

Welcome to our edition of LG Matters, covering a snapshot of current legal issues affecting Local Government in South Australia, presented to you by the Local Government Team at Wallmans Lawyers.

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Are your Delegations Cumbersome?

Powers and functions are conferred by the Parliament upon Councils through Acts. These powers and functions may be delegated by the Council where there is statutory provision to permit that to occur. The common law maxim *delegatus non potest delegare* means that a power or function cannot be delegated without appropriate authority to do so. Accordingly, when a Council is delegating powers or functions under an Act to a committee or to the Chief Executive Officer (or otherwise) it must rely upon a source of power to do so.

Where an individual Act does not have a power of delegation Councils can rely upon Section 44 of the *Local Government Act*, as the source of power to delegate a power or function vested or conferred under the *Local Government Act* or any other Act. However, this is a general provision which must give way to a specific power of delegation in another Act.



It is important to note that when legislation confers the power to delegate it does so in respect of powers and functions – **not** duties. This is because a duty is an absolute (statutory) impost upon the person or body exercising the power or function. A duty must be observed and, therefore, there is no ability, let alone any requirement, to delegate such.

If your scheme of delegation appears to be rather voluminous and cumbersome it may be because it includes statutory duties. Given that there is no statutory power for doing so, these purported delegations of duties may be removed to ensure full compliance with the *Local Government Act*. See the wording at Section 44(1) of the *Act* – it does not encompass 'duties'.

Separately, it is to be noted that the obligation at Section 44(6) of the *Local Government Act* is that delegations should be reviewed at least once in every financial year. This is simply a duty to review. There is no requirement to revoke existing delegations and make fresh ones but, simply and more efficiently, to just review the delegations that the Council has in place. In our opinion, a review

- will entail consideration of the existing scheme of delegation;
- will ensure that any statutory repeals or amendments or new statutory powers/functions are reflected within the delegations;
- will consider powers that have not previously been delegated being included within the scheme of delegation; and/or
- will identify delegation of other powers or functions which have proven problematical or have not been used over the previous 12 months and should be considered for removal from the scheme of delegation.

For further information please contact Michael Kelledy, Partner, Local Government, on (08) 8235 3091 or michael.kelledy@wallmans.com.au

It's not 'I believe in miracles...': It's proposed amendments to the Sex Discrimination Act 1984 (Cth)

Although the Bill has yet to be passed, Local Government employers should be aware and prepare for the operation of the proposed amendments to the *Sex Discrimination Act 1984 (Cth)*, which include equal protection for men and women, increased protection from discrimination on the basis of family responsibilities to all areas of work (not only dismissal), breastfeeding as a new ground for discrimination and an amended test for sexual harassment.

The amended sexual harassment test will be whether *a reasonable person would anticipate the possibility that the person harassed would be offended, humiliated or intimidated*'. By broadening the scope to include the possibility of offence, humiliation or intimidation, the Bill anticipates a wide range of factors for determining the possibility, which is potentially limitless.

The location where harassment may occur will no longer be confined to the workplace of both workplace participants. Consequently, seconded employees may bring claims against their own employer and/or the employer operating at the site of the secondment in respect of harassment. In such circumstances both employers will need to have suitable policies in place and take appropriate and prompt steps for the investigation of complaints. Therefore, the Bill makes no allowance for delegation of the obligations of the



seconded employee's employer to ensure that policies and complaint procedures are properly implemented in such circumstances.

The review of policies in light of these proposed changes should also include consideration of their practical application and whether they operate to the disadvantage of any class of persons, particularly as the protections offered under the proposed amendments include equal protection for men and women.

For further information please contact Fiona Tillmann, Senior Associate, Local Government Employment and Workplace, on (08) 8235 3002 or fiona.tillmann@wallmans.com.au

You do need your Chief Executive Officer: FOI and Extension of Time Limits

Section 14(1) of the *Freedom of Information Act 1991* enables applications to be dealt with on behalf of the Council by an accredited FOI officer. However, the situation is different if the Council needs an extension of time to deal with the application. In some circumstances the application is to access a large number of documents or necessitates a search through a large quantity of information where dealing with the application within the statutory period of 30 days will unreasonably divert the Council's resources. Alternatively, the application could be to access documents in respect of which consultation is required and the Council requires additional time to undertake this task.

If the Council identifies that an extension of time is needed, the extension must be effected by giving written notice of the extension to the applicant within 20 days after the application is received.

However, while an accredited FOI officer of the Council can deal with applications, it is only the principal officer of the Council that can extend the period within which the application must be addressed. The principal officer of the Council is the Chief Executive Officer or a person designated by the regulations as a principal officer of the Council. No regulations designate an alternative person. This means that the Chief Executive Officer of the Council is the only person who may extend time in accordance with section 14A of the *Freedom of Information Act* (unless the Chief Executive Officer has delegated this power and function to another officer).

Accordingly, unless the Council has appropriate delegations in place, it is wise to ensure that the Chief Executive Officer is available when you need him or her in the event that an extension of time is needed.

For further information please contact Natasha Jones, Partner, Local Government, on (08) 8235 3039 or natasha.jones@wallmans.com.au

When Does a Lease Amount to a Land Division?

Recently, we have provided advice to a number of Councils in relation to situations where a lease or licence over land amounts to a land division requiring development authorisation under the *Development Act 1993*.

By way of a reminder, a lease or licence over **part** of an allotment of land will amount to a land division where the land subject to the lease or licence either:

- comprises of a dwelling and curtilage; or
- does not contain any building which is suitable and used for human occupation;

and where:

- the term of the lease or licence exceeds six years; or



- the lease or licence could, by virtue of rights or options to extend or renew the lease or licence, operate for a total period exceeding six years.

Put simply this requirement is intended to capture and regulate the long-term (i.e. greater than 6 year) leasing of parts of dwellings (i.e not where the entire allotment is leased to the same person) and parts of non-residential land. This requirement does not apply to developments such as boarding houses, supported residential facilities, nursing homes and residential units leased under the *Retirement Villages Act*.

For further information please contact Victoria Shute, Associate, Local Government, on (08) 8235 3078 or victoria.shute@wallmans.com.au

Late tenders

Question: Should Council ever accept a late tender?

Answer: No.

Probity demands that a tender submitted out of time not be considered, evaluated or accepted. A lack of probity leaves the tender process open to legal and/or administrative challenge and undermines confidence in the procurement activities.

For more information please contact Peter Watson, Senior Associate, Local Government Commercial and Property on (08) 8235 3010 or peter.watson@wallmans.com.au, or, Mark Sallis, Special Counsel, Commercial and Property, on (08) 8235 3006 or mark.sallis@wallmans.com.au

Managing the 'Dead Centre' of Town: Changes to Cemetery Regulations

As some readers will be aware, the new *Local Government (Cemetery) Regulations 2010* commenced operation on 1 September 2010. The 2010 Regulations replace the previous 1995 Cemetery Regulations.

For the most part, the new Regulations have not changed substantially from the previous Regulations. There are, however, some minor changes which can be summarised as follows:

- there is no longer a general offence provision under the Regulations. Instead, specific offence provisions are included and the prescribed maximum penalties apply. Council's now have power to expiate offences under Regulation 23 which requires that persons driving in a cemetery comply with the cemetery authority's directions;
- before granting an interment right to a person, Regulation 10 requires that person be provided with a statement which sets out the prescribed information (set out under Regulation 10(2)) and the rights and responsibilities of both the Council (in its capacity as the cemetery authority) and relatives of a deceased person whose remains are interred pursuant to the interment right; and
- Regulation 21 is new and relates to the disposal of unclaimed memorials. The Regulation sets out the circumstances in which a cemetery authority may dispose of a memorial.

For further information please contact Cimon Burke, Associate, Local Government, on (08) 8235 3084 or cimon.burke@wallmans.com.au



Variations to Schedule 10 of the *Development Regulations 2008* – Development Assessment Commission ("DAC") as the relevant authority

On 16 September, the *Development (Miscellaneous) Variation Regulations 2010* were Gazetted. These Regulations have altered Schedule 10 so that the DAC is no longer the relevant authority in respect of the following developments:

- excavating and filling within the Hills Face Zone; and
- large shopping developments of over 2,000 square metres.

We have been informed that, in accordance with these changes, the DAC is no longer willing to dedicate resources to undertake enforcement action in respect of the above developments.

We recommend that Councils ensure that their development assessment and compliance staff are made aware of these changes so that these matters are no longer referred to the DAC.

For further information please contact Victoria Shute, Associate, Local Government, on (08) 8235 3078 or victoria.shute@wallmans.com.au

Dedicated Land Held by Council

The *Crown Land Management Act 2009* now governs land held by a Council (whether or not under a certificate of title in Council's name) subject to a dedication e.g., as a "reserve".

Such land:

- must only be used for the purpose of the dedication (and to amend the dedication, application must be made to the Department for Environment and Heritage)
- may cease to be dedicated, in which case all fixtures are then to be removed and the land left in acceptable condition
- may not be the subject of a new / extended lease, except with consent of the Minister for Environment and Conservation
- may not be subjected to an easement, except with the Minister's consent
- remains owned by the Crown, and if to be purchased from the Crown the purchaser (including the Council) is likely to have pay the market value, plus stamp duty
- may be subject to native title rights.

For more information please contact Peter Watson, Senior Associate, Local Government Commercial and Property on (08) 8235 3010 or peter.watson@wallmans.com.au, or, Mark Sallis, Special Counsel, Commercial and Property, on (08) 8235 3006 or mark.sallis@wallmans.com.au



Guidance provided on the meaning of "entertainment complex" - *Vandborg v The City of Onkaparinga* [2010] SAERDC 50

Recently, the ERD Court delivered a judgment which provided some guidance in the interpretation of the term "entertainment complex" as used in Schedule 10 of the *Development Regulations 2008*.

By way of background, the applicant sought a review of the Council's decision to act as the 'relevant authority' in respect of a development application lodged by the Council for a proposed development described as "...Sports Park upgrade including construction of a two storey tennis club room 'including the use of a function centre'...".

The upgrade included the construction of a new clubroom building comprising of:

- store (18.25 square metres);
- lift and stairwell (7.8 square metres);
- club meeting and function area (82.2 square metres – 50 person capacity);
- clubroom kitchen/bar (29.9 square metres);
- breezeway between toilets and clubroom area (27.4 square metres); and
- an upper-level viewing platform solely for the purposes of spectating during club matches (164.3 square metres – 50 person capacity).

The applicant argued that the proposed development consisted of an "entertainment complex" such that the Development Assessment Commission, rather than the Council, was the relevant authority pursuant to Schedule 10(2)(a)(iii) of the Regulations.

The Court stated that a "*complex is something composed of interconnected parts...A building may contain an entertainment complex if it includes separate entertainment facilities*".

In finding for the Council, the Court concluded that, at most, only two parts of the proposed clubrooms (the bar/function area and the viewing platform) could conceivably be described as entertainment areas or facilities and that this did not constitute an "entertainment complex".

Although the case does not provide a definitive definition of "entertainment complex", the judgment provides guidance in that such a development must consist of, at least, several (and certainly more than two) interconnected entertainment facilities.

For further information please contact Victoria Shute, Associate, Local Government, on (08) 8235 3078 or victoria.shute@wallmans.com.au

Release of Recent Liquor Licensing Discussion Papers

The Liquor and Gambling Commissioner recently released 2 discussion papers addressing the perceived increase in alcohol-related crime and anti-social behaviour, and to better ensure the responsible service of alcohol.

The first paper, "A Safer Night Out", proposes to provide the Commissioner with new powers to impose restrictions on individual licences or all licensed premises in a particular location/precinct. Other changes proposed include a mandatory 3 hour close (either between 4am to 7am or 5am and 8am) for all hotels and



entertainment venues, and giving the Commissioner of Police powers to temporarily close down a licensed venue in an emergency situation.

The second paper proposes changes to the Code of Practice, a document which provides Licensees with a guide on responsible service and consumption of liquor practices. The paper outlined a variety of measures intended to improve practices in and around licensed premises.

Public consultation for both discussion papers is now closed. Nevertheless Councils, as interested stakeholders, should keep abreast of any further developments with a view to participating where appropriate.

For further advice or assistance please contact Ben Allen, Partner, Hospitality and Development on (08) 8235 3018, or ben.allen@wallmans.com.au or Peter Hoban, Partner, Hospitality and Development on (08) 8235 3001 or peter.hoban@wallmans.com.au

Tree Disputes Between Neighbours – What a Nuisance?!

Councils are often faced with complaints, requests for assistance and statutory applications from property owners unhappy about the impact of a tree on neighbouring land. Things can get tricky when those trees are wholly on private property and disgruntled neighbours can easily end up in court.

The Minor Civil Division of the Magistrate's Court deals with claims where damages sought are less than \$6000. Unlike more formal proceedings in higher courts, the Magistrate is not constrained by "technicalities and legal forms". Importantly, parties are not ordinarily permitted to be represented by lawyers.

Many neighbourhood disputes are heard in the Minor Civil court. The District Court case of *Belluco v Netting & Netting* ([2010] SADC 12) provides a recent example of the process and the way an SA court will look at liability in nuisance in suburban Adelaide.

Mr Balluco complained that a native Spotted Gum Tree and Red River Gum Tree on the adjoining Netting property created a nuisance by way of overhang into their rear yard, with resulting leaf litter, intrusive roots and falling limbs. Both trees were healthy, with a life expectancy of over 20 years. Both trees were "significant trees" requiring development approval for any tree-damaging activity. The local area was described as part of a "wildlife corridor of native vegetation".

The neighbours could not agree upon removal and attempts to negotiate failed.

Mr Balluco applied to the Council for approval to remove the trees – and eventually development approval was granted for the Spotted Gum tree. However, because the tree was located on land not *owned* by Mr Balluco, the Council approval only allowed the Nettings to remove the tree if they so wished and could not compel that action. Mr Balluco's subsequent application for removal of the tree pursuant to s299 of the LGAct was refused. So, Mr Balluco applied to the Minor Civil court for an order to compel the Nettings to remove the tree, at the same time renewing a plea for removal of both trees.

The Nettings gave evidence that they were aware of the risk posed by such species and that to address that risk they engaged in arboreal inspection and pruning every 6 – 12 months.



After considering expert arborists' evidence and viewing the trees, the Deputy Chief Magistrate refused to order removal. Mr Balluco then appealed to the District Court, where Judge Smith affirmed the Magistrates decision (to dismiss the claim) on the basis that:

- the interference was not "substantial" enough to warrant removal, particularly taking into account the "arboreal nature" of the surrounding area, and/or, that
- the ongoing management regime adopted by the Nettings had sufficiently abated any ongoing nuisance.

Consistent with the SA stance on when a remedy is warranted, in late May 2010 the NSW Land & Environment Court held that *"it is expected that some level of external housekeeping and maintenance is normal for people who live in leafy urban environments and who benefit from the environmental and aesthetic services that trees provide"* (Moase v MacMahon [2010] NSWLEC 1123).

Councils, as managers of trees as development authorities and in exercising order-making powers can take some comfort in the caselaw which reiterates that action to address encroaching trees will only be necessary where interference with enjoyment of the adjoining land is **substantial** having regard to the character of the surrounding locality. In essence, the dispute between neighbours may be more of a 'nuisance' than the tree itself.

For further information please contact Melanie Burton, Partner, Litigation and Dispute Resolution, on (08) 8235 3029 or melanie.burton@wallmans.com.au



Welcome Peter Watson, Senior Associate Local Government Commercial, Infrastructure and Property

As part of our firm's commitment in providing you with the best Local Government team in South Australia, we are proud to announce the appointment of Peter Watson, Senior Associate to our Local Government team, specialising in commercial, infrastructure and property matters for Local Government entities.

Peter has extensive experience advising the government sector having lead the Commonwealth Government's commercial and property practice in South Australia for over three years. His expertise includes contract management, asset management, due diligence, major projects, probity, procurement, leasing, occupation agreements and land services.

Having previously worked for both private and public entities, he is well placed in appreciating the unique complexities and stakeholder issues facing Councils.

Peter can be contacted on (08) 8235 3010 or peter.whatson@wallmans.com.au

Upcoming Professional Development- Register Now

□ *Eyre Peninsula Councils: Local Government: Liquor Licensing – The Changing Climate*

Feedback from our May Session:

'Well covered, I will encourage others from my council to attend'

'Presenters well-knowledged and versed on topics'

'The role play was extremely useful and very well played out'

Date and Location: Thursday 21st October, 1:00 -3:00pm, Wudinna

This seminar will guide Council staff through basic considerations when dealing with applications of various kinds made under the *Liquor Licensing Act* including:

- Amendments to the Liquor Licensing Act which came into effect 3 May 2010.
- What do I need to do when I receive Notice of an Application made under the *Act*?
- What approvals, consents or exemptions am I required to be satisfied are in place?
- Do I have delegated authority?
- When should I intervene, object to an Application or just do nothing?
- What can Council expect to achieve out of the Conciliation process?
- Does Council still have a role to play once development approval has been granted?
- Do trial periods work?
- Council's role in relation to Limited Licences (1 off special events)?
- How do I control outdoor dining permits?
- Can Council take disciplinary action under the *Liquor Licensing Act*?
- Does Council have a role in noise/disturbance complaints in relation to licensed premises?
- Dry Zones.
- Food and Wine Festivals.

For the complete seminar flier, including registration form, please visit:

<http://www.wallmans.com.au/2010LiquorLicenseEP.pdf>

□ *A Good Call- Essential Decision Making Training Following*

A Good Call is an in-house training initiative especially designed for the new Council including Council members and officers, which is proposed to be utilized as an essential induction component following the November elections.



This in-house one day training program has been developed by Wallmans as a result of overwhelming feedback regarding the topics covered by the *Six of the Best* Seminar Series. The training covers the legal and administrative framework in which decision makers can understand the obligations upon them and will cover appropriate principles, ensuring that decisions are made not only with relevance to public administrative law, but also the application of basic principles of fairness, objectivity, thoroughness, investigation and compliance.

The program can be run at a date, time and location suitable to Council and there are no minimum numbers to run the training. Neighbouring Councils may wish to partner and receive the training simultaneously for one fixed fee.

For the complete training program including content, format and costs please visit:
http://www.wallmans.com.au/2010_training/AGoodCallTrainingProgram.pdf

Alternatively, please call Natasha Jones, Partner, Local Government (08) 8235 3039 or natasha.jones@wallmans.com.au to discuss your training needs in more detail.

Women in Local Government Conference: Social Snaps

Wallmans were thrilled to be a major sponsor at the Year of Women in Local Government Conference, held 17th September at the revamped Entertainment Centre. Over 200 women (and some brave fellows) attended the conference which attracted an assortment of high calibre speakers and interesting sessions discussing and celebrating the achievements of women in local government. As a special treat, Wallmans offered all delegates a pampering cuticle treatment and hand massage at our trade display... ahh heaven...



LG Kitchen

Here's our next favourite recipe, courtesy of Jodie Stanton, Personal Assistant to Michael and Natasha.



Jodie's Apricot Nectar Cheesecake

Ingredients:

150g plain sweet biscuits (milk coffee etc.)
440g can apricot nectar
1 table spoon gelatine
1/2 cup castor sugar
50g margarine 350g cream cheese
1 table spoon lemon juice
300ml cream

Topping Ingredients:

1 table spoon sugar
1 table spoon rum
1 1/2 table spoon cornflour

Method:

Crush biscuits into small crumbs and melt margarine and mix with crumbs. Press crumbs onto sides of cheesecake tin.

Measure 1 cup apricot nectar from can (use remainder for topping) and pour into small saucepan, sprinkle gelatine over, stir over low heat until gelatine is dissolved, allow to cool and thicken slightly. Beat softened cream cheese and sugar until mix is smooth and creamy, beat in lemon juice, then apricot mix, fold in whipped cream. Pour onto crumbs crust and refrigerate for 2 hours or until firm.

Topping

Put sugar and cornflour in saucepan, gradually stir in reserved nectar. Bring to boil, stirring constantly.

Remove from heat, add rum. Continue to stir a few minutes until cool, mix slightly. Pour over cheesecake, refrigerate for 1 hour.

Disclaimer: The content of this newsletter is for information only and should not be regarded as formal legal advice.



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