

PROGRAMMING LEGAL COMPLIANCE INTO PUBLIC WORKS PROJECTS

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Abstract

A presentation and associated paper on how local government can develop programs and procedures to help them comply within an increasingly complex legal and regulatory environment when planning and implementing public works projects.

Key Words

'legal compliance program', 'programming legal compliance', 'developing compliance tools', 'AS3806-1998 Compliance Programs', 'due diligence', 'public works projects', 'program machinery', 'program support'.

Introduction

Nothing is more fundamental to a project's success than completion within time and within budget. Often the success of a project is not publicly judged by its engineering feats or utility value but in the manner in which it is delivered (e.g. the Goodwill Bridge in Brisbane). In the local government context, it is sometimes the case that public works projects are regarded as unsuccessful by elected Councillors, managers, the media and the public because legal impediments delay them, derail them or result in substantial cost overruns.

In response, those involved in project planning need to develop and rely on increasingly sophisticated and structured programs designed to ensure that legal requirements and risks are dealt with in a comprehensive manner as early as possible in the life of the project.

The programs seek to help Council officers identify, and then to eliminate or manage a variety of legalities (and potential illegalities) which may, apart from being 'project killers', otherwise adversely affect a project in the following ways:

- Delays;
- Budget overruns;
- Fines or monetary penalties;
- Civil liability;

- Adverse publicity;
- Disruption and loss of morale;
- Legal costs;
- Expenses of restitution or other corrective action; and
- Increases in insurance premiums.

Well developed legal compliance programs are the means by which the potential legal minefields often traversed by public works projects can be successfully negotiated. This paper describes how legal compliance programs can be developed and how they can be integrated into the planning and implementation of projects.

Legal compliance programs

What is contemporary legal compliance?

"Legal compliance is the management discipline of designing and implementing effective steps to ensure that an organisation actually complies with the laws, regulations and codes of practice relating to its operations. Put another way, it is a system which is designed to ensure that the organisation does, as far as reasonably practical, what is necessary to 'get it right' in relation to its legal obligations." Sharpe (1996).

Sometimes the term 'due diligence' is also used to describe legal compliance.

Legal compliance is not the same as 'risk management'. 'Risk management' is a wider discipline involving the identification of broader risks (not just legal risks) and the implementation of steps to eliminate, minimise or manage those risks.

While there are clear overlaps between legal compliance and both risk management and quality management systems, it is important to understand the distinct role of a legal compliance program. It is a discreet management system which requires a co-operative blend of legal and management disciplines. Whereas risk management relies on a weighted analysis of the likelihood and consequence of risks, proper legal compliance does not just take into account the frequency with which a legal compliance issue may arise. Rather it aims for a state of compliance that seeks to achieve, as close as possible, to absolute legal protection by identifying and meeting the specific legal requirements in a particular set of circumstances.

Legal compliance has been regarded by some as the sole domain of lawyers. However we do not believe that to be accurate. The platform upon which a legal compliance program is built should not be limited to the engagement of lawyers to advise on particular transactions or to educate personnel about legal requirements. An effective compliance program requires the integration of legal and auditing skills into an organisation's overall management system.

A legal compliance system must not be overly legalistic in its approach and must be capable of working in the real world. Commonly, legal compliance systems have relied upon a manual and lectures on legal detail and a legal auditing process. These systems, whilst important ingredients, have by themselves been found to be lacking because:

- They are often too complex and seek to impart too much legalistic information that is ultimately forgotten or difficult to implement;
- They allow too much latitude for interpretation of the law rather than telling people what the legal

requirements are in a particular set of circumstances; and

- They are operated by separate legal, risk management or compliance personnel without proper input from, or observance by, operational management.

Ultimately, the modern approach to legal compliance requires skills that go beyond those of lawyers and auditors. It requires a holistic approach that includes input from across the organisation and a proper consideration of the expertise and experience of those involved at the 'coal face'.

Often legal compliance programs are developed across an entire organisation. For example a program might be developed to identify the laws which an entire Council organisation must comply with across the full range of its operational activities. Our view is that such programs often fall short because of the vast body of laws that apply and the extraordinarily complex compliance manuals and other mechanisms that are developed in response.

None of the texts on legal compliance address the development of programs specific to public works projects. Whilst the range of laws applicable to public works projects is extensive, a structured program concentrating solely on this discrete area of a Council's operational activities should provide practical assistance and real outcomes in achieving legal compliance.

Consequences of not having a legal compliance program

The penalties associated with corporate non-compliance with laws and regulations are becoming increasingly onerous. The Courts have become more alive to the systems which organisations have in place when deciding on culpability or penalty for breaches. Some legislation (e.g. *Trade Practices Act 1975 (Cth)* and *Environmental Protection Act 1994(Qld)*) establish defences in the face of prosecution if an appropriate level of 'due diligence' has been applied.

Due diligence can often be established by demonstrating that a real and substantive legal compliance program has been

established and implemented. In those circumstances, Courts do look at the nature and effectiveness of the program and the mechanisms built into the organisation to help ensure adherence.

In addition to statutory penalties associated with breaches, the implications for a project of not having an effective legal compliance program can include:

- Cost blow outs;
- Time delays;
- Civil liability;
- Project programming/sequencing difficulties; and
- Political embarrassment/adverse publicity.

Appendix A contains a brief summary of two contrasting legal cases which highlight the importance of a well developed and properly applied legal compliance program in the retail sector. The cases also articulate what Courts will consider to be an appropriate program in circumstances where a due diligence defence is raised.

What are the elements of a legal compliance program?

A legal compliance system or program is more than a checklist, manual, auditing process or on-going training program. It is a comprehensive management program that forms part of the operating procedures for an organisation.

Fissa (1989) argues that the standard elements of a legal compliance system should include:

- Clearly stated compliance policies that are reinforced by top as well as middle-level management;
- Systematic identification and management of risks and compliance requirements created by the organisation's operations;
- Clear allocation of responsibility for compliance functions to specified personnel;
- Segregation and rostering of functions in high-risk areas so as to restrict opportunities for non-compliance;

- Readable compliance manuals setting out relevant standards (legal, corporate, and industry self-regulating), operating procedures for particular units in the organisation, and concrete examples;
- Routine controls for monitoring and enforcing compliance together with safeguards for ensuring command of compliance problems by senior management;
- Standard procedures for avoiding the creation or retention of unnecessarily damaging or incriminating documentation;
- Investigative and reporting procedures structured so as to maximise the protection possible from legal professional privilege;
- Action plans in the event of discovery of illegality and resolution of complaints received from employees, members of the public or enforcement agencies;
- Education and training of personnel;
- Interaction with enforcement agencies, as by submitting compliance materials for preview.

The relevant Australian Standard, *AS3806-1998 Compliance Programs*, sets out the essential elements of a legal compliance program as:

- Structural elements:
 - Commitment of the entire organisation;
 - Compliance policy
 - Management responsibility – all levels of management need to understand, promote and be responsible for compliance;
 - Adequate resources must be allocated to implement the compliance policy;
 - A philosophy of continuous improvement should be adopted.
- Operational elements:
 - Identification of compliance issues;

- Integration of legal requirements into day to day operating procedures;
 - Uniform implementation of compliance system with appropriate remedial measures and continuous training;
 - Complaints handling system;
 - Record keeping;
 - Identification, investigation and classification of compliance failures;
 - Identification, investigation and classification of systemic and recurring failures;
 - Internal reporting;
 - Management supervision.
- Maintenance elements:
 - Education and training;
 - Visibility and communication;
 - Monitoring and assessment;
 - Review;
 - Liaison with regulatory authorities;
 - Accountability.

AS3806 highlights that a compliance system must start with a commitment from the 'top'. In the case of local governments, that means the elected Council, the Chief Executive Officer and senior management. The standard also emphasises that this commitment must be manifest in on-going reviews and monitoring of the system.

Legal compliance programs in public work projects

Why is Legal Compliance important to public works projects?

While the development of legal compliance as a discipline has been traditionally focussed at a whole of organisation level, its principles can be applied equally to a discrete area of an organisation's operations (eg. public works projects). Indeed legal compliance can be applied on a project by project basis. General legal compliance principles can be adapted to become project oriented and can be infused into project

planning, procurement, implementation and operation.

From a local government public works perspective, legal compliance is particularly important having regard to the large capital cost of many projects, the complexity of the laws that relate to them and the serious consequences that can arise if compliance is not identified at an early stage and effected in a timely manner.

A legal compliance program for public works projects can assist local governments to:

- Identify and comply with the law on a project by project basis;
- Identify legal compliance issues which affect the feasibility of a project at an early stage and before substantial costs in implementation are incurred;
- Minimise the prospect of problems, disputes and litigation arising out of non-compliance during and after construction;
- Assess site selection, design and other feasibility issues;
- Prepare more accurate budgets for public works projects;
- Make applications and submissions for government subsidies and grants;
- Avail itself of 'due diligence' defences if the law provides for them.

How to construct a legal compliance program for public works projects.

It is possible for Councils to construct a generic legal compliance program for all of their public works projects rather than developing a separate program for each and every project.

Of course the sophistication of a public works legal compliance program will depend, in part, on the size of the Council and the resources available to it. Inevitably, there is not one packaged program which will suit every Council. Different ingredients can be selected in different measures on a Council by Council basis. There are however some essential ingredients which should be common to all.

A distinction also needs to be drawn between the construction of management systems

which comprise the legal compliance system and the implementation of that program on a project by project basis. When implementing legal compliance in a particular project, the program will not avoid the need for professional legal and other expert advice specific to the individual project. However the legal compliance program should enable a much more focused and defined use of that expertise.

A public works legal compliance program will have two broad sets of ingredients. Firstly there are the tangible and intangible rules, systems and procedures which together might be called the 'program machinery'. Secondly there should be a policy and education environment which provides the foundation support, we call it "program support", which enables the program machinery to work effectively.

When should legal compliance be addressed in a project?

To answer this question it is trite to say 'the sooner the better'. However, the reality is that to achieve optimum results, the application of a legal compliance program for any project should occur at the earliest stages of inception. Apart from its wider purpose, the legal compliance program will be an invaluable tool in feasibility assessment.

The process by which each Council usually develops and procures public works projects will inevitably differ to at least some degree from Council to Council. Some Councils will have a very structured system in place. For others, project development will be largely a matter of 'feel' dictated by the availability of resources and the pressures of the day.

There is however much to be said for recording, even if in the fairly simple terms of Appendix B, the path which Council usually follows from project initiation to project completion. Council should then turn its mind specifically to where and when in that process legal compliance assessment will be undertaken. A legal compliance assessment and any associated plan should ideally be done at about the feasibility assessment/planning stage.

Implementation of a legal compliance program into public works projects

Ingredients of compliance for projects

The ingredients or tools of compliance are a range of documents, mechanisms and systems that in combination comprise an effective legal compliance program. The elements of the program may be conveniently divided into two categories, program machinery and program support.

Program machinery are those essential driving elements of the program and may include:

- A guide for overall legal compliance in public works projects;
- Regularly updated manuals and checklists;
- Monitoring and internal auditing;
- Identification and control of 'danger' areas;
- External legal auditing;
- Control over distributors and contractors;
- Reporting system;
- Timely rectification of system failures;
- Assessment criteria.

Program support elements are those components that assist in the overall operation of the program and may include:

- A compliance policy on the part of Council itself;
- Education and training;
- Public information systems;
- Records, statistics and information technology;

Further details of a simple two part legal compliance program for public works are contained in Appendix C.

It is essential that whatever form of legal compliance program is adopted that it be 'embedded' into all stages of the project. The concept of 'embedding' reflects a requirement that systemised procedures be established by the legal compliance program throughout the course of the project. These procedures drive compliance by actively preventing breaches from occurring. By

embedding these procedures, managers and other officers participate in achieving compliance in their day to day work.

Sharpe (1999) notes that *"embedding must consist of short, direct, and clear operating procedures and cross checks, preferably in step-by-step modular form based on outputs."*

It is vitally important that the development of the program and its components is not undertaken in a legalistic manner. It must be understandable and practical. In order to achieve this, procedures must:

- Be simple, clear and addressed to the people who will use them;
- Be confined to those steps that tell people what or what not to do;
- Be in plain language;
- Adopt short instructive passages with active verbs.

A set of procedures should not be developed and then left for operatives to interpret. Training in the context of each operative's role is essential as is supervision and on-going monitoring.

Developing compliance tools

Although the literature tends to suggest that manuals, procedures and checklists are subordinate to an all encompassing legal compliance management system, they are nevertheless extremely important in helping to identify the laws which need to be complied with and in achieving compliance.

It is for this reason that after obtaining commitment from stakeholders for the development of a program, one of the first tasks must involve an identification of laws instruments which could affect Council generally in its implementation of the project and those laws which are specific to the project itself.

Those laws which generally bear on the implementation of public works projects by Council might be called 'regulatory framework laws'. They are laws which would usually be applicable to all, or at least, most public works projects. They would include, for example, laws relating to tendering and

the acquisition of goods and services under the *Local Government Act, 1993* and the need for Council to be licensed to undertake building work itself under the *Queensland Building Services Authority Act, 1991*. Regulatory framework laws will be separately identified in the template public works legal compliance guide that MacDonnells is developing.

On the other hand 'project facilitation laws' are those which are far more project specific. Characteristically, these laws will be invoked by the particular circumstances of each project. They would include, for example, the need to comply with the 'future act' requirements in the *Native Title Act, 1993* where a project is proposed for land where native title could continue to exist. These project facilitation laws can be identified and categorised according to the type of land tenure on which the project is to be located (eg. the project facilitation laws which will necessarily require compliance for a project on unallocated State land, reserve land, freehold land, etc). Alternatively project facilitation laws can be identified according to the type of project involved - those laws applicable to landfill projects, airport projects, roadworks projects, etc. The MacDonnells template guide will utilise both approaches.

Suffice it to say that any guide for use in the identification of applicable laws will not be entirely failsafe. An individual assessment on a case by case basis will still be required to identify any unusual Acts or Regulations and any new laws or recent changes to laws.

Identification of laws and effecting compliance

The range of Acts, Regulations and Codes applicable to public works projects is wide. It will often be a daunting task to comprehensively identify and address all the legal compliance requirements of a project at an early stage. It is therefore important to establish a framework for a public works legal compliance program that:-

- Enables a reasonably simple but also reasonably accurate identification of regulatory framework laws and project

- facilitation laws applicable to particular projects; and
- Enables compliance with relevant laws to be effected once they have been identified.

A non exhaustive list of laws that could apply to a public works project are attached at Appendix C.

In our experience, most difficulties arise because laws applicable to public works projects are not identified at all or are identified far too late in the critical path for the project. Once identified, most legal requirements for projects can usually be effectively dealt with, particularly if expert assistance is sought before, rather than after, problems arise and if sufficient time is allowed.

At this conference, MacDonnells is conducting a survey amongst public works engineers on the areas of law which they have found to most frequently impact adversely on public works projects. The survey particularly seeks to identify those fields of law where compliance has proved most difficult and those which are least known or considered.

The results of the survey will be made available to the Institute of Public Works Engineers Queensland Branch and will be used to assist in the development of our legal compliance guide for the identification of laws applicable to public works projects. Please see us at the MacDonnells conference trade display about the survey.

Conclusion

There is no doubt that the operating environment for Councils, particularly in the area of public works projects, is becoming evermore complex. Observing the growing pile of Acts and Regulations applicable to projects, many engineers see design and construction as the easier aspects of many new projects.

A structured and orderly approach to programming legal compliance into public works projects is part of the solution. An

effective legal compliance program will not only help deliver public works projects more easily, more cheaply and more quickly but will also help deliver easier working lives to public works engineers.

References

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Appendix A - Case Summaries

(a) **Tesco Supermarkets Ltd -v- Natrass [1972] AC 153**

This is an English case. Tesco is the operator of a chain of supermarkets. It charged with a breach of the *Trade Descriptions Act 1968* in the UK. The legislation included a "due diligence" defence in certain circumstances. The breach involved Tesco running a "special" on certain discounted goods in one of its stores until those discounted goods ran out of stock. As a result of an oversight by a shop assistant, the store manager was not informed when the discounted goods had run out. Signs offering the discount remained in place.

A customer tried to purchase some of the goods but was advised that the special was over and that he would have to pay full price.

Tesco had in place a compliance system which required shop assistants to inform the manager as soon as discounted stock was sold out so that the manager could remove the signs. The House of Lords, after examining the Tesco system formed the view that the company could not have reasonably been expected to do anything more and the breach was a one-off human oversight. Tesco was acquitted on the basis that it had acted with due diligence.

The key elements of the Tesco system were:

- The system was initiated and commenced at board level.
- Each store was under the control of a manager.
- The system of selecting the manager was careful and reasonable.
- The company provided adequate staff and equipment to run the store.
- The instructions the manager received to run the store included:
 - a six day management course and further course on relevant legislation;
 - a store manual which had provisions on legal compliance;
 - weekly visitations and instructions from a branch inspector and periodic inspections by area controllers and regional directors;
 - up to date price lists for which goods were to be sold;
 - literature relevant to promotions;
 - reminder notices on legislation; and
 - a standard operating procedure.
- The standard operating procedure included a directive that all packs marked with the normal price were to be removed from display during any discount offer and that shop assistants immediately inform the manager when discounted stocks were exhausted.

(b) **Tip Top Case - (Australian Competition and Consumer Commission -v- Australian Safeway Stores Pty Ltd & Ors (1997) 75 FCR 238)**

Tip Top is a large supplier of bread to Safeway stores in Victoria. Tip Top also sold to other vendors and directly to the public at local fairs for a price that undercut the Safeway price. Safeway took exception to these practices.

With a view to retaining Safeway's goodwill, Tip Top stopped undercutting and instructed those other vendors that it supplied to do likewise.

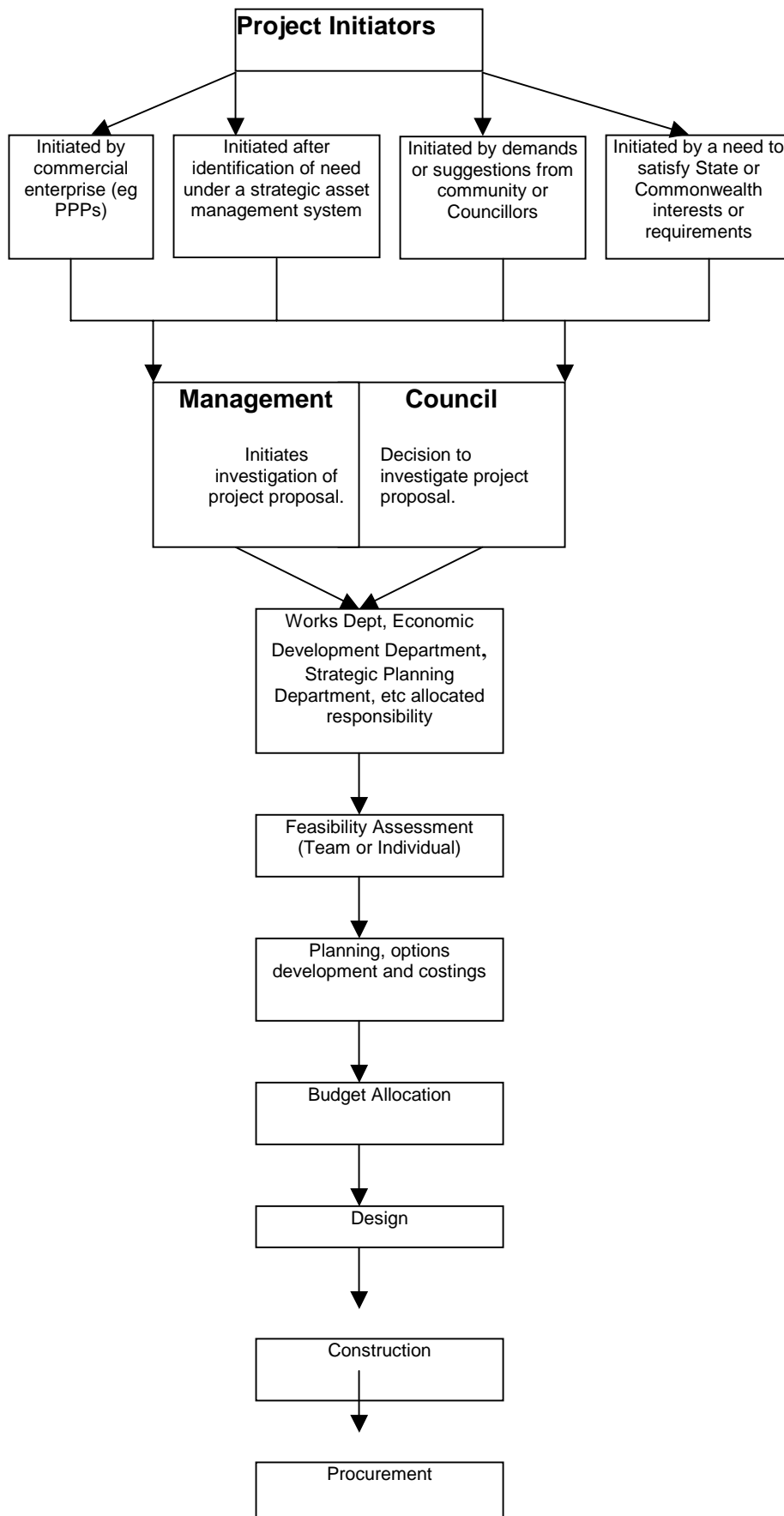
Tip Top was charged with price fixing and resale price maintenance under Pt IV of the *Trade Practices Act 1974*.

In mitigation of penalty, Tip Top claimed that it had in place a compliance system that would ordinarily have prevented such a breach from occurring. What it did in fact have was only a legal manual and a program for legal tuition on the *Trade Practices Act* by a lawyer every year or two.

The system was completely ignored by management and was held by the Court, in imposing a fine of \$1.25 million, to be ineffective.

Appendix B

Public Works Project Procurement Process



Appendix C - A simple legal compliance program for Public Works Projects

<p align="center">Part One Program Machinery</p>	<p align="center">Part Two Program Support</p>
<ul style="list-style-type: none"> • Documentary record of the usual public works project procurement process for your Council. Identify the stage in that process when a legal compliance assessment will be done. • Nominate specific staff who have responsibility for conducting and overseeing the legal compliance assessment. • Develop a documented guide to laws which require compliance. MacDonnells is developing a template guide. • For laws which frequently require compliance consider developing or obtaining specific checklists and manuals. An example of a legal compliance checklist prepared by MacDonnells is the Council Activities and Native Title Checklist. Copies are available upon request. • Assess the availability and procurement of legal and other expertise to assist with the identification of relevant laws and to help with compliance on a project by project basis. Consider preparing a written policy. • Prepare a plan specific to each project on what laws are applicable, what steps are being taken to comply, what timeframes are applicable for compliance, who is in charge of effecting compliance (in-house and external experts) and what estimated costs are involved. Contingency planning can also be included. The legal 	<ul style="list-style-type: none"> • Council policy requiring and supporting the legal compliance program. Council support could also include relevant sections in Council's Corporate Plan and/or Operational Plans. • Education and training. This could extend to both decision makers (eg. elected Councillors and senior managers) and officers at an operational level.

compliance plan must be integrated into the overall compliance program and the critical path for the project. A template document can be developed to help in formulating each individual plan.

- Systems for checking and re-checking by management on the steps being taken to effect compliance. A template timeline showing essential dates and deadlines can be developed. This must be integrated into the overall project program (Ghant Chart). Clear reporting systems and standards are also important.
- Systems for complaints recording and debriefings at the end of projects. The best lessons are learnt from correcting mistakes. Debriefing reports and meetings should be recorded in a central location to enable corporate knowledge to be accumulated and accessed.

Appendix D - List of example Acts and Regulations

- Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987
- Disability Discrimination Act 1992 (Cth);
- Queensland Heritage Act, 1992;
- Integrated Planning Act 1997 (Qld);
- Queensland Building Services Authority Act 1991;
- Environmental Protection Act 1994 (Qld);
- Environmental Protection Regulation 1998 (Qld)
- Environmental Protection (Water) Policy 1997 (Qld);
- Environmental Protection (Noise) Policy 1997 (Qld);
- Environmental Protection (Waste Management) Regulation 2000 (Qld)
- Environmental Protection (Waste Management) Policy 2000 (Qld);
- Environmental Protection (Air) Policy 1998 (Qld);
- Beach Protection Act 1968 (Qld);
- Coastal Protection Management Act 1995 (Qld);
- Environmental Protection and Biodiversity Conservation Act 1999 (Cth);
- State Development and Public Works Organisation Act 1971 (Qld);
- Land Title Act 1993 (Qld);
- Land Act 1994 (Qld);
- Native Title Act 1993 (Cth);
- Native Title (Queensland) Act 1993 (Qld);
- Workplace Health and Safety Act 1995 (Qld);
- Transport Infrastructure Act 1994 (Qld);
- Australian Heritage Commission Act 1975 (Cth);
- Dangerous Goods Safety Management Act 2001 (Qld);
- Health Act 1937 (Qld);
- Health Regulations 1996 (Qld);
- Recreation Areas Management Act 1988 (Qld);
- Vegetation Management Act 1999 (Qld);
- Water Act 2000 (Qld);
- Water Resources Act 1989 (Qld);
- Nature Conservation Act 1992 (Qld);
- Soil Conservation Act 1986 (Qld);
- Corporations Act 2001 (Cth);
- Local Government Act 1993;
- Council's own Local Laws and Local Law Policies

Also need to consider common law requirements such as the duty of care for negligence purposes in relation to design, construction and operational features of public works and the application of relevant Australian Standards in meeting legislative and common law requirements.

Author Biography



Oliver Gilkerson has been practising law since 1989. He joined MacDonnells Solicitors in 1990 and became a partner in 1998.

Oliver provides legal advice to government, major corporate entities and individuals. He practises mainly in the areas of government advisory, infrastructure projects and property, native title and indigenous law, risk management and legal compliance.

Today, much of Oliver's work involves assisting private and public entities with major infrastructure projects. His work in that field encompasses property and tenure requirements, contracts and tendering, assessing requirements for statutory approvals, native title and cultural heritage and other legal compliance issues.

In native title and other indigenous law matters, Oliver provides strategic advice to peak industry bodies, and major industry players in energy, mining, tourism and local government.

In his general advisory work, Oliver mainly assists statutory authorities, local governments, energy companies and infrastructure providers. He provides on-call advice to officers, managers and elected Councils on a wide range of public law operational and strategic issues. He travels extensively throughout regional Queensland for that purpose.



Michael is a Senior Associate with MacDonnells Solicitors, Brisbane. He was admitted as a solicitor in 1994 and since that time has practised primarily in the areas of local government, planning and environmental law. Michael is an experienced litigator. He also advises project proponents and governments on project procurement strategies, statutory approval processes, legal compliance, and project/service

delivery issues.

Michael is particularly interested in the development of environmental training and legal compliance packages which assist organisations in meeting their legislative and community obligations.

Michael is a multi-disciplinary lawyer. In addition to his legal qualifications, Michael holds a Master of Urban and Regional Planning (UQ) and Graduate Diploma in Project Management (QUT).