

#### 4. PUBLIC AUDIT ACT 2001

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The purpose of this report is to inform Councillors of the recent enactment of the Public Audit Act 2001 which comes into force on 1 July 2001 and to set out the new statutory provisions relating to the surcharging of elected members.

##### BACKGROUND

The purpose of the Public Audit Act 2001 is to establish the position of the Controller and Auditor-General as an Officer of Parliament, and to reform and restate the law relating to the audit of public sector organisations.

The Act modernises the Auditor-General's mandate and applies that mandate consistently to all public entities with certain exceptions for state-owned enterprises.

The Act states that the Auditor-General is to be the auditor of every public entity, including local authorities, and confers powers on the Auditor-General in relation to the carrying out of financial report audits, performance audits and enquiries into any matter concerning a public entity's use of its resources.

The existing powers of the Auditor-General under the Public Finance Act 1977 to surcharge persons responsible for deficiencies and losses are to be abolished, but in respect of local authorities, there are new provisions to replace those surcharge powers.

##### CURRENT SURCHARGE PROVISIONS

The Public Finance Act 1977 currently sets out the statutory provisions relating to surcharges in respect of actions of local authorities. The Act provides that a council is deemed to have incurred a loss where money has been unlawfully expended, or a liability has been unlawfully incurred, or the local authority has wilfully or negligently failed to enforce the collection of money it is lawfully entitled to receive.

In any one of those three situations, the Auditor-General may require each councillor to show cause why they should not be surcharged with the amount of the loss. An opportunity is then given for explanations to be made as to why a surcharge should not be made and if the Auditor-General decides to surcharge councillors, then they are jointly and severally liable for that loss.

The Act provides that it is a good defence if a councillor proves that the act or failure to act that resulted in the loss incurred:

- (a) without that councillor's knowledge;
- (b) if with their knowledge, then against their protest at the time, and that protest was recorded in writing;
- (c) they voted against the issue at a meeting of the council;
- (d) that in being a party to the act or failing to act, they acted in good faith and in accordance with the written advice of the solicitor of the local authority.

To the writer's knowledge there has not been any surcharge by the Audit Office in New Zealand in the last 20 years. However, surcharge provisions in the United Kingdom have been implemented and have been very contentious.

##### NEW SURCHARGE PROVISIONS

The new Public Audit Act now places the surcharge provisions in the Local Government Act and the grounds that are stated for a loss to have occurred are:

- (a) money has been unlawfully expended by the council;
- (b) an asset has been unlawfully sold or otherwise disposed of by the council;
- (c) a liability has been unlawfully incurred by the council; or
- (d) the council has intentionally or negligently failed to enforce the collection of money it is lawfully entitled to receive.

If the Auditor-General is satisfied that the council has incurred a loss, the Auditor-General may make a report on that loss to the Council and include recommendations as to recovery of the loss. A copy of that report is to be sent to the Minister of Local Government and to every Councillor.

On receipt of that report from the Auditor-General the Council must, within 20 working days, respond in writing and the response must be to each of the Auditor-General's recommendations and include a statement as to what action, if any, the Council intends to take in respect of the loss. An individual councillor also has the ability to respond separately. The Council must also, in sending its response to the Auditor-General, table at an open Council meeting a copy of the Auditor-General's report, the council's response and the response of any individual councillor.

If the Auditor-General has made a report on a loss to the Council, then that loss is recoverable as a debt due to the Crown from each councillor jointly and severally, and the Crown may commence proceedings to recover the loss from all or any of those councillors. Any amount recovered by the Crown from councillors must be paid to the Council, less the Crown's cost.

The change from the existing law is that recovery of the surcharge is now initiated by the Crown, and not by the Auditor-General.

It is now a defence to proceedings by the Crown if a councillor proves that the act or failure to act resulting in the loss occurred:

- (a) without the councillor's knowledge;
- (b) with the councillor's knowledge but against the councillor's protest made at or before the time when it occurred;
- (c) contrary to the matter on which the councillor voted on the issue at a council meeting;
- (d) *"...in circumstances that, although being a party to the act or failure to act, (the councillor) acted in good faith and in reliance on reports, statements, financial data, or other information prepared or supplied, or on professional or expert advice given, by any of the following persons:*
  - (i) an employee of the (council) whom the (councillor) believed on reasonable grounds to be reliable and competent in relation to the matters concerned;*
  - (ii) a professional adviser or expert in relation to matters which the (councillor) believed on reasonable grounds to be within the person's professional or expert competence."*

Paragraph (d) is based on a similar provision in the Companies Act and has now extended the defence available to councillors from that of a solicitor acting for the Council to a reliable and competent employee or professional adviser in relation to a particular matter.

**Chairman's**

**Recommendation:** That the information be received.