Bartier Perry LAWYERS

Council CONNECT

ISSUE 10

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Inside this issue

Created for Bartier Perry by Jasmine Sarin of JS Koori Designs. *Always Was, Always Will Be.*

Doing things differently

Welcome to the December issue of Council Connect. Our theme is *doing things differently*. Given 2020's events, many might find that phrase an understatement.

Australians, as we always do, have found a way to adapt to a new reality. We have become more aware of our role in keeping each other safe and perhaps we are a little kinder, more inventive – finding new ways to stay connected when we cannot be together in person.

We have also found ways to keep our eyes firmly on the road ahead, to focus on what is good and positive even with uncertainty around us.

In this issue, we hear from Carey McIntyre, CEO of Shellharbour City Council, who shares with us his Council's commitment to *delivering services in a different way*. Looking beyond the 3Rs (roads, rates and rubbish), Council is striving to build a more family friendly workplace and a culture that properly recognises and hears Australia's indigenous people through its Aboriginal Advisory Committee. We applaud and share Shellharbour City Council's commitment.

A big thank you also to StateCover Mutual's CEO, Linda Bostock, who shares some clear trends in psychological injuries along with the wellbeing strategies they are assisting council members with. As we know, knowledge is power and we all need to be aware of the growing pressures many workers and their workplaces face.

I believe what we are seeing and hearing reflects a growing willingness among organisations to embrace positive change across the board. I see councils and businesses seeking smarter technology, more sustainable practices, more flexible approaches to the way they work, and a deeper appreciation of the unique contribution each person has to offer. This is cause for celebration and hope.

I trust you will enjoy and get value from this issue. It includes points to remember for self-insured councils regarding recovering workers compensation payments, tips for negotiating development and lease agreements with commercial entities, and councils' ability to require weekend overtime. As always, if there are topics you would like to see us address, please reach out to your usual Bartier Perry contact.

I wish you and your families safety, good health and a wonderful break at the end of the year. Take care and stay kind.

Warm regards

Riana Steyn, CEO

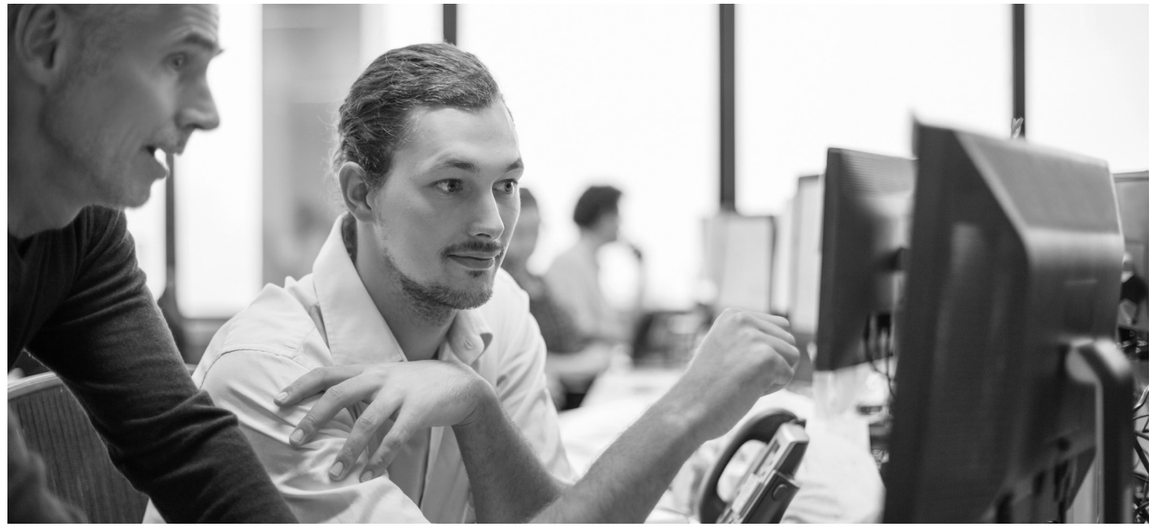
INTERVIEW WITH CAREY MCINTYRE
CEO AT SHELLHARBOUR CITY COUNCIL

Welcome to our second Council Connect video interview. David Creais, head of our property, planning and construction team talks to Carey McIntyre, CEO at Shellharbour City Council about what has been happening in his community and his Council's commitment to delivering services in a different way.

Shellharbour City Library. Image reproduced by courtesy of Shellharbour City Council.

STATE PLANNING SYSTEM ADAPTED FOR A POST-COVID ECONOMY

DENNIS LOETHER AND JULIDE AYAS



Covid-19 has had a devastating impact on our lives and the economy. The NSW Government has responded by implementing changes to its Planning System designed to inject investment into the economy and keep people in jobs. Below is a summary of the most recent changes.

The ePlanning Program

From 1 July councils and registered certifiers began using ePlanning Digital Services to process planning applications. From 31 December all planning applications must be processed this way.

This has required amendments to the *Environmental Planning and Assessment Regulation 2000*, making use of the portal mandatory when lodging planning applications. This includes development applications, including modification applications, applications for CDCs and for certificates under Part 6 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). Applications must also be assessed through the portal.

The purpose is to improve efficiency and transparency of the planning system.

Guidance on what constitutes "Physical Commencement"

The introduction of the *COVID-19 Legislation Amendment (Emergency Measures – Attorney General Act) 2020* (COVID Act) has extended the date that certain development consents will lapse under the EP&A Act.

On 15 May 2020, a new clause was added to the EP&A Regulation clarifying the work required to 'physically commence' a development and also specifying works that do not meet the criterion. As well as providing clarity, this will also help developers and landowners expedite more substantive works approved under a consent.

Under the recent amendments 'physical commencement' *does not* include:

- Creating a bore hole for testing
- Removing water or soil for testing
- Carrying out of survey work (including the placing of pegs or other survey equipment)
- Acoustic testing
- Removing vegetation as an ancillary activity to those activities approved under the development consent
- Marking the ground to indicate how the land will be developed.

The new thresholds will only apply to consents granted after 15 May 2020.

Extension of Lapsing Period

Development consents that are operational (that is, not lapsed) at 25 March 2020 will lapse an additional two years later than provided for by the consent. This change also applies to deferred commencement consents.

The changes introduced under the COVID Act also revive development consents that lapsed between 25 March and 14 May 2020, which will also receive a two year extension of the lapsing period.

Development consents granted after 25 March 2020 will remain subject to the five year lapsing period. However, consent authorities will not be able to reduce the lapsing period to less than five years (as was previously possible under the EP&A Act).

These changes will give developers and landowners time to recover from the economic impacts of the pandemic before proceeding with their approved development consent.

Extending time to appeal determinations or refusals

Amendments to the Act have also extended the time to appeal determinations or refusals, including deemed refusals.

If the right to appeal a determination or refusal of a development application fell between 25 September 2019 and 25 March 2022, that right is now extended from the usual 6 months to 12 months after the date of the determination or refusal.

Deferring payment of local infrastructure levies

In July 2020, a new ministerial direction was made to temporarily defer payment of local infrastructure contributions and levies until the issuing of the occupation certificate. This is seen as a means of stimulating activity in the housing sector.

Additional requirements for certifiers

Recent amendments to the EP&A Regulations requires certifiers to confirm there are no outstanding infrastructure contributions or levies before issuing an occupation certificate for projects over $10 million.

Lifting maximum cap on section 7.12 developer contributions

The EP&A Regulation sets 1% as the standard highest maximum percentage which councils can levy under a section 7.12 development contributions plan. However, land in six local government areas are listed in the EP&A Regulations as having higher maximum percentage levies.

On 14 August 2020 (for the first time since 2012), the NSW Government approved an exceedance of the 1% cap. However, the Department is currently considering a series of criteria to be considered to assist with the assessment and determination of a request to increase the maximum percentage levy to ensure the process of assessing requests for a higher maximum percentage levy is efficient and transparent.

> “...a new ministerial direction was made to temporarily defer payment of local infrastructure contributions and levies until the issuing of the occupation certificate.”

What's next?

In addition to the above changes, the Department of Planning, Industry and Environment is considering the following changes to the NSW planning system:

- A new Housing Diversity State Environmental Planning Policy to facilitate diverse, affordable housing for the state's growing population. The changes will encourage more social housing, particularly build-to-rent, student and co-living. The Explanation of Intended Effect was on exhibition from 29 July 2020 to 9 September 2020.
- Amendments to the EPA Regulation to improve transparency in the infrastructure contributions system through better reporting of contributions received and spent for individual contributions plans and planning agreements.
- Draft Special Infrastructure Contributions Guidelines on the purpose and objectives of the SIC framework, the method for determining a new SIC, and the process for allocating SIC revenue to infrastructure investment once received. These were exhibited from 15 April 2020 to 12 June 2020.

The Department is also considering the following changes to local infrastructure contributions plans:

- Increased value thresholds for triggering the review process
- An annual indexation mechanism for the thresholds that trigger the review process based on the CPI
- Reviewing the IPART terms of reference
- Removing exemptions to the review process
- Removing requirements for councils to re-exhibit an IPART reviewed contributions plan following receipt of advice from the Minister.

We will continue to monitor and provide updates.

WORKERS COMPENSATION RECOVERIES – A MONEY SAVING OPPORTUNITY, IF DONE WELL

MICHAEL LAMPROGLOU

Not all employers pay insurance companies to manage employee work-related injury claims and compensation. Many choose to self-insure, either individually or through a mutual specialised insurer like StateCover.

This approach offers significant benefits as well as risks and obligations.

Section 151Z – the employer's friend

One benefit is the ability to recover compensation paid to an employee, where a third party is responsible for the employee's injury. Given that compensation payments are a direct expense to your business, any opportunity to recover them should be taken.

This ability is granted by Section 151Z of the *Workers Compensation Act 1987* (NSW).

The key is to establish that a third party either caused, or was in some way responsible for, your employee's injury, and that they are liable to pay damages to your employee.

What are damages?

Damages are paid to compensate for a loss or injury. Unlike compensation, they are a once-and-for-all lump sum payment as opposed to periodic payments over time.

Entitlement to damages for personal injury is governed by common law principles of negligence. Over time those principles have been written into different pieces of legislation.

For example, a worker injured in a car accident will only be entitled to damages if they satisfy the *Motor Accidents Compensation Act 1999* (NSW) or the *Motor Accident Injuries Act 2017* (NSW), depending on the date of the accident.

Otherwise, the *Civil Liability Act 2002* (NSW) will likely apply. It covers trips, slips and falls, manufacturing defects, nervous shock and even assaults.

For an employer to recover payments made, the damages the worker may be entitled to must exceed the compensation payments they have received.

Are all workers compensation payments recoverable?

The short answer is yes, as long as the payments of compensation are in fact payments of compensation.

For example, payments made for legal or investigation expenses, which are not categorised as compensation under the Act, are not recoverable.

The following workers compensation payments are recoverable:

- Weekly payments
- Medical expenses
- Lump sum compensation
- Property damage payments
- Commutation payments
- Death benefits.

Note that compensation paid for unrelated work injuries is not recoverable. The liability of the third party to pay damages to the worker and the liability of the employer to pay compensation must arise out of the same injury.

The only other restriction relates to motor vehicle accidents from 1 December 2017, for which only weekly payments of compensation can be recovered.

Lump sum compensation paid under sections 66 and 67 can also be recovered if the worker satisfies the greater than 10% whole person impairment threshold in the *Motor Accident Injuries Act 2017* (NSW).

How it works

Typically, an employee claims and receives workers compensation payments following an injury. From here, two rights of recovery exist.

The first right is **directly against the third party** who caused the employee's injury. This requires a letter of demand to that party (or, more appropriately, their insurer given they will be the one writing you a cheque).

> "The key is to establish that a third party either caused, or was in some way responsible for, your employee's injury, and that they are liable to pay damages to your employee."

The letter provides the compensation payments made to the employee, the evidence for the third party being responsible for the injury, and the medical evidence confirming the employee's injuries.

From here, negotiations for reimbursement begin. Issues such as liability, contributory negligence, the damages the worker is entitled to, the effect of any previous or subsequent injuries, and the effect of any employer negligence, will all be considered.

If negotiations break down, Court proceedings may be commenced.

The second right arises if your employee has already received damages from the third party responsible for their injuries. That right of recovery is **directly against the employee** themselves.

This right exists to avoid an employee being doubly compensated for an injury.

The legislation says an employee must repay workers compensation payments once they receive damages for the same injury.

The reason for two rights of recovery is that not all employees seek damages from the third party. In that case, an employer must be able to seek the recovery from the third party themselves.

Limitation period

Following each payment of compensation, parties have six years to:

1. Recover the payment
2. Obtain a written admission of liability from the third party (which has the effect of re-starting the six-year limitation period from the date of the written admission) or
3. Commence Court proceedings to recover those payments.

While six years seems a generous time, the reality is that the evidence to support a claim for damages is much easier to obtain just after an injury. The moral: don't wait six years.

The Bartier Perry Team

Our new and highly experienced Recoveries team have recovered millions of dollars for clients, and helped recoveries become standard in workers compensation setups across NSW. Our team also provides insights into trends and organisational issues that can impact recoveries and the risk of future injuries.

WORKPLACE MENTAL HEALTH TOP OF MIND

StateCover Mutual's partnership approach helps make mentally healthy workplaces a reality

MIRIAM HILL, STATECOVER MUTUAL

2020 might just be the year we thank for creating an unprecedented focus on mental health. Despite some alarming Covid-related statistics and experiences, many Australians are now feeling 'allowed' to speak up, check in and seek support.

The huge push across government and society to provide mental health support indicates that the stigma is reducing, understanding of signs and symptoms is increasing, and access to support is *opening up*.

These positives also bring with them the reality that workplace psychological claims are still on the rise. In 2018, StateCover observed a troubling rise in psychological claims, indicating the growing stresses many workers and councils face.

"StateCover Mutual has spent 20 years working with local government in psychological risk prevention and injury management. Councils are calling out for health and wellbeing services, and we are well positioned to understand their needs. Our research suggests the issues councils face are different from those impacting many other employers," says Linda Bostock, MD/CEO of StateCover Mutual.

"Mental wellbeing needs to be top of mind, particularly now with ongoing change from amalgamations, increasing community needs and expectations, bushfires and drought ravaging communities, and now the pandemic.

"The safety and wellbeing of more than 130 NSW local government organisations and 35,000 employees, is our priority", she says.

Understanding mental injuries

Mental ill health is more prevalent than most of us realise. One in five Australians experience a mental health condition in any given year. With over 3.5 million people working across NSW, this is equivalent to over 700,000 workers.

Psychological injuries in NSW alone are climbing 15 times faster than physical injuries. NSW Health reports that in 2018-19 more than 1.2 million days were lost to work-related psychological injuries, at a cost of more than $585 million. Psychological injury claims increased by 53% from 2014-15, while claims for physical injuries increased by only 3.5%. On average, workers were off work for approximately 175 days for a psychological injury, around four times longer than a physical injury.

Linda Bostock, MD/CEO of StateCover Mutual

Unlike a physical injury, a psychological injury cannot be easily recognised and understood. According to Safe Work Australia, a psychological or mental injury includes a range of cognitive, emotional and behavioural symptoms that impact a worker's life and significantly affect the way they feel, think, behave and interact with others. Broadly speaking, these injuries can be caused by environmental (such as unsafe noise levels, equipment and accidents), organisational (including poor levels of support, constant change and high levels of stress) and individual factors (such as personality and past experiences).

Psychological injuries are exceptionally complex on every level – for the person with the injury, for their place of work, for the claims management team and for those involved in their medical and ongoing support. Injuries usually result in longer periods off work and sometimes slower and lower chances of eventual return to work.

StateCover has found the 10 most common root causes of psychological injury claims are:

- Failure to address behaviours/issues in the past
- Management styles
- Changed expectations
- Poorly executed performance management
- Handling of grievances/complaints
- Recruitment practices
- Misunderstandings/poor communication
- Inappropriate medical certification
- Personality and/or pre-existing mental health issues
- Factors unrelated to work.

Feature article provided by StateCover Mutual

An empathetic and tailored approach

StateCover's experience of local government has led to the development of the Complex Claims Model and Psychological Injury Management Framework. This anchors StateCover's psychological claims management in best practice and prescribes the highest level of collaboration.

"Making a psychological injury claim can be confusing and stressful," says Linda. "We don't want that. We aim for consistency and a well-managed process. Providing consistent contacts provides support to the council and the injured worker and supports recovery and return to work."

As a claim is progressed, our team partner with the Member's return to work coordinator and senior management. There is no one size fits all approach, so we tailor our strategies to optimise outcomes.

"StateCover's complex psychological claims process delivers intensive, rigorous and collaborative claims management when Members need it most."

When a claim is received, StateCover's process moves through four stages:

1. **Rigorous liability determination:** This ensures the appropriate liability decision is made, in accordance with legislation and regulatory guidelines, and that all parties understand the reasons for the decision.
2. **Intensive collaboration:** Our Member's senior management and RTW coordinator are kept informed of developments and claim goals. Claim strategies are developed in consultation with Members, and we hold frequent case conferences for as long as needed.
3. **Systematic proactivity:** StateCover schedules regular meetings between the Case Manager and the Member's RTW Coordinator. By doing so all parties are on the same page and potential barriers are identified and actioned.
4. **Premium impact analysis:** Mental health claims often pose a big risk to a council's premium. We are open about the potential impact and provide premium impact analysis on any complex claim.

"Building trust takes time. Our team draws on two decades of experience, helping us understand what Members need today and what they'll need in the future."

Onward and upward

There is evidence that healthier workers are less likely to be injured at work and, if they are injured, their rate of recovery is faster. For StateCover Members, there are clear additional organisational and financial benefits to investing in worker wellbeing.

Benefits of a healthy workplace

3x
more productive

50%
less injuries

5x
more engaged

$3-$6
ROI for every $1 spent

Costs of an Unhealthy Worker

4x
more likely to lose talented workers

7x
more costly workers compensation claims

5x
more sick days taken per year

$6.4b
Productivity losses in Australia per year due to obesity alone

"StateCover is in a unique position to provide wellbeing and early intervention programs and strategies. It aligns with our purpose of delivering mutual value and our promise to go beyond to support Members," says Linda.

StateCover's wellbeing services have been on offer for 12 months, following rigorous consultation and co-creation with Members. Wellbeing with StateCover offers Member Only access to mental health resources, programs and services tailored for local government such as a mental health awareness campaign, online learning modules, EAP services, check in tools, webinars and face-to-face workshops with experts in the field.

StateCover is now trialing a psycho-social audit tool to help councils identify the root causes of psychological injuries. StateCover will soon offer this tool to support Members in minimising the risk factors associated with psychological injury.

Bullying is another difficult area for any workplace, made more so by complex workers compensation legislation. StateCover has developed a practical bullying prevention package which includes a ready to use policy and procedure, a training package for workers and another for managers and supervisors, a due diligence assessment tool, posters and fact sheets, and a set of toolbox talks.

"Our current wellbeing and early intervention offerings are great," says Linda, "but there is so much more to do. We want to make mentally healthy workplaces a reality for our Members, and that's why we're giving them the tools to build mental health strategies. This is a central pillar of our overall value."

With employers coming under increasing scrutiny around employee mental health and wellbeing, now is a good time to review the relevant practices, policies and support structures for your people.

For more information about StateCover Mutual and how they can support and work with you, contact memberservices@statecover.net.au or call (02) 8235 2800.

"We share Members' passion for keeping their people well and working. We're committed to working in partnership with our Members to deliver optimum results and to help them thrive."

COMBUSTIBLE CLADDING AND THE NEW DESIGN AND BUILDING PRACTITIONERS ACT

MARK GLYNN, SHARON LEVY & JACK WILLIAMS

Time for councils to review standard form contracts

The *Design and Building Practitioners Act 2020* (DBP Act) is a significant part of the NSW Government's attempt to reform and restore trust in the building and construction industry.

The reforms are in part in response to the fires involving non-compliant combustible cladding at the Lacrosse Tower in Docklands, Victoria in 2014 and London's Grenfell Tower in 2017. Both fires spread rapidly because of aluminium composite panels with a polyethylene core, which acted as a source of fuel.

NSW Government Response

In February 2019, the NSW Government committed to implementing four major reforms across the NSW construction industry:

1. The appointment of an expert Building Commissioner
2. An overhaul of compliance reporting introduced by the DBP Act. It states that:
   - a regulated design can only be prepared by a registered design practitioner, who must provide a design compliance certificate with the initial design and any variations that follow
   - building practitioners must provide a building compliance declaration to the principal before an occupation certificate can be sought. The certificate must confirm that the building complies with the Building Code of Australia and has been built in accordance with the regulated design, and must state whether a design compliance certificate has been obtained in relation to any regulated design.
3. All building and design practitioners with reporting obligations must be registered. Moreover, the DBP Act requires that:
   - from 1 July 2021, building and design practitioners must be competent, qualified and suitably insured
   - practitioners must maintain the skills and insurances needed to meet registration requirements and will be subject to disciplinary action for professional misconduct. (Note that the definition of practitioner is not yet clear. It remains to be seen whether it will include facade engineers and fire engineers.)
4. The introduction of an industry-wide duty of care introduced by the DBP Act.

The New Duty of Care

Part 4 of the DBP Act provides that 'a person who carries out construction work' has a duty to exercise reasonable care to avoid economic loss caused by defects which are either in or related to a building for which the work is done or arise as a result of the construction work.

The new duty of care provisions are in addition to the duties, statutory warranties and other obligations imposed under the *Home Building Act 1989* (**HBA**). They do not in any way limit the duties imposed under the HBA, any other legislation or common law.

The new DBP Act broadly defines 'construction work' to include:

- Building work
- Designs for building work
- Manufacture or supply of a building product used for building work
- Supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any of the above.

> "The new duty of care is owed to each owner of the land on which the building stands *and to each subsequent owner*. That is, future sales and new ownership do not extinguish responsibility or liability for breaches of the duty of care."

This means that if a building is defective, owners can make claims not only against the builder or developer, but also against the architect, engineer, individual subcontractors, building product manufacturers and suppliers, and project manager.

The new duty of care is owed to each owner of the land on which the building stands *and to each subsequent owner*. That is, future sales and new ownership do not extinguish responsibility or liability for breaches of the duty of care.

A contract is not required to establish duty of care and nor can parties contract out of it.

The duty of care provisions apply retrospectively, provided the loss first became apparent no earlier than 11 June 2010 (10 years before the new Act was passed).

In addition, a claim made under the DBP Act for economic loss can be added to existing proceedings. This means that claims for the presence of aluminium composite panels can now be added to existing court proceedings against builders or developers as a breach of duty of care under the DBP Act, and not just for a breach of the statutory warranties under the Home Building Act.

Is the cladding defective and can a claim be made?

Aluminium composite panel cores are made of a variety of materials, including polyethylene. The higher the polyethylene content the more combustible the panels will be.

In determining whether a claim in relation to aluminium composite panels can be made, the level of polyethylene content must be considered.

In NSW, panels with a core of more than 30% polyethylene by mass have been banned in any external cladding, external wall, external insulation, facade or rendered finish in buildings.

For the aluminium composite panels to be defective, a registered testing authority must confirm that the core is more than 30%. This is done by testing a number of samples from various points, which also allows an assessment of the overall risk it poses (low, medium, high or extreme).

The level of risk posed by the panels will depend on their location on the façade and the potential consequences of ignition. Low risk is tolerable and may be managed

without removing the panels (it is also likely the panels complied with the Building Code of Australia at the time of installation). Medium risk will typically require partial removal of panels or removal of ignition sources. High or extreme risk will require immediate removal of the panels, as it represents an intolerable risk to life and safety.

What should councils do?

The Government has said the new scheme under the DBP Act will initially apply only to Class 2 buildings and buildings that include Class 2 components. While this may form part of the regulations which at the time of writing had not been released, it is not reflected in the Act itself.

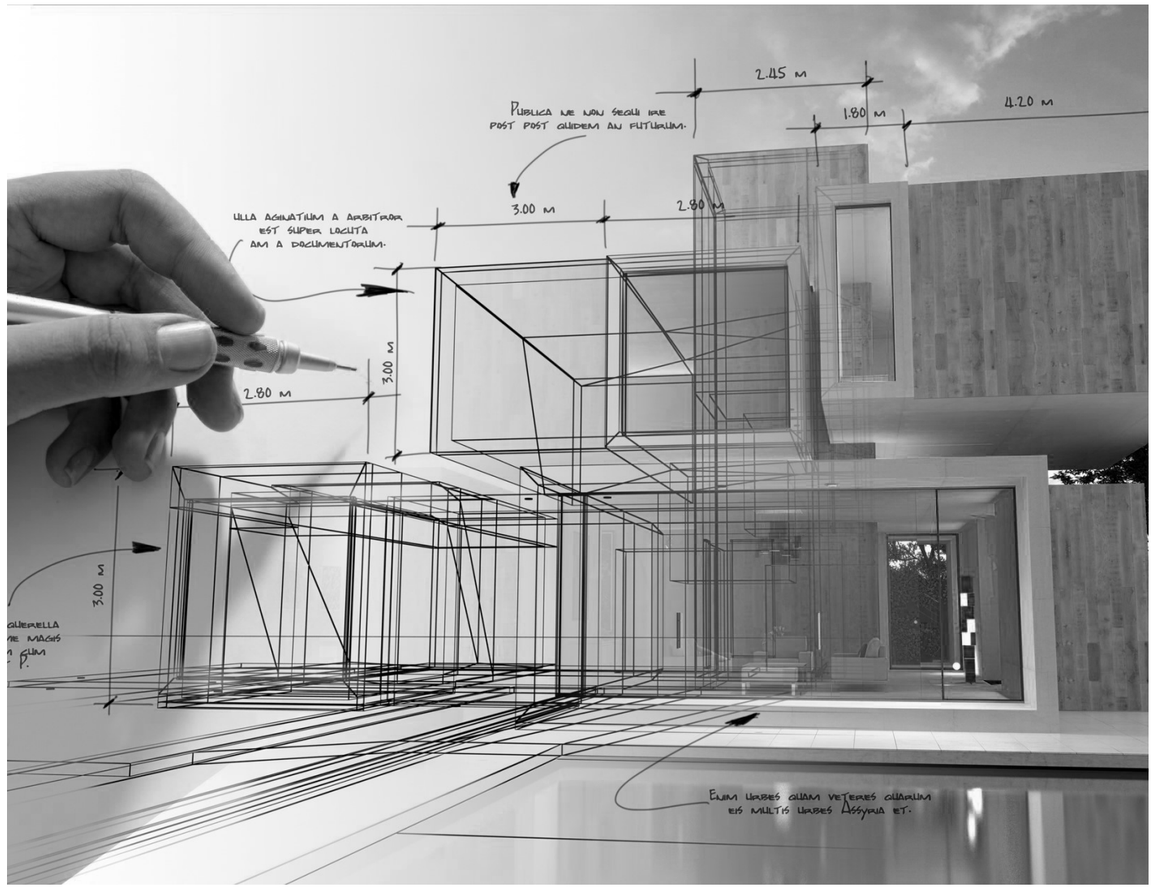
We therefore recommend that councils review and amend their standard form contracts to reflect the regulated design and compliance declarations requirements under Part 2 of the DBP Act.

Amendments could require that:

- Design practitioners engaged directly by council or by the builder under a design and construct contract are registered
- Regulated designs are prepared by registered design practitioners
- Design compliance certificates are provided for all regulated designs
- Building work using regulated designs does not start without design compliance declarations
- Any claim for the variation of a regulated design must be accompanied by a relevant design compliance declaration
- Practical completion includes the building compliance declaration being provided to council
- The builder warrants that he or she is a registered building practitioner as prescribed by the DBP Act.

In addition, if any buildings owned by council may contain aluminium composite panels, testing should be undertaken immediately to determine the polyethylene content and subsequent advice obtained.

Bartier Perry's team of experienced construction lawyers can assist councils ensure that contracts already under way are amended to protect council and comply with the DBP Act.



Wagga Wagga Airport. Image reproduced by courtesy of Lightbox Imageworks Photography.

WORKING WITH BUSINESS TO DEVELOP COUNCIL LAND – 11 THINGS A COUNCIL MUST CONSIDER

MARK GLYNN & MELISSA POTTER

A brief guide to negotiating development and lease agreements with commercial entities

Council's management plans deliver on the vision for their LGA to better serve and enhance the social and economic lives of their communities.

The master plans or management plans set the actions to turn the vision into reality and invariably include strategies for the development of council owned assets.

Often the realisation of the vision involves an agreement between council and a non-government commercial entity or organisation involving the development and lease of council owned land.

These agreements can be a win-win. Commercial organisations gain access to a valuable asset and council welcomes the investment, jobs and services they bring.

More than ever, Bartier Perry's team is being engaged to assist council clients in developing and documenting such transactions.

This article discusses 11 important aspects of these transactions, and offers practical steps to take and points to consider when contemplating entering into agreements relating to council owned land.

1. The most appropriate project delivery method

The typical development project sees council lease the developed land to the commercial entity as tenant. However, responsibility and payment for the development may take a number of forms:

- Council carries out the development in line with the tenant's design requirements and recovers the cost through a higher rent.
- The tenant carries out the development to the agreed design and the cost is reflected in a lower rent.
- The tenant carries out the development to the agreed design and is reimbursed by council. Rent is then set with no consideration of development costs.

Each method raises different concerns and risks to be considered by council such as:

- Is council equipped to carry out development works, particularly if they are for a specialised use such as health, aviation or highly automated warehouses?
- Can council carry out the development as efficiently and cost effectively as, say, a national retailer who has a blueprint and panel of selected contractors with a proven track record?
- If the tenant carries out the works, can council rely on the warranties and performance guarantees given by the builder (who was engaged not by council, but by the tenant)?

2. The negotiation framework

Having identified a preferred party to undertake development, council will then enter into discussions with that party. Before discussions start, council should consider agreeing to the following framework:

- An Exclusivity Agreement. Discussions of this type consume significant time, personnel and money. Accordingly, it is usual for one or both parties to seek an agreed period of exclusive dealings.
- A Confidentiality Agreement to govern the negotiation and disclosure of information.
- A Negotiation Protocol that sets appropriate standards of governance, probity and integrity for all discussions. It should expressly state that discussions are not an offer from council guaranteeing the interested party any contractual or other rights in respect of the land.
- The appointment of a probity officer or advisor to ensure the probity and integrity of the negotiation process.

3. Heads of Agreement/Term Sheet

Discussions will be aimed at reaching consensus on the key commercial terms of the proposed agreement. These terms will then be captured in a non-binding Heads of Agreement or Term Sheet.

The benefit of such a document is that it ensures both parties understand the commercial terms of the resulting agreement.

The document also allows council to seek formal approval of its councillors to proceed to the next stage, namely the drawing up of legally binding contracts of which the Agreement of Lease (AFL) is generally the primary document.

4. Landowner not consent authority

When negotiating commercial terms, councils should always be aware that they may be wearing two separate hats – as landowner/developer and as consent authority. It is essential that councils do not fetter their roles as consent authorities.

Concessions that can be granted by a private landowner cannot always be granted by councils. So it is important for documents to require the other party to acknowledge that council is a government body which must exercise its statutory responsibilities.

5. Standard of the works

It is imperative that the standard of the works to be carried out by the builder is documented. Ultimately, council may be required to reimburse the tenant for those works or even be responsible for their quality.

At a minimum, the completed works must comply with all legislative requirements, development consents and relevant Australian Standards, including the Building Code of Australia.

If the works are highly specialised (for example, a race track or a foreshore or public access development), it may be appropriate to agree on an existing development to provide the baseline standard required.

6. Warranties and performance obligations for the works for the benefit of council

If the works are carried out by the developer under a contract with the builder, it is highly likely that any warranties or performance obligations in the contract will not be assigned to council.

The agreement between council and tenant must address this by assigning warranties to council. Alternatively, council may enter into a tripartite agreement with the builder or consultant that provides for warranties to be provided to council directly.

7. Variation of the works

Works in most building projects are subject, at one stage or another, to variations.

The building contract will invariably include a regime for requesting, approving and valuing variations of works being carried out by the builder for the tenant. Such variations will generally result in:

- An extension of time for the builder to bring the varied works to practical completion
- Cost relief for the builder, with the contract sum payable by the developer to the builder adjusted to incorporate the price of the variation.

But how are variations of the works provided for in the AFL? Things to consider include:

- If the works are varied, does the rent payable under the lease require adjustment?
- If the works are varied and the development costs increased, does the sum to be reimbursed by council to the tenant require adjustment?
- To what extent is council approval required for a variation of the works?
- If council delays approval of a variation and works are subsequently delayed, is council liable for delay damages?

> “When negotiating commercial terms, councils should always be aware that they may be wearing two separate hats – as landowner/developer and as consent authority.”

8. Security for the works

Under the building contract, the builder will generally provide security in the form of two bank guarantees, each to the value of 2.5% of the contract sum, to support its performance.

This security is available to the principal for such things as rectification of defects that the builder does not attend to, payment of liquidated damages, and claims arising from early termination of the building contract or from the insolvency of the builder.

Councils should also consider what security it requires to be provided by the tenant under the AFL to support the carrying out of the works. Council will suffer loss if the works are defective or if the tenant is not able or willing to compete the works by the agreed date. Damages sought would take into account:

- The cost of completing the unfinished works or restoring the land to its original condition
- Rectification of defects
- Loss suffered as a result of the tenant's insolvency.

9. Practical completion of the works and extensions of time

Under most agreements, the lease will commence and rental income will become payable to council around the date the development works reach practical completion. Consideration must be given to:

- The date for practical completion
- Damages payable to council if the works are not completed on time
- The stage the works must reach to achieve practical completion
- How council will satisfy itself that the works have reached practical completion
- In what circumstances the date for practical completion can be extended
- A 'sunset date' beyond which no further extensions of time will be granted and the AFL can be terminated by council.

10. Intellectual Property

If the works are designed by the tenant or builder under a design and construct contract, council will require intellectual property rights in the design documents.

This will allow council to use and copy the design to whatever extent needed for any subsequent repairs, maintenance or servicing of the development, or later additions, alterations or further development of the land.

11. Lease

To ensure a return on their initial investment, tenants may require a long term lease, sometimes in excess of 50 years. Often the terms of such a lease will be different from those in a shorter term lease. For example:

- Permitted Use should be narrowly defined, to avoid the possibility of the premises being used in the future for something not supported by the community.
- Consider who will be responsible for repair and maintenance of the building over the long term to ensure it does not fall into gradual disrepair.
- Assignment. It is to be expected that during the life of a long term lease, the lease will be assigned to a new tenant who may not have the same financial strength or experience as the original. Consider putting security in place to cover any risk, such as bank or corporate guarantees. Parent company guarantees should be considered if a tenant wishes to transfer the lease to another company within the corporate group.

Parting thoughts

Agreements to develop and lease council land involve significant capital investment and long (sometimes very long) periods of tenure. The tenant will often seek rights that are generally the preserve of a landowner, not an occupier under a lease.

While such transactions can be rewarding for councils and may be demanded by their residents, councils must also assess the risks against the rewards, being especially mindful that during a 50 year plus lease council's master plans and community expectations will inevitably change.

YOU'RE INVITED

There's a lot for council to consider when negotiating these deals – more than we can do justice to in a single article.

That's why we've developed a one hour training presentation which expands on these concepts. We can deliver it in person or online – whichever suits you best.

To discuss or arrange for this presentation to your executive, legal, projects or development teams, please contact Melissa or Mark.

OVERTIME OR OVERLOAD?

WHEN IS WORKING ON WEEKENDS PART OF THE JOB?

NICK LEON

We all know how precious our weekends are – for well-earned downtime and respite from work, but many of us also spend time on weekends caring for children and other family members.

In a recent decision, Commissioner Webster of the Industrial Relations Commission of NSW provided local councils with helpful guidance on their ability to make employees work overtime on weekends when they didn't want to.

The case deals with the requirement to work *"reasonable overtime"* in the *Local Government Award 2017* (the Award). The Commission applied a common sense approach that provides comfort for councils in managing the delivery of essential services, many of which are available to their communities on weekends.

The case and what it means for you

Do I really have to do overtime?

Mr Robinson had worked in the Hornsby Shire Council cleansing and waste unit for 19 years. During that period, employees were required to work regular weekend overtime shifts to ensure that amenities provided by Council were maintained daily. Employees routinely performed three weekend-morning overtime shifts a month, each lasting about five hours.

Following a return to work after a period of absence, Mr Robinson advised his manager that he no longer wished to do regular weekend overtime. Among his reasons was a desire to care for his granddaughter, who had a medical condition, and provide respite for his daughter and son-in-law.

Council considered Mr Robinson's request and decided that its requirement for regular weekend overtime was reasonable. As a compromise, Council offered to reduce his overtime shifts to two shifts per month.

Mr Robinson wasn't happy with Council's decision and the union lodged a dispute.

The overtime requirement – "perfect opposites"

In resolving the dispute, Commissioner Webster was required to interpret clause 19(viii) of the Award, which provides:

> *(a) Subject to paragraph (b), the employer may require an employee to work reasonable overtime at overtime rates.*
>
> *(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable.*
>
> *(c) For the purposes of paragraph (b), what is unreasonable or otherwise will be determined having regard to:*
>
> - *any risk to the employee;*
> - *the employee's personal circumstances including any family and carer responsibilities;*
> - *the needs of the workplace;*
> - *the notice, if any, given by the employer of the overtime and by the employee of their intention to refuse it; and*
> - *any other matter.*

Commissioner Webster confirmed that the clause confirms the *"well-established proposition that* the employer can indeed require an employee to undertake reasonable overtime", but also that at the same time employees have a "concurrent right" to refuse hours if they are unreasonable.

The union argued that clause 19(viii) involved a two-step approach. First, one needs to work out if the overtime is reasonable, and if it is, whether the working hours are unreasonable (having regard to clause 19(viii)(c)). The Commission disagreed, stating:

> *What is evident from the dictionary definition of both "reasonable" and "unreasonable" is that they are perfect opposites. It defies reason that overtime can be both "reasonable" and the overtime hours "unreasonable" at the same time. The analysis in the context of whether overtime is "reasonable" or the hours "unreasonable" requires an examination of the same matters and that need only occur once to arrive at a conclusion whether the employee may refuse to do the relevant overtime. This interpretation of the clause is consistent with its purpose, namely, to balance the interests of the parties to the employment relationship to ensure that the employer may require overtime to be undertaken, but only if the requirement is reasonable and not unreasonable.*

> "...the clause confirms the *"well-established proposition that* the employer can indeed require an employee to undertake reasonable overtime", but also that at the same time employees have a "concurrent right" to refuse hours if they are unreasonable."

The decision

Commissioner Webster held that the requirement to work two early morning, five-hour Saturday overtime shifts each month was reasonable, and that Mr Robinson's refusal to perform those hours was unreasonable.

The Commissioner accepted that it was important the work be performed each day of the week and, therefore, that overtime was required. She said the requirement was not excessive and *"does not warrant the engagement of a new and separate workforce to undertake the eight weekend shifts required"*. Commissioner Webster also noted that:

- Mr Robinson had worked under these conditions for a lengthy period and had recently signed a position description which expressly provided that the overtime was required on weekends in his position; and
- In order to assist Mr Robinson, Council had offered a compromise of its usual position of requiring staff to work three regular weekend overtime shifts a month.

While she was sympathetic to Mr Robinson's circumstances and his caring obligations, they had to be balanced against Council's operational requirements and the impact Mr Robinson's refusal would have on other staff members. Mr Robinson was not the primary carer of his granddaughter and only wanted to be available for the possibility he may be needed. Mr Robinson remained available to care for his granddaughter all week, other than the five hours early on a Saturday morning.

Guidance for councils

The decision is particularly useful as, to date, there has been limited consideration of the requirement to work reasonable overtime. The decision:

- Confirms that councils can require employees to undertake reasonable overtime
- Highlights the benefit of the position description identifying the need to work overtime
- Suggests that an existing pattern of requiring overtime may also be relevant.

While 'carer responsibilities' should not be ignored, they cannot be used as a shield to refuse to perform overtime. The employment contract and employee obligations must be discharged to the greatest extent possible, and as always it is about finding a workable balance – something Mr Robinson unfortunately refused to entertain.

In determining what is *"reasonable overtime"* versus *"unreasonable hours"* there is an attempt to try and balance the needs of the council (including its operational requirements and the impact on other staff) against the employee's personal circumstances. The balance results in one answer.

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.

DAVID CREAIS
Partner*

T +61 2 8281 7823
M 0419 169 889

dcreais@bartier.com.au

GAVIN STUART
Partner*

T +61 2 8281 7878
M 0407 752 659

gstuart@bartier.com.au

MARK GLYNN
Partner

T +61 2 8281 7865
M 0418 219 505

mglynn@bartier.com.au

Dispute Resolution & Advisory

- Building & Construction
- Property disputes
- Commercial disputes
- Debt recovery
- Alternative dispute resolution

MICK FRANCO
Partner*

T +61 2 8281 7822
M 0413 890 246

mfranco@bartier.com.au

KATHERINE RUSCHEN
Partner*

T +61 2 8281 7971
M 0409 223 281

kruschen@bartier.com.au

Insurance

- Advice on return to work & employment issues
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- Public Liability

NORMAN DONATO
Partner*

T +61 2 8281 7863
M 0419 790 097

ndonato@bartier.com.au

JASON SPRAGUE
Partner*

T +61 2 8281 7824
M 0414 755 747

jsprague@bartier.com.au

Corporate & Commercial

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

MELISSA POTTER
Partner*

T +61 2 8281 7952
M 0481 236 412

mpotter@bartier.com.au

PETER BARAKATE
Partner*

T +61 2 8281 7970
M 0405 311 501

pbarakate@bartier.com.au

Property

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DENNIS LOETHER
Partner*

T +61 2 8281 7925
M 0402 891 641

dloether@bartier.com.au

MARY-LYNNE TAYLOR
Special Counsel

T +61 2 8281 7935
M 0438 671 640

mtaylor@bartier.com.au

STEVEN GRIFFITHS
Senior Associate

T +61 2 8281 7816

sgriffiths@bartier.com.au

Environment & Planning

- Development applications
- Environmental protection & planning
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JAMES MATTSON
Partner*

T +61 2 8281 7894
M 0414 512 106

jmattson@bartier.com.au

DARREN GARDNER
Partner*

T +61 2 8281 7806
M 0400 988 724

dgardner@bartier.com.au

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- Work Health & Safety

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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:

- (Mis)behaviour: can employers set and enforce the standard?
- Cladding and the new Design and Building Practitioner's Act

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

For any enquiries, feel free to contact us at info@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 80 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.

Please email info@bartier.com.au

BARTIER PERRY PTY LTD
Level 10, 77 Castlereagh Street, Sydney NSW 2000
T +61 2 8281 7800
F +61 2 8281 7838
bartier.com.au
ABN 30 124 690 053

Bartier Perry

@BartierPerryLaw

Bartier Perry

BARTIER PERRY LAWYERS