



**DEPARTMENT OF LOCAL GOVERNMENT**

**COUNCIL RATING AND  
REVENUE RAISING  
MANUAL**

**Last update: 2007**

## COMMENT

<b>1. INTRODUCTION.....</b>	<b>5</b>
<b>2. HISTORY OF LOCAL GOVERNMENT RATING IN NSW.....</b>	<b>6</b>
<b>3. OBJECTIVES OF THE LOCAL GOVERNMENT ACT 1993 .....</b>	<b>7</b>
<b>4. THE SOURCES OF COUNCIL INCOME UNDER THE LOCAL GOVERNMENT ACT 1993.....</b>	<b>8</b>
4.1 Sources of council income	8
4.2 Rates	8
4.3 Types of rates	10
4.4 The ordinary rate	10
4.5 The special rate	10
4.6 Charges	10
4.7 Fees	10
4.8 Grants	11
4.9 Borrowings	11
4.10 Internal loans	12
4.11 Investments	12
<b>5. PRINCIPLES IN RELATION TO THE IMPOSITION OF LOCAL TAXATION .....</b>	<b>14</b>
5.1 Competitive neutrality	15
<b>6. CATEGORIES OF THE ORDINARY RATE.....</b>	<b>17</b>
6.1 The farmland category of the ordinary rate	17
6.2 Sub-categories of the farmland category of ordinary rate	20
6.3 The residential category of the ordinary rate	20
6.4 Sub-categories of the residential category of the ordinary rate	22
6.5 Rural residential land sub-categorisation is not mandatory.	23
6.6 The mining category of the ordinary rate	24
6.7 Categorisation of new mines in council areas where no mines existed previously.	25
6.8 Sub-categories of the mining category of the ordinary rate	25
6.9 The business category of the ordinary rate	26
6.10 Sub-categories of the business category of the ordinary rate	26
6.11 Vacant land	27
6.12 Categorisation of strata titles	28
6.13 Mixed developments	28
<b>7. CATEGORISATION AND SUB-CATEGORISATION OF LAND AND APPLICATION OF ORDINARY RATING .....</b>	<b>30</b>
7.1 Sub-categorisation subject to same mandatory requirements of Act as categorisation	30
7.2 Categorisation	30
7.3 How ordinary rates are applied to cover all rateable land in a council area.	31
<b>8. SPECIAL RATES .....</b>	<b>32</b>
8.1 Making and levying of special rates	32
8.2 Environmental levy	34
8.3 Alternative use of money raised by a special rate or charge	34
8.4 Special provisions relating to water supply, sewerage and drainage special rates	35
8.5 Water and sewerage special rates	35
<b>9. THE STRUCTURE OF A RATE.....</b>	<b>36</b>
9.1 Base amounts	36
9.2 Formal requirements regarding base amounts	37

9.3 The ad valorem amount of a rate	37
9.4 Minimum amounts of rates	38
9.5 Aggregation of certain parcels of land subject to base amounts and minimum rates	38
9.6 Application of rates, base amounts and charges to multiple occupancy developments	39
9.7 What is a parcel of land for rating purposes.	39
<b>10. CHARGES .....</b>	<b>41</b>
10.1 Domestic waste management services charges	41
10.2 Stormwater management services charge	41
10.3 Other charges	42
10.4 Flexibility in setting charges	43
10.5 Water, sewerage and drainage charges	43
10.6 Water and sewerage pricing	44
10.7 Water dividends	44
10.8 Water and sewerage charges to strata and community title properties	45
10.9 On-site sewage management revenue policy	45
<b>11. CHARGING FOR DOMESTIC WASTE MANAGEMENT SERVICES .....</b>	<b>47</b>
11.1 The role of councils: their powers to regulate waste and to carry out waste collection and disposal	47
11.2 What services are or are not domestic waste management services	48
11.3 Raising revenue for domestic waste management services	48
11.4 User-pays charges may be applied	49
11.5 Option to determine different levels of charges	49
11.6 Revenue obtained by councils must be tied to "reasonable costs"	49
11.7 Charging for products, devices and facilities and resale of waste	50
11.8 Concessions	50
11.9 Apportionment of pensioner concessions between ordinary rates and domestic waste management service charges	50
11.10 Financing the cost of domestic waste management services	51
11.11 Financing the cost of recycling activities	51
11.12 Some capacity exists to adjust revenue from charges mid-year	51
11.13 The benefits and disadvantages of pay-for-use revenue raising	51
11.14 Management plans	51
11.15 Charging and financing non-domestic waste services	52
11.16 Trade waste services, their financing and council powers to regulate waste	52
<b>12. REASONABLE COST OF DOMESTIC WASTE MANAGEMENT SERVICES .</b>	<b>54</b>
12.1 General considerations	54
12.2 Costing and revenue raising considerations	56
12.3 An accumulated surplus may be justifiable	57
12.4 Provisions for future events	57
12.5 Borrowings	57
12.6 Gradualisation advocated	57
<b>13. WHAT LAND IS EXEMPT FROM RATES?.....</b>	<b>59</b>
13.1 Land exempt from rates	59
13.2 Suggested procedure for determining whether land is exempt from rating	60
13.3 Conservation agreements	61
13.4 Important words and phrases	61

13.5 Right of appeal on question of whether land is rateable	64
13.6 Aboriginal Land Council land	65
<b>14. MAKING OF RATES AND CHARGES .....</b>	<b>66</b>
14.1 Publication of draft management plan	66
14.3 Method of making a rate or charge	67
14.4 Criteria relevant in determining base amount	67
14.5 Other requirements	68
14.6 Curing of irregularities and invalidities	68
14.7 Timetable for rates	69
<b>15. LIMIT ON ANNUAL INCOME FROM RATES AND CHARGES .....</b>	<b>70</b>
15.1 Estimate of changes in value for the purposes of notional rate income	71
15.2 Crown land adjustments to general income	71
15.3 Special variations to general income	72
15.4 Rating return – comprising the statement of compliance	74
15.5 Rate pegging diagram:	75
<b>16. LEVYING OF RATES AND CHARGES .....</b>	<b>76</b>
16.1 Notices by council	76
16.2 Information on a rates notice.	78
<b>17. PAYMENT OF RATES AND CHARGES .....</b>	<b>80</b>
17.1 Liability	80
17.2 Due date	80
17.3 Agreement as to periodical payment	81
17.4 Capital contributions instead of payment of special rates	82
17.5 Accrual of interest	82
17.6 Methods of payment	82
17.7 Merchant fees on credit card payments	83
17.8 Liability of the occupier	83
17.9 Transfer of land in payment of rates or charges	83
<b>18. WRITING OFF RATES AND CHARGES AND ACCRUED INTEREST.....</b>	<b>85</b>
18.1 Writing off	85
18.2 Procedures for writing off rates and charges	85
18.3 Refund of money in respect of rates and charges	86
<b>19. CONCESSIONS FOR PENSIONERS.....</b>	<b>88</b>
<b>20. OTHER CONCESSIONS .....</b>	<b>92</b>
20.1 Postponement of rates	92
20.2 Application for postponement	92
20.3 Rebates in respect of certain land vested in public bodies	93
20.4 Hardship resulting from certain valuation changes	93
20.5 Other provisions to assist with rates	93
<b>21. FEES.....</b>	<b>94</b>
21.1 Approved fees	94
21.2 Council fees for business activities	94
21.3 Council fees for non-business activities	95
21.4 Restrictions and limitations	95
21.5 Fees for development applications	95
21.6 Council may waive or reduce fees	95
21.7 Annual charge on rails, pipes etc.	96
21.8 Management plan requirements	97
21.9 Onsite sewage management	97
<b>22. RECOVERY OF RATES, CHARGES AND FEES .....</b>	<b>98</b>
22.1 Rates and charges represent a charge against land	98

22.2 Fees are not a charge against land	98
22.3 Court proceedings for recovery of unpaid rates and charges	98
22.4 Expenses for tracing persons	99
22.5 Sale of land for unpaid rates and charges	99
22.6 Options available to dispose of land that does not sell.	102
<b>23. MISCELLANEOUS MATTERS CONCERNING RATES AND CHARGES.....</b>	<b>103</b>
23.1 Record of rates and charges	103
23.2 Certificate as to rates and charges – 603 certificates	103
23.3 Transfer of land	104
23.4 Notice of transfer	104
23.5 Notice of granting of certain crown leases	104
<b>24. VALUATION OF LAND .....</b>	<b>105</b>
24.1 Valuation process	105
24.2 Valuation objections	108
24.3 Need for valuation	109
24.4 Land value	110
24.5 Supplementary lists	111
24.6 1 July effective date for valuations	112
24.7 Valuation of several parcels	112
24.8 Other annual rates on land	112
<b>25. PRIVACY .....</b>	<b>114</b>
25.1 Requirements by councils	114
25.2 How does PPIPA affect disclosure of information	114
25.3 “Public registers” versus other sources of council information	114
25.4 Public registers	115
25.5 Is council’s rates record a “public register”	116
25.6 Other privacy matters	117
<b>26. RELEVANT SECTIONS OF THE LOCAL GOVERNMENT ACT 1993 .....</b>	<b>119</b>

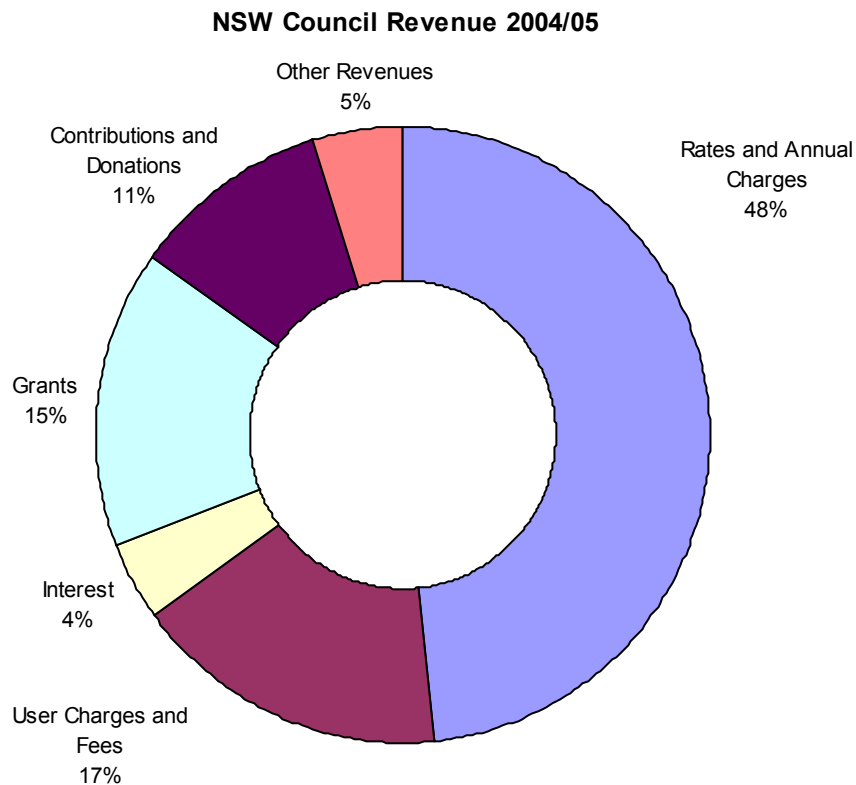
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# 1. INTRODUCTION

The levying by local government of local taxes distributed on the basis of relative value of property has been the principal means of financing local government in Australia throughout this century. The local property tax has always been a tax base principally allocated to local government, which is the level of government routinely providing public services which retain or enhance the value of private property (such as local roads, garbage disposal, parks, footpaths).

The chart below demonstrates both the importance of rate income to councils' total revenue and key expenditure items. Over recent years, the rate revenue raised by councils in New South Wales has been in vicinity of \$2-\$3 billion per annum.



## 2. HISTORY OF LOCAL GOVERNMENT RATING IN NSW

The rating provisions of the *Local Government Act 1919* were exceptionally difficult to interpret. They had been amended annually for at least fifty years, without a comprehensive legislative review. That Act included remnants of two different approaches to rate pegging, as well as several different conceptual approaches to differential rating.

The complexity of the 1919 Act contributed substantially to poor understanding by local government and ratepayers of the rating system and has helped to diminish community confidence in the fairness of the local tax system.

In view of the importance of rating to council revenue raising, and the level of ratepayer concern about the rating system, the government conducted reviews of rating including:

- The Oakes Report (Report of the Committee of Inquiry into Local Government Rating and other Revenue Powers and Resources 1989)
- The Local Government Rating Task Force (1990)

Testing of the recommendations contained in the Oakes Report confirmed its rating and revenue raising concept to be too complex and costly to administer efficiently. It lacked simplicity and transparency, and was not conducive to promotion of community scrutiny of council performance. However, some of the policy directions suggested by the Oakes Report, such as promotion of greater use of pay-for-service were capable of wider application in the provision of local government services.

The Rating Task Force reviewed the Oakes Report and tested its rating and revenue raising model. The Task Force proposed a hybrid between the Rating Inquiry concept and the existing *Local Government Act*. Many of the proposals of the Rating Task Force were focused towards improving transparency and accountability.

Both the Oakes Report and Task Force reviews saw considerable merit in applying a base charge to all residential properties.

The reviews proved worthwhile in establishing or confirming some policy directions for local revenue raising. The work of both assisted in opening up discussions concerning the objectives and proposals that would best address the needs of both the community and the local government industry.

### 3. OBJECTIVES OF THE LOCAL GOVERNMENT ACT 1993

The objectives of the Act with regard to rating are to:

- provide a system of local taxation, based on rates levied on property, which is simple, fair, broadly uniform, and which promotes local accountability
- permit the use of particular rates for the provision of specific services or facilities
- provide that councils will annually justify to their community their proposed revenue raising decisions in an open manner
- allow reasonable flexibility in the administration of the local taxation and charging regime
- reinforce councils' accountability and responsibility for local revenue raising to the local community to provide for councils to set their own fees and charges for services.

The council's charter at [section 8](#) of the Act includes the following:

"to raise funds for local purposes by **the fair imposition** of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants".

## 4. THE SOURCES OF COUNCIL INCOME UNDER THE LOCAL GOVERNMENT ACT 1993

### 4.1 Sources of council income

[Section 491](#) of the *Local Government Act 1993* (the Act) sets out the main sources of a council's income. They are as follows:

- rates
- charges
- fees
- grants
- borrowings
- investments.

### 4.2 Rates

Although the actual position has always varied from council to council, the main financial resource of a council has been, traditionally, rating - in particular, ordinary rating.

It is generally acknowledged that rating should be considered as one of several elements, and a very important one, available for usage in a council's overall revenue raising system and finances.

The distinguishing feature of the Act is that it allows councils to strike a better balance between ordinary rate revenue and the revenue requirements of particular works or services which may be more appropriately financed by way of special rating or annualised or pay for use charges or fees or combinations of one or more of these elements.

The Act provides unprecedented flexibility between rating and charging options in recognition of the need to encourage councils to use modern pricing policies and techniques to manage demand and resources. Simultaneously, the Act seeks to achieve heightened transparency of councils' financial activities and to expose their revenue decisions to greater public scrutiny and input in the furtherance of local accountability and responsibility.

Types	Levied on or payable by	Differentiation				Structure	Application
Ordinary rates (s.492)	All rateable land (s.554, 555, 556)	<b>4 Categories</b> (s.493, 514)				<ul style="list-style-type: none"> <li>• Wholly ad valorem or</li> <li>• Base amount plus ad valorem (s.497, 498, 499)</li> </ul> Base amount may yield up to 50% of income from rate, category or subcategory (s.500)	Ordinary rate must be made each year (s.494)  Ad valorem amount may be the same or different for categories (s.528) and the same or different for subcategories (s.529)  Special rate may be made in addition to ordinary rate (s.495 and see note to s.495)
		<b>Farmland</b> (s.515)	<b>Residential</b> (s.516)	<b>Mining</b> (s.517)	<b>Business</b> (s.518)		
		<b>Optional subcategories</b> (s.493,529)					
		<ul style="list-style-type: none"> <li>• Intensity of land use</li> <li>• Economic factors</li> <li>• Irrigability</li> </ul>	<ul style="list-style-type: none"> <li>• Rural</li> <li>• Centre of population</li> </ul>	<ul style="list-style-type: none"> <li>• Kind of mining</li> </ul>	<ul style="list-style-type: none"> <li>• Centre of activity</li> </ul>		
Special rates (s.492)	Rateable land that <ul style="list-style-type: none"> <li>• benefits from works, etc</li> <li>• contributes to need for works, etc</li> <li>• has access to works, etc (s.495, 498, 538)</li> </ul>	<ul style="list-style-type: none"> <li>• Works</li> <li>• Services</li> <li>• Facilities</li> <li>• Activities</li> </ul> provided or undertaken, or proposed to be provided or undertaken, by the council within the whole or any part of its area (other than domestic waste management services) (s.495)					
Annual charges for domestic waste management services (s.496)	Each parcel of rateable land for which the service is available (s.496)	A council may determine differing amounts for the same charge (s.541)				<ul style="list-style-type: none"> <li>• Income from charges not to exceed reasonable cost to council of providing the service (s.504)</li> <li>• Annual percentage increase on charge for individual property (s.510)</li> </ul>	Charge must be made each year (s.496)
Other annual charges (s.501)	Each parcel of rateable land for which the service is provided or proposed to be provided (s.501)	<ul style="list-style-type: none"> <li>• Water supply services</li> <li>• Sewerage services</li> <li>• Drainage services</li> <li>• Waste management services (other than domestic waste management services)</li> <li>• Other services prescribed by the regulations (s.501)</li> </ul> A council may determine differing amounts for the same charge (s.541)				Charge may be a single amount, a rate per unit, or a combination (s.540) Charge may be of differing amounts (s.541)  A minimum amount may be fixed (s.542) A single charge may be imposed for two or more services (s.501)  Criteria for determining amount (s.539)	Charge may be made <ul style="list-style-type: none"> <li>• in addition to ordinary rate and</li> <li>• in addition to or instead of special rate (s.503)</li> </ul>
Charges for actual use (s.502)	The user of the service (s.502)						

### 4.3 Types of rates

[Section 492](#) of the Act provides that rates are of 2 types:

- ordinary rates
- special rates.

It should be noted that rates and charges will not be subject to GST.

### 4.4 The ordinary rate

By virtue of [section 494](#) of the Act, council is required to make and levy an ordinary rate for each year on all rateable land in its area.

This is a mandatory requirement. In that regard, it has been held that a council can be compelled by a court order to make an ordinary rate.

### 4.5 The special rate

Council has a discretion whether to make a special rate.

Special rates must be made pursuant to [section 495](#) of the Act but may be levied under either section 495 or the provisions of Division 2 of Part 5 of Chapter 15. In the former instance, the special rates may be levied for works or services provided or proposed to be provided by council (eg town improvement works benefiting a specific locality, tourism promotion benefiting a particular ratepayer sector) or for other special purposes. Special rates relating to water supply, sewerage and drainage must be levied in accordance with the provisions of Division 2 of Part 5 of Chapter 15 (sections 551-553) in all cases where the infrastructure is in situ.

Special rates are also capable of application across all ratepayers. For example, all ratepayers in a council area could be made subject to a special rate intended to finance a project that will benefit the **whole of the council area. It should not be levied on properties that will not benefit.**

### 4.6 Charges

The Act also enables the making and levying of charges. Charges may be annualised or based upon usage. A charge may be made in relation to specified services provided by council (eg provision of water, sewerage or drainage services or the collection of garbage). A charge may be set at a level that enables part or full cost recovery.

Council may impose charges in addition to ordinary rates and special rates or in substitution for special rates that may be made for the same purposes as a charge. The level of a charge can be differentiated according to a broad range of criteria ([section 539](#)).

A charge, when made, has the same characteristics as a rate concerning payment, the accrual of interest (if the charge remains unpaid) and the procedures that may be taken for its recovery.

### 4.7 Fees

Council may (except as otherwise provided by [section 608](#) of the Act) charge and recover an [approved fee](#) for any service it provides.

Fees if unpaid do not become a debt upon the land and will be recoverable as civil proceedings against the person who requested and was provided with the service to which the fee relates.

#### **4.8 Grants**

Local government financial assistance grants are general purpose grants that are paid to local councils under the provisions of the Commonwealth [Local Government \(Financial Assistance\) Act 1995](#). This legislation also details how the total amount of grant funds is determined and how the funds are to be distributed between the states and territories.

Each state must have a Local Government Grants Commission for it to receive funding and it is the responsibility of these Commissions to make recommendations on the allocation of grants in their state.

The two components of the grants are distributed on the basis of principles developed in consultation with local government.

With the **general purpose component** the Grants Commission attempts to assess the extent of relative disadvantage between councils. The approach taken considers cost advantage in the provision of services on the one hand (expenditure allowances) and an assessment of the revenue raising capacity on the other (revenue allowances).

The **local roads component** is assessed on the basis of council's proportion of the state's population and the lengths of roads and bridges.

The total funds paid to councils are unconditional grants and councils have complete autonomy in deciding how the funds should be spent.

#### **4.9 Borrowings**

[Section 621](#) of the Act enables councils to borrow "at any time" for any purpose allowed under the Act. Borrowing refers to any form of debt incurred where there is an obligation to repay over a fixed term. A council may borrow by way of an overdraft or loan or by any other means approved by the Minister ([section 622](#)).

A council may give security for any borrowing in any manner prescribed by regulation under [section 623\(1\)](#) of the Act. Currently no regulation is in force for this section. However, the Minister is empowered to impose limitations or restrictions on borrowings raised by a council ([section 624](#)).

Restrictions on borrowings by council are included in the Minister's Borrowing Order. The restrictions are as follows:

A council shall not:-

1. borrow at an interest rate in excess of the indicative interest rate as calculated by the New South Wales Treasury Corporation;
2. borrow for a period of less than thirty (30) days nor for a period in excess of the estimated life of the asset for which the borrowing is made;
3. borrow from any source outside the Commonwealth of Australia nor in any currency other than Australian currency;

4. pay a placement fee exceeding 0.25% of the total amount being borrowed; or
5. pay a documentation fee, or any other fee associated with a borrowing, exceeding 0.1% of the total amount being borrowed.

Councils should note that the obligation of the general manager under clause 230 of the Local Government (General) Regulation 2005 is that within 7 days after the council borrows money under a loan contract the general manager must notify the Director General of the Department of Local Government of the details of the borrowings. This extends to further loan advances under existing loan contracts, but does not apply to borrowings for an overdraft.

#### New money borrowings:

This represents new money borrowings for the state approved by the Loan Council. New money borrowings include deferred payment arrangements; financial and operating leases (including leveraged leasing and similar arrangements); sale and leaseback arrangements; the net change in temporary purpose borrowings over the financial year and any other form of raising new capital funds.

#### **4.10 Internal loans**

[Section 409](#) of the Act safeguards moneys raised for a specific purpose by requiring that they be spent on the purpose for which they were raised.

[Section 410\(3\)](#) allows money that is not yet required for the purpose for which it was raised to be lent (by way of an internal loan) for use by the council for any other purpose if the loan is approved by the Minister.

In granting approval the Minister must impose conditions as to the time within which the internal loan must be repaid and as to any additional amount, in the nature of interest, that is to be paid in connection with the loan.

#### **4.11 Investments**

[Section 625](#) provides that a council may invest money that is not, for the time being, required by the council for any other purpose. However, this can only be done within strict guidelines by order of the Minister for Local Government published in the government gazette (No. 94 dated 29/7/05).

In accordance with the Code of Accounting Practice and Financial Reporting councils must maintain an investment policy. That investment policy must comply with the legislation and investment guidelines.

#### Estimate of income and expenditure

The responsible accounting officer of the council must estimate and maintain a system of budgetary control that will enable the council's actual income and expenditure to be monitored each month and to be compared with the estimate of council's income and expenditure. Should a material difference arise between the estimate and actual the responsible accounting officer must report the difference to the next meeting of council. Refer to Local Government (General) Regulation 2005, part 9 for further information.

### General revenue collected

By virtue of section 409 of the Act, general revenue collected from the making and levying of rates and charges is to be held in council's "consolidated fund". However, 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: section 409(3)(a). Any money or property received by council "in trust" is required to be held in council's "trust fund": [section 411\(1\)](#).

## 5. PRINCIPLES IN RELATION TO THE IMPOSITION OF LOCAL TAXATION

At the outset, it may be useful to refer to the principles which were enunciated by Edwin Cannan, the English economist, in relation to the imposition of local taxation. He said in his lectures on the History of Local Rates in England that:

"Every inhabitant of a district should be made to contribute according to his **ability** and everyone who receives benefit from the local expenditure should be made to contribute in proportion to the **benefit** he receives."

Thus, the "fairness" or "appropriateness" of rates may be considered in the light of these two criteria:

- The extent to which those who receive the benefits of council's services also pay for those services - the so called "**benefit principle**".
- The extent to which those who pay for council's services have the ability to pay for those services - the so called "**ability to pay principle**".

It goes without saying that a rate which is fair when judged by the benefit principle may not be fair according to the ability to pay principle, and vice versa.

In recent years, the benefit principle has been often quoted as the main element in local government finance, as increasing attention is devoted to user charges. However, the correlation between rates paid and services used is an elusive one.

At best, the value of land can be said to "approximate" ability to pay. The value of land (particularly land which is not income producing) is often no indication of the means of the owner. A rate based solely on the value of rateable land ignores the cost and value of common services and facilities from which all properties benefit, regardless of their rateable value.

In many local government areas the making of a wholly ad valorem based rate could be seen by owners of highly valued land as causing unacceptably uneven distribution of the costs of local government because they might have to bear a higher share of the total rate burden than the owners of lower valued land.

The *Local Government Act 1993* seeks to give councils more options and greater flexibility in the types and the nature of the rates and charges that may be made and levied. For example, choosing to levy a special rate as an adjunct to an ordinary rate and/or choosing to structure a rate with a base amount may represent a successful method for a council to use to flatten the incidence of rates across ratepayers, and thus reduce the magnitude of variations in rate levies between different properties of varying rateable value.

The opposite alternative of a rate based solely on **land value** may have been deemed unacceptable because the resulting rating burden it would have created, if used, would have departed too greatly from the "benefit" or, "ability to pay" principles.

The increased scope for the making of charges and fees, with the twin objectives of proper pricing and reducing reliance upon rating as the revenue source, will allow a council to gain a more accurate view of true "consumer" demand for various local services. Substantively based user charging regimes can provide a council with

valuable information on consumer preferences and reduce service or commodity wastage thereby minimising councils' costs. What people are prepared to pay appears to be the best measure of the priority given to expenditures.

Much debate on local government finance emphasises **equity**. No one can deny the importance of equity considerations. However, **efficiency** considerations are also important.

Ultimately, each council has to decide for itself what combination of rates, charges and fees (and pricing policies) is "appropriate" for its area and its community. The annual statement of revenue policy will ensure that the community has access to sufficient information to enable it to judge the appropriateness of council's proposals (i.e. is the service actually required) and to determine whether it is receiving "value for money" (i.e. would a less costly service produce acceptable results).

### **5.1 Competitive neutrality**

The National Competition Policy (NCP) principles require reform of government monopolies, separation of a government's regulatory and business functions, removal of legislative restrictions on competition and the adoption of pricing reforms to recognise and offset the public ownership advantages enjoyed by government businesses.

The NCP requires governments to reassess how business activities are conducted and how they compete or potentially compete in the market.

The principle of competitive neutrality is based on the concept of a "level playing field" between persons competing in a market place, particularly between private and public sector competitors. Essentially, the principle is that government businesses, whether Commonwealth, State or Local, should operate without net competitive advantages over other businesses as a result of their public ownership.

The underlying philosophy is that a "level playing field" will enhance competition. Competition can promote greater efficiency and lower costs to government and the community. However, the government recognises that policies to enhance competition may have social impacts. These include (but are not limited to) local government job losses (particularly in rural and remote areas), reductions in working conditions (particularly women and employees from non-English speaking backgrounds) and a weakening in the ability of the public to pursue concerns against service providers. The general presumption is that competition will confer net benefits on the community. However, if the application of competition policy is thought to impose net costs on the community, and this is supported by a benefit/cost analysis, then an exemption from the application will be allowed. The conduct of benefit/cost analyses is discussed in more detail below.

Government agencies may receive a number of competitive advantages which private sector competitors will not have, or may not include certain costs which the private sector includes in pricing. The *Policy Statement on the Application of National Competition Policy to Local Government* identifies the main elements of competitive advantage which councils have and which they are required to address. The Competitive Neutrality Guidelines detailed in [Pricing and Costings for Council Businesses – A Guide to Competitive Neutrality](#) addresses these elements and applies them to council business activities.

Councils also have a number of competitive disadvantages compared with the private sector. These include limitations on borrowings, reduced flexibility to respond to market pressures, requirements for additional public accountability, specific legislative duties and community service obligations. The government has been conscious of these issues in developing the Guidelines.

It is important to note that competition policy does not require that individual businesses compete on an equal footing. Councils and other government agencies will have advantages through size, buying power, specialist expertise, assets etc, in the same way that the private sector will have its own characteristics.

It is also stressed that the principle of competitive neutrality applies only to the business activities of councils and not to their non-business, non-profit activities.

A competitive neutrality regime requires the development of a cost reflective pricing policy which takes into account cost components which potential private competitors would usually include as a basis for price determination.

It requires a local council's **significant** business activities to be subject to the same corporatisation principles as those applied to significant state government business activities.

According to the NSW Government Policy Statement on the Application of National Competition Policy to Local Government, a **business activity**:

- will involve the supply of goods and services for a fee or charge, includes activities classified by the Government Statistician as trading enterprises such as water supply, sewerage, gas production and reticulation, and abattoirs;
- could include activities where there is competition with the private sector.

The government has proposed two categories of business activity to assist councils to determine whether the business activity is significant enough to be subject to the principles of competitive neutrality.

**Category 1:** Businesses where annual gross operating income is \$2m or more.

**Category 2:** Businesses where annual gross operating income is less than \$2m.

## 6. CATEGORIES OF THE ORDINARY RATE

[Section 493](#) of the Act states that there are 4 categories of the ordinary rate:

- farmland
- residential
- mining
- business.

These categories may, at councils' discretion, be divided into sub-categories in accordance with [section 529](#) of the Act.

Before making the ordinary rate, council must have declared each parcel of rateable land in its area to be within one or other of the 4 categories ([section 514](#)) or a sub-category of a main category and given written notice of its decision to the landowner ([sections 520](#) and [531](#)).

The process of categorisation of land and application of ordinary rating is described in the following chapter. It is strongly recommended that reference be made to that information by rating practitioners prior to establishing or revising rating structures.

### 6.1 The farmland category of the ordinary rate

[Section 515](#)(1) of the Act sets out the prerequisites for occupied land to be categorised as "farmland". [Section 519](#) facilitates the categorisation of vacant land and it should be noted that scope exists for vacant land to be categorised as "farmland" in certain circumstances via those provisions.

For land to be categorised as farmland in terms of [section 515](#) it must be:

- a parcel of rateable land
- valued as one assessment
- the dominant use of which is for farming (that is, the business or - industry of grazing, animal feedlots, dairying, pig-farming, poultry farming, viticulture, orcharding, beekeeping, horticulture, vegetable growing, the growing of crops of any kind, forestry, or aquaculture within the meaning of the Fisheries Management Act 1994, or any combination of those businesses or industries) which:
- has a significant and substantial commercial purpose or character; and
- is engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made).

However, land is not to be categorised as farmland if it is "rural residential land": [section 515](#)(2). [Rural residential land](#) is defined in the Dictionary at the end of the Act to mean land that:

- is the site of a dwelling and is not less than 2 hectares and not more than 40 hectares in area; and
- is either:
  - not zoned or otherwise designated for use under an environmental planning instrument; or

- zoned or otherwise designated for use under such an instrument for non-urban purposes; and
- does not have a significant and substantial commercial purpose or character.

The expression "[parcel of land](#)" is defined in the Dictionary at the end of the Act to mean a portion or parcel of land separately valued under the *Valuation of Land Act*. It has been established in a number of cases that the question whether land is one or more parcels for the purposes of the Act and the *Valuation of Land Act* is a question of fact.

In order to determine whether the **dominant use** of the land in question is for farming, council must look not merely at the amount of land used for the particular activity carried on, but also at the intensity of that use.

Thus, merely because the greater part in area of a parcel of rateable land is used for farming does not necessarily mean that the "dominant" use of the land is for farming. Each case depends on its merits; in some cases the area of land used for farming may be determinative, whilst in other cases the intensity of use may be the decisive factor. In *EA & JM Clarke v Hawkesbury SC* (LEC, O'Neile A, 30331/87, 24/11/87) the Court found that the main use of the subject land was as a residence. The goats kept on the land were an "incidental use" which might or might not develop into a business in the future.

For land to be used for farming it must be used for one or more of the activities specified in section 515(1) of the Act (eg grazing, pig-farming, etc.) and must also be a business or industry.

To be a business, the activity or activities carried on must be carried on systematically as a commercial venture organised for profit. The carrying on of a business implies repetition of acts with a somewhat permanent character

In order to determine whether a business is being carried on, it must be kept in mind that:

- the activity or activities carried on must be a business within the ordinary meaning of that word as a word in the English language;
- a small farming business is still a business;
- a new business does not always produce profits in the initial year or years;
- an activity can be considered to be a business even though it is in an early stage;
- the fact that, for income tax purposes, the applicant is regarded as a primary producer has little or no significance for what is required to be decided by council under section 515 of the Act.

In order to determine whether the farming has a **significant and substantial commercial purpose or character**, it is legitimate for council to enquire whether the particular activity or activities carried on are "too slight" or "too minor" to be reasonably regarded as having the requisite degree of commercial purpose or character. Thus, in the case of farming activities producing very small returns, it may be difficult, if not impossible, to designate those activities as a business having a significant and substantial commercial purpose or character. In addition, as

mentioned above, there should be present in the activities some element of continuity and repetition.

Although section 515(1) makes it clear- that the question of whether or not a profit is actually made is immaterial to the question of whether the farming is **engaged in for the purpose of profit on a continuous or repetitive basis**, it is still reasonable for council to enquire, more or less objectively, as to whether there is evidence to support a conclusion that the activities will be economically viable in the future. In other words, the farming carried on must be "on a sufficient scale to have some element of independent viability".

Admittedly, the use of the word "purpose" (plus the express inclusion of the words "whether or not a profit is actually made") makes it clear that the question is to be answered by asking "for what reason", "with what intent" or "to achieve what result" is the activity carried out. However, the necessary purpose will not, it seems, be easily established subjectively (by mere statements of intent) in the absence of an income profit being derived but will need to be established more-or-less objectively (by inferences or conclusions drawn from primary facts), having regard to the likelihood of an income profit being derived in the foreseeable future: Thus, in *Satchwell v Lake Macquarie CC* (LEC Bly A 30104/91 24/5/91) the Court concluded that the requirement for the farming to be engaged in for the purpose of profit on a continuous or repetitive basis was not satisfied as the property was not likely to be profitable for the future 5 year period nor had it been profitable in the past.

In many Land and Environment Court decisions, the interpolated need for some element of "independent viability" appears to have been treated as if synonymous with the "significant and substantial commercial purpose or character" requirement. In other cases, the emphasis has been on the need for evidence of a "going concern" as indicative of the fact that the farming is engaged in for the purpose of profit on a continuous or repetitive basis.

However, matters such as "the magnitude of profits made", "costs incurred" and whether the applicant has any other sources of income have been held to be irrelevant or extraneous considerations.

One thing is clear the "significant and substantial commercial purpose or character" is an attribute of the "farming use" as identified, and is not to be measured or assessed by reference to the size of the land on which the farming activity is undertaken. What is relevant is the fact and degree of the commercial purpose or character and not merely the area of the property used.

There is no authority under the Act for council to adopt a practice involving the setting of an arbitrary income or profit threshold as criteria for the grant or refusal of "farmland" applications.

It is also important to note that the use of farmland categorisation as a method of providing rate concessions is not justifiable. It is recommended that councils have some form of policy as to what factors it will use in determining whether any particular parcel of land satisfies the "tests" of "business or industry", "dominant use", "significant and substantial commercial purpose and character" and "engaged in for the purpose of profit" etc. These policies do not have to be formal but an internal set of guidelines would be a minimum. It is important that any policies be flexible to take account of the different natures of farming "industries" in different areas, and so that any changes in the nature of the industries are able to be considered.

## Water licences and irrigated land

Where a water entitlement, under the [Water Act 1912](#), attaches to any parcel of land the value of that entitlement has been included in the valuation of that land for rating purposes ([section 6A\(3\)](#) of the *Valuation of Land Act*). This has meant that water entitlements were rated under the farmland category.

From July 1 2005 the value of water access licences under the Water Management Act, or the right to take water under the Water Act 1912 will no longer be included in valuations of land for rating purposes provided to councils by the Valuer General.

The [Water Management Act](#) is a key component of the NSW Government's water reform agenda flowing from the 1994 Council of Australian Governments (CoAG) Strategic Water Reform Framework. It effectively converts current water entitlements to three separate licences or approvals:

- An access licence. This effectively entitles the holder to a share of a water resource as specified in a water sharing plan and does not relate to any particular parcel of land or property on which that water may be used;
- A water use approval. This attaches to a specific piece of land and confers the right to use water for a particular purpose according to specific conditions; and
- A [water supply work](#) approval. This also attaches to a specific piece of land. It confers the right to construct or use a water supply work for the purposes of bringing water to a specified property.

### 6.2 Sub-categories of the farmland category of ordinary rate

Before making the ordinary rate, council may determine a sub-category or sub-categories for the "farmland" category: [section 529\(1\)](#).

By virtue of [section 529\(2\)\(a\)](#) of the Act, a sub-category may be determined according to the **intensity** of land use; **economic factors** affecting the land or **irrigability** of the land.

Insofar as intensity of land use is concerned, it is submitted that, once again, council will need to look beyond the actual extent or area of land used and to focus especially on the actual intensity of the particular use.

In relation to economic factors affecting the land, it should be noted that abnormal climate conditions (such as drought) are not economic in nature, but may give rise to economic factors e.g. abnormal input costs. Revaluation of land is also not an economic factor; it is merely a statement of the economic value of the land.

### 6.3 The residential category of the ordinary rate

[Section 516\(1\)](#) of the Act states that land is to be categorised as residential if it is a parcel of rateable land valued as one assessment and:

- its dominant use is for residential accommodation (otherwise than as a hotel, motel, guest-house, backpacker hostel or nursing home or for any other form of residential accommodation, not being a boarding house or lodging house, prescribed by the regulations); or

- in the case of vacant land, it is zoned or otherwise designated for use under an environmental planning instrument (with or without development consent) for residential purposes; or
- it is [rural residential land](#).

Changes by way of the *Local Government (Boarding and Lodging Houses) Amendment Act 1994* made it mandatory for boarding and lodging houses to be categorised as residential, whereas prior to that they were specifically precluded from being so categorised. Backpacker hostels, however, continue to fall within the business category.

If the "dominant" use of land is for a caravan park or a [manufactured home estate](#), the land is not to be categorised as "residential" for rating purposes.

The expression "[parcel of land](#)" is defined in the Dictionary at the end of the Act to mean a portion or parcel of land separately valued under the *Valuation of Land Act*. It has been established in a number of cases that the question whether land is one or more parcels for the purposes of the Act and the *Valuation of Land Act* is a question of fact.

As to the meaning of the word "dominant", it is reiterated that, council will need to look at not just the actual area of land used for "residential accommodation" but also at the intensity of use. (Of course, if land is truly used for residential accommodation, the number of "residents" will be immaterial).

Court judgments have gone some way to assist in defining the term "dominant use" and the factors that councils should consider in determining the dominant use of each individual parcel of land. While the judgments have assisted in defining "dominant use", it is clear that the individual circumstances in each case have been the ultimate deciding factor as to whether the land has been categorised correctly.

In *McKenzie v Randwick CC* LEC, Pearlman J, 30177/95, 26/2/96, her Honour found that "dominant use" meant "main or principal use". In *Paunovski & Anor v Bankstown CC*, LEC 30349/94, 3/2/95, it was stated that "use refers to right or purpose, and there is no question that the applicants have endeavoured to maintain that right or purpose in terms of the existing use rights... (and) that right will continue notwithstanding that one of the shops is vacant".

The place of residence of a person is "the place where [that person] eats, drinks, and sleeps" *Stoke-on-Trent BC v Cheshire CC* [1913] 3 KB 699 per Ridley J at 706. However, a person may have more than one permanent residence at the same time, in either of which he or she may establish his or her abode at any period, and for any length of time: see *A-G v Coote* (1817) 4 Price 183.

The expressions "hotel", "motel", "guest-house", "backpacker hostel" and "nursing home", are not defined in the Act. However, council may derive assistance from the corresponding definitions (if any) from other state legislation such as the *Liquor Act 1982*, and in the *Environmental Planning and Assessment Model Provisions 1980*, even though any such definitions are not strictly applicable as a matter of statutory construction.

Serviced apartments are to be categorised as residential (Clause 122 of the Local Government (General) Regulation 2005), while time-shares and retirement villages should also be considered under the residential category.

In terms of a definition for “boarding houses” and “lodging houses”, section 516 (1A) defines these as a building wholly or partly let as lodging in which each letting provides the tariff-paying occupant with a principal place of residence and in which:

(a) *each tariff charged does not exceed the maximum tariff for boarding houses or lodging houses for the time being determined by the Minister by order published in the Gazette for the purposes of this subsection, and*

(b) *there are at least 3 tariff-paying occupants who have resided there for the last 3 consecutive months, or any period totalling 3 months during the last year,*

and, includes a vacant building that was so let immediately before becoming vacant, but does not include a residential flat building, licensed premises, a private hotel, a building containing serviced apartments or a backpacker hostel or other tourist establishment.

Although the expression vacant land is not defined, it is clear that it is capable of referring to land which is not actually used for residential accommodation but which would be capable of being used for residential purposes by reason of its zoning, under an environmental planning instrument, were a dwelling to be erected thereon.

Again, it is recommended that councils have some form of policy as to what factors it will use in determining whether any particular parcel of land satisfies the “tests” contained in the definition of “residential”. It is reiterated that these policies do not have to be formal but an internal set of guidelines would be a minimum. It is important that any policies be flexible to take account of the specific nature of each individual parcel of land.

In *Meriton Apartments Pty Ltd v Parramatta CC* [2003] NSWLEC 309 it was considered that use of the land was approved for the purpose of residential units and that land should be categorised as residential even though the units had not been fully constructed and had been categorised as business prior to construction commencing.

#### **6.4 Sub-categories of the residential category of the ordinary rate**

Before making the ordinary rate, council may determine a sub-category or sub-categories for the "residential" category: [section 529\(1\)](#).

By virtue of section 529(2)(b) of the Act, a sub-category for the "residential" category may be determined according to whether the land is **rural residential land** or within a **centre of population**.

It is emphasised that section 529(2)(b) does not permit council to determine sub-categories solely or predominantly on the basis of **land value**, whether on a property-by-property basis or otherwise. In that regard, if council wishes to minimise the effect of land valuations on total rates payable, the use of base amounts would help to achieve this while not disturbing the land valuation relativities between parcels of land. Determination of sub-categories must be conducted according to the factors set out in section 529(2). [Section 601](#) may be utilised to ameliorate substantial hardship in the case of individual ratepayers.

While section 529(2)(b) does not permit council to determine sub-categories solely or predominantly on the basis of land value, sub-categories can be determined to

facilitate large fluctuations in land value in a certain part of a council's area, as long as the sub-categories are determined in accordance with section 529(2)(b).

In the view of the Department, the words **centre of population** as they occur in section 529(2)(b) of the Act have their ordinary Dictionary meaning.

It is for council to consider the definition when making decisions about sub-categories for the purpose of residential rating.

Nevertheless the following guidelines are provided for councils:

- Separate towns or villages may be regarded as discrete centres of population.
- Wherever contiguous urban development exists the criteria that should be present in order to constitute a centre of population are:
  - that there is a discernible community of interest amongst the residents which differs from those living outside that part of the area; and,
  - that part of the council area is independently serviced by infrastructure which reflects the focus of that part of the area as a centre of population.
- A centre of population should not be a device intended to enable rating variations within an homogeneous suburb or suburbs, or by street, or by any special feature such as proximity to water.

It is clear that sub-categorisation on the basis of centres of population may have limited application within the suburbs of the main urban centres.

As to the expression **rural residential land**, see the definition in the Dictionary at the end of the Act. If a council sub-categorises an ordinary residential rate to apply to "rural residential land" that rate must be applied to all land throughout the area that qualifies under that definition. There is no authority for the council to apply the sub-categorised rate to some parcels of rural residential land and not others.

### **6.5 Rural residential land sub-categorisation is not mandatory.**

Some councils have interpreted the Act as requiring the mandatory automatic sub-categorisation of land as "**rural residential land**" if it meets the criteria contained in that definition regardless that the councils concerned had no intention of differentiating the ordinary rate proposed to be levied in respect of land categorised as "residential" within their areas.

The correct position is that it is only in cases where the council is intending to establish a "rural residential land" ordinary rate sub-category within its ordinary "residential" rating structure that it will need to assess whether a parcel of land will qualify in terms of the "rural residential land" definition.

Moreover, it is not always a pre-requisite that councils sub-categorise "rural residential land" in order to confer a lower ordinary residential rate for "residential" land situated in rural areas in comparison to the "residential" ordinary rate that will apply to "residential" land within towns and villages etc.

Councils are cautioned that if it is their intention to provide a sub-categorised residential ordinary rate to all residential land outside towns and villages, relying on

the use of "rural residential land" sub-categorisation would result in failure to achieve that policy objective. This is because the rural residential land ordinary rate can only be applied to land which fits that definition. All land used for residential purposes outside the towns and villages (which is not farmland) and is less than 2 or greater than 40 hectares in area must fail to qualify for the "rural residential land" ordinary rate as it is not "[rural residential land](#)".

The simple and correct method to implement a residential ordinary rate intended to apply to all residential land outside towns and villages is for the council to resolve to make a "residential" ordinary rate that will apply to all land categorised "residential" throughout the whole of its area excepting that land categorised "residential" situated within a designated centre (or centres) of population which can either be some or all of the towns, villages, or portions of the council's area (whose boundaries are defined by acceptable means). The council's resolution then can proceed to attribute a higher residential sub-category ordinary rate to the latter land.

## 6.6 The mining category of the ordinary rate

[Section 517](#)(1) of the Act states that land is to be categorised as mining if it is:

- a parcel of rateable land;
- valued as one assessment,
- the dominant use of which is for a coal mine or metalliferous mine.

The expression "parcel of land" is defined in the Dictionary at the end of the Act to mean a portion or parcel of land separately valued under the *Valuation of Land Act*. It has been established in a number of cases that the question whether land is one or more parcels for the purposes of the Act and the *Valuation of Land Act* is a question of fact.

Once again, as to the meaning of the word dominant, council will need to look at not just the actual area of land used but also at the intensity of use.

It is important to note that the word mine (see the definition in the Act Dictionary) is not a definite term, but is one susceptible of limitation or expansion according to the intention with which it is used.

"The primary meaning of the word "mine" is a subterranean excavation for the purpose of getting minerals": *Federal Commissioner of Taxation v Henderson* (1943) 68 CLR 29 per Latham CJ at 44. However, in the definition of "[mine](#)" contained in the Dictionary at the end of the Act, this so called "primary meaning" has been extended to include land on or below the surface used or held for any mining purpose.

When the term "mining" is associated with the name of a particular product, according to the ordinary use of the word it relates to the production of that product (eg coal) beginning with the actual removal of either the product itself, or that which contains it (eg gold bearing quartz), from the soil, and ending with the production of the product itself.

The unqualified reference to "coal" in coal mine is, in the view of the Department, sufficient justification for not limiting the meaning of the word to only one class of coal (eg bituminous coal).

As to the meaning of the words metalliferous mine, the word "metal", implicit in the expression, should be given its ordinary meaning, namely "any of a class of elementary substances, such as gold, silver, copper, etc., all of which are crystalline when solid and many of which are characterised by opacity, ductility, conductivity, and a peculiar lustre when freshly fractured" (Concise Macquarie Dictionary).

By virtue of section 517(2) of the Act, the regulations may prescribe circumstances in which land is or is not to be categorised as mining. To date, there has been no such regulation. Thus, in the absence of any prescription, mines not covered by section 517(1) of the Act must be categorised as business.

It should be noted that the Act makes no provision for "valuation based on output".

[Section 528\(2\)](#) of the Act allows a regulation to be made to regulate the level of an ordinary "mining" rate in a particular council or across all councils by specifying that the ad valorem amount of the ordinary "mining" rate is to be a percentage of the ordinary "business" rate. Although no such percentage has been specified, or is currently proposed, the Minister has the power to prescribe this percentage by way of a regulation.

### **6.7 Categorisation of new mines in council areas where no mines existed previously.**

Where a new mine is established in a council area with no previous mining activities, and therefore no ordinary rate for "mining", councils have options available to them that would enable them to avoid any rating problems that could arise.

It could reasonably be assumed that a significant new mining operation would not become operative without some exploration and surveys that would need to be completed beforehand. This may provide enough time for the council to make sufficient planning arrangements for the rating of the new mine.

If a council believes that mining will begin in its area, the council can adopt a rate for a mining category as part of its Statement of Revenue Policy within the council's Management Plan (refer to sections [404](#), [405](#), [406](#) of *Local Government Act 1993*). This would enable a parcel of land in which a new mining operation has begun at any time throughout the following year, to be rated at an appropriate level, from the day the category of the land was changed to mining. This option would ensure the council's level of general income remained appropriate.

Should the pre-emptive setting of a mining category rate not be possible the council could, if it believed that its financial arrangements would be adversely affected, one option is to rate the new mine at the valuation provided by the Valuer General in the existing category for the remainder of the year in which the activity of the land had changed to mining, then re-categorise the mine and set the rates at an appropriate level from the beginning of the next rating year.

### **6.8 Sub-categories of the mining category of the ordinary rate**

Before making the ordinary rate, council may determine a sub-category or sub-categories for the "mining" category: [section 529\(1\)](#).

By virtue of section 529(1) of the Act, a sub-category may be determined for the "mining" category according to the kind of mining involved and it will therefore be possible to differentiate open-cut mining and subterranean mining etc.

Also on the basis of the kind of mining involved, the council could determine separate sub-categories in respect of, for example, coal mining, silver mining and gold mining.

In all cases where land used for a particular kind of mining activity has been sub-categorised, the relevant sub-categorised mining ordinary rate must be applied to all such land in the council area. There is no authority to apply that rate to some of the land that is used for that kind of mining activity and not to other land also used for that kind of mining activity.

### Coal Rights

A coal right is not a mine and may be worth very little in value. Charging mining rates on coal rights is therefore inequitable in most circumstances and could cause hardship. Section 529(2) of the *Local Government Act* allows for sub-categories in the Mining category – according to the kind of mining involved. Councils are encouraged to establish sub-categories for coal rights under the principle of fair and equitable rating of land.

Provision also exists in the Act for a council to accept transfer of land in full payment of rates (section 570) and to aggregate separate parcels that are subject to the same base or minimum amount of the rate (section 548 A), if it is considered that it may apply unfairly or cause hardship. These options can be exercised at the council's discretion.

### **6.9 The business category of the ordinary rate**

[Section 518](#) of the Act states that land is to be categorised as business if it cannot be categorised as farmland, residential, or mining.

### **6.10 Sub-categories of the business category of the ordinary rate**

Before making the ordinary rate, council may determine a sub-category or sub-categories for the "business" category: [section 529\(1\)](#).

By virtue of section 529(2) of the Act, a sub-category may be determined for the "business" category according to a **centre of activity**.

The note to section 529 does attempt to illustrate the concept of "centre of activity" in terms of a business sub-category as "a centre of activity might comprise a business centre, industrial estate or other concentration of like activities".

However, in the view of the Department, the words refer to an area of land (usually comprising more than one parcel of rateable land) at which a complex of "business" activities are carried on in a fairly concentrated manner and with a high degree of congruity and homogeneity, having regard to the geographic cohesion of the land, the use to which it is put, and the comparative independence and self-relatedness of the activity or activities carried on in the area (e.g. a business centre or industrial estate).

The word business will include professional, commercial, trade and industrial purposes, as well as mining purposes other than "mining" within the meaning of [section 517\(1\)](#) of the Act.

## 6.11 Vacant land

Subject to [sections 515](#) (categorisation as farmland) and [516](#) (categorisation as residential), "vacant land" is to be categorised as provided in [section 519](#), as follows:

- if the land is zoned or otherwise designated for use under an environmental planning instrument - according to any purpose for which the land may be used after taking into account the nature of any improvements on the land and the nature of surrounding development or
- if the land is not so zoned or designated - according to the predominant categorisation of surrounding land.

Section 549 of the Act makes special provision for the reduction of rates containing base amounts if levied on vacant land.

Some councils have incorrectly interpreted section 519 to mean that if vacant land is unable to meet the "farmland", "residential" or "mining" land criteria (contained in sections 515 to 517 respectively) then section 519 cannot facilitate the categorisation of vacant land into any of these categories.

Councils should carefully note that sections 515 to 518 define the four categories of land for ordinary rating purposes and provide the tests which are to be applied to each parcel of land to determine whether the land falls within a particular category. The tests are essentially concerned with the "dominant use" of the land. However sections 516 and 518 do contain other measures. In the case of vacant land, there may not be a "dominant use" to examine and thus section 519 provides further tests by which a council might determine the proper categorisation.

Since only the tests, but not the definitions, are contained within section 519 it is not a "stand alone" provision. There are also further constraints in respect of "farmland" and "residential" categorisation, as evidenced by the opening words. If vacant land is unable to be categorised under sections 515, 516 or 517. Taking the "residential" category as an example, in applying the tests of section 519 to land that is possibly "residential" land, it is essential to refer back to the category as defined in section 516. There is nothing within section 519 to suggest that the category of "residential" land may be "redefined" by the section.

Therefore, if vacant land is zoned or designated for use for residential purposes under an environmental planning instrument section 516(1)(b), it must be categorised as "residential". Section 519, being subject to section 516, could not be used to avoid this requirement. The relationship of section 519 to sections 515 and 517 is similar to its relationship to section 516.

Councils should note that the provisions of section 519 must be applied in the sequence given by the section, viz., categorisation according to zoning or designation for use, where this is contained in an environment planning instrument (subsection (a)), or, where there is no such zoning or designation for use, according to the predominant categorisation of surrounding land (subsection (b)).

It is clear from the preceding information that vacant land situated in a non-urban environment that initially fails the criteria of sections 515-517 could nonetheless be categorised for ordinary rating purposes as either "farmland" or "residential" or "mining" land.

The principle to be observed is that vacant land must not be arbitrarily categorised as "business" land. It may only be validly categorised as "business" land if all of the tests of sections 515-517 and 519 have been applied and have failed to produce a categorisation.

The Act's provisions appear fully capable of allowing a close link between the uses to which vacant land can be put and the rating category or sub-category into which it is placed. Councils should be able to achieve logical, practical rating categorisation outcomes that readily gain landowner and community acceptance.

As an example, a parcel of vacant land in which the zoning only allows "farming" activities to be undertaken on the land, will by virtue of it being vacant not satisfy the criteria contained in section 515. However, section 519 provides that it would still have to be categorised as farmland (or a sub-category thereof) due to its only potential use (i.e. its zoning) being for farming. Equally, if the zoning allowed for either farming or residential purposes, then section 516(1)(b) requires the land to be categorised as residential (or a sub-category thereof).

## **6.12 Categorisation of strata titles**

[Section 518A](#) of the Act states that each lot in a registered strata plan being land provided for, under the *Strata Schemes (Freehold Development) Act 1973* or *Strata Scheme (Leasehold Development) Act 1986*, is to be regarded as separate parcels of land for categorisation and rating purposes.

Company title land being each dwelling or portion of the kind referred to under [section 547](#) (1) is taken to be a separate parcel.

## **6.13 Mixed developments**

Mixed Development Apportionment Factors (MDAFs) provide a rating option for mixed development lands. They allow councils to rate parcels of land with both residential and business uses proportionally according to those uses, based on the MDAF determined by the Valuer General.

To qualify for the receipt of an MDAF the residential and non-residential components of the property must have their own facilities and their own access. Generally the test is that if the property shares communal facilities, such as a kitchen, bathroom, etc, then it cannot be classed as mixed development land.

Mixed Development land and non-residential land have the same meaning as in [Section 14BB](#) of the *Valuation of Land Act* and [Section 518B](#) of the *Local Government Act 1993*.

### **Assessing Mixed Development Apportionment Factors**

Section 14X of the *Valuation of Land Act* requires the Valuer General to provide an Apportionment Factor on any valuation of Mixed Development land. The Apportionment Factor is the proportion (expressed as a percentage) that the rental value of the non-residential land bears to the rental value of the mixed development land as a whole.

Apportionment Factor = 
$$\frac{\text{Rental Value of Non-Residential Land}}{\text{Rental Value Mixed Development Land as a Whole}}$$

The rental values relate to the 1 July base date currently being used. The part of the land that is non-residential land is taken to have been categorised, or sub-categorised as Business for rating purposes, and the remainder of the land is taken to be categorised or sub-categorised, as Residential.

An objection may be made against the decision of the Valuer General in relation to the MDAF in respect of any land.

### **Apportionment of Rates and Charges**

Section 518(4) of the *Local Government Act 1993* requires that the MDAF must be applied to the rates levied, as opposed to being applied to the land value.

The following examples illustrate how the rates should be calculated for mixed development land:

#### **Base Charge**

Land Value = \$200,000, MDAF = 70% , Residential Rate = 0.2415c in \$ & Base Charge = \$250, Business = 0.35c in \$ & Base Charge = \$300

##### Residential

= (\$200,000 x .002415 + \$250) x 30%  
= \$483.00 + \$250 = \$733 x 30%  
= \$219.90

##### Business

= (\$200,000 x .0035 + \$300) x 70%  
= \$700 + \$300 = \$ 1,000 x 70%  
= \$700

**Total Rates** = \$219.90 + \$700 = \$919.90

#### **Minimum Rate**

Land Value = \$90,000, MDAF = 60% , Residential Rate = 0.15c in \$ & Minimum Rate = \$400, Business = 0.41c in \$ & Minimum Rate = \$500)

##### Residential

= \$90,000 x .0015 = \$135 thus minimum of \$400 applies x 40%  
= \$400 x 40%  
= \$160

##### Business

= \$90,000 x .0041 = \$369 thus minimum of \$500 applies x 60%  
= \$500 x 60%  
= \$300

**Total Rates** = \$160 + \$300 = \$460.00

## **7. CATEGORISATION AND SUB-CATEGORISATION OF LAND AND APPLICATION OF ORDINARY RATING**

Before making an ordinary rate, council must have declared each parcel of rateable land in its area to be within one or other of the 4 categories: [section 514](#).

Categorisation of land for rating purposes will assist greatly in achieving transparency in the rating system.

### **7.1 Sub-categorisation subject to same mandatory requirements of Act as categorisation**

[Section 531](#) of the Act stipulates that sections 519-527 apply to the determination of a sub-category of rateable land in the same way as those sections apply to a declaration of a category. Accordingly, and particularly in situations where the council has already notified all landowners of the ordinary rating categorisation of their land but subsequently proposes to implement ordinary rates based upon sub-categories of land certain compliance implications will arise:

- sub-categorisation notices will have to be issued to all ratepayers whose land is involved ([section 531](#));
- it is recommended that the issuing of sub-category notices should precede or at least coincide with the publication of the draft management plan where possible. Subsequent issuing of land categorisation notices may result in ratepayers being denied their statutory right, under the Act, to object to the draft management plan ([sections 406, 532](#)).

### **7.2 Categorisation**

[Section 521](#) of the Act provides that a declaration of category takes effect from the date specified for the purpose in the declaration. Changes in categorisation will often require adjustments to be made to the amount of rates that will be payable.

There is an obligation imposed on the [rateable person](#) to notify council within 30 days after the person's rateable land changes from one category to another, under [section 524](#). Councils should ensure that landowners are made aware of their responsibilities under the Act.

A rateable person may, at any time, apply, in the approved form to council for a review of the categorisation of his or her land ([section 525](#)). The "approved form" is to be devised by each council according to the information required to carry out a review of the category.

The extent and nature of information that a rateable person is willing to put in his or her application is a matter entirely for the discretion of the rateable person. The use of questionnaires or physical inspections are not mandatory requirements of the Act.

There is no compulsion on applicants to provide information of a sensitive and/or confidential nature and the ratepayer has the discretion not to consent to an inspection by council. It should be recognised, though, that it will be in the interests of both the council and the landowner if an exchange of relevant information between the two parties does occur and that this process is simplified. Questionnaires, if used appropriately can facilitate this process.

Ultimately, the council must decide whether to re-categorise the land or not, and it may only base a decision on the criteria prescribed in the Act, not extraneous issues, in conjunction with the information provided by the applicant.

Caution is also recommended in the use of questionnaires so as to make sure that they do not contain insensitive and irrelevant questions and do not breach privacy laws.

Finally, there is a right of appeal to the Land and Environment Court in regard to categorisation decisions made by councils. Councils should seek to resolve categorisation disputes during the review process and the conduct of meaningful objective reviews may mean that appeals are minimised: [section 526](#). In the case of *Meriton Apartments Pty Limited v Parramatta City Council [2003] NSWLEC 309*, the court ruled in favour of Meriton Apartments and ordered the council to re-categorise a property from business to residential backdated to July 2002.

### **7.3 How ordinary rates are applied to cover all rateable land in a council area.**

All rateable land is subject to an ordinary rate ([section 494](#)) and a council may levy a uniform ordinary rate upon all land regardless of its categorisation or it may determine to levy a different level of ordinary rate for one or more different categories ([section 528](#)). Note that the terms category and sub-category are synonymous due to [section 531](#).

The key point to note is that the making of a sub-categorised rate or rates must never precede the making of a rate for the category of land of the same kind to which the land which is to be subject to a sub-categorised rate belongs.

Accordingly using "residential" rating as an example a council should not attempt to apply ordinary rating to all "residential" assessments throughout the whole of its area solely by adopting a number of sub-categorised "residential" rates. If the council's intention is to apply one or more sub-categories of "residential" ordinary rates it must initially make a residential ordinary rate that applies to all land categorised as residential throughout its area excepting that land which will be subject to the sub-categorised "residential" rates.

## 8. SPECIAL RATES

It is important to note that special rates levied in terms of [section 495](#) have a fairly broad application whereas special rates levied in terms of sections 551-553 are limited to water supply, sewerage and drainage revenue raising and only in situations where the infrastructure relating to the services is already in place and services are actually being provided.

[Section 495](#) of the Act enables council to 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 council within the whole or any part of council's area, other than "domestic waste management services".

By virtue of section 495(2), the special rate is to be levied on such rateable land in council's area as, in council's "opinion":

- benefits or will benefit from the works, services, facilities or activities; or
- contributes or will contribute to the need for the works, services, facilities or activities; or
- has or will have access to the works, services, facilities or activities.

Whereas council must make and levy an ordinary rate each year, council has a discretion as to whether or not to make and levy one or more special rates.

### 8.1 Making and levying of special rates

As the note box to section 495 indicates, council could, for example, 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.

With respect to local rates, council is required to form a certain "opinion" as a necessary precondition to the making and levying of a special rate. It is the land which will benefit from, contribute to the need for, or have access to the particular works, services, facilities or activities the subject of the rate. Council must define, with some precision, the work, service, facility or activity in question which will benefit, etc., the land.

The opinion must correspond exactly with the "substance" and "effect" of the rate, that is, all land rated must be identical to the land which will benefit from, contribute to the need for, or have access to the particular works, services, facilities or activities the subject of the rate. Thus, the rate must not be levied on any land which will not, in council's reasonable opinion, benefit from, contribute to the need for, or have access to those works, services, facilities or activities. All land which will, in council's reasonable opinion, benefit from, contribute to the need for, or have access to those works, services, facilities or activities must be rated.

The High Court, in *Parramatta CC v Pestell* (1927) 128 CLR 305 stated that parliament gave council the power to determine if specified works, etc, would "benefit" certain land and that it was not for the Court to override council's opinion.

However, the Court indicated that it may review a decision to see whether it has been made within the confines of the law or to determine "if it is so unreasonable that no reasonable council could have formed it".

A work, service, facility or activity "benefits" certain land if the land in question derives a benefit which is not shared by other land. However, if in the opinion of council two parcels of land will benefit from a work, council cannot subject one of those parcels to the rate and exclude the other parcel from the rate.

Whether certain land will benefit, etc., from works, services, facilities or activities is a question of fact: cf *FCT v Broken Hill South Ltd* (1941) 65 CLR 150. However, whether the evidence is sufficient to justify a finding by council that certain land will derive benefit, is a question of law. Thus, although the Court is not required to assess the weight of the evidence to determine whether it is sufficient to support council's conclusion of fact (see *Hope v Bathurst CC* (1980) 144 CLR 1), the Court may still find an error of law made in the course of deciding the question of fact if, for example, council reaches a conclusion (i.e. that certain land would or would not derive benefit) which was "impossible" to reach on the facts: *Hope*.

In *Alan E Tucker Pty Ltd v Orange CC* (1969) 18 LGRA 314 at 321, Else Mitchell J said:

" ... It is obviously not open to the council to form an opinion that has no basis in fact nor to reach an opinion by the exercise of considerations or factors which have no relevance to the benefits ensuing from the provision of the works or services to be financed from the [rate]."

It must also be stressed that the section is concerned with the question whether certain land will benefit, etc., from the works, services, facilities or activities the subject of the rate, "not with the question whether the owners of some lands will, having regard to their personal circumstances, in fact be able immediately to avail themselves of that benefit": *Pestell*. It has been held that although an individual landowner may personally derive no present benefit from the works, etc., his or her land does benefit when its value is increased by the additional amenity.

In relation to special rates, it is not possible to draw any artificial distinction between the ordinary expenses of a council and other expenses which might attract a special rate. The Department recommends that each special rate should only relate to one particular work, service, facility or activity or one particular set of works, services, facilities or activities of a like character.

In the context of special rates, council should keep in mind the provisions of [section 565](#) of the Act. That section enables council to waive payment by a rateable person of the whole or part of a special rate for one or more years as specified by council if the person pays, or enters into a written agreement to pay, a lump sum capital contribution towards the capital cost of any works, services or facilities for which the rate is made.

Whenever a council makes any kind of a special rate the council must, in the resolution making the rate, state whether the rate applies to all rateable land in the area or only part of that land: [section 538\(1\)](#). Where the rate applies to only a part of the area, council must specify in the resolution the land to which the rate is to apply: [section 538\(2\)](#). Once again, these requirements are mandatory so as to affect the validity of the rate.

Finally, although the proceeds of a special rate (or charge) are to be held in council's "consolidated fund" ([section 409\(1\)](#)), money received as a result of levying the rate may not be used "otherwise than for the purpose for which the rate was levied". This does not necessarily mean that the money received as a result of levying the rate may only be spent in the area where it is raised. The "purpose" for which the rate was levied is a question of fact, and much would depend on what was the stated purpose and intention of levying the particular rate.

## **8.2 Environmental levy**

Making a special rate and calling it an Environmental Levy or other levies do not need Ministerial approval. The resolution should reflect that the levy is a special rate.

Councils are autonomous to make and levy special rates. If, however, the revenue from making a special rate causes a council to exceed its permissible income, it must seek the Minister's approval for a special variation.

A special rate as an "environmental levy" requires the rate to be made and levied legally as either pure ad valorem, ad valorem with a base amount or ad valorem and a minimum amount. Rates levied on the basis of valuation remain the primary and predominant method of rating whereby the incidence of any rate burden is split differentially according to the value of rateable property: see *Sutton v Blue Mountains CC* (1977) 40 LGRA 51.

A number of councils in NSW make and levy special rates for environmental services. The special rates may apply to part or the whole of the council's area. However, councils need to exercise care that in the council's opinion the properties benefit from, contribute to the need, or have access to the services ([section 495\(2\)](#)).

Alternatively, some councils make and levy an ordinary rate with an ad valorem amount and a base amount that enables them to charge all properties subject to the rate (or the category or sub-category of the rate) a sufficient levy to cover the cost of common services (such as environmental initiatives), as well as basic administration costs. Note that if council wishes, it is able to identify on its rates notices or accompanying information the specific contribution ratepayers are making to the proposed works.

In regard to fixed annual charges, [section 501](#) of the Act allows councils to levy an annual charge but only for purposes specified in the Act and those prescribed by regulation. Under the Act the council may impose annual charges only for water, sewerage, drainage and waste services. Note that drainage services are likely to have environmental implications in respect of stormwater management.

Annual charges are limited in their use, as the tangible service must actually be provided to that parcel of land. Altering the rating and charging provisions of the Act to enable councils to levy flat charges for various purposes such as "the environment" would result in a rating system similar to a poll tax, rather than one based upon land valuations.

## **8.3 Alternative use of money raised by a special rate or charge**

By virtue of [section 409](#) of the Act, general revenue collected from the making and levying of rates and charges is to be held in council's "consolidated fund". However, 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: section 409(3)(a).

If the special rate has been discontinued and the purpose for which the money was raised has been achieved any money remaining may be used by council if the proposal is included in the draft management plan and [public notice](#) was given.

[Section 410\(3\)](#) allows money that is not yet required for the purpose for which it was raised to be lent (by way of an internal loan) for use by the council for any other purpose if the loan is approved by the Minister. The Minister must impose conditions as to the time of repayment of the loan and interest payable on the internal loan.

#### **8.4 Special provisions relating to water supply, sewerage and drainage special rates**

Councils need to be aware of the special provisions contained in Division 2 of Part 5 of Chapter 15 of the Act in relation to special rates (and charges) with respect to water supply, sewerage and drainage. A special rate intended to finance (or go towards financing) borrowings associated with plan or design works for a proposed water supply, sewerage or drainage scheme (eg. an XYZ Sewerage Scheme Feasibility Study Special Local Loan Rate) would only be validly made and levied via [section 495](#).

#### **8.5 Water and sewerage special rates**

Under [section 552](#) a water special rate can only be levied on properties where:

- the land is supplied with water from a council pipe
- the land that is situated within **225 metres** of a water pipe of the council;

A sewerage special rate can be levied on all land except:

- land which is more than **75 metres** from a sewer of the council and is not connected to the sewer; and land from which sewage could not be discharged into any sewer of the council.

A drainage special rate can be levied on rateable land that is within the basin served by the drainage works.

Vacant and unoccupied land which are within the above criteria and not exempt under section 555 and 556 can be levied with these water and sewerage special rates.

Under [section 565](#) a council is allowed to waive the payment of a special rate if the [rateable person](#) pays a lump sum towards the capital cost of the relevant works or service.

## 9. THE STRUCTURE OF A RATE

A rate - whether ordinary or special - may, at council's discretion, consist of:

- an ad valorem amount ([section 497](#)); which may, in accordance with [section 548](#), be subject to a minimum amount of the rate; or
- a base amount to which an ad valorem amount is added ([section 497](#)).

### 9.1 Base amounts

It is entirely at the discretion of council as to whether there ought to be a base amount. Although it is not an essential or inevitable consequence of a rating system that a ratepayer receive services commensurate with the rates he or she pays, it is still the case that there is a quantifiable cost per property that represents the basic administrative costs of council and from which all properties benefit, regardless of their rateable value.

In addition, there are other services and facilities provided by council which benefit all properties, regardless of their rateable value.

A base amount, equitably determined, can enable council (should it so desire) to charge all properties subject to the rate (or the category or sub-category of the rate) a sufficient levy to cover the cost of common services, as well as basic general administration costs. A base amount can be used successfully to "flatten" out the incidence of rates across ratepayers where, for example, land values vary greatly within categories of ratepayers or there is disproportionate variations in valuations arising from a new valuation.

By taking into account the particular features of the distribution of rateable values in its local government area, a council can set the level of its base amount (or base amounts) so as to achieve the best possible balance between the "benefit principle" and the "ability to pay principle".

While the Act makes provision for "base amounts", the overriding characteristic of local government rating is that the assessments that are produced will be **primarily and predominantly determined via the ad valorem method** whereby the incidence of any rate burden is split differentially according to the value of rateable property: see *Sutton v Blue Mountains CC* (1977) 40 LGRA 51.

Although the *Sutton* case dealt with minimum rates, it is still relevant in answering the question of why a base amount is limited to 50% of the total income from a category or sub-category. In *Sutton*, it was held that rates levied by the council were invalid if, in most cases the minimum rate paid by a ratepayer was greater than that which would otherwise have been payable had the rate been calculated on an ad valorem basis.

The percentage of ratepayers in *Sutton* paying the relevant minimum rates ranged from 76.2% to 97.1%. The Court did not give any specific indication of what would be an acceptable "cut-off" point. However, it did find that the minimum rate which the council had determined was intended by the council to be "the rule rather than the exception".

As mentioned above, the Act specifically provides that the application of the base amount must not produce more than 50% of the total revenue to be derived from the

rate (or the category or sub-category of the rate). This fact should serve as a guide to councils that it is still implicit in the Act that rating is intended to be primarily and predominantly determined upon an ad valorem system.

## **9.2 Formal requirements regarding base amounts**

Where council resolves to make an ordinary or special rate with a two part structure (i.e. with a base amount), the base amount may be uniform or may vary between categories or sub-categories: [section 499](#). However, whatever the amount of the base amount, it must apply uniformly to all rateable land subject to the rate (or category or sub-category of rate in the case of an ordinary rate).

If council decides to impose a base amount, it must be specified in the resolution making the rate: [section 499\(1\)](#). This is a requirement which is mandatory so as to affect the validity of the rate. In addition, in the resolution that specifies a base amount of a rate, or the base amount of a rate for a category or sub-category of an ordinary rate, council must state:

- the amount in dollars of the base amount; and
- the percentage of the total amount derived from the base amount from each category or sub-category ([section 537](#)).

Once again, this is a requirement which is mandatory so as to affect the validity of the rate.

In determining a base amount, council must have regard to (but is not limited to) the matters set out in [section 536](#) of the Act. Although the list of matters set out in the section is not exhaustive, the factors specified are prima facie relevant considerations to which due, proper and real regard must be had by council. Factors not specifically set out in the section may be extraneous or irrelevant. Whether a factor is extraneous or irrelevant must be determined by implication from the subject matter, scope and purpose of the section and the specific factors set out in the section in that regard, the charter contained in [section 8](#) of the Act refers to the "fair" imposition of rates.

If council makes a rate with a 2 part structure, the application of the base amount for the rate (or category or sub-category of the rate) must not produce more than 50% of the total amount payable by the levying of the rate (or category or sub-category of the rate): [section 500](#).

## **9.3 The ad valorem amount of a rate**

Irrespective of whether or not council specifies a base amount, the ad valorem amount of a rate is to be levied on the land value of all land that is to be rateable to the rate ([section 498](#)) and the rate in the dollar is to apply uniformly:

- in the case of an ordinary rate - to the land value of all rateable land in the area within the category or sub-category of the rate; and
- in the case of a special rate - to the land value of all rateable land in the area or such rateable land as is specified by council in accordance with [section 538](#).

The ad valorem amount of the ordinary rate may be the same for all categories or it may be different for different categories: [section 528\(1\)](#).

In accordance with [section 498\(3\)](#) and [499\(4\)](#) parcels of land must have the same ad valorem and/or base rate as other parcels of land in the same category or sub-category unless the land values of the parcels were last determined by reference to different base dates and the Minister approves the different ad valorem amounts. This also applies to minimum rates under [section 548\(8\)](#) of the Act.

#### **9.4 Minimum amounts of rates**

The decision as to whether a council will or will not use minimum rates is entirely left to the discretion of each council. If a council resolves to specify one or more minimum amounts of a rate in accordance with [section 548\(3\)\(a\)](#), the size of any minimum amount must not exceed the relevant permissible limits provided for in the Act and clause 126 of the Local Government (General) Regulation 2005, unless special Ministerial approval for a higher amount has been granted. The minimum amount of a special rate under [section 548\(3\)\(b\)](#) is \$2 unless prior Ministerial approval for a higher amount has been given.

Attention is also drawn to point 9.1 Base Amounts, which outlines that the Court, in *Sutton*, determined that rates should be primarily and predominantly determined via the ad valorem method.

[Sections 497](#) and [548](#) clarifies that an ordinary or special rate may comprise one of the following three structures only:

- an ad valorem rate only,
- an ad valorem rate subject to a minimum amount, or
- an ad valorem rate plus a base amount (which raises up to 50% of the income from the particular rate). This makes it clear that any particular ordinary rate for a category or sub-category, or any special rate may not have both a base amount and minimum amount applied to it.

#### **9.5 Aggregation of certain parcels of land subject to base amounts and minimum rates**

[Section 548A](#) allows a council to aggregate the land values of two or more parcels of rateable land that are subject to ordinary or special rates containing base amounts and minimum rates and are owned by the same person(s), if, in the opinion of the council, the levying of a rate containing a base amount or minimum, a) would apply unfairly and b) could cause hardship to a rateable person. Land values are only allowed to be aggregated if "each separate parcel of land is subject to the same category or sub-category in the case of ordinary rates, or the same special rate." Further, a council must not aggregate the land values of two or more parcels of land if each parcel has a dwelling erected on it or each parcel "comprises (or substantially comprises) a dwelling in a residential flat building", or a combination of both of these.

Section 548A is available where the levying of rates would apply **unfairly** and **could cause hardship** to the rateable person. If ratepayers approach the council on this basis it would be difficult for the council not to apply this provision.

In particular, the Department encourages councils to aggregate garages and car spaces where the owner has a separate rateable property in the same building or strata complex. [Section 531B](#) (3) states that a council must not treat separate parcels as being a single parcel if each parcel on which a dwelling is erected or a

parcel that comprises a dwelling in a residential flat building. A garage is not a dwelling and aggregation is possible in these circumstances.

## **9.6 Application of rates, base amounts and charges to multiple occupancy developments**

The rating of multiple occupancy developments is an issue that has come about because of the perceived inequity in councils only levying one set of rates and charges on a property that has more than one distinct occupation or dwelling and whose occupants/residents have the same access to council provided services as the owners of single occupancies who are separately paying rates and charges.

It is argued that the present rating system does not provide adequate income to service the increasing number of these developments eg: dual occupancies, cluster homes, caravan parks, duplex dwellings etc.

However, to rate these properties individually would be contrary to government policy of providing affordable housing. Significant administrative and valuation difficulties involved in such a system are also identified.

## **9.7 What is a parcel of land for rating purposes.**

The *Local Government Act* requires rates to be levied on each "parcel of land" which is separately valued and also for each parcel of land to be placed in one of four categories.

The definition of "parcel of land" in the *Local Government Act* is a portion or parcel of land which is separately valued under the *Valuation of Land Act*. The *Valuation of Land Act* requires separate valuations to be made under the following circumstances:-

- |                               |   |
|-------------------------------|---|
| <a href="#">Section 26(1)</a> | if buildings are erected thereon which are obviously adapted for separate occupation.   |
| <a href="#">Section 27(1)</a> | Where several parcels of land owned by the same person are separately let, they shall be separately valued.   |
| <a href="#">Section 27(2)</a> | Lands which do not adjoin or which are separated by a road or are separately owned shall be separately valued, except land held for agricultural or pastoral purposes which are owned by the same person. |
| <a href="#">Section 27(B)</a> | Lots in a subdivision may be separately valued.   |

In regard to the separate valuation of multiple occupancies, the Valuer General has adopted the following policy:-

- (1) Lots in a subdivision will be separately valued upon registration of a Deposited Plan if it is reasonable that the lots will be sold in the near future.
- (2) In deciding whether separate valuations should be made where there are buildings on land, the answers to each of the following questions must be "yes".

- (a) Is the "degree of separation effected by the owner in using the land" such that it is obvious that the "parcels" are quite separate to the remainder of the property?
  - (b) Can the physical boundaries of the parcels of land be readily determined?
  - (c) Are the buildings obviously adapted for separate occupation?
  - (d) Is there clearly defined access to each parcel of land from a public road?
- (3) The determination of each of the above questions is a matter of fact.
  - (4) Workers cottages on rural properties are not separately valued because a rural property has been considered as a parcel of land. In the majority of situations they would also fail 2(a).
  - (5) Dwellings on **rural land** zoned for multiple occupancy have been treated in the same manner as (4). They may also fail at least one of the tests in (2).

Currently it seems that existing legislation would allow for charges to be levied having regard to the multiple occupancy, especially in terms of domestic waste management service charges. [Section 539](#) of the Act sets out some criteria that councils may use when determining the amount of a charge. These include the nature, extent and frequency of the service, the nature and use of premises to which the service is provided, and others. [Section 541](#) allows for differing amounts of the same charge to be determined.

This is, however, not applicable for rating, including the levying of base amounts.

If a council believes that a multiple occupancy development may be able to be separately valued because it could possibly satisfy the above criteria, then the council is able to apply for separate valuations to be provided by the Valuer General.

There may be costs levied by the Valuer General involved in this for each such application by a council.

For other multiple occupancies that do not satisfy the Valuer General's separate valuation criteria (e.g. granny flats), there would not currently be a way of separately rating each occupancy.

## 10. CHARGES

The Act allows councils to set charges on:

- an annual basis; and,
- a pay for use basis.

Moreover, it is a mandatory requirement of the Act that domestic waste management service charges be applied to all rateable land within the area to which such service is available. The Act also allows councils to determine other types of charges as part of their overall revenue mix.

### 10.1 Domestic waste management services charges

Councils must make and levy an annual charge for the provision of "[domestic waste management services](#)" for each parcel of rateable land for which the service is available: [section 496](#). Income to be applied by councils towards the cost of providing such services must be obtained from the making and levying of annual charges or the imposition of charges for the actual use of the service, or both ([section 504\(2\)](#)).

Section 504(3) of the Act provides for income from charges for domestic waste management being calculated so as not to exceed the **reasonable cost** to the council of providing those services. Further, the Act's Dictionary defines [domestic waste management services](#) as services comprising the periodic collection of [domestic waste](#) from individual parcels of rateable land and services that are associated with those services.

Thus, the cost of a garbage truck used for collection of domestic waste could be included in reasonable costs associated with the service however such costs as damage to the roads from the garbage truck would not be seen as a reasonable cost as the road is used by vehicles other than garbage trucks. The damage caused and the council's costs towards the road paving repairs is therefore not a relevant component of the domestic waste management services charge associated with a domestic waste periodic collection service and domestic waste funds should not be used for this purpose.

This Manual contains a separate "Charging for Domestic Waste Management Services" section following this section and this provides a more detailed explanation of the Act's provisions.

### 10.2 Stormwater management services charge

[Section 496A](#) of the Act enables councils to make and levy an annual charge for stormwater management services for each parcel of rateable land for which a [stormwater management service](#) is provided, with the exception of rateable land owned by the Crown and leased for private purposes under the *Housing Act 2001* or the *Aboriginal Housing Act 1997*.

Clause 125A of the *Local Government (General) Regulation 2005* provides that:

- An annual charge for stormwater management services may only be levied on land categorised for rating purposes as residential or business
- The charge cannot apply to vacant land

- The charge cannot be levied on a parcel of land subject to a special rate or charge for which the primary purpose is to provide a stormwater management service
- The charge cannot be levied by a council if it has received a special variation from the Minister for Local Government for which the primary purpose is to provide a stormwater management service
- The charge cannot exceed the anticipated cost (if less than maximum charge) or the maximum charge (if anticipated cost greater than maximum charge)

Clause 125AA of the Regulation prescribes the maximum charge that may be levied on rateable land is:

- \$25 for land categorised as residential
- \$25 per 350 square metres (or part thereof) for land categorised as business.

The Department has issued a separate document, 'Stormwater Management Service Charge Guidelines', to assist councils that wish to levy a stormwater management service charge. This document is available under the Publications section of the Department of Local Government's website.

### **10.3 Other charges**

By virtue of [section 501](#)(1) of the Act, council is empowered to make and levy an "annual charge" for any of the following services provided, or proposed to be provided, on an annual basis by council:

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

A capacity to levy charges for water, sewerage and drainage services also exists within Division 2 of Part 5 of Chapter 15 (sections 551-553). The provisions of Division 2 apply in all instances where the infrastructure relating to the service is in situ (i.e. the water supply mains etc. are constructed and in proximity to the land).

A council may make a charge for the "actual use" of a service referred to in section 496 or 501 provided by council: [section 502](#). It is emphasised that section 502 charges cannot be applied in advance, they are only applicable after, and in respect of, the actual use of the service.

## 10.4 Flexibility in setting charges

The system of charges in the Act seeks to confer the maximum possible degree of flexibility, in recognition of the need to allow and encourage councils to implement modern pricing structures and policies for the basic services and utilities concerned.

A charge may be made in addition to an ordinary rate, and in addition to or instead of a special rate, the exception being domestic waste management service revenue raising.

However, if land is not rateable to a special rate for a particular service, council is prevented from levying a charge in respect of that land relating to the same service, unless the charge is limited to recovering the cost of providing the service to that land: [section 503\(2\)](#).

In determining the amount of an annual or a user pays charge, councils may have regard to (but are not limited to) the matters set out in [section 539\(1\)](#). The amount of a charge need not be limited to recovering the cost of providing the service for which the charge is made, except as provided by sections 503(2) [where land is not rateable to a special rate] and [504\(3\)](#) [charges for domestic waste management].

The amount of a charge may be expressed as a "single amount" or as a rate per unit or as any combination of them: section 540. Differing amounts may be determined for the same charge: [section 541](#). A minimum amount may be specified for the charge and (where applicable) differing minimum amounts may be specified for differing amounts for the same charge: [section 542](#).

While the amount of a charge need not be limited to recovering the cost of providing the service in question (except as provided by sections 503(2) and 504(3)), the amount of a charge would still need to be "reasonable".

As is the case for special rates, the proceeds of a charge should be held in council's "consolidated fund" ([section 409\(1\)](#)), although money received as a result of levying the charge may not be used otherwise than for the purpose for which the charge was levied. Similarly for special rates, this does not necessarily mean that the money received as a result of levying the charge may only be spent in the area where it is raised. The "purpose" for which the charge was levied is a question of fact, and much would depend on what was the stated purpose and intention of levying the particular charge.

In their resolutions making charges, councils should ensure that annualised charges are expressed as relating to a rating year and that pay for use charges are expressed as relating to a defined measure of service or commodity provided (upon landowner or occupier request) in a specified year.

It also needs to be noted that [section 575](#) of the Act makes provision for mandatory rate rebates in respect of charges relating to water supply, sewerage and domestic waste management services charges in certain circumstances.

## 10.5 Water, sewerage and drainage charges

Under [section 552](#) a water or sewerage charge relating to:

- water supply may be levied on land that is supplied with water from a water pipe of the council, and land that is situated within **225 metres** of a water pipe.
- sewerage may be levied on all land except land which is more than **75 metres** from a sewer of the council and is not connected to the sewer, and land from which sewage could not be discharged into any sewer of the council.
- drainage may be levied on rateable land that is within the basin served by the drainage works.

Vacant and unoccupied land that are within the above criteria and not exempt under section 555 and 556 are required to pay if council determines to levy annual charges for these services.

### **10.6 Water and sewerage pricing**

As a consequence of the 1994 Council of Australian Governments (CoAG) agreement on a strategic framework for the efficient and sustainable management of the Australian water industry, the NSW Government (in line with all other jurisdictions) has adopted best practice pricing principles, full cost recovery and transparency as policy objectives for water supply and sewerage businesses and liquid trade waste services.

It is incumbent on councils to adopt best practice management and charging policies for services such as water supply and sewerage. Unless councils have carried out a benefit/cost analysis that has demonstrated that, for their community, best practice pricing is not cost effective there is no sufficient reason for retaining rates based charges and water allowances.

Best practice pricing for water supply includes an appropriate per kilolitre usage charge together with a cost reflective access charge. Best practice pricing for sewerage includes a two-part tariff for non-residential customers, a uniform sewerage bill for residential customers and appropriate trade waste fees and charges for all dischargers of liquid trade waste.

The Water Systems Branch of the Department of Energy, Utilities & Sustainability has a number of initiatives in place that can assist councils in the implementation of best practice pricing principles. These include guidelines, checklists and software for pricing, developer charges and financial planning, schedule of trade waste fees and charges, as well as ongoing helpdesk assistance for developing and analysing the impact of tariff options.

### **10.7 Water dividends**

Most of the provisions of the *Local Government Amendment (National Competition Policy Review) Act 2003* commenced on 1 September 2003. [Section 409](#) of the *Local Government Act 1993* has been amended to allow councils with water supply and/or sewerage businesses to pay a dividend from any operating surplus of those funds to their general fund. Previously the dividend was only notional and was not able to be paid because of limitations on transfers between funds.

The payment of dividends will be subject to the council complying with best practice guidelines to published by the Department of Energy, Utilities & Sustainability.

## **10.8 Water and sewerage charges to strata and community title properties**

The Local Government (General) Regulation 2005 regulates the installation of water meters to all premises. The Regulation derives its authority from the *Local Government Act 1993* and took effect on 1 September 1999.

As expressed in clause 152, the Regulation intends that individual lots/units be connected to a water supply by way of a separately metered and independent house service pipe. This provision for independent water metering is consistent with the user-pays basis of water supply in New South Wales.

However, the Regulation allows councils to determine at their discretion how best to satisfy the intent of the Regulation. If private meters are installed for each lot/unit, it is a matter for negotiation between the owner and the council how meter usage will be recorded and administered.

## **10.9 On-site sewage management revenue policy**

In line with [section 68](#) of the *Local Government Act* landowners are accountable to the council for approval to operate a system of sewage management. The council is required to keep an up to date register of decentralised sewage systems in use and to notify landowners of their obligation to comply with the performance standards for sewage management specified in the Part 2, Division 4, Subdivision 7 of the Local Government (General) Regulation 2005. The approval requirement also allows the council to recover an application fee or periodic renewal fee. The fee provision is intended to assist the council to fund the establishment of an effective performance management scheme in line with the regulations. Consideration of the following information may assist councils reviewing their revenue policies.

### Revenue policy for sustainable on-site sewage management

While considering its revenue policy for the on-site sewage management activity, councils should consider the purpose of the service, its contribution to meeting the council's duty of care to ensure safe decentralised sewage management in the local area, affordability and equity and the National Competition Policy principles.

Council's revenue policy for its on-site sewage management strategy could include:

- a component of application/renewal fees,
- a component for inspection fees and/or
- a component of general rates income.

The on-site sewage management reforms, where they have been implemented successfully, are contributing to improvements to the environment and reducing the risks to public health. These benefits flow to affected landowners and on to the broader community. In some council areas landowners who operate private on-site sewage management facilities live in rural and semi-rural areas and do not benefit from the many council services that are provided in urban areas. Furthermore, those landowners pay the full cost of their sewage services without the benefit of pooled funding arrangements and sewerage subsidies that flow to residents with access to town sewerage services.

Councils can levy an on-site sewage management fee under section 608 of the Act. In order to assist councils to minimise the cost of levying and collecting this fee periodically, the Act provides that an application is deemed to have been made on payment of the due fee (section 107A). Consequently this fee can be collected by listing it as a separate item in the invoice section of the annual rates notice provided that the fee item and the funds when collected (which are service fees, not rates), are separately specified and accounted for. Failure by the ratepayer to pay the fee may be dealt with by penalty notice where the offence of operating a system of sewage management without approval is committed.

#### Recommended fee for approval to operate

When the Minister for Local Government announced the package of local government regulatory reforms and guidelines for the management of domestic on-site sewage management facilities in 1998, an operating approval fee of up to \$30 was recommended. It should also be noted that there is no compulsion to charge this fee.

The recommendation stated that the fee was intended to apply for the first year of operation, during which time it was expected that a detailed analysis of the costs involved in implementing and administering the sewage management reforms be carried out by councils. Following the first year of operation the council must determine an appropriate annual fee. It is of critical importance that appropriate resources are allocated for effective maintenance of the statutory register of on-site sewage management approvals and for risk assessment and clear service targeting by the council.

It is important that application, renewal and inspection fees, or the application of any of the revenue generating mechanisms outlined above, be set on a reasonable basis taking into account equity and cost recovery principles and be determined in consultation with the community. It is also important that the community is informed of what services and benefits they receive from the revenue allocated.

## 11. CHARGING FOR DOMESTIC WASTE MANAGEMENT SERVICES

The *Local Government Act 1993* provides in [sections 496 & 504](#) that the domestic waste management services of the council must be financed by a specific annual charge made and levied for that purpose alone.

The *Local Government Act Dictionary* defines [waste](#) in three categories:

- effluent waste,
- trade waste and
- garbage;

and includes the following definitions relevant to domestic waste management:

**domestic waste** means waste on domestic premises of a kind and quantity ordinarily generated on domestic premises and includes waste that may be recycled, but does not include sewage.

**domestic waste management services** means services comprising the periodic collection of domestic waste from individual parcels of rateable land and services that are associated with those services.

Other waste management services of the council are to be separately financed.

### 11.1 The role of councils: their powers to regulate waste and to carry out waste collection and disposal

The *Local Government Act 1993* gives the council a role in the regulation of waste and in the provision of waste management services.

#### Local government regulatory functions

The council's waste regulation functions are set out in Chapter 7 of the Act. Regulatory functions are subject to review by the Land and Environment Court and must be exercised in strict compliance with the procedure specified in the Act.

The council may also exercise regulatory functions in relation to waste under other legislation (eg. EP&A Act, Impounding Act; EP&O Act, etc.)

Under [section 68](#) of the *Local Government Act* council approval is required to transport waste for a fee or reward (except in the Sydney Waste Management Region) and to place waste or a waste storage container in a public place.

[Section 124](#) of the Act provides power for councils outside the Metropolitan Waste Management Region to order the person responsible for waste to manage that waste in a manner specified by the council.

Subject to the Act and regulations, a council is able to make local approvals and orders to specify the circumstances in which a person is exempt from the requirement to obtain a specific approval and to specify criteria for council approvals and orders.

#### Local government service functions

In addition to regulatory functions imposed upon the council by the *Local Government Act* or other legislation the council has a general power under [section](#)

24 of the Act to provide goods, services and facilities, and to carry out activities appropriate to the current and future needs within its local community and of the wider public, subject to the Act, the regulations and any other law.

### **11.2 What services are or are not domestic waste management services**

The clear intention of the Act is that council household garbage services are to be funded by specific annual charges made and levied for that purpose. The council is expressly prevented from applying income from an ordinary rate towards the cost of providing domestic waste management services ([section 504](#)) and from making a special rate for the cost of such services ([section 495](#)).

The following are some examples of services **not** considered to be "domestic waste management services" and should not be confused as such:

- providing landowner access to council tipping sites and rural depots or any related activities of the council (even though some of the waste received may be of a "domestic" nature);
- the removal or treatment etc., of any waste being the by-product of business, commercial, industrial or any other non-domestic activities;
- the removal of any kind of waste from business, commercial, industrial or any other non-domestic premises (regardless that the waste may comprise materials similar to domestic waste);
- removal of abandoned motor vehicles from private land, clearing of vegetation, grass etc;
- street cleansing and parks maintenance etc.

These functions are elements of "domestic waste management services":

- weekly (or other periodical) garbage collection from domestic premises;
- weekly (or other periodical) waste collection from domestic premises;
- extra services of the kind referred to in 1 and 2 above (e.g. for flats);
- periodical clean-ups from domestic premises;
- one-off collections of a similar nature arranged "on-request" by occupants of domestic premises;
- recycling activities tied in with any of the above elements.

This above list is not necessarily exhaustive.

### **11.3 Raising revenue for domestic waste management services**

By virtue of [section 496](#) all councils must levy an annual charge in respect of all rateable land within their areas for which the domestic waste management service is available. The structure of the charge can, of course, be different for different service areas and different for different types of services within a service area. The section 496 charge is not the only source of revenue for domestic waste management services, user-pays charges can be used to supplement annual charges.

It is emphasised that it is entirely within the discretion of each council to differentiate the levels of such charges on the basis of the volume of the domestic service. For

example a two tier pricing structure could be established with one annual charge for a once weekly 240 litre bin service and a different level of that charge for premises using a once weekly 55 litre bin service.

All rateable land that is situated within the area in which a domestic waste management service can be provided whether occupied land or vacant land, must be subject to an annualised section 496 charge.

The owners of unoccupied land cannot avoid making any contribution whatsoever towards the costs of the service. That is not to say that unoccupied land should automatically be subjected to the same level of annualised charge as occupied land. The charge can, and perhaps should, be differentiated to a lower amount as a matter of policy by each council, if circumstances justify this under the criteria of [section 539](#). However, it would be contrary to law to attempt to set a section 496 charge at a zero amount.

#### **11.4 User-pays charges may be applied**

Councils are empowered by [section 502](#) to also adopt user-pays based charges in combination with section 496 charges, if they wish to do so.

Any council wishing to finance domestic waste management services predominantly upon the basis of volume, weight or type of domestic waste removed from premises would best implement such a policy by virtue of section 502 which empowers a council to make a charge for the actual use of any service it provides.

#### **11.5 Option to determine different levels of charges**

The main criteria which councils may use in determining the amounts of charges are specified within [section 539](#) of the Act. These are the:

- purpose for which the service is provided;
- nature, extent and frequency of the service;
- cost of providing the service;
- categorisation for rating purposes of the land to which the service is provided;
- nature and use of premises to which the service is provided; and
- the area of land to which the service is provided.

These criteria are equally applicable to setting the level of a differentiated annualised charge, as they are applicable to setting the levels of user-pays charges based upon criteria such as volume, weight or other forms of measure.

Differing amounts for the same charge may be determined ([section 541](#)), upon substantive criteria ([section 539](#)) and the amount of the charge may be expressed as a single amount or as a rate per unit or as any combination of them ([section 540](#)). There is also provision for a minimum amount of a charge, and for differing minimum amounts of a charge ([section 542](#)).

#### **11.6 Revenue obtained by councils must be tied to "reasonable costs"**

[Section 504](#) of the Act makes it very clear that the income that councils can obtain from charges for domestic waste management services, whether of an annualised

type or a user-pays charge, or a combination of both, must be calculated to not exceed the "reasonable costs" to the council of providing the services. The concept of "reasonable cost" is fully explained later in the manual.

### 11.7 Charging for products, devices and facilities and resale of waste

[Section 608](#) provides that the council must not charge a fee for a service provided or proposed to be provided on an annual basis for which it may make an annual charge. However section 608 does not prevent the council from charging an [approved fee](#) for products, devices and facilities provided from time to time in association with waste services nor from charging an approved fee for the sale of waste.

For example some councils provide waste management products to domestic and other consumers such as: special garbage bins, HAZMAT and sharps containers, recycling crates and on-site treatment devices such as compost bins and worm farms. The council is able to recover an approved fee under section 608 for supply of the product as distinct from provision of a waste service to the premises.

The Act provides ([section 743](#)) that the council has ownership of waste removed from land or premises by or on behalf of the council or received at a depot of the council. The council is able to charge an approved fee for the sale of waste materials irrespective of whether collection was the subject of an annual charge.

### 11.8 Concessions

The Act allows pensioners to obtain mandatory rebates in respect of the aggregated total of their ordinary rates assessment and their domestic waste management services charge: ([section 575](#)). Councils also have the discretion to provide voluntary rebates: ([section 582](#)).

### 11.9 Apportionment of pensioner concessions between ordinary rates and domestic waste management service charges

It is important that an accurate apportionment of pensioner concessions between rates and DWMS charges is undertaken if the cost of providing the concessions is part of the reasonable cost calculations used when setting the DWMS charge.

The apportionment should be in the same proportions as the levels of rates and DWMS charges. For example, in the case of a pensioner with ordinary rates (before concession) of \$400 and a DWMS charge of \$100, the \$250 concession would be apportioned at \$200 from the ordinary rates and \$50 from the DWMS charges. The cost of \$50 would be applicable to be used in the calculation of reasonable cost for the provision of the DWMS charge.

#### Calculation

Ordinary rates \$400 + DWMS \$100 = \$500

Ordinary rates as % of total	80%	DWMS as % of total	20%
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Pensioner concession	\$250	Pensioner concession	\$250
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80% of pensioner concession	\$200	20% of concession	\$50
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When pensioner concessions are treated as a cost of providing the DWM service, consequentially, the amount of government reimbursement should also be considered and deducted from the calculation of the cost of providing the pensioner concession.

### **11.10 Financing the cost of domestic waste management services**

A council is expressly prevented from applying income from an ordinary rate towards the cost of providing domestic waste management services ([section 504\(1\)](#)). In addition, a council is also expressly prevented from making a special rate for or towards meeting the cost of such services ([section 495\(1\)](#)).

### **11.11 Financing the cost of recycling activities**

[Section 539](#) allows councils to take into consideration the "nature of materials" involved and therefore allow for the differentiation between recyclable and non-recyclable waste. For example a council has the power to set an annual domestic waste management service charge of which components represent the contribution to recycling activities and to domestic waste costs generally.

### **11.12 Some capacity exists to adjust revenue from charges mid-year**

The Act specifies that charges cannot be adjusted except on an annual basis in accordance with the council's management plan.

However, [section 533](#) does provide a mechanism whereby Ministerial approval may be granted for a council to make the charge "late" in the year, if special circumstances exist and the charge was included in the management plan.

### **11.13 The benefits and disadvantages of pay-for-use revenue raising**

The positive aspects of embracing the user-pays revenue raising method (in conjunction with [section 496](#)) are that:

- economic, social and environmental advantages will accrue via waste minimisation;
- the disposal capacity of land fill sites will be conserved;
- fairer distribution of costs of waste management will result.

The negative aspects are:

- increased administrative difficulty of charging (i.e. charges can only be levied after the provision and actual use of the service);
- estimates of usage, and therefore income, may differ greatly to actual usage and therefore charges may not approximate costs;
- increased administrative difficulty in future planning.

### **11.14 Management plans**

The provisions of the Act ([section 405](#)) relating to the public notification by councils of their draft management plans (with particular reference to services to be provided and charges proposed to be levied) will result in improved levels of consultation between councils and their local communities. Such consultation, combined with waste education campaigns, will lead to greater transparency in respect of the inter-

relationships between the amounts of charges and service costs and, in the long run, to a better environment.

### **11.15 Charging and financing non-domestic waste services**

In cases where rural landowners who are allowed to access council garbage tipping facilities are not receiving a domestic waste management service, there are still options available to councils to recover costs. However these are not to be considered as part of any DWMS calculations.

Domestic waste management services must comprise the "periodic collection" of materials from domestic premises. Hence, merely allowing landowners access to a council garbage tip cannot represent the provision of such a service.

Accordingly, the council could:

- levy a special ([section 495](#)) tip access rate upon the land; or
- levy an annual ([section 501](#)) tip access charge as part of its waste management charge; or
- levy fees ([section 608](#)) or user pays charges ([section 502](#)) at the tip entrance; or
- levy a combination of some or all of the above rates and charges types in order to seek a fair distribution of the costs involved in maintaining the tipping facility (see limitation under [section 503\(2\)](#)).

### **11.16 Trade waste services, their financing and council powers to regulate waste**

The term "[waste](#)" is defined in the Act Dictionary and includes trade waste. A "waste" service will generally involve waste removal from business premises but depending upon the nature of the waste materials may also include domestic premises, or farmland. For example, a home industry or mixed development may generate both "domestic waste" and "waste", each of which should be charged for separately.

Councils may levy either special rates, annual charges, or user-pays charges or combinations of all or several of these elements to finance "waste management services".

Sections 68 and 124 of the Act give councils the capacity to ensure premises that generate waste are maintained in a safe and healthy condition and waste is stored, collected, transported and disposed of properly.

There is also scope under the Act for councils to apply a financial incentive for waste producers to properly dispose of waste. Section 501(3) empowers councils to levy an annual charge in respect of all rateable land for which a waste management service is provided or proposed to be provided.

Furthermore, section 495 empowers councils to levy special rates on all rateable land in the area which benefit from, contribute towards the need for, or will have access to: works/services/facilities or activities undertaken or provided or so proposed. This includes waste management removal services.

A special rate is able to be levied upon all commercial premises regardless of whether the land is subject to private waste contract service or utilises the available

council waste removal service. However, attention is drawn to the points made in Chapter 8 of this Manual regarding the levying of special rates.

Councils also have the discretion to apply section 502 charges for actual use separately or in combination with special rates and annual charges.

It is also important to note that flexibility is conferred via sections 495 and 539 to determine the levels of any special rates and charges.

All of the above measures can assist in creating strong incentives for proper "waste" disposal by individuals and companies etc.

In councils' resolutions making charges, care needs to be exercised to ensure that the level of annual charges is fixed to a particular year while the levels of user pays charges is fixed to a specified unit of service or of product or commodity.

## 12. REASONABLE COST OF DOMESTIC WASTE MANAGEMENT SERVICES

"Reasonable cost" is a crucial Act compliance factor in the context of establishing a revenue raising system based upon either a mandatory annual charge ([section 496](#)), or a combination of an annual charge plus user pays charge(s) ([section 502](#)). It is therefore essential that councils have a good understanding of how they will determine what is "reasonable cost". The following will facilitate that understanding.

[Section 504\(3\)](#) of the Act provides for income from charges for domestic waste management being calculated so as not to exceed the reasonable cost to the council of providing those services. Further, the Act's Dictionary defines [domestic waste management services](#) as services comprising the periodic collection of domestic waste from individual parcels of rateable land and services that are associated with those services.

### 12.1 General considerations

All councils must have established and implemented a separate Domestic Waste Management (DWM) revenue raising structure based on the determined "reasonable cost" of providing that service.

[Section 504\(3\)](#) stipulates that DWM income from charges must be calculated not to exceed the "reasonable cost" to the council providing those services. While [section 501\(1\)](#) precludes any ordinary rate income being applied towards DWM this does not stop councils using general income as a temporary funding source at equivalent commercial rates. The restriction of reasonable cost over revenue should not be construed as an event focused on one individual year.

The DWM service must be established and recorded separately from other waste activities such as trade waste. [Section 496](#) of the *Local Government Act* requires that "a council must make and levy a charge for each year for the provision of domestic waste management services for each parcel of rateable land for which the service is available". This provision requires a council to levy a charge for the provision of the DWM service separately from ordinary rates or other annual charges. In addition to the mandatory annual charge, a user pays charge can also be established for these services.

The equalisation of revenues with reasonable cost of service delivery can be assumed to cover a flexible time period over a number of financial years. Therefore DWM charges need not fluctuate annually to recover a deficit or eliminate a surplus; adjustments to charges, outside the rate pegging increases, may be gradual.

Councils are required under [section 402](#) of the *Local Government Act* to provide management plans with respect to:

- (a) The council's activities for at least the next 3 years; and
- (b) The council's revenue policy for the next year.

Because of the special status of the DWM service in the Act it is appropriate that councils consider the inclusion of this service as a highlighted activity in their management plan. The charging structure must form part of the annual revenue policy.

The DWM charge is required to be based on various components: expected level of service delivery for the year, accumulated surplus or deficit depletion, and provision for changes in the nature of service delivery costs in future years. Costs in the short term may increase as a result of recovering previous years shortfalls. A surplus may be absorbed over time through anticipated higher service delivery costs or in a reduction to the charge.

Where a DWM service is in a deficit situation, costs can temporarily be funded from other income. Under these circumstances, the DWM activity should incur an interest penalty equivalent to that charged commercially. The planned repayment of the short term funding should also be disclosed in the management plan of council.

The concept of reasonable cost in the context of charging for DWM services is in keeping with the principle that all costs, which can be reliably measured and reasonably associated with providing a DWM service, should be included in determining the charge for the service. The charge includes provisions for future events that are planned but not current legal commitments. The charge may typically cover those short term, recurrent and operational costs of waste management, longer term capital costs, anticipated material shifts in outsourcing costs or future replacement costs. In bringing future events into the costing process prudent management judgment must be exercised in restricting the time horizon to ensure estimates are realistic and accurate.

In order to determine the reasonable cost of providing a DWM service, management need to consider the changing nature of costs associated in providing the service over the long term. Gradual adjustments to reasonable cost is preferred to sudden, material, shifts in reasonable cost. This approach also fosters gradual changes to the charging structure for DWM. For the purpose of distributing costs over time, it should be assumed that an acceptable level of service is being offered and funded in perpetuity. Thus DWM costs including operating and capital expenditures should be spread and recouped from users over the duration of the service delivery.

Operating costs would include direct costs, indirect costs and overheads that can be allocated on a reliable basis. Capital which assists in providing a DWM service exclusively or in part must also be included in determining the cost of providing the service. As capital costs represent the provision of service potential over a period of time, the cost that should be included in the DWM charge should only be that portion relevant to the current period.

The periodic consumption of a capital asset is reflected in the depreciation expense based on the historical cost, or other revalued amount substituted for historical cost, less any salvage value.

In addition to using up existing assets, council can create provisions for future events so as not to leave the burden of abnormally large periodic costs to customers at that future time. With a waste tip site, for example, rehabilitation (including restoration) costs, and interest expense for funding the capital purchase, should be provided for, and amortised/depreciated over the life of the site, as costs of DWM.

In the case of acquiring land for a tip, the initial cost of the land is not to be fully charged to the current period DWM charge but rather apportioned equally over the periods in which the tip will provide service potential. Provision should be made however for possible shifts in land value resulting from the land being used for DWM activity. The provision may be amortised over the life of the tip and reassessed for

adequacy with land revaluations. This adjustment in land valuation may be considered as degradation from the activity it supports, and included in the rehabilitation costs.

The reasonable cost of DWM includes all the costs of service delivery less any revenue offsets. Such offsets would include the use or sale of landfill and road construction materials for a waste tip site and sale of collected recyclable materials.

### **Accounting Implications**

[Section 409\(3\)\(a\)](#) of the *Local Government Act* requires that "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". This requires that all revenues raised for the purpose of DWM be restricted to that service.

The DWM service must be accounted for as a separate and distinct activity of council. It should record the following aspects of performance and financial position:

- (a) The cost of providing the DWM service distinguishing between actual costs incurred and provisions for future costs;
- (b) The extent to which those costs have been recovered from revenues;
- (c) The surplus or deficit of the activity; and
- (d) The assets acquired and liabilities incurred in carrying out that activity.

In the initial determination of assets and liabilities of the DWM activity, opening balances must be identified. These may include assets previously acquired for household garbage disposal or cash set aside for the specific replacement of DWM plant and equipment. Any future capital commitments (in whole or shared) will similarly be restricted in use, and recorded within the DWM activity.

DWM covers services comprising the periodic collection of domestic waste, and other related services, from individual parcels of rateable land. DWM, for example, may include recycling, weekly pick-up and annual domestic clean-up services, and the related use of a waste tip site.

DWM service must be accounted for as a distinct activity by council, held apart from trade waste or other garbage activity. The activity will accommodate its own costs and revenues and reflect an operating surplus or deficit. The cash component of an accumulated surplus for DWM will be reflective of a restricted asset.

### **12.2 Costing and revenue raising considerations**

Costing considerations for DWM involve a management accounting process for decision making and can include recognition of cost elements that are outside of the general purpose financial reporting requirements.

DWM "reasonable cost" will be based in part on an expected level of service delivery. The cost may also include allowances, for example, for reducing an opening balance accumulated surplus or deficit, or future events that require providing for immediately as part of a prudent management plan. A "reasonable cost" analysis therefore includes carry forward balances, current operating issues, and future considerations. The operating issues would include direct costs, indirect costs and overheads allocated to DWM on a reliable basis. Future considerations could include plans to develop a new tip site or upscale existing facilities.

Cost elements should in some instances reflect net cost after adjustment for revenues. For example, revenue from sale of recyclable material should be an offset against the reasonable cost of a recycling collection program.

### **12.3 An accumulated surplus may be justifiable**

An accumulated surplus for DWM should lead to a reduction in the appropriate charge(s), over time, unless it is planned to absorb the surplus through anticipated higher service delivery costs in future years. Deficits can only be temporarily funded out of other income; over the longer term deficits should be recovered by an upward adjustment to the DWM charge(s) unless management plans anticipate lower service delivery costs in the future.

### **12.4 Provisions for future events**

The inclusion of provisions for future events in the calculation of "reasonable cost" requires a management approach that does not leave the burden of abnormally large periodic costs to customers of that time. Present and future customers should face a charging structure based on the notion that an acceptable level of service must be funded to continue in perpetuity. For example, the capitalisation and depreciation (for management accounting purposes) of waste tip site rehabilitation costs and interest expense on land acquisition should be determined as costs over the term of life of the waste site. This management accounting approach in the case of interest capitalisation, while acceptable for determining "reasonable cost", would vary from the AASB treatment for general purpose reporting.

Capital equipment or facilities, shared or for the exclusive use of DWM must also be part of the "reasonable cost" of service delivery through their depreciation expense. Depreciation expense should be based on book value, reflecting periodic revaluation to replacement cost.

In the case of shared capital items a proportion of depreciation expense is to be assigned to DWM as part of the normal allocation of costs.

Capital costs should reflect net cost after consideration of salvage, resale, or placement of the asset to an alternative purpose. In addition, capital cost would include rehabilitation (as distinct from maintenance) costs to return a waste site to its original condition. Capitalised rehabilitation costs should be provided for and depreciated over the expected life of the tip.

In the case of acquiring land for a tip the cost of the land is not to be considered as part of the DWM service delivery costs.

### **12.5 Borrowings**

If term borrowing is required to fund land acquisition for the tip site the interest can be capitalised and amortised over the expected life of the tip. Term funding can be from both external and internal sources. In the case of any internal funding from non DWM activity, an appropriate interest rate should be struck that reflects equivalent commercial rates. In the case of funding from a DWM surplus, no interest rate opportunity cost should be raised in the "reasonable cost" determination.

### **12.6 Gradualisation advocated**

The above DWM treatment brings forward a notion of gradualisation in equating the charging structure to "reasonable cost". The approach to determining "reasonable

cost" introduces cost components outside of those recognised for financial reporting under the Australian Accounting Standards. This difference is not seen as an impediment to the orderly process of financial reporting and compliance to generally accepted accounting practice. The decision making process around planning, costing, and striking an acceptable charging structure, with respect to DWM, is held aside from financial reporting requirements and undertaken in the context of a management accounting exercise.

The above considerations relating reasonable cost in determining and adjusting domestic waste management charges are similar to those in preparing and monitoring ordinary rates or special rates. Forecasting service delivery levels, estimating costs for service delivery, taking into consideration activities and events over time, reviewing the progress of actual results to expectations and taking remedial action where necessary to adjust revenues and cost are part of the management process. A similar process should be expected with respect to striking user pays charges.

## 13. WHAT LAND IS EXEMPT FROM RATES?

### 13.1 Land exempt from rates

By virtue of [section 554](#) of the Act, all land in a local government area is "rateable" unless it is "exempt from rating".

Some land is exempt from all rates see section 555.

The types of land included under [section 555](#) include:

- Land held by the Crown, not being leased for private purposes.
- Land within a national park, historic site, nature reserve or state game reserve.
- Land subject to a conservation agreement.
- Land occupied by a church or another building used or occupied for public worship.
- Land occupied by a building used or occupied with religious teaching or training, or as a residence for a minister of religion.
- Land that belongs to and is occupied and used in connection with a school.
- Land that is within a special area for the Hunter Water Corporation or other water supply authority.
- Land that is vested in the NSW Aboriginal Land Council or a Local Aboriginal Land Council and is declared under Division 5 of Part 2 of the *Aboriginal Land Rights Act 1983* (this may also exempt land from all charges in some circumstances).
- Land owned by the Rail Infrastructure Corporation.
- Land below the high water mark and used for any aquaculture relating to the cultivation of oysters.

Section 502 deals with charges for actual use of service as opposed to annual charges. It should be noted that a charge for actual use of service is not linked to the fact that a land is *rateable* or *non-rateable*. Accordingly, no land is exempt from user charges made under section 502.

Some land is exempt from all rates, other than water supply special rates and sewerage special rates: see section 556. It must be noted that land under this section is not exempt from annual charges made under section 501.

The types of land included under [section 556](#) include:

- Land that is a public place, common or [public reserve](#).
- Land used as a public cemetery, public library, public hospital, college, university or mining rescue company.
- Land that belongs to and is used by a public benevolent institution or charity.

- Land belonging to the Sydney Cricket and Sports Ground Trust or the Zoological Parks Board.

It should be noted that where council owned land meets the definition of public land, this exemption should apply. There is no provision to treat operational and community land differently.

In addition to the land specified in section 555, land may be exempt from water supply special rates and sewerage special rates if the council has resolved not to supply water or connect to council's sewers ([section 557](#)).

Finally, councils may exempt some land and bodies may be exempted from water supply special rates and sewerage special rates under [section 558](#) these include:

- a [public reserve](#),
- public hospital,
- a public charity,
- land that is not occupied and or water and sewer is not connected,
- land that is not suitable for building or subject to flooding,
- land within 225 metres of a main but not connected to the main.

A council may revoke or alter an exemption granted under section 558.

Whether land is rateable is often a mixed question of law and fact.

First, it is necessary to decide as a matter of law whether the Act uses certain expressions (eg "religious body", "public charity", "public benevolent institution") in any other sense than that which they have in ordinary speech. Having answered that question, the meaning of a word or phrase in the Act used according to its "common understanding" is a question of fact, whereas the "legal" meaning of a legal word or phrase used in the Act is a question of law.

The question of whether primary facts (concerning, say, the use of certain land), fully found, fall within the ambit of a statutory exemption is generally considered to be a question of fact. However, whether the primary facts, fully found, are capable of coming within the statutory exemption is a question of law.

### **13.2 Suggested procedure for determining whether land is exempt from rating**

To determine whether certain land is "exempt" from rating, or from a particular rate, the following tasks need to be carefully carried out by Council:

- Ascertain all relevant facts in relation to the land, its ownership and use, and the purpose for which it is used.
- The language of the exemption provisions should be studied very carefully. There are minor variations in wording in each of the paragraphs which will affect the range of the exemptions.
- The "elements" required for an exemption will be relevant to particular facts. These are the facts which will or will not come within the exemption. These particular facts must be carefully identified.

### 13.3 Conservation agreements

Section 555(1)(b1) provides for land that is subject to a conservation agreement under the *National Parks and Wildlife Act 1974*, being exempt from all rates.

Section 555(3) provides for rates being made and levied **proportionately** on the part of a parcel not subject to the conservation agreement. Therefore, if 50% of a parcel is covered by a conservation agreement the portion subject to rates will be 50% of the rates calculated on the whole of the parcel, irrespective of whether this equates to less than the minimum or base amount of rate.

A suggestion that separate valuations be provided for both the rateable and exempt portions of a parcel has been considered. However, the intention of providing for an apportionment of rates was included in the amendment as an incentive for landowners to enter into conservation agreements.

### 13.4 Important words and phrases

#### "Belongs"

The word "belongs" generally refers to some form of proprietorship. However, land may be said to "belong" to a person or body even where there is a possession short of actual legal ownership, provided there is an absolute right of user.

Land may be said to "belong" to a public hospital or public benevolent institution if it is held by trustees or by a body corporate for those purposes. Similarly, if land is held by trustees of a statutory body for charitable purposes it will "belong" to the trustees of that body.

#### "The Crown"

"The Crown" (which, by virtue of [section 13](#) of the *Interpretation Act 1987*, means the Crown in right of NSW) - this is not a reference to the Commonwealth - is defined in the Dictionary at the end of the Act to include "any statutory body representing the Crown". Where an Act constituting a statutory body does not expressly state that the body is to be taken to be a statutory body representing the Crown for the purposes of any Act, it is necessary to determine the status of the body by reference to certain tests laid down by the courts.

Two broad tests have been used to determine whether a particular body is entitled to the "shield of the Crown".

The first test - the **"functions" test** - looks at whether the functions of the body belong within the province of "government". However, this test is not necessarily determinative. The real question is what intention appears from the relevant statutory provisions.

The second test - the **"control" test** - looks at the degree of governmental or ministerial control over the body in question in order to determine whether it is a servant or agent of the Crown. Here one asks such questions as: Who appoints the governing body? Is the authority, in the exercise of its functions, subject to the control and direction of the responsible Minister? This test would now appear to be the preferred one, although it is by no means uncommon for the courts to use a combination of the two tests.

It has more than once been said in the High Court that there is a "strong tendency" to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant or agent of the Crown.

### **"Land"**

The word "land" is defined in [section 21](#)(1) of the *Interpretation Act 1987* to include (among other things) any "estate or interest" in land. A leasehold interest in land is taken to be land.

The boundaries of "land" for rating purposes may be horizontal, vertical or inclined.

### **"Leased"**

As to the word "leased", see the definition of "[lease](#)" in the Dictionary at the end of the Act. In that regard, "lease", in relation to Crown land, is defined to include, among other things, a "licence" or "permit". The true relationship between the parties (whether a lease, licence or otherwise) is to be determined by the law (having regard to the "substance" and true "effect" of the agreement) and not by the "label".

### **"Occupied"**

As to the word "occupied", land may still be occupied by the eligible body notwithstanding that others (eg residents in a retirement complex) are "occupants" of the land.

### **"Owned"**

As to the word "owned", see the definition of "[owner](#)" in the Dictionary at the end of the Act. The definition includes certain persons and is not encompassing. (Note, carefully, its application to Crown land. In *Rural Bank of NSW v Bland SC* (1947) 74 CLR 408, it was held that "land owned by the Crown" means land owned absolutely and not, for example, as mortgagee in possession.

### **"Private purposes"**

In considering whether certain land is held under a lease for "private purposes", regard must be had to such factors as whether the use to which the land is put benefits the public as a whole and whether the use is a source of private profit.

The purpose for which the land is held is the most important issue. However, it needs to be kept in mind that "private purposes" does not mean all purposes other than Crown purposes.

### **"Public"**

Many of the exemptions relate to land which is in "public" use or bodies which are "public" in character. In general land is in "public" use, and a body has a "public" character, if it is operated or conducted otherwise than for private gain.

### **"Public charity"**

In considering whether a particular body is a "public charity" council must look at the body as a whole, of which its permissible objects, purposes and activities are a vital (but not necessarily solely determinative) part. To be a "public charity" in law, it is not

essential that all of the activities of the body be "charitable", provided that its main or dominant purpose is charitable.

The provisions of the *Charitable Fundraising Act 1991* are irrelevant in determining whether the body is a public charity: [section 559](#). The body must be a "charity" in law. In that regard, the word "charity" must not be confused with common or everyday concepts of merely "good works".

"Charity" in its legal sense comprises of 4 principal divisions: trusts for the advancement of religion; trusts for the relief of poverty; trusts for the advancement of education; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

As to what are "other purposes beneficial to the community", there is a wide-ranging assortment of purposes which have been held to be within the "spirit" or "intention" of the preamble to the Statute of Charitable Uses 1601 but otherwise seem to lack a common denominator, and hence cannot be more informatively labelled. If council is in any doubt, it should obtain a legal opinion as to the status of the body in question. However, the "relief of aged persons" is part of the first set of charitable purposes contained in the preamble to the Statute.

A "charity" is "public" within the meaning of [section 556](#) of the Act if its "benefits" are available to a substantial body of the public even though the number able to receive the benefits at any one time is limited. The fact that the objects of the body are restricted to a particular class of persons does not in itself deprive the body of its character as a "public" charity.

In respect to rateable properties not deemed to be a public charity, such as a non-profit organisation or community club where residential or business categories are used. At the councils discretion a council may provide financial assistance to these groups to pay part or all of the rates and charges. In these circumstances a rates notice must be raised and served on the owner of the [rateable land](#).

### **"Public benevolent institution"**

A "public benevolent institution" is an institution organised for the relief of poverty, sickness, destitution or helplessness. The organisation or body in question must have an "institutional" character and the question whether it is a "public benevolent institution" for the purposes of [section 556](#) depends upon the character and objects of its benevolence rather than upon the particular circumstances of its constitution and domestic government.

A public benevolent institution is a public charity in the technical sense, although the expression "public charity" includes many charities which would not be public benevolent institutions: A benevolent institution does not forfeit its status as a "public" benevolent institution merely because it is conducted on business lines and is partly self-supporting.

Once again, the provisions of the *Charitable Fundraising Act 1991* are irrelevant in determining whether the body in question is a public benevolent institution.

## **"Public reserve"**

In the case of a "public reserve", the land must be generally available to the general public as of right for public recreational purposes. However, it is not necessary for all members of the public to have free access to all parts of the land at all times.

## **"Religious body"**

In considering whether a particular body is a "religious body", it needs to be kept in mind that the Courts have, in recent years, given the word "religion" a fairly broad interpretation. However, in *Arrowsmith v North Sydney MC* (1955) 20 LGR 267, a Bible Society was found not to be a "religious body" since it did not profess any particular tenet or creed, did not advance any particular teaching or training, and did not maintain clergy or church buildings.

Whether land is used for religious purposes is a question of fact: if restrictions are placed on the attendance of strangers at church services, the use of the building cannot be said to be "used or occupied for public worship".

As to the meaning of the words "religious teaching or training", it would appear that the "teaching or training" is not limited to that provided in theological seminaries and colleges and the like: see *Cessnock Methodist Church Trust v Cessnock MC* (1947) 16 LGR 125. In that case, a building used by "clubs" of various denominations (as well as the YWCA), partly for devotional and partly for social purposes, was held to be used for "religious teaching or training".

## **"Solely"**

Where the word "solely" is not used (in relation to a "use" or "occupation" requirement), the Court will generally look to the main or dominant "use" to ascertain whether the land is non-rateable.

## **"Used"**

Land may still be considered "used" in section 556 even if it is in a virgin state: User is a question of fact.

## **"Vested"**

The word "vested" is more elastic than the word "owned". Land is "vested" in a public body if the body has powers of control and management and such proprietary interest as will enable the body to carry out its public functions. However, there must be actual "possession" of the property.

### **13.5 Right of appeal on question of whether land is rateable**

[Section 574](#) of the Act provides for a right of appeal to the Land and Environment Court as to whether land is not rateable or is not rateable to a particular ordinary or special rate. An appeal may not be made under this section on the ground that land has been wrongly categorised: section 574(2). (In that regard, see section 526 as to the right of appeal against a declaration of category.)

The appeal must be made within 30 days after service of the rates and charges notice. An appeal under the section is an appeal on the question of rateability, not valuation. Questions on the correctness of valuations may be raised under the provisions of the *Valuation of Land Act*.

Appellants must lodge an appeal with the Registrar of the Land and Environment Court and also with the general manager of the council.

Court proceedings seeking a declaration that a rate is invalid need not be instituted within the 30 day period. The service of a rates notice is held to have occurred when the notice is placed in the ratepayers private post or letterbox.

There is a presumption in favour of council in the validity of rates levied and the burden of establishing invalidity rests on the ratepayer. Nevertheless, in any recovery proceedings instituted under [section 712](#) of the Act, the defendant is precluded from asserting that the land in question is non-rateable, "if the time within which the right of appeal (under section 574) may be exercised has expired".

### **13.6 Aboriginal Land Council land**

Section 555 (1) (g) of the *Local Government Act* provides for the exemption of rates from "land that is vested in the New South Wales Aboriginal Land Council or a Local Aboriginal Land Council and is declared under Division 5 of Part 6 of the *Aboriginal Land Rights Act 1983* (is) exempt from the payment of rates".

## 14. MAKING OF RATES AND CHARGES

### 14.1 Publication of draft management plan

By virtue of [section 532](#) of the Act, council is prevented from making a rate or charge until:

- Council has given public notice (in accordance with [section 405](#) of the Act) of its draft management plan for the year; and
- Council has considered any matters concerning the draft management plan (in accordance with [section 406](#) of the Act).

This is a mandatory requirement so as to affect the validity of the rate or charge.

A draft management plan must contain the information set out in [section 403](#) of the Act. This information includes a statement of principal activities, performance targets, services provided by council, sales of assets, etc.

In addition, the draft management plan must also include the "revenue" statements required by [section 404](#) as follows:

- a statement containing detailed estimates of income and expenditure,
- a statement with respect to each ordinary rate and each special rate proposed to be levied,
- a statement with respect to each charge proposed to be levied,
- a statement of the types of fees proposed to be charged by the council and, if the fee concerned is a fee to which Division 3 of Part 10 of Chapter 15 applies, the amount of each such fee,
- a statement of the council's proposed pricing methodology for determining the prices of goods and the approved fees under Division 2 of Part 10 of Chapter 15 for services provided by it, being an avoidable cost pricing methodology determined by the council in accordance with guidelines issued by the Director General,
- a statement of the amounts of any proposed borrowings (other than internal borrowing), the sources from which they are proposed to be borrowed and the means by which they are proposed to be secured,
- statements with respect to such other matters as may be prescribed by the regulations.

The statement with respect to an ordinary or special rate proposed to be levied must include the following particulars:

- the ad valorem amount (the amount in the dollar) of the rate
- whether the rate is to have a base amount and, if so:
  - the amount in dollars of the base amount, and
  - the percentage, in conformity with [section 500](#), of the total amount payable by the levying of the rate, or, in the case of the rate, the rate for the category or sub-category concerned of the ordinary rate, that the levying of the base amount will produce

- the estimated yield of the rate,
- in the case of a special rate—the purpose for which the rate is to be levied,
- the categories or sub-categories of land in respect of which the council proposes to levy the rate.

The statement with respect to each charge proposed to be levied must include the following particulars:

- the amount or rate per unit of the charge,
- the differing amounts for the charge, if relevant,
- the minimum amount or amounts of the charge, if relevant,
- the estimated yield of the charge.

#### **14.2 Public notice of draft management plan**

The council must give public notice of the draft management plan and place it on public exhibition for 28 days. During this time the public can make submissions to council; these submissions must be taken into account by council in deciding on the final management plan.

#### **14.3 Method of making a rate or charge**

A rate or charge is made "by resolution" of council ([section 535](#)). The function cannot be delegated by council ([section 377](#)). Furthermore, the legality of a rate may be challenged if the resolution purporting to make the rate or charge is incorrectly framed. ([section 545](#)) (A common error has been to use the word "levy" instead of "make" in the resolution. The levy does not take place until the rates and charges notice is served.)

[Section 537](#) of the Act requires council to state, in the resolution that specifies a base amount of a rate, or the base amount of a rate for a category or sub-category of an ordinary rate:

- the amount in dollars of the base amount; and
- the percentage, in conformity with [section 500](#) of the Act, of the total amount payable by the levying of the rate, or the rate for the category or subcategory concerned of the ordinary rate, that the levying of the base amount will produce.

[Section 538](#) of the Act requires council to state, in the resolution that makes a special rate, whether the rate is to be levied on all [rateable land](#) in council's area or on only a part of that land. Where the rate is to be levied on only a part of the area, council must specify in the resolution the part in question.

#### **14.4 Criteria relevant in determining base amount**

In determining a base amount of a rate, the council must have regard to (but is not limited to) the following ([section 536](#)):

- its general administration and overhead costs
- the extent to which projected ad valorem rates on individual properties do not reflect the cost of providing necessary services and facilities
- the level of grant or similar income available to provide necessary services and facilities
- the degree of congruity and homogeneity between the values of properties subject to the rate and their spread throughout the area
- whether a rate that is wholly an ad valorem rate would result in an uneven distribution of the rate burden because a comparatively high proportion of assessments would bear a comparatively low share of the total rate burden
- in the case of a special rate—the cost of providing the works, services, facilities or activities to the parcels of land subject to the rate (ignoring the rateable value of those parcels).

The council, in having regard to its general administration and overhead costs, must use net costs, with income being included in the calculation of standard costs for all community service functions, library services, recreational and cultural facilities and amenities and the like.

#### **14.5 Other requirements**

Council must, when making an ordinary rate, give a "short separate name" for each amount of the ordinary rate: [section 543\(1\)](#). In addition, council must, when making a special rate, give the rate a "short name": [section 543\(2\)](#). Finally, council must, when making a charge, give a "short separate name" for each amount of the charge: [section 543\(3\)](#).

A rate or charge must be made before 1 August in the year for which the rate or charge is made or before such later date in that year as the Minister may, if the Minister is of the opinion that there are special circumstances, allow ([section 533](#)). Each rate or charge is to be made for a "specified year", being the year in which the rate or charge is made "or the next year". Thus, a rate or charge may be made in the "previous year".

#### **14.6 Curing of irregularities and invalidities**

By virtue of [section 545\(1\)](#) of the Act, the Minister is empowered to "authorise" a council to do "such things as may be necessary to cure an irregularity in the making or levying of a rate or charge". It should be noted that this power only extends to the curing of an "irregularity", not an "invalidity".

However, by virtue of [section 545\(2\)](#), the Minister may declare, by order published in the Gazette, that a rate or charge that would otherwise be "invalid" because of a provision of Part 4 of Chapter 15 of the Act is "taken to have been validly made" from the time it is purported to have been made. (Nevertheless, the Minister is not empowered to make such an order unless, in the Minister's opinion, the rate or charge in question is invalid "only because of a minor and technical breach": [section 545\(3\)](#)).

Council should also note the terms of [section 512](#) as to the implications of failing to comply with the "rate pegging" limits.

## 14.7 Timetable for rates

Prior 1 July	Council requests Valuer General to estimate increase in value of land subject to supplementary valuations. (This may be done after 31 January but before 31 May)	s 513
	Minister specified % (if any) by which last year's general income and annual charges for domestic waste management services are to vary	s 506
	Council prepares draft management plan which includes the council's revenue policy for the next year	s 402, 404
	Council publicly exhibits draft management plan	s 405(1)
	Public notice of draft management plan for not less than 28 days	s 405(2), 532
	Council considers submissions concerning draft management plan	s. 406(2), 706(3)
	Council adopts management plan	s 406
	Council makes rates and charges by resolution	s 535, 537, 538
1 July		
1 August	Final day for making of rates and charges for current year (unless Minister allows a later day)	s 533
	Rates levied by service of rates and charges notice	s 546
31 August	1 <sup>st</sup> quarterly instalment of rates and charges payable (unless rate notice not served by 1 August)	s 562

## 15. LIMIT ON ANNUAL INCOME FROM RATES AND CHARGES

Part 2 of Chapter 15 of the Act enables the Minister to impose limits on a council's "general income" and on amounts of annual charges for domestic waste management services.

"General income" is defined in section 505(a) of the Act to mean income from ordinary rates, special rates and annual charges other than:

- water supply special rates and sewerage special rates;
- charges for water supply services and sewerage services;
- annual charges for (domestic) waste management services and
- annual charges referred to in [section 611](#).

By virtue of [section 506](#) of the Act, the Minister is empowered to specify the percentage by which council's general income for a specified year may be varied.

By virtue of [section 507](#) of the Act, the Minister is empowered to specify the percentage by which the amounts of annual charges made by councils for domestic waste management services for a specified year may be varied, and to impose conditions with respect to the variation of those charges.

[Section 508](#) of the Act makes provision for "council-specific" orders. Thus, the Minister is empowered by section 508(2) to specify, by instrument in writing given to a council, the percentage by which that council's general income or the amount of an annual charge for domestic waste management services (or both) for a specified year may be varied. Where such an "instrument" is given to a council any percentage specified in an order under section 506 or 507 does not apply to that council: section 508(4) and (5).

Council's general income will be limited to its "**notional general income**" for the previous year as varied by the percentage (if any) applicable to council for the year for which the rates and charges are made (except as provided by [section 511](#) or [section 511A](#)): [section 509](#). This calculation should not include those supplementary valuations provided as a result of the separation of water.

Section 511 of the Act enables a council, if it does not take advantage of the "full percentage increase available to it" under section 506 for a particular year, to "catch up" the shortfall in either or both of the next 2 years. However, the amount of any shortfall may be caught up once only.

Councils should note that "catch up" will be available only where a council did not take advantage of the full "rate pegging" percentage increase available to it. The current provisions of the Act do not extend catch up entitlement to permit re-establishment of the rating base where this has been eroded due to valuation changes resulting from successful objections against valuations determined after rates have been levied.

When a council cannot recover or retain a part of the maximum permissible general income determined for a year because a valuation used in making a rate is reduced,

a council may increase the maximum permissible general income for the following year by the unrecovered amount ([section 511A](#)).

If a council contravenes the "rate pegging" limits in any year, [section 512\(1\)](#) of the Act provides that the contravention does not affect the validity of the rate or charge but rates and charges made for the following year are invalid "for all purposes" unless:

- before the rates and charges were made the council submitted to the Minister such information respecting the rates and charges proposed to be made for that following year as the Minister may require and the Minister, by order published in the Gazette, approved of their being made; and
- the rates and charges conform with the Minister's approval; and
- the council did not contravene section 509, 510, 511 or 511A in making the rates and charges.

However, by virtue of [section 512\(2\)](#) of the Act, the Minister may, by order published in the Gazette, exempt a specified council from the invalidity for a specified year.

It should also be noted that [section 712](#) of the Act does not prevent a person's liability for a rate or charge by reason only of such invalidity: [section 512\(3\)](#).

### **15.1 Estimate of changes in value for the purposes of notional rate income**

[Section 513](#) specifies that, within the period, 31 January in any year but before 31 May in that year, a council may request the Valuer General to provide estimates of increases and decreases in values for parcels of [rateable land](#) for which supplementary valuations are required to be furnished under the *Valuation of Land Act* but which either before the date of the request had not been supplied or have or will have a different base date from those used for rating purposes for that year because of a general valuation furnished in that year for the council's area.

An estimate must be made with respect to the same base date as the valuation used for rating purposes for the year in which the request is made.

### **15.2 Crown land adjustments to general income**

Councils that wish to apply for "Adjustments to Notional Income for Newly Rateable Crown Land" when appropriate, are invited to do so. Those applications that receive the Minister's approval (under [section 508](#) (2) of the *Local Government Act* ) entitle councils to increase their total permissible general income by a percentage, similar to any special variation approvals.

Councils can apply, without the need for a special variation, to increase their notional general income by an amount equivalent to the annual amount of rates payable by these properties. The major reason identified as requiring this adjustment is to enable councils to add to notional general income, income from sources such as Landcom land which was sub-divided (and a supplementary valuation provided) in a year before it was sold (and therefore became rateable). Section 509 of the Act only permits supplementary valuations of rateable land (not non-rateable land) to be added to the next year's notional general income. Land that becomes rateable in the same year that a supplementary valuation is provided is therefore not to be included in this adjustment.

Generally, the circumstances for which income will be increased are as follows:

1. Land owned by Landcom or its Business Land Group that has been subdivided in a previous year and not sold during that same year can be included in the schedule if they have been sold and therefore became rateable.
2. Crown land that has become rateable during the year for which an ex-gratia payment was previously collected (usually commonwealth government owned land). Any adjustment will be equivalent to the ex-gratia payment.
3. Land that has become rateable during the year as a result of the corporatisation of a State Owned Corporation that has been specified in either Schedule 1 (Company SOCs) or Schedule 5 (Statutory SOCs) of the [State Owned Corporations Act 1989](#).

Councils are reminded that increasing notional general income by this Income Adjustment procedure is not compulsory. A council may choose not to apply an increase in notional general income or may wish to take up only a portion of the increase, and instead levy lower rates on other properties.

### **15.3 Special variations to general income**

In determining whether to apply the full general variation percentage or to apply for a special variation it is essential that councils consider the effects of prevailing economic conditions in their area. Generally it is expected that applications will relate to initiatives of a specific and strategic nature, which require funding beyond any identifiable sources available to council to cover either the shorter or longer term. Councils are required to demonstrate that broad community support has been received for these initiatives.

Applications seeking Ministerial approval for special variation in general income may be made by councils in regard to:

- |   |  |
|---|--|
| <a href="#">Section 508(2)</a>              | Increase in General Income for a specified year which may apply for either a fixed period or on an on-going basis. |
| <a href="#">Section 508A</a>                | Increase in General Income above rate-pegging each year for a period up to a maximum of 7 years.                   |
| <a href="#">Section 548(3)(a) &amp; (b)</a> | Variation in Minimum Ordinary and/or Special Rate(s) beyond statutory maximum limits.                              |

Councils must first determine whether they wish to apply under section 508(2) or 508A. It is important that this is clear as the criteria and guidelines when applying under section 508(2) are different from those under section 508A. Council circular 05/04 provides clarification on the different types of special variations.

Generally, an application under section 508(2) will only be considered in the following circumstances:

- Where additional income is necessary to finance a project which has regional significance or a demonstrable regional economic benefit. Regional significance and/or benefit would be demonstrated by joint participation by several councils in planning and/or execution of the project or by state/commonwealth participation in planning or contribution of funds

towards the project or by demonstrated consistency with a relevant regional management plan (e.g. a catchment blueprint) endorsed by the state government.

- Where additional income is necessary to finance new or enhanced local government services or facilities specified in a comprehensive principal activity statement in the council's draft management plan. Proposals may include infrastructure maintenance or replacement programs and services related to sustainable natural resource management, waste management, environmental protection, pollution control and protection of public health.
- Where additional income is necessary to meet substantial increases in government contributions or charges (for example: variation of charges by the Valuer General, NSW Fire Levy or Rural Fire Contribution).

In the majority of these circumstances the project funding requirements should have a definite time horizon after which time the special variation would lapse. However, there may be circumstances where the funding requirements are of an on-going nature and in these circumstances the special variation would not lapse. In the case of service enhancements or additional infrastructure operating costs there is an expectation that productivity improvements will be achieved to offset ongoing costs. The proposed initiative is also expected to have clear outcomes which are capable of being measured.

If a council applies to increase its income beyond the ratepegging amount by the use of a special rate on certain ratepayers, the council must be able to demonstrate that the affected ratepayers are in favour of the proposal unless it addresses a specific public health or safety issue.

Generally, an application to exceed the ratepegging limit under section 508A will only be considered where, following an exhaustive examination of alternative funding options, the additional income is deemed necessary to implement these essential and strategically significant initiatives.

As part of the application under 508A Councils are required to submit to the Department a rigorous ten year plan which separately identifies additional income generated through the special variation. Evidence of the council's commitment to the plan, including how this commitment will be sustained over the long term should also be disclosed. The council would also need to demonstrate its progress in the area of integrated planning, policy development and benchmarking of standards for its maintenance and construction operations.

As the assessment and monitoring processes will be much more rigorous for applications under 508A, it is expected that extensive consultation with the department will occur prior to the Council lodging its final application.

- Each year the Director-General will issue guidelines for special variation applications. Councils considering applying for a special variation will need to ensure that these guidelines are followed when preparing their applications.

#### **15.4 Rating return – comprising the statement of compliance**

All councils are required to complete the annual rating return. The rating return is formatted as an excel spreadsheet and is to be completed in this format and submitted by e-mail to the Department of Local Government annually.

If significant boundary changes and amalgamation of councils occurs in a particular year, there is likely to be 2 versions of the “Rating Return” comprising the statement of compliance.

The rating return for councils not affected by amalgamation will comprise:

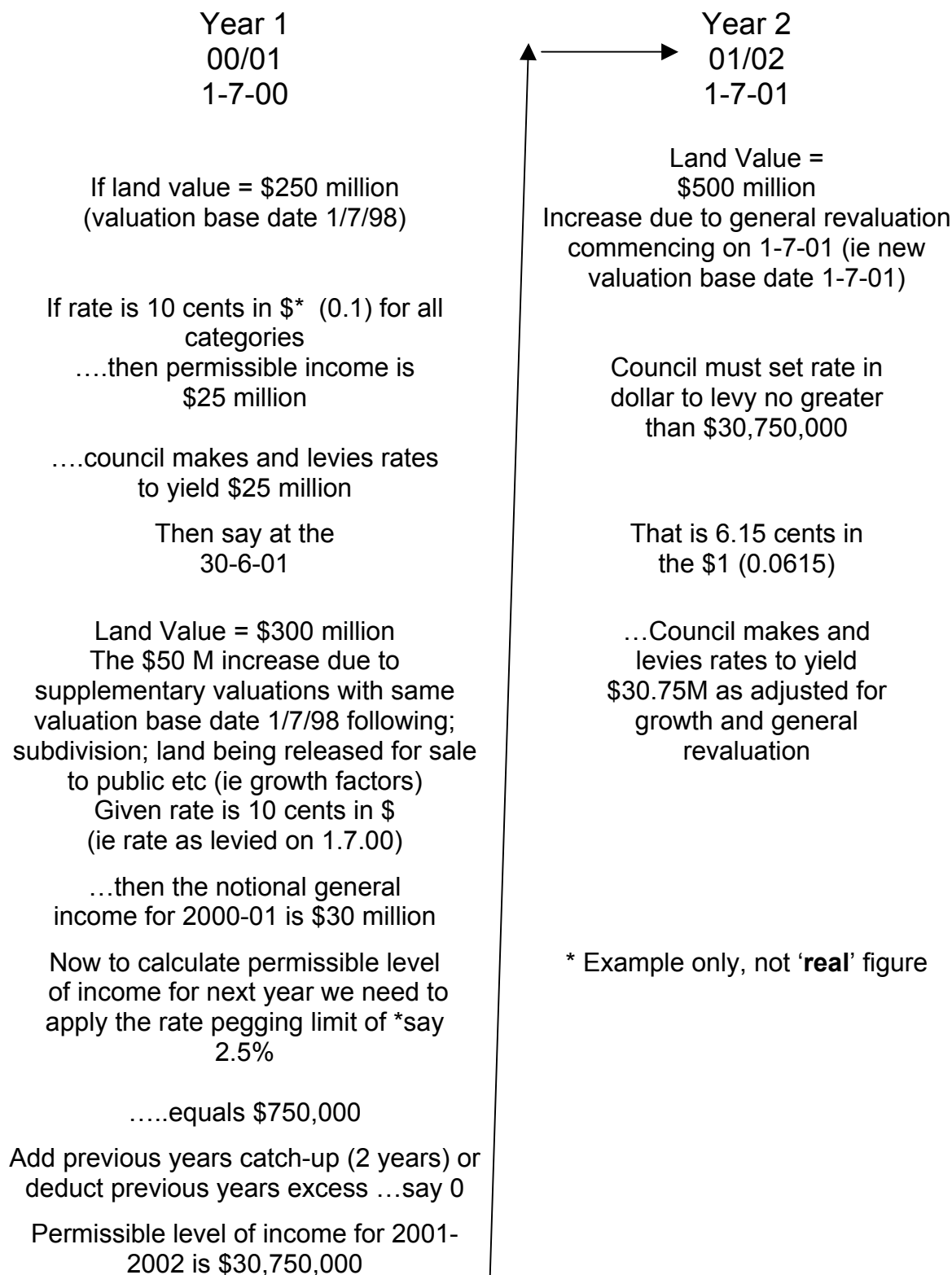
- **Work Paper 1** To assist with the calculation of the previous years notional general income.
- **Schedule 1** Calculation of the previous years notional general income.
- **Schedule 2** Calculation of the current years notional general income yield.
- **Schedule 3** Total permissible general income for the current years.
- **Schedule 4** Income lost in previous years due to valuation objections.
- **Schedule 4A** Adjustment to income lost in the current year due to conservation agreements.
- **Work Paper 2** To assist with the calculation of the available catch-up/excess.
- **Schedule 5** Non-general income rates and charges the current year.
- **Schedule 6** Independent auditor’s report.
- **Schedule 7** Statement of Compliance.

The rating return for newly proclaimed councils will comprise:

- **Schedule 1** Calculation of previous years notional general income of the former councils.
- **Schedule 2** Calculation of current years notional general income yield.
- **Schedule 3** Total permissible general income for the current year.
- **Schedule 5** Non general income rates and charges for current year.
- **Schedule 6** Independent Auditor’s Report.
- **Schedule 7** Statement of compliance

**Important information and guidelines are provided each year as an attachment to the circular that is relevant in completing the return. Councils are urged to refer to the relevant circular on the department’s website prior to completing the return.**

### 15.5 Rate pegging diagram:



## 16. LEVYING OF RATES AND CHARGES

A rate or charge is "levied" by service of the "rates and charges notice": section 546(1). It has been held that the "service" of the notice is the actual "levying": *Church of England Property Trust v Metropolitan Mutual Permanent Building Assn* (1932) 47 CLR 369.

In the case of a rate, the rate must relate to particular land, a particular person and a particular valuation.

As a consequence of the *Valuation of Land Act* (section 60A) rates must be levied using the land valuation as at **1 July** for that rating year.

The notice may be served at any time after 1 July in the year for which the rate or charge is made "**or in a subsequent year**": section 546(2).

A notice that is required to effect an adjustment of rates or charges may also be served in that year or a subsequent year: section 546(3). By virtue of section 712 (1) of the Act proceedings for the recovery of rates and charges may commence at any time within 20 years. Further, section 712(6) states that service of a rates and charges notice may not be called into question more than 10 years after the alleged service of a notice.

A "rates and charges notice" must contain the information set out in part 5 of the Local Government (General) Regulation 2005. In addition, council must include the name of each rate and charge, "in full or in an abbreviated form", in the rates and charges notice: section 544.

Section 710 of the Act deals with service of notices. In that regard, section 710(8) states that proof by affidavit or orally that a notice has been posted in accordance with the section is "conclusive evidence" of service. A statutory declaration by an employee of council is also prima facie evidence of service (section 699).

Although the rates and charges notice may be served (levied) after the year in which the rate or charge has been made (section 546(2)), unless it can be proved that the notice was duly served council will not be able to recover the rate or charge.

### 16.1 Notices by council

The service of rates notices is covered by section 710 of the Act, which sets out the manner in which a council notice is required to be served on a person. The service of a notice may be:

- (a) personal, or
- (b) by delivering the notice at or on the premises at which the person to be served lives or carries on business, and leaving it with any person apparently above the age of 14 years resident or employed at the premises, or
- (c) by posting the notice by prepaid letter addressed to the last known place of residence or business or post office box of the person to be served, or
- (d) by facsimile transmission to a number specified by the person (on correspondence or otherwise) as a number to which facsimile transmissions to that person may be sent, or

- (d1) by transmitting the notice by electronic mail to an email address specified by the person (on correspondence or otherwise) as an address to which electronic mail to that person may be transmitted, or
- (e) by fixing the notice on any conspicuous part of the land, building or premises owned or occupied by the person, or
- (f) in the case of an offence involving a vehicle, by attaching the notice to the vehicle, or
- (g) if the person to be served maintains a box at a document exchange established in New South Wales, by depositing the notice in that box or leaving it at another such exchange for transmission to the firstmentioned exchange for deposit in that box.

It should be noted that subsection (2)(d1) does not authorise a notice to be transmitted to a person by electronic mail unless the person has requested the council, in writing, that notices of that kind be transmitted to the person by electronic mail, and has not subsequently withdrawn the request (Subsection 2A).

A person's request under subsection (2A) is taken to have been withdrawn in relation to a particular kind of notice only if the person has informed the council, in writing, that notices of that kind are no longer to be transmitted to the person by electronic mail (Subsection 2B).

While a person's request under subsection (2A) has effect in relation to a particular kind of notice, the address to which notices of that kind are to be transmitted is (Subsection 2C):

- (a) the email address indicated in the request, or
- (b) if the person subsequently directs the council, in writing, to transmit notices of that kind to a different email address, that different address.

Where the person to be served with a notice appears to be absent from NSW, the notice may be served on the person's agent.

In any case where the land or building is unoccupied and the owner's address is unknown, service of the notice may be by advertisement in the [approved form](#) published in a newspaper which is circulated in the district in which the land is situated.

Service of a rates notice may be effected by delivering the notice to the premises at which the person to be served lives or carries on business and depositing it in the person's letterbox or receptacle provided at those premises.

A notice complies with the Act if it is addressed to the rateable person, owner or occupier of the land as appropriate without further name or description. The extent to which the notice is printed or written does not affect its validity (section 710 (6)).

If a notice has been served by any means prescribed by [section 710](#) all inquiries required under the Act are taken to have been made and service of the rates notice is conclusive evidence of them. Proof by affidavit or orally that the notice has been posted is conclusive evidence of service. For this purpose a justice of the peace is authorised to take and receive an affidavit, whether any matter to which the affidavit relates is pending in any court or not.

## 16.2 Information on a rates notice.

Part 5 of the Local Government (General) Regulation 2005 contains details of what information must appear on a rates and charges notice as follows:

- (a) the land to which it relates,
- (b) the land value of the land to which it relates and the base date of the general valuation from which the land value is derived,
- (c) particulars of each rate or charge levied on the land by the notice,
- (d) if the rate consists of a base amount to which an ad valorem amount is added, particulars of the base amount,
- (e) the date the notice is taken to have effect,
- (f) particulars of any outstanding arrears of rates and charges levied on the land and of any interest payable on those amounts,
- (g) the total amount due and the dates for payment of the rates or charges concerned,
- (h) the amounts payable for, and the due dates for payment of, instalments of rates or charges,
- (i) particulars of any waiver of an amount of special rate in consideration of payment of a lump sum,
- (j) a statement that concessions are available to eligible pensioners for any quarter in which they are eligible pensioners,
- (k) particulars of any concession extended in respect of payment of the rates,
- (l) particulars of any discount for prompt payment in full of a rate or charge,
- (m) particulars of any postponement of rates or postponed rates,
- (n) particulars of any option to pay a lump sum towards the capital cost of any works, services or facilities instead of a special rate in the notice,
- (o) a statement that if payment is not made on or before the due date or dates interest accrues on the overdue amount,
- (p) a statement as to how to make inquiries about the notice,
- (q) the text, or a summary, of the following provisions of the Act (if applicable):
  - [Section 524](#) (Notice of change of category)
  - [Section 525](#) (Application for change of category)
  - [Section 526](#) (Appeal against declaration of category)
  - [Section 555](#) (What land is exempt from all rates?)
  - [Section 556](#) (What land is exempt from all rates, other than water supply special rates and sewerage special rates?)
  - [Section 557](#) (What land is exempt from water supply special rates and sewerage special rates?)
  - [Section 562](#) (Payment of rates and annual charges)
  - [Section 563](#) (Discount for prompt payment in full)

- [Section 564](#) (Agreement as to periodical payment of rates and charges)
- [Section 566](#) (Accrual of interest on overdue rates and charges)
- [Section 567](#) (Writing off of accrued interest)
- [Section 574](#) (Appeal on question of whether land is rateable or subject to a charge).

## 17. PAYMENT OF RATES AND CHARGES

### 17.1 Liability

Generally speaking, the "**owner**" for the time being of land on which a rate is levied is the "**rateable person**" or person "liable" to pay the rate: [section 560\(1\)](#). However, see [section 560\(2\)](#) and (4) in relation to land owned by the Crown.

Generally speaking, the person "liable" to pay a charge is the person who, if the charge were a rate, would be liable to pay the rate: [section 561\(a\)](#).

The owner of land as defined in the Act is:

a) in relation to Crown land, means the Crown and includes:

- (i) a lessee of land from the Crown, and
- (ii) a person to whom the Crown has lawfully contracted to sell the land but in respect of which the purchase price or other consideration for the sale has not been received by the Crown, and

(b) in relation to land other than Crown land, includes:

- (i) every person who jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession, and
- (ii) every such person who is entitled to receive, or is in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, [trustee](#), mortgagee in possession, or otherwise, and
- (iii) in the case of land that is the subject of a strata scheme under the [Strata Schemes \(Freehold Development\) Act 1973](#) or the [Strata Schemes \(Leasehold Development\) Act 1986](#), the owners corporation for that scheme constituted under the [Strata Schemes Management Act 1996](#), and
- (iv) in the case of land that is a community, precinct or neighbourhood parcel within the meaning of the [Community Land Development Act 1989](#), the association for the parcel, and
- (v) every person who by this Act is taken to be the owner, and

(c) in relation to land subject to a mining lease under the [Mining Act 1992](#), includes the holder of the lease, and

(d) in Part 2 of Chapter 7, in relation to a building, means the owner of the building or the owner of the land on which the building is erected.

### 17.2 Due date

The Act specifies the "due date" for the whole single payment of the full year's rates and charges assessment as 31 August: [section 562](#). This section also specifies the dates by which the quarterly instalments are payable as 31 August, 30 November, 28 February and 31 May. [Section 563](#) of the Act enables council to "discount" the

amount of a rate or charge to such extent as council determines if the whole of the discounted amount of the rate or charge is paid "by a date nominated" by council.

However, it should be remembered that if there is no payment made by the first quarterly due date, either in full or by quarterly instalment, interest accrues on the first quarterly amount from the date on which the rates and charges become overdue (i.e. the day after the first quarterly instalment date). This process continues for the second, third and fourth quarterly instalments.

However, section 562(4) requires that rates notices that are served after 1 August the first instalment does not become payable until the second instalment due date of 30 November.

There is no authority under the Act for a council to seek to terminate the rights of ratepayers to pay by the instalment method. Ratepayers may at their own discretion choose to pay the full year's rates in a lump sum in order to qualify for a discount (section 563). A prize may be separately offered to encourage payment by lump sum instead of use of the instalment method.

In relation to payments by quarterly instalments, section 562(5) of the Act requires council progressively and separately to issue a reminder notice to each person whose rates and charges are being paid by quarterly instalments (on or before 31 October, 31 January and 30 April).

While the Act does not specifically define a "quarter", "quarters" should be taken to be calendar quarters, as per the common meaning of the term:

<u>Quarterly</u>	<u>Last</u>	
<u>Instalment Period</u>	<u>Serving Date</u>	<u>Due Date</u>
1 July - 30 September	1 August	31 August
1 July - 30 September	After 1 August	30 November
1 October - 31 December	1 November	30 November
1 January - 31 March	1 February	28 February
1 April - 30 June	1 May	30 May

### **17.3 Agreement as to periodical payment**

[Section 564](#) of the Act empowers a council to accept payment of rates and charges due and payable by a person in accordance with an agreement made with the person. Either the council or the ratepayer may initiate a proposal to enter into an agreement.

It is not considered valid for a council to grant a "blanket" dispensation in terms of section 564 without the agreement of each individual ratepayer. However, there is no impediment against a council having a general policy to agree to certain payment options, enclosing a draft agreement as to periodical payments with a rates and charges notice for consideration and acceptance by the ratepayer, if that person so chooses.

It is important to note that section 564 does not enable a council to enter into arrangements with ratepayers to instalment plans that are, in essence, inconsistent with [section 562](#) unless and until the rates and charges are due and payable. The fact that under the Act either party may now make the initial offer to enter into an agreement does not alter this position.

Agreements entered into in advance of the rates and charges coming due and payable could be inconsistent with the overall structure of Part 7 and may potentially be invalid.

The section also empowers council to write off or reduce interest accrued on rates and charges "if the person complies with the agreement".

Councils should be mindful that instalment notices issued on a quarterly basis relate to those ratepayers paying on a quarterly basis. Where ratepayers have entered into an agreement for an alternative payment plan, council should ensure that instalment notices provide relevant information regarding amount due and payable.

#### **17.4 Capital contributions instead of payment of special rates**

[Section 565](#) of the Act enables councils to waive payment by a rateable person of the whole or part of a special rate for one or more years as specified by council if the person pays, or enters into a written agreement to pay, a "lump sum" towards the capital cost of any works, services or facilities for which the special rate is made.

#### **17.5 Accrual of interest**

Interest accrues on rates and charges that remain unpaid after they become "due and payable": [section 566](#)(1). The interest accrues on a daily basis. The rate of interest is that set by council, not exceeding the rate specified for the time being by the Minister by notice published in the gazette.

Furthermore, accrued interest is only taken to be a "rate or charge" for "the purpose of recovery" (and not for "computation" purposes): [section 566](#)(4). It is simply the case that interest accrues "on a daily basis".

Those councils that have expressed concern that small amounts of interest will always accrue and be difficult to deal with unless amounts of arrears are paid by the debtor on the same date that advice as to the total of the arrears is provided to the debtor, simply need to programme their software to calculate interest charges at reasonable intervals instead of on a daily basis.

For example, if a council were to choose to programme its software to calculate interest accrued on arrears of rates on a monthly basis at the last day of each month, this would mean that if a [section 603](#) certificate were issued at say 2 April showing a total amount of rates etc. outstanding of \$500, provided that amount was paid by 29 April, no additional interest would accrue against that account.

#### **17.6 Methods of payment**

Councils may choose the method of payment of the rates notice and the locations where rates can be paid.

### **17.7 Merchant fees on credit card payments**

As from 1 January 2003 merchants could charge an extra charge for paying by credit card. Consequently, councils could charge ratepayers an extra charge for paying rates by credit card. This fee or extra charge is not mandatory and it is entirely in the councils decision whether to charge this additional amount.

If a council elects to collect payment by credit cards and charge ratepayers a merchant fee, councils should inform ratepayers of the fee or extra charge. Any additional charge should not be included on the face of the rates notice, however disclosure of payment options should be included on the rates notice, eg EFTPOS, cheque, credit card etc. This is an administration fee not a rate or a charge.

### **17.8 Liability of the occupier**

A council may serve on an occupier of land a notice of the amount of any rate or charge unpaid ([section 569](#)) in respect of land or of the amount of any judgment given against a person for unpaid rates or charges, if the person liable for the rates or charges:

- resides outside of NSW
- is unknown to council
- missing
- becomes bankrupt or insolvent
- dies
- has had a judgment give against him or her

The notice may demand that any rent is to be paid, in respect to the land, to the council. Council may recover the amount due for unpaid rates and charges outstanding as a debt from the occupier if rent is not paid to the council in accordance with the demand ([section 569\(3\)](#)). A payment under section 569(3) to the council discharges the payer from any liability to any person to pay rent.

### **17.9 Transfer of land in payment of rates or charges**

[Section 570](#) of the Act empowers council to accept a [transfer](#) of the land in respect of which rates or charges and/or accrued interest is due and payable "in full satisfaction" of the rates, charges or accrued interest.

A request for council to accept transfer of land under section 570 of the Act in lieu of payment of rates, charges and accrued interest must be in writing, signed by each owner or person having an interest in the land concerned and contain the following information:

- title particulars and the rate assessment number of the land,
- particulars of any mortgage, charge, lien or other encumbrance affecting the land.

Councils should be mindful of the impact of granting dispensation under section 570 will have on the councils outstanding rates and charges percentage and the impact this will have on the councils ability to provide services.

A person who disposes of land is liable for payment of rates and charges levied before he or she disposes of the land or before he or she gives notice of [transfer section 571\(1\)](#). The person may recover from the disposal in respect of any proportion of the rate or charge accruing after disposition. However, the original owner remains liable unless notice is given under section 604 of the Act.

## **18. WRITING OFF RATES AND CHARGES AND ACCRUED INTEREST**

### **18.1 Writing off**

Various provisions of the Act and regulations deal with the writing off of rates and charges and accrued interest.

First, [section 564](#)(2) of the Act enables council to write off or reduce interest accrued on rates or charges if the person complies with an agreement made with council as to periodical payment of those rates and charges.

Secondly, [section 567](#) of the Act enables council to write off accrued interest on rates or charges payable by a person if, in council's opinion, the person is unable to pay the accrued interest "for reasons beyond the person's control" or payment of the accrued interest would cause the person "hardship". It is clear from section 567 that the exercise of a council's discretion to write off or reduce interest is to be based upon merit and requires a consideration of each individual case against the criteria contained within the section.

Thirdly, [section 583](#) of the Act requires council to write off amounts of rates, charges and interest reduced or waived under Division 1 of Part 8 of Chapter 15 of the Act (concessions for pensioners).

Fourthly, [section 595](#) of the Act requires council to write off, after 5 years, rates postponed under Division 2 of Part 8 of Chapter 15 of the Act (zoning affected land), as well as any accrued interest.

[Section 607](#) of the Act provides that the regulations may specify circumstances, in addition to those for which provision is made in Chapter 15 of the Act, in which a council may write off rates and charges and interest accrued on unpaid rates and charges.

Clause 130 of the Local Government (General) Regulation 2005 provides that councils may write off the portion of rates that have been reduced as a consequence of the Local Government and Valuation of Land Amendment (Water Rights) Act 2005.

### **18.2 Procedures for writing off rates and charges**

The procedures for writing off rates and charges contained in the Local Government (General) Regulation 2005 must be strictly complied with. In addition, the amount of rates and charges written off during a year must be included in council's annual report.

- (1) The council must, from time to time, by resolution, fix the amount of rates and charges above which any individual rate or charge may be written off only by resolution of the council.
- (2) An amount of rates or charges of or below that amount can be written off either by resolution of the council or by order in writing of the council's general manager. In the absence of a resolution under subclause (1), rates and charges can be written off only by resolution of the council.
- (3) A resolution or order writing off an amount of rates or charges must:

- (a) specify the name of the person whose debt is being written off, and
  - (b) identify the account concerned, and
  - (c) specify the amount written off,
- or must refer to a record kept by the council in which those particulars are recorded.
- (4) An amount of rates or charges can be written off under this clause only:
    - (a) if there is an error in the assessment, or
    - (b) if the amount is not lawfully recoverable, or
    - (c) if as a result of a decision of a court, or
    - (d) if the council or the general manager believes on reasonable grounds that an attempt to recover the amount would not be cost effective.
  - (5) The fact that an amount of rates or charges is written off under this clause does not prevent the council concerned from taking legal proceedings to recover the amount.
  - (6) The general manager must advise the council of rates and charges written off by written order of the general manager.

### **18.3 Refund of money in respect of rates and charges**

The traditional position in relation to this matter was that money honestly paid under a "mistake of fact" was recoverable: see, for example, *Byrne v Queanbeyan MC* (1927) 8 LGR 85. (Nevertheless, there could be no mistake of fact if the person in question had no belief as to the existence or otherwise of facts which proved to be mistaken see *South Australian Cold Stores Ltd v Electricity Trust of SA* (1957) 98 CLR 65.)

However, money paid voluntarily with full knowledge of the facts but under a "mistake of law" was not generally recoverable, unless the payment was "involuntary" (i.e. made under some compulsion): In *Smith v Scone MC* (1924) 7 LGR 30, a ratepayer had paid rates without objection on land which she did not own. Although the council admitted its error in levying rates on 20ha instead of the 13ha owned by the ratepayer the Court held that the ratepayer could not recover.

However, in *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia* (HCA, 7/10/92), the High Court determined that action would lie for the recovery of money voluntarily paid under a mistake of law. The Court accepted the principle that payments made under a mistake of law should, prima facie, be recoverable in the same way as payments made under a mistake of fact. The Court's earlier decision in *South Australian Cold Stores Ltd v Electricity Trust of SA* (1957) 98 CLR 65 was justified on a narrower basis and that the traditional rule was not necessary to that decision. The High Court concluded that "the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia".

It would appear that, in future, cases about attempted recovery of money paid under a mistake of fact or law will more likely be decided upon the doctrine of "restitution" or "unjust enrichment". As the Court observed:

"If the ground for ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except insofar as the manner of gaining the enrichment bears upon the justice of the case." *David Securities Pty Ltd & Ors v Commonwealth Bank of Australia*.

The High Court decision in *David Securities* has important implications for councils where there have been overpayments of rates or charges.

## 19. CONCESSIONS FOR PENSIONERS

Division 1 of Part 8 of Chapter 15 of the Act provides for concessions for eligible pensioners. The Local Government (General) Regulation 2005 and the Act Dictionary prescribes that, in relation to a rate or charge levied on land on which a dwelling is situated "[eligible pensioners](#)" are:

- [a] persons who receive a pension, benefit or allowance under Chapter 2 of the [Social Security Act 1991](#) of the Commonwealth, or a service pension under Part III of the [Veterans' Entitlements Act 1986](#) of the commonwealth, and who are entitled to a pensioner concession card issued by or on behalf of the commonwealth government; or
- [b] persons who receives a pension from the commonwealth Department of Veterans' Affairs as the:
- the widow or widower of a member of the Australian Defence or Peacekeeping Forces,
  - the unmarried mother of a deceased unmarried member of either of those Forces, or
  - the widowed mother of a deceased unmarried member of either of those Forces,

and who does not have [income and assets](#) that would prevent them from being granted a pensioner concession card (assuming they were eligible for such a card), or

- [c] persons who receive a general rate of pension adjusted for extreme disablement under [section 22](#) (4) of the [Veterans' Entitlements Act 1986](#) of the Commonwealth, or a special rate of pension under section 24 of that Act.

and, who occupy that dwelling as their sole or principal place of living.

By virtue of [section 575](#), an [eligible pensioner](#) may apply to council for a concession on a rate or charge. This application must be on the form approved by the Director-General, which is available on the Department of Local Government's website. The amount of the concession depends upon whether the

- person is solely liable or jointly liable with one or more [jointly eligible occupiers](#) but with no other person for the rate or charge (full concession allowable); or
- person is jointly liable with one other person who is not a jointly eligible occupier or with 2 or more other persons any of whom is not a jointly eligible occupier (pro rata concession).

The Act Dictionary defines a [jointly eligible occupier](#) as a person jointly liable (see [section 560](#)) with an [eligible pensioner](#) who is (a) the spouse of the eligible pensioner, or (b) another eligible pensioner, or (c) if another eligible pensioner and their spouse have the same sole or principal place of dwelling, is the spouse of that

other eligible pensioner; and whose sole or principal place of living is the same as that of the first mentioned eligible pensioner.

The definition of a “[jointly eligible occupier](#)” in the Act’s Dictionary includes a spouse of the [eligible pensioner](#) with the same sole or principal place of living. This does not include [de facto](#) or same sex partners.

There is a maximum reduction of **\$250** (in respect of the aggregate of **ordinary** rates and charges for domestic waste management services). Note the reference to domestic waste management services charges encompass all such charges, not merely section 496 charges. Therefore, pay for use charges in terms of section 502 must be taken into account in calculating the rebate. Special rates do not qualify for a concession.

Where councils are involved in the provision of water supply or sewerage services maximum reductions of **\$87.50** (in respect of water supply special rates or charges) and **\$87.50** (in respect of sewerage special rates or charges) apply.

[Section 575\(4\)](#) in relation to pro rata rebates provides that rebates will be granted from the next quarter immediately following the pensioner becoming an eligible pensioner.

[Section 584](#) provides that when a person ceases to qualify as an eligible pensioner, the entitlement for rebates also ceases at the end of the quarterly billing period during which the person's status altered. The section also provides for circumstances where the rates or charges (as concessionally reduced) have been paid for the full year.

Councils should confirm the eligibility of pensioners with Centrelink as to the actual date of service of the annual rates and charges notice. The council may conduct the check against the Centrelink files etc. at a time prior to the effective date for determining eligibility under the Act. Some councils do this in order to informally advise applicants that their application appears to generally meet the eligibility criteria.

[Section 577](#) enables council to make an order deeming certain persons who are jointly liable with an eligible pensioner, but who are not themselves eligible, to be eligible pensioners for the purpose of a mandatory reduction. The section also enables an order to be made deeming an eligible pensioner to be solely liable where the person otherwise is not.

By virtue of [section 578](#), a "hardship" order under section 577 takes effect (or is deemed to take effect) on the date specified in the order, being a date in the year commencing on 1 July during which the order is made. The "effective date" of the order may be before or after the date on which the order is made. Where the "effective date" predates the date of making the order, there is provision for a refund.

An application under Division 1 of Part 8 is to be made within the time and in the manner fixed by resolution of council (in the absence of any relevant prescription by regulation): see [section 579](#). Accordingly, it is open to a council to adopt a policy of allowing pensioner's rates reductions in respect of previous year's rates. However, the department considers that such discretion should only be exercised where there are substantive reasons provided for the pensioner not submitting a proper application at the time each previous year's rates were levied. Furthermore, the

council should take all reasonable steps to ensure that the application is a bona-fide one e.g. insist upon conclusive proof that the person did in fact permanently reside in the subject premises at the relevant time etc.

Concessions are not provided to deceased persons nor to estates of deceased persons. If a person is residing in premises belonging to the estate of a deceased person, (other than a life tenant who is an [eligible pensioner](#) who is automatically eligible for rebates under [section 575](#)) and the occupant's circumstances are such as would warrant the issue of an order by the council under [section 577](#) deeming him or her to be an "eligible pensioner" for the purposes of the Act, then the provision of a concession may be appropriate.

A council may also extend the concession in order to avoid hardship (section 577). This extension is optional for the council, however if exercised, a claim can be made on the state to meet 50%. About 55% of the statutory rebate scheme is funded by the state government (50%) and federal government (5%) and 45% by each council (council "write-off" the concession under [section 583](#) of the Act).

[Section 582](#) enables council to waive or reduce rates, charges and accrued interest due by any person prescribed by the regulations who is in receipt of a pension, benefit or allowance under the [Social Security Act 1991](#). Thus, council may, in its absolute discretion, further reduce on a voluntary basis (with no subsidy from the state government) rates and charges otherwise payable by an eligible pensioner. Councils may also agree to allow the remainder of pensioners' rates, after concessions have been deducted, to accrue against the future estate or sale of the land in appropriate cases.

#### Pensioners temporarily in nursing homes or hospitals.

If a ratepayer is required to leave their principal place of living for a temporary period with an intention to return to their home, councils have the discretion to assess whether the ratepayer is still eligible for a pensioner concession. Factors for consideration include whether the property is vacant or only occupied by the ratepayer's spouse during the time of their absence.

#### Status of concession while pensioners are temporarily overseas.

The view of the department on the above issue is that a pensioner would continue to be entitled to a concession providing they were still receiving their pension from Centrelink and the dwelling was still their sole place of living.

#### Concessions on water charges.

The implementation of Best Practice Pricing for water, with the requirement to derive 75% of income from consumption charges and 25% from annual charges, will result in the level of annual water charges decreasing. The effect that this will have on pensioner rebates is that a residual balance of the rebate will likely remain when the concession is applied to annual charges. Due to this, the application of pensioner rebates to water consumption charges will become common practice.

The department considers that a suitable method to apply the pensioner rebate to usage charges, if a council wishes, is to pro-rata the remaining or residual balance of the rebate, after application to the annual water charge, equally over the number of billing periods in a year. The pro-rata amounts would then be applied to each billing

period at a ratio of 50% of the billed amount, up to the maximum amount allowed for that billing period.

The following provides an example of how the residual pensioner rebate can be applied.

Assumptions:

1. Annual water charge of \$110.00 with applicable pensioner rebate of \$55, residual pensioner rebate of \$32.50.
2. Quarterly billing frequencies

<b>Bill No</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>Total</b>
Bill Amount	25.10	8.50	12.00	32.80	78.40
Rebate available	(8.50)	(8.00)	(8.00)	(8.00)	(32.50)
Rebate applied	8.50	4.25	6.00	8.00	26.75
Balance	16.60	4.25	6.00	24.80	51.65

Total rebate granted \$81.75 = annual charge (\$55.00) + consumption charge (\$26.75)

<b>Bill No</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>Total</b>
Bill Amount	50.60	44.00	31.50	47.00	173.10
Rebate available	(8.50)	(8.00)	(8.00)	(8.00)	(32.50)
Rebate applied	8.50	8.00	8.00	8.00	32.50
Balance	16.60	4.25	6.00	24.80	51.65

Total rebate granted \$87.50 = annual charge (\$55.00) + consumption charge (\$32.50)

This method will result in the consistent administrative application of the rebate in each of the billing periods. It will also provide a method that enables a consistent application of the pensioner rebate when a property changes ownership.

It is acknowledged that this method may result in an eligible pensioner not receiving the full benefit of the pensioner rebate for water although the pensioner has, in total for the year, been billed accounts which would entitle them to the full residual balance of the pensioner rebate. Each council should consider the appropriate action to take if in the event this circumstance should arise.

## 20. OTHER CONCESSIONS

Division 2 of Part 8 of Chapter 15 of the Act makes provision with respect to other types of concessions in relation to rates and charges.

### 20.1 Postponement of rates

In particular, sections 585-599 enables a ratepayer to apply for a postponement of part of the rates on land which is used only as the site of a house or [rural land](#) but, because of its zoning or permitted use, is valued for rating purposes in a way that reflects its permitted use rather than its actual use.

By virtue of [section 595](#), rates attributable to the increased value are postponed for 5 years and, thereafter, are to be written off together with the interest that has accrued on those rates.

In the case of rates based upon a two part structure inclusive of a base amount it is only the ad valorem component of the rate that is affected by the postponement provisions. In all cases, special rates should also be postponed in relation to the ad valorem component.

### 20.2 Application for postponement

The rateable person for land may apply to the council for a postponement of rates payable for the land in the current or following rating year if the parcel of land has a single dwelling-house used or occupied and which is zoned or otherwise designated for use under an environmental planning instrument for the purposes of

- industry, commerce or the erection of residential flat buildings;
- permitting subdivision for residential purposes

In addition, an application may be made with respect to a parcel of rural land which is zoned or otherwise designated under an environmental planning instrument so as to permit its use otherwise than as rural land, or its subdivision into two or more portions, one of which is at less than 40 hectares.

The application for postponement must be referred to the Valuer General who will determine the attributable part of the land.

The attributable part of the land is the area affected by the environmental planning instrument. The value of that land is determined by deducting from the land value that it would have had if the land was not subject to the environmental planning instrument ([section 587](#)).

A council must postpone payment of rates in any rating year for which a determination is made. Interest accrues on parts of rates postponed as if the rates were overdue.

On the determination of postponing rates a council must refund any overpayment of rates to the ratepayer and adjust the amount of rates payable.

If 5 years elapses since the commencement of a rating year for which rates were postponed, the part of the postponed rate and interest which applied to the first year that the entitlement was granted should be written off ([section 595](#)).

The entitlement to postponement ceases if the whole of the land usage changes ([section 597](#)). If only part of the land usage changes in circumstances, a redetermination must be made.

The postponement concession does not cease when there is a change in ownership. In the event of a transfer in ownership, councils may wish to seek a fresh application from the new owner, prior to transferring the entitlement, to confirm that they wish to continue with the entitlement.

### **20.3 Rebates in respect of certain land vested in public bodies**

[Section 600](#) entitles the Waterways Authority, Ports authorities, the State Rail Authority Rail Infrastructure Corporation and the State Transit Authority (or the relevant rateable person) to a 25% rebate for ordinary rates payable for certain land, where the body in question provides access and services which would otherwise need to be provided by council. If a dispute arises between council and the body in question, the Minister is empowered to determine the matter. Rebates of less than 25% are permitted if, on objection by the council, the Minister determines a lesser amount.

The rebate is to be written off or abandoned by council.

### **20.4 Hardship resulting from certain valuation changes**

[Section 601](#) enables a ratepayer who suffers "substantial hardship" as a result of the use of a new valuation to make application to council for rate relief. Council has the discretion to waive, reduce or defer the payment of all or part of the increase in the amount of the rate. The ratepayer may ask the council to review any decision and the council has the discretion to do so.

### **20.5 Other provisions to assist with rates**

Council may agree to the periodic payment of rates (other than by the mandatory quarterly instalments) ([section 564](#)), by writing off accrued interest in cases of hardship or where the person is unable to pay the accrued interest for reasons beyond their control ([section 567](#)).

## 21. FEES

### 21.1 Approved fees

By virtue of [section 608](#)(1) of the Act, council may charge and recover an "approved fee" (see definition in the Dictionary at the end of the Act) for any service it provides, other than a service provided or proposed to be provided, on an annual basis for which it is authorised or required to make an annual charge under section 496 or 501.

The services for which an approved fee may be charged include those set out in section 608(2) and (3), irrespective of whether the service in question is provided under the *Local Government Act* or under another Act.

Under section 608 of the *Local Government Act* councils are empowered to charge and recover fees for any service that they provide (except for a service proposed or provided on an annual basis). Services for which a council may charge a fee include those in connection with the exercise of its regulatory functions such as applications for approval, inspections and certificates. Councils must not charge a fee for "free of charge" documents as detailed under [section 12](#).

A council must not determine the amount of a fee until it has given public notice of the fee in accordance with this section and has considered any submissions duly made to it during the period of public notice ([section 610F](#)).

Public notice of the amount of a proposed fee must be given (in accordance with section 405) in the draft management plan for the year in which the fee is to be made.

However, if, after the date on which the management plan commences, a new service is provided, or the nature or extent of an existing service is changed, or the regulations in accordance with which the fee is determined are amended, the council must give public notice (in accordance with [section 705](#)) for at least 28 days of the fee proposed for the new or changed service.

### 21.2 Council fees for business activities

A fee charged by a council for any of the following business activities services must be in accordance with pricing methodologies as adopted by the council in its management plan or by a resolution at an open meeting of council: [section 610B](#).

- the operation of an abattoir,
- the operation of a gas production or reticulation service,
- the carrying out of a water supply or sewerage service (other than a service provided, or proposed to be provided, on an annual basis for which the council is authorised or required to make an annual charge under section 501),
- the carrying out of work under section 67,
- the carrying out of graffiti removal work under section 67A,
- any other activity prescribed by the regulations for the purposes of this subsection.

### **21.3 Council fees for non-business activities**

When determining the amount of a fee for a service for a non-business activity it must take into consideration the following factors: ([section 610D](#))

- the cost to the council of providing the service,
- the price suggested for that service by any relevant industry body or in any schedule of charges published, from time to time, by the Department,
- the importance of the service to the community,
- any factors specified in the regulations.

The cost to the council of providing a service in connection with the exercise of a regulatory function need not be the only basis for determining the approved fee for that service.

A higher fee or an additional fee may be charged for an expedited service provided, for example, in a case of urgency.

### **21.4 Restrictions and limitations**

Council should, however, keep in mind that [section 608\(4\)](#) prevents council from charging an approved fee for the inspection of non-commercial premises, except where the inspection is in connection with an application for an approval concerning the premises. The inspection must still be "necessary", i.e. reasonably appropriate, even if not absolutely or essentially necessary. However, the power does not extend to any inspection which, in the circumstances, council considers to be necessary. The inspection must be necessary.

Council should note the provisions of [section 610](#) as to the effect of other Acts. In that regard, where the amount of a fee for a service is determined under another Act, council is precluded from determining an amount "inconsistent" with the amount determined under the other Act. (Case law suggests that the word "inconsistent" means "antipathetic" or "incapable of existing in harmony".)

Furthermore, council is precluded from charging a fee in addition to the amount determined under the other Act. Finally, if the other Act prohibits the charging of a fee, no fee may be charged under the Act.

### **21.5 Fees for development applications**

Certain fees for development and related functions are set under the [Environmental Planning and Assessment Regulation 2000](#) (clauses 245-263).

### **21.6 Council may waive or reduce fees**

A council may waive payment of, or reduce, a fee (whether expressed as an actual or a maximum amount) in a particular case if the council is satisfied that the case falls within a category of hardship or any other category in respect of which the council has determined payment should be so waived or reduced. However, a council must not determine a category of cases under [section 610E](#) until it has given public notice of the proposed category in the same way as it is required to give public notice of the amount of a proposed fee under [section 610F](#) (2) or (3).

## 21.7 Annual charge on rails, pipes etc.

[Section 611](#) enables council to make an "annual charge" on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a "public place" (see definition in the Dictionary at the end of the Act).

The charge may be made, levied and recovered as if it were a rate. There is a right of appeal to the Land and Environment Court. The section does not apply to the Crown, Sydney Water Corporation, Rail Infrastructure Corporation, a light rail system or a water supply authority. Further bodies may be added to this list from time to time.

A [water supply authority](#) is defined under the [Water Management Act 2000](#) as

- Benerembah Irrigation District Environment Protection Trust
- Cobar Water Board
- Upper Parramatta River Catchment Trust
- Gosford City Council
- Sydney Olympic Park Authority
- Wyong Council
- Australian Inland Energy Water Infrastructure

Councils may not levy a section 611 charge to telecommunications carriers for running overhead or underground cables on public land. This was the ruling of the High Court of Australia in the case of *Bayside City Council v Telstra Corporation Limited* [2004] HCA 19. The court upheld federal laws exempting the telecommunications carriers from this charge.

It is not intended that the section 611 "annual charge" be treated like other annual charges made under section 501 and should be considered as more of an annual fee.

Charges made under section 611 should not be included as part of a council's general income for the purposes of Part 2 of Chapter 15 of the Act.

[Section 611](#) does not use the expression "fair annual charge". However, the Department takes the view that the amount of the annual charge would still need to be "fair" or "reasonable": see *Australian Gas Light Co v Glebe MC* (1922) 6 LGR 39 as to the basis for assessment (the so called "Pike formula") which has been followed in many subsequent cases.

In the AGL case, the "fair annual charge" was based upon the average annual value of the gas sold in each council area, the average being taken over the period of 5 years preceding the assessment. The amount of the charge was fixed at 0.75% of the total sales of gas. This was, however, subject to a proviso that when 90.75% of the total sales exceeded 7% on the quinquennial average of the profits, the Court would consider an application from the Company for reassessment or from the council if the amount fell below 5% of the profits.

Other energy utilities, particularly state owned electricity providers do not pay similar charges as AGL. With energy companies now bundling services and state owned

entities being required to operate on a commercial basis, major questions on the application of section 611 have been raised in relation to the issue of competitive neutrality.

With the publication of best practice guidelines councils, where they comply with the guidelines, will be able to transfer funds from their water and sewerage utilities to their general funds under [section 409](#) (capped at \$30 as the maximum average dividend per property).

Previously councils have used the provisions of section 611 to levy charges on their water and sewerage funds. The department does not encourage the use of this mechanism for councils to obtain funds for their general funds and it is questionable whether this is in breach of section 611(1) as the annual charge can only be levied on a person not a council.

### **21.8 Management plan requirements**

The provisions of [section 610F](#) of the Act are most important and are undoubtedly mandatory so as to affect validity. Council must not determine the amount of an "approved fee" until:

- Council has given public notice (in accordance with section 405) of its draft management plan for the year in which the fee is to be made; and
- Council has considered any submissions duly made to it concerning the draft management plan

### **21.9 Onsite sewage management**

Councils have the ability under the *Local Government Act* to charge for approvals, inspection and renewal of onsite sewerage management systems under section 608 which specifically provides services in relation to approvals, inspections and renewals.

This fee can be collected by listing it as a separate item in the invoice section of the annual rates notice. Refer to section 10.8 of this manual for further details.

## 22. RECOVERY OF RATES, CHARGES AND FEES

### 22.1 Rates and charges represent a charge against land

[Section 550](#) provides that a rate or charge levied on land under the Act including any accrued interest (as referred to in [section 566](#)) and any costs awarded by the courts in proceedings to recover the rate or charge is a charge on the land.

### 22.2 Fees are not a charge against land

Fees charged by the council are not a charge upon the land. Recovery of unpaid fees may involve civil proceedings against the person who requested, and was provided with, the service to which the fee relates.

### 22.3 Court proceedings for recovery of unpaid rates and charges

By virtue of [section 712\(1\)](#) of the Act, proceedings for the recovery of a rate or charge may be commenced at any time within 20 years from the date when the rate or charge became "due and payable". (In that regard, see [sections 562](#) and [563](#) of the Act.)

The general limitation period of 20 years for the recovery of rates and charges commences to run on the day on which liability to pay the rates or charges arose.

Prima facie, the person "liable" is the person "rateable" (or who would be rateable, if the charge were a rate) at the time when proceedings are commenced: However, [section 569](#) of the Act makes the person in occupation liable in certain circumstances to pay council in liquidation of the rate, charge or judgment any rent due or to become due.

In proceedings under section 712 for the recovery of rates and charges, the defence that the land is exempt from the rate or charge is not open to the defendant: In that regard, section 712(5) of the Act expressly provides that no matter in respect of which a right of appeal is given under [section 574](#) of the Act may be "called into question" in any recovery proceedings so as to prevent recovery "if the time within which the right of appeal may be exercised has expired".

Service of a rates and charges notice or notice of a charge may not be called into question more than 10 years after the date of alleged service of the notice (section 712(6)). However, in all other cases council should be in a position to prove service. (In that regard, see [sections 699](#) and [710\(8\)](#) of the Act.)

Council needs to be aware of section 712(7) of the Act which is as follows:

"Proceedings for the recovery of any rate or charge by the enforcement of the charge it comprises on the land are not to be taken in any court, except proceedings for the purposes of Division 5 [sale of land for unpaid rates and charges]."

Essentially, the preceding provision operates to defer the sale of land (for purposes of recovery of overdue rates) until the overdue rates are at least 5 years old. That is the council can sell all other property and assets (except the land) at any time to satisfy a judgment debt.

In addition, [section 102 of the Conveyancing Act 1919](#) relevantly provides that on a judgment of any court for a debt secured by a "mortgage" (defined in section 7 of

that Act to include a "charge") of any property, the interest of the mortgagor in that property shall not be taken in execution under the judgment.

Accordingly, notwithstanding that a rate or charge (including any accrued interest) is a "charge" on the land (see [section 550](#)), a judgment for rates is not enforceable by a sale of the land rated. (If the rateable person owns other land or goods, it or they may be taken in execution under the judgment.)

Finally, it should be noted that [section 512\(3\)](#) of the Act provides that section 712 of the Act does not prevent a person's liability for a rate or charge by reason only of invalidity arising from failure to comply with the "rate pegging" requirements and limits.

#### **22.4 Expenses for tracing persons**

A council may add to the amount of a rate or charge any reasonable out-of-pocket expenses incurred in tracing the person liable to pay the rate or charge. Those expenses may be recovered as rates or charges and without the need to give any notice concerning them ([section 605](#)).

#### **22.5 Sale of land for unpaid rates and charges**

For the purposes of Division 5 of Part 2 Chapter 17, of the Act, a rate or charge is overdue if it has remained unpaid for more than one year in the case of vacant land, or five years otherwise, from the date on which it became payable ([section 713](#)). A council may sell any land on which any rate or charge is overdue.

Where vacant land is concerned, land may be sold after rates or charges have remained unpaid for only one year, as long as the council obtains a valuation of the land which shows that the total amount of unpaid rates and charges exceeds the land value. The council needs to sell the land within six months of the date of receipt of that valuation.

For the purposes of this section, the term "rate or charge" does not necessarily refer to a whole years assessment having been in arrears but may equally refer to a quarterly instalment of rates and charges in arrears.

Compliance with [section 713\(3\)](#) of the Act is an essential prerequisite to any sale of land under the section. Before selling land for overdue rates or charges, the general manager or the public officer must certify in writing: what rates and charges, including those that are overdue, are payable on the land; when each of these rates and charges was made and how it was levied; when each became payable; what amounts are payable by way of overdue rates and charges on the land; and what amounts are payable by way of other rates and charges on the land.

A council may, in the case of [adjoining](#) parcels of land (whether in the same or different ownership) each of which may be sold for the recovery of unpaid rates and charges:

- sell them separately or as a single parcel, and under whatever conditions of sale it considers proper; and
- do such things as it considers appropriate for the purpose of selling the land at its full value ([section 713](#)).

## Estates and interests of the Crown in land

The sale of any estate or interest of the Crown in land, or any interest in land owned by the Crown, that may not be transferred at law, cannot be sold for the recovery of unpaid rates and charges ([section 714](#)).

## Notice of proposal to sell land

There are requirements in the Act with which a council must comply before selling the land. A council must:

- fix a convenient time and place for the sale, between three and six months from publication in a newspaper of the advertisement referred to below ([section 715](#));
- give notice of the proposed sale by means of an advertisement published in the government gazette and at least one newspaper. However, if the purchaser completes the sale without notice of the failure to advertise, his or her right to the land will not be disturbed ([section 725](#));
- take reasonable steps to ascertain the identity of any person who has an interest in the land ([section 715](#)); and
- take reasonable steps to notify each such person (and the Crown, if the land concerned is owned by the Crown) of the council's intention to sell the land ([section 715](#)).

If, before the time fixed for the sale, all rates and charges payable (including those that are overdue) are paid to the council, or an arrangement satisfactory to the council for their payment is entered by the rateable person, the council must not proceed with the sale ([section 715](#)). In that event, the council cannot recover costs incurred in relation to the proposed sale.

The advertisement in the newspaper under [section 715\(1\)](#), must include the information detailed in the Local Government (General) Regulation 2005. The information includes:

- (a) council proposes to sell the land for unpaid rates or charges at public auction,
- (b) the name of the auctioneer and the proposed place, date and time of the auction,
- (c) the persons known to the council to have an interest in the land,
- (d) the amount of rates and charges unpaid for more than 5 years from the date on which they became payable and the amount of any interest accrued,
- (e) the amount of any other rates and charges payable and unpaid and the amount of any interest accrued,
- (f) the total amount due,
- (g) that, if all rates and charges payable (including overdue rates and charges) are not paid to the council or an arrangement satisfactory to the council is not entered into by the rateable person before the time fixed for the sale, the council will proceed with the sale.

### Sale of land by public auction

The Act requires that any sale of land must be attempted by way of public auction. If the sale by public auction is unsuccessful, the council may sell the land by private treaty.

Note particularly that land may be sold to a council, a councillor, a [relative](#) of a councillor, or a member of staff of a council, or any relative of a member of staff in the case of sale by public auction, but not by a way of private treaty ([section 716](#)).

### Payment of purchase money

The purchase money for land sold in this manner must be paid to the council. The council's receipt acts to discharge the purchaser from all expenses, rates, charges and debts referred to in [section 718](#).

The money for land purchased by a council must be paid by way of transfer between the appropriate funds kept by the council. This is taken to be payment to the council of the purchase price of the land for the purposes of [section 722](#). Purchase money received by the council on the sale of land for unpaid rates and charges is taken to be money received by the council for the purpose of section 718 ([section 717](#)).

### Application of purchase money

Purchase money received by a council on the sale of land for unpaid rates and charges is applied in the following order: first, the expenses of the council incurred in connection with the sale; and secondly, in equal proportions, any rate or charge on the land due to the council or any other rating authority, and any debt on the land due to the Crown as a consequence of the sale of which the council has notice ([section 718](#)).

### Purchase money less than amounts owing

If the purchase money is insufficient to satisfy all rates, charges and debts referred to in section 718, the amount available is to be divided between the rates, charges and debts in proportion to the amounts owing on each and the rates, charges and debts are taken to have been fully satisfied ([section 719](#)).

### Purchase money more than amounts owing

Where the purchase money is more than the amounts owing, any balance of the purchase money must be paid into the council's trust fund and held by the council in trust for everyone having an estate or interest in the land immediately before the sale, according to his or her respective estate or interest. Should a council be of the opinion that any persons are clearly entitled to the balance, the council may pay it to them. The receipt of such money effectively discharges the council from its trust ([section 720](#)).

### Appointment of rates on subdivided land

Where land on which a rate or charge is levied is subsequently subdivided and only part of the land is sold, any paid rates and charges for the land may be apportioned by the council on the recommendation of the Valuer General ([section 721](#)).

### Conveyance or transfer of land

Section 722 gives a council, on payment to it of the purchase money, the power to convey or transfer the land to the purchaser ([section 722](#)).

### Land is conveyed free of certain interests

The transfer or conveyance of land vests it in the purchaser for an estate in fee simple, freed and discharged from all types of encumbrance including rates and charges, subject to any reservations or conditions for the benefit of the Crown, easements and covenants created under ss88D or 88E of the [Conveyancing Act 1919](#) and public rights of way affecting the land ([section 723](#)). Section 723 does not apply to a leasehold estate under a lease that may be transferred at law in land owned by the Crown.

### Special provisions concerning leases of land owned by the Crown

Where a leasehold estate under a transferable lease in land owned by the Crown is concerned, [section 724](#) provides for its transfer or conveyance free from all encumbrances other than any debt payable to the Crown or liability for any prior breach of lease. The provision of the [Crown Lands Act 1989](#), the [Crown Lands \(Continued Tenures\) Act 1989](#) and the [Western Lands Act 1901](#) apply to the leasehold estate.

### Transfers not invalid because of procedural irregularities.

A transfer or conveyance issued by a council is not invalid merely because the council has failed to comply with any of the requirements described above ([section 725](#)).

### Registration of transfer of land under the *Real Property Act 1900*

On lodgment of a transfer of land under the [Real Property Act 1900](#), the Registrar-General is to make those recordings in the Register under the Act that are necessary to give effect to the provisions of the *Local Government Act*. The transfer does not operate at law until it is registered under the *Real Property Act* ([section 726](#)).

## **22.6 Options available to dispose of land that does not sell.**

Parcels of land that have low land values or will not sell are often offered to the neighbouring property. The property and its value are then amalgamated into the neighbouring land.

Alternatively, the Department of Planning can be approached and the property offered as a gift to the Minister under [section 134](#) of the *Crown Lands Act 1989*.

If there are any protected species or cultural heritage considerations, then the Minister for the Environment, on behalf of the National Parks and Wildlife Service, can also accept gifts. In either instance the Minister is not bound to accept the land.

## 23. MISCELLANEOUS MATTERS CONCERNING RATES AND CHARGES

### 23.1 Record of rates and charges

By virtue of [section 602\(1\)](#) of the Act, Council is required to keep a "record of rates and charges".

The record must contain the following information:

- particulars of each rate and charge made by council;
- in relation to each separate parcel of land within council's area:
  - the land value of the parcel;
  - whether the parcel is rateable, exempt from all rates or exempt from particular kinds of rates;
  - the category declared under Part 3 of Chapter 15 of the Act for the parcel of land; and
  - the owner or lessee of each such parcel.

Council may amend the record "as the occasion requires": [section 602\(2\)](#). In that regard, the Act does not prescriptively delineate the circumstances when an alteration or amendment in the record may be made.

### 23.2 Certificate as to rates and charges – 603 certificates

[Section 603](#) of the Act provides for the issue of a "certificate as to rates and charges". The certificate states the amount (if any) due or payable to council by way of rates, charges or otherwise, in respect of a parcel of land. The production of the certificate is taken for all purposes to be "conclusive proof" in favour of a "bona fide purchaser for value" of the matters certified: [section 603\(4\)](#).

However, the issue of a certificate will not be conclusive in favour of a person who acquires the certificate after becoming the owner of the land in question.

[Section 603](#) deals only with rates and charges and, despite the words "other amounts", has no application to amounts due to a council pursuant to contractual obligations.

Thus, a certificate under [section 603](#) of the Act is not intended to be a mechanism for furnishing information in the nature of "handy hints". However, the Department has no objection to councils including "relevant" information of a "consumer" nature pertaining to rates and charges e.g. whether the land is/is not subject to a rating concession, such as farmland, "postponement", pensioner concessions, whether user-pays charging applies etc. A clear distinction between the two functions should be apparent from a reading of the certificate.

In regard to pensioner concessions, it may be necessary to include some notation regarding a possible write-back of rates on the certificate. The following example is provided of the type of notation that may be used:

"A pensioner concession shown on this certificate is subject to the [owner](#) being an [eligible pensioner](#), under [section 575 or 577](#) of the *Local Government Act*, for the whole of the year to which the rates and charges refer. Should eligibility cease for

whatever reason, or the property is sold, the entitlement to the reduction ceases on the last day of the quarter during which those circumstances occur, and the amount of any reduction granted for the remaining quarters of the year becomes due and payable."

Section 603 does not protect council against any liability in respect of any such advice or information provided in good faith ([section 149\(6\), Environmental Planning and Assessment Act 1979](#)).

### **23.3 Transfer of land**

A person who disposes of land is liable for payment of rates and charges levied before he or she disposes of the land or before he or she gives notice of transfer [section 571\(1\)](#). The person may recover from the disposal in respect of any proportion of the rate or charge accruing after disposition. However, the original [owner](#) remains liable unless notice is given under section 604 of the Act.

### **23.4 Notice of transfer**

[Section 604](#) of the Act imposes an obligation on certain persons (eg transferees and mortgagees) to give notice ("notice of transfer") to council of certain events (eg transfers, entry into possession). The notice must be given within one month after the event occurs ([section 604\(2\)](#)). A person is taken to have satisfied the requirements of the section if notice of the event is lodged with the Registrar General in accordance with the *Conveyancing Act 1919* or the *Real Property Act 1900* within one month after the event occurs ([section 604\(4\)](#)). Council should note that there is no longer any legal obligation on the "rateable person" (usually the vendor) to give notice.

In *MacLeay SC v MacLeay Dairy Co Ltd* (1913) 2 LGR 33, it was held that a council was not stopped from rating the vendors of land where moneys had been returned to the purchaser who had paid the rates where the notice of transfer had been found to be invalid.

### **23.5 Notice of granting of certain crown leases**

A government department that grants a lease of Crown lands, land within a State forest, for private purposes is obliged to give particulars of the lease to the council within 60 days of the lease being granted ([section 606](#)).

## 24. VALUATION OF LAND

### 24.1 Valuation process

A general valuation of land within council areas occurs at regular intervals. These valuations are the basis of the rates notices issued by local councils. Valuations are one factor used in determining landowners' level of rates.

Each council that is re-valued is advised of the latest values of properties and the landowner is advised with a Notice of Valuation issued by the Valuer General.

An annual revision of land values for land tax purposes is undertaken by the Valuer General for the Office State of Revenue (OSR). The Assessments of Land Tax are issued by the OSR based on these valuations. Valuations are performed by contracted valuers.

The method for working out land values is contained in [section 6A](#) of the *Valuation of Land Act*.

Valuations are based on certain assumptions, for example, that the property is vacant and no improvements have been made.

However, land improvements as defined in [section 4](#) of the *Valuation of Land Act* remain part of the land value.

The permitted use of the land must be taken into account in determining the "highest and best use". The actual use of land can be captured in the valuation of a parcel of land if that use results in a higher valuation, (section 6A(2)(a) of the *Valuation of Land Act*).

Land valuations will not take easements into account, as they are required to be made on the hypothetical basis that the land is free of impediments to title.

An easement is an acquired legal right enjoyed by the owner of land over the land of another. However, the physical effects of an easement, for example transmission lines, access roads and pipes laid for drainage, will be reflected in the land value.

Statutory restrictions on the use of the land are taken into account when assessing the value of land. Such statutory restrictions include regulating catchment areas proclaimed under the Water Boards Acts and Soil Conservation Act 1938 and planning scheme controls.

The most direct evidence for assessing the land value is to compare the property with sales of comparable vacant lands. The comparison between the sales and the land being valued will relate to the size of the land, soil type, land surfact (such as slope), the services available to it and the uses to which it may be or is being put.

Other factors relating to comparability could include surrounding developments and amenities. These would include both positive factors, such as parks or views, as well as negative factors such as frontage to a busy road.

In areas or types of property development where there are limited sales of comparable vacant land the valuer may use sales of improved properties and make allowances for the value of the improvements. This would be appropriate where houses are either being demolished or extensively renovated.

Investment and commercial properties are valued by a hypothetical development exercise when sales of comparable sites are not available.

The Courts have consistently applied the above methodologies in determining the value of land.

There are assumptions applied in valuing certain categories of land, for example special provisions apply to land the subject of a listing on the State Heritage Register, heritage restricted land, coal mines, rent protected land and Crown lease restricted land.

The Courts have consistently applied the above methodologies in determining the value of land.

The contract valuers undertaking the valuation will have available to them a whole range of material and information, including maps, deposited plans, sales evidence etc., that will allow them to determine accurate valuations. The valuer may make an inspection of the locality and in most cases will have a general knowledge of the local area that enables him/her to identify the negative and positive factors.

With the valuer's professional training and experience he or she is able to analyse and interpret this evidence to determine the land value that is to be placed on individual properties.

There are a number of particular valuation services provided to the public, local government and other agencies. These include:-

#### Just Terms Valuations

The Valuer General's Office is required by [section 47](#) of the *Land Acquisition (Just Terms Compensation) Act 1991* to determine the amount of compensation to be offered to a dispossessed owner where land is compulsorily acquired.

#### Supplementary valuations

In addition to regular revision of the record by means of general valuation, valuations are updated following sub-divisions; sales and transfers of properties, and when an appeal against a valuation has been upheld. These are known as supplementary valuations and issued to local government on a supplementary list every month, providing an up-to-date rating base. Because of changing market conditions values can alter between general valuations; however, in all cases supplementary valuations are related to the base date already in use in a local government area. This action ensures a consistent valuation basis throughout each local government area.

#### Revaluations and general valuations

The Valuer General provides valuations, cyclically to the state's local government authorities. Every valuation made in a local government area is produced on a list and issued to councils. These valuations may be used as a base for calculating council rates, including water and sewerage. The Valuation of Land Act ensures councils receive new valuations at least every 4 years, with most councils receiving new valuations every three years. The time frame for issuing land values to councils is determined by the Valuer General, following consultation with council.

When a local government area has been re-valued the property owner will be issued with a [Notice of Valuation](#). Each Notice of Valuation contains both details of the property as they are recorded on the Valuer General's records and the [land value](#) as at the common base date for all Valuer General valuations in the particular local government area.

The valuations are objective and impartial, and are based on the market for land. The "[land value](#)" represents the value that the "fee simple" interest in the land, assumed to be vacant, would be if offered for sale.

### Annual valuations

Each year the Valuer General provides the Office of State Revenue with land values used to determine land tax liabilities of owners of land in NSW. These valuations are made under the authority of the *Valuation of Land Act* at 1 July prior to the 31 December tax date and are only six months old when used for land tax assessment purposes.

Land tax land values are made under the *Valuation of Land Act* which provides a right of objection to the land value within 60 days of the receipt of the Notice of Assessment of the land tax from the Office of State Revenue. This objection must be lodged with the Valuer General who will undertake a review of the land value. The Valuer General advises the landowners of the results of the objections.

### Valuations for special rating requirements

The Valuer General also supplies local government with valuations for special rating requirements. Some of these are:-

- Allowances for profitable expenditure:

If an owner undertakes certain improvements that form part of the land value, then an allowance is supplied to the rating or taxing authority. The authority deducts the allowance from the land value before any rate or tax is levied. These allowances are only available to the owner who actually made and paid for the work.

- Heritage valuations:

Properties with a heritage significance are recognised under two (2) distinct acts for rating and taxing purposes.

Owners of heritage restricted properties within a planning instrument may apply to the Valuer General for a Heritage Restricted value under section 14G of the *Valuation of Land Act*.

Properties which are the subject of a listing on the State Heritage Register under the [Heritage Act 1977](#) require special valuations taking into account restrictions placed on the use of the land and buildings by the listing under the *Heritage Act*. These valuations over heritage properties are used for rating and taxing purposes.

- Rating factors:

The *Valuation of Land Act* provides for a special rating concession where land is held under certain classes of lease from the Crown.

In general terms the leases to which this concession applies are those which terminate after a specified period. In these cases rating is based on the Land Value shown on the notice of value which takes into consideration the restrictions imposed by the leases on the use and sale of the land, and the notice of value will indicate this.

## **24.2 Valuation objections**

When a property is re-valued for rating purposes, property owners receive advice of the new rating land value on a Notice of Valuation issued by the Valuer General. Where a property is liable for land tax the owner will receive advice of the new land value on the Notice of Assessment of Land Tax issued by the [Office of State Revenue](#).

Owners may now lodge objections to both rating and land tax land values with the Valuer General. Objection may be made against both the information about the property or the ownership, or against the amount of valuation.

The grounds for objection can be found in [section 34](#) of the *Valuation of Land Act*.

A brief summary follows:-

- (a) that the values assigned are either too high or too low;
- (a1) that the area, description or dimensions of the land are not correctly stated;
- (b) that the interests held by various persons in the land have not been correctly apportioned;
- (c) that the apportionment of the valuation is not correct;
- (d) that lands which should be included in one valuation have been valued separately;
- (e) that lands which should be valued separately have been included in one valuation; and
- (f) that the person named in the notice is not the lessee or owner of the land.

The effect that the land value will have on rates or taxes is not a valid ground for an objection under this section.

Landowners and lessees lodging an objection must use the Valuation Objection Form which is available online or at [Land and Property Information NSW](#) offices and from some local councils. Objections will not be accepted unless they are on this form.

The objection must clearly state:-

- (a) Valuation district and property reference number shown on the top of

Notice and the base date (or return a copy of the front of the notice).

- (b) The information on the property (eg ownership, addresses, etc), and,
- (c) If the objection is to the value(s), the reasons on which the objection is based and contentions as to what the value(s) should be, together with any evidence supporting the contentions.

The objection, with any supporting evidence, will be considered. The owner may be contacted for an inspection of the property prior to making a determination.

Objectors will be notified in writing of the formal decision on the objection and, where appropriate, provided with answers to issues that they may have raised.

With rating land values, the objection must be received by the Valuer General no later than the date shown as the “Last date to object” on the Notice of Valuation (60 days from the notices issuance).

An appeal can be lodged with the Land and Environment Court against determinations of objections.

The court is independent of the Valuer General and sets both Appeal lodgement fees and the procedures that are to be followed in court appearances. An application form to lodge an appeal can be collected from the court at Level 4, Windeyer Chambers, 225 Macquarie Street, Sydney, 2000, enquiries on (02) 9228 8388, and the Land and Environment Court website, [www.lawlink.nsw.gov.au/lawlink/lec](http://www.lawlink.nsw.gov.au/lawlink/lec).

As a general rule the court places the onus on the appellant to prove that the land value issued by the Valuer General is not correct.

### **24.3 Need for valuation**

Council cannot make and levy a rate in respect of a parcel unless council has been furnished with a valuation by the Valuer General under the *Valuation of Land Act*. Refer to definition of “land” within the *Interpretation Act 1987* and “parcel of land” within the Act Dictionary.

[Section 48](#) (2) of the *Valuation of Land Act*, requires the Valuer General to furnish councils with a current valuation list at least every 4 years. This may be varied if there has been little movement in values but cannot exceed 6 years.

Rates must be levied on the valuations in force as at 1 July of the rating year. In other words if a parcel does not change during the course of the rating year, then the valuation cannot change. However, supplementary valuations which address appeals and clerical errors must be acted upon.

It should be noted that this provision does not apply to newly created parcels which did not exist at the beginning of the rating year. The *Local Government Act* and the [Strata Schemes \(Freehold Development\) Act 1973](#), determine that every parcel of land following subdivision is to be rated, unless exempt from rates. [Section 573](#) of the *Local Government Act*, determines that subdivided land is to be valued and unpaid rates apportioned in accordance with the Valuer General’s determination. Sections [90](#), [91](#) & [92](#) of the *Strata Schemes (Freehold Development) Act 1973*

provide for strata units to be valued in accordance with unit entitlements and rates levied on the registered parcel proprietor.

While the *Valuation of Land Act* makes provision for the determination of a number of different valuations of land, [section 498\(2\)](#) of the *Local Government Act* provides that the ad valorem amount of a rate is to be levied on the "land value" of rateable land, except as provided by the *Local Government Act* or any other Act. (For example, a value other than land value may be used under [section 127](#) of the *Heritage Act 1977*).

Objections to valuations must be made in writing within 60 days of the Notice of Valuation. The Valuer General should answer appeals and determine new supplementary valuations within 90 days. Rates and taxes may still be levied and recovered despite the objection. If the Valuer General has not determined an objection within 90 days, the objection or appeal is taken to have been disallowed.

#### **24.4 Land value**

Land value is defined in the Dictionary at the end of the *Local Government Act*. Generally, it is a value determined specially for rating and taxing purposes by the Valuer General under the *Valuation of Land Act* ("land value" has a statutory meaning assuming that any improvements, other than certain "land improvements" on the land had not been made).

##### Subdivisions

Land can be subdivided by either Deposited Plan or Strata Plan. Both subdivisions require supplementary valuations. The landowner becomes liable both under the *Local Government Act* and the *Strata Schemes (Freehold Development) Act 1973* for current and unpaid rates.

The Valuer General may grant allowances (see sections [14L-14W](#)) under the *Valuation of Land Act*. Allowances can be granted for "subdivision" and "developer" costs and are only applicable whilst the parcels remain in the developers ownership, and are not built upon.

[Section 27B](#) of the *Valuation of Land Act* requires that lots created in a new Deposited Plan must initially be separately valued. [Section 14T](#) provides that if a lot qualifies for an allowance for subdivision then that allowance (including a nil allowance) is to be entered in the Register of Land Values in respect of any land value to which it relates.

The subdivision allowance will lapse upon sale of land; upon the erection of any buildings or when more than three years have passed since the Deposited Plan was registered.

Following the sub-division of a parcel of land, rates cannot be levied on new lots until supplementary valuations have been provided to the council by the Valuer General and the council has categorised each of the new parcels. Once this has happened, rates can be levied on a pro-rata basis from the date the deposited plan was registered. If a council levies rates on new parcels of land on a pro-rata basis, an adjustment must be made in respect of the parcel of land that existed prior to the sub-division to reflect that rates and charges are only payable on that parcel up until the date of sub-division.

The levying of rates mid year will not adversely affect a council's maximum general income limit as supplementary valuations furnished during the year are included when the notional general income for the previous year is calculated.

Although the legislation does allow councils to levy rates on newly sub-divided parcels mid-year, it does not however compel them to do so. The decision on when to levy rates on these properties is one for each council.

## **24.5 Supplementary lists**

**Section 49** of the *Valuation of Land Act* provides for the furnishing of a "supplementary list" containing information as to all changes of ownership, occupation, and values which have been made in the district valuation roll since the last list was furnished to the relevant authority (council). Supplementary lists are provided to councils on a regular basis.

Supplementary valuations should be entered into councils computer database on a regular basis, and balanced to the gross figure provided by the Valuer General.

Once a council has been issued with a revaluation, the Valuer General is not required to provide supplementary valuations on the superseded valuation. The Valuer General will however provide gross figures as at the end of the financial year to enable council to reconcile its valuation and prepare its notional yield return as provided under section 513 of the Local Government Act.

The supplementary list is the official method of informing a council of changes to the valuation roll and forms part of a valuation list.

### New valuation lists

**Section 51** of the *Valuation of Land Act* provides that the Valuer General shall on request by any rating or taxing authority (council) furnish council with a new valuation list for the whole or any part of its area brought up to a specified date, and copied from the existing valuation roll. On the commencement of council's next rating year, the list supersedes all previous lists so far as they relate to land and strata included in the list.

### Valuation rolls

By virtue of **section 53** of the Act, a valuation list, together with any supplementary list, is (except as otherwise provided) the valuation roll or valuation book or assessment book of the rating or taxing authority until superseded by a fresh complete list. The valuation roll is a fluid register of property values, ownership, descriptions, etc., and is stored on a computer.

### New valuations in special circumstances

**Section 60A(1)** of the Act requires the Valuer General on written request by council to make a new valuation of the land value of any land or stratum if:

- (a) as a consequence of the making of or an amendment to or the repeal or substitution of a planning instrument, the purposes for which development may be carried out on the land or stratum are changed; or
- (b) a water right relating to the land is acquired or ceases, or

- (c) the land suffers or is likely to suffer physical damage (such as landslip or erosion); or
- (d) the land is or is likely to be affected by coastal hazard.

The Valuer General is not required to furnish a new valuation if the land valuation has not changed since the last valuation.

The Valuer General is not required to furnish a new valuation list if there has been so little movement in the value of the land that new valuations are not warranted.

#### **24.6 1 July effective date for valuations**

In accordance with section 60A(3) of the *Valuation of Land Act*, land that is valued at the request of council or by supplementary valuations is to be valued for rating purposes as 1 July, if a planning instrument is made or amended or a water right is acquired or ceases or in the circumstances referred to in S60A(3)(a)(3).

#### **24.7 Valuation of several parcels**

Where several parcels of land adjoin, and are in the same ownership, and no part is leased, they are to be included in the one valuation unless the Valuer General directs otherwise ([section 26](#) of *Valuation of Land Act*). Separate valuations are required where buildings are erected thereon which are obviously adapted to separate occupation. Where several parcels of land adjoin, are owned by the same person and are all let to one person then they are subject to one valuation, otherwise they should be separately valued and rated (section 27 of *Valuation of Land Act*).

Where portions of land that has one value are sold, then separate valuations are required for the portions sold and the residue portion.

#### **24.8 Other annual rates on land**

##### **Land Tax**

Land tax is a tax levied on the ownership of land in NSW as at mid-night on 31 December of each year. It includes vacant land, land where a house, residential unit or flat, or holiday home has been built.

In general, the principal place of residence or land used for primary production is exempt from land tax.

Annual valuations for land tax are made by the Valuer General as at 1 July preceding each land tax year. These values should not be confused with those valuations made every four years for local government rating purposes. The register of land values is maintained by the Land and Property Information Division of the Department of Land.

##### **Rural Land Protection Rates**

The *Rural Lands Protection Act 1998* requires that all rural lands over the prescribed size be liable for rates to the local Rural Lands Protection Board.

These rates include the following rates:

- a general rate

- an animal health rate
- special purpose rates.

These rates are assessed on the size of the property and the livestock carrying capacity of each farm.

## 25. PRIVACY

The *Privacy and Personal Information Protection Act 1998* (“PPIPA”) commenced on 1 July 2000. It provides for the protection of personal information and privacy of individuals generally. “**Personal information**” is defined as: “*information or an opinion ... about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.*”

It establishes 12 information protection principles which cover the collection, storage, use and disclosure of (and access to) personal information.

### 25.1 Requirements by councils

The principal requirements imposed by the privacy legislation on councils and other public sector agencies are:

- to comply with the information protection principles as modified by relevant exemptions or privacy codes of practice;
- to prepare and report on privacy management plans;
- to comply with the public register provisions;
- to conduct internal reviews of conduct which infringes the information protection principles, privacy codes of practice or public register provisions.

A *Privacy Code of Practice for Local Government*, (the **Code of Practice**) approved by the Attorney General, has been introduced. The Code of Practice, which covers all councils, has the effect of modifying the application of Part 6 of PPIPA (to the “public register” provisions) and the application of the information protection principles to local government.

### 25.2 How does PPIPA affect disclosure of information

PPIPA only governs the supply of information that constitutes “personal information”. The disclosure of personal information is also regulated under the *Local Government Act* and the *Freedom of Information Act* (“FOI Act”). Copying of information is also governed by the Commonwealth *Copyright Act 1968*.

Disclosure of non-personal information by councils remains governed by the Local Government Act and FOI Acts.

### 25.3 “Public registers” versus other sources of council information

PPIPA distinguishes between information held on “public registers”, and other types of personal information held by councils.

Requests by third parties for information will therefore be subject to different tests depending on:

- if the information is “personal information”, and
- whether or not it is held on a “public register”.

## 25.4 Public registers

A public register is defined in [section 3](#) of the PPIPA as follows:

*public register means a register of personal information that is required by law to be, or is made, publicly available or open to public inspection (whether or not on payment of a fee).*

[Section 57](#) of the PPIPA provides:

### *57 Disclosure of personal information contained in public registers*

- (1) The public sector agency responsible for keeping a public register must not disclose any personal information kept in the register unless the agency is satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept.*
- (2) In order to enable the responsible agency to comply with subsection (1), the agency may require any person who applies to inspect personal information contained in the public register to give particulars, in the form of a statutory declaration, as to the intended use of any information obtained from the inspection.*

By virtue of [section 59](#) of the PPIPA, section 57 prevails over the requirements of the law under which the public register concerned is established to the extent of any inconsistency. However the operation of section 57 has been modified by the Privacy Code of Practice for Local Government.

Part 2 of the Code of Practice deals with information sought from councils' public registers; each council may have different types of information held as "public registers". For example a council may have general rating or property information held as a "public register".

In the past councils could sell information from the rates records in bulk to private businesses, which could use the information to conduct "direct marketing" campaigns for their products or services. This generated a large number of complaints to the Privacy Commissioner. The sale of this type of personal information by local government to private businesses is not within the spirit of ensuring the privacy of the individual.

In general, personal information may only be disclosed from a public register if for a purpose related to the purpose of the register or the Act under which the register is kept. In some cases the use of bulk-supplied information *may* be for such a purpose. The council may request a statutory declaration to that effect from the person seeking the information.

However, councils may also allow:

- inspection of any part of the register; or
- copying of single entries or pages from the register; or
- copying or purchase of part (or the whole) of the register, as long as the names and addresses of individuals are first deleted.

Councils are therefore prevented from supplying bulk property data to third parties for the purpose of direct marketing while still being able to disclose information for many legitimate reasons.

### **25.5 Is council's rates record a "public register"**

Thus, disclosure to third parties of personal information from a "public register" is governed by section 57 of the PPIPA as modified by the Privacy Code of Practice for Local Government, and the requirements of the law under which the public register concerned is established, so long as those requirements are not inconsistent with the PPIPA.

The *Local Government Act* does not, at section 602 or thereabouts, describe records held pursuant to [section 602](#) as a "public register", or indeed even as a "register".

The Privacy Commissioner has taken the view that a public register is "any record system which meets the normally accepted definition of a register, is made available for public access or inspection, and contains personal information".

PPIPA does not include a definition of the word "register". The Macquarie Dictionary defines "register" as:

- a book in which records of acts, happenings, names are made,
- any list of such recordings,
- a recording in such a book or list,
- a mechanical device by which certain information is automatically recorded, such as a cash register.

It will depend upon the record-keeping system of the council as to whether rates records kept under section 602 of the *Local Government Act* are kept together in such a manner as to meet the normally accepted definition of a "register".

As noted above, the *Local Government Act* does not describe records held pursuant to section 602 as a "public register". Nor does [section 12\(1\)](#) of the *Local Government Act* refer to the records kept under section 602 as being available to the public for inspection as a right.

However section 12(6) of the *Local Government Act* provides a scheme of access, whereby most of a council's other documents are expected to be made available to the public, free of charge, unless the council is satisfied that allowing inspection of the document would be contrary to the public interest.

Thus, assuming that a council holds its rates records in a manner which meets the normally accepted definition of "register", it could be argued that, by virtue of either the statutory right of access under [section 12\(6\)](#), and/or a council's past practice (regardless of their obligations under section 12(6) of the *Local Government Act*) in allowing public access to its Rates Record, a council's Rates Record would meet the definition of "public register" as it is "required by law to be, or is made, publicly available or open to public inspection".

#### Implications if the Rates Record is a "public register"

As noted above, disclosure to third parties of personal information from a "public register" is governed by section 57 of the PPIPA as modified by the Privacy Code of

Practice for Local Government, and the requirements of the law under which the public register concerned is established, so long as those requirements are not inconsistent with the PPIPA.

Thus a disclosure from a “public register” also covered by section 12(6) of the *Local Government Act* must not be made unless:

- (i) the disclosure is allowed under section 57(1) of the PPIPA (as modified); *and*
- (ii) the disclosure would not be contrary to the public interest as per section 12(6) of the *Local Government Act*.

Under section 57 of the PPIPA, a person seeking a disclosure concerning someone else's personal information from a public register must first satisfy council that the intended use of the information is for "a purpose relating to the purpose of the register" or the Act under which the register is kept.

However this section is modified by the [Privacy Code of Practice for Local Government](#), which provides that:

*A council may allow any person to:*

- (i) inspect a publicly available copy of a public register in council premises, and*
- (ii) copy a single entry or a page of the register*

without requiring the person to provide a reason for accessing the register and without determining that the proposed use of the register is consistent with the purpose of the register or the Act under which the register is kept.

Many rates records held by councils could meet the definition of “public register” under the PPIPA, the position may nevertheless differ from council to council, according to practice. Unfortunately, the Department of Local Government is not in a position to determine whether or not a particular council's own rates record-keeping system meets the definition of “public register” under the PPIPA.

It is therefore for each council to determine for itself whether or not their rates record-keeping system is likely to meet the above definition of “public register”, and hence be subject to the provisions governing “public registers” with respect to disclosure to third parties.

However if a council determines that their rates record-keeping system is *not* likely to meet the above definition of “public register”, the provisions of the *Local Government Act* and the PPIPA regarding third-party disclosures from other sources should be applied. In particular, when applying the “public interest” test under section 12(6) of the *Local Government Act*, councils should bear in mind the public interest objective of privacy protection.

## **25.6 Other privacy matters**

### Access to information by the public

Council must determine whether or not the public are seeking a “document” or another form of information such as a verbal opinion. Rights of access to “documents” under the *Local Government Act* or the FOI Act may not extend to other

forms of information. The word “document” is defined in [section 21](#) of the Interpretation Act 1987 as meaning any record of information, and includes information held in electronic form.

Next determine whether or not “personal information” is being sought or whether the information is on a “public register”. A request for information can be in writing, in person, or by telephone.

#### Fees for access to information

In general access to council records is free, as provided for by section 12 of the *Local Government Act*, although reasonable photocopying charges may be payable. However there may be a fee depending on whether the legislation under which you are seeking to access the records allows a fee to be charged. For example, a fee is payable for applications under the FOI Act. Requests for access to information about the ratepayers own information, if made under [section 14](#) of PPIPA, may incur a fee also.

#### Contacting owners of properties

Details of property ownership are held by the council, or the Land Titles Office. If the council holds this information on a “public register”, any person may view or copy a single entry or single page without providing a reason to council. If a request is made to access, copy or sell a substantial part or the whole of the public register, the names and addresses of all current and previous property owners must be removed before it can be provided. If this information is not on a “public register”, the public will normally be allowed to have the information under section 12(6) of the *Local Government Act* subject to the public interest test.

#### Details of valuation in the area

If members of the public seek to obtain the official land valuation for a particular property and/or the most recent sales prices for properties in the area, then this is not personal information and therefore it is not affected by PPIPA.

A request for the information under section 12(6) of the *Local Government Act*. In deciding whether to allow access the council must consider whether on balance it would be contrary to the public interest.

#### What can a ratepayer do if they think the council is not handling personal information appropriately.

If a ratepayer believes their personal information has been disclosed to a third party, or used by the council itself, other than in accordance with the PPIPA or the Privacy Code of Practice for Local Government, they may request from the council an internal review of the council’s conduct. They should make a request within six months of first becoming aware of council’s conduct. Complaints must be in writing and addressed to the council’s Privacy Contact Officer.

If, following the internal review, the ratepayer remains unsatisfied, they may appeal to the Administrative Decisions Tribunal of New South Wales section. The Tribunal hears the matter afresh and may impose its own decision. For conduct occurring after 1 July 2001 the Tribunal may also award damages of up to \$40,000 for a breach of an information protection principle.

## **26. RELEVANT SECTIONS OF THE LOCAL GOVERNMENT ACT 1993**

### Payment of Rates - Chapter 17

- 560 - Who is liable to pay rates
- 561 - Who is liable to pay charges
- 562 - Payment by quarterly instalment
- 563 - Discount for prompt payment
- 564 - Agreement to periodic payment of rates
- 566 - Accrual of interest on overdue rates & charges.
  - Interest accrues on a daily basis.
- 567 - Writing off accrued interest
- 570 - Transfer of land as payment of rates and charges.

### Rates - General - Chapters 9, 14, 15 & 16

- 497 - Ad valorem or Base plus ad valorem
- 503 - Relationship between rates and charges
- 533 - Rates to be made be for 1 August or later if approved by Minister
- 547 - Rating under company title
- 548 - Minimum Rates

### Special Rates - Chapter 8

- 409 - Money raised from a special rate
- 495 - Making and levying of special rates
- 538 - Form of resolution for a special rate
- 551- 553 - Levying of water and sewerage special rates
- 552 - What land is subject to water supply or sewerage rate or charge
- 553 - Time at which land becomes subject to water supply or sewerage rate or charge
- 565 - Capital contribution instead of special rates

### Base Amounts - Chapter 9

- 499 - The base amount
- 500 - Not more than 50% (Limit on revenue)
- 536 - Relevant criteria in determining base amount
- 537 - Form of resolution of base amounts
- 548A - Aggregation of certain parcels subject to base amount
- 549 - Reduction of rates containing base amounts if levied on vacant land

### Charges - Chapter 10

- 539 - Relevant criteria for determining the amount of a charge
- 540 - Form of charge, either rate, single amount or both
- 541 - Differing amounts of a charge
- 542 - Minimum amounts for charges

### Categorisation of Land - Chapters 6 & 7

- 493 - Categories of ordinary rates
- 514 - Each parcel of rateable land to be categorised
- 515 - Categorisation as farmland
- 516 - Categorisation as residential
- 517 - Categorisation as mining
- 518 - Categorisation of vacant land
- 521-527 Other categorisation issues
- 528 - Rate may be the same or different for different categories
- 529 - Rate may be same or different within a category (sub-categorisation).

### Rate Exemptions - Chapter 13

- 554 - What land is rateable
- 555 - What land is exempt from all rates
- 556 - What land is exempt from all rates except water & sewerage
- 557-558 What land may be exempt from water and sewerage rates

### Management Plans

- 532 - Rate or charge not made until public notice given
- 402 - Draft management plan to be prepared
- 403 - Activities
- 404 - Contents of draft management plan with respect to councils revenue policy

### Pensioner Concessions - Chapter 19

- 575 - Reduction for eligible pensioners
- Dictionary - Definition of eligible pensioner
- Dictionary - Definition of jointly eligible occupier
- 577 - Extension of concession to avoid hardship
- 584 - Ending of concession

### Fees - Chapter 21

- 608 - Fees for services
- 610A - Council fees for business activities
- 610B - Fees to be determined in accordance with pricing methodologies
- 610D - How does a council determine the amount of a fee for a service
- 610E - Council may waive or reduce fees
- 610F - Public notice of fees
- Dictionary Approved fee

Domestic Waste - Chapters 11 & 12

- 496 - Annual charge for domestic waste
- 504 - Reasonable cost of DWMS
- 507 - Minister may specify a percentage
- 510 - Maximum charge for Domestic Waste Charges