COUNCIL CONNECT

Bartier Perry LAWYERS

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Images reproduced courtesy of Wollongong City Council

FROM THE CEO

Welcome to our end of FY2023 issue of Council Connect.

We hope you are all keeping well and warm as the shortest day of the year approaches and a new financial year begins.

Our thanks go to Jeff Reilly, General Counsel at Wollongong City Council who kindly participated in this issue's interview. Jeff discusses housing affordability and other challenges as well as what makes the Wollongong local government area an amazing place to live and work.

I always enjoy our interviews with those who are key figures in councils who are often at the centre of ensuring our communities stay strong. In working with our council clients we see much of what Jeff says reflected across other councils throughout NSW.

Our articles in this edition, as always, cover an array of topics that aim to keep councils in the know. In this edition our authors look at issues including dispute avoidance, best practice employee management and the importance of getting construction and consultancy contracts right.

Being the end of the financial year, I would like to thank you for your support and trust. Looking ahead, two important things to note today is that:

- Our 2023 Local Government Forum is in the final planning stages – look out for your invitation and lock 6 September into your diaries!
- Bartier Perry is moving offices – our lease has come to an end and like many organisations we are moving (just down the road) to an office that better allows for our flexible working practices. We look forward to showing you around when you're next in the CBD.

Please enjoy reading this Council Connect and as always, if you have feedback or if any of our team can assist you, please give us a call.

Warm regards,
Riana

WHAT'S NEW

SAVE THE DATE

Finding the balance

BARTIER PERRY – LOCAL GOVERNMENT FORUM

6 September 2023 - *Pullman Sydney Hyde Park*

Keynote presentation by:

The Hon. Stephen Kamper MP,
Minister for Lands and Property,
Minister for Multiculturalism,
Minister for Sport and
Minister for Small Business.

BARTIER PERRY IS MOVING!

Same people, same service. Looking forward to seeing you at our new offices.

From Monday, 17th July 2023,
our new address will be:

Level 25, 161 Castlereagh Street,
Sydney NSW 2000.

Our phone number and PO Box
numbers will remain unchanged.

INTERVIEW WITH JEFF REILLY

GENERAL COUNSEL, WOLLONGONG CITY COUNCIL

The President of LGNSW, Darriea Turley, has said that 2023 is a year when councils and their communities are facing unprecedented (there's that word again) challenges. What are some of the challenges your Council is facing and how will they be addressed?

There is that word again – but I think it's appropriate. We're all familiar with our recent challenges, be they the pandemic, work from home, and supply chain issues, but the evolving picture is only getting more complicated. I think the scenario for Wollongong City Council is fairly similar to most of the local government sector in NSW and indeed Australia in terms of challenges and complexity. The challenges and complexity arise partly because we only can influence an aspect of the picture. For example, take climate change. Our Council has undertaken a range of initiatives in this space, including membership of the International Global Covenant of Mayors for Climate and Energy and the National Cities Power Partnership Program, both of which support local government to move towards lower emissions. We've adopted and are implementing a range of direct actions as well, including environmental sustainability for our buildings, more effective waste management and prioritising walking and cycling infrastructure, but ultimately this is a national and international issue.

Labour shortages and wages is another area that is presenting challenges for us. Many regional, coastal or country councils have historically sought to emphasise their unique surroundings as a selling point to prospective employees. That's trickier now where many of our knowledge workers can continue to work for other employers in our larger cities, while living in our regional or coastal towns. It means in this space that you look at the totality of your employment offering, and particularly look at matters around wellbeing and broader opportunities across all aspects of Council's operations.

Increasing legislative requirements remains challenging. Our most recent risk review in relation to that topic identified over 150 pieces of primary legislation that affect our business. That's only increasing, in both detail and sheer breadth. As a local government lawyer, I'm perhaps selfishly grateful for my continued employability(!), but the fact remains that the space for error and challenge is not getting smaller. Working as a sector here is key, so that state government understand and appreciate what we can do well, and what really needs to be best addressed by a different level of government or with better funding.

Supply-chain issues, shortage of specialised contractors, and asset management and renewal would also be key in my list of current challenges. Those aspects directly feed into increased costs, and then maintaining financial strength becomes more difficult. One other key issue that is really on our radar is cyber-security. It's continuing to be an emerging risk, and addressing it well is impacted by being able to hire the right people to get in front of that risk, and be as robust as we can whilst still increasing our channels of engagement for our community and providing the cloud-based flexibility to our staff.

It's not all doom and gloom though! There's many things we do well with limited resources, and that's one of the things I love about local government – the "can-do" attitude even in a challenging environment.

Affordable housing is a hot topic. What is your Council doing to address the rising affordable housing and homelessness crisis?

It's definitely a hot topic, and only growing hotter. Our statistics are particularly acute, given our proximity to Sydney, ability to commute there and rising house prices. But obviously behind the statistics are real people struggling to afford a roof over their head. Each level of government needs to play a role. For us, our most recent strategies have looked at waiving developer contributions for developments from certain community housing providers, requiring minimum gross floor area dedications to affordable housing for planning proposals permitting residential development, and investigating our own operational land as to whether there are opportunities for it to be leased for affordable housing. We've partnered now with a community housing provider on grant funding with performance indicators around delivery of specific sites and dwelling numbers. I think those types of partnerships and continued advocacy will continue to mark our approach to this difficult area.

How do you see the role of General Counsel and their teams evolving in local government?

In a career that's spanned private legal practice acting for local government, as well as separate stints at two different councils as an in-house lawyer, I've seen in-house legal teams' numbers grow exponentially from around four councils 25 years ago to more than 30 councils today with in-house legal teams.

That certainly suggests a perceived need for in-house legal functions, and reflects to a degree what we've talked about earlier regarding increasing legislative complexity. It's not straightforwardly true though to say that simply adding lawyers adds value. In my experience, the best outcomes for councils are where the legal team are able to get in front of issues as early as possible, and then have sufficient access to senior leaders to explain legal risks and implications. My GM calls making contact with our team the "dial before you dig" strategy, and routinely emphasises it across our business units. The other key aspects for a successful legal team are providing advice and assistance that builds confidence in the strength of the decisions taken, and builds the knowledge base of staff so they are empowered in their everyday operations. Accessibility of our team and timeliness of responses are also really important in meeting those goals.

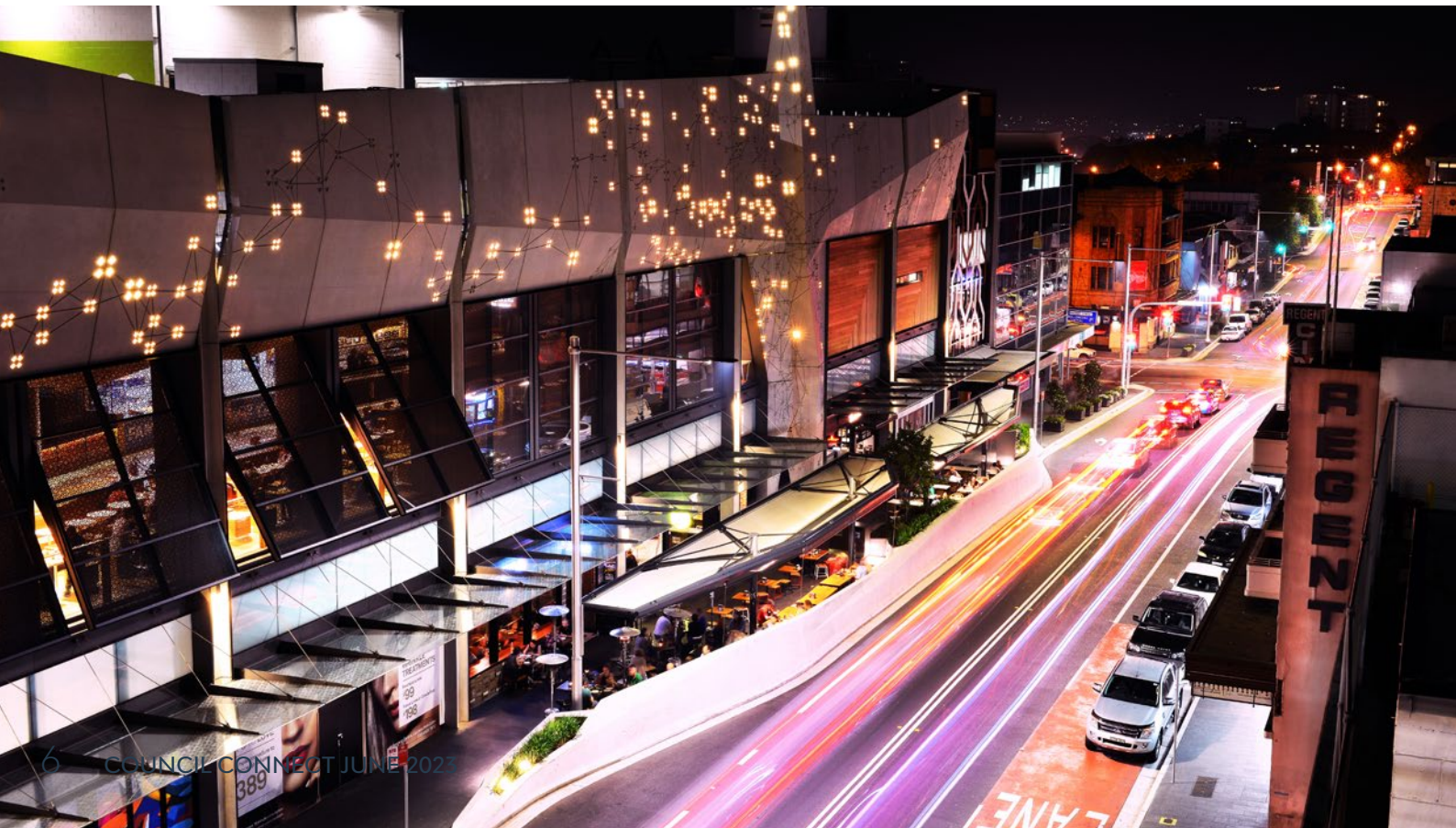
Perhaps a little idiosyncratically, I think every member of the legal team, including the General Counsel, has to stay close to the legal coalface, in order to ultimately then give the most up to date advice and assistance and to enjoy the confidence of staff. In that regard, our team manage almost all Land and Environment Court matters and local court prosecutions, as well as all conveyancing matters. What remains of course is the reality that there are still many areas where different expertise or legal depth is required, and thus determining and then utilising external law firms is critical. Having that trusted adviser relationship with our externals has been fundamental to many successes we've recently enjoyed in some very complex matters.

What do you enjoy most about working at Wollongong City Council?

Plenty of things! We have an encouraging, unified and positive executive team, and an elected council that is engaged, collegiate and community minded. These are not always common across the sector, and I'm very grateful for a work environment where it feels like everyone is pulling in the same direction.

I'd also have to say working with the rest of the legal team here at Council (Karina Ponne, Laura Morley, Erina Kilpatrick and Vanessa Battishall). We have strong internal cohesion, and consistently share knowledge and challenge one another to be the best legal service providers we can be.

The stunning local environment and coastline along make it a great place to work. I do wish though that the mighty Souths Sydney Rabbitohs would be drawn to play at WIN Stadium here in Wollongong a little more often to save me a trip to Sydney!



Easements left in the cold – how to ease them out of existence

Authors: Edward Choi & Melissa Potter

An easement which has historically benefited a parcel of land may lose its practical value for various reasons, including changes in ownership or the surrounding environment. In such cases, councils should consider extinguishing the abandoned easement and realise the land's unencumbered value for future use.

RECENT CASE

We were recently asked to investigate an easement for a right of way burdening our council client's land. The easement was created more than a century ago when the land and that next to it were owned by the same family. The idea was to prevent the land benefited by the easement from becoming landlocked.

Over time, each parcel of land went through a number of subdivisions and the easement (now a public reserve) had been made redundant by the opening of a public road along its boundary.

STATUTORY BACKGROUND

Section 49(1) of the *Real Property Act 1900* (NSW) allows the Registrar-General to cancel a recording of an abandoned easement. Section 49(2) of the Act also says an easement is considered abandoned if the Registrar-General is satisfied it has not been used for at least 20 years.

WHO CAN APPLY FOR CANCELLATION?

An application for the cancellation of recording of an abandoned easement may only be made by the owner of the land. It must be accompanied by a statutory declaration by at least one party who is not affected by the easement, confirming the easement has not been used for at least 20 years. The application should state:

- how and when the easement was created
- how long each declarant has observed the easement not being used
- the date on which the easement ceased to be used, as well as any circumstances relevant to that cessation
- whether each declarant is aware of any litigation involving the easement.

Anyone unaffected by the easement can provide the statutory declaration as a disinterested party. In this case, good candidates included the occupants of neighbouring properties.

What if a candidate hasn't observed the property for 20 years or more? In that case, it may be wise to contact previous occupants as well in order to cover the statutory timeline under section 49(2) of the Act.

WHAT HAPPENS AFTER THE APPLICATION IS SUBMITTED?

Once the application for extinguishment is submitted, the Registrar-General will serve a notice of intention to cancel the recording on:

- anyone who has a registered estate or interest in land benefited by the easement (including tenants under any registered lease)
- if the land benefited by the easement cannot be identified, any person that the Registrar-General considers should receive such a notice. In doing this, the Registrar-General will consider the nature and location of the easement, circumstances surrounding its creation, and the physical characteristics of any relevant land.

Anyone receiving such a notice has one month to make submissions to the Registrar-General. Councils will have the opportunity to respond to any submissions received.

CAUTION

A council considering making an application for extinguishment of an abandoned easement should not approach the owner or occupier of the land benefited by the easement. The reason: if the owner or occupier has forgotten about the easement, they may resurrect it by recommencing its usage. If that happens, council's application will fail.

Instead, councils should seek legal advice before acting.

Do your construction and consultancy contracts address the Design and Building Practitioners Act?

Authors: David Creais

In mid 2017, the Building Ministers' Forum, which oversees policy and regulatory issues in the building and construction industry, requested an expert assessment of the effectiveness of compliance and enforcement systems for the industry.

The Forum appointed Professor Peter Shergold AC and Bronwyn Weir to co-lead the assessment, and in February 2018 their report was delivered.

Its recommendations included:

- a national approach to the registration and training of building practitioners
- a statutory requirement for design practitioners to prepare documentation that demonstrates that proposed buildings comply with the National Construction Code.

In response, the NSW Government in February 2019 committed to major reforms to restore consumer confidence in the industry. They included:

- the appointment of an expert Building Commissioner
- an overhaul of compliance reporting
- a requirement for all building practitioners with reporting obligations to be registered.

On 1 July 2021, the *Design and Building Practitioners Regulation 2021* took effect.

The Regulation confirms that the Act applies to building work for the construction, making of alterations or additions, or the repair, renovation or protective treatment of class 2 buildings.

Of relevance to councils is that the word "building" includes part of a building.

This means a council development comprising one or more public facilities, a carpark or council offices in addition to residential apartments (often undertaken as a public private partnership) will be subject to the Act and Regulation.

The registration requirements aim to ensure that practitioners involved in the building and construction process are competent, qualified and suitably insured.

The Act and the Regulation require registered building and design practitioners to supply design compliance, principal compliance and building compliance declarations. These require a registered practitioner to declare that the work (whether design or building work) complies with the Act as well as the Building Code of Australia and the Regulation.

Under the Regulation, practitioners are also required to lodge documents at different stages of construction through the NSW Planning Portal. They include construction issued regulated designs for the building work, design compliance declarations, and a contractor document. The latter should include a list of:

- the builder's subcontractors
- others who have undertaken building work
- work done by subcontractors.

While these obligations are imposed on contractors and consultants (unless council is providing designs internally), it is in council's interest to ensure they are properly carried out.

It is also council's responsibility to the public to ensure its developments deliver quality buildings that are safe and comply with all legislative requirements.

That means that the design consultant and construction contracts employed by council respond to and implement the regime mandated by the Act and Regulation.

To this end, the NSW Building Commissioner offers two sample "contracts" – a construct only building contract and a design consultancy agreement – which are actually model clauses designed to interface with the Act and Regulation.

The construction clauses, which are based on AS4000, should be used in construction contracts for construct only building work. Because the Regulation had not been published when the model clauses were created, the clauses will require some modification.

The design consultancy model clauses are based on AS4122 – 2010. They are not intended to be used for the appointment of a principal design practitioner, so such appointments will require different clauses.

The model clauses are provided as information only and not as legal advice, and they do not address contract matters other than the Act. Accordingly, councils should obtain legal advice about including the model clauses in their construction contracts.

Alternatively, councils may prefer to include bespoke clauses to ensure contractors and consultants comply with the Act and Regulation.

Either way, it is imperative that councils protect themselves and their communities by addressing this important legislation in their contracts.

CONSTRUCT NSW RESEARCH REPORT

Bartier Perry were delighted to be involved in the research report produced for the Office of the NSW Building Commissioner on how the building and construction industry in NSW is responding to the NSW Government's reforms.

The research report, authored by MinterEllison, included our review of a design and construction contract and related agreements from a sample of large mixed use residential projects located in NSW. Visit the Office of the NSW Building Commissioner to learn more about the reform and the report.

Dismissing an employee? Don't be harsh, unreasonable or unjust

Author: Shawn Skyring

Effectively managing an employee's workplace performance and conduct will reduce the risk of a successful and potentially costly unfair dismissal claim.

Two key pieces of relevant legal instruments are the *Local Government Employees (State) Award 2020* (the Award) and section 84 of the *Industrial Relations Act 1996* (NSW) (the Act).

The first includes guidelines (Clause 37) for conducting investigations. The Award also states that failure to comply with the guidelines may be used as evidence of failure to properly conduct or speedily conclude an investigation, so they should be better treated as instructions.

The Act includes permissible grounds for ruling a termination harsh, unreasonable or unjust.

Should a finding be made against the employer, the Industrial Relations Commission of NSW can grant an order to reinstate, re-employ, or award compensation of up to six months' pay. Other orders include remuneration from the time of termination to the time an order is made by the Commission and the dismissal of an application.

This is another way of saying that mishandling an employee investigation or termination may be expensive indeed.

THE AWARD PROVISIONS DEALING WITH DISCIPLINARY ACTION

Among other things, Clause 37 of the Award states that employees:

- are to have access to their personal file and may take notes and/or obtain copies of them
- are entitled to sight, note and/or respond to any adverse information on their personal file
- are entitled to request the deletion or amendment of any disciplinary or other record on their personal file
- are entitled to request the presence or involvement of a union representative at any stage
- are entitled to apply for accrued leave for whole or part of any period in which they have been suspended.

THE INVESTIGATION PROCESS UNDER THE AWARD

These provisions recently received consideration by the Commission in *Bowen v City of Ryde Council (No 2)* [2020] NSWIRComm 1076 where Commissioner Sloan commented regarding the Award's predecessor:

> *"The Award anticipates a three-stage process. There is nothing to suggest that the Council turned its mind at all to section 36 [now section 37]. The repeated use of the word "shall" in clause 36(D) makes it clear that the disciplinary process it sets out is mandatory. Further the employer may only proceed to dismissal after complying with clause 36(D) and clause 36(E)(i). An argument may arise as to whether in the absence of full compliance with clause 36(D), an employer is precluded by the Award from proceeding to termination."*

A FAIR PROCESS IS ESSENTIAL

Regardless of the reason for considering termination, the employer must follow a procedurally fair process. Generally, this includes allowing the employee an opportunity to provide an explanation (whether the circumstances involve poor performance or misconduct).

CASES DEALING WITH THE CONCEPT OF "HARSH, UNREASONABLE OR UNJUST"

What constitutes "harsh, unreasonable or unjust" in employment cases? These terms have received wide judicial consideration in New South Wales.

In *Antonakopoulos v State Bank of NSW* (1999) 91 IR 385 the Commission found that failure to operate in a procedurally fair way may constitute the basis for determining whether a dismissal is harsh, unreasonable or unjust. However, such a finding is not inevitable in all such cases.

In *Burge v NSW BHP Steel* [2001] NSWIRComm 117 the Commission found that determining whether a remedy should be granted involved the question of whether the dismissal was harsh, unreasonable or unjust. In *Hollingsworth v Cmr of*

Police (No 2) (1999) 47 NSWLR 151 at 181-2, the Commissioner also found that whether a dismissal was harsh, unreasonable or unjust involved matters of both fact and law.

Byrne v Australian Airlines Ltd (1995) 185 CLR 410 and *Bankstown City Council v Paris* (1999) 93 IR 209, made it clear that while the terms are distinct from one another, they also overlap to some degree. In each case, the Commission stated that dismissal of an employee may be capable of being unreasonable but not harsh, or harsh but not unjust, and other permutations may also apply.

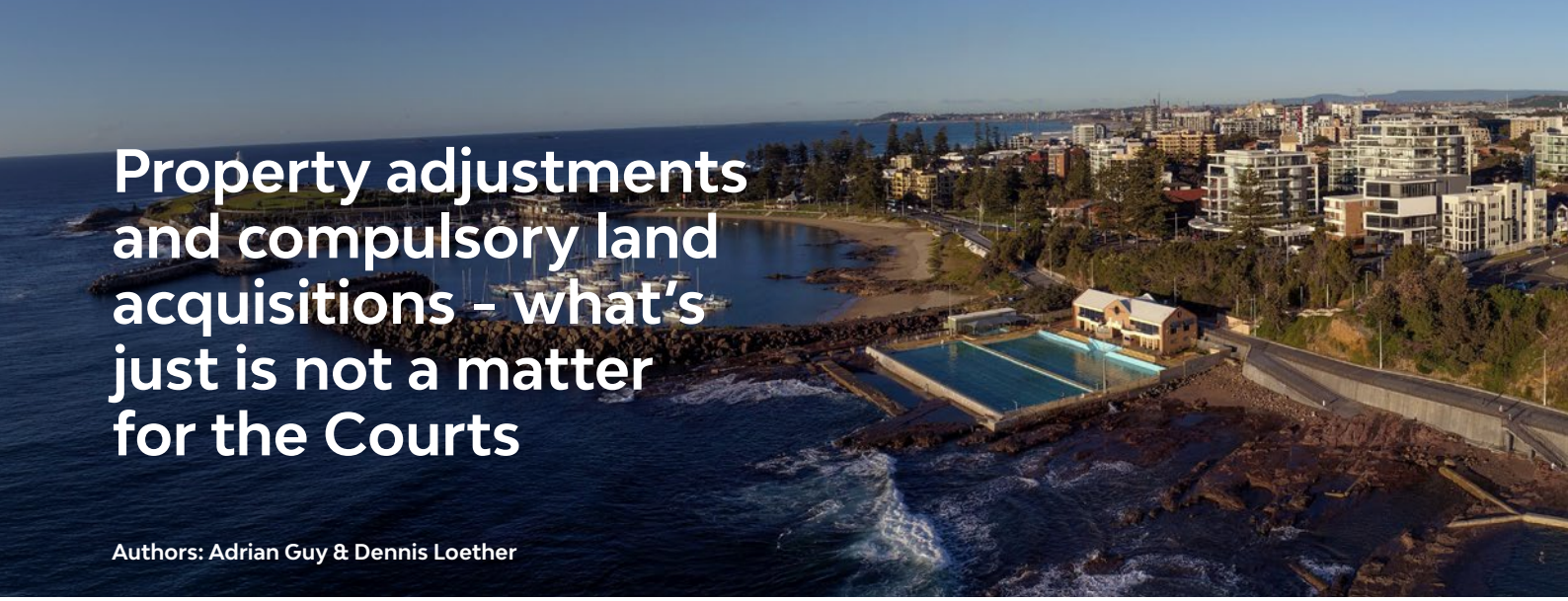
In *Department of Health v Perihan Kaplan* [2010] NSWIRComm 65, the Commission rejected the argument that terminating employment following breach of a fundamental term of the employment contract "would necessarily not be harsh."

Finally, in *William James Sandilands v Industrial Relations Secretary on behalf of Legal Aid NSW* [2018] NSWIRComm 1051 concerned domestic violence by a solicitor with Legal Aid. The case examined whether there was sufficient connection between the misconduct and the solicitor's employment. The commission held there was, as the employer had a right to protect its reputation. The dismissal was found to be not harsh.

While these cases are useful, they also illustrate that what constitutes a harsh, unreasonable or unjust dismissal remains, to a meaningful extent, a case-by-case matter.

KEY LESSONS

The key takeaway for employers is to follow a well-documented disciplinary process that adheres to the guidelines in Clause 37 of the Award and is procedurally fair. Doing so will minimise the prospect of having a termination ruled harsh, unreasonable or unjust.



Property adjustments and compulsory land acquisitions – what's just is not a matter for the Courts

Authors: Adrian Guy & Dennis Loether

Councils may, pursuant to section 186 of the *Local Government Act 1993* (LG Act), compulsorily acquire land:

1. for the purpose of exercising any of its functions
2. to make it available for any public purpose for which it is reserved or zoned under an environmental planning instrument
3. which forms part of, or adjoins or lies in the vicinity of land proposed to be acquired under chapter 8, part 1 of the LG Act.

Pursuant to section 187 of the LG Act, a council's actions in such acquisitions are subject to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act).

An owner whose interest in land is affected by an acquisition notice has a right to be paid compensation by the council, pursuant to section 37 of the Just Terms Act. The amount of compensation to be paid by a council, having regard to relevant matters for consideration, must 'justly compensate' that owner for the acquisition (see sections 54 and 55 of the Just Terms Act).

However, that compensation need not be monetary in all circumstances. It may also be provided, either wholly or partly, in the form of carrying out of works on the land pursuant to section 64 of the Just Terms Act, otherwise known as 'property adjustments'.

Such compensation is common in compulsory acquisitions, especially when only part of a parcel of land is acquired. In such instances, property adjustments often include relocation and reconstruction of driveways and boundary fences, but may also include more extensive works as well.

PROVIDING PROPERTY ADJUSTMENT WORKS – KEY ELEMENTS

Breaking down section 64 of the Just Terms Act, the following three elements are apparent:

1. The compensation concerned is that which the owner of the interest is entitled to. Accordingly, pursuant to section 54 of the Just Terms Act, the compensation must 'justly compensate' the owner of the interest for the acquisition.
2. Whole or part of the entitlement may instead be provided in the form of property adjustment works.
3. The owner of the interest and council must agree to either whole or part of the compensation being provided as property adjustment works.

CASE LAW REGARDING PROPERTY ADJUSTMENT WORKS

The Land and Environment Court has jurisdiction to determine disputes concerning compensation for compulsory acquisitions. Its power is limited to determining the nature of the estate or interest and the amount of compensation to which the owner is entitled, pursuant to section 25(1) of the *Land and Environment Court Act 1979* (LEC Act). It does not have jurisdiction to rule on the nature or extent of property adjustments.

This was made clear in *Van Tonder v Hodgkinson* [2012] NSWLEC 86 at [9] per Biscoe J, where the Court stated:

> *In substance, at least some of the orders sought appear to be for compensation for compulsory acquisition in the form of land and works. In my opinion, even if this Court has jurisdiction, it has no power to make such orders. The Court's power under the Just Terms Act is limited to determining compensation because of the compulsory acquisition of land "in accordance with" the Just Terms Act, Division 2 of Part 12 of the Roads Act 1993 or any other Act: ss 19(e) and 24 of the Land and Environment Court Act 1979. Entitlement to compensation in the form of land or works only arises if the person and the authority of the State concerned agree: s 64 Just Terms Act. In the present case there is no such agreement.*

However, the Court may make orders for property adjustments in accordance with an agreement between the parties (being the owner of the interest and the council) as to terms of a decision in the proceedings, pursuant to section 34(3) of the LEC Act. In that instance, the Commissioner must dispose of the proceedings in accordance with the agreement and set out the reasons for their decision in writing.

In *Billbergia Group Pty Ltd v Transport for New South Wales* [2020] NSWLEC 1652, the parties agreed on compensation in the form of money and in the form of an easement (being a form of land, as defined in section 4(1) of the Just Terms Act). Peatman AC subsequently made orders in accordance with the agreement and provided the following reasons in the written decision at [26]-[28]:

> *[26] In this case, the parties have agreed that the compensation will be partly by money paid, and partly by way of an easement for services over the Land, and entering into a deed to facilitate potential relocation of the easement if required…In light of the s 34 agreement between the parties in this case, compensation determined in accordance with the requirements of Part 3 Division 4 of the Just Terms Act may be provided partly by the payment of money and partly by the giving of an interest in land.*
>
> *[27] As set out above, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.*
>
> *[28] As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.*

Case law makes it clear that the operation of section 64 of the Just Terms Act is dependent upon agreement being reached between the owner of the interest and the council: see *Reginald Arthur Gosper v Hornsby Shire Council* [1993] NSWLEC 84 (Bignold J); *Cook, Saad, Raguz & Ors v Roads and Traffic Authority of New South Wales* [2007] NSWLEC 136, [77] (Jagot J); *Van Tonder v Hodgkinson* [2012] NSWLEC 86, [9] (Bisco J).

Although the above decision did not involve compensation in the form of property adjustment works, the same approach is taken by the Court when such agreements are reached.

In the absence of agreement between the parties, the Court cannot make orders for compensation in the form of property adjustment works; it may only make a determination of compensation to be paid. However, compensation that may have otherwise been provided in the form of property adjustment works can be awarded as disturbance, pursuant to sections 55(f) and 59(f) of the Just Terms Act.

KEY ELEMENTS REVISITED

Looking back to the three key elements for providing property adjustments pursuant to section 64 of the Just Terms Act, it is evident that the second and third elements are clear cut and supported by the Court.

However, the first element begs the question - how do councils determine whether compensation in the form of property adjustment works will 'justly compensate' the owner of the interest in land?

Where compensation is to be provided partly in form of property adjustment works, the remaining compensation amount may be discounted by the exact cost of the property adjustment works. In that respect, calculating losses for disturbance pursuant to section 59(f) of the Just Terms Act may be useful in determining an arrangement that may 'justly compensate' the owner of the interest.

Ultimately, it is for the owner and the council to determine what constitutes a just set of property adjustments. They may represent 'like-for-like'; for example, a driveway that directly replaces one that has been compulsorily acquired. They may also represent a 'this-for-that', where works leave the owner either better or worse off than before.

What is fundamental is that the parties reach agreement.

A common issue in negotiations is the possibility of 'double-dipping'; that is, the provision of property adjustments and monetary compensation, without any discount being applied to the latter by virtue of the former. This can be avoided by distilling the agreement into a Deed, where the scope and timing of property adjustment works are sufficiently detailed, and the works themselves are accurately quantified so the remaining monetary compensation is subsequently discounted.

Bartier Perry can assist with the negotiation, drafting and review of such agreements.

How the private sector can bolster local councils' ESG response

Authors: Jason Sprague, Eric Kwan and Samantha Pacchiarotta

Around the globe, Environmental, Social and Governance (ESG) issues continue to make headlines as the public becomes more and more interested in these matters.

As public bodies, local councils are often at the forefront of ESG initiatives. In this article we look at how organisations in the private sector are responding to ESG issues and what this could provide to local councils in developing and implementing their own policies.

WHAT IS ESG?

ESG is a framework that forms part of an organisation's overall strategy. It helps them ensure they are generating real value, not just monetary value, for stakeholders.

While ESG and sustainability are often used interchangeably, they are not the same thing. Sustainability is an internal framework that guides an organisation's projects and investments. Said another way, sustainability is the motivation, ESG is the reported outcome.

HOW HAVE ORGANISATIONS RESPONDED TO ESG ISSUES WITHIN THE PRIVATE SECTOR?

Many ESG issues in the private sector also affect the public sector. The following table provides examples of such issues as well as common responses to them.

Environmental	Social	Governance	Common responses
> climate change > pollution > renewable resources > use of fossil fuels > use and management of water and other resources > clean energy initiatives	> physical and mental health issues > employment equality and gender diversity > privacy issues > product safety and liability > supply chain transparency > human rights > affordable and available housing	> board and company diversity > financial reporting transparency > cybersecurity > fraud > bribery and corruption > ethics and values > board oversight and internal controls	> adopting an ESG statement > updating strategy and policy documents > adopting mechanisms to assess ESG-related claims > updating ESG reporting frameworks > appointment of an ESG officer

WHAT DOES THIS MEAN FOR LOCAL COUNCILS?

How the public responds to private sector initiatives can provide a good guide for local councils. Here are some recent ESG practices and trends in the private sector:

1. Adopting an ESG statement

More and more businesses are developing an ESG strategy and commitments through an ESG statement. An ESG statement is typically shared with an organisation's stakeholders and the community.

Under the *Local Government Act 1993* (NSW), local councils are required to consider social justice principles and principles of ecologically sustainable development as part of any decision-making process.

Given that, a local council may wish to take a prospective supplier's ESG statement into consideration as part of a procurement process.

Local councils may also wish to create their own ESG statement. This could help clarify and communicate council's values to its community and may guide those who are part of the council's operations.

2. Updating strategy and policy documents

We have seen many private organisations update their internal policies and strategy documents to align with their position on ESG.

Such policies include modern slavery, whistle blowing, flexible work, gender equality and anti-bribery and corruption, to name a few.

Local councils should consider whether their own internal and external policies reflect their stance on ESG issues and if necessary, update them accordingly.

3. Adopting mechanisms to assess ESG-related claims

Whilst ESG propositions can be good selling points for business, they need to be justified. One thing we have noticed is the clamp down by ASIC and the ACCC on greenwashing, or misrepresenting the extent to which a product or service is environmentally friendly.

Local councils need to be wary of potential greenwashing claims and the ramifications on their own position should a claim prove to be false or exaggerated.

To manage this, councils should request trustworthy supporting documentation such as scientific reports, supply chain information, or third-party certification.

Incorporating a checklist in an RFQ or similar document requires the tenderer to provide evidence to support any sustainability claims. Failure to provide that evidence should be treated with caution and questioned.

4. Updating ESG reporting frameworks

An increasing number of larger organisations are adopting ESG reporting to show they are meeting ESG targets and that their ESG initiatives are genuine.

ESG reports summarise the qualitative and quantitative benefits of a company's ESG activities, thus allowing investors to align investments to their personal values. Many organisations incorporate ESG reporting into their annual reports.

While a universal set of ESG reporting standards does not yet exist, a variety of good reporting frameworks and voluntary standards are used within the private sector.

Given local councils are required to address social, environmental, economic and civic leadership issues within the Integrated Planning and Reporting Framework, a recognised ESG reporting framework could be a good platform to demonstrate results objectively and transparently.

5. Appoint an ESG officer

It is becoming common for organisations in the private sector to create ESG-specific roles such as ESG officer or sustainability officer.

The role of an ESG officer is to monitor and evaluate the organisation's ESG goals. They also help develop policies and implement strategies that promote sustainability.

A common challenge for local councils is how to manage the significant compliance and reporting burden involving ESG issues with limited resources. An ESG officer can help relieve that burden and promote their local council's ESG commitments and initiatives.

Bartier Perry advises on a range of ESG-related matters including modern slavery, employment relations and governance and policy documents.

Contractual disputes and practical tips to avoid them

Author: Nicholas Kallipolitis

The dangers of poorly drafted contracts are well known. Nonetheless, disputes continue to make their way to the courts.

Faced with limited resources and real time constraints, councils often enter into contracts that have been used previously, containing schedules and annexures to determine scope that do not apply to the current project.

Likewise, insufficient thought may be given to what certain words or terms mean, and the operation of the contract's terms.

That said, there are ways to avoid disputes.

THE OVERARCHING RULE

As a general rule parties are bound by the words within the four corners of a written contract, a principle known as the *parol evidence rule*. Said another way, extrinsic evidence – such as oral discussions held before the contract was signed – is inadmissible in court should a contract dispute arise, unless an exception applies.

What's more, this rule means the courts cannot rewrite a contract to apply an interpretation that is consistent with their view of what is commercially sensible.

The court will only look beyond the wording of a contract where there is sufficient ambiguity or uncertainty in its language. In that case, it will apply a position that is consistent with the commercial purpose of the contract and that also makes business sense. In those exceptional circumstances, the court may then consider external evidence such as notes, oral evidence and drafts of documents.

CASE EXAMPLES

In *Port Macquarie-Hastings Council v Diveva Pty Ltd* [2017] NSWCA 97, the Court of Appeal considered whether the Supreme Court made an error in the construction of an option in a contract for the supply and laying of asphalt in 2011. The contract merely stated that the agreement was for 24 months with an option provided within that term. The option included the words "with a further twelve (12) month option available" following the period of the tender agreement.

The Council advised Diveva it would not exercise the option and would advertise a new tender. It also said the option could only be exercised by Council or by mutual agreement.

Council did not offer any further work to Diveva under the 2011 contract, alleging that Diveva had not complied with the asphalting specifications. Diveva then commenced proceedings for breach of contract.

The Supreme Court and subsequently the Court of Appeal disagreed with the Council's interpretation. They found that the Council, by way of the option, granted an entitlement to Diveva as the successful tenderer to action the option.

Had the Council wanted sole rights to exercise this option, it had the opportunity when the contract was drawn up to insert a clause to that effect.

As to whether Council's interpretation of the option should be implied in the 2011 contract, the onus was on the Council to prove that was the case. The Court found that to imply such words would not operate reasonably or give business efficacy to the agreement.

The Court of Appeal dismissed the appeal and Diveva was entitled to damages for loss of profits and lost opportunity to tender for two further contracts with the Council.

Another contract dispute arose in relation to a contract between four councils and waste processing company WSN Environmental Solutions. The dispute was over WSN's entitlement to vary payment terms due to having to use an alternative facility because of odour issues at the original plant.

At issue was whether the relevant variation clause had been activated and, as such, whether the dispute should be dealt with under the dispute resolution mechanisms provided for in the agreement. There were two distinct dispute resolution regimes in the contract and a dispute arose as to which should apply. The Court of Appeal held that the variation circumstances were not foreseeable at the time of the contract and that WSN's interpretation should be preferred and the councils were unsuccessful.

TAKEAWAYS

Councils deal with a myriad of contracts. The following steps can help avoid or minimise the risk of a dispute:

1. Have contracts that are clear and concise. Seek legal review if in doubt.
2. Review contracts to ensure they are relevant and suited to the circumstances and commercial purpose to which they apply.
3. Keep records of discussions and copies of documents regarding any pre-contract negotiations. Confirm positions in writing.
4. Know the contract, its obligations, and the time periods it refers to.
5. Store records so they can be easily located, particularly as employees come and go.
6. When contractual disputes arise, seek early legal advice and representation to avoid communicating a position that may be inconsistent with the relevant legal position.
7. Work with your legal representative to tailor a strategic outcome that provides a satisfactory resolution while minimising costs and lost time.

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 Human Resources Summit and the StateCover Mutual Seminar. We also regularly host our own Local Government Forum.

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).

CPD, 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:

- Return to Work Interest Group - Workers Compensation Panel
- Anatomy of a privacy breach
- Leasing, planning and construction – the issues you face in Government Property
- Fraud in organisations – the prevention and the cure

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

- Corporate & Commercial and Financial Services
- Dispute Resolution & Advisory
- Planning & Property
- 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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