COUNCILCONNECT

Bartier Perry LAWYERS

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FROM THE CEO

Welcome to the autumn 2022 edition of Council Connect.

As always, many interesting things are happening in both the law and in what our Council clients are up to (not to mention a new government). We're delighted that we get to share those things with you along with our perspective on what they may mean for you.

We couldn't bring Council Connect together without the generosity of our Council clients. In particular, a big thank you to Meredith Wallace, General Manager of Bayside Council, who kindly agreed to be our interviewee for this issue.

In her interview, Meredith describes the challenges of merging two councils as well as the more recent challenge of continuing to provide services to the community when so many people and resources were simply unavailable. Preparing for similar situations in the future and building sufficient agility into council operations to cope with them is a hot topic right now – and consistent with the theme of our upcoming Local Government Forum (more on this below).

In this issue, we also acknowledge a true legend of the legal profession. Our own Mary-Lynne Taylor, a key member of our Property, Planning & Construction team, recently achieved her 50-year milestone as a legal practitioner. Mary-Lynne's contribution to the profession is simply immense. She is deeply respected by her peers, and also dearly loved. What Mary-Lynne brings to her clients, the community and to Bartier Perry has been immeasurable. You can read more about her journey on page 17.

We also look at the nature of different contracts and how councils can protect themselves while fulfilling their obligation to act in the interests of their community. That is especially pertinent in the light of recent construction company collapses (see page 14), and also relevant when procuring ICT contracts (page 12) and managing employees who have suffered a debilitating work injury with long term consequences (page 6).

We are very excited to be finally able to once again host our Local Government Forum. It will be held in August and we are thrilled that both Shane Fitzsimmons AO AFSM and The Hon. Rob Stokes MP will be joining us this year to discuss Anticipation and Agility – Planning for Future Communities. Please put this in your diaries, as it is a great opportunity for all of us to get together again. Page 4 has all the details.

The election of a new government in Australia will likely see legislative developments in a number of areas and again we are committed to keeping our Council clients informed as to the potential implications of these.

Finally, you'll notice a refreshed design for Council Connect. We've sought to make it brighter and more engaging. Please let us know what you think – your feedback is always welcome.

Warm regards,
Riana

WHAT'S NEW

RECENT WEBINARS

Missed our webinar or would like to watch it again?

To view the recordings, please visit:

ELECTRONIC LODGEMENT OF DOCUMENTS – UNDERSTANDING THE PEXA SYSTEM

ABANDONED CONSTRUCTION CONTRACTS: MITIGATING THE RISK AND RESCUING THE PROJECT

SIGNING DOCUMENTS IN THE MODERN ERA

CONTINGENT LABOUR – CONTRACTORS, LABOUR HIRE, EMPLOYEE?

SAVE THE DATE

ANTICIPATION AND AGILITY

Planning for Future Communities

LOCAL GOVERNMENT FORUM

16 August 2022 – *ParkRoyal Parramatta*

Keynote presenters including:

- The Hon Rob Stokes MP, Minister for Infrastructure, Minister for Cities, and Minister for Active Transport
- Shane Fitzsimmons, AO ASFM, Commissioner of Resilience NSW.

The Hon Rob Stokes MP, Minister for Infrastructure, Minister for Cities, and Minister for Active Transport

Shane Fitzsimmons, AO ASFM, Commissioner of Resilience NSW

Interview with Meredith Wallace, General Manager, Bayside Council

Welcome to our Council Connect video interview. David Creais talks to Meredith Wallace about the challenges of merging two councils and providing services to the community when so many people and resources were simply unavailable.

To watch the interview visit:

Meredith Wallace,
General Manager,
Bayside Council

David Creais
Partner, Dispute Resolution
& Advisory, Bartier Perry

No employer obligation to provide 'suitable duties' to an injured employee indefinitely

Authors: Linda Mackinlay, Mick Franco & Andrew Yahl

Is it acceptable to dismiss an injured worker once all reasonable accommodations and options have been considered? If yes, what exactly is considered reasonable?

The NSW Industrial Relations Commission recently shed light on these troublesome questions.

It confirmed that an employer is not obliged to provide suitable alternative duties to an injured worker indefinitely nor are they required to search for suitable employment externally.

What is important, as always, is to look closely at the particular facts in each and every case as there are so many specific considerations that can influence how the case should be managed.

THE DECISION AND BACKGROUND

Bartier Perry assisted Nepean Blue Mountains Local Health District (**NBMLHD**) in defending an unfair dismissal claim in *Jenkins v Secretary, Ministry of Health* [2022] NSWIRComm 1013.

Mr Jenkins had been employed by NBMLHD since 2002. In 2016, he suffered a workplace injury for which workers compensation liability was accepted. In the four years following the injury, Mr Jenkins was unable to fully perform his normal duties.

HOW DID NBMLHD ATTEMPT TO ACCOMMODATE MR JENKINS?

To accommodate Mr Jenkins, NBMLHD ensured that:

- Mr Jenkins performed suitable duties in a number of alternative positions
- Mr Jenkins was referred to an external Vocational Rehabilitation provider
- numerous workplace assessments were undertaken for alternative roles for which Mr Jenkins was unsuited
- a skills assessment report was obtained to understand Mr Jenkins' strengths and difficulties.

By mid-2020, all reasonable alternatives had been exhausted. At that point, NBMLHD terminated Mr Jenkins' employment.

DID NBMLHD ACT REASONABLY?

Section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (**1998 Act**) obliges an employer to provide suitable employment to an injured worker following workplace injury. Failure to comply can incur a penalty of up to $5,500.

This obligation is not absolute. It only applies where:

- there is a work-related injury
- the employee recovers a capacity to resume work, full-time or part-time and whether or not to the pre-injury role, following a period of incapacity resulting from the injury
- the employee requests provision of suitable employment.

If the worker remains totally unfit, the obligation does not arise.

WHAT IS MEANT BY "SUITABLE EMPLOYMENT"?

"Suitable employment" is defined by section 32A of the *Workers Compensation Act 1987* (**1987 Act**) as *"employment in work for which the worker is currently suited"*, having regard to:

- their age, education, skills and work experience
- the nature of the incapacity and medical information
- injury management and return to work plans
- occupational rehabilitation services.

and regardless of:

- whether the work or employment is available
- whether the work or the employment is of a type that is generally available in the employment market
- the nature of the pre-injury employment
- the worker's place of residence.

Within reason, the suitable employment must be the same as, or equivalent to, the employment at the time of injury.

The employer cannot provide work that is meaningless, demeaning, or for which the worker is not qualified or is unable to perform.

EXCEPTIONS TO THE OBLIGATION TO PROVIDE SUITABLE EMPLOYMENT

The obligation to provide suitable employment does not apply if it is not reasonably practicable to do so in accordance with section 49. That means the circumstances of the worker and injury must be considered. Relevant issues also include any operational requirements and administrative burden to the employer.

Usually, employers rely on the latter to demonstrate that, the rehabilitation process having been exhausted, nothing further can reasonably be done.

Other circumstances that would render the obligation irrelevant include:

- if the employee voluntarily leaves the employer after the injury; in other words, they resign, accept redundancy or leave by mutual agreement for other reasons
- if the employment is terminated after the injury for reasons other than unfitness as a result of the injury, for instance, misconduct.

MR JENKINS' CIRCUMSTANCES

In deciding Mr Jenkins' case, the Commission quoted the Full Bench of the Federal Commission in its decision in J *Boag & Son Brewing Pty Limited v Alan John Button* [2010] FWAFB 4022 (at [22]):

> *When an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered.*

Relevantly, and referring to Full Bench authority, Webster C found that section 49 of the 1998 Act does not oblige an employer to create a position of suitable duties on a *permanent* basis. Further, the Commissioner found that the section does not prohibit dismissal of an injured worker.

That said, the employer must act reasonably. The Commission said:

> *It may, for example, be reasonably practicable to provide "suitable duties" for a finite time, while an employee attempts to recover from an injury, but not reasonably practicable to provide those same duties on a permanent basis. There is no obligation upon an employer to provide "suitable duties" to an injured employee indefinitely.*

Mr Jenkins asserted that suitable duties were available to him because he was performing certain duties of a role, but not all the duties of the role. The Commission dismissed this argument, stating that it was not reasonably practicable for NBMLHD to offer those duties on an ongoing basis because:

- Mr Jenkins could only perform some of the duties required for the role; and
- to have Mr Jenkins' perform those duties permanently would have required a new unbudgeted role in a small team, which would lead to unreasonable implications for NBMLHD.

The Commission also found that NBMLHD took reasonable steps to support Mr Jenkins including looking for suitable employment *within* NBMLHD. Despite Mr Jenkins' claim that his employer was "morally obliged" to do so, the Commission added that this obligation did not extend to searching for suitable employment outside of NBMLHD.

DID NBMLHD DO THE RIGHT THING?

Yes. The Commission found:

- NBMLHD had a proper basis to conclude that Mr Jenkins could not fulfill the inherent requirements of his substantive role
- NBMLHD took reasonable and appropriate steps to support Mr Jenkins, initially with the aim of returning him to his pre-injury duties and then in efforts to find suitable alternative employment
- a fair and reasonable process was adopted in the dismissal process. Although the decision maker did not meet with Mr Jenkins face to face, that did not necessarily render the process unfair.

The Commission dismissed Mr Jenkins' application.

The Commission noted that should Mr Jenkins regain fitness within two years of his dismissal, he may apply for reinstatement pursuant to sections 241 and 242 of the 1987 Act. In that case, Mr Jenkins would need to demonstrate that he is medically fit for employment.

We also note that this case notwithstanding, what is reasonably practicable for an injured worker and the employer will vary according to the circumstances. We can be certain that this area of the law will continue to be tested in court.

OTHER EMPLOYER RISKS

If an employee recovers their capacity to work following an injury, identifies and requests suitable work, and the employer fails to provide it, the employer may be subject to an injury management dispute in the Personal Injury Commission.

We have also seen the failure to provide suitable employment referred to IRO (the workers compensation industry ombudsman) and SIRA (the workers compensation insurer regulator). These complaints can be troublesome for employers who are self-insured and subject to the scrutiny of IRO and SIRA.

Occasionally, this type of complaint is escalated to SafeWork NSW. This often sees the safety regulator entering the employer's workplace to scrutinise injury management and return to work programs, and issuing improvement notices if the programs are considered deficient.

Acquiring land for transport projects – The gap between law and government policy

Authors: Dennis Loether & Laura Raffaele

When acquiring land for major transport projects, authorities must make "genuine attempts" to acquire the land by agreement with its owner. We explore below what this means and how councils should define a genuine attempt.

A series of media-labelled "controversial" acquisitions (Grand Avenue at Camellia, Jannali Commuter Carpark and Orchard Hills) has brought into question whether the law has been followed recently. In 2021, a parliamentary inquiry was launched to consider this.

The inquiry hearings have highlighted the difficulty acquiring authorities face when commencing land acquisition. One of the major challenges is inconsistency between legislation and government policy regarding what constitutes a "genuine attempt" with the initial offer.

WHAT THE LAW SAYS

The relevant legislation comes from section 10A(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (the *Just Terms Act*), which states:

(2) *The authority of the State is to make a genuine attempt to acquire the land by agreement for at least 6 months before giving a proposed acquisition notice.*

Many would assume from this that, when making an initial offer, an acquiring authority would provide its valuation report for the property at the same time. Doing so would be consistent with the Just Terms Act, surely?

WHAT GOVERNMENT POLICY SAYS

Not according to government policy, which stipulates that the landowner should only receive the acquiring authority's valuation once they have themselves provided an independent valuation report.

On the face of it, this is a glaring inconsistency between legislation and policy.

In fact, many of the submissions to the parliamentary inquiry (from both landowners and interested parties and the Law Society) made this very point.

While we wait for the final report to be published, we explore from case law what authority may guide acquiring authorities in what is meant by making a genuine attempt at negotiations.

WHAT CASE LAW TELLS US

Elmasri v Transport for NSW [2021] NSWSC 929 sheds light on what may be interpreted as a genuine attempt.

The first question considered was when the six-month period required under section 10A(2) of the *Just Terms Act* begins – curiously, the legislation is silent on this point. The defendant argued that it was only necessary to identify a starting date. A variation of their argument was that it was only necessary to identify *any* six-month period before the proposed acquisition notice (PAN) was served and to show, within that period, there was a genuine attempt.

The Court rejected this argument because it would imply that any six-month period (no matter how long before the PAN was issued) could be relied on. His Honour said this would be inconsistent with *"encourage[ing] the acquisition of land by agreement"* (as required under section 3(1)(e) of the *Just Terms Act*), as it would mean that acquiring authorities could make a genuine attempt for six months, unreasonably refuse to negotiate for months thereafter, and still be able to issue a PAN.

His Honour held that the entire period was relevant, from the start of negotiation until the issue of the PAN. This would increase the acquiring authority's accountability to genuinely seek an agreement.

There have since been further arguments that the six-month period should only begin once a letter of offer has been issued, rather than the letter acknowledging the plan to acquire the land. As the *Just Terms Act* is – once again – silent on this issue, this becomes a matter for the Court to determine.

Roads and Maritime Services v Desane Properties Pty Ltd [2018] NSWCA 196 provides further insight. Here the Court held that a genuine attempt at negotiations means an obligation to negotiate in good faith. The Court stated that good faith *"includes the requirement upon an acquiring authority, if asked, to provide such information about an acquisition so as to permit a landowner to negotiate about*

sale price." It also means acquiring authorities must respond to reasonable requests for information (*Strickland v Minister of Lands for Western Australia* (1998) 85 FCR 303).

WHO WILL CUT THE GORDIAN KNOT?

Acquiring authorities may, with some justification, feel they are facing an unsolvable problem. On the one hand, they are required to satisfy common law precedent. On the other, they are expected to follow internal policies that are – or appear to be – inconsistent with the law.

Frustration at the actions of acquiring authorities might therefore be best directed to these deep-rooted inconsistencies between the legislative framework and internal policies.

We expect the parliamentary inquiry will consider how to bridge the gap between the expectations of landowners/interested parties and the requirements of acquiring authorities. That should include commentary on how to promote fairness and transparency on the part of acquiring authorities.

This is the first substantial look into acquisitions since the reforms of 2016. Given the changing environmental landscape, it is timely.

Until the inquiry is finalised, the message for councils, as acquiring authorities, is to make ***genuine attempts*** at negotiating in ***good faith*** for a ***minimum*** six-month period. Whether a government agency has acted and negotiated in good faith is a frequent issue raised by landowners against an acquiring authority. To avoid such an accusation, acquiring authorities should keep open lines of communication with landowners/interested parties, respond to all reasonable requests and genuinely consider any counter offers.

For any queries, contact the Bartier Perry acquisition team – Dennis Loether, Steven Griffiths and Laura Raffaele and from property Melissa Potter and Irene Horan.

Avoiding defamation claims in contentious times

Authors: Gavin Stuart, Adam Cutri & David de Mestre

The recent Federal election, coupled with heightened media interests in politics, has seen an increase in proceedings for defamation.

In the last two years alone:

- Peter Dutton brought defamation proceedings and won damages in the final judgment after a tweet referred to him as a "rape apologist"
- John Barilaro brought defamation proceedings asserting that a video on YouTube depicted him as "vile and racist" and brought him into public disrepute, ridicule and contempt, which proceedings were settled out of Court
- National MP Anne Webster successfully sued, and was awarded judgment against, Karen Brewer for false and defamatory imputations that she was associated with a "secret pedophile network".

Post Federal election, we don't see this trend disappearing. While political swipes are part and parcel of running for office, defamatory comments can have serious reputational and financial ramifications.

In this article, we provide tips to avoid being on the receiving end of a Concerns Notice or, worse, a defamation lawsuit.

DEFAMATION LAW

Defamation is a tort which enables people to sue for damages if a publication (written, verbal or an image) identifies them and causes harm to their reputation. In Australia, defamation is codified in national legislation – the *Defamation Act*.

From 1 July 2021, sweeping changes to defamation laws were enacted in New South Wales, Victoria, South Australia and Queensland. Some of the most significant changes include:

1. a new requirement (under section 10A) for the aggrieved person to prove that publication caused or is likely to cause serious harm to their reputation
2. a "Single Publication Rule", which means the limitation period of one year to commence proceedings will start from the date the material is first published and will not restart on republication (say on social media)
3. the introduction of a 'Public Interest' statutory defence (under section 29A)
4. the introduction of certain statutory requirements for Concerns Notices (under section 12A) and a requirement to serve a Concerns Notice prior to any proceedings (under section 12B).

While a number of these changes were straightforward, identifying what constitutes "serious harm" was left for aggrieved parties and defendants – and therefore the Courts – to determine.

In February 2022, in the first case dealing with this matter, the Supreme Court of New South Wales (*Newman v Whittington* [2022] NSWSC 249) indicated that serious harm is to be determined by the actual impact of the defamatory statement, not just the meaning of the words. This means that an aggrieved person must show that the words were inherently injurious to their reputation and that they caused them actual, provable, serious harm.

For further details about defamation law and the changes to Australia's statutory defamation law regime, please refer to this article.

DEFENCES IN DEFAMATION

Leaving aside the defence of truth (which is self-explanatory), the most likely defences against a defamation charge are public interest and qualified privilege.

Public interest

Section 29A of the *Defamation Act 2005* (NSW) and its uniform Australian counterparts say it is a defence to an action in defamation if the defendant proves that:

- the subject of the publication concerns an issue of public interest and
- the defendant reasonably believed that publishing the matter was in the public interest.

When assessing a 'public interest' defence, Courts will consider:

- the seriousness of any defamatory imputation the extent to which the matter published relates to the performance of the public functions or activities of the person
- the sources of the information, including their integrity
- whether the matter contained the substance of the person's

side of the story and, if not, whether a reasonable attempt was made to obtain their side of the story

- the importance of freedom of expression in issues of public interest.

A publisher may be successful in arguing that *matters concerning political parties or their policies* are in the public interest.

Qualified privilege

While Australia's Constitution does not expressly confer a right of freedom of speech on Australian citizens, there is an implied freedom of political communication at common law.[1] Until 1997, the Courts treated this implied freedom as a defence in defamation actions.[2]

However, in the 1997 case of *Lange v Australian Broadcasting Corporation*,[3] the High Court of Australia clarified that the implied constitutional freedom of political communication **does not** confer a personal right on defendants, nor does it give defendants a complete defence to a defamation action in and of itself.

Instead, the Court said, the law operates to prevent lawmakers from making defamation laws that are inconsistent with this constitutional freedom.

From this ruling came the qualified privilege statutory defence in the *Defamation Act*:

- section 30 of the *Defamation Act* states that it is a defence to the publication of defamatory subject matter if the defendant proves that the recipient of the subject matter had an interest or apparent interest in having information on the subject
- the matter was published to the recipient by the defendant in the course of giving the recipient information on the subject matter in which the recipient had an interest
- the conduct of the defendant in publishing the matter was reasonable in all of the circumstances.

Most recently, qualified privilege was relied on by the Australian Broadcasting Corporation in defence of a suit by former Australian Attorney-General, Christian Porter. The ABC said recipients of its article had an interest in information concerning the fitness of political ministers for their roles and, therefore, the publications concerned matters of public interest. That defence was never tested, as proceedings were settled out of Court.

Statutory qualified privilege has limited application. The wisest course is to avoid publishing defamatory material rather than seeking this defence after the fact.

PRACTICAL TIPS FOR AVOIDING DEFAMATION ACTIONS

Defamation proceedings are complex, expensive, time consuming and emotionally taxing. From a corporate governance and risk mitigation perspective, the safest course is to minimise the risk of such actions.

Importantly, councils can neither sue[4] nor be sued for defamation in New South Wales. However, this does not stop claims being brought against individual officers for defamatory statements made during their employment. While some councils indemnify their officers for such (provided the statements were made in good faith), litigation can often lead to other concerns for council, including the health and wellbeing of the officer.

The following steps may help prevent publications from your organisation resulting in Concerns Notices or legal proceedings:

- above all, only publish matters that are demonstrably true and supported by documentary evidence
- create and regularly review communications policies which:
  - consider your organisation's audience
  - identify permissible and non-permissible types of subject matter (for example, you might decide that political commentary is not appropriate for certain audiences)
  - establish parameters for acceptable language, as well as factual, unemotive and source-based content
- avoid labels and unproven allegations
- when commenting on political people or matters, stick to evidence-based content and avoid conjecture, opinion and unsubstantiated allegations
- focus on policies rather than people
- provide staff with regular media and communications training
- keep abreast of current defamation laws and cases
- seek legal advice before issuing controversial or contentious communications.

If you would like advice on defamation, Bartier Perry's Commercial Disputes team is experienced and available to assist. Whether you are a publisher or aggrieved person, we can advise on and review publications, issue or respond to Concerns Notices and protect your interests in your reputation.

Please contact Gavin Stuart, Adam Cutri or David de Mestre for a confidential discussion.

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1 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58.

2 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

3 (1997) 145 ALR 96.

4 *Ballina Shire Council v Ringland* [1994] 33 NSWLR 680

Revised NSW Government ICT Contracting Framework – a marked improvement?

Author: Jason Sprague

With councils' increasing reliance on information and communications technology (ICT), it is essential that their ICT contracts are sufficiently robust to mitigate risk, secure value for money and deliver benefits to the community.

While the ICT procurement process can be complicated, the "lynch pin" in the whole puzzle is the contract. This sets out the rights and obligations of the parties and provides the framework for the acquisition, implementation, operation and maintenance of the ICT being acquired. It is also what council will rely on if things do not go to plan or disputes arise.

Surprisingly, we are often asked what contract should be used after the tender has been awarded. One reason for this is that tenderers will often largely agree to a contract framework in their submissions only to seek to impose their own terms and conditions when the "real contract" negotiations start. Having endured a lengthy and often arduous tender process, councils are understandably reluctant to reopen the tender and are then left to negotiate a contract that is less than ideal.

To minimise possible problems down the track, it is important to get the contractual terms right at the start. Which contract framework and terms are suitable will depend on the complexity, size and cost of the ICT procurement. We consider here what councils need to bear in mind when looking at particular frameworks.

USING OLD CONTRACTS– NOT ALWAYS THE BEST OPTION

To save time, many councils will use their own ICT contracts which have been developed over time. However, in many cases those contracts no longer fit with the type of ICT being acquired.

That can lead to the successful tenderer insisting on their own terms being applied. Those terms invariably favor the tenderer, resulting in *extra* time spent negotiating and rewriting the contract.

REVISED GOVERNMENT SUITE A POSSIBLE ALTERNATIVE

One resource which contract managers may find useful is the NSW Government Procure IT contracts suite. This was developed to provide a standard document for all NSW Government ICT procurements.

While councils are not obliged to use these contracts, we have found them useful when developing ICT contracts between council and suppliers. Their terms are up to date and they provide a commercially realistic balance for risk allocation and liability between the parties.

A criticism of the Procure IT contracts suite has been their complexity and lack of user friendliness. Contract managers and suppliers, not familiar with the suite, often find them challenging to navigate and negotiate.

That prompted the NSW Government to revamp them. The recently released new contracting framework aims to:

- be more streamlined and simplified
- allow procurement and contracting flexibility and agility
- reflect best industry practice
- modernise legacy contract concepts, positions and language
- improve the user experience in a number of ways, for example, by reducing the number of order forms and the number of documents to sign.

DIFFERENT CONTRACTS FOR DIFFERENT SCENARIOS

As previously, the new Procure IT document suite has contracts for complex, high risk or high value procurements and contracts for simple, low risk and low value procurements. They are as follows:

- MICTA/ICTA Contracting Framework for use when buying high-risk or high-value (over $1 million) ICT goods and services. It replaces ProcureIT version 3.2
- Core& contracts for the procurement of ICT/digital solutions that are low risk and involve expenditure of up to $1 million (excluding GST). The Core& contracts have two versions:
  - Core&One when procuring one individual solution in one transaction
  - Core&Combined when procuring more than one solution in one transaction.

The Core& contracts have been available since late 2018 but were updated into a more concise format

in 2021, while the MICTA/ICTA contracts have only been in their current form since November 2021.

We believe the Core& contract document suite provides a good starting point for low risk and low value ICT procurement. The terms reflect current commercial practice and provide a sensible balancing of risk and liability between the parties.

Key changes to terms in the ICTA template include:

- providing a default general liability cap of two x fees paid or payable where contract value is over $1 million and a cap of $2m where the fees are less than $1 million
- clearly carving out from the general indemnity caps supplier liability for breaches of privacy, confidentiality, security, fraud/recklessness/wilful misconduct, personal injury/death and third-party claims in relation to IP infringement, although the parties can negotiate different limitations
- requiring suppliers to have a data management and protection plan for personal information and compliance with privacy laws
- mandating a formal program of technical and organisational security measures for ICT and cyber security that suppliers implement and enforce and have audited at least annually
- greater flexibility for the parties to negotiate on intellectual property ownership in developments and modifications of a supplier's pre-existing IP.

WHICH CONTRACT TO USE?

When determining which version of the new contracts to use, the value of the contract and risks associated with the ICT procurement need to be assessed.

Determining contract value is reasonably straightforward. It should be calculated by reference to the total value of the procurement over the contract term including any option/renewal period/s. If it cannot be reasonably determined from the contract, then by reference to a reasonably estimated contract value over the term and any option/renewal period/s.

Assessing risk is much harder. The NSW Government has produced tools to assist with this, including the Risk Identification Toolkit and the ICT/Digital sourcing checklist. These are useful and we recommend council procurement teams and contract managers take advantage of them.

Note, however, that they are not designed to replace a comprehensive risk assessment or override a council's own policies on risk management and contracting requirements.

Which contract framework to use can be a subtle question, requiring an assessment of both value and risk. Some procurements may be under $1 million in value but still be high risk. In that case, the ICTA framework may be most appropriate.

THE VERDICT

Our view is the new ICTA contract framework is worth consideration by councils for their ICT procurements. It is an improvement on Procure IT 3.2. The documents are streamlined and consolidated. In particular the ICTA framework has gone from core contract + 14 modules + 14 order forms, to core contract + and 4 modules. This should make it easier to navigate and negotiate the ICTA contract for larger scale ICT procurements.

However, this consolidation comes with a trade-off. Many terms in the old modules have simply been incorporated into the core ICTA template. As a result, the core contract is longer: 185 pages compared to the previous 152.

Finally, while the new ICT contract suite appears to be more user friendly, it does not address all problems. The need for robust negotiation in complex and high-risk ICT procurements remains.

Builder demolition – how councils can reduce construction company failures and protect against them when they happen

Authors: David Creais & Mark Glynn

The recent collapse of one of Australia's largest construction companies, Probuild Construction, adds another chapter to the sad and predicted ongoing occurrence of construction company failures across Australia.

Despite the current strong pipeline of work, led by the significant NSW Government's $107 billion in infrastructure projects, some sector participants suggest that the sustainability of the construction industry is on a knife's edge.

Increased material prices, increased fuel prices, labour shortages and wafer-thin margins (Probuild is reported to have most recently earned a stunningly low 0.3% profit off $1.3 billion turnover) support the view that further insolvencies in the construction industry are likely.

Such low levels of profitability are unsustainable and unreasonable when considered against the risks and complexity involved in construction projects of any considerable size.

The Master Builders Association (MBA) NSW recently reported that building materials are increasing at their fastest rate since 1980, with the cost of materials used in house building increasing by 4.2% in the March 2022 quarter alone.

MBA NSW further identified the following significant material increases for the year ended March 2022:

- Reinforcing steel (+43.5%)
- Steel beams/sections (+41.5%)
- Structural timber (+39.2%)
- Plywood and board (+29.8%)
- Electrical cable and conduit (+27.1%)
- Plastic pipes and fittings (+26.5%)
- Copper pipes and fittings (+25.7%)
- Terracotta tiles (+21.5%)
- Metal roofing and guttering (+19.9%)
- Insulation (+14.0%)

Builders locked in to fixed price (lump sum) contracts are most vulnerable as project owners push escalating price risk onto construction companies.

Supply chain disruptions caused by reasons beyond the control of both project owners and contractors are well documented. The last couple of years has been characterised by disruptions caused by COVID, decrease in timber production due to bushfires, constraints on international materials production and international freight and more recently exacerbated by Russia's invasion of Ukraine.

There is also a widely held view, with which we largely agree, that the trend in Australia is for principals to look to push all project risks onto construction companies, typically through fixed price contracts and a disproportionate allocation of risk for the price.

However the adage that 'risk equals return' is not holding true in many construction projects. A project in which one party assumes much of the project risk without adequate return carries a greater risk of failure.

Consequently, despite a nationwide building boom, construction accounts for 28% of all insolvencies against only about 10% of GDP.

One corollary of these sobering numbers is that any organisation engaging a construction firm for a major project must be prepared for the prospect that the firm may not remain viable long enough to finish the work.

Engaging a construction company based on lowest price or greatest assumption of project risk including shortest delivery times is surely inviting trouble.

Australian Constructors Association Chief Executive Jon Davies was recently quoted as saying that contractors will continue to fail unless radical action is taken to improve the sustainability of the industry.

> *"I don't think there are too many surprised by Probuild becoming another sad statistic of Australia's construction sector, unfortunately, and industry reforms are urgently needed or more contractors will go under,"*
>
> *"The current focus of selecting contractors based on the lowest price and the greatest transfer of risk is unsustainable. Lowest price doesn't mean greatest value.*
>
> *"We have to move away from the idea that construction is a zero-sum game with winners and losers.*

"Contractors are being asked to lock in prices for risks that they cannot control such as material price escalation and pandemic risk for projects that in many cases will take years to deliver."

This article proposes two simple points on this issue. The first is that a council engaging a construction company has as its objective the successful delivery of the project as planned. Simply transferring as much project risk as possible to the contractor puts that objective at risk.

Using the tender or other procurement process to drive parties below, and risk transfer above, a level that generates value for all parties can often work against the successful delivery of the project. It is estimated that the collapse of a builder midway through a project will result in up to a 30% increase in cost to a project owner to deliver that project, not to mention the significant delay to the build program.

It also invites human misery (construction has one of the highest suicide rates of all industries).

The second point is that councils must protect themselves against the possibility of construction company failure. How to do that in a way that doesn't prejudice the successful completion of the project is the second point covered here.

IT'S TIME FOR A NEW MODEL

The current, combative model for construction projects is unsustainable. Every time a project is halted because of a company collapse, the cost of the project rises dramatically – often well beyond what it would have cost if the client had been realistic from the start.

We encourage councils to adopt a collaborative approach that supports the reasonable financial stability of their provider. Such an approach would include principles of fair return, improved benchmarking, and shared risk allocation.

That would likely mean an end to or variation of the traditional "fixed price, fixed scope" contracts, which inherently encourage adversarial behaviour and often results in costly disputes, delays or worse still court action.

Queensland, which has a $62 billion major-projects pipeline over the next five years, allows companies to try to push the rising costs of prefabricated steel, steel bar and mesh and ready-mix concrete back onto taxpayers if prices rise significantly after tenders are submitted or materials purchased.

This is one way to build flexibility into contracts. There are others, and we encourage councils to explore options that will work for them and the companies they engage.

IT'S ALSO TIME TO BE EXTRA CAREFUL

Acting ethically towards suppliers does not mean councils should expose themselves to undue risk. In fact, the shakiness of the construction industry is a sign to take extra care when engaging building companies. Here are some critical steps to follow.

1. Due diligence

Ensure that the builder you are engaging is financially sound and can be relied on to deliver is basic good practice.

Perform a Google search, check sites like productreview.com.au, seek client references and do an ASIC search. Ask the builder for details of similar sized projects it has completed.

Engage through platforms such as Local Government Procurement or check NSW Government lists of approved contractors.

2. Contract terms

Wherever possible, negotiate these contract terms:

- security for performance of the builder's obligations, usually by retention of progress payments or bank guarantees
- a right to assume the builder's obligations, or have a third party perform them, or both
- liquidated damages for late completion
- no payment for materials or equipment before it is on site
- a right to terminate in case of the builder's insolvency
- immediate access to project documentation, preferably transferring title but at least giving a licence for the project
- evidence of payment to sub-contractors and the right to make direct payments to subcontractors if necessary
- a right to assignment or novation of subcontracts and rights to certificates of compliance necessary for a certificate of occupation on completion
- progress payments subject to independent certification of the value of work carried out or completion of stages, and the right to set off the cost of rectifying defective work.

3. Watch for warning signs of impending builder insolvency

Sub-contractors and suppliers are first to know if a builder is feeling the pinch. An occasional quiet chat with them can be revealing. Also watch for them allocating resources to other sites or simply refusing to work.

Credit reporting agency CreditorWatch said Probuild's average repayment time went from just under 28 days in March 2021 year to 58 days in February 2022. The industry as a whole maintained an average repayment time of seven days over that same period.

Other signs of distress include:

- overclaimed progress payments
- adjudication applications by subcontractors
- a drop off in the quality of site management (poor programming, shortcuts in health and safety, etc)
- requests for direct payments in advance.

4. Act when warning signs appear

It's important to act quickly when signs of insolvency emerge. The earlier the intervention the greater the prospects of minimising the harm. Do these things:

Enforce rights under the contract
Examine the contract with the builder and identify relevant rights such as the right to terminate, to have recourse to security and to take over the builder's obligations.

Identify defective works
Lack of funds leads to cost-cutting, which results in non-compliance with relevant standards or approved plans and specifications. Have an independent, qualified building consultant undertake a thorough review. Their report will allow the principal to identify relevant rights under the contract.

Deal with ransom subcontractors
If sub-contractors have not been paid, they may refuse to complete work or provide necessary certificates of compliance. Finding new sub-contractors to complete work left unfinished by others is notoriously difficult.

You may need to negotiate with critical sub-contractors to get them back to site, and pay them money you have already paid to the builder, but which they didn't receive. Such costs, while painful, are small compared to starting from scratch.

Secure project documentation
Key construction documentation (and the right to use it) must be secured to ensure a new builder can complete the project and comply with consent conditions. Documentation includes warranties and sub-contractor compliance certification needed to obtain a certificate of occupancy.

Secure key personnel
Depending on the size and stage of completion of the project, you may consider employing key people such as the builder's project manager or site supervisor to provide continuity.

Seek independent assessment
Retain an independent building consultant to identify defects and assess the time, cost and tasks needed to complete the project.

This will ensure all forecasts, assumptions and estimates made by those who have been involved in the project (including the builder) are objectively tested and future decisions are made with complete information.

No discrimination – just lousy wages. 50-year legal landmark for Mary-Lynne.

Of the 320 students starting at Sydney University Law School in 1964 Mary-Lynne Taylor was one of just eight women.

Having started at the University two years earlier studying arts she switched to the Law School – which was then housed in a condemned building in Phillip Street.

Her first legal job as an articled clerk in 1965 saw her working at 77 Castlereagh Street, the now location of Bartier Perry. But unable to survive on six pounds a week – a third of the minimum wage at the time – she left after a year.

Not that you'll get any complaints as Mary-Lynne marks her 50th year in the law this month – making her one of the longest serving female lawyers working in commercial law in Australia.

She went on to join the Crown Solicitor's office, graduating in Law in 1968, admitted as a non-practising barrister in 1969 and undertaking her articles in 1970 at Legal Aid in Wollongong.

After getting a job at Dawson Waldron (now Ashurst) in the early seventies, Mary-Lynne was one of a small team working for client Sydney City Council in closing down brothels, gambling dens and battling some colourful developers.

"I enjoyed environment and planning law, but found I had a passion for helping people. I've always wanted to be a solicitor and not a barrister or judge for that reason – I love working with my colleagues," she said.

"Technology has made the job easier and faster. While legal workplaces were often closed enclaves of Sydney society or old school ties, they have now become far more interesting and diverse places to work."

"I was lucky to not face any gender discrimination in my career," said Mary-Lynne. "Certainly, though more needs to be done right across the profession to recognise that while women now represent 50% of most law firms, that's not reflected in partner numbers."

"During my time the law has also turned more from a profession into a business but the courtesy and understanding between legal professionals remain and that's really important."

Bartier Perry CEO Riana Steyn said "Mary-Lynne's expert knowledge is generously shared with all across Bartier Perry. She does it with flair, patience and humour. Particularly Mary-Lynne teaches our people not just about the law but how to build strong and lasting networks and how to help people along the way. She is a master teacher to us all and not just to Bartier Perry but to our clients and to university students and many government bodies. After 50 years of being in the law Mary-Lynne's enthusiasm and energy doesn't seemed to have waned and that has a contagious effect for all who know her."

Mary-Lynne's advice to law students today is to add another interest to their law degree by studying another subject and to otherwise, "go for it."

Along with continuing her role as Special Counsel at Bartier Perry, her own career has come full circle in being appointed Adjunct Professor by Sydney University for her work within the Urban and Regional planning section of the Faculty of Architecture.

WOULD YOU LIKE TO KNOW MORE?

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

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VALUE ADDED SERVICES

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 Summit and the Australian Property Institute (API) Public Sector Conference.

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

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:

- Contingent labour – contractors, labour hire, employee?
- Signing documents in the modern era
- Electronic lodgement of documents – understanding the PEXA system
- Abandoned construction contracts: mitigating the risk and rescuing the project

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 80 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 95 lawyers, we offer personalised legal services delivered within the following divisional practice groups:

- Corporate & Commercial and Financial Services
- Dispute Resolution & Advisory
- Property, Planning & Construction
- Insurance Litigation
- Estate Planning & Litigation, Taxation and Business Succession
- Workplace Law & Culture

YOUR THOUGHTS AND FEEDBACK

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

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

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