

24

Tips and traps in dealing with appeals and reviews from animal management decisions

BARRY DUNPHY

Partner, Government Services Group, Clayton Utz

Australian Institute of Animal Management Annual Conference

Legal Issues and Trends - Animal Management Issues

Barry Dunphy - Partner, Clayton Utz

13 October 2011

© Clayton Utz

Overview

- Key Legal Issues and Trends Across Australia
- The recent state of play in Queensland
 - . The role of the Queensland Civil and Administrative Tribunal (**Tribunal**)
 - . Key legal issues

CLAYTON UTZ

Overview

- Investigations and Decision-Making Process
 - . Best practice investigation procedures and processes
 - . Decision-making frameworks
- Emerging Issues in this area

CLAYTON UTZ

Relevant Legal Issues and Trends Across Australia

Key Emerging Legal Issues

- The accurate identification of the offending animal
- Gathering contemporaneous evidence
- Establishing that a dog is a particular breed of dog
- Public interest considerations and the reviewability of local government decisions

CLAYTON UTZ

Trends

Recent Issues:

- Recurring media attention on Pitt Bull dogs in Australia
 - . 4 year old mauled to death by Pit Bull on 17 August 2011 in Melbourne
 - . That incident followed other attacks in 2007, 2009, 2010 and 2011 involving injuries allegedly caused by Pit Bulls
 - . Each incident has sparked questions about the ownership of Pitt Bulls

CLAYTON UTZ

The State of Play in Queensland - Role of QCAT

The State of Play in Queensland

Overview

- The Role of the Tribunal
- Key Emerging Legal Issues

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- The Tribunal has three types of jurisdiction:
 - **Original Jurisdiction** - where the Tribunal has the jurisdiction to decide matters at first instance;
 - **Review Jurisdiction** - where the Tribunal exercises the jurisdiction to review administrative decisions made by government agencies and statutory bodies; and
 - **Appeal Jurisdiction** - where the Tribunal has the jurisdiction to hear and decide appeals from earlier QCAT decisions, decisions under certain enabling Acts and decisions of statutory officers.

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- The Tribunal's Review Jurisdiction is the most relevant jurisdiction for animal management issues
- This is because the Tribunal, in this jurisdiction, is the external review body for the majority of animal management related decisions made by Local Governments
- Examples of these types of decisions include:
 - Declarations declaring dog dangerous
 - The seizure of an animal
 - The euthanizing of an animal

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- In exercising its Review Jurisdiction, the Tribunal may:
 - Confirm or amend the original decision (s.24(1)(b) of the QCAT Act);
 - Set aside the decision and substitute its own decision (s.24(1)(a) of the QCAT Act); or
 - Set aside the decision and return the matter for reconsideration to the decision-maker with any directions that the Tribunal considers appropriate (s.24(1)(c) of the QCAT Act).

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal.

- There are several procedural and legal issues affecting how matters are heard in the Tribunal
- Section 22 of the QCAT Act provides that the start of proceedings for the review of a reviewable decision under the QCAT Act does not affect the operation or implementation of the reviewable decision unless:
 - The Enabling Act (which does not include a statutory instrument under the Statutory Instrument); or
 - The Tribunal has made an order staying the operation of the decision under s.22 of the QCAT Act and the order is still in effect.

CLAYTON UTZ



.....

.....

.....

.....

The State of Play in Queensland

The Role of the Tribunal.

- There are several procedural and legal issues affecting how matters are heard in the Tribunal
- Section 22 of the QCAT Act provides that the start of proceedings for the review of a reviewable decision under the QCAT Act does not affect the operation or implementation of the reviewable decision unless:
 - The Enabling Act (which does not include a statutory instrument under the Statutory Instrument); or
 - The Tribunal has made an order staying the operation of the decision under s.22 of the QCAT Act and the order is still in effect.

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- This may be problematic in cases where the decision in question is a decision to euthanize an animal
- Section 21 of the QCAT Act provides that a decision-maker must use their best endeavours to assist the Tribunal in reviewing the particular decision. This will include the provision of relevant documents to the Tribunal

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Under s.67 of the QCAT Act the Tribunal or the Principal Registrar may direct the parties to a proceeding to attend one or more compulsory conference/s

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- There are specific requirements for experts who are called to give evidence by parties

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Practice Direction 4 of 2009 is of key importance
- The key requirements for Practice Direction 4 2009 include:
 - Parties can only call one expert from each area of expertise;
 - An expert's duty is to assist the Tribunal - this overrides any duty to the parties.

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Experts must attend a conclave
- A Conclave:
 - Involves each party's experts and a Tribunal member
 - Has the purpose of identifying areas of agreement and disagreement between the experts
 - Requires the experts to prepare a joint report
 - Provides that, other than matters included in the joint report, anything said at the conclave is inadmissible in the proceedings

CLAYTON UTZ



.....

.....

.....

.....

The State of Play in Queensland

- Experts are to prepare a written statement of evidence:
 - If a joint report prepared, that is taken to be a statement of evidence;
 - May prepare further statement of evidence relating to any issue of disagreement recorded in the joint report; and
 - Cannot contradict, depart from or qualify an opinion about an issue raised in the joint report, or raise a matter not dealt with in the joint report, without leave of the Tribunal.

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Parties are to represent themselves unless the interests of justice otherwise require (s.43(1) of the QCAT Act)
 - Leave from Tribunal is required for a party to be legally represented (s.43(2)(b)(iv) of the QCAT Act)

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Circumstances that the Tribunal may have regard to in considering whether to grant legal representation have included (s.43(3) of the QCAT Act):
 - The party is a State agency;
 - The matter involves complex questions of fact or law;
 - Another party to the proceedings is represented; and
 - All parties have agreed.

CLAYTON UTZ

The State of Play in Queensland

The Role of the Tribunal

- Early QCAT decisions indicate that the Tribunal is reluctant to grant leave for legal representation
- Leave of Tribunal not required for legal assistance in relation to the preparation of the case and necessary documents
- However, there are several decisions where leave has now successfully been obtained
- The QCAT Rules allow an entity to be represented by an officer of that entity

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

- Identification of offending animal
- Contemporaneous evidence
- Breeds of dogs
- Public interest considerations and reviewability of local government decisions

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

Identification

- Review of council decisions by QCAT requires the Tribunal to decide whether or not the applicant's dog was in fact responsible for the offence
- In *Graham v Lockyer Valley Regional Council* [2011] QCAT 151, the Tribunal set aside the Council's decision to declare three dogs as "dangerous". This was because it was not reasonably satisfied on the balance of probabilities that the dogs owned by the applicant were responsible for the attack.

CLAYTON UTZ



The State of Play in Queensland

Key legal issues

Contemporaneous evidence

- In *Gala v Fraser Coast Regional Council* [2010] QCAT 576, the council ordered the seizure and destruction of a dog following the killing of a number of sheep and rams in a yard which was part of a school environment
- Witnesses included a school cleaner, a teacher, the school principal, the Council's Compliance Officer and the Council's Executive Manager

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

- Key issue in *Gala* was whether the dog was found with visible traces of blood following the incident
- The Tribunal took note of the oral evidence provided by each of the witnesses
- "The duty of the Tribunal is to make its own mind as to the facts that are proved by the evidence and the inferences that should be drawn from those facts, giving appropriate weight to the opinion of the original decision-maker"
- Conclusion: the dog was seriously implicated in the direct attack and death of the sheep and rams

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

Breeds

- Different breeds and cross-breeds of dogs presents challenges for the AM Act
- In *Chivers v Gold Coast City Council* [2010] QSC 098, the council ordered that a dog be destroyed because it was an American Pit Bull Terrier and contravened local policy
- Applicant argued that the dog was in fact an American Staffordshire Terrier breed and therefore allowed
- Court held that the two breeds were biologically if not semantically identical and thus the seizure was valid

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

Public interest test

- *Van Cuylenburg v Tablelands Regional Council* [2010] QCAT 274
 - Concerned an application for review of a decision by the Council to declare two dogs owned by the applicant to be regulated under the Act.
 - "Determining what is in the public interest in this case requires in the view of the Tribunal a consideration of the provisions of the Animal Management (Cats and Dogs) Act 2008."

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

- In that case, the Tribunal refused to grant the applicant a stay of the Council's decision.
- "It is in the public interest that the respondent is able to carry out its statutory responsibility... of ensuring that regulated dogs are not a risk to community health or safety with all reasonable diligence and independence. It is in the public interest that the functions of the respondent... are not unnecessarily impeded in ways that would tend to undermine the integrity of the statutory scheme for the protection of the public against regulated dogs."

CLAYTON UTZ

The State of Play in Queensland

Key legal issues

- As the Tribunal review process is a merits review process, this means that:
 - The decision maker should ensure that procedurally, its decision-making processes are reasonably sound
 - The decision maker has a sound evidentiary basis to reach the factual conclusions that underpin the final decision
- This highlights the need for decision makers to conduct sound and robust investigations and to have appropriate decision-making processes

CLAYTON UTZ



Investigations and Decision-Making Processes

Investigations and Decision-Making Processes

Overview

- . Best Practice in Investigation Procedures and Processes
- . Planning an Investigation
- . Evidence Gathering and Analysis
- . Making Findings of Fact
- . Documenting Your Decision

CLAYTON UTZ

Investigations and Decision-Making Processes

- Decision-Making Framework
 - . 10 steps for Decision-Making
 - . Decision making guides

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- A failure to properly plan and scope an investigation can have serious adverse consequences.
- Scoping and planning an investigation includes:
 - . Determining the scope and purpose of the investigation;
 - . Developing terms of reference for the investigation;
 - . Considering the resources necessary to conduct the investigation;
 - . Considering deadlines for completion of the investigation.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- . Consider the scope of the relevant legislative framework
- . The Animal Management (Cats and Dogs) Act 2008 (Qld) (**AM Act**) stipulates the obligations that are placed on owners, sellers and care givers.
- . In particular, the AM Act provides for:
 - . the identification and registration of cats and dogs;
 - . the effective management of regulated dogs; and
 - . responsible ownership practices.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Under s.89 of the AM Act, a local government may declare a particular dog to be:
 - . A dangerous dog;
 - . A menacing dog; or
 - . A restricted dog.

CLAYTON UTZ



Investigations and Decision-Making Processes

Investigation Best Practice

- Authorised persons have powers of entry under s.111 of the AM Act to investigate, monitor and enforce compliance with the Act.
- Under s.123 of the AM Act, an authorised person may request the occupier of a place or person in close vicinity to help. The person must provide reasonable help unless he or she has a reasonable excuse.
 - Non-compliance with this provision carries a maximum penalty of 8 penalty units.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Dogs may be seized under s.125 of the AM Act if:
 - An authorised person reasonably believes the dog has attacked or threatened to attack a person or another animal;
 - The dog poses a risk to the community;
 - The dog is a restricted or regulated dog and the relevant permit application or compliance notice has not been adhered to; or
 - The dog is in a public place.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Section 127 of the AM Act provides authorised persons with the power to destroy seized regulated dogs and to serve destruction orders on owners
- Authorised persons may also ask a police officer for help in exercising particular powers under s.138 of the AM Act

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Authorised persons have the power to issue compliance notices (s.132) and the power to require a person to state their name and address (s.139).
- The Governor in Council may make regulations under s.210.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Establishing the Evidence
 - Prior to gathering evidence, the investigator needs to be clear in understanding what must be established to successfully make out or establish the breach or offence in question

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Identification and Gathering of Necessary Evidence
 - The key to conducting a comprehensive investigation is the investigator having the capacity to identify and obtain all of the evidence that is relevant to the investigation.
 - Determining an investigation without all the relevant evidence can have adverse legal and practical consequences.

CLAYTON UTZ



Investigations and Decision-Making Processes

Investigation Best Practice

- The key issues to consider in building this capacity include the following:
 - The identification of specific documents and/or witnesses relevant to the investigation;
 - The order of interviewing witnesses;
 - Structuring interviews;
 - Techniques and skills in interviewing witnesses;
 - An understanding of the rules of evidence and relevant evidentiary standards; and
 - Drafting and preparing witness statements and affidavits.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Identification and Gathering of Necessary Evidence
 - Types of Evidence
 - Direct
 - Evidence of senses - saw, heard, felt, smelt, tasted.
 - Circumstantial
 - indirect evidence from which facts may then be inferred
 - Both types of evidence has to be relevant, reliable and logically probative - i.e. be capable of affecting the assessment of whether a fact that is in issue exists.
 - Both types of evidence can be applied to establish facts in an investigation.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Identification and Gathering of Necessary Evidence
 - Sources of Evidence
 - Oral
 - Documentary
 - Expert evidence
 - Most investigations are likely to primarily involve oral and documentary evidence
 - Investigators should map out in an investigation plan all likely sources of evidence

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Analysis of Evidence
 - Only consider evidence that is relevant to deciding whether the breach has occurred.
 - Have parties who will be adversely affected by the investigation been given the opportunity to respond to new or conflicting evidence?
 - Have other witnesses been questioned about evidence that is in conflict with their witness statements?
 - Have any alternative plausible explanations provided by the witnesses been properly considered?

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- When making a judgement about the reliability of the evidence:
 - primary sources of evidence are clearly preferable to secondary sources (i.e. an original document is better than a photocopy, direct eye witness evidence is better than hearsay evidence);
 - disputed facts should, if possible, be corroborated by other evidence;
 - give consideration to the weight that should be placed on hearsay evidence; and
 - consider the credibility of the witnesses - inconsistencies, honesty, the possibility of collaboration or improper purpose.

CLAYTON UTZ

Investigations and Decision-Making Processes

Investigation Best Practice

- Documenting your Decision
- Consider any statutory pre-conditions or time limits
- Be careful to carefully document the decision made. Be mindful of any statutory requirements regarding record keeping
- Remember that proper records will be highly relevant if the decision is sought to be reviewed

CLAYTON UTZ



Investigations and Decision-Making Processes

Decision-Making Framework

- There are numerous models which can be utilised to aid in the decision-making process.
- There are three key issues when developing a decision-making framework:
 - . Planning;
 - . Consistency; and
 - . Monitoring and Review.

CLAYTON UTZ

Investigations and Decision-Making Processes

Decision-Making Framework

- Analysis of the decision;
- Identify the decision-making steps;
- Gather evidence;
- Make findings of fact;
- Consider relevant criteria and policies;
- Examine the merits;
- Exercise the discretion;
- Record the decision;
- Implement the decision; and
- Review mechanisms.

CLAYTON UTZ

Investigations and Decision-Making Processes

Decision-Making Framework

- Analysis of the Decision
 - . Identify the decision maker who has the power;
 - . Identify the relevant considerations to the decision making process;
 - . Understand the applicable procedures and potential review mechanisms.
- Steps in the Decision
 - . Are there statutory prescribed procedures?
 - . Do particular facts and/or considerations have to be established?

CLAYTON UTZ

Investigations and Decision-Making Processes

Decision-Making Framework

- Gathering Evidence
 - . Sources and types of evidence; and
 - . Use of Evidence.
- Findings of Fact
 - . Status and quality of evidence.
 - . Is the evidence corroborated?
 - . Is the evidence contradicted?

CLAYTON UTZ

Investigations and Decision-Making Processes

Decision-Making Framework

- Criteria and Relevant Policies
 - . Identify what are the legally relevant considerations; and
 - . Identify and consider applicable any applicable policies
- Examine the Merits
 - . Consider the merits of the case; and
 - . Beware of administrative inflexibility.

CLAYTON UTZ

Investigations and Decision-Making Processes

Decision-Making Framework

- Exercise the Discretion
 - . Make the decision
- Record the Decision
 - . What is an acceptable level of recording; and
 - . Obligation to provide a statement of reasons.

CLAYTON UTZ



Investigations and Decision-Making Processes

Decision-Making Framework

- Implement the Decision
 - Follow any statutory directions; and
 - Advise affected parties;
- Review Mechanisms
 - Statutory review; and
 - Common law proceedings.

CLAYTON UTZ

www.claytonutz.com



CONTACT

Barry Dunphy

Partner, Government Services Group,
Clayton Utz

Email: bdunphy@claytonutz.com

CLAYTON UTZ

Government Training Program

Government Decision-Making

Analyse the Decision Making Power

As a first step, it is necessary to read the Act authorising the decision to ascertain whether there are provisions that deal with the matters listed below.

- (a) Decision maker
 - Identity of the decision maker
 - Required qualifications
 - If a body of persons – is there a quorum?
 - Is delegation permissible? If Yes, is a proper delegation in place?
 - Is there any potential bias?
- (b) Who can be an Applicant?
- (c) Scope of the power to decide
 - What are the terms of the statutory power?
 - Is there a discretion or a duty to decide?
- (d) Are there other special provisions in relation to the decision and making power?
- (e) Matters relating to the decision
 - Circumstances/grounds/preconditions
 - Criteria to be applied
 - Purpose of the discretionary provision
 - Are directions applicable?
 - Need for advice or consultation
- (f) Procedures

These may be statutory procedures or natural justice requirements specified by the provisions in the Act.
- (g) Matters affecting review
 - Privative clauses
 - Provision for special review

Work out the Steps in the Decision

Look for:

- In the particular Act do the rules of natural justice apply, and if they do, what do they require of the decision maker and what other statutory procedures are prescribed?
- Are there special procedures for a particular decision, eg, in the light of the issues raised in the decision.

Take Evidence

The decision maker has to take evidence relevant to each substantive issue to be considered as part of the decision making process in the decision. Taking evidence is part of the procedure for making the decision.

Sources of Evidence

- Department/Authority
- Client/Applicant
- Third Parties

Types of Evidence

- Oral
- Written statement
- Document
- Object
- View/photograph/video/sound recording

Does the statute provide that the decision maker is bound by the rules of evidence?

In most cases the decision maker is not bound by the technical rules of evidence. However, each major fact must still be based on some probative evidence.

Barry Dunphy
Partner
Clayton Utz
www.claytonutz.com

Sydney
T 02 9353 4000

Melbourne
T 03 9286 6000

Brisbane
T 07 3292 7000

Perth
T 08 9426 8000

Canberra
T 02 6279 4000

Darwin
T 08 8943 2555

CLAYTON UTZ

Government Training Program

Government Decision-Making [cont]

Finding of Facts

Having taken evidence a finding of fact is made. This raises the question of credibility.

This will be affected by:

- Status and quality of the evidence – is it hearsay/direct testimony; fact/opinion coherent, plausible?
- Is the evidence for or against the person giving it?
- It is corroborated or uncorroborated?
- Is it contradicted or uncontradicted?

Criteria and Policies

Consider the criteria and policies which govern the decision. The decision maker must give weight to relevant and proper considerations and disregard irrelevant and improper ones.

Merits

- Consider the merits
- Do not apply policies inflexibly - consider each case on its merits

Exercise the Discretion

- Exercise the discretion to make the decision

Record the Decision

Implement the Decision

Review the Mechanisms

Barry Dunphy
Partner
Clayton Utz
www.claytonutz.com

Sydney
T 02 9353 4000

Melbourne
T 03 9286 6000

Brisbane
T 07 3292 7000

Perth
T 08 9426 8000

Canberra
T 02 6279 4000

Darwin
T 08 8943 2555