PIKES & VEREKERS
LAWYERS

EDAP LEGAL UPDATE
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PIKES & VEREKERS' NEWS

Mark Cottom

The Partners would like to announce the promotion of Mark Cottom to partnership, commencing 1 July 2019. Mark joined Pikes & Verekers from HWL Ebsworth in March of 2018 and since that time has become an invaluable member of the local government practice of the firm. Mark has won the trust of the firm's existing Council clients through his excellent advocacy, advice and attention to detail. Mark's promotion is a recognition of his dedication and skill demonstrated in a very short period of time.

In the last twelve months, Mark has advised and/or appeared for a number of rural and regional councils such as Broken Hill, Gilgandra, Gunnedah and Lithgow on matters ranging from telecommunication towers and quarries, to hoarding and manufactured homes. This is in addition to his previous experience acting for local government authorities and private clients in a number of council areas outside of Sydney including the lower to mid North Coast, northern NSW and the Illawarra.

The Partners congratulate Mark on his appointment.

Tom Ward

The firm has recently appointed a new solicitor Tom Ward, who will join the firm as an Associate commencing 29 April. Tom joins the firm's local government team and comes from a role as an in-house solicitor with the City of Sydney Council. Tom comes with over 10 years' experience in advising local

government on the range of environment and planning issues faced by local councils.

COURT CLARIFIES RELATIONSHIP BETWEEN EXECUTIVE LIABILITY PROVISIONS IN POEO ACT

Sections 169-169B of the *Protection of the Environment Operations Act 1997* (**POEO Act**) create what are known as executive liability offences for certain environmental breaches. In the recent decision of *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd; Environment Protection Authority v Davis* [2019] NSWLEC 26, the Land and Environment Court of NSW has provided some clarification regarding the relationship between those provisions.

Facts

The case concerned, among others, five charges under section 66(2) of the POEO Act against a company of providing false information in relation to its 2017 quarterly reports and annual return to the EPA. The company pleaded guilty to each of those five charges.

Mr Davis (for whom we acted) was separately charged under section 169(1) of the POEO Act of having been a person concerned in the management of the company when it committed the above five offences, and having been in a position to influence the company's conduct in relation to those offences (but not having used all due diligence to prevent those offences occurring).

Our client pleaded guilty to each of those five charges, on the basis that he was the general manager during the charge periods and had not used all due diligence to prevent the offences occurring. Despite this, the EPA wished to lead evidence in our client's sentencing that purported to implicate him in relation to the falsification of the relevant records (despite the falsified information having been provided to the EPA by another employee of the company).

Executive Liability Provisions

Apart from strenuously denying those allegations, our client was successful in arguing that the EPA's purported evidence could not be led against him in sentencing at all. This was because while section 169(1) of the POEO Act contained **no element of knowledge** on the part of directors and managers of corporations that commit particular serious environmental offences, section 169B of the POEO Act is a separate provision that provides a separate offence of having been **knowingly concerned** in the commission of an offence by a company.

Finding

While the separate executive liability provisions in sections 169 and 169B of the POEO Act contain the same maximum penalty, Justice Pain of the Court found that the elements of section 169B are more objectively serious in terms of **personal moral culpability** given the requirement for the person charged to have been knowingly concerned in the commission of the offence by the corporation. The Court found that evidence seeking to prove that somebody acted fraudulently which would fall within that element of an offence against section 169B is **clearly more serious** than the elements of section 169 of failing to exercise due diligence.

Accordingly, it would be unfairly prejudicial to a defendant charged with a special executive liability offence that contains no requirement for knowledge on the defendant's part to then be sentenced on the basis of knowledge which could give rise to a much higher penalty (albeit subject to the same maximum) under a separate offence provision.

Conclusion

Accordingly, the Court ruled certain parts of the evidence that was proposed to be relied upon by the EPA inadmissible as against our client. The Court is yet to decide on the appropriate penalty to be imposed, however this intermediate decision of the Court usefully clarifies that the special executive liability provision in section 169 of the POEO Act (which is commonly used by prosecuting authorities under that Act) only extends so far in relation to the relevant factors that can be taken into account by the Court in sentencing directors and managers of corporations that commit serious environmental offences.

As the current decision reveals, it appears that no charges have ever been brought as yet by a prosecuting authority under section 169B of the POEO Act. Accordingly, it will be interesting to see over time whether authorities wishing to prosecute persons for deliberate involvement in corporate offences lay charges under that provision, given the need to prove such knowledge beyond reasonable doubt as an element of the offence.

For further information regarding this update, please contact Mark Cottom.

COURT UPHOLDS RELIANCE ON INFORMATION OBTAINED UNDER COMPULSORY NOTICE

The issue of a Council's power to compel the answering of questions and the provision of records under the *Environmental Planning and Assessment Act* 1979 (**EPA Act**), and the subsequent reliance on that information in prosecution proceedings, was considered in the recent decision of the Court of Criminal Appeal (**the CCA**) in *Port Macquarie-Hastings Council v Mansfield* [2019] NSWCCA 7.

The CCA overturned an earlier decision of Justice Sheahan of the Land and Environment Court (reported in our legal update of September 2018).

Facts

The Council charged Mr Mansfield with two offences under the EPA Act. In each case, the development related to the construction of a facility that appeared to be a recreation hall with ancillary facilities.

In December 2015, almost two years prior to the commencement of prosecution proceedings, a Council officer with powers under the EPA Act issued a notice to Mr Mansfield requiring him to provide information and produce records pursuant to the former section 119J (now 9.22) of the EPA Act. The notice required him to provide details of who carried out works, the dates when the work was undertaken and plans for the work.

Mr Mansfield responded to the notice without raising an objection pursuant to section 119S (now 9.31) of the EPA Act, being that providing the information might incriminate him.

The Council then charged Mr Mansfield with offences under the EPA Act for carrying out unlawful works. Subpoenas were issued on behalf of the prosecutor to a related company controlled by Mr Mansfield and a consultancy that had prepared a Statement of Environmental Effects. It was argued by lawyers for Mr Mansfield that the issuing of the subpoena relied upon information that was provided following the use of coercive investigative powers under the EPA Act. It was therefore argued that the subpoenas amounted to an "abuse of process".

In challenging the validity of the subpoenas the defendant claimed that it was an "abuse of process" to rely on information obtained as part of the notices as they were issued with the substantial possibility of criminal prosecution to follow. Particularly, it was alleged that once Council had considered the possibility of prosecution, the overriding purpose of the notices was to exercise the function of commencing prosecution proceedings and was therefore an abuse of process.

In setting aside the subpoenas, Justice Sheahan upheld the defendant's principal argument, finding that the notices had been issued unlawfully. The fact that the information obtained as part of those notices was used to frame the two subpoenas meant that the subpoenas would be set aside.

Finding

The CCA, delivering a combined decision of three judges found that the subpoenas, which relied upon information obtained pursuant to the coercive powers available in its investigations, were issued validly and should not be set aside.

The judges noted that the issue of the Council officer's motivations in issuing the notices was much debated. However, the CCA observed that the question at hand was whether, at the time of issuing the notices, there was an investigation purpose. The Court commented that the fact that prosecution proceedings may or may not have been contemplated was a factor informing the assessment of whether the notices were valid and that the timing of the notices was relevant but not determinative.

The CCA found that the subpoenas were valid because the Council officer was clearly exercising an investigation purpose when issuing the notice. The fact that the Council officer contemplated the possibility, or even likelihood, of prosecution proceedings did not matter. Particularly, the judges found that the EPA Act specifically contemplated that information obtained under such notices could be used in criminal proceedings, if they were subsequently brought.

The CCA held that the extension of the conclusions reached in *Zhang v Woodgate*, where notices were issued **after** prosecution had been commenced, was incorrect.

Conclusion

In the investigation of suspected breaches of the EPA Act, councils should always carefully consider the timing of issuing of issuing notices such as those to compel a person or company to provide records or answer questions under section 9.22. These

powers infringe upon a person's usual "right to silence". Therefore, such notices should be considered a powerful tool and used accordingly.

Nevertheless, the CCA has clearly said that the issuing of such notices under the EPA Act, where it was relevant to an investigation purpose, will lead to the resulting evidence gathered being admissible in subsequent prosecution proceedings. The only available exception is in such proceedings against a natural persons, in relation to answers given by them during questioning by a council officer following their objection to doing so.

For further information regarding this update, please contact James Fan.

COURT CLARIFIES POWERS REGARDING SITE COMPATIBILITY CERTIFICATES

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**SEPP HSPD**) allows serviced self-care housing on land which is, or is adjoining, land zoned primarily for urban purposes. In the case of land that adjoins land zoned primarily for urban purposes, clause 24(2) of SEPP HSPD requires a consent authority to be satisfied that development of the kind proposed in a DA has been certified in a current site compatibility certificate (**SCC**). The procedure for the issue of a SCC is set out in cl 25 of SEPP HSPD. Prior to 1 October 2018 SCCs were issued by the Planning Secretary, they are now issued by the relevant panel.

Facts

The applicant appealed against Council's refusal of a DA for golf course upgrade and construction of seniors housing comprising 85 serviced self-care units and ancillary facilities on the Bayview Golf Club site.

The Deputy Secretary issued a SCC on 27 March 2017 (before the relevant panel became the issuing authority). It certified development as described in Schedule 1, which stated as follows "to permit 95 in-fill self-care units and ancillary facilities for the purpose of seniors living." A number of requirements were specified at Schedule 2, including a footprint area in accordance with the nominated map. The proposed development did not align with the footprint area per Schedule 2.

At hearing, Council contended that there was no power to grant development consent as the development was not of the kind described in Schedule 1, nor was it consistent with the building footprint requirement in Schedule 2 of the existing SCC. Council also raised other merits contentions.

The applicant contended that the development was of the kind described in Schedule 1 but nevertheless sought amendment to the existing SCC to amend the building footprint. The applicant made an amendment application to the Department of Planning and Environment and asked the Court to deal with it in the course of considering the subject DA pursuant to s 39(2) of the *Land and Environment Court Act 1979*.

Findings

The Court held that there was no power to grant consent as the terms of the existing SCC neither explicitly referred to "development for the purposes of seniors housing of the kind proposed in the development application" nor implicitly referred to such development by reference to the definitional elements or requirements of the seniors housing "of the kind proposed".

The Court found that there is a power to amend an existing SCC pursuant to s 1.4(8) of the *Environmental Planning and Assessment Act 1979*. As there is no distinct statutory process for amendment (such as s 4.55) then it could only occur through the grant of a further SCC. However, the Court's power pursuant to s 39(2) of the *LEC Act* and s 8.14(1) of the *EPA Act* did not extend to amending the Existing SCC or issuing an amended SCC as it was not a function that the consent authority (being the *North Sydney Planning Panel)* had at the time of determining the DA.

The Court did not consider the other contentions raised by Council as it held that there was no power to grant consent.

Conclusion

The case turned on the fact that the amendment and savings provision regarding the relevant certifying authority for a SCC precluded the Court from issuing an amended or further SCC.

Nevertheless, the finding that the description of the development in the SCC did not comply with cl 24(2)(b) of SEPP HSPD shows that relevant parties should carefully consider the description of development, as well as any relevant conditions, when applying for or issuing SCCs and lodging or determining DAs for seniors housing.

For further information regarding this update, please contact Alistair Knox or Ryan Bennett.

THE "STADIUMS CASE" – INFRASTRUCTURE NSW WINS A BATTLE OF TWO HALVES

The Sydney Football Stadium ("SFS") rebuild was the subject of recent political and judicial consideration. The court component arose after proceedings were commenced by a community group challenging the Minister of Planning's decision to grant development consent to a stage 1 concept plan and demolition of the SFS. Waverley Council later commenced a separate challenge raising the same grounds. Both proceedings were heard by the Land and Environment Court.

The challenge to the consent raised three grounds:

1. Whether the application was exhibited for a sufficient period;
2. Whether the decision failed to consider requirements of design excellence under the Sydney Local Environmental Plan 2012; and
3. Whether the decision failed to consider the requirements of State Environmental Planning Policy 55 – Remediation of Land.

The Interlocutory Injunction

At the conclusion of argument on the grounds for challenge, the Court was asked by both applicants to issue an order to restrain "hard demolition work".

No undertaking as to damages was offered and this was raised by Infrastructure NSW as potential prejudice as any delay would likely result in payment of damages to its contractor.

Nevertheless, the Court issued an injunction for a period of 10 days to allow a decision to be delivered. The Court found the injunction would be short, related to a matter of public importance and that there was a serious question to be tried.

The Decision

The Court considered the three grounds for challenging the consent and found that the arguments raised did not render the approval unlawful.

A Further Injunction Sought

Following the delivery of reasons dismissing the challenge, the community group sought a further order restraining hard demolition work whilst an appeal was brought against the Land and Environment Court's decision.

The Court found that there was power to stay the order to dismiss the challenge. However, special or exceptional circumstances need to be made out and the Court found that the mere lodgement of an appeal was not such a circumstance. Further, the Court found that there was no longer a serious question to be tried as the grounds challenging the approval had been considered.

The application for a further injunction was dismissed by the Land and Environment Court.

For further information regarding this update, please contact James Fan or Alistair Knox.

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