Bartier Perry LAWYERS

Council CONNECT

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Inside this issue

Building bridges

While much of the work that councils do is highly visible, they also do an enormous amount of work that goes unseen and unheralded. In this issue, we chat to Julie Briggs, CEO of Riverina Eastern Regional Organisation of Councils (REROC) which was formed to enable initiatives that may not have been possible without cooperation.

We're delighted to have had the opportunity to speak with Julie and shine a well-deserved light on the commitment, smart thinking, and collaborative mindset that the Councils have brought to bear here – a great example of the power of working together.

Their inspiring initiatives include the Build a Bridge program, which has seen dozens of young people enter an engineering career; Take Charge! leadership forums for young people; the Waste Forum; and Southern Lights NSW, an initiative to install 75,000 LED street lights across 41 local government areas.

Throughout NSW, councils themselves are building bridges in so many ways. From improving physical amenities such as libraries, to improving accessibility to the many social initiatives that have a profoundly positive impact on our communities, it is clear that our councils help pave the way to better living.

We see in this a reflection of trends throughout Australia to create a society inclusive of everyone, and a recognition of the value of listening, collaborating and acting boldly.

This is close to our hearts at Bartier Perry. It's one of the many reasons we value working with councils. While the work we do may be different, we share a commitment to building a better Australia and we are looking forward with confidence and hope.

This edition of Council Connect looks at issues including wrongful dismissal, the importance of proper and precise examination of environmental impacts on council activities and considerations when implementing 'buy local' policies. Our team provides guidance when facing self represented litigants, on the changes coming to Australian defamation laws as well as when public rights can override private rights in land dealings. As always, we hope you find our articles informative and interesting.

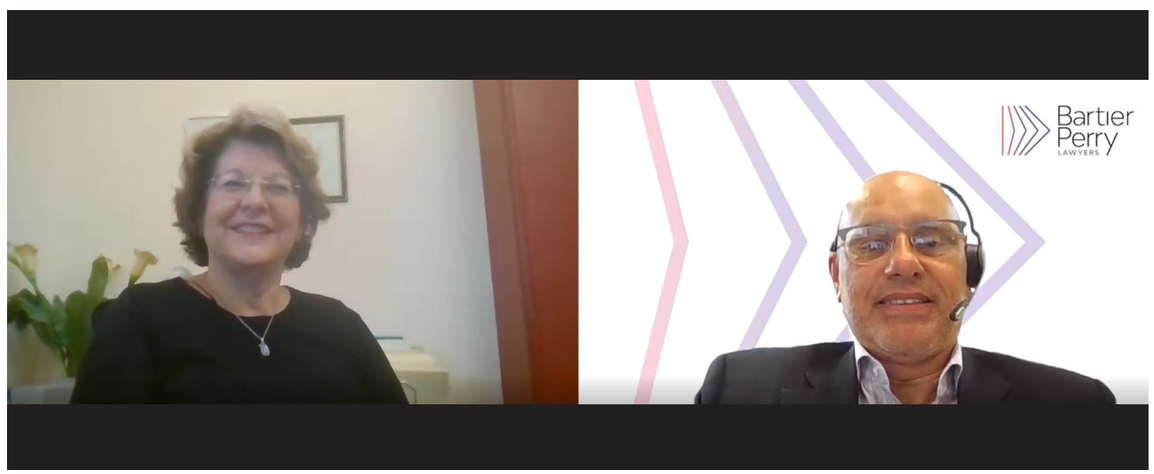
Warm regards

Riana Steyn, CEO

INTERVIEW WITH JULIE BRIGGS

CEO, RIVERINA EASTERN REGIONAL ORGANISATION OF COUNCILS (REROC)

Welcome to our third Council Connect video interview. David Creais, head of our property, planning and construction team talks to Julie Briggs, CEO at REROC about what is happening in their region, their current projects and how they find regional solutions for local problems.



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

Build A Bridge...and get over it! Image reproduced by courtesy of REROC.

THE DEFAMATION REFORMATION:

AUSTRALIA'S LAWS RECEIVE A MAKEOVER FOR THE DIGITAL AGE

JENNIFER SHAW

Sixteen years ago, when Australia's current defamation laws were written, it was the norm for people to purchase printed newspapers. They were the days when tomorrow brought 'new news' and yesterday's news would end up in the waste paper basket.

Times have certainly changed. We now have iPhones, social media (including Facebook, Twitter and Instagram) and of course, online news media which is available 24/7.

Changes to Australia's defamation laws are expected in the near future to catch up with the reality of today's world. In this article I take a closer look at those changes.

What is defamation?

First, a quick look at what defamation means and a case example.

Defamation is a communication from one person to another or to a group of people which damages the reputation of a third person. In NSW the law of defamation is currently governed by the *Defamation Act 2005* (NSW) and common law.

Key elements to a defamation action

To be successful in a defamation action, the plaintiff (the person suing) must prove three things:

1. The communication or statement has been **published** in some shape or form to a third person.

   Publication can occur by any means (in writing, verbally or in pictures) and must be published to at least one other person other than the person being defamed. Everyone involved in the publication is potentially liable. A person can also be liable for republishing defamatory material. It is no defence to argue you were only repeating a comment made by someone else. Liability can also arise if a person innocently disseminates defamatory material then fails to remove it when asked.

2. The communication **identifies** the plaintiff or is about the plaintiff.

   A communication does not need to refer to a person by name to satisfy this element. Anything that leads to the person's identification will suffice (such as a photograph or other description). The plaintiff has to prove that the communication was talking about them and that an ordinary reasonable person would assume this.

3. The meaning of what was said is **defamatory** and damages a person's reputation.

   The test for this is whether the communication lowers or harms the plaintiff's reputation, holds the plaintiff up to ridicule, or leads others to shun and avoid the plaintiff. In other words, whether the communication affects the reputation of the plaintiff in a damaging way.

Damages and injunctions for defamation

A person who sues for defamation is usually seeking to protect their reputation and receive payment of damages for hurt and distress. Damages can also be sought for economic loss.

In assessing damages, the Court will consider the extent of the publication and the gravity of the defamatory allegations. If the defamatory publication is still circulating, a defamed person will often also seek an injunction preventing further publication.

Defences

There are a number of defences available to defamation actions, some of which are summarised below:

- **Honest opinion/fair comment**

  This requires the defendant to prove that the material was an expression of honest opinion rather than a statement of fact, related to a matter of public interest and based on material that was substantially true (or subject to absolute or qualified privilege).

- **Justification/truth**

  A successful plea of justification/truth is a complete defence to a defamation action. For the defence to succeed the Court must find that the defamatory 'stings' of the publication are objectively true as a matter of fact.

- **Qualified privilege**

  This defence traditionally protects communications to the police and relevant authorities. It will not succeed if it can be proved that the defamation was motivated by malice.

- **Innocent dissemination**

  For example, this defence would be available to a newsagent who innocently sells a newspaper that contains defamatory material.

- **Triviality**

  This is a defence based on an argument that the communication is unlikely to cause harm to a person's reputation or standing in the community. It is rarely effective as a defence.

- **Absolute privilege and fair reporting**

  For example, statements made in Parliament or legal proceedings are protected from defamation actions. Likewise, material can be published if it is a fair report of proceedings of public concern.

Case example

A good case example of a defamation action relevant to councils can be found in an earlier Council Connect article by Gavin Stuart - How dare you say that! – the ins and outs of dealing with defamation - regarding a former Mayor of Narrabri Council who was awarded more than $100,000.00 in damages after Facebook posts were made by a local resident accusing him of corruption and intimidation.

Key upcoming changes to the defamation law

Defamation law in Australia is now under review, led by NSW. In July 2020 the Council of Attorneys-General approved amendments to Australia's Model Defamation Provisions, which are now set to be enacted in each State and Territory's legislation.

In NSW the changes are being introduced via the *Defamation Amendment Bill 2020*, assented to on 11 August 2020 and expected to come in to force on 1 July 2021.

Key changes include:

A new 'serious harm' threshold

One of the major changes is a new 'serious harm' threshold. Plaintiffs will need to show that the defamatory publication has caused, or is likely to cause, *serious harm* to their reputation. This will be determined by the judicial officer (not the jury) and will usually be determined as a preliminary question, prior to trial. It is expected that this threshold will significantly reduce the number of smaller 'trivial' cases that proceed to trial.

Single publication rule

As the law currently stands, a plaintiff has one year from the date of publication to bring an action for defamation. If the material continues to be downloaded, the one-year limitation period re-starts with each download. Under the changes, a plaintiff will have one year to bring a claim for defamation *from the first time material is uploaded for access or sent electronically.*

A new public interest defence

Another major change is a new public interest defence modelled on UK defamation law. It will apply if the defendant can show that the matter concerns a matter of public interest and the defendant reasonably believed that publication of the matter was in the public interest.

> "A person who sues for defamation is usually seeking to protect their reputation and receive payment of damages for hurt and distress. Damages can also be sought for economic loss."

Concerns notices and offers to make amends

Under the changes, prospective plaintiffs will have to serve a 'concerns notice' setting out the imputations to be relied upon in the proposed proceedings and then wait for the applicable period (usually 28 days) for an offer to make amends to elapse *before* commencing proceedings.

The concerns notice will need to specify where the matter in question can be accessed (for example the web address). It will also need to set out what 'serious harm' the plaintiff alleges they have suffered or will suffer and, if practicable, include a copy of the alleged defamatory material.

Offers to make amends must remain open for at least 28 days and can include offers to publish an apology, remove the publication from a website or pay compensation.

These changes are expected to promote the swift resolution of many disputes without the need for court proceedings.

Damages

The amendments clarify that a maximum of $250,000 can be awarded for non-economic loss, even if a plaintiff is also awarded aggravated damages. Further, the maximum amount for non-economic loss should only be awarded in the most serious of cases.

Multiple proceedings

People may no longer bring multiple proceedings for publication of the same or similar material by the same or associated defendants without the Court's permission.

New scientific or academic peer review defence

A person will be able to rely on this defence if it can be established that the material is contained in a peer-reviewed publication in an academic or scientific journal.

Conclusion

These amendments should see fewer small or less serious claims for defamation brought before the courts. Note that the amendments will only apply to new publications from the date the amendments come in to force - publications before that date will continue to be dealt with under the existing law.

The changes are seen as the first stage of defamation law reform. An anticipated second stage will focus on the responsibilities and liability of digital platforms for defamatory content published online.

DEVELOPER'S LAND DECLARED A PUBLIC ROAD, DESPITE CLEAR TITLE

PETER BARAKATE

With Torrens title land, you'd reckon that title is everything. It's a given (surely?) that you should be able to rely on a title search to see who owns the land, who has a mortgage over it and whether it is leased or subject to any easements.

Not so fast! The Torrens system is subject to what is known as 'overriding statutes' which create public rights that trump private rights in land. This exception to the conclusive nature of the Torrens Register appears in every Australian jurisdiction.

There is nothing particularly controversial about this, many statutes override the Torrens Register. However, it does create uncertainty and can have significant impacts on the parties involved.

Take the recent case of *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* [1]. WCL wanted to use land it owned under the Torrens Register as part of a planned development. Orb Holdings owned land adjoining WCL's development site to which it gained access via the land owned by WCL. Orb Holdings commenced proceedings in Queensland's Supreme Court arguing that the land owned by WCL was actually a public road.

The Supreme Court agreed with Orb Holdings, scuppering WCL's plans.

Now you might be asking, what has this got to do with New South Wales? The answer is that we have similar legislation in this area and the Court drew on New South Wales case law in reaching its conclusion. So the Court's decision is of direct relevance to us.

The history of Beatrice Lane

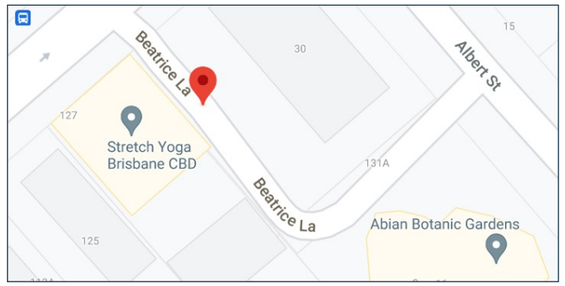
Indulge me on some background facts. They're important!

In 1874, the trustees of Brisbane Grammar School purchased four adjacent freehold parcels of land bounded by Margaret, Albert and Alice Streets.

In 1876 the trustees lodged a plan to divide part of the land into new lots. The plan showed some remaining land, the L-shaped piece which became Beatrice Lane (see excerpt from Google Maps). It was described as 'Lot 11 (Balance)' and the words 'Right of Way' were written on its area.

This was what was known as an 'undescribed balance' on a plan of subdivision, meaning it was not described as a distinct lot, but simply noted as the remainder of the original land that had been subdivided.

In this way, the land remained in the ownership of the school trustees, even though there was no separate description of it in the Torrens Register, nor any certificate of title.



Beatrice Lane, the "undescribed balance" of a subdivision created in 1876 and the subject of an important Supreme Court case in 2020.

Image reproduced by courtesy of Google Maps.

> "The Torrens system is subject to what is known as 'overriding statutes' which create public rights that trump private rights in land."

In 1994 the Automated Titles System was established. Under its auspices, the 'undescribed balance' of land was given its own description (Lot 11 on RP1073). On 4 March 1994, a certificate of title for the land was issued to the trustees, free of any encumbrance.

In 2008, the trustees transferred the land to a developer. In 2012, another plan, SP142332, was registered, which showed the land described as Beatrice Lane [2].

In March 2014, Lot 11 was transferred to another company, which then transferred it to WCL in September that year.

Lot 11 is recorded in the Roads Register maintained by the Brisbane City Council, where it is described as Beatrice Lane and a road controlled by the Council.

1 [2020] QCA 198

2 If this occurred in New South Wales, that would have been sufficient to dedicate the land as public road under section 9 of the *Roads Act 1993*.

The decision of the Court

Until 1962, Beatrice Lane was vested in the trustees of the Grammar School. However, on the facts assumed in the case, there were co-existing public rights to use the land (through a dedication of the land as public road at common law), which were independent of the trustees' ownership.

In 1962, the *Land Act* was enacted in Queensland. Section 369 of the Act provided that all land which had previously been dedicated by the owner for public use as a road was now vested in the Crown.

The Queensland Supreme Court held that Beatrice Lane clearly fell within the definition of 'road' under the *Land Act*. It also held that, if this land was dedicated as a public road, there were public rights to use the land. The trustees, as owners of the fee simple, were subject to these rights, even though they held a Torrens title.

Section 369 thereby overrode the provisions of the Torrens statute.

In support of this ruling, the Court cited the decision of Sir Laurence Street in *Pratten v Warringah Shire Council* [3], who said it had long been accepted that proprietary rights could exist over freehold land regardless of registration under a Torrens statute.

The Supreme Court held that Pratten (amongst other cases) provided strong guidance for the interpretation of the legislation in this case and that section 369 of the *Land Act 1962* unambiguously vested this land in the Crown (if it had been dedicated as a public road).

The Act did not require that anything be recorded on the Torrens Register for the vesting to hold. In the words of Street J, not only were the registered owners of this land thereafter incapable of calling back their fee simple, but no act of the Registrar could encroach upon the Crown's fee simple [4].

This decision of the Court therefore prevented WCL from incorporating Beatrice Lane into its development site.

Lessons for New South Wales

The position in New South Wales is no different – owners of Torrens land cannot rely on the Torrens Register as determinative or conclusive of all interests in the land. Torrens title is statutory title, given under the *Real Property Act 1900*. That makes it subject to later legislation.

New South Wales has 33 provisions in 23 Acts that take precedence over the provisions of the *Real Property Act 1900*. The *Local Government Act 1993*, for example, grants councils specific rights regarding water supply, sewerage and stormwater drainage that they have installed on the land of other people.

The moral of this story is that if there is doubt about the title, it should be investigated to determine the land's true owner. I was recently able to do this for a private client, by successfully arguing to the roads authority that the land was no longer a public road, but was actually part of my client's title. The roads authority accepted this (somewhat begrudgingly) and my client's development could proceed. In Sydney, where land prices continue to soar, this was a significant win.

3 [1969] 2 NSWR 161 at 164

4 At 166-167

DISHONEST GENERAL MANAGER WAS NOT WRONGFULLY DISMISSED

JAMES MATTSON & HANNAH DAWSON

It is well known in employment, especially in senior roles, that honesty is an important quality. This is especially so in public sector employment.

This principle was recently made abundantly clear by President Bell of the NSW Supreme Court in *Eldridge v Wagga Wagga City Council* [2021] NSWSC 312 (31 March 2021).

In this case, President Bell formed the view that the General Manager of Wagga Wagga City Council was lawfully terminated for, amongst other reasons, his failure to disclose pecuniary interests as well as conflicts of interest, constituting serious and persistent breaches of his employment contract. In this article, we examine the lessons from this case.

A local businessman becomes General Manager

In April 2016, Mr Eldridge, a local businessman, was appointed General Manager of the Council for a four-year term. His employment was governed by the Standard Contract of Employment for General Managers of Councils and the *Local Government Act* 1993 (NSW).

In May 2017, just over one year into his contract, the Council summarily dismissed Mr Eldridge. Mr Eldridge subsequently sued the Council for wrongful dismissal and claimed damages of $1,159,425 (representing the income he would have received during the balance of his term).

What did he do wrong?

> “Employers are entitled to rely on after-acquired knowledge to justify an earlier dismissal (if unaware of the conduct at the time).”

The conduct

In defending proceedings, the Council relied on an array of breaches of the Standard Contract, some of which only became known to the Council after Mr Eldridge’s dismissal. Employers are entitled to rely on after-acquired knowledge to justify an earlier dismissal (if unaware of the conduct at the time).

The conduct included:

- failure to lodge a Disclosure of Pecuniary Interest Return declaring his interests and ownership in local businesses
- knowingly misleading Council by approving a report which falsely stated that all Declarations of Pecuniary Interest Returns had been received from designated persons
- engaging in external employment without Council knowledge or approval
- retention of Council lawyers to address personal allegations against him, without express Council approval
- incurring an unauthorised personal expense of $281.10.

Most notably, the Council’s defence heavily relied on Mr Eldridge’s failure to disclose his son’s interest in the Inglewood Road Planning Proposal, a proposal in which Mr Eldridge took an active role in expediting through the Council. Mr Eldridge insistently denied that he had known of the proposal before it was brought to his attention by a journalist. He went as far as publicly denying such knowledge in a Council media release.

Despite this, President Bell found there was a *“wealth of evidence”* that Mr Eldridge was not only aware of the conflict, but was himself involved in the proposal and had made a deliberate effort to conceal that involvement. *“The lies were disgraceful and dishonest and represented a further breach of Mr Eldridge’s duties to the Council and those under his control”*, President Bell said.

The decision

The President, in reviewing the regulatory scheme, said:

> *The statutory provisions of the* [Local Government] *Act, the Standard Contract of Employment for General Managers of Councils in New South Wales, the Code and the Policy all place important emphasis on good corporate governance and proper and formal disclosure of pecuniary and non-pecuniary interests.*

In that regime, the President rejected Mr Eldridge’s downplaying of his failures to disclose as “oversights”. *“For a well-qualified, apparently vastly experienced businessman who purported to be across corporate governance obligations, it is not possible to accept … that his failure ever to disclose his … interest[s], … was an oversight on his part,”* the President concluded.

The breaches of his duties were not trivial but serious. President Bell was of the view that Council was “*both fully entitled to and justified in summarily dismissing*” Mr Eldridge, stating:

> *I consider that the allegations in relation to non-disclosure of the conflict with regard to the Inglewood Road Planning Proposal, … and the misleading of Council in that respect, and his unauthorised work … were each of such seriousness to have individually justified summary dismissal. When they are considered together or in combination, the case for Mr Eldridge’s dismissal was an extremely strong one.*

What about the personal expense?

As a reminder of the need to consider all circumstances for summary dismissal, the President concluded:

> *Viewed in isolation, it is difficult to see how the incurring of a single unauthorised expense, at least in the amount of $281.10, would justify the termination of a four year contract as General Manager of the Council. That is not to condone the expenditure if it was in fact unauthorised; it is simply to have regard to the principles relating to the quality of the seriousness of any breach which may justify summary dismissal.*

Though dishonest, this act alone was not grave enough to justify summary dismissal. Curious reasoning, but a reminder that an employer's right to summary dismissal is narrow, along with the President's view that *"[w]hat is required is the 'exceptional circumstances' founded in conduct 'destructive of the mutual trust between the employer and employee' "*. This is a stringent test indeed.

What the case means

It is important that senior executives and other officer holders do not put their own interests, particularly their external business interests, above the interests of local government and the local community.

Where senior executives and officer holders are decision-makers, full and frank disclosure is imperative for good, defensible decision-making, a lack of which can undermine public confidence in the integrity and administration of local government.

This decision sends a strong message that the non-disclosure of interests, whether pecuniary, conflicts of interest or engagements in external work, is extremely serious and unacceptable. There are grave consequences for not being honest.

However, employers need to assess the conduct and its seriousness and not too readily jump to summary dismissal, conscious of the exacting test to be met.

COURT BARES ITS TEETH OVER BREACH OF ENVIRONMENTAL LAW

DENNIS LOETHER & GABRIELLE ELLIS

A recent Court decision contains important findings for councils assessing applications pursuant to Part 5 of the *Environmental Planning & Assessment Act 1979*.

In *Palm Beach Protection Group Inc v Northern Beaches Council* [2020] NSWLEC 156, the Court found that Council failed to examine and take into account to the fullest extent possible, all environmental impacts when deciding to allow dogs on Station Beach, which was also a public reserve.

The Court held that the Council had breached two sections of the Act; namely:

- section 5.5(1) by not examining and taking into account to the fullest extent possible all matters likely to affect the environment by virtue of the activity
- its implied duty under section 5.7 to consider whether the activity was likely to have a significant effect on the environment.

Background

On 27 August 2019 Council passed a resolution to conduct a 12-month dog off-leash trial at Station Beach. The boundaries of the off-leash area, as recommended by a Review of Environmental Factors (REF), would be clearly signposted to mitigate the environmental impacts on nearby threatened species of seagrass and seahorse.

The Palm Beach Protection Group opposed the resolution and commenced judicial review proceedings on 8 October.

On 17 December Council passed another resolution to only allow dogs on-leash at Station Beach. In this case, no western boundary was defined, thus allowing dogs on-leash to enter the water and nearby seagrass.

Both decisions were the subject of judicial reviews.

The Court's findings

The Court ruled that Council breached s 5.5(1) of the Act by failing to examine and take into account, to the fullest extent possible, all matters affecting or likely to affect the environment by allowing dog on-leash activities.

Section 5.5(1) imposes a duty on Council to determine whether an activity is likely to significantly affect the environment. This duty is imperative.

Council must first ask, is the activity likely to significantly affect the environment?

If the answer is yes, Council is under a strict duty to obtain and examine an Environmental Impact Statement before approving or carrying out the activity (s 5.7 of the Act). In doing so, Council must take into account all factors in clause 228 of the *Environmental Planning and Assessment Regulation 2000*. The Council in this case, did not obtain or examine an Environmental Impact Statement in respect of either activity.

The duty imposed by s 5.5(1) applies to every activity; an environmental assessment of one does not discharge the duty to consider the environmental impact of another. Rather, every activity requires a 'particular and precise evaluation' of its environmental impact.

The Second Decision did not consider any environmental impacts of dog on-leash activities and was inconsistent with the protective measures recommended in the REF.

Ultimately, the Court found that both the on-leash and off-leash activities, when properly assessed, were likely to significantly affect the environment. The activities were:

- "likely" in the sense that there is a *real chance or possibility of the effects occurring by reason of the activity*, and;
- likely to be "significant", in the sense that they *are important, notable, weighty or more than ordinary*, for the same reasons that the adverse effects of conducting the dog off-leash area trial are likely to significantly affect the environment.

The Court agreed with the incorporated association that there was likely to be a significant effect from the *off-leash* activities because:

- the Council failed to adopt the REF's recommendations for implementation and enforcement of all the mitigation measures. These measures were a condition of the finding of no likely significant effect. Accordingly, the Council did not find that conducting the approved activity was not likely to significantly affect the environment; and
- as a jurisdictional fact, the approved activity was likely to significantly affect the environment when properly assessed.

> "Section 5.5(1) imposes a duty on Council to determine whether an activity is likely to significantly affect the environment. This duty is imperative."

The REF was an assessment of the environmental impact of off-leash activity only, and did not comply with the requirements of s 5.5(1) of the Act and cl 228 of the Regulation to assess the likely environmental impact of on-leash activity.

The REF for the off-leash area trial recommended several preventative and mitigative measures. The Council's on-leash resolution imposed no requirements to implement or enforce any of these measures. No western boundary was fixed, so there was no restriction on dogs and their owners entering and harming the seagrass beds, and the southern boundary was moved, meaning dogs and owners could enter and harm the threatened seagrass.

Without limiting the boundaries of the area in accordance with the REF recommendations, adverse environmental impacts were likely.

Likewise, Council did not adopt other recommended mitigation measures including a management plan incorporating a monitoring program. The Court noted that in the absence of strict implementation and enforcement, the likelihood that many dogs would be allowed to roam off-leash was high.

Further, the Court said, *"to approve the activity of allowing dogs on-leash in an area and on terms that are inconsistent with the REF, evidences a failure to take into account all matters affecting or likely to affect the environment by reason of the activity"*.

The Court therefore declared the Council's First Decision and Second Decision invalid.

This decision highlights the complexity surrounding the application of Part 5 of the Act and reaffirms the strict duty imposed on Councils to conduct a proper and precise examination of the likely environmental impacts of any activity carried out under this Part of the Act.

If you have questions or require further information, please do not hesitate to contact our team at Bartier Perry.

STOPPING SELF-REPRESENTED LITIGANTS IN THEIR TRACKS: HOW TO USE SECURITY FOR COSTS AND OTHER PROCEDURES

DAVID CREAIS

One of the enduring, not to mention expensive, bugbears for every local council is unmeritorious litigation from self-represented plaintiffs.

Regardless of their merits, such claims generally cost large sums of public money to defend. Winning them is often of little comfort to councils because the legal costs are usually not recoverable, as self-represented litigants rarely have the means to pay them.

Costs generally take two forms: hard costs from external legal counsel, and the indirect cost of the time spent by council's own legal and other staff.

It is understandable how such situations can arise. One of the principles of our legal system is that everyone should have fair access to "their day in court". However, often it seems that the playing field is tilted unduly in favour of self-represented litigants.

Helpfully, the courts' position has shifted of late, with recent cases demonstrating a greater willingness to order security for costs against individuals and require self-represented litigants to expose their personal assets to a costs order. The net effect is that councils do have effective options to bring actions to a speedy conclusion and protect themselves against non-meritorious or vexatious proceedings.

Two procedures in particular are relevant here:

1. The first is the court's ability to order a plaintiff to provide security, usually by way of a bank guarantee or cash deposit, which can be called on by the council at the end of proceedings, assuming costs are awarded in favour of council.
2. The second is the requirement that a company be represented either by a solicitor or by a director of the company. This requirement means a plaintiff cannot hide behind a shell company and also avoid incurring their own legal costs. If a director does appear, their personal assets are available to satisfy an order for costs – a prospect sufficient to give any such plaintiff serious pause for thought. If the company is not represented in the manner prescribed, the judge can order proceedings to be stayed.

The principle in both cases is simple: a plaintiff must have "skin in the game" when bringing proceedings. If the plaintiff has assets, that means those assets must be put at risk. If they don't have assets, they need access to funds sufficient to cover a potential adverse costs order.

Until recently it was considered that an order for provision of security for costs would only be made against an individual (as opposed to a corporation) where the plaintiff had divested assets with the intention of avoiding the consequences of the proceedings.

However in *Mohareb v Fairfax Media Publications Pty Limited*, the Supreme Court of NSW held that the Supreme Court has inherent jurisdiction to order security, and that the question whether to order security is a discretionary matter, to be determined in light of all relevant circumstances.

Further, the Court stated that there is no justification for limiting the circumstances in which a court can order an individual to provide security for costs to cases where the divesting of assets, or the deliberate organisation of affairs to avoid acquiring assets, occurs after proceedings have been commenced or are in active contemplation.

In *A-Link Technology Pty vs Cumberland Council*, both procedures were used to contain Council's costs and to stay the proceedings before they ran very far.

The dispute concerned a contract to purchase land from the Council. The plaintiff stated that the Council had misled it concerning the ability to develop the property, and had wrongfully rescinded the contract. The plaintiff claimed damages of approximately $56m.

In bringing the claim, A-Link was not represented by a solicitor (the notorious Mr Salim Mehajer had been primarily communicating on behalf of the plaintiff) and none of its directors were named as a joint plaintiff, as would be required by Uniform Civil Procedure Rule (**UCPR**) 7.1.

The plaintiff was in a delicate financial position, its assets consisting mainly of property in which it held little, if any, equity.

The Council had asked the plaintiff to produce its financial records, but the plaintiff had failed to do so.

The Council therefore requested that the Court require the plaintiff to provide security for costs, and for a stay of proceedings until a solicitor was appointed or one of the directors was joined as a party to the proceedings.

> "The net effect is that councils do have effective options to bring actions to a speedy conclusion and protect themselves against non-meritorious or vexatious proceedings."

The Court held that the evidence comprehensively established a valid concern regarding the plaintiff's ability to pay costs if unsuccessful. This conclusion arose not only from the plaintiff's failure to provide the information Council had requested, but also from matters to which a Court is to have regard when considering ordering security for costs.

Those matters, set out in UCPR 42.21, included:

- the slender prospects of the claim succeeding
- the apparent impecuniosity of the plaintiff(s)
- the Council having not caused the plaintiff's impecuniosity
- no matter of public importance in the case having been demonstrated
- the events that led to the proceedings being dated and the delay in commencing the proceedings
- the likelihood of costs being substantial
- that although making an order for security might stultify the proceedings, there was no evidence that the director and shareholder of the plaintiff did not have the ability to fund them.

Based on evidence from the Council regarding its likely costs, the Court ordered the plaintiff to provide a bank guarantee or cash bond of $340,000, until which time proceedings would be stayed.

The Court also ordered that as the plaintiff was in breach of Rule UCPR 7.1, and because the breach had been pointed out twice by Council to no effect, the proceedings were therefore not competently constituted and should be stayed until a director of the plaintiff was joined as an additional plaintiff in the proceedings or until a solicitor filed a notice of appearance for the plaintiff.

Takeaways for councils

The main takeaway from this case and the case law surrounding it is that councils need not unduly fear vexatious or non-meritorious litigation from those unable or unwilling to cover orders for court costs.

Self-represented plaintiffs (corporate or individual) can be expected to demonstrate an ability to pay any costs awarded against them before proceedings go ahead, and councils have the ability to apply for a stay of proceedings when a plaintiff fails to do so.

In the few cases where proceedings do go ahead, a council can then expect to recover all or most of its costs in those cases that lack merit.

SUPPORT FOR LOCAL BUSINESSES:
A GOOD IDEA, BUT WATCH THOSE FISH HOOKS

NORMAN DONATO

Who doesn't love supporting their local businesses? It's a powerful driver for not only individuals, but also business owners and managers.

But what about councils? Can they establish a "buy local" policy that favours businesses just down the road over those outside their borders, and if so what are some things to consider?

Acts that come into play when considering this question include the *Competition and Consumer Act 2010* (Cth), the *Fair Trading Act 1987* (NSW) and the *Local Government Act 1993* (Act). "Tendering Guidelines for NSW Local Government", issued in October 2009 (**Guidelines**), must also be considered and, in some circumstances, even some international trade agreements may also come into the frame.

Given the volume of legislation to consider, it may come as a surprise that the answer is a clear "yes" – councils' freedom to institute buy local policies is recognised in, among other places, the Tendering Guidelines for NSW Local Government (**Guidelines**).

But that freedom is not absolute or unlimited, as becomes obvious from paragraph 1.6 of the Guidelines, which states that a council should develop a buy local policy if it wishes to consider local preference as a factor in the procurement process.

Note the temperate wording: "consider", "preference" and "a factor". Add these together, and it's obvious that a buy local policy is not a licence to tilt the playing field unduly in favour of the businesses in the council neighbourhood.

Which then raises the question of what is an acceptable advantage, and at what point does a line get crossed?

The law – as it often is – is not prescriptive on this point. Some councils offer local businesses a 15% price advantage when putting projects out for tender, and there has yet to be a successful legal challenge to this. But as to how much exactly is too much, has yet to be determined.

Also important is the type of work to be carried out. By implementing a Buy-Local policy, councils may not, in certain circumstances, be breaching the *Competition and Consumer Act*, which is designed to prevent practices that substantially lessen competition. Its provisions regarding restrictive trade practices apply to councils when they are acting as, or carrying on, a business, as opposed to carrying out statutory functions.

What constitutes (and doesn't constitute) carrying on a business is – again – not prescribed in all cases. Case law provides some useful guidelines.

- For an activity to be regarded as a "business" it must have some element of commerce of trade such as a private citizen or trader might undertake.
- A business refers to activities undertaken as a going concern, not just a one-off activity.
- Although a business can be for non-profit, the existence or absence of a profit-making purpose is relevant.
- A business activity is one that takes place in a business context and bears a business character. That generally rules out the carrying out of regulatory or governmental functions in the interests of the community or the performance of a statutory duty in relation to which fees are charged.

> "Can councils establish a "buy local" policy that favours businesses just down the road over those outside their borders, and if so what are some things to consider?"

As mentioned, activities that fall outside this purview include those required by council as part of their statutory or regulatory obligations. Such things, that is, as sewage. Also, not regarded as business activities are those that a council undertakes at its discretion in order to meet the current or future needs of its community.

Note, however, that while building a road might be considered part of a council's statutory role, charging tolls on that road could well be regarded as a business activity. *Murphy v Victoria* [2014] VSCA 238, which centres on such an instance, is still being argued and we await the outcome with interest.

If considering a Buy Local policy, councils should keep in mind the following requirements. The policy should be:

- Based on sound reasoning and include a statement indicating the basis for its use.
- Clear in its application - for example, where an additional cost would be incurred by the council in implementing its policy, the maximum amount or percentage of that additional cost should be specified and the particular circumstances in which the amount should also be acceptable to the local community.
- Disclosed to all potential tenderers prior to their decision to submit a tender.
- Included in the tender documents and identified in the evaluation criteria.
- Referred to when reporting the result of the tender evaluation process including the details of any additional cost to be incurred by the council if it accepts a tender, other than the lowest tender, as a result of the implementation of the policy.

In summary, councils:

- Generally, may implement or apply a Buy Local policy, or other policy designed to favour local businesses, in relation to works that are conducted as part of their statutory obligations and do not include any business-type activity.
- Must ensure the policy does not unduly tip the playing field in favour of local businesses.
- Must be transparent in their application of the policy.
- Should seek legal advice when developing or amending a Buy Local policy, or any initiative designed to confer an advantage on local businesses, to avoid the potential fish hooks are both numerous and widely scattered throughout numerous pieces of legislation. Gaining an independent, specialist view is a prudent investment.

WOULD YOU LIKE TO KNOW MORE?

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

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VALUE ADDED SERVICES

We spend significant time looking at ways we can assist councils outside of just providing legal advice. We have at times sought your feedback to clarify what is of importance to you and what else we can do to simply help you do your role. Examples of these include:

Articles

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

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

Support of industry and community

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

Bartier Perry regularly sponsors and provides speakers to council-related conferences, including the LGNSW Property Professionals Conference, LGNSW Human Resources Conference and the Australian Property Institute (API) Public Sector Conference.

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

CLE, training and education

We provide councils with tailored seminars, workshops and executive briefings for senior management on current legislative changes and regulatory issues. Other recent seminars we've held include:

- How do you successfully restructure your workforce for the new world?
- Competition and Consumer Law Compliance Training 2021

Seminars are captured via webcast for regional clients and footage then uploaded to our website.

For any enquiries, feel free to contact us at info@bartier.com.au

All articles, upcoming events and past videos can be found under the Insights tab at – www.bartier.com.au

ABOUT BARTIER PERRY

Based in Sydney's CBD, Bartier Perry is an established and respected mid-tier law firm which has been providing expert legal services for over 75 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 80 lawyers, we offer personalised legal services delivered within the following divisional practice groups:

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

YOUR THOUGHTS AND FEEDBACK

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

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

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