

SUCCESSFUL CAMPAIGN TO REINSTATE POWER OF ENTRY FOR NSW LOCAL GOVERNMENT

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Paper Summary

The Local Government Act 1919 conferred appropriate power of entry provisions for local government to exercise its water supply, sewerage and stormwater functions on private property.

The Local Government Act 1993 and Roads Act 1993 severely restricted the ability of Councils to undertake works on private property. Without the reinstatement of appropriate easements Council's powers were effectively limited to inspections and investigations.

The NSW Local Government Water Directorate pursued the power of entry issue from November 1999 as a high priority action in its inception year.

Councils were surveyed to determine the extent of the existing easements, as the 1993 legislation did not provide any exemptions for 'pre 1993 infrastructure'. Some 85% of properties were shown not to be appropriately covered.

The survey indicated that the likely cost of creating easements in non-metropolitan NSW would be in the order of \$1.275 billion.

The Water Directorate, in conjunction with the Lgov developed a strategy to have the 1919 powers reinstated into the 1993 Act.

This paper provides an outline of the process adopted that led to the successful reinstatement of Power of Entry provisions on 25 June 2002.

The outcome is an example of what can be achieved by developing partnerships between technical and political organisations on a state-wide integrated basis.

Introduction

On the 1st July 1993 the Local Government Act 1993 became effective. The new Act removed the power of entry for maintenance and repair of water, sewerage and drainage assets on private property for asset owners, predominantly non metropolitan NSW Councils. The previous 1919 Act had conferred powers available under the Public Works Act 1912. This enabled "construction authorities" to construct

water services infrastructure, without the need to acquire an easement either before or after the works were undertaken. This paper details the process adopted by the NSW Local Government Water Directorate in seeking reinstatement of the powers previously available. The three year campaign was successfully concluded on the 26 July 2002 with gazettal of a bill incorporating a new section, 191A Power of Entry, into the Local Government Act.

Background

In August 1999 the newly formed NSW Local Government Water Directorate sought feedback through its monthly newsletter with a view to identifying power of entry issues being experienced by local authorities.

This was in response to an increasing awareness across the industry and within local communities of Council's inability to undertake work on private property. Six Councils (Goldenfields, Armidale, Tweed, Tamworth, Port Macquarie and Mid Coast Water) reported that they had been denied access to essential infrastructure.

The Water Directorate Executive Committee subsequently resolved to pursue reinstatement as a high priority action.

A further more detailed survey was conducted in February 2000. The survey indicated that 80% of properties were not adequately covered by easements for water supply and that 55% were not adequately covered by easements for sewerage.

In response to receiving those survey results the preliminary advice from the Department of Local Government was to create easements over existing infrastructure. The advice was not considered to be practical, particularly given that the estimated cost was in the vicinity of \$1.3 billion. At the same time the Department also advised that it would be "impossible to amend the legislation" on the basis that the new Act had bipartisan political support.

Existing Legislation – Local Government Act 1993 and Roads Act 1993

Section 192 (pt) – Local Government Act 1993

"192. Inspections and Investigations

For the purpose of enabling a council to exercise its functions, a person authorised to enter premises under this Part may:

- (a) inspect the premises and any food, vehicle, article, matter or thing on the premises, and*
- (b) for the purpose of an inspection:*
 - (i) open any ground and remove any flooring and take such measures as may be necessary to ascertain the character and condition of the premises and of any pipe, sewer, drain, wire or fitting."*

Section 165 – Roads Act 1993

"165 Inspections and investigations

For the purpose of this Act, an authorised officer who enters land under any power of entry conferred by this Division:

- (a) may inspect the land, and*
- (b) may, for the purposes of an inspection, dig up any ground and take such measures as are necessary to ascertain the character and condition of the land and of any building, structure or work that is situated in, or over the land."*

Comprehensive Report

The Water Directorate Executive Committee determined that it would need a comprehensive report on access provisions for local government water services as a technical and political basis if legislative change was to occur.

K J Halstead & Associates were commissioned to prepare such a report. The report was finalised in March 2001 and formally submitted to the Department of Local Government at that time. The report dealt with all aspects of access provisions and councils power of entry. It addressed all relevant legislation and compared the power of entry available to NSW authorities with other states and territories of the Commonwealth of Australia. The report is an excellent reference document and it has been widely accepted across the state for its value as a management tool.

Report Findings

- NSW Local Government was an anomaly

All States and Territories and other water authorities in NSW (Sydney Water, Hunter, Gosford and Wyong) had appropriate power of entry provisions for works of construction and maintenance.

- NSW Councils had no power to undertake work under the provisions of the 1993 Act.
- Compensation is payable for construction if the surface is disturbed or if an easement or right to enter is required.
- Loss of power included pre-1993 infrastructure.
- Water supply, sewerage and drainage affected.
- Excellent reference document.

Compensation

The Land Acquisition (Just Terms Compensation Act) 1991 outlines the process for easement acquisition in Section 62.

The Act does not provide for compensation for underground services. Post implementation of the 1993 Local Government Act it had been widely misinterpreted that there was no entitlement for compensation for water supply, sewerage and drainage works. In fact the entitlement for compensation is only waived if the surface is not broken, e.g. a tunnel or underground bored conduit.

If the ground surface is broken during construction or required to be broken during maintenance then compensation is payable. If an easement is required (as is normally the case) for water supply, sewerage and drainage assets, then compensation is also payable. Standard easement conditions normally result in some restriction to use over the affected land, e.g. a requirement to not construct anything other than minor structures over the affected land. It is this restriction to user that has a detrimental impact on the value of the land and hence the payment of compensation.

The quantum of compensation is normally determined by the court in the absence of parties negotiating a satisfactory commercial outcome.

As a rule of thumb a figure of 50% of the pro-rata property value could be expected.

For example:-

- Property value \$100,000
- Easement area 10% of property
- Compensation $\$100,000 \times .5 \times .1 = \$5,000$

Post Report Actions

The Power of Entry report concluded with a number of recommendations. These recommendations were vigorously pursued by the Water Directorate Executive Committee.

Representations were made to the State Government to effect legislative changes to the Local Government Act, 1993. The representations addressed the inconsistencies in legislation between other government agencies and local government and highlighted the anomalies in legislation between NSW and all other States and Territories. The substantial cost to be borne by councils in creating easements, in the absence of legislative change, was forcibly presented.

Co-jointly with a letter of support issued by LGOV NSW the report was forwarded to the Department of Local Government in March 2001 urging reinstatement of traditional powers.

Government Response

In July 2001 the Water Directorate received the first acknowledgement from the Department of Local Government that the NSW situation was an anomaly.

In August 2001 Ministerial endorsement to increasing the Power of Entry provisions was obtained.

In May 2002 new legislation was introduced into Parliament.

The Minister's 2nd Parliamentary Reading relied heavily on information extracted from the Directorate's report. It recognised the cost of easement creation, the anomaly of the Water Management Act 2000 and entry provisions available to Water Authorities (Gosford, Wyong, Sydney Water).

The Bill was assented to on the 25 June 2002, gazetted on the 26 July 2002 and was operational from the 1 August 2002.

Power of Entry 2002

New Section 191A deals with the construction and maintenance of water supply, sewerage and stormwater drainage works:-

1. *“Without limiting section 191, a council employee (or other person) authorised by a council may enter any premises to carry out water supply work, sewerage work or stormwater drainage work on or under the premises (being work that the council is authorised by this or any other Act to carry out).”*

Subsection (1) does not apply to premises that comprise a National Parks and Wildlife reserve.”

Campaign Review

The NSW Water Directorate was established in January 1999 to provide leadership to the local government water supply and sewerage industry in NSW, particularly on technical issues. The Directorate is currently supported by 92 member councils.

Power of Entry was identified as a high priority action in 1999.

Early discussions with the Department of Local Government were not fruitful. The Department was quite adamant that the 1919 legislation was unfairly weighted against community members.

There was also an understandable definite reluctance from other agencies to proactively support the Directorate in seeking legislative change.

From inception the Water Directorate Executive Committee was acutely aware of the absolute need to obtain

the continuing support of Lgov NSW and to recognise the political position of Lgov within the NSW water supply and sewerage industry. The Water Directorate's role in providing technical background and support coupled with the political strength of Lgov was the key component of the strategy that resulted in the successful outcome as detailed in this paper. In the absence of the Water Directorate it is unlikely that any process would have achieved reinstatement of the 1919 powers and the significant financial return to both member and non-member councils.

Conclusion – The Way Forward

The Power of Entry campaign has established a precedent to enable the regional NSW water supply and

sewerage industry to continue to grow and improve its service delivery.

The successful model of integrated technical and political partnership will continue to be pursued to develop a regulatory framework through state agencies that is appropriate to local community and industry expectations.

References

Report on Access Provisions for Local Government Water Services (Power of Entry) by Kenneth J Halstead, K J Halstead & Associates for the NSW Local Government Water Industry Directorate, June 2001

Author Biography

Mike Rayner is the Director of Engineering Services at Tweed Shire Council, a position he has held since 1994.

Tweed Shire Council covers an area of just over 1300 square kilometres and serves a population of 70,000; It is one of the fastest growing local government areas in NSW. The Engineering Services Division plans, designs, constructs, maintains and operates water supply and sewerage services, 1100 kilometres of road network and manages flood mitigation and waterways programs.

The position has direct responsibility for \$750 million of assets, 250 staff and an annual budget of \$80 million.

Mike is also past chair and current executive member of the NSW Local Government Water Industry Directorate. The Directorate is funded from member councils in NSW with responsibility for water supply and sewerage services. Its mission is to provide leadership to the Local Government Water Supply and Sewerage Industry in NSW, particularly on technical issues.

Mike has over 27 years professional involvement in the water supply and sewerage industry.

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