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greater WELLINGTON
THE REGIONAL COUNCIL

Report **PE04.477**
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Committee **Policy, Finance and Strategy**
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Stadium Trust - Legal Status

1. Purpose

To update the Committee on the outcome of the High Court action, taken to clarify the legal status of the Trust, and to determine the next steps.

2. Public Excluded

Grounds for exclusion of the public under section 48(1) of the Local Government Official Information and Meetings Act 1987 are:

That the public conduct of the whole or the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist i.e. because of the need to preserve commercial confidentiality.

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3. Background

The Committee will be aware of the longstanding uncertainty over the legal status of the Trust and the considerable efforts made by the two settlors (Greater Wellington Regional Council and Wellington City Council) and the Stadium Trust to clarify the Trust's status.

In recent years the two settlors and the Stadium Trust have pursued the following key initiatives:

- Seeking a clarifying amendment to the Wellington Regional Council (Stadium Empowering) Act 1996 that the Trust was not a Local Authority Trading Enterprise (LATE). This involved lobbying key Ministers, local Members of Parliament and discussions with officials from Dr Cullen's office and IRD officials.

- In submissions on the Local Government Bill:

(a) seeking a specific exemption from the definition of a Council Controlled Trading Organisation (CCTO), which is the new term for a LATE.

(b) seeking clarification of the definition of a CCTO, in particular, the meaning of "operating a trading undertaking for the purpose of making a profit".

Unfortunately, all of our attempts to clarify the legal status of the Trust through legislative means have failed to gain the necessary support from key Ministers or from Parliament. As a result, the Council felt that it had little option but to seek clarification through the High Court (via a declaratory judgement) on whether or not the Stadium Trust is subject to the provisions of the Local Government Act 2002 and, if so, whether or not it is a CCTO.

This decision to seek a declaratory judgement was confirmed by the Council in February 2003, after having considered report 03.34 (refer **Attachment 1**).

The High Court considered the matter in a two day hearing on 8 and 9 June 2004 and on 12 July Justice Mackenzie released his judgement (refer **Attachment 2**).

The two settlors and the Stadium Trust sought a judgement that the Stadium Trust is not a CCTO under the Local Government Act 2002. The Attorney-General, as first defendant, took no part in proceedings. However, the Commissioner of Inland Revenue, as second defendant, sought a judgement that the Trust is a CCTO under the Local Government Act (and therefore also for the purposes of the Income Tax Act as the two pieces of legislation share a common definition of CCTO).

As plaintiff in the case, the Stadium Trust, supported by the two settlors, argued that the Wellington Regional Council (Stadium Empowering) Act 1996 created its own unique governance code for the Stadium Trust and therefore there was no need to refer to the Local Government Act. The Committee may be aware that when the Stadium Empowering Act was considered, Parliament (through the Select Committee process) went to great lengths to ensure the entity owning the Stadium would be a Trust, modelled on the Community Trust model contained in the Local Government Act 1974. The relevant clauses were taken from the Local Government Act 1974 at the time and therefore in our view the Stadium Empowering Act was passed as a self contained Act that clearly specified the nature of governance arrangements under which the Stadium Trust was required to operate in future.

The Stadium Trust, supported by the two settlors, further argued in the High Court that even if the Stadium Empowering Act and the Local Government Act 2002 both applied, the Stadium Trust did not meet the definition of a CCTO.

4. What was the outcome from the declaratory judgement?

In his judgement released on 12 July, Justice Mackenzie unfortunately chose not to rule on the first matter on which we were seeking clarity. We therefore

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remain uncertain as to the robustness of the argument that the Stadium Empowering Act, in creating its own governance code, rendered the Local Government Act 2002 irrelevant to the Stadium Trust.

Notwithstanding the Judge's reluctance to fully deal with the Empowering Act argument, paragraph 60 of the judgement does provide a positive sign on the relationship between the Stadium Empowering Act and the Local Government Act. Justice Mackenzie observed that "Since Parliament has specifically required accountability provisions modelled on those for a Community Trust I do not think the Court should attribute to Parliament an intention that the governance and accountability provisions applying to a CCTO should also apply to the plaintiff." Had Justice Mackenzie chosen to rule more definitively on this matter it would have provided a more complete victory in the Court.

Justice Mackenzie also noted, at paragraph 66 that section 4 of the Empowering Act specifically permitted the GWRC to make its loan on such terms and conditions as GWRC, in its absolute discretion, thought fit. He concluded that section 4 overrode the general provision at section 63 of the Local Government Act 2002 and that section 63 did not apply to GWRC, which meant that if the Stadium Trust was held to be a CCTO, the GWRC would not be required to charge interest on its loan. Although an interesting observation, I'm sure the Council would wish to continue past practice, as reflected in the Funding Deed, of treating GWRC's $25 million advance in exactly the same manner as WCC's $15 million advance.

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However, on the second matter Justice Mackenzie did rule in our favour by determining that the Stadium Trust does not meet the definition of a CCTO. He essentially reached this conclusion on the basis that the dominant purpose of the Stadium Trust is not that of making a profit and that in endeavouring to generate a profit, each year the Stadium Trust is merely trying to further its primary objective of operating a successful sporting and cultural venue for the benefit of people of the region. **In other words, he saw that generating a profit is a means to an end, not an end in itself.**

In my view, the conclusion reached by Justice Mackenzie sounds entirely sensible and logical and is what we have maintained throughout this long drawn out saga.

In fact, the reality is the Stadium Trust must make a financial surplus in order that it can continue to repay external bank debt, which is currently still in the order of $30 million.

The Stadium Trustees are acutely aware that the Trust needs to operate in a financially autonomous manner and that seeking further funding from the settlors is not a viable option. In the case of GWRC the Council is legally precluded from lending any further funding over and above the $25 million advanced in 1998.

5. What is the response of the Commissioner of Inland Revenue to the decision of the High Court?

Perhaps not unexpectedly the Commissioner of Inland Revenue has appealed the decision but the nature of the appeal is very generic so it is difficult at this stage to be precise about the specific aspects of the Judgement being challenged. All that the appeal states is that it is being appealed "on the grounds that it is wrong in fact and in law".

However, it is clear from his actions that the Commissioner of Inland Revenue maintains that the Stadium Trust "operates a trading undertaking for the purpose of making a profit" – a key component of the definition of a CCTO.

While not ideal, the appeal by the Commissioner does enable us to seek the Court of Appeal's determination on our contention that the Stadium Empowering Act creates its own unique governance code for the Stadium and thereby renders the Local Government Act 2002 irrelevant in this case.

This is very significant as this was the main matter on which we sought clarity from the High Court, and if found in our favour, provides the most robust long-term solution to this matter.

A victory in the Court of Appeal on the second matter (i.e. whether the Trust meets the definition of a CCTO) such as that we achieved in the High Court, could be subsequently undermined if the Commissioner of Inland Revenue were able to convince Parliament that the definition of a CCTO in the Local Government Act should be changed.

In terms of timing, I am advised that it could take up to 12 months for the Court of Appeal to consider this matter. In the meantime the legal status of the Trust remains uncertain.

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6. Where to from here?

As I see it the Council, in conjunction with our co-settlor Wellington City Council and the Stadium Trust, have to firstly decide whether to continue with the legal proceedings.

In my view the three parties are already committed to a path of seeking clarification through the Courts. Having won in the High Court it would make no sense not to proceed to the Court of Appeal.

The key issue is then, what happens thereafter?

If we are successful in the Court of Appeal with the argument that the Stadium Empowering Act creates its own unique governance code that should be the end of the matter (assuming the IRD doesn't wish to pursue it to the Supreme Court!).

If we are unsuccessful on the argument that the Stadium Empowering Act creates it own unique governance code but successful again in respect of the

definition of a CCTO (i.e. a similar outcome to the High Court) I expect that the IRD will try and achieve a legislative amendment to make it harder for us to argue the Stadium Trust does not meet the definition of a CCTO.

If this occurs and we then accept that the Stadium Trust is a CCTO, two major impacts will arise:

- The two settlors (or at least WCC) will be required to charge interest on the two advances to the Stadium Trust, pursuant to clause 63 of the Local Government Act 2002 (unless an exemption is granted by the Governor-General on the recommendation of the Minister of Local Government that the Stadium Trust is exempted from being a CCO).

  As noted above if WCC is required to charge interest on its $15 million advance, it in effect means both Councils are required to charge interest, due to the absolute necessity to maintain fairness and equity in respect of the two settor advances.

  The charging of interest by the two settlors would undermine the reported financial position of the Trust and over time, the Trust would become technically insolvent i.e. it would report a negative equity position in its balance sheet due to recognition of accumulated losses arising from increased interest expenditure.

- The Stadium Trust will be considered by the IRD to be a taxable entity.

  As noted above, if interest is charged by the two settlors the Stadium Trust will make a significant financial deficit each year and will therefore build up significant tax losses. In other words, the Stadium Trust will ironically not actually ever pay tax, even though it will be deemed to be a taxable entity!

  However, the tax issues would move to the settlors as the two Councils would be taxed on the interest charged to the Stadium Trust. In the case of GWRC, we have a “back to back” loan from the ANZ National Bank which would enable us to deduct interest expenditure against interest income (for tax purposes), which would largely offset any assessable income. The extent of this offset will reduce over time as we begin to repay more principal and less interest in our quarterly repayments to the ANZ National Bank. I understand that Wellington City Council has no such back to back borrowing meaning all its interest income from the Stadium Trust would be taxable without a corresponding deduction for interest expenditure.

  Alternatively, the two Councils could choose not to continue to appoint the majority of Trustees (by amending the Trust Deed) and thereby the Stadium Trust would not meet the definition of a CCTO. Whenever faced with this option in the past the Council has rejected it on the basis that it is contrary to basic accountability principles for as long as the Council’s $25 million advance remains outstanding.

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7. Communications

Public interest in this matter is high. It will soon be a matter of public record that the Commissioner of Inland Revenue has appealed the High Court judgement.

However, the Council cannot act alone in this matter so until all three parties agree on a way forward no Council position should be publicly released.

8. Recommendations

That the Committee recommend that the Council:

(a) receive the report and note its contents.

(b) approve the continuation of legal proceedings, in conjunction with the Wellington City Council and Wellington Regional Stadium Trust, to the Court of Appeal, in order to seek clarity as to the legal status of the Stadium Trust.

(c) note that the legal action will be charged against the Chief Financial Officer's budget.

(d) note that the matter will need to be further considered by the Committee once the judgement of the Court of Appeal is known.

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Report prepared by:

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Attachment 1: Report 03.34

Attachment 2: Judgement of Justice Mackenzie dated 12 July 2004