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Inside this issue

Providing pragmatic legal advice for councils

When you consider the range of services and regulatory functions provided by local government in the 21st century, it isn't surprising that councils are constantly grappling with a broad spectrum of legal issues.

At Bartier Perry, we are currently celebrating our 75th anniversary. Over the past seven-plus decades, we've built a reputation as a law firm with a particular expertise in local government. Today, we focus on using that experience to assist councils not only to solve legal problems, but also to prevent them from emerging in the first place.

With this objective in mind, in this issue of *Council Connect,* we explore some topics that are of particular relevance to local government. Within each area examined, we identify where some of the common pitfalls lie and explain how you can avoid them.

We hope you find the articles both informative and useful. If you would like to discuss any of the topics covered, or any other legal issue you may be facing, please don't hesitate to get in touch.

David Creais
Chair
Bartier Perry Lawyers

‘Be prepared’: the Land and Environment Court makes changes to its practices and procedures

DENNIS LOETHER

If you work in local government and are involved in the management of litigation, you need to be aware that, at the end of March 2017, the Land and Environment Court (the Court) issued a number of new practice notes, along with a revised Conciliation Conference Policy (the policy).

In order not to find yourself red-faced in court, we suggest that you adopt the advice of Lord Baden-Powell, founding father of the Boy Scouts movement, and ‘be prepared’.

Why has the Court introduced these changes?

The Court introduced changes in response to criticisms that many matters were being conducted in an inefficient manner. Basically, it’s all about the Court ensuring that the old legal ideal – the just, quick and cheap resolution of matters – is more than empty rhetoric.

The recent changes not only formalise what happens in practice, but ensure that cases are run in a more streamlined fashion in the future.

For example, the Court wants both sides to be well prepared when they walk into a conciliation conference. More specifically, neither party will be permitted to arrive at the conciliation with a pile of documents that have not already been provided to the other party – a situation that can bring the litigation process to a grinding halt.

What types of cases are affected?

The new practice notes apply to the following types of cases:

- Class 1: Development appeals and residential development appeals
- Classes 1, 2 and 3: Miscellaneous appeals.

The revised policy applies to:

- Class 1: Environmental, planning and protection appeals
- Class 2: Tree disputes and miscellaneous appeals.

In addition, the policy outlines how conciliation conferences under sections 34 and 34AA of the *Land and Environment Court Act 1979* (NSW) are conducted. Finally, the policy has been updated so that it conforms with the new practice notes in relation to the prior submission of documents and adjournments.

What are the key changes the Court has made to its practices and procedures?

The Court has reduced delays previously associated with the introduction of expert evidence

Parties are now required not only to apply at a directions hearing to permit expert evidence to be used in a hearing, but to justify why it is necessary.

We believe that this makes great sense, because it brings the Court's practice into conformity with the *Uniform Civil Procedure Rules 2005* (NSW) and other superior courts of record. In addition, it helps avoid situations where expert evidence is adduced but, in the circumstances, is not essential to the proceedings.

> The recent changes not only formalise what happens in practice, but ensure that cases are run in a more streamlined fashion in future.

The Court has reduced delays previously associated with the running of conciliation conferences

In the past, conciliation conferences were quite often treated like workshops for redesigning development proposals. The process was time consuming and even chaotic.

The Court has implemented a number of changes to streamline the conciliation process, enabling it to flow more smoothly.

First, it specifies whether matters (in the case of development appeals and miscellaneous appeals) will proceed to a conciliation conference or directly to a hearing.

Second, it now requires that an applicant seeking to rely on amended plans/additional information at a conciliation conference provides such documentation to the respondent consent authority at least 14 days prior to the conference.

Third, the Court now requires that a respondent consent authority provides a response to amended plans/additional information to the applicant at least seven days prior to the conciliation conference. While this may appear to be an additional burden, it means that the applicant will know your position by the date of the conference, which should help to ensure that the process moves forward more quickly.

Although this will involve some additional work for councils, it means that you will have sufficient time to consider the amendments proposed by the applicant and to prepare your response ahead of the conciliation conference.

Fourth, in cases where an in-principle agreement has been reached by the parties at conciliation conferences, the Court will allow only a three-week adjournment so that documentation (such as amended plans or conditions) can be prepared to give effect to the agreement.

From recent experience, this has led to applicants preparing detailed amended plans that are capable of resolving matters being prepared prior to conciliation conferences knowing that the Court won't grant any

adjournment unless an in principle agreement is reached, and further, given only three weeks will be given in which to finalise an agreement after the conciliation conference.

The Court ensures that the timetable it sets out is more likely to be followed

The Court has now set out the procedure to be followed where there has been a failure to comply with a direction of the Court (such as delaying the timetable).

In cases where some slippage to the Court's timetable is inevitable, the practice notes call on the party causing the slippage to address the slippage. For too long now slippages in the Court's timetable have not necessitated action from the parties in seeking from the Court additional time.

The Court ensures that parties are more aware of their specific responsibilities

The Court now requires that information sheets be provided at first directions hearings so that the parties are aware of the process and of their responsibilities. This is not actually a new initiative, but one that has not been previously enforced.

Parties are also required to identify the names of their experts, areas of expertise and list the contentions those experts will be addressing. If a party wishes to change experts mid-stream, they now need to seek leave of the Court to do so. This assists in preventing the scenario where a party retains an alternative expert during the Court process simply to support their position.

These changes should make your life easier

We believe that the key changes incorporated in the new practice notes and the policy are, on the whole, positive ones that should be welcomed by councils.

While the changes may lead to more work, and will require close attention to the details and deadlines in order to avoid potential pitfalls, they make the process more streamlined and efficient and, as such, should make life easier for councils involved in litigation. Most importantly, they may help reduce the overall costs of running litigation.

Would you like to find out more?

If you would like assistance in running your matter in the Land and Environment Court, please contact Dennis Loether on +61 2 8281 7925.

How to manage a compulsory acquisition: avoiding the common pitfalls

PETER BARAKATE

If you are involved in a compulsory acquisition, you will be aware that councils' powers to acquire land in New South Wales are broad in nature and derive from both the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

In addition, there are two instruments that govern the acquisition process:

- *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (the Act)
- *Office of Local Government's Guidelines for the Compulsory Acquisition of Land by Councils* (the Guidelines).

The reality is that compulsory acquisition is a fiddly process that involves jumping through a significant number of hoops. As a result, it will help if you are familiar with the Guidelines, which can be downloaded from the Office of Local Government website: **www.olg.nsw.gov.au.**

But before you bury yourself in the details of the legislation and Guidelines, here is a list of the key things to be aware of in a compulsory acquisition. If you want to ensure that the compulsory acquisition process runs as smoothly as possible, you should keep a particularly watchful eye on these steps in the process.

> The reality is that compulsory acquisition is a fiddly process that involves jumping through a significant number of hoops.

1. Get a council resolution

The starting point for any council-initiated acquisition is to get a council resolution for the acquisition at a council meeting. Be aware that the power to acquire by compulsory process cannot be delegated to staff or individual councillors. You must also provide evidence of the resolution to the Minister for Local Government.

2. Ensure you obtain the required approvals

Before undertaking the acquisition, you need to obtain prior approval from both the Minister and the Governor.

When seeking approval from the Minister to issue a proposed acquisition notice (PAN), you also need to apply for the Governor's approval to publish the acquisition notice in the *NSW Government Gazette* (the Gazette). Don't issue the PAN before the Governor's approval is obtained.

3. Make sure you issue a PAN to *all* the appropriate people or entities

A PAN should be issued to all owners of the land who:

- Have a registered interest in the land
- Are in lawful occupation of the land
- Have, to the actual knowledge of the council, an interest in the land.

This means that you must issue a PAN to:

- The landowner/s
- Any lessee/s
- Any mortgagees
- A purchaser under an exchanged contract
- Other benefited interest holders (such as holders of easements)
- A licensee who is in lawful occupation of the land.

When dealing with landowners, always check whether they have entered into any licences or contracts for the sale of the land. If so, you need to issue a PAN to those licensees or purchasers.

4. Diarise the expiry date of the PAN

A PAN needs to be issued at least 90 days before the land is compulsorily acquired.

A shorter period of notice may be given only if:

- The council and the landowner/s agree to it in writing; or
- The Minister is satisfied that the urgency of the matter or other circumstances of the case make it impracticable to give a longer period of notice and consequently approves of the shorter period.

5. Be aware of the risks associated with non-compliance up until the acquisition takes place

The Act will operate to cure any non-compliance with the statutory process once the acquisition takes place. However, up until that time, the acquisition will be at risk. The risks associated with non-compliance include delays arising from the need to issue PANs to additional parties, and/or interested parties making an unanticipated claim for compensation.

6. Ensure you acquire the land as soon as practicable

You must either acquire the land by compulsory process or agreement, or withdraw the PAN as soon as practicable after the expiration of the notice period set out in the PAN.

7. Be aware of those situations where a PAN will be withdrawn automatically

A PAN will be taken to have been withdrawn automatically if you have not acquired the land or withdrawn the PAN within 120 days of its date of issue (or a longer period to which you and the landowner have agreed in writing).

8. Understand that there are consequences when a PAN is withdrawn

If the PAN has been withdrawn, or is taken to have been withdrawn, you cannot issue a further PAN in respect of the land within 12 months of the date of withdrawal unless the Minister is satisfied that, in the circumstances of the case, the issuing of a further notice within the 12-month period is justified.

9. Be aware of other time pressures

Be aware that it can prove difficult to obtain the Governor's approval to publish the acquisition notice in the *Gazette* (and, consequently, to acquire the land) within the 30-day period between the expiry of the 90-day PAN notice period and the 120-day time limit by which the compulsory acquisition must be completed before it is deemed withdrawn.

Also note that if council has not obtained the Governor's approval and provided it to the *Gazette* along with the acquisition notice, the *Gazette* will not publish the acquisition notice.

10. Be clear as to the exact date of acquisition of the land

You will be deemed to have acquired the land on the date when the acquisition notice is published in the *Gazette*.

At that point, by force of the Act, the land described in the notice will be:

- Vested in council; and
- Freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts, in, over or in connection with the land.

11. Be clear as to the date by which compensation is payable to the former owner

You must issue a compensation notice to the former owners (which will include the amount of compensation determined by the Valuer General) within 45 days after the acquisition notice is published in the *Gazette*.

If the former owners agree with the determination, you are required to pay the amount within 28 days of receipt of a deed of release and indemnity from the former owners. Be aware that interest is payable on the amount from the date the land is acquired until the payment is made.

12. Understand that the former owner has the right to challenge the amount of compensation

The former owners have the right to challenge the amount of compensation.

However, they must initiate court proceedings with the Land and Environment Court within 90 days of receiving the compensation notice. If the former owners fail to initiate court proceedings within this time, it will be assumed that they have accepted the amount of compensation as determined by the Valuer General.

Remember: the devil is in the detail

Like many statutory processes, the compulsory acquisition of land is a logical but extremely technical process. The devil is in the detail. As a result, you need to ensure that you don't miss any of the key steps and remain aware of the possible pitfalls.

Would you like to find out more?

If you would like assistance with a compulsory acquisition matter from a team of experienced lawyers who can ensure that the process will run as smoothly as possible, please contact Peter Barakate on +61 2 8281 7970.

Getting tough on drugs and alcohol at work: it isn't as straightforward as you may think

JAMES MATTSON

Under the *Work Health and Safety Act 2011* (NSW), every employer, including councils, has a duty to eliminate risks to the health and safety of its employees.

As a result, you might think that employers have the right to take whatever steps they think are appropriate to ensure that their employees don't turn up for work while under the influence of drugs and/or alcohol.

Surprisingly, though, the legal position on this issue isn't always clear. We are still seeing industrial disputes and unfair dismissal claims where employees and unions are challenging employer actions in tackling the work-related risks of drugs and alcohol.

This is because there is tension between the basic principles that underpin the regulation of workplace health and safety and the notion of fairness.

The tension between managerial prerogative and the notion of fairness

Managerial prerogative is the unfettered freedom to do as a business thinks fit without any outside interference.

On the whole, industrial commissions recognise this freedom, but they insist that the balance should not tip towards imposing conditions that are unjust and unreasonable.

In *Australian Federated Union of Locomotive Enginemen v State Rail Authority (NSW)* (1984) 295 CAR 188, the principle was clearly stated: subject to legislative restraints on an employer, a commission will 'not [lightly] interfere with the right of an employer to manage [its own] business unless [it] is seeking from the employees something which is unjust or unreasonable'. In applying this principle, the commissions seek to achieve industrial fairness between the parties.

In cases dealing with unfair dismissals, industrial commissions are also obliged to consider the notion of fairness, which allows mitigating and personal circumstances to be used in deciding that a valid dismissal is actually harsh or unfair.

Let's take a look at some recent cases in this area in order to establish how employers can usefully approach this issue.

Can an employer take a one-size-fits-all approach to drugs and alcohol in the workplace?

In *Endeavour Energy v Communications, Electric, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others* [2012] FWA 1809, the employer proposed the uniform imposition of a blood alcohol concentration (BAC) level of 0.02 for all staff.

The union argued that such a uniform standard was unjust and unreasonable. It proposed instead that all employees (which included office staff and receptionists) should be subjected to a BAC level of 0.05 (subject only

to the legislative restrictions that apply to P plate drivers (0.00) and drivers of heavy vehicles (0.02)).

The tribunal agreed with the union and stated that it thought it was 'unreasonable to impose an across the board level of 0.02 per cent BAC on all employees … merely because some employees are engaged in high-risk activities where such a level is justified'. It concluded: 'There is simply no need for a "one size fits all" approach.'

Obviously, the tribunal's decision is an alarming one from the point of view of an employer.

After all, there are plenty of studies on the detrimental impact of alcohol on performance when the BAC is above 0.02. It would also make sense, due to the regulatory pressure on employers to create a strong safety culture and to eliminate risk, for employers to be given the appropriate latitude to determine their own workplace culture and rules, especially when it comes to drugs and alcohol.

Any employer, including councils, will be pleased to hear that this attitude may now be out of date and that there is support for the view that employers have the right to impose a uniform BAC for all employees.

When similar arguments to those in Endeavour Energy were advanced recently by a union against a NSW local council wanting to implement a uniform 0.02 BAC level for all staff, the Commissioner initially hearing the dispute notification told the union sternly:

> *I am surprised to find that an organisation, which no doubt is very strenuous in defending the safety and health of people in the workplace, as you do, and you should do, would object to a more strenuous level of safety being imposed upon employees in a given workplace.*
>
> *I will tell you, I, for my part, congratulate council on taking a step in the right direction in respect of an important health and safety issue. I can't see anything wrong with this at all. Indeed, I think, for my part, and this is just an observation, that an employer would be entitled to insist on 0.00 in the workplace without causing any difficulty in an industrial sense.*

Can an employer dismiss an employee who played no role in causing an accident but was under the influence of drugs?

In *Albert v Alice Springs Town Council* [2017] FWC 73, the facts were as follows:

- At 7.00 am on a Wednesday, the employee started his shift at Alice Springs Town Council.
- At 7.15 am, while driving a council truck, the employee was involved in an accident when the other driver ignored a give way sign and collided with the council truck.
- The police attended the accident.
- The council employee was tested for alcohol and returned a negative reading. The employee appeared unimpaired and the police did not do a drug test.
- The Council did do a drug test, and the employee returned a result 73 times above the Council's cut-off level.
- The employee said that he had smoked cannabis on the previous Sunday evening and thought it would by now be out of his system.
- The Council dismissed the employee six days later.

When the Commission looked at the case, it noted that there were defects in the process effecting the dismissal but focused on the substance of the matter. 'At the time of the motor vehicle accident Mr Albert was obviously

driving a significant sized truck on a public road. That he was not at fault in the accident is not relevant; instead what is relevant is that he was driving while under the influence of a drug … I am satisfied that the … Council was entitled to consider the circumstances as an extremely serious breach', the Commission said. It concluded: 'The seriousness of his [the employee's] actions outweigh the procedural faults of the Town Council.' Had the procedural faults been remedied, it said, they would have been unlikely to affect or alter the ultimate outcome.

Can an employer dismiss an employee who played no role in causing an accident but was under the influence a drug taken for medicinal purposes?

In *Shane Clayton v Coles Group Supply Chain Pty Ltd* [2016] FWC 4724, the facts were as follows:

- Coles had a 'zero tolerance' drug and alcohol policy.
- The employee consumed cannabis before attending work.
- The employee was involved in a forklift incident that was not his fault.
- After testing positively for drugs, the employee said the drug use was for medicinal purposes.

> Surprisingly … we are still seeing industrial disputes and unfair dismissal claims where employees and unions are challenging employer actions in tackling the work-related risks of drugs and alcohol.

It is worth noting that, in *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249, a case that involved a ferry captain who had attended work while affected by drugs in circumstances where there was a zero tolerance policy, the Full Bench of the Fair Work Commission stated:

> *As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor … It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have the discussion.*

In the Coles case, the Commission said that Coles could impose a 'zero tolerance' policy, especially when it allowed self-reporting and provided support for workers. In its view, there was no excuse for the employee to attend work and to operate a forklift when impaired by drugs.

As an employer, you should act responsibly

As an employer, don't let the idiosyncrasies of our industrial system deter you from taking a tough stance on the risks of drugs and alcohol in the workplace.

It is beter to be sure, than sorry. Preserving workplace safety should be your main priority and should guide any policy you decide to adopt.

Ensure that you educate your employees, and that there is a supportive framework in place to deal with any problems they are facing. This will also mean that, if necessary, you can deal sternly with any breaches of policy.

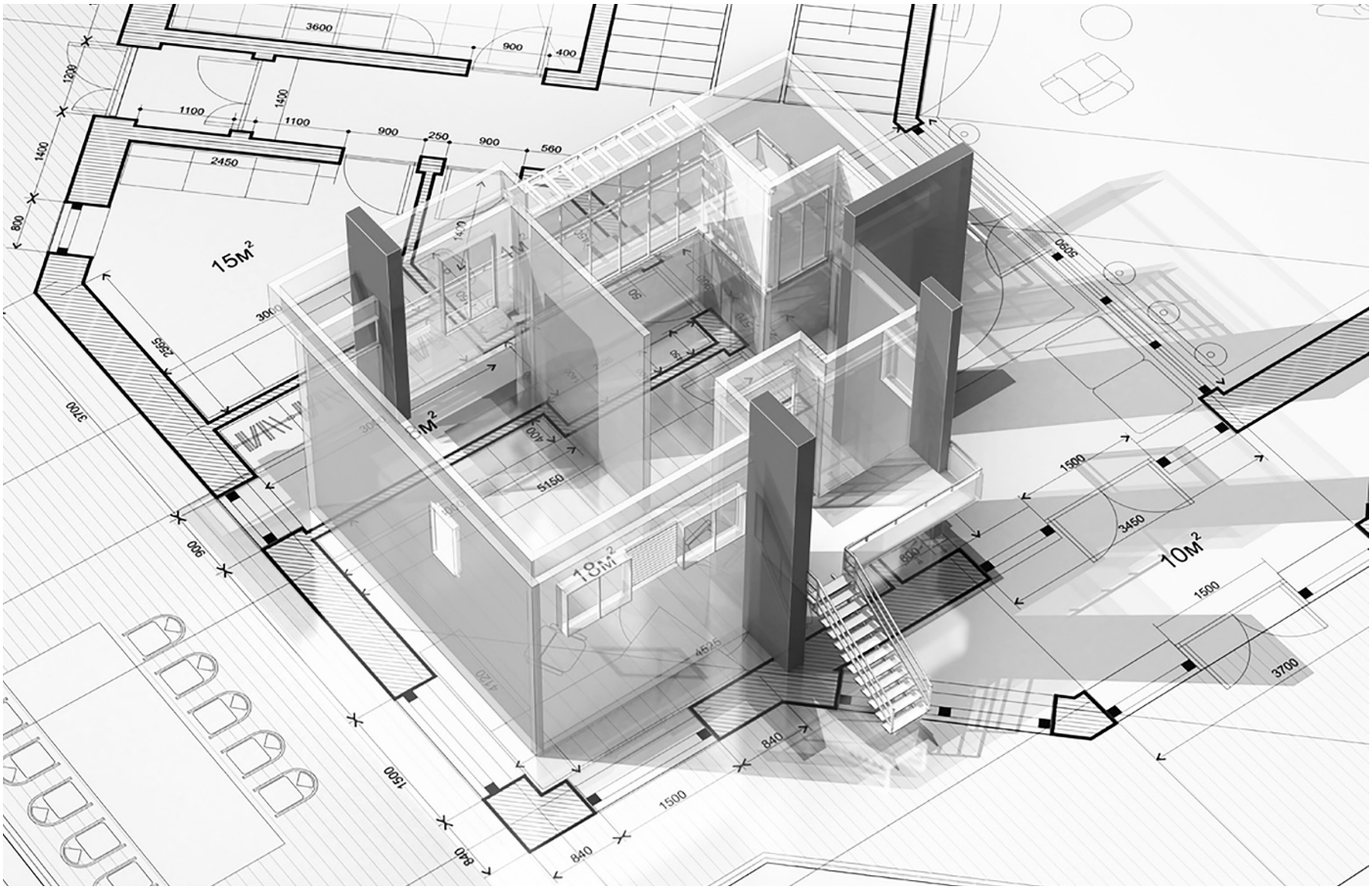
It is also worth noting that the most recent decisions support employers who have taken action to provide a safe workplace and to eliminate any risk.

Would you like to find out more?

If you would like advice on how to deal with drug and alcohol issues in your workplace, or on any other employment law issue, please contact James Mattson on +61 8281 7894.

Security of payment adjudication: think twice before trying to trump traditional service with technology

DAVID CREAIS



If you work for a council and you're responsible for managing construction contracts, you will be familiar with the regime for claiming progress payments under the *Building and Construction Industry Security Payment Act 1989* (the SOP Act).

One of the main features of the process is the very strict time limits for service of:

- Payment claims
- Payment schedules
- Adjudication applications
- Adjudication responses.

The problems caused by these strict time limits are multiplied in cases where a large amount of material, often several hundred pages, needs to be served in support of these documents.

Is digital technology a possible solution to the paper problem?

One possible solution is to be technologically savvy and use modern methods of data storage and communication, such as electronic file compression, email or uploading of data to the 'cloud'.
Sadly, the problem with using modern technology is that it must fit within traditional concepts of delivery and service of documents in order to ensure that you are complying with the SOP Act.

For instance, if documents are saved to a USB stick, are they served when the USB stick is delivered to the intended recipient, or only when the data on the USB stick is actually accessed?

Before you decide to opt for the more modern approach, let's consider the relevant case law.

Case in point: *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd t/a Total Concept Group* [2017] NSWSC 194

The facts

Parkview Constructions Pty Ltd (Parkview) had engaged Total Concept Group (Total) to design, supply and install windows and doors at Woolooware Bay Town Centre.

On 11 October 2016, Total served on Parkview a payment claim for $668,117.24.

On 25 October 2016, Parkview responded with a payment schedule stating that it did not intend to pay any amount in respect of the payment claim.

On 8 November 2016, Total lodged an adjudication application with an authorised nominating authority. The adjudication application ran to four full lever arch folders, totalling over 1,400 pages.

To avoid having to send so many hard copy documents, Total saved a copy of the adjudication application on a USB stick, which it then sent in a prepaid, Express Post envelope to Parkview.

Parkview received the USB stick in its post office box on 9 November 2016.

On 10 November 2016, the USB stick was given to the company secretary of Parkview, who connected the USB stick to her computer and opened it.

On the same day, the authorised nominating authority referred the adjudication application to an adjudicator.

On 17 November 2016, Parkview served its adjudication response.

The deadlines for service

Under the SOP Act, Parkview could lodge an adjudication response within five business days after receiving a copy of the adjudication application.

This meant that if Parkview received a copy of the adjudication application when the USB stick arrived in the post on 9 November, it had until 16 November 2016 to serve its adjudication response. If it first received the adjudication application when it opened the USB stick on 10 November, it had until 17 November 2016 to serve its adjudication response.

The key issue: had Parkview missed the deadline?

Total argued that Parkview's adjudication response was out of time and, as a result, must be disregarded because Parkview had received the adjudication application on 9 November 2016 but had not served its response until 17 November. This meant that Parkview had failed to comply with the five business days requirement.

Was this correct?

The decision at first instance

At first instance, the adjudicator agreed with Total and disregarded the adjudication response. He determined that Parkview should pay Total $539,634.24.

Parkview appeals to the Supreme Court

Parkview applied to the Supreme Court to have the adjudication determination quashed. There were a number of grounds, one of them being that the adjudicator had incorrectly ruled that its adjudication response was out of time.

The Court identified a 'litany of errors' in the manner of service of the adjudication application on the authorised nominating authority, the adjudicator and Parkview. In relation to the USB service issue, it concluded that the delivery alone of a USB stick is not service of a copy of an adjudication application.

This is because service is not effected until the data on the USB stick is actually accessed.

Why did the Supreme Court decide that delivery alone of a USB stick does not constitute service of a copy of an adjudication application?

The Court decided that delivery alone of a USB stick does not constitute service, for the following reasons:

- The SOP Act requires an adjudication application to be in writing and a copy of it to be served on the respondent.
- It follows that what is served on the respondent must itself be in writing.
- The *Interpretation Act 1987* specifies that 'writing' includes printing, typewriting, and any other mode of representing or reproducing words in visible form.
- A document will be served if the efforts of the person who is required to serve it have resulted in the person to be served becoming aware of the contents of the document.
- When a USB stick is delivered, 'one sees only a small piece of plastic, perhaps with some circuitry on it'.
- In order to reproduce what is stored on the USB stick in visible form, the recipient must take the step of accessing, opening and viewing the files.
- In this way, a USB stick is the same as an email transmission, or a document uploaded to the 'cloud', which has been held not to have been served until it has been accessed.
- To view mere delivery of a USB stick as service of a document stored on it in writing is as untenable as it would be to regard mere delivery of a compact disc, cassette or vinyl record as itself constituting aural transmission of what is recorded on it.

> Sadly, the problem with using modern technology is that it must fit within traditional concepts of delivery and service of documents in order to ensure that you are complying with the SOP Act.

What did the decision mean for Parkview?

The decision was a crucial one for Parkview, because it meant that its adjudication response was served in time and that the adjudicator had acted contrary to the SOP Act by disregarding it.

The original decision on the adjudication application in favour of Total was quashed.

What does the decision mean for you?

Although we live in a digital age, and it is tempting to replace the service of cumbersome hard copies with more convenient electronic formats, it may not be a wise step.

Currently, the basic principle is that service of documents stored electronically is not effective until the documents are accessed.

This principle is as applicable to the service of payment schedules and adjudication responses as it is to adjudication applications.

To be certain of the date of service, you need to serve hard copies. You can't rely on a contractor or an adjudicator to access electronically stored documents immediately. In addition, it may be difficult to prove the date of access.

With the way society is embracing digital technology, the situation may change in the future. For the moment, however, you would be better advised to stick to the old-fashioned modes of service.

Would you like to find out more?

If you would like assistance from a team of lawyers with a deep understanding of the principles and processes associated with security of payment adjudication, please contact David Creais on +61 2 8281 7823.

Should councils risk using contracts that may be classified as 'unfair'?

MICHAEL COSSETTO

What is the 'unfair contracts' regime? Why do you need to know about it?

The 'unfair contracts' regime sits under the Australian Consumer Law (ACL). It was introduced in 2010 to cover business-to-consumer transactions where the buyer is an individual.

In November 2016, the regime was extended so that it now applies to business-to-business transactions involving 'small businesses'.

You may be wondering why this would be relevant to councils.

After all, councils are established for the purpose of conducting local government, not for the purpose of 'carrying on a business'.

The reality is that, as councils increasingly involve themselves in commercial enterprises, it is important to be aware of the ACL, including the 'unfair contracts' regime and how it may apply to the various services council provides.

How does the ACL apply to local government?

The ACL applies to 'persons carrying on a business' anywhere in Australia, including New South Wales. The question of whether a government body is carrying on a business has been the subject of several cases over the years, but the following principles are generally accepted:

> Most functions of government that are purely governmental or regulatory, carried out in the interests

of the community, such as the performance of statutory functions, do not constitute the carrying on of a business.
- Nevertheless, a government body, like a council, can be 'carrying on a business' if the relevant activities:
  - >> are undertaken in a commercial enterprise or as a going concern
  - >> take place in a business context and bear a business character
  - >> involve a succession of acts with system and regularity, rather than a solitary transaction
  - >> involve some element of commerce or trade that a private citizen or trader might undertake.

Some common services provided by local councils which fit these criteria include:

- The hire of community facilities and venues
- The management and operation of aquatic and sports centres
- The conduct of school holiday programs
- The provision of family day care
- Community bus hire.

As a result, as a council, you should be wary of your obligations under the ACL, including the unfair contracts regime.

How to identify an 'unfair contract'

The 'unfair contracts' regime applies to both standard form consumer contracts and standard form small business contracts.

> The reality is that, as councils increasingly involve themselves in commercial enterprises, it is important to be aware of the ACL, including the "unfair contracts" regime and how it may apply to the various services council provides.

What is a consumer contract?

A consumer contract includes a contract for the supply of goods and services to an individual person for personal use or consumption.

What is a small business contract?

A small business contract is essentially the same as a consumer contract, but it involves the supply of goods or services to a small business.

A small business is a business that has fewer than 20 employees.

When is a contract classified as a standard form contract?

A contract is presumed to be a standard form contract unless the supplier proves otherwise.

Interestingly, the term 'standard form' is not defined, but refers to those types of contracts that are generally provided on a 'take it or leave it' basis, or with little scope for negotiation.

When will the 'unfair contract' regime apply to a small business contract?

The 'unfair contract' regime only applies to small business contracts where the upfront price payable under the contract does not exceed $300,000, or $1,000,000 if the contract duration is longer than 12 months.

When will a standard form consumer contract or standard form business contract be classified as unfair?

The court has the power to declare a term in a standard form consumer contract or a standard form business contract as void on the basis that it is unfair.

For the term to be declared unfair, it must satisfy the following tests:

- It would cause a significant imbalance in the parties' rights and obligations under the standard form contract.
- It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- It would cause detriment to a party to the contract if the term were applied or relied on.

Examples of terms likely to attract the attention of the regulator include those that:

- Allow one party to vary the contract unilaterally
- Allow one party to assign, terminate or avoid performance of the contract unilaterally without allowing the other party to terminate the agreement
- Impose default fees that are excessive and likely to exceed the amount required.

The consequences of non-compliance

The consequences of failing to comply with the 'unfair contracts' regime can be significant.

A term that is identified as 'unfair' will be declared void and, if the contract is not capable of operating without that term, may result in the entire contract being unenforceable.

This kind of situation can be a disaster, especially if it means that the council is unable to recover loss or damage.

The trouble with the local government approach to contracts

In our experience, some councils find themselves in difficulty because they rely on the broadest possible drafting in their contracts, rather than focusing on the key risks they wish to exclude.

The result is that councils impose harsh and inflexible agreements on both individuals and small businesses that don't comply with the legislation.

Steps you can take to ensure that council's standard form contracts are compliant

If you haven't done so already, we suggest that you undertake the following steps to ensure that any standard form contracts are identified and amended to be compliant.

After all, no one wants the regulator to come knocking.

Step 1: Determine whether the extended regime is likely to affect any of council's existing contracts

This involves the following:

- Identify those services that are undertaken in a commercial enterprise or that bear a business character. (See the list above, but you are likely to have others.)
- Identify the contracts for those business-like services that are at risk of being considered 'standard form' (such as contracts that adopt a 'one-size-fits-all' approach or that typically involve very little negotiation).
- Know the counterparty. This means checking whether the business-like service is being provided to an individual or a small business. (In the case of a small business, you will need to ask the counterparty how many employees it has, not only at the time of entry into the contract but also at each renewal.)
- Calculate the upfront price payable under each contract to identify those that are valued at less than $300,000 or less than $1,000,000 if the contract extends for more than 12 months. (Most contracts for business-like services provided by council will fit this criterion.)

Step 2: Identify any terms in affected contracts that may be at risk of non-compliance

In this case, you need to focus on identifying those contracts that cause a significant imbalance to the rights of the parties or that would cause detriment to the other party if you relied on them.

Step 3: Consider whether council may be able to justify imposing the identified terms on the counterparty

You would need to prove that the particular terms are required to protect the council''legitimate interest'.

Would you like to find out more?

Are you concerned that your contracts may not be complying with the 'unfair contracts' regime? If you would like assistance from a team of lawyers who can review your contracts, identify the compliance risks, and help you to become compliant, please contact Michael Cossetto on +61 2 8281 7892.

Taking a strategic and holistic approach to solving workplace disputes

MICK FRANCO

If you are involved with managing council employees, it is inevitable that you will sometimes run into people problems.

The kinds of issues that executives and managers working in local government commonly encounter include:

- Complaints from unhappy or disgruntled employees arising out of performance or management issues
- Disagreements over employment terms, conditions or job requirements
- Business unit restructure, resourcing and workload issues
- Interpersonal conflict.

When dealing with these kinds of problems, it is important not to view them too narrowly. For example, if you receive a complaint, be aware that what appears to be a human resources matter may also raise issues in the area of workers compensation and work health and safety (WHS).

This means that what is essentially one complaint can result in multiple claims by the employee in different forums within council. In other words, different branches of council may end up responding to the same issue while being unaware that other branches are also involved.

Let's take a look at a recent case that throws some light on this issue, as well as on the possible legal implications of failing to adopt a holistic or strategic approach in these kinds of matters.

Case in point: *Super IP Pty Limited v Mijatovic* [2016] NSWWCCPD 33

The facts

- From 2008 to 2012, the employee was hired as a quality assurance analyst to test software and analyse reports.
- The employee suffered psychological injury due to alleged bullying, harassment and discrimination at work. Her symptoms included anxiety, breathing difficulties, rapid heart rate and panic attacks.
- The employee collapsed at work and was treated by paramedics.
- On 6 March 2012, the employee left work on sick leave due to psychological injury.
- The employee did not return to work.
- On 27 March 2012, the employee submitted an initial workers compensation claim.
- On the same day, the employee made a complaint to the Australian Human Rights Commission (AHRC) alleging discrimination on the basis of sex, pregnancy, family responsibilities, disability and sexual harassment.
- The evidence established that the injury resulted from employer action in dealing with performance issues, termination of flexible working from home arrangements, refusal of a pay rise and variation of the worker's role.
- The discrimination complaint to the AHRC was settled on 12 September 2012 with an agreement that the employer would pay the employee $8,700 under a deed of release, which was paid and accepted.
- The insurer refused to pay the workers compensation claim.

Why did the insurer refuse to pay the workers compensation claim?

The insurer declined liability, for a number of reasons.

The insurer argued that the payment the employee received under the deed created to settle the discrimination claim was a payment of damages for the injury.

In support of its position, the insurer referred to section 151A of the *Workers Compensation Act 1987* (NSW), which states:

> *If a person recovers damages in respect of an injury from the employer liable to pay compensation under the Act then … the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid).*

The employee takes the claim to the Workers Compensation Commission

The employee appealed the decision of the insurer in the Workers Compensation Commission, arguing that the injury resulted from the bullying and harassment she encountered between 2011 and March 2012, as well as from her heavy workload.

The arbitrator ruled in favour of the employee. While he accepted that the worker had received damages, he concluded that the acceptance of the deed of release did not prevent recovery of compensation for the injury.

The employer and insurer appealed

The employer and the insurer appealed the decision of the arbitrator in the Workers Compensation Commission.

The President of the Workers Compensation Commission looked closely at the settlement deed that had resolved the discrimination complaint. It referred to the following:

- The psychological injury and the causative events
- A psychologist's report
- The personal injury claims
- The employer's denial of the claim
- The parties resolving all matters under the deed
- A commercial settlement in respect of the personal injury claim.

Under the deed, the employee agreed to release the employer from all claims, past and future, in respect of the circumstances set out in the recitals to the deed, including:

- The employment and its termination
- The flexible work decision
- The allegations in the deed and complaint
- The personal injury claim.

In addition, the deed purported to exempt workers compensation by excluding 'any claims made in accordance with the provisions of any applicable workers compensation legislation'.

Finally, the President overturned the decision of the arbitrator and held that:

- The psychological injury in the disputed workers compensation claims was the same as the injury covered by the deed.
- The fact that the employee lodged the discrimination complaint and the workers compensation claim on the same day, each alleging psychological injury, supported the view that they both covered the same injury.
- The payment under the deed was damages for the injury. (On this issue, the President noted that 'damages' is defined broadly in section 149 of the *Workers Compensation Act* to be 'any form of monetary compensation'.)

> '... what is essentially one complaint can result in multiple claims by the employee in different forums within council. In other words, different branches of council may end up responding to the same issue while being unaware that other branches are also involved.'

- The problem for the employee was her acceptance of the money, rather than the terms of the deed.
- The subjective intention of the parties to exclude workers compensation from the discrimination settlement did not matter.

What should you take away from this decision?

The decision shows that the management and resolution of employment claims can have an impact on workers compensation entitlements. As a result, it is important to be aware that settlements in the employment arena can have the effect of finalising workers compensation claims.

More specifically, what is essentially one complaint could result in multiple claims by the employee. As I have mentioned above, these claims could end up in different forums within a council. In turn, this could lead to different branches of the council (such as human resources, or the area that handles workers compensation claims) responding to the issue without knowing that other branches are also involved.

The advantages of taking a holistic and strategic approach to people problems

The most sensible way to avoid having these kinds of issues emerge in workplace disputes is to take practical steps to ensure that you manage people problems in a holistic and strategic manner.

First, implement procedures to ensure that:

- The human resources team always informs the area that handles workers compensation of the nature, status and resolution of any employment claims, especially where there is a simultaneous or an emerging workers compensation claim
- The area managing the workers compensation claim provides any relevant information concerning the management of a claim to the human resources team.

Second, ensure that all the relevant information relating to the employment claim and its resolution is provided to your workers compensation insurer.

Would you like to find out more?

If you are dealing with a workers compensation, a related employment or WHS matter and would like expert assistance, please contact Mick Franco on +61 2 8281 7822.

Would you like to know more?

Our dedicated team of Executive Lawyers has a wealth of knowledge and expertise from working with local government clients across NSW over a long time.

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About Bartier Perry

For the past 75 years, Bartier Perry has provided legal advice to local councils in New South Wales. During that time, we've acted for over 20 councils and have become highly regarded experts in the legal issues that affect local government.

Why do we have such a long-standing relationship with so many councils?

We always provide pragmatic legal advice that is also commercially astute. In addition, we are able to identify issues that have the potential to become problematic, and to resolve them before they can spiral out of control.

In short, we know and understand NSW councils – it's our focus.

If you would like to go on our mailing list to receive bulletins and invitations that are of interest, you can subscribe at **www.bartier.com.au/subscribe.**

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