In the matter of a proposed application for judicial review in relation to the Adelaide Oval Hotel development

Opinion

INTRODUCTION

1. The recent redevelopment of the Adelaide Oval (the **Oval**),[1] completed in 2014, included the construction of new eastern and southern grandstands with upgraded pedestrian access and site landscaping. The redevelopment was given legislative force by the *Adelaide Oval Redevelopment and Management Act 2011* (SA) (the **Act**), the long title of which provided that it was an Act 'to facilitate the redevelopment of the Adelaide Oval; to provide for future care, control and management of the Adelaide Oval and its precincts; and for other purposes'.

2. The Act established the legislative framework for the redevelopment and management of the Oval by establishing the 'Adelaide Oval Core Area' (the **Core Area**) and the 'Adelaide Oval Licence Area' (the **Licence Area**). The Act facilitated the grant of a lease by the Corporation of the City of Adelaide (the **Council**) to 'the Minister', who by virtue of s 4 of the *Acts Interpretation Act 1915* (SA), is the Minister for Transport and Infrastructure and Local Government (the **Minister**). The Minister, in turn, is authorised by s 5(1) of the Act to grant a sublease to Adelaide Oval SMA Limited (**SMA**). SMA is a joint venture company between the South Australian Cricket Association and the South Australian Football League. It is a public company limited by guarantee under the *Corporations Act 2001* (Cth).

3. Section 4(4) of the Act is important. It falls under Pt 2, titled 'Adelaide Oval Core Area', and provides:

> The Adelaide Oval Core Area must be used predominantly for the purposes of a sporting facility (including related uses and with recreational, entertainment, social and other uses being allowed on an ancillary or temporary basis from time to time).

[1] Which had its beginnings as a basic oval in 1871.

All Correspondence to:
12/211 Victoria Square, ADELAIDE SA 5000 | Phone: (08) 8211 7677 | pdassumpcao@hzc.com.au

4. The Act also contains provisions prescribing the assessment process to be adopted for proposed development and the designation of the Development Assessment Commission (now the State Commission Assessment Panel (the **Panel**))[2] as the relevant planning authority.

5. The Act limits the amount of State Government money that may be made available or expended by the Minister, or other entity acting on behalf of the State, on the Oval redevelopment project. The Act limits the appropriation of money to be made available and expected on the project to $535 million during the period from 1 December 2009 to 1 December 2019.

6. The Core Area was leased to the Minister by the Council on 17 November 2011, and that lease expires on 16 November 2091. The Core Area was then subleased by the Minister to SMA pursuant to a lease which expires on 16 November 2091. Adelaide Oval is currently managed by SMA. By s 18 of the Act, SMA is required to pay to the State of South Australia, on account of the sublease granted under s 5, $1M for the 2019/2020 financial year, and for each succeeding financial year while it holds a sublease over any part of the Core Area, $1M (indexed). SMA derives its revenue from game day events at the Oval, but also other revenue streams arising from hosting major concerts, 'Roofclimbs', 'Bodyline Bar' and corporate events.

7. The Oval has been variously described as a world-class stadium.[3] In furtherance of that pursuit, on 10 December 2018, SMA lodged a development application with the Panel for 'alterations and additions to Adelaide Oval to incorporate 138 hotel rooms and reception'. The proposed development essentially consists of modifications and expansion of the existing grandstand at the Oval to accommodate a new five-level building hotel facility to be integrated with the Eastern Grandstand and East Gate entry to the Oval. The proposed development fits within the footprint of the Core Area, and specifically falls within Area D (Eastern Grandstand Area), which appears as a layout in Sch 2 to the Act.

---

2 The State Planning Commission assumed the functions, powers and duties of the Development Assessment Commission on 1 August 2017. On the same day, the State Planning Commission established the Panel to continue the assessment functions formerly undertaken by the Development Assessment Commission.

3 See, for example, the Second Reading Speech of the Hon Patrick Frederick Conlon in the House of Assembly on 18 May 2011.

8. On 21 December 2018, the Panel approved the plans for the hotel.[4] It appears that the Council is responsible for issuing final development approval following lodgement of certified building documentation. The estimated start date for development is May 2019, to be completed by August 2020.

9. The proposed development is within the Adelaide Parklands. However, by s 11(1) of the Act, the *Adelaide Parklands Management Strategy* under s 18 of the *Adelaide Park Lands Act 2005* (SA) does not apply to land within the Core Area. Still, the proposed development is situated in Tarntanya Wama (Park 26) of the Adelaide Parklands.

QUESTIONS AND SHORT ANSWERS

10. I am asked by my instructing solicitor to advise the Adelaide Park Lands Preservation Association (the **Association**) and to answer several questions, which, in large part, collapse into the question of whether the proposed development of the Oval is authorised by the Act. When I refer to the proposed development below, I mean the hotel within the Core Area.

11. I am asked:

    1. On what grounds, if any, might a court issue an injunction or order to prevent the [SMA] proceeding with its announced intention and development approval to construct a hotel to be attached to the Adelaide Oval?

---

[4] Section 10(3) of the Act provides that:

> Any development –
>
> (a) undertaken within the Adelaide Oval Core Area associated (directly or indirectly) with the redevelopment of Adelaide Oval, its stands or other facilities, or in connection with a lease under section 4 or a sublease under section 5; ...
>
> will be taken to be complying development under section 35 of the *Development Act 1993* and Category 1 development under section 38 of that Act.

The Act also provides in s 10(4) that:

> The Development Assessment Commission will be taken to be the relevant authority under section 34 of the *Development Act 1993* (SA) in relation to any proposed development within the ambit of subsection (3).

Section 35(1) of the Development Act provides that:

> ... if a proposed development is of a kind described as a complying development under the regulations or the relevant Development Plan, the development must be granted a development plan consent ...

2. Was the decision by the [Panel] on 21 December 2018 to approve plans for a Hotel at Adelaide Oval, made validly in accordance with law?
3. Specifically, was [the Panel's] classification of the application as a 'complying' development consistent with sub-section 4 (4) of the [Act]?
4. Did [the Panel] fail to take into account the fact that a hotel operating 24/7 would change the 'predominant' land use (at least in a temporal sense) from being a 'sporting facility' to being, at nearly all times, a 'hotel'?
5. Did [the Panel] fall into error by failing to have regard to the limitation in subsection 4(4) that uses other than a sporting facility are to be only 'other uses being allowed on an ancillary or temporary basis from time to time'?
6. Is [SMA] prevented by its Constitution from engaging in hotel construction, leasing and/or operation?
7. Has the State Government breached section 8 of the [Act] by giving in-principle support (a de facto effective financial guarantee) for a $42 million loan facility almost a year before a prohibition on such a financial guarantee was due to expire (pursuant to section 8) on 1 December 2019?
8. Was [SMA] incorporated unlawfully? (And is it therefore incapable of entering any legal contract?)

12. I answer:

1. The most obvious attack on the proposed development is a potential breach of s 4(4) of the Act. It is not without risk and I would require further information before recommending that a proceeding be instituted.

   As to an injunction, a court would need to engage with the relevant principles, the most important of which are the existence of a prima facie case for relief, and that the balance of convenience favours the grant of the injunction.

2. Sections 10(1) and 10(3)(a) provide that any development in the Core Area will be taken to be 'complying development' under s 35 of the *Development Act 1993* (SA) and Category 1 development under s 38 of that Act. Accordingly, the development plan must be granted a development plan consent. However, an issue arises as to what work s 4(4) of the Act has to do in light of a deeming provision such as s 10(3). If the proposed development is 'not in connection with a lease under section 4', it arguably cannot obtain the benefit of s 10(3) of the Act.
3. See answer 2 above.
4. See answer 2 above.
5. The answer to this question depends upon which part of s 4(4) of the Act the development plan relies on to justify the development.
6. There is no material in the brief to suggest that SMA does not enjoy the benefits typically associated with companies limited by guarantee, including entering into contracts.
7. There is no information in the brief, nor am I aware, that an appropriation has been made under s 8 of the Act. All that has been done at this point is to indicate an 'in principle' agreement to the appropriation. To the extent that the question is posed, there is nothing to suggest bad faith on the part of the Government in that regard.
8. I do not have any material in the brief supporting the conclusion that SMA was invalidly constituted. If, of course, material directed to that topic were available, I would be happy to revisit the issue.

13. In this context, I have been briefed with a series of documents relevant to the above questions.

ANALYSIS

14. It seems to me that the central question for determination in the present case is the meaning of the words: 'related uses' and 'on an ancillary or temporary basis from time to time', as those words appear in s 4(4) of the Act. From the proper construction of that question flows the answers to most of the other questions I am asked to answer. The question must be determined as a matter of construction having regard to the objects, scope and purpose of the Act.

15. The task of construction begins and ends with the statutory text, which must of course be read in context.[5] That context includes the general policy and purpose of the provision under consideration,[6] which must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.[7] An orthodox application of those established principles is that the primary object of statutory construction 'is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute'.[8]

16. Extrinsic material, such as second reading speeches, may be used as an aid to the construction of a provision.[9] But the High Court has repeatedly expressed a reminder that 'extrinsic material cannot be relied upon to displace the clear meaning of the text'[10] and that 'reading the Explanatory Memorandum and the Second Reading Speech is much less helpful than reading the legislation itself'.[11]

17. Against those general principles, it is convenient to set out s 4(4) of the Act again here:

---

5 See, for example, *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *R v Maloney* (2013) 252 CLR 168 at 291-292 [324] (Gageler J).

6 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [41] (French CJ and Crennan J); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

7 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390, [26] (French CJ and Hayne J).

8 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

9 *Owen v South Australia* (1996) 66 SASR 251. Unlike other Acts, the *Acts Interpretation Act 1915* (SA) does not have a provision which expressly deals with the circumstances in which extrinsic (or secondary) materials may be used: compare s 15AB of the *Acts Interpretation Act 1901* (Cth), and other like provisions in other States and Territories.

10 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47].

11 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 277 [74].

> The Adelaide Oval Core Area must be used predominantly for the purposes of a sporting facility (including related uses and with recreational, entertainment, social and other uses being allowed on an ancillary or temporary basis from time to time).

18. The first thing to note is the collocation of 'predominantly for the purpose of a sporting facility' against the mandatory words 'must be used' suggests that Parliament was concerned to ensure that, among other things, the Oval retained its historical heritage as a sports-based facility. The parenthesised words 'including related uses and with recreational, entertainment, social and other uses being allowed on an ancillary or temporary basis from time to time' suggest two separate pathways for expansive uses of the Oval. The operation of both pathways hinges on the overarching requirement that the Oval must be used for the predominant purpose of a sporting facility.

19. So understood, I would read the first pathway as confined to 'related uses' and the second as 'with recreational, entertainment, social and **other uses** being allowed on an ancillary or temporary basis from time to time'. The text and context support that approach. So much is clear from the use of the words 'and with ...', which indicates that the latter part of the phrase is to be considered as a composite phrase. The Second Reading speech also points to a conclusion that those two pathways are intended to reflect separate uses: i.e. 'related uses' and 'other uses':

> The clause provides that the area must be used predominantly for the purposes of a sporting facility (including **related uses**) **with other uses** (such as recreational, entertainment and social uses) being allowed on an ancillary or temporary basis from time to time. [Emphasis added]

20. As can be seen, the Second Reading speech effectively adopts the language of s 4(4) of the Act, but places brackets in different places so as to emphasise the two kinds of uses. (It is also important to observe that the Minister sought, and obtained, leave to have the 'second reading explanation inserted in Hansard without [him] reading it'. The bracketed words assume more significance when understood in that light, for they do not represent the transcribed word of the Minister in Parliament.) By bifurcating the uses - beyond the predominant use - Parliament's intention may be understood to be concerned with uses

which have a temporal limitation (the second group, as indicated by the words 'from time to time') and those that do not (the first, or 'related uses' group).

21. Further, unlike the 'other uses' group, the 'related uses' group do not indicate the factors which permissibly fall within its range. As they are not expressly identified in the statute, at least by analogy to the concept of what are relevant considerations, those uses must be determined by implication from its subject matter, scope and purpose.[12] I develop this below.

22. Although, in the time available, I have not located any relevant authorities which shed any light on the phrase 'related uses', there is some commentary on other phrases regularly used in legislative drafting, such as 'in relation to'.[13] Recognising that there are some distinctive aspects between 'related uses' and 'in relation to', I consider that the authorities on the subject are still instructive.

23. The words 'in relation to' (here 'related uses') signify a degree of connection which may be affected by the context. As French CJ said in *R v Khazaal* (2012) 246 CLR 601 at 613 [31] (footnotes omitted):

> Relational terms such as “connected with” appear in a variety of statutory settings. Other examples are: “in relation to”; “in respect of”; “in connection with”; and “in”. They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. Generally speaking it is not desirable, in construing relational terms, to go further

---

12 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J); *Price v Elder* (2000) 97 FCR 218 at 221 [13] (Black CJ, Sackville and Emmett JJ); *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 (Gleeson CJ and McHugh J).

13 In *O'Grady v The Northern Queensland Company Limited* (1990) 169 CLR 356, it was considered that the phrase 'in relation to' required no more than a relationship, whether direct or indirect between two subject matters.

than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

24. Next, it is necessary to appreciate that s 4(4) of the Act is part of a law with respect to 'the redevelopment of the [Oval]'. The period of financial appropriation for the development commenced on 1 December 2009 and ends on 1 December 2019: s 8(1) of the Act. Putting aside the question of whether the hotel is a 'related use' for a moment, the characterisation of 'redevelopment' by way of the proposed hotel *generally* falls within the notion of redevelopment within the time allotted for appropriations. I say, 'generally', because it appears to me that the question of whether the development is authorised by the Act is a threshold question, insofar as it requires an appropriation, since the appropriation is contemplated within the timeframe set out in s 8(1). Put simply, the proposed development bears the character of 'redevelopment'. But it does not necessarily follow that the proposed development is authorised by s 4(4). I deal with this issue further below.

25. Obviously the substantive issue is whether the proposed development is a 'related use'. That then leads to the following: is the activity of developing a hotel as an adjunct to an existing structure of the Core Area sufficiently 'related use' to a sporting facility? No doubt the connection which the phrase imports is a question of degree. The resolution of the issue will be determined by whether the words 'related uses' bear a broad, intermediate or narrow meaning on the facts. As noted, those constructional possibilities must be addressed by reference to the axiomatic principle that matters of construction are concerned with text, context and purpose.

26. If the words 'related uses' are to be construed so as to deny a development which is arguably tangential - but still related - to the predominant use of the Oval, then that would be a narrow one. I am not convinced that that was Parliament's intention. So long as the predominant use remains, uses *related* to that predominant use may be considered by a Court of competent jurisdiction to be permissible.

27. Clearly enough, the predominant (or, perhaps, chief)[14] use of the Oval is for football and cricket, operated through SMA. The proposed development is 0.17 ha and falls within the Core Area. If a judicial review proceeding is brought to challenge the development (or development approval), putting aside for the moment questions of standing,[15] I expect that the Defendant or Respondent (depending on which Court the proceeding instituted) would argue that the Oval has been pitched as a world class sporting complex, which draws in crowds both domestically and internationally.[16] On that analysis, which would see the Oval's being used only for sporting events (I discuss the full-time component below), I can conceive a situation where evidence would be placed before the Court directed to the 'related' use of the Oval which merely enhances - and therefore remaining consistent with - the predominant use of the Oval as a sporting facility by enabling crowd members to participate in observing the sporting activity. On that analysis, the use of the hotel for that specific purpose may not be held to detract from the predominant purpose. Indeed, part of SMA's development application to the Panel relied on the emergence of overseas hotels forming part of an Oval complex. If the point of entry for construing the words 'related uses' rests, in part, on the absence of any novelty around the idea of an Oval having an adjunct hotel, then I can readily imagine a Court accepting that proposition (among a mix of factors advanced in support of a broad construction).

28. That is not to say that arguments could not be made that the proposed development as an adjunct to the existing structure is inconsistent with the maintenance of the Oval predominantly being used as a sporting facility; it is rather to emphasise that, based on the material I am briefed with, I incline to the view that a Court would construe this aspect of s 4(4) broadly enough to capture the development of a hotel. More particularly, it is not clear from the material available to me that the proposed hotel would be operating on a full-time basis, although to be financially viable, I suspect (without knowing)[17] that it would need to be. If that were the case, then an argument could be

---

14 Since 'predominant' is not defined, it adopts its ordinary and natural meaning. The Macquarie dictionary defines predominant as: '1. having ascendancy, power, authority, or influence over others; ascendant. 2. prevailing'.

15 That is, whether the Association could be regarded as having a sufficient interest to give it standing to challenge the decision to grant planning consent.

16 The Adelaide Oval website promotes the hotel being open 'in time for the ICC World T20': https://www.adelaideoval.com.au/adelaide-oval-hotel/

17 There are media reports suggesting that it would be a full time establishment.

developed that, since it could not be said that the hotel - used primary for another source of income to sustain the SMA's operations - does not have a real and direct relationship with the predominant purpose identified in s 4(4). Once again, it is a question of fact and degree. It might be contended that the activity of a hotel, on the factual assumption that it is a full-time hotel, is not sufficiently close to warrant the conclusion that it relates to a predominant use of the Core Area as a sporting facility. Once the argument is properly constructed, based on established facts, an argument along those lines would increase the chances of the Court accepting the contention that the hotel is not a complying development. The argument would run that, by way of cascading provisions, if s 4(4) is not met, the development was *not* 'in connection with a lease under s 4' because it did not comply with s 4(4) (see s 10(3)(a) of the Act). There may be other ways to put it.

29. The result is to show that, inasmuch as the hotel is used for a purpose consistent with, and aimed at enhancing the predominant use of the Core Area as a sporting facility, a Court is more likely than not to adopt a broad interpretation of the words 'related uses'. The expression is chameleon-like, or protean, depending on the proposed use. Significantly, even if the expression 'related uses' is given a much narrower meaning, it is possible that the same result would obtain, assuming the Court is satisfied that: 1) a hotel is relevantly related to the predominant use of the Core Area as a sporting facility; 2) the hotel would not detract from the predominant use. It might also be said against the Association that it is difficult to envisage how a 138-room hotel would materially detract from the operation of a stadium designed to house 53,500 people.

30. Again, the resolution of that issue will turn both on the statutory construction point, as well as the evidence placed before the Court. On the material before me, I therefore foresee some risk in bringing a judicial review proceeding to challenge the proposed development if SMA (or the Minister) relies on the words 'related uses' to justify the proposed development. It appears that the context in which the provision was drafted was plainly intended to allow for some development to enhance the predominant purpose.

31. On the other hand, if SMA or the Minister rely on the second pathway, namely the 'other uses', then I consider that the development of a hotel would not be consistent with s 4(4).

32. As indicated, s 4(4) expressly distinguishes between 'related uses', a phrase which is used without examples, and other specific examples of particular 'other uses' *being allowed* but by reference to a temporal restriction. In my view, the temporal element 'from time to time' attaches to the words 'with recreational, entertainment, social and other uses being allowed on an ancillary or temporary basis'. Assuming that characterisation is accepted by a Court, I cannot see any rational justification for a permanent structure, in the nature of a hotel, fitting within the category of something used 'from time to time'.

33. Moreover, the use of the words 'and other uses', which follow 'recreational, entertainment [and] social' is a familiar drafting technique, whereby a drafter will not spell out at length all the kinds of things or types of conduct which are permitted (or proscribed). Rather, once the main specific matters or conduct that fall within a category are identified, any general words which follow will be read to embrace only things or conduct falling within that category. 'Other uses', then, must be understood to fall within the category offered by the descriptors 'recreational, entertainment [and] social', and would generally extend to other relaxing or community activities of that kind. It is not necessary to chart the full extent of the limitations of that category here.

34. I am fortified in my view that the 'other uses' pathway is temporal and in accord with Parliament's intention when regard is had to the Parliamentary debates on the *Adelaide Oval Redevelopment and Management Bill*, which recorded the following exchange between the Hon Iain Frederick Evans and the then Minister (Patrick Frederick Conlon) on 8 June 2011:

> **The Hon. I. F. EVANS:** ... Clause 4(4) is the clause that allows temporary buildings to be placed on that area from time to time for events, and I understand why that provision is in there. I assume that it is the SMA that makes the decision as to what is a temporary basis in relation to subclause (4)(b), which provides 'on a temporary basis for the purposes of a special event or activity prescribed by the regulations'. There is no time frame in relation to that. So, if, in 20 years' time, the SMA decides that a temporary activity is for the whole of the football season, they could theoretically erect a stand there for six months. The way I read it, it is that open. So, who makes the decision and how is it restricted?

The Hon. P.F. CONLON: To be fair to parliamentary counsel and these people, they are trying to write a bill for things that are not foreseen at present; for example, a World Cup that might involve you playing there for more than a month and require something else. So, that is the intent of it.

If it is a power made by regulation, it remains in the power of the parliament, of course, to put some restrictions upon the regulation. What we do not want to do is make the people running the oval unable to do an event because of an unnecessarily restrictive piece of legislation that would require changes in here. I think it would be unfortunate if there were a major international event and we had to go and change the act because the oval could not accommodate it on a temporary basis.

So, the provision exists for those things not foreseen that may come up. I cannot give you an example because they are not foreseen yet. ...

...

The Hon. I. F. EVANS: ... I just make the point to the minister that my reading of that clause means that, as long as the SMA thinks something is temporary, it can be there as long as it wants. I do not think that is the minister's intention.

If the SMA decides it wants to put up temporary grandstands for football for the whole of the season, it can and it still meets the provision. I am not sure that that is what the minister intends. All I am saying to you is, between the houses, you may want to look at that provision because a smart lawyer in 30 years' time is going to say, 'Well, we have kept the open space.' I know that the clause says for 'a special event or activity', but that is a special event or activity in the opinion of the SMA. As long as it thinks it is a special activity, it is in.

The Hon. P.F. CONLON: No. There are two protections. One is that it is on a temporary basis. You might argue that we are all temporary and everything ends, but it is a temporary basis and it is 'for the purposes of a special event or activity prescribed by the regulations'.

> I am quite happy to examine it for loopholes in between, but what I cannot do is make it so restrictive that we find that we cannot do something. You would know that the first part of that clause is for things like test matches where they put—I have been in one—really good temporary facilities at the northern end, looking back behind the bowler's arm. This is for corporate facilities for the Ashes match or something like that.
>
> The other thing may be something like a World Cup soccer match, where you may have three games over a period of several months, and you need facilities. I do not know, but I am happy with the intention, as we have stated, and we will check for loopholes.

35. On that approach, that is, that the 'other uses' are only permitted for short-term use, it is not necessary to address the more nuanced question of whether the hotel could be described as 'ancillary'.[18]

INJUNCTIVE RELIEF

36. I have also been asked on what basis the Court would grant injunctive relief. The principles to be applied in determining whether to issue an interlocutory injunction are well settled. White J recently summarised them as follows in *Metro Investments Holdings Pty Ltd v GM Holden Ltd* (citations omitted):[19]

> The principles relating to the [Federal] Court's grant of interlocutory injunctions are settled and it is not necessary to refer to the authorities in detail. They were summarised by the Full Court in *Samsung Electronics Co Ltd v Apple Inc*. An applicant for an interlocutory injunction must identify the legal or equitable rights which it seeks to have determined at the trial and in respect of which final relief is sought. When such rights have been identified, the Court has regard to two principal matters: first, whether the applicant has made out a *prima facie* case, in the sense that if the evidence remains as it is at trial, there is probability that it will be held

---

[18] The phrase 'ancillary or incidental to' was considered in *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57; see also *Pearce v London and South Western Railway* [1900] 2 QB 100.

[19] [2017] FCA 1523 at [13]-[15] (citations omitted). See also *Australian Broadcasting Commission v O'Neill* (2006) 227 CLR 57 at 68-69 [19], 81-84 [65]-[72]; *Ottoway Engineering Pty Ltd v Westpac Banking Corporation* [2016] FCA 635 at [2].

> entitled to relief; and, secondly, whether the balance of convenience favours the granting of the injunction. That includes consideration of whether damages or other remedies will be an adequate remedy. The two questions are not independent. The more that the balance of convenience supports a respondent, and the more serious the consequences for a respondent, the stronger will be the *prima facie* case that the applicant may need to establish to support an interlocutory injunction. Conversely, when the balance of convenience strongly favours the applicant, then the strength of the *prima facie* case required to support the interlocutory injunction diminishes ...
>
> In cases in which the grant or refusal of an interlocutory injunction will in a practical sense determine the substance of the matter in issue on a final basis, the Court gives particular attention to the strength of the applicant's case for final relief …
>
> The Court will also consider and evaluate the impact that the grant or refusal of an injunction will have, or is likely to have, on third persons and the public generally …

37. Where a mandatory interlocutory injunction is sought, there are cases which suggest that the Court should be satisfied with 'a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction'.[20] The prevailing view, however, is that no different test applies in the case of a mandatory interlocutory application.[21] Rather, the mandatory nature of the injunction sought will often weigh in the balance against the grant of interlocutory relief in the application of the above principles.

38. Without knowing the basis upon which SMA or the Minister rely to justify the proposed development (i.e. 'related uses' or 'other uses'), I am not in a position to advise whether there exists a prima facie case. The balance of convenience is also an important factor. Mindful of the steps that SMA has already taken to progress the development application to this point, and in the absence of any material which suggests that the Adelaide Park Lands (through the Association) would be adversely prejudiced in the meantime if the status quo were not maintained,[22] I consider that the Court would (based on the material

---

[20] *Shepherd Homes Ltd v Sandham [No 2]* [1971] 1 Ch 340 at 351; *Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562 at 563; *Imac Security Services Pty Ltd v Tyco Australia Pty Ltd* [2002] VSC 592 at [23] (Redlich J).

[21] See *Bradto Pty Ltd v Victoria* (2006) 15 VR 65 at 73 [33]-[35]; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 68 [19], 81-84 [65]-[72].

[22] I am conscious of the operation of s 13 of the Act, which provides: 'Except to the extent that is *reasonably required* in connection with the operation of Part 2 [the Core Area] ..., the Minister should,

before me) likely weigh the balance of convenience in SMA's favour. This would obviously militate against the issue of an injunction. There is also a question as to whether any application for judicial review would be premature, in the sense that final approval has not been given by the Council. According to the Panel's website: 'Copies of the plans have been provided to Adelaide City Council who are responsible for issuing final development approval following lodgement of certified building documentation'. If that is the case, then it is another factor militating against the grant of an injunction.

OTHER ISSUES

39. I am also asked a number of other questions, which do not strictly turn on the constructional choices set out above.

40. As to the questions relating to SMA's constitution, there is nothing in the brief before me to suggest that: 1) SMA was not properly constituted (notwithstanding contrary assertions of Mr Philip Groves); 2) its constitution (as a company limited by guarantee) stands in the way of it entering into the proposed development.[23] Under the *Corporations Act 2001* (Cth), a company limited by guarantee has the capacity to sue and be sued, and enter into contracts and hold assets in its name. The fact that SMA, by its constitution, cannot distribute income or property to its members (see cl 6) does not operate as a bar to those functions.

41. Insofar as I am asked whether the 'in principle' agreement to appropriate funds to SMA was done in good faith, I have nothing in my brief to suggest that a contrary conclusion is remotely open. As stated in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, at [60], citing with approval remarks in this same regard made by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Commissioner of Taxation* (2000) 46 ATR 191 at 193:

> Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld.

---

in managing any part of the Adelaide Oval Licence Area, seek to protect and enhance the area as park lands for the use and enjoyment of members of the public'. [Emphasis added]

[23] See s 125 of the *Corporations Act 2001* (Cth) which provides that, if a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of its powers. See also s 126 which concerns a company's power to make, vary, ratify or discharge a contract.

42. Apart from that, I do not see there being any difficulty with the Government providing an 'in-principle' agreement to make further appropriations (subject to the sum of $535 allowed for in s 8(1) having been reached). It just has not done so yet. As far as I am aware, this is not a situation like *Williams v Commonwealth* (2012) 248 CLR 156 where appropriations were not in place. All that has been done, it appears, is an indication that an appropriation will be granted under s 8(1) of the Act. That step would seem to be consistent with executive power, assuming it is appropriate action[24] having regard to the objects, scope and purpose of the Act (including s 4(4)).

CONCLUSION

43. I advise accordingly.

Date:**11 April 2019**

PAUL D'ASSUMPCAO
Howard Zelling Chambers
08 8211 7677
0400 709 647
pdassumpcao@hzc.com.au

[24] *Barton v Commonwealth* (1974) 131 CLR 477 at 498.