



Editorial

The continuing pace of change

The pace of change or looming change for Local Governments continues unabated.

The *Planning and Development Act* has been the most direct example of this change, closely followed by the Federal Government's *Workplace Relations Amendment (WorkChoices) Act*, both of which came into effect in the last few months. This Issue 8 of the Local Government Bulletins contains articles dealing with both of these.

Waiting in the wings is a plethora of further proposed legislative and other changes affecting Local Government, including –

- *Local Government (Official Conduct) Amendment Bill* – referred to in Issue 7, and which has now reached the stage of a Second Reading in the Legislative Council;
- *Local Government (Miscellaneous Provisions) Amendment Bill* – which has also reached the stage of a Second Reading in the Legislative Council;
- the proposed new *Public Health Act* – the Health Department has released a summary of the submissions received on the Discussion Paper and is in the process of drafting the new legislation;
- the proposed new *Building Act* – the period for public comment and consultation has been extended from 28 April 2006 to 30 June 2006;
- the review of the operation of the *Residential Design Codes*;
- the impact of the report of the Local Government Advisory Board on Structural and Electoral Reform; and
- (still) the long-awaited proclamation of the *Contaminated Sites Act*.

The scope of these changes highlights the need for Local Government officers and elected members to ensure you are up to date with the latest developments and the implications for day-to-day operations.

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 elected member 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 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. We welcome any feedback on the content of the Local Government Bulletin or any suggestions for future articles. Again, please email jskinner@jacmac.com.au.

Julius Skinner

Consultant

Jackson McDonald

Editor

Planning and Development Act 2005

There have been a number of presentations and seminars dealing with the provisions of the *Planning and Development Act 2005*. As is often the case with legislation that purports to be no more than a “consolidation” of existing Acts, the real issues are likely to only become apparent as the legislation is applied in practice.

There are a number of areas where the *Planning and Development Act* is more than merely a consolidation of the existing Acts and where there is the potential for issues to emerge. Examples include –

- enforcement provisions, particularly the issuing of infringement notices under Part 13, Division 3;
- the introduction of rights of review in relation to decisions as to the classification of uses and the permissibility of uses not listed in a town planning scheme under s.252(2);
- new provisions dealing with the relationship between Region Schemes and local town planning schemes;
- changes to the requirements for Western Australian Planning Commission approval for leases and licences;
- the requirement for the Western Australian Planning Commission to have “due regard” to the provisions of a local town planning scheme in granting subdivision approval under s.138(2), and the exceptions to this in s.138(3);
- the exemption of all subdivision works from development approval under s.157;
- amendments to the cash-in-lieu of public space provisions;
- the “tied-lot” provisions for rural subdivisions; and
- amendments to rights to compensation, particularly the adoption for local town planning schemes of the previous provisions relating to compensation for injurious affection under Region Schemes.

Several of these topics will be covered in future Issues of the Local Government Bulletin.

One topic that can be dealt with briefly is the introduction of a right of review in relation to decisions as to the classification of uses and the permissibility of uses not listed in a town planning scheme – s.252(2) of the *Planning and Development Act* – which was also referred to briefly in Issue 6 of the Local Government Bulletin.

Section 252(2) of the new Act provides as follows -

... an applicant may apply to the State Administrative Tribunal for a review, in accordance with this Part, of the responsible authority's decision under a local planning scheme as to —

- (a) *the classification of a use under the local planning scheme; or*
- (b) *the permissibility of a use that is not listed under the local planning scheme.*

As indicated in Issue 6, this right of review effectively reverses a principle which dates back to the decision of the Town Planning Court of Western Australia in 1977 in *MMF Holdings Pty Ltd v Town of Claremont* and which had been endorsed by the Supreme Court of Western Australia in several decisions.

It is of interest that s.252(2) is expressly limited to applications for review of the types of decisions set out in the section. These are key “jurisdictional facts” that determine whether or not a development is able to be approved under a town planning scheme, but they are not the only such jurisdictional facts or primary findings of fact that may form the basis of a planning decision, as referred to in *City of Swan v Taylor* [2005] WASCA 88. It would appear that other jurisdictional facts remain outside the scope of an application for review to the State Administrative Tribunal.

Another matter of interest arising from s.252(2) is that it only authorises an applicant to apply for a review of a responsible authority's decision. In *Taylor* the Supreme Court found that not only could an applicant not seek to review a decision by a responsible authority as to the classification of a use, but neither could the responsible authority contend for a different classification of a use by way of response to an application for review. It would appear that this is still the case.

Julius Skinner
Consultant

Tendering for “joint venture” or “public/private partnership” projects

In recent times an increasing number of Local Governments have sought or are seeking to undertake community projects as a “joint venture” or “public/private partnership” with a commercial developer. Typically, in addition to the community project, there is a commercial or residential development undertaken on part of the land – and the Local Government and developer share in the profit from that commercial or residential development as a means by which the Local Government can offset the cost of the community project.

It is fair to say that the *Local Government Act* and the *Local Government (Functions and General) Regulations* do not appear to have been drafted with these types of projects in mind. Because of this, there are a number of traps to be aware of and avoid.

One of the advantages of these joint venture projects for developers is that they usually involve the Local Government retaining ownership of the land in question until the conclusion of the joint venture project. This reduces the up-front costs for the developer in securing the land, but has implications for both the Local Government and the developer. Similarly, the Local Government can often access funding at rates not available to the private sector, but again this can have implications for compliance with the legislation at a later stage.

Firstly, a tender that simply seeks to identify and appoint a joint venture partner and leaves the details of the proposed development to be determined as part of the work of the joint venture project, may lead to a requirement to go out to tender again when the time comes to carry out the project. Section 3.57 of the *Local Government Act* and the provisions of the *Local Government (Functions and General) Regulations* provide that apart from specific exceptions set out in the Regulations, tenders must be called before a Local Government enters into any contract for the supply of goods or services where the consideration is more than \$50,000.00. The construction work associated with a joint venture project will invariably exceed this amount, as may other earlier stages of work. If the Local Government retains ownership of the land for the joint venture project these works will usually be services provided, at least in part, to the Local Government. Depending then on the funding arrangements for the project and how any consideration is being provided by the Local Government, the works may require their own tender process.

It is important to ensure that the tender for the joint venture project contains adequate details of the project.

It is also important to consider the various possible funding arrangements and the implications of these.

The Expression of Interest process under the Regulations can be of great assistance in this regard. Not only can it narrow the field of prospective tenderers, it can also be used to assist in determining the physical and financial parameters of the joint venture project, which the Local Government may otherwise be unable to determine.

At the other end of the joint venture project, it is necessary to ensure compliance with the requirements of the Act and Regulations relating to the disposal of Local Government property. If the Local Government retains even part ownership of the land in question during the joint venture project, any sale, leasing or other disposal of the commercial or residential component of the project must be carried out in accordance with s.3.58 of the Act. There are some exceptions set out in the Act and Regulations, but in many cases these exceptions are unlikely to be acceptable from a commercial perspective. As such, a means to address this issue has to be considered at the outset in determining the relationship between the Local Government and the developer.

Another crucial issue is to consider the structure and details of any profit-sharing arrangement to be entered into between the Local Government and the developer, as the Act and Regulations impose some restrictions on Local Governments in this respect.

Finally, it is important to consider the need for business planning under s.3.59 of the Act. A typical joint venture project is likely to involve a “major land transaction” as defined under s.3.59(1) and, depending on the nature of the project and the Local Government’s involvement in the commercial aspects of it, may also involve a “major trading undertaking”. Any tender should include provisions recognising the need to comply with s.3.59 of the Act.

It is not possible in an article of this scope to deal with all of the particular issues that will arise in preparing an Expression of Interest or Request for Tender in relation to a joint venture or public/private partnership project. It is important to obtain detailed legal advice at an early stage in order to work within the provisions of the Act and Regulations and ensure the smooth progress of the project.

Julius Skinner
Consultant

Australian Workplace Agreements under WorkChoices

The *Workplace Relations Amendment (WorkChoices) Act 2005* ("**WorkChoices**") brought about a raft of changes to the relationships between employers and employees. One of the areas of change was in relation to Australian Workplace Agreements ("**AWA's**").

Before considering the rules for drafting an AWA under the WorkChoices, it is important to note that WorkChoices will not necessarily affect all Local Governments. This will depend primarily on whether each Local Government is a "trading corporation" under the Commonwealth Constitution. The application of various aspects of WorkChoices may also depend on matters such as the number of employees.

For Local Governments affected by WorkChoices, following is a summary of the rules for drafting an AWA –

Content

When drafting a new AWA it **must include**:

- the full name and address of each person who signs the AWA;
- a nominal expiry date of not more than five (5) years (unlike the previous 3 year AWAs); and
- a dispute settlement procedure. If one is not included, the model dispute settlement procedure set out in Work Choices is implied into the AWA.

The AWA must also comply with the new Australian Fair Pay and Conditions Standard, which sets out the five minimum entitlements for all employees covered by WorkChoices (subject to some exceptions). These five entitlements are in respect of: the minimum wage, hours of work, annual leave, personal leave (encompassing sick, carers' and bereavement leave) and parental leave.

Where the employee would be covered by an award (if not for the AWA), then the AWA will automatically also include those terms which are "protected award conditions"; unless they are expressly excluded.

"Protected award conditions" include: rest breaks, incentive-based payments and bonuses, annual leave loadings, State public holidays, monetary allowances for expenses in the course of employment, or responsibilities or skills not taken into account in hourly rates, or disabilities associated with performing tasks, loadings for overtime and shift work, penalty rates, and outworker conditions. (Section 354.)

An AWA **must not include** prohibited content. If an employer lodges an AWA with prohibited content, it may be liable for a civil penalty.

Prohibited content includes:

- discriminatory terms;
- terms that encourage or discourage union membership;
- terms that permit a person bound by the agreement to engage in or organise industrial action;
- prohibition or restriction on disclosing terms of a workplace agreement;
- provision for remedies in the event of an unfair dismissal;
- objectionable terms under freedom of association laws;
- restrictions on the ability of a person bound by the agreement to offer, negotiate or enter into an AWA;
- deductions for trade union membership;
- leave to attend union training, paid leave to attend union meetings;
- renegotiation of a workplace agreement;
- rights of a union or employer organisation to participate in or represent an employee or employer in the dispute settlement procedure, unless the organisation is the choice of the employer or employee;
- union right of entry;
- restrictions on the engagement of independent contractors;
- restrictions on the engagement of labour hire workers;

- forgoing of annual leave other than in accordance with the Act;
- provision of information about employees to a union; and
- matters that do not pertain to the employment relationship.

(See Regulations 8.4, 8.5, 8.6 and 8.7.)

Form of an AWA

An AWA must be in English, in legible typescript, and include the full name and address of each person who signs the AWA. (Regulation 8.11.)

Approval of an AWA

An AWA is approved (where it relates to an employee over the age of 18) if:

- the AWA is signed and dated by the employee and the employer; and
- those signatures are witnessed.

An employer must ensure that an AWA includes the signatures of the employer and employee. The signature must be accompanied by the full name and address of each person signing the AWA and an explanation of the person's authority to sign the AWA.

The employer's and employee's signatures must be properly witnessed. A witness must be over the age of 18 and may not be: the other party to the AWA, the bargaining agent of the other party to the AWA, or (where the other party is a corporation) a director or person involved in the day to day management of the corporation. (Regulation 8.12 and 8.13.)

Prior to Approval

An employer must take reasonable steps to ensure that all eligible employees in relation to the AWA:

- either have, or have ready access to, the AWA in writing at least 7 days before the AWA is approved; and
- have been given a copy of the Office of Employment Advocate ("**OEA**") Information Statement at least 7 days before the AWA is approved.

If the AWA incorporates terms from an industrial instrument, a copy of that instrument in writing must be provided to the employee along with the AWA.

An employee may waive ready access to the AWA if they are an eligible employee at the time the waiver is made. The waiver must be in writing, dated and signed by the eligible employee. However, there is no ability to waive the requirement to provide an Information Statement.

Lodgement

Once an AWA is approved, it must be lodged by the employer within 14 days after the approval.

An AWA comes into effect on the day that it is lodged, regardless of whether or not the AWA meets the requirements as set out in the *Workplace Relations Act 1996* (Cth).

The AWA is lodged by lodging a declaration with the OEA in the prescribed form with a copy of the AWA annexed.

Once lodged the OEA must issue a receipt for the AWA lodgement to the employer. The employer must then provide a copy of that receipt to the relevant employee within 21 days.

Record Keeping

An employer must keep a copy of the signed AWA for the duration of the AWA and for a period of 7 years after it is terminated. (Regulation 8.14.)

Termination of an AWA

Interestingly, after an AWA passes its nominal expiry date, a party to an AWA may now be able to unilaterally terminate it on 90 days written notice.

On the termination of an AWA, the employee's terms and conditions do not revert back to the relevant award. Rather, they become subject to the Australian Fair Pay and Conditions Standard, and any protected award conditions that would otherwise apply.

Penalties

It is important to note that the new agreement making provisions place the majority of the onus, to correctly follow the laws and regulations, on the employer. That is, the OEA is no longer responsible for applying any kind of 'test' to your AWA, or other workplace agreement, to ensure that it meets legal requirements.

Further, if you fail to comply with the requirements, you may be liable for fines of up to \$33,000 (for a body corporate).

Jo Alilovic

Associate

Clarification of rating issues

Trecap Pty Ltd v City of Swan [2006] WASAT 142

On 1 June 2006 the State Administrative Tribunal delivered its decision in the above case, which clarified several issues for the imposition and recovery of rates under the *Local Government Act*.

The Tribunal clarified firstly that the phrase "in possession" where it appears in the definition of "owner" of land in s.1.4 of the Act bears its legal or technical meaning and does not require that a person be in actual or physical possession of the land in question in order to fall within the definition of "owner". The Tribunal gave short shrift to the alternative argument, which would have had the effect of leaving no-one liable for payment of rates in the case of any land leased out by a registered proprietor. The Tribunal stated (at para.[31]) that this "*would fundamentally undermine the purpose or object of the Act to facilitate the effective levying of rates so as to ensure the efficient and effective operation of Local Government*".

The Tribunal also considered the imposition of differential general rates according to the predominant purpose for which land is used under s.6.33(1)(b) of the Act. The Tribunal held that the interpretation of the description of a use for the purpose of such a differential rate is not necessarily tied to the definition of that use in a town planning scheme. In contrast to the provisions used in the Act in relation to the imposition of a differential general rate according to zoning, the Act does not mandate the adoption of use-definitions from a town planning scheme. Unless the town planning scheme definition is actually incorporated expressly or by implication, the description of the use will be given its natural and ordinary meaning.

Bree Rosenthal

Solicitor

Jackson McDonald Local Government services

Jackson McDonald is the largest, independent commercial law firm in Western Australia. Our reputation as one of the State's leading law firms has been built over 80 years by providing high quality legal services to a local, national and international client base.

Our excellent track record demonstrates our commitment to providing clients with the very best, commercially focussed legal advice, delivered in a personalised, responsive and cost-effective manner.

Our specialist Local Government team understand the wide-ranging legal issues confronting Local Governments and comprises of experienced practitioners with 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



Richard Sandover
Partner
T: 9426 6659
E: rsandover@jacmac.com.au



Julius Skinner
Consultant
T: 9426 6874
E: jskinner@jacmac.com.au



Jo Alilovic
Associate
T: 9426 6794
E: jalilovic@jacmac.com.au



Bree Rosenthal
Solicitor
T: 9426 6716
E: broenthal@jacmac.com.au