



Land and Environment Court  
New South Wales

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Case Name: Intrapac Skennars Head Pty Ltd v Ballina Shire Council

Medium Neutral Citation: [2021] NSWLEC 83

Hearing Date(s): 21 July 2021

Date of Orders: 10 August 2021

Decision Date: 10 August 2021

Jurisdiction: Class 1

Before: Preston CJ

Decision: The Court orders:  
(1) The appeal is dismissed.  
(2) The appellant is to pay the respondent's costs of the appeal.

Catchwords: APPEAL – appeal against Commissioner's decision on a question of law – application to modify development consent by amending condition – condition requiring payment of monetary contribution – condition alleged to be unreasonable – dedication of land and provision of material public benefit required by consent – failure to accept as offset to monetary contributions – whether mischaracterisation of source of power – whether misdirection as to relevant considerations – whether benefits required by consent not relevant to unreasonableness – whether error in considering policy of contributions plan – no error established

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 4.16, 4.55, 4.56, 7.11, 7.13, 8.9  
Land and Environment Court Act 1979 s 56A

Cases Cited: AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2021] NSWCA 112  
Arkibuilt Pty Ltd v Ku-ring-gai Council (2006) 67

NSWLR 529; [2006] NSWLEC 502  
Associated Provincial Picture Houses Ltd v  
Wednesbury Corporation 1948] 1 KB 223  
Australian International Academy of Education Inc v  
Hills Shire Council (2013) 196 LGERA 1; [2013]  
NSWLEC 1  
Beaini Projects Pty Ltd v Cumberland Council [2019]  
NSWLEC 1547  
Colonial Credits Pty Ltd v Pittwater Council [2015]  
NSWLEC 188  
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33  
Frevcourt Pty Ltd v Wingecarribee Shire Council (2005)  
139 LGERA 140; [2005] NSWCA 107  
Houlton v Woollahra Municipal Council (1997) 95  
LGERA 201  
Kendall Street Development Pty Ltd v Byron Shire  
Council (No 2) (2004) 138 LGERA 360; [2004]  
NSWLEC 530  
King v Bathurst Shire Council (2006) 150 LGERA 362;  
[2006] NSWLEC 505  
Lake Macquarie City Council v Hammersmith  
Management Pty Ltd (2003) 132 LGERA 325; [2003]  
NSWCA 313  
Maitland City Council v Anambah Homes Pty Ltd (2005)  
147 LGERA 234; [2005] NSWCA 455  
Mirvac Homes (NSW) Pty Ltd v Baulkham Hills Shire  
Council (2000) 110 LGERA 100; [2000] NSWLEC 199  
MLC Properties v Camden Council (1997) 96 LGERA  
52  
North Sydney Council v Michael Standley & Associates  
Pty Ltd (1998) 43 NSWLR 468; [1998] NSWSC 163  
Progress & Securities Pty Ltd v North Sydney Municipal  
Council (1988) 66 LGRA 236  
Rose Consulting Group Pty Ltd v Baulkham Hills Shire  
Council (2003) 58 NSWLR 159; [2003] NSWCA 266  
Security Storage Pty Ltd v Leichhardt Municipal Council  
(1996) 93 LGERA 176  
Swadling v Sutherland Shire Council (1994) 82 LGERA  
431  
Sydney City Council v Ilenace Pty Ltd (1984) 3 NSWLR  
414; 54 LGRA 217  
The Uniting Church in Australia Property Trust (NSW) v  
Parramatta City Council (2018) NSWLEC 158

Toadolla Co Pty Ltd v Dumaresq Shire Council (1992)  
78 LGERA 261

Valhalla Cinemas Pty Ltd v Leichhardt Municipal  
Council (1986) 60 LGRA 240

Valiant Timber and Hardware Co Pty Ltd v Blacktown  
City Council (2005) 144 LGERA 33; [2005] NSWLEC  
747

Willoughby City Council v Dasco Design and  
Construction Pty Ltd (2000) 111 LGERA 422; [2000]  
NSWLEC 275

Windy Dropdown Pty Ltd v Warringah Council (2000)  
111 LGERA 299; [2000] NSWLEC 240

Category: Principal judgment

Parties: Intrapac Skennars Head Pty Ltd (Appellant)  
Ballina Shire Council (Respondent)

Representation: Counsel:  
Mr A Pickles, with Ms J McKelvey (Appellant)  
Mr T To, with Mr A Jucha (Respondent)

Solicitors:  
Holding Redlich (Appellant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/33223

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Land and Environment Court

Jurisdiction: Class 1

Citation: [2021] NSWLEC 1006

Date of Decision: 8 January 2021

Before: Clay AC

File Number(s): 2020/94985

## **JUDGMENT**

### **Nature of appeal and outcome**

- 1 This appeal raises issues concerning the identification and interpretation of the power of the Court on appeal to determine an application to modify a development consent by amending a condition imposed under s 7.11 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The applicant, Intrapac Skennars Head Pty Ltd (Intrapac), has appealed on questions of law against the decision of an Acting Commissioner dismissing its appeal and refusing its application to modify a development consent by amending a condition requiring the payment of monetary contributions. Intrapac contended that the Acting Commissioner mistook and misconstrued the applicable power to be exercised to amend the condition of consent. As I will explain, in fact, it was Intrapac who mistook and misunderstood the applicable power. The Acting Commissioner simply addressed and determined the appeal on the basis of Intrapac's argument. The Acting Commissioner did not err on questions of law in doing so. The appeal should be dismissed with costs.

### **The modification application**

- 2 Intrapac is carrying out a residential subdivision within the Skennars Head Expansion Area in the Ballina local government area. Ballina Shire Council (the Council), by the Northern Regional Planning Panel, granted development consent for Stage 1 of a residential subdivision subject to conditions, pursuant to s 4.16(1)(a) of the EPA Act. The conditions of consent included condition 5.2 requiring the payment of monetary contributions, pursuant to s 7.11(1) of the EPA Act. The monetary contributions so required were of a kind allowed by, and were determined in accordance with, two contributions plans, the Ballina Shire Roads Contributions Plan (Roads Contributions Plan) and the Ballina Shire Open Spaces and Community Facilities Contributions Plan 2016 (Open Space Contributions Plan).
- 3 As the total contribution per lot exceeded \$20,000 when calculated in accordance with the contributions plans, the amount of the contributions was reduced to \$20,000 per lot, in accordance with the Environmental Planning and

Assessment (Local Infrastructure Contributions) Direction 2012, resulting in a total of \$4,580,000 plus adjustments for CPI up until the date of payment.

- 4 Intrapac applied, under s 4.55(2) of the EPA Act, to the Council to modify the development consent by amending condition 5.2 to offset or reduce the monetary contributions payable for certain public amenities and public services. The Statement of Environmental Effects (SEE) by Ms Julia Kaul accompanying the application to modify the consent contended that the modification was justified “to ensure that the monetary contribution payable is reasonable based on the scope of the development and the infrastructure to be provided on-site” (p 1). The modifications sought were described as follows:

“- A 100% offset of contributions towards the provision of:

- Local Parks
- District Parks
- Regional Recreational Facilities

- An offset of contributions under the Roads Contributions Plan equivalent to 70% of the cost of the construction of the roundabout at the intersection of Headlands Drive and The Coast Road.

- The deduction of all offsets to be deducted from the \$20,000 per lot/dwelling contribution cap with no additional contributions added to fill the monetary gap created by the provision of offsets.”

- 5 The SEE argued that these modifications were justified by s 7.11(5)(b) of the EPA Act, which allows a consent authority to accept the provision of a material public benefit in part or full satisfaction of a condition imposed under s 7.11(1), that is to say, in lieu of payment of a monetary contribution or dedication of land. The SEE put forward a number of material public benefits it said should be offset against the monetary contributions:

“For the purposes of this modification offsets are only sought for that infrastructure where demand is being met onsite (passive open space) or where the provision of a material public benefit will address demand generated by existing development (roads).

In this regard no offset is sought for the following infrastructure:

- Playing fields
- District Community Facilities
- Regional Community Facilities
- Plan Administration

A contribution will be payable for these items in accordance with the contribution plans.

No offset is sought for the land to be dedicated under conditions 5.44 and 5.45.” (p 5).

- 6 In relation to passive open space, the SEE sought to demonstrate that the passive open space that will be provided by the development will meet the demand for open space required under the Open Space Contributions Plan (in section 3.1). The SEE contended that the development will meet the demand for a local park, district park and regional open space by dedicating sufficient land for these purposes.
- 7 In relation to roads and traffic management, the SEE explained that a condition of consent, condition 2.4, required the realignment of Headlands Drive and the construction of a roundabout at the intersection of the realigned road and The Coast Road. The construction of the roundabout is not included in the Roads Contributions Plan and hence will be fully funded by the developer. The SEE contended that the construction of the roundabout is a material public benefit to both existing and future development. An amount of the cost of the roundabout represented by the proportion of the demand for the works attributable to the existing development (70%) should be offset against the monetary contribution for roads determined in accordance with the Roads Contributions Plan (section 3.2).
- 8 The result of making these modifications would be to reduce the amount of monetary contributions payable under condition 5.2, from the \$20,000 cap per lot to \$9,808 per lot (p 9).

### **The appeal against the refusal of the modification application**

- 9 Intrapac appealed to the Court, under s 8.9 of the EPA Act, against the Council's deemed refusal of its application to modify the consent. The appeal was heard by Acting Commissioner Clay, who dismissed the appeal and refused the application to modify the consent: *Intrapak Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 1006. The Acting Commissioner found that Intrapac had not demonstrated that condition 5.2 was unreasonable in the particular circumstances of the case, so as to justify amending condition 5.2 to reduce the monetary contributions payable.

10 The Acting Commissioner summarised Intrapac's submissions as to why condition 5.2 should be modified in [133]:

"The Applicant helpfully summarised its submissions as to the legal path to the modification of the Consent in its written reply as follows:

(1) Condition 5.2 of the Consent requires the payment of "monetary contributions" as set out in Annexure 1 to the Consent.

(2) Condition 5.2 of the Consent is a condition under s 7.11 which is "of a kind allowed by a contributions plan", the applicable contributions plans are identified in condition 5.2 itself.

(3) The "unreasonableness" in the particular circumstances" of this case is that Condition 5.2 requires the maximum payment of applicable monetary contributions calculated in accordance with the contributions plans without applying the applicable provisions in either clause 2.16 of the Roads Contributions Plan or clause 4.7 of the OS Contributions Plan to reduce the payment of the monetary contributions otherwise calculated in accordance with the contributions plans.

(4) Consistent with the decisions in *Colonial Credits [Colonial Credits Pty Ltd v Pittwater Council [2015] NSWLEC 188]* and *Beaini Projects [Beaini Projects Pty Ltd v Cumberland Council [2019] NSWLEC 1547]* the 'unreasonableness' arises from the application of the Roads Contributions Plan and the OS Contributions Plan in the calculation of the monetary contributions themselves and not from "some other burden imposed on the beneficiary of a development consent outside the plan" [quoting the Council's submission].

(5) The unreasonableness in the circumstances of the case which the Court ought to remedy is not as to the "non-exercise of a discretion". Rather the Applicant contends that the calculation of monetary contributions which is of a "kind allowed by a contributions plan" must accord with the application of all of the relevant provisions of the contributions plan. This relevantly includes the provisions for the reduction of monetary contributions by application of clause 2.16 of the Roads Contribution Plan or clause 4.7 of the OS Contributions Plan.

(6) The reasonableness of monetary contributions cannot be shielded by provisions of a contributions plan which "reserve to itself flexibility". This would have the effect of ousting the Court's jurisdiction to remedy the unreasonable application of a contributions plan as allowed by s 7.13(3) of the EP&A Act.

(7) There is no "ad hoc" contributions planning. The Council in this case imposed conditions of consent requiring the dedication of land free of cost to the Council and for works-in-kind of the kind allowed in the Roads Contributions Plan and the OS Contributions Plan. The Court must assume that those conditions are imposed under s 7.11 of the EP&A Act in order to be valid. The Council accepts that the imposition of these conditions are for a planning purpose. It must follow that there is nothing 'ad hoc' about reducing the quantum of the monetary contributions as is reasonable in the circumstances.

(8) In the alternative the Applicant submits that Colonial is wrong and should not be followed."

- 11 The Acting Commissioner summarised the Council's response to these submissions in [134]:

"The Council's submissions as to the legal path can be summarised as follows:

(1) The relevant circumstances that can be within the scope of review under s 7.13(3) are not unconstrained or unlimited. They must be found in the application of the contributions plan itself to a site, rather than some other burden imposed on a beneficiary of a development consent, outside the plan (applying *Colonial*).

(2) A discretionary mechanism such as those in the contributions plans here, and the non-use of them does not give rise to a relevant unreasonableness in the sense used in *Colonial*.

(3) There is a risk of "ad hockery" (see *Rose Consulting*) from a case by case redirection of contributions is a powerful reason in principle why *Colonial* is right and *Beaini* is wrong.

(4) The non-exercise of discretion (not applying clause 2.16 and clause 4.7) is not an application of the plan. Each of the contributions plans make it clear that the discretion is intended to be solely a decision for the council, which is best placed to balance the various factors that will impact on its ability to provide planned amenities and services;

(5) It is no part of the power under s 7.13(3) of the EP&A Act that the Court undertakes contributions planning in an *ad hoc* manner within an appeal. The curial forum is unsuited to such an exercise, not least because of the far greater extent of public participation in contributions planning."

- 12 It can be seen from these summaries that the Acting Commissioner understood the issue joined between the parties concerned the power of the Court under s 7.13(3) of the EPA Act to disallow or amend a condition under s 7.11, even if it was determined in accordance with the relevant contributions plan. The focus on s 7.13(3) of the EPA Act arose because of the way Intrapac sought to justify the modification of the development consent by amending condition 5.2 to reduce the monetary contributions payable. Intrapac had argued that condition 5.2 requiring the payment of monetary contributions was unreasonable for the purposes of 7.13(3) because the amount of the contributions payable under the condition did not make allowance for the material public benefits that Intrapac would provide, as could have been done under s 7.11(5) of the EPA Act and certain provisions of the contributions plans, being cl 2.16 of the Road Contributions Plan and cl 4.2 and cl 5.3 of the Open Space Contributions Plan. The Acting Commissioner encapsulated Intrapac's argument in [136]:

"At its most stark, the Applicant's case is that the condition requiring the contributions is unreasonable because in imposing the condition the Council failed to exercise the power to accept a material public benefit in part or full

satisfaction of a proposed contribution pursuant to a condition which had not yet been imposed.”

13 The Acting Commissioner rejected Intrapac’s argument for two sets of reasons: first, Intrapac’s argument conflated two separate steps authorised by the EPA Act, and secondly, on a proper analysis, the condition is not unreasonable: at [136].

14 As to the first, the Acting Commissioner stated at [137]:

“As I have explained above, the EP&A Act only authorises a consent authority to take into consideration a material public benefit in two circumstances:

(1) Where the material public benefit was provided prior to the grant of development consent and was not provided as a consequence of a prior development consent or planning agreement;

(2) After the grant of consent and as a discretionary power to accept the material public benefit in part or full satisfaction of a contribution required by a contributions condition which has been imposed.”

15 The proposition in (1) is founded on s 7.11(6) of the EPA Act, while the proposition in (2) is founded on s 7.11(5)(b) of the EPA Act. The Acting Commissioner noted that “the present situation is neither of those circumstances”: at [138]. That is to say, Intrapac’s application to modify the development consent under s 4.55(2) was neither a request under s 7.11(6) nor a request under s 7.11(5) that the consent authority accept a material public benefit in part or in full satisfaction of a monetary contribution.

16 The Acting Commissioner noted at [140] that one of the provisions in the Roads Contributions Plan, cl 2.16 (although the Acting Commissioner incorrectly referred to it as cl 4.7, which is a clause in the Open Space Contributions Plan), reflects the discretionary power of the Council under s 7.11(5) to accept an offer by an applicant for the dedication of land or the provision of a material public benefit in lieu of paying a monetary contribution in accordance with the condition imposed under s 7.11 of the EPA Act. The Acting Commissioner pointed out that such provision:

“applies after the grant of development consent and the imposition of a contributions condition. It is a provision in the Roads Contributions Plan which reflects the power to accept payment of contributions by accepting material public benefits in s 7.11(5) of the EPA Act.”: at [140].

17 As to the second, although the Acting Commissioner said it was appropriate to deal separately with the Roads Contributions Plan and the Open Space

Contributions Plan (at [139]), and he dealt with the Roads Contributions Plan first (at [140]-[166]), after doing so, the Acting Commissioner stated that his analysis of the Roads Contributions Plan was equally applicable to the Open Space Contributions Plan (at [171] and [202]). Accordingly, the reasons the Acting Commissioner gave for rejecting Intrapac's argument that the contributions condition is unreasonable applied equally to the contributions determined in accordance with the Roads Contributions Plan as to the contributions determined in accordance with the Open Space Contributions Plan.

- 18 The Acting Commissioner gave three reasons why he considered the condition requiring the payment of monetary contributions was not unreasonable for the purposes of s 7.13(3) of the EPA Act. The first reason concerned Intrapac's argument that the condition was unreasonable because the Council had failed to take into account, under s 7.11(5) of the EPA Act, the material public benefits that Intrapac would provide in carrying out the development. The Acting Commissioner rejected this argument. The Council's discretion under s 7.11(5) of the EPA Act to accept the provision of a material public benefit in satisfaction of a condition imposed under s 7.11(1) or (3) of the EPA Act cannot inform the prior decision as to whether to impose a condition under s 7.11(1) or (3) or whether such a condition would be unreasonable. The Acting Commissioner held at [142]-[144]:

"First, in my opinion a condition is not unreasonable because in imposing the Council failed to take into consideration a circumstance which has not yet arisen. That is, the power which the Applicant asserts should have been exercised is not a power which could have been exercised in imposing the contributions condition. The power to allow a credit for the provision of a material public benefit which has not yet been provided only arises after the grant of development consent and the imposition of the condition.

The offset by a future provision of a material public benefit can only occur after the condition requiring the contribution is imposed. During the hearing I raised this issue with the parties, describing it as a temporal issue – the power sought to be relied upon did not arise at the point of the imposition of the condition. The Applicant was in truth complaining about the Council's failure to accept a material public benefit in part or full satisfaction of the contributions condition which had been imposed. An alternative way, in accordance with the legislative scheme, to characterise the Applicant's claim is that the contributions condition has become unreasonable by the Council's failure in refusing the modification application to allow the credit for the future provision of material public benefit. I will deal separately with that proposition.

Whilst the power to amend a development consent is broad, it does not extend in my view to permitting the conflation of two separate steps identified in the EP&A Act and the Roads Contributions Plan – the imposition of a contributions condition and the acceptance of a material public benefit in full or part satisfaction of the contribution payable pursuant to a contributions condition.”

- 19 The second reason the Acting Commissioner gave was, in effect, in the alternative to the first reason and if his first reason was incorrect. The Acting Commissioner explored what material public benefits could be provided under s 7.11(5)(b) in part or in full satisfaction of a condition under s 7.11. The Acting Commissioner held that if material public benefits to be provided by a developer can be taken into account in determining whether a condition imposed under s 7.11(1) or (3) is unreasonable for the purposes of s 7.13(3), the material public benefits have to be provided otherwise than as a condition of the grant of the consent that imposes the condition under s 7.11(1) or (3). The Acting Commissioner held at [145]-[149]:

“Second, the material public benefit arising from work carried out pursuant to a lawful condition of development consent has no role to play in determining the reasonableness of a contributions condition in the very same development consent. It would not be consistent with the scheme of the Act to take into account a material public benefit arising from the imposition of a condition of development consent in the very same instrument. The power in s 4.17 to impose conditions on a development consent includes the imposition of conditions which must meet the Newbury test but may also happen to provide a public benefit. That is not controversial, but the Applicant suggests that it is that very same benefit for which it should receive a credit. The EP&A Act does not contemplate such a “credit” in its terms or by implication.

In fact, the textual indications are to the contrary. Section 7.11(6) of the EP&A Act proscribes taking into account a material public benefit which arises from a condition of an earlier development consent. That sub-section is a plain acknowledgment that lawful conditions of consent can result in a public benefit in addition to serving the development the subject of the consent. However, the sub-section makes it plain that that incidental benefit is not a matter from which the proponent is to benefit in a reduction of contributions in developments in the future. This is in the context of the sub-section making it mandatory to take into account a material public benefit previously provided when imposing a contributions condition, but expressly excluding from consideration the material public benefit from works or land required to be carried out or dedicated pursuant to a condition of an earlier development consent.

It would be an absurd outcome if the material public benefit of the works required here could be taken into account in the determination of the contribution condition of this Consent, whereas the benefit could not be taken into account in a future development application by the same proponent. It would be contrary to the scheme of the EP&A Act to find a contributions condition unreasonable because a properly and lawfully imposed condition also provided a material public benefit.

Again, I recognise the breadth of the power to modify a development consent and that it is a facultative and beneficial power. The discretion is of course not unfettered and must be exercised having regard to the object, scope and purpose of the power and the legislative scheme within which it falls. Having undertaken the consideration set out above, the broad power to modify a consent does not extend to defeating the purpose of the scheme which I have set out.

Similarly, it is recognised that pursuant to s 7.13(3) the Court is not bound by the Roads Contributions Plan and again the Court has a broad discretion. The starting point however must be a finding that the condition is unreasonable, even if in compliance with the contributions plan. In my opinion that does not permit the Court to ignore the purpose of the contributions scheme in the EP&A Act which is nevertheless reflected in the Roads Contribution Plan. The purpose is clear and that is that the beneficiary of a development consent is not entitled to demonstrate unreasonableness by pointing to the works to be carried out in accordance with a condition of consent.”

- 20 The Acting Commissioner noted again that Intrapac’s case was “that the unreasonableness arises from the application of the Roads Contributions Plan itself, in that the Council failed to apply the provisions of clause 4.7 [sic, cl 2.16]. For the reasons I have identified the Council was not obliged at the time of the grant of development consent to consider the provisions of clause 4.7 [sic, cl 2.16] of the Roads Contributions Plan”: at [150].
- 21 The third reason was that the unreasonableness asserted by Intrapac did not arise from the application of the Roads Contributions Plan or the Open Space Contributions Plan. The Acting Commissioner considered that the decisions of the Court of Appeal in *Rose Consulting Group Pty Ltd v Baulkham Hills Shire Council* (2003) 58 NSWLR 159; [2003] NSWCA 266 (*Rose Consulting*) and Moore J in *Colonial Credits Pty Ltd v Pittwater Council* [2015] NSWLEC 118 (*Colonial Credits*) hold that, for the purposes of cl 7.13(3), a condition can only be unreasonable if the unreasonableness arises from the application of the relevant contributions plan. The Acting Commissioner found that, on Intrapac’s argument, the unreasonableness did not flow from the application of the contributions plan to the particular circumstances of Intrapac’s development but rather “from the burden imposed on the beneficiary of the consent by the conditions of the consent requiring the carrying out of works in respect of which the Applicant seeks a ‘credit’”: at [151].

22 Applying the dicta in *Rose Consulting* and *Colonial Credits*, the Acting Commissioner held that there can be no unreasonableness for the purposes of cl 7.13(3): at [151]-[165]. The Acting Commissioner found that:

“The ‘burden’ imposed by a condition of development consent requiring works to be carried out does not arise by the application of the plan itself. And the *Colonial* principle focusses on unreasonableness at the point of imposing the contributions condition, eschewing any question which may arise under s 7.11(5) of the EP&A Act about a consent authority accepting a material public benefit in full or part satisfaction of a contributions condition.”: at [161] and see also [164] and [165].

23 For these three reasons, the Acting Commissioner found that condition 5.2 requiring the payment of monetary contributions was not unreasonable on the basis put forward by Intrapac (at [166]).

24 Notwithstanding this conclusion on the law, the Acting Commissioner went on to address, on the merits, Intrapac’s argument, if he was wrong on his analysis of the law: at [171]. This involved evaluating whether the material public benefits to be provided by Intrapac should be accepted in part or full satisfaction of the monetary contributions required by condition 5.2. The Acting Commissioner referred to the factors to be considered in determining offers of material public benefits in cl 2.16 of the Roads Contributions Plan (in [172]-[201]) and cl 5.3.2 of the Open Space Contributions Plan (in [202]-[213]).

25 In relation to the Roads Contributions Plan, the Acting Commissioner concluded at [200] and [201]:

“Accordingly, I do not consider that the contributions condition is unreasonable because the Council failed to allow any amount for the material public benefit flowing from the works required as conditions of the Consent as a matter of merit, on the assumption that the Council was required to consider clause 2.16 in imposing the contributions condition as submitted by the Applicant.

Having made that finding, it is unnecessary to consider whether the scope of review in s 7.11(3) extends to a condition becoming unreasonable due to circumstances coming into existence after the grant of development consent, as distinct from unreasonableness at the time of the imposition of the condition. At [143] above I referred to the Applicant’s complaint properly characterised was that the contributions condition became unreasonable because in refusing the modification application the Council refused a proposal pursuant to cl 2.16 of the Roads Contributions Plan. The facts otherwise relevant are the same now as they were at the time of the grant of development consent, and accordingly my merit determination at [200] is the same in any event, whatever be the scope of the enquiry.”

26 In relation to the Open Space Contributions Plan, the Acting Commissioner concluded first at [209]:

“The proper construction of the provisions of the OS Contributions Plan means that the Council did not act unreasonably in declining the reduction in contributions.”

and later at [213]:

“For those reasons, on the assumption that consideration of the terms of the OS Contributions Plan is relevant, I do not find that the contributions condition is unreasonable on the basis that upon consideration of clauses 4.7 and 5.3 of the OS Contributions Plan the contributions should have been or should have been reduced to take account of the provision of a material public benefit.”

### **The appeal against the Acting Commissioner’s decision**

27 Intrapac appealed, under s 56A of the *Land and Environment Court Act 1979*, against the Commissioner’s decision and orders. This appeal is limited to questions of law. Intrapac raised four grounds of appeal in its summons commencing the appeal:

“(1) The Acting Commissioner erred in law in characterising the application as seeking an exercise of power of the Council under s 7.11(5) of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the Court, rather than an application to amend the conditions of development consent under s 7.13(3) of the EPA Act (the **Mischaracterisation Ground**).

(2) Having erroneously characterised the application as effectively seeking the exercise of the Council’s power under s 7.11(5), the Commissioner misdirected himself as to the relevant matters to consider as to whether the contributions imposed under the conditions of development consent were unreasonable (the **Misdirection Ground**).

(3) The Acting Commissioner erred in law in concluding that the power under s 7.13(3) did not extend to unreasonableness arising from the requirement to carry out works under conditions of consent (the **Conditional Works Ground**).

(4) The Acting Commissioner further erred in law concluding that he was bound by the policy implicit in the Contributions Plan provisions for determining the reasonableness of the conditions (the **Policy Ground**).”

28 At the hearing of the appeal, Intrapac sought leave to amend its first ground of appeal to substitute “s 4.55(2)” for “s 7.13(3)” in order to more accurately reflect the applicable source of power to modify the development consent by amendment of the condition. Intrapac’s argument on the first ground did not, however, change. Leave was granted to so amend the summons.

29 Resolution of these grounds of appeal requires the identification and interpretation of the power that the Court was exercising on appeal to

determine Intrapac's application to modify the development consent by amending condition 5.2 that had been imposed under s 7.11 of the EPA Act. It will be instructive, therefore, to outline the applicable statutory framework before addressing each of the four grounds of appeal.

### **The statutory framework for modification of development consents**

- 30 Power to modify a development consent was introduced on the enactment of the EPA Act in s 102, and by subsequent amendments in s 96 and s 96AA, and currently in s 4.55 and s 4.56: see *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 at [230]-[234]. Originally, the power of modification in s 102 was restricted to being able to "modify details of the consent". This restriction limited the modifications that could be approved. In *Sydney City Council v Ilenace* [1984] 3 NSWLR 414, a contributions condition upon which the consent was wholly dependent was held by the majority not to be a detail of the consent capable of modification under s 102(1): at 422, 425. Section 102 was amended in 1985, by *Environmental Planning and Assessment (Amendment) Act 1985* s 10(a), to remove this restriction so that the power in s 102(1) became simply "to modify the consent". This amendment was intended to enlarge the power to some degree: *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475; [1998] NSWSC 163.
- 31 Further amendment was made in 1997, by sch 1 cl 96 of the *Environmental Planning and Assessment (Amendment) Act 1997*, establishing two powers of modification: s 96(1) for modifications involving minor error, misdescription or miscalculation and s 96(2) for other modifications. The *Environmental Planning and Assessment Amendment Act 1999* sch 3 cl 4 inserted a third power of modification, s 96(1A), for modifications involving minimal environmental impact. A fourth power of modification, s 96AA, for modification of development consents granted by the Court was inserted by the *Land and Environment Court Amendment Act 2002* sch 2 cl 6. This fourfold power to modify consents continues today.
- 32 Three of the four powers to modify a development consent are conferred by s 4.55: one for modifications involving minor error, misdescription or

miscalculation (s 4.55(1)); a second for modifications involving minimal environmental impact (s 4.55(1A)); and a third for other modifications (s 4.55(2)). The fourth power to modify a development consent granted by the Court is conferred by s 4.56(1) in similar terms to the power for other modifications in s 4.55(2). Three of the powers expressly describe the power as one “to modify the consent” (s 4.55(1A) or (2)) or “to modify the development consent” (s 4.56(1)). To “modify” a development consent is “to alter without radical transformation”: *Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 421. One of the powers (s 4.55(1)) does not expressly describe the power as enabling the modification of a consent, but instead describes the limited modifications enabled by the exercise of the power as being “to correct a minor error, misdescription or miscalculation.”

- 33 The power to modify a development consent has been described as “beneficial and facultative” (*Houlton v Woollahra Municipal Council* (1997) 95 LGERA 201 at 203 and *North Sydney Council v Michael Standley & Associates Pty Ltd* at 475, 482) in that it avoided the necessity for the obtaining of a further development consent to secure a modification of an existing development consent. The power is, however, subject to constraints. The risk of abuse of the power to modify a development consent is circumscribed by the terms in which the statutory provisions confer the power, as these impose constraints on the exercise of the power. The constraints “provide narrow gateways through which those who invoke the power must first proceed”: *North Sydney Council v Michael Standley & Associates Pty Ltd* at 475.
- 34 The constraints found in s 4.55 and s 4.56 of the EPA Act conferring the power to modify a development consent differ between the powers and define the type of modification that can be effected by exercise of the powers: *King v Bathurst Regional Council* (2006) 150 LGERA 362; [2006] NSWLEC 505 at [50]-[86].
- 35 For the first power, the proposed modification must be to correct a minor error, misdescription or miscalculation in the development consent (s 4.55(1)). For the second power, the consent authority must be satisfied that the proposed modification is of minimal environmental impact (s 4.55(1A)(a)); the consent

authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted before that consent as originally granted was modified (s 4.55(1A)(b)); the consent authority has notified the application as required (s 4.55)(1A)(c)); and the consent authority has considered any submissions (s 4.55(1A)(d)).

- 36 For the third power, the consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (s 4.55(2)(a)); the consent authority has consulted with any relevant Minister, public authority or approval body as required (s 4.55(2)(b)); the consent authority has notified the application as required (s 4.55(2)(c)); and the consent authority has considered any submissions made (s 4.55(2)(d)).
- 37 For the fourth power, the consent authority must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (s 4.56(1)(a)); the consent authority has notified the application as required (s 4.56(1)(b)); the consent authority has notified or made reasonable attempts to notify each person who made a submission in respect of the original development application, as required (s 4.56(1)(c)); and the consent authority has considered any submissions made (s 4.5(1)(d)).
- 38 The constraints on the exercise of a particular power to modify a development consent are found only in the statutory provision conferring the power and are not to be derived from other provisions of the EPA Act: *Valhalla Cinemas Pty Ltd v Leichhardt Municipal Council* (1986) 60 LGRA 240 at 246; *City West Housing Pty Ltd v Council of the City of Sydney* [2002] NSWLEC 30 at [20]; *Valiant Timber and Hardware Co Pty Ltd v Blacktown City Council* (2005) 144 LGERA 33; [2005] NSWLEC 747 at [29].
- 39 The modification of a development consent is taken not to be the granting of a development consent: s 4.55(4) and s 4.56(1C) of the EPA Act. Thus, statutory

provisions regulating the exercise of the power to grant development consent or the carrying out of development in accordance with a development consent have no operation or effect on the exercise of the power to modify a development consent: *North Sydney Council v Michael Standley & Associates Pty Ltd* at 481; *Willoughby City Council v Dasco Design and Construction Pty Ltd* at [96]-[99].

40 I turn now to consider the statutory provisions regulating the grant of development consent subject to a condition imposed under s 7.11 of the EPA Act. A condition of development consent may be imposed if it is authorised to be imposed under s 7.11: s 4.17(1)(h) of the EPA Act. Section 7.11 authorises the imposition of a condition in two circumstances. The first circumstance is in s 7.11(1):

“If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring—

- (a) the dedication of land free of cost, or
- (b) the payment of a monetary contribution, or both.”

41 The second circumstance is in s 7.11(3):

“If—

(a) a consent authority has, at any time, whether before or after the date of commencement of this Part, provided public amenities or public services within the area in preparation for or to facilitate the carrying out of development in the area, and

(b) development for which development consent is sought will, if carried out, benefit from the provision of those public amenities or public services,

the consent authority may grant the development consent subject to a condition requiring the payment of a monetary contribution towards recoupment of the cost of providing the public amenities or public services (being the cost as indexed in accordance with the regulations).”

42 There are two constraints on the imposition of a condition under s 7.11(1) or (3). The first constraint in s 7.11(2) and (4) is that of reasonableness. Section 7.11(2) provides:

“A condition referred to in subsection (1) may be imposed only to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned.”

43 Section 7.11(4) provides

“A condition referred to in subsection (3) may be imposed only to require a reasonable contribution towards recoupment of the cost concerned.”

44 The second constraint in s 7.13(1) is that the condition must be of a kind allowed by, and determined in accordance with, a contributions plan:

“A consent authority may impose a condition under section 7.11 or 7.12 only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division).”

45 The second constraint in s 7.13(1) is subject to a power of dispensation by the Court. Section 7.13(3) empowers the Court on appeal to disallow or amend a condition under s 7.11 if it is unreasonable in the particular circumstances of the case:

“A condition under section 7.11 that is of a kind allowed by a contributions plan (or a direction of the Minister under this Division) may be disallowed or amended by the Court on appeal because it is unreasonable in the particular circumstances of that case, even if it was determined in accordance with the relevant contributions plan (or direction). This subsection does not authorise the Court to disallow or amend the contributions plan or direction.”

46 As this provision states, the condition that may be disallowed or amended by the Court is the condition imposed by the consent authority under s 7.11. That refers to the grant of development consent subject to a condition imposed under s 7.11.

47 There is a decision of this Court in *Arkibuilt Pty Ltd v Ku-Ring-Gai Council* (2006) 67 NSWLR 529; [2006] NSWLEC 502 (*Arkibuilt*), holding that this power of the Court in s 7.13(3) to disallow or amend a condition under s 7.11 is available to be exercised not only on an appeal under s 8.7 of the EPA Act against a determination of a development application but also on an appeal under s 8.9 against a determination of an application to modify a development consent. Jagot J held in that case that the Court on an appeal against a determination of a modification application can amend a condition requiring the payment of a monetary contribution under the former s 94, now s 7.11, notwithstanding that this may result in the condition no longer being determined in accordance with the relevant contributions plan, as required by the former s 94B(1), now s 7.13(1), and the Court is empowered to do so by the former s

94B(3), now s 7.13(3): at [30]. I consider this decision to be clearly wrong, for three reasons.

- 48 First, starting with the text of s 7.13(3), s 7.13(3) only applies at the time of imposition of a condition under s 7.11 on the grant of development consent. This is clear by the express reference in subsection (3) to “a condition under s 7.11”, noting that s 7.11 authorises the imposition of a condition of development consent requiring the dedication of land free of cost or the payment of a monetary contribution or both. The phrase presupposes that the consent authority has granted development consent subject to a condition under s 7.11. Subsection (3) empowers the Court on an appeal against the consent authority’s decision to impose a condition under s 7.11 to disallow or amend that condition.
- 49 This timing is also implied by the operation of s 7.13(3) as a dispensation from the constraint imposed by s 7.13(1). Subsection (1) restricts the imposition of a condition under s 7.11 unless it is of a kind allowed by, and is determined in accordance with, a contributions plan. Subsection (3) empowers the Court on appeal nevertheless to disallow or amend a condition under s 7.11 which is of a kind allowed by a contributions plan if the Court considers the condition imposed by the consent authority is unreasonable in the particular circumstances of the case, notwithstanding that this may result in the condition, if it is amended, not being determined in accordance with the contributions plan. The time at which this dispensation can be granted is on an appeal against a determination to grant development consent subject to a condition under s 7.11 that the Court considers to be unreasonable. It is not at the time of an appeal against a determination of a modification application, which does not involve the granting of development consent and hence the imposition of a condition under s 7.11 on the grant of development consent.
- 50 Secondly, turning to the context of s 7.13(3), s 7.13(3) is one of a suite of statutory provisions, being s 4.17(1)(h), s 7.11 and s 7.13, that only apply to the grant of development consent subject to a condition under s 7.11 and not to the modification of a development consent. As I have earlier explained, development consent may be granted subject to a condition that is authorised

to be imposed by s 7.11(s 4.17(1)(h)); a condition is authorised to be imposed under s 7.11(1) or (3) if it meets the statutory tests in those subsections; a condition under s 7.11(1) or (3) may be imposed only to require a reasonable dedication or contribution (s 7.11(2) or (4)); and a condition under s 7.11 may be imposed only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (s 7.13(1)). In this context, s 7.13(3) operates to allow a dispensation from the constraint imposed by s 7.13(1). All of these provisions only apply to the imposition of a condition under s 7.11 on the grant of development consent. The modification of a development consent, however, is not the grant of development consent: s 4.55(4) and s 4.56(1C). Accordingly, a power under s 4.55 or s 4.56 to modify a development consent is unconstrained by these provisions.

51 Thirdly, focusing on the powers to modify a development consent in s 4.55 and s 4.56, as I have earlier pointed out, the constraints on the power to modify a development consent are to be found only in the relevant statutory provision in s 4.55 or s 4.56 conferring the power and are not to be derived from any other statutory provisions in the EPA Act. This means that s 7.13(3) cannot operate to constrain the power to modify a development consent. In terms, s 7.13(3) only allows the Court on appeal to disallow or amend a condition under s 7.11 because it is unreasonable in the particular circumstances of the case. This would operate as a constraint on the power to modify a development consent. If s 7.13(3) applied, it would constrain any modification of a development consent that might be permitted by an applicable power in s 4.55 or s 4.56 only to the actions of disallowance or amendment of a condition under s 7.11 and the ground for such disallowance or amendment only to the condition under s 7.11 being unreasonable in the particular circumstances of the case, which the authorities hold relates to unreasonableness arising from the terms of the contributions plan or its application to the particular circumstances of the case. Such a constraint on the power to modify a development consent, deriving from a statutory provision other than s 4.55 or s 4.56, is impermissible.

52 Accordingly, the power of dispensation in s 7.13(3) is not available to be exercised by the Court on an appeal under s 8.9 of EPA Act against the determination of an application to modify a development consent.

53 This is the statutory framework that governed the consideration and determination of Intrapac's application to modify the development consent by amending condition 5.2 of the development consent. I turn now to address Intrapac's grounds of appeal contending that the Acting Commissioner mistook and misconstrued the power to modify the development consent.

### **Ground 1: the mischaracterisation ground**

#### *Intrapac's argument that mischaracterisation of power*

54 The first ground of appeal is that the Acting Commissioner erroneously characterised the application to modify the development consent as seeking an exercise of power of the Council as consent authority under s 7.11(5) of the EPA Act, rather than an exercise of power of the Court on appeal of the power under s 4.55(2), which involved the power under s 7.13(3) of the EPA Act.

55 Intrapac noted that the Acting Commissioner criticised Intrapac for conflating two separate steps authorised by the EPA Act, one being the allowance of satisfaction of a contributions conditions by the provision of a material public benefit (under s 7.11(5) or the equivalent provisions in the contributions plans) and the other being the amendment of the contributions condition because it was unreasonable in the circumstances (under s 7.13(3)): at [136]. The Acting Commissioner understood Intrapac's complaint to be that the condition requiring the payment of monetary contributions was unreasonable (the step under s 7.13(3)) because the Council had failed to accept a material public benefit in part or full satisfaction of the contributions condition which had been imposed (the step under s 7.11(5)): at [136], [143], [201].

56 Intrapac submitted that this was not its case and that the Acting Commissioner was in error in so characterising it. Intrapac accepted that it could seek under s 7.11(5) for the Council to accept the provision of a material public benefit in part or full satisfaction of a condition imposed under s 7.11, but this was not what Intrapac was seeking by its application to modify the development consent. Instead, Intrapac referred to s 7.11(5) and the discretion of the Council to accept a material public benefit in lieu of the monetary contribution to support its application that the condition should be amended to reduce the contributions payable by offsetting the material public benefits to be provided

by Intrapac against the contributions. The fact that Intrapac so referred to s 7.11(5) did not change the nature of the application to be considered by the Acting Commissioner, which remained an application to modify the development consent. At the hearing of this appeal, Intrapac submitted that the modification power under s 4.55(2) of the EPA Act was the lens through which Intrapac's application and appeal to the Court should have been analysed and adjudicated. Intrapac submitted that the Acting Commissioner did not do so.

- 57 Intrapac submitted that this is evident, firstly, in the Acting Commissioner beginning his analysis with a consideration of the statutory scheme for imposing conditions requiring the payment of monetary contributions (at [108]-[129]). It is secondly evident by the Acting Commissioner's erroneous understanding of Intrapac's argument that the condition was unreasonable because the Council failed to accept the value of the material public benefits to reduce the amount of the monetary contributions (at [135]-[147]). This was erroneous not only because Intrapac did not make that complaint – its argument was different as explained earlier – but also because s 7.11 did not apply to the determination of Intrapac's modification application. Section 7.11 is directed to the imposition of a condition requiring either the dedication of land free of cost or the payment of a monetary contribution upon the grant of a development consent. The modification of a development consent, however, is not the grant of a development consent: s 4.55(4) of the EPA Act.
- 58 Moreover, a contributions condition is not being "imposed" under s 7.11 when the condition is modified under s 4.55, but instead an existing condition already imposed under s 7.11 is being modified: see *Arkibuilt Pty Ltd v Ku-Ring-Gai Council* at [28]-[29]. Therefore, the power under s 7.11 to impose a contributions condition, and the constraint in s 7.13(1) on the exercise of that power, that a condition under s 7.11 can only be imposed if it is of a kind allowed by, and determined in accordance with, a contributions plan, are not determinative of the modification application.
- 59 Intrapac submitted that this error of the Acting Commissioner in focusing on the statutory scheme for the imposition of contributions conditions and on s 7.11(5) in particular, led to the Acting Commissioner misdirecting himself. Intrapac

submitted that, if the starting point in the Acting Commissioner's analysis had been that a contributions plan is not binding in determining a modification application and the Court is not bound by the contributions plan by the terms of s 7.13(3), the Acting Commissioner would have taken a different approach to the assessment of the merits of the modification application than he did. Rather than considering the power available under s 7.11(5), he would have considered the availability of offsetting of works that provide material public benefits against the contributions simply as a matter of reasonableness on the merits, being one of a number of factual circumstances in the case.

- 60 Intrapac submitted that because the Acting Commissioner considered the application to be one relating to the power under s 7.11(5), he went on to consider how the EPA Act deals with material public benefits and concluded at [137] that it is only in two circumstances that material public benefits are authorised by the EPA Act to be considered to reduce the contributions payable: where the benefit was provided prior to the grant of development consent, but not as a requirement of some other consent (under s 7.11(6)) and after the grant of consent under s 7.11(5) in part or full satisfaction of a contribution required by that consent.
- 61 The Acting Commissioner found that Intrapac's application to modify the development consent did not involve either of these circumstances: at [138]. Whilst this is correct, it is not to the point. Intrapac submitted that its modification application referred to s 7.11(5), not to seek for the Council to accept the material public benefits in lieu of the monetary contributions under s 7.11(5), but rather as an argument in support of its application to modify the development consent by amending the condition requiring the payment of monetary contributions.
- 62 The Acting Commissioner's error also led to his consideration and erroneous conclusion that a material public benefit cannot arise from a condition of consent: at [145]. That consideration and conclusion was only relevant to the issue under s 7.11(5) of what material public benefits a consent authority may accept in part or full satisfaction of a condition imposed in s 7.11. That issue did not arise on the modification application.

- 63 That issue also did not arise under s 7.13(3). Intrapac submitted that “there is nothing in the text of s 7.13(3) that suggests that the terms of s 7.11(5) would be a limit on the test that permits the Court to vary the contributions condition – the condition being “unreasonable in the particular circumstances of that case. The clear intent of the text of the s 7.13(3) is to give the Court a broad discretion to vary contributions conditions.”
- 64 In summary, Intrapac submitted that, because the Acting Commissioner mischaracterised the case as an application under s 7.11(5) rather than a modification application with the benefit of enlivening the power in s 7.13(3), the Acting Commissioner misdirected himself as to his task.

*The Council’s argument that no mischaracterisation of power*

- 65 The Council rejected Intrapac’s argument that the Acting Commissioner mischaracterised its application as one seeking an exercise of power under s 7.11(5) of the EPA Act. The Acting Commissioner did no such thing. Instead, the Council submitted, the Acting Commissioner was well aware that the power he was being asked to exercise was under s 4.55, which involved the power under s 7.13(3) of the EPA Act, as evidenced by [4], [23], [160]-[161], [201], [205] and [209] of the judgment. Consideration of s 7.11(5) came about, however, because of the way Intrapac put its case.
- 66 Intrapac’s case was that the relevant unreasonableness for the purposes of s 7.13(3) was that the Council had failed to apply the mechanisms contained in the Roads Contributions Plan and the Open Space Contributions Plan, so as to reduce the amount of monetary contributions payable under the condition. This meant that the mechanisms, being cl 2.16 of the Roads Contributions Plan and cl 4.2 and cl 5.3 of the Open Space Contributions Plan, were a focus of Intrapac’s case. These mechanisms in the contributions plans were not of the same kind. Cl 2.16 of the Roads Contributions Plan and cl 5.3 of the Open Space Contributions Plan were of a kind concerning how a contribution that had already been imposed could be paid or otherwise settled. The Acting Commissioner recognised that these mechanisms were dealing with the same subject matter as s 7.11(5), being the discretion the Council had under that provision to accept the dedication of land or the provision of a material public

benefit in part or full satisfaction or the condition imposed under s 7.11: see [120]-[121] and [127] of the judgment. This was in contrast to cl 4.2 of the Open Space Contributions Plan, which was a provision concerned with the point in time of imposing the contributions condition, and particularly with the possibility of a contributions condition being imposed in a lesser amount than as otherwise calculated in accordance with the plan.

67 Intrapac's case was that these mechanisms under the contributions plans, and s 7.11(5), should have been applied by the Council. The Acting Commissioner was required to address and determine Intrapac's argument.

68 The Council submitted that the Acting Commissioner did so, considering whether the condition requiring the payment of monetary contributions was unreasonable, for the purposes of s 7.13(3), in the ways argued by Intrapac. The Acting Commissioner found that there were three reasons why the contributions imposed without applying the mechanisms were not unreasonable, relating to features of the statutory scheme.

69 First, cl 2.16 of the Roads Contribution Plan and cl 5.3 of the Open Space Contributions Plan were mechanisms of the same kind as s 7.11(5), directed to how a contributions obligation already imposed could be paid or settled, and were thus not available to be applied at the time of imposing the conditions: [132]-[144] and [171] of the judgment. Secondly, the limitation in s 7.11(6) against taking into account material public benefits required by conditions of consent informs the exercise of the power under s 7.11(5): [145]-[149]. Thirdly, the burden imposed by the contributions condition was not a matter arising under the contributions plan. The decision in *Colonial Credits* was considered to be correct and was followed: [151]-[163] of the judgment.

70 In summary, the Acting Commissioner determined the issue of the unreasonableness of the condition under s 7.13(3) in the ways asserted by Intrapac at the hearing, which involved consideration of s 7.11(5). The Acting Commissioner did not err on a question of law in doing so.

71 The Council further submitted that, insofar as Intrapac now argues the Acting Commissioner should have considered unreasonableness more broadly than it advanced at the hearing before the Acting Commissioner, it is bound by the

way it conducted its case at the hearing: *Coulton v Holcombe* (1986) 162 CLR 1 at 7; [1986] HCA 33; *The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* (2018) NSWLEC 158 at [146]-[149]. The Acting Commissioner did not err on a question of law in not determining Intrapac's case in a way not put at the hearing.

*No mischaracterisation of power*

- 72 I find that the Acting Commissioner did not misunderstand the case Intrapac put at the hearing or failed to address that case. The Acting Commissioner summarised Intrapac's case, what the Acting Commissioner described as its "submissions as to the legal path to the modification of the consent," in [133] of the judgment. That summary built upon the Acting Commissioner's quotation in [76] from Intrapac's Statement of Facts and Contentions in Reply in which Intrapac "sought to properly identify the legal framework for the application and its legal basis". Intrapac contended that condition 5.2 was unreasonable by the contributions imposed for roadworks, regional level recreational facilities and district parks not being reduced through the mechanisms available in provisions in the contributions plans, being cl 2.6 in the Roads Contributions Plan and cl 4.2 and cl 5.3 in the Open Space Contributions Plan, to account for an offset for the dedication of land free of cost and the provision of material public benefits by Intrapac.
- 73 Intrapac on this appeal did not contend that the Acting Commissioner's summary of its argument was incorrect. As a matter of fact, the Acting Commissioner's summary was correct. Intrapac's argument was that condition 5.2 was unreasonable because it required the payment of the maximum amount of monetary contributions payable under the contributions plans without applying the mechanisms of those plans, which reflect s 7.11(5) of the EPA Act, that allow the Council to accept a material public benefit or the dedication of land in part or full satisfaction of the monetary contributions.
- 74 That argument had its genesis in Intrapac's application to modify the development consent lodged with the Council. The SEE accompanying the modification application referred to and relied on s 7.11(5) as the reason for the modification of condition 5.2 so as to allow for the provision of a material public

benefit to be offset against the monetary contributions payable (pp 2, 3, 5). The modification application did not rely on the mechanisms equivalent to s 7.11(5)(b) in the contributions plans themselves, only s 7.11(5)(b).

75 Intrapac first relied on the mechanisms in the contributions plans when it appealed against the Council's refusal of the modification application. In its Statement of Facts and Contentions in Reply, Intrapac identified these mechanisms, being cl 2.16 of the Roads Contributions Plan and cl 4.2 and cl 5.3 of the Open Space Contributions Plan. As the Acting Commissioner quoted in [76] of his judgment, Intrapac summarised its argument in three contentions:

““Contention 1 – Roads

1. The Applicant contends that Condition 5.2 of the Consent is unreasonable as the quantum of contributions imposed for road works was not reduced through the mechanism available in clause 2.16 of the Roads CP to account for an offset for the material public benefit provided by the road works to be undertaken by the Applicant in all the circumstances.

.....

Contention 2 – Coastal Buffer

2. The Applicant contends that Condition 5.2 of the Consent is unreasonable as the quantum of contributions imposed for Regional Level Recreational Facilities was not reduced through the mechanisms available in clauses 4.2 and 5.3 of the Open Space CP to account for an offset for the dedication of land or material public benefit provided by the Applicant in all the circumstances.

.....

Contention 3 – District Parks

3. The Applicant contends that Condition 5.2 of the Consent is unreasonable as the quantum of contributions imposed for District Parks was not reduced through the mechanism available in clause 4.2 and clause 5.3 of the Open Space CP to account for the dedication of land free of cost to the Council and its embellishment by the Applicant in all the circumstances.”

76 There was a fourth contention in relation to local parks. The Acting Commissioner rejected this contention (at [215]-[220]) and Intrapac does not appeal against this decision.

77 In the Applicant's Outline of Opening Submissions, Intrapac identified the sources of the Court's power to amend condition 5.2 as being s 4.55(2) and s 7.13(3) of the EPA Act (at [5(c)]). Intrapac summarised its argument for

amendment of condition 5.2 by relying on its Statement of Facts and Contentions in Reply:

“The Applicant relies upon its Statement of Facts and Contentions filed on 28 August 2019 (SOFAC in Reply), which summarises the applicable conditions of consent and the mechanisms in the Roads CP and the Open Space CP which unreasonably were not applied by the Council in Condition 5.2 of the Consent. The Applicant submits these mechanisms ought be applied by the Court on appeal in the circumstances of this case to reduce the monetary contributions payable so as to relieve the Applicant of the economic burden of both providing the material public benefit and the undiscounted monetary contributions in Condition 5.2.” (at [5(d)]).

- 78 Intrapac summarised the applicable statutory framework in three sections: the power to impose development contributions (under s 7.11, the power under s 4.55, and the power under s 7.13). In the section on the power to impose development contributions, Intrapac asserted that s 7.11(5)(b) is relevant (at [71]). In the section on the power under s 7.13(3), Intrapac stated that “in addition to the broad power pursuant to the provision of s 4.55 itself, on appeal the Court is given a broad power to disallow or amend a condition imposed under s 7.11. This power is contained in s 7.13(3) of the EPA Act...” (at [20]). In so stating, Intrapac relied on the decision in *Arkibuilt*.
- 79 Intrapac referred to the decision in *Rose Consulting* to explain “the limits on the Court’s power to disallow or amend a condition under s 7.13(3) on appeal (and the former s 94) on the basis that the condition is ‘unreasonable in the particular circumstances of that case’” (at [21]).
- 80 Intrapac reiterated that it relied on the four contentions raised in its Statement of Facts and Contentions in reply (at [30]). Intrapac explained each of these contentions by reference to the evidence: contention 1 – roads in [32]-[42], contention 2 – coastal buffer in [43]-[48] and contention 3 – district parks in [49]-[55]. These explanations of the contentions maintained Intrapac’s central argument that condition 5.2 was unreasonable because the monetary contributions payable were not reduced through the mechanisms in the contributions plans so as to accept the dedication of land or the provision of material public benefit provided by Intrapac in part or full satisfaction of the monetary contributions (see at [34], [44] and [51] respectively for the three contentions).

- 81 Intrapac maintained its argument in response to questioning by the Acting Commissioner during the hearing. In oral opening submissions, Intrapac took the Acting Commissioner through its written outline of opening submissions, including the power in s 7.11(5)(b) (at T 10/11/20 pp 39-40) and the Court's power on appeal in s 7.13(3) (at T 10/11/20 pp 41-43). Intrapac orally summarised its argument on the unreasonableness of condition 5.2 to be that it was not reasonable to impose the maximum contributions payable and not adjust them in accordance with the adjustment mechanisms in the contributions plan, being cl 2.16 of the Roads Contributions Plan and cl 5.3 in the Open Space Contributions Plan (T 10/11/20 p 48). Intrapac contended that, pursuant to s 7.13(3), "there is a discretion for the Court in this appeal to make a finding that's not strictly in accordance with the contributions plan, because the Court isn't so bound [so] that the Court can make a finding that's reasonable in all the circumstances" (T 10/11/20 pp 48-49).
- 82 The Acting Commissioner put to Intrapac a number of different ways a condition requiring the dedication of land free of cost or the payment of a monetary contribution might be unreasonable and asked Intrapac, in due course, to explain which way it was contending condition 5.2 was unreasonable (T 10/11/20 pp 52-53). This provided Intrapac with the opportunity to put its argument about the unreasonableness of condition 5.2 in a different way to how it had been putting it so far.
- 83 Intrapac provided to the Court in writing, the Applicant's Outline of Closing Submissions and the Applicant's Outline of Closing Submissions in Reply and orally addressed the Acting Commissioner in supplementation of these written submissions. In its Outline of Closing Submissions, Intrapac repeated what it had said in its Outline of Opening Submissions, that the Court's power to amend condition 5.2 lies in s 4.55(2) and s 7.13(3) of the EPA Act (at [5(c)]) and the reason that the Court ought to amend the condition is the same reason that Intrapac had outlined in paragraph 5(d) of its Outline of Opening Submissions that I have quoted earlier (also at [5(d)] of the Outline of Closing Submissions).

- 84 Intrapac referred to and relied on the mechanisms in the contributions plans for reducing the monetary contributions payable by accepting the dedication of land or the provision of material public benefits in part or full satisfaction of the monetary contributions required by condition 5.2, being cl 2.6 of the Roads Contributions Plan and cl 4.2 and cl 5.3 of the Open Space Contributions Plan (at [18]-[20]).
- 85 Intrapac repeated its summary of the applicable statutory framework given in its Outline of Opening Submissions, referring to s 7.11, s 4.55 and s.7.13(3) of the EPA Act. Intrapac again referred to and relied on s 7.11(5)(b) allowing the consent authority to accept the provision of material public benefits in part or full satisfaction of the condition under s 7.11 (at [22]), and s 7.13(3) allowing the Court on appeal to disallow or amend a condition imposed under s 7.11 (at [13]). Intrapac reiterated that it relied on the four contentions raised in its Statement of Facts and Contentions in Reply (at [41]), and repeated, with some elaboration to account for the evidence given at the hearing, what it had said in its Outline of Opening Submissions. Importantly, Intrapac reiterated its argument that condition 5.2 is unreasonable because the quantum of monetary contributions imposed for each of the roadworks, regional level recreational facilities and district parks is the maximum under the relevant contributions plan and was not reduced through the mechanisms available in the contributions plans to account for as an offset the dedication of land or the provision of material public benefits by Intrapac (at [45] for roadworks, at [65] for regional level recreational facilities and [77] for district parks).
- 86 In its written Outline of Closing Submissions in Reply, Intrapac asserted that certain “matters of construction of the Court’s power in this appeal are common ground between the parties”, namely:
- “(a) That the power to modify a development consent on appeal under s 4.55 of the EPA Act, includes the power, within s 7.13(3) (former s 94B(3)), to disallow or amend a contribution condition imposed under s 7.11 (former s 94) of the EPA Act.
  - (b) A contributions condition of a kind allowed by a contributions plan can be disallowed or amended by the Court on appeal ‘because it is unreasonable in the particular circumstances of the case’, even if imposed in accordance with a plan (s 7.13(3)) and

(c) That Court on appeal has a 'broader discretion' pursuant to s 7.13(3) to disallow or amend a condition imposed under s 7.11 if found to be 'unreasonable', even if the result is not one permitted by the relevant contributions plan.

(d) When determining the question of whether a question is unreasonable pursuant to s 7.13(3), the Court is not required to assess reasonableness to a *Wednesbury* standard." (footnotes and references omitted): at [8].

87 On the basis that the Court is exercising the power under s 7.13(3), and in response to the Council's submission that Intrapac had not established that the unreasonableness of the condition flowed from the contributions plans, Intrapac made submissions on the correctness of the decisions in *Colonial Credits* and *Beaini* and whether they should be followed (at [12]-[27]). Intrapac argued that the Acting Commissioner was not bound by or obliged to follow the decision in *Colonial Credits* and did not need to find that either decision in *Colonial Credits* or *Beaini* was wrong as each case turned on its own facts.

88 Nevertheless, Intrapac sought to demonstrate that the unreasonableness of condition 5.2 did arise from the application of the contributions plans to the case:

"(c) The 'unreasonableness' in the circumstances of this case is that condition 5.2 requires the maximum payment of applicable monetary contributions calculated in accordance with the contributions plans without applying the applicable provisions in either cl 2.6 in the Roads CP or cl 4.7 of the Open Space CP to reduce the payment of the monetary contributions otherwise calculated in accordance with the contributions plans.

(d) Consistent with the decisions in *Colonial Credits* and *Beaini* Projects, the 'unreasonableness' arises from the application of the Roads CP and the Open Space CP in the calculation of the monetary contributions themselves and not from 'some other burden imposed on the beneficiary of a development consent, outside the plan'" (at [28(c) and (d)]).

89 Intrapac added:

"In Reply to RWS at [37], the unreasonableness in the circumstances of the case which the Court ought remedy is not as to the 'non-exercise of a discretion'. Rather, the applicant contends that the calculation of monetary contributions which is of a 'kind allowed by a contributions plan' must accord with the applicant of all of the relevant provisions of contributions plans. This relevantly includes the provisions for the reduction of monetary contributions by application of cl 2.16 of the Roads CP or cl 4.7 of the Open Space CP" (at [29(a)]).

90 Intrapac in its oral closing submissions took the Acting Commissioner through both the written outline of closing submissions (T 12/11/20 p 5ff) and the outline of closing submissions in reply (T 24/11/20 p 86ff). This included

emphasising the Court's power under s 7.13(3) to amend the condition so as to vary the contributions payable (T 12/11/20 p 7) and the mechanisms in the contributions plans to accept the dedication of land or the provision of a material public benefit in part or full satisfaction of a monetary contribution required by a condition under s 7.11 (T 12/11/20 p8).

- 91 Intrapac referred to the factors to be considered in determining offers of material public benefits in cl 2.16 of the Roads Contributions Plan and cl 5.3.2 in the Open Space Contributions Plan (T 12/11/20 pp 13, 25). In response to a question from the Acting Commissioner, Intrapac answered that there was no factor outside of the list of factors for exercise of the mechanisms in the contributions plan that it relied on for its argument that the mechanisms in the contributions plan should be applied to reduce the monetary contributions payable (T 12/11/20 pp 13, 14 and 26).
- 92 In response to a question from the Acting Commissioner about [45] of the Applicant's Outline of Closing Submissions, which summarised Intrapac's argument on its contention 1 that condition 5.2 was unreasonable because the monetary contributions imposed for roadworks had not been reduced through the mechanism available in cl 2.16 of the Roads Contributions Plan, Intrapac confirmed that the Council had power under s 7.11(5) to accept a material public benefit in part or full satisfaction of the condition and the Court had power under s 7.13(3) to amend the condition because it is unreasonable (T 12/11/20 p 16).
- 93 Intrapac asserted that the Acting Commissioner only needed to exercise the power in s 7.13(3) if he did not accept Intrapac's argument that the condition could be amended by the Council under s 7.11(5) and the mechanisms in the contributions plans (T 12/11/20 pp 16-17). In particular, Intrapac accepted as correct the Acting Commissioner's summary of its argument that "you're picking at unreasonableness within the scope of the plan itself by the failure of the Council to apply cl 2.16 in the way you said it should've been applied." (T 12/11/20 p 17). Intrapac made the same argument with regard to the mechanisms in the Open Space Contributions Plan (T 12/11/20 pp 25-26).

94 During Intrapac's oral closing submissions in reply, the Acting Commissioner raised what he described as "a temporal element" or the difference in timing between the exercise of the powers in s 7.11(5) and s 7.13(3) and sought clarification as to "the power that you invite the Court to exercise" (T 24/11/20 pp 89-90). Intrapac responded to the Acting Commissioner's question:

"Commissioner, I'm grateful for your explanation of that question because I certainly didn't understand it in opening – I didn't understand that temporal element to be as the Court's put it. What I will say is that the Court as the consent authority in this case is dealing with a modification application with respect to the reasonableness of a condition which has already been imposed.

So, in terms of there being a temporal problem, there is no temporal problem because the Court can in effect see that as part of the consent, there has been the dedication of land, there has been the carrying out of works and there has been the payment of contributions. So in terms of there being a temporal problem in s 7.11(5) that you've identified, that temporal problem doesn't exist when the Court is the decision maker on appeal." (T 24/11/20 p 90).

95 Intrapac later explained that its argument was that the Acting Commissioner had the power under s 7.13(3) to have regard to the mechanisms in the contributions plans, cl 2.16 of the Roads Contributions Plan and cl 5.3 of the Open Space Contributions Plan, which are the ways the Council says it will consider material public benefits or works in kind, in order to reduce the monetary contributions required by the condition (T 24/11/20 pp 92-93).

96 This narration of Intrapac's argument, from the time of it making the modification application to its closing submissions on the appeal against the refusal of the modification application, clearly establishes that Intrapac's case was as summarised by the Acting Commissioner in [76] and [133] of the judgment. Insofar as the Acting Commissioner examined and adjudicated Intrapac's case by reference to s 7.11(5), and the equivalent mechanisms in the contributions plans, and s 7.13(3), this was necessary in order to determine Intrapac's contentions regarding the unreasonableness of condition 5.2.

97 In doing so, the Acting Commissioner did not mischaracterise the power that he was exercising. He was well aware that he was determining on appeal Intrapac's application to modify the development consent by amending condition 5.2 to reduce the monetary contributions payable and that the power to modify the development consent was in s 4.55(2) of the EPA Act. Intrapac had asserted that on appeal the Court's power under s 4.55(2) included the

power under s 7.13(3) to disallow or amend the condition because it is unreasonable. Intrapac contended that the reason the condition was unreasonable was that the Council had not accepted, under s 7.11(5) and the equivalent mechanisms in the contributions plans, the dedication of land and the provision of material public benefits by Intrapac in part or full satisfaction of the monetary contributions required by the condition.

- 98 The Acting Commissioner determined Intrapac's argument, rejecting it for three reasons. The first reason concerned the conflation of, and the temporal problem raised by, two separate steps under the EPA Act: the first step under s 7.11(1) or (3) of imposing a condition requiring payment of a monetary contribution and the second step under s 7.11(5) of accepting the dedication of land or the provision of a material public benefit in part or full satisfaction of that monetary contribution required by the condition (at [136]-[144] of the judgment). The Acting Commissioner found that a condition imposed under s 7.11(1) or (3) requiring the payment of a monetary contribution cannot be unreasonable because the Council, in imposing the condition (which is the first step), failed to take into account the circumstance that had not yet arisen of the applicant offering to dedicate land or provide a material public benefit in part or full satisfaction of the monetary contribution (which is the second step). That finding is clearly correct. This was a logical flaw in Intrapac's argument. In rejecting Intrapac's argument, the Acting Commissioner did not misunderstand that he was being asked on the appeal to exercise the power of the Council under s 7.11(5) or the equivalent mechanisms under the contributions plans, but instead correctly understood that Intrapac's argument was that the condition was unreasonable by reason of the Council failing to exercise that power and those mechanisms under the contributions plans.
- 99 The Acting Commissioner did nevertheless proceed to consider whether he should exercise the discretion under the mechanisms in the contributions plans to offset Intrapac's dedication of land and provision of material public benefits in part or full satisfaction of the monetary contributions payable under the condition, but this was in the alternative to his decision that this step was a distinct and later step to the step of imposing the condition requiring the payment of monetary contributions in the first place.

100 The Acting Commissioner's consideration of the unreasonableness of the condition by reference to s 7.13(3) was responsive to Intrapac's argument that on appeal the Court's exercise of the modification power in s 4.55(2) involved the exercise of the power in s 7.13(3). This was in law incorrect, as I have earlier explained. But the Acting Commissioner in considering s 7.13(3) was doing no more than addressing Intrapac's argument as to how he should determine its modification application. The Acting Commissioner did not misdirect himself by considering but rejecting Intrapac's erroneous argument based on s 7.13(3). It might be different if the Acting Commissioner had accepted the argument, but he did not.

101 In these circumstances, I reject Intrapac's first ground that the Acting Commissioner had mischaracterised the power he was exercising in determining Intrapac's modification application.

## **Ground 2: misdirection ground**

102 The second ground flows from the first ground. Intrapac contended that because the Acting Commissioner treated the modification application as an application under s 7.11(5) of the EPA Act, the Acting Commissioner analysed the provisions in the contributions plans for accepting the dedication of land or the provision of material public benefits in part or full satisfaction of the monetary contributions required by condition 5.2 (in [172]-[200]). Intrapac contended that the Acting Commissioner thought himself bound by the criteria in these provisions in the contributions plans. The Acting Commissioner assessed each matter or factor required by the provisions to be considered in determining whether to accept the dedication of land or provision of a material public benefit in lieu of monetary contributions, set out in cl 2.16 of the Roads Contributions Plan and cl 5.3.2 of the Open Space Contributions Plan, but did not consider any other matters. Intrapac contended that this involved the Acting Commissioner misdirecting himself as to the relevant matters to be considered in determining whether the monetary contributions imposed by condition 5.2 were unreasonable.

103 Intrapac noted that the Acting Commissioner had analysed these provisions in the contributions plan in the event that he was wrong in his decision that

condition 5.2 was not unreasonable because the Council had failed to accept the dedication of land or provision of material public benefits by Intrapac under the provisions in the contributions plans (see at [171], [201]).

- 104 Intrapac submitted that the Acting Commissioner's analysis of the provisions in the contributions plans was "infected by the mischaracterisation of the application before him and his findings that the contributions could not be reduced as a consequence of a material public benefit arising from the conditions of the consent itself."
- 105 Intrapac contended that the matters or factors in cl 2.16 of the Roads Contributions Plan and cl 5.3.2 of the Open Space Contributions Plan, whilst relevant to the assessment under s 7.13(3) of whether condition 5.2 is unreasonable in the circumstances of the case, did not bind the Acting Commissioner's decision-making under s 7.13(3) and were not the only matters to be considered in that decision-making. In confining himself to these matters in the contributions plans, the Acting Commissioner misdirected himself and failed to ask the broader question as to whether, in the circumstances of the case, the condition requiring the payment of the maximum contributions under the contributions plans is unreasonable.
- 106 The Council responded, as it had with regard to the first ground of appeal, submitting that the Acting Commissioner, in considering the factors in cl 2.16 of the Roads Contributions Plan and cl 5.3.2 of the Open Space Contributions Plan, was doing no more than what Intrapac had asked him to do. Intrapac's case was not only that the condition was unreasonable because the Council had failed to apply the mechanisms in the contributions plans to reduce the amount of monetary contributions payable (the contentions in its Statement of Facts and Contentions in Reply) but also that "these mechanisms ought be applied by the Court on appeal to reduce the monetary contributions payable so as to relieve the Applicant from the economic burden of providing the material public benefit and the undiscounted monetary contributions in condition 5.2" (at [5(d)] of Applicant's Outline of Opening Submission and [5(d)] of Applicant's Outline of Closing Submissions).

- 107 The Council noted that, during Intrapac's oral closing submissions, the Acting Commissioner had asked Intrapac whether the relevant matters to be considered are those to be identified in the contributions plans (cl 2.16 of the Roads Contributions Plan and cl 5.3.2 of the Open Space Contributions Plan) or whether there are some other relevant considerations. Intrapac confirmed, after some discussion, that there is no factor outside of the matters in those provisions of the contributions plans that Intrapac relied on (T 12/11/20 pp 13-14).
- 108 The Council submitted that in these circumstances, the Acting Commissioner's analysis of the provisions in the contributions plans and only the factors identified in those provisions, was responsive to the way Intrapac put its case. The Acting Commissioner cannot have misdirected himself by doing what Intrapac asked him to do.
- 109 The Council rebutted Intrapac's argument made on this appeal that the Acting Commissioner should have asked a broader question of whether the monetary contributions imposed by the condition were unreasonable in all the circumstances. This was not the basis on which Intrapac put its case before the Acting Commissioner and Intrapac should be bound by the way it conducted itself at that hearing. The Acting Commissioner cannot have misdirected himself by not dealing with an argument that was not put by Intrapac.
- 110 I reject Intrapac's second ground. It is dependent on its first ground, that the Acting Commissioner mischaracterised the power that he was exercising as being under s 7.11(5). That argument is incorrect for the reasons I have earlier given. The Acting Commissioner analysed the mechanisms in the contributions plans and the factors required by the contributions plans to be considered in determining whether to apply these mechanisms, because Intrapac's case was that he should do so. This is clear from Intrapac's opening and closing submissions and confirmed in oral submissions. Intrapac did not positively identify any factor other than the factors in the contributions plans that it asserted the Acting Commissioner should consider in determining whether the condition requiring the payment of monetary contributions was unreasonable. Intrapac did not put a case that the condition was unreasonable on any basis

other than that the mechanisms in the contributions plans should have been applied by the Council or should be applied by the Court to reduce the monetary contributions payable.

111 In these circumstances, the Acting Commissioner did not misdirect himself or ask himself the wrong question in dealing with the arguments put by Intrapac. I reject the second ground.

### **Ground 3: the conditioned works ground**

#### *Intrapac's argument that two alleged errors*

112 The third ground focuses on the power under s 7.13(3) and is, in effect, in the alternative to the first two grounds. The first two grounds contend that the Acting Commissioner had mischaracterised and misdirected himself regarding the power that he was exercising as being under s 7.11(5). The third ground contends that, if the Acting Commissioner in fact considered he was exercising the power under s 7.13(3), he nevertheless misdirected himself as to the matters he could take into account in determining whether condition 5.2 was unreasonable. The misdirection, Intrapac argued, is revealed in the Acting Commissioner's second and third reasons for finding that condition 5.2 is not unreasonable.

113 The second reason, explained by the Acting Commissioner in [145]-[150], was that a material public benefit arising from the carrying out of work pursuant to a condition of development consent "has no role to play" in determining whether a condition under s 7.11 requiring the payment of a monetary contribution in the same development consent is unreasonable (see at [145]). The material public benefits relied on by Intrapac fell into this category – the benefits would arise from the works that Intrapac would be required to carry out by other conditions of consent. The Acting Commissioner found, for the purposes of s 7.13(3), "the beneficiary of a development consent is not entitled to demonstrate unreasonableness by pointing to the works to be carried out in accordance with a condition of consent." (at [149]).

114 Intrapac contended that the Acting Commissioner misdirected himself by applying the limitation on the exercise of the power in s 7.11(6). This was the first alleged error made by the Acting Commissioner. Whilst s 7.11(6) does

state that any material public benefit the consent authority should take into consideration in imposing a condition under s 7.11(1) or (3) is to be “other than a benefit provided as a condition of the grant of development consent under this Act”, that limitation does not apply when determining the unreasonableness of a condition for the purposes of s 7.13(3). Intrapac contended that the Acting Commissioner, in his consideration of the unreasonableness of condition 5.2, could have and should have considered the material public benefits that would be provided by Intrapac, even though these benefits arise from the carrying out of works pursuant to other conditions of consent.

- 115 The third reason, explained by the Acting Commissioner in [151]-[170], was that a condition imposed by s 7.11 must arise from the contributions plans pursuant to which the condition was imposed or the application of the contributions plans to the particular circumstances of the case. The Acting Commissioner found that, on the argument of Intrapac, the unreasonableness of condition 5.2 does not arise from the application of the contributions plans, but rather is imposed on Intrapac by the conditions of consent requiring the carrying out of works (at [151]). In making this finding, the Acting Commissioner applied the decision in *Colonial Credits*.
- 116 Intrapac contended that the Acting Commissioner was in error in accepting the correctness of the decision in *Colonial Credits* and following it. This was the second alleged error. Intrapac submitted that Moore J in *Colonial Credits* had misunderstood and misapplied the Court of Appeal’s decision in *Rose Consulting*. In *Colonial Credits*, Moore J considered that, referring to [25] of Santow JA’s judgment in *Rose Consulting*:

“The interlinking made clear by his Honour of the enabling and the disallowing provisions and the comparison between the requirement for reasonableness in the enabling provision and unreasonableness in the disallowing provision clearly identifies the limitation on the scope of s 94B(3) as being confined to reasonableness in the context of that which is contained in and imposed by the contributions plan itself.” (at [47]).

- 117 Moore J also referred to [35] and [37] of Santow JA’s judgment in *Rose Consulting Group*, saying:

“The opening sentence of [35] and the first three sentences of [37] in his Honour’s reasons reinforce my conclusion that the power to set aside a

contributions' condition, such as condition C19, must find a basis of unreasonableness in the contributions plan's application to the site rather than in some other burden imposed on the beneficiary of the development consent where that burden is said to be unreasonable but has no foundation whatsoever in the contributions plan itself." (at [48]).

- 118 Intrapac submitted that these paragraphs of Santow JA's judgment in *Rose Consulting* did not support the limitation found by Moore J in *Colonial Credits* on the scope of s 94B(3), which is the current s 7.13(3). Intrapac submitted that *Rose Consulting* was directed at rejecting the Council's argument in that case that a condition can only be unreasonable for the purposes of s 94(12), the predecessor to s 94B(3) and s 7.13(3), by "finding unreasonableness of a so-called project-specific condition based on 'the particular circumstances of the case'", rather than by "finding a so-called generic condition unreasonable; that is, unreasonable by reason of the contributions plan being somehow 'faulty in itself'" (at [25] of *Rose Consulting*). Santow JA held the unreasonableness of a condition can arise from the unreasonableness of the contributions plan. Santow JA gave as examples, "a contributions plan which projected, quite fallaciously, a huge increase in population from a particular development in order to maximise exactions from the developer" or "conditions requiring an exorbitant contribution that was utterly unreasonable when tested against a realistic population increase from the development, as compared to a fictitious larger one" (at [34]). In such circumstances, it is the contributions plan itself that "mandates an unreasonable result in terms of conditions" (at [37]).
- 119 Intrapac submitted that this focus in the decision in *Rose Consulting* on the unreasonableness of the contributions plan itself was explicable because the Court was rejecting the argument of the Council in that case that a condition could not be unreasonable for the purposes of the then s 94(12), merely because of unreasonableness in the contributions plan itself. This does not mean that establishing unreasonableness in the contributions plan was the only way that a condition imposed in accordance with the contributions plan could be unreasonable for the purposes of the former s 94(12) or s 94B(3) or the current s 7.13(3). Rather, unreasonableness can arise from the condition itself and from the circumstances of the case, whether or not the contributions plan is inherently unreasonable.

120 Intrapac submitted that the decision in *Colonial Credits* misunderstood and misapplied the decision in *Rose Consulting*, and the Acting Commissioner thereby erred in following *Colonial Credits*.

*The Council's argument that no errors*

121 The Council rejected Intrapac's argument that the Acting Commissioner misdirected himself as to the power in s 7.13(3). The Acting Commissioner did not improperly limit his consideration of the unreasonableness of the condition under s 7.13(3) by reference to s 7.11(6). The limitation the Acting Commissioner observed in s 7.11(6) – that the material public benefit needs to be other than a benefit provided as a condition of the grant of development consent – was correct. The Acting Commissioner was not in error in recognising that s 7.11(6) restricted the material public benefits that could inform a reduction in monetary contributions under that provision. The Acting Commissioner's reference to that provision in construing and applying s 7.13(3) involved no error. Construing different elements of the statutory scheme in a consistent way is conventional and correct.

122 The Council submitted that the Acting Commissioner's reference to s 7.11(5) and (6) was also responsive to Intrapac's argument. Intrapac had argued that the unreasonableness of condition 5.2 for the purposes of s 7.13(3) flowed from not taking account of the material public benefits that Intrapac would provide in carrying out works pursuant to other conditions of consent. This argument required the Acting Commissioner to address whether the provision of benefits as a condition of the grant of consent is a relevant material public benefit that could found the unreasonableness of condition 5.2. The Acting Commissioner cannot have misdirected himself by addressing but rejecting Intrapac's argument that it did.

123 In any event, the Council submitted the Acting Commissioner did not ignore the material public benefits suggested by Intrapac, which would arise by its carrying out the works required by conditions of consent, as the Acting Commissioner went on to address these alleged benefits (at [196]-[200]). The Acting Commissioner found, as a matter of merit, that the refusal to apply the

mechanisms in the contributions plan with respect to these benefits was not unreasonable.

- 124 The Council rejected Intrapac's second argument that the Acting Commissioner erred in following the decision in *Colonial Credits*. The Council submitted, firstly, that the decision in *Colonial Credits* did not misunderstand or misapply the decision in *Rose Consulting*. Moore J recognised that the unreasonableness of a condition can arise from the unreasonableness of the contributions plan, pursuant to which the condition was imposed (at [47]), or from the contributions plan's application to the circumstances of the development and the site (at [48]). Moore J was not purporting to limit the ways that a condition can be found to be unreasonable for the purposes of s 94B(3), but instead was pointing out that a condition cannot be unreasonable for this purpose if the sole reason given for the unreasonableness has not foundation whatsoever in either the contributions plan itself or the application of the contributions plan to the circumstances of the case.
- 125 Secondly, the Acting Commissioner, in following Moore J's decision in *Colonial Credits*, was again addressing and adjudicating on Intrapac's argument. Intrapac had argued, consistently with what Moore J had held in *Colonial Credits*, that the unreasonableness of condition 5.2 arose from the contributions plans, because the mechanisms in those contributions plans for reducing the monetary contributions payable had not been applied by the Council and should be applied by the Court on appeal. Hence, Intrapac did not argue before the Acting Commissioner that the decision in *Colonial Credits* was incorrect; Intrapac assumed it was correct and sought to apply it in aid of its argument.
- 126 In answer to both of the alleged errors under this ground, the Council submitted that even if error be found, it is not material and does not vitiate the Acting Commissioner's decision. The Acting Commissioner's first reason for rejecting Intrapac's argument for the unreasonableness of condition 5.2 is dispositive. The Acting Commissioner's second and third reasons are supplemental and in the alternative in the event that the Acting Commissioner were to have been wrong in his first reason. Hence, even if the Acting Commissioner were to be

found to have erred in his second or third reason, this is not material. In answer to Intrapac's response that the three reasons were interdependent, the Council noted that, whilst the second and third reasons might be dependent on the first reason, in the sense that they are supplemental and in the alternative to the first reason, the converse does not hold. The first reason is independent of the second and third reason, so that any error in the second or third reason cannot affect or infect the first reason.

*No error established*

- 127 I find Intrapac has not established that the Acting Commissioner erred in either way contended in his second and third reasons for concluding that condition 5.2 was not unreasonable. As with the first two grounds, the third ground is founded on the Acting Commissioner having made an error by addressing and adjudicating Intrapac's argument on the unreasonableness of the condition.
- 128 Intrapac had argued that the material public benefits that Intrapac would provide in carrying out works required by conditions of consent should be taken into account to reduce the monetary contributions payable by condition 5.2. Not to do so makes the condition unreasonable for the purposes of s 7.13(3). This argument required the Acting Commissioner to determine two questions: first, is such a benefit, which is provided as a condition of consent, a material public benefit that can be accepted in part or full satisfaction of the monetary contributions required by condition 5.2 and, secondly, does such a benefit, which does not arise from an application of the contributions plan, give rise to the unreasonableness of the condition. The Acting Commissioner addressed these two questions in his second and third reasons for determining that condition 5.2 was not unreasonable, in the manner argued by Intrapac. The Acting Commissioner did not err in giving these two reasons as this was necessary in order to deal with Intrapac's argument.
- 129 True it is that neither s 7.11(5) or (6) nor s 7.13(3) applied to regulate the exercise of the power in s 4.55(2) to modify the development consent, as those provisions regulated the grant of consent subject to conditions, including a condition imposed under s 7.11, such as condition 5.2, and not the modification of the consent, including by amending condition 5.2. Intrapac's argument was,

therefore, misguided in asking the Acting Commissioner to exercise the power in s 7.13(3) by reference to s 7.11(5) or (6). The Acting Commissioner was nevertheless required to address and adjudicate upon the argument that Intrapac had put. Intrapac cannot now argue that the Acting Commissioner erred on a question of law by considering but rejecting Intrapac's argument.

- 130 Starting with the first alleged error, Intrapac had argued that the unreasonableness of condition 5.2, for the purposes of s 7.13(3), arose from the Council failing to accept, under s 7.11(5), the provision of a material public benefit in part or full satisfaction of the monetary contributions required by condition 5.2. The material public benefit Intrapac argued that it would provide was the benefit of Intrapac carrying out works pursuant to other conditions of consent. This argument necessitated the Acting Commissioner determining whether the failure to accept the provision of such a benefit led to condition 5.2 being unreasonable. The Acting Commissioner found that it did not, as the unreasonableness of a condition of consent imposed under s 7.11 is not demonstrated by pointing to a benefit that may be provided by the carrying out of works in accordance with another condition of consent.
- 131 The Acting Commissioner referred to s 7.11(6) in support of this finding that a material public benefit to be taken into account in determining the unreasonableness of a condition needs to be a benefit other than a benefit provided as a condition of consent. As the Commissioner pointed out in [147], "it would be an absurd outcome if the material public benefit of the works required here could be taken into account in the determination of the contribution condition of this consent, whereas the benefit could not be taken into account in future development applications by the same proponent." This was not to apply impermissibly s 7.11(6) to limit the exercise of the power under s 7.13(3), but only to explain his finding that, if the provision of a material public benefit that could be accepted under s 7.11(5) can be taken into account in determining whether a condition imposed under s 7.11 is unreasonable for the purposes of s 7.13(3) (contrary to his first reason), the benefit needs to be one provided otherwise than by a condition of the consent.

- 132 The Acting Commissioner did not err in addressing but rejecting Intrapac's argument to the contrary, even though as I have earlier found, neither s 7.11(5) or (6) nor 7.13(3) applied to the Acting Commissioner's determination of Intrapac's modification application, so that the issue raised by Intrapac's argument did not need to be determined. Nevertheless, the Acting Commissioner did not err by determining Intrapac's argument.
- 133 Turning to the second alleged error, Intrapac had argued that the unreasonableness of condition 5.2 did arise from the contributions plans, in that the contributions plans provided mechanisms that would have allowed the Council, and the Court on appeal, to accept the provision of a material public benefit in part or full satisfaction of the monetary contributions required by condition 5.2, but such mechanisms had not been applied. In putting its argument in this way, Intrapac was applying what had been held by Moore J in *Colonial Credits*. Indeed, Intrapac asserted in its Outline of Closing Submissions in Reply that, consistent with the decision in *Colonial Credits*, the unreasonableness arose from the application of the contributions plans themselves and not from some other burden imposed on Intrapac outside of the contributions plan (at [28(d)]). Intrapac also said in its Outline of Closing Submissions in Reply that the Acting Commissioner did not need to find that the decision in *Colonial Credits* was wrong (see [27]).
- 134 In these circumstances, the Acting Commissioner did not err in applying the decision in *Colonial Credits* in order to address but reject Intrapac's argument. The Acting Commissioner found that, contrary to Intrapac's assertion, the alleged unreasonableness of the condition did not arise from the application of the contributions plans. The Acting Commissioner did not err in not considering whether the decision in *Colonial Credits* was correct in its understanding and application of the decision in *Rose Consulting* as Intrapac had not asked him to consider this question. It is not necessary on this appeal either to consider this question.
- 135 In these circumstances, I reject the third ground that the Acting Commissioner misdirected himself in determining Intrapac's argument that the

unreasonableness of the condition arose from the carrying out of works under the consent.

#### **Ground 4: the policy ground**

- 136 The fourth ground concerned the Acting Commissioner's consideration of the mechanism in cl 5.3 of the Open Space Contributions Plan. The Acting Commissioner had rejected Intrapac's argument that condition 5.2 was unreasonable by reason of the Council's failure to apply mechanisms in the contributions plans, for the three reasons he had given earlier. Nevertheless, if he were to be wrong in that conclusion, the Acting Commissioner went on to consider the mechanisms in the contributions plans, including the mechanism in cl 5.3 of the Open Space Contributions Plan, as Intrapac had argued the Commissioner should do.
- 137 The Acting Commissioner identified a difficulty in applying the mechanism in cl 5.3 of the Open Space Contributions Plan, which lay in cl 5.3.3 of the contributions plan, that the subclause limited the material public benefits that could be "offset" against the monetary contributions payable to those contained in the works schedule in the Open Space Contributions Plan (at [207]). The works that would be carried out by Intrapac pursuant to conditions of consent, which Intrapac contended constituted material public benefits, were not contained in the contributions plan's work schedule. Intrapac nevertheless argued that the Council should have granted an offset when condition 5.2 was imposed and its failure to do so rendered the condition unreasonable, or alternatively, the Council should have varied the condition at the time of determining the modification application (at [208]).
- 138 Intrapac further argued that the Court, in exercising the power under s 7.13(3) to determine whether the condition was unreasonable, could accept as an offset the works that will be carried out by Intrapac, notwithstanding that the works are not contained in the Open Space Contributions Plan's work schedule, as the Court is not bound by the contributions plan (at [209]).
- 139 The Acting Commissioner found that, although he had power not to apply cl 5.3.3 of the Open Space Contributions Plan, because he was not bound by the

Contributions Plan, it would be inappropriate for him to do so. The Acting Commissioner gave his reasons in [210]-[212]:

“In my opinion it is inappropriate of the Court to ignore a provision such as clause 5.3.3 of the OS Contributions Plan in determining the reasonableness of a condition. It is one thing for the Court, based on the evidence before it, to make a different determination from a council on matters where there are criteria for assessment. It is quite another to make a finding directly contrary to a policy decision in a contributions plan.

A contributions plan is a document adopted by the Council after public consultation and involves a significant number of policy decisions. Those decisions encompass prioritisation of works, where works are to be carried out, the nature of the works, the needs and demands of its community. The Council will balance a whole host of matters to first draft and then adopt a contributions plan.

Here the Council has made the policy decision that the works in the schedule to the OS Contributions Plan have primacy over other works – the contributions required under the plan are not to be reduced by permitting other works to be carried in lieu of the works detailed in the plan. That is a policy decision with which the Court should not interfere in exercising the power in s 7.11(3) EP&A Act. In so doing I am not considering myself bound by the OS Contributions Plan, but rather recognising that I would be making a policy decision to determine that the contributions condition is unreasonable because the contributions were not reduced by the value of the material public benefits consequent upon the carrying out of the work the subject of the particular conditions.”

140 Intrapac contended that the Acting Commissioner erred in concluding that he was bound by the policy implicit in the contributions plan when determining whether condition 5.2 was unreasonable for the purposes of s 7.13(3). Intrapac argued that the Acting Commissioner’s confinement of his discretion under s 7.13(3) to depart from the provisions of the contributions plan, on the basis that this would be to make a policy decision, was inconsistent with what Santow JA had observed in [37] of *Rose Consulting*. There, it was recognised that the amendment of a condition requiring the payment of a monetary contribution, which would result in the contribution no longer being determined in accordance with the contributions plan, does not amend the contributions plan itself. Similarly, Intrapac argued, making a decision to reduce the contributions in the circumstances of the case does not involve making a policy decision to give primacy to some works over the works contained in the works schedule in the contributions plan.

141 The Council refuted Intrapac’s assertion that the Acting Commissioner had concluded that he was bound by the policy implicit in the Open Space

Contributions Plan. The Acting Commissioner expressly said to the contrary. He explicitly noted in [209] that the Court was not bound by the provisions of the Open Space Contributions Plan, which included cl 5.3.3. The Acting Commissioner reiterated that, in his referring to the policy implicit in cl 5.3.3, he was not “considering myself bound by the OS Contributions Plan” (at [212]). The Acting Commissioner recognised that he could depart from cl 5.3.3, if he thought that to be appropriate. The Acting Commissioner, however, thought it would not be appropriate to depart from cl 5.3.3. His reason was that the Council had made a policy decision that the works contained in the works schedule in the Open Space Contributions Plan should “have primacy over other works” for the purposes of applying the offset provision of cl 5.3, so that the works contained in the works schedule can be considered as offsets, but works not contained in the works schedule cannot be considered as offsets (at [212]).

142 The Acting Commissioner recognised that in making the contributions plan that embodied in its provisions this and other policy decisions, the Council will have had to “balance a whole host of matters” and engage in public consultation (at [211]).

143 These considerations informed the Acting Commissioner’s decision that he should not, as distinct from could not, make a finding accepting as an offset the works to be provided by Intrapac that would be contrary to cl 5.3.3 and the policy implicit in that provision.

144 The Council submitted that this reasoning process does not reveal any error on a question of law. It involved an evaluative factual decision that was open to the Acting Commissioner.

145 Furthermore, the Council submitted that the Acting Commissioner’s decision was in fact an application of Intrapac’s central argument. Intrapac had argued that the unreasonableness of condition 5.2 arose from the non-application of the mechanisms in the contributions plans. Intrapac had argued that the Council should have applied, and the Court on appeal should apply, the mechanisms in the contributions plan. In the case of the Open Space Contributions Plan, this would include application of cl 5.3.3. Application of cl

5.3.3 would result in the works to be carried out by Intrapac not being able to be accepted as an offset, because the works are not contained in the contributions plans' work schedule. The Acting Commissioner did what Intrapac argued he should have done of applying the mechanisms in the contributions plans, including cl 5.3.3 of the Open Space Contributions Plan. The Council submitted that it was not unreasonable for the Acting Commissioner to have done so.

146 I reject Intrapac's argument. As submitted by the Council, the Acting Commissioner's reasoning does not reveal that the Acting Commissioner considered himself to be bound by the policy implicit in cl 5.3.3 of the Open Space Contributions Plan in determining whether condition 5.2 was unreasonable. The Acting Commissioner expressly noted that he was not bound by the Open Space Contributions Plan generally or cl 5.3.3 particularly, or any policy implicit in the provisions of the contributions plans. Nevertheless, he considered that he should follow the provisions of the contributions plan, not because he was bound to, but because that would accord with the policy of the provisions with which he agreed. That was an evaluative decision open to him. In so deciding, the Acting Commissioner did not misdirect himself or impermissibly fetter the exercise of his discretion to decide whether the condition was unreasonable in the circumstances. There is also force in the Council's submission that the Acting Commissioner, in applying cl 5.3.3, was doing what Intrapac had argued the Acting Commissioner should do of applying the mechanisms in the contributions plans to determine whether condition 5.2 was unreasonable.

147 For these reasons, I reject the fourth ground.

### **Conclusion and orders**

148 Intrapac has not established any of its grounds of appeal. The appeal should be dismissed with costs.

149 The Court orders:

- (1) The appeal is dismissed.
- (2) The appellant is to pay the respondent's costs of the appeal.

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