

Welcome to our final edition of LG Matters for 2009, covering a snapshot of current legal issues affecting Local Government in South Australia, presented to you by the Team at Wallmans Lawyers.

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Section 48 Prudential Reporting

The passage of the *Local Government (Accountability Framework) Amendment Act 2009* will result, amongst other things, in amendments to the Section 48 prudential reporting requirements for certain activities of Councils. Section 48 will be amended to include the development and maintenance of prudential management policies, practices and procedures for the assessment of Council projects, clarification that the undertaking of a project in stages will not limit the application of the Section to the project as a whole and Councils will be required to ensure that the report is not prepared by an employee of the Council or a person with an interest in the project.

In light of these amendments it is timely to reinforce that Section 48 captures any project (whether commercial or otherwise and including through a subsidiary or participation in a joint venture, trust, partnership or other similar body) where the capital expenditure of the project over the ensuing five years is likely to exceed \$4 million **or** where the expected expenditure of the Council over the ensuing five years is likely to exceed 20% of the Council's average annual operating expenses over the previous five financial years.

The relevance of Section 48 must, therefore, be considered in respect of all projects with significant cost implications. In this regard, many Councils have traditionally entered into waste arrangements through their regional subsidiary and otherwise, by separate contracts for waste collection and waste disposal. In this regard, Councils must note that when entering into new waste contracts, whilst the \$4 million cap on capital expenditure will be irrelevant, the 20% of average annual operating expenses test is



a relevant consideration to determine whether the Council must undertake a Section 48 prudential reporting exercise before entering into a waste contract.

For more information on this topic or generally, please contact Michael Kelledey, Partner, on 8235 3091 or michael.kelledey@wallmans.com.au

2010 – A Year of Change

The *Local Government (Elections)(Miscellaneous) Amendment Act 2009*, *Local Government (Accountability Framework) Amendment Act 2009* and *Statutes Amendment (Council Allowances) Act 2009* have all now passed, and are awaiting commencement. The amendments to the *Local Government (Elections) Act 1999* commence 21 December 2009 as a number of matters will need to be addressed by Councils in the new year. For example, the "purging" of the voters roll that occurs on 1 January 2010. Each Council, other than the City of Adelaide, must from 1 January inform potential voters in its area of the requirements to be enrolled on the voters roll.

The state's Remuneration Tribunal will set allowances for the 2010-2014 term of office for elected members before the November 2010 periodic elections. Subject to the commencement of the *Local Government (Accountability Framework) Amendment Act*, all members to be elected at the November 2010 elections will need to be aware and familiar with the changes to the *Local Government Act 1999*. In addition, the *Outback Communities (Administration and Management) Act 2009* has also been passed and is likely to commence mid next year. This will see the unincorporated areas of South Australia managed by the Outback Communities Authority. The Authority will be provided with greater powers, which will see the Authority function, in many ways, similar to a Council.

In a year of significant change, we will continue to provide you with updates, but in the meantime, please let us know if you have any questions.

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

Letters of Intent and MOU's: Important Considerations

Wallmans Local Government Property & Infrastructure lawyers have been dealing with a number of documents of late that fall into the category of 'letter of intent' or 'Memorandum of Understanding'. The extent of the information contained in such documents can vary to a significant degree. Some of the main issues are covered below.

What is a letter of intent?

Letters of intent (or Memorandum of Agreement (MOU)) are used increasingly by Councils in cases where works commence or expenditure is incurred prior to a contract being entered into. In such cases the contractor or consultant will require some comfort that it will be paid for those works/services and/or reimbursed for those expenses. A letter of intent will usually state that the parties intend to enter into a contract at some point in the near future and that the contract will supersede the letter of intent. If used properly and a contract is concluded in due course, everybody is happy. However problems arise when the parties cannot reach agreement and the intended contract is never executed.

The effect of a letter of intent

Letters of intent vary as to their nature and effect- in common parlance they could be compared to "liquorice allsorts". Some are

- merely used as expressions of hope;
- others are firmer, but make it clear that no legal consequences ensue;
- others presage a contract and may tend to mount to an agreement "subject to contract";
- others are contracts falling short of the full blown contract that is contemplated; and
- others are in reality the contract in all but name.



However, every letter of intent will be interpreted individually by the courts and effect will be given to terms which are clear.

Conclusion

When writing a letter of intent or MOU the terms must be clear. The less there is outstanding to be agreed when the work is given in a letter of intent, the more likely it will be that a contract can be executed to define all the rights and obligations of the parties. Caps are a useful protection for both parties and, if used, both parties should be aware of the progress of the works and should not allow the works to continue beyond the cap without making further express and realistic arrangements.

For more information or assistance in drafting your Letters of Intent or MOU's, please contact Trevor Gormley, Senior Associate, on 8235 3010 or trevor.gormley@wallmans.com.au, or Mark Sallis, Special Counsel, on 8235 3006 or mark.sallis@wallmans.com.au

Regulated Trees make their Parliamentary Comeback

You may remember the introduction of the *Development (Regulated Trees) Amendment Bill* in 2007. This Bill lapsed in 2008.

Recently, the *Development (Regulated Trees) Amendment Bill 2009* was reintroduced into the Legislative Council, and passed both Houses on 26 November 2009.

The 2009 Act is substantially the same as the 2007 Bill. The main changes which this Act will make to the *Development Act 1993*, when it comes into force are as follows:

1. A two-tier system of "regulated trees" and "significant trees" will be created.
 - (a) Trees meeting certain criteria to be specified by regulation will be "regulated trees".

It is presumed that applications for the removal of "regulated trees" will be assessed against less vigorous criteria than that applying to significant trees.
 - (b) Trees will only be "significant trees" if they are specifically declared as such within a Council's Development Plan.
 - (i) The Development Plan will only be able to declare a tree as a significant tree if:
 - A. it makes a significant contribution to the character or visual amenity of the local area; or
 - B. it is indigenous to the local area, it is a rare or endangered species taking into account any criteria to be specified by regulation, or it forms part of a remnant area of native vegetation; or
 - C. it is an important habitat for native fauna taking into account any criteria prescribed by regulation; or
 - D. if it satisfies any other criteria to be prescribed by regulation.
 - (ii) "Stands" (groups) of trees will also be able to be declared as significant in a Development Plan, provided that the stand, as a group, meets similar criteria to that described above for individual significant trees.
2. The Act will be modified to allow Councils to impose specific conditions for tree replanting, or money to be paid in lieu of tree replanting, upon development authorisations for the killing, destruction or removal of a regulated or significant tree.



3. An "Urban Trees Fund" will be created so that money in lieu of tree-planting paid to Councils as a condition of development authorisation for the killing, destruction or removal of regulated or significant trees can be applied to the maintenance or planting of trees in the Council area.
4. The ERD Court will be empowered to impose "make good orders" where the Court has found that a person has breached the Act by undertaking a tree-damaging activity.

This Act will come into force on a day to be fixed by proclamation. We will keep you posted when this occurs.

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

Dealing with Representations, Avoid Complications!

It has recently come to our attention that some Council's are in the practice of placing representations received by them in respect of Categories 2 and 3 Development Applications on their websites as attachments to items in the Council's DAP agendas. As a result, complaints may be made by representors who are concerned about their personal details being published in this manner. The question has, therefore, arisen whether it is appropriate for a Council to include representations on the internet?

The *Development Act 1993* provides guidance as to how representations must be dealt with. Under section 38(8), the applicant must be provided with a copy of the representations and afforded an opportunity to respond. There is nothing further within the *Act* or associated *Regulations* which require the representations to be made public and/or to be dealt with as an anonymous representation in the event that it is made public.

Additionally, regulation 35(b) of the *Development Regulations 2008* sets out the content that is required to be included in a representation. In particular, sub-regulation (b) states that "a representation must include the name and address of the person.... making the representation". It is relevant for the DAP to have regard to these matters.

Section 56(15) of the *Act* requires a Council to provide the public with reasonable access to agendas and minutes of meetings of the Council's DAP. In our view, the provision of reasonable access to agendas extends to making the planning officers' reports available on the Council's website, but does not extend to making representations available as attachments to the planning officers' reports.

Many Councils do not include representations as attachments to planning officers' reports as part of the agenda on the website, but include a summary of the issues raised in the representations in the planning officers' reports. Other Councils do include representations as attachments to planning officers' reports as part of the agenda on the website, but the names of the representors are removed first. Both approaches avoid the disclosure of the representor's personal details and strike a balance between a member of the public's rights to access information relevant to the decision making process and the representor's rights of privacy.

For more information please contact Cimon Burke, Solicitor, on 8235 3084 or cimon.burke@wallmans.com.au

Guidance for Assessing Development Applications to Operate Home Businesses

The Supreme Court, in the case of *Allbound Pty Ltd v City of Onkaparinga [2009] SASC 358*, recently considered a decision of the ERD court in respect of a development proposal to change the approved use of land from "residential flat building" to "office and dwelling development". The ERD Court had upheld the Council's decision to refuse to grant Development Plan consent in respect of the application.

The Council's Development Plan contained a provision which stated, as one of the objectives of the Council-wide area, "Small scale home business, local service and community uses, sited, designed and operated to minimise detrimental impacts to residential use".



The Supreme Court said that the proper construction of the provision was that it did not, of itself, permit or encourage the establishment of small-scale home businesses. Rather, the provision contained a "*direction that any such businesses, as may be approved, be sited, designed and operated in a way which minimises its detrimental impact on other residences in the locality*". In addition, the Court said that the provision "*anticipates that the residents of dwellings which generally, but not exclusively, will be found in residential zones, may be given approval to operate small-scale businesses from their homes consistently with the objectives and principles of the Development Plan*" (the Court noted that it is in the very nature of a home business that it may be operated from wherever there is a home).

The relevant question was distilled as being "*whether the use of a residence should be approved having regard to the appropriate balance between the residential amenity considerations and those provisions which speak of the need to provide dwellings and allow developments which meet the needs of the community*".

The Court identified a number of considerations:

1. The scale of any home business must be restricted so that it remains subordinate to the approved residential use of the dwelling. Conditions can be imposed to limit the scale of the operation. For example, conditions limiting the operation of the business to operation by the resident of the dwelling, the number of non-residents who may assist in the business, the type of business permitted (e.g. advisory or similar services) and the hours of operation may be imposed.
2. The nature, scope and intensity of the home business will generally need to be at the lower end of the scale (with home business operating at a higher scale to be confined to zones dedicated to commercial uses).
3. Whether the scale of the home business will exceed the limitations imposed by the definition of "home activity" in the Development Regulations 2008 (if it does not the home business will not be 'development' and will not require approval). The Court noted that where the scale of the home business is not significantly greater than the types of home businesses that can operate without approval, that will be a factor in favour of approval of the home business.
4. The Court also recognised that there are good policy reasons for allowing people to live and work on the same land (for example, increasing transport and energy costs).

The Supreme Court remitted the matter back to the ERD Court for further hearing.

For further information please contact Nicole Harris, Senior Associate, on 8235 3017 or nicole.harris@wallmans.com.au

Imitation Firearms

Does your Council own imitation firearms to scare birds or for other reasons? Does your Council loan these items to members of the public?

On 1 October 2009, the *Firearms Regulations 2008* were amended so that the definition of 'firearm' now includes imitation firearms. Councils which own imitation firearms that fall within the expanded definition of 'firearm', will need to surrender them to a member of the police force or apply for the appropriate licences, permits and registration. Even if your Council already hold a firearms licence for other reasons, it cannot authorise possession of an imitation firearm unless the licence has been endorsed by the Registrar of Firearms to that effect.

An item will be taken to be a firearm if it imitates the action of a firearm (regardless of its shape, material or colour), or if it imitates the shape of a firearm (regardless of its material or colour). The Minister also has the power to declare classes of items to be imitation firearms. The following two examples both fall within the expanded definition of 'firearm':

- a device that looks like a firearm but fires blanks, is front or top venting, and has a threaded muzzle capable of accepting an adaptor allowing for the firing of flares or other projectiles; and
- a device that looks like a firearm but fires blanks, is top venting, and while not designed with a threaded muzzle, imitates the firing action of a firearm.



The circumstances in which an imitation firearm will not be deemed to be a firearm are:

- a) *if it could not reasonably be taken to be a firearm **and** –*
 - i. *it contains no working parts; or*
 - ii. *it is not designed to fire a projectile and none of its working parts imitate the firing action or any mechanism involved in the functioning of a firearm; or*
 - iii. *it is designed and, if marketed, marketed only as a toy for children or as a novelty item (such as a lighter) and cannot readily be altered in a manner that would enable it to be used as a firearm; or*
- b) *if it is of a class declared by the Minister, by notice in the gazette, not to be a firearm for the purposes of the Act.*

On 25 September 2009, the Registrar of Firearms declared a General Amnesty from certain provisions of the *Firearms Act 1977* and the *Firearms Regulations 2008*. This amnesty is in force until 31 December 2009, and will protect Councils in possession of imitation firearms that fall within the expanded definition, but only where those Councils are in possession of them for the purposes of surrendering them to a member of the police force.

Councils which hold these imitation firearms should take swift action to surrender them to a member of the police force, or to apply for the appropriate licences, permits and registration.

For more information please contact Renae Leverenz, Associate, on 8235 3041 or renae.leverenz@wallmans.com.au

"Can I Help You?" – Managing the Risk of Giving Advice & Information

Councils are a primary source of information for the public on a vast range of topics from planning and property zoning to local environmental and historical data. This can (and does) occur over the front counter, at the planning desk, by Council registers, on Council websites, and in correspondence and Council publications.

In providing such information and advice Councils, like any other statutory bodies, have a **duty to take care** to ensure that any verbal or written information is accurate to avoid loss to parties who might reasonably rely on that advice or information.

The best way to do that is to ensure that:

- ✓ any, and all Council officers who provide information have a **sound knowledge** of the relevant area of information and any statutory framework;
- ✓ Council officers are **aware** that the recipient of the information or advice may rely on that advice in making important decisions;
- ✓ only **accurate** information is given;
- ✓ the Council maintains a written and/or electronic **record** of information sought and provided;
- ✓ any **qualifications** to the information or advice are made clear and recorded;
- ✓ if the best available information is held by another government agency then the enquirer is **referred** to that source;

Ticking those boxes will reduce the risk of mistakes and potential for loss to recipients and complaints and/or liability exposure for Councils. While express disclaimers can have some application, Council's main aim should be to provide current and accurate information and advice when responding to enquiries across all areas of Council service.

For further information please contact Melanie Burton, Partner, Litigation, on 8235 3029 or melanie.burton@wallmans.com.au

Council Easements held over Private Land – are they Community Land?

It is common knowledge that land which the Council owned or had the care, control and management of as at 1 January 2000, and over which easements/rights of way granted to third parties existed, became community land on that date. The Council then



had 3 years (i.e. to 31 December 2002) to exclude the land from that classification in accordance with section 193(1)(a) of the Act.

Further, if a Council acquires land over which easements exist, this land becomes community land once vested in the Council, unless the Council resolves to exclude the land from community land classification in accordance with subsection 193(4)(a).

However, land over which the Council holds the benefit of a right-of-way or an easement does not, in our view, automatically become community land through the operation of sub-sections 193(1)(a) and 193(4)(a). This view is consistent with the nature of an easement or a right-of-way, which generally only provide access rights to land, and do not otherwise allow the holder of such an interest to modify the land.

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

Limited Patience for Limited Licences

Councils will usually be asked to comment on Limited Licence applications made under the *Liquor Licensing Act*, where an applicant wishes to temporarily increase their trading rights (e.g. longer trading hours, provision of entertainment etc) or to license a one off event at the local park or maybe even the Town Hall.

Councils will often receive such applications at short notice as they need only be lodged at the Licensing Authority 14 days ahead of the proposed event (60 days for large events).

Firstly, Council should determine whether all approvals, consents, or exemptions required are in place – planning, building, development etc. Councils should also turn their mind to whether undue offence, annoyance, disturbance or inconvenience will result to people who reside, work or worship in the vicinity of the premises.

Councils might also consider obtaining the views of local police before responding formally.

Councils should consider if additional conditions ought to be placed on the Licence, for example, changes to timing/duration of the event, security measures, noise control, the presence of fire and medical services, liquor service control, post-event clean up measures and possibly additional toilets.

Where the Council is also the landlord, it will also need to provide its response in this capacity. Generally speaking, the Licensing Authority rarely grants an application in the absence of landlord consent.

Finally, Councils should provide a written response to both the Licensing Authority and the Applicant and if a subsequent conciliation or hearing is required, should be represented.

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.

It's a Wrap: Six of the Best-Good Decision Making: What you Need to Know.

'Finally, a program designed to provide an insight into the importance of good governance processes and how they relate to the local government decision-making environment. The six modules offer a comprehensive and relevant overview of how to make sound decisions. The sessions have been tailored to suit the South Australian context, providing a real opportunity to raise the bar within local government to ensure we can stand the test of scrutiny and inspire confidence in our governance practices.'

Lisa Mara, Manager, Governance and Civic Affairs, City of Norwood Payneham & St Peters



Our final *Six of the Best* Consolidated Conference for the year took place in early November. Over 550 Local Government staff and Elected Members have taken part in the program over the past 11 months, with the program also having been run in rural locations and as an in-house training series. With the overwhelming success of the afternoon session program which was run over 6 months, a two 2 day regional conference was held in two locations, and due to demand, a metropolitan 2 day intensive was also held.

Individual Council's are also requesting the training be provided in a 1 day consolidated session that is tailored to suit their needs.

To all our participants we thank you for taking part and hope you gained the knowledge and skills that will assist you in making more effective and robust decisions.

If you or someone you know missed out on the program, Wallmans will be running a refresher course next year, together with a more intensive program following the November 2010 elections. With such a flexible program being offered there is no reason to miss out! If you would like further information regarding *Six of the Best* in 2010, or to register your interest, please contact Sharon Pitardi, Marketing and Business Relations Manager, on 8235 3085 or sharon.pitardi@wallmans.com.au

Wallmans Lawyers are Moving... January 2010.

Don't forget that from the 4th of January 2010, Wallmans Lawyers, will be located at **Level 5, 400 King William St, Adelaide.**



Located in the vibrant southern precinct, the new 11 storey building is finalising construction phase.

With more than 60% growth in employees over four years, Wallmans has outgrown its current Wakefield St offices. The firm has partnered closely with leading interior designers, Hassell, to design a dynamic and contemporary environment for our clients. Working with the principles of sustainability, the space, rich with warm and natural materials, (many sourced from South Australia), will provide a harmonious connection to the Wallmans' brand.

The building offers close proximity to the Courts and the Gouger St precinct, on and off street car parking, and a consolidated working environment across one floor,

facilitating greater accessibility, convenience and effectiveness in servicing our clients.

We look forward to welcoming you to our new premises in the New Year! Please take the time to update your records.

Address Details:

Level 5, 400 King William St, Adelaide SA 5000
GPO Box 1018, Adelaide SA 5001

Phone numbers, email, fax and PO Box details will remain the same.

Ph: 08 8235 3000

Fax: 08 8232 0926

Merry Christmas and Happy Holidays!

From the Local Government team at Wallmans Lawyers, we extend our warmest wishes for the festive season. We look forward to working with you in 2010.



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



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