kelledy jones
LAWYERS

July 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

How independent is independent?

Michael Kelledy

It is interesting to note the increasing emphasis on 'independence' that has been imposed in respect of certain Council functions over the past few years. For instance:

- the auditor rotation requirements limiting the term of an individual to 5 successive or 5 out of 6 successive financial years;
- the requirement that at least 1 member of the audit committee (with relevant financial experience) not be a member of the Council;
- the requirement for similar 'independence' for the audit committee of a section 42 or 43 subsidiary;
- the requirement that an auditor of a council or a subsidiary not be engaged to provide services outside the scope of the audit function;
- the requirement for an annual certificate of independence of the council/subsidiary auditor to be provided by the Council Chief Executive Officer and Presiding Member of the relevant audit committee; and
- the obligation to appoint 'independent' persons to the Council's Development Assessment Panel.

The independence requirements are to be considered in the context of their public policy objectives but also with regard to the conflict of interest provisions of the Local Government Act and the Development Act.

Therefore, we recommend that you have regard to the above if any independent person (or the organisation that employs the person) undertakes or seeks to undertake work or functions (i.e. to provide services) for the council/subsidiary and whether they can do so and also be truly independent! For example, can an independent member of a council committee (or a close associate of theirs) undertake work and at the same time maintain a claim to independence? The answer is, in our view, obvious – and with the operational commencement of the ICAC on 1 September, maybe greater attention should be given to the true concept of and requirement for independence!

Ensuring a smooth transition to the South Australian Public Health Act

Cimon Burke

As readers will be aware, since our last LG Leader publication, the *South Australian Public Health Act 2011* has commenced full operation. We have been responding to a number of questions regarding the status of notices issued under the *Public and Environmental Health Act 1987*, in particular, notices under section 15 of the 1987 Act to address insanitary conditions on land.

Under the transitional provisions contained in the *SA Public Health (General) Regulations 2013*, Councils can continue to monitor compliance with and enforce such notices. Regulation 15 of the General Regulations operates such that a notice issued by the Council under the 1987 Act that was in force immediately before the commencement of the General Regulations is now taken to be a notice issued by the Council under section 92 of the 2011 Act. The notice remains subject to the same requirements contained in it when issued under the 1987 Act.

This means that notices that were in operation up until the 2011 Act commenced, remain valid and continue in operation under the 2011 Act. In order to monitor compliance with these notices, the investigation powers under the 1987 Act are now redundant. Accordingly, authorised officers must exercise investigation powers in accordance with the 2011 Act to monitor compliance. Further, in the event a council wishes to take action in default to give effect to such notices, the action will be in accordance with section 93 of the 2011 Act.

Which staff need to complete an ordinary return before 29 August 2013?

Natasha Jones

It has been brought to our attention that there exists some concern regarding the completion of primary and ordinary returns. It has been suggested that because of the commencement of ICAC it is now 'best practice' for all staff to complete returns – this is simply not the case and it is not a position supported by the *Local Government Act 1999*.

The Act provides for 'prescribed officers' to complete and lodge a primary return 30 days after appointment and an ordinary return within 60 days after 30 June. A 'prescribed officer' is the Chief Executive Officer by operation of the Act and any other officer of a class declared by the Council to be subject to these provisions. The Act does not contemplate and certainly does not provide for all Council staff to complete such returns.

Whilst there is good reason to have certain staff (indeed, maybe more than has been the case to date) complete returns there is also good reason to ensure that not all staff are brought within the prescribed officer provisions given the different levels of responsibilities and the range of staff employed by a Council. In light of these reasons and the legal framework it is only the Chief Executive Officer and any other 'prescribed officer' that is required to complete an ordinary return before 29 August 2013.

Changes to Directors' Liability and Penalty Provisions

Joanna Oborne

At law, corporations have their own legal identity and can be held liable for breaching legislation. However, many Acts and Regulations also contain provisions which attribute liability to the directors and CEOs of corporations for the wrongdoing of those corporations.

On 6 June 2013, the *Statutes Amendment (Directors Liability) Act 2013* ("the Act") changed the way in which such provisions operate in relation to many State Acts, including:

- the *Development Act 1993*;
- the *Heritage Places Act 1993*;
- the *Liquor Licensing Act 1997*;
- the *Natural Resources Management Act 2004*; and
- the *South Australian Public Health Act 2011*.

In each of these cases, the number of offences committed by a corporation for which directors and CEOs of the corporation can also be held liable have been reduced. For example, the Act removes all directors' liability from the Liquor Licensing Act.

The Act also creates two separate classes of liability for those offences which remain. For offences which are deemed to be more serious (such as a breach of sections 44 or 45 of the Development Act, or section 57(1) or (2) of the South Australian Public Health Act), a director or CEO will also be liable for an offence committed by a corporation unless he or she can prove that he or she could not have prevented the commission of the offence by the exercise of due diligence.

For offences which are deemed less serious, a director or CEO will only be liable if it is proved that the director or CEO:

- knew, or ought reasonably to have known, that there was a significant risk that the offence would be committed; and
- was in a position to influence the conduct of the corporation in relation to the offence; and
- failed to exercise due diligence to prevent the commission of the offence.

The reason for these changes is to standardise the way in which directors' liability operates throughout each State and Territory. Minister Rau, who introduced the Bill into Parliament, has predicted that it will increase certainty and predictability in business and assist efforts to promote effective corporate compliance and risk management.

Finally, also be aware that the Act increases the penalty provisions within some Acts. For example, the maximum fines and default penalties which can be imposed under sections 69 and 71 of the Development Act have been increased.

Development contracts for Community Title land divisions – change is coming

Victoria Shute

On 12 April 2012, Parliament assented to the *Statutes Amendment (Community and Strata Titles) Act 2012*. This Act proposes a raft of changes to Community Title and Strata Title schemes including, relevantly, an amendment to section 47 of the *Community Titles Act 1996* such that developers may be obliged to provide security to a community corporation in respect of a development contract.

Development contracts are intended to ensure the construction of common property by a developer after a community scheme is created. Development contracts are registered, together with the scheme description and initial by-laws and become binding between the developer and the community corporation upon creation of the scheme.

Currently, a development contract is not required to be supported by any form of security. As a result, it is not unheard of for a developer to become insolvent or to simply "disappear" prior to constructing common property. When this occurs the liability for constructing the common property must be borne by the community corporation and, in turn, each individual lot owner within the community scheme.

The amendment to section 47 will commence operation on 28 October 2013 and regulations supporting this provision will no doubt also commence operation on this day. Draft regulations under section 47 of the Act have not yet been released for comment. We will keep you informed with any updates in this regard.

The Concept of the "Internal Ombudsman"

Michael Kelledy

A number of interstate councils have embodied the position of 'Internal Ombudsman' within their organisational structure. It is a position that has developed in response to increasing numbers of complaints about councils, their processes/procedures and the conduct of public officers. However, it has developed in a relatively ad hoc manner without legislative recognition and with a lack of understanding as to the role and powers of the Internal Ombudsman position in the scheme of complaint handling.

The role of 'Internal Ombudsman' is filled by a council employee, usually in circumstances where the person reports directly to the Chief Executive Officer. However, their employment is subject to the same terms and conditions as all other employees meaning that they can similarly be dismissed and they have no greater protection than any other council employee.

Whilst the role has attracted both general interest and support from a corporate governance perspective and has been recognised as a role that promotes better practices in improving complaint handling and better administration, the incumbent of the position cannot operate independently of the council.

At present a number of councils in Victoria and New South Wales have 'independent Ombudsmen' and in New South Wales the Local Government Internal Ombudsman Network exists. Could this be a future direction for South Australia?

The answer is a definitive 'No'. This is because, as a matter of law, section 32 of the *SA Ombudsman Act 1972* provides that any agency which is subject to the Act must not use the word "Ombudsman" in describing a process or procedure by which complaints are investigated and resolved or in describing a person responsible for such a process or procedure. Rather, such processes must, in South Australia, be left to the governance area of the council.

It's the RATE time of year to check eligibilities for REBATES

Gene Norton

We have been fielding many enquiries relating to eligibility for rate rebates consequent upon the 'rate declaration season'!

One significant issue is that the Government has commenced the process of transferring large numbers of Housing Trust properties to community service organisations (CSO's) across the State. By virtue of section 161 of the *Local Government Act 1999*, this will impact council revenues and in some cases, dramatically so. As Kym McHugh, the then LGA President stated in March, *"The Local Government Association's specific concern is about the State forcing council ratepayers to provide subsidy to community housing organisations when in the past, rates were paid by the SA Housing Trust."* While there appear to be many suggestions floating around as to how to avoid or rectify this issue, what is most important right now is compliance with the Community Service Organisation (CSO) mandatory rebate requirements set out at section 161 of the Act.

Whilst the rebate for CSO's is mandatory, there are certain requirements which must be met in order to be eligible for the rebate. These requirements are set out at section 161(3) of the Act and require the CSO's to evidence that they are a body that:

- is incorporated on a not-for-profit basis for the benefit of the public; and
- provides community services without charge or for a charge that is below the cost to the body of providing the service; and
- does not restrict its services to persons who are members of the body; and
- provides one or more of the prescribed community services.

The prescribed community services are defined at section 161(4)(c) of the Act and include 'supported accommodation' which is defined at section 4 of the Act to mean a:

1. residential care facility that is approved for Commonwealth funding under the *Aged Care Act 1997* (Cth); or
2. accommodation for persons with mental health difficulties, intellectual or physical difficulties or other difficulties, who require support in order to live an independent life; or
3. accommodation for persons provided by a housing association registered under the *South Australian Co-operative and Community Housing Act 1991*.

In short, if a CSO does not meet these requirements it will not be regarded as being incorporated on a not-for-profit basis and will be ineligible for the rebate. However, if it does, the council cannot contract out or otherwise avoid the obligation to provide the mandatory rebate.

An oxymoron: Council Representatives on External Boards

Natasha Jones

It is common practice for Councils to appoint elected members (or, on occasion, Council employees) to the boards of community associations. Whilst there is no express provision in the *Local Government Act* 1999 relating to such appointments, elected members are not prevented from being appointed to a community association as a "Council representative".

However, when consideration is given to the duties that attach to such appointments the term "community representative" is rendered an oxymoron. The reason for this is that if an elected member or Council employee is appointed to a board of an association they do so in the capacity as a member of that association **not** as a "Council representative". The elected member or Council employee has a fiduciary duty to act in the best interests of that community association when attending meetings and making decisions for that association including a duty to maintain confidentiality – despite the fact that they may have been nominated or appointed by the Council for all intents and purposes as the "Council representative".

Is your section 101A Strategic Planning and Development Policy Committee operating at its full potential?

Victoria Shute

Section 101A of the *Development Act 1993* requires councils to establish a Strategic Planning and Development Policy Committee or to ensure that the prescribed functions are undertaken by another committee. The prescribed functions include:

- to provide advice to the council in relation to the extent to which the council's strategic planning and development policies accord with the Planning Strategy; and
- to assist the council in undertaking strategic planning and monitoring directed at achieving—
    - orderly and efficient development within the area of the council; and
    - high levels of integration of transport and land-use planning; and
    - relevant targets set out in the Planning Strategy within the area of the council; and
    - the implementation of affordable housing policies set out in the Planning Strategy; and
- to provide advice to the council (or to act as its delegate) in relation to strategic planning and development policy issues when the council is preparing—
    - a Strategic Directions Report; or
    - a Development Plan Amendment Proposal.

From this framework, it is clear that the intended purpose of this Committee is to consider strategic planning matters in the first instance, to assist and advise the council on such matters in addition to (if the council so decides) acting as a delegate of the council in limited matters.

As such, the committee **does not** displace council decision-making.

Many councils' committees are comprised of elected members only and may include elected members who are also CDAP members. Where this occurs, the intended role of the committee as an advisor is inappropriately blurred with the council's functions as the ultimate decision-maker on policy issues, as well as its function as the relevant authority for planning applications. This is because the advisor and ultimate decision maker are ultimately the same (or very similar) body!

Further, the committees meetings may be perceived to be defacto council meetings by members of the public and issues of perceived bias and conflicts of interest may arise.

In any event, where a committee comprises council elected members and staff, the council is missing a significant opportunity to receive independent advice on strategic planning issues from experts in planning and allied fields with appropriate expertise and to apply the benefit of such advice and assistance to improving strategic planning policy and other related matters within the council area.

Accordingly, if your council's Committee does not include independent members, we recommend that you consider the Committee's functions and the importance and utility of promoting its status as an independent and valuable advisor to the council. This is most readily achieved by ensuring that the membership of the Committee is addressed at the next opportunity so that the Committee is able to operate to its fullest potential.

AIBS Conference Dinner

Victoria Shute and Joanna Oborne recently attended the AIBS Conference Dinner. Here are some photos of their time at the event.

Welcome new members of the KJ Team

Gene Norton

Gene is an enthusiastic lawyer who is dedicated to providing high quality, client focussed, practical legal solutions. Gene comes from a Corporate and Commercial background and brings with him a broad range of life and legal experiences. He excels in drafting legal agreements and providing plain English legal advice. Gene has extensive expertise in directors duties, corporate governance and negotiating commercial settlements. Gene prides himself on his ability to communicate effectively and clearly with his clients.

Apart from his legal qualifications, Gene has also completed a Bachelor of International Studies, which ranged from a focus on government, elections and parliament, to an analysis of power relations, in the media, culture, social relations and everyday life.

Since joining our team in July 2013, Gene has worked on a wide range of matters covering governance, compliance and regulatory issues. His aptitude for advising local government clients in the context of legal, strategic, business and political considerations is already setting him apart from his peers.

Kate Hosford

We are pleased to introduce Kate Hosford to the KelledyJones team. Kate joined the KelledyJones team as a Personal Assistant in May 2013.

She completed her Legal Secretarial Diploma in 2004 and began her career at a Barristers Chambers in London. Since then Kate has furthered her career in Business Development and busy Executive Assistant roles.

She is a valued and enthusiastic member of the team working closely with Joanna, Victoria, Cimon and Gene.

Affordable Housing Stimulus Package

Joanna Oborne

On 3 June 2013, the Government announced an Affordable Housing Stimulus Package which will be deployed over 18 months and has been designed to "fast-track" the development of 16 housing projects involving almost 1,000 new dwellings (including 100 social housing and 75 community housing dwellings).

The Package will operate via a Coordinator-General, who will oversee the process and approve developments.

In order to "fast-track" developments associated with the Package, the Government has made the following amendments to the *Development Regulations 2008* ("the Regulations"). These amendments will apply to developments which have been approved by the Coordinator-General:

- applications must be lodged with the DAC, which is designated as the decision-maker (regulation 15(3)(b)(iv) and Schedule 10 clause 17 to the Regulations);
- Development Plan consent is not required unless the site contains a State heritage place (Schedule 1A clause 13 to the Regulations)
- the DAC is not required to give the council for the area in which the development is to be undertaken an reasonable opportunity to provide it with a report (regulation 38(5));
- schedule 8 to the Regulations does not apply (regulation 24(5));
- section 49 of the *Development Act 1993* does not apply (Schedule 14 clause 5 to the Regulations); and
- trees within the relevant sites are exempt from classification as regulated or significant (regulation 6A(5)).

Each of these amendments will expire on 31 December 2014, the time when the Affordable Housing Stimulus Package is anticipated to be completed.

In readiness for Register Requirements...

Cimon Burke

The date of commencement of the ICAC Act and Mandatory Codes of Conduct is fast approaching - 1 September 2013 as we understand it. It is, therefore, now necessary for Chief Executive Officers to turn their minds to preparing a Gifts and Benefits Register to ensure compliance with the obligations of the Mandatory Codes of Conduct and, in particular, the requirement that staff and elected members record the receipt of gifts/benefits over a prescribed value (being an amount yet to be Gazetted by the Minister) or over a value set by the Council, in a register maintained by the Chief Executive Officer.

Neither the ICAC Act nor the proposed Mandatory Codes mandate the form or content of the register. Our advice is that, as a minimum, the register should make provision for the following details to be recorded:

- the name of the recipient;
- the name of the person offering the gif/benefit and their organisation (where applicable);
- the nature of the gift/benefit;
- the estimated retail value of the gift/benefit (where applicable) or otherwise, the estimated value and the reason it was offered (if ascertainable);
- a mechanism to cross reference any gift/benefit from the same source to the same recipient within the same financial year;
- whether the gift/benefit was refused or accepted; and
- if accepted, what was done with the gift.

Importantly, our view is that it is necessary to maintain two separate registers - one for members, the other for employees. This is also consistent with the separate treatment of staff and elected members under two distinct Codes of Conduct to reflect the division of roles between the administration and the governing body.

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

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: tba
Email: gnorton@kelledyjones.com.au

Wendy Bozzett
Telephone: (08) 8113 7101
Email: wbozzett@kelledyjones.com.au

Kate Hosford
Telephone: (08) 8113 7107
Email: khosford@kelledyjones.com.au

Lawyers for Local Government