

## Saved by the Bias! The High Court quashes destruction order

Yesterday, Wednesday 10 June 2015, the High Court handed down its decision in *Isbester v Knox City Council* [2015] HCA 20. The Court allowed the appeal from the Supreme Court of Victoria's Court of Appeal against the Council decision to destroy a dog, pursuant to the Victorian *Domestic Animals Act 1994*.

### FACTS

Ms Isbester was the owner of 3 Staffordshire Terrier dogs – Jock, Izzy and Bub. Various combinations of these dogs were involved in 3 attacks on other dogs and the owners of those other dogs between August 2012 and June 2013. Izzy is the dog the subject of the destruction order which was considered in the High Court proceedings.

On 23 June 2013, criminal proceedings were commenced in the Magistrates Court of Victoria against Ms Isbester who was charged with 23 offences in respect of two of the attacks in May and June 2013. The next day, 24 June 2013, a separate criminal proceeding was commenced against Ms Isbester concerning the attack in August 2012 and she was charged with a further 6 offences. The Council's By-Laws Coordinator, Ms Hughes, was the informer to the Court in respect of the later proceedings.

On advice, Ms Isbester pleaded guilty and was convicted of all of the charged offences. Consequently, an order could be made, pursuant to section 84P of the *Domestic Animals Act*, to destroy Izzy. Under that Act an order for destruction may be made by the Court on application of the Council, or it can be made by a delegate of the Council with appropriate authority to do so. In this instance the Council did not seek an order from the Court even though the Court indicated that had it done so the order would have been made. Instead, the Council convened a panel to hear evidence and to determine the fate of Izzy. There is nothing in the Act which requires or otherwise provides for the Council to follow this path. The Council stated in argument that convening a panel for these matters was its policy. However, such a policy was not documented.

Ms Isbester presented to the panel, as did the owners and victims of the other dogs involved in the attacks.

The panel was compromised of three persons, each of whom individually held the appropriate authority to order the destruction of Izzy. One of the panel members was Ms Hughes.

Although it was accepted that the ultimate decision was not made by Ms Hughes, but by the chair of the panel as a delegate of the Council, there was nevertheless, no dispute that Ms Hughes played a significant role in the processes of the panel and in the capacity as an advisor or someone informing the decision of the panel. Ms Hughes also was

responsible, on behalf of the chair of the panel, for drafting the reasons for the panel decision.

### DECISION

The appeal by Ms Isbester was unanimously allowed by the High Court.

The Court took the view that an apprehension of bias existed in this case with the effect that, in the view of a fair-minded person, Ms Hughes might not have brought an impartial mind to the decision to be made by the panel. The Court found that the role played by Ms Hughes was sufficient to give rise to an apprehension that the decision making of the other panel members was affected.

The position of the Court was that the principles of natural justice required that Ms Hughes not participate in the decision making process of the panel (on behalf of the Council) after having acted as the informer to the Magistrates Court for the purpose of the criminal proceedings. The decision of the chair of the panel as the Council's delegate, following the panel hearing, to destroy Izzy, was quashed.

Whilst this case was tried under the Victorian legislation, the principles of procedural fairness identified and affirmed by the High Court are of general application in administrative decision making and hence have equal relevance to all South Australian councils. It is, therefore, necessary for councils to be aware of the principles of natural justice and the obligations to afford procedural fairness when making decisions which may have a substantial impact on individuals within the community. This case also serves as a reminder for councils to be aware of their obligations under the relevant legislation and to be cognisant of the impact of any processes established within or with reference to the legislative framework relevant to the decision being made.

Our clients will be aware of our expertise and experience in all regulatory matters, in particular matters of animal management consistent with the facts of this case but also of our position as the leading advisers to councils in all matters of administrative law. In particular, it was many of our team members that, during the last council terms, provided State-wide dedicated council training workshops on good decision making within the administrative law framework. This training was specifically designed to ensure that SA council officers did not contravene principles of administrative law as occurred in this case.

With the advent of the SA Civil and Administrative Tribunal and the focus on administrative law compliance in many aspects of council decision making, it is a particularly important time for animal management officers to be certain and assured that their decisions and decision making processes will withstand scrutiny and even challenge. We are best placed to assist in this regard whether by means of training, workshops, or matter specific advice.

If you have any questions please contact Adam Crichton on 08 8113 7108 or [acrichton@kellyjones.com.au](mailto:acrichton@kellyjones.com.au)