

18 September 2019

Our Ref: AKL:SYD007/4003

Russell Miller AM  
Chair of IPC Panel  
Independent Planning Commission  
Level 3, 201 Elizabeth Street  
SYDNEY NSW 2000

By Email:  
ipcn@ipcn.nsw.gov.au

Dear Mr Miller

### Sydney Zoo Development Consent SSD7228 - Modification 3 Application

#### 1. Introduction

1.1 We act for Sydney Zoo Pty Ltd (**Sydney Zoo**). We refer to the submission made on behalf of Elanor Investors Limited (**Elanor**), owners and operators of Featherdale Wildlife Park (**Featherdale**), submitted to the Independent Planning Commission (**IPC**) on 28 August 2019 (**Featherdale Submission**) in response to Sydney Zoo's Modification 3 Application for Development Consent SSD 7228 (**Mod 3**).

1.2 We have prepared this submission in response to the Featherdale Submission, as we have a number of concerns regarding the accuracy and the appropriateness of the Featherdale Submission, particularly in light of the current legal proceedings in the Land and Environment Court of NSW, which were commenced by Elanor against Sydney Zoo late last year. Various assertions in that letter are without basis and are misleading or have the capacity to mislead.

#### 2. Background

2.1 Elanor has shown itself to be opposed to Sydney Zoo from the outset. Elanor's opposition is driven by commercial self-interest rather than any legitimate planning concern.

2.2 Elanor is not interested in the potential benefits Sydney Zoo might bring to the broader Sydney region and NSW including by providing an attractive new tourist facility to the benefit of the tourism industry.

2.3 Since the approval of the SSD for the zoo, Elanor has continued to wage a campaign of disputation, threats and litigation against Sydney Zoo before it has even opened.

2.4 Elanor's conduct is all the more extraordinary in circumstances where:

- (a) Sydney Zoo will require an occupational certificate before opening to certify that the zoo complies with the consent;
- (b) the relevant date for compliance with the consent is at the opening of the zoo; and
- (c) there can be no proper suggestion that a certifier won't properly certify compliance with conditions.

2.5 Elanor has already put in a number of submissions regarding Mod 3. The further submission is gratuitous and to be seen in light of the above.

### 3. Irrelevant matters raised by Elanor

- 3.1 Mod 3 is required to be assessed on its merits having regard to relevant planning considerations. The allegations that Sydney Zoo is in breach of various conditions (which are vehemently denied) are not relevant to the assessment of Mod 3 on its merits and having regard to legitimate planning considerations.
- 3.2 There are of course avenues available to address any supposed breach, should the responsible agencies consider that appropriate (or at the behest of Elanor itself). But the suggestions of breach are remarkable in a context where Sydney Zoo has not even opened.
- 3.3 The majority of Elanor's submission raises matters that are irrelevant to the assessment of Mod 3. In particular, the suggestion that Sydney Zoo has "embarked on a course of conduct which demonstrates that it has flagrant disregard for the differentiation obligations imposed by the PAC" are not relevant to the assessment or determination of Mod 3.
- 3.4 Having regard to baseless allegations of this kind may involve the taking into account of irrelevant considerations and legal error.

### 4. Legal Proceedings

- 4.1 The Featherdale Submission makes various allegations that Sydney Zoo has breached or disregarded so-called "differentiation obligations" imposed by the PAC.
- 4.2 Some of those matters overlap (to a degree) with matters Elanor is pursuing in proceedings in the Land and Environment Court of NSW against Sydney Zoo (the **Proceedings**), and some of them go even further.
- 4.3 During the course of the Proceedings, Elanor applied to amend its Summons and Points of Claim to expand its allegations as to alleged breaches or threatened breaches of the consent and so-called differentiation obligations. Elanor was unsuccessful on that application but was granted leave to re-plead on the basis of Justice Pain's judgment delivered on 12 June 2019 (**Judgment**). A copy of the Judgment is enclosed with this submission.
- 4.4 Significantly, during the course of the hearing, and as referred to in paragraph 10 of the Judgment, it was admitted by Mr Fuller (Elanor's solicitor and one of the signatories to the Featherdale Submission) in cross-examination that:
- (a) Featherdale does not know when Sydney Zoo will open;
  - (b) Sydney Zoo would need to obtain an occupation certificate before it opens;
  - (c) in considering the issuing of an occupation certificate, the certifier would need to determine compliance with the various conditions of the development consent;
  - (d) there was no reason to believe that Sydney Zoo would open prior to obtaining an occupation certificate; and
  - (e) there was no basis to believe that any future appointed certifier would not properly carry out their role.
- 4.5 Those concessions (properly made under oath) make clear that Featherdale has no proper reasonable basis for any allegation of threatened breach based on the proposition that Sydney Zoo intends to and will open in non-compliance with various conditions of consent.
- 4.6 As also recognised in the Judgment at [30], no allegation was made of "an intention on the [Sydney Zoo's] part to breach the conditions of consent when the zoo opens, the key date for

compliance. **The Court should assume that the conditions of development consent as presently framed will be complied with at the relevant date, the opening of the zoo**" (emphasis added).

- 4.7 Clearly (including in view of the concessions referred to above as to an occupation certificate) Featherdale could have no basis for an allegation of an intention on Sydney Zoo's part to breach the conditions of consent when it opens. Tellingly, following the Judgment, it has studiously avoided pursuing any such allegation in the Proceedings (instead pursuing a different case based on certain marketing). No doubt because it has no proper basis to do so.
- 4.8 This also saw Elanor abandon various allegations, including (but not limited to) allegations that Sydney Zoo was not going to comply with condition B7 of the Consent (concerning the requirement to have certain exotic species at opening of the zoo). As can be seen in the Judgment at paragraph 11, Elanor's lawyer admitted that this condition applies on the opening of the zoo, which is yet to occur, and that it is possible for the operators of the zoo to comply with the condition at any time until the zoo opens. It is unsurprising then that Elanor abandoned this element of its claim.
- 4.9 In view of the above, it is both surprising and extraordinary for these matters to be raised in the Featherdale Submission. This includes the assertion at paragraph 1.3(h) that Sydney Zoo is "flouting the representation it made to the PAC that it would have two-thirds of its exotic species for display from opening of the new zoo, and that it would maintain those exotic species post-opening to sufficiently differentiate its animal offering", which it has abandoned in the Proceedings when challenged as to its basis (or lack of it).
- 4.10 Other matters concerning marketing are the subject of litigation and it would not be appropriate to comment on them further. Suffice it to say, Sydney Zoo completely rejects all allegations of wrongdoing.
- 4.11 To be clear, Sydney Zoo maintains that there is no basis to any suggestion that it intends to breach any obligations of the Consent. It completely rejects any suggestion of breach or threatened breach. It is required to obtain an occupation certificate before it opens and will (of course) do so. It will be fully compliant with the conditions of the Consent and there is no basis for any suggestion to the contrary. The suggestions to the contrary in the Featherdale Submission are wholly without basis and should not have been responsibly made.

## 5. **Assertions without evidence**

- 5.1 The Featherdale Submission contains many assertions that are wholly uncorroborated by any evidence. They are simply made by way of assertion. There are many assertions of this kind and they should also be disregarded on that basis. Not the least of these is the assertion:

"If the IPC approves Modification 3, and Sydney Zoo continues to breach the obligations imposed by the PAC to differentiate itself from Featherdale, it would severely impact the commercial feasibility of Featherdale such that it will be unable to maintain programs which have significant social, educational, employment and conservation benefits for not only the immediate locality but also for Western Sydney, NSW and the country."

- 5.2 There is no basis to accept such a contention which is fanciful. Leaving aside that the suggestion that Sydney Zoo is in breach of any obligation is vehemently denied, this contention would require proper financial modelling (including an examination of the profit margins being earned by Elanor as the investment and funds management business which is the commercial operator of Featherdale). The suggestion that the very limited and

constrained proposal involved with Mod 3 could have such impacts is unsubstantiated and without merit.

## 6. Operating Hours

6.1 Throughout the Featherdale Submission, representations are made that the Mod 3 Application is an attempt by Sydney Zoo to breach or “cut across” its obligations to differentiate itself from Featherdale Wildlife Park, and that the proposed change to operating hours is a “deliberate attempt to mimic Featherdale’s offering”.

6.2 These representations are false. The operating hours of the zoo as currently approved by the Consent have nothing to do with any apparent requirement that Sydney Zoo differentiate itself from Featherdale.

6.3 The hours of operation condition is not identified by Elanor as a “differentiation obligation” in the Proceedings or the Featherdale Submission at Annexure A. The hours of operation were not imposed in relation to any attempt to differentiate Sydney Zoo’s offering from Featherdale.

6.4 Further, as made clear in the Mod 3 – Statement of Environmental Effects and Response to Submissions report, Sydney Zoo has sought to extend its permitted operating hours to cater for private tour groups and temporary events (and some other operational activities). The extension of operating hours is not designed to specifically target international tour groups as alleged by Featherdale.

## 7. Minimal Environmental Impact

7.1 The Featherdale Submission states that Mod 3 would not result in a “minimal” environmental impact but provides no evidence to support its statement. The SEE and Response to Submissions Report prepared by Ethos Urban demonstrate that minimal environmental impacts would result from the approval of Mod 3. Mod 3 seeks to amend the opening hours only. The operation of the Zoo and the built form of the development remains unchanged.

7.2 Section 4.55(1A) permits a modification of development where the development would result in minimal environmental impacts. Mod 3 is squarely the type of modification contemplated by this section. Elanor alleges that the additional 1.5 operational hours each day for private zoo experiences and small group tours would “materially expand the native animal offering at Sydney Zoo” and cause adverse social and economic impacts in the locality. This position has clearly been overstated.

7.3 There is nothing in the Mod 3 Application and SEE which indicates that there is any expansion of the native animal offering at Sydney Zoo or an anticipated increase in international visitation. The proposed modification will continue to have positive socio-economic and conservation impacts for Western Sydney. All of the environmental assessment undertaken for Mod 3 indicates there will be minimal environmental impacts from the change in operation hours.

7.4 There is nothing in the Mod 3 Application, SEE or Response to Submissions report which indicates that Sydney Zoo is only proposing modified hours for the international tour market or that the international groups will take their business to Sydney Zoo in the afternoon. The proposal is for temporary events and private tours – these tours may be for either domestic or international visitors.

## 8. Conclusion

8.1 If IPC requires additional information or clarification of any matters raised, please do not hesitate to contact us.

Yours faithfully



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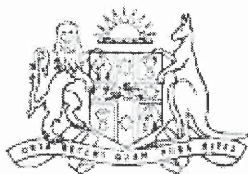
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## Land and Environment Court New South Wales

Case Name: Elanor Investors Limited v Sydney Zoo Pty Limited

Medium Neutral Citation: [2019] NSWLEC 80

Hearing Date: 4 June 2019

Date of Orders: 12 June 2019

Date of Decision: 12 June 2019

Jurisdiction: Class 4

Before: Pain J

Decision: See [33] of judgment

Catchwords: PRACTICE AND PROCEDURE – application for leave to rely on amended summons and amended points of claim – pleadings embarrassing as vague – essential facts necessary for claim to succeed not identified – leave to re-plead granted

Legislation cited: Civil Procedure Act 2005 s 56  
Environmental Planning and Assessment Act 1979

Cases Cited: Alexandria Landfill Pty Ltd Roads and Maritime Services; Boiling Pty Limited v Roads and Maritime Services (No 4) [2018] NSWLEC 31  
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69  
Gunns Limited v Marr [2005] VSC 251  
Hastie Group Ltd (in liq) v Bourne; Hastie Group Ltd (in liq) v Moore [2017] NSWSC 709  
HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq) (No 2) [2016] FCA 446  
Knowles v Roberts (1888) 38 Ch D 263 at 270  
McGuirk v University of New South Wales [2009] NSWSC 1424  
Trans Realities Pty Ltd v Grbac [1975] 1 NSWLR 170

Category: Procedural and other rulings

Parties: Elanor Investors Limited (Applicant)  
Sydney Zoo Pty Limited (Respondent)

Representation: COUNSEL:  
N Eastman (Applicant)  
A Shearer (Respondent)

SOLICITORS:  
Gilbert & Tobin (Applicant)  
Addisons (Respondent)

File Number: 18/359630

## JUDGMENT

- 1 The Applicant company Elanor Investors Ltd runs Featherdale Wildlife Park at Doonside. It has commenced Class 4 proceedings seeking declarations of breaches of the *Environmental Planning and Assessment Act 1979* (EPA Act) and consequential orders restraining the use of certain marketing material by the Respondent Sydney Zoo Pty Ltd (Sydney Zoo). Sydney Zoo has development consent for a new zoo which is presently under development and has yet to open.
- 2 By notice of motion dated 30 April 2019 the Applicant seeks leave to rely on an amended summons and an amended points of claim (APOC). The Respondent opposes leave being granted.
- 3 In order to understand the parties' arguments it is useful to set out in full the amendments sought.

### Amended summons

- 4 The amended summons states (additions are underlined and deletions struck out):

#### RELIEF CLAIMED

1. A declaration that the Respondent has threatened to breach, or in the alternative has breached, section 4.2(1)(b) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) by failing to comply with condition B2 of Schedule B of Development Consent (SSD 7228) granted by the Planning Assessment Commission of NSW, as delegate for the Minister for Planning, to the respondent dated 8 September 2017 (**Development Consent**).

#### Particulars

- (a) Condition B2 of Schedule B provides that the Respondent shall carry out the development in accordance with the **EIS**, the **RTS**, the Supplementary Information and the **Additional Information** (as defined in the **Development Consent**).
- (b) The conduct of the Respondent amounts to a threatened or apprehended breach of the obligation to comply with section 6.14 of the EIS, which indicates that Sydney Zoo will have approximately 40 Australian species;



- (c) The conduct of the Respondent amounts to a threatened or apprehended breach of the obligation to comply with section 6 and Attachment F of the RTS, which indicates that Sydney Zoo will display Australian animal species in a way that is “*integrated with Aboriginal cultural experience*” in an area less than 1.6 ha of the Sydney Zoo site;
- (d) The conduct of the Respondent amounts to a threatened or apprehended breach, or in the alternative a breach, of the obligation to comply with section 6.14 of the EIS, Attachment F of the RTS, and with that part of the Additional Information in the Respondent’s letter dated 10 August 2017 under the heading “*Facility Differentiation*” and “*Product Differentiation – Australian Animals*” (together, **Differentiation Obligations**), which provide that:
  - (i) the “*product offering*” of Sydney Zoo will be materially differentiated from Featherdale Wildlife Park;
  - (ii) Sydney Zoo will provide for differing experiences for guests, compared to Featherdale Wildlife Park;
  - (iii) Sydney Zoo will position itself and operate in a way that allows Featherdale Wildlife Park “*to continue to occupy the niche of ‘getting close to the animals’*”, including but not restricted to substantial limitations on interactions with koalas;
  - (iv) Sydney Zoo will position itself and operate as a “*full-service facility*” and be priced comparatively with Taronga Zoo, such that the Sydney Zoo pricing strategy establishes a “critical differentiator” from Featherdale Wildlife Park and such that Featherdale Wildlife Park may have the “*key competitive advantage of being lower in price*” when compared to Sydney Zoo.

2 A declaration that the Respondent has threatened to breach, or in the alternative has breached, section 4.2(1)(b) of the EP&A Act by failing to comply with condition B6 of Schedule B of the Development Consent.

**Particulars**

- (a) The conduct of the Respondent amounts to a threatened or apprehended breach of the obligation contained in condition B6 which requires the display of Australian native animals:
  - (i) to comprise less than 1.6 hectares of the overall exhibited animal collection in accordance with the area designated for Australian animals presented within the Site Plan at Appendix A to the Development Consent; and
  - (ii) to be part of an Aboriginal Cultural Experience.

- 3 A declaration that the Respondent has threatened to breach, or in the alternative has breached, section 4.2(1)(b) of the EP&A Act by failing to comply with condition B7 of Schedule B of the Development Consent.

**Particulars**

- (a) The conduct of the Respondent amounts to a threatened or apprehended breach of the obligation contained in condition B7 which requires the Respondent to have for display to the public at least two-thirds of the exotic species nominated in the Additional Information for the commencement of opening to the public of the Development (as defined in the Development Consent).

- 4 A declaration that the Respondent has threatened to breach, or in the alternative has breached, section 4.2(1)(b) of the EP&A Act by failing to comply with condition B8 of Schedule B of the Development Consent.

**Particulars**

- (a) The conduct of the Respondent amounts to a threatened or apprehended breach of the obligation contained in condition B8 which prohibits the Respondent from having Interactive Programs (as defined in the Development Consent) that involve touching a koala except as part of demonstrations in the educational amphitheatre or provided in the context of education of school groups for the first three years after opening to the public.

- 25 A declaration that the Respondent has threatened to breach section 4.2(1)(b) of the EP&A Act by failing to comply with the hours of operation contained in Condition B10 of the Development Consent (**Hours of Operation**).

- 36 An order that the Respondent must, by itself, its servants or agents, immediately cease distributing the marketing material attached at Annexure A to these Orders (Marketing Material), in breach of conditions B2, B6, B7, B8 or B10 of the Development Consent including:

- (a) distributing the marketing material attached at Annexure A and B to these Orders;

and

- (b) distributing any further marketing material identified at trial (together the **Marketing Material**).

- 4-7 An order that the Respondent must, by itself, its servants or agents, not distribute any document or information, that does not comply with the Differentiation Obligations conditions B2, B6, B7, B8 or B10 of the Development Consent or Hours of Operation obligations imposed by the Development Consent.

- 5 8 An order that the Respondent must within 7 days of the date of these orders, cause a notice, in a form to be agreed by the Court, to be served on all persons who were issued with the Marketing Material.

6 9 Within 28 days of the date of these orders, the Respondent must provide to the Applicant information demonstrating compliance with Order 5 8 above.

7 10 The Respondent is to pay the Applicant's costs of the proceedings.

8 11 Such further or other order as to the Court seems fit.

### **Amended points of claim**

5 The APOC state (additions are underlined and deletions struck out):

#### **The Parties**

1. The applicant, Elanor Investors Limited:
  - a. Owns Elanor Funds Management Limited - which is the registered proprietor of Lot 258 in DP 752051 known as 217-229 Kildare Road, Doonside (the Site); and
  - b. Owns and operates the Featherdale Wildlife Park (Featherdale) business located at the Site.
2. Featherdale:
  - a. Was established in 1972;
  - b. Is the largest exhibitor of Australian fauna in the world and exhibits 1700 birds and animals, with more than 280 different species;
  - c. Employs 58 fulltime staff, 3 part time staff, 50 casual staff and 49 volunteer staff;
  - d. Facilitates \$75 million of investment in employment, social, educational and conservation programs;
  - e. Has conservation programs of local, regional, state and national significance; and
  - f. Has recently been awarded the Excellence in Export at the 2018 NSW Business Awards, and the Silver Medal at the 2018 NSW Tourism Awards.
3. The respondent, Sydney Zoo Pty Ltd;
  - a. Is the proponent for the State Significant Development Application (SSD 15\_7228) (DA); and
  - b. Proposed in the DA to operate a zoological facility (New Zoo) on the land owned by Western Sydney Parklands Trust being Lot 101 in DP 1195067.

## The Consent

...

6. On 8 September 2017, the PAC as delegate for the NSW Minister for Planning, granted Development Consent (SSD 15\_7228) to the respondent for a zoological facility within the Western Sydney Parklands (Development Consent).
7. The Development Consent was subsequently modified on 8 May 2018 and 20 September 2018.
8. The conditions of the Development Consent include:
  - a. Condition B2 of Schedule B of the Development Consent which provides that the respondent shall carry out the development in accordance with the EIS, the RTS, the Supplementary Information and the Additional Information (as defined in the Development Consent);
  - b. Condition B6 of Schedule B which provides that the display of Australian native animals shall comprise less than 1.6 hectares of the overall exhibited animal collection and be in accordance with the area designated for Australian animals presented within the Site Plan at Appendix A of the Development Consent. The Australian native animals must be displayed as part of an Aboriginal Cultural Experience as detailed at Condition C21 of Schedule C;
  - c. Condition B7 of Schedule B which provides that the respondent must have at least two-thirds of the exotic species nominated in the Additional Information, on display for the commencement of opening to the public of the Development;
  - d. Condition B8 of Schedule B which provides that for the first three years after opening to the public, the respondent is prohibited from having Interactive Programs that involve touching a koala except as part of demonstrations in the educational amphitheatre or provided in the context of education of school groups; and
  - e. Condition B10 of Schedule B which provides that the hours of operation for the Development are restricted, on any day, to 9am – 10pm (December and January) and 9am – 6pm (February to November).
9. Incorporated into the Development Consent are:
  - a. by way of condition B2 of Schedule B:
    - a(i) “Environmental Impact Statement titled ‘Sydney Zoo SSD 7228 – Environmental Impact Statement’, prepared by JBA, dated December 2015”;
    - b(ii) “Response to Submissions titled ‘Sydney Zoo SSD 7228 - Response to Submissions’ prepared by JBA, dated May 2016”;

e(iii) “Supplementary Information submitted by JBA, dated 22 August 2016”; and

d(iv) “Response to the Planning Assessment Commission's request for further information” prepared by Sydney Zoo and dated April 2017, “Social Impact Assessment” prepared by the University of Technology Sydney (undated), and letter titled “The Sydney Zoo – D440/16 – amendment of proposal” signed by Jake Burgess and dated 10 August 2017; and

b. by way of condition B6 of Schedule B the Site Plan attached at Appendix A of the Development Consent

### **The Differentiation Obligations**

10. As a consequence of the conditions of the Development Consent pleaded at [8](a) – (d) and [9] above, the following differentiation obligations are incorporated into the Development Consent:

- a. Type of Facility;
- b. Pricing;
- c. Type of Australian Animal Encounters;
- d. Amount of Australian Species;
- e. Two Thirds Exotic Species At Opening
- f. Koala Interaction; and
- g. ~~Development of Regional Tourism~~
- g. Size of Australian Native Animals Display

### **Particulars**

See Schedule 1 annexed to this pleading.

10A. As a consequence of the condition of the Development Consent pleaded at [8](e), the following operational obligations are incorporated into the Development Consent:

- a. Hours of Operation

### **Marketing Actions in Breach of the Differentiation Obligations**

11 The respondent has caused or permitted the marketing of the New Zoo in breach of the differentiation obligations referred to in [10](a)-(c), (f) and (g) and the operational obligation in [10A](a).

a—~~Sydney Zoo Marketing Brochure~~

### **Particulars**

~~i. its employees, agents or representatives to create the marketing brochure entitled "Sydney Zoo Bungarribee Wildlife Park at Sydney Zoo" (Sydney Zoo Marketing Brochure) which advertises, among other matters~~

~~(A) "Bungarribee Wildlife Park" at Sydney Zoo opening in 2019,~~

~~(B) Experiences including that all displays will allow visitors to get up close to Koalas, Echidnas, Wombats, Tasmanian Devils and a range of other unique species, and~~

~~(C) An adult nett rate for registered travel operators of \$12 00.~~

~~ii. Its employees, agents or representatives to distribute the Sydney Zoo Marketing Brochure to day tour operators, inbound tour operators, international travel groups and/or travel agents prior to the Australian Tourism Exchange that was held in Adelaide in April 2018 as part of a deliberate strategy, based on advice from its consultant Australian Attractions Pty Ltd, to market the zoo as a wildlife park because it was more attractive to international tourists than a zoo;~~

~~iii. Its employees, agents or representatives to distribute the Sydney Zoo Marketing Brochure to day tour operators, inbound tour operators, international travel groups and/or travel agents including to, among other operators, groups and agents:~~

~~(A) To Diamond Tours in March 2018 by email from its representative Australian Attractions Pty Ltd; and~~

~~(B) To Oz Travel Consulting Services.~~

~~B Korean Marketing Stall~~

### **Particulars**

~~i. Its employees, representatives or agents to exhibit an advertising stall at the HanaTour Exhibition in Korea during the period 7 to 10 June 2018 (Korean Marketing Stall) which advertises "Bungarribee Wildlife Park" at Sydney Zoo opening in early 2019 e Hong Kong Marketing Brochure.~~

### **Particulars**

~~i. Its employees, agents or representatives to create a marketing brochure entitled '[CHINESE CHARACTERS]' (Hong Kong Marketing Brochure) which contains the following advertisement:~~

~~"At the end of 2018, you can enjoy a close up 'live fed' wildlife experience in Sydney West The Sydney Zoo, built at \$36 million, raises 30 species of animals, and visitors can see Australian and other special animals on the boardwalk. The zoo also features a well-known Australian non-cage safari area that allows visitors to get close to nature in the wild."~~

~~li Its employees, agents or representatives to distribute the Hong Kong Marketing Brochure to inbound tour operators and travel agents including to~~

~~an inbound tour operator in Hong Kong called Morning Star in about September 2018.~~

~~d. — \$12 Trade Rate~~

**Particulars**

~~i. — Its employees, agents or representatives to offer day tour operators, inbound tour operators, international travel groups and/or travel agents a \$12 adult trade rate for the New Zoo including to, among other operators, groups or agents:~~

~~(A) — Diamond Tours in March 2018;~~

~~(A) — Oz Travel Consulting Services in May 2018; and~~

~~(B) — Orient Express Tours and Travel in November 2018.~~

**Particulars**

- a. Type of Facility: The respondent is marketing itself as both a zoological facility and wildlife park (known as the “Bungarrabee Wildlife Park at Sydney Zoo”) and a wildlife experience (known as the “Bungarrabee Wildlife Experience”);
  - b. Pricing: The respondent is marketing trade rates lower than that of Featherdale and the advertised retail rate is comparable to that of Featherdale and significantly lower than Taronga Zoo;
  - c. Type of Australian Animal Encounters: The respondent is marketing itself as an opportunity for visitors to get up close to Koalas and a range of other unique species. The marketing contains no reference, or no adequate reference, to that experience being part of an integrated Aboriginal cultural experience;
  - d. Koala Interaction: The respondent is marketing that all displays will allow visitors to get up close to Koalas and a range of other unique species. There is nothing in the marketing which limits the proposed interaction to to [sic] being part of demonstrations in the educational amphitheatre or in the context of education of school groups.
  - e. Size of Australian Native Animals Display: The respondent is marketing an area for the Australian native animal display which is larger than 1.6 hectares, and exceeds the area designated for that native animal display in the Site Plan at Appendix A of the Development Consent.
  - f. Hours of Operation: The respondent is marketing operating hours for the New Zoo as being 9am to 5pm daily with negotiable early access.
- 11A The respondent has caused or permitted conduct in breach of the differentiation obligations referred to in [10](d) and (e).

### Particulars

- a. Amount of Australian Species: The respondent has applied on the Zoological Information Management Software (ZIMS) list for 80 native animal species;
- b. Two Thirds Exotic Species at Opening: The respondent has applied on the ZIMS list for 24 species of exotic animals, being less than the number of exotic species to achieve the mandatory two-thirds target for the commencement of the opening to the public (and/or there is no realistic prospect that Sydney Zoo will obtain many of those exotic species within the required timeframe).

### **Breach of s 9.45 of the *Environmental Planning and Assessment Act 1979***

12. As a consequence of the matters pleaded in [10], [10A], [11] and [11A] above, the respondent is in breach of s 4.2 of the *Environmental Planning and Assessment Act 1979*.

### Particulars

- a. Type of Facility: The respondent is obliged to offer a different type of facility, being a zoological facility, with Featherdale playing the role of a “wildlife park”. However, the respondent is marketing itself as both a zoological facility and wildlife park (known as the “Bungarribee Wildlife Park at Sydney Zoo”) and a wildlife experience (known as the “Bungarribee Wildlife Experience”);
- b. Pricing: The respondent is obliged to price its offering at rates that are more expensive than Featherdale, and comparative with Taronga Zoo. However, the marketing material indicates that the trade rates (as distributed to tour operators) are lower than that of Featherdale and the advertised retail rate is comparable to that of Featherdale and significantly lower than Taronga Zoo;
- c. Type of Australian Animal Encounters: The respondent is obliged to offer encounters with Australian Animals primarily occurring as part of an integrated Aboriginal cultural experience, with Featherdale being allowed to focus on petting/up close experiences and to continue to occupy the marketing niche of “getting close to the animals”. However, the marketing material primarily markets the Bungarribee Wildlife Park Experience and Bungarribee Wildlife Experience as an opportunity for visitors to “*get up close to Koalas .... and a range of other unique species.*” There is no reference, or no adequate reference, to that experience being part of an integrated Aboriginal cultural experience;
- d. Amount of Australian Species: The respondent is obliged to have only approximately 40 species of native animals at the New Zoo. However, as at 17 December 2018 the Zoological Information Management Software (ZIMS) list provides that the respondent has applied for 80 native animal species;
- e. Two Thirds Exotic Species at Opening: The respondent is obliged to have at least two-thirds of the exotic species nominated in the Additional



Information on display at opening. The ZIMS list indicates that as at 17 December 2018 the respondent has applied for 24 species of exotic animals, being less than the ~~which is not a sufficient~~ number of exotic species to achieve the mandatory two-thirds target for the commencement of the opening to the public ~~which is scheduled for 4 April 2019~~ (and/or there is no realistic prospect that Sydney Zoo will obtain many of those exotic species within the at required timeframe); and

- f. Koala Interaction: For the first three years after opening to the public, the respondent is prohibited from having Interactive Programs that involve touching a koala except as part of demonstrations in the educational amphitheatre or provided in the context of education of school groups. However, the marketing material provides that “*All displays will allow visitors to get up close to Koalas .... and a range of other unique species*”. There is nothing in the marketing material which limits the proposed “Interactive Program” set out above to being part of demonstrations in the educational amphitheatre or in the context of education of school groups;
- g. Size of Australian Native Animals Display: The respondent is obliged to display Australian native animals in an area that shall comprise less than 1.6 hectares of the overall exhibited animal collection and be in accordance with the area designated for Australian animals presented within the Site Plan at Appendix A of the Development Consent. The respondent is marketing an area for the Australian native animal display which is larger than 1.6 hectares, and exceeds the area designated for that native animal display in the Site Plan at Appendix A of the Development Consent; and
- h. Hours of Operation: The respondent is obliged to operate the New Zoo in compliance with the hours of operation which are restricted, on any day, to 9am - 10pm (December and January) and 9am - 6pm (February to November). The respondent is marketing operating hours for the New Zoo as being 9am to 5pm daily with negotiable early access.

**Discretionary factors under s 9.45 of the *Environmental Planning and Assessment Act 1979***

- 13. The breaches identified in [12] above ought be remedied or restrained under s 9.46 of the *Environmental Planning and Assessment Act 1979* because:
  - a. There is either real or prospective harm to Featherdale's operations described in [2] above;
  - b. A contributing reason as to why the PAC approved the New Zoo was because of the differentiation obligations incorporated into the Development Consent pleaded at [10] above; and
  - c. Planning law ought not be undermined by non-compliance.

## Evidence

- 6 Ms Lindeman-Jones solicitor for the Respondent affirmed an affidavit dated 20 May 2019. "Exhibit AKL-1" to this affidavit (which became exhibit 1) contains various documents which describe the procedural history of this matter. The Respondent also tendered development consent SSD 7228 dated 8 September 2017 for the construction and operation of the proposed zoo and a modification application to that consent dated 4 December 2018 (both of which became exhibit 2). The modification application to change the hours of operation of the development is undetermined.
- 7 Ms Lindeman-Jones' affidavit contains a chronology of the proceedings which is summarised below:

22 November 2018	The proceedings were commenced.
14 December 2018	At the first directions hearing the Applicant requested that the proceedings be listed for hearing and proposed directions. The Court did not make an order listing the proceedings for trial.
21 December 2018	The Applicant filed points of claim, a notice to produce and a subpoena to produce.
21 January 2019	The Respondent filed a notice of motion seeking to set aside the notice to produce and the subpoena.
22 February 2019	The notice of motion was heard by the Registrar.
17 April 2019	Judgment was delivered by the Registrar dismissing the Respondent's notice of motion.
24 April 2019	A further notice of motion was filed by the Respondent seeking a review of the Registrar's decision dated 17 April 2019. The hearing date of that notice of motion is yet to be allocated.
1 May 2019	The Applicant filed the notice of motion the subject of this judgment seeking to amend its summons and points of claim.

- 8 Mr Fuller solicitor for the Applicant affirmed an affidavit dated 30 April 2019. "Exhibit BF-1" to this affidavit (which became exhibit A) contains documents that were before the Registrar at the hearing of the Respondent's notice of motion dated 21 January 2019 to set aside the Applicant's notice to produce. An email dated 8 April 2019 from Mr Chiefari general manager of Featherdale Wildlife Park attaching Sydney Zoo's latest marketing material was annexed to the affidavit. The Registrar's judgment dated 17 April 2019 dismissing the Respondent's motion to set aside was also annexed.
- 9 Cross-examination of Mr Fuller solicitor was allowed, reluctantly, as the Respondent alleged that there was no arguable basis in fact for some of the amendments. Its counsel sought to obtain admissions to that effect from Mr Fuller.
- 10 Mr Fuller agreed that he did not know when Sydney Zoo will open, was aware that it needed an occupation certificate before opening, had no reason to think it would not obtain such a certificate before opening and had no basis not to believe a private certifier would comply with the relevant law in issuing an occupation certificate. Mr Fuller agreed that there was no identification of the marketing conduct alleged to give rise to breaches and that the APOC were open-ended in that regard.
- 11 Regarding pars 11A(b) and 12(e) of the APOC (which concern the Respondent's obligation to have at least two thirds of the exotic species nominated at opening), Mr Fuller agreed that condition B7 of the development consent applies on the opening of the new zoo, agreed that that has yet to occur and that it is possible for the operators of the new zoo to comply with the condition at any time until it opens.
- 12 Regarding pars 11A(a) and 12(d) of the APOC (which concern the amount of Australian species the Respondent has applied for), Mr Fuller agreed that just because an application is made to the Zoological Information Management Software (ZIMS) list for certain species an applicant does not have a positive obligation to get them. He stated that the affidavit evidence of the Applicant

was that an application to ZIMS is a strong indicator of what species are intended to be acquired.

- 13 Regarding pars 11(c), 12(c), and 12(f) of the APOC (which concern the types of Australian animal, including koala, encounters the Respondent intends to offer) Mr Fuller agreed that just because a person can get up close to a koala does not mean it can be touched and agreed that any interaction depends on how an animal display is presented, about which he can have no idea at present. Mr Fuller agreed that the sole basis for the allegation of a breach was the statement in marketing material that visitors could get close to a koala.
- 14 Regarding pars 11(f) and 12(h) of the APOC (which concern the hours of operation the Respondent has marketed), Mr Fuller agreed he had no basis to think the Respondent would not abide by the conditions of development consent if the modification application was refused.

#### **Applicant's submissions**

- 15 The amendments are intended to clarify the scope of the case, take into account new information so that a declaration in relation to a breach of condition B6 (which regulates the area of display of Australian animals) has been added, and address the mismatch identified by the Respondent between the summons and the points of claim. Unless a pleading is so obviously untenable or manifestly groundless it should not be struck out: *Alexandria Landfill Pty Ltd Roads and Maritime Services; Boiling Pty Limited v Roads and Maritime Services (No 4)* [2018] NSWLEC 31 at [66] citing *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69 at 129-130. All the amendments raise issues which should be the subject of contested evidence.

#### **Respondent's submissions**

- 16 Leave to amend should not be allowed if the amendment would be liable to be struck out had it appeared in the original pleading: *Hastie Group Ltd (in liq) v Bourne; Hastie Group Ltd (in liq) v Moore* [2017] NSWSC 709 at [236]. Firstly,

the allegations in pars 11 and 11A of the APOC are too vague and the Respondent does not know what is alleged against it.

- 17 Secondly, the allegations have no basis in fact and should not be allowed: *HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq) (No 2)* [2016] FCA 446 at [56].
- 18 Pleadings which are embarrassing should not be allowed: *McGuirk v University of New South Wales* [2009] NSWSC 1424 (*McGuirk*) at [33]-[34]. A pleading may be embarrassing even if it contains allegations of material facts sufficient to constitute a cause of action if the material facts leave doubts about what is alleged: *McGuirk* at [32]. Pleadings that are too general are also embarrassing: *McGuirk* at [33].
- 19 Thirdly, the amendments are not in accordance with s 56 of the *Civil Procedure Act 2005* as they facilitate a wasteful exercise. The pending notice of motion seeking to review the Registrar's decision to uphold the Applicant's notice to produce is also partly concerned with this issue.
- 20 The APOC do not specify the conduct complained of in the amended summons. In particular par 11 does not specify any actions by the Respondent. The reference to marketing is vague and provides no essential facts which inform the Respondent of the case it must meet.
- 21 Concerning par 11A of the APOC, the new zoo has not yet opened. The development consent granted in September 2017 requires certain matters to be satisfied before it can open. Mr Fuller accepted that an occupation certificate would be needed before the opening of the new zoo and that would require compliance with conditions of consent before it can be issued. The Applicant has not alleged an apprehended breach of that obligation by a certifier. Nor does the Applicant allege an intention by the Respondent to breach the conditions of consent identified. In the absence of such allegations there is no link between the matters referred to in par 11A and any apprehended breach. Overall the claims lack key factual bases.

## Consideration

22 While this is not a court of strict pleading, it is important that a party's claim is clear and properly founded in a summons and points of claim as a matter of fairness and efficiency. Authorities which have considered the adequacy of pleadings are helpful. As referred to by the Respondent, in *Gunns Limited v Marr* [2005] VSC 251 Bongiorno J observed at [57]:

... Not only must the pleading inform the defendants of the case they must meet now, but it must clearly set out the facts which the plaintiffs must assert to make good their claim with sufficient particularity to enable any eventual trial to be conducted fairly to all parties. Vague allegations on very significant matters may conceal claims which are merely speculative...

23 As identified by the parties, the Respondent bears the onus of establishing that the Applicant's claim as articulated in the amended summons and points of claim ought be struck out, a high hurdle, or alternatively that leave to re-plead should not be granted, a lesser hurdle. Such an order should be made only in plain and obvious cases without consideration of the merits of a claim. No evidence to be relied on by the Applicant has been considered. The Court is not to undertake a task of redrafting: *Trans Realities Pty Ltd v Grbac* [1975] 1 NSWLR 170 at 186 citing *Knowles v Roberts* (1888) 38 Ch D 263 at 270, and *McGuirk* at [35].

24 The APOC refers to the "required timeframe" and Mr Fuller accepted that meant the opening of the new zoo, a date unknown to the public. The advertising material attached to the summons refers to a mid-2019 opening date. This has not and will not occur in mid-2019 according to the Respondent's counsel (I note that it is already June 2019). "Required timeframe" is referred to expressly in pars 11A(b) and 12(e). While only appearing on two occasions it is a timeframe which is highly relevant to much of the Applicant's claim given that it relies on breaches of development consent for a project that is yet to commence operating.

25 The amended summons continues to seek a declaration that conduct of the Respondent amounts to a breach or apprehended breach of conditions B2

(prayer 1) and B10 (now prayer 5). The term “conduct” as referred to in prayers 1-4 is not defined in the summons. Additional declarations of breach of conditions B6, B7 and B8 are now sought (see prayers 2-4). Reference to condition B6 is new according to the Applicant. Conditions B7 and B8 are included to match up the summons with the points of claim according to the Applicant. The key consequential relief sought in prayer 6(a) is the cessation of distribution of marketing material attached to the summons in breach of conditions B2, B6, B7, B8 and B10. A catch-all for additional marketing material is contained in prayer 6(b).

- 26 The APOC have substantial changes. The breaches of the EPA Act alleged in par 12 have been expanded to include the size of the Australian native animals display and hours of operation (pars 12(g) and (h) respectively). The breaches are said to arise from the matters in pars 10 and 10A (essentially factual statements of what is contained in the development consent conditions) and par 11 (marketing in breach of conditions) and 11A (Respondent’s conduct in breach of conditions). No specific complaint is made about pars 10 and 10A and I do not need to further consider them.
- 27 The hours of operation issue is that the marketing material includes a statement that earlier opening hours can be negotiated which, I was informed, is not presently in accordance with the relevant conditions of consent. I was informed by the Respondent’s counsel that a modification application had been made (part of exhibit 2) which would allow for earlier opening hours for certain activities if approved. I note that the marketing material concerning the extension of opening hours appears to be premature given that the modification application has yet to be determined.
- 28 Paragraph 11 is headed “actions in breach of the obligations”. Three specified instances of distribution of marketing material said to be in breach of various consent conditions are now deleted as particulars. The matter as now pleaded is a broad claim of marketing in breach of obligations in conditions B2, B6, B7, B8 and B10 in relation to the type of facility, pricing, type of Australian animal encounter, amount of Australian species, the requirement that two thirds of

the nominated exotic species be displayed upon opening, koala interaction and size of Australian native animals display. The Respondent submitted that it does not know the case it has to meet by this generalised pleading. I agree. The Applicant has to specify what marketing conduct it seeks to restrain. The Applicant's counsel referred to the specific relief in prayer 6 of the amended summons as tied to par 11. That has to be better linked to the APOC at a minimum. A clearer pleading might be retaining the original particulars and adding a catch-all claim linked to the relief sought in prayer 6(a) and (b).

29 Paragraph 11A of the APOC is new and alleges conduct which is described as being in breach of conditions of consent concerning the number of Australian species and the requirement that two thirds of the nominated exotic species be displayed upon the opening of the new zoo. The factual circumstance cited is that applications have been made to the ZIMS list for Australian and exotic animals in the numbers specified. An opinion about the consequence for the operation of the new zoo based on the number of animals applied for is stated. There is no direct link between the facts alleged, leaving aside the opinion expressed, and a breach of any conditions. For example, it is not a breach of a specified condition of consent to apply to the ZIMS list, or to do so for any particular number of Australian and exotic animals. The particulars do not state that the ZIMS list is the only source of animals available to the Respondent. That certain orders for Australian and exotic animals have been made through the ZIMS list is a matter of fact but the Applicant's view that this means there is no realistic prospect of obtaining sufficient species within a required timeframe (meaning the opening of the new zoo) is a matter of opinion alone.

30 As the Respondent submitted the pleading does not allege an intention on the Respondent's part to breach the conditions of consent when the new zoo opens, the key date for compliance. The Court should assume that the conditions of development consent as presently framed will be complied with at the relevant date, the opening of the zoo. I consider par 11A is embarrassing as the Respondent cannot discern the nature of the case against it from the paragraph as presently drafted. It cannot stand applying



*McGuirk* at [32]-[34]. This has consequences for any reference to condition B7 in the amended summons and elsewhere in the APOC such as pars 12(d) and (e).

31 The Applicant is not permitted to rely on the amended summons and APOC. It can avail itself of the opportunity to re-plead, mindful of the observations in this judgment. The Applicant has 14 days to do so.

32 The usual order in Class 4 proceedings is that costs follow the event. As the Applicant has been unsuccessful it should pay the Respondent's costs of the notice of motion.

### **Order**

33 The Court orders as follows:

- (1) The Applicant's notice of motion dated 30 April 2019 is refused and leave to re-plead within 14 days is granted.
- (2) The Applicant is to pay the Respondent's costs of the notice of motion dated 30 April 2019.
- (3) The exhibits are returned.

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I CERTIFY THAT THIS AND THE 19 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE N. H. M. PAIN.



Associate

Date **12 June 2019**