McCullough Robertson Lawyers

The Local Law

Navigating good government

November 2024

Welcome

We are pleased to bring you the November 2024 edition of The Local Law.

In an ever-changing landscape of local government, staying informed is crucial. This publication is designed for CEOs, elected representatives, local government officers and in-house lawyers, offering insights and updates on key decisions, legislation, and relevant topics you need to make informed decisions.

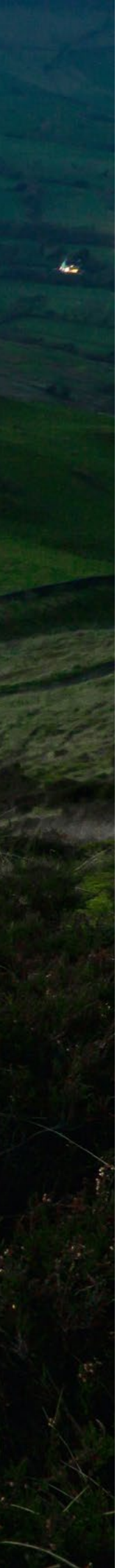
In this edition we offer essential insights for navigating the rules surrounding authorised persons and private property, highlight the importance of non-party disclosure in enforcement proceedings, and outline steps local governments must take to comply with WHS amendments advising management of harassment.

Further, we explain key drafting strategies to maximise the effectiveness of your security clauses in construction contracts, examine recent amendments to anti-discrimination legislation to act on now and address key considerations for managing third-party development of council-owned land.

To provide feedback or if you would like to read more about particular topics, please send your thoughts to a member of our team.

We hope that you find this edition insightful and engaging.

Troy Webb
Partner and Head of Local Government



Contents

Harassment prevention plans

The compliance deadline is looming!

Recent developments have seen work health and safety responsibilities expanding into areas traditionally in the domain of employment and anti-discrimination laws.

This has emerged as part of the 'Managing the risk of psychosocial hazards at work Code of Practice 2022' under Queensland's health and safety laws, and also through developments under Federal anti-discrimination laws where a risk management approach to preventing workplace harassment is now required.

A significant milestone has been reached with amendments to the *Work Health and Safety Regulation 2011* (Qld), specifically addressing the management of sexual harassment and sex and gender-based harassment.

These requirements are already in effect and mandate that councils proactively eliminate or minimise these hazards and the risks created by them. Existing systems that are limited to occasional training and dealing with issues once reported will not meet the required standard. Additionally, from 1 March 2025, councils must prepare and implement a prevention plan to manage identified harassment risks. This plan must be accessible to all workers and reviewed at least every three years. Failure to comply will result in an an offence.

In short, the steps council must take are to:

1. consult with workers to:
    a. identify risks associated with sexual harassment and sex and gender-based harassment, considering the following factors:
        i. characteristics of workers – age, gender, sex, sexual orientation and disability; and

ii. workplace and work environment – culture or system of work that may enable harassment, lack of diversity, and power imbalances that could create harassment risks.

b. identify appropriate control measures.

2. Create and implement a written prevention plan describing the control measures and ensuring there is an accessible and effective procedure for dealing with harassment at work with details of how to make reports, the investigation process, representation rights and the issue resolution processes; and
3. Review the effectiveness of control measures over time and update them as required.

Key takeaway

The time for putting in place these required measures is short, so it is important that councils act now. If you need help or support, our Employment Relations and Safety team can assist with understanding these new requirements and developing compliant prevention plans.

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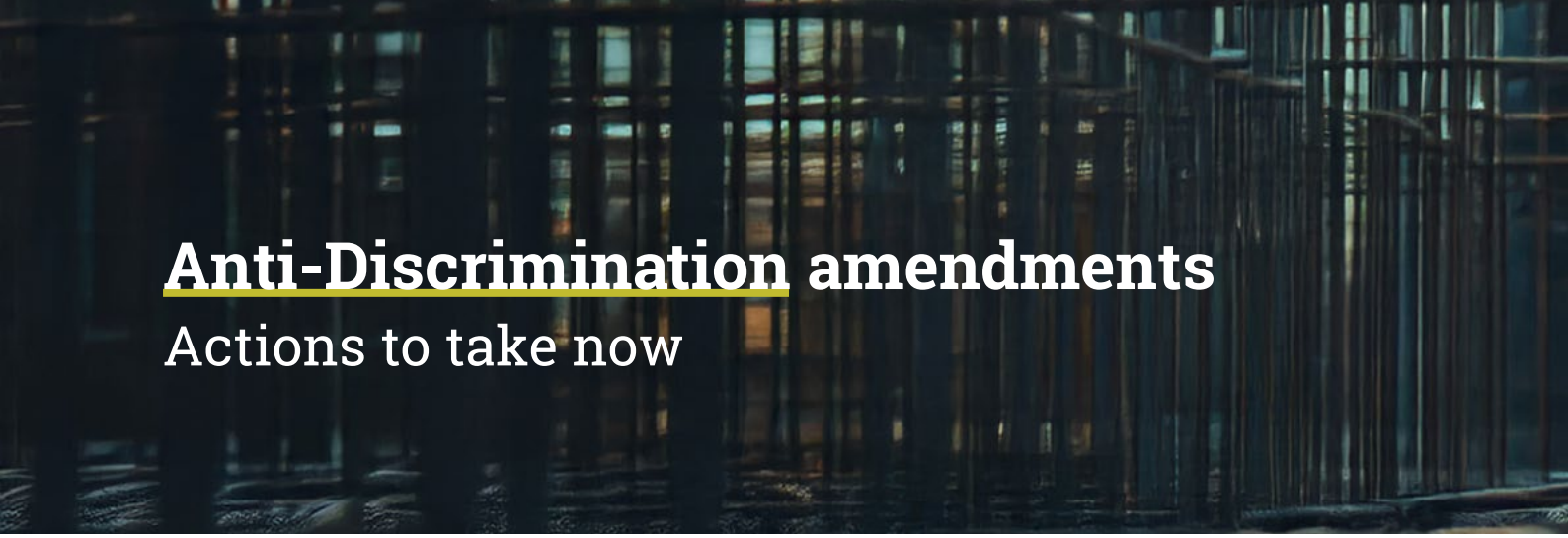

Anti-Discrimination amendments

Actions to take now

On 10 September 2024, the Queensland Parliament passed the *Respect at Work and Other Matters Amendment Act 2024* (Qld) (**Respect Act**). The Respect Act significantly amends the *Anti-Discrimination Act 1991* (Qld) (**AD Act**), with a focus on eliminating sexual and gender-based harassment in workplaces. Most of the Respect Act's amendments will commence on 1 July 2025.

Outlined below are the key changes in the Respect Act that are relevant to local governments. It is important to note these changes are in addition to the additional new requirements for the management of sexual harassment and sex and gender-based harassment made by the *Work Health and Safety Regulation 2011* (Qld). See our recent article about these changes here.

Changes to tests for discrimination

The Respect Act changes the tests for direct and indirect discrimination. It is no longer necessary to consider how a person without the relevant protected attribute would be treated in the same or similar circumstances.

The new tests involve a pure assessment of whether a person has been treated unfavourably due to a protected attribute (**direct discrimination**), or has been, or is likely to be, disadvantaged because of a protected attribute by a condition imposed on them (**indirect discrimination**).

The new tests will make it easier for applicants to bring discrimination claims and prove unlawful discrimination. Accordingly, local governments need to be aware of the need for stronger vigilance in preventing discrimination in the workplace.

New protected attributes

The Respect Act introduces new protected attributes and modifies several existing attributes. The new protected attributes include potential pregnancy, physical appearance, irrelevant medical records and irrelevant criminal records (notably, including criminal charges not yet finalised). As a result, updating current processes and training to ensure these aspects are covered is required.

Discrimination can now also occur based on the combined effect of two or more protected attributes possessed by an individual. For example, an employee may claim that they were passed over for a promotion due to the combined effect of their age, sex, and family responsibilities.

New prohibitions on sexual harassment and similar conduct

The Respect Act introduces two new types of unlawful conduct based on sex in work contexts. These are:

- **Harassment on the basis of sex** – unwelcome and demeaning conduct towards another person on the basis of their sex with the intention of offending, humiliating or intimidating them, and where a reasonable person would have anticipated the possibility of that outcome.

- **Being subjected to a hostile work environment on the basis of sex** – engaging in conduct in a workplace where a reasonable person would have anticipated the possibility the conduct would create a work environment that is offensive, humiliating or intimidating to people of a particular sex.

Again, updating current processes and training to incorporate these requirements will be necessary.

Positive duty to eliminate conduct unlawful under the AD Act

The Respect Act introduces a positive duty for all entities subject to the AD Act to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, harassment on the basis of sex or other objectionable conduct as far as possible.

The AD Act's positive duty is broader than similar existing duties under the Federal *Sex Discrimination Act 1984* (Cth), as the AD Act's duty will apply to discrimination on **all** protected attributes. The positive duty also reflects duties under the *Work Health and Safety Act 2011* (Qld) for employers, including local governments, to proactively eliminate or minimise health and safety risks posed by sexual and gender-based harassment, as confirmed in the *Work Health and Safety (Sexual Harassment) Amendment Regulation 2024* (Qld).

Key takeaway

The Respect Act will significantly alter Queensland's anti-discrimination regime. Before these changes take effect, local governments should review the Respect Act's amendments, ensure policies, procedures and training programs are aligned with these changes, and assess whether existing systems include the necessary reasonable and proportionate measures to meet the new positive duty.

If you need help to manage these issues, please contact our Employment Relations and Safety team. We can help assess and implement the necessary changes required, as well as review and deliver training materials to support local governments meet these new obligations and to manage potential legal exposure.

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Unpacking the Local Government Act

Authorised persons and private property

Under the *Local Government Act 2009* (Qld) (**Act**), authorised persons may need to enter private property to carry out their functions. However, the protection of property rights remains a cornerstone of our legal system. The Act balances these two competing concerns by allowing authorised persons to enter private property in a specific manner in certain circumstances.

In this edition, we look at the rules around entering private property with the consent of the owner.

Entering private property with permission

Section 129 of the Act sets out a process for entering private property to exercise powers under a Local Government Act.[1] The process for entering private property with occupier's consent to exercise powers is:

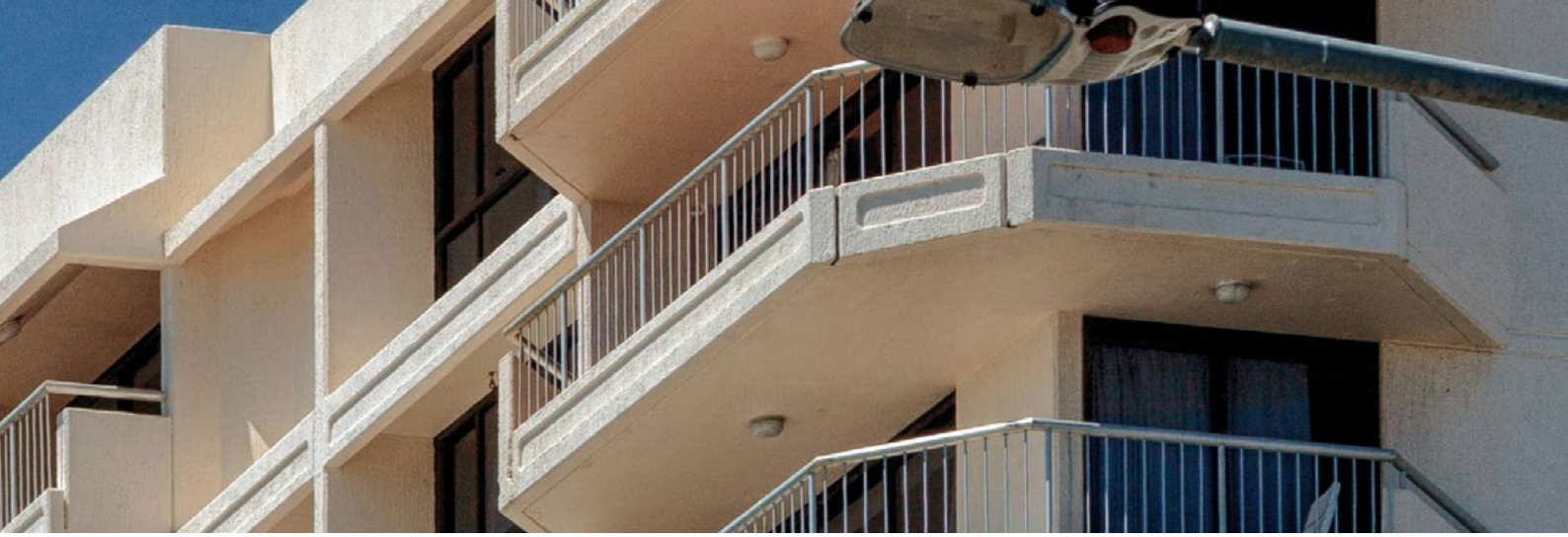
1. an authorised person can enter private property that is not closed to the public (explained below) to ask the occupier of the property for permission to stay on the property and exercise powers under the Act;
2. the authorised person must inform the occupier of the property of the purpose of entering the property, that anything found may be used as evidence in court, and that the occupier is not obliged to give permission to enter;
3. the authorised person may ask the occupier to sign a document confirming that the occupier has given permission;
4. if a document is signed, the authorised person must immediately give a copy of the document to the occupier; and
5. if the occupier gives permission, the authorised person may stay on the property and exercise the powers that the occupier has agreed to be exercised on the property.

Closed to the public?

Section 129(1) of the Act allows an authorised person to enter private property to follow the process set out above. This means an authorised person can (for example) cross a yard to knock on a front door or enter an open building to find an occupier.

However, if the area is 'closed to the public', an authorised person cannot enter. This could include if a gate is locked or there are signs prohibiting.

1 We discussed what a 'Local Government Act' is in the August 2024 edition of The Local Law.



Permission document

While not compulsory, it is prudent for an authorised person to ask the occupier to sign a document confirming they gave permission to enter. If a question arises in a court about whether an authorised person had consent to enter the property, and no permission document is produced, the Act provides that the court may assume that the occupier did not give permission, unless proven otherwise.[2]

Conditional consent

Section 129 of the Act grants the power to enter property based on the occupier's consent. The occupier:

1. can refuse to give permission to enter;
2. does not need a reason to refuse to give permission to enter;
3. can impose any conditions on the entry that they want; and
4. can withdraw the consent at any time, including after entry has occurred.

Conditions of entry could include things like:

1. when the entry can occur;
2. where the authorised person can or cannot go; or
3. that they must be accompanied at all times.

If the conditions are not acceptable to the authorised person, then the power of entry under section 129 of the Act should not be used.

Even if the occupier signs a document giving permission to enter, the occupier can withdraw that consent at any time. The authorised person is essentially on the private property as a guest of the occupier, and the occupier has the right to ask the guest to leave at any time.

When is it appropriate?

Section 129 of the Act is a valuable tool when the relationship between property occupiers and council is productive and issues are being addressed in good faith. It is typically most appropriate early in an enforcement process.

If consent is not forthcoming, then the authorised person should look at other powers in the Act.

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2 *Local Government Act 2009* (Qld) s 129(6).

Non-party disclosure in enforcement proceedings

Insights from the Planning and Environment Court

Non-party disclosure and UCPR Rule 242

During civil proceedings, it may be necessary for a party to obtain documents from an individual who is not named in, and would not otherwise be involved in, the proceedings. This is known as 'non-party disclosure'.

Pursuant to Rule 242 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), a party to the proceedings may issue a notice of non-party disclosure, requiring a person who is not party to the proceeding to produce specific documents within 14 days of receiving the notice. These documents must be:

1. directly relevant to an allegation or issue in the proceeding;
2. in the possession or under the control of the respondent; and
3. a document the respondent could be required to produce at the trial of the matter.[1]

A non-party cannot be required to produce a document if there is another reasonable and cost-effective way of proving the matter the document is intended to support.[2] Further, any disclosure under Rule 242 of the UCPR is not an ongoing obligation.[3]

Non-party disclosure in Planning and Environment enforcement proceedings

To grant an enforcement order under section 180 of the *Planning Act 2016* (Qld), the Planning and Environment Court must be satisfied, through evidence, that a development offence has been or will be committed. The concept of non-party disclosure can be a useful option when a party seeking an enforcement order is aware of documents controlled by a third party that may help establish a development offence.[4]

Notably, Rule 242 of the UCPR applies only to proceedings initiated by a statement of claim.[5] Therefore, in enforcement proceedings before the Planning and Environment Court, a party must first seek the Court's leave or direction before issuing a notice requesting disclosure under Rule 242. While leave may be granted,[6] there are significant limitations on when a Rule 242 notice is deemed appropriate. The Planning and Environment Court recently addressed the application of Rule 242 in *Noosa Shire Council v Noosa Airfield* (No 2) (**Noosa Airfield**).[7]

Limits on non-party disclosure: *Noosa Airfield (No 2)*

The decision in *Noosa Airfield* arose out of an ongoing dispute between Noosa Shire Council and the owners of land at Noosaville. Council alleged that the land was being used as an airfield without the required development permit since 2010 and that since 2018, there was an increase in flights at the site which constituted an unlawful material change of use.

1 *Uniform Civil Procedure Rules 1999* (Qld), r242(1).
2 *Uniform Civil Procedure Rules 1999* (Qld), r242(2).
3 *Uniform Civil Procedure Rules 1999* (Qld), r242(4).
4 See Darwen v Pacific Reef Fisheries (Australia) Pty Ltd
5 *Uniform Civil Procedure Rules 1999* (Qld), r209.
6 Non-party disclosure mentioned (but not discussed in depth): *Boral Resources (Qld) Pty Ltd v Gold Coast City Council* [2017] QPELR 530; *Wu & Kuo Childcare Pty Ltd V Brisbane City Council And Another* [2024] QPELR 509.
7 [2024] QPEC 38.

As part of enforcement proceedings, council applied to the Court for disclosure of records pursuant to a Rule 242 notice from select commercial aircraft operators at the airfield, as well as from the Civil Aviation Safety Authority (**CASA**) and Airservices Australia (**AA**). The Respondent, Noosa Airfield, resisted the application.

In dismissing the application, the Court stated that a non-party disclosure notice cannot be used for 'speculation or general intelligence gathering'[8] and the disclosure sought from the regulatory authorities was deemed to fall into this category. Council argued that the regulatory authorities might possess documents related to the 'number, type and frequency of aircraft using the land', but was unable to identify what specific records existed or what the authorities were required to keep.[9]

With respect to the disclosure sought from aircraft operators, the Court considered that seeking disclosure from only select operators was a 'piecemeal approach' and would not meaningfully assist in proving the material change of use the subject of the proceeding.[10]

The '*essential problem*' with the application was that Rule 242(1)(a) of the UCPR was not satisfied in this case. The Applicant could not sufficiently identify the availability of any specific documents that would prove any allegation in dispute.[11] It was not enough that the broad disclosure sought may have been relevant to the nature and impacts of the use of the land. Instead, the Applicant was required to specifically identify documents that could, themselves, prove a disputed issue.

Key takeaways

Non-party disclosure under Rule 242 of the UCPR may be available to assist local governments in the course of enforcement proceedings. However, it should be noted that:

1. a party seeking to issue a Rule 242 notice must seek leave of the Court;
2. the documents sought must be directly relevant to an allegation in issue of the proceeding and specifically identified; and
3. the power to require documents from a non-party under Rule 242 of the UCPR cannot be used for '*speculation or general intelligence gathering*'.

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9 *Niceforo v Berkshire Hathaway Speciality Insurance Company & Ors* [2023] QSC 282, [18]-[19].
10 *Noosa Shire Council v Noosa Airfield Pty Ltd & Anor (No 2)* [2024] QPEC 38, [36]-[39].
11 *Noosa Shire Council v Noosa Airfield Pty Ltd & Anor (No 2)* [2024] QPEC 38, [39].
12 *Noosa Shire Council v Noosa Airfield Pty Ltd & Anor (No 2)* [2024] QPEC 38, [40].

Securing your rights with contract security

Security is a widely used contractual mechanism by which a contractor provides financial reassurance, typically through a bank guarantee or retention money, to secure its performance under a construction contract. This article outlines key drafting considerations to help you maximise the effectiveness of your security clauses.

Topping up security

Security is typically for a percentage of the contract sum, often around 5%. However, circumstances may occur during a project which reduce the actual percentage held. This could be through events which increase the contract sum, such as variations, or if council has recourse to some of the security already held.

To maintain an appropriate level of security, council may include a 'top up' provision in its contract which entitles council to request that security be topped up if the value of the security drops below a certain percentage of the contract sum. It is important to note that the *Queensland Building and Construction Commission Act* (**QBCC Act**), imposes limits on the amount of security that can be held under a building contract.

Retention of security

Construction contracts often provide for security to be released in two equal portions following practical completion and issue of the final certificate. However, releasing security at these times may remove council's leverage to ensure the contractor meets its ongoing obligations. To alleviate this issue, it is recommended to include a provision entitling council to retain security beyond the usual time for release in certain circumstances, such as when council has a current claim or if the contract is terminated due to the contractor's breach.

Additionally, if council agreed that some obligations may be met after practical completion (e.g. supply of certain documents), council may consider linking the release of security to the completion when these obligations are fulfilled rather than just practical completion being achieved.

Recourse to security

Security is only effective if it is easily accessible. Council should ensure that its contractual rights to have recourse are clearly set out and easy to action. Key concerns to look out for include:

a. council should not be delayed in having recourse to security due to the contract requiring a separate notice to be given, although notice is required for building contracts within the meaning of the QBCC Act;

b. council should not agree to be limited to only having recourse for amounts which are 'due and payable' as this is a high threshold which may be difficult to demonstrate; and

c. ensuring a clause is included which specifically prevents a contractor from seeking an injunction or otherwise restraining council from having recourse to security.

Key takeaways

Effective security provisions are crucial for ensuring a contractor's compliance with their obligations under a construction contract. Key considerations include timely access to security, avoiding restrictions, and linking release to the fulfilment of all obligations. Tailored clauses can provide greater flexibility and protection throughout the project.

If you have any questions or need assistance regarding the above, please reach out to a member of our Construction and Infrastructure team.

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Upcoming IPWEA-QNT Webinars

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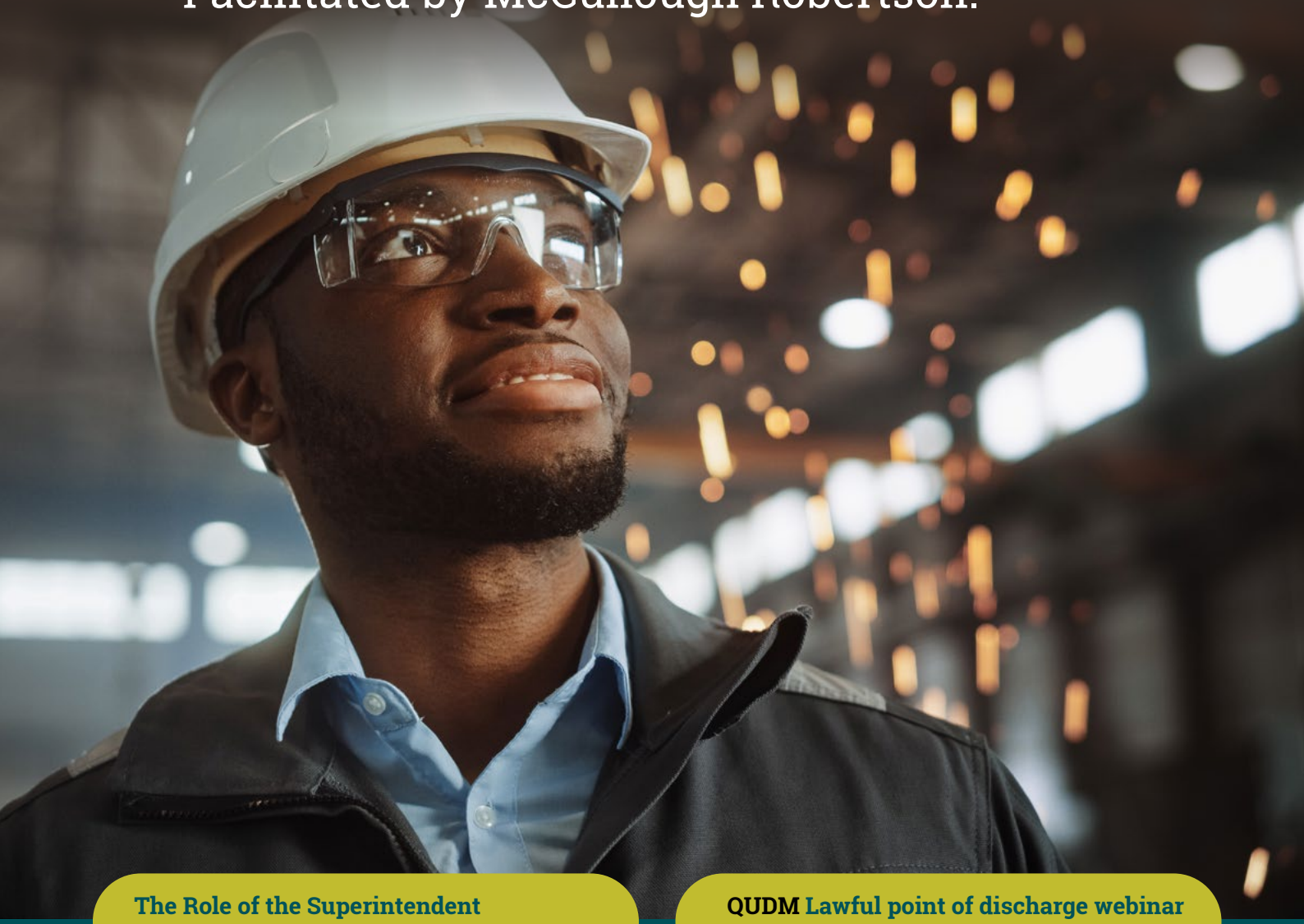


The Role of the Superintendent
21 January 2025

REGISTER HERE

Matt Bradbury and Lisa Myers will discuss recent case trends and tips and tricks for Principals and other 'contracting' parties to ensure the Superintendent's independence is preserved throughout the project.

QUDM Lawful point of discharge webinar
10 February 2025

REGISTER HERE

Sarah Hausler and Patrick O'Brien explain the legal context behind the limbs of the lawful point of discharge test, and explain key practical factors to consider in evaluating whether stormwater changes will satisfy lawful point of discharge or no actionable nuisance requirements.

Key considerations for third-party development of council-owned land

Councils seeking to support local development or fulfil a particular community need, without engaging in development activities itself, may consider proposals for council-owned land to be developed by third parties. Often the benefit of these arrangements sits with a local community group or charity, that agrees to develop the land for a specific purpose approved by council.

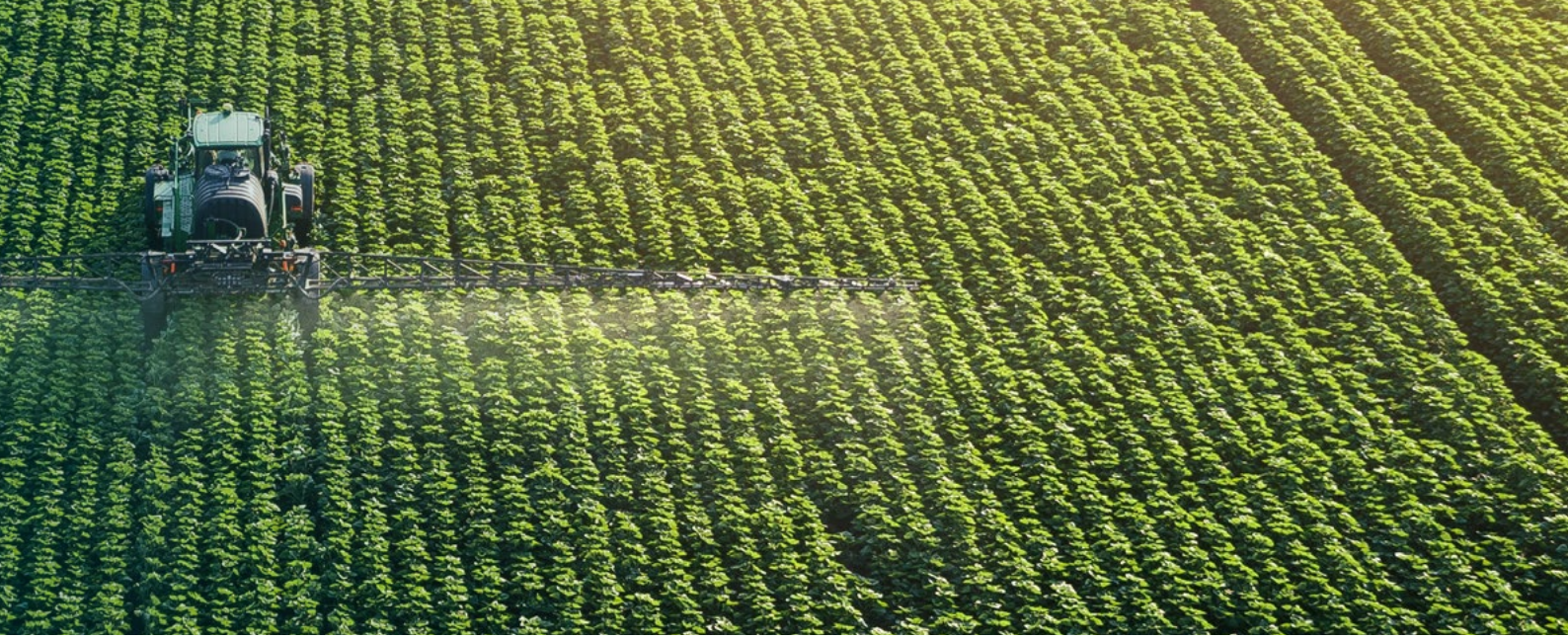
The key question for councils is how should these arrangements be documented, and how will the risk that the land is not used for the approved purpose, be managed?

Broadly, the following avenues are favoured for a conditional disposal of land:

1. **Transfer with buy-back rights** - council transfers the land, subject to buy-back rights for non-compliance secured by a caveat, along with a first right of refusal benefitting council. Depending on the circumstances, the purchase price could be $1.00 or market value.
2. **Development lease with future transfer** - council grants a development lease for the period required to obtain approvals and complete construction of the necessary improvements. After this period, council transfers the land, subject to buy-back rights secured by a caveat and a first right of refusal benefitting council.
3. **Leasehold interest only** - instead of transferring ownership of the land, council grants a development lease for construction, followed by a fixed term operational lease of up to 99 years.

Each of these options offer a different balance of control and security. To determine the best option for a particular project councils should consider:

1. **The lifetime of the project** – will the development fill a temporary or permanent need in the community? When the lifetime of the development comes to an end, what is to become of the land and the building?
2. **Project funding** – how is the third-party funding its construction? Traditional financiers will often take issue with security in the form of buy-back rights, for example. Alternatively, will the financier accept a mortgage over a long-term lease?
3. **Responsibilities as Landlord** – is council prepared to remain connected to the development in its capacity as owner of the land, by complying with obligations as landlord at law (e.g. work, health and safety obligations, fire safety compliance, enforcement of the lease terms)?



4. **Commerciality** – is the arrangement attractive to the party acquiring the interest? Are the limitations on use and control of the property balanced so as not to unnecessarily impact the project's progression?
5. **Enforcement** – is the third party reliable, and what set of circumstances is council prepared to inherit in the event of early non-compliance? If the arrangement does not proceed as intended, it is generally easier to terminate a lease than it is to transfer land.

Key takeaways

While the disposition of council-owned land presents an opportunity to support local development and quickly address community needs, it is crucial to secure arrangements that also address the immediate and long-term consequences and risks. It is important to ensure the implications of such arrangements are fully contemplated, and the transaction documents include appropriate security and contingency measures to manage major risks.

For assistance in documenting these arrangements, or advice on your project, please contact a member of our Real Estate Group.

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Cameron is an experienced employment and industrial lawyer with a focus on public sector operations. He has a strong understanding of the challenges facing local government bodies in managing their workforce across both blue and white collar roles.

His work in this space includes advising councils on complex employment matters, from industrial relations compliance to employee discipline and contract management.

In addition to his employment law expertise, Cameron leads the Workplace Health and Safety team, where he addresses a range of issues related to public sector safety. He is experienced in the legal and practical aspects of workplace incidents, ensuring clients are equipped to respond effectively and manage issues as they arise. His guidance has proven especially valuable in sensitive situations, such as coronial inquests and workplace investigations.

Cameron's experience covers a broad range of areas, including training, policy drafting, and advising on compliance with Queensland's WHS and Industrial Relations legislation. His work includes supporting local councils in meeting statutory requirements and preparing their teams to handle employment and safety challenges.

Throughout his career, Cameron has been a resource for public sector clients, bringing a practical understanding of the intersection between employment obligations and operational needs in local government.

Meet our team

McCullough Robertson has acted for local governments across Queensland for over 25 years. Our dedicated Local Government Industry Group are specialists in fields of law relevant to local government and ensure that the advice given aligns with, and is cognisant of, the industry and its framework.

For further information, please contact one of our team members:

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