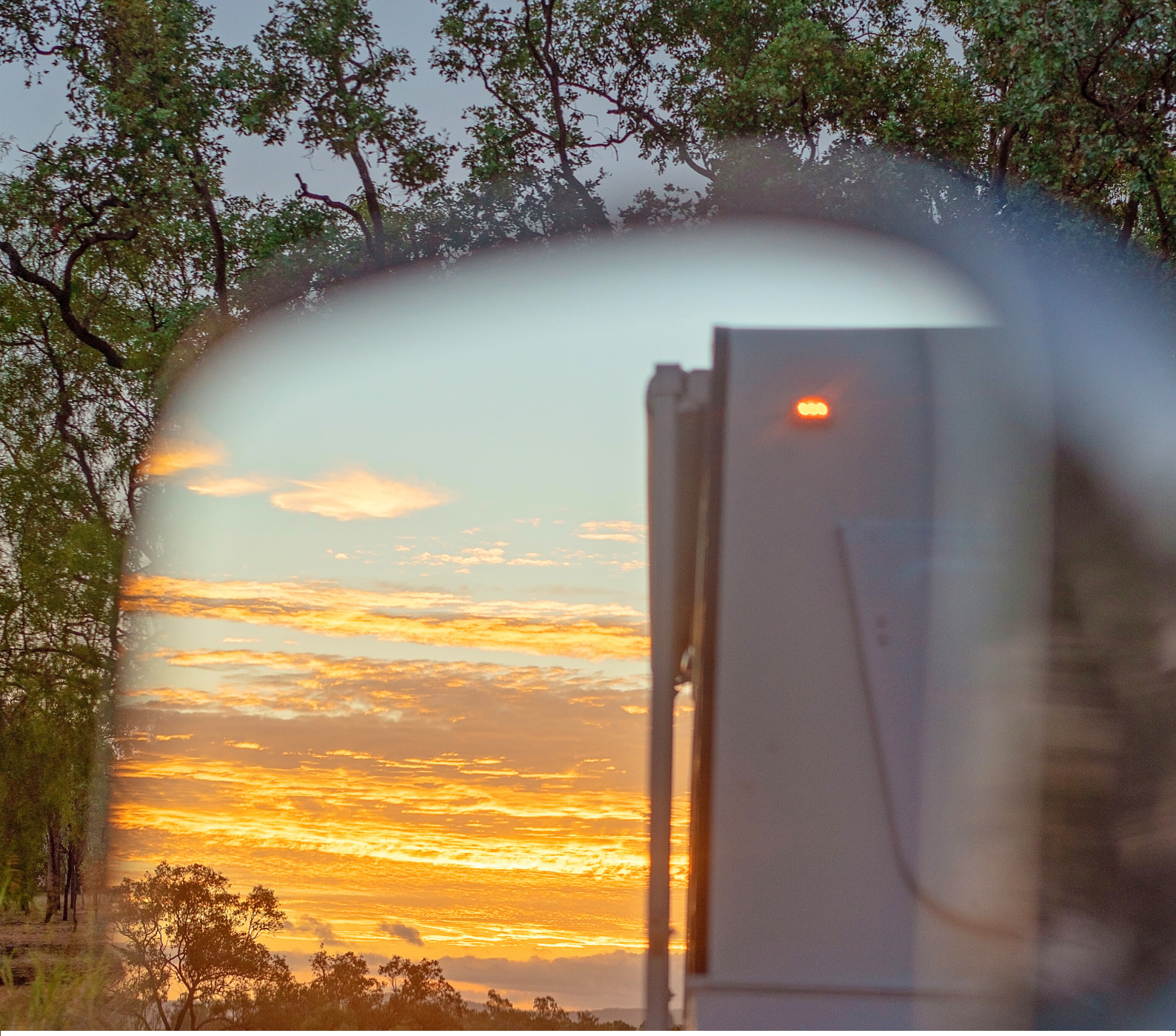


The Local Law

Navigating good government | March 2023

Lawyers | McCullough Robertson

Welcome

We are pleased to bring you the March 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.

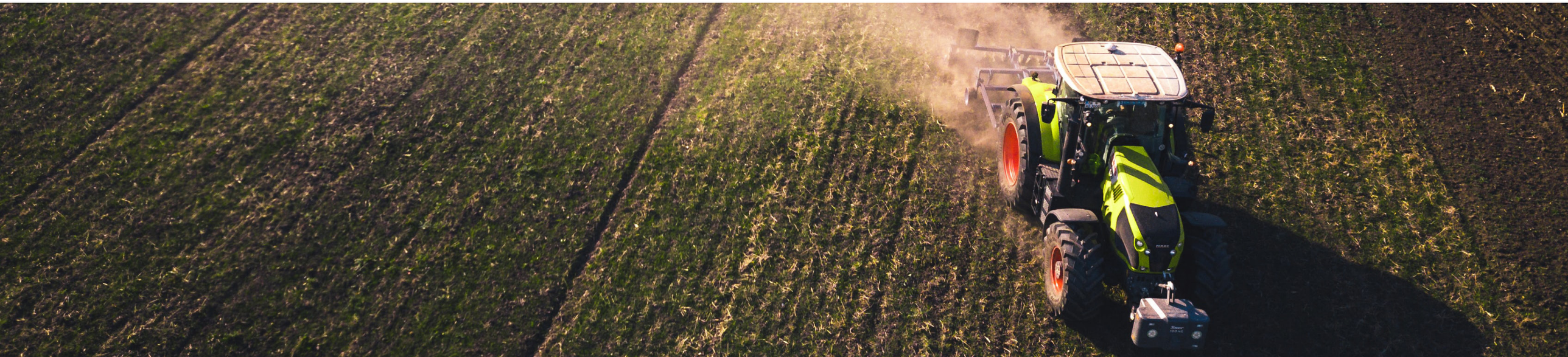
In this edition we again turn to Chapter 3 of the *Local Government Act* to explore the concept of a 'beneficial enterprise', provide an overview of the proposed changes to Queensland's waste legislation, outline what local governments can do in the current contracting market and summarised key takeaways from the recent District Court decision relating to special rules applying under the Civil Liability Act for local governments.

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
Local Government Industry Group

Contents



Unpacking the Local Government Act – Beneficial Enterprises

Welcome to our ongoing series, *Unpacking the Local Government Act*. In this article, we once again turn to Chapter 3 of the *Local Government Act 2009* (Qld) (**LGA**) to explore the concept of a 'beneficial enterprise.'

A beneficial enterprise?

In a nutshell, the beneficial enterprise provisions allow local governments to form independent legal entities or enter into arrangements with other private entities, in order to pursue initiatives that are of public benefit.

A beneficial enterprise, under the LGA, is defined as an enterprise that a local government considers and reasonably expects to be of benefit to the whole or part of its local government area[1]. This relatively open definition captures a wide range of initiatives, commercial or otherwise. An investment service, museum, waste management company and airport are all examples of beneficial enterprises that have been, or are being, undertaken by local governments in Queensland.

Constraints on beneficial enterprises

The LGA permits a local government to conduct a beneficial enterprise, subject to certain constraints. To conduct a beneficial enterprise, a local government may form, join, buy shares in, or otherwise participate with, an 'association,' whether this be a partnership, a corporation limited by shares or guarantee (not listed on the stock exchange) or an unincorporated group[2]. However, whatever form the beneficial enterprise takes, the liability of a local government must be limited. Section 40 of the LGA prohibits a local government from:

- becoming involved with a company whose members have unlimited liability; nor
- entering any agreement that does not limit the amount committed by the local government.

As an additional transparency measure, any beneficial enterprise conducted by a local government must be listed in the local government's annual report.

Some beneficial enterprises may also have to comply with the principle of 'competitive neutrality'. This means that an entity conducting a business that competes with the private sector should not be advantaged just because the entity is in the public sector. As an example, a competitive advantage could be a beneficial enterprise charging lower prices than private sector competitors because the beneficial enterprise has lower costs as it does not have to pay rates.

However, a local government only needs to take steps to uphold competitive neutrality if the enterprise is a '*significant business activity*' under the *Local Government Regulation 2012* (Qld) and if implementing the principle is in the public benefit.[3]

In addition to these overarching restrictions in the LGA, many local governments have specific policies covering beneficial enterprises and how they are to be operated and governed. These often contain practices or principles relating to transparency and risk mitigation, to ensure the integrity of the local government is maintained. While the undertaking of a beneficial enterprise is authorised to occur under the LGA, some transactions may, depending on the circumstances, require authorisation under the *Statutory Bodies Financial Arrangements Act 1982* (Qld). Specific advice may be needed, depending on the transaction.

Key takeaways

The beneficial enterprise framework is a useful tool for local governments and if used effectively, can go a long way in supporting the financial and community goals of local government. They allow local governments to carry out beneficial activities outside the ordinary scope of local government activities.

If seeking to conduct a beneficial enterprise under the LGA, local governments must:

- take care to ensure that the enterprise can reasonably be expected to benefit the public;
- ensure that the local government's liability is appropriately limited; and
- comply with any regulations or policies and, in some circumstances, the competitive neutrality provisions.

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

With thanks to Caleb Caswell for assistance with this article.

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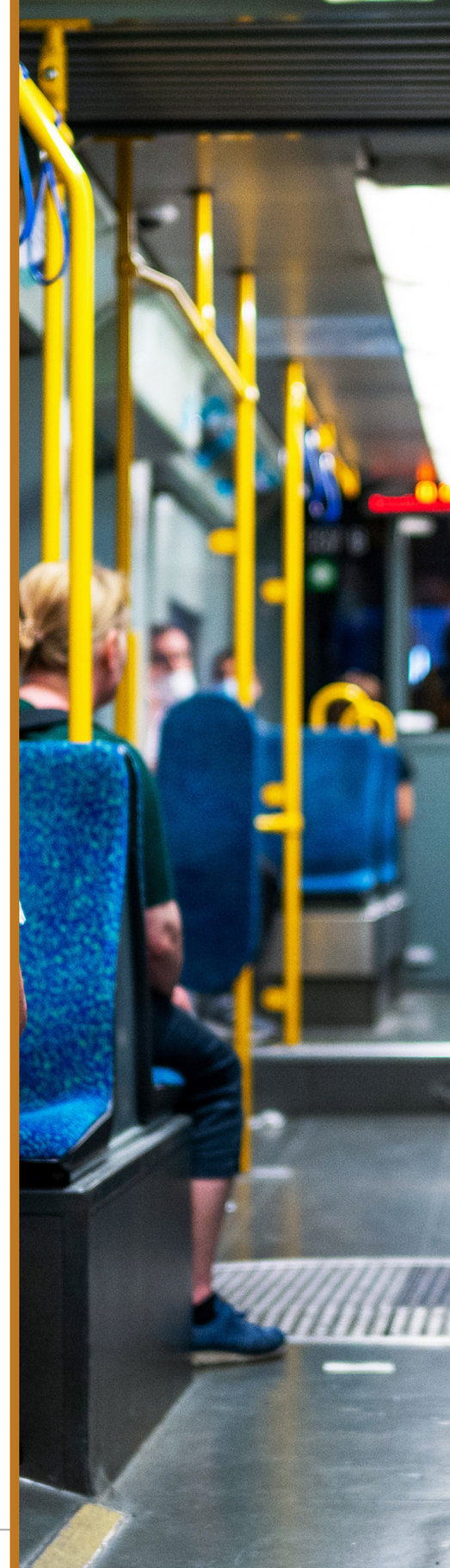
[1] *Local Government Act 2009 (Qld) s 39(2).*

[2] *Local Government Act 2009 (Qld) s 40.*

[3] *Local Government Act 2009 (Qld) s 43.*



Proposed changes to Queensland's waste legislation

On 22 February 2023, the *Waste Reduction and Recycling and Other Legislation Amendment Bill 2023* (**WRR Bill 2023**) was introduced into Queensland Parliament.

The WRR Bill 2023 proposes to amend provisions of the *Environmental Protection Act 1994* (Qld) (**EP Act**) and the *Waste Reduction and Recycling Act 2011* (Qld) (**Waste Act**) to better embed the goals for, and practical implementation of, circular economy principles.

We provide a summary of the key points below. Read our full alert here for more details about the proposed changes and what they could mean for you.

Definition of waste

The Waste Act and the EP Act are proposed to be amended to include a new definition of waste. The definition is still broad and includes anything that is left-over or unwanted from an industrial, commercial, domestic or other activity, or surplus to the activity generating the waste. Importantly, the new definition carves out 'things prescribed by a regulation not to be a waste'.

The purpose of the amendment is said to provide security and flexibility for those who want to invest in circular economy processes and products. Under the new definition, the pathway for repurposing different types of materials is intended to be clearer.

It will be interesting to see how this new definition will interact with the detailed end-of-waste codes in the Waste Act for specific products. This is especially topical, in light of the Department's current review of the end-of-waste framework being undertaken by its consultants.

Definition of circular economy

The WRR Bill 2023 introduces into the Waste Act a specific definition of 'circular economy' and 'circular economy principle', which embeds this broader policy concept into the legislative framework. The circular economy is to be explicitly included in the State's waste management strategy, as well as local government strategic planning for waste.

Clean earth exemptions

The WRR Bill 2023 proposes the removal of the automatic levy exemption for clean earth that is delivered to a leviable waste disposal site. The waste levy is proposed to now apply to any clean earth disposed of in a landfill or waste facility.

Of note for landfill and waste facility operators is that an exemption may be available to landfill operators who take in the clean earth or other products and use it for good operation and maintenance of the site.

This move to narrowing the scope of waste exemptions is consistent with the existing provisions in the *Waste Reduction and Recycling Regulation 2011* (Qld) that phase out the exemptions for road planings (from 30 June 2023), alum sludge (from 30 June 2024), and fly ash produced by a power station (from 30 June 2029).

Resource recovery area declarations

Under these proposed amendments, the regulator will have broader powers for compliance action in resource recovery areas (**RRA**).

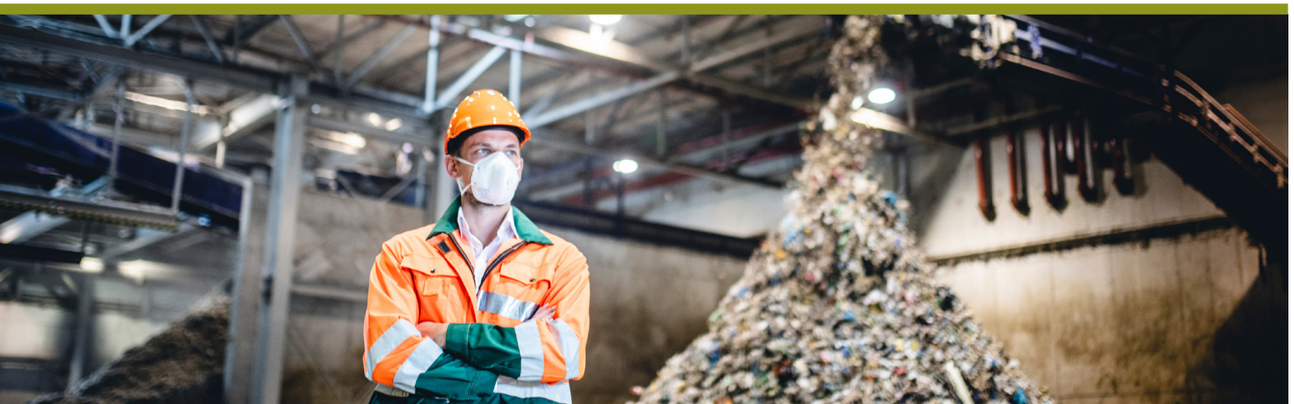
The proposed changes mean the regulator can, following a show cause process, amend or suspend the resource recovery area to undertake an investigation of the site activities. If the regulator chooses to take no further action following investigation, the RRA can continue to operate without the 12-month wait period.

The changes mean that the regulator can effectively close an RRA (as the waste levy is payable during the suspension period) to investigate the 'possible commission' of an offence relating to the RRA requirements.

Next steps

The WRR Bill 2023 has been referred to the Health and Environment Committee. Public submissions are open until 10 March 2023, and the Committee's report is due on 14 April 2023.

The McCullough Robertson team will be closely monitoring the WRR Bill 2023.



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Contracting in the current market

The construction industry is facing many pressures. Although many of these affect contractors, such as supply chain issues and rampant inflation, the boom of projects due to a myriad of factors has meant that there is currently a lot of construction work available and demand for contractors is high. As a result, some local governments are finding fewer tender responses for its projects.

One reason for this is that the current market has made the difference in priorities between parties much more pronounced.

For example, many contractors are concerned that:

- supply insecurity for materials and labour as well as the threat of adverse weather and flooding, may prevent achieving strict project timeframes; and
- inflation and the volatility of material pricing could erode or eliminate profits on a project.

In other words, strict time limitations and fixed lump sum pricing are less attractive which conflicts with two priorities many local government projects focus on – certainty of cost and time. To still meet these requirements, many contractors have factored in higher amounts in their pricing or margins to account for market uncertainties and future potential costs.

What can local governments do?

Local governments could review their procurement model to attract more competitive tenders. This would need to reflect the specific requirements for the project, but could consider:

- 'market sounding' to identity what contractors are available;
- identifying ways to make contracts more attractive to contractors while still adequately balancing risks; and
- whether options such as early tenderer involvement could help in identifying risks and the best allocation of such risk.

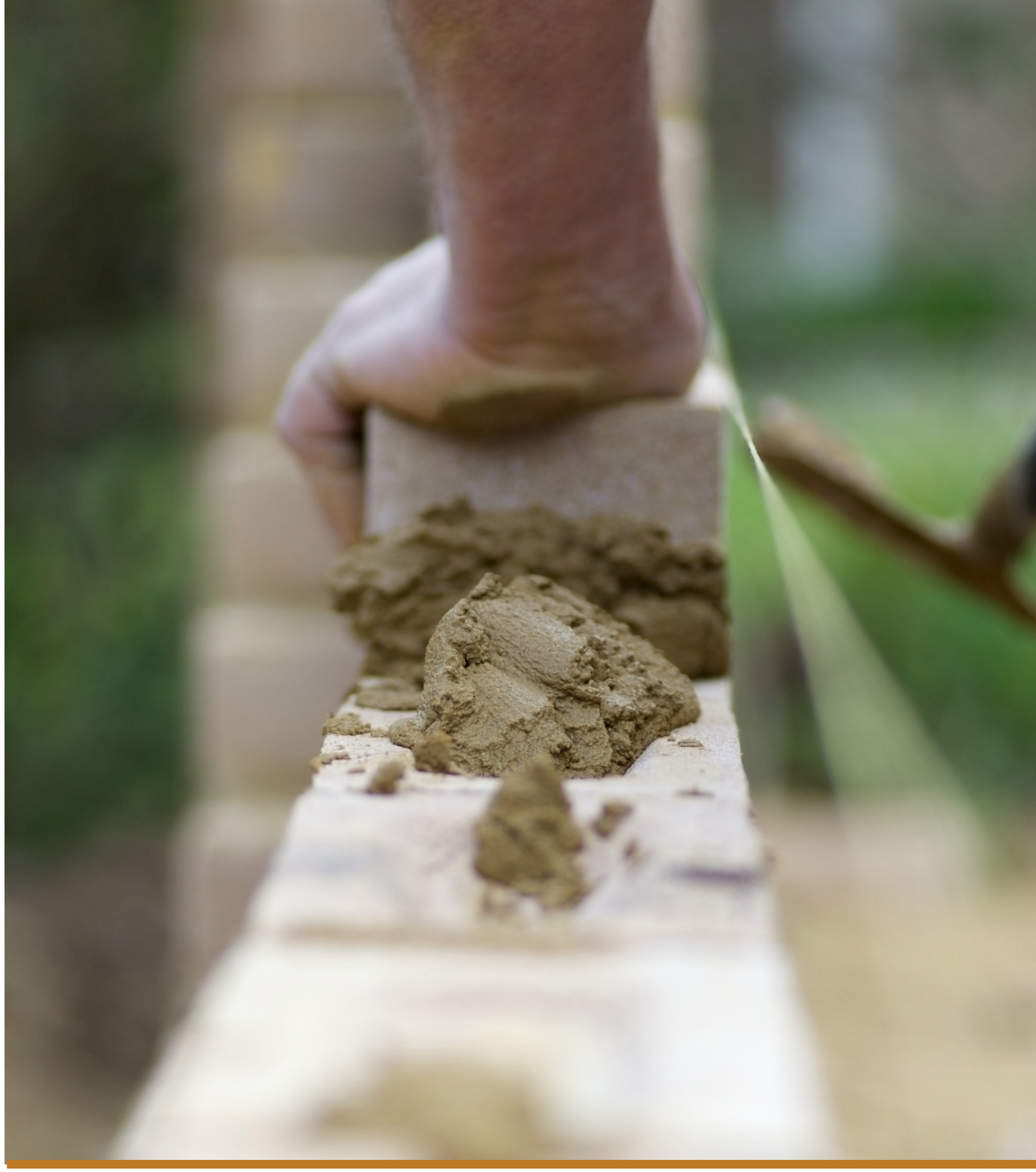
Addressing cost pressures through alternative pricing mechanisms such as rise and fall provisions and target pricing may, although creating some price uncertainty, potentially deliver better value for money. For example, where claims for rise and fall are permitted for commodity prices, if no increase occurs then the contractor is not entitled to claim anything further. Under a lump sum contract, the risk in cost increases may already be priced in by the contractor and would be payable even if the commodity price remained the same or decreased.

Similarly, for time sensitive projects local governments should consider where the time pressures lie and what could be done to alleviate these. For example, can a project be split to allow two contractors to undertake works or could a separable portion be created for the most urgent section, with a longer time frame permitted for the remaining work.

Key takeaways

Overall, local governments should be proactive in their procurement and tender process to ensure they are getting competitive tenders and value-for-money contracts. Although lump sum contracts are not dead and buried, and are still suitable for many projects, consideration should be given to other options available to get the best overall outcome and deliver value for money.

If you would like to discuss how you can implement these into your procurement and tender processes, please contact our Construction and Infrastructure Team here.



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Dealing with Queensland's housing crisis

In an effort to alleviate the current housing crisis, the Queensland Government has recently passed a number of amendments to the Planning Regulation 2017. In short, these amendments:

- remove restrictions on who can live in secondary dwellings, enabling homeowners to rent out secondary dwellings, such as granny flats, to anyone;
- allow the state and local governments to deliver emergency housing on a temporary basis in response to an 'event', without seeking planning approval;
- allow for an infrastructure designation to be made for social or affordable housing provided by a community housing provider or under a state-funded program;
- prohibit rooming accommodation from being assessable development under a planning scheme where it meets certain requirements in the low-density, low-medium density and general residential zones;
- remove the ability for certain overlays to regulate development of dwelling houses and rooming accommodation;
- allow for the re-purpose of underutilised facilities for rural workers' accommodation on premises nominated by the State; and
- allow for small scale rural workers' accommodation to proceed without a material change of use approval, when certain criteria are met.

Key takeaways

Local governments should be aware that any definitions prescribed under the Planning Regulation and amended by this recent suite of amendments apply instead of the definitions in the council's planning scheme, to the extent of any inconsistency.

If you would like to discuss the amendments to the Planning Regulation or would like assistance in reviewing and updating your planning scheme in light of the amendments, please contact our Planning and Environment team.

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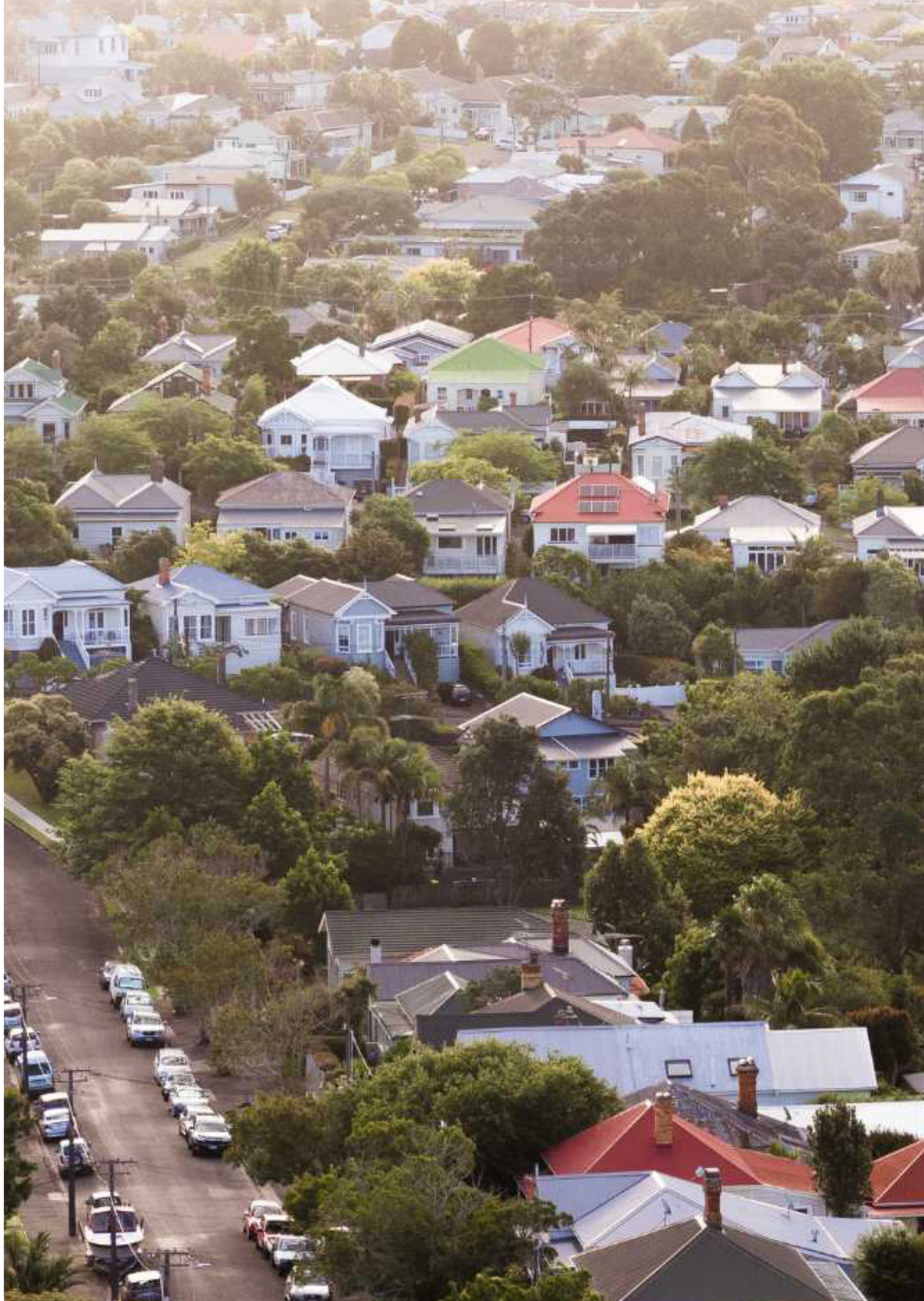

Maintenance standards for Council parks and public spaces – *Hodges v Townville City Council* [2022] QDC 272

The 2020 decision of the Court of Appeal in *Goondiwindi Regional Council v Tait* brought into sharp focus the extent of the immunities available to local governments under the *Civil Liability Act 2003* (Qld) for road maintenance.

The recent District Court decision in *Hodges v Townsville City Council* once again explores the extent to which the special rules applying to local governments can assist in shielding them from common law liability for negligence claims, this time in the context of park maintenance.

Background

Barbara Hodges liked to visit Sherriff Park situated on Love Lane at Mundingburra with her family. When visiting the park on 15 October 2015, she stepped into a concealed hole and badly injured her left leg. To compound her distress, when she was being transported from the location of the incident on an ambulance stretcher, the stretcher became caught in the same hole which caused it to fall, with Ms Hodges still on it.

The Council was sued for damages in negligence by Ms Hodges.

The Issues

It was common ground that Council was the occupier of the park and was responsible for its maintenance, such as to owe a duty of care to Ms Hodges.

The evidence established that there was indeed a concealed hole in the park surface which could have been as wide as 20 centimetres and as deep as six centimetres. The hole was located close to the adjacent car park, meaning park users regularly traversed the area, giving rise to a foreseeable hazard.

Council argued it had adequate systems in place to inspect and identify hazards of this nature. However, in evidence, Council was not able to establish who was responsible for such inspections and which of them had actual responsibility for maintaining the park surface.

Defences

Council had sought to rely upon the defence arising under section 35 of the *Civil Liability Act* which states, when considering the question of whether it had breached its duty, a council can rely upon evidence of compliance with its general policies and procedures as evidence of the proper exercise of its functions.

However, in the face of findings that none of the Council employees had appropriately inspected the area of the incident, the defence failed to find favour with the court. The court was also not attracted to the argument that Council's financial resources were so limited it could not have addressed the issue before the incident. Although the Council had adequate resources; the problem was it did not adequately implement its own systems.

Key take aways

Lessons for local governments to take away from this decision include:

- fundamentally, local governments owe a duty of care to maintain their parks and other public spaces to remove foreseeable risks of injury;
- where there are concealed hazards which pose a foreseeable risk to park users, courts will look unfavourably on arguments designed to downplay the problem;
- local governments must not only have good systems in place to identify and deal with risks, but those systems must be implemented and documented clearly. Local governments must be able to point to which of its personnel have responsibility for specific tasks; and
- courts may not be attracted to arguments about a lack of financial resources to address obvious risks where it is clear that existing resources can be deployed more efficiently and effectively and where the extent of works required are minimal.

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Team spotlight

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Stephen has more than 20 years experience practising in contentious and non-contentious insurance related matters.

He has managed claims in a number of policy classes including ISR, public and product liability, professional indemnity, disability, TPD and personal lines. He also advises on contract drafting, insurance program design and risk allocation strategies for construction and infrastructure projects.

Stephen has acted extensively for government and corporate insured clients in the construction, resources and infrastructure sectors and is adept at balancing the interests of these clients with their insurers. He has also developed claims management strategies which closely align with client risk allocation and their insurance programs.

His experience in managing risk and insurance for government and corporate clients means that he is able to assist with the design and review of contractual and insurance solutions which deliver greater certainty to project and operational exposures.

Stephen regularly conducts seminars and training for clients, most recently assisting clients to manage psychosocial risk and workers compensation claims.

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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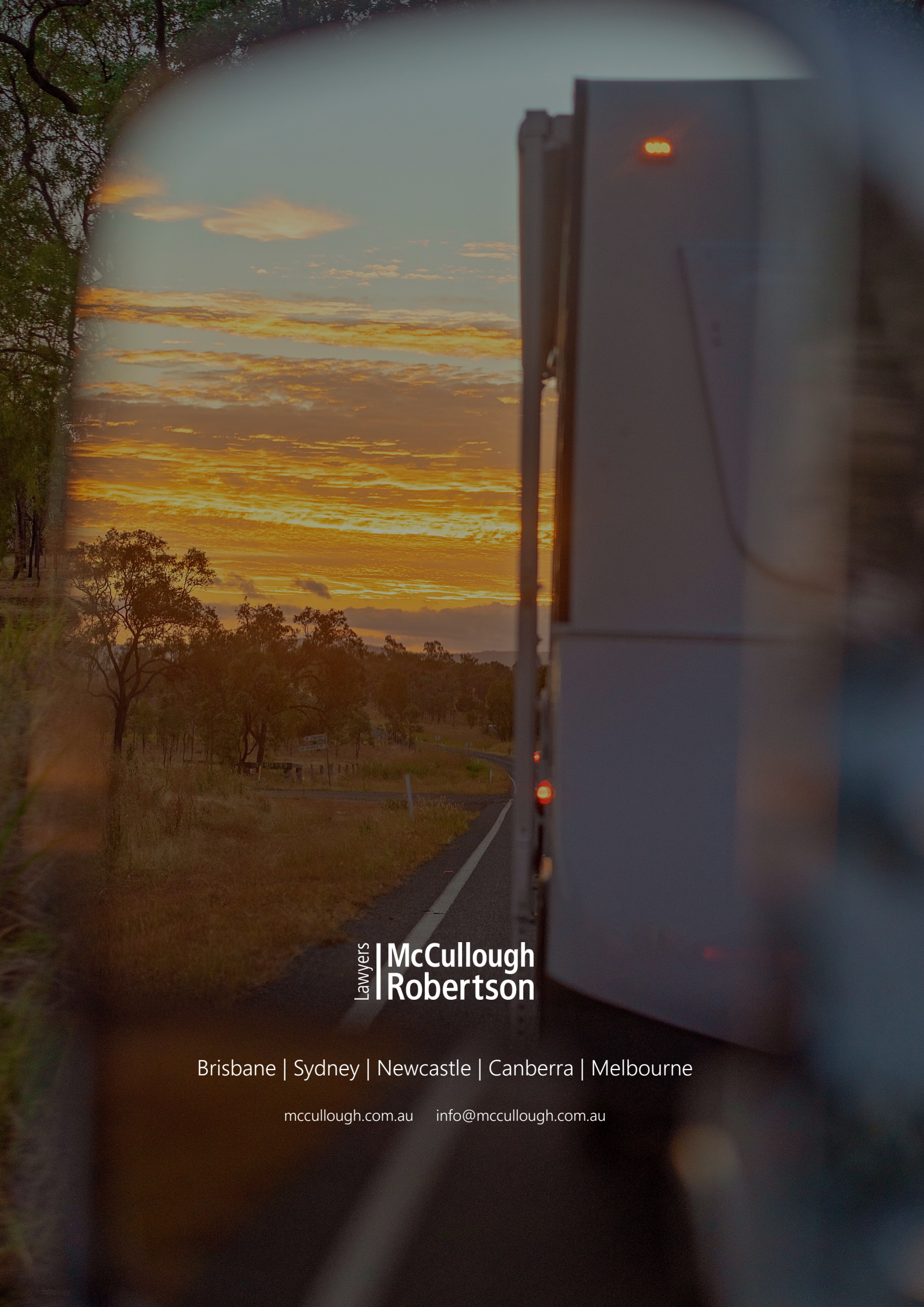

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