



## Editorial – Issue 09

This issue of the Local Government Bulletin highlights two important developments at Jackson McDonald, as well as a decision of the Full Court of the Court of Appeal of Western Australia showing the benefits of a determined attitude on the part of a local authority to follow a matter through to the highest judicial level, and two related issues concerning the conduct of Councillors and officers.

First, Jackson McDonald is pleased to announce that the firm was recently named the inaugural Perth Law Firm of the Year at the 2007 ALB Law Awards. This Award recognises the excellent work of our people in providing a first class legal service to our clients. Nominations were sought from a wide range of legal practitioners and we thank our clients for putting us forward.

Secondly, Jackson McDonald is pleased to welcome Jamie Blanchard, who joined our local government/ planning law team from 21 May 2007. Many of you will know or know of Jamie, as he has more than 8 years experience in senior positions in local government. A brief profile of Jamie is set out below.

As to the articles in this edition, we comment on the decision of the Court of Appeal in ***Town of Cottesloe v Multiplex (Marine Parade) Pty Ltd***, which dealt with matters associated with Multiplex's proposed redevelopment of the Cottesloe Beach Hotel. The article is not so much concerned with the legal effect of the decision, but with the decision as an example of the dogged pursuit of an outcome believed to be correct.

We also focus on two distinct but related recent issues – the adoption by State Parliament of the *Local Government (Official Conduct) Act 2007* and the Department of Local Government and Regional Development's release of the Report of the Inquiry into the City of South Perth 2006.

The *Local Government (Official Conduct) Act* proposes renaming Division 9 of Part 5 of the *Local Government Act 1995* from "Codes of Conduct" to "Councillor Conduct" to acknowledge the new legislation's focus on Councillor conduct. The new legislation provides a regime for reporting, investigating and dealing with breaches of rules of conduct by individual Councillors.

The 2006 South Perth Inquiry focussed on an incident involving a particular Councillor and that Councillor's relationship with officers of the Council. The behaviour of individual Councillors, and a breach of the City of South Perth's Code of Conduct, was addressed in detail in the Inquiry Report.

The Local Government Bulletin is distributed electronically to various Local Government officers. We encourage its wider distribution within Local Governments, although we ask that it be distributed in its entirety. Any officer or Councillor who has not received a copy directly and would like to be included on the direct distribution list, please send an email to [jskinner@jacmac.com.au](mailto:jskinner@jacmac.com.au) with "Add to Distribution List" as the subject. Similarly, if you have received a copy but don't wish to, please send an email with "Remove from Distribution List" as the subject.

For further advice on any of the matters dealt with in the Local Government Bulletin please contact either myself or any other member of our Local Government legal services team.

### Julius Skinner

Special Counsel  
Jackson McDonald  
Editor

## Welcome to Jamie Blanchard

Earlier this month we welcomed Jamie Blanchard to Jackson McDonald.

Jamie has a Bachelor of Laws and a Bachelor of Arts from Murdoch University, as well as a Master of Business Administration from the University of Western Australia.

Most recently, Jamie was employed in a senior position at the City of Belmont as the City's Principal Legal & Compliance Adviser. Before that he was the Executive Support Officer at the City of South Perth. Jamie joins Jackson McDonald with more than 8 years experience working for local government. He brings with him a wealth of practical experience in the way in which the law is actually applied in day-to-day operations.

Jamie has been a Board Member of Local Government Managers Australia. He was also one of three finalists for the 2007 National Young Governance Professional of the Year, an award provided by the Chartered Secretaries of Australia. Jamie was the only finalist with a local government background – the winner being an officer of the ANZ Bank in Sydney and the other finalist being from BHP.

Highlights of Jamie's career in local government include having led the team that oversaw the City of Belmont's accreditation to quality and safety standards and the successful resolution of rating issues involving the Federal Airports Corporation and the Perth Airport. Jamie also has experience in implementing governance systems and the drafting and review of Codes of Conduct and Local Laws.

Jamie has presented sessional papers at the last 2 LGMA State Conferences – in 2005 on governance frameworks and in 2006 on risk avoidance and auditing.

Jamie has written the articles appearing in this Bulletin dealing with the Local Government (Official Conduct) Act and the Report of the Inquiry into the City of South Perth – both are matters of which he is particularly familiar.

Jamie strengthens our local government team and provides Jackson McDonald with an enhanced practical viewpoint that is important in providing legal services to local government. We look forward to continuing the significant growth of our practice in this area with Jamie on board.

## Cottesloe Beach Hotel decision

On Tuesday, 29 May 2007 the Full Court of the Court of Appeal handed down its decision in ***Town of Cottesloe v Multiplex (Marine Parade) Pty Ltd***, an appeal by the Town of Cottesloe against a decision of Justice Barker of the State Administrative Tribunal on a preliminary issue arising in relation to Multiplex's application for review of the Town's refusal of Multiplex's proposed redevelopment of the Cottesloe Beach Hotel.

Mayor Kevin Morgan said, "Today's judgment is a victory for grass-roots, community aspirations for a low-rise Cottesloe beachfront. It thwarted the big end of town's attempt to use clever legal reasoning to side-step the height limits that are so treasured by the community."

Jackson McDonald acted for the Town of Cottesloe.

The Court of Appeal decision, which upheld the Town's appeal, essentially found that there is no discretion under the Town of Cottesloe Town Planning Scheme No.2 to increase a height limit of 12m or 3 storeys specified by the Scheme in relation to the Cottesloe Beach Hotel site.

More than that, however, the decision shows that sometimes it is worth "sticking to one's guns" despite opposition and setbacks along the way.

On 22 December 2004 the Council of the Town refused Multiplex's application to for a proposed five-storey redevelopment of the Cottesloe Beach Hotel. At that time the Town had legal advice indicating that it did have the necessary discretion to deal with the application on its merits – and Multiplex had also provided the Town with a copy of legal advice that it had obtained to the same effect.

On 18 February 2005, Multiplex applied to the State Administrative Tribunal to review the Town's decision.

Jackson McDonald was instructed at that time, and provided advice to the Town that there was a real question as to whether the Town had any discretion under the Scheme to vary the specific height limit referred to above.

The Town raised this issue at an early Directions Hearing before the Tribunal and it was listed for hearing as a preliminary issue on 12 April 2005, but on 7 April 2005 Multiplex sought an urgent Directions Hearing and was successful in having the hearing date of 12 April 2005 vacated.

There then followed a lengthy process of exchange of Statements of Issues, Facts & Contentions, by which the Town continued to seek that the issue be dealt with as a preliminary issue, despite continued opposition to this from Multiplex. Ultimately, at a Directions Hearing on 27 May 2005, Justice Barker agreed that the issue should be dealt with as a preliminary issue. A hearing was relisted on 30 June 2005, at which both Multiplex and the Town were represented by Queen's Counsel. Julius Skinner of our office also appeared for the Town.

Justice Barker's decision was delivered on 8 July 2005 (*Multiplex (Marine Parade) Pty Ltd v Town of Cottesloe* [2005] WASAT 159) and determined the preliminary issue in Multiplex's favour.

The parties then agreed to undertake a mediation process, on the basis that if the matter could not be resolved then Multiplex would not object if the Town lodged a late appeal to the Court of Appeal against the Tribunal's decision on the preliminary issue. The mediation process went on for some months, and resulted in a revised development proposal, but in early April 2006 the Council of the Town resolved that the revised proposal did not sufficiently address a number of issues, including height.

On 24 April 2006, the Town lodged an Appeal Notice and an Application for Leave to Appeal at the Court of Appeal. After the exchange of substantial materials setting out the detailed submissions supporting and opposing the appeal, the appeal was listed for hearing before the Full Court of the Court of Appeal on 12 March 2007. Again, both Multiplex and the Town were represented by Queen's Counsel and Julius Skinner of our office again also appeared as Counsel on behalf of the Town.

The Court of Appeal's decision in favour of the Town, which also resulted in the dismissal of the State Administrative Tribunal proceedings, came more than 2 years after the issue was first raised in the Tribunal. It is one of the first occasions that a decision of the Tribunal has been taken on appeal to the Court of Appeal under the appeal provisions of the *State Administrative Tribunal Act*. The case raised some important issues for the Town of Cottesloe and the interpretation of its town planning scheme, but it also demonstrates the importance of pursuing these types of legal issues to their conclusion when based on sound legal advice. It would have been easy for the Town not to have pursued the preliminary issue in light of the strong opposition from Multiplex to this course from the outset. Even more so, it would have been open to the Town to abide the Tribunal's decision on the preliminary issue, notwithstanding concerns as to whether that decision was correct. Ultimately, however, the pursuit of the preliminary issue all the way to the Court of Appeal, where the hearing lasted only half a day, resolved the matter in the Town's favour and avoided what was likely to have been a 2-3 week hearing in the Tribunal, with hefty costs. Multiplex was ordered to pay the Town's costs of the appeal.

It goes without saying that this will not always be the appropriate course, or a necessary one, but in this case it was both.

## The Official Conduct Act

The *Local Government (Official Conduct) Act 2007* (“**Official Conduct Act**”) was the first Act adopted by State Parliament in 2007. It received Royal Assent on 28 March 2007. The Official Conduct Act is awaiting proclamation, as it requires regulations to be drafted to support the proposed amendments to the *Local Government Act 1995*.

The Official Conduct Act will primarily amend Division 9 of Part 5 of the *Local Government Act 1995* to establish a new disciplinary framework for Councillors. Currently, the only remedy available to address misconduct by Councillors is for the Minister to suspend or dismiss the entire Council. It has long been recognised this is a particularly heavy-handed remedy for misconduct by Councillors and is not suitable when only one or a few Councillors are engaged in misconduct. The following is a summary of some of the features of the Official Conduct Act, however there are additional detailed changes and requirements emerging from the Act.

Regulations are currently being drafted to establish rules of conduct that will apply to all Councillors across Western Australia. The rules of conduct will be in addition to any Code of Conduct adopted by a local government.

### The proposed new regime

Under the new regime, anyone may lodge a complaint that a Councillor has breached a rule of conduct or a written law with either a local government’s complaints officer or the Executive Director of the Department of Local Government. The complaints officer for each local government is to be a designated senior employee nominated by the local government, or if no such designation is made, the Chief Executive Officer of the local government. Complaints officers are responsible for forwarding complaints to the standards panel or Executive Director and may also lodge complaints in their own right.

The new regime divides complaints into “minor breaches”; which are breaches of the rules of conduct and “serious breaches”; which are breaches of a law, other than a local law, which are related to the performance of official duties. The act also sets out a “recurrent breach” which is where a Councillor has already been found to have committed 2 minor breaches.

Minor breaches are to be referred by the complaints officer to the standards panels established by the Minister for Local Government. Membership of the panel is to consist of three people; an officer of the Local Government Department, a Councillor or former Councillor and a person with relevant legal knowledge. A right of appeal to the State Administrative Tribunal (“**SAT**”) has been provided if either the complainant, or the person against whom the complaint is lodged, is unhappy with a decision of a standards panel. The costs of a standards panel dealing with a complaint are to be paid by the relevant local government.

Recurrent breaches and serious breaches are to be dealt with by either the standards panel or the SAT at the request of the Executive Director. Serious breaches are to be dealt with by the SAT.

In all circumstances, the standard of proof for determining that a breach has occurred is to be based on the evidence showing that it is more likely than not that the breach occurred. This is a lower standard of proof than the criminal standard.

The remedies available for a minor breach include public censure, a requirement that the Councillor make a public apology or a requirement that the Councillor attend training. These same remedies are available to the SAT for a serious breach, however SAT may also suspend a Councillor for a period of up to 6 months or disqualify a Councillor from holding office for a period of up to 5 years.

### Assessing the Impact of the New Regime

The impact that the new regime will have on the conduct of Councillors remains to be seen. The strength of the

new regime may depend on the contents of the rules of conduct as these will set out the circumstances in which a complaint can be lodged. The final contents of these rules of conduct will be critical to the effective functioning of the proposed new regime. These rules of conduct will need to be broad enough to allow disciplinary action to be taken against Councillors who engage in conduct that is not a breach of legislation; but which is detrimental to the good governance of the Council.

There are other aspects of the new legislation which may have an interesting impact, particularly in terms of potential disincentives to make complaints in light of certain aspects of the proposed complaints procedures. If you have any queries regarding the provisions of the *Official Conduct Act*, please contact any one of our Local Government team members.

A copy of the new legislation is available at the State Law Publisher website at the following link:

[Local Government \(Official Conduct\) Act 2007](#)

## **Report of the Inquiry into the City of South Perth**

On 10 May 2007, the Department of Local Government and Regional Development issued its report and findings on an Inquiry that it had been conducting into the City of South Perth. The Inquiry was a Departmental Inquiry under Division 1 of Part 8 of the *Local Government Act 1995*.

### **The Events Leading to the Inquiry**

The Inquiry focussed on events surrounding and subsequent to the demolition of premises on the South Perth Esplanade in South Perth. Council had previously removed the premises from its Municipal Heritage Inventory. Immediately prior to issuing a demolition licence over the premises, the Heritage Council of Western Australia issued a Stop Work Order over the premises, precluding the City of South Perth from issuing a demolition licence. As a result, the Acting CEO at the time did not issue the demolition licence despite attempted influence by a particular Councillor. The Inquiry focussed on the behaviour of this Councillor and City officers during these events, as well as the behaviour of Councillors and the decision of the Council, as they sought action against individual officers as a result of these events.

Subsequent to the events, a Code of Conduct complaint was lodged by the Councillor against the employee who was the Acting CEO at the relevant time. The CEO investigated the Code of Conduct complaint. He found that the Acting CEO at the time had acted appropriately. The CEO also found that the Councillor who had lodged the Code of Conduct complaint may have acted inappropriately in attempting to influence the then Acting CEO to issue the demolition licence.

The Councillor refused to accept the findings of the Code of Conduct investigation. What followed for a period of at least 12 months was an orchestrated campaign of attacks by the Councillor against the CEO and the officer who had been Acting CEO (as found by the Inquiry Report). This campaign was supported by a majority of Councillors on at least one occasion during this time. At various stages notices of motion were submitted that purported to be motions of no confidence in the CEO and other members of the staff. One notice of motion purported to terminate the contract of an employee other than the CEO. In December 2005, the Council resolved to take no further action in relation to the Councillor's Code of Conduct complaint. Then in May 2006, the Council resolved to revoke that December 2005 resolution. It was at that point that the Mayor requested the intervention of the Department of Local Government.

### **The Findings of the Inquiry**

The Inquiry Report makes 15 findings of fact in relation to the events that lead to the Inquiry and the outcomes of the Inquiry investigation. These included findings about the behaviour of Councillors and officers who were named in the Inquiry report.

Four of the findings related to the behaviour of the Councillor who had lodged the Code of Conduct complaint, including finding 15 that the Councillor “had used his position as Councillor to orchestrate and implement a personal and improper campaign of attacks against the professional and personal integrity of a staff member.”

Another 3 findings related to decisions of Council or the decision of a majority of Councillors to take a particular course of action. Significantly, finding 7 set out that Council should have observed the legal advice provided to it that it did not have the power to deliberate on the matter of the employment of a staff member other than the CEO. This recognizes the importance of Council understanding the limitations of its role in dealing with the employment of staff members other than the CEO. The South Perth Council had also disregarded its own legal advice, which stated it could not adopt certain resolutions regarding the employment of staff members other than the CEO, as this was beyond its role.

A further 6 findings dealt with the actions of South Perth employees throughout the entire matter which largely endorsed the actions of the officers and exonerated officers who had been the subject of certain allegations. One other finding related to a Councillor who had contacted a staff member and asked certain questions regarding the events which had led to the Inquiry. The Inquiry Report found that this Councillor had acted inappropriately in asking certain questions outside the established protocol under which Councillors were only able to contact designated senior employees.

### **Recommendations of the Inquiry**

The Inquiry Report makes a number of recommendations regarding the behaviour of Councillors and recommends future action by the Council. The recommendations included the following specific actions to be undertaken by the Council:

1. Council to employ a mediator to moderate relationships and conflicts between Councillors and members of staff.
2. Councillors to undertake training in the role of Council and Councillors.
3. Councillors to observe the Code of Conduct and the future new rules of conduct under the Official Conduct Act.
4. The City of South Perth to audio tape its Council meetings and keep the recordings for future reference.

### **Outcomes of the Inquiry Report**

The Inquiry Report refers at the outset to the recent passage of the *Local Government (Official Conduct) Act 2007* and the impact that this will have on the responsibility of Councillors for their individual behaviour. The recommendations also address the new regime whereby Code of Conduct complaints will be investigated by independent parties.

In our opinion, it is implicit in the Inquiry Report that had the new legislative regime been in place then this may have avoided the need for an Inquiry at the City of South Perth. As the Inquiry was undertaken under the current legislative regime there could be no specific action taken against the Councillor who was found to have improperly used his position to attack staff members.

A copy of the Inquiry Report is available at the Department of Local Government and Regional Services Website at the following link:

[Inquiry Into the City of South Perth 2006](#)

## Jackson McDonald Local Government services

As a large independent commercial law firm in Western Australia, Jackson McDonald has built its reputation by providing excellent client service. You can count on us to understand, explore and deliver what you expect of a first class legal service provider.

Our specialist Local Government team understand the wide-ranging legal issues confronting Local Governments and comprises experienced practitioners that have the collective expertise to fully address your legal needs in the following areas:

- Government and Governance
- Town planning and development
- Environment and health
- Interpretation of legislation
- Enforcement
- Employee, industrial relations and occupational safety & health
- Commercial and property
- Litigation and dispute resolution



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