

Council CONNECT

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From kangaroos to Native Title – and everything in between

Anyone looking for a single theme running through this issue of Council Connect will look in vain. The territory covered in this issue is as broad and varied as New South Wales itself.

That speaks volumes about the work that local councils perform. As Kerry Robinson, CEO of Blacktown City Council, notes in this issue's interview, few commercial enterprises have as many business lines as councils. (And thank you, Kerry, for generously giving us your time.)

One theme that is common to all councils – in fact, to all workplaces – is that knowing the law is only one part of the equation. Equally critical is understanding how to apply it in today's fast changing world.

Fundamental cultural shifts are placing new challenges before councils. The #metoo movement, ever-changing technology and what our recently appointed partner Katherine Ruschen has described as an Age of Inquiries are all examples of this. Councils are not immune to any of it.

Nor do those with vision want to be. Mostly, the change is positive, leading to more diverse, equitable and engaging places to work, and communities who are often deeply involved in their councils' decision making.

As another Bartier Perry partner, Amber Sharp, recently stated, workplace changes in the last decade have not been driven by legislation but rather culture. The same goes for how councils engage with their communities.

It's our privilege to work alongside you as you develop and enhance your local communities and embrace new approaches to doing that. In that vein, planning is already well under way for this year's Local Council Managers & Officers Forum, which will take place on September 19. We'll be in touch soon with more details.

Riana Steyn
Chief Executive Officer
Bartier Perry



INTERVIEW WITH KERRY ROBINSON CEO, BLACKTOWN CITY COUNCIL



Kerry, you came from a corporate environment to local government. How different are they from each other?

There are quite notable differences. In public service, we're here to serve a broad range of objectives, not just generate profit and add shareholder value. Local government is very diverse – few business entities have more than 40 different business lines, as council has. It's a very satisfying environment. I can be talking about capital investment in one conversation, then childcare centre improvement, then workplace health and safety. It's stimulating. I have a broad range of interests, which is good. I can take an interest in all kinds of things – for example, why don't we electrify our truck fleet, where are we at with construction projects? And so on.

What are some of the major projects Blacktown City Council is involved in?

Atypically for councils, we have a lot of transformational projects on right now. Warrick Lane is a 2.5-hectare site in the centre of CBD. We let a demolition contract for a whole set of shopfronts and will replace them with a 450-space underground carpark and new town plaza flanked with retail buildings. We'll carry out remediation on surrounding plots for residential and office buildings. It's a \$76m build that creates the opportunity for about \$1b of development.

We've also gone to market as part of a separate project seeking a university partner in the CBD. The Australian Catholic University will build a substantial new facility in the new precinct with up to 18,000 sq. metres, suitable for 3,500 or more students. Blacktown has a population of about 370,000, 18,000 of them students. We want to provide opportunities for them. Council will also explore building its own office co-located within the university. We're looking at big integration – shared facilities like childcare, library, a common booking system for spaces, use of theatre space for council chambers. These are synergies that drive value for ratepayers. While we could happily run separate libraries, for example, a shared library will give our community access to a better range of resources.

We're also looking at a \$100m centre of training excellence and recovery, currently in the feasibility stage. Should it go ahead, it will be located at Blacktown International Sports Park, a former Olympic facility. It'll provide training and recovery facilities for elite athletes and a pathway for juniors. The Health facilities will also serve the broader community – when you work with the best sports people, you attract the best medicos, and that's good for community. Australian Catholic University is also interested in participating with us in allied health teaching and research.

We also have a \$26m new animal rehoming centre beginning construction next year. We look after companion animals of seven other councils, and once this centre's completed, we'll look after a third of Sydney's companion animals. We're working with Sydney University here, building a space for them to do teaching and training.

A capital spend is in medical research and training and Blacktown hospital. We've just completed a feasibility study that demonstrates that a private hospital of around 150 beds is viable. We're talking with a private operator who's keen on a model that includes medical research and other recovery facilities, as well as a private hospital.

We're driving a project that's seeking to optimise outcomes from Blacktown Hospital, which is going through expansion that will see it become the fourth largest hospital in NSW. We're looking at opportunities for development around the hospital – creating an environment where allied health services can flourish.

What do you see as the biggest challenge facing your council over the next 12 months?

Financing. The biggest challenge is two-fold.

There's rate capping by the State Government and changes in the Commonwealth's Financial Assistance Grants.

The Financial Assistance Grant is the only form of untied grant that local councils receive. It's shrunk over time and the balance has shifted from metro to rural areas. For Blacktown City Council that's quite a significant reduction in our discretionary operating fund.

What do you do about that?

Three years ago we went to ratepayers and asked for a rate rise, based on long term renewal of assets. There was support for the idea, along with understandable concerns. There's a conversation to be had with incoming council on that in the future.

One other challenge is that in the developer contribution side of our revenues, we're unable to levy for community facility buildings. Population growth in Blacktown – 370,000 to over 500,000 in the next 20 or so years – means we'll have a \$300m shortfall with no funding source. We're telling anyone who'll listen about that issue, but to not much avail.

Issues of growing councils like ours are different from those that are static or shrinking.

One thing we're blessed with is a great bunch of collaborative councillors with a clear vision. We have an appropriate level of governance and oversight, which makes my role very rewarding. Not every council enjoys the quality we do – it's very varied across all councils, and some suffer from significant dysfunction.

What are you most excited about?

The ongoing growth of our local economy – 4.5% p.a. – and the growth of the population. They're adding 104 jobs a week to our community. I come from a development background, so managing growth and doing the best job we can for the incoming population and businesses is important to me. Also, growth gives you opportunities that are more pleasant than those that come with shrinking. New community members give us new options.

I'm excited about our business review process. We've undertaken a comprehensive Better Practice Review process supported by the University of Technology which has a strong interest in local government and a lot to offer us.

I grew up in this area. Council gave me a cadetship when I was doing a planning degree, then I went on to commercial property development. Coming back was very satisfying – this is an area that I have a great affinity and love for. I have a great relationship with the Mayor, who grew up near where I grew up. We work hard to deliver for the city and we have the support of great councillors and a strong executive – I couldn't wish for a better executive.

We have a wonderful opportunity in the Blacktown CBD to change the course of the city for the benefit of the community over the next century. That's very rewarding.



A LESSON ON CULTURE FROM THE HAYNE ROYAL COMMISSION

NORMAN DONATO

The recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, aka the Hayne Royal Commission, asked whether the conduct of financial services entities amounted to *misconduct* and whether any conduct, practices, behaviour or business activities by those entities fell below community standards and expectations.

Volume 1 of the Commission's four volume report stated that primary responsibility for the misconduct it identified lay with the entities concerned and those who manage and control them; that is, the board and senior management. Therefore, it said *"close attention must be given to the culture, the governance and their remuneration practices."*

This article examines those aspects of the Report that deal with culture, focusing on Recommendation 5.6. The Report's discussion of the pivotal role of culture in driving or discouraging misconduct is relevant to both government and private organisations.

What is culture?

The culture of an entity, the Report says, is the *"shared values and norms that shape behaviours and mindsets"*. It is *"what people do when no one is watching"* and the essentially internalised or instinctive application of shared norms and values.



The Report makes three general points about culture.

1. The culture of each entity is unique, and may vary widely within different parts of the entity.
2. Basic Norms of Behaviour: There is no single “best practice” for creating or maintaining a desirable culture but one necessary element is adherence to these basic norms of behaviour:
 - > obey the law
 - > do not mislead or deceive
 - > act fairly
 - > provide services that are fit for purpose
 - > deliver services with reasonable care and skill
 - > when acting for one another, act in the best interests of that other.

As culture is about behaviours and outcomes, these norms must be applied consistently, within the organisation and in its dealings with others. This will embed the norms of behaviour into the organisation’s DNA.

3. Culture cannot be prescribed or legislated or imposed by rules. *It is about behaviours*, and behaviours are mostly not amenable to legislation and regulation.

How does an organisation assess its culture?

The Report notes that assessing culture is more difficult in organisations with problematic cultures. The reason: problematic cultures tend to arise from the organisation turning a blind eye to its own faults.

When assessing its own culture, every organisation must therefore ask itself how it knows what it knows, and whether it has a sound basis for that view.

Another problem in assessing culture, says the Report, *“...is that what constitutes truth differs. It is invariably framed by ideological predisposition. Reasonable people can differ. One must, however, be able to distinguish between opinion and fact.”*

So what approach could be reliable enough to reasonably identify an organisation’s culture?

Perhaps the answer is recognising that while cultural norms and beliefs can’t be empirically measured, behaviours and outcomes can. The Report suggests that regulators could adopt a “hold up a mirror” approach that reflects back to the entity and its people, its behaviours and outcomes, thereby making them aware of them.

The Report adopts such an approach in Volume 2 with case studies which reflect the behaviours, outcomes and misconduct that arose from organisations that did not have the right culture.

It would be difficult for any reasonable and honest organisation to deny behaviours and outcomes reflected back in this manner. It is also easy to acknowledge the impact of those behaviours on others when reflection is judgement free.

How can culture be changed?

One of the recommendations made by the Report was that:

All ... entities should, as often as reasonably possible, take proper steps to:

- > *assess the entity’s culture and its governance*
- > *identify any problems with the culture and governance*
- > *deal with those problems; and*
- > *determine whether the changes it has made have been effective.*

This is no mere box ticking exercise. It requires intellectual drive, honesty and rigour. It demands thought, work and action informed by what has happened in the past, why it happened and what steps are now proposed to prevent its recurrence.

Managing culture, says the Report, is an ongoing process that must be integrated into day-to-day business operations. It highlights the importance of leadership and management at all levels, and requires all to be appropriately trained, promoted and supported. The goal should be to develop a sustainable culture that embeds at least the basic norms of behaviour above into the organisation’s DNA.

Finally, there is a close connection between culture, governance and remuneration. As the Report notes, *“Positive steps in one area will reinforce positive steps taken in the others. Failings in one area will undermine progress in the others.”*

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The Report’s discussion of the pivotal role of culture in driving or discouraging misconduct is relevant to both government and private organisations.

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NO MORE MONSTER BOARDING HOUSES IN R2 LOW DENSITY ZONES

DENNIS LOETHER



Recent amendments this year to the *State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP)* significantly affect how councils should consider boarding house proposals on R2 Low Density zoned land.

The amendments were driven largely by feedback to the Department of Planning and Environment regarding the number of rooms in many new boarding houses.

The absence of a limit on rooms in proposals was resulting in larger builds incompatible with low-density environments.

Also raised was the incompatibility of large boarding house developments with the objectives of R2 Zones, outlined in the Land Use Table of the *Standard Instrument—Principal Local Environmental Plan* as:

Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

In response, the Department of Planning and Environment issued an Explanation of Intended Effect proposing "... to amend the boarding house provisions in the ARH SEPP so that a boarding house in the R2 zone can consist of no more than 12 boarding rooms."

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The absence of a limit on rooms in proposals was resulting in larger builds incompatible with low-density environments.

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In 2019, the amended Planning Policy was passed. One of its provisions stated that the Policy only applied to development applications made after its amendment. Applications made before that date (that is, 28 February 2019) should be determined under the old ARH SEPP.

But that provision is far from the last word on the matter.

Can the amendments be considered in assessing an application lodged before 28 February?

Section 4.15(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* states that any proposed instrument that is or has been the subject of public consultation under the Act can, in fact, be relevant when determining any development application.

The question is how relevant? How much weight should be given to such draft instruments?

Case law provides guidance. In *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) NSWCA 289, Spigelman CJ put forward two key considerations, one of which read in determining the weight to be attributed to a draft environmental planning instrument:

Such weight will be greater if the proposal being considered would in a substantial way undermine the objectives of the draft planning instrument.

In *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279, Lloyd J found that in considering the weight to be applied to an instrument that was certain and imminent:

"It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith."

So what were the Department of Planning and Environment's objectives in drafting the amended Planning Policy? The Explanation of Intended Effect lays it out:

"To facilitate the development of boarding houses in the R2 zone that are compatible with the character of residential density that is typically expected in that zone..."

It's clear. That objective, taken with the judgements above, leave no doubt that, notwithstanding the provision of the amended ARH SEPP, consent authorities may consider in the context of compatibility with character the amendment to the SEPP when determining applications made before 28 February 2019.



CAUSE NOT NEEDED TO DISMISS A SENIOR EXECUTIVE

DARREN GARDNER & ANDREW YAHL

In *Stapleton v City of Parramatta Council* [2019] NSWSC 123, Bartier Perry successfully defended the City of Parramatta Council against interlocutory relief sought by its then CEO, Mark Stapleton.

Council appointed Mr Stapleton in June 2018. His employment contract, which was set to run until 2021, included these standard local government senior manager contract clauses:

This contract may be terminated before the termination date by way of any of the following:

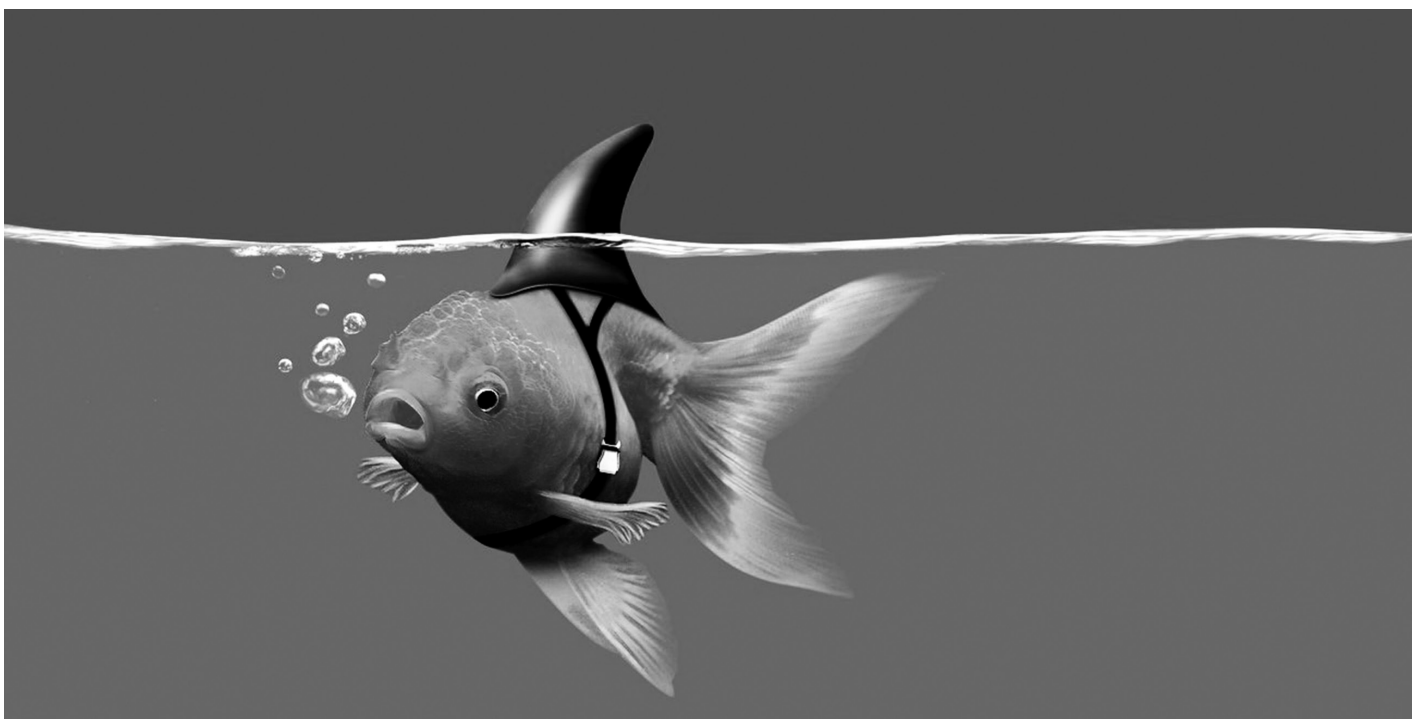
- 10.3.5 Council giving 38 weeks' written notice to the employee, or alternatively, by termination payment under subclause 11.3.
- 11.3 On termination of this contract under subclause 10.3.5, where written notice has not been given, Council will pay the employee a monetary amount equivalent to 38 weeks' remuneration calculated in accordance with Schedule C, or the remuneration which the employee would have received if the employee had been employed by Council to the termination date, whichever is the lesser.

Soon after Mr Stapleton's appointment, allegations were made in the media that his CV was incorrect in a number of material ways.

On 7 September 2018, the Lord Mayor of Council called an extraordinary council meeting at which this resolution was passed:

- (a) *That Council does not accept the veracity of the allegations made against the Chief Executive Officer.*
- (b) *That an independent external review be conducted to confirm the authenticity of the work experiences, qualifications, references and associated claims provided by Mr Stapleton in relation to his application for the role of Director of Property and Significant Assets and Chief Executive Officer at City of Parramatta Council.*
- (c) *That an independent external review be conducted into the accuracy of Mr Stapleton's declaration of interests under section 449 of the Local Government Act 1993.*
- (d) *That an independent external review be conducted into all aspects of the recruitment of Mr Stapleton to the roles of Director Property and Significant Assets and Chief Executive Officer at City of Parramatta Council.*
- (e) *That Council suspend Mr Stapleton on full pay effective immediately.*

...





An independent external review into the allegations was conducted and considered by Council.

On 4 February 2019, following the external review, council passed a further resolution authorising *“the Lord Mayor and the Acting CEO (or their delegates) to negotiate with Mark Stapleton in relation to the CEO’s contract of employment with Council, within the parameters set out in the Contract and the Local Government Act 1993”*.

On 11 February, without notifying Council, Mr Stapleton sought interlocutory relief from the NSW Supreme Court, including that Council be prevented from terminating his employment for the term of the contract. Council was able to appear at the proceedings, but with limited information in relation to Mr Stapleton’s claim, and so the Court treated the application as having been made *ex parte* (in the interests of the applying party only).

The Court granted a temporary injunction for one week restraining Council from terminating Mr Stapleton’s employment, but said the onus would then be on Mr Stapleton to prove he was entitled to the interlocutory relief.

Mr Stapleton then purported to invoke the dispute resolution clause in his contract (clause 17 of the standard contract).

One week later, Justice Kunc found that Mr Stapleton had not proved he was entitled to interlocutory relief because:

1. *No risk of imminent termination was shown.*
2. *There was no evidence to show that Council was departing from its resolution made on 4 February.*
3. *There was no prima facie case that Mr Stapleton’s employment was about to be wrongfully terminated.*
4. *The principles regarding specific performance, which in employment require the existence of exceptional circumstances, could not be enlivened.*

The Court ordered that Mr Stapleton pay Council’s costs on an indemnity basis.

This was an excellent outcome, and Bartier Perry was pleased to be able to assist in achieving it.

Soon after this decision, Council terminated Mr Stapleton’s employment by exercising its express contractual right to do so.

What can be learned?

First, and somewhat obviously, a resolution that Council negotiate on the exit of an employee is not a threat to dismiss.

Second, despite Mr Stapleton arguing that terminating his employment would be wrongful because Council had not engaged in the dispute resolution process, the Court found that clause 17 (even if enforceable) was not a pre-requisite to the Council’s right to terminate the contract under clause 10.3.5.

Third, the Court considered that clause 10.3.5 of the standard contract was the “complete answer” because the Council could terminate the contract without cause (that is without specifying any reasons) by relying solely on that clause and paying the standard 38 weeks’ notice.

Although the decision is an interlocutory judgment, it offers useful guidance for councils. Of course, before deciding to terminate a senior manager contract, councils should seek legal advice, as the circumstances of each case are unique and may involve special considerations.

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... a resolution that Council negotiate on the exit of an employee is not a threat to dismiss

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A DELICATE BALANCE – EXECUTING COUNCIL DUTIES UNDER ONE ACT WITHOUT BREACHING ANOTHER

PETER BARAKATE

As is well known, the *Crown Land Management Act 2016* (CLM Act) made councils responsible for managing Crown land in their LGAs as if it were community land. At the same time, however, the *Native Title Act 1993* forbids councils from doing anything that affects native title.

Sometimes, that can place councils in delicate situations. Here we examine two recent cases which provide valuable guidance to council managers.

A heavy price for flouting the Act

The first is the 13 March 2019 decision of the High Court on compensation payable to native title holders in the Northern Territory. The case ([2019] HCA 7) involved Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples.

In this case, the Northern Territory had granted or allowed development leases and public works, among other things, in the town of Timber Creek. The native title holders claimed compensation on behalf of their group under the Native Title Act, arguing that the council's actions had impaired or extinguished native title rights and interests.

The High Court agreed and awarded compensation as follows:

- > Compensation for economic loss: \$320,250
- > Interest: \$910,100
- > Compensation for 'cultural loss': \$1,300,000

The basis on which the court ordered compensation was:

- > Economic value of exclusive native title rights to an interest in land equates to the objective economic value of an unencumbered freehold estate in that land. In these appeals, the objective economic value of the non-exclusive native title rights and interests of the claim group was 50% of the freehold value of the land.
- > Interest is payable on the compensation for economic loss on a simple interest basis.
- > Compensation for cultural loss arises from the diminution of traditional attachment to the land or connection to country and for the loss of rights to gain spiritual sustenance from the land.



The risk to councils is clear. They must seek advice from their native title managers before dealing with Crown land if they are to avoid impairing native title rights. Liability under the CLM Act is on an indemnity basis and, as the Griffiths litigation shows, can be extensive.

Where the burden of proof lies

The second case is the 18 January 2019 decision of the Federal Court in *Pate v State of Queensland* [2019] FCA 25.

In this case, Pate had made a non-claimant application to convert her Crown lease into freehold land. A non-claimant application is one made by a person who has a non-native title interest in Crown land and is asking the Court to rule that native title does not exist.

Pate's application failed because she did not provide sufficient evidence to prove, on the balance of probabilities, that native title did not exist in the land. As one of the main purposes of the Native Title Act is to protect native title, the Court could not rule in her favour. Said another way, the burden of proof rested with Ms Pate – and she failed to meet it.

Councils, too, must meet this standard before the Court will determine that native title does not exist.

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They must seek advice from their native title managers before dealing with Crown land if they are to avoid impairing native title rights.

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CLASS ACTIONS – DIFFERENT FROM YOUR STANDARD LITIGATION

GAVIN STUART & ADAM CUTRI



Class actions in Australia have seen steady growth since the 2012 hearing of *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* [2012] FCA 1028. In this case, three councils brought proceedings on behalf of 72 other councils, charities, churches and not for profit groups, who collectively lost over \$200 million from the collapse of Lehman Brothers.

Historically, more than half of all class actions in Australia have been brought by shareholders, generally against listed companies. Claims usually arise out of alleged misleading information from the companies to the market which directly affects the value of group members' shareholding.

Recently, however, we have seen a shift toward more class actions relating to general commercial disputes.

Of 113 active class actions in either the Federal Court of Australia or the Supreme Court of New South Wales on 15 August 2018, three were against councils and one brought on behalf of councils.

For that reason, it is a good idea for councils to have some understanding of class actions and how they differ from other proceedings.

Why class actions are different

While similar to individually brought proceedings, class actions have several procedural differences which councils should be aware of. They include:

1. **Class members:** There will be a class if the facts establish that the claims arise out of the same or similar related circumstances and those claims give rise to substantial common issues at law. At least seven group members are needed to make up a class.
2. **Open or closed classes:** The class action must be brought as an 'open' or 'closed' class. In an open class, everyone is included unless they expressly opt out. In a closed class, each class member is known and potential parties must opt in to the proceedings.
3. **Common issues:** The issues complained of by the lead plaintiff must be common to each class member. The Court will need to determine that facts, acts, matters and circumstances are common in order to establish that liability can be proved on behalf of each class member, as opposed to just those members who lead evidence in the proceedings.

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... it is a good idea for councils to have some understanding of class actions and how they differ from other proceedings.

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4. **Litigation funding:** Litigation funding of class actions is more common than in general commercial litigation. The terms of the funding arrangements are relevant, and the Court could be asked to make a 'common fund' order. This essentially results in each member of the class paying a proportion to the funder (from settlement or judgment proceeds), whether they have entered into the agreement directly or not.
5. **Approval of settlement:** A settlement agreed to by the lead plaintiff (and often the litigation funder, who can decide to settle matters pursuant to the litigation funding agreement) needs to be approved by the Court if it is to be enforceable. This requires a balanced consideration of the competing interests of the funder, lead plaintiff and group members.

The approach to be taken to a class action will depend on whether you are defending or pursuing it. Here are five tips to bear in mind in each case.

If you receive a class action claim

1. Buy time to investigate the matter properly and do not say or do anything that could be considered an admission of liability. Apart from helping a claimant's case, such admissions can be a basis to void or limit the coverage of any relevant insurance policy.
2. Investigate the facts of the claim as early as possible to assess the nature and scope of the claim and potential exposure. Only then can you properly brief internal parties (including councillors and staff), progress any insurance coverage, engage external lawyers to advise, contact any other defendants and consider how to manage internal HR and external PR matters.
3. Engage external lawyers early and take advice not just on the claim itself, but also on your insurance arrangements, how to manage any HR issues and in relation to any media and communications steps. It's generally best to engage your lawyers for substantive investigations of the issues and engage relevant service

providers in this regard so that privilege is maintained over any documents that are created in the process.

4. Notify your insurer of the claim and get a decision on policy coverage and indemnity as soon as you can. Involve your lawyers early in negotiations with your insurer to help resolve any issues around policy coverage, and to avoid the uncertainty, risk and cost of an indemnity dispute.
5. Take media and communications advice early so you have scripts ready for use in case of media or other queries. Identify your spokesperson (or people) who will deal with media and staff enquiries.

If you want to pursue a class action claim

1. Consider the direct financial ramifications of joining any class action. Also carefully review your litigation funding agreement (if a funder is involved) to determine if there will be any liability to Council if the proceedings are not successful (including liability for costs).
2. Also consider non-financial ramifications, including criticisms that may be levelled at the General Manager and/or Councillors if they elect not to proceed (despite minimal risk of adverse financial costs) and judgment is ordered in favour of other group members.
3. Review the definition of Group Member closely and discuss with Councillors as soon as possible whether to proceed or not. Note that there are strict timelines to both 'Opt In' and 'Opt Out'.
4. Seek independent legal advice regarding prospects of success and whether Council should assist with evidence, should such a request be made by the solicitors acting for the group members.
5. Ensure that Council's media and communications consultants are kept up to date so scripts can be prepared in case of negative publicity as a result of deciding to join or not join the proceeding.





BURNING ISSUES – PLENTY FOR COUNCILS TO LEARN FROM LACROSSE FIRE AND SUBSEQUENT LITIGATION

MARK GLYNN

Councils regularly engage in the delivery of construction projects, including new buildings, fitouts and rectification following damage. Such projects often see council entering into contracts with professional consultants such as architects and building surveyors.

The recent Lacrosse tower decision contains a number of salient reminders for councils in such situations.

Background

In November 2014, the 23-storey mixed-use Lacrosse tower in Docklands, Victoria caught fire after Jean-Francois Gubitta, a resident of the building, left a smouldering cigarette butt in a plastic food container on a level 8 balcony.

By the time the first fire crew arrived, the fire was travelling rapidly up the external wall cladding and spreading onto the balcony on each level. The fire had already climbed to level 14 and a few minutes later reached the top of the building. About 500 residents had to be evacuated.

How the fire spread so quickly and so far became the subject of a Fire and Emergency Services Board *Post Incident Analysis Report* and, unsurprisingly, subsequent litigation.

Cause of fire

In its post-fire report, the FESB found that Alucobest brand aluminium composite panels (**ACPs**) on the external façade of the building had contributed to the spread of the fire.

Following the report, the Municipal Building Surveyor, City of Melbourne directed the Lacrosse Owners Corporations to replace Building Code of Australia (**BCA**) non-compliant cladding with compliant non-combustible cladding.

The Owner's Corporations and the individual owners of the affected lots (together **Owners**) then commenced proceedings in the Victorian Civil and Administrative Tribunal (VCAT) against the builder (LU Simon) for the recovery of current and anticipated future losses exceeding \$12 million.

The building surveyor (certifier), the architect, the fire engineer, the Superintendent, the occupier (lessee) of Apartment 805 and Mr Gubitta were later joined to the proceedings.



The Decision

On 28 February 2019, at the end of a 22-day trial involving 91 volumes of Tribunal books and evidence from seven lay witnesses and 13 expert witnesses, Judge Woodward of the Victorian Civil and Administrative Tribunal (VCAT) handed down his decision in the case.

The judge found that Chinese-sourced ACPs used on the building's facade, which had a 100% polyethylene core, were combustible within the meaning of the BCA and in accordance with the test prescribed in AS3530.1.

He stated that *'the polyethylene core has a calorific value of 44MJ/kg, which is similar to petrol, diesel and propane'* and that *'the use of an ACP with a 100% polyethylene core as part of the external walls of the Lacrosse tower was primarily responsible for causing the spread of fire up the side of the building'*.¹

The judge determined that:

- > the external cladding specified in the original design (Alucobond) failed to comply with the deemed-to-satisfy provisions of the BCA
- > the external cladding actually installed (Alucobest) also failed to comply with the BCA (it was also combustible within the meaning of the BCA)
- > the builder breached the implied warranties of suitability of materials, fitness for purpose and compliance with the Code as set out in the Victorian Domestic Building Contracts Act
- > these implied warranties run with the building, so the Owners were allowed to bring proceedings against the builder
- > the builder was liable for breach of contract to the Owners.

Judge Woodward ruled that the builder was liable for damages and ordered it to pay the Owners \$5,748,233 for the replacement cost of the non-compliant combustible cladding.

Judge Woodward then looked at the consultancy agreements entered into between the builder and a number of the consultants involved in the delivery. He ordered the building surveyor, the architect and the fire engineer to proportionately reimburse the builder for their respective failure to exercise due care and skill in the selection, approval and installation of the cladding, which amounted to a breach of their respective consultancy agreements.

Each was found to be a concurrent wrongdoer and the damages payable by the builder to the Owners was reimbursable by the consultants (and Mr Gubitta) apportioned as follows:

1. **building surveyor** **33%**
 - > **failed** to exercise due care and skill in issuing the building permit which approved the architect's specification of ACPs "indicative to Alucobond"
 - > **failed** to notice and query the incomplete description of the cladding system in the fire engineering report
2. **architect** **25%**
 - > **failed** to exercise due care and skill in failing to remedy defects in its design and to ensure that the ACP sample provided by the builder was compliant with its own design intent articulated in the specification and the BCA
3. **fire engineer** **39%**
 - > **failed** to conduct a full engineering assessment
 - > **failed** to recognise that the ACP's proposed did not comply with the BCA
 - > **failed** to warn the builder and other consultants of that fact
4. **Mr Gubitta** **3%**

¹ Owners Corporation No's 1, 2 and 3 of PS613436T v LU Simon Pty Ltd & Ors [2019] VCAT 286 at [193]

What can councils take away from this?

Resist caps on consultant's liability

Consultants often propose caps on their liability, frequently linking the cap to the consultancy fee payable. For example, if the fee is \$100,000, the consultant may propose a liability cap of exactly that amount or a multiple thereof.

But the fee is often a poor proxy for the quantum of loss that a consultant can actually cause.

Case in point: In the Lacrosse tower case, the fire engineer's consultancy fee was \$33,500 + GST. Its liability, however, was over \$2.2 million.

At the very least, any cap on liability should exclude liability recoverable under a policy of insurance.

Consider adequacy of professional indemnity insurance limits

Council should ensure that the building contractor and the consultants maintain adequate levels of liability insurance. In some cases, council should require them to increase their current level of cover, even if the cost of the additional cover increases the contract sum.

Many construction and consultancy agreements give the principal the right to review and approve insurance policies and limits, and to require the consultant to provide evidence of the currency of insurance throughout the project.

Does your council have appropriate procedures to ensure your risk officers review consultants' insurance policies and require evidence of currency at least once a year? If not, we suggest you put such procedures in place.

Obtain 'fitness for purpose' warranties

Construction and consultancy agreements entered into by Council should provide a range of contractual warranties for council's protection.

In the Lacrosse case, the builder was found to have breached statutory warranties of suitability of materials, compliance with the law, and fitness for purpose implied in the construction contract by the *Domestic Building Contracts Act 1995* (VIC).

In NSW similar statutory warranties are implied in all contracts for 'residential building work' by the *Home Building Act 1989*. However, as councils are rarely involved in residential building work they should ensure that relevant warranties are expressly provided for in the contracts they enter into.

Understand the scope of the services and contractual obligations

It is apparent from the judgement in the Lacrosse case that the consultants misunderstood the full nature of their contractual obligations; the fire engineer, Thomas Nicolas, fundamentally so.

Just as a consultant must fully understand the nature of the services to be provided, so should councils. Functions and obligations agreed to under a contract may be considerably more or less than what might 'usually' be done.

The more accurately councils specify and detail the scope of the services, the less opportunity there is for dispute.

Also, as Judge Woodward cautioned, use template documents carefully. How often does one see contracts with irrelevant clauses carried forward from previous projects?

In the Lacrosse decision, Judge Woodward said about the fire engineer and the 'boiler plate' clauses that were carried forward:

the reason for this apparent disconnect between Mr Nicolas's evidence of what he understood his role to be, compared to the terms of the contract he signed, may have been hinted at by his reference to the use of templates It is often the case that diligent and competent professionals blithely reuse standard documents that have served them well over the years, focusing only on those parts that need to be tailored to each job. It is only when something goes wrong and the lawyers become involved, that any real attention is given to how that boilerplate language informs potential liability.

“

At the very least, any cap on liability should exclude liability recoverable under a policy of insurance.

”

KANGAROO ON THE RUNWAY?

AN OBVIOUS RISK, RULES COURT OF APPEAL

DAVID GREENHALGH

It's not every day that a plane runs into a kangaroo. That may be why *Kempsey Shire Council v Five Star Medical Centre Pty Limited* [2018] NSWCA 308 required two courts to arrive at a judgement as to liability.

The case contains legal issues of interest to councils generally, including the obligation to assess, and warn of, obvious risks, and the application of the defence relating to limited resources of a public authority.

Facts

Kempsey Shire Council operated a rural airport. Kangaroos were known to intrude onto the airfield from time to time, leading the Civil Aviation Safety Authority (CASA) to publish a bulletin alerting the aviation community to the fact.

The present case arose when an aircraft landing at Kempsey struck a kangaroo. While the aircraft was damaged, no one on the plane was (although the kangaroo had no doubt had better days). The aircraft owner sued Kempsey Shire Council for the damage to the aircraft.

Legal considerations

The plaintiff asserted that the Council should have issued a notice to aircrew stating that kangaroo incursions on the airfield had increased or, alternatively, that it should have erected a kangaroo-proof fence around the airfield.

The court agreed, ruling for the plaintiff. Whereupon the Council went to the Court of Appeal.

That Court ruled that the possibility of kangaroos being on the airfield should be regarded as an "obvious risk" within the meaning of the *Civil Liability Act*. It gave two reasons for this ruling.

First, the CASA bulletin specifically alerted pilots to the possibility of kangaroos being on the airfield. Secondly, the pilot knew about the danger.

The trial judge had earlier said the pilot was not aware of the "kangaroo risk" on the airfield on *this particular day*. In that trial, the plaintiff claimed the volume of kangaroo traffic on the airfield had increased before the accident, thereby placing an increased onus on the Council.



“

The case contains legal issues of interest to councils generally, including the obligation to assess, and warn of, obvious risks, and the application of the defence relating to limited resources of a public authority.

”

But the Court of Appeal saw no evidence for this claim. Therefore, the CASA bulletin and the pilot's own knowledge made the possible presence of kangaroos an obvious risk. This meant that Council did not have to warn the plaintiff of that risk, as per section 5H of the *Civil Liability Act*.

Nor did the fact that there was not a great likelihood of kangaroos being on the airfield at any given time detract from it as being an obvious risk.

The Court of Appeal held that the obviousness of a risk needs to be assessed *at a reasonable level of generality*. This has obvious significance for councils assessing how or when to alert others of risks associated with their activities.

The plaintiff's second main submission was that Council should have erected a high fence around the airfield to keep the kangaroos away. The high cost of this led to consideration of the defence available to public authorities about the allocation of resources, under section 42 of the *Civil Liability Act*.

As it turned out, Council was making an operating loss on the airport, which would have been relevant if considering whether to build a fence. The plaintiff therefore cast its net wider by bringing Council's general financial position into the picture.

The Court of Appeal again disagreed with the trial judge, stating that the proper operation of section 42(b) applied to this case. That meant there should not be a breach of duty by the Council by its failure to build the fence where this would have impacted directly on conflicting demands on its budget.

Comment

Shortly after the *Kempsey* judgment, the Court of Appeal heard another case with obvious parallels. In *Bruce v Apex Software Pty Ltd* [2018] NSWCA 330 a 70 year old pedestrian tripped on pavement that had been uneven for some time. The Court of Appeal said the height differential on the pavement was an "obvious risk" since there was only a remote possibility of a pedestrian failing to notice it.

Kempsey and *Bruce* are both useful cases for councils (and indeed many other defendants) to bear in mind. While it can readily be appreciated that the pavement in *Bruce* may have been an "obvious risk", some defendants would not have been expecting the Court of Appeal to find the facts in the airfield case to have been an obvious risk.

Similarly, the court's upholding a section 42 defence demonstrates how a careful analysis of council funds, and evidence relating to the costs of implementing the project in question, can be used to defend claims of this nature.



SAVE THE DATE!

**19
SEPT**

Bartier Perry's Local Council Managers
& Officers Forum – Bankstown

**10 – 11
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Bartier Perry will be sponsoring
and presenting at the LGNSW
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**13 – 15
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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.

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.

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

CLE, training and education

We provide councils with tailored seminars, workshops and executive briefings for senior management on current legislative changes and regulatory issues. Other recent seminars we've held include:

- > The modern workplace – some impacts of technology
- > How to minimise legal risk in the digital era
- > Significant appeal cases in the last 12 months
- > The Heritage Report

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

All articles, upcoming events and past videos can be found under the Insights tab at – www.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 over 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 over 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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