



# The Local Law

Navigating good government | September 2023

Lawyers | **McCullough  
Robertson**



# Welcome

We are pleased to bring you the September 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 look at the key changes proposed by the Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023 introduced into parliament on 13 September, explore the caretaker period arrangements, and review the various tools introduced by local Councils to deal with the housing crisis.

With more and more contractors forced into insolvency in the construction industry, we provide some key considerations for Councils when procuring projects, and provide insight into copyright considerations when using livestreaming platforms.

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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# Local Government Act set for amendment...again

On 13 September 2023, the Deputy Premier introduced the Local Government (Councillor Conduct) and Other Legislation Amendment Bill 2023 (**Bill**) into State Parliament. The Bill responds to the 40 recommendations made in the final report by the State Development and Regional Industries Committee (**Committee**) arising from the inquiry into the functions of the Independent Assessor and councillor conduct complaints system.

In introducing the Bill, the Deputy Premier advised the House that:

*'The proposed amendments in this bill address 19 of the recommendations made by the Committee which require legislative amendments to implement. It is the intention of the government that all 40 recommendations will be implemented before the local government elections in March.'*

## Key changes

The Bill proposed a number of changes to the councillor conduct framework set out in Chapter 5A of the *Local Government Act 2009* (Qld) (**Act**). Some of the most notable proposed changes to the Act include:

1. changing the name of 'inappropriate conduct' to 'conduct breach';
2. providing for situations in which the Chair of a meeting engages in unsuitable meeting conduct, which is not addressed in the current Act;

3. changing the definition of 'misconduct' to remove 'breach of trust' and replace it with 'non-compliance with an Act by the councillor';
4. limiting the application of the councillor conduct provisions to current councillors, not former councillors (unless they are re-elected in a short time period);
5. setting up a 'preliminary assessment' framework – clarifying the role of the Office of the Independent Assessor (**OIA**) when it first receives a complaint;
6. limiting the time for acting on a complaint to one year after the conduct occurs or six months after a complainant becomes aware of the conduct (effectively a limitation period);
7. requiring local government investigative reports (often conducted by third parties on behalf of Councils) to be publicised, subject to some information being withheld;
8. allowing the OIA to declare a complainant vexatious; and
9. changing the QCAT appeal process.

The Bill also includes proposed changes to chapter 5B of the Act, and introduces a new obligation to undergo training on the role of a councillor after being elected.

The Bill in its current form is subject to further change.

## Timeline for changes

The Bill has been referred to the Committee for consideration. Submissions to the Committee can be made by 3 October 2023, with the Committee's report due by 27 October 2023. Public hearings have not yet been scheduled.

Given the Deputy Premier's comments, it seems likely that the Bill will be passed prior to the Local Government elections scheduled for 16 March 2024 with commencement likely to coincide with the new term.

## Resources

The Bill can be accessed [here](#).

Information on the Committee's review of the Bill is available [here](#).

Details of the inquiry, and the associated Committee Report can be access [here](#).

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# Unpacking the Local Government Act – caretaker period

Welcome to Unpacking the Local Government Act, our regular column exploring the *Local Government Act 2009* (Qld) (LGA). In this edition, we turn back to Chapter 3 of the LGA to explore the caretaker period arrangements.

## What is the caretaker period?

Local governments should not be, or appear to be, politicised during a local government election campaign. They must not favour the interests of incumbent councillors and must remain politically neutral. This ensures that elections are free and fair, with incumbent councillors not getting an undue advantage by virtue of their existing office. The caretaker rules are in place to help local governments remain politically neutral.

Caretaker arrangements are common in government. Conventions and procedures exist at the State and Federal levels. For local governments, the caretaker rules are contained in sections 90A to 90D of the LGA.

## When is the caretaker period?

While some councillors might already be in 'campaign mode', the official caretaker period does not start until the date when public notice of the holding of the election is given by the Electoral Commission of Queensland. There is a window in which this can occur but

it is likely to be late January 2024. Given the 2024 quadrennial election is earlier than usual, we can expect the caretaker period to start earlier than it did in 2020.

## What are the restrictions?

There are two key caretaker rules:

1. no 'major policy decisions'; and
2. no publishing or distributing 'election material'.

## Major policy decisions

'Major policy decision' is defined in Schedule 4 of the LGA. It includes actions like:

1. appointing, dismissing or adjusting the remuneration of the CEO;
2. entering into large contracts (the greater of \$200,000 or 1% net rate and utility charges);
3. making, amending or repealing a local law or planning instrument; and
4. certain decisions under the *Planning Act 2016* (Qld) (PA). Importantly, not all decisions under the PA are major policy decisions and so appropriate mechanisms (including delegations) need to be in place to prevent deemed approvals if councillors are not meeting.

In our experience, large contracts are the biggest caretaker period risk for local governments. Thought should be given to what contracts may need to be entered into early in 2024, and either bring forward or delay their entry. A prohibited decision made during caretaker period is void (i.e. of no effect), and third parties can seek compensation from local governments for losses they suffer as a result of a void caretaker period decision.

Ministerial approval can be sought to make a major policy decision in exceptional circumstances, but local governments should not assume or expect an exemption to be forthcoming.

## Election material

Election material is anything able to, or intended to, influence an elector about voting at an election or affect the result of an election. While this obviously captures blatant campaign material, it can also capture more innocuous and routine publications, like a fact sheet or newsletter that raises the profile of a councillor. Thought should be given to all communication channels and whether otherwise routine updates could 'influence an elector'. For example, could a regular social media update about a divisional councillor's activities or improvement work undertaken by Council positively influence voters in favour of the incumbents?

The prohibition of publishing and distributing election material also extends to 'controlled

entities' of a local government, like companies or businesses owned by the local government.

## Key resources

More information on the caretaker period and the 2024 election generally can be found on the [Department's website](#).

The Electoral Commission of Queensland publishes a newsletter about the 2024 election called 'The Countdown'. It is available [here](#).

*If there is a particular area of the LGA you would like us to unpack, please email [Kristy Jacobsen](mailto:Kristy.Jacobsen).*

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# The builder has gone bust – what next?

The construction industry is facing delays and global supply issues exacerbated by the COVID-19 pandemic. As a result, we are seeing more and more contractors forced into insolvency. This poses a risk to Council projects, including potential stoppage of work, engaging replacement contractors who are unlikely to take on liability of the previous works, and therefore potential defect risks.

What action a party can take when a contractor is or may be insolvent will largely depend on the terms of the contract. In the majority of cases, a contract will have some form of termination right where an 'insolvency event' occurs. Parties should be aware that there are some statutory restrictions on exercising termination rights when a contractor enters administration. This is ideally to protect a contractor's limited opportunity to trade itself out of financial trouble during administration.

To ensure that the contracting party has as many options as possible in the event of contractor insolvency, it is important to consider what rights to include in the contract when procuring projects.

Some key considerations include:

1. ensuring that the definition of an 'insolvency event' is broad enough to encompass not only statutory forms of insolvency such as liquidation or administration, but other early warning signs of financial distress e.g. a failure to pay debts as and when due, or action by other creditors;
2. giving council a direct link to key subcontractors and where necessary, a right to assign those subcontracts to itself to ensure works can continue smoothly;
3. broad set-off rights to avoid further payments to the contractor. Also carefully consider when to apply those set-off rights. For example, are there any existing defects in the works, breaches of the contract, or other residual claims which can be quantified?

4. making sure that any security can be 'cashed in' in the event of contractor insolvency to sure up a cash pool for future claims for defects or completion of work;
5. rights to take over and use the contractor's plant, equipment and materials to continue works;
6. rights to sell plant, equipment and materials left onsite to settle any claims against the contractor; and
7. when exercising the right to terminate for insolvency, consider whether any other rights may be relied upon (e.g. termination for breach or non-performance).

The issue of contractor insolvency is here to stay, at least in the short term. Local governments will need to develop strategies to adapt to and protect against the flow-on-effects of insolvency. Ensuring that your contracts take insolvency into consideration can be a great first step.

To discuss the potential project risks, or if you need assistance in conducting a contract review for your projects, please get in touch with a member of our Construction and Infrastructure team.

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# Dealing with the 'housing crisis'

The State and local Councils have introduced various tools in an attempt to address the current housing crisis, including in relation to:

1. the regulation of secondary dwellings;
2. designations under the *Planning Act 2016* (Qld) (PA);
3. incentive policies; and
4. the regulation of short stay letting and home-hosted accommodation under local laws.

## Secondary dwellings

The Planning Regulation 2017 (PR) was amended in September 2022 to remove restrictions on who can live in secondary dwellings to enable homeowners to rent out secondary dwellings, such as granny flats, to anyone.

This was done by amending the definition of 'dwelling' and 'household' to remove the requirement that a dwelling be used for a 'single household' and that individuals must intend on living together on a long-term basis and make common provision for food and other essentials.

However, the secondary dwelling must still be 'used in conjunction with, and subordinate to' the other dwelling. The Planning and Environment Court has previously considered that this requires a nexus or functional connection between the two dwellings and that the second dwelling must be secondary to, subservient or dependant on the other.

Any definitions prescribed under the PR apply instead of the definitions in a local planning instrument, to the extent of any inconsistency.

The amendments do not remove the requirement to obtain any relevant development approvals, building approvals or requirements under other legislation, including in relation to fire safety.

If the dwelling is not a 'secondary dwelling', it may be a 'dual occupancy' and may require planning approval.

## Designations under the Planning Act

Both the State and local Councils can issue a designation under the PA. The PR was amended in September 2022 to allow a designation to be made for:

1. housing that is provided as part of a State funded program for social or affordable housing; and
2. social or affordable housing that is provided by a registered provider under the *Housing Act 2003* (Qld).

Development (except building work) undertaken in accordance with a designation is accepted development and does not require approval.

## Incentive policies

'Incentive policies' are being used to incentivise developers to carry out certain development, such as social and affordable housing and infill development (rather than greenfield development).

These policies provide for:

1. a reduction (either partial or 100%) in infrastructure charges; or
2. an extension to, or payment plan for, the payment of infrastructure charges.

Councils must issue an infrastructure charges notice in accordance with the PA, so these policies must be implemented by an infrastructure agreement.

## Local laws

In an effort to return houses to permanent housing stock, some Councils have introduced a new prescribed activity into their local laws for short stay letting and home-hosted accommodation. As a result, property owners

may have to obtain both a planning approval and a local law approval to operate short-term accommodation such as Airbnb.

Importantly, local law approvals:

1. are personal – they do not attach to land or pass to new owners of land;
2. often expire after one year and the holder must apply to renew the approval, giving Council an opportunity to reassess the proposal; and
3. can be suspended, cancelled and amended, including for a breach of conditions or repeated complaints.

McCullough Robertson is advising several local Councils in relation to these tools. If you would like to find out more, and how these changes impact you, contact a member of our Planning and Environment team.

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# Livestreaming – have you considered copyright protection and infringement?

With the advent of an increasingly remote and/or hybrid work culture, there has been an increase in the use of various livestreaming platforms, including in relation to the viewing of business, organisational, cultural and sporting events. However, this may leave open the possibility of infringing on third-party copyright materials, or having the livestream material shared without copyright protection.

Knowing your rights and obligations under copyright laws is important. Set out below are some key considerations.

## Copyright in livestreams

### What is a livestream?

A livestream is the live transmission of a video through an online platform such as YouTube, Facebook, Twitch, or other streaming platforms. It requires the compression, encoding/decoding, and distribution of data. Viewers are not required to download any file prior to watching the livestream, as the video file is transmitted in real time.

### Is my livestream protected under copyright?

Under the *Copyright Act 1968* (Cth) (**Copyright Act**), copyright automatically arises in original 'works' created and expressed in writing or in other material form. Importantly, copyright protects only the particular expression of an idea as fixed in a tangible form, and not the idea itself. For copyright protection to be enlivened, the subject matter will need to comprise a 'work' under the Copyright Act. Generally

speaking, copyright protection extends to the following types of works:

1. literary works (e.g. books, articles, reports, compilations and computer programs);
2. dramatic works;
3. musical works;
4. artistic works (including plans, drawings, photographs and buildings whether or not they are of artistic quality);
5. sound recordings;
6. cinematograph films;
7. certain broadcasts; and
8. published editions.

In the absence of a contrary agreement, the author of the work will be the entity that first expresses that work, and the author will be the first owner of copyright that subsists in that work.

For a livestream, despite the fact that the video signal is transmitted to an audience through a film data stream and received on a device as audio-visual material, a livestream that only takes place online is not a 'cinematographic film' as intended by the Copyright Act, as it lacks the 'expression in material form' requirement. Material form for films includes any form of storage of the work, such as a file in which the visual images or sounds comprising the film are embodied.

As such, generally speaking, no copyright subsists in a livestream that only takes place online. The only exception to this is if the

livestream is a 'broadcast' within the meaning intended by the Copyright Act. Namely, a livestream created and delivered in real time to the public by a licenced commercial, national or subscription broadcaster under the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**), such as ABC, SBS, Nine Network etc.

This position was reflected in a 2014 decision by the Federal Court in *Seven Network Ltd v Commissioner of Taxation* [2014] FCA 1411, in which it was held that the communication of data (that is not a material embodiment) to a receiver, cannot constitute a cinematograph film or broadcast under the Copyright Act. Therefore, for the purpose of copyright and broadcast laws, no protection is offered to livestreaming footage.

Despite this, a livestream that has been recorded and fixed into a tangible form is protected under copyright law, such as where the livestream is recorded and saved as a video file.

## Third-party copyright infringement

While organisations can enjoy the benefits of livestreaming their activities, caution must be taken to ensure that third-party copyright materials do not appear in these videos.

Some examples of third-party materials found at various types of places/events are set out below:

Place/event	Third-party copyright material
Concerts	Songs
Theatre/dance performances	Music, choreography, and scripts
Public/personal events	Background music
Galleries	Paintings, photographs, and sculptures

If third-party copyright materials are used in a livestream without permission of the copyright owner, then the entity responsible for the livestream will likely have infringed copyright, unless an exception applies.

## Key takeaways

With emerging platforms and software enabling livestreams to be created almost anywhere, keeping up with copyright laws is fundamental to ensure legal protection.

In particular:

1. livestreams are not protected under copyright laws unless recorded and saved as a video file, or created by a broadcasting service under the Broadcasting Services Act;
2. for an organisation that engages in livestreaming, it is important to have in place an appropriate livestream policy, as well as a copyright disclaimer published alongside any uploaded livestream recordings; and
3. creators also need to take care to ensure no third-party copyright material appears in their livestreams, otherwise they may be infringing copyright, unless an exception applies under the Copyright Act.

If you are interested in learning more, or require assistance with copyright in livestreams, a livestreaming policy, copyright disclaimer, or copyright in general including whether any exceptions to infringement may apply, please contact a member of our Digital and Intellectual Property team.

*Thank you to Renee Edwards for assisting with this article.*

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## Team spotlight



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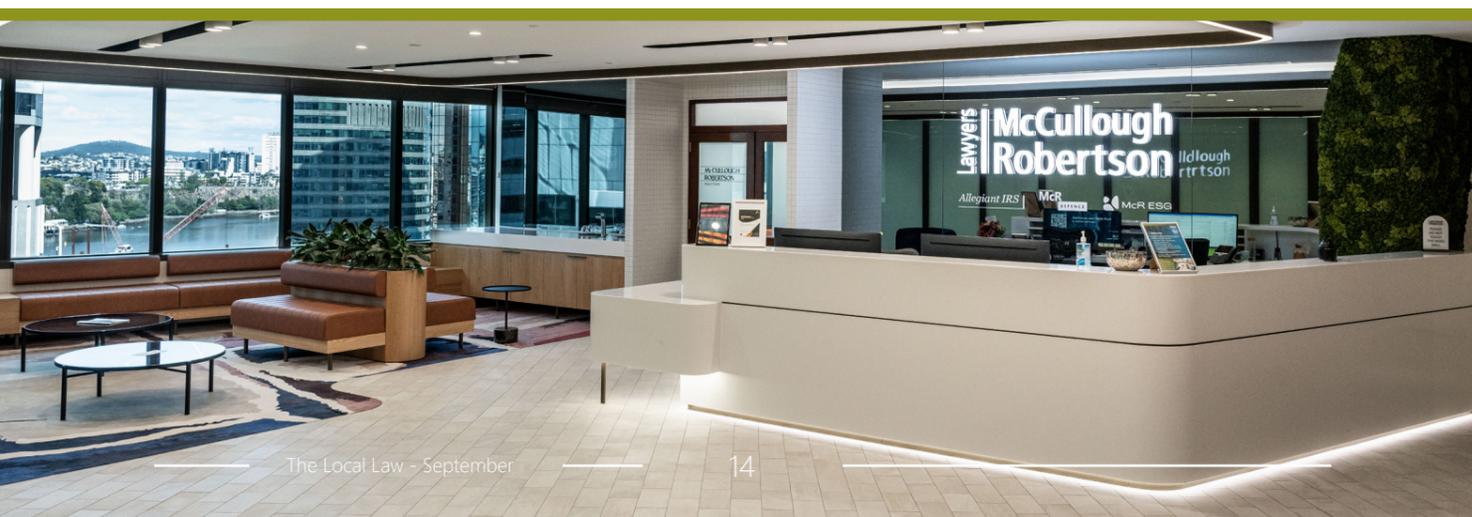
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As head of McCullough Robertson's Local Government Industry Group, Troy is passionate about the industry. His passion was embedded from an early age as the son of a Council CEO. Since starting his career, Troy has supported local governments for over 25 years. Helping them and the communities around them to succeed is part of his DNA.

Troy also leads the Planning and Environment team, specialising in government, planning and environment law. His practice focuses on planning and environment litigation, infrastructure agreements, judicial review and health prosecutions, and governance advisory particularly relating to councillor and staff governance obligations.

Troy is known for his deep industry knowledge of local government. He is proactive, a practical problem-solver and is down-to-earth in communicating with clients and team members. As a litigator, Troy is formidable with a proven track record of success in the court environment and also in negotiating positive outcomes for his clients.

Troy is dedicated to boosting the capacity and capability of his local government clients, as demonstrated by his involvement in the QELA Executive, presentations to the LGMA and in leading the firm's successful annual Local Government In-house Counsel Forum. He provides tailored training to local government clients across a range of topics including councillor conduct, conflicts of interest, approvals, development compliance, enforcement and planning and environment.



## 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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