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LAWYERS

LG Leader

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Contents

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Now that the elections are over…!

Michael Kelledy

Now that the periodic election cycle for November 2014 has been completed, it is time to get down to business which, of course, includes complying with the necessary accountability requirements. In this regard, campaign donation returns for all persons who participated in the elections as a candidate must be furnished to the chief executive officer of the council, in accordance with the requirements of Part 14 of the *Local Government (Elections) Act 1999*.

The campaign donations return must be completed for the 'return period' expiring on 28 November 2014 and be provided to the chief executive officer by the close of business on 15 December 2014. Whilst it is an offence punishable with a maximum penalty of $10,000.00 for any person to fail to furnish a return, for elected members it is also to be noted that under section 54 of the *Local Government Act 1999* there is the additional risk of loss of office if the return is not submitted by 15 January 2015. The loss of office will occur automatically by operation of a self-executing provision of the *Local Government Act 1999*.

In addition, for any elected member who was not a member of the council immediately before the conclusion of the November periodic elections, they must also complete a primary return in accordance with the requirements of Division 2, Part 4 of Chapter 5 of the *Local Government Act 1999*. The primary return must be submitted to the chief executive officer of the council within six weeks of the conclusion of the election – by, on an arithmetical calculation, six weeks from 14 November is 26 December 2014. However, since 26 December 2014 is a public holiday, the date by which the primary return must be submitted is by close of business on Monday 29 December 2014. Again, an elected member who fails to submit a primary return to the Chief Executive Officer will, 1 month after the due date, lose office by operation of the Local Government Act 1999.

I expect that governance officers will have these dates in their diaries to ensure that no member inadvertently finds him/herself in breach of the legal requirements that now attach to them, as a requirement of their term in public office.

Legislative Change: New Training Requirements and more

Natasha Jones

On 20 November 2014 two amendments came into operation that effect councils. The first amendment is to regulation 6 of the *Local Government (General) Regulations 2013* with respect to the content of Form 2 that sets out the undertaking to be made by a member of a council before participating in their first formal meeting. Many council members took their oath of office before 20 November 2014. The question we have been asked, is whether those members need to retake the 'oath of office' in accordance with the new prescribed wording. In short, the answer is 'no'. There is no requirement for any council member who made their undertaking before 20 November 2014 to remake it - at that time it accorded with the law that was in operation and, accordingly, is valid.

The second amendment is the introduction of regulation 8AA of the *Local Government (General) Regulations 2013*. Regulation 8AA introduces the requirement that each council must ensure its training and development policy provides that members must undertake regular training in accordance with the policy and which complies with the LGA Training Standards. The LGA Training Standards is a document approved by the Minister for the purposes of this regulation and any alteration to the LGA Training Standards will only have affect if the Minister provides his or her written approval to the making of the alterations.

The Training Standards impose a minimum amount of mandatory training of a total of 7.5 hours. The time dedicated to training is allocated between 4 modules. The first module is an introduction to Local Government (1.5 hours), module 2 is legal responsibilities (2 hours), module 3 is council and committee meetings (1.5 hours) and module 4 is financial management and reporting (2.5 hours).

Note that council members have 12 months to complete the minimum training requirements. This means completion of all 4 modules is to be achieved by November 2015.

Council members should also take note of clause 2.6 of the Code of Conduct for Council Members which requires them to comply with all council policies, codes and resolutions. This means that each council member must comply with the council's training and development policy under section 80A of the *Local Government Act 1999* that requires adherence to the Training Standards. Accordingly, a failure to meet the minimum training requirements will be a breach of clause 2.6 of the Code of Conduct. This position will also be the case if a council imposes, through its training and development policy, additional training requirements over and above the Training Standards.

Applying for a dry area? Changes to liquor licensing legislation

Philippa Metljak

On 5 January 2015 the *Liquor Licensing (Miscellaneous) Amendment Act 2013* comes into operation. The Act amends the way in which dry areas are applied for and established.

From 5 January 2015 dry areas will be established by notices in the Government Gazette rather than through the drafting or amending of regulations. Short term dry areas will be approved by the Liquor and Gambling Commissioner by notice in the Government Gazette and long term dry areas will be approved by the Minister by notice in the Gazette following a recommendation by the Commissioner.

Applications for dry areas must be made to the Commissioner by the relevant Council. When applying for a dry area, a Council must provide the following information:

- a written letter outlining why the Council is seeking the establishment of a dry area. This could include anti-social behaviour related to alcohol misuse or similar;
- whether the requested dry area is long term. Long term being continuous and short term generally not exceeding 14 days;
- a letter of support from the Officer in Charge of the local Police station;
- a letter of support from the local Member of Parliament;
- a detailed and accurate description and plan of the area in the application, including geographic information systems (GIS) data of the boundary:
    - Where a Council applies for a new and modified dry area the Council must include accurate plans. The descriptions and plans are legal documents and will be published in the Government Gazette. It is critical they are clear, exact and unambiguous. Dry areas should follow commonly identifiable geographical features. Where possible they should follow allotments boundaries, road reserves and topographic features; and
- in the case of long term dry areas, details of public consultation. This should include consultation with any relevant service providers.

Applications must be made to the Commissioner at least four months before the event or commencement date.

Importantly, the amendments do not affect dry areas already established. To ensure dry areas previously prescribed under the existing Regulations remain in force when the Act commences, a Liquor Licensing (Dry Areas) Notice will be published in the Government Gazette on 5 January 2015 which will list all existing dry areas previously prescribed.

Dry area applications or amendments to existing dry areas received after 5 December 2014 will be declared by the Minister by notice in the Government Gazette after 5 January 2015 in accordance with the amended Act.

In the future, where a Council applies to renew an existing dry area, the application can include a copy of the existing gazette notice containing the description and plan.

If you require assistance with a dry area application or have any questions in relation to the changes to the Act please contact me and I would be happy to assist.

Please note that our offices will be closed from 5.30pm, Tuesday 23 December 2014, re-opening on Monday 5 January 2015.

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

Notice, what notice? Is constructive notice sufficient to constitute 'receiving notice' for the purposes of section 86(4) of the *Development Act 1993*?

Victoria Shute

According to section 86(4) of the *Development Act*, a person has two months after receiving notice of a decision to commence an appeal or other action under section 86 of the Act.

This provision is somewhat problematic in the context of a section 86(1)(f) application made by the owner or occupier of land adjacent to the site of a proposed development to review decisions made in respect of the public notice category for a Category 1 developments.

As is required by the Act, notice of a Category 1 development application is not provided to any person other than the applicant.

It is often the case that the first time a land owner or occupier becomes aware that development has been approved on neighbouring land is when the development is commenced. In circumstances where this is the case, and the land owner or occupier makes enquiries such that they discover soon after that the council has approved the development as a Category 1 form of development and is "on notice" of the decision, the ERD Court will generally be satisfied that the time runs from when this discovery is made.

This then begs the question, what if development is commenced, but a neighbouring land owner or occupier waits several months before making proper enquiries? Does time still run from when they view the development file or otherwise are on notice that the development application was processed as Category 1?

This very question was determined by the ERD Court in the recent, unreported decision in *Sanderson & Anor v City of Mitcham & Anor*.

This decision concerned an application for the review of the Council's decision to determine a development application proposing a raised deck and privacy screen as a Category 1 form of development. Development approval was granted in respect of the privacy screen on 11 January 2013 and the screen was erected between February and April 2013. The application to the ERD Court was filed at the ERD Court on 3 October 2014.

The Applicants for review claimed that they were within time to make their application as they did not receive notice of the Council's decision until 8 September 2014 when one of the Applicants visited the Council and viewed the application file.

The Council and the developer argued that the Applicants received "constructive notice" of the Council's decision between February and March 2013 and were therefore over 12 months out of time.

"Constructive notice" means that, in the particular circumstances of a case, a person *should have known* of the Council's decision, even though they may not have had actual notice of that decision.

In this case, the Applicants had:

- prior to the erection of the screens, received approval for a Category 3 development on their land and had therefore had some experience with public notification processes under the Act;
- spoken to the builder prior to the lodgement of the relevant development application. The Applicants had observed building work occurring on the developer's land;
    - one of the Applicants questioned the builder undertaking this work. The builder stated that he was constructing a deck which did not require approval;
    - the Applicants made enquiries with the Council who were advised that this was incorrect. This action resulted in the developer lodging a development application for the deck;
    - during the assessment of the development application, the assessing officer visited the Applicants, who expressed concerns about the impact of the deck on their privacy. This led to the development application being amended to include the screen;
- spoken to the builder on a second occasion when the screen was being erected. The Applicants claimed that, on this occasion, the builder stated that the screen component of the development did not require approval. This statement was not checked by the Applicants.

The Court was satisfied that the Applicants had received *constructive notice* of the Council's decision on or before April 2013. In making this finding, the Court determined that it was unreasonable for the Applicants to rely upon the assertion of the builder, particularly given their past experiences.

This decision is significant as it demonstrates that the timeframe for commencing a section 86(1)(f) review does have limitations and can be triggered in circumstances where it is relatively clear that a development has been approved without public notification occurring, rather than when an applicant visits the Council to view the application file.

'Tis the Season of Gift Giving – But for Public Officers, not (necessarily) receiving

Cimon Burke

As 2014 rapidly draws to a close and Christmas approaches (where has the year gone?), it is the time of year where gift giving is contemplated as a way of saying 'thanks' and invitations are received to festive events where generous hospitality is on offer.

The important consideration (and potential challenge) for all council members and employees at this time is to remain cognisant of the duties that attach to their positions of public office in respect of accepting gifts and benefits (including in the form of hospitality). These duties are, of course, contained in the prescribed Codes of Conduct that respectively bind council members and council employees at all times when they are carrying out the functions and duties that attach to their office.

For new council members and as a reminder for re-elected council members, be aware that the *Code of Conduct for Council Members* prohibits the acceptance of any gift or benefit:

- that may create a sense of obligation on your part or may be perceived to be intended or likely to influence you in carrying out your public duty; or
- from any person who is in, or who seeks to be in, any contractual relationship with the Council, other than the prescribed hospitality benefits that are captured within the exemption under clause 3.9 of this Code.

Council employees are bound by equivalent provisions that are contained in the *Code of Conduct for Council Employees*.

When a gift or benefit is on offer, note that even if it is considered that acceptance will not create a sense of obligation, the primary issue is whether it may, if accepted, give rise to a perception that it was intended to influence or, will be likely to have such influence (i.e. regardless of the intentions of the person offering the gift or benefit) in carrying out functions and duties that attach to the public office.

This means that whilst it is impossible to know the motive of a person offering a gift or benefit, in the capacity of public officer, there is a requirement to make an assessment as to whether a third party may reasonably perceive that the person offering the gift or benefit is doing so to influence in some way. Whilst most gift giving is genuine, personal opinion as to whether the gift or benefit is intended to or likely to influence is irrelevant - the test is what a reasonable, objective bystander would conclude in the situation.

For example, in the case of a gift or benefit offered by a person who is in or seeking to be in a contractual relationship with the council, ask yourself whether a reasonable person observing the situation could form a view that the person intends the gift or benefit to cause you to exercise your functions and duties of office in a manner favourable to them. If the answer is 'yes', acceptance of the gift or benefit will likely constitute a breach of the Code - this is the case even if the gift or benefit falls within the hospitality exemptions.

Put simply, if there is a reasonable prospect that an objective bystander may perceive that a gift or benefit on offer to a council member or council employee (in their capacity as a public officer) is intended to influence – it must be refused.

Finally, we are aware that both the Minister for Local Government and the Independent Commissioner Against Corruption have indicated that the Codes of Conduct are to the subject of review. Until this time, the position articulated above prevails, particularly over the 2014 Christmas season.

Issuing and Enforcing Section 84 Notices – Recent clarification from the ERD Court

Joanna Clare

The recent decision of the ERD Court, *Reed v District Council of Mallala* [2014] SAERDC 49, contains some important rulings which are relevant to section 84 enforcement notices under the *Development Act 1993* ("the Act") generally. These rulings concern the ERD Court's ability to vary directions and the effect of Court Orders made on appeal.

Varying directions

The appeal in *Reed* concerned two section 84 notices which had been issued to the appellant in respect of two adjoining allotments of land.

Both notices alleged an unauthorised change in the use of the land to a junk yard or store and issued directions requiring that junk materials be removed from, and not returned to, the land. One of the notices also alleged that conditions attaching to a development approval for a dwelling situated on the land had not been complied with and directed that the appellant agree a schedule of works with the Council so as to comply with the conditions.

The Court found that the breaches of the Act alleged in the notices had been made out. However, it held that the direction requiring the appellant to agree a schedule of works was not a valid direction, as it was uncertain (i.e., it required an agreement be reached in order to be complied with, and there could be no certainty that the appellant and the Council would reach such an agreement).

However, the Court has the discretion, under section 88(1)(b) of the Act, to not only affirm or quash a section 84 notice, but vary it. Therefore, as the Court was satisfied that the breaches alleged in the notices were made out, it determined that the appropriate course of action was to vary the direction in the notice, rather than strike it out or otherwise invalidate the notice.

The variation made was to direct that the conditions of development approval (as well as the other directions in the notice) be complied with within 3 months.

Council officers should therefore take some comfort in the fact that an invalid direction may not be fatal to the validity of a notice in each and every circumstance.

Orders made in section 84 appeals

As noted above, in dismissing the appellant's appeals, the ERD Court made orders varying the notices and extending the date for compliance with all directions (as varied) for a period of 3 months. The Court's powers to make such orders are found in section 88(1)(b) of the Act, as discussed above, as well as section 88(1)(c) which permits the Court to "order or direct a person or body to take such action as the Court thinks fit, or to refrain (either temporarily or permanently) from such action or activity as the Court thinks fit."

When delivering its judgment, the Court reinforced to the parties that a failure to comply with the directions in the notices by the new date set in the Court's orders would constitute a breach of the Court's orders. Therefore, it could be prosecuted as a contempt of Court, rather than only as a failure to comply with the notices under section 84(11) of the Act.

This was an important statement from the Court as the ability to prosecute a person the subject of a section 84 notice who has unsuccessfully appealed the notice for contempt of Court rather than under s 84(11) of the Act:

- carries the potential for more severe penalties to be imposed, including a sentence of imprisonment (which the Court has shown a willingness to impose (albeit suspended only) in recent contempt of Court prosecutions such as *The Registrar, Environment, Resources and Development Court v Wandel (No. 2)* [2014] SAERDC 13 and *The Registrar, Environment, Resources and Development Court v Papalia* [2013] SAERDC 40); and

- negates the need for Councils to both defend itself against an appeal of a section 84 notice and then commence a prosecution under section 84(11) of the Act before it can obtain Court orders with respect to breaches of the Act.

Therefore, it is important that Council officers remember that, where section 84 notices are appealed, the Council seeks orders from the Court not only affirming (or varying!) the notice, but also setting new timeframes for compliance with the notice, or otherwise ordering that the notice be complied with so that a failure to comply with the notice can be addressed as a contempt of the Court's orders.

Return to Work Act 2014: Are You Serious...?

Adam Crichton

The *Return to Work Act 2014* ("RTW Act") is set to have a significant impact on the workers' compensation and return to work landscape in South Australia. It is anticipated that this new regime will commence on 1 July 2015. Changes to the workers' compensation scheme effected by the RTW Act will affect the entitlements to compensation, and benefits, for injured workers and will also impact on the employer's management of compensation matters. The RTW Act repeals the *Workers Compensation and Rehabilitation Act 1986* ("WCR Act").

Compensability

The RTW Act separates the threshold requirements for physical injuries and psychological injuries. In order for a worker to be entitled to compensation for physical injury under the RTW Act the physical injury must arise out of, or in the course of, employment and the person's employment must be a significant contributing cause of the injury. No definition for 'significant contributing cause' is provided. The additional requirement of employment being a significant contributing cause is not included in the WCR Act. Under the WCR Act a person is entitled to compensation if his/her injuries arose out of or in the course of employment only. The proposed test means it will be more difficult to establish a physical injury is work related.

The threshold is also higher when assessing psychiatric injuries for compensability. In order to qualify for compensation for psychiatric injury, the injury must arise out of or in the course of employment and the person's employment must be the significant contributing cause. It will not be sufficient if employment is but one of a number of causes, even significant contributing causes. It must be identifiably the significant contributing cause. Again, there is no assistance for what significant contributing cause means for these purposes, and each case will need to be assessed on its merits.

A person will only be entitled to compensation for the aggravation of a previous or pre-existing injury if that previous injury was itself compensable. That is, it must have arisen out of or in the course of employment and employment must have been a significant contributing cause.

Serious and Non-serious

Under the RTW Act a person will be considered "seriously injured" if the injury suffered has caused permanent impairment and his/her 'Whole Person Impairment' ("WPI") has been assessed as 30% or more. The WPI threshold minimum of 30% applies to the assessment of physical and psychological injuries separately. A person cannot rely on a combination of physical and psychiatric injuries to reach the threshold. A person who does not satisfy the 30% threshold minimum will be considered 'non-seriously injured'.

There are significant differences in the rights and entitlements of seriously injured workers compared to non-seriously injured. For example, non-seriously injured workers will be entitled to weekly payments for a maximum of 104 weeks from the date of injury. Whereas seriously injured workers will be entitled to weekly payments until retirement. Further, a seriously injured worker will be eligible to claim medical expenses that are reasonable and necessary without an applicable time limitation, whilst non-seriously injured workers are entitled to medical expenses for a maximum of 12 months following the cessation of weekly payments.

A significant change to the workers' compensation scheme found in the RTW Act is the return of a common law action in certain circumstances. The RTW Act allows a seriously injured worker to bring a common law action in negligence against the employer in circumstances when an injury is suffered as a result of the negligence of the employer, or due to a breach of a statutory duty. This option is only available to seriously injured workers.

Non-seriously injured workers whose WPI assessment exceeds 5% but is less than 30% are entitled to a lump sum payment for economic loss. This calculation will be made taking into account the worker's age, their pre-injury working hours, and their WPI percentage score. Seriously injured workers are not entitled to this benefit.

The provisions of the WCR Act concerning the employer's obligation to provide employment to a worker once that person has regained some capacity to work have largely remained in the RTW Act. A failure by the employer to provide suitable employment is an offence subject to a fine. However, the RTW Act provides an additional mechanism for the affected worker to apply to the Tribunal in order to compel the employer to provide employment. If the employer fails to comply with such an order, the worker may receive financial assistance to the equivalent amount the he/she would have received had the employer complied.

These changes introduce important considerations for councils in relation to the management of injured workers and return to work programs. Further, the ability for common law proceedings in certain circumstances means councils must be cognisant of their obligations and practices. It may be an opportune time to review policies and procedures.

Moving away from Moseley? *Tru Energy Renewable Developments Pty Ltd v Regional Council of Goyder & Ors* [2014] SAERDC 48

Claudia Molina

On 4 November 2014, the ERD Court delivered its judgment in the case of *Tru Energy Renewable Developments Pty Ltd v Regional Council of Goyder & Ors* [2014] SAERDC 48.

This case involved a proposal to construct a wind farm and transmission line over many parcels of land, to the north of the Tothill Ranges, about 5 kilometres south of Burra. The Council had initially refused the application, but later agreed to a compromise proposal. During this time, two adjacent land owners became parties joined to the proceedings. The parties joined argued that the refusal should be upheld. The Council abided the event of the appeal. The Court found that the proposal warranted development plan consent, subject to conditions.

The judgment delivered by the Court is extensive, with much evidence and planning merits considered.

As is typical of wind farm developments, Tru Energy does not own the land upon which the turbines and related infrastructure are proposed to be located. At the time of the hearing, Tru Energy had obtained licences from each relevant land owner granting them rights of entry to the relevant sites. Long term leases of up to 25 years were required for the proposal to proceed. At the time of the appeal hearing, Tru Energy had not obtained development approval for land division by way of lease. Tru Energy acknowledged that the proposed leases would be "development" requiring development approval from the Council.

Of broad interest to councils across the State, is a ruling of the Court on the application of the principles established in *City of Port Adelaide Enfield v Moseley* [2008] SASC 88 to this case.

The Second and Third Respondents argued that the *Moseley* decision applied to the present case such that Tru Energy's application must be refused on the basis that the application for land division had not been determined.

In deciding that the *Moseley* case did not apply to this proposal, the Court held that:

- the *Moseley* decision was primarily concerned with ensuring that development be orderly and economic;
- in the context of a residential land division, new allotments have implications for the provision of services, may entrench patterns of development which are contrary to the Desired Character. Further, the Court noted that the question of whether the allotment is to be divided may dictate the nature of the development (i.e. whether a proposed dwelling is a detached dwelling or not, which in turn dictates classification and categorisation processes. All of these concerns are relevant to whether development is orderly and economic
- the Court found that the question of how rights will be conferred to Tru Energy over the sites required for its development has no impact upon the question of whether the development will be orderly and economic in that:
- no additional services will need to be provided for it; and
    - o the division will subsist only for the life of the wind farm; and
    - o the division of allotments by lease do not have any impact upon the characterisation of the development or the provisions of the Development Plan which apply.

This judgment is significant as it effectively limits the application of the *Moseley* decision to dwellings and residential land divisions, thereby removing the confusion and uncertainty about the application of this case to all forms of development which has existed since it was delivered in 2008.

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