

LG Alert – COVID-19 – notices under the South Australian Public Health Act 2011

A number of our client councils have expressed concern about recommendations to consider the issuing of a notice (under section 92 of the *South Australian Public Health Act 2011*) to themselves to direct and restrict public movement within their facilities. This is suggested as a means of closing the principal office to the attendance of members of the public.

Our position (hence, our advice) is that to take such measure is wholly unnecessary and, potentially, unlawful.

Our reasons for this position are:

1. as the owner and occupier of its own premises, a council is able to control access to, from and within them;
2. as set out in our recent [LG Alert](#), the only legislative guidance on the requirement or otherwise for councils to remain 'open' is that at section 45 of the *Local Government Act 1999* ("the LG Act"). For the reasons expressed in our [LG Alert](#), closing the principal office (or other facilities) of a council to personal attendances, does not contravene section 45 of the LG Act, provided that appropriate measures are in place to enable the council to continue to undertake the '*transaction of business*'; In this way, the council continues, through its principal office, to be open for business during the predetermined office hours;
3. indeed, councils are taking steps for WHS and public health reasons and consistent with the tenor and spirit of Government guidance, to ensure that, as a general position, persons are unable to attend at the principal office. However, those same persons may, otherwise, transact business with the council (through principal office staff) by way of telephone, email, skype/FaceTime and the like and, by exception but on the basis of prior arrangements, face-to-face meetings within social distancing guidelines;
4. councils are, of course, local health authorities in their area under the *South Australian Public Health Act 2011* ("the Act"). The Act confers a number of functions on councils, which, relevantly, include '*to take action to preserve, protect and promote public health within its area*' (see section 37(2)(a));
5. it follows that as the owner and occupier of its own premises/facilities the council has power and is within its remit under the Act, to restrict public access to its offices and facilities (including by ensuring that appropriate social isolation measures are observed), as necessary to preserve and protect public health, without the need to (somewhat artificially) serve notice on itself under section 92 of the Act;
6. for the sake of completeness, if a council were to issue a notice to itself under section 92 of the Act, that would be inappropriate and, potentially, unlawful because:
 - 6.1 it is contrary to long-standing principles of law that preclude persons from taking legal action (including enforcement action) against themselves;
 - 6.2 there is nothing in the Act that displaces these principles. On the contrary, section 91 of the Act defines councils **and** the Chief Public Health Officer as relevant authorities for the purposes of issuing section 92 notices; and

- 6.3 the Act, read as a whole, reflects a clear intention that the responsibility for enforcement action against a council would fall to the Chief Public Health Officer. Further, any failure by a council to discharge a responsibility under the Act, is actionable by the Minister for Local Government under section 272 of the LG Act.

For the reasons above, there is no logical or legal basis or necessity for a council to purport to issue itself with a notice under section 92 of the Act for the purposes of restricting public access to its principal office or other facilities, in order to address a risk or a perceived risk to public health. A council has lawful authority to take such action in its capacity as the owner and occupier of its own property - and, as a local health authority under the Act.

If you have any questions in relation to this Alert, please contact:

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