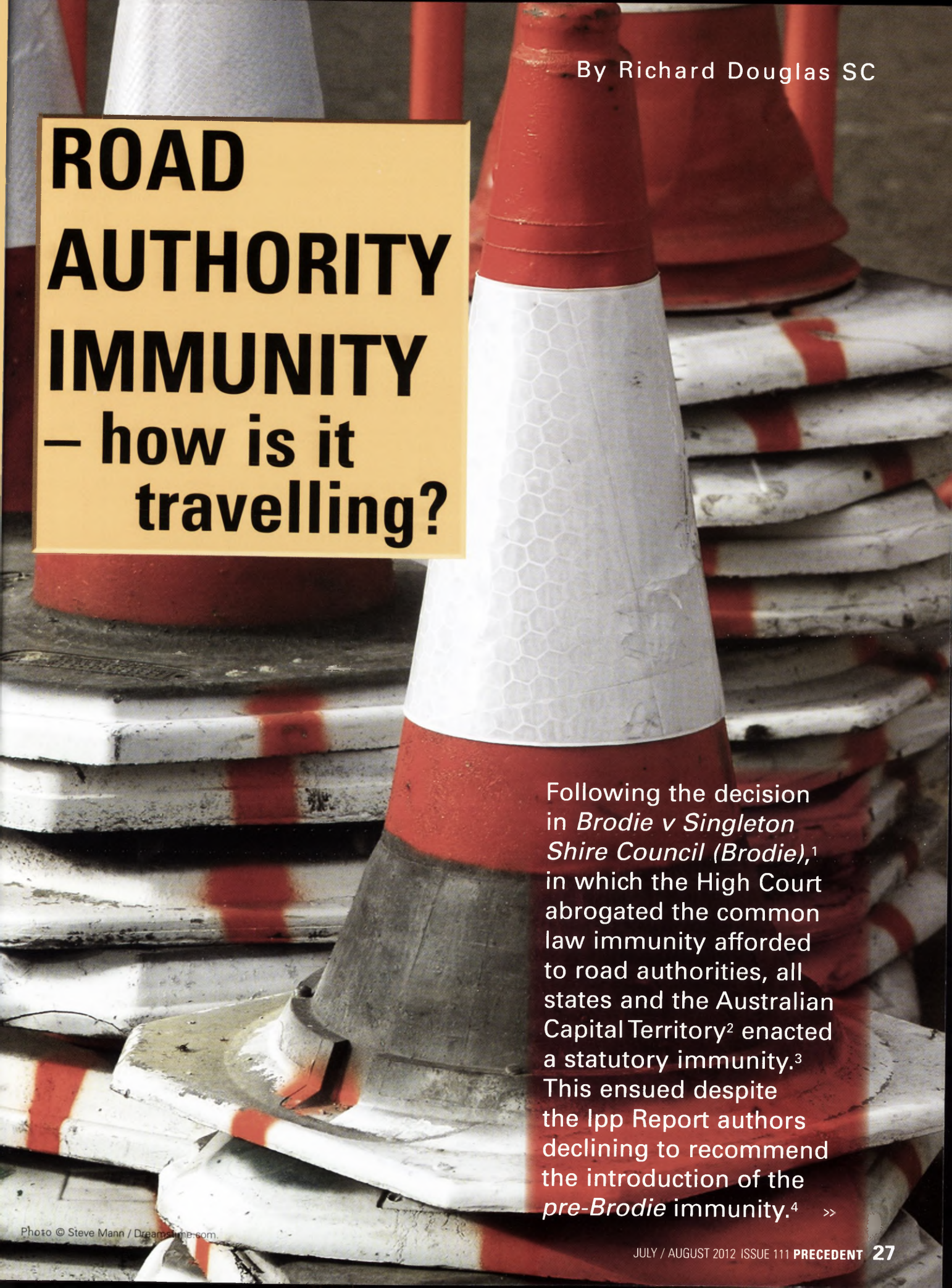
By Richard Douglas SC

ROAD AUTHORITY IMMUNITY – how is it travelling?



Following the decision in *Brodie v Singleton Shire Council (Brodie)*,[1] in which the High Court abrogated the common law immunity afforded to road authorities, all states and the Australian Capital Territory[2] enacted a statutory immunity.[3] This ensued despite the Ipp Report authors declining to recommend the introduction of the *pre-Brodie* immunity.[4] »

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ESSENTIAL IMPORT OF ENACTMENTS

Although the various enactments are not uniform, s 45 of the NSW Civil Liability Act is broadly representative:

> **45 Special non-feasance protection for roads authorities**
>
> (1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.
>
> (2) This section does not operate:
>
> (a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk; or
>
> (b) to affect any standard of care that would otherwise be applicable in respect of a risk.
>
> (3) In this section:**"carry out road work"** means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a road work within the meaning of the *Roads Act 1993*.
>
> **"roads authority"** has the same meaning as in the *Roads Act 1993*.

No enactment *expressly* refers to exceptions to the former common law immunity. These consisted in:

- The road authority failed in respect of some statutory capacity other than as a road authority ('the source of authority exception').
- The road authority performed a positive act which created a danger or increased an existing danger to road users ('misfeasance exception').
- The road authority failed to take reasonable care in the maintenance or repair to other objects on or near the road but not forming part of the road ('artificial structure exception').[5]

The immunity in each enactment has the following features:

- The immunity protects the relevant authority only in its capacity as a road authority, not in respect of any other statutory function it was or is obliged to perform (that is, the common law source of authority exception is enshrined).
- The immunity extends to all tortious causes of action archetypal in this sphere, namely negligence, nuisance[6] and breach of statutory duty.
- The immunity transcends a mere failure to repair, comprehending a failure to warn of absence of repair. The Victorian Act expressly covers this but the other enactments, expressed in language such as 'harm arising from a failure to carry out work', implicitly embrace absence of hazard warning or deterioration.
- The immunity is not afforded to a private contractor engaged by the road authority apropos its independent liability.
- In five states (NSW, Vic, Qld, WA, Tas) and the ACT,[7] the immunity is excluded in the event of the authority harbouring 'actual knowledge of the particular risk the materialisation of which resulted in a harm' (or similar language).
- The common law misfeasance exception is almost certainly enshrined in the fabric of the statutory immunity.
- The harm which is the subject of the immunity is not confined to personal injury extending to other types of damage (property damage and economic loss).
- The immunity assumes an otherwise proven case of causative liability in the road authority (after navigation of the other provisions of the enactments which, arguably, raise the bar of proof in respect of liability against statutory authorities).[8]

'Road' or 'road work'

Each enactment carries different treatment of the subject matter of the absence of repair (or ineffective repair). The SA, Tas and ACT enactments each provide a definition of 'road' or 'road work'. The other enactments require reference to other statutory provisions for these concepts.

The NSW enactment in s45(3) takes up the *Roads Act* 1993 (NSW) definition, which defines 'road work' inclusively as:

> '... any kind of work, building or structure ... that is constructed or installed on or in the vicinity of a road for the purpose of facilitating the use of the road as a road, the regulation of traffic on the road or the carriage of utility services across the road, *but does not include a traffic control facility* ...' [emphasis added].

In *Colavon Pty Ltd v Bellingen Shire Council (No. 1)*[9], the plaintiff was the owner of a prime mover and trailer which were damaged when they went over the edge of a narrow road and rolled down an embankment. The defect in the roadway consisted of road edge subsidence. Widening of the road was conducted subsequently, along with the installation of three guideposts to enable easier clearance.

The NSW Court of Appeal concluded, by dint of the above s45(3) definitions, that the allegation of negligence to the extent of non-erection of guideposts (but not to the extent of misfeasance and properly grading the road) was not open to found liability in the defendant council.

Thus, it will be a jurisdiction-by-jurisdiction proposition as to whether the common law artificial structure exception is still to be found enshrined in the enacted immunity.

Actual knowledge of particular risk

This, again, is the exception contained in the NSW, Vic, Qld, WA and Tas enactments. The discussion below also informs the construction of the ACT enactment, which extends to constructive knowledge.

The persuasive and pleading onus of satisfying this exception of the immunity, and indeed of navigating the immunity *per se*, lies with the plaintiff (see below).

The knowledge must be of the 'particular risk', not some general risk.

A road authority is usually a corporation sole or equivalent substantial entity, so knowledge would be enjoyed by employees or agents engaged in undertaking that authority's statutory obligations. Their imputed knowledge would suffice.

At what level of the management of the road authority must knowledge be proved in order for a plaintiff to invoke the statutory 'actual knowledge' exception? This issue was addressed by the NSW Court of Appeal in *North Sydney Council v Roman* (*Roman*).[10]

In *Roman*, the plaintiff was injured when she fell in a pothole in a public street. She alleged negligence in the defendant council in failing to maintain the road by repairing the pothole. The defendant contended that it did not have actual knowledge of the pothole as required by s45 of the NSW Act.

The evidence in that case established that:

- the defendant's street sweepers regularly swept the gutters in the relevant street, the hole being proximate to the gutter; and
- the sweepers were instructed, as part of their induction, to identify hazards which needed attention and to report them to their supervisor.

No street sweeper was called by the defendant. The plaintiff argued that the street sweepers' actual knowledge of the pothole could be inferred from the regularity of their duties and the obligation to identify hazards that required attention. The plaintiff also contended that the sweepers' knowledge ought be imputed to the defendant.

While the sweepers were not called by the defendant, the supervisory personnel were. Each said he or she had no knowledge of the pothole.

The court in *Roman*, by majority, held that the immunity exempted liability in the defendant. Thus, the 'actual knowledge' exception was not invoked by the facts. Basten JA (with whom Bryson JA agreed) observed:

> ' [157] ....The section confers an immunity on a roads authority where harm arises "'from a failure of the authority to carry out road work". The exception only arises where "at the time of the alleged failure" the authority had actual knowledge of the particular risk. A purposive construction would require that the relevant knowledge exists in an officer responsible for exercising the power of the authority to mitigate the harm. The existence of the power is only coupled with a duty to act in circumstances where such knowledge exists. Accordingly, *the knowledge must exist at or above the level of the officer responsible for undertaking necessary repairs. The knowledge of others without such responsibility will not, relevantly for the purposes of the provision, constitute "actual knowledge" of the roads authority itself; at best it could give rise to "constructive" or imputed knowledge. The use of the term "actual" precludes reliance on constructive or imputed knowledge.* It follows that, even if a street sweeper having a duty to note and report defects, was aware of the pothole, the immunity is engaged absent proof on the balance of probabilities that the officer in charge of maintenance works received that information.' [Emphasis added]

McColl JA, in a powerful dissent, wrote:

> '[60] In my view, for the purposes of s45, *the knowledge of those persons who, acting within the scope of their duties, learn of the particular risk under an obligation to report it as part of the roads authority's system of maintaining the roads under its jurisdiction, should be attributed to the roads authority.* On the facts of this case, such people were sufficiently "relevantly connected" with discharging the appellant's responsibility for carrying out road work to hold it prima facie liable in tort where it can be found, whether by direct proof, or inference, that they had actual knowledge of the particular risk which materialised in harm to the plaintiff. *Attributing those persons' knowledge to the roads authority is consistent with the language of s45, the context in which it appears and the policy discernible in its enactment.'* [Emphasis added]

The plaintiff was the owner of a prime mover and trailer damaged when they went over the edge of a narrow road and rolled down an embankment. The defect in the roadway consisted of road edge subsidence.

The High Court granted special leave to appeal in *Roman*, but the appeal was compromised. Subsequently the NSW Court of Appeal convened two five-member benches to reconsider the issue, namely in *Blacktown City Council v Hocking* (*Blacktown*)[11] and *Angel v Hawkesbury City Council* (*Angel*).[12]

Unfortunately, on the facts of each case, the court found it unnecessary to adjudicate on the merits of the ratio in *Roman*. Further, in *Angel* but not *Blacktown*, there was a finding of requisite knowledge by the authority in question. In *Blacktown*, however, Tobias JA, in obiter, expressed preference for the reasoning in the dissenting judgment of McColl JA in *Roman*.

On 14 November 2008, the High Court refused special leave to appeal in *Blacktown*.

These decisions highlight the critical importance of interlocutory scrutiny and proof of road authority records pertaining to prior road inspection, and systems in existence in respect thereof, together with minute examination of road authority witnesses. The chain of authority in respect of remediation also requires close scrutiny.

Nowadays, road authorities routinely and regularly inspect (often with the use of digital recorders) and make records of the condition of public roads and footpaths. These visual inspections, and records thereof, will constitute important pieces of evidence in any invocation of the 'actual knowledge' exception to the statutory immunity.

The case as to knowledge will be circumstantial. Proof by the plaintiff of the existence of an inspection routine, or some other inspection or monitoring opportunity (for example, under a contract with a subcontractor) will sometimes, but not always, cause an evidentiary onus to shift to the road authority as to 'actual knowledge'. >>

These decisions highlight the critical importance of interlocutory scrutiny and proof of road authority records pertaining to road inspection, and systems in respect thereof, and minute examination of road authority witnesses.

In discharging the last-mentioned evidentiary onus, it would ordinarily be incumbent upon the road authority to lead evidence going to absence of 'actual knowledge', in particular of the absence of inspection, even if the opportunity was available or ordinarily undertaken as a matter of routine.

The relevant pool of facts then before the court may suffice to permit an inference of 'actual knowledge' to be drawn (the persuasive onus of proof always lying with the plaintiff).

In *Leichhardt Council v Serratore* (*Serratore*),[13] where the council, under a contract with the relevant contractor, had an obligation to inspect the road work in question, it was observed:

> '[15] It will often be the case that a plaintiff does not have direct knowledge of a road authority's knowledge of a risk. Like all facts, knowledge can be inferred from other facts, and if the inference is freely available and the road authority calls no evidence to rebut it, the court can comfortably find knowledge.

No such inference was drawn in *Porter v Lachlan Shire Council*[14] or *Council of the City of Liverpool v Turano*.[15] Such inference was drawn in *Serratore* and in *Gales Holdings Pty Ltd v Tweed Shire Council*.[16]

PLEADING AND PROOF

In *Colavon Pty Ltd v Bellingen Shire Council (No. 1)*[17] Campbell JA (Beazley JA and Handley AJA agreeing) wrote:

> '[98] If a plaintiff wishes to put a case that a roads authority is liable for harm arising from a failure to carry out road work or to consider carrying out road work, *the plaintiff must assert and prove facts that take the roads authority out of the immunity that section 45 creates. The facts by virtue of which the plaintiff seeks to establish that the roads authority "had actual knowledge of the particular risk the materialisation of which resulted in the harm" are facts that must be established before the plaintiff's cause of action is complete*. Thus they are "material facts" within the meaning of UCPR 14.7, and hence must be pleaded.
>
> [99] In *Porter v Lachlan Shire Council* [2006] NSWCA 126 at [41] Hodgson JA (with whom Beazley JA and Giles JA agreed) said, concerning section 45:
>
> When a plaintiff alleges actual knowledge of something in a defendant, the defendant is entitled to particulars of any communication of that information that the plaintiff relies on, and if the actual knowledge is alleged by the plaintiff to be a matter of inference from certain circumstances, the defendant is entitled to particulars of the circumstances relied on.' [Emphasis added]

Not to so plead the case renders a plaintiff's claim susceptible to an application for summary judgment or strike out at the behest of the road authority defendant.

That stated, the character of the statutory immunity as a complete defence to the claim would ordinarily behove a defendant road authority, under the procedural surprise rule, to plead it as a matter rendering such claim as not maintainable.[18]

CONCLUSION

While yet to make its way to the High Court for necessary clarification, the various enactments affording immunity to road authorities have enjoyed a moderately easy passage into Australian jurisprudence.

Those acting for plaintiffs in claims against road authorities need to be mindful of the metes and bounds of the enactment in question, navigate it expressly in the pleading of the claim and be in a position to prove 'actual knowledge' of the road authority at the requisite level of administration.

The ratio in *Roman* is likely to find its way to the High Court for consideration in the not too distant future. ■

Notes: **1** (2001) 206 CLR 512. **2** Not, on this author's research, the Northern Territory. **3** *Civil Liability Act* 2002 (NSW), s 45; *Road Management Act* 2004 (Vic), s102; *Civil Liability Act* 2003 (Qld), s37; *Civil Liability Act* 1936 (SA), s42; *Civil Liability Act* 2002 (WA), s5Z; *Civil Liability Act* 2002 (Tas), s42; *Civil Law (Wrongs) Act* 2002 (ACT), s113. **4** D A Ipp (Chairman), *Review of the Law of Negligence Report, Final Report*, 2 October 2002 at [10.6]. **5** See the discussion of these in R Douglas, G Mullins and S Grant, *Civil Liability Australia*, LexisNexis, 2006. **6** See *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128 at [398] – [404]; the only possible exception to this proposition is the Vic Civil Liability Act where s102 refers to 'breach of the statutory duty imposed by s 40 or for negligence' but s40 would probably be the foundation of a claim in nuisance. **7** The ACT also extends the exception to constructive knowledge but, extraordinarily, the SA statute provides no knowledge exception – see the criticism rightly levelled in J Dietrich, 'Duty of Care under the Civil Liability Acts' (2005) 13 *Torts Law Journal* 17 at 30. **8** See, for example, *Allianz Australia Insurance Ltd v RTA* [2010] NSWCA 328 at [87] – [90]. **9** (2008) 51 MVR 549; [2008] NSWCA 355; see also to the same effect *Krawczuk v RTA* [2007] NSWSC 884 at [62] – [63]; in *Edson v RTA* [2006] NSWCA 68 at [97] – freeway fence was held to be 'road work'. **10** [2007] NSWCA 27, High Court special leave granted 3 August 2007, but the appeal was compromised. **11** (2008) Aust Torts Reports ¶81-956; [2008] NSWCA 144. **12** (2008) Aust Torts Reports ¶81-955; [2008] NSWCA 130. **13** [2005] NSWCA 406. **14** [2006] NSWCA 126. **15** (2008) 51 MVR 262; [2008] NSWCA 270 at [182] – [192]. **16** [2011] NSWSC 1128 at [393] – [403]. **17** (2008) 51 MVR 549; [2008] NSWCA 355. **18** *Bellingen Shire Council v Colavon Pty Ltd (No. 2)* [2012] NSWCA 34 at [23].

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