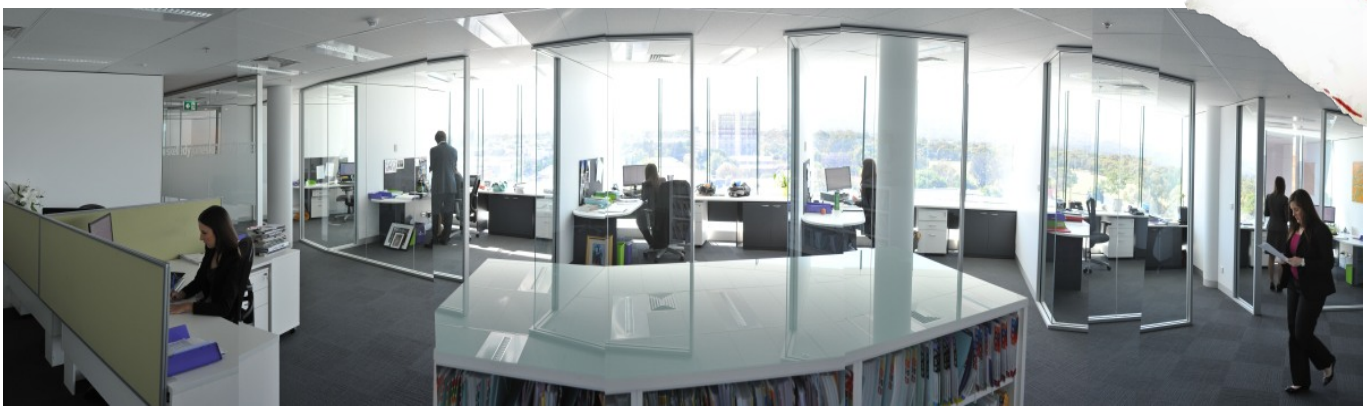
kelledy jones
LAWYERS



December 2013

LG Leader

Contents

CONTACT
T: (08) 8113 7100
F: (08) 8113 7199
E: info@kelledyjones.com.au

Address
Level 6, 19 Gilles St
Adelaide SA 5000

Postal Address
GPO Box 2024
Adelaide SA 5001

Marina Berth Rating

Michael Kelledy

The *Local Government (Rates) Amendment Act 2013* has recently passed through both Houses of Parliament and has been assented to.

The single purpose of what was a private member's Bill is to amend the rating provisions of the *Local Government Act 1999* as they apply to 'marina berths' (defined) within a 'marina' (also defined).

In summary, what this means for councils with a marina in their area is:

- a fixed charge cannot be imposed against each marina berth within a marina;
- alternatively, a minimum amount payable by way of rates cannot apply to a marina or marina berth;
- the recognition of a marina berth as a new permissible differentiating factor for differential rating; and
- where a council uses differential rating, the rate in the dollar for marina berths cannot exceed the differential rates for land with a commercial land use.

In summary, individual marina berths will no longer be subject to individual fixed charges or minimum amounts or pay a higher rate in the dollar than commercial land uses.

It is also important to note that these legislative changes will only have a practical impact for the 2014/15 rating year because they do not have any retrospective effect and hence do not impact the rates declared for 2013/14.

Impact of *Freedom of Information Act 1991* throughout Council

Joanna Oborne

In the course of providing advice to Councils under the *Freedom of Information Act 1991* ("FOI Act"), we have identified a number of documents, especially internal emails, which:

- include comments regarding members of the Council's community or a community group; or
- include personal matters which primarily discuss Council business.

This kind of material, if released to an applicant under a freedom of information request, can often lead to embarrassment for the Council or the Council officer and, occasionally, to a complaint being made against the Council officer who has authored the document.

We <u>often</u> find that these documents are <u>not</u> exempt from disclosure and, therefore, must be released to the applicant. This is because the objects of the FOI Act promote openness and accountability of Councils. Therefore, the starting point when assessing any FOI application is that the documents requested should be released, unless it can be shown that they are exempt from disclosure under Schedule 1 to the FOI Act, not the other way around.

Furthermore, some of the grounds of exemption under Schedule 1 to the FOI Act involve a test that the release of the document (or information within it) must be unreasonable or contrary to the public interest. However, where the information in the document is benign or where it relates to the applicant (i.e. a community member requesting access to information about him or herself), then these tests may not be met. Similarly, the fact that the release of a document will embarrass the Council or a Council officer <u>is not</u>, without more, a ground on which to deny an applicant access to it.

Therefore, we remind all Council officers to keep in mind the operation of the FOI Act and to always remember that the documents (including electronic documents) created by Council officers form part of the Council's records and can be the subject of an application under the FOI Act.

Get a handle on complaint handling: the new Code of Conduct for Council Members

Natasha Jones

As you should be aware, a complaint handling procedure is required under Part 2 of the new Code of Conduct for Council Members. Part 2 – Behavioural Code specifically refers to the requirement that each Council is to adopt a process for the handling of alleged breaches of this Part. This means that Councils are unable to rely upon any process that may have been in place under the previous Code, unless it is specifically adopted as the process to address the handling of alleged breaches under the Behavioural Code. Within the procedure any alleged breaches of the Behavioural Code should be brought to the attention of the Principal Member or CEO of the Council, or nominated delegate(s). This means there is the ability for the CEO to nominate his/her delegate for the receipt of complaints under this Part of the Code.

The Council has discretion to determine what is an appropriate process for the handling of alleged breaches. This can include circumstances when there may be good reason why no action should be taken. For example, a procedure could provide the ability for a preliminary assessment to be undertaken by an appropriate person/body to determine whether the complaint:

- is frivolous, vexatious or trivial and will not be investigated further;
- that it requires referral to another agency such as SAPOL, the Ombudsman or the Office for Public Integrity;
- has been previously dealt with by the Council or another agency; or
- there is other good reason why no action should be taken in relation to the matter.

If a preliminary assessment of this nature is made the procedure should ensure reasons are recorded and also provided to the complainant to explain the action taken.

It would also be of assistance to the CEO if the procedure expressly provided for circumstances when the CEO is to refer a complaint to the Ombudsman where it is properly a complaint under Part 3, not Part 2.

The Code also recognises different processes that may be relied upon to resolve a complaint, such as the use of a mediator or conciliator, LGA Governance Panel or an independent assessor (clause 2.19). This means Councils can develop procedures that are flexible and provide sufficient discretion to enable the most appropriate procedure to be adopted.

Separately, but also relevant to what a Council needs to determine under the new Code, is whether the CEO wishes to nominate a delegate for the purposes of clauses 2.12 and 2.13 of the Code. If a delegate is appointed, Council members need to be advised who within Council administration they can direct their requests for information and requests for work or actions to. This will assist in ensuring members do not place themselves at risk of being in breach of the Code by approaching an incorrect staff member.

Also remember that the adopted process will need to be reviewed before November 2015, being within 12 months of the next general election.

PIA Awards Dinner

Kicking Bullying – New National and Local (Government) Laws

Gene Norton

Bullying has become a prevalent and recognised issue in the workplace. Until recently there has not been any comprehensive legislation in Australia dealing specifically with the issue of workplace bullying. As a result many employers and employees struggle to understand their rights and obligations when dealing with workplace bullying.

On 1 July 2013 the *Fair Work Amendment Act 2013* (Cth) came into operation. It amends the *Fair Work Act 2009* (Cth) to create a new anti-bullying jurisdiction for the Fair Work Commission, giving a worker the ability to seek redress for workplace bullying. The new laws also introduce new 'family friendly' measures, changes to the right of entry provisions and to give the Fair Work Commission the right to arbitrate adverse action claims.

The bullying provisions will take effect on 1 January 2014.

The *Work Health and Safety Act 2012* (SA) is based on the 'model' WHS Act developed by Safework Australia, and provides for the development of Regulations and Codes of Practice. The aim of that Act is to provide all workers in Australia with the same standard of health and safety protection. This Act applies to all industries including the Crown and Local Government.

Relevant to bullying is *'The Guide for Preventing and Responding to Workplace Bullying'* together with *'Workplace Bullying – A Workers Guide'* which was published on 27 November 2013. While it was originally intended that these Guidelines would be released as a Code of Practice, Safework SA, after consultation, made the decision to release them as guidelines stating that they add to the state of knowledge of a workplace hazard and its management and, as such, this information must be considered when determining hazard control or harm prevention strategies. These Guidelines provide practical guidance on how to meet the standards set out in the *Work Health and Safety Act 2012* (SA) and provides guidance on identifying and dealing with bullying in the workplace.

Recently the *'Code of Conduct for Council Members'* (Gazetted 29 August 2013) was made pursuant to section 110(1) of the *Local Government Act 1999*. On bullying, the Code of Conduct for Council Members states that Council Members must not 'bully or harass' other Council members and Council staff. The prescribed Code of Conduct for Council employees currently remains in draft form.

There is a significant push at local and National levels towards proactively preparing workplaces in the prevention and response to bullying in the workplace. The prominence of the issue of bullying and the implementation of legislation and guidelines dealing with it shows that the issue is clearly going to need to be effectively addressed by workplaces across Australia. Councils can be pre-emptive to these changes by reviewing their current policies dealing with bullying and training staff and members in these policies and the strategies developed nationally to deal with the issue.

What We Have Heard – South Australia's Expert Panel on Planning Reform delivered its first report

Victoria Shute

On 9 December 2013, the Expert Panel delivered its first report as part of the Planning Improvement Project ("PIP"). This report details the views and opinions expressed by the participants in the extensive public engagement undertaken by the Panel during its "Listening and Scoping" phase. Mr Brian Hayes QC, the Chair of the Panel has publicly stated at events hosted by the Australian Institute of Urban Studies and Urban Development Institute of Australia this week that the next phase of the Panel's work is to critically examine and thoroughly investigate each of the "good ideas" which have been put forward for the future of our planning system before making recommendations in this regard.

The report makes for interesting reading. Of particular interest to councils are suggestions that Regional Development Assessment Panels be mandated, that "prohibited" and "exempt" classes of development be re-introduced into the system, that pre-lodgement processes be increased and that planning merits appeals be heard in a different forum from the ERD Court – for instance the South Australian Civil and Administrative Tribunal.

As has been emphasised by the Panel over the past few days, no view has been formed on any of the suggestions put to it – this will occur at the conclusion of the Exploring and Discussion phase of the PIP which will now commence. It will be very interesting to see the result of this phase of the PIP and we will keep you updated on any progress in this regard.

The Report, summaries of all workshops undertaken by the Panel and submissions received are all available to be viewed on the Panel's website – www.thinkdesigndeliver.sa.gov.au

Welcome new members of the KJ Team

David Greenwell

David is a highly respected and sought-after local government specialist. Local government is in David's DNA: that is why he is such a great fit for KelledyJones.

His 35 years in public and local government law adds great depth to the team's experience and elevates the already extensive breadth of skills at KelledyJones.

David consults as part of the KelledyJones team in all areas, but with a focus on employment, commercial transactions and litigation.

David is a former director of industrial relations for the Local Government Association and developed the Local Government Workers' Compensation Scheme and the Mutual Liability Scheme. As a barrister he has worked predominately in local government, employment and commercial litigation.

He is a former partner at one of South Australia's largest law firms, a Fellow of the Australian Institute of Company Directors and a director on public and not-for-profit boards.

Hazel Kotro

Hazel is a lateral thinker and problem solver. She is a pro-active lawyer, focusing on process improvement and, consistent with the other members of the KelledyJones team, provides practical, solution-focussed advice to our wide range of Local Government clients.

Immediately prior to joining KelledyJones Hazel enjoyed experience working in-house at a council and as a procurement officer at LGA Procurement. In these roles she has provided advice and drafted complex procurement documentation in addition to undertaking negotiations, strategic anaylsis, procurement probity and contract/tender preparation.

Hazel is a registered conveyancer with significant experience in a broad range of property transactions including in the preparation of leases, licences, agreements, easements, encumbrances, complex infrastructure acquisition and disposal and the vesting of real property assets.

Future Liquor Licence Applications and Developments in Centre Zones – *Kipa Freeholds Pty Ltd v City of Tea Tree Gully & Ors* [2013] SAERDC 45

Victoria Shute

Kipa Freeholds Pty Ltd appealed against the decision of the City of Tea Tree Gully to grant Development Plan consent to a development application proposing to change the use of an existing office and retail showroom to a retail liquor outlet in the Regional Centre Zone.

As a preliminary step in this appeal, Kipa made an application to the Court seeking Orders requiring the second and third respondents, Swanbury Penglase and Coles Group Property Developments, to provide further particulars of their case and to produce a list of specified documents related to the particulars.

The particulars sought by Kipa related to the future liquor licensing arrangements for the proposed development. In particular, whether a licence would be removed from another premises or whether a new licence would be sought and, if a licence was proposed to be removed, from which premises was it proposed to be removed.

In order to convince the Court that such Orders should be granted, Kipa were required to establish that the particulars and documents sought by them were directly relevant to the issues in the appeal.

Kipa's argument in support of their application was premised on the removal of an existing licence from premises in another Centre or similar Zone (which Kipa asserted was likely as a number of Coles-affiliated Liquor Land bottle shops were located within 5 kilometres of the subject land in Centre Zones) prejudicing the achievement of the Development Plan's objectives for that zone.

In dismissing Kipa's application, the Court agreed with the Council's submissions that the objectives of each form of Centre and similar Zones speaks to a "a range of shopping facilities" being provided in an orderly and economic way and in a manner which does not prejudice other developments in those Zones and does not extend to a level of specificity such that a particular types of shop must be located in a particular Zone.

The Court acknowledged that shopping developments are dynamic entities and that the disappearance of a bottle shop could result in an equally useful yet different form of shop, or another bottle shop.

Whilst the Court acknowledged that in some circumstances, a particular shop could, by reason of its sheer size or influence, be of such importance that its removal could prejudice a Centre or Zone. Given the dynamic nature of shopping developments, the Court was not persuaded that the removal of a single retail bottle shop from a Centre was one such circumstance.

Further, the Court identified that issues surrounding the need or otherwise for a single bottle shop in a particular Centre or Zone are issues which are within the jurisdiction of the Licensing Court and not the ERD Court. This is due to the fact that the Licensing Court can assess questions of supply and demand for liquor and because other details relevant to the proposed liquor licensing arrangements for the proposed development would be issues central to any liquor licence application and subsequent objection.

The Elections 2014!

Michael Kelledy & Natasha Jones

No… not that in March 2014, but the important elections in November 2014.

If you are:

- considering re-nominating; or
- know someone considering nominating for a first time; or
- are a council officer with relevant responsibilities

for the local government periodic elections in November 2014, then the following 'key dates' will be relevant to you:

- 1 January 2014 – voters rolls expires;
- Friday 8 August 2014 – close of the voters rolls;
- Tuesday 2 September 2014 – nominations open;
- Tuesday 16 September 2014 (midday) – nominations close;
- Friday 7 November 2014 (5.00pm) – close of voting.

Also meaning, of course, that the 'caretaker period' commences on 16 September 2014 or such earlier date that a council specifies.

Social Media is here to stay. Is specialised legal advice necessary to help through the maze?

David Greenwell

The answer to the question posed in the heading is most definitely yes.

Social media is a complex area of expertise, encompassing several key areas of the Law and at least 14 Acts of Parliament both State and Commonwealth.

Two years ago one platform alone, Facebook, had more than 400,000.000 users. This is as many people as it takes to populate the world's third most populated country. Today it has close to 1 billion users and it is growing by an additional 100 million users every 3 months.

All social media brings with it, inherent risks. Similar to those brought by other forms of IT. In January 2012 there were 16.4 million Australians online (population of Australia 22.596 million). Of these a third contacted Local Government using the internet. This is up from 14% in 2005. The inherent risks includes such things as inefficiency, wasted investment, insufficient effectiveness and lost opportunity but it is the unique risk areas that require specialised legal advice in the formation of an entity Social Media Policy.

There are many myths that attach to this form of social intercourse. So let us put some to sleep.

- The internet is different – myth – legal rules may apply elsewhere but don't apply to the internet. Untrue.
- If someone else said it first, it is ok to repeat it – myth – if you republish a defamatory statement by copying and pasting the statement to your site you are treated as if you were the author. Accuracy of the statement or naming the author is no defence.
- You are not responsible if somebody else repeats or forwards your defamatory statement – myth
- If somebody posts a photo or video or article online they are consenting to its use by anyone – myth
- You cannot be responsible if somebody else posts defamatory or infringement material on your site or page – myth.
- "If somebody takes a photo of me they cannot post it online without my consent" – myth

The Australian Centre of Excellence for Local Government, in partnership with the University of Canberra, undertook a survey to explore the application, adoption and use of social media tools and techniques in Local Government.

A particular focus was on the changing role social media is playing in communications and community engagement. Of the 560 Council's surveyed across Australia 235 responded with half indicating that they are using social media. Social media is here to stay. The survey was designed to identify those areas where social media might best serve the sector. The results are very interesting and whilst we don't have time to produce them in this article we will publish a separate article to all councils.

There is just one finding that the survey clearly identified and that is that social media is not without significant risks that can and should be resourced intensively when developing strategies establishing platforms and monitoring responses for this. The report found that a specialised lawyer well versed in social media is essential to guide the Council through the various phases of the development of its social media policy.

Metro Games 2013

Dog Impound & Detention Fees – so long as the Minister approves, Council's don't lose

Cimon Burke

As many regulatory service officers will be aware, the *Dog and Cat Management Act 1995* does not confer an express power upon a Council to charge dog owners impound and/or daily detention fees in respect of dogs that are seized and detained by the Council. This has given rise to questions about the legality of Councils demanding payment of seizure and detention fees before a dog is released to its owner.

Section 62 of the Act outlines the circumstances in which a person is entitled to the return of his/her dog after it has been seized by the Council. One of the criteria that must be satisfied before such entitlement arises is that the person must pay to the Council:

i. the charges that are payable under the regulations in relation to the seizure and detention of the dog; and
ii. any other outstanding charges or fees payable under the Act in relation to the dog.

The Act clearly recognises seizure and detention fees at section 62(a)(i) but only in the context of fees payable under the Regulations. Since the Regulations do not make provision for such fees, this section has no work to do. In relation to point (ii) above, since there is no express power for Councils to recover seizure and detention fees under the Act this provision alone provides limited assistance.

However, the good news is that where Councils have sought and obtained Ministerial approval to impose a charge linked to the impound and/or daily detention of a dog, such charge is recoverable and can lawfully be demanded from a dog owner before his/her dog is returned. The reason for this is because in this case, the charge is one imposed in connection with the Council's power under section 26(6)(b)(iii) of the Act (i.e. which provides that a Council may charge fees approved by the Minister for meeting requirements imposed on Councils under the Act).

Whilst the Act is clear in relation to the scope and limit of a Council's power to impose charges under section 26(6)(b)(iii) and the exercise of the power in relation to the seizure and detention of dogs has not been 'tested' in Court, we are aware that the Minister's practice is to approve reasonable impound and daily holding charges nominated by a Council on the *'Dog Registration Fee Schedule Proforma'* that is sent to Councils annually from the Dog and Cat Management Board. Where such approval is forthcoming, our view is it is reasonable for Council's to rely upon it.

Therefore, a Council's ability to lawfully refuse to release a dog to its owner until such time as impound and detention charges have been paid, is contingent upon the Council having obtained Ministerial approval to impose such charges. In this way, wherever Ministerial approval is obtained, Council's will not be left out of pocket.

The Panel Contract and the Standing Offer what do they mean and how can they benefit Council?

Hazel Kotro

Most Council Procurement Policies will outline Council's preferred procurement method for ensuring a balance between open and fair competition, accountability, transparency, value for money purchasing and the efficient and effective use of Council procurement staff time and resources.

Councils are continually being asked to do more with less.

Council staff in undertaking their purchasing activities, must meet their statutory obligations in particular, but not limited to, the *Local Government Act 1999* and the *Independent Commissioner Against Corruption Act 2012*, they must abide by Council's policies, procedures and guidelines, meet internal budget constraints and make savings.

The Panel Contract and Standing Offer can help. After the initial set up, in accordance with Council's purchasing policy, Council staff can engage a contractor with a Council Purchase Order. A number of quotes can still be sought, negotiation can still occur and a preferred supplier chosen. Specialist advice is required to set up the Panel Contract, but once in place purchasing of certain goods and services can be considerably quicker, more efficient and decentralised.

Neither the Panel Contract or the Standing Offer are defined in the above legislation, Council policies will often refer to this type of arrangement. The Local Government Association Procurement *LGA Guide Procurement Policy* states that a Panel Contract is where a Council establishes panel arrangements with a select group of suppliers and can include either:

1. a standing offer from a pool of suppliers for the provision of goods and services on agreed terms; or

2. the prequalification of certain suppliers who may or may not be engaged on terms to be agreed;

The Panel Contract or Standing Offer is a supply arrangement for a future contract. They are beneficial when at the time of going to tender specific items, quantities and prices are not necessarily known. It is identified and anticipated in the Procurement Planning stage that a substantial number of requirements for the goods and services will be required in the near future or at least during the term of the Contract.

Panel Contract or Standing Offers are also beneficial where a considerable quantity of goods or services will be required by a council individually, a group of councils or the sector as a whole. By utilising their combined buying power administration costs are shared and savings are realised in both dollar terms and council expenditure on time and resources. The Panel Contract or Standing Offer can then be used numerous times throughout its term by all levels within the organisations.

The Panel Contract or Standing Offer can reference Councils' Purchase Order Terms and Conditions and must refer to the supply arrangement established (ie the Panel Contract number). No contract is formed until the Purchase Order is raised, Council staff must ensure the Purchase Order approving officer has the necessary delegation. No additional formal contract signing is required.

Please note that our offices will be closed from 5.30pm, Monday 23 December 2013, re-opening on Monday 6 January 2014.

The team at KelledyJones wish you a safe and happy festive season.

KelledyJones Contact List

Michael Kelledy

Telephone: (08) 8113 7103
Mobile: 0417 653 417
Email: mkelledy@kelledyjones.com.au

Natasha Jones

Telephone: (08) 8113 7102
Mobile: 0419 864 531
Email: njones@kelledyjones.com.au

David Greenwell

Telephone: (08) 8113 7110
Mobile: 0414 488 777
Email: dgreenwell@kelledyjones.com.au

Victoria Shute

Telephone: (08) 8113 7104
Mobile: 0423 004 339
Email: vshute@kelledyjones.com.au

Cimon Burke

Telephone: (08) 8113 7105
Mobile: 0422 165 614
Email: cburke@kelledyjones.com.au

Joanna Oborne

Telephone: (08) 8113 7106
Mobile: 0401 176 240
Email: joborne@kelledyjones.com.au

Gene Norton

Telephone: (08) 8113 7108
Mobile: 0418 660 124
Email: gnorton@kelledyjones.com.au

Hazel Kotro

Telephone: (08) 8113 7100
Mobile: 0438 636 035
Email: hkotro@kelledyjones.com.au

Wendy Bozzett

Telephone: (08) 8113 7101
Email: wbozzett@kelledyjones.com.au
(Executive Assistant)

Kate Hosford

Telephone: (08) 8113 7107
Email: khosford@kelledyjones.com.au
(Personal Assistant)

Lawyers for Local Government