Bartier Perry LAWYERS

Council CONNECT

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Inside this issue

Welcome

Welcome to the December 2021 issue of Council Connect.

We hope this issue finds you well and that Saturday's Local Government elections ran smoothly. I'm sure you are all looking forward to a well-earned rest over the upcoming break.

Our articles in this issue shine a spotlight on some of the challenges and also of course, the opportunities faced by councils who are committed to good business practices. We explore issues and provide guidance on matters ranging from garbage truck safety to social housing, and the complications that can derail seemingly straightforward commercial contracts between councils and contractors.

Our thanks to Morven Cameron, CEO of Lake Macquarie City Council (LMCC) who took time out to speak to our own David Creais for this issue's CEO interview (the link to the video interview is on page 2). David's discussion with Morven highlights the resilience and foresight of LMCC over the last year. We hear about the technology rollout that saw inside and outside teams alike able to participate in Council Town Halls. Taking part in the larger conversations that help keep workplaces unified and motivated has been a real positive for the Council this past year. After learning about the tourism growth and natural beauty of the region, the Bartier Perry team are all busy looking for their next getaway accommodation!

I would like to also take this opportunity to remind our council clients that a large part of what we do includes value-added services. We invite all our council clients to feed back to us how we can be of practical help. We are very open to trying new things which you believe may help you in your day-to-day or other. Your key contacts are listed at the back of this issue – feel free to contact them directly. We want to work with you to make sure you receive the very best value from us.

As 2021 draws to a close, on behalf of the Bartier Perry team, I wish you and your families a safe and festive holiday. We look forward to what 2022 brings.

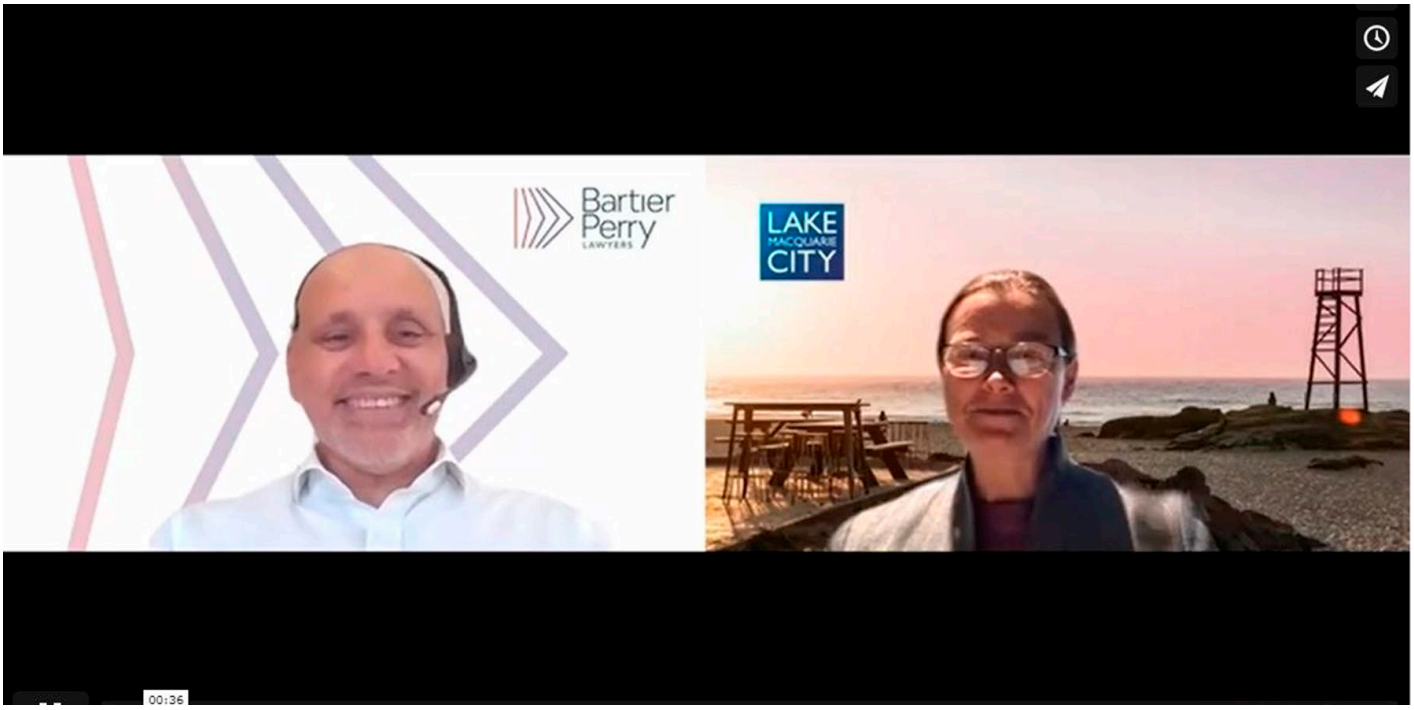
Kind regards,

Riana Steyn, CEO

INTERVIEW WITH MORVEN CAMERON

CEO, LAKE MACQUARIE CITY COUNCIL

Welcome to our Council Connect video interview. David Creais, head of our property, planning and construction team talks to Morven Cameron about what has been happening at Lake Macquarie City Council and the opportunities and challenges they (and other councils) face over the next 6 months.



To watch the interview visit https://www.bartier.com.au/insights/video-library/council-connect-december-2021-interview/

Image reproduced by courtesy of Lake Macquarie City Council.

NSW'S LANDMARK MODERN SLAVERY ACT AND WHAT IT MEANS FOR LOCAL COUNCILS

JASON SPRAGUE & SAMANTHA PACCHIAROTTA

Modern slavery is closer than you might think

The Walk Free Foundation's Global Slavery Index estimates that 15,000 people in Australia[1] (and 40 million people globally[2]) are living in modern slavery.

In the last complete year of records, the Australian Federal Police received 224 reports of human trafficking, slavery and slavery-like offences. One of those reports led to the arrest of the owners of The Cake Merchant, a chain of cake stores in Western Sydney.

The owners have been accused of making an employee work excessive hours without pay, confiscating their passport, using threats of deportation and monitoring overseas phone calls with friends and family. They have been charged with multiple modern slavery offences.

Developments in reporting obligations

The *Modern Slavery Act 2018* (Cth) (**Commonwealth Act**) has been in place for nearly four years and imposes mandatory reporting obligations on Commonwealth government bodies and private enterprises if they meet specific criteria. Local councils were not subject to any modern slavery reporting requirements under the Commonwealth Act.

With recent amendments to the *Modern Slavery Act 2018* (NSW) (**Act**), which come into effect on 1 January 2022, local councils will now be obliged to review their supply chains and undertake a form of modern slavery reporting.

Thanks to their extensive supply chains, local councils can play an important role in the fight against modern slavery. The Act requires councils to take reasonable steps to ensure the goods and services they buy are not the product of modern slavery, and to report on how they do this.

What are the obligations of local councils?

The Act imposes less onerous reporting obligations compared to the Commonwealth Act. While the Commonwealth Act sets out several mandatory reporting criteria for preparing a Modern Slavery Statement (**MSS**), the Act is less prescriptive and requires councils to:

- assess the risks of modern slavery within their supply chains
- implement effective due diligence to ensure that goods and services are not the product of modern slavery
- include a statement in their annual report (which must be publicly accessible) detailing:
  - the steps taken to ensure goods and services procured during the reporting period were not the product of modern slavery
  - action taken in relation to any issue identified as significant by the Anti-Slavery Commissioner (see below) concerning the operations of the council during the reporting period
- co-operate with the Anti-Slavery Commissioner in the disclosure of information and provision of assistance and support with respect to modern slavery and victims of modern slavery.

A local council is not obliged to prepare a MSS in accordance with the Commonwealth Act or file it on the federal Modern Slavery Statement Register. However, if it chooses to do so, it will meet the requirements of the Act.

To facilitate disclosure and transparency, the Act also provides protection from criminal and civil liability if information is disclosed in good faith to the Anti-Slavery Commissioner, which may otherwise be subject to disclosure restrictions, for example, confidentiality obligations.

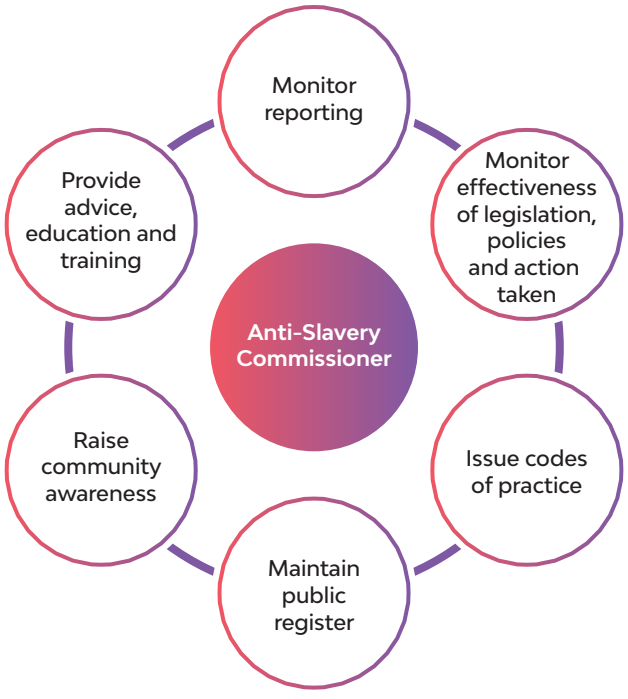
1 2018 Global Slavery Index – Australia, Walk Free Foundation https://www.globalslaveryindex.org/2018/findings/country-studies/australia/

2 2018 Global Slavery Index – Global findings, Walk Free Foundation https://www.globalslaveryindex.org/2018/findings/global-findings/

> The Act requires councils to take reasonable steps to ensure the goods and services they buy are not the product of modern slavery, and to report on how they do this.

Anti-Slavery Commissioner

With the Act comes the establishment of Australia's first Anti-Slavery Commissioner, an independent office with broad oversight of Government agencies and local councils.



The Anti-Slavery Commissioner has multiple roles, including awareness, education, monitoring and maintaining anti-slavery records.

The Commissioner will also:

- monitor the effectiveness of legislation, governmental policies and action taken to combat modern slavery
- issue codes of practice and maintain a public register of Government agencies and local councils that do not apply.

Other roles include recommendations, information, advice, education and training about ways to prevent modern slavery.

The public register

A publicly available register will be maintained by the Anti-Slavery Commissioner to identify any Government agency and local council that has failed to:

- comply with the Act or directions of the Commissioner
- take appropriate steps to ensure future compliance with the Act in the future.

Penalties and public perception

Failure to publish a Modern Slavery Report is not currently punishable under the Act. However, this may change. That said, the *Crimes Act 1900* (NSW), *Human Tissue Act 1983* (NSW) and the *Criminal Code Act 1995* (Cth) do carry penalties for modern slavery offences.

Of course, councils will be less concerned with penalties than they are with doing the right thing and being seen by ratepayers to be acting this way.

Preparing for the reporting period

If you are a local council that requires assistance in preparing for the reporting requirements under NSW's modern slavery law, please get in touch with us to discuss how we can help you meet your obligations under the Act. We have advised clients on their obligations to report under the Commonwealth Act, assisted with due diligence processes to determine modern slavery issues and responses, and prepared MSS's for lodgement on the Modern Slavery Statements Register.

PREPARING FOR WHAT'S TO COME – WHAT THE HOUSING SEPP MEANS FOR COUNCILS

LAURA RAFFAELE

The public exhibition of the NSW Government's Draft *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**) concluded at the end of August with the expectation that the reforms would come into effect on 1 November 2021.

Although we are yet to see that happen, it is still timely to review those reforms and their possible impacts.

The proposed changes and their intentions

The Housing SEPP is designed to encourage more affordable and diverse housing.

The Housing SEPP proposes to consolidate and repeal the following five existing State Environmental Planning Policies:

- *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**ARH SEPP**)
- *State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004*
- *State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)*
- *State Environmental Planning Policy No 21 – Caravan Parks*
- *State Environmental Planning Policy No 36 – Manufactured Home Estates.*

The reforms will incorporate previous changes regarding build-to-rent housing, short-term rental accommodation, and social and affordable housing. They will also include new provisions including changes to boarding houses and seniors housing and the introduction of co-living housing.

Despite the good intentions of the proposed changes, we believe they may have the effect of steering developers away.

Boarding Houses

Despite them having been traditionally considered affordable housing, the ARH SEPP does not restrict or means test boarding house occupants.

Under the reforms, this will change. Boarding houses will be required to remain 'affordable' in perpetuity and be managed by a registered community housing provider.

In addition, they will no longer be mandated in R2 zones and, in fact, may only be permitted in these zones if they are located within an accessible area.

We expect these changes will see a decline in the development of boarding houses as developers pursue more viable options. This is despite provisions such as the bonus floor space ratio of 25% for boarding houses in zones in which residential flat buildings are also permitted.

Many NSW councils will have experienced community backlash from proposed boarding houses in the past, particularly in residential zones. Accordingly, councils should already consider amending planning controls to prohibit boarding houses in R2 zones once the reforms come into effect.

Seniors Housing

The Housing SEPP proposes to create certainty for councils, industry and the community about where seniors housing development is permitted.

The most significant changes include:

- raising the age to 60 (previously 55) to align with relevant superannuation regulations
- prescribing zones in which seniors housing development is allowed and the imposition of planning controls with respect to such things as building heights, landscaped areas and car parking
- abolishing the requirement for site compatibility certificates.

Co-Living Housing

The Housing SEPP proposes a new form of development called co-living housing. Co-living housing:

- has at least six private rooms (which may have private kitchen or bathroom facilities)
- provides occupants with a principal place of residence for at least three months
- has shared facilities, such as a communal living room, bathroom, kitchen or laundry, maintained by a managing agent, who provides management services 24 hours a day.

This form of development does not include backpackers' accommodation, boarding houses, group homes, hotel or motel accommodation, seniors housing or serviced apartments, and will only be permitted in zones where residential flats or shop top housing are permitted.

Co-living housing will be subject to similar controls as boarding houses. However, given they do not need to be affordable in perpetuity or managed by a community housing provider, we anticipate this form of development will be preferred over boarding houses.

Part of a long term vision

The NSW Government has set a 20-year vision for delivering better housing outcomes by 2041. Its aspirations include affordable, secure, enduring and resilient housing in the right locations and suiting diverse needs.

To achieve these ambitions, the NSW Government has created a two-year action plan which requires the involvement and assistance of local councils (among other stakeholders). Consequently, councils should be prepared to:

- assess existing and establish new local housing strategies
- develop social and affordable housing on Land and Housing Corporation land
- explore the potential use of under-utilised operational land
- develop affordable, innovative housing projects on NSW Government, council and privately owned land
- develop affordable housing contribution schemes
- update planning controls to improve environmental performance, including compliance with code and contribution to community net-zero targets.

> "Despite the good intentions of the proposed changes, we believe they may have the effect of steering developers away."

The NSW Government is ambitious in its targets, particularly those of the next two years. However, it is part of a plan to ensure the home building sector assists the economic recovery of NSW following the COVID-19 pandemic.

Now is the time to consider the provisions

Pursuant to section 4.15(1)(a) (ii) of the *Environmental Planning and Assessment Act 1979*, councils should already have regard to the Housing SEPP when assessing development applications.

While the provisions of the Housing SEPP are not yet binding, their imminency and certainty should be taken into account. For example, consent authorities might consider whether it is appropriate to adopt or apply a provision before it becomes legally binding to ensure decisions are consistent with that provision's intended effect.

In saying that, the Housing SEPP provisions will only apply and be binding on applications lodged after enactment of the policy.

Given the implications of the amendments proposed, we will continue to watch the status of the Housing SEPP and provide an update in due course.

WORK-RELATED PSYCHOLOGICAL INJURY – A SENSITIVE AND COMPLEX AREA

MICK FRANCO

For reasons we all understand well, the last two years have seen major changes in how we work. With that has come challenges for both employers and employees in how to manage psychological wellbeing, highlighting the fact that workplaces are made up of human beings, who each respond to life's – and work's – challenges differently. From what we are seeing at Bartier Perry, councils are no exception.

In this article we look at psychological injury resulting from workplace events. Our intention is to provide general guidelines for responding to an employee claim for such an injury under section 11A of the *Workers Compensation Act 1987* (the 1987 Act). In the process, we trust that the article will also provide useful insights into how to minimise the likelihood of such claims being made in the first place.

More than simply being upset

The 1987 Act defines psychological injury as a psychological or psychiatric disorder, extending to include the physiological effect of such a disorder on the nervous system.

Simply being upset, hurt or even humiliated does not qualify as a psychological injury. A physiological effect must also result. Essentially that requires a psychological/psychiatric diagnosis.

Psychological injuries may be the result of:

- a traumatic event such as a robbery
- the workplace environment – interpersonal conflict, overwork and lack of training or resources, poor work processes, or poor supervision
- poor performance management, disciplinary action, job transfer, promotion, demotion, retrenchment, dismissal or the provision of employment benefits.

Most claims for injury fall into the second and third categories. The third category triggers the possible application of section 11A(1) of the 1987 Act.

Onus is on employers

When relying on a defence under section 11A, it is important to know exactly what that section states:

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

In the event of a claim for psychological injury, and assuming such an injury is demonstrated, the employer may claim that section 11A(1) applies. More often than not, however, such efforts fail.

There are several reasons for this. One, there are often multiple work events responsible for the injury, some of which do not fall within the ambit of the section. That means an employer cannot establish that section 11A conduct was the predominant cause of the worker's condition.

Secondly, it can be difficult to demonstrate that the relevant section 11A action was reasonable in the circumstances.

Further, such a defence will almost certainly fail if the worker was the subject of any bullying, harassment, intimidation, discrimination or unfair treatment at work.

In assessing whether the section 11A defence is established, the Personal Injury Commission will, in part, consider the entire process surrounding the transfer, demotion, promotion, performance appraisal, discipline, retrenchment, dismissal, or provision of employment benefits. The overriding question is: were such employer actions reasonable in the circumstances?

What is meant by reasonable?

Reasonableness is a question of fact involving application of an objective test.

The defence will fail if the employer cannot demonstrate the action was reasonable in all the circumstances.

The focus is on the reasonableness of the causal action – that is, the action that led to the psychological injury – and not on the historical employment relationship. That history may provide background but is not determinative of whether the section 11A defence succeeds.

Assessing reasonableness involves weighing the rights, circumstances and health of the employee against the objectives and business requirements of the employer.

The fact that an action may be permitted under guidelines, policies or legislation does not in itself make it reasonable. However, failure by the employer to follow policy or procedures may nullify the defence.

Gathering evidence

To determine whether the section 11A defence applies, it is necessary to obtain an accurate account of the conduct, incident or event/s which caused the injury. Sources of important information to address that issue may include:

- initial notification and claim form, medical certificates
- clinical notes of treating GPs, psychologist or psychiatrist
- sick leave records
- personnel or HR file
- grievance complaints, investigation and determination of the complaints
- disciplinary investigations including complaints, correspondence, interview notes and reports of internal/external investigators
- emails between the worker and supervisors/managers.

In gathering evidence the aim is to develop a chronology of relevant events and identify witnesses who can testify about those events from direct knowledge.

Further, developing a chronology will be important when tracking the evolution of the worker's psychological condition.

It is important to question descriptors such as bullying and harassment in the initial notification, claim form and medical certificates. These can be meaningless words when looking at the actual conduct complained of. We need to identify what actually occurred at work to assess whether a worker's complaints are grounded in fact. That is, what happened? What was said or done to the worker, by whom, and where and when?

When representing a client in a psychological injury case, we may:

- seek particulars of the injurious conduct, incident or events from the worker and NTD
- seek a statement from the employee
- seek statements from relevant representatives of the council
- obtain copies of all relevant records held by the council
- obtain complete clinical records of treating doctors
- review historical sick leave records – this may disclose other doctors and different history.

It is important to identify non-work events and pre-existing medical conditions which may be relevant to the cause of the alleged psychological condition, and who has that information. Are there reasons for the claim other than work injury?

The potential for section 11A to apply should be considered at the start of the claims process. Ideally, the council should alert its insurer if it considers a section 11A defence may be available.

In summary

This article only touches on a few aspects of what is a complex and somewhat fraught area of workers compensation liability. Your workers compensation insurer will have conduct of management of the claim. To assist with assessing liability for a claim it may seek your co-operation with the following:

- making an early assessment of the potential application of section 11A
- that is, was the injury caused by employer action with respect to one or more of the prescribed actions: transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits or demotion or promotion? If so, assemble and build this evidence.
- focus on causative events or conduct rather than labels such as bullying and harassment – what was in fact said or done to the worker, by whom, and where and when?

Assemble employer information in a logical, relevant and streamlined manner:

- assemble evidence carefully, early and in detail
- obtain copies of treating medical records
- obtain independent psychiatric opinion
- understand that the worker's claim and evidence can change and be prepared to assemble further evidence.

To assist with collating relevant evidence your workers compensation insurer may well commission a factual investigator to obtain statements and other relevant information.

The bottom line is that to establish a defence under section 11A a council needs to prove:

- the predominant cause of the worker's psychological condition is the type of conduct set out in section 11A(1), and
- council's conduct was reasonable.

As always, we are here to help.

> “Simply being upset, hurt or even humiliated does not qualify as a psychological injury. A physiological effect must also result.”

WHEN IS A TENDER CONSIDERED ACCEPTED? A REMINDER TO TREAD CAREFULLY

GAVIN STUART & SCOTT HOMAN

Bartier Perry recently acted for the defendant developer in Dyna Constructions Pty Ltd v Bocco Developments Pty Ltd [2021] NSWDC 507. Our client, Bocco Developments Pty Ltd (**Bocco**), was sued by a builder who had tendered for a construction project on Sydney's northern beaches. While Bocco succeeded in defending the claim, the case presents a timely reminder for council procurement teams to carefully consider their conduct when communicating with prospective tenderers or contractors before a contract is signed.

The facts

Through its agent, Bocco ran a tender process for the construction of a residential apartment complex in Narrabeen. Dyna Constructions Pty Ltd (**Dyna**) was subsequently identified by Bocco as its preferred tenderer. Bocco's agent advised Dyna that Bocco would be proceeding with it on the project.

The parties commenced negotiations regarding the construction contract, only for Bocco's financier to fall away. This required Bocco to identify a new financier, who subsequently chose a different builder.

Dyna claimed that:

1. by advising that Bocco would proceed with Dyna on the project, Bocco had accepted Dyna's tender and a binding agreement had been formed between the parties
2. Bocco's conduct amounted to misleading or deceptive conduct.

The contract claim

On the contract claim, the terms of the tender were key. Bocco's invitation to tender set out three prerequisites to a tender being accepted; namely that a tender would not be accepted unless and until:

1. a notice in writing of such acceptance was sent by email to the successful tenderer
2. negotiations and contract documents were completed
3. the contract document had been vetted by the lawyers representing each party.

Judge Scotting was not convinced that an email stating Bocco had agreed to proceed on the project with Dyna necessarily satisfied the first requirement. Nonetheless, the second and third requirements had not been made out.

His Honour found that negotiations between the parties were still ongoing at the time Dyna was claiming a

contract had been formed. This included negotiation of price as well as a number of other contract clauses which were still being marked up by the parties' legal representatives.

As for the third requirement, Judge Scotting found that in commercial reality, this was part of completion of contract negotiations and, for the same reasons as requirement two, was not satisfied.

Given these findings, his Honour was not satisfied that Bocco's conduct amounted to an acceptance of the tender within the meaning of the invitation to tender.

In addition, his Honour found that for a number of other reasons Dyna's contract claim would otherwise fail. They included:

- the parties had not satisfied the condition precedent set out in the draft contract documents
- the parties had not agreed on essential terms, which precluded a finding that a contract had come into effect
- the alleged contract did not satisfy section 7 of the *Home Building Act 1989* (NSW).

The misleading or deceptive conduct claim

Dyna's misleading or deceptive conduct claim was based on representations alleged to have been conveyed by both the invitation to tender and in subsequent conversations between Bocco and Dyna.

While Judge Scotting found that the alleged representations had not been conveyed, he went on to consider the damage that may have flowed from those representations should he be wrong on this issue.

Importantly, his Honour did make a finding that had the representations been proven, the plaintiff may have been entitled to damages.

Broader matters

Although the Court found against the plaintiff on both its claims, the case is a timely reminder for anyone engaging third party providers and contractors to be mindful of their conduct. In particular, the takeaways from the case align closely with some of the guiding principles in the Tendering Guidelines for NSW Local Government (**Guidelines**), including:

- Honesty and fairness – An important finding on the misleading or deceptive conduct case against Bocco was that Bocco had a reasonable basis to represent to the tenderer that it had been approved by its financier. This was found to be an honest representation based on the information Bocco had at the time. During the tender process, Council staff should ensure they have an honest, factual basis before making statements to a tendering party.
- Accountability and transparency – Pursuant to the Guidelines, councils must ensure the process for awarding contracts is open, clear, fully documented and defensible. Bocco was able to rely on similar principles to defend the claim brought against it, particularly by relying on the documented tender process and the progress of the parties' contract negotiations, both of which were important findings in determining there was no contract entered into between Bocco and Dyna.
- Consistency – The Guidelines require that councils ensure consistency in all stages of the tendering process, including by clearly specifying the tender documents and the criteria for evaluation. Dyna's failure to prove to the Court that it had satisfied the documented tender criteria was a key reason why it was unable to demonstrate it had entered into a binding contract. In accordance with the Guidelines, councils should always ensure the tender process is run in accordance with the documented procedure.
- Intention to proceed – Councils must not invite or submit tenders without a firm intention and capacity to proceed with a contract, including having funds available. The lack of adequate financing for the project was, in effect, what triggered the dispute between Bocco and Dyna. There was no dispute that Dyna had spent much time tendering for the project and it was likely displeased to learn there was an issue with financing. Tendering parties expect councils to be in a position to fund the successful contractor and failure to provide such funding can, in certain circumstances, create litigation risk for councils.
- Co-operation – The Guidelines encourage business relationships based on open and effective communication, respect and trust, and a non-adversarial approach to dispute resolution. Bocco was placed in a difficult position once its financier dropped out of the project. The effectiveness of communication between the parties on this matter was an issue in the proceedings, but it did not determine the outcome. However, there is no doubt that constructive and respectful communications between commercial parties in the tender process can facilitate non-litigious outcomes which, given the time and legal cost associated with court proceedings, ultimately benefits all parties.

> "We encourage procurement teams to review their processes on projects going to tender and to ensure all conduct, particularly communications to tendering parties, is consistent with the progress of the tender process and also the terms of the tender itself."

This is not the only case we have seen recently where a tenderer has alleged a breach of contract or misleading or deceptive conduct by a tendering party, including a government body. We encourage procurement teams to review their processes on projects going to tender and to ensure all conduct, particularly communications to tendering parties, is consistent with the progress of the tender process and also the terms of the tender itself.

ALTERNATIVE DISPUTE RESOLUTION CLAUSES MAY, THEMSELVES, BE THE SOURCE OF DISPUTES

DAVID CREAIS

Because disputes are common in construction projects, most construction contracts contain alternative dispute resolution (ADR) clauses requiring disputes to be resolved by processes such as mediation, arbitration and expert determination.

The main purpose of ADR is to save time and money and to keep matters out of Court, away from public scrutiny. However, sometimes ADR provisions themselves are the cause of disputes.

Recently, the NSW Supreme Court had occasion to consider the meaning of the standard ADR clause in a contract between a government agency and private contractor. The decision *(CPB Contractors Pty Ltd v Transport for NSW)* suggests that a change to similar provisions might be warranted. If so, local councils may be wise to review ADR clauses in their own standard contracts and consider whether they should amend them.

Background

The predecessor to Transport for NSW, Roads and Maritime Services, had contracted CPB Contractors (CPB) to carry out widening of the M1 Pacific Motorway from Tuggerah to Doyalson. The contract contained the standard ADR clauses used for such contracts.

In carrying out the work, CPB accumulated excess non-contaminated spoil. Transport issued CPB with instructions to remove the spoil to a location on Kooragang Island.

CPB claimed that it was entitled to be paid extra for this work, but Transport disagreed.

In keeping with the ADR provisions of the contract, the dispute was referred for expert determination. The expert determined that CPB was not entitled to any further payments.

CPB then commenced Court proceedings seeking payment for these claims and others. Transport sought a stay of the proceedings in relation to the claims determined by the expert, stating that under cl 71 of the contract, CPB had agreed to accept the determination as "final and binding".

The argument

Subclause 71.8 of the ADR provision states:

> *".8 Neither party may commence litigation in respect of the matters determined by the **Expert** unless the determination:*
>
> *.1 does not involve paying a sum of money; or*
>
> *.2 requires one party to pay the other an amount in excess of ..."*

CBP contended it was not bound by the expert's determination because:

1. the expert made no determination for the purposes of cl 71 of the contract because there was a "deficiency or error" in the determination that meant the expert did not make "a determination in accordance with the contract"
2. alternatively, assuming a valid determination had been made, it did not "involve paying a sum of money".

This article is only concerned with the second of those contentions.

The question was whether in stating that CPB had no right to further compensation, the expert made a determination that "does not involve paying a sum of money" for the purpose of cl 71.8.1 of the contract.

CPB submitted that where the issues involve a claim for payment of money, a determination that no money is payable is, in effect, a dismissal or rejection of the claim and does not and cannot involve "paying" a sum of money.

Transport, on the other hand, submitted that:

1. the determination "involved" the issue that was referred to the expert
2. the issue "involved" a claim for money
3. the use of the words "involve" in cl 71.8.1 and "requires" in cl 71.8.2 must mean it was intended that those words have different operation
4. the use of the word "involve" rather than "requires" in cl 71.8.1 suggests it is directed to circumstances where the issue does not involve a claim for money, an example being an issue as to the proper construction of the contract.

The judgment

Stevenson J accepted Transport's submission and held that in the context in which "involve" is used in cl 71.8.1, it does not mean "require". Because the words "involve" and "requires" are used in the same clause it must indicate those words are to have different meanings.

In context, the intent of the clause appears to be that determination of relatively small claims should be binding, whereas parties are free to litigate claims where the determination "requires" one party to pay the other more than the stipulated sum.

His Honour cited Gleeson JA in *Lahey Constructions Pty Ltd v State of New South Wales* who observed, of cl 71.8.2:

> *"An arbitrary threshold of $500,000 has been chosen by the parties for what might be described as minor claims, which following an expert determination, are subject to the preclusion of litigation".*

> "The main purpose of ADR is to save time and money and to keep matters out of Court, away from public scrutiny. However, sometimes ADR provisions themselves are the cause of disputes."

However, Stevenson J pointed out that: "the clause, and cl 71.8.1 in particular, works awkwardly in a case where the determination is that a money claim is refused or, in effect, dismissed."

This was illustrated by the competing contentions of the parties; namely:

a. on Transport's case, a dismissal of a money claim is binding no matter how **big** the claim is because cl 71.8.1 is not engaged and cl 71.8.2 operates on the amount of the determination, not the amount of the claim

b. on CPB's case, a dismissal of a money claim is not binding no matter how **small** the claim is, because no sum of money is payable.

Neither of these formulations is entirely consistent with the intention of the clause as postulated by his Honour or the Court of Appeal; that is, to ensure that determination of relatively small claims is binding, whereas the parties are free to litigate more significant claims.

Despite this, Stevenson J felt that a reasonable business person would understand cl 71.8 to mean that a determination of a money claim that leads to the amount payable being less than the stipulated sum (including if the payable sum is zero) is final and binding.

He reasoned that a determination that dismisses a claim for money does "involve" "paying a sum of money" in the sense that it "concerns" a claim to pay a sum of money, and rejects that claim.

CPB's claims regarding the expert's determination were therefore stayed.

Key take-aways

Subject to any different interpretation by the Court of Appeal, the meaning of the word "involves" in cl 71.8.1 is settled so that cl 71.8.1 is only relevant to determinations that are not in respect of money claims.

Similarly, the interpretation of cl 71.8.2 as leaving as final and binding that a determination of a money claim (that awards an amount less than the stipulated sum, including nothing) is settled. This applies even if the amount of the **claim** may have exceeded the stipulated sum.

That interpretation of cl 71.8.2 is not consistent, however, with the object of the clause in precluding litigation of only minor **claims** following an expert determination. This was described by both the Court of Appeal in *Lahey Constructions* and Stevenson J in *CPB Contractors*. In fact, in CPB Contractors CPB's claim before the expert was for some $8.2 million. Ironically, had the claim succeeded before the expert, the determination would not have been binding since the stipulated sum was $500,000.

Clearer drafting of the clause would have prevented litigation over the meaning of a provision whose very object was to prevent litigation.

LEASING AND LICENSING COUNCIL LAND AND BUILDINGS. INS, OUTS AND SPECIAL CONSIDERATIONS WITH TELCOS

KRISTIE CARLILE

The *Local Government Act* ("LGA") sets out the various parameters within which councils have the right to lease or licence community land and buildings to other parties. The purpose of the lease or licence must be in accordance with the plan of management and the core objectives for the categorisation of the land (sections 36A to 36N LGA). The purpose must also be one which falls within the prescriptive and definitive list set out in section 46(1) LGA – including the provision of public utilities, public roads, recreation, events, and facilities that promote physical, cultural, social and intellectual welfare (eg. clubs, daycare centres, art centres).

The LGA also has provisions that increase transparency and competitiveness as the term of the proposed lease gets longer, noting that:

- if community land is to be leased for more than five years (including options) to anything other than a non-profit organisation, the lease may only be granted by tender, and may only be granted after public notice and exhibition of the proposal, notice to owners/occupiers of adjoining land and surrounding owner/occupiers for whom the subject land is likely to be a primary focus. A 28 day submission period follows, and Minister's consent will be required if an objection is received.
- if community land is to be leased for more than 21 years (including options), the Minister for Local Government must approve and there must be special circumstances to justify the long term.
- the term of lease or licence may not exceed 30 years (including any option to renew).

The *Telecommunications Act 1997* (Cth) ("Act") grants telco carriers specific rights and powers designed to enable them to deliver their network services with confidence over time, including in relation to council-owned land.

Those include the right to inspect the land, remove trees and vegetation, install and maintain facilities, and alter the position of other utilities such as water, gas mains and electricity cables, provided that the carrier complies with the notice and other requirements set out in the Act (which is often why they prefer to enter into a lease).

The far-reaching nature of these rights can place councils in a delicate position when negotiating with telcos. That does not mean, however, that councils' hands are tied. When negotiating a lease with a carrier, we believe councils should adopt a commercial approach and be aware of the following provisions:

- try to limit the breadth of the permitted use, particularly by avoiding references to use of the 'Land' generally (keep to a particularly defined premises)
- avoid broad clauses which grant a licence to use the 'Land' generally (keep to a defined route for access, cables, etc. the location of which requires council's consent)
- ensure that make good requirements include the whole of the premises/land used by the telco, including under the surface, back to the condition it was in when the carrier first took occupation (not the commencement date)
- carefully check the wording of the assignment clause, as the carrier will usually want the ability to assign without consent in certain circumstances
- carefully check any clauses which restrict council from granting rights of occupation to subsequent occupiers (eg. occupiers who may operate telecommunications equipment or cause interference to the telco's premises) and resist any requirement to obtain the telco's consent to such deals/rights of termination
- carefully check any clauses which require council to support the telco's application for permits or approvals, which is particularly problematic for councils as consent authority. A 'no fetter' clause should be included.
- check for clauses which permit the telco to terminate early (eg. where service levels drop or interference emerges). Such clauses should allow for an objective assessment, and not be left entirely to the telco's opinion.
- carriers will often make a contribution to council's legal costs relating to the preparation, negotiation, execution and registration of any leasing documentation, capped at a certain amount.

> The far-reaching nature of these rights can place councils in a delicate position when negotiating with telcos.

Most importantly, avoid clauses where council waives the requirement for the usual notice that the telco must provide under Schedule 3 of the Act before exercising its statutory rights. At the very least, such clause should specify that it does not survive the expiry or earlier termination of the lease.

Below we have included a few specific solutions to questions we have encountered when discussing these matters with councils – if you have any other queries, don't hesitate to get in touch.

Q: Regarding the clause in the *Telecommunications Act* allowing the provider access to adjoining land for guy anchors and access – should this be under licence or are they allowed in the *Telecommunications Act*?

A: The definition of 'facility' under the *Telecommunications Act* is broad, and would incorporate guy anchors. Therefore, a carrier would be able to exercise its Schedule 3 rights to inspect, install and maintain such a facility provided it complies with other requirements set out in the Act.

If negotiating a lease with a carrier, the land to which the guy anchors are attached should form part of the leased premises. A licence over a defined part of the surrounding land could also be granted for access/maintenance.

Q: Infinite nature of statutory rights means infinite access right is logical. But doesn't this pose a problem under community tenure legislation?

A: For the term of the lease, the carrier's occupation of council land must be in accordance with the parameters set out in the *Local Government Act* (including the time limits on length of term).

Once that lease has expired or has been terminated, the carrier no longer occupies the land pursuant to the lease. If the carrier insists on continuing to occupy the premises, the carrier must comply with its obligations under the *Telecommunications Act* and the carrier will be occupying council's land pursuant to its Schedule 3 powers (rather than under a lease which may fall foul of the time limits set out in the LGA).

Q: If a Council Plan of Management doesn't specifically refer to telco use, and telcos have a statutory right to locate their facilities wherever needed, isn't there an insoluble problem?

A: Council's use of community land must be in accordance with the Plan of Management and the parameters for each category of community land set out in sections 36 to 36N of the *Local Government Act*. However, section 46(1)(a) generally permits grant of a lease, licence or other estate for the provision of public utilities.

If a carrier exercises its rights in relation to council land, that is out of council's control and council would therefore not fall foul of the LGA provisions.

Section 47D of the *Local Government Act* does state *"the exclusive occupation or exclusive use by any person of community land otherwise than in accordance with a lease, licence or estate to which section 47 or 47A applies … is prohibited"*. But it is likely this relates to occupation or use granted by council, as opposed to occupation or use obtained by the carrier's exercise of powers under the *Telecommunications Act*.

Q: What are our options if a carrier offers a rent that is way too low for renewal?

A: This is a matter for commercial negotiations between the parties. Council could obtain a market rent valuation from a suitably qualified valuer to support its position.

If negotiations break down, council could consider giving the carrier notice that the lease has expired, terminating any holding over period and requiring the carrier to vacate and make good in accordance with the terms of the lease.

However, this could see the carrier invoke its statutory Schedule 3 rights to maintain its facility. If the lease contains a provision waiving council's right to receive notices under Schedule 3 of the *Telecommunications Act*, and that clause does not expire when the lease expires, the carrier could exercise those rights without notifying council (and council would lose the opportunity to object under the *Telecommunications Act*).

If the carrier relies on its statutory rights, it would only be obliged to pay compensation to council if section 42, Schedule 3 (compensation for financial loss or damage suffered by council) or section 62, Schedule 3 (compensation if it could be said the land had been acquired) apply. That amount may be agreed between the parties or determined by a court.

If agreement on the amount is not reached, council could be forced to commence proceedings to either enforce the lease (requiring vacate and make good) or have an amount of compensation determined (assuming council is, in fact, entitled to compensation). In some circumstances, councils may also make a complaint to the Telecommunications Ombudsman, which offers a dispute resolution service.

OPEN AND TRANSPARENT GOVERNMENT, BUT NOT AT THE COST OF INDIVIDUAL PRIVACY

NORMAN DONATO

The recent decision of *EIG v North Sydney Council* [2021] NSWCATAD 313 in the Civil and Administrative Tribunal, is a reminder that open and transparent government must be weighed against individuals' right to privacy.

In this case, the Tribunal ruled a local council breached Information Privacy Principles when a complainant's identity was made public.

What happened?

The background facts are somewhat sketchy, as the Senior Member of the Tribunal tried to ensure the anonymity of the Applicant. What is clear is that:

- the Applicant was a Councillor who had made an earlier complaint about the Council's handling of personal information
- the Applicant's request for an internal review of that conduct was the subject of Initial Proceedings before the Tribunal.

Before the Initial Proceedings were decided, the Applicant's name was published in two Legal and Planning Committee (LPC) meetings of the Council, certain LPC papers and on the Council's public website. That occurred even though the Applicant's name had been anonymised by the Tribunal, as per NCAT Administrative and Equal Opportunity Division Guidelines.

In these proceedings, the Applicant complained of the following breaches:

- the Applicant's name was identified in the 'Current Appeals and Results Report' (Report), which was included in the agenda papers for the LPC meeting in June and posted to the Council's website
- open discussion of the decision of the proceedings (knowing the Applicant had been identified in the Report) at the June LPC meeting and posting a recording of that meeting on the Council's website
- identifying the Applicant in a further report in October and including that report in the agenda papers to an LPC meeting in October and posting that information on the Council website.

Before the alleged breaches, the Council had been advised of the Tribunal's anonymisation practice.

On becoming aware in July of the Council's actions, the Applicant notified the Council of its breach of the *Privacy and Personal Information Protection Act 1998* (**PPIP Act**) and the Tribunal's anonymisation practice and requested an internal review of those breaches. Despite this, further breaches occurred in October.

What is personal information in relation to a public sector agency?

The **PPIP Act** defines personal information as:

> *information or an opinion (including information or an opinion forming part of the database and whether or not recorded in material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.*

Information or an opinion may be about an individual even if it has multiple subject matters. Further, even if a piece of information is not about an individual, it may become so when combined with other information. In *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 the Federal Court said:

> *in every case it is necessary to consider whether each item of personal information requested, individually or in combination with other items, is about an individual. This will require an evaluative conclusion, depending upon the facts of any individual case, just as a determination of whether the identity can reasonably be ascertained will require and evaluate to conclusion.*

Importantly, it has been held that the definition of 'personal information' in the PPIP Act 'is broad and to be interpreted broadly'.

'Personal information' excludes information about an individual in a publicly available publication. However, what seems clear is that disclosure of personal information is making that information known to a person who, ***but for that disclosure***, would not know that information.

What was the personal information used?

The Council conceded that the personal information was the Applicant's name attached to the details of the decision regarding the Initial Proceedings (**Relevant Personal Information**) and that it used and disclosed that information in the manner complained of.

What are the relevant privacy principals?

The relevant information privacy principles (IPPs) were:

(a) IPP 10 (**use**) – a public sector agency that holds personal information must not use the information for a purpose other than that for which it was collected unless,

  (i) the individual to whom the information relates has consented to the use of the information for that other purpose, or

  (ii) the other purpose for which the information is used is directly related to the purpose for which the information was collected, or

  (iii) the use of the information for that other purpose is necessary to prevent or lessen serious and imminent threat to the life or health of the individual to whom the information relates or of another person.

(b) IPP 11 (disclosure) – an agency must not disclose personal information to … other than the individual to whom the information relates unless,

  (i) the disclosure is directly related to the purpose for which it was collected and there is no reason to believe the individual concerned would object;

  (ii) the individual is reasonably likely to have been made aware that such information is usually disclosed to that other person; or

  (iii) the agency believes are reasonable grounds disclosure is necessary to prevent or lessen a serious or imminent threat to life or health of any person.

(c) Section 11 of the *Local Government Act 1993* provides:

Public access to correspondence and reports

(1) A council and a committee of which all the members are councillors must, during or at the close of a meeting, or during the business day following the meeting, give reasonable access to any person to inspect correspondence and reports laid on the table at, or submitted to, the meeting.

(2) This section does not apply if the correspondence or reports:

  (a) relate to a matter that was received or discussed, or

  (b) were laid on the table at, or submitted to, the meeting,

  when the meeting was closed to the public.

(3) This section does not apply if the council or committee resolves at the meeting, when open to the public, that the correspondence or reports, because they relate to a matter specified in section 10A(2), are to be treated as confidential.

Council's arguments and concerns

The Council denied contravening the PPIP Act.

It said it used the personal information to prepare a report to the LPC meeting, comprising counsellors and senior staff. It also argued that IPP 10 did not apply to unsolicited information (such as a complaint), as this was not collected by the public sector agency. Alternatively, if the information was held to have been collected, the Council said it was used for the purpose for which it was collected; namely, to prepare an internal report for the LPC.

The Council also said that as the Applicant was reasonably likely to have been aware that parties to litigation were usually made public through the agenda of the LPC meetings, such disclosure was permitted under IPP 11.

Finally, the Council claimed it was obliged to make the Report public under section 11 of the *Local Government Act 1993* dealing with open and transparent government.

Sorry but Open Government has its bounds?

(a) The Tribunal rejected the argument **that the personal information was unsolicited**. It said the Information Privacy Commissioner *"has warned agencies against treating complaints as unsolicited information if the agency holds itself out as the agency to contact in relation to such complaints."*

> The proceedings highlight that in applying the principles of open government, councils must also consider the application of any complaint handling policy, as well as privacy protection guidelines.

(b) The information was therefore collected in relation to an internal review request and the Initial Proceedings. Further, the LPC was not involved in the day-to-day investigation, review and/or prosecution of complaints and only had an after-the-fact role in such matters. Accordingly, the Tribunal found that the use of the Relevant Personal Information in the report for the LPC **was not for the purpose for which that information was collected** or directly related to that purpose. The Council therefore breached IPP 10 in the incidents of June and October 2020.

(c) The Tribunal held that as a result of the Council's Complaint Handling Policy and Access to Information Policy, the Applicant would **not have expected his personal information to be disclosed in the Reports**. In particular, the Complaint Handling Policy said:

"personally identifiable complainant information will be actively protected from disclosure and only used for the purposes of addressing the complaint within the Council"

"Council will ensure that confidentiality is maintained in regard to the complaints received. Personally identifiable information of the complainant will be used for the purposes of addressing and resolving the complaint only ...'

"Complaints relating to privacy and breaches ... will be managed in accordance with the requirements of the Privacy and Personal Information Protection Act 1998 and Council's Privacy Management Plan".

It was not reasonably likely, even if it was actually done, that the Applicant was aware the Relevant Personal Information was usually included in the Reports and disclosed to the public.

(d) **Open Government – section 11 of LGA did not imply or contemplate publication of the Relevant Personal Information.** The Senior Member of the Tribunal agreed that the Reports were required to be disclosed under section 11 at the LPC meetings; however, it was not necessary for the Relevant Personal Information to be included.

What orders were made?

The Tribunal made a number of orders including that:

- within 14 days of the reasons for tribunal's decision, the Council is to:
  - provide an unreserved formal written apology to the Applicant addressing and apologising for the Council's breaches under IPPs 10 and 11 in respect of the personal information of the Applicant;
  - publish an anonymous notice not identifying the Applicant in the 'Latest News' section of a Council's website, under the heading 'Council found to have committed privacy breaches' and noting the relevant orders of the Tribunal against the Council in relation to those breaches and the notice was to stay up for two months from its publication;
- within 30 days of the date of the reasons the Council must take steps to anonymise the Applicant's name in all publicly available digital publications and make all reasonable efforts to recover and destroy or anonymise the Applicant's name printed in all hardcopy materials.

Take outs

The proceedings highlight that in applying the principles of open government, councils must also consider the application of any complaint handling policy, as well as privacy protection guidelines.

In brief, the commitment to open and transparent government is not unfettered.

WORKING FASTER IS NOT WORKING SAFER

JADE BOND & JAMES MATTSON

The NSW Industrial Relations Commission has continued to maintain a strong stance on safety in the workplace, giving employers the confidence to take decisive action when employees flagrantly breach safety rules.

In the Full Bench decision of Hamlin v Council of the City of Sydney [2021] NSWIRComm 1066, the Commission accepted the City of Sydney's argument about the importance of safety in deciding to dismiss Mr Hamlin. The Full Bench said, *'[s]afety is not subservient to the duty to work; it is an inherent and fundamental part of the duty to work itself.'*

Background

Earlier this year, Commissioner Webster determined that the dismissal of Mr Hamlin, after he was seen riding on the back of a garbage truck down a busy Sydney street, was not harsh.

The City had prohibited riding on the back of garbage trucks following a number of incidents. A risk assessment process determined that the practice was unsafe.

Despite his lengthy service (over 40 years), Commissioner Webster found that Mr Hamlin *'did not demonstrate sufficient insight into his [safety] transgression … for there to be confidence he would not breach another safety protocol in the future if it was convenient for him to do so'*. As such, the dismissal was the correct decision for such a flagrant breach.

In dismissing the unfair dismissal application, Commissioner Webster said:

> *This decision should serve to reinforce the important message to employees that compliance with their employer's safety protocols is not optional and the consequences of ignoring them can be serious even if no injury is sustained in the process.*

You can check out our full summary of the earlier decision here.

The appeal

Mr Hamlin appealed Commissioner Webster's decision on two main grounds:

1. The decision was *'unbalanced and attended by error in principle'*, as Commissioner Webster had allegedly focussed almost entirely on Mr Hamlin's failure to comply with a safety direction and ignored other factors like his duty to complete his work.
2. The decision was manifestly unjust given Mr Hamlin's age, limited prospects for future work, his family's dependence on his earnings, his mental health and wellbeing following his dismissal, and loss of his accrued sick leave.

Mr Hamlin argued that Commissioner Webster failed to consider that he had competing duties – a duty to perform his work safely and a separate duty to work in the interests of the City. Mr Hamlin said it was okay for him to work quickly to get his job completed and that he was working with diligence and cooperatively in getting his work completed. Mr Hamlin said he worked in a way he felt was safe and efficient by riding on the back of the garbage truck as he had always done.

Mr Hamlin claimed that *'the duty to comply with a safety obligation is subservient to an overriding obligation to work in the interests of the employer'*. He added that the interest of the City was for him to complete all his work in his shift and he was trying to do his job the quickest and safest way possible. Mr Hamlin said this was acting diligently.

The City disagreed. It was submitted that *"to work diligently required him to work safely. To co-operate required him to do his job safely as directed. Safety is not subservient to the duty to work; it is an inherent and fundamental part of the duty to work itself. To the extent [Mr Hamlin] suggests that the duty to complete work justified ignoring … the safety rule, it is a fundamentally false proposition.*

"In this case, consistent with the risk of serious injury, a clear and well-known safety rule was implemented. [Mr Hamlin] was fully aware of the direction and expectation that he work as directed. No other circumstance or event could justify his actions. Least so the explanation of trying to do his job in the quickest and safest way he could. The safest way was to not ride on the back. The quickest way was to do so in the safe manner required by the [City]. Safety cannot be subservient to speed."

This suggestion that the duty to work prevailed over safety was completely rejected by the Full Bench, which stated at [21]:

> *Safety is not subservient to the duty to work; it is an inherent and fundamental part of the duty to work itself.*

To put it another way, employees have an obligation to perform their work safely. There is no separate and competing obligation. To work safely is the quickest way to work. Indeed, in this day and age, with heavy penalties for breaching safety laws, it is in the employer's best interests that employees perform their work safely!

What does this decision mean?

Reassuringly, the Full Bench has continued to maintain a strong stance on safety in the workplace. Compliance with safety is not optional for employees.

Employers should take comfort in this decision and confidently enforce their safety protocols. Employees who wilfully and recklessly ignore them, and then show no insight, are unlikely to attract any sympathy from the Commission, even if they have lengthy service and other mitigating factors on their side.

"... in this day and age, with heavy penalties for breaching safety laws, it is in the employer's best interests that employees perform their work safely!"

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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Bartier Perry is committed to a partnership approach with our NSW Local Council clients. We believe the way to provide best value add services is to work with you to identify opportunities and initiatives that best meet your needs. We invite you to reach out to any of the key contacts listed in this publication with suggestions (that are outside of the below offerings) as they arise.

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:

- Local Government Property: What council property professionals need to know
- IP Roundup
- End of year health check – current issues in employment

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

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YOUR THOUGHTS AND FEEDBACK

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

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

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