COUNCIL CONNECT

Bartier Perry LAWYERS

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Welcome to the autumn 2024 issue of Council Connect

Welcome to Autumn (where has summer gone?) and our 15th issue of Council Connect. Reading over the articles our team have prepared, I am struck by how much change and growth our local councils manage relentlessly. Maintaining focus on what's important while leaping the hurdles that appear is no easy task.

Change seems to be 'the new black' and an aspect of life and work that we all juggle. Head of our Workplace Law and Culture Team, Darren Gardner and Associate Hannah Lawson talk about changes arising from new Industrial Relations legislation that will bring about a new (or new again) Industrial Relations Court in NSW.

Unfair contract terms also come under our team's microscope in two of our articles that look at changes arising from the unfair contract terms reform that councils need to be aware of. These have broader implications than what first meets the eye.

David Creais and Breitil Sulaiman's article also discusses changes resulting from recent Supreme Court decisions on the *Design and Building Practitioners Act 2020* (DBP Act) which will make it easier for councils to prosecute contractors for defective work and design.

As well as legal-related change, councils are constantly challenged to keep pace with population growth – with some LGA's almost doubling by 2040. We hear from many councils – both metropolitan and regional – that their number one priority is to ensure housing (and affordable housing) into the future. Councils are working hard to balance housing targets and the development of supporting infrastructure with maintaining their green space. Dennis Loether and Monique Lewis' article discusses recent changes to the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP). and the potential impact on residential housing developments.

Thank you to Gail Connolly, CEO of City of Parramatta who shared her time with us recently to talk about how proud she is of her LGA. Gail talks about her council's focus on ensuring the community 'has access to the services they deserve' and I know this is a focus for all our council clients – as populations increase so do community needs. Following successful projects including the restored Town Hall and the Parramatta Aquatic Centre, it's easy to see why Gail is so proud of her LGA. I can't wait to take my boys to visit the coolest pool in town at the Aquatic Centre – it is a state of the art facility that will enrich the community for many years to come.

At Bartier Perry we look forward to continuing to work with you on the projects that make a difference. Our team are always available if you want to run an idea by them or discuss a potential problem. Our local council team are in the initial stages of planning our Local Government Forum later this year – if there are topics you would like to hear from us on please don't hesitate to get in touch.

Warm regards,
Riana

INTERVIEW WITH GAIL CONNOLLY
CEO, CITY OF PARRAMATTA

What are some of the opportunities and challenges for your Council in delivering on the commitments made in its Community Strategic Plan 2018-2038?

Our CSP gives us a roadmap to make Parramatta the best place to live, work and do business – and I'm proud of how we're tracking on that mission.

Our central location and diverse culture provide a unique stage for Australia's growing economy and attracting global talent. We're already home to five universities that attract students from all over the world as well as a world-class medical, education and research precinct at Westmead and we see opportunities to build on that.

Parramatta is a hub of learning, ideas and collaboration – a place where people come for a life-defining education, to build their business to their next level and collaborate on ideas that will shape industries for decades.

Our biggest challenge is keeping up with growth. By 2041, our population is expected to almost double to 446,000 people. We're working to make sure they have access to the services they deserve – whether that's Council services like great community infrastructure or advocating to State and Federal Governments for the transport, health and education services a City of that size needs.

With Parramatta the geographic centre of Sydney and a population forecast of nearly half a million people by 2041, where does Council see the future growth opportunities for housing across its LGA?

Parramatta is on track to exceed its housing targets and working to ensure we meet the growing need for housing in our area while preserving the character of our neighbourhoods.

We've done the hard yards to rezone land and increase densities in growth precincts where it makes sense – and we'll keep doing that. For example, we lobbied the State Government to rezone Church St North which will create the potential for 1800 more homes close to a light rail line.

We're also trying to increase affordable housing supply in key precincts like Westmead, Camellia and Granville and even considering the potential for council-owned land to deliver affordable rental dwellings.

It was great to see Council's award-winning aquatic centre open recently. What other projects and/or initiatives in Parramatta are you proud of and why?

How long have you got?

When we opened the Parramatta Aquatic Centre (PAC), I warned Bondi Icebergs they were no longer the coolest pool in town. And I was right! In its first five months, the PAC has had more than 300,000 visits, hosted live TV crosses and even a fashion shoot for Marie Claire.

We are committed to building infrastructure for our community that is not only world-class but smart and sustainable. PAC, for example, has an automated, naturally ventilated façade that uses data from the Bureau of Meteorology to adjust for light and fresh air, reducing dependence on air-conditioning. Our iconic community, cultural and civic hub, PHIVE, recently became the first council building in the State to have received a green design rating of six stars. And when I say world-class infrastructure I mean it – PHIVE was last year recognised as one of the best new libraries in the world.

We recently reopened our much-loved Town Hall after a $30 million restoration. Situated at the entrance to Parramatta Square, it's the perfect link between our past and present and a reminder of what's possible over time.

I'm also excited about progress on our Civic Link project which will create an iconic green pedestrian boulevard that runs through the spine of our CBD from the river to Parramatta Square. Great cities of the world deserve a grand promenade – this will be ours.

What does Council foresee in terms of rejuvenation of the Church St corridor and the restaurant precinct?

We're working hard to realise the potential of this precinct as new transport connections like Stage One of Parramatta Light Rail come online.

Church St links so many of the things we want to showcase about our City – its diverse food scene and growing night-time economy, its cultural offerings and the river.

We pushed the NSW Government to rezone Church St North which will allow up to 1800 new homes to be built right on the doorstep of Sydney's second largest CBD and just a short light rail trip from jobs and one of the best 'eat streets' in the State.

In the coming months, we'll land on a design for the new Riverside Theatres which will be the new home of performing arts in Western Sydney and a key anchor in our growing cultural precinct.

What do you enjoy most about being CEO at City of Parramatta?

Parramatta is full of untapped potential – and the chance to shape a city that will be as big a global force as Parramatta will be doesn't come around very often.

One of my favourite things to do is just take a stroll around the City and see how it's changing. I look at Riverside Theatres which is set for a major redevelopment that will create a state-of-the-art performing arts centre for the West or Powerhouse Parramatta, the biggest investment in a cultural institution since the Sydney Opera House. I look at the work underway on Metro West which will link Sydney's two biggest CBDs in just 20 minutes and Stage 1 of Parramatta Light Rail which is only months away from operating and will forever change the way people move around our city. I look at the growing presence of the country's top 500 companies and government departments seeking to establish a home here because they see the need to be positioned in Sydney's true heart. There is a buzz in Parramatta you just don't see elsewhere.

People will look back on this period as a defining time in Parramatta's history. We're not just delivering a physical legacy of critical infrastructure but the thought leadership that will position our city for the next 30 years. That's a very good reason to jump out of bed in the morning and make the most of every minute in the day.

Reformation of the Industrial Court of NSW and more

Authors: Darren Gardner and Hannah Lawson

This has certainly been the season of industrial relations and workplace legislative reform. We have already seen three recent tranches from the Federal Government, and now a new wave of industrial relations reform in the NSW State system is upon us.

In November 2023, in the first raft of industrial changes for the *Industrial Relations Act 1996* (NSW) (IR Act) NSW State IR Minister Sophie Cotsis introduced the *Industrial Relations Amendment Bill 2023*.

The Bill not only re-establishes the Industrial Court of NSW (which was abolished in 2016), but also delivers on election promises to remove the public sector wages cap, improve recruitment and retention practices, and implement "more cooperative, interest-based" bargaining for the public sector in NSW.

Schedules related to bargaining and other provisions described below came into force in December last year. The provisions relating to the Industrial Court are anticipated to commence early this year.

THE INDUSTRIAL RELATIONS COURT

Once the relevant Schedules of the Bill commence, the Industrial Court will be re-established – almost as if 2016 never happened.

This means that the Industrial Relations and Workplace Health & Safety (WH&S) jurisdictions previously held by the Supreme Court, District Court and Commission, will be transferred to the new Industrial Court.

The Industrial Court will be a superior court of record, equivalent to the Supreme Court of NSW, and will have the jurisdiction to resolve disputes, impose fines, handle WH&S prosecutions and hear underpayment cases. It may also exercise powers of apprehension, detention and punishment of persons guilty of contempt of the Commission.

The Industrial Court will also have an appellant jurisdiction that will allow it to hear proceedings on an appeal or case stated basis from an Industrial Magistrate or other court; or from a member of the Commission exercising the functions of the Commission in Court Session. Appeals will also be possible from the Full Bench of the Industrial Court to the Court of Criminal Appeal concerning criminal proceedings.

The office of Chief Commissioner of the Industrial Relations Commission will be abolished. The offices of President, Vice-President and Deputy President will be reinstated as judicial members of the Commission.

Minister Cotsis claims the changes will encourage quick, cheap and practical resolutions for industrial issues, stating that the members of the Industrial Court will be able to *"switch roles immediately and act in either a conciliation or arbitration role"*, as opposed to what he alleged was *"legalistic, slow and costly"* processes that workers, employers and unions currently experienced in the Supreme Court.

In response, Chief Justice Bell issued a statement on behalf of the Supreme Court's judges insisting that the Minister's observations were *"not accurate and cannot go uncorrected as a matter of public record."* In fact, many industrial relations matters have been dealt with by judgment delivered by the Supreme Court on the same day of hearing or within a matter of days.

WAGES CAP AND MUTUAL GAINS BARGAINING

The Bill has now repealed the wage cap on the public sector imposed by section 146C of the IR Act.

A new Chapter 2A has been inserted into the IR Act, enshrining *"mutual gains bargaining"* for the public sector, and the modernisation of good faith bargaining. Minister Cotsis has framed these amendments as a move towards "more consultative" bargaining, allowing workers and unions to engage with government agencies for mutual gain.

Section 129L of the IR Act lists the following as the application bargaining principles:

- a *"collaborative approach"*
- parties are to *"identify and communicate their key needs"* to...*"maximise...common interests and reconcile...conflicting interests"*
- negotiations are to be *"consensus-seeking"*; and *"parties are to work together"*

- parties are to aim to reach an agreement that meets their *"core needs"*, so that the parties are satisfied
- the bargaining is efficient
- the bargaining creates, maintains or strengthens relationships between the parties
- each party is satisfied their interests have been addressed.

Minister Cotsis also said that the Government hoped that overall, the amendments would allow all parties to *"negotiate effectively with public sector workers to promote potential increases in real wages while returning benefit to the people of New South Wales"*.

Finally, the miscellaneous provisions of the Bill include a requirement that the Industrial Relations Commission take into account the Government's fiscal position and outlook in the exercise of its functions regarding public sector employees.

CONCLUSION

It remains to be seen whether *"mutual gains bargaining"*, heavily influenced by the new Fair Work Ombudsman Anna Booth (formerly of the Fair Work Commission), will have the desired effect of enabling fair wages to be negotiated.

The reformation of the Industrial Court may reinvigorate the industrial relations system in NSW, giving unions more confidence to commence proceedings in a familiar setting with access to enforceable judicial powers. In particular, there may be more union sponsored WH&S proceedings, as unions will perceive the Industrial Court as being more flexible and forgiving in comparison to the strict legal procedures applied in the District & Supreme Courts.

Injured workers – what medical evidence is needed to get a job back?

Authors: James Mattson & Jonathan Yassa

Part 8 of the *Workers Compensation Act 1987* (NSW) allows workers who are dismissed as the result of a work-related injury to seek reinstatement (or reemployment) within two years. In the first instance, an application is made to the employer. If the employer declines, an application may then be made to the Industrial Relations Commission of New South Wales.

In a recent decision, the Full Bench of the Commission confirmed the importance of robust medical evidence if it is to make an order for reinstatement.

But what of the quality of evidence provided to the employer in the initial application?

In *Health Secretary in respect of HealthShare NSW v Betts* [2023] NSWIRComm 1104, the Full Bench explored two important – and distinct – issues:

1. the quality of the medical certification provided by a worker to an employer when first seeking reinstatement; and
2. the evidence on which the *Commission* can subsequently order reinstatement.

In this case, the medical certificates provided by Ms Betts to her former employer were questionable. In fact, Ms Betts was not fit at the time she sought reinstatement. But two years later when her application was heard by the Commission, Ms Betts argued she was now fit and should be reinstated.

Bartier Perry acted for HealthShare NSW in successfully opposing the reinstatement order. The decision provides important principles on the operation of Part 8 of the Act. The outcome also identifies an area for legislative reform.

THE CASE

Part 8 of the Act includes a "gateway provision" (s 241(3)) with the requirements an injured worker must satisfy when seeking reinstatement. This section states:

> *(1) If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.*
>
> *(2) The kind of employment for which the worker applies for reinstatement cannot be more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.*
>
> *(3) The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement.*

Although the application to the employer must be made within two years of dismissal, there is – remarkably – no time limit on when an application can be made to the Commission should the employer refuse the application. Under the Act, the Commission may:

> *… order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), but only if the Commission is satisfied that the worker is fit for that kind of employment.*

THE FACTS

Ms Betts struggled with her managerial role at HealthShare NSW and suffered a significant psychological injury. Ms Betts had been unfit for work from early 2015 and was unsuccessful in return-to-work attempts in 2017. Ms Betts was completely unfit for any work. In fact, doctors said her impairment was permanent and she would never recover sufficiently to perform her role. She was given a whole-person impairment assessment of 19%.

Not surprisingly, Ms Betts' employment was terminated by HealthShare on medical grounds on 17 June 2018. Ms Betts secured a common law damages payment premised on her ongoing incapacity for work.

Less than two years later, on 6 March 2020, Ms Betts applied to be reinstated to her former position, providing a medical certificate from her general practitioner and treating psychiatrist. Ms Betts' general practitioner said, *"Ms Betts has improved and will be fit to attend her normal duty"*.

HealthShare NSW did not accept the certificate, as it did not certify Ms Betts "is fit for employment" as required under s 241(3). When the general practitioner was questioned, she said, *"I cannot in a good conscience provide my opinion on whether Ms Betts should return to full-time work because I do not have sufficient information regarding her mental state and capacity"*.

Ms Betts' treating psychiatrist said in a report on 13 March 2020:

> *I saw Ms Betts today for a review. She is mentally stable and functioning well. She is working two days and needs to be cognitively challenged and needs stimulation. She is very motivated and her confidence is good.*
>
> *She has recovered from her previous episode and resumed full functioning.*
>
> *I am of the opinion that she is fit to resume her pre-injury role and hours as a quality co-ordinator on a full time basis from medical perspective.*

The psychiatrist also said Ms Betts *"has been working in a highly stressful work environment and proven to function effectively without relapses"*.

HealthShare NSW investigated and discovered:

- there was little evidence of Ms Betts obtaining meaningful medical treatment for her psychological condition after her dismissal in 2018
- Ms Betts obtained a low-level administrative role, working part-time, but appeared to struggle in that employment
- Ms Betts experienced relapses in her condition and had a dependence on alcohol to cope with anxiety and stress. This was impacting her psychological condition.

HealthShare declined to reinstate Ms Betts. Ms Betts then applied to the Commission in April 2021, over a year later, seeking orders for reinstatement and backpay.

FIRST INSTANCE DECISION

At first instance, Commissioner Muir ordered HealthShare to reinstate Ms Betts to her position, though with no backpay (*Betts v Health Secretary in respect of HealthShare* [2023] NSWIRComm 1054).

Commissioner Muir concluded that based on the medical evidence, Ms Betts was not fit for employment when she initially sought reinstatement in 2020 and the following months. In fact, the evidence showed that the psychiatrist's reports supporting her opinion of fitness were factually incorrect. Yet, Commissioner Muir held – despite the reports being factually flawed, "[the treating psychiatrist] *has given a medical certificate which satisfies the gateway"*.

Able to then make the claim to the Commission for reinstatement, Ms Betts was ultimately found to be fit at the time of the hearing based on:

1. inferences from HealthShare's expert witness, Dr Smith, that Ms Betts had moved from early remission to sustained remission from alcohol use disorder and for this reason was much less likely to relapse at that point than during the first 12 months
2. the way Ms Betts conducted her case before the Commission, including the way in which she competently cross examined HealthShare's witnesses.

HealthShare disagreed with that outcome for many reasons, including the lack of medical evidence of fitness. Dr Smith's expert medical report actually provided:

> *In my opinion, Ms Betts presented with symptoms consistent with the diagnosis of severe Alcohol Use Disorder, in early remission, although there would need to be independent verification that she is not currently consuming alcohol. She also presented with a history consistent with the diagnosis of Major Depressive Disorder, with Anxious Distress, currently in remission.*
>
> *In my opinion, Ms Betts would likely be at high risk of relapse to heavy alcohol consumption and then significant anxiety and depressive symptoms if she returned to her pre-injury role. Her pre-injury role requires substantial travel which likely had a significant impact on her mood previously and there is evidence that, even with minor stressors, she remains at risk of resorting to alcohol consumption as a means of coping. Therefore, in my opinion, Ms Betts presented as unfit to return to the full-time pre-injury role as Quality Assurance Business Partner for HealthShare.*

Dr Smith was not challenged on this opinion. At no time was it put to Dr Smith that he would find Ms Betts fit for employment if satisfied that she had abstained from alcohol and had committed to ongoing abstinence. Ms Betts provided no evidence of independently verified abstinence. Dr Smith gave evidence of studies that suggest people with an Alcohol Use Disorder routinely exaggerate the length of time they have not been drinking.

Ms Betts provided no medical evidence other than the report of her general practitioner and treating psychiatrist.

APPEAL BEFORE THE FULL BENCH

The Full Bench quashed the decision of Commissioner Muir and Ms Betts' reinstatement application was dismissed.

The Full Bench examined the gateway issue. HealthShare argued that a certificate or report found to be factually flawed is not a certification of fitness for the purposes of the gateway. The Full Bench partially disagreed, and found:

> *We agree with HealthShare that in circumstances of fraud, the requirements of s 241(3) will not have been met because in effect, there is no certificate of fitness. As we already observed, there was no allegation that the production of the relevant certificate by Ms Betts or Dr Rastogi involved any fraud by either of them. We also agree with HealthShare that it may be that a certificate is so ambiguous or contradictory that it does not in fact certify that the employee is fit for the position for which they have applied. However, we do not agree the requirements of the gateway are not met when the medical opinion is based upon an incorrect factual foundation, even where it can be argued that this has made the opinion unreliable.*
>
> *"The plain words of s 241(3) do nothing more than require the worker to produce a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement",* the Full Bench said.

While rejecting HealthShare's argument that allowing flawed certificates to be used to seek reinstatement would defeat the objects of the Act (which include safety), the Full Bench gave some words of comfort:

> *... although an employee may have produced an unreliable certificate (as occurred here), if the reinstatement is contested, it would be open for the Commission to take into account the passage of time since the worker was dismissed in deciding whether to make any order for reinstatement sought.*

The Full Bench nevertheless took issue with the manner in which Commissioner Muir was satisfied that Ms Betts was fit for employment. It said, *"there was no medical evidence before the Commission that provided Ms Betts was fit for the Employment at the time of the hearing"* and for this reason *"it was not open to the Commissioner to find that Ms Betts was fit for the Employment."*

Ms Betts bore the legal onus of persuading the Commission that she should be reinstated, and this included providing medical evidence in support of her fitness. Ms Betts did not do so. Other than the report of her treating psychiatrist, which was based on an incorrect factual foundation about Ms Betts' sobriety and recovery, Ms Betts provided no evidence to support her fitness for employment. The psychiatrist's report *"could bear no relevance to the assessment of Ms Betts' fitness at the time of the hearing,"* the Full Bench said.

The Full Bench said Commissioner Muir was not entitled to draw inferences of fitness from parts of medical evidence and Ms Betts' performance at the hearing.

TAKEAWAY

Given the risk of injured workers 'doctor shopping,' providing incomplete information to a doctor to obtain a clearance certificate, or delaying applying to the Commission for reinstatement in order to improve and or gain fitness, Parliament should consider either:

- reducing the time allowed to re-apply for reinstatement or imposing a timeframe to apply to the Commission; or
- reinforcing the gateway to not permit reinstatement if an employee is not actually fit for employment at the time of applying.

Nonetheless, the decision of the Full Bench should give employers some confidence that applications for reinstatement need to be based on sound medical evidence.

In dealing with an application for reinstatement, employers should promptly:

- collate detailed information of the original injury, medical opinions and any recovery (or lack thereof) before dismissal
- critically analyse any medical certification of fitness provided when reinstatement is sought
- seek all relevant medical records and other information relating to health and recovery post dismissal
- consider an Independent Medical Examination before agreeing to reinstate the worker.

By being properly informed, employers can discharge their safety duties and make better decisions about whether to oppose applications for reinstatement. The inquiries by HealthShare of Ms Betts' fitness allowed it to defeat her claim.

Unfair contract terms - the noose tightens on bad practices

Authors: Nicholas Kallipolitis, Matthew Singh and Mario Rashid-Ring

On 10 November 2023, new, far-reaching legislation was introduced to address the use of unfair terms in standard form contracts.

The Unfair Contract Terms Regime (UCT Regime) applies to consumer contracts and small business contracts. A small business contract is defined as a contract for the supply of goods or services, or sale or grant of an interest in land where at least one party to that contract:

- employs fewer than 100 persons (excluding casual employees, but including casual employees employed on a "regular and systemic basis"); or
- has an annual turnover of the previous financial year of less than $10 million.

A small business contract could include a building contract, a subcontractor agreement, a consultancy agreement or even a material/product supply agreement – all of which councils will enter into at times.

The UCT Regime impacts all participants in the building and construction industry, whether you are a principal, developer or head contractor, or whether you are a subcontractor or consultant.

A term may be declared unfair if it can be established that it:

- will result in a significant imbalance in the parties' rights and obligations
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (financial or otherwise) to a party if it were to be relied on.

If a term is found to be unfair:

- a Court may make orders for loss or damage, or orders to prevent loss or damage (for example, it could find the term void and unenforceable)
- a Court may restrain a party from entering into future contracts that contain the same or similar term
- civil penalties may be applied to anyone proposing to include, applying, relying upon, or purporting to apply or rely upon, unfair terms. The penalties could be $50 million per unfair term or three times the value of the "reasonably attributable" benefit obtained by the breach.

IMPACT FOR CONSTRUCTION CONTRACTS

There have been few Court decisions relating to unfair contract terms to date. However, that will likely now change. Clauses likely to be scrutinised in light of the UCT Regime include:

1. *Disproportionate termination terms:* A term that permits one party to terminate the contract in a far wider range of circumstances than available to the other party. Termination-for-convenience clauses may constitute unfair contract terms in certain circumstances.
2. *Imbalanced limitation of liability and indemnity terms:* These terms usually grant a one-sided limitation of liability or a one-way indemnity with very limited exceptions.
3. *Unilateral variation terms:* These terms grant one party the unilateral right to vary key terms of the agreement or the product/service description (for example, the scope of work to be undertaken, the timeframe for works, etc).
4. *Unfair payment terms:* These terms may require one party to pay costs and expenses on a full indemnity basis that the other party may incur in exercising its rights under the contract. It may also provide a unilateral right to withhold payment for work performed or services provided.
5. *Unreasonable time bars:* Such a term imposes an unreasonably short time for a party to make a claim, failing which, the claim will be barred.

All such terms should be carefully considered, with due regard to the facts of the project and circumstances of the parties, when drawing up contracts. In certain circumstances a term may be unfair, while in others it may be reasonable and appropriate.

PRACTICAL TIPS FOR HEAD CONTRACTORS AND SUBCONTRACTORS

While the expansion of the UCT Regime has not yet resulted in any Court decisions, we anticipate it will impact negotiation, contract administration and claims management in the construction industry in particular. The following checklist may be useful when entering new contracts.

Checklist	
Head Contractors / Principals	**Subcontractors**
Review contracts in light of the UCT Regime and assess whether any terms may be considered unfair	Consider whether you are a small business within the meaning of the UCT Regime
Consider whether you are contracting with a small business	Raise any concerns regarding potential unfair contract terms in writing during the negotiation period (that is, before signing the contract)
Assess whether your contractual term is reasonably necessary to protect your interests (for example, you have an upstream liability you need to protect your business against)	Continue to properly administer the contract even if you suspect a term may be unfair (for example, send EOT and other claims in the time and form required)
Consider whether you have provided an opportunity to negotiate a contract or whether it is provided on a "take it or leave it" basis. Keep detailed records of any concessions in pre-contract negotiation	If a contract term appears to be unfair, seek legal advice as soon as possible
Consider whether a termination for convenience clause is reasonably necessary	
Act reasonably in contract management to avoid having to test whether a term may be unfair in Court	

Unfair contract terms in property contracts

Authors: Stella Sun & Melissa Potter

The Unfair Contract Terms Regime (UCT Regime) is likely to also apply to a significant number of property-related contracts such as:

- **land sales contracts**
- **retail and commercial property leases or licences**
- **residential tenancy or accommodation agreements**
- **property easements and covenants**

especially where one party has more bargaining power and there is limited ability to negotiate or change the terms of the contract.

While each term needs to be assessed on a case-by-case basis and in the context of the contract as a whole, terms that could potentially be considered unfair include:

- Contracts for the sale and purchase of land
  - clauses that allow a vendor to make changes without the consent of the purchaser (for example, to plans and materials), especially where the changes are material and the implications are not apparent
  - termination clauses that allow a vendor (but not the purchaser) to terminate the contract for any reason
  - clauses that penalise one party (but not the other) for a breach or termination of the contract
  - clauses that extend due dates or conditions at the discretion of the vendor.
- Commercial leases or licences
  - ratchet clauses (that is, clauses that prevent rent from going down after a review), especially as this is already prohibited in retail leasing legislation in multiple states and territories
  - automatic renewal clauses
  - termination for convenience clauses which give the landlord the right to terminate the lease for any reason at any time
  - clauses which allow a landlord to terminate the lease for breach by a tenant, without giving the tenant reasonable time to remedy such breach (for example, assigning the lease without consent, failure to comply with a specific obligation)
  - unlimited indemnity clauses which require a tenant to indemnify the landlord for broad or unclear indemnities, losses outside a tenant's reasonable control or losses caused or contributed to by the landlord's negligence or breach. Indemnity clauses should be limited to acts arising from premises or default under the lease. Clauses carving out the landlord's own negligence from an indemnity will be essential and councils should routinely include "carve out" clauses in their leases
  - clauses which allow landlords to take possession of and deal with a tenant's property without prior notice to the tenant; for example, where a tenant has failed to remove their property at the end of the lease.

Some of the above provisions are already prohibited under the *Retail Leases Act 1994* (NSW) and retail leases to which the Act applies may already have these protections.

PRACTICAL TIPS FOR COUNCILS AS PROPERTY OWNERS

Councils should work on the assumption that the UCT regime applies to them and their contracts, leases and other property agreements.

This means that councils (including as vendor and landlord) should be taking steps to ensure their contracts do not contain unfair terms in the future. This would include:

- carrying out a thorough review of all precedents and considering, on a clause-by-clause basis, which clauses are critical and which could be considered unfair (and modifying those unfair terms as appropriate)
- providing the other party an opportunity to negotiate the contract, rather than providing the contract on a 'take it or leave it' basis, and keeping records of pre-contract negotiations
- acting reasonably in contract negotiations
- where a lease or other agreement is due for renewal, considering moving existing tenants onto new leases or agreements (that do not contain unfair terms) rather than simply renewing those leases or agreements.

Councils and criminal reporting – recent law changes make it important to know your rights and obligations

Authors: Adam Cutri, David de Mestre and Isabelle Stillman

Australia's whistleblower and defamation laws are changing to offer greater protections to those reporting crimes, and to whistleblowers in the public sector. Councils must be aware of their obligations and ensure their policies and procedures are updated accordingly.

In this article, we outline:

- recent developments in the law concerning the regulation of corruption and public interest disclosures
- proposed reforms to defamation legislation that extend the "absolute privilege" defence.

We also consider how such changes may impact local councils.

ANTI-CORRUPTION LEGISLATION

Recently, federal and state anti-corruption regimes have been amended to increase protections for whistleblowers who report corrupt conduct in government. Perhaps the most significant of these changes is the establishment of the new National Anti-Corruption Commission, or NACC.

The NACC is an independent Australian Government agency that detects, investigates and reports on serious or systemic corrupt conduct in the Australian Government public sector. It also has an educational role.

While the NACC cannot investigate concerns relating to a State or Territory government entity, including their local councils, it may well take an interest where contracts in those areas are funded by Commonwealth grants. To that extent, its work has the potential to impact all local councils within Australia.

Public interest disclosures

In addition to the newly formed NACC, reforms to New South Wales' public interest disclosures legislation came into effect in 2023. Broadly, public interest disclosures concern 'serious wrongdoing' in the public sector. The new *Public Interest Disclosures Act 2022* (PID Act) is aimed at:

- simplifying the disclosure process
- improving protections for whistle blowers
- preventing technicalities which resulted in unprotected disclosures.

The new provisions also:

- reduce the threshold to trigger protections for public officials from detrimental action if they are suspected of having made a public interest disclosure
- place a duty on agencies to investigate or refer a public interest disclosure, provide training to employees on public interest disclosures, and to undertake risk assessments and corrective action when necessary
- make agencies statutorily liable for any injury, damage or loss suffered by a person as a result of a failure to comply with their statutory risk management obligations.

Councils must ensure internal whistleblower, complaints and workplace health and safety policies are updated to align with current laws. They should also provide education and resources (such as confidential disclosure hotlines for staff and stakeholders) to their staff regarding whistleblower and public interest disclosure requirements.

DEFAMATION LEGISLATION UPDATE

Australia's defamation laws are also changing, with proposed reforms aimed at improving protections for victims and witnesses reporting potential criminal activity to the police. The Stage 2 Model Defamation Law Provisions are due to come into effect in July 2024.

The changes follow heightened social concern about the "chilling" effect potential defamation claims may have on victims' reporting of alleged sexual misconduct or fraud. In response, it is proposed to extend the absolute privilege defence to anyone reporting alleged or suspected criminal conduct to police.

Absolute privilege provides a complete defence to a defamation claim, irrespective of the publisher's motive or reasonableness. This is distinct from qualified privilege, which can be defeated by evidence of malice on the part of the publishing party.

Presently, absolute privilege applies where the matter is published during proceedings of a parliamentary body, Australian Court or Australian Tribunal, or in circumstances specified in Schedule 1 of the *Defamation Act* (**Act**). One of those circumstances is any

matter disclosed to or by the NSW Independent Commission Against Corruption. The current position, however, is that false reports and declarations are punishable offences.

The Federal position is slightly different. It is a criminal offence to take reprisal against a person for making a referral, providing information or giving evidence to the NACC or under the PID Act. While a defence of qualified privilege would likely apply, adding the NACC to Schedule 1 of the *Defamation Act* would confirm that absolute privilege applies to disclosures to the NACC.

Future case law may clarify whether the NACC is captured by the proposed reforms to absolute privilege in defamation law. Should the answer be yes, this is likely to eliminate the chilling effect potential defamation claims have on those reporting crime.

In any event, councils should keep in mind that the PID Act is covered by the absolute privilege defence in Schedule 1 of the *Defamation Act*. This means councils should encourage public interest disclosures of corrupt conduct by assuring staff and stakeholders against the perceived chilling effect of defamation claims.

CONCLUSION

Council officers should be aware of their rights and obligations with respect to anti-corruption legislation, including understanding that:

- whistleblower protections exist for those reporting "serious wrongdoing" in the public sector
- the newly created NACC and the Independent Commission Against Corruption have broad mandates to detect and investigate corruption
- local councils are most likely affected by reforms to the PID Act and may also experience indirect consequences from the Federal NACC powers
- amendments to the *Defamation Act* due to come into effect in July 2024 extend protections to reports of crime, to prevent victims and witnesses being sued in defamation.

Should you have any queries, please don't hesitate to reach out to any of the authors.

Recent cases benefit councils in disputes with contractors

Authors: David Creais and Breitil Sulaiman

Two recent cases in the Supreme Court of NSW have made it easier for councils to prosecute claims against contractors for defective work and design under the *Design and Building Practitioners Act 2020* (DBP Act) and to resist payment claims under the *Building and Construction Industry Security of Payment Act NSW 1999* (SOP Act).

Firstly, in *The Owners Strata Plan No 84674 v Pafburn Pty Ltd* the Court of Appeal held that proportionate liability under the *Civil Liability Act 2002* (CL Act) doesn't apply to the duty of care under section 37 of the DBP Act.

Secondly, in *Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd* the Supreme Court confirmed that by calling on security held under a construction contract a council can effectively neutralise an adverse SOP Act determination.

THE DBP ACT AND PROPORTIONATE LIABILITY

Before the introduction of the proportionate liability provisions of the CL Act, a contractor was jointly and severally liable for loss arising from a failure to take reasonable care in the execution of the work under the contract.

The contractor was liable for the acts and omissions of its subcontractors and consultants, as well as of its employees. So, a council would only have to sue one defendant.

By contrast, the proportionate liability provisions divide liability for loss amongst multiple parties (such as architects, engineers and subcontractors) based on each party's degree of responsibility. So, a council would have to bring claims against a number of defendants to recover all of its loss, making this litigation more expensive, complex, time-consuming and uncertain.

Earlier cases had indicated that the proportionate liability provisions apply to a claim for damages arising from a breach of the duty to exercise reasonable care to avoid economic loss caused by defects under section 37 of the DBP Act.

However, in Pafburn the Court of Appeal held that the duty of care under section 37 of the DBP Act is non-delegable and that developers and builders cannot apportion liability to subcontractors or consultants.

The case concerned proceedings commenced by the owners corporation of a strata development against the developer, Madarina, in relation to defective construction work. Madarina pleaded that its head contractor (and its subcontractors) were concurrent wrongdoers and that liability should be apportioned under the CL Act.

The primary judge agreed that Madarina was entitled to run this defence because the section of the CL Act that might take the duty of care under section 37 of the DBP Act out of the reach of the proportionate liability provisions (section 5Q of the CL Act which applies to non-delegable duties) only applies to common law negligence (a common law "tort").

But the Court of Appeal overturned this finding. It considered that the intention of section 5Q is to address the full scope of the problem of non-delegable duties and should not be 'read down' and confined to liability for breach of a common law duty.

A claim relying upon section 37 of the DBP Act is a claim brought "in tort" because of the deeming phrase "as if the duty … were established in common law" in section 37(3).

Since section 39 of the DBP Act expressly states that:

> ***39 Duty must not be delegated***
>
> *A person who owes a duty of care under this Part is not entitled to delegate that duty."*

the builder is vicariously liable for breaches by concurrent wrongdoers pursuant to section 5Q of the CL Act and this is sufficient to exclude the proportionate liability provisions.

Key takeaways

The judgment confirmed that:

1. a breach of the statutory duty of care under section 37 of the DBP Act is considered a 'tort'
2. it is non-delegable so that developers and builders are responsible for the actions of their subcontractors and consultants.

The judgment is a welcome win for councils who can take comfort in the knowledge that the party with whom they contract will be held responsible for the whole loss and cannot 'offload' some or all of this responsibility to other parties.

USING SECURITY TO NEUTRALISE AN SOP ACT DETERMINATION

The rationale behind providing security under a contract is considered to be two-fold. Its first purpose is as a risk allocation device. Its second purpose is to ensure a party has a fund from which to recover its losses if the opposing party causes a breach.

However, there is an intersection between an adjudication determination under the SOP Act providing cashflow for contractors, and a contractual right to have recourse to security.

In particular, the Courts have heard several matters in which a contractor has received a favourable adjudication determination and the principal then calls on its security for an amount equivalent to the determination.

Two key issues arise:

1. Is a claim to repayment of the security amount by the contractor a claim in relation to 'construction work'?
2. Is a right to call on security in respect of an issue that has been the subject of an adjudication determination rendered void by section 34 of the SOP Act?

The requirements of a payment claim

The essential requirements of a payment claim are outlined in sections 8 and 13(1) of the SOP Act which state:

> ***8 Right to progress payments***
>
> *A person who,* ***under a construction contract****, has undertaken to* ***carry out construction work or to supply related goods and services*** *is entitled to receive a progress payment.*
>
> ***13 Payment claims***
>
> *(1) A person referred to in section 8 who is or who claims to be entitled to a progress payment (the* ***claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment."***

It is clear from these sections that one precondition is for the claim to relate to "construction work".

Section 34 of the SOP Act

This section states that a provision of any contract "under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act)…is void."

Acciona vs Enermech: section 34 gets tested in Court

In Acciona, a dispute arose in relation to a contract between the head contractor, Acciona, and a subcontractor, Enermech, for electrical works in the Sydney Westconnex tunnelling project.

The contract required Enermech to provide an unconditional undertaking as security for any money Acciona claimed it was owed by Enermech.

During the project, Enermech had two adjudication determinations in its favour which were paid by Acciona. Acciona then called on the unconditional undertakings for the same amount as it had paid, which Acciona assessed was an overpayment to Enermech under the contract.

Enermech subsequently served a payment claim which comprised the amount paid in response to the call on the unconditional undertakings.

After Acciona disputed the payment claim, Enermech gained an adjudication determination for the amount.

Acciona appealed the determination, arguing that the claimed amount was not for 'construction work' under the SOP Act. Enermech responded by claiming that the contractual provisions permitting Acciona to call on the security in respect of claims that had already been rejected by a determination under the SOP Act were rendered void by section 34 of the SOP Act.

Is 'security' construction work?

Acciona argued that a claim for the payment to Enermech of the amount obtained by Acciona from calling on the unconditional undertaking was plainly not a claim for, or on account of, 'construction work' or 'related goods and services'.

The essential question before the Court was whether a claim comprising an entitlement to claim as a credit of an amount equivalent to the security amount, was a claim for payment for 'construction work' for the purposes of the SOP Act.

The Court determined that the answer was no. In this it followed *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* in finding that a claim which is in substance for the return of money paid by recourse to security is in effect a claim for credit and cannot be considered 'construction work', thus rendering the adjudication determination invalid.

Are contractual provisions void if they permit a principal to call on security for amounts paid pursuant to an adjudication determination?

The Court concluded that such contractual provisions could not be seen to exclude, modify or restrict the operation of the SOP Act, and were not void.

Acciona complied with the first and second adjudication determinations. The SOP Act had thus "operated" in accordance with its terms.

Acciona then exercised a contractual right to make the demand for the security amount and call on the unconditional undertaking.

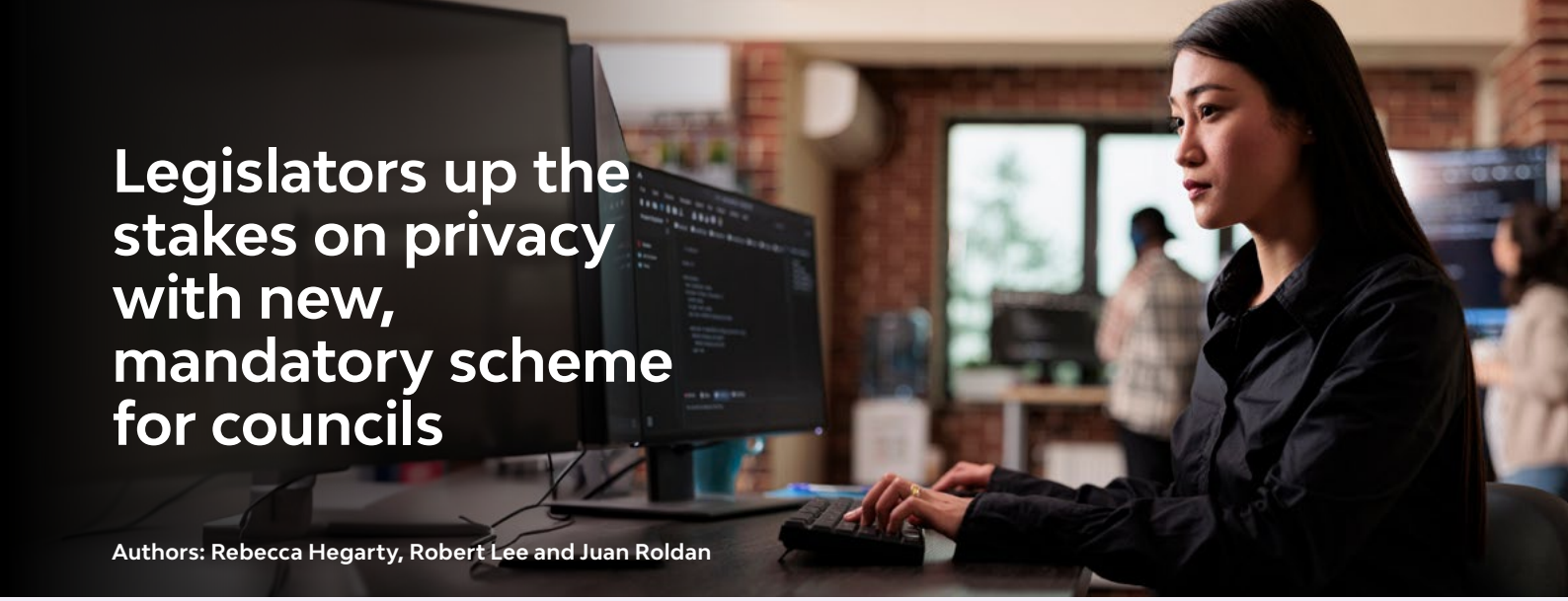
It was true that following the payment to Acciona of the security amount, the effect of those determinations had, as a practical matter, been reversed. But that was a result of events after the orderly operation of the SOP Act, and not as a result of any modification, or restriction, on the operation of the SOP Act.

Key takeaways

The judgment confirms that:

1. a claim for return of security monies is, in effect, a claim for credit and cannot be considered 'construction work', and so cannot be the subject of a payment claim
2. a carefully drafted and applied security provision can neutralise the effect of an adverse adjudication determination.

CREDIT: Destination NSW



Legislators up the stakes on privacy with new, mandatory scheme for councils

Authors: Rebecca Hegarty, Robert Lee and Juan Roldan

Given the recent surge in cyberattacks and data breaches, NSW councils must be more proactive than ever about their cybersecurity and data-handling practices.

Not only are attacks becoming more frequent, but according to a recent Australian Cyber Security Centre report, last year the average cost of each reported cyber crime rose by 14 per cent.[1]

NSW legislators have taken note. In November last year, the Mandatory Notification of Data Breach (MNDB) scheme commenced, replacing the previous scheme, which was merely voluntary. The changes have been enacted under amendments to the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act).

Amendments include:

- a new MNDB scheme that requires agencies (including councils) to notify the Information and Privacy Commissioner (IPC) and affected individuals of eligible data breaches that are likely to result in serious harm to the affected person
- exemptions from mandatory notification in certain circumstances
- giving the IPC power to investigate, monitor, audit and report on agencies regarding the mandatory notification of data breaches
- requiring agencies to publish a data breach policy and keep a data breach register.

NEW OBLIGATIONS FOR COUNCILS

Under the MNDB scheme agencies must now:

- immediately make all reasonable efforts to contain a data breach
- undertake an assessment within 30 days where there are reasonable grounds to suspect there may have been an eligible data breach
- during the assessment period, make all reasonable attempts to mitigate the harm caused by the suspected breach
- decide whether a breach is an eligible data breach or there are reasonable grounds to believe it is
- notify the IPC and affected individuals of the eligible data breach
- comply with other data management requirements.[2]

TO WHOM DOES THE PPIP ACT APPLY?

The PPIP Act applies to NSW government agencies, statutory authorities, universities, NSW local councils, and other bodies whose accounts are subject to the Auditor General.[3]

The NSW Information and Privacy Commission (IPC) administers the PPIP Act and the Health Records and Information Privacy Act 2002 (NSW).

THE INFORMATION PROTECTION PRINCIPLES (IPPS)

The PPIP Act contains twelve Information Protection Principles that describe what NSW agencies must do when handling personal information (including how it must be collected, stored, used and disclosed) and a person's rights to access their own information. For further information on the principles click here.

The IPC has also created a Data Breach Self-assessment Tool for MNDB, and Data Breach Notification to the Privacy Commissioner form, each of which provide guidance on identifying and notifying the IPC of an eligible data breach.

Councils that collect tax file numbers have additional obligations under the Commonwealth Notifiable Data Breaches scheme established by the *Privacy Act 1988* (Cth), where a data breach occurs involving TFNs.

1. See https://www.cyber.gov.au/about-us/reports-and-statistics/asd-cyber-threat-report-july-2022-june-2023
2. See https://www.ipc.nsw.gov.au/privacy/MNDB-scheme
3. See https://www.ipc.nsw.gov.au/privacy/nsw-privacy-laws/ppip

WHAT IS PERSONAL INFORMATION?

Section 4(1) of the PPIP Act defines personal information as:

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

Personal information includes things such as an individual's fingerprints, retina prints, body samples or genetic characteristics. It also includes information, or an opinion, that could identify an individual. For example, their name, address, date of birth, gender, or audio-visual material.

Personal information does not include any of the types of information listed under section 4(3). For example, information about:

- an individual who has been dead for more than 30 years
- an individual that is contained in a publicly available publication
- an individual arising out of a Royal Commission or Special Commission of Inquiry.

PENALTIES

While there are no monetary penalties for non-compliance with the MNDB scheme, reputational damage remains an important consideration.

What's more, individuals affected by an agency's conduct may seek review of that conduct under Part 5 of the PPIP Act. Even if the agency takes remedial action, the individual may still apply to the NSW Civil and Administrative Tribunal for administrative review. The tribunal may order the agency to pay the individual up to $40,000 for loss or damage suffered.

HOW TO REMAIN COMPLIANT

The IPC says agencies should take these actions as a matter of course:

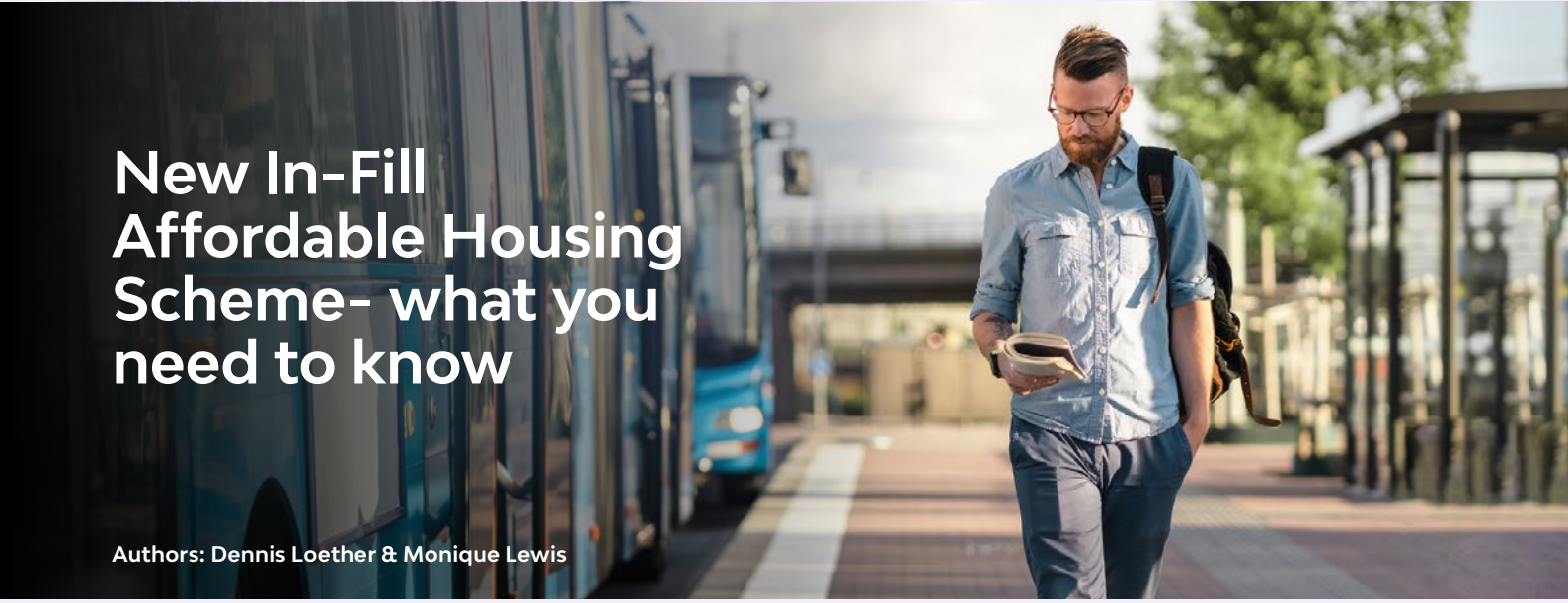
- clearly define roles and responsibilities for the management of actual or suspected data breaches
- ensure the Privacy Management Plan complies with new section 33(2)(c1), which requires provisions for complying with Part 6A of the PPIP Act, specifically the mandatory notification of data breach scheme. (Note: the plan should reference the agency's data breach policy).
- develop and publish a data breach policy in accordance with section 59ZD, outlining the agency's response to a data breach (commonly called a Data Breach Response Plan)
- revise relevant policies and procedures to align with obligations under the MNDB scheme
- establish and maintain an internal register of eligible data breaches in accordance with section 59ZE, recording the information specified under section 59ZE(2). Note: this should include where practicable, for all eligible data breaches –
  - who was notified of the breach
  - when the breach was notified
  - the type of breach
  - details of steps taken by the public sector agency to mitigate harm done by the breach
  - details of the actions taken to prevent future breaches
  - the estimated cost of the breach
- maintain a public notification register of any notifications made under section 59N(2). Information in the register must be publicly available for at least 12 months after publication and include the information specified under section 59O).[4]

Councils should also update agreements with contractors to include suitable provisions regarding data breach notification and management. Combined with training to upskill staff, this will help establish clear lines of responsibility and accountability.

REPORTING A CYBERCRIME, INCIDENT OR VULNERABILITY

Aside from the new requirements, local councils can report cyber security events or vulnerabilities to the police and/or the Australian Signal's Directorate's Australian Cyber Security Centre.

[4] See https://www.ipc.nsw.gov.au/privacy/MNDB-scheme



New In-Fill Affordable Housing Scheme- what you need to know

Authors: Dennis Loether & Monique Lewis

In response to demands for more new homes and improved housing affordability, the NSW Government has amended the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP) to encourage developers to build affordable homes.

The amendments primarily concern floor space ratio (FSR) and height of building bonuses for residential developments.

TYPES OF DEVELOPMENTS

The amendments apply to 'residential developments', as defined in section 15B of the Housing SEPP. They include:

- attached dwellings
- dual occupancies
- dwelling houses
- manor houses
- multi dwelling housing
- multi dwelling housing (terraces)
- residential flat buildings
- semi-detached dwellings
- shop top housing
- build to rent zones pursuant to Chapter 3, Part 4 of the Housing SEPP.

LOCATION OF DEVELOPMENTS

With the exception of Shoalhaven, the home must be sited within the Six Cities Region, comprising the Lower Hunter and Greater Newcastle City, Central Coast City, Illawarra-Shoalhaven City, Western Parkland City, Central River City and Eastern Harbour City. It must also be within an accessible area, defined as a site that is:

- within 800m walking distance of a railway, metro or light rail station, or wharf which a Sydney Ferries service operates; or
- within 400m walking distance of a bus stop regularly serviced by at least one bus an hour, 6am-9pm Monday to Friday, and 8am-6pm on weekends.

Any site outside the Six Cities Region or within Shoalhaven must be within 800m walking distance of one of the following zones:

- E1, Local Centre
- MU1, Mixed Use
- B1, Neighbourhood Centre
- B2, Local Centre
- B4, Mixed Use.

Certain parts of the City of Sydney are excluded.

THE "BONUS" PROVISIONS - FSR

The amendments allow residential development projects to apply for a FSR bonus of up to 30%, and a height of building bonus of up to 30%, where at least 10% of the gross floor area is dedicated as affordable housing.

The additional floor space is afforded at a rate double the affordable housing component. For example, if a development offers 10% of the gross floor area as affordable housing, it may apply for up to 20% additional FSR. If it offers 15%, it may apply for up to 30% additional FSR (maximum additional FSR available).

The FSR bonus applies to the whole of the development, not just the residential component.

The bonus also applies in commercial zones, even if residential accommodation is prohibited. The idea is to allow build to rent developments to benefit from the incentives.

THE "BONUS" PROVISIONS - HEIGHT

The height bonus only applies to residential flat buildings and shop-top housing.

The additional height of building is calculated in the same way as additional FSR.

THE FORMER FSR BONUS FOR REGISTERED COMMUNITY HOUSING PROVIDERS

The former FSR bonus still applies for developments carried out by or on behalf of Land and Housing Corporation, the Aboriginal Housing Office, Landcom or registered community housing providers. This bonus is available for development on land with a maximum permissible FSR of 2:1 or less.

Under the former FSR bonus, if the affordable housing component is at least 50% of the development, the potential additional FSR is 0.5:1. If the affordable housing component is between 20% and 50%, it will apply on a sliding scale. For example, if 30% of the development is affordable housing the development may apply for additional FSR of 0.30:1.

The amendments mean these agencies can now apply for either of the two formulas for the FSR bonus: either the amended FSR "bonus" provisions under section 16

of the Housing SEPP, or the former FSR bonus under section 17 of the Housing SEPP.

NEW STATE SIGNIFICANT DEVELOPMENT

A new State Significant Development (SSD) has also been created. It is defined as a residential development component with a capital investment value of $75m in the Greater Sydney Region (as defined in the Housing SEPP), or more than $30m across the rest of NSW.

SSD applications will require an environmental impact statement, rather than a statement of environmental effects, which must be submitted to the Department of Planning and Environment rather than local council.

If the SSD assessment determines that the full 130% bonus cannot be accommodated on the site, for the development application to be determined under the SSD pathway it must still provide at least 10% of total gross floor area as affordable housing. If a developer does not wish to do this because the additional bonuses cannot be afforded, it must withdraw the SSD application and lodge a development application with local council.

'AFFORDABLE HOUSING'

The affordable housing proportion of the development must be managed by a registered community housing provider for a minimum of 15 years.

Amendments to the EP&A Regulation 2021 mean consent conditions must require evidence of section 88E instruments that ensure the affordable housing component is managed by a registered community housing provider. In addition, evidence of an *agreement* with a registered community housing provider must be provided. These amendments do not apply to developments carried out by or on behalf of Land and Housing Corporation or the Aboriginal Housing Office.

Any local requirements for affordable housing, such as those under other instruments or planning agreements, will not count towards the criteria needed to access the additional FSR and/or height of building.

RELATIONSHIP WITH OTHER BONUSES

Other FSR bonuses available in the Housing SEPP are capped at 130%.

However, site-specific or project specific FSR and/or height of building bonuses available under other Environmental Planning Instruments may still apply as well. The maximum permissible FSR achievable under another Environmental Planning Instrument should be determined first, and these bonus provisions then applied in addition.

RELATIONSHIP WITH OTHER ENVIRONMENTAL PLANNING INSTRUMENTS

The amendments do not override any provisions in Local Environment Plans or Environmental Planning Instruments.

However, Development Control Plan provisions do not apply to SSD applications. Development Control Plan provisions also do not apply when there is a conflict between them and the new Design Competition Guidelines SEPP.

NON-DISCRETIONARY STANDARDS

Clause 19 of the Housing SEPP provides non-discretionary development standards which, if complied with, prevent the consent authority from requiring more onerous standards. This provision prevents consent authorities from doing any of the following:

- taking the non-discretionary development standard into further consideration in determining the development application
- refusing the development application on the grounds that the development does not comply with that standard
- imposing a condition of consent that has the same effect but is more onerous than the standard.

REPEAL SEPP 65 AND NEW SEPP AMENDMENT (DESIGN COMPETITION GUIDELINES) 2023

The *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* (SEPP 65) has been repealed and replaced with a new Chapter 4 of the Housing SEPP, which requires consideration of design quality principles including residential amenity.

Under Chapter 4, the consent authority must consider the new *State Environmental Planning Policy Amendment (Design Competition Guidelines) 2023* (Design Competition Guidelines SEPP), published on 15 December 2023 with immediate effect.

The new Design Competition Guidelines SEPP do not require full compliance with the design criteria specified in the guidelines. It also amends 14 Local Environment Plans and 3 SEPPs to allow the Department of Planning and Environment to waive the rights for an architectural design competition.

SUMMARY – EFFECT OF THE NEW SCHEME ON CONSENT AUTHORITIES

The amendments are considered "bonus" provisions; however, there is no automatic entitlement to the additional FSR or height of building provisions.

The amendments do not affect a consent authority's responsibility to consider the requirements of relevant Environmental Planning Instruments. Consent authorities must still consider site constraints and local impacts including the acceptability of the height of building, massing, likely impacts and suitability of the site, in the context of the permitted and additional FSR and height of building provisions. A consent authority must also consider the character of the local area and its desired future character.

Site-specific factors may mean the full extent of the additional bonus provisions cannot be granted in some circumstances.

However, the NSW Government has released a planning circular "designed to encourage consent authorities to consider the flexible application of the Housing SEPP controls in light of the public benefit relating to the delivery of affordable housing".

It and the practice note encourage consent authorities to balance Local Environment Plans and Environmental Planning Instrument standards flexibly against the need for more affordable housing.

Juggling the desire for flexible application of controls against the need for compliance remains a difficult task when assessing applications relating to these amendments.

We will continue to report on further amendments.

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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.

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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.

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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.

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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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- Fair Play – Understanding the Unfair Contract Terms Regime
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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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