

Local Government Update

Winter 2008

Good news for Council property officers!

The Minister for Small Business has issued a Determination to exclude certain kinds of Council leases from the definition of the "Retail Premises" in the *Retail Leases Act 2003* ("the Act").

From 1 August 2008, a lease (or sublease) of premises by a Council where the premises are used wholly or predominately for:

- a. any one or more of public or municipal charitable or armed forces or returned service purposes; or
- b. community, cultural, sporting or recreational purposes (including where Council is acting as a committee of management);

will not be classed as "Retail Premises". This means that the Act will not apply to these leases. So disclosure statements and the associated compliance requirements will not apply.

It is important for Councils to note that the Small Business Commissioner can issue a certificate to confirm that a particular lease is a kind of lease to which the exemption applies, and most importantly, the certificate will be sufficient evidence of this. It would be prudent for Councils to obtain a certificate for each future applicable lease in its municipality, to avoid the rigour of the Act.

A copy of the Determination which contains a full description of the 'types' of lease that are exempt can be obtained via the link below.

<http://www.gazette.vic.gov.au/Gazettes2008/GG2008S209.pdf>

If you require any further information or assistance in classifying Council's lease portfolio or would like assistance to obtain a certificate from the Small Business Commissioner please do not hesitate to contact us.

Recent Developments under Local Government Legislation

On 5 August 2008 the Governor in Council fixed higher values for contracts for which a prior public tender must be conducted by Councils. On the same day, the Local Government (General) Regulations 2004 were amended to clarify the position in relation to making documents in relation to such contracts available for public inspection.

Order in Council

Section 186 of the *Local Government Act* has the effect that (except in limited circumstances) a public tender must be entered into for contracts for the purchase of goods or services or for the carrying out of works to the value of \$100,000 or more "or such higher amount as may be fixed by Order in Council".

By Order in Council, the value of contracts for which a public tender must be carried out under s.186(1) has been increased to the following amounts:

\$150,000 – contracts for the purchase of goods and services.

\$200,000 – contracts for the carrying out of works.

As such, there is no requirement for a public tender to be entered into for contracts under those amounts.

Local Government (General) Regulations 2004

The amendment to the Regulations inserts a new phrase into regulation 11(q). Prior to the amendment, reg 11(q) provided that (*continued on page 4*)



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Discrimination and superannuation legislation changes

Many Councils are focusing on the proposed amendments to the *Workplace Relations Act* to be introduced by the Rudd Government and are taking measures in anticipation of those changes. Councils should not, however, overlook the effect of recent changes in other areas such as The *Victorian Equal Opportunity Act 1995* ("the EO Act") and The *Superannuation Guarantee (Administration) Act 1992* ("the SG Act") which will have a more immediate impact.

Discrimination on the basis of "Employment Activity"

The EO Act sets out attributes which an employee may rely on in support of a discrimination claim. Councils will be familiar with most of these attributes which include age, race, sex, family/carer's responsibilities, impairment, and other protected characteristics.

With effect from 31 March 2008 a further category has been included to this list of attributes namely "employment activity". This is different to discrimination on the basis of industrial activity (which relates to industrial matters such as association with a union) and means Councils may not discriminate against employees who make a reasonable request and/or communicate concerns about their employment entitlements.

Examples include:

- what is my rate of pay?
- how many holidays have I accrued?
- do I have an entitlement to paid maternity leave?

Where a Council responds to such a request in a manner which negatively impacts on the employee's employment it exposes itself to the risk of a discrimination claim.

Examples of negative responses include:

- reducing an employee's hours or regular overtime;
- denying annual leave requests;
- overlooking an employee for promotion/training; and
- transferring the employee to duties considered to be undesirable.

Requests for flexible work arrangements to accommodate family/carer's commitments

With effect from 1 September 2008, a further amendment relates to discrimination on the basis of "family responsibilities". This is intended to assist workers in balancing their work with their family/caring obligations.

Whilst the Rudd Government is still in the process of legislating flexible work arrangements which will be included in the ten National Employment Standards (in effect from 1 October 2008), the EO Act pre-empts this issue and is broader.

Importantly, the new family responsibilities provisions of the EO Act are not confined to employees - they extend to prospective employees and independent contractors. The practical effect of this change is that Councils will be prohibited from unreasonably refusing to accommodate requests from workers for flexible work arrangements because of responsibilities that they have as a parent or a carer.

Examples of outcomes that could arise pursuant to requests for flexible work arrangements include:

- working part-time or fewer days;
- working from home;
- changing working hours including starting and finishing times;
- granting further unpaid leave entitlements;
- rescheduling the times of staff meetings.

Whilst Councils are not obliged to agree to every request that is made, they are obliged to give serious consideration to these requests. Where Councils have reasonable grounds for refusing the request, they should inform the employee of those grounds and take measures to ensure that they are able to objectively support their reasoning.

These developments necessitate a review of existing policies, practices (including pre-employment practices), agreements and processes in order to ensure compliance with these new requirements. Training should be provided to relevant staff and decision makers on an on-going basis and proactive measures adopted to improve those aspects of a business which could negatively impact on the family/carer's commitments of employees.

Changes to Superannuation Guarantee contribution obligations

With effect from 1 July 2008 the criteria for calculating superannuation guarantee contributions ("SG contributions") in terms of the SG Act is "ordinary time earnings". Prior to this date, some Councils calculated their SG contributions on an earnings base which may have been contained in an industrial award, agreement, superannuation fund trust deed or Commonwealth or State law.

Under the new provisions, "ordinary time earnings" generally relate to earnings arising from an employee's ordinary hours of work including over award payments, commissions, shift allowances and paid leave. In practical terms, this means that a Council's required SG contributions could change.

Please contact David Thompson if you have any questions about the operation of the *Workplace Relations Act*.

Consequences of council's misrepresentation of property zoning

A recent NSW Court of Appeal case is a timely reminder that mistakes in information issued by Councils can have costly consequences. In *Rockdale City Council –v– Micro Developments [2008] NSWCA 128 (5 June 2008)*, the plaintiff property developer claimed that it suffered loss when it purchased a property for development relying on zoning information provided by Council and included in the Council's statutory certificate. The developer was awarded damages of \$2.6M.

Facts

In 1997 a developer purchased a property for \$640,000 with the intention of constructing residential units. Prior to finalising the purchase, the developer made enquiries of Council and was told that the zoning for the property was "Residential 2(c2)" and that it could construct residential units as long as it complied with the relevant building code. In 1993-94 the developer had carried out a development of six residential units at an adjacent property and believed Council's advice was correct. Later, Council issued a certificate under the relevant legislation which confirmed the zoning as Residential 2(c2). The certificate formed an annexure to the contract signed by the vendor and the developer. The property was in fact zoned Residential 2(b1). Under that zoning residential units were prohibited. Council later conceded that, after some confusion, it had misrepresented the property's zoning.

The developer did not sell the property after the correct zoning came to light, believing that Council would rezone the property. However the property was not rezoned until eight years later, when the developer constructed residential units on the site.

The developer commenced proceedings against Council claiming damages for misrepresentation of the zoning. The developer alleged that because its money was tied up in the property in question

it was unable to undertake other developments as it otherwise would have done. It claimed \$5M damages as compensation for its loss. In its defence Council admitted negligence but not the substantial damages claimed. Council argued that the developer should not have retained the property after it discovered it had been given incorrect zoning information. Council also argued that, had the developer sold the property when it became aware of the zoning issue, it would have suffered only minimal loss and that consequently the developer had failed to mitigate its losses.

Court decision

The trial judge held that:

- Council bore the burden of establishing that the developer had acted unreasonably and had failed to mitigate its loss;
- the developer was not obliged to sell the property to mitigate its loss upon becoming aware of the zoning misrepresentation;
- it was reasonable for the developer to keep the property in the hope that the land would be re-zoned even though Council had informed the developer in 1999 that the land would not be re-zoned (re-zoning having occurred eight years after the purchase); and
- the developer had sustained a loss of opportunity amounting to \$2,668,652.

Council appealed against the findings and the assessment of damages. The Court of Appeal upheld the findings and commented that although the damages awarded of \$2,668,652 had been calculated without much precision, it was open to the trial judge to arrive at a broad assessment of damages.

A key to the Court's assessment of damages was the fact that the developer had undertaken property development in the municipality over the past

16 years and had usually rolled over its developments by purchasing the next development site whilst it undertook its current development.

The trial judge, in assessing damages, had made an estimation of the developer's assumed profits (\$1,061,280) generated from a following hypothetical development (that would have been undertaken had the development in question not been delayed as a result of Council's misrepresentation of the applicable zoning). The judge also awarded an additional amount of \$400,000, representing a portion of further lost profits from a second hypothetical development. Interest was then applied to the hypothetical profits with adjustments for tax.

Lessons for Councils

The Rockdale decision is a timely reminder that Councils have a duty of care to provide accurate information. The decision highlights the damages consequences to Councils of a failure of that duty of care. It is also a timely reminder that assessments of damages by courts may be vague and lacking in precision, and may also be assessed on hypothetical events stemming from a Council's negligence.



Graffiti Prevention Act 2007 – The Essentials

The *Graffiti Prevention Act 2007* ('the Act') became fully operational on 30 June 2008, having come into partial operation on 17 April 2008.

The Act:

- creates graffiti related offences, including restricting the sale and advertising of spray paint;
- creates tougher penalties for offenders;
- provides powers for Council to remove graffiti from private property in certain circumstances; and
- provides stronger search and seizure powers for the Police, but not for Council.

Two parts of the Act are of particular relevance to Councils:

Part 2 of the Act sets out the new offences, including an offence of selling aerosol paint to a minor which is a lodgeable offence under the *Infringements Act*. The offences in the *Summary Offences Act* and *Crimes Act* continue to exist in tandem with the offences under the *Graffiti Prevention Act*.

Part 4 of the Act creates a mechanism for removing graffiti from private property (where the graffiti is visible from a public place. The Act does not deal with graffiti on public property, which can be dealt without having to use the mechanism in the Act). It provides Councils with powers to remove graffiti in certain, limited, circumstances. The Act does not impose any obligations on Council to remove graffiti from private property if it does not wish to do so.

Recent Developments under Local Government Legislation (cont)

(from page 1) Council had to make available a list of certain contracts "valued at \$100,000 or more". After the amendment, Council has to make available a list of certain contracts "valued at \$100,000 (or such higher amount as is fixed from time to time under section 186(1) of the Act) or more". The insertion of the words "or such higher amount as is fixed from time to time under section 186(1) of the Act" reflects the wording in s.186(1) of the Act.

The amendment to the Regulations was required because the effect of reg 11(q) as it was drafted prior to the amendment was that while a public tender would not have been required for contracts for more than \$100,000 but less than \$150,000 or \$200,000 as the case may be, Council would have had to disclose such contracts under reg 11(q). As such, the amendment is largely of a housekeeping nature.

Please contact Nieva Connell if you have any questions in relation to contracts affected by s.186 of the *Local Government Act* or the disclosure required under Local Government (General) Regulations.

Steps Councils Should Now Be Taking...

1. Ensuring all relevant staff are aware of the Act (including street cleansing, local laws and community programs staff);
 2. Preparing 10 day and 28 day notices (including a provision for the owner/occupier to give written consent);
 3. Preparing operational parameters;
 4. Making authorisations under s.19, including obtaining written consent from authorised persons and issuing ID cards;
 5. Drafting infringement notices and charge and summons (for s.10(2)).
- Please contact Nieva Connell or Barry Josephs for more information about the operation of the *Graffiti Prevention Act*.

Contact us

To discuss any of the issues raised in this update or require further information, please contact:

David Thompson
T 03 8602 9251
E dthompson@hunthunt.com.au

Des Bethke
T 03 8602 9222
E dbethke@hunthunt.com.au

Peter Ewin
T 03 8602 9226
E pewin@hunthunt.com.au

Ashley Pelman
T 03 8602 9213
E apelman@hunthunt.com.au

Barry Josephs
T 03 8602 9247
E bjoosephs@hunthunt.com.au

Murray McCutcheon
T 03 8602 9204
E mmccutcheon@hunthunt.com.au

Michael Bromby
T 03 8602 9216
E mbromby@hunthunt.com.au

Nieva Connell
T 03 8602 9239
E nconnell@hunthunt.com.au

Andrew Weeks
T 03 8602 9237
E aweeks@hunthunt.com.au

Megan Bowler
T 03 8602 9230
E mbowler@hunthunt.com.au

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