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NATIONAL

FEDERAL COURT OF AUSTRALIA

(24-079) Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd [2024] FCAFC 26

Mortimer CJ, Rangiah and O'Bryan JJ – 6 March 2024

Keywords: Native Title – public interest – climate change – negotiating in good faith

On 19 December 2022, the National Native Title Tribunal (**NNTT**) granted Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd's application for 4 petroleum production leases (**PPLs**) for the Narrabri Gas Project (**Project**), which is located within the country of the Gomeroi People.

The Gomeroi People appealed to the Full Court of the Federal Court against the NNTT determination.

Five of the 6 questions of law concerned whether Santos failed to negotiate with the Gomeroi People in good faith in respect of Santos' PPL applications, as required by s 31 of the *Native Title Act 1993* (Cth) (**NTA**). Specifically, the Gomeroi People argued that the NNTT erroneously focussed on Santos' knowledge of their offers and whether they provided "fair value", rather than on Santos' subjective intentions and whether they avoided considering evidence which would have demonstrated why the compensation offered was "under value".

Santos argued that the NTA requires that negotiations in good faith be assessed objectively, but not that all conduct be objectively reasonable. That is, while the Gomeroi People considered that Santos' offer was outside of an acceptable range, Santos did not have to agree to other terms, or to change its offer, in order to act in good faith.

The remaining question of law concerned the operation of s 39(1) of the NTA, which prescribes mandatory considerations for the NNTT in making determinations, and relevantly includes at (e) "any public interest in doing of the act".

The Gomeroi People argued that the NNTT erred in finding that s 39(1)(e) excludes consideration of "environmental matters" because that issue had been "extensively considered" by other "relevant state agencies" – for example, in determining to grant development consent.

Rather, the Gomeroi People argued s 39(1)(e) required the NNTT to consider the issue afresh, namely whether the Project was in the public interest having regard to its expected greenhouse gas emissions and contribution to global warming, and other adverse environmental matters.

HELD:

1. An assessment of whether a party has negotiated in good faith pursuant to s 31 of the NTA requires consideration of the conduct as a whole.

2. The good faith test is directed to a party's state of mind and requires an assessment of whether the party is "honestly, legitimately and fairly negotiating toward an agreed outcome". A party must not "shut its eyes to the obvious" or refrain from asking questions to avoid information they might prefer not to know.

3. The making of a patently unreasonable offer in particular circumstances may indicate, but does not prove, a lack of honesty or an ulterior motive. It will depend on the evidence and the circumstances, assessed objectively.

4. The NNTT did not err in finding that Santos negotiated with the Gomeroi People in good faith.

5. The NNTT erred in failing to consider environmental matters raised by the Gomeroi People as a matter of public interest, including evidence that the Project would generate substantial greenhouse gas emissions and contribute to global warming.

6. Public interest considerations in s 39(1)(e) of the NTA are not restricted by any findings of other authorities and it is impermissible for the NNTT to defer to state environmental assessment processes. The obligation under s 39(1)(e) is to actively and genuinely take into account both positive and negative matters of public interest.

Appeal allowed (Rangiah J dissenting).

Reporter: Georgia Appleby

NEW SOUTH WALES

COURT OF APPEAL

(24-080) Cooke v Tweed Shire Council [2024] NSWCA 50

Ward P, Gleeson JA, Basten AJA– 11 March 2024

Keywords: Appeals – standard of review – characterisation of land use – evaluative judgment – civil enforcement proceeding – permissible uses not requiring consent – whether cultivating hemp was "horticulture" or "extensive agriculture" – whether processing ancillary or incidental to cultivation activities separate uses or one integrated purpose

The appellant operated a business selling hemp-infused products (such as olive oil and beeswax) without development consent. He grew the hemp and subsequently processed, infused and packaged it on two adjoining parcels of land in northern New South Wales. The respondent Council commenced civil enforcement proceedings in the Land and Environment Court seeking declaratory relief and orders restraining the continued use of the land and requiring demolition and removal of the offending buildings and structures.

At first instance in the LEC, Pain J granted the declaratory relief in the terms sought by the Council having determined that applicant was using the land for a single integrated purpose (the selling of hemp-infused products) of a "rural industry" under the Tweed Local Environmental Plan 2014, which required development consent.

Mr Cooke appealed on the basis that the primary judge had incorrectly characterised the purpose of the use of the land or, in the alternative, the activities that comprised the 'rural industry' were confined to a single building on the land which ought to limit the relief sought against him.

HELD:

1. As to the appropriate standard of review for an appeal under s.58 of the *Land and Environment Court Act 1979*:

    a) The Council's submission that findings as to the characterisation of land use at first instance are not open to review unless it is demonstrated that the decision maker misconstrued the legislative test or otherwise that it was not open on the facts, should not be accepted.

    b) The correctness standard should be applied which permits an inquiry as to whether the primary judge's conclusion was in error.

2. As to the identification of permissible uses:

    a) Cultivating hemp did not constitute horticulture (permissible under Tweed LEP without consent). While hemp was a flowering plant and was cultivated for its leaves, cultivating hemp did not fall within the term 'cut flowers and foliage' within the definition of 'horticulture'. '[C]ut flowers and foliage' should be considered as a composite term.

    b) Although farming hemp falls within the class of activities defined as 'extensive agriculture' (permissible under Tweed LEP without consent), that definition does not extend to processing of the crop.

    c) The processing of hemp leaves was not ancillary to 'horticulture' or 'extensive agriculture'.

3. As to the proper characterisation of the use of the land:

    a) The growing of hemp and its processing were steps in the process of the single integrated purpose of selling hemp – infused products.

4. The finding that the use of the land was for a single integrated purpose meant that separate uses could not be distinguished from each other and it was not possible to limit the relief to one single building (as submitted by the appellant).

Leave to appeal granted. Appeal dismissed.

Reporter: Joanna Ling

LAND AND ENVIRONMENT COURT

(24-081) Environment Protection Authority v Crush and Haul Pty Ltd [2024] NSWLEC 15

Pain J – 11 March 2024

Keywords: Grounds of s 56A appeal – fit and proper person – environmental planning licence – environmental protection authority - appeal dismissed

The EPA appealed orders of an Acting Commissioner of the Land and Environment Court which granted the respondent an environmental planning licence for a quarry extension after finding the respondent was a fit and proper person to hold an EPL.

The appellant had claimed the Acting Commissioner made errors of law.

The appellant raised 4 grounds of appeal. The first ground was that the Acting Commissioner failed to apply the correct statutory test as required by ss 54(f) and 83(2) of the POEO Act to determine if the respondent is a fit and proper person. It was put that the Acting Commissioner incorrectly inverted the test by not using positive language when considering character.

The appellant's second ground was that the Acting Commissioner failed to consider certain findings of Preston CJ, who convicted the respondent of an offence contrary to s 48 of the POEO Act and the sole director of the respondent of an executive liability offence for that same conduct. It was put that the Acting Commissioner put undue weight on the findings that the offence was of low objective seriousness in *Crush and Haul Pty Ltd v Environment Protection Authority* [2023] NSWLEC 1367.

The appellant's third ground was that the Acting Commissioner's minimal consideration of the convictions of the respondent and its sole director was too minimal and legally unreasonable.

The appellant's final ground was that the Acting Commissioner's ruling that the evidence of the respondent's sole director's claims of misconduct on the part of the EPA was not relevant to the statutory task under ss 45 and 83 of the POEO Act, and the attendant failure to have regard to the relevant material resulted in a legally unreasonable decision.

HELD:

1. The correct legal test was identified by the Acting Commissioner and there was no failure to apply the correct statutory test despite using positive and negative language when applying the statutory test.

2. The absence of reference in the reasons for the decision does not mean that the Acting Commissioner did not consider that matter. The judgment must be read as a whole and doing so shows thorough reasoning of the Acting Commissioner in considering the various relevant material in the judgment.

3. An allegation of insufficient weight given to particular evidence in the absence of any statutory indication is insufficient in grounds of appeal.

4. No material error of law has been established.

The appellant was unsuccessful in all 4 grounds and the s 56A appeal was dismissed with costs.

Reporter: Bonnie Chan

(24-082) Agia Projects Pty Ltd v Woollahra Municipal Council [2024] NSWLEC 16

Robson J - 12 March 2024

Keywords: costs - appeal proceedings improperly commenced - appeal discontinued following successful Local Court annulment application - company acted without legal advice - Council acted reasonably - company ordered to pay 60% of Council's costs

Agia Projects Pty Ltd was convicted and sentenced ex parte in the Local Court of an offence of pollute waters. The company commenced Class 7 appeal proceedings in the LEC in September 2023. Following receipt of the summons, the respondent Council advised Agia that, pursuant to s 32 of the ***Crimes (Appeal and Review) Act 2001*** (Review Act), the LEC could not grant leave to appeal where Agia was entitled to make an annulment application in the Local Court but had not done so. Agia promptly applied for an annulment in the Local Court pursuant to s 4 of the Review Act. The Council declined to consent

to an adjournment of the appeal proceedings and, at the first listing in the LEC, sought that the proceedings be dismissed. Contrary to the Council's submission, the LEC adjourned the proceedings pending determination of the annulment application. Agia's annulment application was successful and Agia sought to discontinue the LEC proceedings. The Council made an application seeking its costs.

The Council argued that had Agia agreed to discontinue the proceedings or accepted the Council's earlier offers of settlement in relation to the costs dispute, significant costs would have been saved.

Agia submitted that it had acted reasonably in circumstances where it was self-represented and acting without legal advice. Agia submitted that the Council would have incurred less costs had it agreed to adjourn the appeal by consent. It sought its costs or, in the alternative, that Agia not be ordered to pay the costs of various "unnecessary hearings".

HELD:

1. The LEC proceedings were inappropriately commenced.

2. The Council promptly brought this fact to Agia's attention, and its conduct in the matter was at all times appropriate. There was no evidence of conduct that would disentitle it to its costs.

3. On the other hand, the appellant was acting in ignorance of the correct procedure, presumably because it had not received legal advice.

4. The Court noted it's broad discretion pursuant to s 36(3) of the Review Act in relation to costs. In all the circumstances, the Council was entitled to 60% of its costs of the appeal proceedings, including the application for costs.

Agia was ordered to pay 60% of the Council's costs and the proceedings were dismissed.

Reporter: Ellen Woffenden

(24-083) Waluya Pty Ltd v Minister for Planning and Public Spaces [2024] NSWLEC 18

Robson J – 15 March 2024

Keywords – Separate question – class 1 proceedings – whether or not to determine separate question as to permissibility

These proceedings concerned the Respondent's deemed refusal to determine a development application for the clearing of existing vegetation and structures and the construction of a bus depot with buildings, wash bays, carparking, refuelling, landscaping, fencing and signage.

The Respondent filed a notice of motion to determine a separate question prior to the hearing of any other issue in the proceedings. That question concerned whether or not the proposed development was permissible or prohibited.

The Respondent's position was that the proposed development was properly characterised as a 'transport depot', which was a prohibited use pursuant to the ***State Environmental Planning Policy (Precincts – Regional) 2021***.

The Respondent submitted that determining this separate question would facilitate the just, quick and cheap resolution of the proceedings. It submitted that the establishment of whether the development was permissible is required to determine whether the Court has power to grant the consent. If it does not, then such determination may dispose of the proceedings. The Respondent also submitted that early resolution would be beneficial and would facilitate discussions at a conciliation conference.

The Applicant's position was that the proposed development was properly characterised as 'light industry' or a 'bus depot' pursuant to the ***State Environmental Planning Policy (Transport and Infrastructure) 2021***. Relevantly, the proposed development would only constitute 'light industry' if the industrial activity proposed does not interfere with the amenity of the neighbourhood. This required assessment of expert evidence, and a mix of legal and factual issues.

The Applicant submitted that the hearing of the separate question would take three days and come at considerable

cost as expert evidence would be required, which would overlap the evidence required for the ultimate hearing. Further, the Applicant submitted that even if there was a determination of the separate question, this could be appealed and, therefore, would not necessarily dispose of the proceedings.

The parties also presented evidence as to the likely cost of determining any separate question, with the Applicant's estimate significantly higher than the Respondent's estimate.

HELD:

1. Whether a separate question should be determined must be approached with caution.

2. Given the disparity between the evidence as to costs, the Court could not be satisfied that the determination of a separate question would result in material cost savings.

3. There would be overlap in the evidence required for the separate question and ultimate hearing. It was not clear that the determination of a separate question would result in the quicker and cheaper resolution of the proceedings.

4. Given the Applicant foreshadowed a potential appeal of any determination of the separate question, this would result in a multiplicity of proceedings and an undesirable fragmentation of the proceedings.

5. The matter should proceed in accordance with the Class 1 Practice Note.

6. The Court declined to order the separate question.

Notice of motion dismissed. Costs reserved.

Reporter: Serafina Carrington

(24-084) Connect Global Limited v Port Stephens Council [2024] NSWLEC 20

Pain J – 18 March 2024

Keywords: Practice and procedure – adjournment – adjournment of Class 1 appeals pending outcome of Class 4 proceeding

Fisherman's Village in Swan Bay was an oyster farming and processing facility. In 1993, a development consent was granted for a subdivision and tourist development. In 2013, Connect Global Limited leased lots in the subdivision and began using the facilities for an outreach program for men dealing with substance abuse and other social issues.

In 2022, Port Stephens Council issued a development control order restraining the Applicant's use of the land. The Applicant then lodged a development application for the use of the land as a transitional group home. Council refused the Applicant's DA.

The Applicant commenced Class 1 appeals in relation to the DCO and the refusal of the DA. Council did not seek to give effect to the DCO pending the appeals.

Subsequently, the director of the Applicant commenced Class 4 proceeding against other owners of units in Fisherman's Village alleging they were unlawfully using their units.

The Applicant applied to adjourn each of the Class 1 appeals pending the resolution of the Class 4 proceeding under s 66 of the ***Civil Procedure Act 2005***.

HELD:

1. The legal effect of the Applicant's application for an adjournment was a stay of the Class 1 appeals pending the Class 4 proceeding under s 67 of the CP Act.

2. There was no basis for a stay of the Class 1 appeals pending the outcome of the Class 4 proceeding having regard to: (a) the overriding purpose in s 56; (b) the fairness to all parties; and (c) the balance of convenience.

3. The determination of the Class 1 appeals did not require the legal status of the 1993 development consent, which was relevant to the Class 4

proceeding, to be resolved. Regardless of the outcome of the Class 4 proceedings, the conflicting land uses (viz. the Applicant's transitional group home and other's short and long-term residential occupancies) could be considered in the Class 1 appeals.

Application to vacate the hearing dates for the Class 1 appeals dismissed. Stay of DCO until final resolution of Class 1 appeals granted. Costs reserved.

Reporter: Nicholas Andrews

(24-085) City of Parramatta Council v Sydney Metro [2024] NSWLEC 23

Robson J – 21 March 2024

Keywords: Compulsory acquisition – compensation – assessment of amount payable – market value – adjoining owner premium – special value – disturbance

Council commenced Class 3 proceedings in the Land and Environment Court objecting to the amount of compensation offered by Sydney Metro for its compulsory acquisition of land in Parramatta CBD in March 2021 as part of the Sydney Metro West project. At issue was the market value of the acquired land under ss 55(a) and 56(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) and Council's submission that it was entitled to the special value of the acquired land under ss 55(b) and 57 of the Just Terms Act.

The Court examined extensive expert evidence, with two primary scenarios considered by the parties' experts. This included "Revised Scenario 2" (**Scenario 2**) – the likelihood of various components of a building, including basement retail and a cantilever structure, being approved, and the adequacy of the proposed access to neighbouring properties having regard to possible existing equitable easements; and "Alternative Scenario 3" (**Scenario 3**) – the likelihood of basement retail and a 3m wide cantilever over Horwood Place being approved. The Council contended that, under both scenarios, each site would be sold separately to an adjoining landholder for amalgamation and redevelopment. Sydney Metro disagreed, contending that if Scenario 2 was adopted, substantial development on both sites would be required and the suggested amalgamations would not be achievable. The parties also disagreed on whether the amalgamations needed to proceed upon the assumption that the Draft Civic Link DCP required substantial compliance.

The parties also disagreed on the most appropriate valuation methodology to be applied to the acquired land. Council sought to apply the direct comparison approach (**DCA**), while Sydney Metro contended that both the DCA method and the residual land value (**RLV**) method should be applied. In relation to the DCA method, there was dispute between the parties as to the adjustments to be made to certain comparable sales; and in relation to the RLV method, the parties disagreed on a significant number of inputs and assumptions.

The Court focused on the following issues for determination:

1. when assessing the "market value" under s 56(1) of the Just Terms Act, although the "highest and best use" of the acquired land was agreed by both parties as a redevelopment site, the following matters needed to be considered:

    a) the likely development yield that would receive development approval over the acquired land in the minds of the hypothetical parties in striking a purchase price which requires consideration of the planning controls; and

    b) whether the acquired land should be considered for valuation purposes as one parcel or considered in two or three separate parts; and

2. if the development yield of the acquired land was determined by reference to Scenario 3, whether the Council was entitled to compensation for "special value" above and over the acquired land's market value pursuant to s 57 of the Just Terms Act.

HELD:

1. In relation to the market value of the Acquired Land pursuant to s 56(1):

    a) the hypothetical transaction would proceed on the basis that Council was likely to approve development generally in accordance with

most of Scenario 3 such that a development yield of 84,143m^2 would be achieved; and

b) the need to determine numerous disputed inputs that may generate significantly different outcomes in circumstances where there are material differences between the experts and where there was readily available and agreed alternative methodology, militates against the use of the RLV method in favour of the DCA method.

2. The Council was not entitled to the special value of the acquired land under s 57 because:

a) the carrying out of a public purpose such as a pedestrian link cannot be considered to contribute a financial advantage in any relevant sense and as such cannot constitute special value;

b) while the "advantage" must be in some way incidental to a person's use of the land, Council had no current "use", only a plan for future use; and

c) as the use of land was intended for a future Civic Link, and as the claim for special value appears to be on the basis that this has the effect of reducing the market value, the Council's use of the acquired land was not an advantage at all.

The Council was entitled to total compensation in the sum of $201,417,049, comprising: market value under s 55(a) of $201,093,472, and, as agreed between the parties, Council was entitled to loss attributable to disturbance under s 55(d) of $323,577. Sydney Metro ordered to pay Council's costs.

Reporter: Nathan Fok

(24-086) Tier Architects Pty Ltd v Sutherland Shire Council [2024] NSWLEC 32

Pain J – 22 March 2024

Keywords: Review of Deputy Registrar's decision pursuant to r 49.19(1) of the *Uniform Civil Procedure Rules 2005* – issues raised in notice of motion to be resolved prior to exercise of court's discretion – amended plans considered under cl 37 of the *Environmental Planning and Assessment Regulation 2021* – concept plan does not affect requirement for rigorous environmental impact assessment

The Applicant, by notice of motion and pursuant to r 49.19(1) of the *Uniform Civil Procedure Rules 2005*, sought to set aside orders made by the Deputy Registrar which dismissed the Applicant's notice of motion seeking leave to rely on amended plans (which included a concept plan) in its development application. The motion, of successful, would have required the Applicant under s 8.15(3) of the EPA Act to pay the costs of the Council thrown away by reason of the amendments and required the hearing dates to be vacated.

The Deputy Registrar had stated that, in exercising her discretion, leave was refused on the basis that cl 92 of the Class 1 Development Appeals Practice Note set out the presumption that leave would not ordinarily be granted to an amendment which would require the final hearing or adjournment of the final hearing.

Before Pain J, the Applicant submitted that it would discontinue its Class 1 appeal should leave to rely on the amended plans be refused. The parties agreed that the Deputy Registrar had not determined the Applicant's notice of motion seeking leave to rely on the amended plans by application of cl 37 of the ***Environmental Planning and Assessment Regulation 2021***.

HELD:

1. In the interests of justice, the Deputy Registrar should have resolved the issue raised by the Applicant's notice of motion (by applying cl 37 of the EPA Reg) before considering the discretionary arguments concerning the efficient conduct of the court's processes.

2. Re-considering the Applicant's notice of motion and re-exercising the court's discretion, leave was not granted to the Applicant to rely on the amended plans because they did not fall within the scope of amendments permitted by cl 37 of the EPA Reg. The changes were so substantial that they warranted consideration by way of a new development application.

3. Describing part of an application to amend plans as being for a concept plan does not result in a less rigorous environmental impact assessment being required.

Applicant's notice of motion dismissed.

Reporter: Amelia Cook

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