

Case Note: Port Macquarie-Hastings Council v Mansfield

Date : May 27, 2019

In the recent decision of *Port Macquarie-Hastings Council v Mansfield* [2019] NSWCCA 7 (**Mansfield**), the NSW Court of Criminal Appeal overturned an earlier decision of the Land and Environment Court in relation to the power of councils to compel production of documents under the former section 119J (now section 9.22) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EPA Act**).

Background

Mr Mansfield was accused of carrying out a development that was prohibited under the *Local Environmental Plan*. After some investigations and before the commencement of the criminal proceedings, Council's investigation officer, Craig Henderson, issued a number of notices under section 119J (now section 9.22) of the EPA Act. From the documents produced under those notices, Council learned two companies may have further documents relating to the alleged offence and issued a subpoena to each of the two companies after criminal prosecution had commenced.

Mr Mansfield challenged the validity of the two subpoenas in the Land and Environment Court, primarily on the basis that Council must not rely on the information gathered from section 119J notices to issue the subpoena because the section 119J notices were not validly issued in the first place.

To support the argument that Council's section 119J notices were invalid, Mr Mansfield sought to rely on the finding of Preston CJ in *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10 (*Zhang*). The finding of *Zhang* can be summarised as thus:

1. Council can only compel the answering of questions under section 118BA of the EPA Act (which was worded similar to section s119J) for 'investigation purpose' under the EPA Act.
2. However, 'investigation purpose' under the EPA Act does not include the advancement of criminal prosecution, because the prosecution against breaches of the Act is a function conferred onto councils directly or indirectly under the *Local Government Act 1993* (NSW) (**the LG Act**).
3. As such, councils cannot rely on section 118BA of the EPA Act to compel a witness to give evidence in aid of the pending criminal proceedings.

Mr Mansfield argued, in the first instance, that the finding of *Zhang* meant that, once Council has contemplated laying criminal charges, it cannot issue section 119J notices to compel production of documents because the notice would be issued for a 'prosecutorial purpose' rather than for an 'investigation purpose'.

Sheahan J in the Land and Environment Court agreed with Mr Mansfield's argument, and



ordered the two subpoenas to be set aside.

Appeal

On appeal, the Court of Criminal Appeal held that while council is still investigating an apparent breach of the Act, a s119J notice can be issued against a potential defendant or third party, *'even if the [council] officer then considers it likely that a prosecution for breach of the Act will later be brought by council against that person'*. However, an investigation officer of council cannot use section 119J notice in order to advance a prosecution once the investigation has led council to bring a criminal prosecution.

What does it mean to councils?

For councils, the Court of Criminal Appeal's decision is a sight of relief. It is now clear that councils can issue a notice section 9.22 to compel production of documents and, in reliance of the information gathered under section 9.22 notices, issue subpoenas to further the prosecution even if the possibility of laying criminal charges has been contemplated at the time of issuing the section 9.22 notice.

Furthermore, *Mansfield* made it clear that there is no distinction between an investigation conducted by a council into alleged breaches of the EPA Act for the purpose of a criminal prosecution, and investigations of such breaches conducted for the other purposes under the EPA Act.

However, care should still be exercised to distinguish between section 9.22 notices issued for the purpose of investigation purposes and for the purpose of advancing criminal prosecutions as the latter may still be considered invalid. As the Criminal Court of Appeal observed in the dicta, *'the relative timing of the issue of the notices on the one hand and the institution of the criminal proceedings on the other hand is a persuasive, but not a determinative, consideration in deciding whether or not the issue of the s119J notices occurred in connection with an investigation purpose.'*