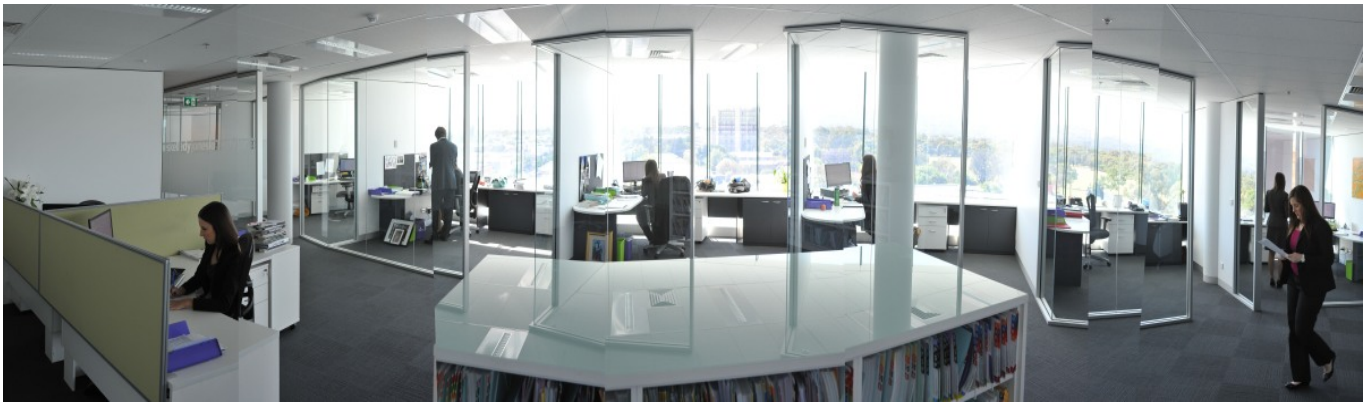
kelledy jones
LAWYERS



March 2014

LG Leader

Contents

- A timely reminder!.....2
- Recent Legislative Change in Victoria relevant to SA Councils.....2
- SACAT – Where is it at?.....3
- Secret Recordings: is dismissal justified?.....4
- Private Certification - FAQ.....4
- SA Notes 2014 – Election Issues: Caretaker Provisions.....5
- Welcome to our newest member of the KJ Team.....6
- 'To Whomever the Soil Belongs, Owns to the Sky and to the Depths' or do they?.....7
- Our Planning System – a central issue in the 2014 State Election.....8
- Contact List.....9

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

A timely reminder!

Michael Kelledy

The 'new Meeting Regulations' (i.e. the *Local Government (Procedures at Meetings) Regulations 2013*) have now been in operation for a few months and the following are relevant reminders:

- in calculating 'clear days' for the giving of a notice of motion or a question on notice, it is to be remembered that any notice given after 5.00pm on a day is taken to be given the next day;
- whilst in the writer's view, the question of obtaining the 'leave of the meeting' should properly be by consensus indicated by a show of hands (as opposed to a motion moved and seconded), there now exists a right to call for a division (as per regulation 17) on the matter – even though there has not been a motion. This is a permissible exception given the wording of regulation 17(2) which limits this privilege to motions; and
- under the new regulation 21, it is recognised that a recommendation in a report from the Chief Executive Officer is equal to a notice of motion for rescission purposes. To extend this power to other senior report-writing officers of the Council, it is necessary for an appropriate delegation to be in place.

Recent Legislative Change in Victoria relevant to SA Councils

Cimon Burke

Councils are responsible for enforcing a number of offences involving vehicles. These include, but are not limited to, offences for stopping and parking under Chapter 12 of the *Australian Road Rules*.

In some cases, the vehicle involved in the commission of an offence is registered interstate. In these circumstances, a Council's ability to successfully enforce the relevant offence may be contingent upon the disclosure of vehicle registration details to Council by interstate authorities to the extent the laws of the relevant jurisdiction allow.

In the case of vehicles that display Victorian plates, recent changes to the Victorian *Road Safety Act 1986* operate such that from 31 March 2014, a Council's ability to obtain vehicle registration details for the purposes of enforcing offences is contingent upon the Council entering into an Information Protection Agreement with VicRoads (being the Victorian registration authority).

Specifically Part 7B was recently inserted into the *Road Safety Act 1986*, which addresses the use and disclosure of information. Councils fall within the scope of a 'law enforcement agency' for the purposes of Part 7B. Accordingly, VicRoads may disclose registration information that identifies a person for the purposes of functions and activities undertaken by a Council (in its capacity as an enforcement agency) including in relation to the prevention, detection, investigation, prosecution or punishment of any offences and/or the enforcement of expiation notices. However, moving forward, such disclosure can only occur where the Council has first entered into an Information Protection Agreement with VicRoads (IPA).

VicRoads has advised that to apply to enter into an IPA, Councils are required:

- to complete a prescribed form (known as Schedule 1) that outlines the purpose for which information is required from VicRoads and the relevant legislative provisions in respect of which the Council may require information; and
- to submit a letter from the Council's legal advisor confirming that the information listed in Schedule 1 is correct.

Ultimately, if a Council does not have an IPA in place with VicRoads by 31 March 2014, VicRoads will not be able to provide that Council with access to vehicle registration information. We, therefore, recommend that Councils, and particularly those located closer to the Victorian border, undertake the necessary steps to enter into an IPA with VicRoads before 31 March 2014.

SACAT – Where is it at?

Joanna Oborne

In July of last year, the Government announced the introduction of a Bill into parliament to establish the South Australian Civil and Administrative Tribunal ("SACAT"). Seven months on, we provide an update on the progress which has been made towards the establishment of the Tribunal.

What is SACAT?

The SACAT is a tribunal which has been established to:

- replace a number of existing tribunals and bodies such as the Guardianship Board and the Residential Tenancies Tribunal; and
- become the new appellate body for a number of administrative decisions made by Councils and Government departments. While no decision has been made as to which decisions will be reviewable by SACAT, possibilities include decisions made under the:
    - *Local Government Act 1999;*
    - *Development Act 1993;*
    - *Freedom of Information Act 1991;*
    - *Dog and Cat Management Act 1995; and*
    - *Ombudsman Act 1972.*

The intent is that a "one stop shop" is created to reduce overlap (and overheads) between different tribunals and bodies as well as to provide a cheaper and less formal forum than a Court in which appeals regarding certain administrative decisions and matters can be heard.

Developments

In November 2013, the *South Australian Civil and Administrative Tribunal Act 2013* ("the Act") was passed into law. Some parts of the Act have already commenced, such as the power to appoint the President, Deputy President and Registrar to the Tribunal. This was a necessary first step to ensure that these key people are involved in and can oversee the Tribunal's development.

The roles of President and Deputy President have not been established as full time positions, but are held by members of the Supreme and District Courts concurrently with their role as Judges of those Courts. In November 2013, Justice Parker, the former Crown Solicitor for South Australia, was appointed both a Judge of the Supreme Court and the President of SACAT. Following this appointment, on 13 February 2014, Judge Cole, a Judge of the District Court, and the Senior Judge of the Environment, Resources and Development Court was appointed the Deputy President of SACAT.

Despite Judge Cole's appointment to the SACAT, we **do not** anticipate that the ERD Court will be affected by the Tribunal. Rather, we anticipate that it will continue to operate as a specialist Court with jurisdiction under the *Development Act 1993*, *Environment Protection Act 1993* and the other Acts within its current jurisdiction.

This is primarily because SACAT will not be a body of record (i.e., it is not proposed that hearings of SACAT will be recorded and transcribed or that its decisions will be published).

Furthermore, the ERD Court presently performs functions which fall outside of SACAT's powers, such as the power to hear criminal matters and sentence offenders (such as criminal prosecutions under the *Development Act*) and to grant certain kinds of orders, such as injunctions restraining one party from performing a certain act or activity.

Next Steps

Over the coming months, reviews of current tribunals and bodies will be undertaken, as well as analyses of how a wide range of administrative decisions are presently reviewed.

Decisions will then be made (we anticipate in consultation with the tribunals and bodies affected) regarding which tribunals and bodies should have their jurisdictions transferred to SACAT. Following this, changes will begin to be made (via amending Acts) to various pieces of legislation transferring the jurisdiction for appeals, applications and reviews to SACAT. Finally, the SACAT itself will commence as a body capable of receiving appeals and applications and making decisions on them.

We will continue to keep you updated on the progress of the Act and the Tribunal, as they occur.

Secret Recordings: is dismissal justified?

Natasha Jones

A Queensland regional council supervisor has failed in his claim for unfair dismissal because he had acted in an intimidating and threatening manner towards his colleagues.

The Queensland Industrial Relations Commission in *Stover & Charters Towers Regional Council* (26 November 2013) heard six allegations had been made against Mr Stover that included the covert recording of conversations with fellow employees contrary to Council policy, actively seeking out and encouraging other employees to criticise and take action against the Council, requesting other HR staff to complete his studies for him, and told other Council employees that he had seen a fellow female employee naked and described her body in an unflattering and highly indecent manner to colleagues.

The Court considered each allegation and assessed the evidence relevant to each. The Court held the view that the making of derogatory comments about a colleague, coupled with Mr Stover's taping of conversations at the workplace justified the view held by the Council that his employment was untenable as was any belief that he could be reinstated to his position.

The Court considered the allegation of taping conversations as a serious issue. There was significant evidence from a range of witnesses to the effect that Mr Stover advised them that he had been taping conversations of others in discourse with him. This was accepted even though there was no evidence to show any actual tape or recordings of any taped conversations. The Court also held the view that it was not relevant whether a policy was in place prohibiting the taping of conversations. This is because such a practice was considered to be of serious concern not only to management but to other employees. The Commission said *"it strongly suggests entrapment by the Applicant of his work colleagues"*.

The Commission also noted that the derogatory comments made about a female work colleague were not only *"of an uncouth nature, but also of a particularly uncommon and very nasty nature"*. In light of the evidence, the Commission confirmed the Council was justified in dismissing Mr Stover and that the tape recording of conversations and the comments regarding a female employee showed a level of disrespect towards another employee that was so far out of the ordinary bounds of reasonable behaviour. The Commission accepted that these two factors alone were sufficient grounds to dismiss Mr Stover.

Private Certification - FAQ

Victoria Shute

Over the past few months we have received many queries concerning private certification processes. As similar queries are arising across different councils, below is a quick FAQ concerning particularly popular queries.

1. *Where a residential code development application is privately certified by the same private certifier for both development plan consent and building rules consent, does the private certifier need to complete a Schedule 22 Certificate of Consistency?*

   Yes.

   Section 93 of the *Development Act* and regulation 92 of the *Development Regulations* require that this occur regardless of whether the particular private certifier granted development plan consent to the relevant development or not.

2. *We have been informed by a private certifier that they are unable to assess and determine Schedule 1A development applications. They have asked whether they could lodge a development application for development plan consent and have that assessed by the Council. Can this occur?*

   No.

   According to section 33(4a) of the *Development Act* where a form of development complies with Schedule 1A, section 33(1)(a) – the provision which provides a relevant authority with the ability to assess and determine an application for development plan consent – does not operate in respect of such developments.

   A council cannot therefore accept an application for development plan consent for a Schedule 1A development as this application is hypothetical on the basis that the council has no legal ability to assess and determine it.

3. *A private certifier has issued an amended building rules consent. We are concerned that the amended building rules consent is inconsistent with the existing development plan consent. What should happen next?*

   Where an amended building rules consent is issued by a private certifier, it must be provided to the relevant council and development approval must be issued in respect of it.

   If the amended building rules consent is inconsistent with the development plan consent, then the council cannot grant development approval in respect of it. Rather, the applicant will need to obtain a variation to the relevant development plan consent before development approval can be issued.

SA Notes 2014 – Election Issues: Caretaker Provisions

Gene Norton

With the State election tomorrow and the Local Government elections in November this year. There are a number of issues Councils should be aware of, and prepared for.

The SA State election

The 2014 South Australian state election will elect members to the 53rd Parliament of South Australia on 15 March 2014. All seats in the House of Assembly or lower house, whose current members were elected at the 2010 election, and half the seats in the Legislative Council or upper house, last filled at the 2006 election, will become vacant. The State Government caretaker period runs from the date of issue of the writs, 15 February 2014, until the outcome of the election is clear.

In the same way that Councils do, in the period immediately preceding a State election, the Government of the day assumes a 'caretaker role'. During this caretaker mode, the State Government abides by certain conventions that guide political practice in areas on which the Constitution is silent. The State Government caretaker conventions, very broadly, intend that the Government of the day avoids major policy decisions that are likely to bind an incoming Government and avoids making significant appointments. In addition, the Government must protect the apolitical nature of the public service and ensure that it does not use State resources in a manner to advantage a particular party. Major new contracts, projects or undertakings within Government programs are normally deferred by Ministers. This may mean that some Council projects involving the State Government have been stalled or deferred until after the Election.

Local Government Elections

The caretaker period for the Local Government elections commences on 16 September 2014, the day nominations close, and will expire at the conclusion of the election, which will be around 8 of November 2014.

As with the State Government caretaker mode, Local Governments caretaker provisions are in effect in the lead up to an election to ensure that one party is not unfairly advantaged or disadvantaged and also to ensure that Councils are still able to perform their important and essential services. The *Local Government (Elections) Act 1999* ("the Act") at section 91A sets out the conduct requirements of Council during the caretaker period, which is expanded upon in each Council's Policy. Section 91A(8) of the Act lists the key decisions and actions that cannot be made during caretaker mode, which are:

- decisions relating to or the termination of the employment of a Chief Executive Officer;
- entering into contracts, arrangements or understandings to the value of $100,000 or 1% of Council's revenue from rates; and
- allowing the use of Council resources for the advantage of a particular candidate or group of candidates.

Importantly, Council staff must also be vigilant during the caretaker period to ensure that Council resources, which may be printing or administrative support are not being used for the advantage of a single candidate or group of candidates. In the lead up to the Local Government Elections, now is the time to consult your Council's relevant caretaker policy and ensure that all staff understand the obligations upon them.

Welcome to our newest member of the KJ Team

Claudia Molina

Claudia is a bright and enthusiastic lawyer who joined our team at the beginning of 2014 after having worked at the Environment, Resources and Development Court for a number of years. Needless to say, Claudia's focus is providing advice and representation to clients on planning, building and environmental matters. Claudia also assists in providing advice and representation to our clients in a broad range of matters across all of our practice areas.

Claudia exudes a clear passion for the law and demonstrates this through her energy and initiative. In addition to her legal skills, Claudia brings to our team varied practical skills gained from her additional qualification in a Bachelor of Behavioural Science, her time at the Courts and her volunteer work for the Women's Legal Service and other not-for-profit organisations.

Similar to our other practitioners, Claudia shares the values expressed in the KelledyJones Client Undertaking and we are excited to have her in our team.

2014 EPLGA Conference @ Tumby Bay

A number of our team members recently attended the 2014 EPLGA Conference and our team member Hazel Kotro had an opportunity to facilitate a Q & A session. Here are some photos of their time at the Conference.

'To Whomever the Soil Belongs, Owns to the Sky and to the Depths' or do they?

Hazel Kotro

Our recent attendance at the Eyre Peninsula LGA Conference hosted by the District Council of Tumby Bay highlighted the importance of understanding the right of landowners and the impact on councils and their communities when mining activities are planned. As part of the Conference we heard from the great work being done by the Tumby Bay District Community Consultative Group, a community group established to provide coordinated liaison with mining companies to ensure that communication between mining companies and the community occur in a positive way.

In light of the activity in this area, I consider it important to outline the current law in South Australia with regard to ownership of minerals on privately owned land.

In the most part, minerals within land in the State of South Australia are not owned by landowners, but are by legislation, vested in the Crown.

Common Law

At common law the owner of land in fee simple owns all the subsoil, including minerals down to the centre of the earth.[1] However, it has always been possible to exclude minerals from the scope of a conveyance either by express grant or reservation. Common law has always recognised the possibility of separate ownership of the subsoil and/or any minerals lying beneath the surface.

In South Australia, section 3 of the *Real Property Act 1886*, defines 'Land' to extend and include all tenements and hereditaments corporeal and incorporeal of every kind and description, and every estate and interest in land. It is recognised that separate Certificates of Title can be issued for the land surface and the minerals within the land, the subsoil.

The only common law exception to the rule that the owner of land in fee simple owns the minerals beneath the surface is that the Crown retains the rights to all precious metals (i.e. gold and silver). Upon issuing land grants, the Crown retains the right to enter, dig and remove the ores and such other powers as are necessary to effect this purpose. This was determined in 1877 by the then highest Court in the land, the Privy Council.[2]

The Privy Council stated that it is open to the legislature to curtail or abolish this prerogative right by statute, but only by express words or necessary implication.

At the time, legislation across the States did not expressly retain the right to minerals to the Crown. In most instances, legislation subsequently enacted did not apply retrospectively, causing one to look to the date and the wording of the original Crown grant of land to accurately determine the Crown's right to minerals. This means each jurisdiction in Australia needed to be considered separately.

Gradually legislation was enacted across the States to reserve various minerals to the Crown by legislation.

Legislation

South Australia enacted the *Mining Act 1971*, this Act (as amended) now sets out the law and rights of minerals for landowners.

In South Australia section 16 of the *Mining Act 1971* provides that all minerals vest in the Crown.

Minerals are defined in section 6 as:

> *(a) Any naturally occurring deposit of metal or metalliferous ore, precious stones or any other mineral (including sand, gravel, stone, shell, coal, oil shale, shale and clay); or*
> *(b) Any metal, metalliferous substance or mineral recoverable from the sea or a natural water supply; or*
> *(c) Any metal, metalliferous ore or mineral that has been dumped or discarded –*
> *(i) In the course of mining operations or operations incidental to mining operations; or*
> *(ii) In other prescribed circumstances;*
>
> *But does not include –*
>
> *(d) Soil; or*
> *(e) Petroleum or any other substance, the recovery or production of which is governed by the Petroleum and Geothermal Energy Act 2000;*[3]

Application to Councils

The emotional effects of having land you own accessed and explored without your consent can be understandably

[1] *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; Wilkinson v Proud (1943) 11 M & W 33; 152 ER 704 (Exch).
[2] *Woolley v Attorney-General* (Vic) (1877) 2 App Cas 163.
[3] By legislation the Crown retained complete ownership of petroleum and helium regardless of when the Crown grant was made.

traumatic. Although compensation is available, this may not recompense for the emotional sense of intrusion and possible loss.

As a landowner you do have a say in what happens on your land. You have rights to object in court. The court will take the concerns of all parties into consideration, consultation and communication is the key.

Councils often own land in fee simple, Council land is subject to the mining legislation.

Where land owned by Council residents is to be accessed and/or explored those residents may seek assistance from the Council. Also, the Council itself may be working in a joint venture partnership with mining companies within the region which is to be borne in mind if providing any assistance to a resident or ratepayer.

The Council must be, and seen to be, impartial in their decision making both through their planning areas and regional community development initiatives.

It is recommended that where land is subject to an early Crown land grant, and mining interests are being sought that legal advice is obtained.

Our Planning System – a central issue in the 2014 State Election

Claudia Molina

Given that this election is occurring in the midst of the introduction of the precinct planning amendments to the *Housing and Urban Development (Administrative Arrangements) Act*, the review of the *Development Act* currently being undertaken by the Expert Panel on Planning Reform as part of the Planning Review Project, and with significant media coverage of the Inner Metropolitan Growth Development Plan Amendments and related changes to the *Development Regulations*, it is no surprise that our planning system, and in particular, the role of local government in that system, has become a key election issue.

We had the pleasure of attending the LGA's Planning Forum on 14 February 2014 at which the Minister for Planning, John Rau MP, the Shadow Minister for Planning, Vickie Chapman MP and Greens MLC Mark Parnell each spoke about their intentions for the involvement of local government in planning processes.

Each of the speakers agreed that significant changes to our planning system should not occur until the Expert Panel delivers its final recommendations to Parliament in December this year.

The speakers disagreed on the way in which local government should be involved in the determination of development applications for developments within the City of Adelaide and within the Inner Metropolitan Areas.

John Rau MP stated that the Government's current policy for these areas would remain in place if re-elected and that this policy, which sees development applications for developments worth over $10 million within the City of Adelaide and developments of 5 storeys or more within the Inner Metropolitan Areas, determined by the DAC and not the relevant council. The view held is that this provides a consistent and certain process which encourages investment in development projects and therefore encourages job growth in the construction sector.

Vickie Chapman MP confirmed that, if elected, a Liberal Government would amend the Development Regulations so that the developments listed above will, in most circumstances, be determined by councils and not the DAC.

Mark Parnell MLC confirmed that it was the Greens policy to increase council and community involvement in the determination of development applications, and that the Greens will also advocate for changes to the *Development Act* to ensure that the Minister for Planning cannot make planning policy and major development decisions without ensuring that the public could properly participate in this process.

Whilst it remains to be seen who our future Government will consist of, and what policies will be implemented, it is clear that changes are likely to occur to the role of local government in our planning system either before or after the conclusion of the Planning Improvement Project.

Michael Kelledy
mkelledy@
kelledyjones.com.au
0417 653 417
(08) 8113 7103

Victoria Shute
vshute@
kelledyjones.com.au
0423 004 339
(08) 8113 7104

Cimon Burke
cburke@
kelledyjones.com.au
0422 165 614
(08) 8113 7105

Joanna Oborne
joborne@
kelledyjones.com.au
0401 176 240
(08) 8113 7106

Claudia Molina
cmolina@
kelledyjones.com.au
0422 073 093
(08) 8113 7111

Gene Norton
gnorton@
kelledyjones.com.au
0418 660 124
(08) 8113 7108

Natasha Jones
njones@
kelledyjones.com.au
0419 864 531
(08) 8113 7102

Hazel Kotro
hkotro@
kelledyjones.com.au
0438 636 035
(08) 8113 7109

David Greenwell
dgreenwell@
kelledyjones.com.au
0414 488 777
(08) 8113 7110

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

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

We're different for a good reason.