ENVIRONMENTAL LAW REPORTER

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NATIONAL

FEDERAL COURT OF AUSTRALIA

(24-068) Friends of the Gelorup Corridor v Minister for the Environment and Water [2023] FCAFC 139

Jackson, Feutrill and Kennett JJ – 22 August 2023

Keywords – Judicial review – decision to approve controlled action – postponing essential consideration – precautionary principle

The Respondent granted an approval to the Commissioner for Main Roads to carry out a controlled action under the ***Environment Protection and Biodiversity Conservation Act 1999*** **(Cth) (EPBC Act)** as part of a project to development a traffic bypass to the urban area around Bunbury, Western Australia.

The controlled activity resulted in clearing of native vegetation and impacts to a number of listed species and threatened ecological communities.

The Appellant unsuccessfully challenged the decision in the Court below. The Appellant again sought to quash the approval, and to restrain the Respondent from carrying out any further work or relying upon that approval. An early injunction was granted in these proceedings, but did not continue, and works were ongoing.

The proposal resulted in impacts to a cockatoo species, which required, by condition, compensatory measures to be undertaken in order for the impacts to be considered acceptable. Main Roads proposed specified areas of land as 'offsets' in order to compensate for the impact, however, the Respondent determined that this was not sufficient. A condition required a revised strategy to be submitted. The same conclusion was made in relation to the potential impacts on a Western Ringtail Possum species, Banksia Woodlands and Tuart Woodlands.

The Appellant contended that this amounted to the postponing of a significant aspect of the decision to a later time by transferring the evaluation into a regime that was not governed by the EPBC Act. Further, the Appellant contended that the offset conditions were so broad that the decision-maker would not have formed a view as to precisely what must be done for approval to be given.

Three situations exist in which indeterminacy of a condition (under s133 of the EPBC Act) could lead to a decision being set aside. First, the condition was beyond power and inseverable from the approval decision. Such an argument was not put by the Appellant.

Second, the effect of the condition may be that the scope or nature of the proposed action remains to be fixed at a later time, the form of which would be approved by a different decision-making process. Here, it was argued that the offset conditions do not create any uncertainty or lack of clarity as to the scope of the project the subject of the appeal.

Third, the terms of the condition reveal irrationality in the reasoning leading to the decision. The Minister was clearly concerned with the impacts of the project, and imposed conditions which would render those impacts acceptable. It was argued that if the effect of the condition resulted in significant issues to be determined later, the effect may be a legally unreasonable decision.

The Appellant also contended that the Minister did not consider the precautionary principle as was required by the EPBC Act. The precautionary principle is triggered when there is a threat of serious or irreversible environmental damage, and scientific uncertainty as to the environmental damage. Invoking the precautionary principle permits the taking of preventative measures, without having to wait for the reality of the threat to be known.

A question arose as to the meaning of 'take account of' and 'take into account' the precautionary principle.

The precautionary principle applies when a question arises in relation to the postponing of a measure to prevent degradation of the environment. This was not the question before the Minister. Approval of the project, which may have significant impacts on a species, is not a measure to prevent degradation to the environment. If the Minister had accepted there was a threat of serious harm, but did not impose any measures to prevent the harm on the basis of lack of scientific certainty, this may infringe the requirement. That was not the case here.

Reasoning forming part of approval decision that was not consistent with the precautionary principle would potentially make the decision liable to be set aside, on the basis that 'account' had not been taken of that principle, notwithstanding the principle does not apply according to its terms.

What is required is the likely impacts of the proposed action on the nominated species, and the weight against the social and economic benefits of the project. The decision-maker was not required to ask themselves whether each nominated species had some threshold to meet. Where the Minister was faced with scientific uncertainty, she invoked the principle and proceeded on the basis that there would be impacts.

HELD:

1. Ground two, concerning the conditions relating to the offset strategy, was rejected.

2. Ground three, concerning the precautionary principle, was rejected. There were no findings from the Minister to demonstrate that she failed to take account or take into account, the precautionary principle. Further, the terms to 'take account of' and 'consider' are essentially interchangeable.

3. The precautionary principle is not a mandatory consideration that was to be weighed up by the Minister against other relevant considerations. Instead, it was an evidentiary principle as to how the evidence presented to it is acted upon.

4. The Minister did not need to consider whether the precautionary principle applied to each nominated species, but to be aware of the principle. In the circumstances, the Minister's assessment and application of the precautionary principle was appropriate.

5. The Appellant failed to demonstrate that the Minister overlooked the precautionary principle.

Appeal dismissed with costs.

Reporter: Serafina Carrington

NEW SOUTH WALES

COURT OF APPEAL

(24-069) May v Northern Beaches Council [2023] NSWCA 205

Meagher & Payne JJA – 5 September 2023

Keywords – Leave to appeal summary dismissal by the primary judge of judicial review proceedings – dispute between neighbours – application brought out of time – self represented litigant – no challenge to the legal test applied by the primary judge or the Council's decision to approve the modifications – Leave to appeal refused

The Applicant sought leave to appeal the interlocutory decision of Robson J to summarily dismiss proceedings commenced in the LEC's Class 4 jurisdiction.

The Applicant commenced judicial review proceedings in 2022, almost 5 years after his neighbour obtained development consent (**Consent**) to build a family home in the Northern Beaches Council area and more than 3 years after construction at the site had commenced claiming, in substance, that various regulations or development plans were not complied with by the Council in making their decisions. The Applicant challenged four decisions in those proceedings: the Consent, two modification decisions and the private certifier's decision to issue a construction certificate.

The Applicant failed to apply for an extension of time despite the 3-month limitation on the bringing of judicial review applications under r 59.10 of the UCPR. The Applicant did not challenge the legal tests applied by the primary judge. He also conceded in the appeal proceedings that the grant of the modifications was in accordance with then s 96 of the EPA Act, and that he did not challenge the Council's decision to approve the modification.

HELD:

1. Ground 1 complaining that "*leave was obtained to appeal against the non-compliances with the Development Application and Construction Certificate*

and was then suspended after being notified of this appeal" and Ground 4 complaining that "*non-compliance with the works as constructed […]*" were refused as they conflated Robson J's decision to take the administrative step to stay civil enforcement proceedings pending the outcome of the Appellant's application for leave to appeal, with a revocation of leave to replead the civil enforcement part of the Applicant's claims.

2. Ground 2 of the Applicant's appeal, which concerned the primary judge's approach to r 59.10 of the UCPR was rejected, as the Applicant's reliance on r 59.10(5) (which is an exception to the 3-month time limitation for the commencement of judicial review proceedings) to overcome the fact that judicial review proceedings for the Consent, first modification and construction certificate were brought out of time, was not available. Had the Applicant established jurisdictional error (which he did not), the invalidity of the particular decisions said to have been affected by jurisdictional error was the inevitable consequence of the declaratory relief the Applicant sought.

3. Ground 3 in which the Applicant asserted the primary judge erred in failing to conclude that there was a reasonable cause of action that Consent was affected by jurisdictional error was rejected, with the Court finding nothing in the Applicant's submissions gave rise to any doubt about the conclusions of the primary judge.

4. Leave on the basis of Ground 5, in which the Applicant argued the Respondent was attempting to use a strike out application as a basis for obtaining a costs order, had no arguable basis and was refused.

The extension of time seeking leave to appeal was refused and the summons seeking leave to appeal dismissed. The Applicant was ordered to pay the Second Respondent's costs.

Reporter: Zoe Mountakis

LAND AND ENVIRONMENT COURT

(24-070) Australian Unity Funds Management Ltd in its capacity as Responsible Entity of the Australian Unity Healthcare Property Trust v Boston Nepean Pty Ltd & Penrith City Council [2023] NSWLEC 49

Pepper J – 12 May 2023

Keywords: Judicial review of decision to grant development consent – whether LEP provision permitting bonus maximum height was a development standard capable of cl 4.6 variation

The First Respondent was granted consent to demolish an existing building and construct a hotel with a rooftop bar and restaurant. The Applicant sought a declaration that the consent was invalid on the basis that the development exceeded the maximum building height controls in clauses 4.3(2) and 7.11(3) of the *Penrith Local Environmental Plan 2010* (**PLEP**).

The maximum permissible height for the development was 18m (pursuant to cl 4.3(2) of the PLEP). Under cl 7.11 of the PLEP, the maximum height could be exceeded by up to 20% if the floor to ceiling height of both the ground and first floors was equal to or greater than 3.5m (bringing the maximum permissible height to 21.6m).

The First Respondent initially sought a cl 4.6 variation to achieve a maximum height of 23.8m (excluding lift overrun). It then sought a second cl 4.6 variation to achieve a maximum height of 22.632 (excluding lift overrun) with a 3m floor to ceiling height on the first floor. The Applicant claimed that cl 7.11 was not a development standard capable of variation under cl 4.6, and was instead merely an exception to the development standard in cl 4.3(2).

The key issue was whether cl 7.11 was a development standard capable of being varied pursuant to cl 4.6.

HELD:

1. Clause 7.11 regulated the circumstances in which consent could be granted to a development which exceeded the maximum height controls.

2. It therefore met the definition of a "development standard" in the EP&A Act, being a provision "by or under which requirements are specified or standards are fixed in respect of any aspect of that development".

3. The fact that cl 7.11 was not included in Part 4 of the PLEP which specifically dealt with development standards was not relevant.

4. Clause 7.11 conditions the power to grant consent by reference to satisfying two requirements, being the floor to ceiling height and that the maximum height not be increased by more than 20%. Properly understood, the clause is therefore not merely an exception, but is a development standard in its own right.

The further amended summons was dismissed with costs.

Reporter: Brigitte Rheinberger

(24-071) Skyton Holdings No 5 Pty Ltd v Strathfield Municipal Council [2023] NSWLEC 61

Pain J – 7 June 2023

Keywords: Development consent – separate questions of law - validity of decision of local planning panel - chair of local planning panel not appointed by Minister - application of s 52(1) of the *Interpretation Act 1987* – valid decision

In October 2022, Skyton Holdings No 5 Pty Ltd (**Skyton**) commenced Class 1 merit appeal proceedings in the Land and Environment Court against the actual refusal by the Strathfield Local Planning Panel (**LPP**) to grant development consent (**Decision**).

Separate questions of law emerged regarding the validity of the Decision made by the LPP who, at the time of the Decision, was not correctly constituted under the EPA Act. In particular, the Strathfield Municipal Council (**Council**) conceded that the Chair of the LPP was not an "approved independent person" by the Minister under s 2.18(2)(a) and (4) of the EPA Act.

The Council filed a Further Amended Notice of Motion which sought that the Court determine the following separate questions of law: whether the Decision was valid by virtue of the application of s 52 of the ***Interpretation Act 1987*** and/or the common law *de facto* officer doctrine.

The Council's case was that s 52 of the Interpretation Act operated to make the Decision valid. Under s 52(1) of the Interpretation Act, *an act of a statutory body cannot be challenged 'merely because of'* any defects in the appointment of a member, any disqualifications of any members of the body, and/or the participation of a person not qualified to be present. However, for s 52(1) to apply such that the Decision was valid at law, it was necessary to establish that there were no statutory indicators in the EPA Act ousting the application of s 52 (s 5(2) of the Interpretation Act).

The Court focused on the following questions for determination:

1. whether the LPP was a statutory body as referred to in s 52; and

2. if so, whether the EPA Act suggested any contrary intention preventing the application of s 52.

If s 52 applied in the absence of contrary statutory indicators, then any disqualification of a member of the LPP would not give rise to the invalidity in question.

HELD:

1. The LPP was a statutory body as referred to in s 52 of the Interpretation Act; and

2. There were no statutory indicators in the EPA Act ousting the application of s 52 of the Interpretation Act in the circumstances of the case.

3. Since the Court's findings on the application of s 52 resolved the matter, the application of the common law *de facto* officer doctrine was not addressed.

4. The Decision made by an incorrectly constituted LPP was valid in light of s 52(1) of the Interpretation Act.

Reporter: Mayumi Martins

(24-072) Lord v Broken Hill Cobalt Project Pty Limited [2023] NSWLEC 70

Duggan J – 7 July 2023

Keywords: Judicial review – process of remittal – scope of remitter – remitted to consider and determine the quantification of compensation payable

The proceedings relate to an appeal from a determination of an arbitrator in respect of a land access arrangement under s 155 of the *Mining Act 1992* (NSW). The Land and Environment Court's review included the assessment of the compensation payable for any 'compensable loss' under s 262 of the *Mining Act*. This aspect of the primary judge's determination was challenged under appeal to the Court of Appeal.

The Court of Appeal remitted the matter to Duggan J on "the question of quantification of the compensation payable by the appellants for the compensable losses identified … in the primary judgement".

Broken Hill Cobalt Project Pty Ltd in the present case argued that the scope of the remitter was not limited to providing further reasons but permitted the Court to further consider and determine the question of the quantification of the compensation payable. The Respondent relied on the considerations canvassed in ***Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*** (2009) 168 LGERA 1 and submitted that the remitter in questions was expressed clearly and readily enabled the matter and scope to be identified as sufficiently broad.

HELD:

1. The Court is to determine the manner in which the remitter is to be conducted.

2. The Court of Appeal had not anticipated that the remitter would be limited to merely the giving of reasons. The order was not formulated to reflect such limitation.

3. The Court of Appeal had upheld the appeal with particular consideration to the difficulty in ascertaining how the calculations for compensable loss were made.

4. The scope of the remitter is sufficiently clear and broad to permit consideration of submissions relation to the quantification of compensation payable for the heads of compensation specified in the order.

Parties directed as to the finalisation of the proceedings on the remitter.

Reporter: Taylor Finnegan

(24-073) Gabriel v Billett [2023] NSWLEC 85

Robson J – 15 November 2023

Keywords – Class 3 Application – encroachment – application by encroaching owner – area exceeded encroachment – heritage conservation area

The Applicant commenced Class 3 proceedings which sought the transfer of part of the Respondent's land, which contained an encroaching timber and metal shed as well as an additional area of land surrounding the shed in order to service it.

The Respondent opposed the transfer of land and sought the removal of that part of the shed which encroached onto her land.

The shed was built by previous owners of the parties' respective land.

The Applicant had been using the shed, as well as a further area on the Respondent's land for storage purposes associated with the use of his land. Whilst the Applicant's and Respondent's land was located within a heritage conservation area, the shed was not identified as a heritage item.

The Applicant contended that the shed had historical value and that it should be preserved, however, no evidence was provided to support this. There was conflicting evidence as to the condition of the shed, which had been altered significantly throughout its life.

The Respondent contended that she wished to redevelop her land, and would experience restriction in doing so if the area of her land was reduced. Further, any reduction

to the size of the shed to remove the encroachment would not prevent the Applicant from continuing to use the remaining area for storage.

The Respondent also contended that there was adequate area within the Applicant's land, which was much larger than the Respondent's land, to relocate the shed. The Court accepted that submission. The Respondent provided evidence as to the limited cost of removing part, or all, of the shed, which would be a cost effective resolution to the dispute.

The Local Court previously resolved a dispute and made orders concerning the construction of a dividing fence along the common boundary, noting a historically erected fence was located some distance within the Respondents' land. The Applicant sought to challenge these orders and sought orders for a further survey to verify the location of the shared boundary.

HELD:

1. Section 3(2) of the *Encroachment of Buildings Act 1922* limited the Court's power to transfer land to the 'subject land', which only includes the land vertically under the encroachment (s 2).

2. The Court had no jurisdiction to transfer the land beyond the encroaching part of the shed.

3. The encroachment is not insubstantial and constrains the Respondent's ability to deal with her property as she chooses, to some extent.

4. The Court declined to make orders regarding the location of the boundary as it was an attempt to relitigate matters already determined by the Local Court.

5. The encroaching structure was to be removed from the Respondent's land at the cost of the Respondent.

6. The encroaching structure was to be removed within 4 months, or such further period should development approval be necessary, given the land is located within a heritage conservation area.

Orders made and costs reserved.

Reporter: Serafina Carrington

(24-074) Blacktown City Council v Hambly (No 2) [2023] NSWLEC 91

Pritchard J - 8 September 2023

Key words: Contempt of Court – ex parte sentencing hearing – principles in relation to setting aside, or varying, a judgement order after it has been entered.

Pepper J found Mr Derek Hambly (**Respondent**) guilty of contempt of court for failing to comply with orders made on 26 August 2020 requiring the Respondent to (among other things) remove unauthorised structures from land in Riverstone and pay the Council's costs of the proceedings.

On 24 August 2023, an email was sent to the Court by a Mr Barry Valdeck "for and on behalf of" the Respondent citing a number of circumstances said to justify the contempt orders being set aside. The Respondent was directed to, but did not, file with the Court any notice of motion seeking to set aside the orders.

Proceedings for sentencing occurred on 4 September 2023 where there was no appearance from the Respondent. There were two questions posed by Pritchard J: first, whether the Court should proceed *ex parte* where the Respondent did not appear; and secondly, whether the Court had power to set aside orders made in relation to contempt of Court.

HELD:

1. Based on Council's evidence, Pritchard J found the Respondent aware of the proceedings, notwithstanding his absence.

2. As a general rule, apart from a small number of exceptions, judgments or orders which have been formally recorded or entered can only be varied or discharged on appeal. The discretionary power of the Court to set aside an undefended judgment is in r 36.16(2)(b) of the UCPR which provides that the Court may set aside or vary a judgement or order after it has been entered if it has been made in the absence of a party whether or not the absent party had notice.

3. The email sent on the Respondent's behalf did not constitute a proper application to set aside the contempt judgment and orders of Pepper J.

Any application to set aside contempt of Court orders made by Pepper J dismissed.
Judgement reserved in relation to sentence to be imposed on the Respondent.

Reporter: Nethmi Amarasekera

(24-075) Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulburn Mulwaree Council (No 2) [2023] NSWLEC 93

Robson J – 11 September 2023

Key words: Judicial Review – Declaration as to validity sought under s 25C of Land Environment Court Act 1979 – Statutory construction of the scheme for validating consent

These Class 4 proceedings related to the validity of the re-grant of a development consent that had previously been suspended by the Court under s 25B of the ***Land and Environment Court Act 1979*** (**Court Act**). Goulburn Mulwaree Council (**Council**) sought various orders under s 25C(2) of the Court Act including a declaration that, following actions taken by the Council to satisfy the orders made in the previous judgment, the consent had been validly re-granted. Filetron Pty Ltd (**Filetron**) opposed the application.

Robson J was required to determine three issues broadly relating to the availability of Council's power to regrant the consent under s 4.61 of the EPA Act. Issue 1 was in relation to whether the re-grant of the consent could occur concurrently pursuant to s 4.61 of the EPA Act. Issue 2 was in relation to the delegation of powers by Council in complying with the Court's orders. Issue 3 related to substantial compliance with the terms imposed by the Court under s 25B of the Court Act, namely that Council was required to consider the imposition of a condition limiting the number of patrons permitted to attend cellar door premises by way of preparation of a management plan.

HELD:

1. Pursuant to s 4.61(3) of the EPA Act, the consent authority may revoke and re-grant the consent concurrently where the terms imposed by the Court have been substantially complied with. This construction was found to be consistent with the purpose of the scheme and the terms of s 4.61 of the EPA Act which was to facilitate the rectification of consents which would otherwise be held invalid.

2. The power to act in respect of s 4.61 of the EPA Act was a function under an enactment and was therefore capable of being delegated by Councils 377 of the ***Local Government Act 1993***.

3. Condition 51A of the development consent constituted substantial compliance with the terms specified under s 25B of the Court Act.

The declarations sought by Council under s 25C(2) of the Court Act were granted.

Reporter: Nethmi Amarasekera

(24-076) Environment Protection Authority v Maules Creek Coal Pty Ltd [2023] NSWLEC 94

Pritchard J – 15 September 2023

Keywords: Bias – Application for recusal – apprehension of bias

The Defendant made an application in Class 5 proceedings that were listed before Pritchard J seeking that her Honour recuse herself from hearing the proceedings due to a "meeting" that the Defendant alleged her Honour participated in with Ms Anna Christie, a PhD candidate from Western Sydney University who was following the proceedings, but which her Honour did not disclose to the parties.

Briefly, the substantive proceedings were commenced by the EPA charging the Defendant with three offences against s 64(1) of the POEO Act and one offence against s1 40(1) of the POEO Act.

On 14 August 2023, her Honour's associate received an email from Ms Anna Christie in relation to the proceedings. The email referred to a previous 'disclosure' Ms Christie made to Pritchard J, namely that she was

undertaking a law and science PhD and following the proceedings closely as potential case studies. On 18 August 2023, her Honour's associate sent an email to Ms Christie informing her that an AVL link would be available for the hearing of the substantive proceedings.

This correspondence between Ms Christie and Pritchard J's associate formed the basis for the Defendant's application for recusal. It emerged that Ms Christie had attended Pritchard J's chambers during the hearing on 3 February 2023.

Her Honour explained to the parties that Ms Christie had attended her chambers, as a number of university students can do to facilitate learning and interaction with all levels of the legal profession, and that once her Honour had determined that Ms Christie was not a university student for those purposes, but that she had an interest in the litigation before her Honour, she terminated the meeting immediately.

In determining whether there existed grounds to recuse herself from hearing the substantive proceedings, Pritchard J applied the two step test in ***Ebner v Official Trustee in Bankruptcy*** (2000) 205 CLR 337.

HELD:

Applying the two step test in *Ebner*, the Court found:

1. the interaction between her Honour and Ms Christie was identified as a circumstance that might lead a judge to decide a case other than on its factual and legal merits; and

2. the defendant failed to establish a logical connection between the interaction between her Honour and Ms Christie and the "feared deviation from deciding the case on its merits".

The application for Pritchard J for her Honour to recuse herself from hearing the proceedings was dismissed.

Reporter: Teagan Wood

(24-077) Environment Protection Authority v Maules Creek Coal Pty Ltd (No 2) [2023] NSWLEC 97

Pritchard J – 19 September 2023

Keywords: Practice and Procedure – whether recusal decision is an "interlocutory judgment or order" within the meaning of s 5F(3) of the *Criminal Appeal Act 1912* (NSW)

On 15 September 2023, Pritchard J dismissed an application by the Defendant to recuse her from hearing Class 5 proceedings on the basis of apprehended bias.

Following the recusal application, senior counsel for the Defendant:

1. sought a certificate under s 5F(3)(b) of the *Criminal Appeal Act 1912* (NSW) (**CA Act**) certifying that the recusal application was a proper one for determination on appeal; and

2. foreshadowed an application to stay the proceedings until determination of any appeal by the Court of Criminal Appeal in relation to the recusal decision.

The parties agreed that a recusal decision was an interlocutory decision, however, disagreed on whether it was an "interlocutory judgment or order" within the meaning of s 5F(3) of the CA Act.

The Prosecutor submitted that a recusal decision was not a decision capable of being appealed pursuant to s 5F(3) of the CA Act, relying on the decision of Gleeson JA (R Hulme and Button JJ agreeing) in ***Chamoun v Director of Public Prosecutions (NSW)*** [2018] NSWCCA 182.

The Defendant submitted that a recusal decision was a decision capable of being appealed pursuant to s 5F(3) of the CA Act, relying on the decision in ***Polsen v Harrison*** [2021] NSWCA 23. In that case the Court of Appeal held that a recusal decision constituted an "interlocutory judgment or order" in the context of appeals to the Court of Appeal pursuant to s 101 of the ***Supreme Court Act 1970***.

HELD:

Pritchard J determined that she did not need to resolve the question of the construction of "interlocutory judgment or order" in s 5F of the CA Act and the apparent tension between the outcomes in ***Chamoun*** and ***Polsen*** given her Honour had declined to exercise her discretion and certify the recusal judgment as "a proper one for determination on appeal". In declining to exercise her discretion, her Honour had regard to:

1. the fact that the power under s 5F should be exercised with caution;

2. the fact that the Defendant had not pointed to any matter suggesting an appealable error in the recusal decision; and

3. significantly, the undesirability of further fragmenting and delaying the conclusion of the substantive proceedings.

With respect to the stay application, Pritchard J found that:

1. the onus was on the Defendant to persuade the Court to grant a stay;

2. there was no real risk that an appeal would prove hollow in these proceedings if the Defendant succeeded in the Court of Criminal Appeal but was not granted a stay, or that the Defendant would suffer prejudice or damage without a stay, any such prejudice or damage being capable of being addressed by a successful appeal;

3. the Defendant had failed to identify error in the recusal decision;

4. there was no suggestion of any injustice or unfair consequences of declining a stay; and

5. it was undesirable to further interrupt or fragment the substantive proceedings.

The Court ordered:

1. the Defendant's application pursuant to s 5F(3)(b) of the CA Act is dismissed; and

2. the Defendant's application for a stay of the proceedings pending determination by the Court of Criminal Appeal of the appeal is dismissed.

Reporter: Teagan Wood

VICTORIA

SUPREME COURT OF VICTORIA

(24-078) Dickson v Yarra Ranges Council [2023] VSC 491

Richards J – 18 August 2023

Keywords – Public consultation of Urban Design Framework - No impediment of democracy in closing council meetings to the public – meetings open to public at all relevant times in accordance with the *Local Government Act* – plaintiff lacked standing to bring the proceedings – failure to demonstrate special interest – self represented litigant - proceedings dismissed with costs

The Plaintiff, a self-proclaimed member of the Yarra Ranges community in Victoria brought proceedings seeking an order of mandamus requiring the Defendant Council to reopen its public gallery for meetings of the Council, and clarification as to whether members of the public gallery may film Council meetings.

Following threatening and offensive behaviour from members of the community at in person meetings, as well as the filming of Council meetings without Councillors' consent (or the consent of the Chair as required by r 75 of the ***Yarra Ranges Council Governance Rules*** (at 2 September 2022)), the Council restricted Council meetings to online attendance only.

The Plaintiff alleged the Council was in breach of their obligations under the ***Local Government Act 2020 (Vic)*** **(LGA)** to ensure public engagement and community consultation in denying public input in the Monbulk Urban Design Framework (**UDF**).

He also alleged the Council as a public authority acted incompatibly with the human rights protected by the ***Charter of Human Rights and Responsibilities Act 2006 (Vic)*****(Charter)**, specifically the rights to privacy, to freedom of expression, and to participate in public life.

HELD:

1. The Plaintiff did not have standing to seek the remedies claimed, failing to demonstrate a special interest in the UDF above that of another member of the public.

2. The Council did not breach its obligations under the LGA and the Charter to engage with the community in relation to the UDF; it was a matter for Council to determine how, when and with whom it should engage in the application of its community engagement policy.

3. At all times, the Council meetings were 'open to the public' in accordance with s 66 of the LGA. They were held virtually with participation available via Zoom or the livestream via the Council's website, as permitted by s 61(6A) of the LGA.

4. The Council's Governance Rules did not pose unreasonable constraints on the Charter right to participate in the conduct of public affairs or democratic participation, but rather facilitated the enjoyment of that right.

5. The right to privacy under s13(a) of the Charter was not unreasonably interfered with as a result of registration requirements requiring personal details. The Council was lawfully entitled to impose such requirements under s 10(1) of the LGA.

The proceedings were dismissed. The Plaintiff was ordered to pay the Council's costs.

Reporter: Zoe Mountakis

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