kelledy jones
LAWYERS

LG Leader

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Elected Member Appointments

Michael Kelledy

Once the looming periodic elections are over and councils 'settle down' to the business of local government, one of the first matters that will be attended to is the appointment of elected members to various bodies. These bodies, generally, comprise committees established by the council under section 41 of the *Local Government Act 1999*, or a subsidiary established as a council subsidiary under section 42 or a regional subsidiary under section 43 of the Act or, one of the numerous community groups or bodies which request elected members be appointed to their governing body, often established under other legislation, such as the *Associations Incorporation Act 1985.*

There are a number of 'givens' when elected members accept such appointments, probably the two most important of which are, firstly, the duty not to participate in decision-making with a conflict of interest and, secondly, the duty to exercise an active discretion in respect of all matters to be decided by the committee or the governing body (board) to which they have been appointed. In addition, of course, it is necessary for members accepting such appointments to take reasonable steps to inform themselves about the operations and activities of the body, to be sufficiently informed to participate in informed and responsible decision-making, to exercise reasonable diligence and, of course, to be aware of relevant *fiduciary duties* that attach to the appointment. A fiduciary duty is the duty that the law recognizes to act in good faith in the best interests of the body to which the appointment has been made – for a committee, the body is the council, for a subsidiary it is the subsidiary itself and for external organisations it is the entity for which the governing body (board) exists.

The above considerations are, therefore, particularly important when the appointment is to a separate entity, a body corporate such as a subsidiary or an incorporated association. In these circumstances in particular, the elected member who has been appointed to the governing body must accept that their overriding fiduciary duty is to act in the best interest of that body and not the interests of their appointor council. In this context it is not accurate to describe elected members who have accepted such appointments as "council representatives" because the fiduciary obligations that come with the appointment are inconsistent with the concept of them representing the interest of their appointing council when making decisions in the best interests of the body for which the decisions are being made.

The above consideration applies equally to board members of a subsidiary. Further, just because the subsidiary has been established by the appointor council, either alone or in concert with other councils, this does not enable the council to direct the appointed board member how to vote. Whilst the council might purport to do so, whether by resolution or otherwise (noting that an informed chair should disallow any such motion as ultra vires – beyond the power of the council) any elected member who found themselves subject to such a purported direction has a legal obligation, under both the *Local Government Act* and pursuant to their fiduciary duties, to exercise an active discretion. That means to vote in what he/she believes is the best interests of the organisation for which the decision is being made.

Whilst a board member of a subsidiary may vote in accordance with a direction of the constituent council of a council subsidiary or the joint direction of the constituent councils of a regional subsidiary (see clauses 10 and 26 of Schedule 2 to the Act), this power of direction of the subsidiary which the Act gives to the council(s) is not and cannot be construed as a general power to direct an elected member who has been appointed to the board of management, how to vote at a board meeting of that subsidiary.

Dishing it Up: The Post Election Training Menu for Council Members

KelledyJones is pleased to present a post-election training menu for Council Members. For full details click on the following link: http://www.kelledyjones.com.au/wp-content/uploads/2014/09/Dishing-it-Up-The-Post-Election-Training-Menu-for-Council-Members.pdf

This program will meet any requirements that may be introduced by regulation as a result of the *Local Government (Governance) Amendment Bill 2014*.

Penalty served up to Café Owner in Food Act Prosecution

Cimon Burke

We recently assisted a metropolitan Council to successfully prosecuting the owner of a café in the Magistrates Court. The café owner pleaded guilty to 6 counts relating to offences under the *Food Act 2001*. One of these offences related to a breach of an improvement notice and the remaining five were contraventions of the Food Standards Code. The contraventions of the Code arose as a result of the café owner having failed to maintain equipment used in connection with food preparation (namely a meat slicer) in a clean and sanitary condition, to store potentially hazardous food under temperature control, to maintain the food premises to the requisite standard of cleanliness and to discharge the obligations under the Code in relation to dealings with food for disposal.

As is the case for the majority of Food Act prosecutions, the Council commenced the proceedings as a last resort, following a protracted history of non-compliance with the requirements of the Code on the part of the café owner, including at another food business owned prior to the café. The cafe closed shortly after the Council commenced the proceedings (according to the café owner this was due to the media having reported upon the proceedings).

At the sentencing hearing, the Magistrate determined to impose a penalty of $7,500 for all of the offences. Costs were also awarded to the Council. The penalty took into account the café owners personal circumstances including the financial consequences arising from the cafe closure.

In his remarks on sentence, the Magistrate noted that an offence for a breach of an improvement notice is a particularly serious offence. This is on the basis that such offence 'shows defiance', having occurred in circumstances where the offender has previously been warned. His Honour, therefore, considered that in the circumstances, a 'harsher' penalty was appropriate in respect of this offence. The remarks in this regard are relevant in the context of future food act prosecutions brought by councils.

In any event, the case provides another example of the Courts having expressly recognised the seriousness of offending under the Food Act, given its public health implications and the need for the Courts to penalise offenders accordingly.

The case also reinforces the relevant issues for councils when considering a decision to prosecute. Indeed, in circumstances where interim enforcement action (i.e. such as issuing orders and/or expiations) have failed to deter repeat offending, it is incumbent upon councils in discharging their regulatory duties and functions, to consider taking escalated enforcement action and, in some cases, this will necessarily and appropriately mean a prosecution.

You can't write that! Defamatory election material explained

Philippa Metljak

As the local government elections draw closer you may come across a variety of election material aimed at influencing a vote. For the most part, election material should simply advocate for one individual or another but, unfortunately, some material is more critical. Where material is produced that criticises an individual often the question is asked: is it defamatory?

The test of what constitutes a defamatory publication depends on the standards of the community as a whole. It does not matter if the person who wrote the material intended to refer to, or disparage, a particular person, it is enough if the words reasonably lead persons acquainted with the complaining person to believe she or he is referred to and that the material discredits the person's character and reputation.

A council itself cannot commence legal action for defamation. This does not, however, prevent individual members of a council from taking action in their own right for the individual wrong they have suffered. An individual council employee may also sue in defamation but not the council by which he or she is employed.

When considering legal action of this nature several relevant considerations are to be taken into account including the available defences under the *Defamation Act 2005* and the High Court's position relating to the freedom of political expression within a 'body politic'. This means that those who participate in governmental or 'political' activities, or are in the public eye, have to be somewhat more resilient than other members of the public.

If any member of a council or a council employee is considering defamation proceedings, the primary consideration is that it is a private action. This means that any action to be taken would be taken by the affected person in their personal capacity. Obviously, to take such action, those affected may wish to consider whether they are required to personally fund the action or whether it is appropriate (and, if so, whether it is possible) for the council to do so in circumstances where public funds would be utilised.

In serious circumstances it may be appropriate to liaise with the South Australian Police regarding the possibility of criminal defamation which is an offence under the *Criminal Law Consolidation Act 1935*.

Significant and Regulated Tree Prosecutions

Joanna Clare

Over the past 12 months, we have seen many councils display an increased interest in taking action against land owners and/or contractors who cause, suffer or permit unauthorised tree-damaging activity in relation to significant or regulated trees. Such action includes undertaking criminal prosecutions.

However, as such prosecutions invoke the criminal jurisdiction of the Environment, Resources and Development Court ("the Court"), a higher burden of proof, being *proof beyond reasonable doubt*, must be met. This requires that the Council prove its case to a 99.9 per cent degree of certainty.

This is much higher than the burden of proof which councils are required to meet in other enforcement proceedings, which is *proof on the balance of probabilities* and requires only that the council establish that it is more likely than not that an offence occurred (i.e., a 51 per cent degree of certainty).

The relevance of this difference is that significantly more evidence is required in order to be successful in criminal proceedings. This is particularly problematic in the case of tree prosecutions, given that:

- the key piece of evidence, the tree itself (or its branches and foliage), has often been partially or completely removed before it is brought to the council's attention; and
- while the council must prove its case beyond reasonable doubt, the land owner is only required to prove any defence he or she might offer, such as the tree having been situated within 10 meters of an existing dwelling or in-ground swimming pool to the lower standard of proof of the balance of probabilities.

In these circumstances, we offer the following practical tips – particularly to authorised officers as 'first on the scene' – based on our own experiences and on guidance provided by the ERD Court, particularly in *The Corporation of the City of Adelaide v BFR Pty Ltd & Anor* [2014] SAERDC 37 and *City of Marion v Markou & Ors, City of Marion v Mouhalos & Anor* [2011] SAERD 56.

- Ensure that you produce your identification card under section 18(3) of the Development Act 1993. Without following the correct procedures under sections 18 and 19, any evidence that you gather will not be admissible in later court proceedings.
- Evidence of the circumference of a tree can be adduced in many forms. While nothing will beat a measurement taken while the tree remains in situ, it may also be possible, depending on the circumstances, to establish a tree's circumference via other means, such as an estimation from one or more experienced arborists from photographic evidence; and/or measurements showing that the tree's trunk (or those parts which remain) was a certain minimum diameter. Therefore:
    - where council is alerted to a tree's removal by a telephone call from a neighbour, request that he or she take photographs of the tree while it remains in the ground (while explaining that he or she can decide at a later date whether to provide these photographs to the council as evidence);
    - when you arrive on site, take a series of photographs of all parts of the tree which remain, including all foliage and branches, (so that it can be established that the tree (or parts of it) were not diseased or dying);
    - where the tree's trunk remains on site, take measurements of its circumference at regular intervals along its entire length (or at least for a distance of more than one metre). This also applies to any rounds which may have been cut from the trunk. Take photographs and written records of each measurement;
    - if any portion of the tree's stump remains in-ground, ensure that both its circumference and height are measured, and that photographs and notes are taken of the measurements; and
    - request that the land owner or occupier provide any photographs which he or she might have of the tree.
- Take as many (detailed) notes as you can as you go, rather than once you get back to your office. The less time between an act or activity occurring (be it a measurement, or an admission of guilt from a contractor) and it being written down, the more likely it is to be accepted as true and correct by the Court.
- When questioning relevant stakeholders, cast your net as widely as you can. For example, if the land has recently been sold, seek to ascertain whether the previous land owners had measured the tree, or have any information in relation to it.
- Take audio recordings of all interviews conducted. This will ensure that a party cannot later claim that they did not make an admission, or that an admission made has been taken out of context.

At the end of the day, the more evidence which can be compiled against a land owner or contractor, the greater the chance that he or she will plead guilty to the offence, saving the council significant costs (as well as time) in a prosecution.

Is a term of mutual trust and confidence implied into employment contracts? The High Court says 'no'

Adam Crichton

The High Court recently handed down its decision in *Commonwealth Bank of Australia v Barker* [2014] HCA 32, and in doing so clarified that no term of mutual trust and confidence is implied into employment contracts. The Court stated that although such a term is implied into employment contracts in the UK, it ought not to be imported into the common law of Australia.

The facts

Mr Barker had been employed by the Commonwealth Bank for approximately 28 years and had held senior management positions within the Bank's Adelaide office. In April 2009 Mr Barker's position was made redundant. According to the terms of its Redundancy Policy, the Bank was obliged to take meaningful steps to redeploy Mr Barker within the Bank. It failed to do so and consequently Mr Barker's employment was terminated.

Mr Barker initiated action in the Federal Court alleging that a term of mutual trust and confidence was implied into his employment contract in order to give it business efficacy and that the Bank had breached this term by its conduct. At first instance a single judge of the Federal Court found in favour of Mr Barker and agreed that such a term was implied. Mr Barker was awarded $317,500 in damages.

The Bank appealed to the Full Court of the Federal Court and on appeal the decision of the primary judge was affirmed by the majority. The Bank appealed the Full Court's decision to the High Court.

The High Court decision

The decision concerned the test of necessity when implying a term into an employment contract. The Court accepted the concept of necessity as being the requisite condition before implying a term such as this. Necessity in this context means that absent the implication, the rights conferred by the contract could not be enjoyed, or would perhaps be seriously undermined.

The Court found that the employment contract in question did not require the implication of the term for its efficacy, and crucially, stated "*more generally, contracts of employment do not require such an implication for their effective operation.*"

The Court noted that the question as to whether the term of mutual trust and confidence should be implied in employment contracts in Australia had not previously been considered by the Court. In light of the complex policy considerations associated with implying such a term, it is more appropriate that the matter be determined by the legislature rather than the Court.

The Court did highlight, however, that its negative view toward implying a term of mutual trust and confidence does not impact on the general obligation to act in good faith in the performance of contracts.

What does this mean?

This decision provides greater clarity for councils when dealing with a chief executive officer and senior employees who are subject to an employment contract, particularly in relation to termination. No longer can an employee sustain a broad claim that conduct of the employer has breached an implied term of trust and confidence.

In this instance, such a claim was founded on the employer's failure to take meaningful steps to redeploy Mr Barker. However, a claim of this type could have previously been made in relation to any conduct (including a failure to act) by an employer during the term of a contract. It is important to note that both a council and an employee continue to have an obligation to act in good faith in the performance of the employment contract.

David Greenwell

We are happy to report that as a result of his enjoyable experience working at KelledyJones Lawyers, David has decided to reignite his career by returning to the bar at Elliott Johnston Chambers. David is currently continuing to work with us on matters that he commenced as a solicitor.

Welcome new members of the KJ Team

Adam Crichton

Adam joined our team in 2014 after having worked for Parliament's Legislative Review Committee for a number of years, advising on subordinate legislation. Adam also brings with him broader work experience having spent a number of years in the public sector, working in emergency management planning at the Department of Health and the SA Police Department. As a result of his time in the public sector, Adam developed a particular interest in administrative law.

Adam communicates clearly and effectively and has an enthusiasm for providing advice and representation to clients on regulatory and governance matters, as well as assisting our clients in a broad range of matters across all of our practice areas.

Philippa Metljak

Philippa developed a keen interest in and passion for local government having previously practised in planning, environment, native title, energy and resources and liquor licensing law at a large firm which services local government and non-local government clients.

It was Philippa's expressed desire to become a dedicated local government practitioner and her enthusiasm for our Client Undertaking which led to her becoming a member of our team in 2014.

In addition to her passion and enthusiasm for local government, Philippa's excellent communication and analytical skills make her an asset to our team and we are excited to have her on board.

Philippa provides advice and representation to our clients in a broad range of matters across all of our practice areas.

Remember to return those returns: Campaign Donations

Natasha Jones

All candidates standing for election must provide, within 30 days after the conclusion of the election, a completed campaign donations return to the chief executive officer. The conclusion of the election is likely to be around 14 November 2014, which means the return must be completed accurately and provided to the CEO on or before Monday 15 December 2014.

It does not matter if the candidate was unsuccessful or that they did not receive any campaign donations, a return must still be provided. For a new candidate the disclosure period is from the time when he or she announced they would be a candidate or the day on which their nomination form was received by the returning officer (whichever is earlier) to 28 November and, for returning candidates, is 3 December 2010 to 28 November 2014.

The return must also include the details of any gift where the value is more than $500. A *gift* is defined to mean a disposition of property made by a person to another person (other than by a will) where no consideration is made on money or something equivalent to a payment of money, and includes the provision of a service (other than volunteer labour0 provided for no consideration or for inadequate consideration. This means volunteer help provided by friends to assist a candidate with a letterbox drop does not need to be disclosed, but the value of printing services provided by a relative at no cost needs to be included if the total value exceeds $500.

The value of $500 can be reached by the giving of one gift or two or more gifts by the same person, which is then treated as one gift.

The return must also include:

- the total amount or value of all gifts received by the candidate during the disclosure period;
- the number of person who made those gifts;
- the amount or value of each gift;
- the date on which each gift was made;
- details of any unincorporated association that has provided a gift (other than a registered industrial organization); and
- details of each gift purportedly made out of a trust fund or out of the funds of a foundation; and
- details of any other gift (including the name and address of the person who made the gift).

A private gift made to a candidate or any other gift if the amount or value is less than $500 does not need to be disclosed in the return. This includes a gift such as a birthday present where the gift is given in the candidate's private capacity and/or for personal use where it will not be used solely or substantially for an election purpose.

If a candidate does not receive any gifts then a 'nil' return must be provided. Otherwise, a person who fails to provide a return is guilty of an offence under section 85 of the *Local Government (Elections) Act* 1999 which attaches a maximum penalty of $10,000.

Separately, any person elected to a council in November (who was not a member of that council for the 2010-2014 term) is also required to complete and lodge with the chief executive officer, a primary return, within six weeks of their election. A recent relevant District Court case about such obligations can be accessed here: http://www.kelledyjones.com.au/wp-content/uploads/2014/10/SMITH-_-ORS.pdf

New CEO requirement for the first council meeting!

Michael Kelledy & Natasha Jones

The introduction of the *Local Government (Procedures at Meetings) Regulations 2013* this year introduced a few new requirements, one of which, relevantly given the periodic elections, relates to questions that are *lying on the table*, pursuant to a successful formal motion under regulation 12(14)(c).

Any such question (item) that lies on the table will now, pursuant to regulation 12(19), lapse at the November periodic elections.

The introduction of regulation 12(19) and (20) has a twofold effect. Firstly, as above, it causes such matters to lapse by operation of the Regulations without there being any action by the elected body or the Administration. Secondly, it places a new obligation upon the chief executive officer, at the first ordinary council meeting after the elections, to report to the new Council upon each question that has been lying on the table and advising of the fact that it has lapsed, as a result of the election. The practical effect is that the question is disposed of and the only way for the matter to again be considered by the council is by consideration of a new report prepared by administration or by way of a motion given by an elected member. Both approaches result in the council considering the item of business afresh.

Beware *informal application* processes – *Paior & Anor v City of Marion & Ors (No. 3)* [2014] SAERDC 42

Victoria Shute

The recent ERD Court judgment of *Paior* contains 3 findings which are of great significance to all councils and which are relevant to the way in which:

1. development applications for detached, semi-detached and row dwellings must be processed in circumstances where the proposed dwelling site does not comprise a single allotment with its own Certificate of Title;

2. minor variations to Development Plan consents must be processed; and

3. development applications proposing retaining walls should be Categorised, in particular, whether retaining walls can be considered to be "minor" Category 1 developments pursuant to clause 2(g) of Schedule 9 to the *Development Regulations 2008*.

The first finding was discussed in our recent LG Alert which can be accessed here http://www.kelledyjones.com.au/wp-content/uploads/2014/09/LG-Alert-Paior-Anor-v-City-of-Marion-23-September-2014.pdf .

This article discusses the second finding. The third finding is the subject of the subsequent article in this current edition of the LG Leader by my colleague Claudia Molina.

The judgment in *Paior* determined two applications for review made pursuant to section 86(1)(f) of the *Development Act* in respect of two development applications proposing the construction of a dwelling on the same site. One application was lodged in 2011 and the other was lodged in 2013.

At the time that the 2011 application was lodged, a moss rock retaining wall existed on the subject land, in between the site of an existing dwelling and the site of a proposed dwelling. Both dwellings were, at the time, on the same allotment of land.

The 2011 application plans showed that the retaining wall was to remain in place. When the application was assessed for Building Rules consent, it became apparent that the retaining wall would need to be replaced.

A plan depicting a new retaining wall was approved for Building Rules consent and provided to the Council. The new wall was in the same location as the existing wall and was around the same height.

The Council determined that the wall was a Category 1 form of development and that it warranted Development Plan consent. For this reason and to avoid the inconvenience of requiring a formal variation application to be lodged and fees paid, the Council waived the requirements to lodge a formal variation application, determined that the variation warranted approval, struck out the superseded plans and stamped the new plan as having received development approval.

The ERD Court took a dim view of this "informal" variation process, stating that "*the Act required formal steps to be taken*" and that to "*maintain the integrity of processes under the Act, and the integrity of local government generally*", variation applications must occur by way of a formal application process.

If your council is one of the many that allow waive the requirements for lodgement of a formal variation application or otherwise allow informal processes to occur for some forms of variations to development authorisations, we recommend that these processes be reconsidered in the light of the *Paior* judgment as such processes are unlikely to withstand legal scrutiny.

Land Division Documents Training Session

KelledyJones, in conjunction with Development Answers, will be presenting a training session on Land Division Documents. For full details click on the following link: http://www.kelledyjones.com.au/wp-content/uploads/2014/09/Registration-Form-Land-Division-Conditions-and-Agreements.pdf

When are retaining walls Category 1 development pursuant to clause 2(g) of Schedule 9? *Paior* sheds some light:

Claudia Molina

Retaining walls located on sloped sites and associated with residential development which:

- cannot be viewed from neighbouring properties; and/or
- which do not have a significant visual impact; and/or
- are replacing existing retaining walls,

are often determined to be Category 1 development on the basis that they are of "a minor nature only and will not unreasonably impact on the owners or occupiers of land in the locality of the site of the development" in accordance with clause 2(g) of Schedule 9 to the *Development Regulations*.

Both of the development applications reviewed in the *Paior* judgment proposed retaining walls. Each of the retaining walls was determined by the Council to be Category 1 on the basis of clause 2(g) of Schedule 9. The ERD Court however, determined that each of the walls was a Category 3 form of development.

As discussed in Victoria Shute's article, the 2011 application proposed a new, concrete sleeper retaining wall to replace an existing moss-rock retaining wall.

The Council determined that the wall was Category 1 on the basis that it was in the same location as the existing wall, was generally lower in height than the existing wall, was adjacent a 'service yard' and its highest point was hidden from view and would not be particularly visible from neighbouring properties.

The 2013 application proposed a series of stepped retaining walls, each being one metre or less in height. The Council determined that if these structures were "development" that they were Category 1.

In determining that the opinions formed by the Council on both retaining walls were unreasonable and that the walls were both Category 3 forms of development, the Court considered the following to be relevant:

- the considerable difference in levels between the development site and neighbouring properties and the visual impact of the dwelling supported by the retaining wall;
- in respect of the 2011 application in particular:
  - the change to the load on the higher portion of the land; and
  - the change in design from an existing moss rock wall against the batter slope to a system of concrete sleeper retaining walls; and
- in respect of the 2013 application, the structural adequacy of those walls and their potential effect on neighbouring properties.

These findings have broad implications. Wherever a proposed retaining wall:

- may have a structural impact on a neighbouring properties; and/or
- supports development which will be visually prominent when viewed from neighbouring properties,

it is, on the basis of this judgment, unlikely to be able to be considered "minor" and therefore Category 1.

2014 Metro Games hosted by the City of Charles Sturt

As gold sponsors, we participated along with 9 councils in the 2014 Metro Games hosted by the City of Charles Sturt at St Michael's College on Saturday 11 October.

The City of Playford were the winning council on the day and so will host the Games next year – congratulations to the City of Playford!

Dealing with difficult library patrons: what options does a council have?

Philippa Metljak

Dealing with difficult or unruly library patrons can be an unpleasant task. Often there is confusion about what powers a council has and what actions can be taken in relation to unwanted behaviour.

The *Libraries Act 1982* and the *Libraries Regulations 2013* provide for the administration of public libraries and library services in South Australia. The Act and Regulations set out the type of behaviour that is prohibited and prescribe what action can be taken.

Under the Regulations, certain behaviour is prohibited where it is likely to interfere with the comfort of, or disturb or annoy, another person. Such behaviour is punishable by a maximum penalty of $250 or an expiation fee of $80.

In addition, the Regulations provide for notices of exclusion to be issued where an offence against the Act or Regulations has occurred and to prevent further offences occurring. A notice of exclusion can ban the person from entering a library or part of a library for any period not exceeding 2 years.

It may be the case that, in addition to the provisions outlined in the Act and Regulations, a council has a code of conduct for Library users.

Where a breach of the legislative provisions or any code of conduct occurs it may be appropriate, in the first instance, to warn the person that their behaviour constitutes a breach and that further action may be taken if such conduct continues. Where a council seeks to ban a person from the library, the person should be advised of the nature of their conduct, how it breaches the Act or Regulations (or code of conduct) and the action the council proposes to take. If the council intends to impose a ban then the affected person should be provided with the opportunity to explain their conduct and provide comment on the proposed sanction.

It's more than likely that the type of action required will depend on the specific behaviour. In some cases a simple warning letter may be all that is necessary whilst in other circumstances an immediate ban may be justified.

Are you dealing with difficult library patrons? If you require assistance or guidance in taking action please contact us.

2014 Metro Games hosted by the City of Charles Sturt

The KelledyJones women's 4 x 100 metre relay secured third place at the Games.

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We're different for a good reason.