MARSDENS LAW GROUP

LOCAL GOVERNMENT, PLANNING AND ENVIRONMENTAL LAW UPDATE

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23 June 2023

The Topics

1. The topics I intend to deal with today are:

    (a) Does the height of a building really matter?

    (b) Height and an "architectural roof feature"

    (c) Floor space ratio – again!

    (d) Does a development consent granted for integrated development oblige the approval body who provided general terms of approval to actually grant approval?

    (e) Design excellence

    (f) Complying development under the Codes SEPP and "draft heritage items".

    (g) Turnbull v Clarence Valley Council [2023] NSWSC 83

2. Before turning to those topics I want to remind you of something a very learned former NSW Planning Minister (who will possibly be chairing one of our sessions later today) said in 1997 when introducing an amendment that was proposed at that time to the EP&A Act:

    > *"The most often stated problems with the system are that it is over-regulated; it is full of duplication; separate approval processes sometimes conflict with one another; there is a lack of certainty; there is a lack of transparency; no-one is accountable; there is little co-ordination; the process and scale of assessment is often out of proportion to the environmental impact; and it all takes too long."*

3. The past year has been busier than ever in the L&E Court for our firm. Despite the downturn in the property transaction market we acted in more than 70 concluded cases in the Court (i.e. more than 1 per week). Many of the planning appeals related to deemed refusals i.e. matters where no formal decision had been made and where the proceedings had been commenced as soon as the 40 or 60 day period for determination had expired.

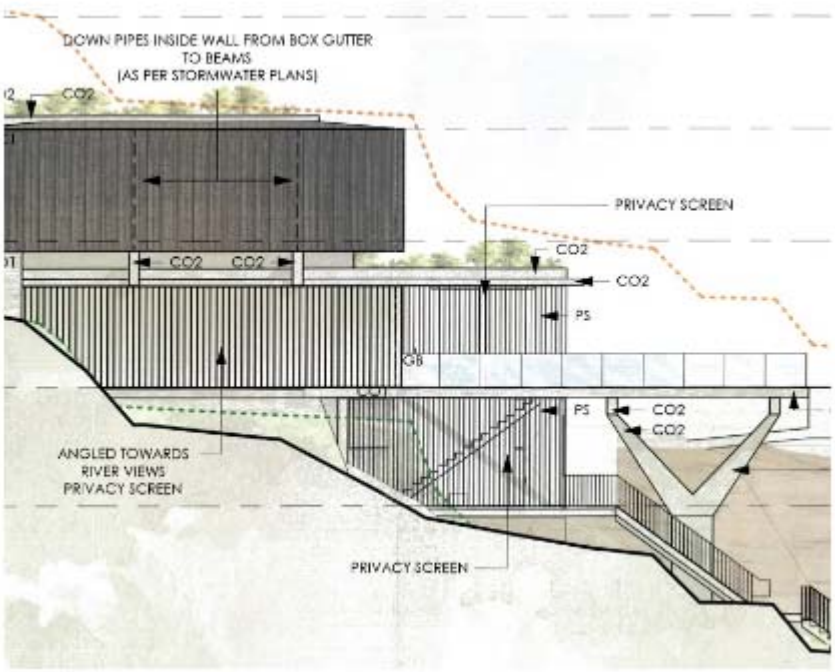
4. Available dates for conciliation conferences and hearings for appeals are now into mid-November which means if you started a planning appeal tomorrow you probably wouldn't get a conciliation date until December and a hearing date well into next year if the matter didn't resolve at conciliation.

Does the height of a building really matter? El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78

5. In the case of *Gemaveld Pty Limited v Georges River Council* [2022] NSWLEC 1182 the Council and the Applicant reached a conciliated agreement for approval of a development application for demolition works, construction a multi-level dwelling house with swimming pool at 117 Stuart Street, Blakehurst.

6. Commissioner Horton of the Land and Environment Court was provided with the signed conciliation agreement and was informed by the parties that the development complied with the height of building standard of 9m in cl 4.3 of the Kogarah LEP. He made orders approving the development application consistent with the agreement reached between the parties.

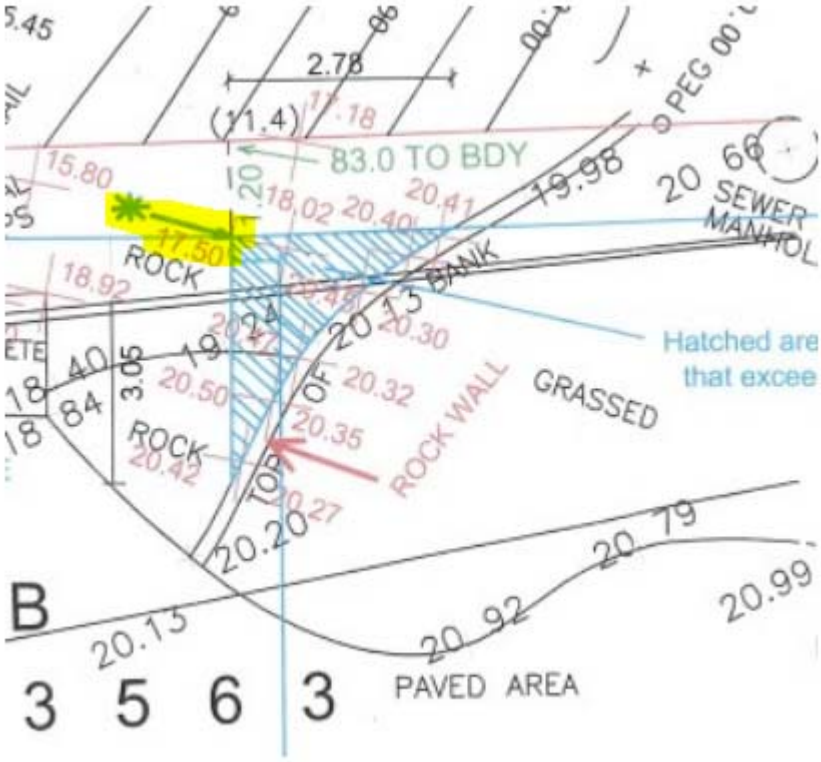
7. The plans provided to the Commissioner showed the building envelope sitting wholly within a line drawn 9m from ground level, on both the northern and southern elevations of the proposed development. Part of one of those elevations (DA-6.02), which shows levels -1, -2 and -3, is reproduced below:



8. It was clear that the Commissioner formed the opinion that the proposed building did not exceed the 9m height limit, and that he did so based on the evidence before him.

9. The neighbours were not happy with the decision to approve the application and commenced proceedings in the Supreme Court by way of judicial review claiming that the Court had no power to approve the development application because they had evidence that development in fact exceeded the 9m maximum building height. (See El Khouri v Gemaveld Pty Ltd [2023] NSWSC 25; and El Khouri v Gemaveld Pty Ltd [2023] NSWCA 78)

10. The neighbours had obtained a survey of the land subject of the DA which showed that the existing ground level below a small part of the proposed building that was overhanging the rock wall in north-west corner was at RL17.50 which meant that the height of the building above that point exceeded 9m. A small portion of the survey is reproduced below:



11. The question that arose in the proceedings in the Supreme Court and the Court of Appeal was whether the power to issue consent depended on an opinion being formed by the Commissioner that the building did not exceed the height control **or** on the actual fact that the building did not exceed the height control.

12. There was no suggestion in the case of any fraud on the part of any of those involved in preparing or evaluating the development application. There was also no suggestion of any negligence.

13. Hence the issue was whether a non-negligent error resulting in a development application which in fact breached the maximum height in cl 4.3 of the Kogarah LEP was a jurisdictional fact that entitled the Court, on different evidence, to set aside the decision of the Land and Environment Court.

14. *[It was noted that it is an offence to provide information in connection with an application which is known, or which the person ought reasonably to know, is false or misleading in a material particular: see section 10.6 of the EP&A Act and that*

different considerations may apply where an administrative decision has been obtained through fraud or where section 10.6 has been contravened.]

15. When reference is made to a "jurisdictional fact", the issue is whether a precondition to the exercise of statutory power has been satisfied.

16. The question that arose in the Gemaveld case was whether the precondition required something to be satisfied as a matter of fact or whether it simply required the decision maker to *be satisfied* that or *be of the opinion* that the precondition is satisfied.

17. Justice Leeming in the Court of Appeal found that:

    (a) Compliance with cl 4.3 of the Kogarah LEP was not a jurisdictional fact. Rather, it was a mandatory consideration pursuant to s 4.15(1)(a) of the EP&A Act, to which the commissioner plainly had regard: at [74];

    (b) The commissioner formed the only view that was open to him on the evidence, namely, that there was compliance with the height requirement: at [75]; and

    (c) The commissioner's decision was not vitiated merely because the applicants established on evidence not available to the commissioner that there was non-compliance: at [75].

18. **The conclusion**: Where the maximum height specified in a LEP is relevant to a particular development application the question of whether the development complies with the height will be a matter left to be determined by the decision-maker on the evidence before the decision maker and not something that must exist as a matter of objective fact in order for there to be power to approve the application.

Height and an "architectural roof feature"

19. Most LEP's contain a provision that allows the maximum building height to be exceeded by an "architectural roof feature". Unhelpfully, there is no definition in the LEP or elsewhere for the term "architectural roof feature". The relevant clause is usually cl 5.6 which states:

5.6 Architectural roof features

(1) The objectives of this clause are as follows—

(a) to permit variations to maximum building height standards for roof features of visual interest,

(b) to ensure that roof features are decorative elements and that the majority of the roof is contained within the maximum building height standard.

(2) Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3 may be carried out, but only with development consent.

(3) Development consent must not be granted to any such development unless the consent authority is satisfied that—

(a) the architectural roof feature—

*(i) comprises **a decorative element** on the **uppermost portion of a building**, and*

(ii) is not an advertising structure, and

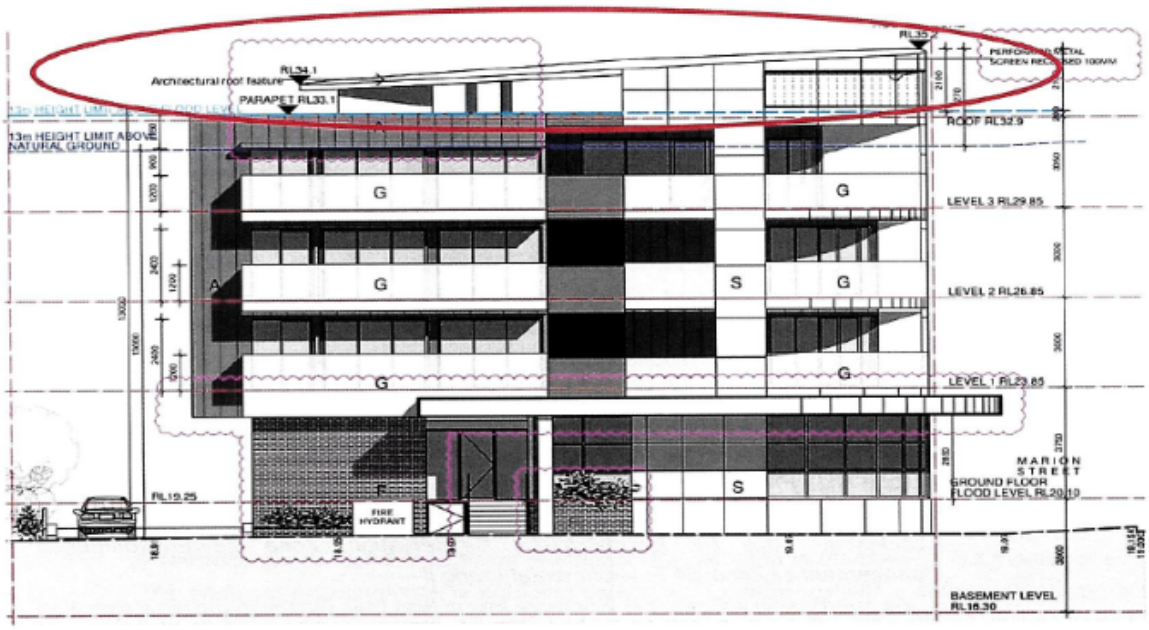
(iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and

(iv) will cause minimal overshadowing, and

(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.

20. The clause tells us what the consent authority needs to be satisfied of in respect of an "architectural roof feature" but does not actually define what an "architectural roof feature" is.

21. In the recent case of ***Sioud v Canterbury-Bankstown Council*** [2023] NSWLEC 1171 the Senior Commissioner of the Court was required to consider whether the roof element in the 4 storey mixed use building shown below was an "architectural roof feature" for the purposes of cl 5.6 of the Bankstown Local Environmental Plan 2015.



22. The Senior Commissioner noted [at 33] that:

> *"There is no definition of the term "architectural roof feature" in the LEP and the reference in objective cl 5.6(1)(a) "to enable [a] minor roof feature to exceed the maximum height of the building" does not assist in defining the term "architectural roof feature". Instead, it sets an outcome for the clause."*

23. The Commissioner said that the only indication in the clause of what is intended is that it be a "decorative" element and that it be located on "uppermost portion" of the building". The balance of cl 5.6(3)(a) is directed to identifying what cannot constitute an "architectural roof feature" within the meaning of the clause.

24. Jeff Mead, who is a town planner that some of you may recall spoke to us last year at this conference, was able to convince the Senior Commissioner that the roof element was in fact an "architectural roof feature" that satisfied the matters in clause 5.6(3) and should be allowed to exceed the maximum height standard.

25. Based on the evidence of Mr Mead the Applicant contended that the roof element had the characteristics of a roof feature listed in cl 5.6(3)(a) namely:

- It was a decorative element on the uppermost portion of a building;

- It was not an advertising sign;
- It did not include floor space nor is it reasonably capable of modification to include floor space; and
- It did not cause overshadowing.
- It also served the purpose of integrating the lift overrun and the mechanical exhaust into an architectural feature as anticipated by cl 5.6(3)(b).

26. The Senior Commissioner accepted all of those things and said [at 36]:

> *"Having satisfied each of the criteria in the clause it follows, as Mr Mead suggests, that this roof element is a roof feature which engages cl 5.6 of the LEP.* ***The length and height of a roof feature are not prescribed by the clause so its extent over the roof is irrelevant****. Furthermore, the DCP cannot be used to define a roof feature for the purposes of cl 5.6 of the LEP."*

Floor Space Ratio calculation

27. The saga relating to whether certain floor areas may be counted as gross floor area (GFA) under the LEP standard instrument definition continues.

28. The definition of GFA in LEP's has been in a similar for many years and still invites many arguments about whether areas are included or excluded. Even the Commissioners of the Court don't agree on the approach to be taken.

29. The standard GFA definition provides:

> "**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—
>
> (a) the area of a mezzanine, and
>
> (b) habitable rooms in a basement or an attic, and
>
> (c) any shop, auditorium, cinema, and the like, in a basement or attic,
>
> **but excludes—**
>
> (d) any area for common vertical circulation, such as lifts and stairs, and
>
> (e) any basement—

(i) storage, and

(ii) vehicular access, loading areas, garbage and services, and

(f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and

(g) car parking to meet any requirements of the consent authority (including access to that car parking), and

(h) any space used for the loading or unloading of goods (including access to it), and

(i) terraces and balconies with outer walls less than 1.4 metres high, and

(j) voids above a floor at the level of a storey or storey above.

30. In the recent case of ***Australex Group Pty Ltd v Fairfield City Council*** [2022] NSWLEC 1685 Commissioner Walsh recognised that different approaches had been taken by Commissioners of the Court in regard to the legal interpretation of the GFA definition's phrasing *"measured from the internal face of external walls"* and what constitutes external walls as a factor in the interpretation of GFA, specifically in regard to partially open corridors or similar configurations.

31. He referred to the decision of Commissioner O'Neill in *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521 ("Danks") where she said:

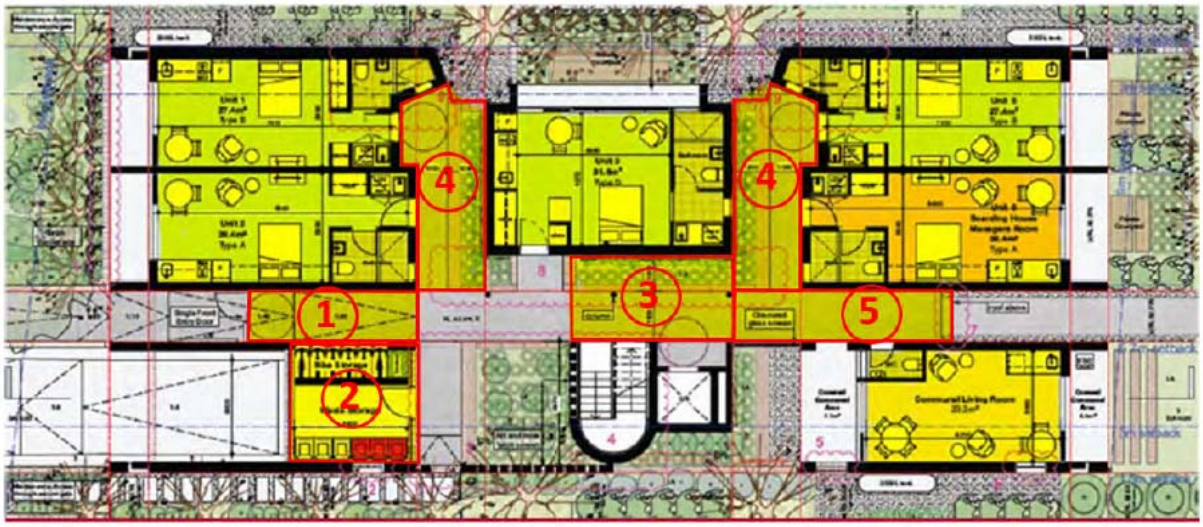
> *"….The definition of GFA … requires the floor area of each level to be measured from the internal face of external walls, measured at a height of 1.4m above ground. The corridor is contained on either side by the external face of walls that form the external walls of the units on either side of the corridor … . The external face of the wall cannot be characterised as an internal face, because an external wall must provide the weatherproofing that maintains the internal wall or face as a dry wall, in other words, an external wall has a specific function that distinguishes it from an internal wall. In full brick construction, where the wall forms the façade of a building, the outer skin of brickwork is wet during inclement weather and the purpose of the cavity between the brickwork skins is to maintain the inner or internal wall as dry. The internal face of an external wall in the definition of GFA must refer to the interior surface of the wall that forms the façade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall. Therefore, the sum of the floor area of each floor of a building measured from the internal face of external*

walls requires the floor area that is included in the GFA calculation to be internal floor space. The corridor will be wet during inclement weather by rain blown along the gap, the walls containing the corridor function as external walls and so the corridor cannot be characterised as internal floor space."

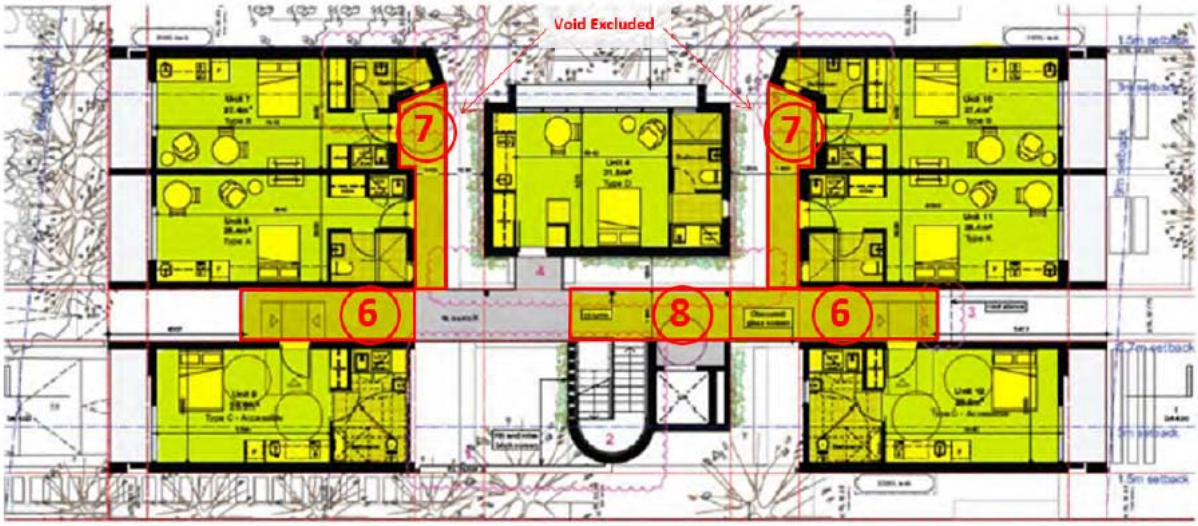
32. In essence the approach in Danks was that because of the corridor openings at either end (which included openings to weather), there was a need for the corridor walls to be built and function as external walls along the corridor. The side walls of the corridors would therefore perform the function of an external wall (distinguished from that of internal walls, as a point of measurement for the purposes of the definition), so that the floor area in the corridor should be considered as external space and not included in GFA.

33. Commissioner Walsh also referred *to Landmark Group Australia Pty Ltd v Sutherland Shire Council* [2016] NSWLEC 1577 (Landmark), where a finding was made that partially open breezeway or corridor areas were "within the internal face of external walls of the building" and thus were included within GFA (at [59]-[60]). This was followed in *Ceerose Pty Ltd v Inner West Council [*2017] NSWLEC 1289 , where corridors with louvred openings at the end walls were included as GFA, a factor here was that the louvred openings where considered "proportionally insignificant" (at [60]). There was also a finding in *Britely Property Pty Ltd v Randwick City Council* (No 2) [2020] NSWLEC 1389 that a lobby "wholly within the envelope of the building" but in part enclosed by louvred screens should be included within GFA (at [56]).

34. The main issue in the Australex case related to whether certain corridors or breezeways, with a significant degree of enclosure, should count as GFA.



Ground Floor Plan



First Floor Plan

35. Commissioner Walsh preferred the approach in the Landmark decision rather than the Danks decision. He said:

"29.In my opinion, in a structural sense, the definition can be understood to have four parts. The first and second parts are within the chapeau to the definition. The third and fourth parts are at pars (a)-(c) and (d)-(j) of the definition, respectively.

30. The first part of the definition, in its clear expression, establishes that GFA means the sum of the floor area of each floor of a building. The second part describes from where measurement is to be undertaken (reference, relevantly, the

definition's phrasing "measured from the internal face of external walls" and "measured at a height of 1.4 metres above the floor"). The third part clarifies areas of inclusion. The fourth part clarifies areas of exclusion.

31. I see the first part as the primary element of the GFA definition. The points of central attention when determining GFA are first in understanding the building, and then the area of floor within the building at each level. The second part of the definition seems to me to be simply concerned with how to measure, nothing grander would be taken from a plain reading. It indicates that in determining floor area, you measure from the internal face of external walls of the building. This is a practical point and makes clear for example that it is wrong to measure from say skirtings, which usually partially cover the area of floor, or the external wall, which might be a particular point of argument in some building configurations, particularly given that building bulk (see below in regard to my second point of reasoning) would generally be perceived on the basis of the external wall form. Measuring at a height of 1.4 metres above the floor is of a similar vein, relating directly to the contextual objective of understanding building bulk as perceived (again see below in regard to my second point of reasoning).

36. At paragraphs 36 and 37 the Commissioner concluded:

36. The confines of a building (or structure) for this purpose can be understood as the built structure generally within roof and the outer walls of the building, albeit that there may be articulation here and there that need to be taken into account. While I acknowledge Danks takes a different view, windows and openings to horizontal communal corridors (louvred or otherwise, and whether or not associated internal corridors require waterproofing or otherwise) would both be seen the same way in my construction. Neither should be seen as obstructing (or thwarting) the interpretation of the confines of the building, generally defined by the line of outer walls. At the primary level, the floor area for each level is established by the confines of the building itself. Then this primary understanding is translated into a measurable factor by the second part of FLEP's GFA definition. There are some points of clarity in regard to inclusions and exclusions in what I call the third and fourth parts of the definition. Clearly, there is no accounting for proportionately small openings in otherwise enclosed communal corridors in either the third and

fourth parts of the definition, nor is there any consideration of (internal v external) wall construction particulars specified in the definition. In my view, the issue of how the walls function, also, does not relate to the underlying contextual question of the interpretation of building confines or building density or bulk.

37. In turn, I conclude that it would be at odds with the GFA definition, read in whole and in context, to exclude lengths of internal communal corridors which happened to have openings, at one or both ends, to the otherwise generally perceived building (and thus floor area) confines. I am more aligned with the views expressed in Landmark and, again respectfully, disagree with Danks and those judgments following it on this point.

37. Another recent case of interest in respect of GFA concerned the exclusion in the GFA definition of "car parking to meet any requirements of the consent authority".

38. Randwick Council in the case of ***Contill Holdings Pty Ltd ATF Revay Discretionary Trust v Randwick City Council*** [2021] NSWLEC 1543 argued that motorcycle parking was not excluded from GFA because it was not "car parking".

39. The Council said that had the legislature intended that motorcycle parking be excluded from the GFA, then it would have expressed paragraph (g) of the definition as "*parking spaces (and not "car parking")* to meet any requirements of the consent authority" or *"motor vehicle parking to meet any requirements of the consent authority"* – but it did not.

40. The Senior Commissioner did not agree with the Council. She said [at 41]:

"Applying common law principles of interpretation relevant to a proper construction of cl 4.4 and the definition of "gross floor area" in the Dictionary, I accept that the definition of "car park" is clearly a reference to a land use. As such, it is intended to cover all "motor vehicles" rather than just "cars". Furthermore, a "parking space" is an expansive definition that includes parking of motor vehicles. Taking practical and purposive approach to the construction of the RLEP 2012, I am of the opinion that the reference in the GFA definition to "car parking to meet any requirements of the consent authority" must necessarily include all motor vehicles."

Development consent granted for integrated development

41. Many years ago a Planning Minister introduced provisions to the EP&A Act that were aimed at streamlining the approval process where multiple approvals were required for particular development.

42. The statutory regime for integrated development was established pursuant to the Environmental Planning and Assessment Amendment Act 1997 No 152 (the Amending Act), which commenced on 1 July 1998.

43. The provisions are presently contained in Division 4.8 of Part 4 of the EP&A Act. In essence, the provisions enable an applicant for development consent in respect of development that may also require one or more of the following approvals in order for it to be carried out to obtain from each relevant approval body the general terms of any approval proposed to be granted by that approval body in relation to the development:

Act	Provision	Approval
Coal Mine Subsidence Compensation Act 2017	s 22	approval to alter or erect improvements, or to subdivide land, within a mine subsidence district
Fisheries Management Act 1994	s 144	aquaculture permit
	s 201	permit to carry out dredging or reclamation work
	s 205	permit to cut, remove, damage or destroy marine vegetation on public water land or an aquaculture lease, or on the foreshore of any such land or lease
	s 219	permit to— (a) set a net, netting or other material, or (b) construct or alter a dam, floodgate, causeway or weir, or (c) otherwise create an obstruction, across or within a bay, inlet, river or creek, or across or around a flat
Heritage Act 1977	s 58	approval in respect of the doing or carrying out of an act, matter or thing referred to in s 57(1)
Mining Act 1992	ss 63, 64	grant of mining lease
National Parks and Wildlife Act 1974	s 90	grant of Aboriginal heritage impact permit
Petroleum (Onshore) Act 1991	s 16	grant of production lease
Protection of the Environment Operations Act 1997	ss 43(a), 47 and 55	Environment protection licence to authorise carrying out of scheduled development work at any premises.

	ss 43(b), 48 and 55	Environment protection licence to authorise carrying out of scheduled activities at any premises (excluding any activity described as a "waste activity" but including any activity described as a "waste facility").
	ss 43(d), 55 and 122	Environment protection licences to control carrying out of non-scheduled activities for the purposes of regulating water pollution resulting from the activity.
Roads Act 1993	s 138	consent to— (a) erect a structure or carry out a work in, on or over a public road, or (b) dig up or disturb the surface of a public road, or (c) remove or interfere with a structure, work or tree on a public road, or (d) pump water into a public road from any land adjoining the road, or (e) connect a road (whether public or private) to a classified road
Rural Fires Act 1997	s 100B	authorisation under section 100B in respect of bush fire safety of subdivision of land that could lawfully be used for residential or rural residential purposes or development of land for special fire protection purposes
Water Management Act 2000	ss 89, 90, 91	water use approval, water management work approval or activity approval under Part 3 of Chapter 3

44. It was confirmed by Justice Lloyd in the case of ***Maule v Liporoni & Anor*** [2002] NSWLEC 25 there is no compulsion on an applicant to make an application for an integrated development approval, if he or she chooses not to do so. His Honour said:

> *"83. The provisions of Pt 4, Div 5 of the EP&A Act are beneficial and facultative. They were enacted to overcome delays and duplications where there is more than one consent or approval body for a particular development so that an applicant for consent would not have to go through the whole process again for each application….*
>
> *84. If a development application is made for integrated development, the effect of any subsequent development consent is that an approval body, following notification of the development application, and which then fails to inform the consent authority whether or not it will grant the approval or to inform it of the general terms of its approval, cannot subsequently refuse to grant approval to an*

application for approval in respect of that development and any such approval must not be inconsistent with the development consent (s 91A(5)). The provisions relating to integrated development are there for the benefit of applicants for development consent and not to hinder them….

…

86. In making the development application Mr Liporoni did not tick the box in the application form to indicate that consent was being sought for an integrated development approval. In so doing he elected to have his development application processed as if it were not an application for integrated development. That was his choice. There was and is no compulsion on an applicant to make an application for an integrated development approval, if he or she choses (sic) *not to do so."*

45. Section 4.50 of the EP&A Act relevantly states:

> **4.50 Granting and modification of approval by approval body**
>
> (1) **Despite any other Act or law, an approval body must**, in respect of integrated development for which development consent has been granted following the provision by the approval body of the general terms of the approval proposed to be granted by the approval body in relation to the development, **grant approval to any application for approval that is made within 3 years after the date on which the development consent is granted** if, within that 3-year period, the development consent has not lapsed or been revoked.
>
> **Note—**
>
> Under section 380A of the Mining Act 1992 and section 24A of the Petroleum (Onshore) Act 1991, a mining lease or production lease can be refused on the ground that the applicant is not a fit and proper person, despite this section.
>
> (2) The **approval may be granted subject to conditions that are not inconsistent with the development consent.** Neither the provisions of section 4.17(6)–(10) nor the imposition of conditions as to security by the consent authority prevent an approval body from imposing conditions, or additional conditions, as to security."

46. The requirement in section 4.50 for an approval body that has provided GTA's to grant approval to any application for approval that is made within 3 years after the date on which the development consent is granted was considered by Justice Pritchard in the case of *Crush and Haul Pty Limited v Environment Protection Authority* [2023] NSWLEC 60.

47. Coffs Harbour City Council had issued a development consent on 24 November 2020 to Rixa Quarries Pty Ltd (Rixa) for an extractive industry (quarry extension). The

development application had been notified to the EPA as an integrated development application, seeking the EPA's determination as to whether or not to grant general terms of approval.

48. On 24 January 2020, the EPA issued general terms of approval proposed to be granted by it in relation to the development the subject of the development application In its letter, the EPA said:

> *"EPA has reviewed the information provided and has determined that it is able to issue a licence for the proposal, subject to a number of conditions. The applicant will need to make a separate application to EPA to obtain this licence."*

49. The general terms of approval issued by the EPA included condition A2.1 as follows:

> *"A2.1 The applicant must, in the opinion of the EPA, be a **fit and proper person** to hold a licence under the Protection of the Environment Operations Act 1997, having regard to the matters in s. 83 of the Act."*

50. Crush and Haul lodged an environment protection licence application with the EPA, seeking an environment protection licence to carry out the scheduled activities of "extractive activities" and "crushing, grinding or separating" at the land (the scheduled activities). It was not disputed that the scheduled activities were controlled activities for which development consent had been granted. Likewise, it was not disputed that the EPL application was made within 3 years of the grant of development consent.

51. The EPA subsequently issued a notice of intention to refuse the EPL application on the basis that Crush and Haul was not a fit and proper person. In that regard, section 45(f) of the POEO Act required the EPA to take into consideration in respect of an application for an EPL "whether the person concerned is a fit and proper person".

52. Crush and Haul took proceedings in Class 4 of the L&E Court seeking a declaration that the EPA was required, by operation of section 4.50(1) of the EP&A Act, to issue the EPL subject to conditions that were not inconsistent with the Development Consent.

53. Crush and Haul summarised the intention of the integrated development scheme as providing a "one-stop shop" where everything that is necessary to be assessed

should be done at the general terms of approval stage. Crush and Haul further submitted that the provisions are designed to promote certainty by ensuring that the carrying out of development which has the benefit of development consent is not later frustrated by the denial of one or more of the requisite approvals listed in s 4.46(1). Crush and Haul submitted that the mechanism by which that certainty is achieved (where either general terms of approval are given or no response is received) is s 4.50 of the EPA Act.

54. The central issue for determination was whether s 4.50(1) of the EPA Act should be construed so as to compel the EPA to issue to Crush and Haul an environment protection licence pursuant to the EPL application made by it.

55. Justice Pritchard dismissed the proceedings and found that that the EPA was not required, by operation of s 4.50(1) of the EP&A Act, to issue an environment protection licence because:

(a) the development consent was not granted to Crush and Haul, but to Rixa, a different entity;

(b) In exercising its licensing functions under Chapter 3, the EPA is "required" under s 45 to take into consideration various matters, including, at s 45(f), **"whether the person concerned is a fit and proper person"** (emphasis added) and section 83(2) provides matters in paragraphs (a) to (o) that the regulatory authority may take into consideration in determining whether the person concerned is a fit and proper person.

(c) the POEO Act was a later act containing specific provisions including a provision that said *"this Act prevails over any other Act or statutory rule to the extent of any inconsistency"* (s7(2)).

(d) Crush and Haul's construction of s 4.50(1) of the EPA Act would render nugatory the obligation imposed by s 45(f) of the POEO Act on the EPA in exercising its functions under Chapter 3 of that Act to take into consideration whether an applicant for a licence is a fit and proper person. Those functions include deciding whether the applicant should be granted a licence under s 55 of that Act. That process may involve the exercise of the discretion in s 60(1) to

obtain further information from the applicant (which may be necessary in cases where, for example, the material provided by the applicant pursuant to s 53(2)(6) is inadequate).

(e) On Crush and Haul's construction of s 4.50(1) of the EPA Act, there would be no scope for the EPA to comply with its obligations under s 45 of the POEO Act or to satisfy itself that it has sufficient information properly to exercise its decision-making power in s 55 of that Act.

(f) Construing s 4.50(1) in the manner for which Crush and Haul contends would produce the result that the EPA would be bound to issue an environment protection licence to an environmental offender who was not the applicant for development consent. That is a result that cannot have been intended by Parliament. It is also a result that pays no, or insufficient, regard to the inconsistency provision in s 7(2).

Design Excellence

56. Many modern LEP's contain a provision that applies to certain land or certain types of development that says development consent must not be granted unless, in the opinion of the consent authority, the proposed development exhibits design excellence.

57. An example of such a provision is found in clause 8.4 of Penrith LEP 2010 which states:

> **8.4 Design excellence**
>
> (1) Development consent must not be granted for development involving the construction of a new building, or external alterations to an existing building, on land to which this Part applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.
>
> (2) In deciding whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters—
>
> (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
>
> (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
>
> (c) whether the development will detrimentally impact on view corridors,

(d) (Repealed)

(e) how the development will address the following matters—

(i) the suitability of the land for development,

(ii) existing and proposed uses and use mix,

(iii) heritage issues and streetscape constraints,

(iv) the relationship of the development with other buildings (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,

(v) bulk, massing and modulation of buildings,

(vi) street frontage heights,

(vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,

(viii) the achievement of the principles of ecologically sustainable development,

(ix) pedestrian, cycle, vehicular and service access, circulation and requirements,

(x) the impact on, and any proposed improvements to, the public domain.

58. The manner in which such a provision is to be interpreted and applied was the subject of consideration by Justice Preston in Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117 (Toga).

59. Toga lodged a development application with Penrith City Council seeking development consent for a mixed use development at Penrith. Toga appealed against the deemed refusal of the development application to the Court. Acting Commissioner Morris heard the appeal. She determined that the appeal should be dismissed and the development application refused. Toga appealed against the Commissioner's decision and among other things claimed that she had erred in her construction and application of the design excellence provision.

60. Toga submitted that the Commissioner failed to have regard to the matters listed in clause 8.4(2) in coming to the conclusion that the proposed development did not exhibit design excellence. The Commissioner had said in her judgment:

"Having regard to the Urban Design evidence in particular, I prefer the evidence of Ms Morrish. In this regard, there are a number of elements that I agree do not exhibit design excellence. In particular the design, materials and treatment of the

podium carparking levels, the lack of interface between that podium and the planned 'eat street' along John Tipping Grove, and that poor amenity within the public domain that will result because that important interconnection will not occur."

61. Justice Preston confirmed that clause 8.4(1) establishes a jurisdictional fact – an essential criterion – that must be satisfied in order to enliven the power to grant development consent to development to which cl 8.4 applies. This jurisdictional fact is the opinion of the consent authority that the proposed development exhibits design excellence.

62. His honour went on to find that the Commissioner failed to consider the relevant matters in cl 8.4(2) of PLEP in deciding whether the proposed development exhibited design excellence. He said that it was not sufficient for the Commissioner to form the opinion that the proposed development did not exhibit design excellence or to do so having had regard to the evidence of the urban design experts, without having proper regard to each of the matters set out in Clause 8.4(2).

63. His Honour said:

"Clause 8.4(2) prescribes the matters to which a consent authority must have regard in deciding whether the proposed development does or does not exhibit design excellence. An opinion that the proposed development does or does not exhibit design excellence , which is formed without having regard to the matters prescribed in cl 8.4(2), will not be an opinion for the purposes of cl 8.4(1)."

64. The matters in cl 8.4(2) are framed in particular language, not as general topics but instead as outcomes or objectives to be achieved. The statutory obligation to "have regard to" these matters requires having regard to the particular terms in which the matters are expressed and not just the general topics that are the subject of the matters.

65. Thus, consideration of the matter in paragraph (a) of cl 8.4(2) requires answering the particular question posed – whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved – and not merely considering what are the architectural design, materials and detailing of the

development. Consideration of the matter in paragraph (b) requires answering the particular question posed – whether the form and external appearance of the development will improve the quality and amenity of the public domain – and not merely considering what are the form and external appearance of the development. Consideration of the matter in paragraph (c) requires answering the particular question posed – whether the development will detrimentally impact on view corridors – and not merely considering any view impacts of the development. Consideration of the multiple matters in paragraph (e) requires answering each of the particular questions posed – how the development will address each of the matters listed in subparagraphs (i) to (x) – and not merely considering the topics of those matters.

66. At paragraph 75 of the Toga judgment His Honour said:

> *"The Commissioner failed to have regard to the particular terms of and answer the particular questions raised by the matters in cl 8.4(2). Rather, the Commissioner substituted for the statutory requirements a different approach of merely considering the evidence of the urban design experts on the general topic of whether the proposed development exhibited design excellence. …. By adopting this approach, the Commissioner proceeded on an impermissible basis: see analogously Zhang v Canterbury City Council at [76]."*

Complying development under the Codes SEPP and "draft heritage items"

67. Clauses 1.17A and 1.18 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) establish general limits on when development can be categorised as complying development.

68. Relevantly Section 1.18(1)(c3) provides that to be complying development under the Codes SEPP, the development must not be carried out on land ***"that comprises, or on which there is, a draft heritage item".***

69. The definitions of heritage item and draft heritage item are set out in s 1.5 of the Codes SEPP as:

"**heritage item** means a building, work, archaeological site, tree, place or Aboriginal object identified as a heritage item in an environmental planning instrument.

draft heritage item means a building, work, archeological site, tree, place or aboriginal object identified as a heritage item in a local environmental plan that has been subject to community consultation, other than an item that was consulted on before 1 March 2006, but has not been included in a plan before 27 February 2009.

70. The literal meaning of the words in the definition of “draft heritage item” means that a “draft heritage item” is encompassed wholly within “heritage item” which would render redundant the various references in the Codes SEPP to “heritage item or draft heritage item”.

71. In the case of ***Randwick City Council v Belle Living Pty Ltd*** [2023] NSWLEC 63 the Council commenced proceedings challenging the validity of a CDC issued for demolition of building in Randwick and sought an urgent injunction to stop the demolition of the building.

72. The Council is contending in the proceedings that the demolition works cannot be carried out as either exempt of complying development as the building is a “draft heritage item” within the meaning of the Codes SEPP.

73. In that regard the listing of the property as a heritage item was the subject of a planning proposal placed on public exhibition between 17 April 2023 and 12 May 2023. Council submitted that the fundamental issue in the substantive proceedings is whether the planning proposal regarding the property renders the item a “draft heritage item”. If the property is a draft heritage item, then:

    - the development is not complying development and the CDC is liable to be declared invalid pursuant to s 4.61 of the EPA Act;

    - the demolition works cannot be carried out as exempt development; and

    - the demolition works require development consent pursuant to s 2.7 of the RLEP.

74. Council submitted that the different references to heritage item and draft heritage item were intended to capture those heritage items listed and those:

    - the subject of a proposal to amend an LEP to list the item;

- on which public consultation had concluded.

75. The Court found that there is a serious question to be tried

Turnbull v Clarence Valley Council [2023] NSWSC 83

76. Mr Turnbull commenced proceedings seeking damages in excess of $25 million against the Clarence Valley Council. He claimed that Council had wrongly given him a stop work order in relation to a shed he was erecting on a property and had sent correspondence to the owners of the property, who then successfully made a development application. That led to a falling out between he and the landowners and a written agreement which they entered, by which Mr Turnbull agreed to sell them the partly erected building and vacate the property. Mr Turnbull also sold his tools to an acquaintance who lived in the vicinity.

77. Mr Turnbull claimed that as a result, he was wrongly left homeless, sleeping on the streets where he was subjected to ongoing harassment by employees of the Council, when he was fined for parking his motor home contrary to parking signs Council had erected.

78. In documents provided to the Court Mr Turnbull claimed:

- that his purpose (occupation) is “Galactic Emissary”;
- that it was treachery for the State to enforce a stop work order using laws that contravened the Commonwealth Constitution;
- that there had been alleged intentional frauds and conspiracies pursued, including one that had been uncovered in the 1960s and involved secret IMF banking policies to control the global financial system and all governments under a world government;
- that other conspiracies had been pursued by Australian prime ministers, to remove the people from the Commonwealth of Australia;
- that before the 1993 enactment of the Local Government Act 1993 (NSW), everyone who owned land had specified rights, including the right to build any dwelling or structure there, or any number of buildings and since then, the

system had gone mad at the expense of peace, welfare and good government.

- That the laws of God were relevant to his claim.

79. Justice Schmidt said:

> *"Nor are the laws of God, as Mr Turnbull claims them to be, relevant to his claims. Australia's legal system is the product of the common law and the legislative actions of British, Commonwealth and State parliaments. All are the result of steps which human beings, not the divine, have taken over the course of centuries, no matter what opinions Mr Turnbull has about them."*

Adam Seton