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LEGAL UPDATE
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THE NSW COURT OF APPEAL OVERTURNS DECISION ON STANDING AND FINDS THAT COMMON LAW STANDING PRINCIPLES CONTINUE TO APPLY UNDER FORESTRY ACT 2012

South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2) [2024] NSWCA 113

The NSWCA has confirmed that South East Forest Rescue Incorporated (**SEFRI**) had standing at common law to bring proceedings to restrain the Forestry Corporation of NSW (**FCNSW**) from carrying out operations in certain State Forests. In these proceedings, SEFRI also sought a declaration that particular trees be recognised as habitat for the threatened Southern Great Glider species under the Coastal Integrated Forestry Operations Approval.

Background

Sections 69SB and 69ZA of the Forestry Act, along with s 13.14 and 13.14A of the Biodiversity Conservation Act, purport to limit standing in certain circumstances.

At first instance, the NSWLEC found that, considering the purpose of the *Forestry Act*, the context and language of sections 69SB and 69ZA, and the principle of legality (being that courts should not assume the legislature intended to interfere with fundamental rights), s 69ZA did not eliminate common law standing to bring proceedings to enforce compliance with the requirements of an Integrated Forestry Operations Approval [at 128].

Despite this finding, the Court was not satisfied that SEFRI had established a sufficient "special interest" to bring proceedings [at 140].

Common law standing

The test for standing at common law is provided in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493. To bring proceedings, a person or entity must have a "special interest" – or stand to gain some advantage if the action succeeds or suffer a disadvantage if the action fails [at 526 - 531].

SEFRI was found not to have a special interest as there was no clear evidence of its role in protecting State forests and Glider species. Additionally, its efforts to protect Glider habitats were recent, and the NSWLEC proceedings concerned the North East forest subregions, while SEFRI was registered as South East entity [at 136].

The NSWCA decision

The primary issues for determination on appeal were whether section 69ZA of the *Forestry Act 2012* eliminated common law standing, and if it did not, whether SEFRI had a "special interest" in the subject matter of the proceedings [at 37].

In accordance with the NSWLEC decision, Griffiths AJA concluded that common law standing was available despite the operation of s 69ZA. Further, SEFRI possessed a sufficient "special interest" in the subject matter of the proceedings.

The NSWCA considered several factors in reaching its decision, including:

- Although SEFRI was established to end native logging in the State and the proceedings concerned protecting Glider species, there was a relevant connection between these two issues as reflected in SEFRI's vision statement at the time of its incorporation [at 161].

- SEFRI had filed upwards of 36 breach reports related to unlawful forestry operations and submitted 38 reports, submissions, and representations to government bodies over 14 years, seeking to influence government action to protect native forests [at 153, 154].

- SEFRI had conducted surveys for Glider den trees in State forests, pursued previous judicial review litigation related to logging native forests and their wildlife, and maintained a strong media presence [at 155, 156].

For these reasons, SEFRI was determined to possess a sufficient special interest in the subject matter of the proceedings, and the appeal was unanimously upheld [at 176–178].

Reflections

- These proceedings demonstrate that even if a statute purports to eliminate open standing provisions, common law standing may still be available to community organisations.

- This decision also suggests that the courts adopt a broad approach to the determination of standing in public interest litigation.

For more information about this update, please contact Tom Ward or Ryan Bennett

COMPLIANCE WITH DEVELOPMENT STANDARDS AND JURISDICTIONAL PREREQUISITES

Lahoud v Willoughby City Council [2024] NSWCA 163

These proceedings arise from a challenge to the grant of development consent by Willoughby Local Planning Panel for the adaptive reuse for an existing commercial building.

The *Lahoud* proceedings confirm the approach taken by the NSWCA in *El Khouri v Gemaveld Pty Ltd* [2023) NSWCA 78 (**El Khouri**) with respect to jurisdictional prerequisites for the grant of development consent.

Lahoud v Willoughby City Council [2023] NSWLEC 117

The Applicant, being a neighbour to the land the subject of the development consent, brought Class 4 proceedings alleging that the development consent was invalid on six grounds relating to jurisdictional error.

At first instance, two issues for determination concerned non-compliance with development standards in the *Willoughby Local Environmental Plan 2012* (**WLEP**).

Ground 1 concerned the contravention of the height control provided in cl 4.3 of the WLEP. Lahoud argued that the Panel's decision under cl 4.6 regarding the height control was invalid for several reasons, including that the Panel had made a conditional request to approve only a portion of the development [at 105].

Moore J found that although the Panel was dissatisfied with the cl 4.6 request for the entire development, the ground failed because under s 4.16 of the *EPA Act*, the consent authority may approve only part of the development for which consent was sought [at 149 - 150]. The Panel had appropriately exercised this power by requiring the removal of part of the proposed new level at the northern end of the development [at 151].

Ground 4 related to a dispute between Lahoud and the developer (Helm Pty Ltd) as to the calculation of the gross floor area (GFA) and the floor space ratio (FSR) ascribed to the development. Lahoud contended that the FSR development standard provided in cl 4.4 of the WLEP was not met and that a cl 4.6 request, which was required, had not been submitted. Relevantly, Lahoud sought to rely on surveying evidence which was not available to the Panel. Moore J determined this was inconsistent with the approach in *El Khouri* in the sense that the surveying evidence was "fresh"[at 251].

Moore J made further remarks in relation to time limitations for bringing proceedings. Helm contended that proceedings were commenced after the expiry of the three-month statutory period provided by s 4.59 of the *EPA Act*, and cl 124 of the *EPA Regulation*. However, the Court was satisfied the proceedings were commenced

within time on the basis that one of three publications to the Council's website complied with the requirements of notice [at 49 - 50].

The NSW Court of Appeal

Lahoud appealed the decision of Moore J under section 58 of the *Land and Environment Court Act 1979* (NSW). The 12 grounds of appeal can be grouped into four categories:

- The Panel's failure to be satisfied under cl 4.6 of the WLEP before granting development consent to the development that contravened the height standard under cl 4.3;
- The Panel's satisfaction that the development will have an active street frontage, contrary to cl 6.7(3) of WLEP;
- The Panel's acceptance of the development being for the permissible use of shop top housing; and
- The Panel's failure to consider contamination matters under cl 7 of *State Environmental Planning Policy 55 – Remediation of Land* (SEPP 55).

Two significant issues for determination arose from the height standards and active street frontage grounds.

Height standards

The NSWCA (Preston CJ of LEC; Meagher JA; and Leeming JA) determined that the height standard grounds of appeal were based on three incorrect assumptions of the statutory scheme.

- The first assumption was that s 4.16(4)(b) of the *EPA Act* itself is a source of power to grant development consent. Here, the Court confirmed that there is only one power to grant consent being s 4.16(1) of the *EPA Act* [at 26].
- The second assumption was that s 4.16(4) only enables the grant of development consent for the development for which the consent is sought, except for a specified part or aspect of that development, or for a specified part of the development, by specifying that limitation in the description of the development in the development consent and not in the conditions to which the development consent is subject. Such a limitation was found not to be within the terms of s 4.16(4) [at 31].
- The third assumption was that the consideration of the matters in cl 4.6(4) of the WLEP could only be in relation to the "proposed development" for which consent was sought, and not the development to which consent was granted. This assumption was found to be inconsistent with the terms of cl 4.6(4) [at 36].

In light of these assumptions, each of the height standard grounds of appeal were dismissed.

Active street frontage

The question of whether the building, as proposed to be redeveloped, will be a building that has an active street frontage within the meaning of cl 6.7(5) of the *WLEP* was held not to be a jurisdictional fact [at 60].

The Court found that it was for the Panel to decide, provided in the terms of cl 6.7(3): *the consent authority is to determine whether it "is satisfied that the building will have an active street frontage"* [at 60].

The Panel's decision of satisfaction or non-satisfaction is reviewable, not as a jurisdictional fact, but only for jurisdictional error [at 60 – 61]. Here, the NSWCA overturned the findings of the primary judge being "there is no proper basis in fact on any rational construction of the wording of the clause that could have led the Planning Panel to have concluded that it was satisfied (at [186])".

As the Panel was satisfied that the building will have an active street frontage after the change of use of the ground floor of the building, the Panel was not precluded by cl 6.7(3) from granting consent to the change of use of the building [at 66].

Time limitations

The NSWCA upheld Moore J's findings that the proceedings were not time-barred. Notification from the Council on 30 June and 1 July 2021 did not qualify as public notices under s 4.59 of the *EPA Act*. However, notice on 15 July 2021 did comply. This notice was sufficient to ensure that the proceedings were commenced within time [at 126 – 128].

Lahoud did not establish any grounds of appeal challenging Moore J's review of the Panel's decision to grant consent. Helm however, established two contentions challenging Moore J's upholding of review of the Panel's decision.

Accordingly, the appeal was dismissed, and Lahoud was ordered to pay Helm's costs of the proceedings.

Reflections

- *Lahoud* confirms that accurate assessments play a large role in maintaining the integrity of the planning system in relation to compliance with development standards.
- These proceedings confirm the approach taken in *El Khouri* – that compliance with an environmental planning instrument is not a jurisdictional prerequisite to the power to grant consent.
- These proceedings also underscore the importance of adhering to notice requirements under the *EPA Act* and *Regulations*, as any deficiencies could lead to the proceedings being deemed out of time.

For more information about this update, please contact Tom Ward or Ryan Bennett.

DEALING WITH A DEFECT IN A SUMMONS

M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2024] NSWCA 151

M. & S. Investments commenced private prosecution proceedings, charging five defendants with an offence under s 144AAA of the Protection of the Environment Operations Act 1997 (NSW) (**POEO Act**) by unlawfully disposing of asbestos waste.

The summonses contained a defect in that they stated the offence was committed on a "day or days in the period 1 September 2016 to 17 November 2016." However, the offence provision, being s 1444AAA did not commence until 25 January 2019 [at 3].

At first instance, both M. & S. Investments and the defendants sought to address the defect. M. & S. Investments applied, by notice of motion, to amend the summonses to the correct date of the offence which was 30 August 2019. The defendants applied to quash the summonses on the basis of the defect [at 4].

The primary judge (Pain J) granted each of the defendant's motions to dismiss the summonses because it did "not disclose any offence known to law as s 144AAA… did not exist when the offence allegedly occurred" (see [2023] NSWLEC 111).

The NSWCA decision

M. & S. Investments sought to review and appeal Pain J's decision. The grounds of review and appeal included, among other reasons, that [at 6]:

- The primary judge incorrectly found that the summonses were nullities;
- M. & S. were denied procedural fairness as the primary judge addressed the motion to dismiss the summonses before hearing the motion to amend; and
- The primary judge incorrectly concluded that there was no power to amend the summonses

Were the summonses invalid?

The Court found (per Preston CJ of LEC, Ward P and Mitchelmore JA agreeing): that the "wrong" statement in the summonses, being the date on which the offence was committed, did not cause the summonses to be nullities [at 9].

There were two reasons for this [at 10 – 11].

First, s 16(1) of the *Criminal Procedure Act 1986* (NSW) (**CPA**), provides that an indictment is not "bad, insufficient, void, erroneous or defective" on the basis that -

"(g) except where time is an essential ingredient, for omitting to state the time at which an offence was committed, for stating the time wrongly or for stating the time imperfectly,

(h) for stating an offence to have been committed on a day subsequent to the finding of the indictment, on an impossible day or on a day that never happened".

Furthermore, s 16(2)(a) and (b) of the CPA provides that an indictment cannot be challenged on the basis of any errors in its substance or form, or because of variance between it and the evidence adduced during the proceedings.

For these reasons, the Court confirmed that an incorrect statement in the indictment will not be a material issue unless it is a key element of the alleged offence [at 12 – 13]. For an offence under s 1444AAA of the POEO Act, the date of the offence is "not an essential ingredient" – although the date does affect when proceedings can be commenced (see s 216 of the POEO Act) [at 14 – 15]. Accordingly, the summonses were determined held to be valid.

Additionally, the summonses were found to have correctly identified an offence known to law [at 20]. The Court considered that s 1444AAA of the POEO Act does not lose its character as an offence known to law merely because the summonses incorrectly stated the date of the commission of the offence [at 20 – 21].

Could the summonses be amended?

M. & S. Investments sought to amend the summonses pursuant to s 68(2) of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**), on the basis that the incorrect date was a "failure to comply with the requirements of the LEC Act and Regulations". M. & S. Investments further relied on s 21(a) of the POEO Act which grants the Court jurisdiction to dispose of proceedings under Part 8.2 of the POEO Act, including proceedings under s 144AA [at 23].

Here, the Court found that neither s 21(a), nor Part 8.2 made the jurisdiction of the Court to dispose of proceedings dependent on a correct statement in the summons. As such, M. & S. Investments did not fail to comply with any procedural requirements of the LEC Act which would nullify the proceedings [at 23].

However, this did not mean that Pain J did not have power to allow the summonses to be amended. The Land and Environment Court has power under s 20 and 21 of the CPA to allow amendment of the summonses to change the date on which an offence was committed. The Court determined that Pain J erred by not considering exercising these powers [at 24].

Lastly, the Court determined that Pain J misunderstood the argument advanced by M. & S. Investments regarding the nature of the offence under s 1444AAA, by finding that the definition of "dispose" in s 144AAA(2) and s 144AAA(1) is directed to "positive acts" of disposal and not omissions [at 25, 27]. Ultimately, this meant that M. & S. Investments was denied the opportunity to run its case at trial, which was that the defendants committed the offence against s 144AAA by omitting to dispose of the waste at a place that can lawfully receive the waste [at 27].

For these reasons, the orders made by Pain J were set aside, and the proceedings were remitted to the Land and Environment Court.

Reflections

- This case underscores the importance of ensuring that all procedural documents, including summonses, contain accurate information.

- However, the decision also illustrates that minor procedural errors, such as incorrect dates, do not necessarily nullify proceedings if they do not affect the substance of an offence.

For more information about this update, please contact Tom Ward or Ryan Bennett.

APPLICATIONS BY A PROSECUTOR TO RELY ON ADDITIONAL EVIDENCE

Secretary, Department of Planning and Environment v Harris [2024] NSWCCA 88

The facts in this case concerned Class 5 proceedings against five personal and corporate defendants, which alleged 16 offences of clearing native vegetation.

Background

In May 2021, the prosecutor filed a notice under s 247E of the CPA, which outlined the prosecutor's case and attached witness affidavits and expert reports.

On 19 February 2024, which was five months before the first hearing, the prosecutor provided the defendants' legal representatives with updated reports. These reports included 2,000 pages of additional expert evidence.

The primary judge (Pain J) in the Land and Environment Court denied the prosecutor's request to rely upon the updated reports.

This decision was based on the complex and significant nature of the new evidence, as well as concern that the defendants may need to find and present their own expert evidence shortly before the trial [see 30 – 31, 33, 40, 43].

The NSWCA Decision

The Applicant sought to rely on three grounds of appeal: [at 58]

- The primary judge erred in refusing the prosecutor leave to serve an amended s 247E notice that included supplementary expert evidence on the basis that the defendants would suffer "great potential for prejudice" if leave was granted

- The primary judge failed to take into account whether any prejudice to the defendants was capable of being cured

- The primary judge failed to take into account the prejudice to the prosecutor's case if the supplementary expert evidence was not able to be relied upon in support of the criminal charges.

The Court (per Sweeney J, N Adams J and R A Hulme AJ agreeing) allowed each of the grounds of appeal.

The Applicant's submissions

The Applicant argued that the primary judge's determination that the defendants would suffer "great potential prejudice" was an incorrect basis to refuse the Applicant leave [at 59]. The Applicant relied upon the decision of Biscoe J in *Sutherland Shire Council v Benedict Industries Limited Shire Council v Benedict Industries Limited [2013] NSWLEC 121*(**Benedict Industries**) (at 27) which discusses the courts power to manage proceedings by deciding whether evidence would cause the defendant "irremediable prejudice" or if such harm could be cured by an order.

The Applicant contended that Pain J failed to consider whether there was irremediable prejudice, or prejudice that could be cured by an order that the Court was not willing to make [at 60].

It was further submitted that the primary judge criticised the prosecutor for not presenting the new reports to the Court. However, the primary judge had also refused to consider the new evidence when it was attached to an affidavit by the defendants' solicitor [at 62].

The Respondents' submissions

The Respondents argued that they were not required to show they would suffer irremediable prejudice if the prosecutor were granted leave, and that Biscoe J in *Benedict Industries* was merely referring to examples of bases on which a prosecutor may not be permitted to lead evidence [at 68].

The Respondents also argued that the proposed new evidence is significant and includes new aerial images. As such, the Respondents may need to reconsider whether they need expert evidence.

Further, there was a delay in the prosecutor bringing the application, and introducing new evidence so close to the trial date will impose a burden on the defendants and may jeopardise the trial dates [at 69].

Findings

The Court held that the primary judge anticipated problems with the evidence that had not yet occurred. In other words, the primary judge conflated prejudice which may arise for the defendants with actual prejudice demonstrated. As a result, the Court found that the primary judge had either misunderstood the facts or considered irrelevant issues that were not supported by the evidence presented [at 85].

Additionally, the Court found that the primary judge failed to take into account the prejudice to the prosecution if the prosecutor was not able to rely upon the new reports. Relevantly, Her Honour had been informed that the new material was essential to prove elements of the offence charged. As such, the primary judge was determined to have failed to take into account a material consideration [at 86].

Ultimately, all three grounds of appeal were upheld, and the orders made by Pain J were quashed. This decision allowed the prosecutor to file and serve an amended Section 247E notice on the defendants, which included the amended reports.

For more information about this update, please contact Tom Ward or Ryan Bennett.

THE AVAILABILITY OF JUDICIAL REVIEW TO SET ASIDE A CONSTRUCTION CERTIFICATE IS CONFIRMED BY THE COURT OF APPEAL

Cameron v Woollahra Municipal Council [2024] NSWCA 216

Background

On 13 April 2021, Woollahra Municipal Council (**Council**) granted development consent for a proposed development in Bellevue Hill, which involved demolishing a pre-existing dwelling and replacing it with a three-storey house.

On 11 April 2022, the Appellants (**Cameron**) lodged a modification application under s 4.55 of the *EPA Act*, which sought to add a cellar level to the proposed development, among other things.

The modification application was approved with condition C.1(d). Condition C.1(d) deleted the cellar level and provided that the 'cellar level' area must remain unexcavated. The modified development consent approved three construction plans in each case with the notation "Cellar Level Deleted."

A certifier subsequently issued a construction certificate for the site which appeared to permit works in the area of the former cellar, including excavation works, the building of a crane base and installation of a crane.

As such, an issue arose from the inconsistency between condition C.1(d) of the consent, which deleted the cellar level from the proposed consent, and the construction certificate, which permitted works in the 'cellar level' area.

At first instance (see Woollahra Municipal Council v Cameron [2024] NSWLEC 27), Pritchard J held that the modified consent, properly construed, prohibited excavation within the area previously identified as the 'cellar' level for all purposes [at 136 – 137].

The plans specifications and standards of building work specified in the construction certificate were found to be inconsistent with the modified development consent [at 152, 179]. Accordingly, Pritchard J found that it was legally unreasonable for the certifier to issue the construction certificate [at 179 – 180].

Her Honour made a declaration of invalidity, having found jurisdictional error, to the extent of works in the 'cellar' area [at 197].

The NSWCA Decision

On Appeal, the NSWCA agreed that the certifier's decision to determine the construction certificate was legally unreasonable [at 139]. However, there was a dispute as to consequence of such a finding.

The NSWCA accepted that a finding of jurisdictional error has the effect that the decision is to be regarded as 'no decision at all' which, usually, will result in a declaration of invalidity [at 177].

Ultimately, however, the Court found that in this statutory scheme (being the EPA Act and Regs) a finding of jurisdictional error permits the setting aside of the construction certificate in part rather than in whole [at 177] and dismissed the appeal.

Reflections

In *Cameron* the Appellants sought to rely on the decision in Burwood Council v Ralan Burwood Pty Ltd (No 3) [2014] NSWCA 404 (**Ralan**), to argue that the finding of jurisdictional error did not necessarily result in the invalidation of the construction certificate.

In *Ralan,* the NSWCA held that inconsistency between a development consent and a construction certificate does not, in itself, establish that the decision of the certifier to issue a construction certificate was legally unreasonable [at 109 – 125]. However, the focus in *Ralan* was on the relevant statutory framework, specifically the EPA Act and Regs. It was held that this framework emphasises the need for finality and predictability regarding construction certificates. Permitting construction certificates to be set aside for, what may be, minor inconsistencies would undermine these objectives in the regulatory process. Pursuant to the decision in *Ralan*, a construction certificate would only be considered invalid if it is legally unreasonable, meaning the certificate is so inconsistent with the original approval that no reasonable certifier could have issued it.

The key difference between *Ralan* and *Cameron,* however, is that *Ralan* did not address the availability of judicial review, nor the consequences of a finding of jurisdictional error [see *Cameron* at 178]. As such, the NSWCA in *Cameron* has confirmed the availability of judicial review to an appellant who seeks to challenge a construction certificate on the basis that the decision to issue the certificate involved a jurisdictional error.

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