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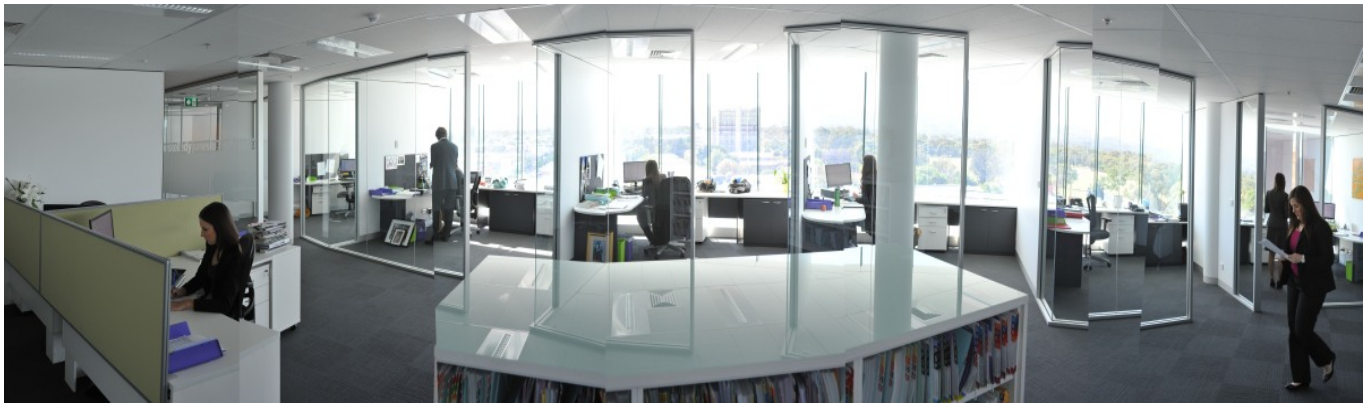

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LG Leader

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Gifts and Benefits: Our gift to you (Elected Members and Staff)

Natasha Jones

Elected Members and Staff should now be aware that the respective proposed Mandatory Codes of Conduct are currently subject to consultation. The clause within the Mandatory Code of Conduct for Elected Members relating to gifts and benefits has been amended and re-released for consultation. The clause relating to gifts and benefits is now the same for both Elected Members and Staff.

The first part of the proposed clause relating to gifts and benefits is clear in introducing an unequivocal prohibition.

In the course of performing official duties, Elected Members and Staff may be offered 'gifts and benefits'. This may be in the form of alcohol, gift vouchers, free tickets to entertainment, sporting and other events such as, golfing days, chartered fishing trips and various dinners hosted by private service providers. The question is can such offers be accepted?

The first part of the proposed clause relating to gifts and benefits is clear in introducing an unequivocal prohibition. Elected Members and Staff must not accept any gift or benefit from any person who is in, or seeks to be in, any contractual relationship with the council. This position applies to every supplier, service provider or contractor to the council (presumably it is not intended to address relationships between councils, although this type of relationship is not specifically addressed in either Code). This means there will need to be some level of awareness amongst Elected Members and Staff as to who the council has a contractual relationship with and those persons who seek to be in a contractual relationship with the council.

The second part of the proposed clause introduces flexibility in other circumstances by providing that when the council is not in a contractual relationship with a person or it is not a person that seeks to be in a contractual relationship with the council, Elected Members and Staff may receive hospitality in limited circumstances from that person. These limited circumstances, however, are less clear. For instance, an Elected Member or a Staff member may accept free or subsidised meals, beverages or refreshments of reasonable value provided it is in conjunction with a social function organised by groups such as council committees and community organisations.

Elected Members and Staff may accept other 'gifts and benefits' such as invitations to attend a local social, cultural or sporting event. The question is then what is local? Is it an event within the council area or a neighbouring council area or something else? Given the intent of this provision is to differentiate between 'community events' and hospitality that could be an attempt to unduly influence Elected Members and staff, it would appear to exclude, for example, the ability to accept an invitation to a pre-match function for the AFL Grand Final or even an invitation to attend the match itself even if the service provider offering the tickets is not or is not seeking to be in a contractual relationship with the council.

Questions regarding:

- the management of gifts from third parties that are outside the prescribed criteria;
- the proposed financial threshold to be gazetted by the Minister for gifts before they need to be recorded in a public gifts and benefits register;
- whether the financial threshold will apply cumulatively; and over what period;
- how gifts for relatives/associates are to be managed; and
- how a council can enforce a position that is firmer than that expressed in the Code;

  are all questions that will be answered over time (or maybe in the final Code).

The clause within the Mandatory Code of Conduct for Elected Members relating to gifts and benefits has been amended and re-released for consultation.

No doubt through the consultation process greater clarity will be provided by the Office for State/Local Government Relations (in consultation with the LGA) and also by the ICAC, once operational. However, in the meantime, our advice is our gift to you - that until greater clarity is provided take a precautionary approach whenever you are uncertain whether receipt of a gift or benefit may place you at risk of a complaint, particularly given the ICAC has retrospective powers!

'Small bar licences' – what are they and how will they affect your council?

Victoria Shute

On 18 February 2013, the *Liquor Licensing (Small Venue Licence) Amendment Act 2013* passed Parliament. This Act will amend the *Liquor Licensing Act 1997* to allow the creation of a new and unique form of liquor licence applying to small bars – the small venue licence.

The Act and its relatively short passage into law, only having been introduced into Parliament as a Bill on 28 November 2012, has been the subject of significant media and political attention, particularly in respect of the efforts of lobby groups who expressed opposition to the reforms.

Ahead of the commencement of the Act (which we anticipate to be very soon), we answer key questions which have arisen amongst councils concerning small venues.

> ...will amend the Liquor Licensing Act 1997 to allow the creation of a new and unique form of liquor licence applying to small bars – the small venue licence.

What is a small venue?

A small venue is a venue with a capacity of 120 persons or less. Small venue licences will be subject to a mandatory licence condition restricting the capacity of a relevant venue to this number.

How late will small venues be allowed to trade?

The standard license hours for a small venue are 11.00am to midnight other than on Good Friday and Christmas Day when the sale of liquor cannot lawfully occur.

If a small venue obtains an extended trading authorisation, they can trade from 8.00am (except on Good Friday and Christmas Day) until 2.00am (except on the day after Good Friday and the day after Christmas Day).

I have heard that small venue licence applications cannot be subject to legal challenges from councils or the community, is this correct?

Yes.

The Act provides for a unique, streamlined process for the determination of small venue licences in that:

- objections cannot be made to applications for small venue licences;
- neither councils, nor the Commissioner of Police, are entitled to intervene in a small venue licence application;
- any person may, within a prescribed period, make a written submission to the Commissioner in respect of a small venue licence;
- small venue licence applications can only be determined by the Commissioner and decisions are made in the Commissioner's absolute discretion;
- the Licensing Court can only review a Commissioner's decision upon application by the licence applicant, or by the Commissioner of Police in limited circumstances.

These reforms are designed to ensure that applications for small venue licences can be determined without the interference of third parties and without requiring a formal hearing.

Currently, any member of the public (including the proprietors of other licensed premises) may object to a licence application. Further, councils and the Commissioner of Police may intervene in respect of a licence application where they are opposed to it. Where an objection or intervention occurs and cannot be resolved, the licence cannot be determined unless a formal hearing before the Commissioner or the Licencing Court occurs.

By removing the ability to object or intervene, licence applications for small venues will be issued quickly, and without the need for an applicant to expend legal and other costs on a hearing.

Where will small venue licences be granted?

Currently, the Act only allows small venue licences to be granted in the Adelaide central business district. However, the Act does allow small venue licences to apply within other areas declared by Regulation. Where Regulations are proposed in this regard, the Minister administering the Act is required to undertake consultation with the affected council or councils.

Inner Metropolitan Growth Project DPAs

Joanna Oborne

On 4 December 2012, the first stage of the Inner Metropolitan Growth Project Development Plan Amendments ("DPAs") were released for public consultation. These DPAs, covering the Cities of Burnside, Prospect, Norwood, Payneham & St Peters, Unley and West Torrens were developed consistently with the Government's Inner Rim Structure Plans as a key aspect of the Government's *30-Year Plan for Greater Adelaide*.

The DPAs identify growth corridors within each council area (predominantly along arterial roads), which are amenable to increased density. These corridors are to be rezoned as *Urban Corridor Zones*. Key features of this new Zone will include:

- a focus on mixed-use developments, especially integrated developments involving medium to high density residential development with compatible non-residential development, such as ground floor office or retail developments;
- minimum as well as maximum building storey levels; and
- the introduction of an incentive system whereby councils will provide developers with benefits such as an extra storey of development or reduced requirement for carparking spaces where the developer meets certain targets, such as creating a mixed-use development, or allocating a certain percentage of the development as affordable housing.

The Government has estimated that the Inner Metropolitan Growth Project will create 25,000 new dwellings across the five council areas, 9,000 of which will be established through this current stage 1 DPA process.

However, key industry groups have queried the Government's ability to deliver such a high number of new dwellings, citing the following problems:

- the tension between the existing limitations along key transport routes and increasing density along such routes. This will require improved transport strategies to be developed in tandem with such developments;
- some height storey limits (both minimum and maximum) have been determined based on aesthetic or amenity considerations, rather than economic or market realities. Therefore, some sites may not be present feasible development opportunities;
- much of the Zone, especially along arterial roads, is only one lot deep. Given the building envelopes which have been prescribed for the Zone to prevent bulk and overshadowing problems arising for the residential properties behind them, such sites may present limited development opportunities; and
- up to 40% of the properties which will fall within the new Urban Corridor Zones have been identified as being constrained, either by EPA licence, strata title or a heritage listing. Such properties will not be attractive to developers.

Beware Gifts from Trojans – or should that be from the EPA?

Michael Kelledy

Or even, as we hear the recent international news, of a deposit account offering from the Bank of Cyprus!

What we are really considering here is the EPA Discussion Paper about a proposed Local Environmental Nuisance Bill. This Bill will be considered by Cabinet in May.

Local environmental nuisance is regarded as minor water pollution, odour and smoke from domestic premises, dust and/or noise. The Discussion Paper considers the issue of the Bill formalising the role of councils in managing such local environmental nuisance issues and also reforming existing litter laws.

The offering of such regulatory 'gifts' from the EPA is not to be frowned upon. Indeed, there is already interstate and overseas evidence of such matters properly falling within the functional purview of councils. In our view, the principle of expanding the functional responsibilities of councils is to be welcomed in strengthing the local level of government – but not at any cost! This is the important message in welcoming the gift but being wary of the resource implications to ensure that it is not the proverbial 'Trojan Horse' that is being delivered.

The Discussion Paper does outline provisions proposed to ease the administration and the management of costs associated with such a transfer of responsibilities. In this context, offerings in the nature of retention of expiation fees, limiting liability for council decisions and the opportunity to impose a levy on ratepayers to fund the increase in functions are canvassed.

So what is the message? Just as those depositing their savings with the Bank of Cyprus did not expect a levy to be imposed and extracted from their funds for their good faith actions, in treating with the bank, so too will ratepayers not expect to fund a transfer of functions previously undertaken by a State agency for the reqard of their local council now dealing with local environmental nuisance issues. Whilst the transfer of powers is to be welcomed so too is a proportionate transfer of funds to undertake the exercise of those powers.

Lessons to be learnt from the Ombudsman's investigations into the Growth Investigation Areas (GIA) Report procurement

Lisa Cameron

When we refer to conflict of interest, the focus is usually on the actions of the elected member, or council employee.

The recent release of the Ombudsman's report on the *"Investigation into the Growth Investigation Areas Report Procurement"* highlights the need for scrutiny surrounding conflicts of interest on the part of suppliers or consultants who seek to engage with council.

In the view of the South Australian Ombudsman, *"… conflicts which go undeclared or unmanaged in this area can be just as damaging as conflicts involving public officials, and can impact on project outcomes, community confidence in government, and reputations of all of the parties …"*.

The Ombudsman rightly notes that outsourcing and consultancy engagement with the private sector is increasing. Therefore, this is an area which requires more attention. In his report, the Ombudsman referred to a report of the Queensland Crime and Misconduct Commission titled *"Ethics, Probity and Accountability in Procurement"*. In this report it was stated that *"A focus on internal probity issues should not overshadow the importance of external probity issues related to the business practice, past conduct and performance of offerors"*.

South Australians are particularly vulnerable to conflict of interest of this type as our relatively small population and industry base reduces the degree of separation. Councils must take a proactive approach to ensure all potential conflicts of interest are avoided by ensuring policy and guidelines address this issue appropriately and they are strictly adhered to. As the Ombudsman states *"The conflict of interest needs to be recognised and articulated as such; and second, in the interests of transparency, the conflict needs to be addressed and managed prior to the formal procurement process"*.

We are yet to see the full ramifications resulting from the findings of this investigation. However, in the meantime, some words to note from the Hon Mark Parnell as made in a related Ministerial statement, *"…declaring an actual or potential conflict of interest does not make it go away"*.

Expiable Offences: Does the Council have to disclose its evidence?

Cimon Burke

Increasingly, recipients of expiation notices are seeking to challenge them and to put councils, as the issuing authority, to proof of the offence(s) to which the notice(s) relate. Often, the alleged offender will request that the council provide him/her with its evidence of the offence. This is typically the case in relation to parking offences, where alleged offenders who have received an expiation notice demand that a copy of the relevant photograph be provided to them.

The questions arises, therefore as to whether a council is legally required to provide such information.

The strict answer is no. There is no express duty/obligation that requires the council, at the stage where it expiates an offence, to provide the alleged offender with the council's evidence. However, failure to provide some information upon request would be unreasonable and inconsistent with the Ombudsman's expectations of the council as a responsible and accountable governing authority, were he to investigate on a complaint to his office.

The following considerations will guide a council's decision to provide evidence to an alleged offender:

- a legal obligation to provide evidence will only arise in the event an alleged offender is prosecuted for the relevant offence. In this scenario, the common law places an obligation on the council, as the prosecutorial authority, to act in the manner of a 'model litigant' and disclose the evidence in its possession that proves the offence to the defendant;
- the limits of the prosecution's duty to disclose evidences are not defined by law. Rather they depend upon the circumstances of each case and any matters that are in dispute;
- in the absence of any prosecution proceedings the relevant consideration is whether the request for information is reasonable. In the case of parking offences, it is reasonable to provide a photograph to the alleged offender upon his/her request where he/she has received an expiation notice; and
- in some cases, information sought by an alleged offender in relation to an offence for which he/she has been prosecuted may be accessible by a Freedom of Information request.

Government Announces Comprehensive Review of Planning System – the *Planning Improvement Project*

Victoria Shute & Joanna Oborne

On 18 February 2013, Planning Minister John Rau announced that the Government will undertake an extensive review of the planning system in South Australia. The review, known as the Planning Improvement Project, will be led by an independent five-member panel (the Expert Panel on Planning Reform).

The Panel consists of:

- Brian Hayes QC (Chair – an eminent planning and environment lawyer and the Premier's envoy to India); and
- Stephen Hains (former CEO of the City of Salisbury and qualified planner); and
- Natalya Boujenko (a founder of Intermethod – consultants specialising in street design and transport planning and a committee member of Mainstreet SA); and
- Simon Fogarty (DAC member and qualified planner with significant experience); and
- Theo Maras (Chairman of Maras Group and Chairman of the Rundle Mall Management Authority).

…the Government will undertake an extensive review of the planning system in South Australia.

Under the Panel's Terms of Reference, the Panel is required to:

a) review legislation relating to planning, urban design and urban renewal—including the Development Act 1993 and the Housing and Urban Development (Administrative Arrangements) Act 1995;
b) review the role and operation of all other legislation that impacts on the planning system;
c) review statutory and non-statutory governance and administrative arrangements relating to the planning system;
d) propose a new statutory framework, governance and administrative arrangements for the planning system, and
e) consider any matters referred to the Panel by the Minister for advice.

Further, recommendations made by the Panel must be directed towards:

…"realising the vision of ---

a) a vibrant inner city for Adelaide—including the city centre, park lands and inner suburbs
b) liveable, affordable and healthy neighbourhoods, and
c) thriving, sustainable regional communities

as outlined in the 30-Year Plan for Greater Adelaide and the new strategic plans for regional areas of the State."

The Panel will also have a role providing targeted advice to the Government on legislative reforms that can be progressed *this year*. We can therefore expect changes to the planning system in South Australia to be occurring both over the short term and the medium term.

During a speech given by Minister Rau at an Australian Institute of Urban Studies luncheon held on 1 March 2013, the Minister confirmed that:

- the Panel's Terms of Reference are deliberately broad so that the Panel may identify and examine any areas of the *Development Act 1993* which require reform; and
- the Panel will be consulting with, and calling for submissions from councils on all aspects of the planning system that require reform; and
- that issues relevant to country and rural councils are able to be considered by the Panel as part of the Project.

Further information on the Project is available online at www.thinkdesigndeliver.sa.gov.au

We will be monitoring the activities of the Panel and any progress concerning the Project over the next 20 months or thereabouts and will keep you updated in this regard.

Welcome Lisa: new member of the KJ Team

We are pleased to introduce Lisa Cameron to the KelledyJones team. Lisa is a junior lawyer who brings with her a wealth of invaluable life experiences, including in business environments. She is dedicated to achieving practical, client-focused legal solutions. Prior to being admitted to legal practice in 2011, she multi-tasked in concurrent roles of student, law clerk, business owner and consultant bookkeeper. Hence she has a wealth of practical experience and knows the value and importance of service delivery standards.

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

2013 EPLGA Conference @ Elliston

Natasha Jones and Victoria Shute recently presented at the 2013 EPLGA Conference and had an opportunity to demonstrate their netball skills! Here are some photos of their time at the Conference.

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