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LEGAL UPDATE
April 2020

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NSW LEGAL MEASURES AMID COVID-19 PANDEMIC

In response to the ongoing COVID-19 pandemic, the NSW government has introduced a number of legislative measures to date. While the public health measures are well-known, in the local government and planning spheres the measures include:

Local government

- Postponement of the upcoming 2020 local government elections for a period of twelve months, with a possible further extension to 31 December 2021 should the need arise;
- Enabling local councils to conduct their meetings remotely using audio visual link (AVL); and
- Postponement of the repeal of the *Local Government (General) Regulation 2005* and *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* until 1 September 2021, unless sooner repealed.

Planning

- Provision for the Minister for Planning to make orders authorising development to be carried out on land without the need for any approval under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) or consent from any person (see new section 10.17 of the EP&A Act);

- Any requirement of the planning legislation that a document be made available for inspection at a physical location is satisfied if the document is instead made available on the NSW Planning Portal or any other website approved by the Planning Secretary (see new section 10.18 of the EP&A Act); and

- Postponement of the repeal of the *Environmental Planning and Assessment Regulation 2000* until 1 March 2021, unless sooner repealed.

Temporary development orders

Under the new section 10.17 of the EP&A Act, the Minister for Planning has made the following orders to date:

- *Environmental Planning and Assessment (COVID-19 Development – Extended Operation) Order 2020* – effective 25 March 2020, this Order removes existing planning restrictions on operating hours for retail premises, home businesses and home industries (subject to some limitations);

- *Environmental Planning and Assessment (COVID-19 Development – Health Services Facilities) Order 2020* – effective 1 April 2020, changing the use of a building or place to a health service facility (including changing from one health services facility to another), and construction or installation of a temporary structure and/or a temporary alteration or addition to a building or work for such a purpose, may be carried out without the need for planning approval. Similar to the above, some limitations apply (including on relatively unrestricted hours of construction that are permitted for such development);

- *Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020* – effective 2 April 2020, construction work that is otherwise authorised under the planning legislation may be carried out on a Saturday, Sunday or public holiday (despite the usual restrictions that typically apply under planning approvals); and

- *Environmental Planning and Assessment (COVID-19 Development – Takeaway Food and Beverages) Order 2020* – effective 2 April 2020, premises used for the preparation and sale of takeaway food and beverages (including mobile food and drink outlets) may be carried out without the need for further planning approval. Again, specified limitations within the Order apply.

Each of the above Orders applies for a period of six months after its commencement, or for such longer period of not more than twelve months as the regulations under the EP&A Act may prescribe at a later date. The scope of development permitted by Ministerial Order may change over the coming months, including the duration (of up to twelve months) of the period for which the Orders may apply.

Future changes

Similarly, the arrangements for many types of matters within the State's court system continue to justifiably evolve in line with government responses to the pandemic.

In the case of planning appeals in the Land and Environment Court, how these measures will intersect with the Planning System Acceleration Program first announced by the

Minister for Planning on 3 April 2020 is expected to become clearer over the coming days. Notably, in addition to endeavouring to create opportunities for construction jobs in the next six months and fast-track assessments of development applications at all levels, the Minister proposes to clear the current backlog of cases in the Land and Environment Court with the appointment of additional Acting Commissioners.

As per usual, the articles within this edition of our Legal Update conclude with a note as to which of our lawyers can be contacted for further information regarding a particular article. Just as our lawyers continue to comply with the current public health orders, they may continue to be contacted by usual means (including by calling 9262 6188).

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

PROCEDURAL FAIRNESS REQUIREMENTS WHEN ISSUING DEVELOPMENT CONTROL ORDERS

***Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2020] NSWCA 50**

This case related to a development control order (**DCO**) issued by the Council of the City of Sydney (**Council**) to the owner of premises at 122 - 122B Pitt Street Sydney (**the premises**). The premises are listed as a state and local heritage item, with the ground floor and mezzanine level leased to Universal 1919 Pty Ltd (**Universal**).

Council undertook an investigation into non-compliances with an approval granted for the refurbishment of the premises as a new Greek themed restaurant and bar. The redevelopment was undertaken in 2016 by Universal.

In 2018, Council issued a DCO No. 10 under the *Environmental Planning and Assessment Act* 1979 (**EPA Act**) to the owner of the premises, being 122 Pitt Street Pty Ltd (**the owner**). The DCO required amongst other things the removal of an 8m by 5m Greek flag (which has been inscribed on the southern wall of the premises by removing part of the existing render and exposing brickwork underneath) and restoration of the cement render.

Universal commenced Class 4 judicial review proceedings in the Land and Environment Court, principally arguing that:

- the company had been denied procedural fairness by Council's failure to issue the DCO to the company; and
- the inscription of the Greek flag was not development for which consent was required under the EPA Act.

Justice Sheahan of the Land and Environment Court dismissed the proceedings, finding that:

- the works undertaken for the Greek flag were development for which planning approval was required;
- the statutory procedural fairness requirements under the EPA Act had been complied with; and
- Universal was not required to be afforded such rights.

On appeal Universal contended that:

1. It had been denied procedural fairness in relation to the making of the DCO, principally because this was a breach of a common law obligation the Council owed to Universal.

2. The carving of the Greek flag into the wall's render was not a separate item of development that required development approval or Heritage Council approval but, it was in any event approved in both respects as part of the 2016 renovation works approval.

3. The DCO was void because notice that it was proposed to be made was not given to the principal certifier of the renovation works as required by clause 9 of Schedule 5 to the EPA Act.

The Court of Appeal (**CoA**) considered the requirements for issuing DCOs under the EPA Act and found that the issuing of the DCO to the owner was permitted under Part 1 of Schedule 5 to that Act. Whilst the Council could have, if it had chosen, issued the DCO to Universal (as the company fell within the description of persons to whom such an order number 10 could be issued), the Council had chosen not to do so in this case.

The CoA considered the common law requirements to afford procedural fairness against the express language in Schedule 5 to the EPA Act and found that these provisions left no room for Universal's argument that it should have been afforded procedural fairness.

The CoA also found that due to the size and prominence of the Greek flag, its inscription into the wall was the carrying out of work for which development consent was required under the EPA Act.

Regarding Universal's final argument that the DCO was void as a consequence of Council failing to provide the Notice of Intention to the certifier, the CoA (noting this ground was only raised on appeal) ultimately dismissed it for reasons which included:

1. the firm's appointment as certifier did not extend to the unauthorised works;

2. the certifier issued a final occupation certificate on 8 December 2016, which specifically excluded the removal of the render on the southern wall; and

3. in 2018 when the DCO was proposed, the firm had long since ceased having a role in relation to the development.

The CoA has made it clear in this case that any common law requirements to afford procedural fairness do not apply in circumstances where a statutory scheme contains plain words to exclude such rights.

When issuing Orders, Councils should exercise care to ensure that the power exists under the relevant legislation to issue a particular type of order to a particular person. It is also a timely reminder of the importance of complying with the procedural fairness requirements (as contained within the relevant legislation) when exercising these powers.

For further information regarding this update, please contact Tom Ward.

WHEN IS AN EASEMENT NOT AN EASEMENT?

***Aussie Skips Recycling Pty ltd v Strathfield Municipal Council* [2020] NSWLEC 22**

This recent decision of Duggan J of the Land and Environment Court (**LEC**) explored the legal basis necessary for an applicant to seek an easement under s 88K of the *Conveyancing Act 1919* (**s 88K**).

The proceedings were initially commenced in the Supreme Court by way of Summons seeking orders for easements pursuant to the provisions of s 88K. The proceedings were later transferred from the Supreme Court to the LEC. The easements were to be considered and treated as a composite package (**the Easements**), as each easement relied on the others to be effective.

Although her Honour found factually that the Easements did not meet the necessary precondition to the exercise of the power under s 88K(1), her reasoning on why the Easements were incapable of comprising easements at law is of particular interest.

The respondent Council argued that the Easements were not capable of being granted as they did not legally fall within the meaning of an "easement", as the Easements sought amounted to exclusive occupation of the demised land. This argument is captured in the "fourth test of an easement" derived from *Re Ellenborough Park* [1956] Ch 131 at [164] (*Ellenborough Park*) which described the fourth test as requiring a determination of the question:

> *… whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the … owners of proprietorship or legal possession; …*

The plaintiffs submitted that the Council did not need to retain a reasonable use of the whole of its land and that many easements known to law permit the dominant tenement to occupy, in effect exclusively, a part of the servient tenement.

In this case the Council land was: small; isolated; and constrained by its topography, such that the imposition of the acoustic wall (that acts as a barrier), and the use of the Council Land by Aussie Skips waste facility (where use is inconsistent with any other use of the Easement Land), was of such a degree that the retention by the Council of the small part of the residue of its land was insufficient to offset the exclusive occupation by the plaintiffs and permit a reasonable use by the Council of its own land.

Therefore, her Honour found that the Easements, as proposed, were not capable of comprising an easement at law as they failed the fourth test in *Ellenborough Park*. Her Honour found that the Easements sought to confer on the beneficiary an entitlement to occupy and use the Easement Land to the practical exclusion of the Council and as a consequence deprive the Council, as landowner, of its proprietorship or legal possession.

While the proceedings were dismissed for that fundamental reason, her Honour went on to also make detailed findings as to other reasons why the application for a Court-imposed easement failed under s 88K. This latest decision reinforces that care needs to be taken when drafting the terms of an easement not to go beyond the confines of the

law and attempt to exclude the practical use by the proprietor of the land that the easement seeks to burden.

For further information regarding this update, please contact Shannon Peters.

LOCAL GOVERNMENT AND PLANNING AMENDMENTS TO SUPPORT THOSE AFFECTED BY THE BUSH FIRES

In response to the dreadful bushfires and resulting damage suffered over the past summer, the New South Wales government has introduced amendments to local government and planning legislation and environmental planning instruments over recent months to ease the burden on those who have lost homes and businesses. This article endeavours to briefly outline some of those legislative changes, which form part of a much broader government response across many agencies and legislative portfolios.

Amendments to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*

To assist those needing to rebuild, the Minister for Planning and Public Spaces has introduced two sets of amendments to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**the Codes SEPP**).

Firstly, *State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Bush Fire Response) 2020* commenced on 31 January 2020. Clause 2.25 of the Codes SEPP was amended to allow for demolition of buildings and structures that were significantly damaged by a bushfire, or the partial demolition of a building to the extent necessary to make the building safe, without development approval.

This was followed about a month later by *State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Bush Fire Response) (No 2) 2020*, which commenced on 28 February 2020. This amendment was introduced to enable any existing businesses that have suffered damage from the bushfires to operate from a portable office or shipping container for up to two years.

The amending provisions have been inserted as a new Subdivision 36B within the Exempt Development Code in Part 2 of the Codes SEPP. A number of prerequisites and standards are specified in order for the shipping container or portable office to be installed and temporarily used. Among other things these requirements provide for acceptable specifications of the temporary structure, and that the structure must have appropriate foundations and structural support to ensure it is safe and stable.

Amendments to *Local Government (Manufactured Homes Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*

The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment (Bush Fire Response) Regulation 2020* commenced on 5 February 2020.

The main purpose of this amendment is to assist people who are unable to return to their homes as a result of a bushfire by allowing them to stay in a moveable dwelling (i.e. a

caravan) in a caravan park or camping ground for an extended period of up to two years without council approval.

There is also provision for people whose homes have been badly damaged in a bushfire to install a moveable dwelling on their land without council approval for up to two years.

These amendments are within clauses 73, 74, 77 and 132 of the *Local Government (Manufactured Homes Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005*.

Some of the other changes

The Department of Planning, Industry and Environment also advise on their Bushfire recovery webpage that from 4 February 2020, BASIX Certificate and Planning Reform Fund fees are waived on all development applications related to homes damaged or destroyed in the recent bushfires. These fee waivers complement the varying dispensations given by local councils to people who are rebuilding in bushfire-affected areas.

The particular requirements of the relevant council should be considered in each case where rebuilding is being contemplated. Further, councils themselves have had their procurement rules relaxed until 1 July 2020 for items under $500,000 related to bushfire recovery (see clause 170A of the *Local Government (General) Regulation 2005*).

Finally, *Planning for Bush Fire Protection* (**PBP**) *2019* has been legislatively adopted in the Environmental Planning and Assessment Regulation 2000 (namely clauses 272-273B), commencing on 1 March 2020. This new publication will only apply to development applications made from 1 March 2020, and the former PBP 2006 will continue to apply to applications made before that date.

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

COURT OF CRIMINAL APPEAL EXPLAINS POEO ACT PROVISIONS RELATING TO STATE OF MIND IN SENTENCING CORPORATIONS AND EXECUTIVES FOR OFFENCES

In a previous edition (see pages 2-3 thereof), we reported on a Land and Environment Court (**LEC**) case which clarified the relationship between executive liability provisions in the *Protection of the Environment Operations Act 1997* (**POEO Act**). Since then, while dismissing an appeal against that decision the NSW Court of Criminal Appeal (**CCA**) has overturned aspects of the original decision concerning this relationship. In doing so, the CCA has explained the manner in which the state of mind of both a corporation and an executive may be proved in the sentencing process for offences against the POEO Act.

Following the decision reported in our previous article, both our client and the company that he was previously the general manager of were sentenced by the Land and Environment Court in relation to the relevant offences. The EPA then appealed against the sentences imposed against both offenders, essentially on the basis that the sentencing judge had misapplied relevant provisions in the POEO Act relating to the state of mind of each offender.

In *Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis* [2019] NSWCCA 312, the Court of Criminal Appeal unanimously dismissed both appeals. However, in the Davis case the approach taken by the sentencing judge was found to be in error but not in a way that warranted resentencing.

Wollondilly appeal

In the *Wollondilly* appeal, the EPA asserted that the sentences imposed against the company were manifestly inadequate because the seriousness of the offences had only been assessed by reference to the state of mind of the directors of the company and not also state of mind of its employee(s). Essentially, it was asserted that section 169C of the POEO Act **deemed** the fraudulent state of mind of one or more of the company's employees to be the state of mind of the company.

On that basis, the EPA claimed that the company should have been sentenced on the basis that it had committed each of its offences deliberately rather than unintentionally. In this context, the sentencing judge's findings to the effect that the directors of the company knew nothing of the offending and could not reasonably have foreseen was not challenged. Rather, it was claimed that section 169C required an officer's state of mind to be treated as if it were the company's.

The Court of Criminal Appeal found that section 169C "*does no more than make evidence of the state of mind of a relevant individual some evidence of the state of mind of the corporation; it does not attribute the individual state of mind to the corporation*". That is, section 169C facilitates proof of the state of mind held by a corporation rather than by deeming one officer's state of mind to be that of the corporation. Accordingly, the sentencing judge had **not** erred in concluding that the evidence as a whole was that the controlling mind of the company was not intentional, reckless nor criminally negligent (despite the "*completely opposite state of mind of an employee carrying out fraudulent activity … being outside any reasonable scope of employment*" – as described by the sentencing judge).

Davis appeal

In the *Davis* appeal, it was found that the purported evidence against our client that the sentencing judge had ruled inadmissible in considering the appropriate sentences to be imposed should have in fact been allowed into evidence. The Court of Criminal Appeal described the erroneous exclusion of the disputed evidence as resulting in a "*somewhat bizarre outcome*" that the evidence on which Mr Davis was sentenced emphasised the role of the EPA's witness in the fraudulent conduct at the expense of the other evidence.

That said, the Court of Criminal Appeal found on the basis of the witness's evidence that had been considered by the sentencing judge that there were significant questions concerning the reliability of the excluded evidence. As this challenged evidence was unlikely to have satisfied the sentencing judge beyond reasonable doubt of the matters that the EPA was seeking to demonstrate in the sentencing of Mr Davis, the matter was not remitted to the LEC for resentencing.

As a result, it is no longer the case that evidence intended to demonstrate personal moral culpability on the part of a person who has been charged on the basis merely of special executive liability under section 169(1) of the POEO Act is inadmissible. That is, the evidence of state of mind cannot be limited simply to whether or not the person had

failed to exercise due diligence, but may be used to demonstrate fraudulent or intentional conduct in an appropriate case.

As noted in our previous article, the separate executive liability provision in section 169B of the POEO Act relating to persons who are knowingly concerned in the commission of an offence by a company appears to have not been utilised to date in the Land and Environment Court. Although it will remain interesting to see over time whether authorities wishing to prosecute persons for deliberate involvement in corporate offences lay charges under that provision, the upshot of the Court of Criminal Appeal's decision is that the likelihood of the provision being used more regularly from now on appears to be somewhat diminished.

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

LIMITATIONS ON POWER OF COUNCIL TO MAKE INTERIM HERITAGE ORDERS

Syncept Chatham Pty Ltd v City of Ryde Council [2019] NSWLEC 170

This case concerned a judicial review challenge to an Interim Heritage Order (**IHO**) made by the respondent Council which was preventing redevelopment of the applicant's land. The matter was heard by Duggan J of the Land and Environment Court.

At the commencement of the hearing the applicant pleaded that the IHO was invalid on the basis that it was made in contravention of a condition of the Ministerial Order of 12 July 2013 (**Ministerial Order**). This Order gave the Council power to make IHOs pursuant to s 25(2) of the *Heritage Act 1977* (**Heritage Act**), subject to conditions which prevent a local council from making an IHO unless (among other things):

> *(b) it has considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the council and considers that:*
>
> *(i) the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance;*
>
> *(ii) the item is being or is likely to be harmed;*
>
> *(iii) the IHO is confined to the item determined as being under threat; and …*

The Council initially defended this judicial review challenge on the basis that a Mayoral Minute that had been considered by councillors in resolving to make the relevant IHO amounted to a "preliminary heritage assessment" of the nature referred to in the Ministerial Order. It then expanded upon this defence by seeking to rely on the fact that reports by Council's internal heritage officer and external heritage consultants were relied upon in preparation of the Mayoral Minute. Relevantly, on page 3 of the Mayoral Minute it was noted that there were no "attachments for this report".

Both parties accepted that neither heritage report had actually been before the Council at the time of consideration of the Mayoral Minute. The applicant submitted that the

failure to provide the reports with the Mayoral Minute inferred that the Council could not have considered a "preliminary heritage assessment" of the nature required by the Ministerial Order.

On the other hand, the Council submitted that the Court could not draw such an inference from the evidence on the basis that the internal and external heritage reports were constructively before the Council, meaning that the councillors should be taken to have considered the reports. In the alternative, the Council argued that the Mayoral Minute was a summary of the heritage reports and therefore the councillors were not required to consider the actual reports to satisfy condition 1(b) of the Ministerial Order.

Duggan J made a number of findings in the matter that give clarity on how a council needs to assess an IHO for it to be made validly and within power.

Firstly, her Honour found that the presumption that material in possession of the Council will be generally in possession of the councillors was insufficient to permit an inference to be drawn that the Council gave the reports consideration as required by condition 1(b) of the Ministerial Order. The Council needed to demonstrate more than a mere reading of the report, as consideration of the preliminary heritage assessment must comprise a fundamental element in its deliberations.

Secondly, the Mayoral Minute was not a summary of the heritage reports. Accordingly the Minute could not be said to comprise a consideration of those reports for the purposes of condition 1(b) of the Order.

Thirdly, the operation of s 25 of the *Heritage Act* and the terms of the Order provided a limitation on the power of the Council to make an IHO. Accordingly, a breach of condition 1(b) of the Order (which constituted a breach of s 25(4) of the *Heritage Act*) was intended to comprise an action beyond the scope of the power conferred and was therefore invalid.

As a result, the subject IHO was declared invalid. The above points provide useful guidance in relation to the level of preliminary heritage assessment that needs to be taken into account by councils when deciding to make interim heritage orders.

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

LEC EXPLAINS AVAILABLE GROUNDS FOR JUDICIAL REVIEW OF COMPLYING DEVELOPMENT CERTIFICATES

***Central Coast Council v 40 Gindurra Road Somersby Pty Ltd (No 2)* [2019] NSWLEC 171**

In this recent decision noted above, Pain J of the Land and Environment Court (**LEC**) considered the LEC's power to undertake judicial review of a private certifier's decision to issue three Complying Development Certificate (**CDCs**) that benefitted the First Respondent, 40 Gindurra Road Somersby Pty Ltd (**Gindurra**).

In doing so, her Honour has explained the relationship between the recently-enacted s 4.31 of the Environmental Planning and Assessment Act 1979 (**EPA Act**) and this judicial review power. In turn, this may lead to s 6.32 of the EPA Act being similarly interpreted in

judicial review challenges to certificates (other than occupation certificates) issued under the new Part 6 of the EPA Act.

Case law prior to section 4.31

Section 4.31 of the EPA Act is as follows:

> ***Validity of complying development certificate***
>
> *Without limiting the powers of the Court under section 9.46(1), the Court may by order under that section declare that a complying development certificate is invalid if—*
>
> *(a) proceedings for the order are brought within 3 months after the issue of the certificate, and*
>
> *(b) the certificate authorises the carrying out of development for which the Court determines that a complying development certificate is not authorised to be issued.*

Section 4.31 was introduced in 2018 as a response to the Court of Appeal's decision in *Trives v Hornsby Shore Council* (2015) 208 LGERA 361; [2015] NSWCA 158 (***Trives (CA)***). In *Trives (CA)* the Court of Appeal held that whether or not a CDC was truly issued for "complying development" as defined in the planning legislation was not a jurisdictional fact that could be reviewed directly by the Court in judicial review proceedings challenging the validity of a CDC.

After *Trives (CA)*, a number of LEC decisions had found that instead, the Court could review the state of satisfaction of the certifier issuing the CDC. In such cases, CDCs had been found to be invalid on the basis that it was not **reasonably open** to the certifier in each case to determine that the CDC applied for was truly for "complying development" as defined in the planning legislation.

At first glance, there may appear to be a fine distinction between the Court being able to determine for itself whether a CDC was for "complying development", and being able to determine whether it was reasonably open to the certifier to have decided that matter in favour of the proponent. However, the distinction is much broader because the latter requires the person challenging the validity of the CDC to demonstrate that the certifier's decision was devoid of any legal justification.

Effect of s 4.31 on judicial review of CDCs

In the *Gindurra* case, her Honour noted that the additional ground of judicial review conferred by s 4.31 (i.e. that the CDC was not for "complying development" as a jurisdictional fact) was available only in proceedings commenced after 1 March 2018 if those proceedings were commenced within three months of the date of issue of the certificate. The Council accepted it could therefore not rely on s 4.31, as the CDCs had been issued in 2015 and 2017 (many months before proceedings were commenced).

As it could not rely upon s 4.31 of the EPA Act, the Council contended that each of the three CDCs was invalid on the basis that it was not reasonably open for the certifier to have decided that each CDC was for "complying development" when the relevant certificate was issued. However, strangely Gindurra contended that s 4.31 was actually

intended to prevent **any** judicial review of a CDC in proceedings commenced more than 3 months after the certificate was issued.

Her Honour found that s 4.31 provided the LEC with an additional "jurisdictional fact" ground on which the LEC could review CDCs, for a three month period from the date of issue. Accordingly, her Honour found that s 4.31 was in no way intended to limit the LEC's power of judicial review in relation to CDCs generally.

"Notice" of development consent (including a CDC) can be given for the purposes of s 4.59 only by the consent authority or certifier (as the case may be) – not anyone else (including the proponent)

Her Honour then went on to determine a further argument by Gindurra, which was to the effect that the proceedings were statute-barred in any event because Gindurra's director had himself given public notice in a local newspaper of each of the three CDCs under s 4.59 of the EPA Act more than 3 months before the proceedings were commenced.

Section 4.59 states that:

> *Validity of development consents and complying development certificates (cf previous s 101)*
>
> *If public notice of the granting of a consent or a complying development certificate is given in accordance with the regulations by a consent authority or a certifier, the validity of the consent or certificate cannot be questioned in any legal proceedings except those commenced in the Court by any person at any time before the expiration of 3 months from the date on which public notice was so given.*

Clause 137(1)(a) of the *Environmental Planning and Assessment Regulation 2000* required the public notice to be given in the local newspaper by either the Council or the certifier. On basic principles of statutory construction, her Honour found that the director of Gindurra causing such notice to be published himself did not comply with the requirements of the regulations and therefore the case was not statute-barred.

Conclusion

The judgment included a range of factual matters going to the specifics of why the CDCs were not valid, because it was not reasonably open for the certifier to have determined that each of the three CDCs were for "complying development". These matters resulted in her Honour declaring that each CDC was invalid and of no effect.

The key takeaway from the matter is that consent authorities (or any other persons) with concerns about the issuing of particular CDCs remain able to seek review of their validity in the LEC on the same grounds as were available immediately prior to s 4.31 of the EPA Act coming into effect, and also on the additional ground provided for in s 4.31 if the proceedings are commenced within 3 months of the issuing of the CDC. Given the similarities between s 4.31 and s 6.32 of the EPA Act, the latter section seems to have a similar intention of providing a time-limited additional ground of judicial review relating to the validity of certificates (other than occupation certificates) issued under the new Part

6 of the EPA Act, rather than preventing judicial review challenges that may have been available previously.

For further information regarding this update, please contact Joshua Palmer, Mark Cottom or Shannon Peters.

Pikes & Verekers Lawyers

Level 2
50 King Street
SYDNEY NSW 2000

DX 521 Sydney
T 02 9262 6188
F 02 9262 6175

E info@pvlaw.com.au
W www.pvlaw.com.au