

# APA

# Professional Development Seminar

# 2019

*The Year in Review*

23 May 2019

Presented by Cimon Burke

***Sestili v City of Port Adelaide Enfield***  
**Appeal Against Control (Menacing Dog) Orders**



# The Test

## Section 51, Dog and Cat Management Act 1995

*A council...may make an order in relation to a dog under this Division if satisfied that...*

- c) in the case of a **Control (Menacing Dog) Order**—*
  - i. the dog—*
    - A. is menacing; and*
    - B. has attacked, harassed or chased a person or an animal or bird, or is likely to do so, in circumstances that would constitute an offence against this or any other Act...*

# Background Facts

- Two dogs killed a cat on a Tuesday night whilst wandering at large through a suburban street
- The same dogs (and cat) were previously involved in a 'harass' incident
- A witness to the attack recognised the dogs as belonging to the appellant and phoned the Council immediately to inform it of the attack
- Control (Menacing Dog) Orders were placed on both dogs
- The dogs' owner appealed against the Orders

# Record of Interview

The ROI took place a month after the incident. The appellant:

- recalled her dogs having been off lead on the relevant street and hearing a ‘commotion’;
- recalled the dogs being yelled at by the witness (with whom she had had a previous encounter);
- expressed some confusion as to the timing of the incident; and
- made admissions regarding the hunting behaviours of the dogs.

# Court (Pre-trial) Process

- 15 May 2018 – Orders placed on dogs
- 24 May 2018 – First Notice of Appeal – Grounds are:
  1. Council erred in making the order as it could not establish that the dogs were menacing.
  2. Unduly punishing to dogs to be restricted to leads.
  3. Since the incident, assistance has been sought from an animal behaviourist.
- 8 June 2018 – first hearing before Master Rice

# Court Process

- 16 July 2018 – Second (amended) Notice of Appeal:
  - additional grounds of appeal
  - Council erred in making the order against the dogs as they were not involved in the attack on that date.
  - supporting affidavits filed
- July-October 2018 – Directions hearing & trial preparation
- 31 October 2018 - Trial



# Trial – Appellant’s Case

Appellant called three witnesses:

1. Appellant’s mother
2. Appellant
3. ‘expert’ (Bob Yeo)

# Trial – Appellant’s Case

1. **Appellant’s mother** gave alibi evidence (the alibi was never raised prior to amended Notice of Appeal being filed)
  
1. **Appellant’s evidence:**
  - her whereabouts the Tuesday night;
  - the dogs generally
  
1. **Bob Yeo** description of dogs’ play consistent with witness’ description of the attack.

# Trial – Council’s case

- Council witnesses
  1. Eye-witness to the attack
  2. Investigating officer
  
- Appeal Book:
  - previous phone records
  - recommendation report
  - interim submissions from appellant

# Investigatory Issues

- No statement from the second Neighbour
- No veterinary assessment of deceased cat or swabs taken
- Council's communication with eye-witness regarding action taken

# Outcome

- Appeal Dismissed
- Master Rice's Position:
  - Appellant was a poor witness who was '*confusing and confused*';
  - Appellant's mother was '*unconvincing and unreliable*';
  - the evidence from the eye-witness was '*truthful and accurate*';
  - it was highly unlikely that there were two events with two dogs observed by the same witness on both a Tuesday and Thursday of the same week.

# With the Benefit of Hindsight...

- Communication with complainants (how much information to provide and when)
- Attendance at dog owner's residence
- Ensure adequate particulars of incident provided to accused
- Consideration given to obtaining scientific evidence
- Speak with all relevant parties

# *City of Charles Sturt v Borg*



12/12/2017 15:03







# The Offence

## **Rule 169, Australian Road Rules**

***No stopping on a road with a yellow edge line***

*A driver must not stop at the side of a road marked with a continuous yellow edge line.*

# Background

- Expiation notice issued
- Informally contested in writing:

*I was not stopped... I was in a moving queue to pick up my daughter... The problem with the lane is once people pick up their kids they are unable to leave because the street becomes gridlocked with traffic trying to come down the opposite way and because people are parked on the other side of the road*

- Driver elected to be prosecuted

# Evidence

- Multiple photographs
- Observations of two officers
- Historic EzyReg Search record

# Defence

## *Rule 165—Stopping in an emergency etc or to comply with another rule*

*It is a defence to the prosecution of a driver for an offence against a provision of this Part if—*

- a. the driver stops at a particular place, or in a particular way, to avoid a collision, **and** the driver stops for no longer than is necessary to avoid the collision;*

# Court Process

- 12 June – first hearing, no attendance by accused, ex parte leave granted, matter determined
- 2 July – application for rehearing lodged
- 23 July - application heard and granted, matter listed for PTC
- 4 September – PTC, listed for trial 23 November
- Historic EzyReg Search record

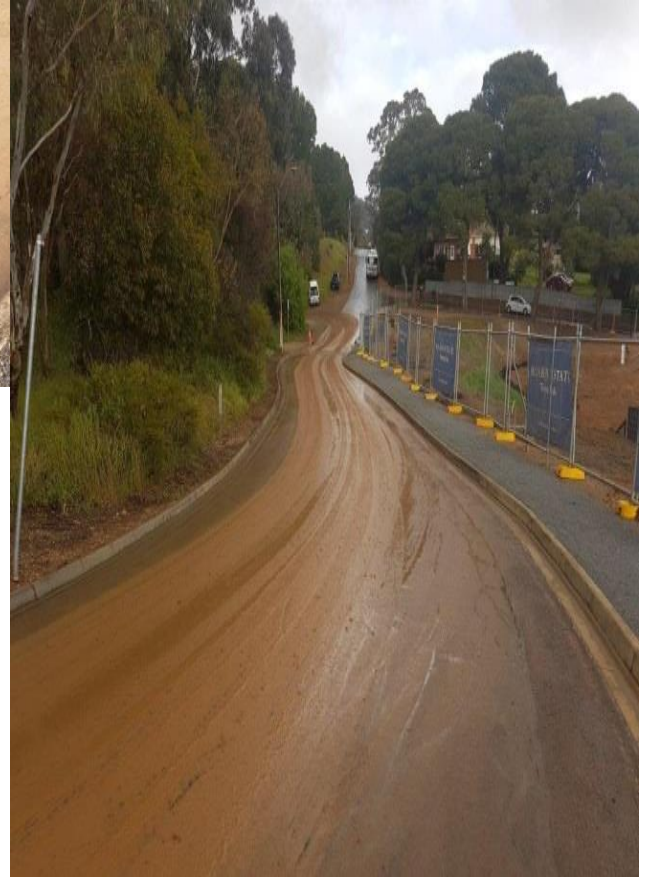
# Negotiations & Outcome

- Letter outlining Council's position including re costs
- Lawyer engaged, written response:
  - Did not stop (within meaning of the term)
  - Did not have clear line of sight to overtake
  - Problematic traffic conditions known to the Council
  - Not in public interest to prosecute
- Offer verbally made on Council instructions
- Expiation fee paid and charge withdrawn



# *What a Drag (Out)*







# The Complaints

- Dust
- Drag Out – water pollution and spread of dirt to neighbouring properties
- Vibration

# The Test - Litter

## *Section 22 LNLC Act — Disposing of litter*

- 1) *A person must not dispose of litter onto any land or into any waters.*
- 2) *For the purposes of subsection (1)—*
  - a) *if litter is discarded, **deposited, blows or falls from...a vehicle** onto land... it is taken to have been disposed of onto the land...; and*
  - b) *a person will be taken to have disposed of litter onto land...if the person **caused or allowed** the litter to be disposed of onto the land or into the waters;*

# The Test - Nuisance

## *Section 17 LNLC Act — Meaning of local nuisance*

- (1) For the purposes of this Act, local nuisance is—*
- a) any adverse effect on an amenity value of an area that—*
    - i. is caused by—*
      - A. noise, odour, smoke, fumes, aerosols or **dust**; or*
      - B. ...*
      - C. any other agent or class of agent declared by Schedule 1; **and***
    - ii. unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area.*

# Enforcement Strategy

- Litter abatement notice
  - Street sweeper frequency
  - Closure of site when rain forecast
  - Installation of rumble grid on internal roadway
  - regular monitoring
  - cover loads
  
- Nuisance abatement notice
  - Water truck treatment prior to use of street sweeper
  - How fill stored on the land (i.e. locate stockpiles so protected from wind)
  
- ‘Show cause’ letter to developer – last warning regarding expiation/prosecution



# Unreasonable Complainant Behaviour

- Written response re Council position (strike balance regarding degree of information provided)
- Policy – NSW Ombudsman guidelines
- No further engagement where same issue repeatedly raised

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LAWYERS

Lead

Reason

Advise

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