Bartier Perry LAWYERS
EMPOWERING INSIGHT

# Council CONNECT

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## Inside this issue



## Hello

Welcome to December's Council Connect. Most of the articles here originate from our inaugural Local Council Managers & Officers Forum in September, held in Parramatta.

Thank you to all the 27 councils who made time to attend this event. It was great to meet so many of you and put some faces to names. We plan to make this a regular event, as it offers a great platform for sharing insights into the complex legal challenges facing councils today.

This year's theme, *Operating in the Public Eye*, clearly resonated with delegates. Operating in the public eye places unique demands on councils. It means greater scrutiny is placed on decisions, and challenges – whether legal or in the court of public opinion – are more likely than in the commercial arena.

The number and variety of stakeholders is generally greater than for other organisations, and their interests can often clash. Further, standards of transparency are higher, and missteps can have more serious consequences.

Yet councils must operate efficiently, making and implementing effective business decisions that support their communities.

In this issue, we explore these challenges and how councils can meet them. We've also included an interview with Steven Head, General Manager of Hornsby Shire Council. Steven's perspective rounds out an invaluable overview of today's landscape for any organisation operating in the public eye.

I trust you will find real value in these pages. On behalf of all of us at Bartier Perry, I also wish you and your loved ones a safe and peaceful holiday period and a successful 2019.

**Riana Steyn**
**Chief Executive Officer**
Bartier Perry

# INTERVIEW WITH STEVEN HEAD
## GENERAL MANAGER, HORNSBY SHIRE COUNCIL

*Steven, thank you for agreeing to this interview. After being appointed to your current role in early 2018, you've now worked at five councils – Warringah, Ku-ring-gai, Parramatta and Willoughby. How different are they from each other?*

It has always amazed me just how similar councils are, yet very different at the same time. While all deliver similar services for their communities, there are very real differences in the strengths and opportunities of each. The differences are often subtle, reflecting political and organisational cultures from each of their areas. That applies to both the elected body, the staff and the communities we provide for. I was lucky to have an opportunity to work in state government for four years. What amazed me about that was just how similar to local government it is in many ways, albeit on a much larger scale. Local government is a great place. The opportunities seem almost endless, even if resources are stretched. The satisfaction of delivering services and facilities directly to the community in that context feels much the same, no matter the council.

*What are some of the major projects Hornsby Shire Council is involved in?*

Despite the impacts of a reduced council size, following the transfer of parts of our LGA to the City of Parramatta, we have committed to a number of exciting projects. We are transforming the old Hornsby Quarry into a significant conservation and parkland area. It will be a truly incredible park that we believe will help define Hornsby in years to come. Similarly, we are in the early stages of developing the Westleigh Recreation Area. Situated on old Sydney Water land, it will feature new sporting fields, mountain bike trails and general recreation areas. We have been working hard for many years to gather the funds for both projects and physical works on both sites will commence over the next two years.

We are also undertaking a major review of our strategies and planning to guide the development of badly needed community facilities and public domain that match the expectations of our community. A particular focus will be creating a vision for the Hornsby Town Centre.

*What do you see as the biggest challenge facing NSW councils over the next 12 months?*

With both state and federal elections looming there is always uncertainty, but in the current environment the most significant challenges we face are sustaining respect and relevance to our communities and engagement with our teams. For Hornsby, achieving closure from the local government reform process and establishing a solid focus on the future is one of our most significant challenges. Responding to these challenges will, we believe, put us on the road to success.

*Where are the opportunities for councils?*

Successful delivery of community services relies more and more on our ability to facilitate and collaborate with others. The technology advances of recent years and our management of highly used public spaces provide local government – especially Hornsby Council – with some unique partnership opportunities with private organisations to improve what we can offer our communities and how we go about providing it.

*What makes you proud about Hornsby Council and what you are doing for your community?*

Our community is resolute about what is important to them and how much they value it. Our environment – characterised by our bushland, the Hawkesbury River, our villages, our recreation facilities and our tree canopy – consistently rates as the most important reason that people come to Hornsby Shire and stay here. I get the most satisfaction when I am able to support our councillors and our teams in sustaining our local values through initiatives such as the transformation of Hornsby Quarry, the Westleigh recreation area, rejuvenating our villages and town centres, and our goal of planting 25,000 new trees by September 2020.

*What is the best thing about your role as General Manager?*

I love being able to work with a committed council, engaged community and passionate staff to deliver as much as we can. Being general manager gives an opportunity to support every area that Council is involved in, demonstrating to our community the value of what our people do.

*How do councils, and in particular Hornsby, manage the tension between increasing service delivery required by constituents and ratepayers and limitations on the ability to raise revenue for investment and resourcing purposes?*

This is an age-old question for local government and just about every organisation I can think of. How do you do more with less? Hornsby Shire Council sensibly made a number of very hard decisions some years ago to ensure we are in a financially sound position. I see our role now, despite losing some of our LGA and a significant amount of revenue to Parramatta, is to ensure we know what is most important to our community, prioritise the funding we have available to our community, ensure they are part of the decision making process, look at the opportunities provided by technology and innovation, and wherever possible seek to leverage partnerships and collaborative approaches to delivering for our communities. I would love to see councils work more closely together to see where we can jointly plan and deliver services. It is not about reducing local democracy; just improving the efficiency and quality of what we do. The current difficulties most councils are facing in waste is one area where we in local government could take a much stronger lead.

# **HOW DARE YOU SAY THAT! –** THE INS AND OUTS OF DEALING WITH DEFAMATION

GAVIN STUART

At the Bartier Perry Local Council Conference on 20 September 2018, I presented on *"Unwelcome media commentary – what can you do about it?"*. In that session, I looked at the changing legal and media landscape for Local Councils, and examined strategies for managing unwelcome media attention. In this bulletin, I look more closely at some of the external management options available to Local Councils.

## A "not uncommon" situation

We are increasingly contacted by councils who are at the centre of unwelcome media attention, often involving social media and sometimes involving serious allegations. Although sometimes the result of unfounded complaints by concerned residents, local media and "shock jocks", the seriousness of the allegations, and their potential effect on council, staff and councillors, make it necessary for all involved to know their rights and what processes to follow to contain and manage the situation.

### A CASE EXAMPLE:

In October 2018 the former mayor of Narrabri Shire Council, Conrad Bolton, was awarded more than $100,000 in damages after Facebook posts were made by a local resident accusing him of corruption and intimidation.

The disgruntled resident had set up a website called "Narri Leaks", which became known to other residents in the area. Mr Bolton's children were approached at school about the allegations on the website, and Mr Bolton and his wife noticed a significant drop in the number of invitations they received to functions and events. The Court was told that the Narri Leaks page had been "devastating" and "soul-destroying".

The proceedings were commenced in 2015, but only came to a conclusion three years later in 2018. Mr Bolton was awarded his legal costs and interest. The disgruntled resident was permanently restrained from publishing or broadcasting any further defamatory content.

## Defamation

*What is defamation?*

Defamation occurs when a person's reputation is damaged as a result of a publication about them. It applies to online and social media statements, as well as statements made by traditional forms of communication. The law of defamation is governed by the *Defamation Act 2005* (NSW) and the common law.

To prove defamation, a person needs to establish that:

- defamatory words/imputations were **published**.
- the publication was made by **a person to at least one other person**.
- the defamed person was **identifiable** in that publication.
- the publication **conveyed meaning** likely to lower the defamed person's reputation in the eyes of ordinary, reasonable members of the community.

The defamed person also needs to bring the claim within one year of publication.

*Who can bring a claim?*

Generally, whoever is identified by the relevant statements has the right to bring a defamation claim. Defamation is a personal right of action owned by the person aggrieved. As a public body, a local council does not have a right of action in defamation. However, an employee or councillor who is adequately identified by a defamatory publication, by name or otherwise, may have the right to bring a claim.

Because defamation is a personal right, councils need to ensure that funding court proceedings for defamation won't lead to allegations of misuse of funds. For this reason, councils often have a rule in their codes of conduct prohibiting the funding of legal services for advice on defamation claims or associated litigation.

*How hard is it to prove defamation?*

To pursue a defamation claim, you must provide proof of publication of the defamatory statement. This means you need to show that the person you are accusing participated in the chain of communication of the offending material to third parties. The person making the defamatory statement must have either intended to convey the material, or been reckless as to whether their conduct would lead to that outcome.

That may not always be easy. For example, if a defamatory publication is disseminated online by an anonymous source, it can be difficult (not to say expensive) to identify the author. While you may be able to prove that a Facebook page has defamatory statements on it, you might not be able to prove that a particular person posted them.

"Publication" of a defamatory statement takes place where the offending material is downloaded onto a device and accessed, regardless of where the offending material was uploaded. For that reason, it is common for actions in defamation in New South Wales courts (for example) to be pursued against people outside that jurisdiction – even overseas.

Although forensic data analysts can find out much about the timing and location of online publications, their work can lead to dead ends if a person has been careful to cover their tracks.

All these factors add up, and pursuing someone for defamation can be protracted, difficult and expensive, particularly when they do not admit publication.

## Managing unwelcome media attention

Councils must be ready to manage serious allegations – even if they at first seem bizarre or unfounded. Councils must also follow policies and procedures, including those in the 2018 Procedures for the Administration of the Model Code of Conduct published by the NSW Government. Finally, councils should be aware of their obligations under legislation, including the GIPA Act and the *Public Interest Disclosures Act 1984*. Outside of these obligations, councils can also take steps to contain fallout from unwelcome public attention.

*Curating a media response*

In today's hostile media environment and the 24-hour news cycle, it is imperative that councils curate a media response to any unwelcome media attention. The time has passed when the best approach is to simply ignore a story or "wait for the storm to pass".

When serious allegations are made (whether they are founded or not), councils should inform the public of prompt action they are taking and keep any investigation transparent. Where appropriate, councils should also consider releasing a public statement of support for employees. It is becoming more common for councils to hire public relations "crisis managers", who can help them get in contact with media outlets and curate public messages, including positive stories to change prevailing sentiment.

"Pursuing someone for defamation can be protracted, difficult and expensive, particularly when they do not admit publication."

*Releasing investigation outcomes*

If allegations against council are serious, internal or external investigations may be needed. Often, councils select a senior person to conduct them, or engage specialist investigation companies or lawyers.

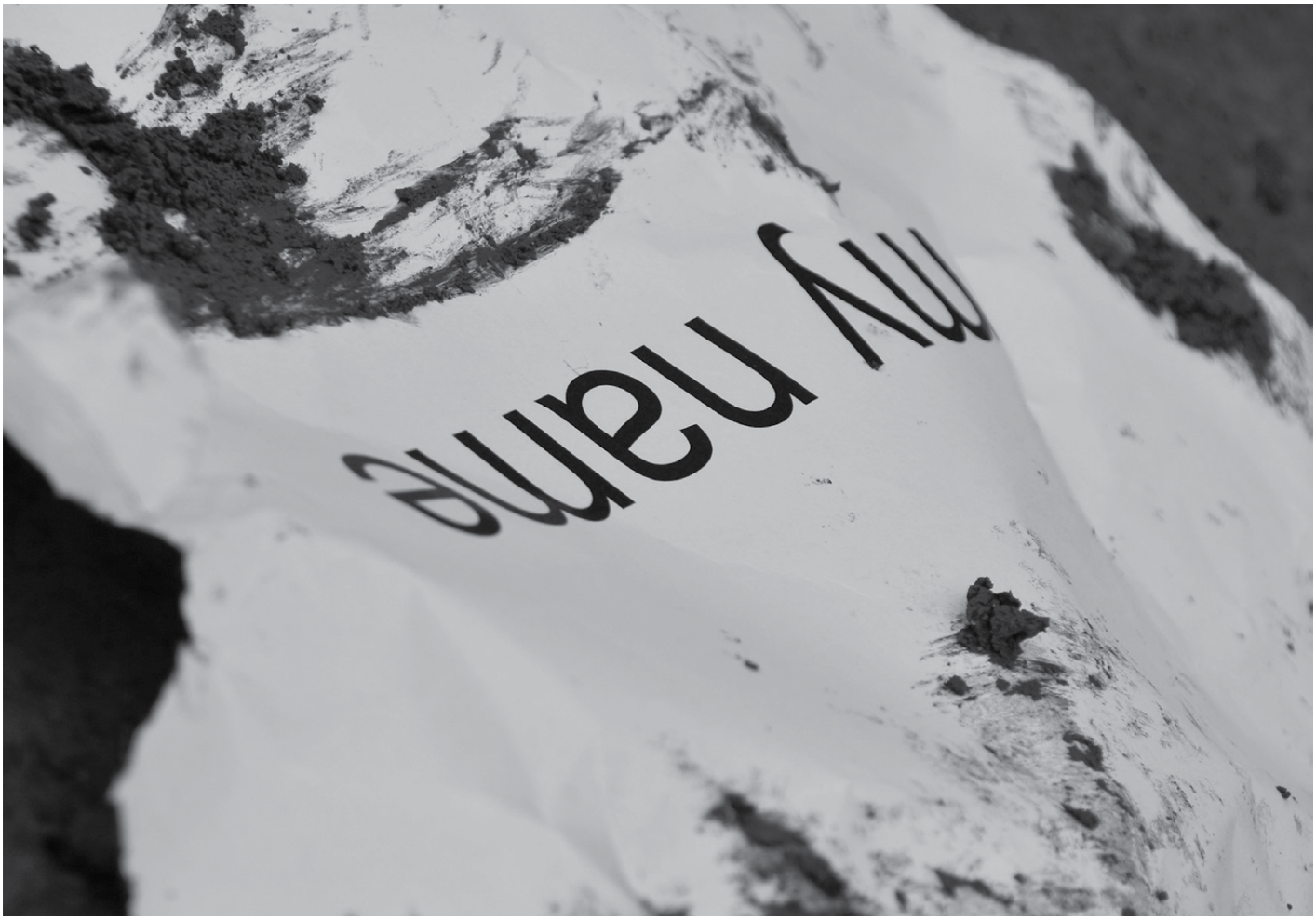
A decision should be made early whether any subsequent report is for internal use only or for external publication. This will frame the approach to the investigation, including privilege and confidentiality over relevant documents, and the content of the report itself.

During the investigation, councils should be conscious of:

1. **Recordkeeping:** It is important for all records to be carefully maintained, especially when the public may request access to them under the GIPA Act, and when some of the documents may be privileged or confidential.
2. **Reporting:** If the allegations are sufficiently serious, it may be necessary to report the allegations to government authorities and NSW Police.
3. **Ongoing training and oversight:** Officers and employees of Council should be provided ongoing training about the procedures involved in the investigation process. This will help ensure that everyone is clear about their obligations, reduce the risk of miscommunication, and reduce staff anxiety.

*Managing Councillors and employees through the process*

Councils are obliged under work health and safety legislation to safeguard the physical and psychological wellbeing of their officers and staff. Anyone named or readily identifiable in media stories will understandably feel anxious and stressed. Investigations, which often involve interviews by external persons, can be confronting and burdensome. Councils should consider procedures to make the process as transparent as possible and to remove uncertainty. This should include access to an employee assistance program, nominating managers or personnel to routinely check on affected employees, and keeping employees well informed of any review and investigation process.



# TRANSPARENCY IN PROCUREMENT

DAVID CREAIS

Councils are bound by specific legislation that demands transparency in contracting, with a view to preventing collusion, corruption, nepotism and paying above market prices. Getting it wrong can lead the Council and responsible officer open to public complaints and court action, not to mention a referral to ICAC. In this article we discuss the legislation, what you must do to comply, and how to avoid common pitfalls.

### *Local Government Act 1993*

Section 55 lists the contracts for which council must invite tenders. The most frequent are for the provision of:

- goods or materials (by sale, lease or otherwise)
- services (other than a contract for banking, borrowing or investment services)

Most relevantly, the section does not apply to:

- a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a council decides by a resolution which states the reasons for the decision that a satisfactory result would not be achieved by inviting tenders; and
- a contract involving an estimated expenditure or receipt of less than $150,000 (Regulation 163).

### *Local Government (General) Regulation 2005*

The *Local Government (General) Regulation 2005* sets out the requirements for contracts to which section 55 applies.

A contract, and any variation or discharge of the contract, must be in writing and be executed by or on behalf of the council (Regulation 165).

Whenever a council is required by section 55 to invite tenders, Regulation 166 states that it must decide which of the following is to be used:

- The open tendering method by which tenders are invited by public advertisement (Regulation 167)
- The selective tendering method by which invitations to tender are made following a public advertisement asking for expressions of interest (Regulation 168)
- The selective tendering method by which recognised contractors selected from a list prepared or adopted by the council are invited to tender for contracts of a particular kind (Regulation 169).

Regulation 170 states that the tender documents must:

- give details of the work to be carried out, the goods or facilities to be provided, the services to be performed or the property to be disposed of
- specify the criteria on which tenders will be assessed
- if a council amends tender documents after they have been issued, it must take all reasonably practicable steps to inform those persons of the amendments.

Regulation 171 relates to shortened tender periods and states that if a council believes there are exceptional circumstances it may decide on an earlier deadline than that advertised.

However, the earlier deadline must be a specified time on a date that is at least 7 days after the first publication of the advertisement.

A council must also keep a record of:

- the circumstances requiring an earlier deadline
- the name of the staff member who made the decision (if it wasn't made by the council).

Similarly if, having specified or included a deadline in an advertisement, a council becomes aware of circumstances that show the deadline may not allow enough time for meaningful tenders, it may extend the deadline (Regulation 172).

The council must then take all reasonable steps to inform people of the later deadline.

As with a shortened deadline, council must then keep a record of:

- the circumstances requiring a later deadline
- the name of the staff member who made the decision (if it wasn't made by the council).

Regulation 175 prescribes that at the time specified for the close of tenders, the appropriate person must open the tenders in the presence of:

- at least 2 people designated by the general manager for the purpose
- any tenderers and members of the public who wish to attend the opening
- as soon as practicable after the tenders have been opened, the appropriate person must prepare a tender list specifying the names of the tenderers in alphabetical order
- immediately after preparing a tender list, the appropriate person must display the list where it can be readily seen by members of the public.

In certain circumstances tenders may be varied (Regulation 176).

> "Councils are bound by specific legislation that demands transparency in contracting, with a view to preventing collusion, corruption, nepotism and paying above market prices."

At any time **before** a council accepts any tenders for a proposed contract, a person who has submitted a tender may vary it by providing the council with further information by way of explanation or clarification, or by correcting a mistake or anomaly.

Such a variation may be made either at the request of the council or the tenderer. The council may only accept the tenderer's request for a variation if it seems reasonable to do so in the circumstances.

If a tender is varied, the council must provide all other tenderers whose tenders have the same or similar characteristics the opportunity to vary their tenders in a similar way.

A council must not consider a variation of a tender if the variation would substantially alter the original tender, and the council must keep a record of:

- the circumstances requiring the variation of a tender
- the name of the staff member handling the matter.

After considering the tenders submitted for a proposed contract, the council must either (Regulation 178):

- accept the tender that, having regard to all the circumstances, appears to be the most advantageous, or
- decline to accept any of the tenders.

A council must ensure that every contract it enters into as a result of an accepted tender is with the successful tenderer and **in accordance with the tende**r (modified only by any variation under Regulation 176).

A council that decides not to accept any of the tenders or receives no tenders for the proposed contract must, by resolution, do one of the following:

- postpone or cancel the proposal for the contract
- invite fresh tenders based on the same or different details
- invite, in accordance with Regulation 168, fresh applications
- invite, in accordance with clause 169, fresh applications
- enter into negotiations with any person (whether or not the person was a tenderer) with a view to entering into a contract in relation to the subject matter of the tender.

However, if a council resolves to enter into negotiations, the resolution must state the council's reasons for declining to invite fresh tenders or applications, and for deciding to enter into negotiations with the person or persons.

As soon as practicable after entering into a contract or deciding not to accept any of the tenders, a council must (Regulation 179):

- notify all tenderers whose tenders were not accepted or, as the case may be, that none of the tenders for the proposed contract was accepted
- display a notice in a conspicuous place accessible to the public specifying the name of the successful tenderer and the amount of the successful tender or, if none of the tenders was accepted, a notice to that effect.

### Tendering Guidelines for NSW Local Government October 2009

The Guidelines were adopted by the Deputy Director General (Local Government), Department of Premier and Cabinet under section 23A of the *Local Government Act 1993*.

They provide a practical and detailed guide to tendering in accordance with the Act and Regulation, and **must** be taken into consideration by all councils when exercising their tendering functions.

The Guidelines are divided into four sections:

**Guiding principles** – sets out the overarching principles that apply to the tendering process.

**Procurement management** – outlines processes necessary to effectively manage the process.

**The tendering process** – outlines the stages involved in the process with reference to specific legislative requirements and recommended practices.

**Resources** – provides useful publications, websites and contacts as well as a tendering checklist and list of commonly used terms.

Section 3, the tendering process, is the heart of the Guidelines; in particular, Part 3.6, which deals with developing the tender documents.

Section 4, Resources, includes a very useful Tendering Checklist

> “Failure by a councillor to comply with the standards of conduct constitutes misconduct for the purposes of the Act.”

### Model Code of Conduct for Local Councils in NSW

The Model code is made under section 440 of the *Local Government Act 1993* and the *Local Government (General) Regulation 2005*.

It sets the minimum standards of conduct for council officers and requires every council to adopt a code of conduct that incorporates the provisions of the Model Code.

Failure by a councillor to comply with the standards of conduct constitutes misconduct for the purposes of the Act.

Failure by a member of staff to comply with a council's code of conduct may give rise to disciplinary action.

Specifically, it prescribes that a councillor or officer must not conduct himself or herself in a manner that:

- is likely to bring the council or other council officials into disrepute
- is contrary to statutory requirements or the council's administrative requirements or policies
- is improper or unethical
- is an abuse of power
- involves the misuse of position to obtain a private benefit.

A councillor or officer must:

- act lawfully and honestly, and exercise a reasonable degree of care and diligence in carrying out functions under any Act
- consider issues consistently, promptly and fairly, and deal with matters in accordance with established procedures, in a non-discriminatory manner
- take all relevant facts known to them, or that they should be reasonably aware of, into consideration and have regard to the particular merits of each case, without taking irrelevant matters or circumstances into consideration when making decisions.

An act or omission in good faith, whether or not it involves error, will not constitute a breach of the Model Code.

### Common law misrepresentation/misleading and deceptive conduct

Misrepresentation is the false statement of a material fact made by one party to another to induce that other party to enter into a contract.

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive (section 18 of the *Australian Consumer Law*).

The statement or representation may be unintentional.

The statement or representation may be made by omission – there will be an actionable misrepresentation if a party had a reasonable expectation that if a relevant matter existed it would be disclosed.

The consequence of misrepresentation in the tender process can be a claim for damages or to be able to rescind (or refuse to enter) the tender contract or both.

### Process contract

A request for tender (**RFT**) can itself constitute a contract, known as a “process contract”.

By submitting a tender in response to the RFT, a binding contract between the tenderer and council is formed that requires the process set out in the RFT to be followed in evaluating the tenders and awarding the tender contract.

Consequences of not complying with the tender "process contract" may be:

- a claim for damages or to be able to rescind (or refuse to enter) the tender contract or both, if the complainant is the successful tenderer, or
- an action to restrain the award of the tender contract to the successful tenderer or damages or both, if the complainant is an unsuccessful tenderer.

## Tips and Traps

Things you should do:

- Consider using the tender process in accordance with the Guidelines even if the contract involves amounts below the prescribed $150,000 threshold (see also Part 3.1 of the Guidelines)
- Be aware when calculating the estimated expenditure under the contract that it is the aggregate or cumulative cost over the life of the contract
- Make sure the tender documents follow the "4 Cs" – clear, consistent, comprehensive and compliant
- Make the specifications as detailed as possible
- Document everything, especially communications with tenderers
- Circulate relevant information and communications to all tenderers – if in doubt, circulate
- Use the Tendering Checklist in the Guidelines (or a similar document).

Things you should not do:

- Vary a contract that was initially below the prescribed threshold for tendering so that expenditure exceeds the prescribed threshold without either going to tender or following the prescribed process
- Negotiate or agree to departures from the terms of the tender contract after the tender has been awarded
- Vary a contract to such an extent that in reality it is a new contract
- Automatically discard a tender received after the deadline for submission (see Regulation 177).


# GOOD DECISION MAKING – A DELICATE BALANCING ACT

NORMAN DONATO

We all like to think we make good decisions, especially in our areas of expertise or specialty. But on what basis?

Sometimes it's simply a gut feeling. "I've been doing this for a long time, I know my stuff, and I know what makes sense in this situation."

Government decision making, however, requires a degree of rigour, coupled with subtlety, not seen in many other areas. Above all, it calls for the balancing of public and private interest, generally in the context of a legal framework.

Good government decision makers are skilled at balancing four distinct requirements:

- Legal demands or requirements
- Objectives of government policy
- Public expectations and those created by the government authority
- Financial and economic restrictions.

But the matter doesn't end there. No matter how sound the government decision, there will almost always be someone who believes it impacts them unfavourably.

From a legal standpoint, then, a good government decision is one that, if challenged, is justifiable within the legal context in which it is made.

What is meant by "legal context"? Put simply, it is the precise wording of the governing rule or legislation that bears on the decision. Government organisations are obliged to apply the law, not be guided by "perception".

"No matter how sound the government decision, there will almost always be someone who believes it impacts them unfavourably."


Where this doesn't happen, decisions are more likely to be challenged, with the tribunal or court then applying the very law that should have been applied in the first place.

Moreover, when making a decision, it is important to clearly state the relevant law and the rationale for its application in this case.

Twelve years ago, Justice Branson in the Federal Court in *Australian Postal Corporation v Barry* (2006) 44 AAR 186 at 190 stated this principle elegantly:

> *"... it is a statutory discipline for every statutory decision-maker to refer to the terms of the relevant statutory provisions and to identify each element of the statutory cause of action. Had the Tribunal in this case set out or paraphrased in its reasons for decision the terms of sections... it is unlikely that it would have overlooked their critical elements."*

Operating from this overriding principle will do much to ensure sound decision making. But there are still ways to go wrong. They include:

- Assuming that the wrong provisions apply
- Proceeding on the wrong interpretation of the details of the correct provisions
- Failing to base the decision on the terms of the enabling power.

The last point bears expanding. Many laws are written for the purpose of enabling authorities to make decisions appropriate to their role. Administrative decision makers are entitled to take policy into account when making decisions.

That doesn't constitute a blank cheque by any means, but it does mean that public interest must be given due consideration.

## Fair's fair – even if the outcome may not be

At times, that may mean a decision is made that is, or seems to be, unfair to specific individuals or groups.

For such a decision to withstand scrutiny, the key is not whether it disadvantages specific people (ie. the decision itself is fair), but whether the *process by which it was arrived at* was fair.

In other words, was the decision made in accordance with the relevant statute and the requirements of natural justice?

Natural justice demands that those affected by a decision have the opportunity to express their views, and that the decision maker (whether an individual or an entity) is impartial and not subject to any conflict of interest.

In practice, this means – among other things – that members of the public should be notified of a proposed decision, provided or given sufficient access to information that would allow them to effectively respond and present arguments, and that this takes place with due consideration of the legislative framework, subject matter and potential consequences of the decision being made.

Regarding impartiality, it is not sufficient for the decision to be unbiased – an apparent bias that could lead a fair-minded person to suspect the decision maker is not impartial may leave a decision open to challenge.

Operating from a clear understanding of these legal principles, coupled with a sound grasp of the material facts in each case (including those that must be inferred), will leave Councils on solid ground when making decisions.

# ENDING 'DEVELOPER CREEP' IN RURAL AREAS – WHAT'S CHANGED IN THE SENIORS HOUSING SEPP

STEVEN GRIFFITHS

For a long time, urban fringe councils have been concerned that *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004* (SEPP) has led to the urbanisation of rural land by providing opportunities to develop such land for seniors housing.

Media interest in the issue peaked earlier this year when some councils were said to be "in revolt" against the SEPP.

Recent amendments to the SEPP address these concerns by placing greater restrictions on opportunities for rural land to be developed for seniors housing, including for the first time, consideration of the cumulative impacts of proposed developments that are close to each other.


We discuss these amendments below.

## 1. Incremental Expansion

A main concern for councils has been site compatibility certificates (SCC) being issued for concept proposals for seniors housing on rural land.

The SEPP displaces any prohibitions of seniors housing developments on rural-zoned land under local environmental plans (LEPs) where the rural land is deemed to be 'land adjoining land zoned primarily for urban purposes.

This led to some developers of rural land which adjoins land zoned primarily for urban purposes (and which has been granted an SCC) to acquire adjoining parcel/s of rural land and expand the proposed development across a larger consolidated site despite the acquired parcel/s being further away from the urban land.

The result has been a steady expansion of rural land being developed for seniors housing, also known as 'developer creep' or incremental expansion.

The amendments – see clause 25(5)(c)(iv) and (5A) of the amended SEPP – address this by barring the issue of a new SCC for an expanded development site if:

- The adjoining parcels of rural land are proposed to comprise structures to be used as accommodation; and
- The total number of dwellings proposed for the expanded development site exceeds that of the original SCC proposal.

*Treysten: A scenario that should no longer be possible*

An example of incremental expansion was seen in *Treysten Pty Ltd v Hornsby Shire Council* [2011] NSWLEC 1364 (Treysten).

Council refused a development application for a seniors housing development. Among its reasons for refusal was that one allotment of the development site, which was acquired and added to the original development site later by the developer, was not in itself 'land that adjoins land zoned primarily for urban purposes', despite being the subject of an SCC.

The applicant successfully argued that the fact that part of the consolidated development site adjoined land zoned primarily for urban purposes did not prevent the whole development site from being considered as one contiguous parcel of land that adjoined land zoned primarily for urban purposes.

The amendments to the SEPP will prevent similar results, unless the adjoining, additional land has no dwellings *and* the total number of dwellings between the original proposal and the expanded proposal does not increase.

The amendments will likely reduce the profitability of adding additional rural lands to a development site and arrest the trend of incremental expansion.

The amendments have also confirmed that a current SCC cannot be modified to include additional land. Instead, a new SCC application will be required (clause 25(10)(a) of the amended SEPP).

Further, the amended SEPP clarifies that rural land developed for seniors housing remains rural land under the zoning of an LEP rather than being urban land to which other rural land could be developed as 'land that adjoins land zoned primarily for urban purposes' (clause 25(10(b) of the amended SEPP).

Note that these amendments do not affect the expansion of development sites within zones that permit seniors housing developments.

## 2. Cumulative Impacts

Another concern of councils has been the lack of consideration given to the potential cumulative impacts of multiple developments on neighbouring areas.

Rural areas usually lack the infrastructure and local services needed to accommodate multiple, large developments of this nature and the new population they bring.

This has been addressed by a new requirement for a ***cumulative impact study*** to accompany SCC applications.

Where land subject to an SCC application is within a kilometre of two or more other parcels of land which either benefit from a current SCC or are the subject of a current application for an SCC (termed as being ***'next to proximate site land'*** under clause 25(2A) of the amended SEPP), a cumulative impact study must be lodged in support of the application.

The requirements of a cumulative impact study are outlined in clause 25(2C) of the amended SEPP.

## 3. Determining Authority

Previously, the determination authority for SCC applications under the SEPP was the Director-General of the DPE (or the Secretary following DPE restructure).

The amendments have now made the ***relevant panel*** the determination authority for SCC applications.

A ***relevant panel*** is defined under amended clause 3(1) of the amended SEPP to be:

> *... the Sydney district or regional planning panel constituted for the part of the State in which the land concerned is located.*

Applications for SCCs are still to be made to, and assessed by, the DPE.

However, the determination of applications will now be made by the relevant district planning panel (Greater Sydney) or regional planning panel (regional NSW) upon receipt and consideration of a report and recommendation from the DPE.

This change increases the transparency of the process while still allowing councils the right to be notified of, and make submissions on, SCC applications.

## Conclusion

The amendments will provide some relief to areas where incremental expansion of seniors housing developments has been an issue.

In addition, greater consideration will be given to the cumulative impacts of SCC sites that are close to each other.

Determination powers passing to relevant planning panels will improve transparency and independence in the determination process.

The amendments are effective now and apply to all applications for SCCs lodged, but not determined, after 10 November 2017.

> "Media interest in the issue peaked earlier this year when some councils were said to be "in revolt" against the SEPP."

# WHEN LAND ACQUISITION MAY COST COUNCILS MORE THAN MARKET VALUE

PETER BARAKATE

When I spoke at the recent Local Government Property Professionals Conference on owner-initiated hardship applications, a couple of key points arose around hardship applications.

Public purpose: Acquisition provisions must operate meaningfully and effectively.

In *Calarco and Anor v Liverpool City Council* [2018] NSWSC 217, the Supreme Court made it clear that the hardship provisions of *Land Acquisition (Just Terms Compensation) Act 1991* are intended to operate in a practical and realistic fashion.

In this case, the plaintiffs, Giuseppe and Antonetta Calarco, owned a parcel of land in Austral composed of two portions. One portion was zoned RE1 Public Recreation and the other zoned SP2 Infrastructure and marked "Local Drainage" under the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*.

Council had argued that while it was required to acquire the portion of land zoned RE1, the land zoned SP2 was not reserved by the EPA for a purpose referred to in the former section 26(1)(c) – now section 3.14(1)(c) – and therefore was not designated for acquisition for public purposes. On this basis, Council argued that it was not required to acquire that land.

The court held that such an interpretation would leave the plaintiffs with part of the land which could not be meaningfully used, let alone sold. Council must act in a manner which would allow the compulsory acquisition provisions to operate meaningfully and effectively with respect to private property rights.

The upshot of this case is that if land is reserved for one of the requisite public purposes and is subject to a successful hardship application, it must be acquired by Council.

## Compensation: When 'generous and liberal' lights the way.

Confusion often arises in hardship applications about the amount of compensation payable to landowners under section 26 of the EPA Act.

Section 26 provides that:

> *The special value of land, any loss attributable to severance or disturbance and disadvantage resulting from relocation (as referred to in Part 3) need not be taken into account in connection with an acquisition of land under this Division, despite anything to the contrary in that Part.*

The best guidance for determining compensation in hardship applications can be found in *Hoy v Coffs Harbour City Council* [2016] NSWCA 257. In this case, the Court of Appeal held that the words 'need not' give the Valuer-General a discretion to take the matters in section 26 into account. The court made clear that such provisions should be construed generously and liberally because they protect the interests of those whose property rights have been damaged – in this case by the land being designated for public purposes.

In this case, the Land and Environment Court commissioners had the discretion to make an allowance for disturbance and solatium (now known as disadvantage resulting from relocation). This decision is consistent with the Second Reading Speech introducing the 1991 Act into Parliament.

So councils should be aware that, in hardship applications, they may need to pay landowners more than market value for the land being acquired.

> "If land is reserved for a requisite public purpose and is subject to a successful hardship application, it must be acquired by Council."

# WORKERS COMPENSATION CLAIMS FOR PSYCHOLOGICAL INJURY – DUAL HR AND INSURER INVESTIGATION – WHY BOTH?

MICK FRANCO

An employer who investigates an employee for any matter – performance, code of conduct issues, grievance complaints or anything else – can sometimes find themselves then dealing with a subsequent workers compensation claim for psychological injury.

The timing of the compensation claim can vary. It can emerge at the beginning of the HR investigation. Sometimes, the claim can be made following the investigation or, often, when leave entitlements run out.

Whether or not the workers compensation claim is justified is one matter. The other matter – and the one addressed in this article – is how to properly deal with such a claim.

The first point to note is that a psychological injury claim will inevitably prompt separate and additional investigation instigated by the insurer or Council self-insurance unit covering at least some, if not many, of the matters already dealt with by the employer or HR investigation.

Given that, why have two investigations at all? Surely a single investigation is stressful enough on all parties, including witnesses, without adding another to the mix. Can the workers compensation claim be addressed by the HR investigation? The short answer is no!

The focus of the employer or HR investigation is usually on conduct or performance of the worker and other employees. This investigation is designed to establish whether the misconduct or poor performance occurred and, if it did, the employer action which should follow such as a warning, performance improvement plan, further training or other disciplinary measures such as demotion or even dismissal.

Where there is also a work-related psychological injury, the entitlement compensation usually depends on the employer action that caused the injury. If the injury was wholly or predominantly caused by reasonable employer action on defined matters such as performance appraisal, discipline or dismissal, there is no entitlement.

The focus of the workers compensation investigation is, therefore, the action taken by the employer to deal with the performance or conduct issue, whether it falls into one of the categories where workers compensation benefits are excluded and whether the employer action was objectively reasonable. Whilst the conduct or performance of the worker is relevant, of more relevance to workers compensation is what the employer did about that.

The focus of this investigation is, therefore, quite different and the material assembled in the HR investigation will not be enough to properly deal with workers compensation.

Moreover, HR investigations often do not produce signed witness statements in admissible form, which is a requirement in the Workers Compensation Commission.

What's more, material that may be important in an investigation – such as interview notes, HR investigation and disciplinary correspondence, internal emails and an investigation report – carry some weight but will just not be enough to deal with the workers compensation claim. The material usually won't address the main employer defence to psychological injury claims under section 11A(1) of the Workers Compensation Act:

> *No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers*

The workers compensation dispute resolution system is designed to do just what the name says – resolve disputes. It is not an adversarial court process, hearing times are kept to a minimum, there is limited opportunity for cross examination and witnesses are rarely called to give oral evidence.

The system is paper driven and 'front end loaded'. This means the witness statements must be prepared in admissible form, signed served with the dispute notice prior to litigation. The evidence must be assembled early and promptly when the claim is made. If the witness statements are not obtained, the insurer generally won't be able to dispute the claim and it will have to be paid.

> "Material that may be important in an HR investigation carries much less weight, if any, in a disputed worker's compensation claim."

## Preparing for a psychological injury claim defence

How, then, do you deal with a claim for psychological injury?

The first principle is to act promptly and identify claims where the section 11A(1) defence may apply to disentitle or exclude payment of workers compensation. You should also identify questionable or suspect claims at the beginning. These claims should be targeted for detailed insurer driven factual investigation.

If you do decide to dispute the claim:

- It is critical to begin by assembling all relevant information before the insurer factual investigation begins. This includes things like the injury notice, claim form, medical certificate(s), HR investigation and records, business unit material such as email and notes, and historical sick leave records.
- Identify any non-work events or pre-existing medical conditions that could be relevant to the alleged injury, and who has that information; but remember unsubstantiated hearsay or speculation does not help and won't be useful.
- Then develop a chronology of potentially relevant causal events; not the worker's life story but the things you think caused the injury.
- Focus on what the worker is alleging in the claim form and medical certificate. Do not be distracted by anything else.
- Create a list of relevant witnesses and their contact details.
- Organise a go-to person for the investigator at the Council to help with lining up witnesses and obtaining any further material.

Limit material only to what is relevant and order it in a way that helps the insurer and/or investigator make sense of it. A jumble of disordered documents does not enhance your case.

Your insurer or solicitor will brief an investigator to research and check relevant evidence. The brief will include establishing a balanced history of relevant events, what the worker alleges, and formulating a cohesive employer response.

Witnesses are not obliged to give statements, and some will refuse to do so on legal advice. Employers cannot oblige employees to sign statements. Those who do sign, should be given the opportunity to review and, if necessary, amend them before doing so and then be given a copy of their signed statement only – do not give them copies of any other documentation.

During a claim investigation, information may come to light that has some bearing on the initial – or even a subsequent – employment issue. That information, however, may only be used to deal with the compensation claim. To use it otherwise can breach workers compensation regulatory requirements and lay the employer open to legitimate complaints from witnesses that their evidence is being used for a purpose not disclosed to them. An employee may have agreed to give a statement for the compensation claim; without permission to use the statement to support disciplinary action against the worker.

Finally, be aware the injury story and related evidence can change over time, including after the claim is disputed. Depending on the nature of those changes further investigation may be warranted.

Should a claim arise get in communication with your insurer or self-insurance unit early and stay in touch with them and the investigator until the matter is settled. In addition, ensure you are doing everything needed to deal with the claim and doing it in a timely fashion.

# *THE POWER AND THE PASSION –* 'NO DISMISSAL JURISDICTION' FOR COUNCIL EMPLOYEE'S PASSION FOR THE EXOTIC AERIAL ARTS OF HOOPS, SILKS, BARS AND POLES!

DARREN GARDNER AND ANDREW YAHL

Is it constructive dismissal to decline an employee request to decrease working hours so they can work more hours with a secondary employer?

In *Moore v North Sydney Council* [2018] NSWIRComm 1062, Darren Gardner, partner at Bartier Perry convinced the Industrial Relations Commission that there was no 'dismissal' when North Sydney Council declined a secondary employment variation request.

Isobel Moore was by day an Events Co-ordinator at North Sydney Council on a maximum-term maternity leave contract, and by night an instructor in the exotic aerial arts of Lyra; Silks and Trapeze. Ms Moore obtained secondary employment approval under s 353 of the *Local Government Act* 1993 (NSW), with her supervisor understanding she wished to leave early at 3pm on Thursdays to do her aerial instructing second job.

After several months, Ms Moore requested a reduction from her contracted 35 hours to 27 hours a week, so she could increase her hours of secondary work.

> "The Commission has long recognised that constructive dismissal requires the employer to be the "real and effective initiator of the termination of the employment."

Because Council had a number of employees on, or soon to be on leave, and several projects that needed completing, it declined Ms Moore's request. It also reasonably held some work, health and safety concerns about the total hours Ms Moore proposed working for Council and her secondary employer.

Following Council declining her request, Ms Moore then tendered her written resignation, claiming she had no choice if she was to pursue her 'true passion' of aerial instructing.

To the reasonable observer, this would seem to be a classic example of an employee voluntarily resigning to take up other preferred employment.

Remarkably though, Ms Moore claimed she had been 'constructively dismissed' because, in her opinion, and based on what she had been told by a solicitor, she had no choice but to resign.

After working out her notice period, Ms Moore filed an unfair dismissal claim.

After hearing all the evidence, the Commission disagreed with Ms Moore's subjective construction of events and much preferred Council's version.

In assessing any given case, the Commission considers whether the resignation:

- was given freely and without undue pressure
- was in response to a desire of the employer for the employment relationship to terminate.

During cross examination, it was also established that Ms Moore was also indulging her passion in her own business and at other non-disclosed workplaces, including in the semi-aerial pole dancing arts.

The Commission found that the only effective initiator of the termination was Ms Moore. It was her decision to prioritise her passion for her secondary (and tertiary) employers when the proposed new hours were declined.

The Commission accordingly found that it did not have jurisdiction to hear the matter because Ms Moore was not 'dismissed'.

## What does this mean for Councils?

There are situations where Councils may be obliged to consider the reasonable request of employees to reduce or change work hours. Such situations include carer's responsibilities, disability or illness. But a request to take up or extend secondary employment is generally not included.

If the reduction in primary work hours is small or can be reasonably accommodated, it should be considered. Ultimately, though, you do not have to accept secondary employment variations if they do not suit business requirements. You can reasonably require the employee to continue working contracted hours as agreed, especially if the variation may result in total hours raising work fatigue issues, or if it would be detrimental to the workload of other employees in a team.

# OPERATING IN THE PUBLIC EYE

Local Council Managers & Officers Forum

20 Sept 2018 - *Mantra Parramatta*

Thank you to all those who attended our inaugural Local Council Managers & Officers Forum at the Mantra Parramatta. With the theme of *Operating in the Public Eye*, we were treated to a line-up of impressive speakers including Chris Fogarty from FMC Change and the Bartier Perry team who addressed the issues facing local government. Thank you to City of Parramatta Lord Mayor Andrew Wilson for opening the forum.



# WOULD YOU LIKE TO KNOW MORE?

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

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# VALUE ADDED SERVICES

We spend significant time looking at ways we can assist councils outside of just providing legal advice. We have at times sought your feedback to clarify what is of importance to you and what else we can do to simply help you do your role. Examples of these include:

## Articles

We distribute electronic articles on a weekly basis which detail legislative and case law changes and industry developments as they occur, and often before they occur.

We encourage our clients to re-publish our articles across their internal communication platforms, as appropriate.

## Council Connect

Published twice yearly, Council Connect focusses on issues and trends affecting councils and is distributed as an added value service to all our council contacts. Each issue carries articles across many areas, and investigates legal issues of particular relevance to councils, with advice on how to prevent them emerging in the first place.

## Support of industry and community

Educating and being involved with our relevant industries is important both to us and to councils. It means together we are always current in an often-changing environment – not only with the law but with industry experts, current trends and broader industry information. We work with the various players in the industry to ensure we bring value back to councils.

Bartier Perry regularly sponsors and provides speakers to council-related conferences, including the LGNSW Property Professionals Conference, LGNSW Human Resources Conference and the Australian Property Institute (API) Public Sector Conference.

In 2018 we partnered with the Planning Institute of Australia (PIA) to bring together expert speakers on the NSW Planning System for a series of evening seminars. Council clients have the opportunity to network with leaders of industry.

Bartier Perry also sponsors, attends and hosts training events for Urban Development Institute of Australia (UDIA) and Australian Institute of Urban Studies (AIUS).

## CLE, training and education

We provide councils with tailored seminars, workshops and executive briefings for senior management on current legislative changes and regulatory issues. A highlight was our September 2018 *Operating in the public eye: Local Council Managers & Officers Forum*. Other recent seminars we've held include:

- Perspectives on Termination and Settlements – a panel discussion
- Site Acquisition and Planning Proposals
- Combustible cladding
- Drafting a compliant and effective s 74 Notice
- Compulsory acquisitions – valuation approaches, tips and traps.

Seminars are captured via webcast for regional clients and footage then uploaded to our website.

For any enquiries, feel free to contact us at LocalCouncilTeam@bartier.com.au

# ABOUT BARTIER PERRY

Based in Sydney's CBD, Bartier Perry is an established and respected mid-tier law firm which has been providing expert legal services for 75 years.

Our practice has corporate clients from a wide range of industry sectors, and appointments to all levels of government including statutory bodies.

With 70 lawyers, we offer personalised legal services delivered within the following divisional practice groups:

- Corporate & Commercial and Financial Services
- Commercial Disputes
- Property, Environment & Planning
- Insurance Litigation
- Estate Planning & Litigation, Taxation, and Business Succession
- Workplace Law & Culture

# YOUR THOUGHTS AND FEEDBACK

Thank you for taking the time to read our Council Connect publication. We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

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