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The General Manager
Clarence Valley Council
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25 February 2022

Dear General Manager,

**Re: Advice - Advice – Development Application No. DA2020/0220 for redevelopment of Calypso Holiday Park at 8A Harbour Street, Yamba**

We refer to the email received from Council's Manager Development and Land Use dated 17 February 2022 concerning Development Application No. DA2020/0220 seeking consent for the redevelopment of the caravan park known as the Calypso Holiday Park on the land at 8A Harbour Street, Yamba ("**the development application**").

Council is seeking legal advice in relation to the following questions at the request of the Northern Regional Planning Panel ("Panel"):

1. *Whether the Panel's powers under the Environmental Planning and Assessment Act 1979 to determine the application are limited or otherwise qualified as a result of ongoing Indigenous Land Use Agreement ("**ILUA**") negotiations?*

2. *Whether the Crown's powers as landowner to provide approval to lodge the development application under the Environmental Planning and Assessment Act, 1979 are limited due to the existence of native title on the subject land?*

Our advice in relation to the questions raised by Council is set out below.

## BACKGROUND

Council is the Applicant in respect of the development application, which seeks consent to redevelop the caravan park at 8A Harbour Street, Yamba in the following manner described in the Statement of Environmental Effects prepared by Integrated Site Design dated March 2020:

- *Reduced total number of sites from 168 to 133;*
- *Provision of a 30-metre-wide public access corridor ("town green") through the centre of the current holiday park footprint connecting Yamba Street to Yamba Bay;*
- *Construction of a new main holiday park entrance off River Street, with controlled (boom gate) access to the eastern holiday park precinct;*
- *Demolition of ageing facilities including:*
    - *two-storey unit block,*
    - *main amenities building,*
    - *manager's residence and reception building,*
    - *work shed,*
    - *concrete swimming pool,*
    - *eastern amenities building,*
    - *three (3) masonry barbecue shelters;*
- *New internal infrastructure throughout (water, sewer, stormwater, power and roads);*
- *New communal facilities comprising:*
    - *manager's residence and reception building,*
    - *work shed and garage,*
    - *two amenity buildings,*
    - *swimming pool,*
    - *pool lounge,*
    - *camp kitchen;*
- *New tourist cabin accommodation comprising:*
    - *six (6) cabins overlooking Yamba Bay foreshore;*

- *six (6) cabins along Harbour Street frontage,*
- *four (4) cabins along eastern edge of new town square*

*(Six of the new cabins will be designed for people with disabilities)*

- *Removal of 18 trees of various species (no Norfolk Island Pine trees will be removed);*
- *Landscaping and fencing;*
- *Removal of disused fuel tanks and site rehabilitation.*

We understand that the land on which the caravan park has been located since 1960 is legally described as Lot 266 822794, Lot 7306 DP 1140375 and Lot 202 DP 727454, although the park is principally contained within Lot 73066 DP 1140375. The development application proposes a minor expansion onto the adjoining land described as Lot 203 DP 727454.

Together each of these lots make up land reserved by the Crown (known as Public Reserve 81523) for which the Council is the appointed Crown land manager.

The development is regionally significant development within the meaning of clause 3 of Schedule 7 of State Environmental Planning Policy (State and Regional Development) 2011 because it is Council related development with a capital investment value of more than $5 million.

The Northern Regional Planning Panel ("**Panel**") is accordingly designated as the consent authority in respect of the development application by dint of section 4.5(b) of the Environmental Planning and Assessment Act 1979 ("**EP&A Act**").

We understand that the Council has finalised its assessment of the development application (which has been peer reviewed by Coffs Harbour City Council) and provided a report to the Panel recommending the approval of the development application subject to conditions of consent.

One of the submissions received in relation to the development application was a letter from NTSCORP Limited dated 27 May 2020.

NTSCORP Limited acted for the Yaegl People in their successful native title determinations, being:

- Yaegl People #1 (Federal Court Proceedings NSD6052/1998) and Yaegl People #2 (Federal Court Proceedings NSD168/2011, Part A), determined by Justice Jagot of the Federal Court of Australia on 25 June 2015; and

- Yaegl People #2 (Federal Court Proceedings NSD168/2011, Part B), determined by Justice Jagot of the Federal Court of Australia on 31 August 2017.

The relevant determination for present purposes is the Yaegl People #2 (Part A Determination). Each of the lots the subject of the proposed development are identified in Schedule 1 to the Determination and are therefore land in respect of which native title has been found to exist.

The nature and extent of the native title rights and interests in the Determination Area is set out in Paragraph 6 of the Determination (but is expressed as being subject to Paragraphs 7 to 10).

Paragraph 9 specifies that the native title rights and interest do not confer the following:

*(a) possession, occupation, use or enjoyment to the exclusion of all others; and*

*(b) any right to control public access or public use of the land or waters in the Determination Area.*

The Determination also identifies certain Other Interests in the Determination Area. Paragraph 12 of the Determination identifies that such Other Interests will continue to have effect and co-exist with the native title rights and interests and that the native title holders do not have the right to control access to or the use of the land and waters by the holders of the Other Interests who act in accordance with those Other Interests. The Other Interests are also said to prevail over but not extinguish the native title rights and interests and any exercise of the same. One such Other Interest set out in Schedule 7 to the Determination is as follows:

"*2. Reserves*

*(a) The rights of State, Local Government and other organisations or persons who have the care, control and management of any reserves within the Determination Area.*

*(b) The rights of persons entitled to access and use any reserves within the Determination Area for the respective purposes for which they are reserved, subject to any statutory limitations upon those rights.*"

NTSCORP Limited continues to act for the Yaegl Traditional Owners Aboriginal Corporation Registered Native Title Body Corporate ("**Yaegl RNTBC**"), whom holds the native title rights and interests of the Yaegl people on trust.

The submission from NTSCORP Limited was provided to the Panel as a confidential submission on the basis that it forms the basis for ongoing confidential discussions between the Council and the Yaegl RNTBC in relation to the preparation of an ILUA.

Without disclosing the full contents of the submission from NTSCORP Limited, it asserted *inter alia* that the proposed development cannot proceed before the finalisation of the ILUA and therefore requested that the Council confirm in writing that it would not determine the development application while the parties' discussions continued.

There has been no declaration made by a Court of competent jurisdiction confirming the extinguishment of the native title rights and interests in the subject site as set out in the Determination dated 25 June 2015. We therefore assume for the purposes of this advice that the relevant rights and interests subsist.

On 22 February 2022, the Panel's determination of the development application was deferred for a period of two weeks to enable this legal advice to be obtained by the Council.

The Panel's record of deferral specifically directs that the legal advice provided to Council be made available to the public through publication on Council's website and the NSW Planning Portal. Despite this, it is ultimately a matter for Council to decide whether it wishes to disclose this legal advice to the Panel, NTSCORP Limited or the publically generally.

**ADVICE**

**1. Whether the Panel's powers under the Environmental Planning and Assessment Act, 1979 to determine the application are limited or otherwise qualified as a result of ongoing Indigenous Land Use Agreement ("ILUA") negotiations?**

The short answer to this question is "no". There is nothing in the EP&A Act that limits or qualifies a Panel's power to determine a development application lodged over land in respect of which negotiations for the preparation of an ILUA have not been finalised.

The Panel is a NSW Government agency constituted pursuant to section 2.12(2) and Part 3 of Schedule 2 of the EP&A Act.

The functions of a Sydney district or regional planning panel are set out in section 2.15 of the EP&A Act, which provides as follows:

> "***2.15 Functions of Sydney district and regional planning panels***
>
> *A Sydney district or regional planning panel has the following functions—*
>
> *(a) the **functions of the consent authority under Part 4** for regionally significant development that are (subject to this Act) conferred on it under this Act,*

*(b) any functions under this Act of a council within its area that are conferred on it under section 9.6,*

*(c) to advise the Minister or the Planning Secretary as to planning or development matters relating to the part of the State for which it is constituted (or any related matters) if requested to do so by the Minister or the Planning Secretary,*

*(d) any other function conferred or imposed on it under this or any other Act.*"

The list of functions provided in section 2.15 of the EP&A Act is exclusive, meaning the Panel does not have any other functions than those specified. However, it is relevant to note that section 2.15(d) is a catch-all provision incorporating any other functions conferred or imposed on a panel under the Act or any other Act.

Most importantly, the Panel has the functions of a consent authority under Part 4 of the EP&A Act for regionally significant development that are conferred upon it. As noted above, the Panel is designated as the consent authority for the subject development application pursuant to section 4.5(b) of the EP&A Act.

As section 2.15(a) of the EP&A Act specifically limits the functions of panels under Part 4 to those that are (subject to the Act) conferred on panels under the Act, it is necessary to have regard to section 4.7(2) of the EP&A Act, which identifies certain functions of panels that are to be exercised by councils. That provision provides as follows:

"*(2) The following consent authority functions of a Sydney district or regional planning panel are to be exercised on behalf of the panel by the council of the area in which the proposed development is to be carried out—*

*(a) receiving development applications and determining and receiving fees for the applications,*

*(b) undertaking assessments of the proposed development and providing them to the panel (but without limiting the assessments that the panel may undertake),*

*(c) obtaining any concurrence, and undertaking any consultation, that the consent authority is required to obtain or undertake,*

*(d) carrying out the community participation requirements of Division 2.6,*

*(e) notifying or registering the determinations of the panel,*

*(f) the functions under section 4.17 in relation to the provision of security,*

*(g) the determination of applications to extend the period before consents lapse,*

*(h) any other function prescribed by the regulations.*"

The other functions prescribed by the Environmental Planning and Assessment Regulation 2000 ("**EP&A Regulation**") under section 4.7(2)(h) of the EP&A Act are limited to matters relating to certain modification applications, which are not relevant for present purposes.

Notwithstanding section 4.7(2) of the EP&A Act, it is apparent that the function of evaluating and determining a development application in accordance with sections 4.15 and 4.16 remains with the Panel.

As Council will be aware, in undertaking the evaluation task the consent authority (here being the Panel) is required to take into consideration such of the matters listed in section 4.15(1) of the EP&A Act as are of relevance to the development the subject of the development application. The specific matters listed are as follows (with **emphasis** added):

"*(1)* ***Matters for consideration—general*** *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*

*(a) the provisions of—*

*(i) any environmental planning instrument, and*

*(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

*(iii) any development control plan, and*

*(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*

*(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*

*(v) (Repealed)*

*that apply to the land to which the development application relates,*

*(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*

*(c) the suitability of the site for the development,*

*(d) **any submissions made in accordance with this Act or the regulations**,*

*(e) **the public interest**.*"

The fact that native title has been determined to exist over land the subject of a development application and that an ILUA is being negotiated as a consequence is not of itself specified as a matter to be considered under section 4.15(1) of the EP&A Act. However, that provision does not in terms prevent the consideration of any other matters of relevance that are not so specified.

In our view, the native title determination and ongoing ILUA negotiations relate to an entirely separate statutory process embodied in federal (as opposed to State) legislation, which does not purport to affect or control the operation of the EP&A Act and will apply irrespective of the determination of this application under the EP&A Act.

In this way, it seems to us that these matters are in essence not of relevance to the redevelopment of the caravan park for the purposes of the EP&A Act, including under section 4.15(1).

However, the matters to be considered under section 4.15(1) do include *"any submissions made in accordance with this Act or the regulations*" and "*the public interest*". As noted above, NTSCORP Limited has made a submission to the Council in relation to the development application, which raises *inter alia* the native title determination and ongoing ILUA negotiations.

Whilst the submission is required to be considered by the Panel by dint of either or both section 4.15(1)(c) and section 4.15(1)(d) relating to the public interest, the fact that there may be ongoing confidential ILUA negotiations does not mandate refusal of the application or require the Panel to refrain from determining the application for the reason we have identified above, i.e. it is a matter that relates to an entirely separate statutory process and does not prevent the Panel, in the exercise of its discretion under the EP&A Act, from approving the development application.

Once the evaluation task under section 4.15(1) of the EP&A Act is carried out, section 4.16 permits a consent authority to determine a development application by granting consent to the application

(either unconditionally or subject to conditions) or by refusing consent to the application. This power of determination is not expressly or impliedly limited in any way by the native title determination or ILUA negotiations.

It follows that there is nothing in the EP&A Act that limits or qualifies the Panel's power to determine a development application lodged over land in respect of which negotiations for the preparation of an ILUA have not been finalised, although those matters could potentially be given some limited consideration by the Panel to the extent that they are raised in NTSCORP's submission or in considering the public interest.

Notwithstanding this, it should be noted that the granting of development consent would not obviate the need to obtain any other necessary approvals or consents that are required under other statutory regimes in order to lawfully carry out the development that is authorised by the consent and we provide no opinion in this advice as to what those approvals or consents may be or whether they are capable of being obtained.

## 2. Whether the Crown's powers as landowner to provide approval to lodge the development application under the Environmental Planning and Assessment Act, 1979 are limited due to the existence of native title on the subject land?

The short answer to this question is "no". Neither the EP&A Act nor any other legislation fetters the discretion of a landowner to provide consent to the lodgement of a development application, including where native title rights and interests have been determined to exist.

In answering this question, we consider the overall framework relating to owner's consent to development applications and some specific provisions relating to the Crown providing the same for developments on Crown land.

Section 4.12(1) of the EP&A Act provides that a person may, subject to the Environmental Planning and Assessment Regulation 2000 ("**EP&A Regulation**"), apply to a consent authority for consent to carry out development.

Clause 49(1) of the EP&A Regulation identifies that a development application may be made either by the owner of the land to which the development application relates, or by any other person, with the consent of the owner of that land.

The requirement for owner's consent under clause 49(1) of the EP&A Regulation is relevantly a jurisdictional prerequisite to a valid determination of a development application (see *Sydney City Council v Ipoh Pty Ltd* (2006) 149 LGERA 329). The absence of owner's consent can, however, be cured at any time until the determination of the development application (*Woolworths Ltd v Bathurst*

*City Council* (1987) 63 LGRA 55; *IGS Enterprises Pty Limited v Hornsby Shire Council* (2008) 164 LGERA 424).

Before considering whether there is any limitation on the discretion to grant owner's consent, in the unusual circumstances of the present case it is firstly necessary to give some consideration as to who the relevant "owner" of the subject site is.

In accordance with section 11 of the Interpretation Act 1987, words and expressions used in the EP&A Regulation (as an instrument made under the EP&A Act) have the same meaning as they have in the EP&A Act.

Section 1.4 of the EP&A Act in turn relevantly adopts the definition of the word "owner" in the Local Government Act 1993 ("**LG Act**"), which is as follows (with **emphasis** added):

"***owner*—**

*(a)* ***in relation to Crown land, means the Crown*** *and includes—*

*(i)* *a lessee of land from the Crown, and*

*(ii)* *a person to whom the Crown has lawfully contracted to sell the land but in respect of which the purchase price or other consideration for the sale has not been received by the Crown, and*

*(b)* *in relation to land other than Crown land, includes—*

*(i)* *every person who jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession, and*

*(ii)* *every such person who is entitled to receive, or is in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise, and*

*(iii)* *in the case of land that is the subject of a strata scheme under the Strata Schemes Development Act 2015, the owners corporation for that scheme constituted under the Strata Schemes Management Act 2015, and*

*(iv)* *in the case of land that is a community, precinct or neighbourhood parcel within the meaning of the Community Land Development Act 2021, the association for the parcel, and*

*(v) every person who by this Act is taken to be the owner, and*

*(c) in relation to land subject to a mining lease under the Mining Act 1992, includes the holder of the lease, and*

*(d) in Part 2 of Chapter 7, in relation to a building, means the owner of the building or the owner of the land on which the building is erected.*"

The word "Crown" is defined in the LG Act as including any statutory body representing the Crown and the term "Crown land" is given the same definition as in the Crown Land Management Act 2016 ("**CLM Act**"), which is contained within section 1.7 of the CLM Act and states:

*"Subject to this Division, each of the following is Crown land for the purposes of this Act—*

*(a) land that was Crown land as defined in the Crown Lands Act 1989 immediately before the Act's repeal,*

*(b) land that becomes Crown land because of the operation of a provision of this Act or a declaration made under section 4.4,*

*(c) land vested, on and from the repeal of the Crown Lands Act 1989, in the Crown (including when it is vested in the name of the State)."*

It is relevant to observe that the definition identifies the Crown as the owner of Crown land without qualification.

We understand that it is not disputed in the present case that the Crown is in fact the owner of the subject land for the purposes of the LG Act and in turn the EP&A Act and EP&A Regulation, notwithstanding the existence of the relevant native title rights and interests over the land.

However, for the interests of completeness, we have conducted title searches in respect of each of lots comprising the subject site, which confirm that the registered proprietor of the land is the State of New South Wales.

Having established that the land is Crown land and the Crown is the owner of the relevant land (for the purposes of the definition of "owner" that is imported form the LG Act) and the entity whose consent would need to be obtained in respect of the lodgement of the development application for the purposes of the EP&A Act, it is then necessary to consider whether there are any fetters on the discretion to provide that consent, including where there has been a determination as to the existence of native title over the land.

In short, neither the EP&A Act nor EP&A Regulation purport to prescribe any circumstances in which owner's consent can or must be given or, conversely, cannot or must not be given in respect of the lodgement of a development application.

It is conceivable that the carrying out of a development on land in respect of which native title exists could constitute a "future act" subject to the applicable provisions within the Native Title Act 1993 ("NT Act"), which may require certain procedures to be followed so that the act is considered to be validly done for the purposes of that legislation. However, there is also nothing in that legislative regime to prevent a landowner (in this case the Crown) from providing its consent to a development application, regardless of whether that development will or will not constitute a future act.

In this way, the decision to give owner's consent is essentially an unlimited discretion that is not qualified by reason of the existence of native title over the subject site.

In the present case, it is also relevant to consider whether the Crown was even required to give actual written owner's consent to the lodgement of the development application having regard to the operation of section 2.23 of the CLM Act, which provides as follows (with **emphasis** added):

> "***2.23 Minister taken to give consent for certain development applications over dedicated or reserved Crown land***
>
> *(1)* ***This section—***
>
> *(a)* ***applies in relation to dedicated or reserved Crown land for the purposes of the Environmental Planning and Assessment Act 1979 (and any instrument made under that Act), and***
>
> *(b)* ***has effect despite anything in that Act (or any instrument made under that Act).***
>
> *(2) The* ***Minister*** *is* ***taken to have given written consent on behalf of the Crown*** *(as the owner of dedicated or reserved Crown land)* ***for its Crown land manager*** *or the holder of a lease or licence over the land* ***to make a development application relating to any of the following kinds of development—***
>
> *(a) without limiting paragraph (g), the repair, maintenance, restoration or renovation of an existing building on the land if it will not do any of the following—*

*(i) alter the footprint of the building by adding or removing more than one square metre (or any other area that may be prescribed by the regulations),*

*(ii) alter the existing building height by adding or removing one or more storeys,*

*(iii) involve excavation of the land,*

*(b) the erection of a fence approved by the manager or the repair, maintenance or replacement of a fence erected with the manager's approval,*

*(c) the use of the land for any of the following purposes—*

*(i) a purpose for which the land may be used under this Act,*

*(ii) a purpose for which a lease or licence has been granted under this Act,*

*(d) the erection of signage approved by the manager or the repair, maintenance or replacement of signage erected with the manager's approval,*

*(e) the erection, repair, maintenance or replacement of a temporary structure on the land,*

*(f) the installation, repair, maintenance or replacement of services on the land,*

*(g) the erection, repair, maintenance or replacement of any of the following on the land—*

*(i) a building or other structure on the land permitted under the lease,*

*(ii) a toilet block,*

*(iii) a structure for the protection of the environment,*

*(h)* ***the carrying out on the land of any other development of a kind*** *prescribed by the regulations or* ***permitted under a plan of management for the land****.*

*(3)* ***Subsection (2) does not apply in relation to any development that involves any of the following—***

*(a) the subdivision of land,*

*(b)* ***the carrying out of development of a kind excluded by the regulations.***

*(4)* ***Any regulations made for the purposes of subsection (3)(b) may exclude the whole or any part of a kind of development specified by subsection (2).***

*(5)* ***To avoid doubt, the Minister's consent on behalf of the Crown (as the owner of dedicated or reserved Crown land) to lodgment of a development application in respect of that land is required for the carrying out of any development to which subsection (2) does not apply.***"

Section 2.23(3) of the CLM identifies that the Crown Land Management Regulation 2018 ("**CLM Regulation**") may exclude the application of section 2.23(2) in respect of the carrying out of developments of particular kinds. The relevant exclusion is found within clause 14 of the CLM Regulation, which provides as follows:

"***14 When Minister taken to give consent for certain development applications over dedicated or reserved Crown land***

*(1) For the purposes of section 2.23(3)(b) of the Act, the carrying out of development involving the erection, repair, maintenance or replacement of services is excluded if the development is not being carried out principally for the benefit of the dedicated or reserved Crown land to which the development application relates.*

*(2) For the purposes of section 2.23(3)(b) of the Act, the carrying out of development within a domestic waterfront precinct is excluded unless—*

*(a) the development involves the repair or maintenance of an existing lawful building or other structure, and*

*(b) the development does not involve the excavation of land, and*

*(c) the building or structure (as repaired or maintained) does not change any of the following—*

*(i) any interruption of water flow caused by the existing building or structure,*

*(ii) the height of the existing building or structure,*

*(iii) the above water footprint of the existing building or structure.*

*(3) In this clause—*

***domestic waterfront precinct** means—*

*(a) submerged dedicated or reserved Crown land (including the bed of a river or estuary) that is within the coastal waters of the State (as defined in section 58 of the Interpretation Act 1987), and*

*(b) dedicated or reserved Crown land that is not submerged, but adjoins—*

*(i) submerged dedicated or reserved Crown land above the mean high water mark for tidal land, or*

*(ii) the bank of a river, creek or lake.*"

As we understand it, Council has formed the view that the proposed development would fall within the scope of section 2.23(2)(h) of the CLM Act, being the carrying out of any other development of a kind permitted under a plan of management for the land. In reaching this conclusion, Council relies upon the following passage that appears in two separate letters from the government agency dealing with Crown Lands dated 20 January 2014 and 4 September 2018:

> "*Plan of Management (PoM) – The Ford Park and Calypso PoM was adopted by the Minister for Lands on 20th January 2005. Crown Lands consider the proposed Redevelopment works to be consistent with the current Plan of Management and will therefore not require formal amendment to accommodate the proposed works.*"

The question of whether a particular development is permitted under a plan of management ("**POM**") for land and therefore whether the Crown's owner's consent will be deemed to have been provided is one of fact that we have not had the opportunity to, nor been asked to, consider in the particular circumstances of this case within the timeframe for providing this advice.

Assuming Council is correct in asserting that the development is of a kind that is permitted by the POM, it is possible that section 2.23(2)(h) of the CLM Act would have the effect of deeming owner's consent for the purposes of this development application.

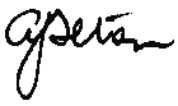
However, before reaching this conclusion it would be necessary to consider the exclusion in clause 14(2) of the CLM Regulation relating to domestic waterfront precincts, particularly noting that such land is excluded from section 2.23(2) of the CLM Act unless the development is limited to repairs and maintenance of existing lawful structures which *inter alia* do not change the height of the structures.

If the proposed development (or any part thereof) was excluded from the application of section 2.23(2) of the CLM Act by reason of clause 14(2) of the CLM Regulation, actual consent for the making of the development application would need to be obtained from the Crown as owner of the land prior to determination in the ordinary course.

We do not express any opinion in this advice as to whether the exclusion in clause 14(2) of the CLM Regulation is applicable in the present circumstances, nor whether the Crown has otherwise provided valid owner's consent if it is not deemed to have done so by dint of section 2.23(2)(h) of the CLM Act (or any of the other sub-sections within that provision).

We trust that the above advice is of assistance. Should you have any queries in relation to the advice or require further advice, please do not hesitate to contact Adam Seton at our Campbelltown office.

Yours faithfully
**MARSDENS LAW GROUP**



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