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VICTORIA'S RATES CAP – EFFECTIVELY GONE

Last night, the Victorian Supreme Court, after two years of deliberation and in 87 pages of reasons, delivered a Judgement of profound significance to all Victorian ratepayers and municipal councils. The Judgement finds that a 'work around' to the rates cap applied by Mornington Peninsula Shire Council was valid. The 'work around' was the recoupment of Council's municipal-wide waste disposal costs via a Waste Service Charge imposed as an extra to its 'capped' general rate.

This KA NewsFlash provides an immediate 'alert' to the key fundamental and highly significant findings.

Mornington Peninsula beach box occupiers challenged the Waste Service Charge on the basis that they could not and did not receive Council waste collection, as they were required by their licences to remove their own waste at their own expense. They argued that a Waste Service Charge could only be imposed for a 'service'.

In a robust, comprehensive Judgement, Cavanough J found that an annual service charge could be imposed on any rateable land in the municipal district, to recover the cost of services proposed to be provided by the Council in the nature of the collection and disposal of refuse, whether those services were to be provided to particular properties in the municipal district or to the 'local community' more broadly. He considered it mattered not whether Waste Service Charge amounted to a tax. He accepted that the beach box occupiers, as a class, stood to gain some direct or indirect benefit from each of four waste-related 'services' Council provided i.e., beach cleaning, foreshore litter bins, drain clearing and waste disposal vouchers.¹

He held that Council's estimate or forecast of the total cost of the relevant future expenditure would need to be made carefully and that 'probably' a Council should not deliberately impose a rate or a charge or a combination thereof designed to produce revenue substantially in excess of the estimate total costs of providing waste services.²

Referring to LGA definition of 'local community', and the objectives, functions and powers of a Council, along with Best Value Principles, His Honour found:

'On reading the Act as a whole, [and the above provisions], it may be said that the predominant concept of 'service' or 'services' in the Act is the concept of services to the local community, rather than particular services to individuals. The Act is also at pains to ensure that Councils will have the power to ensure that they have the resources necessary to provide such 'services'. The tenor of the Act as a whole thus favours the view that a Council may declare an annual service charge for a 'service' or services' to its local community or for services to individuals or for both, as it sees fit.'

Here is the background story ...

Victorian Councils over recent years have experienced increased pressure to fund their own waste management operations. This arises from the global waste management industry fluctuations, further

¹ [para 19, page 8].

² [para 153, page 71]

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exacerbated by the refusal of some Asian countries to accept co-mingled waste³. Some waste collection companies tied into Council contracts have buckled⁴. Waste disposal is a major national environmental issue and a heavy impost on Council budgets.

On 12 June 2018, Mornington Peninsula Shire Council (Council) passed a resolution that included:

'13. An annual Waste Service Charge be declared for the collection and disposal of municipal waste refuse.

14. the annual Waste Service Charge be \$242 for each rateable property ...'.⁵

A statement in its Adopted Budget explained that:

*"Waste Service Charge is based on the **full cost recovery of waste services** including collection, disposal, street sweeping, footpath sweeping plus street and drain litter collection. The increase in costs in providing these services during the year and the impact of China's ban on recycling imports required the Council to further review the Waste Service Charge and the Council determined to increase it to \$241 from \$197, which reflects 22.3% increase on the previous year." [emphasis added].*

The Local Government Act

s162(1) and (2) LGA, provide:

- (1) A Council may declare a service rate or an annual service charge or any combination of such a rate and charge for any of the following services –
 - (a) the provision of a water supply;
 - (b) **the collection and disposal of refuse;**
 - (c) the provision of sewage services;
 - (d) **any other prescribed service.** [emphasis added]
- (2) A service rate or service charge may be declared on the basis of **any** criteria specified by the Council in the rate or charge. [emphasis added]

³ In 2018 China introduced its "National Sword" policy, banning the importation of prescribed categories of waste and introducing contamination thresholds - Mike Ritchie - 'China's National Sword policy' March 2018 - received 19 March 2018.

⁴ For instance, in August 2019 *SKM Recycling Group*, one of Victoria's largest municipal waste disposal providers was made insolvent after the Victorian Supreme Court granted "winding up" orders⁴. A decision which was made after the Victorian Government refused to bail out *SKM*. By cutting corners, such plants have caused disastrous environmental and health consequences. In 2017 massive stockpiles of combustible waste at *SKM Recycling's* Coolaroo site went up in flames – forcing hundreds of local residents to evacuate while the fire blazed for 11 days. As a result, *SKM Recycling* and its director were charged with environmental offences in early 2019.⁴ In their investigation of the matter, the Environmental Protection Agency (EPA) stated that inspections revealed breaches of safety regulations and a failure to meet the requirements of Victoria's Waste Management Policy. By cutting corners, such plants have caused disastrous environmental and health consequences. In 2017 massive stockpiles of combustible waste at *SKM Recycling's* Coolaroo site went up in flames – forcing hundreds of local residents to evacuate while the fire blazed for 11 days. As a result, *SKM Recycling* and its director were charged with environmental offences in early 2019.⁴ In their investigation of the matter, the Environmental Protection Agency (EPA) stated that inspections revealed breaches of safety regulations and a failure to meet the requirements of Victoria's Waste Management Policy <https://www.abc.net.au/news/2019-07-24/skm-recycling-in-victorian-supreme-court-over-unpaid-debts/11342194> accessed 20072021; <https://www.epa.vic.gov.au/about-epa/news-media-and-updates/news-and-updates/epa-requires-skm-to- cease-accepting-new-materials-at-laverton-north-site> accessed 260721.

⁵ The 2018 resolution also included two exceptions that are not relevant to the legal issues in this case.

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The beach box occupiers held licences or permits to occupy foreshore sites pursuant to s 17B *Crown Land (Reserves) Act 1978* (Vic).

Part 8 LGA deals with rates and charges on rateable land, s 155LGA identifies the rates and charges that a Council may declare: being 'general rates', 'municipal charges', 'service rates', 'service charges', 'special rates' and 'special charges'. Each year, Council must declare the amount it intends to raise from general rates and any municipal charge or service rate or charge.

Boatshed Occupiers' Case

Mornington Peninsula Beach Box Association Inc (MPBBA) and one MPBBA licensee brought action. MPBBA is a representative body comprised of persons who hold licences to occupy.

MPBBA argued that s162 LGA requires a connection between a 'service charge' and the provision of a service to particular rateable land. Absent that connection and the exercise of the power to declare a Charge is invalid.

Its evidence was that Council did not provide waste management services to beach box sites or to their occupiers, including collection and disposal services or rubbish bins. For foreshore campers, Council installed public rubbish bins that it removed during non-camping periods. Year-round bins on the foreshore were marked for street litter only and not for commercial or household use with penalties applied.

MPBBA maintained that Part 8LGA recognises an important distinction between 'rates' and 'charges' and that the ordinary meaning of 'charge' is the price required for services rendered⁷ and that 'for any ... service', meant 'in return for' such a service, noting the Rating Better Practice Guidelines. It argued and that, whilst LGA gives a Council great flexibility in setting a service rate or charge, it does not permit it to ignore the fundamental difference between a rate and a charge or the need for connection.

It referred to caselaw, particularly *Airservices Australia v Canadian Airlines*⁸ that it argued that:

1. the purpose of general rates is to 'build up' the revenue of the Council.
2. to constitute a fee for service, some service must actually be provided to the person liable to pay.
3. there exists a well-established distinction between a tax and a fee for service in the constitutional context.⁹

Council's case

Council argued that the appropriate approach was to apply the plain text of the statute which must have primacy over statutory intention or purpose. It argued that Council had power to impose an annual service charge on rateable land based on **any** criteria specified by it and rejected the need for a connection. It distinguished caselaw regarding 'fee for service' and

⁷ Plaintiff's submission, 7[26]; *Oxford English Dictionary*, definition of 'charge'; 112 *Acland Street Pty Ltd v ANZ Banking Group Ltd* (2002) 4 VR 372 at [22]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at [57]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]], [26], [28].

⁸ (1999) 202 CLR 133.

⁹ *Ibid.* 12[43].

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argued that dictionary definitions were unhelpful as there were various ordinary meanings of the term 'service'.

It further argued that, on the balance of probabilities, the Court could not be satisfied that there was no direct or indirect benefit to boatshed occupiers and that the evidence of street rubbish bins and beach bins during busy periods, confirmed the provision of services that provided a specific benefit to them, even if only by improving amenity.

Additional issues of note

The case argued and the Judgment raised a number of other important and interesting legal issues that fall outside this 'early alert' memo.

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¹⁰ MPBBA (web) <http://www.mpbba.org.au/gallery/gallery.html> accessed 260721.