

Wider powers to revoke local government management orders in Western Australia

By Trudi Firth

In Western Australia a significant portion of public land managed by local governments is managed pursuant to management orders granted under section 46 of the *Land Administration Act 1997* (**LAA**), which vests care, control and management of the land in the local government. Recent changes to the LAA have expanded the grounds on which management orders may be revoked.

Revocation of management orders

The *Land and Public Works Legislative Amendment Act 2023* (**Amendments**) has made some significant changes to the LAA including 'administrative improvements'^[1] which effectively give the Minister for Lands (**Minister**) the power to revoke management orders, or excise land from managed reserves, without the consent of the management body.

Prior to the Amendments, a management order could only be revoked without the consent of the management body, if it was considered to be 'in the public interest' or for non-compliance with the management order or plan. As part of the Amendments, the Minister may, in addition, revoke a management order, if the Minister considers the revocation 'necessary for the purposes of a public work': section 50(2)(b).

Public works

The definition of 'public work', in the *Public Works Act 1902* (**Public Works Act**), has also been amended, to provide for a work, facility, building structure or other thing that is declared by the Governor or of a class described in Schedule 1. The list of public work specified in Schedule 1, is similar to the list prior to the Amendments; however, the language and content of the list has been modernised.

The Department of Planning, Land and Heritage (**Department**), which administers the LAA and the Public Works Act, has stated that the introduction of 'public work' as new category for revocation or excision, was to avoid the "uncertainty around what is in the public interest'.... The inclusion of the ability for the Minister to revoke a management order without consent for a public work (as defined in the Public Works Act) removes this uncertainty"^[2]. This sentiment is consistent with the judicial commentary on the concept of the 'public interest'. For example, Justice Nicholson in *Evans v Western Australia* (1997) 77 FCR 193 at 215, recited the following statement:

'The public interest is a concept of wide meaning and not readily delimited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest'^[3].

Excision of area from management reserve

The Amendments to section 51 of the LAA, also permit the Minister to excise an area from a management reserve (other than class A reserves), without the consent of the management body, if the Minister considers the excision is in the public interest.

In respect of the excision of areas from managed reserves, a new formal consultation process, as set out in section 46A of the LAA, is required to be followed. A formal consultation is not required in respect of the decision to revoke a management order, however the Department has stated *‘that procedural fairness would need to be afforded to the management body’*^[4].

Approach of Department

In our experience, the Department has been reluctant to revoke management orders without consent of the management body, and the Department has worked collaboratively with management bodies to find negotiated solutions. The Department’s approach, following the Amendments, appears unchanged, with the Department stating that:

“any request to excise whole or part of a reserve for a public work or the revocation of a management order for a public work should only proceed where the proponent has demonstrated genuine and real attempts to negotiation with the management body....Sufficient evidence will need to be provided in the request demonstrating the attempts to negotiate an agreed outcome with the management body, for a reasonable period of time and that any alternatives to the excision or revocation have been properly considered and rejected for genuine reasons”^[5].

Compensation of management bodies

The Amendments introduce new section 51AA, which provides that a management body (other than a State instrumentality) may seek compensation under section 204 of the LAA for an excision of land from a managed reserve, or for the revocation of a management order. Section 204 of the LAA provides that if a management body loses the use of structures erected or improvements made by the management body on the land in accordance with the terms of the management order, the management body is entitled to compensation for the depreciated value of those structures and improvements.

Section 51AA in effect replicates the position prior to the Amendments in relation to compensation for management bodies following the revocation of a management order. The issue that often arises with the wording of the compensation section (s204) is that the section requires the management body to have *‘made’* the structures or improvements. Often it is a lessee, rather than a management body, who has constructed the structures and it will be the lessee, rather than the management body, who will be entitled to compensation. This may be difficult for a management body to accept, particularly if the lessee has been paying reduced rent in consideration for the construction of those structures or improvements, and/or the management body has borne extensive costs in maintaining such structures or improvements.

The Amendments mean that it is possible for a management body to lose valuable community assets, without consent, with no compensation and minimal consultation, if the Minister determines that the managed reserve, or part thereof, is required for a ‘public work’ or is required in the public interest. However, from a practical perspective, this was largely the position prior to the Amendments, and in most instances, one would expect a revocation for a ‘public work’ to be in the ‘public

interest'. The introduction of the additional category of 'public work' will simply avoid the need for any argument as to whether a revocation is in fact in the public interest.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this article please contact Trudi Firth by email to tfirth@mcleods.com.au.

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[1] Department of Planning, Lands and Heritage, '*LAA amendment presentation session 2 - industry groups*' [PowerPoint slides], <https://www.wa.gov.au/government/document-collections/land-and-public-works-legislation-amendment-act-2023>

[2] Department of Planning, Lands and Heritage, Information Sheet July 2023, '*Changes to Land Administration Act 1997 and Public Works Act 1902*', <https://www.wa.gov.au/government/document-collections/land-and-public-works-legislation-amendment-act-2023>

[3] Nicholson J reciting Lockhart J, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50

[4] Note 2

[5] See Note 2