

Circular No. 06-01
Date 4 January 2006
Doc ID. A40313

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LOCAL COUNCIL WATER UTILITY POWERS UNDER THE LOCAL GOVERNMENT ACT 1993

Recent changes to the rules for subsidy under the Country Towns Water Supply and Sewerage (CTWS&S) Program enable local government water utilities to take increased control over their water supply and sewerage projects, including responsibility for land access and acquisition matters.

Under previous program rules, land access and acquisition for approved program projects were often undertaken under the *Public Works Act 1912* (PW Act) or sometimes under the *Local Government Act 1993* (LG Act). All non-program projects were undertaken under the LG Act.

Following the announcement of the changes to the CTWS&S Program rules, many councils have requested clarification of available powers to construct and maintain works of water supply, sewerage or drainage.

This Circular has been developed in consultation with the Department of Energy, Utilities and Sustainability (DEUS) to clarify the legislative mechanisms and powers available to local government for the provision of water supply, sewerage and stormwater drainage and, in particular, where it occurs on non-council land.

While the PW Act provides broad powers of entry for construction, a strong preference for negotiated outcomes means that these powers are seldom used. Access arrangements are negotiated and formalised with the landowners signing a Consent-to-Enter document and any subsequent land purchase or easement creation are negotiated under the *Land Acquisition (Just Terms Compensation) Act 1991* (LA (JTC) Act). Further advice on this process may be sought from the Department of Commerce.

The introduction of the LG Act removed the powers of entry to construct works of water supply, sewerage or drainage that were available under the previous Act. However, an amendment to the LG Act in 2002 effectively restored these powers. The LG Act now provides councils with the power to enter to construct and maintain their works of water supply, sewerage and stormwater drainage on private land.

Legal advice obtained by the Department of Local Government confirms that s.191A of the LG Act achieves a power of entry onto private land for the construction of new works provided that the works are authorised under the LG Act (or any other Act). If additional rights are required over and beyond the statutory rights created by s.191A, then either the consent of the landholder or an easement or other proprietary interest would be required.

While the LG Act provides local councils with powers of entry to construct, maintain and repair works of water supply, sewerage and stormwater drainage work, it is this Department's long held position that the powers under s.191A should only be used as a last resort. The construction of works on private land should ordinarily be conducted with the consent of the landowner. If agreement cannot be reached after all reasonable efforts at negotiation, council can use its compulsory acquisition powers under the Act to acquire land or an interest in land.

In these cases the private landowner may be entitled to compensation determined either by agreement with the council or by using the LA (JTC) Act. No compensation would be payable if the new works are for the individual benefit of a landowner's property.

Councils are given powers to acquire land (including an interest in land) by sections 186-190 of the LG Act for the purpose of exercising any of its functions. Councils may do so by either agreement or compulsory process in accordance with the LA (JTC) Act. Councils are reminded of DLG Circular to Councils No. 97/1 and its attached Guidelines, which provide detailed information to assist in the compulsory acquisition procedures of land.

Negotiations with landowners should include matters such as:

- benefits of the works
- location of works
- timing and duration of construction
- property disturbance during construction and commissioning
- notification protocols for construction, operation and maintenance, and
- costs and compensation matters

Councils are encouraged to reach a negotiated agreement wherever possible and to implement procedures that ensure fairness for landowners affected by proposed new works. Councils need to observe the notice of entry requirements of the LG Act. This includes giving reasonable notice to landowners of when inspections, testing and construction on their land will be undertaken, as well as when maintenance and repair works are required. Councils have the power to maintain and repair works owned by the council and are also required to follow the notice of entry provisions set out in sections 191-201 of the Act when using these powers.



Garry Payne
Director General