

N E W S L E T T E R

Since our last Newsletter, Kellehers Australia has been associated with many major issues.

We aim to keep our clients informed of significant legal matters in which we are involved.

This Newsletter provides a brief overview of some interesting cases.

~ WATER CATCHMENTS and DEVELOPMENT~

Land adjacent to a tributary of the Barham River at Apollo Bay was not a declared special water supply catchment under the Catchment and Land Protection Act 1994, although an application for declaration was in its early stages. Nevertheless, Barwon Water harvested water from the River.

Kellehers Australia successfully appealed Council's failure to grant permission for a single 3 bedroom dwelling (replacing an existing old dwelling) and a bridge on land zoned Environmental Rural. Vegetation Protection, Erosion Management and Wildfire Management Overlays also applied.



Barham River

VCAT noted that planning policy strongly supports the protection of water catchments from development that could adversely impact on water quality. It considered SEPP – Waters of Victoria and Interim Guidelines for Planning Permit Applications in Open, Potable Water Supply Catchment Areas (August 2000). Despite vigorous opposition by Barwon Water, VCAT noted that these policies do not prevent approval of a replacement dwelling with upgraded and improved effluent disposal system.

The potential for removing the existing unsatisfactory dwelling was considered most important.

VCAT had regard to the precautionary principle. It found that the principle was not a prohibition, but “more about balancing competing interests and

assessing the probability or risk of some irreversible environmental damage occurring.”

The case, *Greentree v Colac Otway Shire Council and Barwon Region Water Authority & Anor* was reported at 20VPR36.

~COUNCILLORS and THE INSPECTOR OF MUNICIPAL ADMINISTRATION ~

We recently acted for a councillor against whom allegations of breach of confidentiality and pecuniary interest were made.

We conducted a Supreme Court challenge to the extent of powers of the Ministerially appointed inspector of municipal administration.

The inspector “may examine or investigate –

- (a) any matter relating to a Council's operations or to Council elections or electoral matters; and
- (b) any possible breaches of this Act”. S223B(1).

An inspector may require a person to produce any document and “give all reasonable assistance in connection with an examination or investigation” and “appear before the inspector for examination on oath and to answer questions”. This information provided upon investigation, potentially becomes sworn evidence in any subsequent prosecution. S223B(2).

In this case, the inspector eventually provided some detail of the allegations, but refused to limit the scope of his investigation to these or any other specified matters. Some allegations carried a substantial gaol term, whilst the penalty for others was a fine or disqualification as a councillor. The allegations arose from a vigorous party political campaign.

The Supreme Court considered whether the inspector could investigate breaches, regardless of their relationship to elections or electoral matters

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and the meaning of the phrase “any matter relating to a Council’s operations”.

Mr Justice Osborn found that “possible breaches of the Act” refers to breaches arising out of any matter relating to one of the categories in (a) ie Council operations.

In respect to “any matter relating to Council’s operations”, His Honour found that allegations concerning confidential information, pecuniary interest and conflict of interest related to Council operations. He found that a “Council consists of its councillors and is elected to provide leadership for the good governance of the municipal district and the local community... It is required to have regard to the “facilitating objective” to “ensure transparency and accountability in decision making”. Compliance with provisions concerning confidential information “bears directly on the operations of a council both as a Council and by way of special committee. It also bears upon the achievement of the Council’s objectives, fulfilment of its role, and exercise of its functions...”

Likewise allegations of failure to disclose a pecuniary interest or conflict of interest, failure to disclose in the register of interests and voting where a declared conflict of interest had been made, “all relate to operations of the Council when it is understood that the imposition of obligations as to conduct and interests imposed upon councillors individually form elements of the statutory scheme within which a Council carries on its operations and further bear on the proper constitution, achievement of objectives, role, functions and power of the Council...”

The councillor was ordered to attend for examination on oath, but not generally. The examination was limited to only those allegations the inspector had particularised.

~SPECIAL RATES AND CHARGES – MINISTERIAL GUIDELINES ~

Following yet more changes to special rates and charges provisions of the Local Government Act in 2003, Ministerial Guidelines for calculating maximum total levy were gazetted on 23 September 2004. The Guidelines are not mandatory, but Kellehers Australia recently advised Council as to their use.

The Guidelines prompt a Council to detail the following:

- Purpose, including when and why the works were proposed.
- Coherence, either by physical or logical connection.
- Total cost calculation, linkage to the purpose and ensuring that expenses are allowable and not speculative or hypothetical.
- Special beneficiaries
- Properties that are included
- Total special benefit
- Quantification of community benefit
- Calculation of the benefit ratio and maximum total levy.

The Guidelines do not alter the statutory requirements but provide a convenient checklist for key compliance aspects.



~DELAY and ILLEGAL PERMITS ~

Kellehers Australia is frequently contacted by abutting owners who have become aware that a planning approval impacting their land was entirely processed without their knowledge. Often they become aware of the approval many months, sometimes years, after it is granted. Sometimes the approval appears to have been unlawful *per se*. Frequently, had notice been properly given and correct procedures followed, approval of development may not have occurred without amendment, or at all.

Often before coming to us, these people have attempted to obtain what they regard as ‘justice’ by talking to the development proponent and council.

Whilst the passage of time and the matter of laches (delay in bringing proceedings) have always been relevant, recent VCAT approaches make it extremely difficult for such persons to obtain

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mediation or reconsideration of the planning merits in such cases.

VCAT now enquires into such applications, requiring the applicant at a Directions Hearing to show cause why the application should be not be struck out.

Not only does this add to costs, but the outcome of such hearings, conducted without any evidence as to the core matters in issue, can be a strongly worded Determination expressing views on the outcome should the appeal proceed and containing warning of potential negative costs orders.

For persons already angered at failure to abide by the law, such an approach by VCAT often leads to an overwhelming sense of injustice. As one client said "if I went through a red light, I would get a fine and if I didn't pay that I would go to gaol. But my neighbour breaches the planning scheme and the Act, Council makes mistakes in processing the application and the law breaker goes away scot free and I have to live with the consequences".

In *Phillips v Greater Shepparton City Council* 2005 VCAT 653, VCAT found that the applicant should have been given notice, was substantially disadvantaged by the issue of the permit but had not made VCAT application quickly enough. The applicant contacted council a number of times over a 3 year period, but VCAT **did "not consider that the obligation rested on Council to inform her** about the permit or the planning scheme provisions."

"There is **a clear public interest in the need for certainty regarding the validity of planning permits.** It is not desirable that permits should generally have hanging over them any aura of uncertainty about their validity depending on whether someone at some time may appear and allege that proper notice was not given..."

Similarly, in determining a recent Directions Hearing, VCAT stated "an application by a third party to cancel or amend permit is a serious matter. It puts in jeopardy an established right to use or develop the land and puts the permit holder to the need and expense of having to defend their right. It is for this reason that the Tribunal has been far more willing to award costs against unsuccessful applicants than in ordinary merits applications..." In this case, the adjoining owner was required to be notified, was not,

was repeatedly told by Council that no permit was required and only discovered the existence of a permit some two years after its issue. With the VCAT application issued, works speeded up, so building was well underway. *Unterberger and Bayside City Council and Fry* P3337/2005 (10 February 2006).

Frequently, VCAT also refuses consent requests for a mediation that might enable the parties promptly to resolve the variety of issues arising between them, without the expense of a extensive hearing.

In our view, there is **a clear public interest in the need for certainty regarding adherence to the law.** Where planning provisions authorise activities only after following specified procedures or subject to conditions, those controls should be followed. Review agencies such a VCAT ought place as much, if not greater weight, on that wider community public interest. Where notice is required to be given to certain parties and is not, that is not a minor or subservient public policy issue. It goes to the core of the planning process.

Planning Scheme provisions have increasingly been changed so as to quite severely limit the circumstances in which notice must be given. The presumption therefore must be made that it is an important cornerstone to the Victorian Planning System that notice is given where it remains required and that, if that does not occur, the planning permit emitting from that process is potentially invalid. An onus must be placed on both permit applicant and Council to ensure that the position of persons who may be impacted by the issue of a planning permit is properly taken into account.

This office has a vast repository of examples of neighbours unlawfully locked out of the planning approvals system who are then denied or delayed access to information, provided with wrong or misleading information on relevant matters including as their rights within the system and even sometimes lied to.

It is not appropriate for VCAT to say that Councils have no obligation to inform ratepayers of the process and their rights within it. The Local Government Act provides that the objectives of a Council include to "endeavour to achieve the best outcomes for the local community ..." s3D(1) and, in seeking to achieve that objective, "to ensure that

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services and facilities provided by the Council are accessible and equitable” and “to ensure transparency and accountability in Council decision making. s3C(2)(e), (f). The role of a Council includes ensuring that resources (including knowledge and information resources) are managed in a responsible and accountable manner s3D(2)(c).

Ratepayers properly rely upon their Council as a source of knowledge and information and assume advice given will be prompt, independent, truthful and accurate. However, often Council has a conflict of interest. It is the policy setter and may be seeking to encourage a particular form of development. It is the exerciser of discretion. It is the provider of information to its community. It is the enforcer. It is the person liable to pay a permit holder compensation should that permit be cancelled or amended due to its error. An organisation with such conflicting obligations faces real challenges in achieving a proper balance at all times. VCAT is the natural place of resort for those who are negatively impacted by Council mismanagement of the planning process. It is of great concern that VCAT's view of public policy appears to weight the permit holder's interests above the lawful pursuit of planning scheme controls.



~SALE OF CONTAMINATED SITE~

The recent Federal Court case of *Caltex Australia Petroleum Pty Ltd v Charben Haulage Pty Ltd* 2005 FCAFC271 (22 December 2005) focused on the purchase from an oil company of land impacted by contaminant from a former petrol station and, particularly, the terms of a sale contract. The contamination was caused by the oil company and remediation works had occurred on the land.

The purchaser signed a contract that was not conditional upon clean up or issue of an audit certificate and contained no warranties that the site was uncontaminated.

The purchaser appears to have understood that past remediation works had achieved site clean up and evidence was given that no purchase would have occurred if it had been known that further remediation would be required.

After exchange of contracts, the purchaser's lawyer was given by the vendor a report on site contamination prepared by the oil companies' consultant engineer and that report was relied upon. It proved to be flawed. Once development approvals were sought, extensive and expensive additional clean up was required.

The Court found the purchaser was required to complete the purchase. The case demonstrates that purchasers must obtain independent technical advice prior to contracting, particularly where clean up is being undertaken by the contaminating oil company and not the landowner or the purchaser. Alternatively 'water tight' warranty conditions must be included in the contract or a substantial price reduction negotiated

Kellehers Australia recently advised the owner of a site that had sustained massive contamination and had been cleaned up by the contaminating oil company, resulting in issue of a Certificate of Environmental Audit – a matter not considered in the Caltex case.

The audit provisions in Part IXD of the Environment Protection Act 1970, suggest that a Certificate or Statement of Environmental Audit creates an expectation that third parties with a current or future interest in the land and/or the wider public may rely upon it. In our view, this renders it reasonable, if not essential for a vendor, particularly where ongoing remediation is conducted by a contaminating oil company, to seek production of an Auditor's report and either a Certificate or Statement of Environmental Audit.

Similarly, prior to committing to any significant building project, such a Certificate or Statement is vital particularly where building area and audit area coincide, particularly on a small former service station allotment. Finally, where a Statement is provided, the contract must address on-going future monitoring and clean up obligations.

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