COUNCILCONNECT

Bartier Perry LAWYERS

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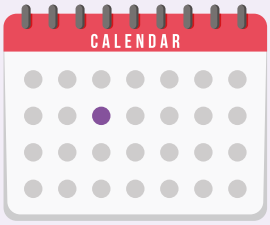


SAVE THE DATE

BARTIER PERRY
LOCAL GOVERNMENT FORUM

WEDNESDAY 17 SEPTEMBER 2025

Welcome to Council Connect, where local government meets sharp legal insights – and now, a slight touch of election fever!

With the federal election shaping so much of the national agenda right now, we understand how the ripple effects might impact councils and communities on the ground. From local government funding shifts to policy pivots and even mounting global tensions, we know this is a time of uncertainty for many of our council clients.

In this issue, we explore some of the latest legal developments, including the High Court's ruling on liability in construction disputes, the practical implications of industrial action, and new laws affecting rights of access. We also examine the introduction of a statutory tort for serious privacy breaches—highlighting that councils are not immune from legal action—along with the growing demands of managing organic waste under the new FOGO legislation. Finally, with invoice fraud on the rise, we consider who bears the cost when a scam succeeds and how councils can protect themselves.

At Bartier Perry, we're committed to supporting you to deliver projects that drive meaningful change in your communities. Our team is always available to discuss ideas or help navigate potential challenges. We're also in the early stages of planning our Local Government Forum for September this year—if there are topics you'd like us to cover, we'd love to hear your suggestions and look forward to seeing you there.

Warm regards,
Riana

Who carries the can when construction goes wrong? The High Court makes a ruling

Authors: Nicholas Kallipolitis & Breitil Sulaiman

In the March 2024 issue of Council Connect, Bartier Perry discussed the Court of Appeal Judgment in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301 (the Appeal).

On 11 December 2024, the High Court of Australia handed down a final judgment in the case. We discuss this further below.

RECAP

The complainant, Owners Corporation, had accused Madarina Pty Ltd (the Developer) and Pafburn Pty Ltd (the Builder) of breaching section 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**).

Section 37 of the DBP Act states that a person who *"carries out construction work"* has a duty to exercise reasonable care to avoid economic loss caused by defects.

Construction work can include:

- performing construction/building work
- preparing designs
- manufacturing a building product
- supervising, project managing, coordinating or having substantive control over the work.

As part of their defences, the Builder and the Developer alleged that other parties (such as the waterproofer, the manufacturer and local council as the consent authority) were proportionately liable for any economic loss. In other words, each party was liable only for their portion of contributed loss.

However, the Owners Corporation claimed that the duty of care in the DBP Act was 'non-delegable', making the Developer and the Builder wholly liable.

CHRONOLOGY OF FINDINGS

In the initial judgment, the Supreme Court found that the Builder and Developer could plead proportionate liability defences.

After the Owners Corporation appealed that decision, the Court of Appeal found that the Builder and Developer could not plead proportionate liability defences.

The proceedings were ultimately appealed to the High Court of Australia.

THE HIGH COURT'S FINDINGS

In a 4:3 split, the High Court dismissed the Builder and Developers' appeal, finding that:

- the Developer and Builder wholly owed the duty of care under section 37 of the DBP Act
- the duty of care was not delegable to subcontractors, consultants or certifiers engaged by or on behalf of the Developer or the Builder.

WHAT WAS THE HIGH COURT'S RATIONALE?

The Court found that:

- Parliament had introduced the DBP Act to respond to the *"crisis of confidence in respect of the safety and quality"* of construction works in New South Wales, particularly because of building defects in incidents such as Mascot Towers.
- If the duty of care was delegable, it would create a collective liability, which would contradict the intention of the DBP Act by complicating redress.
- The duty alleged to be owed by the council and principal certifying authority remains non-delegable:

  "... even if the source of these alleged duties on the part of the local council and the principal certifying authority is not s 37(1) of the DBPA (as pleaded), but is the common law (as also pleaded in respect of the principal certifying authority), ***the duties alleged to have been owed by the local council and the principal certifying authority remain within the scope of the non-delegable duties each appellant is pleaded to owe under s 37(1) of the DBPA and are therefore subject to the operation of s 5Q of the CLA, making each appellant vicariously liable for any failure by the local council or the principal certifying authority to have exercised reasonable care in the carrying out of the tasks entrusted by the appellants to them."***

1. Neither the Developer or the Builder could discharge their duty by delegating the 'construction work' to someone else. The Court said:

   "Contrary to the appellants' submissions, ***the duty created by ss 37(1) and 39 of the DBPA is precisely the kind of non-delegable duty which s 5Q of the CLA contemplates****....*

"Neither Madarina nor Pafburn, however, could discharge, exclude, or limit their s 37(1) duty by delegating or otherwise entrusting their 'construction work' to another competent person. On that basis, ***the liability of each of Madarina and Pafburn is 'as if the liability were the vicarious liability of' them for the whole of the construction work in relation to the Building."***

2. It is not self-evident that a certifier or local council is 'a person who *carries out construction work*' under the DBP Act.

WHAT DOES THIS MEAN FOR COUNCIL?

When push comes to shove, head contractors and developers can be wholly liable for breaches of the statutory duty under the DBP Act and cannot delegate this duty to downstream contractors.

However, the question of whether a council is captured by the scope of the DBP Act remains open.

It's all go for FOGO – new Act creates new demands on councils for managing organic waste

Authors: Dennis Loether & Monique Lewis

Source-separated collection of food organic and garden organic (FOGO) waste has been discussed for many years as a way to reduce both stress on landfills and environmental harm. In fact, the NSW Waste and Sustainable Materials Strategy 2041 includes, among its targets, halving the volume of organic waste going to landfill by 2030.

Recently passed legislation now places obligations on councils to help realise that goal.

The Protection of the Environment Legislation Amendment (FOGO Recycling) Bill 2025 (FOGO Bill) amends the *Protection of the Environment Operations Act 1997* (POEO Act) to require source-separated collection of food organics and garden organics waste from households and businesses.

It is the first State Act of its kind and requires fundamental changes to local councils' waste collection and management.

WHAT'S CHANGED?

The FOGO Bill introduces a new chapter 5A to the POEO Act. One section, 170E, requires local councils to:

- Provide each household in their area with an organic waste collection bin (or separate food organic and garden organic bins) large enough to hold the average amount of FOGO waste generated by a household of that type.
- Ensure that food organic waste is collected and transported away at least once a week. Garden organic waste may be collected and transported at a frequency each council considers appropriate.
- Ensure that FOGO waste is not mixed with non-organic waste during transportation.

PENALTIES FOR NON-COMPLIANCE

From 1 July 2030, non-compliance may attract a penalty of up to $500,000, and a further $50,000 for each day the offence continues.

Importantly, councils are not required to comply with the provisions of section 170E, and an offence is not committed against section 170E for failure to comply, before 1 July 2030.

EXEMPTIONS

The Act contains provisions to support councils in meeting the additional responsibilities imposed by the FOGO Bill.

The new section 170I provides the EPA broad powers to grant exemptions from a provision contained in the new chapter.

An ongoing exemption may be granted where a local council is unable, for example, to meet a particular provision due to remoteness or lack of infrastructure. A temporary exemption may be granted where councils require additional time to respond to the changes required by the FOGO Bill.

However, as the requirements do not take effect until 1 July 2030, councils are encouraged to use that time to understand and prepare to respond effectively.

Households serviced by a private waste certifier rather than a local council will be dictated by the business mandate provisions in section 170F, which also take effect from 1 July 2030.

CHALLENGES FOR COUNCILS

It is up to each council whether FOGO waste is collected in separate food and garden organic bins, or one combined bin. Some councils that already collect garden organic waste may use those bins to include food organic waste, assuming bin capacities are sufficient.

However, one challenge is that food organic waste must be collected weekly. Food organic waste makes up more than one-third of NSW household waste (i.e. red bin waste). The separation of food organic waste from non-organic waste collection is likely to affect required bin sizes for many councils.

Ensuring that FOGO waste is not contaminated by non-organic waste will also pose a challenge. Councils will likely need to invest in ratepayer education to minimise its occurrence and comply with the legislation.

Also challenging will be managing food organic waste collection in multi-unit dwellings where curbside or bin room areas are limited. Councils may need to explore using small bins or kitchen caddies in these locations.

Councils will also need to consider the new legislative requirements when assessing development proposals, including provision for bin storage and curbside collection areas.

SUMMARY

The FOGO Bill provides clear future requirements and responsibilities on councils in managing the collection and transportation of FOGO waste.

We recommend councils study the FOGO Bill closely and adjust their plans and policies to ensure compliance and avoid the possibility of penalties.

New Privacy Act introduces statutory tort for serious invasion of privacy.

Local councils not immune from action.

Authors: Jason Sprague & Juan Roldan

In December last year, almost two years after a review of the *Privacy Act 1988* (Cth) (Privacy Act) by the Attorney-General, the *Privacy and Other Legislation Amendment Act 2024* (the Act) was passed.

The Act amended the Privacy Act with its most controversial and significant amendment – the introduction of a statutory tort for serious invasion of privacy.

TORT FOR SERIOUS INVASION OF PRIVACY

The new tort confers on individuals a cause of action directly against the party responsible for a serious invasion of privacy which will have implications for local councils.

Currently, an individual's rights for alleged privacy breaches by a local council are limited to the frameworks set out in *the Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW).

Individuals lodge a complaint with the NSW Information Privacy Commissioner which then conducts a review. A similar process is also in place at the Federal level under the Privacy Act.

These review processes have been viewed as inadequate remedies for individuals with the idea of a tort floated over a decade ago by the Australian Law Reform Commission. The 2016 New South Wales Legislative Council Standing Committee on Law and Justice also considered it, as did the Australian Competition and Consumer Commission in 2019. Now, after a decade of debate, the new tort is set to come into force on 10 June 2025.

APPLICATION TO LOCAL COUNCILS

Although the tort sits under the Privacy Act, a person does not need to be an Australian Privacy Principles (APP) entity, as defined by that Act, for the tort to apply to them. This means any individual or organisation, such as a local council, can be directly sued under the tort.

In this article we look at how this might impact local councils.

KEY CONCEPTS

Real persons

A plaintiff must be a natural person. Companies cannot sue under this tort.

No damage

Under most legislation, a person needs to show loss or damage if they bring an action, but they do not need to under this tort.

Misusing information

The tort covers more than just 'personal information', as defined in the Privacy Act. Instead, it uses this broader definition:

> *"misusing information" that relates to an individual includes, but is not limited to, collecting, using or disclosing information about the individual.*

There is no reference to a person being able to be identified from the information. This subtle but potentially substantial difference may increase the situations to which the tort can be applied.

When considering what information is captured by the tort, it may be useful to think in terms of 'private information'. While such information may not be directly linked to an individual, it may arise in a context where the individual could reasonably expect that, having provided the information, it will not be made public.

This might sound like a confidentiality rather than a privacy issue. However, confidentiality is an ethical duty to keep information secret, while privacy is the right to freedom from intrusion into one's personal matters or information. This means, even if a duty of confidentiality isn't present, the requirement to maintain privacy can still apply. It also means both duties could apply with two causes of action arising from the same disclosure breach.

Timing

A claim must be brought by the earlier of:

- one year after the day on which the person became aware of the invasion of privacy, or
- three years after the invasion of privacy occurred.

In some situations, the period may be extended to up to six years after the day of the invasion of privacy. However, the individual must prove it was not reasonable in the circumstances for them to have commenced the claim earlier.

Minors

A person under 18 who suffers a serious invasion of privacy is not prevented from bringing a future claim if they do so before their 21st birthday. This has been included because young people are not expected to make the difficult decision to commence legal proceedings.

Elements

For a claim to succeed, an individual needs to prove:

Element	Comment
An invasion of privacy has occurred by either: (a) intruding on their seclusion, or (b) misusing information that relates to them	There are two types of serious invasion of privacy: 1. Intrusion on seclusion: This includes not just physical intrusions but also watching, listening to, or recording a person's private activities or affairs. For instance, security cameras could raise privacy issues if their use goes beyond what is necessary for security and safety. 2. Misusing information: This includes collecting, using, or disclosing information about an individual in a manner that is inappropriate. It also includes storing, changing or interfering with information.
The individual would have a reasonable expectation of privacy in all of the circumstances	This is assessed case by case and will depend on the circumstances of the invasion. Factors to consider include: > the means used to invade the person's privacy, including the use of any device or technology > the purpose of the invasion of privacy > the person's attributes including their age, occupation, or cultural background > the person's conduct, including whether they invited publicity or manifested a desire for privacy > the nature of the information, including whether the information related to intimate or family matters, health or medical matters, or financial matters > how the information was held or communicated by the individual > whether and to what extent the information was already in the public domain Data about children is generally viewed as requiring more protection than data about adults. The level of risk is best illustrated by a 2020 report by VicHealth which reported that by the age of 13, an estimated 72 million data points will have been collected on each child.
The invasion was either intentional or reckless, rather than merely negligent	A claim cannot be substantiated if the invasion of privacy resulted only from negligence. Excluding negligence as a trigger sets a high threshold before a person can bring this cause of action. However, it does not mean that an individual could not bring a negligence action as an alternative remedy. The term 'recklessness' has an established meaning found in the Criminal Code. A person is reckless with respect to a circumstance or result if: > they are aware of a substantial risk that the circumstance exists, will exist, or will occur, and > having regard to the circumstances known to them, it is unjustifiable to take the risk.
The invasion was 'serious'	This requirement is meant to discourage trivial claims. For example, imagine a council sends an e-mail to ratepayers regarding changes to waste management and ratepayers' emails are disclosed in the email. While this is a privacy breach, it is not as serious as leaking financial details or health records, even if it is reckless. When deciding how serious an instance is, the court will look at several factors, including: > the degree of any offence, distress, or harm to dignity that the invasion of privacy was likely to have caused the average person in the same situation > whether the person knew, or should have known, that it would be likely to offend, distress or harm the dignity of the person > if the invasion of privacy was intentional, such as whether the person was motivated by malice.
The public interest in the person's privacy outweighs any countervailing privacy interest	The court must also balance other important public interests, such as: > freedom of expression, including political communication and artistic interest > public health and safety > the prevention and detection of crime and fraud. Data breaches are on the rise and information may need to be shared with law enforcement to help them investigate a crime. Other public interests mentioned in the Act are: > freedom of the media > the proper administration of government > open justice > national security. An important aspect of the public interest test is that the defendant is not required to provide evidence in this regard. Instead, the onus of proof lies on the plaintiff. In addition, courts will be able to take judicial notice of public interest matters.

Defences

The Act provides a range of defences against a serious invasion of privacy claim:

- **Performance in good faith:** Commonwealth agencies and State and Territory authorities and their staff are exempt if the invasion of privacy occurs in the good faith performance or purported performance of a function, or exercise or purported exercise of a power, of the agency or authority. The definition of '*State and Territory authority*' is in section 6C of the Privacy Act and covers local councils.
- **Lawful authority:** If the invasion was required or authorised by Australian law or court order. This can relate to following work health and safety laws or mandatory reporting rules.
- **Consent:** If the individual (or someone who had the right to act on their behalf) agreed to it, either clearly or by implication. The implied consent principle is analogous to that under applicable privacy laws. However, it remains to be seen if this will be construed in a similar way or more narrowly.
- **Necessity:** If the invasion was necessary to prevent a serious threat to someone's life, health, or safety. While this might be more relevant to healthcare professionals, it can also apply in emergencies at workplaces. For example, entering a bathroom to assist someone needing urgent medical attention.
- **Incidental to defence of persons or property:** If the invasion was incidental to exercising a lawful right to defend someone or something, and it was proportionate, necessary, and reasonable.
- **Defamation defences:** Defences relating to defamation include absolute privilege, publication of public documents, and the fair reporting of proceedings of public concern.

Remedies

If a claim is successful, the court can grant several remedies:

- Injunctions, including an interim injunction which restrains an invasion of privacy at any stage of proceedings
- Damages up to $478,550, including exemplary damages when there is a flagrant disregard for the law. This is to deter others from engaging in similar egregious behaviour
- Account of profits
- Apology order
- Correction order
- Destruction or delivery-up of materials order
- Declaration that the plaintiff has seriously invaded the plaintiff's privacy.

WHAT NEXT AND WHAT YOU CAN DO

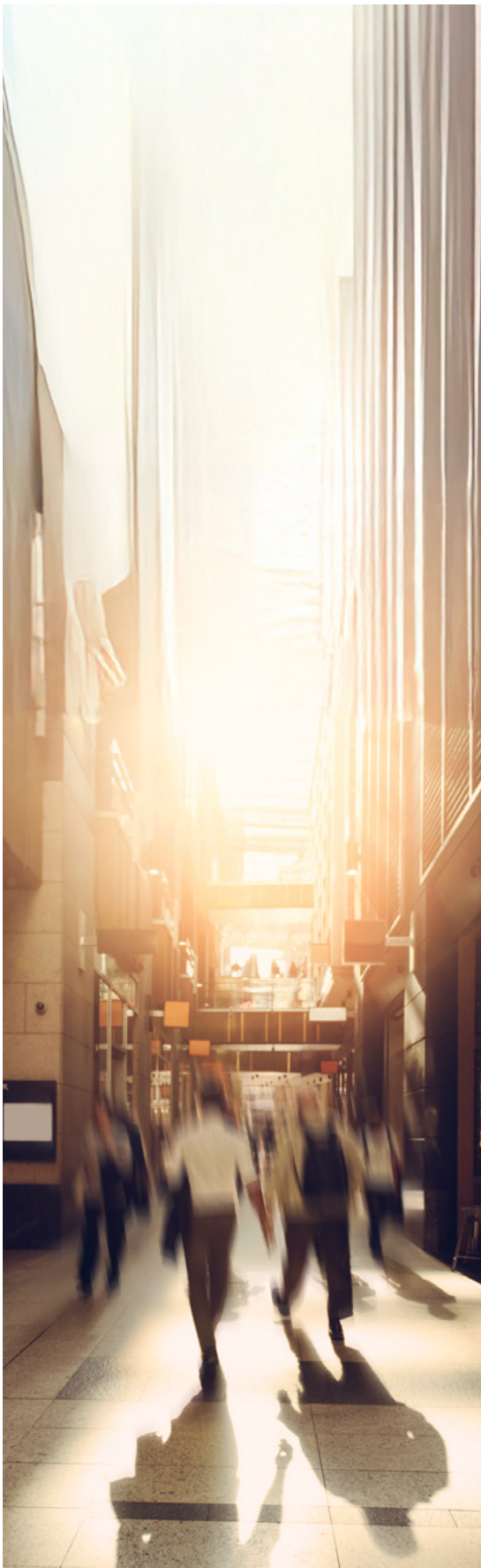
While the new tort may cause alarm, the requirements for a claim show significant hurdles an individual must overcome. Additionally, the defences and exemptions available to government agencies make a tsunami of successful claims unlikely.

In addition, the Act contains a mechanism to determine early if an exemption applies. This will allow courts to deal with the threshold issue of exemption before the parties spend significant time and resources preparing for trial.

However, this may not deter some individuals from 'having a go' and it remains to be seen how the courts will approach the new tort and if their decisions will make it easier to bring claims.

With the tort set to apply from 10 June 2025, local councils should be reviewing their policies and procedures for handling personal information and any activities which may 'invade' a person's privacy. Consideration should be given to changes that may reduce the chances of being subject to a claim. Councils should also review their privacy complaint handling procedures and incorporate strategies and approaches for the handling of claims made under the new tort which will inevitably come.

We are available to discuss strategies with you and review your existing practices.



Invoice fraud - who bears the cost when a scam is successful?

Author: David Creais

Invoice scams, where a fraudster impersonates a legitimate supplier with a fake invoice and false bank account details, are a fact of the modern commercial landscape.

Security measures such as telephoning the supplier to confirm remittance details are now standard practice.

But who bears the loss if payment for a legitimate invoice is made to a fraudster's bank account and is irrecoverable?

In a 2020 article we noted the absence of Australian authority on the point. Since then, two reported Australian decisions have altered that, the latest being *Mobius Group Pty Ltd v Inoteq Pty Ltd*, a decision of the District Court of Western Australia.

BACKGROUND

Mobius Group completed electrical work for Inoteq and invoiced the company a total of $235,400.29 in March and April 2022.

A fraudster hacked Mobius Group's email account and used it to send a fraudulent email to Inoteq noting a change in bank details. That email attached a sham invoice with the purported new details.

An Inoteq staff member called Mobius to confirm the details but was unable to do so because of a poor phone line.

Inoteq sent a follow-up email requesting proof, which the scammer intercepted and replied to from the Mobius Group email account, confirming the change.

Inoteq then transferred the payment, unknowingly, to the fraudster's account.

When the fraud was discovered, Inoteq refused to make a second payment to Mobius Group, maintaining it had fulfilled its obligation by making payment, even if the funds were misdirected.

Mobius Group sued Inoteq for the unpaid sum, arguing that the contractual obligation to pay remained, despite the fraud.

THE JUDGMENT

The Court held that Mobius Group owed no duty of care to take reasonable steps to avoid economic harm to Inoteq arising from unauthorised communications being sent from its email account.

While phoning Mobius Group to confirm the change to the banking details was clearly prudent, the Court said the call was inadequate in all the circumstances and should have prompted a subsequent call.

Further, Inoteq was better placed to take precautions to protect itself from the fraud than Mobius Group. While it may have been vulnerable to loss if Mobius Group's email account was compromised, Inoteq had the ability to protect itself against that vulnerability. It failed to do so.

In squarely placing responsibility for the loss on Inoteq, the Court said: *This case is a salutary reminder for those paying money to ensure the veracity of any banking details provided.*

TAKEAWAY

Councils make payments to a large number of suppliers in any given financial year. There is every prospect that a council will face multiple attempts at false invoicing.

Rigorous protocols, including phone calls, should be implemented to ensure banking details for payment provided by the supplier are genuine.

Otherwise, on current authority, in most cases the council will be liable for any payment made by a mistake induced by fraud.

Provisions might also be included in contracts to shift the risk to the supplier. However, in a standard form contract a council would need to make the provision as balanced as possible to avoid it being deemed an unfair contract term when dealing with a small business (annual turnover under $10 million).

As always, prevention is better than cure.

Interfering with rights of access

Authors: Pree Silva Das & Melissa Potter

A BALANCING ACT WHERE REASONABLENESS MUST PREVAIL

The NSW Supreme Court recently heard two cases relating to rights of carriage way and rights of access, and the activities that may be carried out by the parties benefiting from or burdened by these easements.

In both cases, importance was placed on ensuring that:

- the owner of the land burdened by these rights (the servient tenement owner; henceforth **"the burdened owner"**) does not substantially interfere with a benefitted party's enjoyment of them
- the party benefitting from these rights (a prescribed authority or the dominant tenement owner; henceforth **"the benefitted owner"**) does not engage in activities that unreasonably interfere with the servient tenement owner's use of the land.

WHAT CONSTITUTES SUBSTANTIAL INTERFERENCE WITH ENJOYMENT OF AN EASEMENT?

In *Condran v Collis* [2024] the Court focused on whether the actions of the burdened owner amounted to wrongful interference with the benefitted owner's right of access to such a degree as to render the burdened owner liable for the tort of nuisance.

The case visited principles from previous caselaw. Wrongfully interfering with an easement, including by obstructing use of a right of way, may be actionable in nuisance depending on the degree of obstruction. However, for a private right of way, the obstruction must be a *'real and substantial interference'*.

As a starting point, it is not unreasonable for a benefitted owner to experience slight inconveniences when accessing the right of way. An interference is not considered real and substantial if access can be practically and substantially exercised as conveniently after the obstruction as before the obstruction occurred.

Interference need not be physical to be considered substantial. It can include acts that create danger, impede the benefitted owner's freedom to decide to exercise the right of access or impose a risk or cost on the benefitted owner for exercising their right of access.

In *Condran v Collis*, the placement of CCTV surveillance equipment along the right of way and the installation of gates were not determined to be real and substantive interferences. However, the Court ruled that the following actions of the burdened owner did constitute real and substantial interference:

- vulgar abuse and aggressive conduct towards the benefitted owners when using the right of access
- dumping tyre wrecks and other waste near the right of access
- regularly tightening the chains on the gates across the right of access over a prolonged period
- imposing a risk or cost on the benefitted owner for exercising their right of access
- planting trees near or within the right of access.

RESPONDING TO SUBSTANTIAL INTERFERENCE FROM BURDENED OWNERS

Wrongful interference with a right of access may be addressed by removing the obstruction or by action in court.

If a benefitted owner decides to remove the nuisance, they must act reasonably in doing so. Permitted actions include entering the land to remove the obstruction.

In practice, however, courts have discouraged such attempts, which risk breaches of the peace. A better approach is to give the burdened owner notice of an intention to remove the nuisance.

The Court maintained this line in *FitzGerald v Foxes Lane (NSW) Pty Ltd* [2024], stating that while an easement grants the benefitted owner a right to repair and make improvements, exercising those rights must be exercised consistently with the benefitted owner's reasonable use and enjoyment of the easement, and must not hinder the burdened owner's land. Any such action must also be reasonably necessary for the benefitted owner to enjoy use of the easement.

REASONABLY NECESSARY FOR AN ENJOYMENT OF AN EASEMENT

A benefitted owner's right to repair and make improvements is confined to what is reasonably necessary for their enjoyment of the grant of easement. What is reasonably necessary is assessed in light of all the circumstances.

In *FitzGerald v Foxes Lane (NSW) Pty Ltd* [2024], the benefitted owner received a right of carriageway. To improve the right of carriage, the benefitted owner proposed to build an unsealed crowned road 100-300mm high with table drains and to then undertake periodic grading activities on the site.

The Court considered the following when determining whether this was reasonably necessary:

- physical characteristics of the burdened owner's land and benefitted owner's land
- the historical and current condition of the right of carriageway and whether 4-wheel drive vehicles could pass through the right of carriageway in its existing condition
- whether the works proposed by the benefitted owner could be accurately assessed
- whether, once the proposed works have been completed, the right of carriageway would interfere with the burdened owner's use and enjoyment of their land.

INTERFERENCE WITH A BURDENED OWNER'S USE OF LAND

The Court placed significant weight on ensuring that the benefitted owner's work on the burdened owner's land caused no unreasonable interference with the land or undue inconvenience to the burdened owner.

The benefitted owner's right of way does not entitle them to have the entire strip of land in the right of way cleared of any obstruction. The burdened owner remains the owner of the land, and may use it in any way and maintain on it any structure so long as this does not create a real substantial interference with the enjoyment of the right of way. If sufficient space is left free for passage without any real substantial interference with the right to pass and re-pass, the benefitted owner cannot insist on more.

If a benefitted owner does anything that constitutes an excessive use of a site of easement, that may amount to a nuisance and a trespass on the burdened owner's land. If use of burdened owner's land is carried out unreasonably and causes unreasonable damage to the land, it may be restrained as a nuisance.

KEY TAKEAWAYS

These cases highlight the balancing exercise the Court undertakes between giving benefitted owners sufficient power to enjoy their right of way without materially affecting the burdened owner's right to use their own land.

Interference by either party with the other's enjoyment of their rights may be actionable in nuisance. The Court focuses on the importance of "*keeping the peace*" between parties and exercising reasonableness when enjoying their rights in order to maintain harmony.

Industrial action in action

Author: James Mattson

We are seeing an increase in industrial action by unions and workers in the form of work bans through to full-on strikes. Unions see industrial action as the 'go to' device to pressure employers to meet industrial and other demands. Its increased use is having an impact on businesses and the community.

The New South Wales Industrial Relations Commission has, over the last year, issued significant decisions dealing with industrial action. In this article, we examine some of them and the lessons for NSW employers.

THERE IS A LEGITIMATE MEANS TO RESOLVE DISPUTES

The Industrial Relations Act 1996 (NSW) has a simple process to deal with industrial action which can be summarised as follows:

Both union and employer can lodge a dispute under section 130 of the IR Act. The Commission will seek to resolve the dispute through conciliation and arbitration, and has powers such as issuing a direction or recommendation, or making an award, or even issuing dispute orders.

The IR Act has a clear process to effectively resolve disputes without the need for recourse to industrial action.

DECISION 1: THE FOLLY OF IGNORING THE INDUSTRIAL RELATIONS COMMISSION

In September and November 2024, the NSW Nurses and Midwives Association threatened to take (and ultimately took) strike action in the form of one 12½-hour strike and two 24-hour strikes.

Those strikes took place against the backdrop of the Association's campaign for 15% wage increases. It had lodged an industrial dispute with the Commission, seeking conciliation and arbitration of its wage claim. But rather than follow the process established by the IR Act, the Association used strike action to seek to extract a favourable Government offer.

The Health Secretary applied to the Commission for dispute orders, firstly to prevent the 12½-hour strike. A recommendation was made not to engage in the strike; the Association refused to comply. In *Health Secretary, Ministry of Health v NSW Nurses and Midwives' Association* [2024] NSWIRComm 3, the Vice President of the Commission – the following business day – granted disputes orders for four reasons:

- the fact that the Commission's extensive conciliation and arbitration powers were yet to be utilised to resolve the dispute was *"a significant factor in favour of issuing the dispute orders in this case"*
- the Association's refusal to comply with the Commission's recommendations
- the planned industrial action having adverse outcomes for patients and care, disruption to the provision of essential services, health and safety risks, and broader implications for the public
- under the relevant award dispute resolution process, normal work must continue and there must be no stoppages of work, lockouts or any other bans or limitations on the performance of work.

In respect of the subsequent 24-hour strikes, the President of the Commission said in *Health Secretary, NSW Ministry of Health v New South Wales Nurses and Midwives Association (No 2)* [2024] NSWIRComm 9, when making further dispute orders:

> *It is my view that the Nurses Association, in determining to announce further industrial action and to not proceed to engage in a process to allow the disputes to be set down for arbitration expeditiously, is acting contrary to the commitment it gave to the Commission...*
>
> *...there is, as the Nurses Association is aware, a solution that does not involve industrial action, namely, to bring the claims of nurses to this Commission and*

allow it to do its job as the independent umpire.

Despite those dispute orders, on each occasion the Association continued to organise and implement the strikes, causing disruption to health services.

Non-compliance with dispute orders can lead to further proceedings for the imposition of a penalty. Those proceedings were commenced by the Health Secretary; the Industrial Court has reserved its decision on that matter.

DECISION 2: MASS RESIGNATIONS MAY CONSTITUTE INDUSTRIAL ACTION

In an effort to procure a substantial wage increase, the Australian Salaried Medical Officers Federation (ASMOF) was involved in the mass resignation of psychiatric staff specialists from NSW Health. In *Health Secretary v Australian Salaried Medical Officers' Federation (New South Wales)* [2024] NSWIRComm 1081, the Commission was required to consider, for the first time, whether mass resignations constituted industrial action.

In October 2024, the Health Secretary become aware that psychiatrists were planning to resign *en masse*. ASMOF had prepared a proforma letter of resignation for psychiatrists to sign. The plan was for ASMOF to hold these resignations to deliver to NSW Health at a later time as part of its industrial campaign for more pay.

Despite agreement to not advise, instruct or recommend psychiatrists to resign, by mid-December 2024, mass resignations were imminent. ASMOF refused to comply with the Commission's recommendation to tell its members who had resigned that they should reconsider their decision, and to tell those considering resignation that they should not go ahead.

ASMOF said it could not proactively advocate for a position of not resigning and that it was not involved in organising the resignations. It argued that employees are entitled to resign (and it is not industrial action to resign).

Senior Commissioner Constant said, *"I am satisfied, however, that this campaign is industrial action and the action can be said to be "industrial" in character... I reiterate that it is not the action of resignation by the individuals that is the industrial action but the collective and organised nature of the action in support and furtherance of the union's and the staff specialists' industrial demands"*.

Unfortunately, WhatsApp messages discovered in the proceedings revealed that ASMOF's alleged passive support of mass resignations was, in fact, active. Examples of ASMOF's involvement included drafting the proforma resignation letter and collecting the letters to forward on.

Dispute orders were made seeking to prevent the resignation of psychiatrists.

DECISION 3: A DECISION TO NOT ISSUE DISPUTE ORDERS

The Commission's power to make dispute orders is discretionary; there is no presumption that in the face of industrial action an order under section 130 of the IR Act will be made. Equally, however, there is no presumption against the making of dispute orders. It is often said that issuing dispute orders is a serious step and not to be taken lightly.

In *Secretary, NSW Health in respect of HealthShare NSW v Health Services Union NSW* [2023] NSWIRComm 1085, Commissioner Muir refused to issue dispute orders, despite the employer properly engaging the Commission's processes to resolve the dispute.

In this case, the Health Services Union members employed at HealthShare's Patient Transport Service imposed bans from May 2022, impacting patient transfers in New South Wales. The union purportedly did so on the grounds of safety and refused to work as directed by HealthShare.

Rather than take disciplinary action against the workers, HealthShare engaged the Commission to resolve the dispute by conciliation, and then arbitration. Conciliation failed, with the union continuing the work bans despite the lack of safety issues.

The evidence demonstrated that the bans were causing significant delays in non-emergency patients being transported to medical appointments and between facilities. Some patients were waiting several hours to be transferred, increased use of private providers was adding to operational costs, and the rostering and booking of patient transfers was becoming extremely complex.

Commissioner Muir said, *"The* [work] *process is safe. It is approved by the proper people and it is not the role of the Commission to judge that. I should say that the process appears to the Commission to be safe"*. There was no issue that the direction to work as required was unlawful or unreasonable.

Ultimately, *"the fact that the employer has chosen to use the [IR] system had considerable force, but it did not, in the end, persuade the Commission that it should exercise its discretion"*. The Commission said it wanted *"numbers, dollars and time"* of the impact of the work bans to be swayed to grant the orders.

LESSONS LEARNT

Bartier Perry acted in each of these cases for the Health Secretary. Key lessons include:

- Always, when appropriate, engage with the legitimate processes of the Commission.
- When industrial action is occurring, be prepared to act quickly.
- Consider whether a recommendation or direction will be sufficient to resolve the dispute or whether dispute orders may be needed in arbitration. Prepare the orders you need to resolve the dispute.
- Gather cogent and clear evidence of the industrial action and its organisation. You need to identify the industrial nature of the action and who is to be the subject of the dispute orders (usually the union).
- Gather cogent and clear evidence of the impact of the industrial action, including, where possible, quantification of its impact.
- Given dispute orders are not lightly made, consider other options to address the industrial action, like disciplinary action.

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

ARTICLES

We distribute electronic articles on a weekly basis which detail legislative and case law changes and industry developments as they occur, and often before they occur.

We encourage our clients to re-publish our articles across their internal communication platforms, as appropriate.

SUPPORT OF INDUSTRY AND COMMUNITY

Educating and being involved with our relevant industries is important both to us and to councils. It means together we are always current in an often-changing environment – not only with the law but with industry experts, current trends and broader industry information. We work with the various players in the industry to ensure we bring value back to councils.

Bartier Perry regularly sponsors and provides speakers to council-related conferences, including the LGNSW 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).

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- Cracking the code - inside the fight against banking and finance fraud
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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.

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- Corporate & Commercial and Financial Services
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- Building & Construction
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- Estate Planning & Litigation, Taxation and Business Succession

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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