The Local Law

Navigating good government | June 2023

Lawyers | McCullough Robertson

Welcome

We are pleased to bring you the June 2023 edition of The Local Law.

This publication has been designed to assist CEOs, elected representatives, local government officers and in-house lawyers to navigate the ever-changing government landscape, keeping you up to date with key decisions, legislation and relevant topics.

In this edition, just in time for budgets, we look at the basics of rates and charges as set out in Chapter 4, Part 1 of the *Local Government Act 2009*, subsidised housing for employees as an attraction strategy, changes to the unfair contract terms regime, and managing employees with cannabinoid prescriptions. We also provide an update on the *Potter v Gympie Regional Council* psychological injury case.

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

We hope that you find this edition insightful and engaging.

Troy Webb
Partner and Head of McCullough Robertson's
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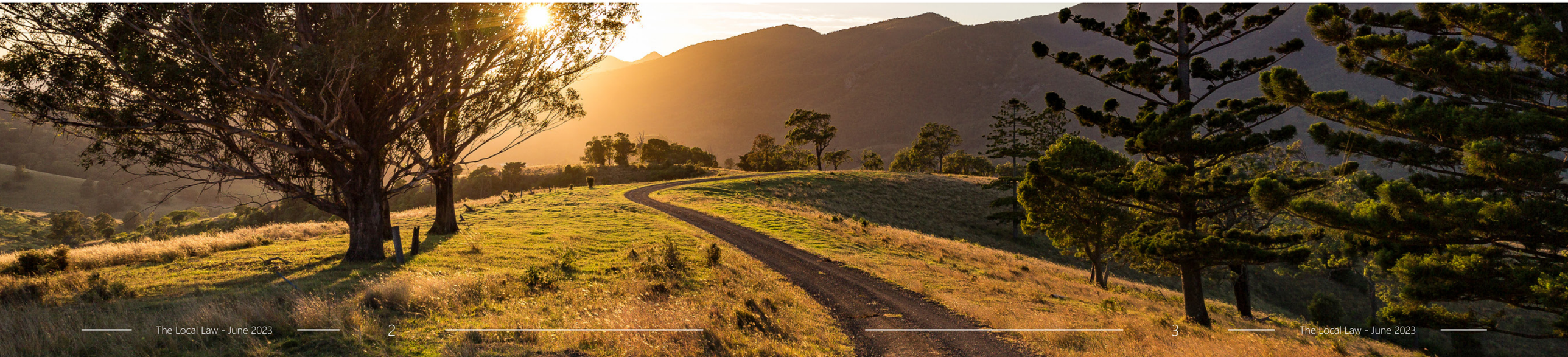

Unpacking the Local Government Act – Rates and charges

Welcome to the next instalment of our ongoing series, Unpacking the Local Government Act. In this article, just in time for budgets, we look at the basics of rates and charges as set out in chapter 4 part 1 of the *Local Government Act 2009* (Qld) (**LGA**).

Rates and charges

Rates and charges are the primary way local governments raise funds to undertake the activities of local government. Unlike other levels of government, local governments cannot directly tax individuals or companies – instead local governments tax land.

Rates and charges may be levied by a local government, upon land, for a service, facility or activity undertaken by a local government. There are four categories of rates and charges, as explained in section 92 of the LGA:

a) general rates – for services, facilities and activities supplied by the local government in general;

b) special rates and charges – for services provided to land or an occupier who receives a special benefit from that service (like maintaining roads in an industrial area frequented by heavy vehicles, or funding a rural fire brigade);

c) utility charges – for waste management, gas, sewerage or water services; and

d) separate rates and charges – for any other service.

Rates may only be levied upon 'rateable land'. Most, but not all, land in a local government area is 'rateable land'. Section 92 of the Act sets out what land is not rateable, including unallocated State land and land owned or held by a local government unless leased to someone else.

A local government must levy general rates on all rateable land in its local government area, and may levy special rates and charges, utility charges and separate rates and charges. In practice, most local governments levy some form of utility charges, to pay for things like rubbish bin collection and many levy special rates and charges for improvement works or particular services.

Overdue rates and charges

Local governments have powerful tools to recover overdue rates and charges. Overdue rates and charges automatically become a 'charge' (a legal interest less than ownership) on the land to which they relate. That charge can be formally registered by lodging with the Registrar of Titles a request to register the charge along with a certificate signed by the Chief Executive Officer.

Once registered, the charge over land will show up on title searches and has priority over any other encumbrance on the land except for those in favour of the State or a government entity. That means the local government's interest in the land sits above commercial mortgagors (like banks) or other registered interests even if it was lodged after another interest – so a local government's right 'jumps the queue'.

Because the rates attach to land, not a particular person or entity, the person who owns the land from time to time is liable to pay the rates – even if they were not the owner when the rate bill was incurred.

Recovering overdue rates and charges

If rates and charges are not paid, local governments can take two different paths to recover the overdue amounts:

a) ordinary debt recovery processes, including commencing court proceedings; or

b) if the prerequisite time periods are met, selling or acquiring the land to which the overdue amounts relate.

If the overdue rates and charges are paid, the local government must lodge a:

a) request to release the charge over the land; and

b) certificate from the Chief Executive Officer stating that the overdue rates and charges have been paid.

Selling land for rates is a local government 'superpower', which we will look at in future articles.

Key takeaways

In summary, it is important to remember:

a) rates are directed at land, not people or companies, and the person who owns the land is liable to pay the rates;

b) general rates must be levied on all rateable land; and

c) overdue rates and charges automatically create a legal interest in the land to which the rates and charges relate, which can be registered with the Titles Office to give local governments priority if the land is dealt with.

Thanks to Lewis Edwards, Graduate for assisting with this article.

If there is a particular area of the LGA you would like us to unpack, please email Kristy Jacobsen.

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Subsidised employee housing – a recipe for success, or disaster?

Regional local governments are feeling the pinch of a tight recruitment market and are turning to a reliable employee attraction strategy – subsidised housing. With rent skyrocketing across Australia, subsidised housing may be the deal-maker for many prospective employees.

However, subsidised housing presents a complex intersection between employment and property issues. If subsidised rental is not set up and managed appropriately, it can cause disputes and can cost local governments rental income, limit the local government's access to their property, and cause reputational damage (which is unlikely to attract prospective employees).

There are three **key documents** for subsidised housing: property agreements (such as leases or tenancy agreements), employment contracts and relevant policies. Those documents should deal with matters including:

What benefit is the local government offering?

Local governments should be very clear about the benefit to be provided to employees, and specify matters such as: details of the property or properties available, the usual rental price, the rental subsidy (as a flat amount or percentage), and the duration of the subsidy.

How will that benefit be provided?

The subsidy can be provided from a local government-owned property rented to an employee, or a property leased by a local government and subleased to an employee, or some combination of those depending on supply and demand. Of course, renting property owned by the local government is generally preferable, because it removes any negotiations or complications which may be caused by an owner leasing to the local government. Local governments should also determine whether, and how, rental payments may be salary sacrificed.

Who can access the benefit?

Is the rental subsidy scheme available to all employees, or all new employees, or some other category of employees? Is it a discretionary benefit, or an employee entitlement?

When does the benefit end?

How quickly after termination of employment does the subsidy and tenancy end? Could the subsidy be withdrawn or varied as a disciplinary penalty? Does the benefit end automatically after the employee has a certain period of service, or has lived in the local government area for a set period, or after some other period? Will the benefit end if the employee takes an extended period of leave?

How can the benefit change over time (if at all)?

How will rent increases be negotiated or determined? Is the rental subsidy fixed or variable over time? Will some other limited benefit become available after the main benefit is no longer available?

Local governments should also consider discrimination and related issues, which can easily arise in subsidised housing issues. For example:

Say an employee of your local government lives in subsidised accommodation with their family. A domestic violence allegation arises. The employee chooses (or is required) to live elsewhere, while their spouse and children remain in the house. Do your key documents deal with this issue?

Say an employee has requirements which cannot be met by the properties available to your local government. The employee may have numerous children or an extended cultural family (requiring a large house), or require special facilities (such as ramps, specialised bathroom fittings, etc.). Do your key documents deal with those issues?

Problems can occur when the key documents are prepared and managed in isolation. Those documents need to work cohesively. For example, if the tenancy agreement is suitable, but the employment contract does not properly deal with subsidised housing, and the policy is limited or outdated, significant disputes may arise.

Providing subsidised housing to employees is also generally a fringe benefit. There are some FBT exemptions available to local governments (such as for providing housing to employees in a remote area) however these exemptions have strict conditions. It is important for local governments to be up to date with current ATO views on these types of fringe benefits. Getting the FBT treatment or general classification of housing benefits wrong not only means that local governments find themselves incurring substantial costs in dealing with the ATO but can also affect relationships with current and prospective employees.

Our Employment and Real Estate teams work together to help local governments navigate these complex issues.

To discuss a tailored solution to your local government subsidised employee accommodation, contact Cameron Dean and Bernard Dwyer from our Employment team or Kristan Conlon and Emile McPhee from the Real Estate team.

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Major changes to unfair contract terms laws are coming

On 10 November 2023, significant changes to the unfair contract terms (UCT) regime in Australia come into effect. With expanded application and the introduction of significant penalties for infringement, if you haven't already, now is the time to assess whether your business is caught by this regime and if so, update your documentation accordingly.

What do these changes mean?

Australia's UCT laws will now apply to more businesses and a broader range of contracts, and potentially severe penalties will apply to those parties who include or rely on an UCT.

The key changes to the regime are:

Expanded scope

- Increased small businesses threshold – The UCT regime will now apply to agreements with businesses who have less than 100 full-time equivalent employees (up from 20 employees) or whose annual turnover is less than $10 million – that is, significantly more agreements may now be caught by the regime;
- Removed or increased contract value thresholds – Currently, the UCT regime applies to small business contracts with a value of less than $300,000 (or, if the contract term is more than 12 months, less than $1 million). From November, all such thresholds will be removed in favour of the functional business size tests listed above, except where a small business acquires financial services or a financial product, in which case the UCT regime will only apply to contracts valued at less than $5 million; and
- Broader standard form contracts – In determining what is a "standard form contract", courts will be obliged to consider whether one party has made other contracts in the same or a substantially similar form, and how many, with its other suppliers or customers.

New penalties

- Complete prohibition on UCTs – Whereas currently a term found to be unfair is rendered void, the Act introduces a complete prohibition on proposing, applying, relying, or purporting to apply or rely on, UCTs; and
- Significant new penalties – If found to propose, apply or rely on a UCT, individuals may receive substantial fines of up to $2.5 million, and corporations the greater of:
  a) $50 million;
  b) three times the value of the benefit received; or
  c) 30% of adjusted turnover (including turnover of related-bodies corporate) during the period in which the breach occurred (minimum 12 months).

Enforcement

Expanded court powers – Courts determining a UCT claim will have the power to void, vary or refuse to enforce any part or all of a contract which contains UCTs. Further, courts will be empowered to prevent a person from entering into future contracts which contain a declared UCT, or relying on a declared UCT in any existing contract (whether or not that contract is before the court).

What should you do now?

With the reforms fast approaching, it's time for local governments to understand the extent to which they are impacted by the changes, and to prepare accordingly. In particular, it is important to:

- identify template contracts used by council and assess if they may be a standard form contract (and whether counterparties are given a meaningful opportunity to negotiate them);
- assess the nature of counterparties to those standard form contracts, to determine whether you enter into contracts with consumers, or with parties with less than 100 employees or whose annual turnover is less than $10m;
- identify any one-sided, unfair or excessively favourable terms in those standard form agreements; and
- identify and document council's legitimate business interests, which can be used to justify the inclusion of contractual terms that would otherwise be considered risky from an UCT perspective.

If you would like to discuss the practical implications of the changes, or need assistance in conducting a UCT review of your standard form contracts, please get in touch with a member of our Digital and Intellectual Property team.

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The cannabis conundrum – managing employees with cannabinoid prescriptions

Employees can now be prescribed cannabinoids. However, that may leave them unable to lawfully drive. That presents local governments with a complex web of health and safety, discrimination and operational considerations. McCullough Robertson's employment and safety team has recently guided several local governments through these issues.

What's the problem?

Employees can now be prescribed cannabinoid medications (which can include Tetrahydrocannabinol (**THC**)). THC is the psychoactive component of cannabis, and when initially taken can cause physical and psychological impairment. However, THC remains detectable in the body long after its more obvious effects have ended. Exactly how long depends on a range of factors including the dose strength and frequency, and the individual's weight, but it can often be detectable for over a week after use.

Currently, it is unlawful to drive a vehicle on a Queensland road with a detectable level of THC in the body. That does not require a person to be under the influence of THC, which is a separate offence. Therefore, employees prescribed THC containing medication may not be able to lawfully drive in Queensland.

Many employees, particularly of regional local governments, are required to drive to, from and during work. If a local government is aware an employee may be driving unlawfully in connection with their work (because they use a THC medication), that presents **liability risks** for the local government and its officer. Arguably, a local government in that circumstance would not be meeting their obligation to take 'all reasonably practicable steps' to ensure work health and safety. If that employee were involved in an accident, the work health and safety and reputational ramifications for a local government and its officers could be significant.

Management of this complex problem is fraught with risk.

What are the risks?

Local governments have adopted a variety of approaches to dealing with this problem. Dismissing or managing an employee for using cannabinoid medication can give rise to significant and public claims, particularly for unfair dismissal and discrimination.

One common approach is to discipline or dismiss an employee for failing to comply with a relevant drug and alcohol policy (i.e. dismissal for misconduct). There are several significant risks with that approach. First, the approach could be criticised by a court or tribunal for failing to properly accommodate the employee's impairment and treatment (i.e. discrimination). Second, courts and tribunals hold local government disciplinary processes to the highest standards, and any misstep during that complex process could support an unfair dismissal application.

Another approach is to dismiss the employee for failing to meet the 'inherent requirements' of their role (which may include driving). Some difficulties with that approach include genuinely evaluating whether 'reasonable adjustments' could be made to allow the employee to perform their role, and gathering appropriate and specific medical evidence. Further, the devil will be in the detail of any show cause process to dismiss the employee. That process must adopt the correct terminology and references from numerous pieces of relevant legislation, or it could be publicly criticised by a court or tribunal in an unfair dismissal or discrimination proceeding.

However, those risks can be mitigated through a carefully tailored approach.

What can be done?

We have assisted local governments to develop and implement strategies which address this problem throughout the employment relationship – from recruitment, to day-to-day management, to ending the employment relationship. We recommend you consider:

a) <u>Does your local government have a robust pre-employment process, which seeks information in a way which is both lawful and provides maximum protection to council?</u> There are three key matters. First, the process should be framed in a particular manner to comply with, and make best use of, several overlapping legislative obligations. Second, the process should seek all information relevant to the employee's ability to safely perform the position they are applying for with the local government. Third, the process must be appropriately confined and not ask 'unnecessary information' from job applicants, as that may breach State and Commonwealth discrimination legislation.

   This approach can allow your local government to make informed recruitment decisions, and potentially avoid a range of problems from the outset. However, some employees may be prescribed cannabinoids during their employment.

b) <u>Does your local government have an optimal drug and alcohol management policy?</u> These policies typically focus only on whether an employee tests positive for a relevant substance at work. That is a good protection for your local government however, with some careful tailoring, these policies can provide far greater protection.

For example, the policy could oblige employees to disclose any medication they have been prescribed which may impact their ability to safely and lawfully perform their role (which can expressly include cannabinoids as an example). If an employee makes that declaration, that will allow your local government to proactively manage the issue. If an employee fails to make that declaration, and their medication use is discovered by your local government (perhaps via drug testing), then a range of options are available, including disciplinary action.

c) Is your local government adequately protected by its template employment contract/s? There are a range of clauses which can be inserted or amended to better protect your local government regarding this problem. For example, confirming the consequences of false or incomplete declarations during pre-employment processes, establishing ongoing disclosure obligations, and clarifying the conditions of employment (including that the employee must be, and remain, able to lawfully drive).

How can you protect your local government?

The issues posed by employees using cannabinoid medications are complex. It is critical to have the right framework in place to deal with those issues before they arise. If issues do arise, a quick call or email seeking legal advice at the outset can save an expensive headache down the track.

Contact Cameron Dean and Bernard Dwyer from our Employment and Safety Team for tailored, timely and practical solutions.

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Case Study: *Potter v Gympie Regional Council [2022]* QCA 255

In a previous article, we looked at a first instance decision where the Supreme Court dismissed a personal injuries claim against Gympie Regional Council by Ron Potter who claims to have suffered psychological injury arising from various management actions taken against him in his role as a Local Laws Coordinator.

Mr Potter appealed against the dismissal of his claim to the Court of Appeal. That appeal was also unsuccessful.

To recap briefly, Ron Potter had been employed by Gympie Regional Council since 2008 as a Local Laws Coordinator. In 2013, an anonymous staff survey raised various issues about the performance of Mr Potter in his role as manager. Meetings between Mr Potter and Council management followed in March and June 2014 to discuss the results of the survey as they pertained to Mr Potter and to inform him that he was to be 'performance managed'. Later, Council staff made further complaints about Mr Potter's management which lead to Council appointing an external investigator and to standing Mr Potter down from his employment in July 2014 pending the outcome of the investigation.

The investigation found that many of the serious complaints against Mr Potter could not be substantiated, although there were findings that Mr Potter had engaged in poor management and poor judgment.

Mr Potter made a claim against Council on the basis that it was negligent in the manner in which it investigated the complaints against him and by suspending him from his employment, had caused him to suffer a psychological injury.

The appeal was limited to issues arising out of the Council's decision to suspend Mr Potter on full pay, pending an investigation in July 2014. For Mr Potter to have succeeded in his appeal, he needed to establish that the primary judge erred in making four findings:

a) that the Council, in suspending him, did not owe him a duty of care (**Issue One**);

b) that as at July 2014, the risk of psychiatric injury being suffered by him was not reasonably foreseeable (**Issue Two**);

c) that if a duty of care was owed, it was not breached by the Council in suspending him (**Issue Three**); and

d) that any breach was not causative of Mr Potter's psychiatric injury (**Issue Four**).

Mr Potter failed to establish that the primary judge erred in making all four findings.

In relation to Issue One, the primary judge found that no duty of care arises in relation to a decision to suspend an employee. There is a general duty that employers should provide a safe system of work. However, employers have a right to relieve an employee of their obligation to perform work during an investigation and an employer does not have a duty to not injure an employee by giving such a direction. Imposing such a duty would be inconsistent with the rights of the employer.

In relation to Issue Two, the Court of Appeal noted the distinction between stress on the one hand and a recognised psychiatric illness on the other. Signs of stress at work are insufficient to make the risk of a psychiatric injury reasonably foreseeable. Hence, no risk of psychiatric injury being suffered by Mr Potter was evident in July 2014 as his signs of stress and anxiety at the relevant time were not an abnormal reaction to his situation.

In relation to Issue Three, Council did not have a duty to implement its own policies, but they were relevant to use as guidance to determine whether the direction to suspend Mr Potter was reasonable. The primary judge's careful analysis of the relevant evidence and the Council's policies and procedures provided a sound basis for a finding that the decision to suspend Mr Potter was lawful and reasonable. The reasons to suspend were justified as the allegations against Mr Potter could constitute serious misconduct and the facts supported the suspension pending the completion of the investigation.

In relation to Issue Four, the primary judge correctly found that Mr Potter's suspension was only one of the stressors. Given the allegations against Mr Potter, he would have still been subject to an investigation and the criticisms as a result of the allegations and investigation would equally have featured in his psychiatric injury.

Although the Court of Appeal found that Council did not owe a duty of care in respect of its decision to suspend Mr Potter, it is important to remember that any suspension or disciplinary process still needs to be performed in a reasonable manner and on reasonable grounds, consistent with the employee's circumstances.

Thank you to Dorothy Luo, Research Clerk, for your contributions to this article.

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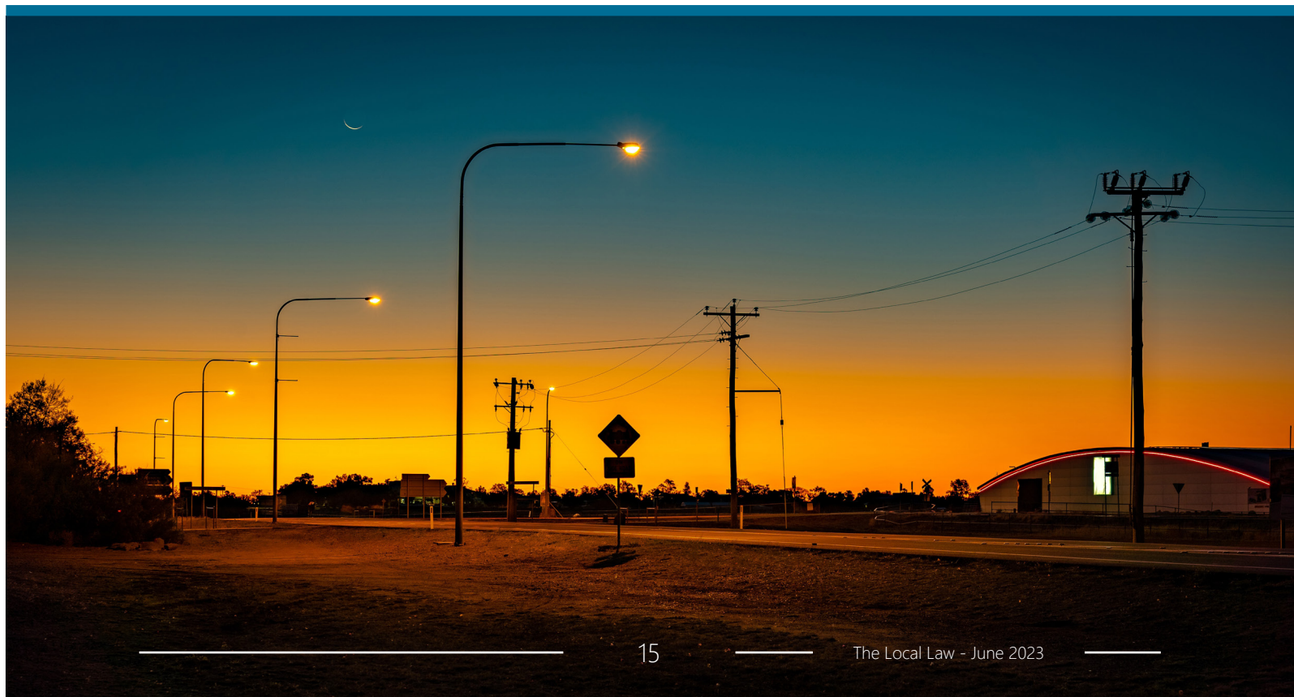

Team spotlight

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With more than 16 years' experience advising Commonwealth, State and Local Government departments and entities, Michael has established himself as a trusted advisor across the broad range of matters which impact upon government, including 'core of core' issues such as statutory interpretation, policy development and application, and public sector decision-making processes.

Michael is known for cutting through the complexity of government problems, providing practical and strategic advice, with a full appreciation of the broader environment which impacts upon government at all levels.

Michael has considerable experience in judicial and merits review, general governance advisory, nationalised regulatory regimes and disciplinary and regulatory prosecutions, including having acted in more than 100 matters for the various national health regulatory boards; Australia's regulator for heavy vehicles; and the regulatory authority under the Education and Care Services National Law. He acts in both criminal prosecution and defence roles, and in Commissions of Inquiry and Royal Commissions.

Michael is also a frequent presenter, able to provide customised training packages to local government clients covering a wide variety of core topics including effective investigations, prosecutions and regulatory proceedings, freedom of information, statutory interpretation, effective decision making, statements of reasons, and human rights.

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.

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