Bartier Perry LAWYERS

Council CONNECT

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Inside this issue

Growing demands

If there is a common thread running through this issue of Council Connect, it's that councils are having to do more and more with limited resources. Among the greatest drivers of this are growing populations, higher community expectations and increasing diversity among our communities.

As it happens, changes in law also create challenges. So many widely varying pieces of legislation apply to council activities that keeping up with them all is almost impossible. Not only that, but often the relevant law is highly complex. We touch on a handful of such areas in this publication, particularly around procurement (where probity is becoming an increasingly sensitive matter), employing people with criminal convictions, and disputed valuations when property is acquired for public works.

Council Connect is our contribution to keeping you up to date with recent legal opinion and topical legal matters. For many of our readers it is a useful addition to their regular sources of information and we hope, a welcome relief from some of the more conventional material that crosses your desk!

As is now becoming the norm, we were impressed by this issue's General Manager interview with Matt Stewart of City of Canterbury Bankstown. We thank Matt for giving us his time and being so candid in his responses to our questions.

If we could say one thing to central government, it would be to never take local councils and their people for granted. The goodwill that drives councils is vast, but it is not infinite, and it is critical that councils receive sufficient funding to do their work.

We trust that Council Connect is a useful support for you in performing your important role for your local community. To ensure it is, we welcome your feedback as well as your thoughts on useful articles for future editions.

Finally, we wish all our readers a peaceful and safe upcoming holiday season. The bush fires raging through much of NSW and the south of Queensland mean that for many people, the coming months may not be that way at all, and our thoughts are with them and the amazing people who are doing all they can to get the fires under control.

Riana Steyn
Chief Executive Officer
Bartier Perry

INTERVIEW WITH MATTHEW STEWART

GENERAL MANAGER, CITY OF CANTERBURY BANKSTOWN

What are some of the major projects City of Canterbury Bankstown is involved in?

The City is undergoing transformational change driven by housing and economic growth and significant state and local infrastructure investment. Council is playing a major role in delivering or advocating on behalf of residents to ensure these projects deliver a lasting legacy.

The South West Metro will bring reliable transport connectivity. However, its true benefits will only be realised if the NSW Government responds to the need for improved public domain and urban renewal at the same time.

The new Western Sydney University campus will provide jobs and educational opportunities, offering accessible, technology-rich teaching and research facilities.

The redevelopment of Bankstown-Lidcombe Hospital will also bring new jobs and improved health services. Council will work closely with the Government over the years to maximise the benefits of this project.

Connective City 2036 is Council's own blueprint for delivering housing and jobs in our city and the infrastructure and community and natural services to support this growth. Council is also working with the Greater Sydney Commission to develop a "whole of government" plan for Bankstown CBD and Bankstown Airport.

Transport is also key to unlocking this City. This includes Complete Streets, our plan for improving streets within the CBD with more pedestrian areas, improved parking, and better public transport and cycle paths. We're also working with Transport for NSW on major regional transport connections such as the Hume Highway/Stacy Street upgrade.

These are in addition to Council's own projects which include:

- 384 capital works projects this financial year, representing a record investment of $101 million.
- Renewing two Leisure and Aquatic Centres and building a new splash park as part of an ambitious $170 million upgrade of our total leisure and aquatics service over the next 15 years.
- Establishing a three-megawatt solar farm, which will provide up to 20% of power. By 2030, we aim to have 50% of our electricity supplied by renewable energy.

What is the biggest challenge facing NSW councils over the next 12 months?

There are three – significant asset backlog, growth driving demand for new infrastructure and increasing community expectations on service delivery.

All councils are dealing with asset backlog in the face of restricted income. At the same time housing growth driven by the NSW Government is creating the need for new schools, hospitals and transport.

Gone are the days when councils were only responsible for Roads, Rates and Rubbish. We now have more than 100 service areas for a growing population of over 361,000, the largest council area in NSW. They deserve a high level of service but we have been impacted by significant cuts in government grant funding.

As a result, the biggest challenge is maintaining services, while also planning for the future. Difficult conversations will continue, to ensure appropriate funding. If we can't meet those requirements, our quality of life will suffer.

Where are the opportunities for councils?

To lead the agenda, not only for their area but for the industry as a whole. As the largest council in NSW by population, we have a strong voice to advocate for all of Western Sydney, one of the fastest growing areas in Australia, and all councils in the state. We are working closely with the NSW Office of Local Government and the Minister to develop a more equitable rating system for the state by mid-2021, which is easier for residents to understand and for councils to apply.

Councils also have an opportunity to be more collaborative and innovative, which is essential when resources are limited. Councils need to be smarter in tackling financial challenges. Our workforce is already lean, so we are investing in new technologies to help maintain or improve services. We recently adopted our *Smart City Roadmap*. I am particularly excited to see the outcome of our current Closing the Loop on Waste project, for which we received a $1 million Federal Government grant (Council has matched dollar for dollar). This will help us close the loop for residents when it comes to issue resolution, and ensure our service is prompt and efficient, with real-time data for residents to access easily.

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

Our people. They are passionate and strive to provide the best level of service for residents.

We were recently recognised as an Employer of Choice at the annual Australian Business Awards, testament to our approach of 'putting people at the heart of what we do'.

We have also led the local government sector in community engagement. This is a passion of mine. With a community that speaks more than 128 languages I support testing as many ways as possible to engage with residents.

We want to work with our community to transform our city and keep it a great place to live and work.

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

Leading our staff, community and Councillors. I'm involved in almost every aspect of our operations, and work with Councillors and senior leaders to set the long term vision and direction for the city.

One of my greatest achievements has been leading our workforce through the recent amalgamation. Together we've created a culture greater than the sum of the former councils. Our Net Promoter Score, which is an indicator of employee advocacy, has improved from -35 to 18 in just three years. Our investment in our people through good structures and development frameworks will ensure they continue to grow and deliver quality services to our community.

How do councils manage the tension between increasing service delivery and limitations on the ability to raise revenue?

We regularly have tough conversations with government agencies, and the NSW and Federal Governments, to ensure equitable grant funding that keeps pace with population growth.

While we will keep seeking new income opportunities, we will never have enough funds to meet all the demands on us. Therefore, it is critical that we are transparent about our priorities and have robust plans that have gone through rigorous community engagement. More importantly, Councillors must lead this discussion with their community as it is they who face the real challenge of balancing changing community demands in a financially responsible manner.

A STITCH IN TIME:
DON'T DELAY WHEN RECOVERING UNPAID RATES

DAVID CREAIS

The saying goes that "a stitch in time saves nine". That is certainly the case when recovering unpaid rates following the recent High Court decision in *Brisbane City Council v Amos*.

The story dates back to 2009, when Brisbane City Council commenced an action to recover unpaid rates owed by Mr Amos, the oldest notices for which stretched back to 1999. In what turned out to be a significant oversight, the proceedings did not involve an application to sell the land to pay the debt.

Mr Amos defended part of the claim by asserting that the Council couldn't recover the rates that were payable before 2003 because such action was statute-barred by the Queensland equivalent of section 14(d) of the *Limitation Act 1969*.

The Act provides that "a cause of action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture" must be started within 6 years of the date on which the cause of action first accrued. In relation to rates, this would mean within 6 years from when payment was first due.

However, our readers will know that rates levied under the *Local Government Act 1993* (including interest and costs awarded by a court) are a charge on the land to which the rates relate.

That brings into play section 42(1) of the *Limitation Act 1969*, which allows 12 years to bring an action to recover money secured by mortgage (noting that "mortgage" includes a charge on any property for securing money)

So it would seem that a council has 12 years, not the 6 claimed by Mr Amos, in which to bring proceedings to recover unpaid rates.

In fact, that is what Brisbane City Council initially successfully counter-claimed, pointing to a provision in the *Limitation of Actions Act 1974* (Qld) that is similar to section 42(1) and also stipulates a 12-year time limit.

Mr Amos then went to the Court of Appeal, which ruled in his favour. Brisbane City Council then appealed to the High Court.

The High Court also ruled in favour of Mr Amos. Following an English case decided in 1899, the High Court held that because the claim brought by the Council was independent of an action against the land, it was a personal claim only, covered by the 6-year time limit in the equivalent of section 14(d). It didn't matter that the debt was secured over the land.

Conversely, just because the period to bring proceedings to only recover the debt might have expired, the Council would not have been prevented from taking proceedings to enforce its charge over the land and have the debt repaid from the proceeds of sale.

The takeaway for councils is not to delay proceedings for unpaid rates on the assumption that they have 12 years to make a claim. After 6 years the only course available will be action to enforce against the ratepayer's land (using the powers in Chapter 17, Part 2, Division 5 of the *Local Government Act 1993*). That course inevitably entails delays, expense and other complications that are to be avoided, especially if the debt is relatively small or if adverse publicity might result.

> "The takeaway for councils is not to delay proceedings for unpaid rates on the assumption that they have 12 years to make a claim."

PROCUREMENT MODELS:
WHAT IS THE BEST WAY TO SOURCE THE SERVICES YOU NEED?

NORMAN DONATO

Procurement is critical to the success of any enterprise, including councils. As the wonderful businessdictionary.com states:

> *"A business will not be able to survive if its price of procurement is more than the profit it makes on selling the actual product."*

While profit may not be the determining factor for councils, the delivery of essential services using scarce resources is – and that makes the statement above very pertinent.

What does procurement involve?

Businessdictionary.com defines procurement as:

> *"The act of obtaining or buying goods and services. The process includes preparation and processing of a demand as well as the end receipt and approval of payment. It often involves:*
>
> *(1) purchase planning*
> *(2) standards determination*
> *(3) specifications development*
> *(4) supplier research and selection*
> *(5) value analysis*
> *(6) financing*
> *(7) price negotiation*
> *(8) making the purchase*
> *(9) supply contract administration*
> *(10) inventory control and stores*
> *(11) disposals and other related functions.*
>
> *The process of procurement is often part of a company's strategy because the ability to purchase certain materials will determine if operations will continue".*

Early contractor procurement model

Several different procurement models can be adopted to deliver services (allocate resources) to the community in an effective and efficient manner.

This article discusses the early contractor involvement model, often shortened to ECI. ECI has several benefits, particularly if the project involves complex design, significant risks, tight timeframes or unknown factors.

An ECI procurement process in those circumstances should result in:

- shorter delivery times
- team approach and collaboration
- early procurement
- fewer changes and variation
- reduced costs, particularly in the pre-tender phase.

How does one maintain probity?

Because ECI involves the early engagement of service providers, councils adopting it need to address probity issues. How to address them will vary depending on the nature and subject of the project. However, these principles will generally apply:

- Impartiality, integrity and honesty. These principles are generally adhered to when all tenderers are treated fairly and consistently, and the rules of natural justice and procedural fairness are applied to the tender process.
- Accountability, transparency and value for money. Parties involved in the tender should have clearly defined methodology for the evaluation and conduct of the tender.
- Avoidance of conflicts of interest. Any actual or potential conflicts of interest of any parties involved in the tender process need to be identified, declared and avoided.
- Confidentiality. A benefit of ECI is the early involvement of ideas, designs and innovations of tenderers. It is important, however, that intellectual property is protected so that tenderers feel they will be truly rewarded for any innovative ideas.
- Consistency in communication with tenderers.

Other aspects of the ECI procurement model that need to be carefully considered by councils include:

- The risk of feeling pressured to proceed with a tenderer given the degree of involvement/investment in the preliminary project design and/or tender process.
- Council being open and flexible in any of its design and/or project expectations.
- The process may require significant resources at the earlier stages of the procurement process to deal with the added involvement and ideas of potential tenders.

Balance is the secret

Procurement is not simply the buying of goods or services; it is the act or process of buying them. The decision to buy is preceded by the decision of how to buy.

Choosing the right procurement method is an important preliminary decision that involves solving the perennial problem of how to allocate limited resources in order to provide services to the community in an effective and efficient manner. It's important to remember that:

> *"The measure of success is not whether you have a tough problem to deal with, but whether it's the same problem you had last year." – John Foster Dulles*

In solving the constant procurement problem, it may be appropriate to consider alternative models such as ECI.

> "Several different procurement models can be adopted to deliver services (allocate resources) to the community in an effective and efficient manner."

WHEN PROBITY IS KEY:
MORE ON PUBLIC-PRIVATE PARTNERSHIPS

PETER BARAKATE

Some readers may have attended the recent Local Government Property Professionals Conference at which I spoke on public-private partnerships.

In my presentation, I outlined six matters Council must address before the project review committee in the first stage assessment of significant and high-risk projects. One involves Council confirming it will undertake a competitive process to identify preferred partners, or, if Council decides not to do this, providing reasons and an alternative process.

The purpose of this article is to provide some further information about the requirements of the Government (OLG) under its PPP guidelines for dealing with this matter.

Guidelines published by the Independent Commission Against Corruption (ICAC) in 2018 provide direction on how to do that and also manage associated risks.

> “Principles of fairness, impartiality, accountability, transparency and value for money must guide the negotiations.”

The guidelines state that direct negotiations can be justified if a joint venture is for property development where the developer owns property on or near the proposed project. In such cases, the developer’s land is necessary to the project. This land might also include the airspace, long-term leases, mining rights, easements, options and other rights over land.

If the proposed public-private partnership involves direct negotiations with the developer of an adjoining property, then based on ICAC’s guidelines, Council should adopt a principles-based approach to avoid potential for corrupt conduct. Principles of fairness, impartiality, accountability, transparency and value for money must guide the negotiations.

The Office of Local Government’s PPP guidelines require Council to prepare a probity plan for the project. The plan should acknowledge that the project proposal will establish that direct negotiations are required because Council will be dealing with the owner of the adjoining property. It should also provide a framework for conducting the negotiations using a principles-based approach.

Engaging a probity adviser early and preparing a project-specific probity plan will ensure that the direct negotiation process is documented thoroughly, all conflicts of interest are disclosed and managed, and proper due diligence checks are undertaken.

The probity plan should state how negotiations will be conducted, require the developer to demonstrate the merits of its contribution, and apportion risks between the developer and Council. Typically, this means obtaining appropriate security (such as a bank guarantee or bond or mortgage) and proof of necessary insurances.

Establishing a clear process for direct negotiations will satisfy the project review committee’s requirement for a clear market testing process to identify preferred partners.

These are only some of the matters that Council should consider when undertaking a joint venture with a developer of adjoining land. Further guidance can be found in *Direct Negotiations: Guidelines for Managing Risks* published by ICAC in August 2018.

YOU CAN'T ALWAYS GET WHAT YOU WANT:
THE DISSATISFIED ACQUIRING AUTHORITY AND THE STRINGENCY OF THE LAW

DENNIS LOETHER AND JORAM RICHA

The proliferation of urban and infrastructure development across Sydney has seen varying and new pressures placed on Councils.

Among them, a rise in the frequency of costly and technical compulsory acquisitions.

Such acquisitions can easily lead to disputes about the fair value of the property being acquired. Under s66 of the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**), dispossessed landowners who are dissatisfied with the Valuer General's determination of compensation may appeal to the Land and Environment Court (**LEC**).

Acquiring authorities (such as Councils), on the other hand, have no equivalent rights of challenge should they be dissatisfied with the Valuer General's determination.

But that doesn't mean they have no rights of challenge at all.

If the acquiring authority – which we'll assume is a Council from this point – can establish jurisdictional error, a determination may be challenged and the Court may set aside what is an administrative decision.

So, what constitutes a jurisdictional error? Typically, it means the decision maker (in this case, the Valuer General) has taken into account irrelevant considerations, or has failed to consider relevant material which they were required to consider, or has failed to comply with relevant legislative requirements. Decisions made unreasonably or based upon an irrationality may also be set aside.

The bar for unreasonableness is set high. It must be demonstrated that no reasonable person acting lawfully would have arrived at that conclusion.

We consider these general principles further below.

What determines whether a consideration is irrelevant? Section 55 of the Just Terms Act makes that clear by stating that "regard must be had to" each of the following, and only the following, in determining the amount of compensation to be paid. They are:

a) *the market value of the land on the date of its acquisition*

b) *any special value of the land on the date of its acquisition*

c) *any special value of the land to the person on the date of its acquisition*

d) *any loss attributable to the severance*

e) *any loss attributable to disturbance*

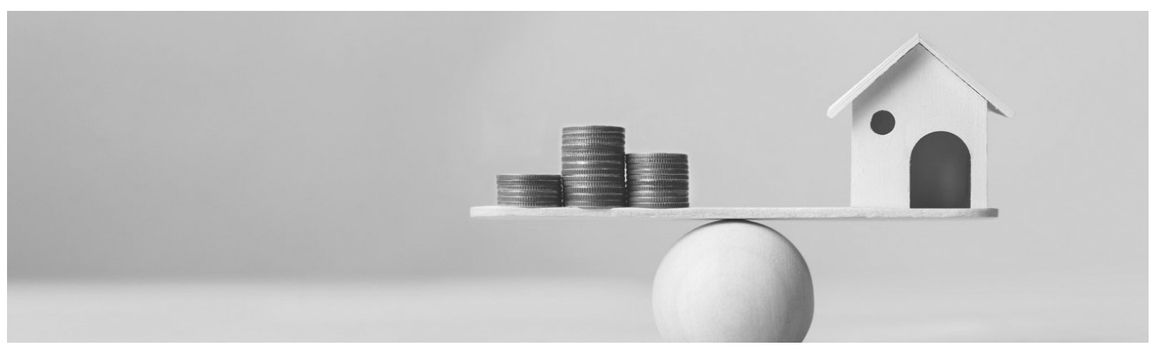
f) *the disadvantage resulting from relocation; and*

g) *any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.*

If it can be established that a mandatory consideration was ignored, the determination of compensation may be invalidated. The same applies if there was insufficient process of evaluation or consideration of those matters.

Similarly if the decision was made unreasonably or was based upon an irrationality.

What a Council cannot challenge is a merely poor decision. Said more rigorously, the rights of an acquiring authority in judicial review proceedings do not extend to a merits review.



Once again, the bar is set high for Councils who wish to challenge. For one thing, it is generally an implied condition that a statutory power will be exercised reasonably.

The test for legal unreasonableness is necessarily stringent, extremely confined and a conclusion of unreasonableness will be rare where the reasons for the decision demonstrate a justification for the particular exercise of that power. For one example, see the Court's finding in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30.

Given that, what would it take for a decision to be sufficiently unreasonable or irrational to give rise to jurisdictional error?

A failure to comply with appropriate valuation principles is one way. For example, if the decision maker ignored a transaction that provided evidence of value, and did so irrationally, it could be argued that there has been an error of law.

Or the absence of probative evidence on which fundamental planning assumptions are based could be construed as having led to an error of law.

So while the bar is high, it is not insurmountable.

In summary, if an acquiring authority can demonstrate that errors have been made, and that those errors constitute a failure to comply with valuation principles, or that the errors comprise errors of law as opposed to errors of fact, it may be possible to establish jurisdictional error such as to vitiate the decision.

We are aware of at least two challenges to determinations by the Valuer General currently awaiting judgment. It remains to be seen whether the Court will consider the alleged errors as jurisdictional errors.

"If it can be established that a mandatory consideration was ignored, the determination of compensation may be invalidated. The same applies if there was insufficient process of evaluation or consideration of those matters."

Can Council be awarded costs? Only in extreme cases.

It is rare for an acquiring authority to be the beneficiary of a costs order in compulsory acquisition matters in the Land and Environment Court.

The power of the Land and Environment Court to award costs in the exercise of its Class 3 proceedings is conferred by section 98 of the *Civil Procedure Act 2005* (NSW). Under that Act, the Court's power to award costs:

a) is subject to rules relating to offers of compromise and the consequences of such orders; but

b) is not subject to rules relating to the presumption that costs 'follow the event'. That is, the successful party will not necessarily be entitled to an order for costs against the unsuccessful party and … an unsuccessful party may still be entitled to costs from the successful party for seeking the court to determine the adequacy of compensation received.

Rule 42.15 of the *Uniform Civil Procedure Rules 2005* (UCPR) states that a respondent who makes an offer of compromise which is more favourable than a judgment later obtained by the applicant is prima facie entitled to a special costs regime.

The rule provides that unless the court 'orders otherwise':

(a) *the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, to be assessed on the ordinary basis, up to the time from which the defendant becomes entitled to costs under paragraph (b), and*

(b) *the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on an indemnity basis:*

(i) *if the offer was made before the first day of the trial, as from the beginning of the day following the day on which the offer was made, and*

(ii) *if the offer was made on or after the first day of the trial, as from 11 am on the day following the day on which the offer was made.*

In the decision of *Croghan V Blacktown City Council* [2019] NSWCA 248 (**Croghan 3**) the Court was asked to consider whether the applicant had acted 'reasonably' in not accepting an offer of compromise, and if it was reasonable, then whether it justified the Court 'ordering otherwise' in relation to costs under rule 42.15.

Two years earlier, in *Faroll v Hobbs (No 2)* [2017] NSWCA 12, the Court considered the presumption that rule 42.15 of the UCPR might be displaced and the Court could 'order otherwise' by demonstrating that the rejection of the offer of compromise was reasonable.

Key considerations influencing reasonableness include:

1. Where the full parameters of the dispute are still uncertain at the time of the offer
2. Where the offeror's case changes after an offer
3. Where all relevant evidence has not been served before the offer and
4. Where the proceedings are not pursued in a way which gives rise to unnecessary delay and expense.

What is reasonable will depend on the circumstances of a particular case. In essence, what matters is the extent to which the claimant and its advisers (including legal) are in a position at the time of the offer to assess the likely outcome of the litigation.

Ordinarily, this will require that the issues on which that outcome depends can be determined, and that the lay and expert evidence of the parties regarding those issues has been made available. This was not held to be the case in Croghan 3.

The facts in Croghan were:

- On 13 October 2016, the Valuer General determined the compensation payable for the acquisition pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) to be $4,802,000, comprising market value of $4,791,000 and loss for disturbance of $11,000.
- The Class 3 compensation proceedings were commenced in late November 2016, the hearing proceeding in mid-February 2018.
- On 27 September 2017, the Council made a formal offer of compromise under rule 20.26 of the UCPR to resolve the proceedings for $5,246,204 plus legal costs "as agreed or assessed on a party/party basis." This offer was open for 28 days and was not accepted.

Ultimately the court determined compensation in the amount of $4,227,314, comprising $4,195,000 for market value and $32,314.98 for loss attributable for disturbance (*Croghan v Blacktown City Council (No 2)* [2019] NSWLEC 9).

Molesworth AJ held it was not appropriate for the court to 'order otherwise' in relation to costs order under rule 42.15 of the UCPR because:

a) It was an instance where a patently inflated or exaggerated claim had been lodged by the applicant (initially $11,157,252 and then $8,405,752), in light of a Valuer General determination of compensation supported by a well-reasoned expert valuation ($4,802,000), which was bettered by an offer of compromise a year later of nearly half a million dollars more ($5,246,205) which could not be characterised as a 'low offer of compromise'; and

b) The applicant had not acted reasonably in refusing the offer of compromise. This was because the amount of the offer exceeded the Valuer General's well-reasoned determination and expert evidence but the applicant had persisted in their higher claim and relied solely on their expert evidence, consequently causing unnecessary cost and delays as a result of pursuing a claim weakened by 'ill-conceived and exaggerated arguments'.

Consequently, Council (Respondent) was entitled to costs under rule 42.15 of the UCPR.

On 15 October 2019, the New South Wales Court of Appeal overturned the decision of Molesworth AJ. That is, it was deemed appropriate for the court to 'order otherwise' in relation to the costs order under rule 42.15 of the UCPR.

Meagher J held that the applicant *was* reasonable in rejecting the offer of compromise and was justified in

bringing the proceedings to test the adequacy of the statutory offer because:

- Council had discredited the Valuer General's determination by making a higher offer;
- When the offer of compromise was made by Council, the parties had not formulated their respective positions in pleadings and no expert reports, joint or otherwise, in relation to valuation, hydrology and traffic engineering had been exchanged. Thus, the applicant could not assess the position taken by Council on those issues by reference to its proposed evidence. So, by mid-2017, the applicant's position remained that it could not make a realistic assessment of the likely outcome of the litigation (versus accepting the offer of compromise);
- Therefore, an initially exaggerated claim and reliance upon flawed evidence by the applicant are not sound bases for denying an applicant their cost of proceedings, if it was still possible they could not have known their claim was exaggerated and would result in unnecessary delay or expense; and
- A more favourable reading of parts of the applicant's expert evidence may have resulted in greater compensation than the determination by the Valuer General.

Consequently, the respondent Council was ordered to pay the applicant costs of the proceedings in the Land and Environment Court on an ordinary basis, and Council's prima facie entitlement to costs under rule 42.15(2) of the UCPR was overturned.

We will continue to provide updates from the Court in this ever-changing environment.

IS IT UNLAWFUL TO NOT EMPLOY SOMEONE BECAUSE OF THEIR CRIMINAL RECORD?

THE CLEAR ANSWER IS: IT DEPENDS

RYAN MURPHY

On 1 October 2019, the *Australian Human Rights Commission Regulations 2019* (Cth) came into effect. Those regulations change the statutory definition of 'discrimination' in relation to criminal records. Let's have a look at how that change might impact councils and their recruitment practices.

By these new regulations, Federal Parliament has amended the definition of 'discrimination' to include any distinction, exclusion or preference made on the ground of an *irrelevant* criminal record. The only change is the addition of the word "irrelevant".

Since the inception of the *Australian Human Rights Commission Act 1986* (Cth), it has not been unlawful for employers to discriminate on the basis of criminal record if that record impacts on the performance of the inherent requirements of the job.

A concern arose that the "inherent requirements" exemption was too narrow. Employers were being criticised for decisions that, to most, appeared appropriate and fair. Here is one example.

BE v Suncorp Group Ltd [2018] AusHRC 122

Last year, Suncorp Group Ltd was found to have unlawfully discriminated against a candidate on the basis of his criminal record. Suncorp withdrew a job offer when it learned the applicant had criminal convictions related to child pornography and failure to comply with reporting obligations.

Suncorp said the convictions would have impacted the individual's ability to perform an inherent requirement of the role. Among other things, he would have had unsupervised access to confidential customer information and have been required to work with technology and the internet. Suncorp was also concerned about compatibility with its values and corporate responsibility.

The Australian Human Rights Commission took a different view and found that by withdrawing the job offer, Suncorp had breached federal discrimination laws. It recommended that Suncorp revise its policies, conduct more training, and pay $2,500 in compensation to the applicant for hurt and suffering. The decision resulted in significant publicity for Suncorp, who appeared to have plenty of supporters of its decision.

One of those supporters seems to have been the Attorney General, Christian Porter, who in a recent radio interview said:

> *The idea that [Suncorp] suffered a law and a decision that told them that they couldn't make that exercise of their own discretion seemed to us to be pretty strange if not a bit ridiculous. So yeah, we've changed the law.*[1]

> "It will no longer be unlawful to discriminate against an applicant whose criminal record could reasonably be said to be relevant."

What constitutes an 'irrelevant' criminal record?

The new regulations have lowered the bar for employers to vet candidates on the basis of their criminal record. It will no longer be unlawful to discriminate against an applicant whose criminal record could reasonably be said to be relevant.

The question facing employers is: when is a criminal record 'irrelevant'?

That will likely be determined on the circumstances, including the nature of the offence, time since the conviction, the nature of the role, the nature of the employer's business and many other considerations. For a council, this will include its statutory functions and purpose and may encompass the demographics of its ratepayers.

Here is a hypothetical to get the debate started. Imagine a candidate who has convictions for violent behaviour in protests against mining from five years ago. Council might depend on mining as a means to building a "strong, healthy and prosperous local community" in accordance with section 8 of the *Local Government Act 1993* (NSW). The candidate is exceptional at their trade and otherwise the best for the job. Do you hire them?

Questions like this will undoubtedly exercise councils and the Australian Human Rights Commission for some time to come.

1 6PR, 'Interview IR Minister Christian Porter', *Mornings with Gareth Parker*, 3 October 2019, transcript available at: https://www.attorneygeneral.gov.au/Media/Pages/Greater-clarity-for-employers-and-providing-further-protections-for-journalists-3-10-2019.aspx

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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Property

- Conveyancing, subdivision & leasing
- Community land & public roads
- Compulsory acquisitions
- Easements & covenants
- Voluntary planning agreements

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Environment & Planning

- Development applications
- Environmental protection & planning
- Land & Environment court litigation
- Regulatory & enforcement

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Workplace Law & Culture

- Government Information (Public Access) Act
- Industrial disputes
- Management guidance, discipline & dismissals
- Navigation of workplace conflicts & injured workers
- Work Health & Safety

* Bartier Perry Pty Limited is a corporation and not a partnership.

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 Workforce Summit 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).

Debt recovery

Bartier Perry offers a convenient online debt recovery solution that is ideal for moderate debts and a cost-effective alternative to using mercantile agents. For details visit bartier.com.au/online-services/debt-recovery.

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:

- Changing attitudes - recent approaches by industrial tribunals to dismissal decisions
- IP: The Essential Update - what you need to know
- To caveat or not to caveat - that is the question!
- Modern Slavery Laws and Sustainable Supply Chains

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
- Dispute Resolution & Advisory
- 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.

Please email info@bartier.com.au

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