



PIKES & VEREKERS  
LAWYERS

## ENFORCEMENT OF ENVIRONMENTAL LAWS

**Paper given by Ryan Bennett**  
to the Environment and Planning Law Forum  
16 March 2023

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### DEVELOPMENT CONTROL ORDERS

1. Development Control Orders (DCOs) are powerful tools that a Council can use to deal with compliance issues. The power of a local authority to issue a DCO is found in s9.34 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*. Schedule 5 of the EPA Act makes provision for the types of orders that may be issued. That schedule is reproduced below:

	Column 1	Column 2	Column 3
	To do what?	When?	To whom?
1.	<p><b>Stop Use Order</b></p> <p>To stop using premises or a building</p> <p>Not to conduct or to stop conducting an activity on the premises</p>	<p>Premises are being used—</p> <ul style="list-style-type: none"><li>• for a prohibited purpose, or</li><li>• for a purpose for which a planning approval is required but has not been obtained, or</li><li>• in contravention of a planning approval.</li></ul> <p>Building is being used—</p> <ul style="list-style-type: none"><li>• inconsistently with its classification under this Act or the Local Government Act 1993, and</li><li>• in a manner that constitutes or is likely to constitute a life threatening hazard or a threat to public health or public safety, and</li><li>• in a manner that is not regulated or controlled under</li></ul>	<ul style="list-style-type: none"><li>• The owner of premises or building</li><li>• The person using the premises or building</li></ul>

		<p>any other Act by a public authority.</p> <p>Premises are being used for an activity (that would or would be likely to require planning approval) that—</p> <ul style="list-style-type: none"> <li>• constitutes or is likely to constitute a life threatening hazard or a threat to public health or public safety, and</li> <li>• is not regulated or controlled under any other Act by a public authority.</li> </ul>	
2.	<p><b>Stop Work Order</b></p> <p>To stop building work or subdivision work carried out in contravention of this Act</p>	<p>Building work or subdivision work is carried out—</p> <ul style="list-style-type: none"> <li>• in contravention of this Act, or</li> <li>• in a manner that would affect the support of adjoining premises.</li> </ul>	<ul style="list-style-type: none"> <li>• Owner of the land</li> <li>• Any person apparently engaged in the work</li> </ul>
3.	<p><b>Demolish Works Order</b></p> <p>To demolish or remove a building</p>	<p>A building—</p> <ul style="list-style-type: none"> <li>• requiring a planning approval is erected without approval, or</li> <li>• requiring approval under the <i>Local Government Act 1993</i> is erected without approval, or</li> <li>• is or is likely to become a danger to the public, or</li> <li>• is so dilapidated that it is prejudicial to persons or property in the neighbourhood, or</li> <li>• is erected in contravention of this Act.</li> </ul>	<p>Owner of building or, if the building is situated wholly or partly in a public place, the person who erected the building</p>
4.	<p><b>Stop Demolition Order</b></p> <p>To stop demolishing, or not to demolish, a building</p>	<p>Demolition requiring a planning approval is being carried out, or would be carried out, without approval or in contravention of an approval.</p>	<ul style="list-style-type: none"> <li>• The owner of premises</li> <li>• The person carrying out the demolition or likely to carry out the demolition</li> </ul>
5.	<p><b>Repair Order</b></p> <p>To repair or make structural alterations to a building</p>	<p>The building is or is likely to become a danger to the public or is so dilapidated that it is prejudicial to the occupants, persons or property in the neighbourhood.</p>	<p>Owner of building</p>
6.	<p><b>Remove Advertising Order</b></p> <p>To modify, demolish or remove an advertisement</p>	<p>The advertisement is—</p>	<ul style="list-style-type: none"> <li>• The owner of premises displaying the advertisement or on which the associated structure is erected</li> </ul>

	and any associated structure	<ul style="list-style-type: none"> <li>• unsightly, objectionable or injurious to the amenity of any natural landscape, foreshore, public reserve or public place at or near where the advertisement is displayed, or</li> <li>• displayed contrary to a provision made by or under this Act, or</li> <li>• associated with a structure erected contrary to a provision made by or under this Act.</li> </ul>	<ul style="list-style-type: none"> <li>• The person responsible for the display of the advertisement and erection of the associated structure</li> </ul>
7.	<b>Public Safety Order</b>  To erect or install structures or appliances necessary for public safety	A building— <ul style="list-style-type: none"> <li>• is about to be erected, or</li> <li>• is dangerous to persons or property on or in a public place, or</li> <li>• is about to be demolished.</li> </ul> Works are— <ul style="list-style-type: none"> <li>• about to be carried out, or</li> <li>• about to be demolished.</li> </ul>	The owner or occupier of the land
8.	<b>Evacuate Premises Order</b>  To stop using premises or to evacuate premises	A person who has failed to comply with a Stop Use Order issued because the use constitutes or is likely to constitute a life threatening hazard or a threat to public health or public safety.	The person to whom the Stop Use Order was given
9.	<b>Exclusion Order</b>  To leave premises or not to enter premises	A person who has failed to comply with a Stop Use Order issued because the use constitutes or is likely to constitute a life threatening hazard or a threat to public health or public safety.	Any person
10.	<b>Restore Works Order</b>  To restore premises to the condition in which they were before unlawful building or other works occurred	An unauthorised building has been the subject of a Demolish Works Order or unauthorised works have been carried out.	<ul style="list-style-type: none"> <li>• The owner of the premises</li> <li>• Any person entitled to act on a planning approval or acting in contravention of a planning approval</li> <li>• In relation to work unlawfully carried out that was the deposit of material in a public place, the person responsible for unlawfully depositing material in a public place</li> </ul>
11.	<b>Compliance Order</b>		

	<p>To comply with a planning approval for the carrying out of works</p> <p>To do whatever is necessary so that any building or part of a building that has been unlawfully erected complies with relevant development standards</p> <p>To carry out works associated with subdivision</p>	<p>A planning approval has not been complied with.</p> <p>Building has been unlawfully erected and does not comply with relevant development standards.</p> <p>Authorised subdivision works, or works agreed to by the applicant, have not been carried out.</p>	<ul style="list-style-type: none"> <li>• The owner of the premises</li> <li>• Any person entitled to act on a planning approval, or acting in contravention of a planning approval</li> </ul> <p>The owner of the premises</p> <p>The person required to carry out the works</p>
12.	<p><b>Repair or Remove Works Order</b></p> <p>To repair or remove a building in a public place</p>	<p>The building is unlawfully situated wholly or partly in a public place.</p>	<p>Owner or occupier of the building or the person who erected the building</p>
13.	<p><b>Complete Works Order</b></p> <p>To complete authorised works under a planning approval within a specified time</p>	<p>The authorised works have commenced, but have not been completed, before the planning approval would (but for the commencement of the works) have lapsed.</p>	<p>The owner of the relevant land</p>
14.	<p><b>Remedy or Restrain Breach Order</b></p> <p>To do or refrain from doing any act to remedy or restrain a breach of Division 5.2 (or an approval under that Division) or a breach of a consent for State significant development</p>	<p>The breach has occurred, is occurring or is likely to occur.</p>	<p>The person who caused, is causing or is likely to cause the breach, or the person entitled to act on the approval or consent</p>
15.	<p><b>Stop Coastal Activities Order</b></p> <p>To cease carrying out or conducting an activity on a beach, dune or foreshore (within the meaning of those terms in the <i>Coastal Management Act 2016</i>), whether or not the activity is subject to a development consent</p>	<p>The activity is being carried out in contravention of this Act.</p>	<p>Any person apparently engaged in promoting, conducting or carrying out the activity</p>

2. The type and nature of orders that may be issued are broad and are directed to achieving compliance in respect of wide-ranging circumstances of breach of environmental laws.

### **When can a Council give a DCO?**

3. A Council has the power to issue an order in any of the circumstances identified in Schedule 5 of the EPA Act and in circumstances described in the table. Column 1 of the table identifies the types of orders that Council can give. Column 2 outlines the circumstances in which the various kinds of orders can be given and column 3 identifies who the order can be given to.

### **When should a Council issue a DCO?**

4. A Council must consider the circumstances surrounding each matter on its own merits as to whether, in the circumstances, it is appropriate to issue an order. In this regard, Council may consider certain of the following matters:
  - (a) the nature of the breach of environmental law in question;
  - (b) the impacts of the continuing nature of a breach upon adjoining owners and the general public and the environment;
  - (c) any hardship to the recipient of the order including the expense of compliance. An order must not cause an injustice disproportionate to the ends sought to be achieved by the order;
  - (d) the time given for compliance with an order must be reasonable in all of the circumstances;
  - (e) whether the consequence of an order is likely to make a recipient, or certain persons the subject of the order, homeless;
  - (f) who the order should be addressed to, in particular, the owners of the land, occupiers of the land, lessees, etc.;
  - (g) whether the property is of heritage significance and whether the terms of the order have the potential to impact upon that heritage significance.

### **Form of the DCO – Requirement to first give notice of intention to issue an order**

5. Prior to issuing any final order, it is a requirement of the EPA Act that the Council first give notice of its intention to give an order. That notice of intention is required to identify the proposed time for compliance and that a recipient may make representations to the Council as to why the order should not be given.
6. Council has an obligation to await the nominated time period for submissions prior to moving to issue a final order and, in the event that representations are made, to duly consider those representations.
7. Following receipt of the reasons for non-compliance, or in the absence of receipt of reasons, the Council must ultimately decide whether to move to issue a final order.
8. If an order is to be issued, the terms of the order are to be set out in the notice so it is clear what the recipient is required to do. Those reasons must be able to be readily understood by the person to whom it is given. Any ambiguity within the DCO will be construed strictly against the relevant power who gave the order.

9. In the above respect, it is of central importance that the language used and the information contained within the notice is expressed with clarity and that the language used throughout the notice and order are consistent. It is also important that the notice correctly identify the recipient (making sure that the recipient is a legal person and not, for example, simply a business name), their relationship to the land and why they are being given the notice, the premises to which the order relates should be identified by lot and DP reference and street address.
10. Some tips for the drafting of notices of intentions and orders:
- (a) The order should state the intention of the Council to give the order to the recipient and give a detailed characterisation of how the breach has arisen and why the notice is being issued.
  - (b) The notice should identify the relevant legislation and/or breach of particular development consent if relevant.
  - (c) Identify the statutory provisions which give rise to the breach and identify the actual breach being alleged.
  - (d) The order should state exactly what the recipient is required to do or refrain from doing and by what time the recipient is to have undertaken the specified action.
  - (e) It is often found that the time for compliance with an order is unreasonable. If the recipient is being requested to undertake certain action to remedy a breach, for instance, to demolish or remove an unauthorised structure, the time for compliance must be reasonable and clear. It is only appropriate to require immediate compliance if there is deemed to be a serious risk to health or safety or in an emergency situation. In all other circumstances, the time for compliance with an order must be reasonable and thought should be given to what is an appropriate amount of time to bring about compliance.
  - (f) Both a notice of intention and final order must provide the recipient an opportunity to make representations to the Council about why the order should not be given, changes to the terms of the proposed order and/or the period of compliance with it.
  - (g) The notice of intention and/or order must identify who the representations are to be made to and the date by which representations are to be received. The order should also note the serious nature of the order, the consequences for non-compliance and that legal advice is recommended to be sought.

### **How is a notice to be served upon the recipient?**

11. Section 10.11 of the EPA Act sets out the requirements for service of a notice on a recipient. In the case of an individual, service may be effected by delivering it to the recipient personally or by sending it by pre-paid post

addressed to the recipient either at an address given by the recipient or, where no address is specified, at the recipient's last known place of address or business.

12. In the case of a corporation, notice may be given by leaving it at the person's place of business or corporate office and/or by sending it by pre-paid post to the person's nominated corporate address or last known place of business.

### **Preceding to giving of an order**

13. In the event that compliance has not been achieved by the expiry of the time specified in the notice of intention to give an order, then the Council must make a determination as to the formal issuing of an order.
14. In the event that the recipient of the order has made representations to the Council during the period provided for in the notice of intention, it is a requirement of the Council to have specifically considered those representations prior to moving to issue of a formal order. Any failure to consider such representations may be a ground for invalidity of any subsequent order. In that regard, a record should be made of how representations have been taken into account by a Council. It is also useful to set out the consideration of any representations in the body of any subsequent order, having considered such representation, Council may proceed to give the recipient an order, in the event that it is still appropriate to do so in circumstances where compliance has not been brought about.
15. In the event that an order is given, the order must make clear that the recipient has a right to appeal against the terms of the order to the Land and Environment Court within 28 days of the date of service of the order upon the recipient.
16. The order must contain the reasons for the giving of the order to the recipient. A particular trap that often leads to the invalidity of orders is that the order must include reasons which are not a mere re-statement of the circumstances specified in the table to Schedule 5 of the EPA Act but rather, are particular reasons relevant to the site and the breach in issue. Again, the reasons should be sufficient to enable the recipient to be able to understand why the order has been given and what is required to be done to achieve compliance.

### **Emergency orders**

17. Council has a wide range of powers to issue what is referred to as an emergency order. In that regard, a number of the general requirements for the giving of an order are dispensed with. In particular, there is:
  - (a) no requirement to give notice;
  - (b) no requirement to hear or consider representations;
  - (c) no requirement for reasonableness in the time for compliance, e.g. time for compliance can be immediate;
  - (d) reasons can be given at a later date.

## BUILDING INFORMATION CERTIFICATES

18. Following the decision of Justice Pain of the Land and Environment Court in *Scarf v Shoalhaven City Council* [2013] NSWLEC 128 (**Scarf**), there is no express or implied power to amend a Building Information Certificate (**BIC**) under the EPA Act.
19. In *Scarf*, class 1 proceedings were commenced against Council's determination to refuse a modification for an animal or boarding training establishment and the deemed refusal of a BIC application for structures associated with an Equine Education Centre Building.
20. The Applicant filed Notices of Motion seeking leave to amend each of the applications. The key issue re the BIC application was the power of the Court to amend a BIC application under the EPA Act.
21. This in turn required consideration of the statutory construction matters considered in *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 and *Duke Developments Australia 4 Pty Ltd v Sutherland Shire Council* [2021] NSWLEC 69.
22. Her Honour found that there was no express or implied power to amend a BIC and that the absence of such a provision should be seen as a deliberate choice of the legislature.
23. Careful consideration will need to be given when submitting an application for a BIC to ensure that it covers the entirety of required matters/parts of the building/premises. Applicants may err on the side of caution and consider it more prudent to submit a BIC application for the entirety of a property to avoid future issues which may arise regarding the lack of any power to amend.

## CONTEMPT

24. Contempt of Court is an act of being disobedient to or disrespectful towards a Court of law and its officers and a form of behaviour that opposes or defies the authority, justice and dignity of the Court. A person guilty of contempt is a contemtor.
25. Offences for contempt are within the civil jurisdiction of the Court and can either be civil contempt or criminal contempt. However, as Justice Robson observed in *Inner West Council v Balmain Rental Pty Ltd and Anor* [2022] NSWLEC 20 AT [36]:

*[36] This is a case of civil contempt. While there is a distinction between civil contempt and criminal contempt, the distinction is largely illusory because both require the charge to be proved beyond reasonable doubt and the usual outcome is punishment: Waverley Council v Tovir Investments Pty Ltd and Rappaport (No 3) [2013] NSWLEC 35 at [23] (Biscoe J). Specifically, a civil contempt involves disobedience of a court order in civil proceedings. Comparatively, a criminal contempt involves contempt in the face of the court or interference with the course of justice: Witham v Holloway (1995) 183 CLR 525 at 530, 538.*



26. The notion of contempt broadly means to be wilfully disobedient.
27. A civil contempt is a breach of a Court's order or an undertaking. The elements of the offence of a civil contempt are set out by Perram J in *Re.group Pty Ltd v Kazal (No. 4)* [2017] FCA 1084 as follows:

*In a case of civil contempt, the Plaintiff must prove that:*

- (i) an order was made by a Court;*
  - (ii) the order was sufficiently clear such that one can be sure beyond reasonable doubt that the order was not complied with;*
  - (iii) the order was served on the alleged contemnor or that service was for some reason dispensed with under some lawful order;*
  - (iv) the alleged contemnor had knowledge of the terms of the order;*
  - (v) the alleged contemnor breached the order; and*
  - (vi) the alleged contemnor took a deliberate step which, even if not intended to, breached the order. What is necessary is not that the alleged contemnor intended to breach the order but rather that the order was breached and that the action constituting the breach was intended. Hence, casual, accidental or unintentional acts which breach an order are excluded.*
28. The elements of criminal contempt are:
- (a) an act is done;
  - (b) which act (objectively) has the tendency to interfere with the administration of justice.

Some examples include refusing to answer questions, threatening judges and legal practitioners, bringing the Court into disrepute.

### **Commencement of proceedings**

29. A civil contempt is usually commenced by way of notice of motion by one of the parties in the proceedings in which the other party has failed to comply with an order of the Court.
30. A criminal contempt is usually commenced by way of summons. The principle difference between the procedure in commencing the two types of contempt is that civil contempt is usually left to the offended party to enforce whereas criminal contempt is instigated by the Court which usually brings the proceedings.

### Standard of proof

31. The standard of proof for both civil and criminal contempt is the criminal standard of beyond reasonable doubt. Part 55 for the *Supreme Court Act 1970* provides the procedural rules of contempt. Division 2 deals with contempt in the face of the Court or of hearing of the Court. Division 3 concerns contempt proceedings commenced by way of motion where contempt is committed in connection with proceedings in another Court.
32. Section 67(D) of the *Land and Environment Court Act 1979* confers the Land and Environment Court the powers vested in the Supreme Court under Part 55 of the Supreme Court Rules in respect of "punishment of persons guilty of contempt or of disobedience to any Order made by the Court". In Class 5 proceedings (Part 55 of the Supreme Court Rules also applies to Classes 1, 2, 3, 4, and 8).

### Sentencing for Contempt

33. The rules of the Court make provision for the procedure to be adopted for contempt. They provide for the types of punishment that may be imposed for an offence of contempt. Typically, provision is made for committal of the contemtor, fines, suspended sentences, and good behaviour bonds. Part 55 Division 4 of the Supreme Court Rules provides under section 13 punishment:
  - (a) where the contemtor is not a corporation, the court may punish contempt by committal to Correctional Centre, or fine, or both;
  - (b) where the contemtor is a corporation, the court may punish contempt by sequestration or fine or both;
  - (c) the Court may make an order for punishment on terms, including suspension of punishment or a suspension of punishment in the case of a contempt gives security in such sum as the court may approve for good behaviour and reforms the terms of security.
34. There is no difference in the types of penalty that may be imposed for civil and criminal contempt. Civil and criminal contempt may be dealt with by way of fine or imprisonment, either of which may be suspended to achieve a bond like type order. There is no maximum penalty specified for contempt in either the Supreme Court Rules or the EPA Act.

### Factors relevant for sentencing for contempt – determining appropriate punishment

35. There are a number matters usually taken into account when considering the appropriate punishment for contempt. These considerations were first set out by the Court in *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 and they have been applied in numerous decisions in NSW and other Courts. The circumstances which gave rise to the contempt in *Wood v Staunton (No 5)* related to a refusal to give evidence, however, the considerations have been applied in other circumstances of contempt including breach of Court order. The considerations include:

- (a) the seriousness of the contempt proved;
  - (b) the contemptors culpability;
  - (c) the reasons or motive for the contempt;
  - (d) whether the contemtor received or has tried to receive benefit from the contempt;
  - (e) whether there has been any expression of genuine contrition by the contemtor;
  - (f) the character and antecedents of the contemtor;
  - (g) the contemptors personal circumstance;
  - (h) general and personal deterrence; and
  - (i) the need for denunciation of the contemptuous conduct.
36. Generally, an overriding consideration is the need for personal or specific deterrence and the need for denunciation of the conduct. These are guiding principles when sentencing for contempt.
37. Costs in contempt proceeding are generally sought and awarded on an indemnity basis.

### Classes of contempt

38. There are three classes of contempt:
- (a) Technical;
  - (b) Wilful; and
  - (c) Contumacious.
39. In *Burwood Council v Ruan* [2008] NSWLEC 167 Justice Biscoe of the Court considered these three classes of contempt at [7]-[10]:

*7 There are three classes of contempt: technical, wilful and contumacious. Technical contempt is where disobedience of a court order (or undertaking to the court) is casual, accidental or unintentional. Wilful contempt is where the disobedience is more than that, but is not contumacious. Contumacious contempt is where there is a specific intention to disobey a court order or undertaking to the court, which evidences a conscious defiance of the court's authority. Although a contempt may be established, in the circumstances of the case the court may decide not to make any order. The element of intention is relevant to whether any order should be made and, if so, to punishment. These principles emerge, in my view, from the following authorities.*

*8 The phrase "casual, accidental or unintentional" was used by the High Court in **Australasian Meat Industry Employees' Union v Mudginberri Station Proprietary Limited** (1986) 161 CLR 98 at 107 (in the joint judgment of Gibbs CJ, Mason, Wilson and Deane JJ) and in **Pelechowski v The Registrar, Court of Appeal (NSW)** (1999) 198 CLR 435 at 484 [147] fn [156] (by Kirby J). The phrase was originally coined in the slightly different conjunctive form "casual or accidental and unintentional" in **Fairclough & Sons v Manchester Ship Canal Co** (1897) 41 Sol Jo 225 (CA), which was quoted in **Witham v Holloway** (1995) 183 CLR 525 at 541 by McHugh J. The meaning of the word "casual" is unclear.*

9 The three classes of contempt were recognised in the High Court by Kirby J in **Pelechowski** at 484-485 [147], by the NSW Court of Appeal in **Registrar of the Court of Appeal v Maniam [No 2]** (1992) 26 NSWLR 309 at 314-315 by Kirby P (Hope A-JA agreeing), and in **Greater Hume Shire Council v J & L Cauchi Civil Contracting Pty Ltd** [2006] NSWLEC 738 at [30] by me. In **Pelechowski** at 484-485 [147] Kirby J noted that technical contempts are sometimes called "casual, accidental or unintentional" contempts and said:

*The underlying purpose of the law on this form of contempt is to vindicate the due administration of justice. Contempts of the kind illustrated in this case may be technical, wilful but without a specific intent to defy the authority of the Court and contumacious. In the last category a serious act of deliberate defiance of judicial authority is evidenced. Conceding that such categories of contempt may sometimes overlap, in a case of a technical contempt, where the contemnor has offered an apology which the Court accepts, it will sometimes be sufficient to make a finding of contempt coupled with an order for the payment of costs. Where a wilful contempt is shown, in the sense of deliberate conduct but without specific intent to defy judicial authority, a finding of contempt and an order for the payment of costs may not be sufficient. In such a case, a fine (and sometimes more) may be needed to vindicate the authority of the court. But in a case of contumacious defiance of a court's orders and authority, it will frequently be appropriate for a custodial sentence to be imposed as a response to an apparent challenge to the authority of the law.*

(footnotes omitted)

# ENFORCING ENVIRONMENTAL LAWS – KEY ISSUES AND RECENT CASES

**Thursday 16 March 2023**

Ryan Bennett, Partner



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1.

# Development Control Orders (DCOs)



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# 1. Validity of DCOs

- Certainty is required
- Will be construed strictly against relevant power
- Clear distinction must be made between notices of intention and orders – *Bobolas v Waverley Council* [2012] NSWCA 126



# 1. Validity of DCOs

- *Ballina Shire Council v Joblin* [2022] NSWLEC 90
- Council filed a Summons charging the owner of the property with a breach of s 9.37 of the EPA Act for failing to comply with a Development Control Order (**DCO**)
- DCO required the demolition of swimming pool and reinstatement of ground at the rear.
- Collateral challenge by the Defendant to the validity of the DCO issued by Council in July 2019.
- Robson J held it was open to raise such a challenge as a defence in criminal proceedings.



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# 1. Validity of DCOs

- Defendant argued DCO was unclear as it was expressed in terms of futurity and pointed to the following wording in the DCO [34]:
  - “Council advises that it will issue you with the Order”,
  - “A Council order, once it is served...”,
  - “Should you fail to comply with the Order once it is served”,
  - “In the event that [Council] serves an Order...”,
  - “Council will issue you with the Order as proposed”, and the heading “Reasons for the Proposed Order”;
  - and where the Order variously refers to “an order” rather than ‘the’ or ‘this’ order.
- Robson J held that the order was invalid as it was not expressed in sufficiently clear and unambiguous language. Charges were dismissed.

# 1. Challenging Validity of DCO – class 1 proceedings

- *Chegade v Canterbury-Bankstown Council* [2022] NSWLEC 1473
- Two development control orders issued by Council:
  - Stop use order; and
  - Demolish works order
- Applicant sought to challenge the validity of the DCOs based upon the alleged short period of time to submit representations.



# 1. Challenging Validity of DCO – class 1 proceedings

- Consistent with her decision in *Maroun Holdings Pty Ltd v Kiama Municipal Council* [2020] NSWLEC 1013 Commissioner Gray held at [60]:

*Even if I accept that insufficient time was given for the making of representations prior to the issue of either of the development control orders, the orders nevertheless persist “so as to found the jurisdiction of the Court to entertain an appeal under s 8.18 of the EPA Act” (Maroun Holdings at [78]). As I made clear in that decision (at [74]):*

- *“As such, whilst the invalidity at law of a development control order may be an appropriate basis on which to exercise the Court’s jurisdiction to revoke the order or make alternate court orders (such as what occurred in Barnes v Dungog Shire Council and Lederer v Sydney City Council), it is not a bar to the Court’s jurisdiction to consider the merits of the appeal and to exercise its discretion pursuant to s 8.18 of the EPA Act.”*

# 2.

## Building Information Certificates



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## 2. Building Information Certificates (BIC)

- *Walker v Queanbeyan-Palerang Regional Council* [2023] NSWLEC 1032
- Development application for use of existing farm building (constructed unlawfully).
- Consent refused as Commissioner held would be inappropriate to grant consent unless and until a BIC had been issued.
- Applicants had not complied with the terms of a Development Control Order and had not appealed against the giving of the order.
- Applicants had also not applied for a BIC.

## 2. Amending BICs

- *Scarf v Shoalhaven City Council* [2021] NSWLEC 128
- Applicant sought leave to amend BIC application following s 34 conciliation conference.
- Applicant argued that power existed pursuant to s 39(2) of the *Land and Environment Court Act 1979 (LEC Act)*.
- Council argued at [44] as follows:
  - *No power exists in the EPA Act to enable the modification of a BIC application. Applying the same statutory construction considerations identified in Dartbrook and Duke Developments there is no express or implied power to do so.*



## 2. Amending BICs

- Pain J held as follows:
- *[45] - Sections 6.22-6.23 of the EPA Act confer a statutory entitlement to make an application for a BIC. Section 6.23(2) of the EPA Act enables regulations to be made to provide for the procedure for making and dealing with applications for BICs. The relevant regulations are set out in cl 260, 280-281 of the EPA Regulation. Notably, there is no express statutory provision which confers an entitlement to amend a BIC application.*
- *[47] - Similarly, there is no express or implied power which enables the Council to permit an amendment to an application for a BIC (Dartbrook per Preston CJ at [252], followed by Robson J in Duke Developments).*
- *[48] - The powers of the Court on appeal are in s 39 of the LEC Act and also s 8.25(3) of the EPA Act. For the reasons explained above s 39 of the LEC Act does not confer upon the Court a function or discretion which the Council did not have in respect of the matter (Dartbrook per Preston CJ at [256]-[258]). Although, having regard to s 8.25(3) the powers of the Court on appeal may be considered wider than that of a Council (Ireland v Cessnock City Council (1999) 103 LGERA 285; [1999] NSWLEC 153 per Bignold J at [58]), nevertheless subs (3) does not confer power on the Court to permit an amendment.*
- Consequently her Honour held there was no express or implied power under the EPA Act to amend a BIC.

# 3.

## Contempt proceedings in the Land and Environment Court



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# 3. Contempt

- Proceedings commenced via filing a Summons and Notice of Motion (generally in the original proceedings).
- Part 55 of the *Supreme Court Rules (SCR)* applies (see r 6.3 of LEC Rules)
- Where the contemtor is not a corporation, Court may punish by committal to a correctional centre or fine or both.
- Where contemnor is a corporation, Court may punish by sequestration or fine or both.

# 3. Contempt

- Importance of serving sealed orders with Penal Notice pursuant to r 40.7 of the UCPR
- No maximum penalty for contempt specified in SCR or EPA Act



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# 3. Contempt

- 10 factors relevant for sentencing for contempt (see *Wood v Staunton (No 5)* including:
  - Seriousness of the contempt
  - Reasons for the contempt
  - Apology or public expression of contrition
  - Character and antecedents of the contemtor
  - General and personal deterrence
  - Denunciation of the contempt



# 3. Contempt - costs

- Costs are generally sought and can be awarded on an indemnity basis (see for example *Sutherland Shire Council v Perdikaris & Inner West Council v Balmain Rentals Pty Ltd* [2022]).
- In *Blacktown City Council v Jason Gabriel Saker (No 4)* [2022] NSWLEC 80m Pepper J held at [120]:

*In my opinion, an order for costs on an indemnity basis is an important sanction to mark the Court's condemnation of Saker's contempt especially in circumstances where:*

1. *in the absence of an early plea of guilty, the Council has incurred considerable costs in proving to the requisite standard that Saker was in contempt;*
2. *Saker's insistence that he had not been served with documents by the Council, means that the Council has incurred significant costs in demonstrating service on him (Saker (No 3) at [17]); and*
3. *he has made no attempt to comply with the final orders and purge the contempt. On the contrary, he has told the Court that he will continue to defy them.*



# 3. Contempt – recent cases

- *Sutherland Shire Council v Perdikaris* [2020] NSWLEC 111
  - Failure to demolish freestanding garage as per orders made in class 4 proceedings
  - Contempt found to be wilful
  - Preston CJ imposed a fine of \$10,000.00 suspended and 3 months provided to comply



# 3. Contempt – recent cases

- *Inner West Council v Balmain Rentals Pty Ltd* [2022] NSWLEC 20
  - Eight counts of contempt for failing to comply with Consent Orders made in class 4 proceedings to cease use of industrial premises
  - Contempt found to be wilful
  - Robson J imposed fines of \$7,500.00 per count



# 3. Contempt – recent cases

- *Blacktown City Council v Jason Gabriel Saker (No 4)* [2022] NSWLEC 80
- Case involved a failure to engage a suitably person to prepare a WCR and Remediation and to provide the remediation plan to Council.
- Her Honour found the contempt was wilful and contumacious and objectively serious.
- Mr Saker was fined \$40,000.00 and in addition to that a suspended periodic fine of \$10,000.00 per month was imposed to be paid until the contempt was purged.