

# Recent decisions of the Land and Environment Court



Acting Justice Simon R Molesworth AO  
Acting Judge of the Land and Environment  
Court

# Outline



☞ The thematic approach

☞ Two areas of law:

☞ The regulation of existing uses

☞ The competency of Class 1 proceedings

☞ The observations of a Victorian

# Existing uses



Two themes in recent decisions:

(1) Identifying the land on which an existing use is carried out,

(2) Identifying what the lawful existing use is

# Identifying the land



- ✧ Since 1979, the privilege of continuing existing uses has been circumscribed
- ✧ Nevertheless, the Environmental Planning Assessment Regulation 2000 allows for existing uses to evolve, with consent, on the land on which the existing use was carried out immediately before the relevant date
- ✧ A body of case law has developed concerning the ambit of the land to which existing uses attach: see, eg, *Eaton & Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 and *Lemworth Pty Ltd v Liverpool City Council* (2001) 53 NSWLR 371

# Identifying the land



Recent contrasting decisions of:

*Seraglio v Shoalhaven City Council* [2017]  
NSWLEC 45 and

*Saffioti v Kiama Municipal Council* [2017]  
NSWLEC 65

# Identifying the land



## ❧ *Seraglio v Shoalhaven City Council*

- ❧ One Lot, two self-contained dwelling houses
- ❧ Dwelling houses had separate addresses, separate driveways, were divided by a paling fence and separately identified in historical Council records
- ❧ **Issue:** whether the Lot comprised two units of land each benefitting from an existing dwelling house use or one single unit of land benefitting from two existing dwelling house uses

# Identifying the land



❧ *Seraglio v Shoalhaven City Council*

❧ Held:

❧ The Lot comprised two separate units of land at the relevant date; each unit of land was used for the purpose of dwelling house

❧ Emphasis on the historical evidence

# Identifying the land



## ❧ *Saffioti v Kiama Municipal Council*

- ❧ One 9.3 ha Lot in the hinterland of Kiama
- ❧ One concrete dwelling house surrounded by (aside from a small cleared area) remnant rainforest native vegetation
- ❧ No evidence of internal divisions or alternative uses
  
- ❧ **Issue:** whether the Lot was one unit of land that benefitted from an existing dwelling house use or, alternatively, the existing use was restricted to a portion of the Lot constituting a reasonable or generous curtilage to the dwelling house

# Identifying the land



## ❧ *Saffioti v Kiama Municipal Council*

❧ Held:

- ❧ The land benefitting from the existing dwelling house use was the entirety of the bush block; this was the single, cohesive planning unit
- ❧ The case was distinguished from more factually complicated circumstances involving, inter alia, evidence of other uses of land

# Identifying the land



## ❧ *Comparing Seraglio and Saffioti*

❧ What explains the different outcomes to a similar issue?

❧ Lawyers as historians

# Identifying a lawful existing use

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- ⌘ The importance of characterisation in existing use cases partly depends on whether the alleged existing use was:
  - ⌘ (1) lawful because it **did not** historically require a development consent or
  - ⌘ (2) lawful because it **obtained** a requisite consent:  
*Jojeni Investments Pty Ltd v Mosman Municipal Council* (2015) 89 NSWLR 760
- ⌘ As Leeming JA observed in *Jojeni*, the question of characterisation “...is not free from difficulty.”

# Identifying a lawful existing use



Recent decisions of:

*Seraglio*

*Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56

# Identifying a lawful existing use

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## ⌘ *Seraglio*

⌘ Uncontroversial that the existing dwelling house uses continued up until the commencement of a 2014 environmental planning instrument

⌘ **Issue:** whether the introduction of dual occupancies as a nominate use permissible with consent changed the use of the land from that of dwelling houses to dual occupancies

# Identifying a lawful existing use

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## ⌘ *Seraglio*

### ⌘ Held:

⌘ Properly characterised, there were two separate uses of the two parts of the land for the purpose of dwelling house rather than the use of two dwellings on one lot of land.

⌘ “When the proper approach to characterisation for the purpose of existing use is understood, it can be seen that the coming into force of an environmental planning instrument that specifies various categories of purpose cannot, by itself, change the proper characterisation of the purpose of a particular use of land” (at [49]).

# Identifying a lawful existing use

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## ❧ *Royal Motor Yacht Club*

❧ The club had used waterfront land and an adjacent waterway for recreational boating activities since 1926, including the construction and use of various land and water-based facilities such as swing-moorings

❧ **Issue:** Whether the purpose of use of the land and waterway was that of recreational boating club or, alternatively, whether the purpose of use of the waterway was that of marina (as defined in a 2014 environmental planning instrument)

# Identifying a lawful existing use

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## ❧ *Royal Motor Yacht Club*

❧ **Held:** The purpose of the club's use of the land and waterways was recreational boating club

❧ "The nature of [the berthing and mooring facilities] might fall within the definition of 'marina' in PLEP 2014, but that does not mean that these facilities are properly to be characterised as being used for the purpose of marinas. The provision of berthing and marina facilities for club members' boats is an important means by which RYMC makes the land and waterway serve the purpose of recreational boating club." (at [29])

# Identifying a lawful existing use

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- ❧ Lessons from *Seraglio* and *Royal Motor Yacht Club*:
  - ❧ Proceed cautiously when characterising an existing use in the context of subsequent planning instruments
  - ❧ Importance of focusing on the purpose of use of the activities rather than meticulously examining each activity
    - ❧ As Meagher JA said in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404 at 409:
      - ❧ “When a resident uses his land to park his motor car at his house, he is no doubt not conducting an independent use of car parking.”

# Competency



Recent decisions of:

- Lateral Estate Pty Ltd v The Council of the City of Sydney* [2017] NSWLEC 6;
- Australian Consulting Architects Pty Ltd v Liverpool City Council* [2017] NSWLEC 129; and
- Corbett Constructions Pty Ltd v Wollondilly Shire Council* [2017] NSWLEC 135.

# Competency



- ❧ The decisions of *Lateral Estate, Australian Consulting Architects*, and *Corbett Constructions* all concerned the issue of whether Class 1 proceedings were commenced within the prescribed six month period under the *Environmental Planning and Assessment Act 1979* for appealing a deemed refusal of a development application
- ❧ Each decision turned on the determination of the date on which the relevant development application was taken to have been refused

# Competency



- ✧ In *Lateral Estate* and *Australian Consulting Architects*, the Applicant argued that the clock measuring the date of deemed refusal was re-set by a valid amendment of the development application
- ✧ In both cases, the Court held that the development application had not been amended under the Environmental Planning and Assessment Regulation 2000

# Competency



- ❧ In *Lateral Estate*, the Court held that the consent authority did not agree to the proposed amendment as required
- ❧ In *Australian Consulting Architects*, the Court held that the alleged amendments had not:
  - ❧ (1) sufficiently crystallised;
  - ❧ (2) been agreed to by the consent authority; and
  - ❧ (3) been accompanied by sufficient written particulars

# Competency



- ✧ In *Australian Consulting Architects and Corbett Constructions*, the Applicant argued that the deemed refusal clock had paused due to an alleged request for further information concerning the development application
- ✧ In the former case, the request was made by RMS
- ✧ In the latter case, the request was made by the consent authority and specified a 28 day period for provision of the further information

# Competency



- ❧ In *Australian Consulting Architects*, the Court held that RMS was not a concurrence authority for the purpose of the development application. Consequently, the deemed refusal clock was not stopped and the proceedings were incompetent
- ❧ **Conversely**, in *Corbett Constructions*, the Court held that the consent authority had validly allowed a further period of time to the initial 28 days for the information to be provided. Consequently, the deemed refusal clock remained stopped until the provision of the information and the proceedings were competent

# Competency



- ❧ The cardinal lesson from these recent decisions:
  - ❧ The Court, as a statutory court, can only hear and dispose of Class 1 proceedings if the Applicant was entitled to commence the proceedings
  - ❧ Hence, care must be taken to avoid prospective applicants being unwittingly deprived of their entitlement to commence such proceedings

# Personal observations

