

## *City of Port Adelaide Enfield v Bingham [2014] SASC 36*

### *Supreme Court confirms that recommendations made by the State Ombudsman can be challenged*

Last week, the Supreme Court of South Australia delivered an important decision about the powers and decision-making constraints upon the State Ombudsman. The decision has particular relevance for Council staff who may be involved in Ombudsman investigations, or who work in the area of procurement, contracts or governance. In our opinion, and acting upon our advice the City of Port Adelaide Enfield was vindicated by both the facts and the Supreme Court decision, in challenging the State Ombudsman's report and recommendations as being legally flawed and without merit.

#### **The Facts**

The Council engaged J & G (SA) Pty Ltd (J & G) to dispose of hundreds of tyres from the Council depot. J & G dumped the tyres on a property at Burton which it leased from Mr Osmond. Mr Osmond complained to the Ombudsman about the Council's decision to engage J & G. Mr Osmond argued that J & G did not have the relevant development and EPA approvals/licences to operate a waste transfer facility at the property and, for this reason, the Council should not have engaged J & G. The Ombudsman identified that the 'administrative act' to which his investigation related was the Council's authorisation to J & G to transport the tyres to the Burton Property.

#### **The Ombudsman's decision**

The Ombudsman concluded that the Council's actions by engaging J & G were wrong within the meaning of section 25 (1)(g) of the *Ombudsman Act 1972* in that it breached its Contracts and Tendering Policy which required purchases to be "compliant with the requirements of relevant legislation". This was because the Council failed to enquire as to whether J & G had development and EPA approval to operate the waste transfer facility. The Ombudsman also recommended that the Council collect the tyres from the Burton property that were disposed of almost two years prior and dispose of them appropriately.

#### **The Action**

The Council was appropriately concerned about the ramifications for it and other councils if required to make enquiries about the approvals, licences and qualifications held by all contractors before deciding to engage them. If the Ombudsman's decision was

correct it would mean that every council would be required to allocate resources to:

- undertake development approval searches and, in this case, a search that would need to be undertaken at another council;
- make enquiries with the Environment Protection Authority; and
- ascertain information about the business operations of each service provider or supplier.

The Council was also concerned as to its ability to implement the recommendations to retrieve the tyres because it had no authority or right to enter the Burton property and even if it could, it had no way of identifying the tyres from its depot.

Accordingly, the Council made application to the Supreme Court for judicial review of the Ombudsman's report and sought an order in the nature of *certiorari*, quashing the decision, and a declaration that the decision was *ultra vires* and, therefore, invalid. The Ombudsman opposed the application for judicial review. The Crown, on behalf of the Ombudsman, argued that *certiorari* does not apply in this case because the opinions reached and the recommendations made by the Ombudsman following an investigation have no binding legal force. Accordingly, an Ombudsman decision cannot be quashed if it has no legal effect. This argument was not accepted by the Court.

**"no reasonable person could have reached this conclusion. The construction of the policy adopted by the Ombudsman is not open. It is not a construction which reasonable minds could reach."**

#### **The Judgment**

The Court said that the Ombudsman's report and recommendations contained within it operate as a precondition to a potential course of action or as a step in a process capable of altering the rights or interests of the Council depending upon the actions of the Minister under section 273 of the *Local Government Act 1999*.

His Honour, Justice Stanley, agreed with the Council's submissions that the reference to the Council complying with relevant legislation as set out in its Contracts and Tendering Policy, meant that the Council had to comply with relevant legislation in entering into contracts, not that it had to make enquiries to ascertain whether third parties with which the Council might do business hold requisite approvals and licences.

The Court said that the Ombudsman's conclusion that the Council had breached the Policy by not ascertaining what, if any approvals J & G had obtained for the transportation and disposal of tyres was an

incorrect interpretation of the Council's policy. The Court said *"no reasonable person could have reached this conclusion. The construction of the policy adopted by the Ombudsman is not open. It is not a construction which reasonable minds could reach."*

Judge Stanley also stated that the Ombudsman's decision that the actions of the Council were wrong *"is tainted by Wednesbury unreasonableness"*. The Court said that the:

*Ombudsman's opinion does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This conclusion lacks an evident and intelligible justification.*

Consistent with the Council's application, the Court made an order setting aside the Ombudsman's opinion and recommendation. In doing so it declared the Ombudsman report to be *ultra vires* and quashed the Ombudsman's decision.

### **What the judgment means for Councils?**

The judgment means that:

1. councils are able to seek declaratory relief of this nature from the Court through a judicial review action;
2. an Ombudsman's report can be quashed;
3. a decision of the Ombudsman, including one that falls to be determined that it was "wrong" within the terms of the Ombudsman's Act, must also satisfy the test of reasonableness;
4. an Ombudsman's report operates as a precondition to a potential course of action that

could be taken against a council, altering that councils' rights or interests; and

5. the procurement obligation that a council comply with relevant legislation cannot be understood to impose an obligation on the council, and more particularly staff, to undertake enquiries for the purpose of ascertaining whether all entities that might tender for Council contracts comply with relevant laws in the conduct of their business.

The Court recognised that the Council enters into numerous contracts and that such a practice would place significant strain on Council resources if it were under a legal obligation to make such enquiries.

Whilst this result is a positive outcome for all councils in South Australia it should not be seen as a reason to not undertake reasonable due diligence when conducting a procurement process and engaging contractors. A council must ensure it has made appropriate enquires before doing business with commercial entities for the provision of goods and/or services, such as requisite insurances and financial viability.

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