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Council CONNECT

ISSUE 4

DECEMBER 2017

Inside this issue

Welcome to the December 2017 edition of Council Connect.

The rapidly changing economic and political climates in Australia continue to provide new and unique challenges for Local Government.

Equipped with an understanding of these challenges, we at Bartier Perry have assembled material on subjects for this edition that we believe will be relevant to your plans and operations over the next year or two.

Council Connect is our demonstration of our commitment to delivering value to Local Government by providing clarity around the legal issues with which you must deal.

Together with some of my colleagues, I have recently heard first hand from a large number of you at the Property Professionals Conference hosted by Shoalhaven City Council. The conversations we had reinforced for us that Local Government has new and evolving needs from its legal panels. By engaging with you at events like the Property Professionals Conference, and from getting feedback on publications like Council Connect, we are best placed to identify and service those needs.

Please don't hesitate if you have a concern about how the law may impact an activity of your council, or if you have a specific legal issue.
Pick up the phone and ask us for help - we are ready to assist on a wide range of topics.

David Creais
Chair
Bartier Perry Lawyers

Acquisition update – favouring the dispossessed landowner

DENNIS LOETHER

If your Council is involved in an acquisition, it is imperative you are aware of recent amendments to the *Land Acquisition (Just Terms Compensation) Amendment Act* 2016 (the Act).

These amendments not only have the effect of increasing the amount of compensation payable to dispossessed landowners, but they add further obligations in the acquisition process.

The amendments are designed to further assist dispossessed landowners while they are also aimed at making the acquisition process more transparent. With that in mind, following is a summary of the 6 key changes to the Act:

1. Changes to negotiation period

Under Section 10A of the Act, State authorities, before issuing a proposed compulsory acquisition notice, are now required to make an attempt for at least 6 months to acquire the land by agreement.

This is consistent with the overall objective of encouraging resolution of acquisitions by agreement. You may only shorten the 6 month period in exceptional circumstances. You will need the approval of both the responsible Minister and the concurrent approval of the Minister responsible for the Act.

The obligation to attempt to acquire the land by agreement for at least 6 months does not apply to:

- acquisition of crown land; or
- an acquisition of easements and rights to use land (or a tunnel) under the surface; or
- an acquisition from an owner who cannot be located or who declines to negotiate.

The owner of the land and the State authority can of course agree to a shorter, or longer, period of negotiation.

It is also important to note that following the giving of a proposed compulsory acquisition notice, negotiations may continue during the standard minimum period of 90 days before the land can be compulsorily acquired.

2. Increased compensation

Disadvantage from relocation

The amount of compensation payable for non-financial disadvantage resulting from relocation has increased pursuant to Section 60(2) of the Act.

The definition of solatium has been replaced with the term disadvantage resulting from relocation. The maximum amount payable, arising from the necessity of a person to relocate his or her principal place of residence as a result of the acquisition, has increased from $27,235 to $75,000.

Of course this head of compensation is in addition to other matters that include the market value of the land being acquired, and legal and valuation costs.

The amount will be increased on 1 July each year in accordance with increases in the Consumer Price Index. The increased compensation payment will also apply retrospectively to former residential landowners and tenants whose acquisitions were settled on or after 26 February 2014.

Market value

Fundamentally the definition of market value has not changed as contained in section 56(1) of the Act.

There is however a new subsection, 56(3) which allows for the market value of the land to be adjusted where the land has a special value for a particular purpose for the landowner.

Accordingly:

- if the land is for a particular purpose; and
- there is no general market for land use for that purpose; and
- the owner genuinely proposes to continue after the acquisition to use other land for that purpose, then

for the purpose of paying compensation, the market value of the land is taken to be the reasonable cost to the owner of equivalent reinstatement in some other location.

That cost is to be reduced by any costs for which compensation is payable for loss attributable to disturbance and by any likely improvement in the owner's position because of the relocation.

3. Hardship review

Introduction of a merits review of owner initiated acquisition in case of hardship is pursuant to Section 27A of the Act. Division 3 of the Act has not changed. It allows the owner of land to require the State authority, by notice in writing, to acquire land if:

- the land is designated for acquisition by that authority for a public purpose; and
- the owner considers that he or she will suffer hardship if there is any delay in the acquisition of the land under the Act.

What constitutes hardship isn't always clear but the Act provides hardship means:

- the owner is unable to sell the land, or is unable to sell the land at its market value, because of the designation of the land for acquisition for a public purpose; and
- it has become necessary for the owner to sell all or any part of the land without delay for pressing personal, domestic or social reasons, or in order to avoid the loss of income.

Landowners may now seek a review of unsuccessful hardship applications.

The new section 27A provides the mechanism for review. In summary, it provides:

- an owner of land who has given a notice requiring the authority to acquire the land may apply to the Secretary of the Department of Finance, Services and Innovation for a review of a decision of the authority not to acquire the land because:
  a) the land is not designated by the operation of this Division for acquisition by the authority for a public purpose, or
  b) the owner will not suffer hardship if there is any delay in the acquisition of the land, or
  c) the authority is not otherwise required under this Division to acquire the land.

The application will be sent to a reviewer for determination. The reviewer is to be a suitably qualified person appointed by the Minister who is not associated with the authority of the State or the applicant.

The reviewer will either quash the decision or if not so satisfied, confirm the decision.

The reviewer is to endeavour to determine the application within 28 days after the application is referred and the decision of the reviewer is final.

4. Land not required for acquired purpose being offered first to its former owner

If during a period of 10 years after the acquisition, the acquiring authority proposes to dispose of land because it is no longer required for the public purpose for which it was acquired, there is an opportunity for the former owner to reacquire the land.

Under Section 71A of the Act, the acquiring authority must first offer the land for sale to the former owner at the market value of the land at the time the offer is made.

There is however a rider to the requirement to offer the land to the new owner in that the new section adopts the words “if practicable”. This is important as, for a number of reasons, it might not be practicable to do so.

Further, the offer is not required if:

- the authority has made substantial improvements to the land;
- the land is crown land; and
- the land is proposed to be disposed of to another authority of the state for a public purpose.

5. Post acquisition occupation

Under Section 34 of the Act, a person who was in lawful occupation of land immediately before it was compulsorily acquired and to whom compensation is payable, is entitled to remain in occupation until the compensation is paid to that person or the authority makes the advance payment of not less than 90% of the amount of compensation offered by the authority.

At present, a person can also remain in occupation of a building that is the person’s principal place of residence, or the person’s place of business, for 3 months after it is compulsorily acquired, even though that person ceases to be entitled to remain in occupation.

Previously, rent could be charged by the acquiring authority from the date of acquisition until the former owner vacates.

The amendment now provides that rent is not payable during the relevant 3 month period after acquisition by a former owner who remains in occupation of any part of a building that is the person’s principal place of residence, pursuant to Section 34(A) of the Act.

6. Strengthening the role of the Valuer-General (VG)

There are several changes aimed at strengthening the role of the VG.

Claims for compensation can now be lodged with either the acquiring authority or the VG.

The other requirements as previously detailed in section 39 of the Act, for example, that the claim be in the form prescribed by the regulations remain unchanged but for an added qualification. The qualification is that as soon as is practicable after a State authority or the VG receives a claim for compensation, they must provide each other with a copy of the claim.

The acquiring authority must provide the VG with a list of issues that the authority believes are relevant to the determination of the amount of compensation.

The list must be provided within 7 days after the authority has compulsorily acquired the land. The government has also encouraged landowners to provide information in support of their claim as soon as is practicable to the VG. Of course, the VG will not be confined to consideration of those issues alone.

The VG will now be required to provide the compensation determination, including a land valuation report, directly to the former landowner at the same time as the acquiring authority.

The period for the determination has been increased from 30 to 45 days, under Section 42(1) of the Act. The period commences from the publication of the acquisition notice.

A Summary and Lessons

So these are the impacts of the changes that have come into effect.

For acquiring authorities, you will need to ensure you are on top of timeframes when compulsorily acquiring properties. This also needs to be factored into timeframes for completion of projects.

The overriding benefits of the reforms are in favour of the dispossessed landowner. Rent exemptions, more time to negotiate, more compensation, potential right to re-purchase land no longer required for acquisition, to name a few.

If you have any questions on these changes please call a member of our Environment and Planning team.

Work Injury Damages Claims – injured workers entitlements

WILL MURPHY

A worker who suffers a compensable injury may be entitled to statutory workers compensation payments. These payments may consist of:

- weekly compensation;
- medical expenses; and in some cases;
- lump sum compensation.

However, some injured workers will also be entitled to bring a claim for damages if they can prove they suffered workplace injury as a result of their employer's negligence. Claims of this kind, brought by employees against employers, are sometimes called work injury damages claims.

This article discusses some of the issues which a worker needs to address under the NSW work injury damages regime to prove he or she was injured as a result of their employer's negligence and, thereby, to recover damages.

15% or more whole person impairment.

To be able to pursue a work injury damages claim a worker must first satisfy a requirement that he or she is 15% or more whole person impaired (WPI) as a result of the injury subject of the claim.

In some cases agreement will be reached between the worker and the relevant workers compensation insurer that a worker does satisfy that 15% WPI threshold. In other cases the worker may have to go to the NSW Workers Compensation Commission to be assessed by an approved medical specialist who will determine whether they are 15% or more whole person impaired. Unless a worker is 15% or more whole person impaired as a result of the workplace injury they cannot pursue a negligence claim.

Negligence

For a worker to prove he or she suffered injury as a result of their employer's negligence, they must prove three things:

- there was a foreseeable risk of injury associated with the work they were doing;
- the employer failed to take reasonable steps to minimise that risk of injury; and
- the employer's negligence caused the worker's loss.

In addressing whether the risk of a worker suffering injury is foreseeable, the High Court has said the question to be asked is whether a reasonable person in the employer's position would have foreseen that their conduct involved a risk of injury to the worker.[1]

However, the Courts have held that the test for deciding if it is foreseeable that a worker may suffer injury as a result of a workplace risk is "undemanding". That means, in many cases, it won't be difficult for a worker to prove there was a foreseeable risk of injury associated with the work he or she was carrying out which resulted in them suffering injury.

As an example of foreseeability, assume you employ a labourer who is regularly, and repetitively, carrying out heavy work. It is foreseeable that a person doing that kind of work may suffer injury as a result of the continuous heavy work. In cases such as this, the worker will have no difficulty in proving there was a foreseeable risk of injury associated with their work.

The next question around negligence is whether the employer took reasonable steps to eliminate or reduce the risk of injury. Whether the employer has taken reasonable steps will be assessed by a judge objectively by reference to all the evidence.

Using our labourer example, a judge will have to consider what steps the employer put in place to address the risk of physical injury arising from employees carrying out heavy and repetitive manual work, and whether those steps were adequate.

In determining whether reasonable steps were taken by an employer the following kinds of issues will be considered:

- was appropriate machinery and equipment supplied to assist with the work being carried out;
- were sufficient personnel provided to assist with the work being carried out;
- was there appropriate job rotation and work breaks to limit the period of time a worker would be required to carry out heavy work;
- were maximum weight lifting limits stipulated by the employer;

> In order to minimise the risk of compensation and work injury damages claims being made, the touchstone for every employer is to work assiduously in creating and enforcing safe systems for their staff to work in.

- what training has the employer provided to the worker so he or she fully understands how their work is to be carried out safely; and
- did the employer provide adequate supervision to ensure the employer's system of work was being followed?

If evidence establishing the above is available, an employer should be able to defeat a negligence claim. Without evidence of this kind, it is likely a worker will succeed in proving negligence.

Sometimes, however, when asking what steps should have been taken by an employer to address a risk of injury, the answer can be "none". It has been said:

It would be a large step to take to find as a general proposition that employers have an obligation to warn or take other precautions in relation to everyday activities in which employees might incidentally engage in the course of their employment, being activities which if not performed with care might lead to injury. Should employers reasonably be expected to warn employees not to cut themselves when using knives in the staff kitchen? Or not to scald themselves when pouring water which they have boiled for their tea or coffee? Or to be

careful when ascending or descending steps? Or not to bump into furniture?[2]

Generally, in relation to some everyday activities which an employer could reasonably presume a fit worker could carry out safely, the employer may not be required to take steps to address the risk of injury arising from such activities.

A further aspect of a worker recovering damages as a result of their employer's negligence is they must be able to prove their employer's negligence caused the accident in question and resulting loss. Sometimes, even if the system of work provided by the employer was inadequate, it can be argued that was not the cause of the worker's injury or resultant loss.

There are other issues relating to negligence to consider:

1. The duty to take reasonable care must account for the fact that sometimes employees are careless, particularly in the context of carrying out repetitive work. Familiarity can breed contempt. An employer's system of work needs to take that possibility into account.

2. An employer's common law duty to take reasonable care for the safety of their employees at work cannot be satisfied by simply delegating that responsibility to a third party.

   For instance, if a Council employee is sent to work with another employer for a period of time, the Council cannot satisfy its obligations to provide a safe system of work by simply requiring the third-party to exercise reasonable care for the safety of the worker.

   The Council would still be obliged to take its own steps to satisfy itself that its employee was working in a safe environment. That may include assessing the risks associated with the work the Council employee is required to undertake for the third party, and to satisfy itself that the host employer had a safe work system for doing that work in place. It may also require the Council to regularly inspect the system of work being adopted by its employee. If it takes appropriate steps the Council may avoid liability in negligence if a worker is injured while working for another organisation.

3. In addition to its own duty to take reasonable care for the safety of its employees, an employer is liable for acts of negligence of its employees. As an example, assume two employees, both labourers, are working together when one of the employees uses equipment in such a manner that the other employee is injured. If the employee who caused the injury was themselves negligent, the Council, as that person's employer, will be vicariously liable for the negligence of that employee. In essence, the negligent act of the employee will be legally attributed to the Council.

What about contributory negligence? If a worker has failed to take reasonable care in how they work, despite the fact the system of work provided by the employer is itself inadequate, then the worker's entitlement to damages will be reduced for their contributory negligence.

It's important to note, however, that if the system of work provided by the employer is inherently unsafe, and a worker is simply following that existing and accepted system of work, the worker may not be contributorily negligent.

Where a worker's injury can be attributed to both their employer's negligence, and their own negligence, a judge will have to assess the relative culpability, or responsibility for causing the injury, between the worker and the employer. To the extent the worker is found to have been negligent, their damages will, generally speaking, be reduced.

Damages

In NSW a worker bringing a negligence claim against their employer can only recover damages for past and future economic loss. They can't recover damages for future medical and care expenses.

Further, if a worker recovers work injury damages, that puts an end to their right to recover statutory compensation payments.

What can be done?

Council's, of course, have workers compensation insurance which will indemnify them in relation to work injury damages claims.

In order to minimise the risk of compensation and work injury damages claims being made, the touchstone for every employer is to work assiduously in creating and enforcing safe systems for their staff to work in. Safe systems for workers reduces the risk of injury and the consequential costs associated with compensable injuries.

Of course, the other benefit is safe work systems will reduce the risk of Work Health and Safety prosecution.

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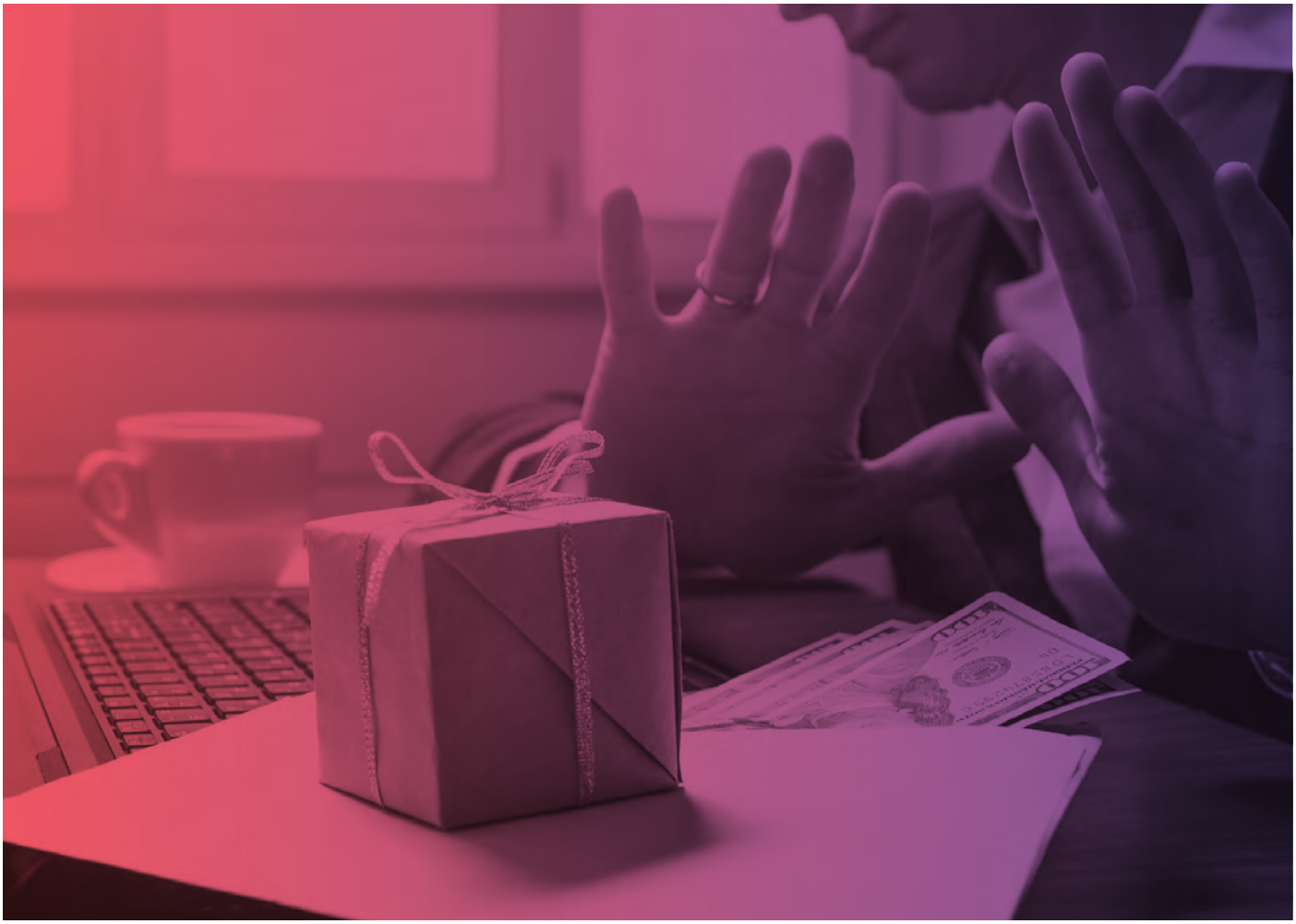
[1] *Wyong Shire Council v Shirt High Court 1980.*

[2] *Seage v State of NSW, NSW Court of Appeal, 2008.*



Gifts, conflicts of interest and bribery – dealing with government

NORMAN DONATO

The corruption of public officials and the exercise of their official functions has been front page news in New South Wales consistently for at least the past 4 years. Most people in New South Wales are aware of the operations of ICAC and how that body brings to account those involved in corrupt conduct.

All levels of government must exercise the utmost care so as to ensure that they do not become part of the latest headline and avoid appearing at ICAC hearings. So how is corruption of a public official defined and what are the legal risks?

Definition and risks

The type of conduct considered actionable corrupt behaviour[1] is set out in Division 142 of the *Criminal Code Act* 1995 (Cth) (Code)[2] as follows:

Offences relating to bribery

142.1 Corrupting benefits given to, or received by, a Commonwealth public official

Giving a corrupting benefit

(1) *A person commits an offence if:*

(a) the person dishonestly:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a public official (who may be the other person) in the exercise of

the official's duties as a public official;

(c) the public official is a Commonwealth public official; and

(d) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

***(2)** In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:*

(a) that the official was a Commonwealth public official; or

(b) that the duties were duties as a Commonwealth public official.

Receiving a corrupting benefit

***(3)** A Commonwealth public official commits an offence if:*

(a) the official dishonestly:

(i) asks for a benefit for himself, herself or another person; or

(ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official's duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

Benefit in the nature of a reward

***(4)** For the purposes of subsections (1) and (3), it is immaterial whether the benefit is in the nature of a reward.*

The penalties are intimidating, as they need to be.

> Certainly we see today that most government contracts include anti-corruption clauses as an additional step in seeking to prevent corrupt conduct.

Compliance - where to start

There is a useful first step for local government officials in Australia in establishing compliance programmes. This step is the **"Anti-Corruption Ethics and Compliance Handbook for Business"** (the Handbook) developed in cooperation by two United Nations bodies, the World Bank and various corporations.

The Handbook makes a number of recommendations in establishing a sturdy and workable compliance program with the undertaking of a risk assessment being a primary course of action. The risk assessment, according to the Handbook, should include:

- establishment of the risk assessment process;
- identification and rating of risks;
- identifying and rating controls;
- calculating residual risk; and
- development of an action plan.

Additional steps recommended by the Handbook include:

- documenting results;
- developing and implementing anti-corruption ethics program;
- establishing internal control and record keeping;
- communication and training;
- promotion and rewarding of compliance;
- addressing violations; and
- periodic reviews.

While the Handbook offers a comprehensive toolkit for anyone seeking to achieve high levels of compliance, as with all compliance programmes there is not a one size fits all solution. Consequently the approach to a strong solution must look at additional sources for advice.

A further step in a compliance program for Local Councils is the Model Code of Conduct **(MCC)** for Local Council in NSW. The MCC was created for the purposes of section 440 of the *Local Government Act* 1993 (NSW) **(LGA)**. It requires compliance with the code by councillors, administrators, members of staff, independent conduct reviewers, members of council committees and delegates of the council.

Any failure to comply with the standards of the MCC constitutes misconduct for the purpose of the LGA. This has important implications in relation to whether the conduct could fall within the definition of "corrupt conduct" under the ICAC Act[3].

Part 5 of the MCC deals specifically with personal benefits and defines "personal benefit" as:

a) seeking or accepting a bribe or other improper inducement;

b) seeking gifts or benefits of any kind;

c) accepting any gift or benefit that may create

a sense of obligation on one's part or may be perceived to be intended or likely to influence one in carrying out their public duty;

d) accepting any gift or benefit of more than a token value; and

e) accepting an offer of cash or a cash-like gift, regardless of the amount." [4]

Certainly we see today that most government contracts include anti-corruption clauses as an additional step in seeking to prevent corrupt conduct.

Breaches of these anti-corruption clauses carry significant punishment including the consequences of criminal sanctions outlined above. In addition, the contract itself may be terminated and payment of damages may be imposed.

Where to next?

Notwithstanding various views expressed by, among others, the High Court, on the powers and actions of ICAC, it must be remembered that ICAC still retains significant scope to explore conduct that may fall within the meaning of corrupt conduct.

If any entity, particularly Local Councils, wish to avoid an investigation by ICAC into possible corrupt behaviour, they must attend to a comprehensive compliance program.

This program must incorporate appropriate risk assessment processes in order to address potential corruption risks. The penalties of large fines and possible imprisonment should be enough to nudge any organisations who have not moved on establishing a compliance programme to do so rapidly. Potential corrupt conduct may be a difficult topic to raise amongst Local Government Councillors, however, surely the attraction of not becoming a press headline and appearing before ICAC in relation to corruption is incentive enough to begin the discussion.

[1] What constitutes corrupt conduct from a moral, ethical and legal perspective does not always synchronise. The differing opinions of the judges that considered the issue in Cunneen's Case, from the Supreme Court to the High Court demonstrates synchronisation is even hard to achieve solely from a legal perspective.

[2] Note also Part 4A of Crimes Act 1900 (NSW)

[3] Section 9 of Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act)

[4] Section 5.5 of MCC

Does the distribution of assets under Deceased estates and Land Titles always match? Where inaccuracy can cost you.

DANIELLE VERDE AND GERARD BASHA

Care must be taken when relying upon land titles ownership when seeking to undertake action on a property that has been the subject of a deceased estate. A veritable nightmare of financial and administrative problems may be encountered through outdated titles. Property titles are, in theory, supposed to reflect the current legal owner of the property. This is not necessarily the case in practice. It sometimes happens that, for a variety of reasons, land title documents are outdated and note owners that have died many decades ago.

For anyone wanting to acquire property, outdated title documents are problematic, often requiring the need to engage genealogical professionals to locate the next of kin of the land owner. Once located, the next of kin may have to make a Court application to empower them to deal with the property in question – all of which can be a lengthy and costly exercise.

The historical development of land title in NSW

The Torrens title system, introduced in the late 1850's was revolutionary for its time, creating a system of land registration that was simple, reliable and accurate.

Fast forward 160 years and we are still using the same system. Some would say it is a testament to the system itself that it actually works. This is not to say the Torrens system is perfect. Like most systems, it has its flaws.

Reliance on individuals to update land title documents

One of the major pitfalls of the system is its reliance on the human element to ensure the system is up to date - and the human element can sometimes let down the system.

For example, the property owners or acquirers of an interest in property need to follow the relevant procedure for updating title to ensure the Torrens title system is accurate.

Where a property owner dies with a will, it is the executor's responsibility to identify and distribute the property in accordance with the will. The will document itself may identify the property that forms part of the deceased's estate.

If it doesn't, sometimes the relationship between the executor and deceased is such that the executor is fully aware of the deceased's financial circumstances, including his/her ownership of property.

Where this is not the case, if a solicitor was involved in the will drafting process, the solicitor can sometimes assist with the identification of property that forms part of the estate.

Difficulties can arise where the will does not specify property that forms part of the deceased's estate and the executor is unfamiliar with the deceased person's circumstances. Whilst this problem can easily be rectified by carrying out a name search, there are many instances where this does not occur, despite the executor's duty to identify and fully distribute the estate.

In circumstances where property is held in joint-tenancy at the date of death, the lodgement of a notice of death, albeit a simple process, does not always happen until after the death of the remaining joint tenant. This creates a further hurdle for the executor of the surviving joint tenant who needs to carry out the surviving joint-tenant's application as well as that of the survivor's estate.

Where a land owner dies intestate, that is, without a will or without a valid will, the statutory next of kin are responsible for the distribution of the estate in accordance with the relevant intestacy laws. Part 4 of the *Succession Act* 2006 (NSW) determines the priority for the statutory next of kin.

In situations of intestacy, particularly where the deceased died without a spouse or children, the first major hurdle can be to find the relevant next of kin. This, in itself, can prove to be a difficult task, sometimes requiring the involvement of a genealogist.

> For anyone wanting to acquire property, outdated title documents are problematic, often requiring the need to engage genealogical professionals to locate the next of kin of the land owner.

In circumstances where the next of kin is an indirect descendant of the deceased, there is an increased risk that the next of kin will fail to identify the deceased's property.

Clearly, the Torrens Title system relies on the human element - executors, administrators or entities - to ensure that the system is accurate. As illustrated above, this reliance on human beings is problematic, and may cause an unnecessary financial burden.

Implications of outdated title documents

Generally speaking, issues with land title often arise when there is a problem of some sort associated with the property or land in question. The problem may be a neighbourhood dispute arising out of illegal dumping on a parcel of land that appears to be government owned or ownerless. It could also be where council rates are substantially in arrears.

By this stage, a considerable amount of time may have passed and the legal title owner is no longer alive, having died a number of years ago, and title to the land in question is outdated and inaccurate.

What is then required is to find the person legally entitled to deal with the property on behalf of the deceased's estate. Where many decades have passed, this could require tracing the deceased's lineage in order to find the person legally entitled to deal with the estate and, thus, the estate property.

Genealogists can be helpful in pursuing this information, but the cost of a genealogist can be significant the more outdated the title documents.

In addition to costs, this information may require a substantial amount of time, particularly where searches may lead to the pursuit of information overseas and review of documentation that requires translation. Many months may go by and thousands of dollars spent before confirmation is received of the identity of the next of kin, or the fact that one cannot be found or no longer exists.

If a next of kin is found, they are required to make an application to the Supreme Court of New South Wales as administrator of the estate, so that they may deal with the property.

Creditors of an estate may apply to the Supreme Court to be the estate's administrator in the following circumstances:

- where a next of kin is not found;
- where an executor or next of kin refuses to make the application; and
- a search for an executor, administrator or next of kin has been unsuccessful.

To obtain the grant, a creditor must undergo further procedural burden, including:

- Where a will exists, to file and serve a notice on the appointed executor or, if there is no executor, on the beneficiaries under the will, to make the application; or
- Where there is no known will, or the creditor is unsure as to the existence of a will, the creditor is to file and serve notice on the next of kin entitled as administrator to apply for the grant; and
- File evidence supporting the debt owed, details of the notices served by the creditor and the steps taken by the creditor to comply with the prerequisites for the application.

Where notice has been served on any of those identified above, their failure to comply with the notice must occur before the application is made by the creditor.

By this point in time, the creditor has invested time and incurred significant costs.

The hurdles a creditor must undergo to obtain the grant, makes it clear the legislature perceives the rights of creditors to obtain grants as significantly inferior to next of kin or beneficiaries.

Once the grant is obtained by the creditor, in order to be paid, the creditor will be required to undertake the sale of the property – normally by way of public auction. Again, this is an expense initially borne by the creditor which may, depending on the circumstances, be reimbursed from the sale proceeds.

In summary - no easy way out

The need to undertake lengthy and expensive genealogical searches and administration applications by creditors of an estate means they essentially have to spend money in order to be paid the money owing to them.

It seems the administrative and financial nightmare that is created through outdated titles cannot be avoided if people are not aware of the procedures or fail to take legal advice about what needs to be done to property titles following a property owner's death.

Supporting statement timing is critical – NSW Security of Payment Act

MARK GLYNN

The smallest detail of dates can be a critical issue when it comes to payment claims and supporting statements under *Building and Construction Industry Security of Payment Act* 1999 (NSW) **(NSW SOP Act)**.

Consider this scenario – Council is served with a payment claim under the NSW SOP Act by a head contractor. The claim is pursuant to a construction contract under which the contractor undertakes to carry out construction work (or to supply related goods and services) for Council as head contractor. When assessing this payment claim, Council must check that the following two important compliance requirements of the NSW SOP Act have been met by the head contractor:

- the payment claim must be accompanied by a 'supporting statement;' **and**
- the supporting statement must NOT be signed and dated earlier than the date of the payment claim to which the supporting statement relates.

If these two requirements are not met, then the payment claim is **not** a valid payment claim served under the NSW SOP Act and an SOP adjudicator does **not** have jurisdiction under the NSW SOP Act to determine the claim.

Why tell me this?

If Council has been served with a payment claim by its head contractor, Council should check that the payment claim meets the essential requirements being:

- that it is accompanied by a supporting statement; and
- that the supporting statement has not been signed and dated prior to the date of the payment claim.

Otherwise, Council as a principal (defined by the NSW SOP Act as the party for whom the construction work is to be carried out) will be paying when it does not need to. Furthermore the head contractor will be claiming a payment under the NSW SOP Act to which it is not entitled (and, therefore, committing an offence!).

What is a supporting statement?

A supporting statement is a declaration, in the prescribed

form, by the head contractor that all subcontractors have been paid all amounts that have become due and payable in relation to the construction work concerned. Section 13(7) of NSW SOP Act provides that:

…a head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim…

The prescribed form of supporting statement is set out at Schedule 1 of the *Building and Construction Industry Security of Payment Regulation* 2008 (NSW) **(NSW SOP Regulation)** and has been reproduced below.

Two important lessons relating to payment claims and supporting statements are demonstrated in two separate cases.

Lesson 1 – A payment claim served on Council without a supporting statement is not validly served
In *Kitchen Xchange v Formacon Building Services* (5 November 2014), principals and head contractors alike were put on notice regarding the limits on the jurisdiction of an adjudicator. In this matter, the adjudicator lacked jurisdiction (i.e. did not have the power under the NSW SOP Act) to determine a payment claim that was served without the requisite supporting statement.

The Court held that the intention of section 13(7) of the NSW SOP Act is to prohibit the service of a payment claim that is not accompanied by a supporting statement and that service of a payment claim which is not so accompanied is ineffective or invalid.

In these circumstances the NSW SOP Act is not triggered and an adjudicator lacks jurisdiction to adjudicate on the payment claim.

The lesson here for Council is to check that all payment claims made to it by its head contractors are accompanied by a supporting statement. If they are not, then the head contractor can't use the machinery of the NSW SOP Act, including going to adjudication, to enforce payment from Council.

Lesson 2 – A supporting statement must not be signed and dated prior to the date of the payment claim to which it relates.
A decision of the NSW Supreme Court handed down on 24 August 2017, *Mt Lewis Estate Pty Ltd v Metricon Homes Pty Ltd* provides a further salient lesson for principals, including Councils, and head contractors. In this case the head contractor (Metricon) served a payment claim on the principal (Mt Lewis) which attached a supporting statement.

The declaration in the supporting statement was made on 13 December 2016, but the payment claim to which the supporting statement related was identified as being dated 15 December 2016, two days later.

Mt Lewis, in challenging the validity of the adjudicator's determination, argued that the NSW SOP Act, and its regulations, required the "declaration to speak as at the time at which the payment claim is made".

The Court agreed and held that:

- the declaration in the supporting statement must be made in relation to *"the matters that are contained in this supporting statement";*
- the supporting statement is to declare that all subcontractors have been paid all amounts that have become due and payable "*in relation to the relevant construction work concerned"*. The Court noted that this is a reference to the construction work the subject of the payment claim to be identified by date; and that
- neither logically nor rationally can a declaration be made that all payments have been paid to subcontractors in relation to a payment claim that has not yet been made.

The Court found further support for its finding in the Second Reading Speech of the 2013 amendment bill, given on 23 October 2013, which recorded the following: *"…if at the time a head contractor makes a payment claim to a principal under a construction contract an amount is owed to a subcontractor or supplier then the provisions require the head contractor to confirm that these payments have been made…"*

The Court held that this passage *"makes it clear that the declaration was intended to pertain to the time of the payment claim".*

To hold otherwise, the Court held, *"would have the consequence that a head contractor could make a payment claim for work done by subcontractors, without having to ensure that those contractors have been paid - even though they are entitled to be paid before the payment claim is actually made. This would be inimical to the policy behind the provisions"* (our emphasis).

Conclusion

The NSW SOP ACT provides considerable rights to all contractors but all rights flow from the service of a valid payment claim.

This includes, in the case of a payment claim served on Council by a head contractor, the inclusion of a compliant supporting statement. Otherwise it is not a payment claim made under the NSW SOP Act and is not a payment claim that can be sent to an adjudicator for determination.

Prescribed form of Supporting Statement

Supporting statement by head contractor regarding payment to subcontractors

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this statement, the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999* .

Head contractor: [business name of head contractor]

ABN: [ABN]

***1. has entered into a contract with:** [business name of subcontractor]

ABN: [ABN]

Contract number/identifier: [contract number/identifier]

OR

***2. has entered into a contract with the subcontractors listed in the attachment to this statement.**

*[Delete whichever of the above does not apply]

This statement applies for work between [start date] and [end date] inclusive (the construction work concerned), subject of the payment claim dated [date].

I, [full name], being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: **Date:**

Full name: **Position/Title:**

Supporting statement by head contractor regarding payment to subcontractors

Schedule of subcontractors paid all amounts due and payable				
SUBCONTRACTOR	ABN	CONTRACT NUMBER/ IDENTIFIER	DATE OF WORKS (period)	DATE OF PAYMENT CLAIM (head contractor claim)

Schedule of subcontractors for which an amount is in dispute and has not been paid				
SUBCONTRACTOR	ABN	CONTRACT NUMBER/ IDENTIFIER	DATE OF WORKS (period)	DATE OF PAYMENT CLAIM (head contractor claim)

"I'm sick ... and that's that" – managing employee absences

JAMES MATTSON AND DARREN GARDNER

Employees (and their unions) may sometimes hold the belief that an employer may not question their absence from work or challenge their medical certificate. *"It's my right to take sick leave",* they may exclaim.

A manager may fear challenging this employee, and prefer to not have a difficult conversation. Maybe they have heard an Industrial Commissioner say "[w]*here the certificate states that the employee will be absent on a particular date it must be assumed that the doctor found the employee incapable of working on the specified date".* [i]

Employers do have the right to manage absences. To ensure business services are delivered effectively and efficiently, employers must manage resources (including staff) and discharge their legal obligations (including safety) with full and proper information to make the right decisions. Employees are obliged to cooperate.

Dishonesty and misuse ... an obvious basis to challenge

An employer may question absences and medical certificates in cases of suspected forgery[ii] or misuse.

Examples of misuse include employees:

- undertaking secondary employment whilst allegedly absent for 'viral illness'; [iii]
- providing a medical certificate but attended a football match instead. [iv]

But be cautious to not jump to conclusions. An employee

unwell for work (due to the anxiety and stress of the workplace) may nevertheless be fit to engage in other activities, such appearing on the television show '*Beauty & the Geek*'.[v]

Public functions and a contract to fulfill

Councils have important statutory and public functions including to provide community services efficiently and at good value for residents and ratepayers. To discharge these functions it is necessary to manage employee absences and the resulting costs.

Underpinning every relationship is an employment contract. A commitment given by an employee to Council is to attend work, as agreed, and to perform the duties of employment to the best of their ability, in the best interests of the Council.

Sick leave

Yes, an employee can be given leave from their contractual commitment, if sick. However, two important qualifications need to be made to that broad statement:

- firstly, sick leave is not an entitlement but a *contingent* benefit; [vi]
- secondly, sick leave is available when the employee is unfit to attend to duty because of illness or injury – that is, they may be ill or injured but still able to work.

Award entitlements and reasonable proof

The *Local Government (State) Award* 2017 usefully provides that sick leave *"is subject to the employer being satisfied that the illness or injury is such that it justifies the time off"* (clause 21 A (iii)).

The type of proof must be reasonable having regard to the circumstances. The 2017 Award now includes that proof of illness or injury may be by statutory declaration. This provision is causing some controversy.

Statutory declarations have long been found to be an acceptable alternative to unnecessarily requiring an employee to incur the cost and inconvenience of obtaining a medical certificate, especially in rural areas. [vii] Equally, statutory declarations to prove absence have been found to be open to misuse by irresponsible employee attitudes.[viii]

Whilst there is some limitation on Council seeking *"proof of illness or injury"* for the first three separate periods of absence in a year (clause 21 A (iv)), it is apparent that Councils:

- can question an absence claimed to be because of illness or injury; and
- are not limited in seeking appropriate and necessary additional information to discharge duties and responsibilities.

Workplace safety - a fundamental responsibility

An employer has a positive duty to ensure, so far as is reasonably practicable, the safety of employees and others at work. To discharge this duty, an employer needs to be properly informed.

As such, it may be reasonable and necessary for an employer to require an employee (who is certified fit to return to work by their doctor) to undergo an independent examination by a company doctor. This is to ensure that the worker is not exposed to unacceptable levels of risk.[ix]

It is also important to keep in mind that employees have duties under work health and safety legislation. These duties include ensuring that their acts or omissions do not endanger them or others; and that they co-operate and comply with lawful and reasonable directions and policies of their employer.

The common law says

The common law implies into the employment contract a term[x]:

… that an employer be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties. Likewise, an employer should, where there is a genuine indication of a need for it, also be able

> An employer should do all that is reasonably practicable to ask and inform itself on employee absences from work to ensure that there are no work, health and safety risks.

to require an employee, on reasonable terms, to attend a medical examination to confirm his or her fitness.

An employee who does not comply with such requests, may provide a valid reason for dismissal.[xi]

The answer is ... it is okay to (reasonably) ask questions

Yes, it is ok for an employer to ask questions. Indeed, an employer should do all that is reasonably practicable to ask and inform itself on employee absences from work to ensure that there are no work, health and safety risks. So, when a Qantas captain challenged Qantas questioning his medical certificate and continued absence for mental illness, the Federal Court usefully observed[xii]

An employee's statutory, certified agreement or analogous industrial award based entitlement to take sick leave does not displace the contractual relationship in which, at some point, the employer is entitled to make its own business arrangements to adjust for the impact that the leave caused by the sickness of the employment will have on it and to address its obligations under the Work Health and Safety Act.

Of course, there are limits to what can reasonably be asked. If the sick leave absence is not work related, then it is rarely relevant what caused the illness or injury. It may also be unlawful to ask an employee to disclose their disability in circumstances where a person without a disability would not be required to do so.[xiii]

It is consistent with employer duties of care though to reasonably ask an employee if they can safely perform the inherent requirements of their job. Where there is claimed incapacity, it will be reasonably necessary to ask whether any reasonable adjustments,[xiv] or special services or facilities may be needed,[xv] so that the ill or injured employee can return to work safely or to decide if such accommodations would cause unjustifiable hardship to the Council.[xvi]

Good management means asking the right questions

Whilst not easy, managing absences is an important part of a manager's role. We recommend:

- engaging with the ill/injured employee early and regularly (but not be harassing);
- talk to the employee (not just about incapacity but) about their fitness, and what they can safely do;
- where possible, liaise with them and their doctor, or other occupational health and safety experts, about a safe and healthy return to work (with any reasonable adjustments if necessary); and
- remember, the end goal, to achieve a timely, functional and safe return to work.

Managing absenteeism is difficult, but knowing you may reasonably ask questions and manage any absence, gives confidence to do so. If you would like advice on navigating these, and other obligations (such as discrimination), please give us a call.

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i *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australia Post [2006] AIRC 541 at [124] and [125].*
ii *Sulis v Woolworths Ltd [2010] FWAFB 145 and Bulzer v Monash University [2017] FWC 2536*
iii *J Didomizio v Tetra Pak Manufacturing Pty Ltd [2005] AIRC 936*
iv *Anderson v Crown Melbourne Ltd [2008] FMCA 152*
v *Marshall v Commonwealth Of Australia (represented by The Bureau Of Meteorology) [2012] FMCA 1052*
vi *Kenneth Ross Milburn v Capral Aluminum Ltd [2004] NSWIRComm 302, [84] – [85]*
vii *Amalgamated Engineering Union Case (1942) 46 CAR 472*
viii *Steel Workers Case (No.1) (1962) AR 334 at pp.377 and 278*
ix *Grant v BHP Coal Pty Ltd [2017] FCAFC 42*
x *Blackadder v Ramsey Butchering Services Pty Ltd [2002] FCA 603 at [67] to [69]*
xi *Salat v NSW Police Force [2011] NSWIRComm 1040*
xii *Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32 at [64]*
xiii *Section 30, Disability Discrimination Act 1992 (Cth)*
xiv *This is the language used in s 21A(1) of the Disability Discrimination Act 1992 (Cth)*
xv *This is the language used in s.49B(4) of the Anti-Discrimination Act 1977 (NSW)*
xvi *Sections 21A and 21B, Disability Discrimination Act 1992 (Cth); s.49D Anti-Discrimination Act 1977 (NSW)*

Registered covenants or restrictions – how councils can regulate land use

PETER BARAKATE

Councils have the power to regulate land use by way of public positive covenants and restrictions on use, although this power is often forgotten.

Councils are enabled to impose public positive covenants and restrictions on their own land and on the land of third parties, and provide for their enforcement by Sections 88D and 88E of the *Conveyancing Act* 1919.

The reason why councils impose these covenants and restrictions on their own land is to curtail the future use of the land by purchasers from council.

The immediate questions that arise when considering these powers are:

- what constitutes covenants and restrictions;
- how are they created; and
- how are they enforced?

What constitutes a public positive covenant and a restriction?

Public positive covenants require land owners to undertake works on land for the benefit of a council.

These works include:

- the carrying out of development on land;
- the provision of services on or to the land or other land in its vicinity; or
- the maintenance, repair or insurance of any structural work on the land.

Such covenants can also impose terms or conditions for the performance of such obligations.

Examples of public positive covenants include the requirement for land owners to maintain landscaping, provide for stormwater retention pits or waste storage facilities in a development.

Restrictions on use are different because they prevent acts from being done on land. Examples include not using land for the sale of goods or the use of showrooms and not using land for medical or hospital purposes. Covenants and restrictions always burden a parcel of land for the benefit of the council. They should not be confused with easements which give the benefited land owner or benefited council the right to use another person's property for a particular purpose (such as a right of carriage way or channel for stormwater drainage). Covenants cannot, however, be used to require a land owner to transfer title.

Development

The type of development which public positive convents can require of land owners includes:

- the use of land;
- the subdivision of land;
- the erection of a building;
- the carrying out of a work; and
- the demolition of a building or work.

> Councils have the power to regulate land use by way of public positive covenants and restrictions on use, although this power is often forgotten.

Subdivision does not include the dedication of public roads by councils, the acquisition of land by agreement or compulsory process, or the consolidation of land. However, councils can use public positive covenants to require land owners to subdivide to effect a public road dedication by the land owners themselves.

How are covenants and restrictions on use created?

The ownership of the land is relevant in considering how covenants and restrictions are created and under which Section of the *Conveyancing Act* they are created.

Covenants and restrictions are imposed on land owned by councils under section 88D and imposed on land not owned by councils under section 88E of the *Conveyancing Act* 1919.

Creation under section 88D

Councils may impose covenants or restrictions of use on any land vested in it by way of an order. The order will typically take the form of a resolution made by the elected council or a decision made by an authorised officer of the council under delegation.

The order must be attached to the approved form and lodged for registration at NSW Land Registry Services. It should be noted that the order will have no effect or force until it is registered.

Registration of the covenant or restriction must take place before council enters into an option agreement or contract for sale in order for the covenant or restriction to be enforceable against the option holder or purchaser.

A council may enforce the registered covenant or restriction against any person claiming an interest in the land as if they had entered into the covenant or restriction with council itself. This means that registered owners, mortgagees, lessees, parties with the benefit of an easement etc will be bound to comply with the covenant.

Creation under section 88E

Councils may also impose covenants or restrictions on use of any land not vested in it; however they may only do so with the consent of the land owner and any other person who has a registered interest in the land. Furthermore the land owner and other persons must agree to be bound by the covenant or restriction.

The easiest way for councils to achieve this result is by requiring the covenant or restriction as a condition of development consent.

It is not essential that all holders of registered interests (such as easements, mortgages and leases) be joined to the covenant or restriction over the land. Such parties only need to be joined if their interest is to be bound by the covenant or restriction.

These covenants and restrictions have no force until registered.

Enforcement under Section 88E
Unlike section 88D covenants and restrictions, councils can only enforce restrictions or covenants created under section 88E against a person who is, or claims under, a signatory to the covenant or restriction on use.

This means that it is necessary to show that the person who owns the land acquired it from a person who is a signatory to the covenant. Accordingly, mortgagees and purchasers from mortgagees exercising a power of the sale will not be bound by a registered covenant or restriction.

The benefit of covenants and restrictions
There are three (3) discernible benefits arising from covenants and restrictions.

1. If there is a failure to comply with the public positive covenant and council obtains a judgment for an amount payable to it, council may lodge with a Registrar-General an application to register a charge over the land for the amount payable to it from time to time: Section 88F.

2. If council is concerned that a person has engaged or proposes to engage in conduct that would contravene a covenant or a restriction on land, it may apply to the Supreme Court for the grant of an injunction restraining the conduct: Section 88H.

3. Where a person has contravened a public positive covenant, council may apply to the Supreme Court for an order that the land be conveyed or transferred to the council: Section 88I.

Examples
There are a number of cases in which applicants have challenged consent conditions requiring the registration of covenants and restrictions under section 88E.

These appeals are sometimes successful on the basis that it is unnecessary to reinforce planning principles through the *Conveyancing Act* 1919 where they are enforceable elsewhere. This approach was taken in the cases of *MacDonald v Mosman Municipal Council* [1999] NSWLEC 215 and *Iris Diversified Property Pty Ltd v Randwick City Council* [2010] NSWLEC 1265.

However, more recently in *Vlahos v Willoughby City Council* [2013] NSWLEC 1068, a consent condition requiring a covenant ensuring the maintenance and protection of 2 weeping Lilly Pilly trees for a 20 year period was upheld. This condition was upheld because, under other environmental planning instruments, there was a real possibility that the trees could be removed without the need for development consent. For this reason, the earlier line of authority was distinguished.

Reflections on section 88E
In imposing covenants and restrictions on use on land held by others, councils should carefully consider the applicable environmental planning instruments for the land.

If those instruments will guarantee the outcome without the need for a covenant or a restriction, then council should not impose a section 88E covenant or restriction on the land in question.

If, however, the environmental planning instruments would undermine the desired outcome without the protection afforded by a covenant or restriction, then council can safely require a covenant or restriction as a condition of consent.

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DAVID CREAIS
Executive Lawyer
T +61 2 8281 7823
M 0419 169 889
dcreais@bartier.com.au

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GAVIN STUART
Executive Lawyer
T +61 2 8281 7878
M 0407 752 659
gstuart@bartier.com.au

MARK GLYNN
Senior Associate
T +61 2 8281 7865
M 0418 219 505
mglynn@bartier.com.au

NORMAN DONATO
Executive Lawyer
T +61 2 8281 7863
M 0419 790 097
ndonato@bartier.com.au

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DENNIS LOETHER
Executive Lawyer
T +61 2 8281 7925
M 0402 891 641
dloether@bartier.com.au

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Executive Lawyer
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M 0413 890 246
mfranco@bartier.com.au

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GERARD BASHA
Executive Lawyer
T +61 2 8281 7808
M 0412 793 592
gbasha@bartier.com.au

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MELISSA POTTER
Executive Lawyer
T +61 2 8281 7952
M 0481 236 412
mpotter@bartier.com.au

PETER BARAKATE
Executive Lawyer
T +61 2 8281 7970
M 0405 311 501
pbarakate@bartier.com.au

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JAMES MATTSON
Executive Lawyer
T +61 2 8281 7894
M 0414 512 106
jmattson@bartier.com.au

DARREN GARDNER
Executive Lawyer
T +61 2 8281 7806
M 0400 988 724
dgardner@bartier.com.au

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Stay connected

Bartier Perry Pty Ltd
Level 10, 77 Castlereagh St
Sydney NSW 2000 Australia

T +61 2 8281 7800
F +61 2 8281 7838
bartier.com.au

ABN 30 124 690 053