

**Saving the Frontline
Income Generation: The Legal
Perspective
16 January 2015**

Presenter:

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Coverage

- Context
- Trading and Charging: What Powers?
- Charging for Services: What are the limits?
- Do you need a trading company? Busting the legal myths
- What are the essential pieces of legislation

Fact or Urban Myth?

True or False?

- There are no explicit powers for local authorities to trade
- If you want to trade then you must set up a company
- You can only recover costs not make a profit
- Local authorities are unable to sub-contract to the private sector

Context

- Coalition aims to deal with the deficit (funding reductions) & re-balance the economy
- Supportive of social enterprise; mutuals; alternative delivery vehicles; trading companies
- Lower Public sector employment Private 25.3m; Public 5.4m; LA 2.3m (1.7m FTE) down 590k since 2007 (410k FTE)
- LG still has £230BN capital assets; spends £20BN capital pa; with £22BN invested by LGPS; & spends £160BN revenue pa

Context: Being Commercial

- Using charging and trading to:
 - drive behaviour change
 - Influence demand for services
- Market/political/environmental factors
 - Maturity of market; displacement of jobs; community benefit?
 - Assess and address risks
- Powers follow purposes
 - Exercise powers properly, in right circumstances

Navigate the legal framework

Powers v Duties

The key types of powers

- Specific/explicit
- General
- Implied
- Incidental

Charging v Trading

Timeline: Pre - LGA 2003; 2003; Localism Act 2011

Find the relevant power and exercise properly with relevant audit trail

Powers: Local Authorities (Goods and Services) Act 1970

- Power to provide any 'public body' with:
 - Supply of goods or materials
 - Provision of any administrative, professional or technical service
 - Use of vehicle, plant/apparatus & appropriate staff
 - Works of maintenance
- Express charging power, but must be public body
- Not limited to spare capacity – YPO case
- Can make a profit – YPO case
- Separate account

Charging and Trading Powers

- Section 45 Environmental Protection Act 1990 (commercial waste)
- Local Government (Miscellaneous Provisions) Act 1976:- Section 11 (Renewables); Section 19 (Leisure); Section 38 (surplus computer capacity)
- Section 145 Local Government Act 1972 (entertainments)
- Section 150 Local Government and Housing Act 1989
- Section 45 Road Traffic Act 1988 (MoT)
- Section 139 LGA 1972 Acceptance of gifts and incidental works

LG(MP)A 1976: Section 11 (Renewables)

Sell heat; and under Regulations electricity produced from:

- (a) wind;
- (b) solar;
- (c) aerothermal;
- (d) geothermal;
- (e) hydrothermal and ocean energy;
- (f) hydropower;
- (g) biomass;
- (h) landfill gas;
- (i) sewage treatment plant gas; and
- (j) biogases.



Charging and Trading Powers

- Powers to Invest s12 Local Government Act 2003
- Staff secondment s113 Local Government Act 1972
- Land: Buy & sell including Local Government Act 1972; Town & Country Planning Act 1990; & Housing Act 1985
- Local Authorities (Land) Act 1963 (development)
- Section 97 Building Act 1984 (works)
- Section 32 Local Government (Miscellaneous Provisions) Act 1976
- Civic Restaurants Act 1947

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Charging for discretionary services

Section 93 Local Government Act 2003

- “A Best Value authority may charge a person for providing a service” if:
 - The authority is authorised, but not required by an enactment to provide the service;
 - S/He has agreed to its provision
- Section 93(6) must have regard to guidance
General Power for Best Value Authorities to Charge for Discretionary Services

Calculating the Charges

- Limitation to cost recovery in s93, but flexibility
- Definition of “each kind of service”
- Time period for calculation “taking one year with another”
 - Corporate and Democratic Core included & other overheads
- Charging discretion
 - Differential charging

Commercial trading through a company

Section 95 Local Government Act 2003: doing for a “**commercial purpose**” ... any of their ordinary functions

- Not where “required” to do something
- Not where existing commercial activity
- Must be through a company (unlimited, limited by shares or guarantee) or society under the Co-operative & Community Benefit Societies Act 2014 or Industrial and Provident Societies Act (Northern Ireland) 1969

Trading Guidance

Developing a Business Case

Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009; (Wales) Order 2006

- Business Case must contain:
 - Objectives of the business
 - Investment and other resources needed
 - Risks and how significant these are
 - Expected financial results and other outcomes expected to achieve
- No subsidy – recover staff and other costs etc.
- Members approve?

General Power of Competence

- Concerns after LAML judgment: [2009] All ER (D) 109 (Jun) and [2008] EWHC 692 (Admin)
- Local authority has “**power to do anything that individuals generally may do**” including things “unlike anything” that public bodies do
- Something extra – run a car dealership? Manufacture clothes? Set up a tourist retreat in the Amazon Rain Forest? Open a town centre plant shop? Make widgets in China? Set up a medical practice?

General Power of Competence

- Power may be exercised in any way whatever:
 - Anywhere in United Kingdom or abroad
 - For a commercial purpose or otherwise, for a charge or without charge
 - For the benefit of the authority and its area or persons resident/present or otherwise
- Not limited by powers that overlap... but

Boundaries and Limits on GPOC

- Restrictions and limitations on existing/new powers
- Power to charge (s3) may not be used if: under a duty; for a commercial purpose; and power to charge elsewhere (ignoring s93 Local Government Act 2003) BUT
 - limited to cost recovery
 - each kind of service
- Power to trade for a commercial purpose (s4) may only be exercised through a company/society under Co-operative & Community Benefit Societies Act 2014 or Industrial and Provident Societies Act (Northern Ireland) 1969

Boundaries and Limits

- No wider powers to delegate functions
- Secretary of State may amend, repeal or revoke legislation which restricts the exercise of the general power
- Secretary of State may constrain by regulations
- Still retain ultra vires rule ie have to exercise powers properly

Tricky Charging/Trading Areas

- Licensing eg door supervisors/taxis etc
- Regulatory Services - Provision of Services Regulations 2009
- Public Health functions – distinguish individuals and corporate arrangements
- Regeneration – is it trading for commercial purposes?

Interesting Cases

- Hazell v LBHF
- Manchester City Council v King
- Barnet CPZ charging
- Leeds & District Allotment Gardeners Federation 2014
- R (Hemming & others) v Westminster City Council 2013
- R (Western Riverside Waste Authority) v Wandsworth LBC
- Davis v ICO and Health and Social Care Information Centre January 2013

Procurement and State Aid

- Teckal Tests – ‘in-house’:
 - Control
 - Greater part of activities for parent(s)
- Procurement by the Teckal body – as if parent
- Trading company – commercial – not bound
- Competition Issues
 - “Public Bodies and Competition Law” OFT Guide December 2011
 - State Aid (Art 87)

Important to distinguish “social” and “commercial” purposes

Other key issues for companies

- Prudential accounting and balance sheet treatment
- Tax/VAT (transactions between the LA and the Company – how are they treated?)
- Staff and assets (& valuation)
- Control and influence: flexibility through constitution & representation i.e. Shareholders & Board of Directors:
 - grants,
 - leases and
 - Contracts
- Effective accountability & responsibility avoiding conflicts of interest

Do you need a Trading Company?

- Motives
 - Private sector client opportunity or mixed?
- Current level of business?
 - LA v Public bodies v private sector
- Significant investment required?
- Build incrementally through goods and services, staff, charging etc wherever possible
- Is there likely to be a tipping point?

Conclusions

- Explore all avenues and fit powers with purposes
- General Power of Competence is **additional** to Local Government Act 2003 & **additional** to wide ranging existing powers (e.g. Goods and Services Act)
- Incremental approach to building a business
- Exercise powers properly & ensure effective audit trail
- Any stakeholders to bring on board?
- Income Generation Strategy?
- Develop a clear process with checks and balances
 - Authority, responsibility and scrutiny

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