

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

## LYNEHAM COMMUNITY ASSOCIATION INC v ACT PLANNING AND LAND AUTHORITY & ORS (Administrative Review) [2024] ACAT 16

AT 55/2023

**Catchwords:** **ADMINISTRATIVE REVIEW** – application to review refusal to issue a controlled activity order – car park constructed without development approval on PRZ1 land sub-leased from the Territory – where the applicable development table stipulates that ‘car park’ is a prohibited development – where a standalone car park is not a permitted use under the sublease – where it was common ground that a controlled activity order should be made requiring use of the land as a car park to cease and restoration of the land to its condition immediately prior to the construction of the car park – where the issue in dispute was whether the controlled activity order should be stayed for a period of up to two years and, if so, on what terms

**Legislation cited:** *ACT Civil and Administrative Tribunal Act 2008* s 68(3)  
*Planning and Development Act 2007* (repealed) ss 6, 7, 8, 50, 350, 351, 358

**Subordinate**

**Legislation cited:** *Planning and Development Regulation 2008* (repealed) s 303

**Cases cited:** *Australian Hotels Association v ACT Planning and Land Authority* [2020] ACAT 98  
*Haridemos & Ors v ACT Planning and Land Authority* [2012] ACAT 74  
*Minister for Immigration and Citizenship v Li* [2013] HCA 18  
*Nb and Nb Marsh Pty Ltd and Minister for Planning* [2003] ACTAAT 11  
*Norbis v Norbis* [1986] HCA 17  
*Peter Kohlsdorf Golf Distributors Pty Ltd v Liangis Investments Pty Ltd & Anor* [2003] ACTAAT 29  
*Re Lambie* [2018] HCA 6  
*R v Toohey; Ex parte Northern Land Council* [1981] HCA 74

**Tribunal:** Senior Member M Orlov  
Senior Member G Trickett

**Date of Orders:** 7 December 2023

**Date of Reasons for Decision:** 30 January 2024

**Date of Publication:** 6 February 2024

**AUSTRALIAN CAPITAL TERRITORY )**  
**CIVIL AND ADMINISTRATIVE TRIBUNAL ) AT 55/2023**

**LYNEHAM COMMUNITY ASSOCIATION INC**  
Applicant

AND:

**BRINDABELLA CHRISTIAN EDUCATION LIMITED (ACN 100 299 669)**  
First Party Joined

AND:

**AUSTRALIAN CAPITAL TERRITORY (as represented by  
TRANSPORT CANBERRA AND CITY SERVICES)**  
Second Party Joined

AND:

**ACT PLANNING AND LAND AUTHORITY**  
Respondent

**TRIBUNAL:** Senior Member M Orlov  
Senior Member G Trickett

**DATE:** 7 December 2023

### **ORDER**

The Tribunal orders that:

1. The deemed decision of the respondent to refuse to make a controlled activity order applied for by the applicant on 7 December 2022 is set aside and substituted by a decision to make a controlled activity order in accordance with the schedule.
2. Any party has liberty to apply on 21 days' notice in writing for an order varying the date on which the order for demolition and reinstatement in paragraph 4(c) of the controlled activity order comes into effect or varying the period within which the order must be complied with after it comes into effect.
3. The first party joined has liberty to apply on 21 days' notice in writing for an order:
  - (a) varying the terms of paragraph 8; or
  - (b) revoking the controlled activity order in the event the first party joined obtains development approval for a car park or other approved use, or the development and use of the premises as a car park ceases to be a controlled activity.

.....(signed).....  
Senior Member M. Orlov  
For and on behalf of the Tribunal

**SCHEDULE**

1. This controlled activity order is made pursuant to sections 68(3) of the *ACT Civil and Administrative Tribunal Act 2008* and section 351 of the *Planning and Development Act 2007* (**PD Act**).
2. The order is directed to Brindabella Christian Education Limited (ACN 100 299 669) trading as Brindabella Christian College (**the Lessee**).
3. The order applies to premises comprising the part of Block 23 Section 41 Lyneham identified as Area 1 in Subleasing Plan number 6664 (**the Premises**) in the sublease between the Australian Capital Territory (**the Lessor**) and the Lessee dated 23 July 2009 (**the Sublease**).
4. The Lessee:
  - (a) must not use or permit invitees of the Lessee to use the Premises as a car park;
  - (b) must not use or permit invitees of the Lessee to use the Premises as a drive-through access point for dropping off or picking up school children (including children attending the early childhood learning centre) before, during or after school hours;
  - (c) must demolish the car park and restore the Premises to their condition as at 30 June 2009 within 12 months from the date this paragraph 4(c) takes effect.
5. The grounds on which this order is made are that the Lessee has undertaken a development for which development approval is required without obtaining development approval, specifically:
  - (a) the Lessee and invitees of the Lessee (including members of staff, students, parents and visitors) have used the Premises since 30 June 2009 as a car park without development approval having been granted for such use and in breach of clause 8.1 of the Sublease;
  - (b) the Lessee constructed, or caused to be constructed an approximately 130 vehicle capacity sealed car park on the Premises with driveway access from Brigalow Street without development approval and in breach of clauses 8.1 and 9.1 of the Sublease;
  - (c) since then, the Lessee and invitees of the Lessee (including members of staff, students, parents and visitors) have continued to use the Premises as a car park without development approval having been granted for such use and in breach of clause 8.1 of the Sublease; and
  - (d) the Lessee and invitees of the Lessee have continue to use the Premises as a drive-through access point for dropping off and picking up school children (including children attending the early childhood learning centre) before, during and after school hours without development approval having been granted for such use and in breach of clause 8.1 and 9.1 of the Sublease.
6. Paragraphs 4(a) and (b) take effect on 8 December 2023 and end when demolition of the car park and restoration of the Premises is completed in accordance with paragraph 4(c) or the order is revoked, whichever happens first.

7. Subject to paragraph 8, paragraph 4(c) takes effect on 15 December 2023 and ends when demolition of the car park and restoration of the Premises is completed or the order is revoked, whichever happens first.
8. Conditional upon the Lessee, within 7 days of the date of this order, installing and maintaining temporary construction fencing at the entrance to the Premises (which may include a locked gate) that restricts vehicular access to the car park from Brigalow Street, the date on which paragraph 4(c) takes effect is deferred for a period of 12 months unless the order is revoked.
9. This controlled activity order operates until it is revoked or ends in accordance with the order.

## REASONS FOR DECISION

1. This is an application by the Lyneham Community Association Inc (**LCA**) for review of a refusal by the ACT Planning and Land Authority (**ACTPLA**) on 23 June 2023 to make a controlled activity order against Brindabella Christian Education Ltd (**BCE**), for which the LCA applied on 8 December 2022 under section 350 of the *Planning and Development Act 2007* (repealed) (**PD Act**).
2. On 8 December 2023, the Tribunal made a controlled activity order in the terms set out earlier. These reasons explain why the Tribunal considered it was in the public interest to make the order.

### Background

3. BCE operates a private non-denominational Christian co-educational early learning, primary and secondary day-school known as Brindabella Christian College (**the College**) from a campus in Brigalow Street, Lyneham. Census data supplied by BCE show that student numbers grew from 519 in 2011 to 1044 in 2023, not including children attending the early learning centre, where annual enrolments over the same period fluctuated from as low as 67 in 2013 and 2023, to as high as 103 in 2019. Over the same period, there has been significant development of the Lyneham campus to accommodate increased student numbers at the expense of on-site operational and visitor parking capacity, which is now non-existent.
4. By a sublease dated 23 July 2009, the Australian Capital Territory (**the Territory**) leased a portion of Block 23 Section 41 Lyneham (**Block 23**), identified as Area 1 in Subleasing Plan number 6664 (**Area 1**), to BCE, for a term of twenty years commencing on 1 May 2009, for use as an outdoor sports facility and ancillary car parking. Transport Canberra and City Services Directorate (**TCCS**) is the custodian of Block 23 (including Area 1) on behalf of the Territory.
5. BCE has never used Area 1 for the purpose authorised by the sub-lease. Immediately after the grant of the sub-lease, BCE constructed a large capacity gravel car park occupying most of the site with driveway access from Brigalow Street. At some point, a right-hand turning lane was created on Brigalow Street to give access to the car park from both directions. This could not have happened

without the concurrence of TCCS. Following complaints by parents about the deteriorating condition of the gravel car park, BCE constructed an approximately 130 vehicle capacity sealed car park on Area 1 in late 2016. Since its creation, BCE has used the car park as a stand-alone parking facility for staff, parents, students and visitors, and to provide drive-through access from Brigalow Street for dropping off and picking up children before, during and after school. BCE estimates that approximately 600 to 1,000 vehicles use the car park daily.<sup>1</sup>

6. The Lyneham Primary School is also located adjacent to Block 23. Numerous young children who attend the primary school traverse the bicycle and footpath in front of the car park on school days, which forms part of what is designated as a 'safe route' to the primary school for the purposes of the ACT Government's 'Active Streets' program. Students from the primary school also use the open space on Block 23 on a shared basis with students of the College. Lyneham High School is also located nearby and use the public open space for recreation.
7. A 'development' in relation to land includes building a structure on land<sup>2</sup> (where a structure includes a driveway or car park),<sup>3</sup> carrying out earthworks or other construction work on land,<sup>4</sup> and changing a use of land.<sup>5</sup>
8. Block 23, which is known locally as the Lyneham Neighbourhood Oval, and Area 1, which forms part of Block 23, is zoned PRZ1 Urban Open Space. 'Car park' is a prohibited development in PRZ1.<sup>6</sup> The primary use of Area 1 as a car park requires the land to be rezoned, necessitating a variation to the Territory Plan. This was never attempted.
9. BCE's use of Area 1 as a car park attracted considerable local opposition. Opposition hardened over the years as BCE sought, unsuccessfully, to obtain development approval for the construction of a sporting pavilion, community activity centre, and larger capacity car park on land comprising Area 1, a public

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<sup>1</sup> Exhibit A1, page 202 at [7.6]

<sup>2</sup> PD Act s 7(1)(a)

<sup>3</sup> PD Act Dictionary, 'structure'

<sup>4</sup> PD Act s 7(1)(b)

<sup>5</sup> PD Act ss 7(1)(d), 8(c)

<sup>6</sup> PRZ1 – Urban Open Space Zone Development Table – Prohibited Development

car park on Block 21 Section 41 Lyneham and additional parts of Block 23; and later, unsuccessfully sought the Territory's agreement to sell Area 1 to BCE.

10. On 8 December 2022, the LCA applied to ACTPLA under section 350(1) of the PD Act for a controlled activity order directing BCE not to undertake a development without development approval, and to restore any land or structure that has been altered without development approval or permission required under territory law.
11. On 9 May 2023, ACTPLA gave BCE a show cause notice under section 350(3) of the PD Act, allowing 10 working days for BCE to give written reasons why an order should not be made.
12. BCE provided a response on 23 May 2023 in which it contended that the application should be dismissed, and no controlled activity order should be made. BCE submitted the car park provided an ancillary service to the local community as well as a parking facility for the College. Removal of the car park would substantially increase the demand for parking in surrounding streets and compromise the safety of children and other pedestrians. Further, removal of the car park was likely to result in deterioration of public land through its continued use as a car park by members of the public, increasing the slip and fall risk to the general public, the risk of motor vehicle collisions, the risk to children navigating the traffic, and potentially giving rise to health and well-being issues for staff, students, and members of the local community. BCE submitted it sealed the car park for the benefit of the community and that the car park remains ancillary to the use of the adjacent oval by students as playing fields and for outdoor sporting activities. Finally, BCE submitted the sports fields are utilised by members of the general public and the car park remains open to the general public, including on weekends.
13. The effect of section 351(4) of the PD Act and section 303 of the *Planning and Development Regulation 2008* (repealed) is that ACTPLA is taken to have refused to make a controlled activity order applied for under section 350 of the PD Act if it fails to decide the application before the end of 20 working days after the end of the 10-working day period allowed for a written response to the show

cause notice. The time for ACTPLA to decide the application by the LCA expired on 22 June 2023. ACTPLA failed to decide the application within the prescribed time and, therefore, is taken to have refused to make a controlled activity order on 23 June 2023.

### **The application to the tribunal**

14. On 19 July 2023, the LCA applied to the tribunal for review of ACTPLA's refusal to make a controlled activity order. The LCA contended that the correct or preferable decision was to make a controlled activity order requiring BCE to cease using Area 1 as a car park and to restore the land to its condition as at 30 June 2009 – i.e. immediately before BCE constructed the gravel car park.
15. On 28 August 2023, the Tribunal made orders for the filing and service of evidence and other material and listed the application for a 3-day hearing commencing on 13 November 2023.
16. On 26 September 2023, ACTPLA filed submissions in which it accepted that a controlled activity had been conducted and that the Tribunal had jurisdiction to make a controlled activity order but submitted that the correct or preferable decision was to not make an order for three reasons. First, planning considerations – in particular, the need for a car park in this location – weighed against removal of the car park. Second, removing the car park would not add considerably to the quality, quantity, and distribution of open spaces in the area. Third, while there was a public interest in upholding the integrity of the Territory's planning laws, the overriding public interest was not served by requiring the removal of the car park given the significant safety and traffic issues that would result and their impact on local residents. ACTPLA submitted that the decision should be affirmed for these reasons.
17. On 18 October 2023, the LCA filed submissions in which it detailed three critical points of difference from the position outlined by ACTPLA, which the LCA submitted should cause the Tribunal to conclude that the correct or preferable decision was to require the removal of the car park and reinstatement of the land. First, while BCE undoubtedly had become dependent on the car park, this was the result of a deliberate strategy to expand the number of students enrolled at the



College and done despite representations that development of the Lyneham campus, for which approval was given in 2016, would not result in any increase in enrolments. BCE's dependence on the car park was irrelevant to the interests of the local community and should be given minimal weight in applying the public interest test required by section 351(2) of the PD Act. Second, the presence of the car park did not reduce the risk to children and others required to traverse the bicycle path and footpath at the entrance to the car park. To the contrary, the car park presented a real and significant danger to pedestrians. Third, this was not a case where BCE could have obtained, but simply omitted to obtain, development approval for a car park. BCE had used Area 1 as a car park for more than 10 years in breach of the purpose clause of the sublease. The use and development of Area 1 as a car park was incapable of being given development approval without a variation to the Territory Plan to change the zoning of the land. On its face, in those circumstances, the sealing of the car park in 2016/2017 involved the commission of a criminal offence under part 7.3 of the PD Act. The LCA submitted that those factors and the public interest in ensuring compliance with the ACT planning system required the making of an order enjoining BCE to reinstate the car park to its proper status as public urban open space. Any resulting inconvenience to BCE was a lower order consideration and should not lead to a different outcome.

18. On 30 October 2023, ACTPLA filed submissions in reply in which it gave four answers to the LCA's submissions. First, it submitted the LCA had not engaged meaningfully with the question of what is likely to occur if the car park is removed. Second, it submitted the safety concerns identified with the car park can be addressed. Third, in response to a suggestion that ACTPLA was, in effect, seeking to cover up its mistakes of the past, ACTPLA said its position was informed by a pragmatic acceptance that the public interest in ensuring compliance with the ACT planning system is outweighed by the public interest in avoiding traffic congestion and safety risks that would result from removal of the car park. Fourth, there is no evidence that any member of the community wishes to use Area 1 in a way that would require it to be restored to its original condition.

19. Although a copy of the application was served on BCE on 10 August 2023, it did not apply to be joined as a party until 27 October 2023, claiming that it did not seek to participate earlier because it “understood the proceedings were an administrative matter that [ACTPLA] should (and was) attending to” and had not sought legal advice as a result.<sup>7</sup> BCE claimed this changed on 10 October 2023, when BCE received correspondence advising that ACTPLA conceded BCE’s use of Area 1 as a car park was a controlled activity and, while ACTPLA intended to oppose the making of a controlled activity order, there nevertheless was a risk of this happening.<sup>8</sup> The application for joinder was not supported by any evidence of the foundational facts. In spite of the lack of evidence and the absence of any satisfactory explanation for BCE’s failure to act promptly to protect its interests upon being served a copy of the application on 10 August 2023 – in particular, where the response to the show cause notice was drafted by BCE’s solicitors – or for its delay in applying to be joined as a party after receipt of the correspondence from ACTPLA on 10 October 2023, in the interests of procedural fairness, the Tribunal made an order for BCE to be joined as a party on 6 November 2023. BCE informed the Tribunal that it did not wish to delay the start of the hearing and was able to serve its evidence and submissions promptly. The Tribunal allowed a short time for this to happen and confirmed that the hearing would commence on 13 November 2023.
20. In written submissions filed on 10 November 2023, BCE conceded that the use and development of the land as a car park constituted a controlled activity and that a controlled activity order should be made against it in respect of that use and development if the position could not be regularised under the ACT planning scheme. To that end, BCE submitted that the decision under review should be set aside and substituted by a decision to make a controlled activity order in the terms sought by the LCA but subject to the order being stayed until 1 March 2024, or:

*[I]n the event that [BCE] makes a development application on or before 1 March 2024 which seeks, either solely or as part of a broader development application, approval for the use and development of the land at Block 23*

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<sup>7</sup> Annexure A to the application for interim or other orders filed 27 October 2023 at [6]

<sup>8</sup> Annexure A to the application for interim or other orders filed 27 October 2023 at [7]

*Section 41 in Lyneham in the ACT (Land) for the purposes of a carpark, until such development application is determined.*

21. BCE proposed that, if it obtained approval for the use and development of the land as a car park, the controlled activity order should be stayed permanently.
22. ACTPLA adopted the same position at the hearing.

### **The hearing**

23. The hearing took place over two days on 13 and 14 November 2023 and commenced with a view of the car park and surrounding streets. At the start of the formal hearing, the Tribunal granted an application by TCCS to be joined as a party on the basis that senior and junior counsel for ACTPLA were briefed to appear for both parties and TCCS did not wish to rely on any additional evidence.
24. Because BCE conceded that a controlled activity order should be made requiring demolition of the car park and reinstatement of the land, and the other parties agreed, the issue the Tribunal was required to determine was whether all or any part of the controlled activity order should be stayed and, if so, for how long and on what terms.
25. The LCA contended that the Tribunal should order BCE to cease using and permitting others to use Area 1 as a car park from the end of the school term on 8 December 2023, but that the order for reinstatement of the land should be stayed for a period of time to allow BCE an opportunity to seek appropriate development approval, recognising that this would require a variation to the Territory Plan. BCE, ACTPLA and TCCS contended that BCE should be permitted to continue to use Area 1 in the same way as it had before, with some minor changes to improve the safety of pedestrians and cyclists at the entrance to the car park, until BCE either obtained development approval for the use and development of the land as a car park or development approval was refused, a process that was acknowledged may take up to two years.
26. Hence, evidence at the hearing was focussed on whether it was in the public interest to order BCE to cease its unlawful use of Area 1 with effect from 8 December 2023, or allow the use to continue and, if so, for how long and on what terms.

### The LCA's evidence

27. The LCA tendered the Tribunal documents (**T-docs**)<sup>9</sup> (being documents used by ACTPLA in considering LCA's application) and two folders of documents compiled by Ms Kate Bradney – a data analyst and member of the LCA who was responsible for researching, preparing, and submitting the application for a controlled activity order on behalf of the LCA – to establish the relevant factual background, which we discuss later. Ms Bradney also provided two witness statements<sup>10</sup> and was cross-examined briefly. She gave evidence that a crossing supervisor had been provided for some time during 2021, but that this had not worked well, with the supervisor focussing attention mainly on directing the flow of traffic entering and exiting the car park, including stopping traffic to allow vehicles to turn right into the car park from the turning lane. She considered that, if a traffic controller is used, it should be someone with appropriate training and qualifications.
28. The LCA tendered a witness statement by Elisabeth Bateson, the President of the Lyneham Primary School Parents and Citizen's Association, without objection.<sup>11</sup> She was not cross-examined. She said:

*The...(BCC) carpark is a significant safety concern for the Lyneham community. The level of traffic entering and exiting the carpark at school drop off and pick up times is enormous. There is very little issue with traffic entering and exiting the BCC carpark outside these times indicating the car park is servicing the BCC only and not the wider community. The traffic build-up after school, between 3:00 p.m. – 3:30 p.m., causes cars to queue all the way back to Moat St. This congestion is linked to the BCC car park only and clears immediately after passing the BCC car park entrance. This traffic build-up causes not only time delays to other drivers using the area but leads drivers to exit the waiting traffic and drive on the wrong side of the road on Brigalow St to get past the traffic congestion. This is a regular occurrence and causes an increased risk to pedestrian safety in the area.*

*Whilst the traffic congestion and pedestrian safety on Brigalow St our concerning, the most concerning issue is the repeated reports of children almost being hit by the cars entering and exiting the BCC car park. The entrance to the BCC carpark is a pedestrian danger hot spot. For the last two years in my position as P&C President, parents have continually reported having to shepherd their children across the entrance to this car park as it is not safe for the children to cross on their own. I too need to do*

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<sup>9</sup> Exhibit A1

<sup>10</sup> Exhibits A9, A10

<sup>11</sup> Exhibit A3

*this with my own children. Every day drivers enter and exit the BCC car park who fail to yield to pedestrians and cyclists.*

*Concerns from parents have been reported to me informally, at the school gate, via discussions at P&C meetings, and by formal emails to the P&C email inbox. In 2022, the P&C supported the 'Safe Active Travel to School in Lyneham' petition to the ACT Legislative assembly..., alerting the ACT Government to the dangers faced by young pedestrians and cyclists, and seeking an assessment of the car park development...*

*The...P&C acknowledges the installation of a green strip "priority crossing" across the entrance to the BCC carpark as a step towards improving the safety of pedestrians and cyclists, however this has done nothing to improve the safety of the crossing...The "priority crossing" is not readily visible to motorists. Cars queue across the intended "priority crossing" every day. Children have to choose between waiting long periods for the crossing to clear or weaving between cars to get to or from school. At times cars will cross the priority crossing area after a child has commenced using the crossing. Parents have reported near misses where they have had to physically pull their children back from the crossing to avoid a collision with a car. Complaints have been made and passed on to the ACT Government but we are yet to see a proper solution which prioritises the safety of our children...<sup>12</sup>*

29. The LCA tendered a witness statement by Liza Yeum, the Chair of the Lyneham Primary School Board, without objection.<sup>13</sup> She was not cross-examined. She said in part:

*Brigalow Street is a high traffic Street utilised by students residing in Lyneham, North Lyneham, Downer, and surrounds. This is a street that is regularly congested at peak school times which causes drivers to become frustrated and distraction [sic] and there is a serious concern this distraction will lead to serious and unnecessary injury of a community member.*

*The presence of the crossing supervisors at the two crossings on Brigalow Street is undermined by the driveway into the BCC Carpark. Drivers are regularly seen queueing across the footpath causing pedestrians and cyclists to weave between vehicles. The footpath across the driveway is only delineated by green paint on the ground, which is easily missed by drivers and often ignored...*

*The Transport Canberra bus route 50 services Lyneham Primary school, providing transport options for students from Watson, Downer, and Dickson. The service is scheduled to arrive at [the primary school] at 8:51 every morning, which allows students enough time to comfortably make their way to the playground for the morning bell. This service is consistently late due to the high traffic on Brigalow Street and the number of vehicles*

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<sup>12</sup> Exhibit A3

<sup>13</sup> Exhibit A6

*trying to access and depart the BCC carpark. It has been witnessed on innumerate [sic] occasions, parents stopping in the designated bus zone at the front of BCC to drop their children because access to the car park is too difficult, this in turn causes even further delays to the bus service.*

*Afternoon bus services are also impacted by the traffic attempting to get into the carpark. There is a turning Lane for north bound traffic to enter the carpark however, this Lane is at capacity most afternoons and causes traffic to bank up on Brigalow Street while drivers wait to access the carpark. With these delays and often the space left for cars to pass being too narrow for the bus, the service has no option to wait and be delayed in picking up waiting passengers who are largely students attempting to get home.*

*There can be a lot of frustration, anger and aggression witnessed at the BCC carpark site at peak periods, with this comes a significant amount of noise pollution. On an almost daily basis impatient drivers attempting to either entry [sic] or leave the carpark can be heard beeping and yelling at each other. There is a real and genuine concern that this behaviour could escalate and expose children and the community to even more unsavoury behaviour.<sup>14</sup>*

30. The LCA tendered witness statements from several local residents attesting to their personal experiences of ‘near misses’ involving their young children and the kind of pedestrian safety issues and unsafe driver behaviour at the entrance to the car park described by Ms Bateson and Ms Yeum.<sup>15</sup> Their statements were tendered without objection and none of the witnesses were required for cross-examination.
31. The LCA tendered a witness statement by a local resident, Trevor Vickers, who took a series of photographs of the car park and pedestrian crossing on 25 August 2023 and an approximately 12-minute video of traffic congestion on Brigalow Street at about 9:00am on 28 August 2023 as vehicles entered and exited the car park.<sup>16</sup> The video shows significant traffic congestion in both directions along Brigalow Street and a constant stream of vehicles entering and exiting the car park across the footpath and bicycle crossing. Vehicles can be seen entering the

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<sup>14</sup> Exhibit A6

<sup>15</sup> The witnesses included Iveta Bales, whose children attend kindergarten and Year 3 at Lyneham Primary School and who walks her children to and from school (exhibit A2); Justine Gilbert, whose son attends kindergarten at the primary school and who walks her child to and from school (exhibit A4); Laura Chien, whose children attend the primary school and who travels with her children to school by bicycle or scooter from Downer (exhibit A5); Natasha Rai, whose child attends the primary school and who walks her child to school (exhibit A7)

<sup>16</sup> Exhibit A8 (a second copy of the video was tendered as exhibit A17)

car park from both directions. Most vehicles exiting the car park can be seen to obey the left-hand-turn-only sign at the exit, but some can be seen making an illegal right-hand turn across traffic.

32. The LCA also called Craig O'Meara, the former property manager of BCE between 2016 and 2019, to give oral evidence about the sealing of the car park at the end of 2016. Mr O'Meara was cross-examined briefly. He said that in about mid-2016, on instructions from the former business manager, Ms Rachel Axford and the Chair of the board of BCE, Mr Zwajgenberg, he obtained a quotation to bitumen seal the car park. Mr Zwajgenberg told Mr O'Meara several times during 2016 that the College owned the car park. Mr O'Meara recalled that, at the College presentation night at the end of 2016, Mr Zwajgenberg announced to the assembly that the College had purchased the car park and would be sealing it for the campus, which drew much applause and cheering. Mr O'Meara arranged for the sealing of the car park over the Christmas break so that it was ready for the start of the school year in 2017. On instructions from Mr Zwajgenberg, Mr O'Meara installed a chain across the entrance to block after-hours access. Several months later, Mr Zwajgenberg instructed him to remove the chain, telling him that it was a public car park and that the College did not own the land.

#### **ACTPLA's evidence**

33. ACTPLA tendered a traffic and road assessment by Benjamin Hubbard, a Senior Director of Roads ACT within the ACT Government. Mr Hubbard was cross-examined.
34. Mr Hubbard based his assessment on three site visits and driving to work along Brigalow Street for several weeks. He said that Brigalow Street is a major collector road joining Mouat Street with Wattle Street. It has a school zone speed limit of 40 km/h in operation on school days between the hours of 8:00am and 4:00pm. The speed limit outside of school hours is 50 km/h. A major collector road can be expected to have a traffic volume of between 3,000 and 6,000 vehicles per day. The average daily traffic on Brigalow Street is approximately 6,400 vehicles per day. Traffic flow data for the period 17 February 2022 to 6 March 2022 shows peak two-way traffic volume occurs between 8:00 and 9:00am at 826 vehicles/hour and between 3:00 and 4:00pm at 649 vehicles/hour.

35. Mr Hubbard said that private schools often attract students from further afield, unlike public schools serving a local catchment where students have the opportunity to walk or cycle to school, which means more people drive their children to school. He observed that the College has no on-site parking, and that the BCE car park operates close to full capacity between the hours of 9:00am to 4:00pm, demonstrating the need for parking for staff and students travelling to school by car.
36. Mr Hubbard assessed that the College was required to provide a minimum of 95 parking spaces based on the parking requirements for a school in the Parking and Vehicular Access General Code (**PVAGC**). Mr Hubbard assumed for the purpose of his assessment that the College has 700 students, with 590 students in kindergarten to year 10, and 110 in years 11 and 12. However, this is likely to be an under-estimate. School census data provided by BCE shows that in 2023 there were 1044 students enrolled in the College, not including another 67 children attending the early childhood centre. Of these, 931 students were in kindergarten to year 10 and 113 were in years 11 and 12. Applying the parking rates from the PVAGC on which Mr Hubbard based his assessment, it would appear that, in 2023, the College may have been required to provide 135 on-site parking spaces before factoring in the drop-off parking requirements for children attending the early childhood centre.
37. In oral evidence, Mr Hubbard said the Territory Plan assumes that businesses and residents will provide off-street parking and that “a very fundamental difference between the ACT and elsewhere is that every property and every business is required to provide adequate parking on their site”.<sup>17</sup> The College appears to be a notable exception to the rule. The circumstances in which the College obtained planning approval to increase the density of development of the campus at the expense of on-site parking merits examination to ensure such planning failures are not permitted to happen again. However, that is an issue for the ACT Government and not this Tribunal.

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<sup>17</sup> Transcript of proceedings dated 14 November 2023, page 112, lines 15-17



38. It was apparent from the site inspection that there is spare parking capacity in nearby streets. Mr Hubbard inspected the area between 1:00 and 2:00pm on the first day of the hearing for the purpose of making a rough estimate of additional parking capacity. He paced out sections of the road between driveways and allowed approximately six metres for each car space and a minimum clearance of two metres to each driveway. He observed that the northern side of Boyd Street has parking restrictions that prohibit parking between 7:30am and 6:00pm. The southern side is unrestricted and can accommodate approximately eight vehicles. Lewin Street between Longstaff Street and Gill Street is quite narrow and can accommodate parking only on one side. The western side has 'no stopping' restrictions and 'no parking' restrictions between 8:30am and 9:30am, and between 2:30pm and 4:00pm on school days. Parking on the eastern side of the street is unrestricted and could accommodate approximately 36 vehicles. There are a further eight unrestricted marked parking bays on Brigalow Street to the south of the oval car park entrance. Mr Hubbard noted that, apart from Lewin Street and Boyd Street, there are other nearby residential streets that have no parking restrictions and could be used for parking by College staff and parents. He did not provide an estimate of the additional capacity. While the Tribunal considers that Mr Hubbard's assessment of the parking capacity of nearby streets is likely to be conservative – common experience suggests that unless parking spaces are clearly delineated, vehicles will park closer to each other and to driveways than Mr Hubbard's estimate allows – the Tribunal accepts that closure of the school car park is likely to result in a reasonably significant shortfall in available parking located a short walking distance from the school. The extent to which the shortfall can be absorbed in other nearby streets is unclear.
39. Mr Hubbard observed that during the morning drop-off period vehicles frequently queued on Brigalow Street in both directions and, while there was some delay to traffic flows, queued vehicles tended to move on reasonably quickly. He observed high numbers of pedestrians – mostly school children from the Lyneham Primary School and Lyneham High School – crossing the entrance to the car park in the morning peak period, which decreased the ability of vehicles to enter the car park. Significantly fewer pedestrians were observed crossing the car park entrance

during the afternoon peak period, probably because the public schools end their day 30 minutes earlier than the College.

40. Mr Hubbard noted that the College campus is well served by school buses and a public bus service that operates every 30 minutes during the day. The campus is also well connected to an extensive walking and cycle path network that includes supervised pedestrian crossings on Brigalow Street during the morning and afternoon peak periods.
41. Mr Hubbard considered that removal of the car park would result in over a hundred drivers seeking to park their vehicles in nearby streets or in other local car parks, such as at the Lyneham shops or the Southwell Park playing fields, where there are parking restrictions and limited availability. The need for before and after school drop off and pick up would continue and would have to be in the bus bay at the front of the College or within a dedicated facility at the location of the current car park. Without a dedicated drop off and pick up location, illegal parking along the campus frontage to Brigalow Street was highly likely, which would increase traffic risks in the afternoon peak period in particular, as parents will tend to arrive early and wait. Shared use of bus bays is also problematic, causing vehicle queuing and delays to scheduled bus services. Mr Hubbard noted that traffic queuing can cause drivers to become frustrated, leading to inappropriate and unsafe driver behaviour. He opined:

*Without a dedicated facility for the drop off and pick up it is likely that the impacts on traffic movement and road safety would be worse than currently experienced. This is because the current arrangement in the car park provides adequate space for immediate drop off and pickup and space for drivers to park for longer periods without affecting circulating traffic.*<sup>18</sup>

42. Mr Hubbard carried out a road safety assessment of the entrance to the car park on 6 September 2023. The assessment considered “whether the features of the access design and car park arrangement are conducive to safe use by all road users”.<sup>19</sup> He identified a number of safety issues and gave each one a “risk priority” ranging from low risk to high risk. Mr Hubbard did not explain the risk assessment method he employed or the criteria he used to determine whether a

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<sup>18</sup> Exhibit R1, page 20

<sup>19</sup> Exhibit R1, page 13

high, medium or low risk priority should apply. Thus, it is unclear whether Mr Hubbard considered that the likelihood of some occurrences was relatively low but the likelihood of the occurrences having serious consequences was relatively high, or vice versa, or some other combination of factors.

43. Mr Hubbard's traffic safety assessment identified the following risks.
44. The placement of the All Traffic Turn Left sign at the exit to the car park could cause some driver confusion because it is located below a sign giving the times of operation. Drivers would expect the times of operation to appear below, rather than above, the regulatory sign. This was assessed as medium risk. The SLOW CHILDREN sign at the bottom of the sign assembly is not a prescribed road sign. The three-sign assembly partially obscures the visibility of pedestrians on the footpath that crosses the car park access. This was assessed as low risk, although the reason why is unclear. Mr Hubbard considered that using standard traffic signs, rearranging their order, and relocating the signage to an alternative location where it would not obscure pedestrians would be a possible mitigation strategy.
45. Mr Hubbard noted that a driver's visibility of pedestrians on the footpath to the right of the access when entering the car park is poor because the alignment of the footpath places approaching pedestrians behind the entering driver's usual cone of vision. Also, particularly in the morning peak period, drivers entering the car park can obscure the visibility of pedestrians on the path for both entering and exiting drivers. Both of these were assessed as medium risk. The risk could be mitigated by supervising the car park access crossing during the morning peak hour and making parents and students aware of the risk.
46. He observed that, on numerous occasions, pedestrians – mostly public school students – crossed the road or waited within the road to cross from and to a shared path connecting Brigalow Street with Lewin Street, which is located directly opposite the car park entry. This was assessed as high risk. The risk could be mitigated by examining the footpath network in the local area and considering aligning paths and crossing locations.

47. He observed that, on several occasions during the morning peak period, the queue of vehicles waiting to turn right into the car park exceeded the length of the queuing lane, temporarily blocking the northbound movement of traffic. This was assessed as medium/low risk and could be mitigated by extending the turning pocket.
48. Mr Hubbard observed that during the morning drop-off and afternoon pick-up periods, many drivers disobeyed the left turn only sign and road markings and turned right out of the car park. This was assessed as medium risk and could be mitigated by reminding parents and student drivers that the obligatory left turn is in place to aid traffic flow and improve road safety. Action may be needed if the situation worsens, however, Mr Hubbard thought current levels of compliance were good and the risk was acceptable.
49. Mr Hubbard observed that, during the morning drop-off and afternoon pick-up periods, some southbound drivers travelled on the wrong side of the road to avoid vehicles queuing to enter the car park. This was assessed as medium risk. Mr Hubbard suggested the situation should be monitored and action may be needed if the situation worsened. He considered current levels of compliance were good and the risk was acceptable.
50. Most of the road safety issues Mr Hubbard identified related to the interaction of pedestrians and vehicular traffic at the entrance to the car park – i.e. at the verge crossing. In oral evidence, Mr Hubbard agreed there was nothing to show that the verge crossing had been designed to comply with the PVAGC and relevant Australian Standards, likely because “it doesn’t appear to have been through any sort of approval process”.<sup>20</sup> He observed that the majority of pedestrians were school children. He noted that young people do not fully develop an awareness of road safety risks until their early 20s and often will make poorer judgments about road safety than older users. Also, young people are often distracted and less observant of road safety risks. He characterised the risk as an increased likelihood of a crash resulting from reduced inter-visibility between car drivers

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<sup>20</sup> Transcript of proceedings dated 14 November 2023, page 112, line 5

and pedestrians, combined with the high number of pedestrians being children who have a lower awareness of road safety risks.

51. Mr Hubbard did not think there was an immediate problem with the verge crossing, nor that a full-time supervisor was necessary and even less so if the following improvements were made. He considered that many of the road safety issues could be mitigated by minor changes to signs, modification of the access configuration or by behavioural management techniques. The current driveway could be converted into a roadway access that would allow installation of a zebra crossing on a raised hump, which would slow vehicles entering and exiting the car park and clarify that pedestrians have right of way. Consideration could be given to relocating the path connections and providing an additional zebra crossing on Brigalow Street south of the car park, which would avoid the need for children to cross the entrance to the car park. Other measures to improve road safety could include reminding parents and school staff of the safety risk, particularly at the entrance to the car park and the need to turn left out of the car park during school hours.
52. Mr Hubbard's overall opinion was that the car park appeared to operate safely and efficiently.
53. The Tribunal does not accept this assessment. The unchallenged evidence of Ms Bateson, Ms Yeum and local residents about the dangers faced daily by young pedestrians and cyclists and the behaviour of drivers entering and exiting the car park, the risks Mr Hubbard identified and his acknowledgment that school age children have reduced awareness of road safety risks and are often distracted and less observant of road safety risks points to a different conclusion. The Tribunal is persuaded that there is a real and foreseeable risk of an accident causing serious injury to a child or cyclist resulting from the interaction of children and cyclists and vehicular traffic at the entrance and exit to the car park.
54. Mr Hubbard did not consider that a full-time crossing supervisor was necessary. There was limited evidence that a previous attempt to manage the crossing using a supervisor proved to be unsatisfactory and was abandoned. The Tribunal was not provided with any evidence of what a crossing supervisor can do lawfully to

control the flow of traffic entering and exiting the car park, or to regulate the movement of cyclists and pedestrians using the pathway, nor how this would affect the flow of traffic on Brigalow Street or contribute to the safety of the crossing. Even if the Tribunal had been persuaded that the College should be required to provide a crossing supervisor between certain hours, an issue would have arisen whether the Tribunal has power to order this. The Tribunal invited the parties to consider whether the Tribunal has power to permit or authorise a controlled activity to continue on a modified basis,<sup>21</sup> but the question was left unanswered.

55. Mr Hubbard's opinion that the risks can be managed by behavioural management techniques does not withstand scrutiny. Encouraging parents to obey the road rules and take care when entering or exiting the car park because children may be crossing is unlikely to have any meaningful effect in reducing the incidence of casual negligence, which is more likely to be the result of momentary inattention, whether due to the driver being distracted, frustrated, late or some other transient cause.
56. The Tribunal accepts that, viewed in the abstract, other ad hoc mitigation measures of the kind suggested by Mr Hubbard may go some way towards managing the risks, but considers that this is neither a lawful, nor satisfactory, substitute for a properly designed and constructed crossing that complies with relevant Australian Standards and has undergone the appropriate development approval process. The suggested modifications to the driveway access configuration, relocating path connections, altering signage and converting the driveway access to a roadway with a zebra crossing on a raised hump, whether appropriately characterised as minor or otherwise, are insufficiently detailed to be capable of proper assessment in their current form. They are described as things that might be done to mitigate the risks. The Tribunal is not equipped to decide, in this application, matters that require detailed assessment as part of a planning approval process. Nor does it have power to do so. Changes of the kind contemplated by Mr Hubbard would require development approval. Undertaking the development without development approval would amount to conducting a

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<sup>21</sup> Transcript of proceedings dated 13 November 2023, page 133 line 15- page 134, line 20

further controlled activity. Moreover, it is doubtful whether development approval, if sought, could lawfully be given where the evident purpose of the development is to facilitate a prohibited development (car park) on PRZ1 land. Section 50 of the PD Act prohibits the Territory, the Executive, a Minister or a territory authority from doing any act, or approving the doing of an act, that is inconsistent with the territory plan.

57. ACTPLA tendered a witness statement by Joshua Thomson, the Assistant Director of Land Information and Addressing within the Office of the Surveyor-General and Land Information within the ACT Government, in which he identified 50 parcels of land zoned PRZ1 within a 1 km radius of the college with a total area of 530,954 m<sup>2</sup> (about 53.1 hectares). Mr Thomson's statement was tendered without objection. He was cross-examined briefly. The Tribunal has placed little weight on his evidence because the determinative issues lie elsewhere.
58. ACTPLA also tendered two witness statements by Alexandra Kaucz, the Senior Director of the Territory Plan team within the Environment, Planning and Sustainable Development Directorate (**EPSDD**) of the ACT Government, in which she explained the process for a major Territory Plan amendment under the new *Planning Act 2023* which was due to commence on 27 November 2023. The gist of her evidence was that the general timeframe for a simple amendment, involving no or few public submissions and no Standing Committee inquiry, is 8-10 months and for a complex amendment, involving significant public submissions and a Standing Committee inquiry, can be 18-24 months. Ms Kaucz was cross-examined briefly.
59. Considering the history of local opposition to BCE's development plans for the oval, it is reasonable to anticipate that the process is likely to take up to two years with no guarantee as to the outcome. No party disputed this.

**BCE's evidence**

60. BCE tendered a witness statement provided by John Clarke, the business manager of BCE, deposing to action taken by BCE on 8 November 2023 to regularise the use and development of the car park, including instructing architects to assist with the preparation and lodgement of a development application, and writing to ACTPLA indicating an intention to formally request a variation to the Territory Plan and amendment to the sublease. Mr Clarke had no personal knowledge of circumstances relating to BCE's use and development of Area 1 as a car park as those events predated his employment. The annexures to his witness statement included a copy of a special resolution passed by the board of BCE, signed by Suzanne Power, Greg Zwajgenberg and Alan Doig on 8 November 2023, stating as follows:

*1. The Board **observes** that:*

- (a) On 1 May 2009, the Brindabella Christian Education Limited (ACN 100 229 669) (**College**) entered into a sublease agreement with the Crown in right of the Australian Capital Territory (**Sublease**) in relation to an area of Block 23 Section 41 in Lyneham in the ACT (**Land**).*
- (b) For some time since 1 May 2009, College students, parents and staff have utilised the Land for the purpose of car parking.*
- (c) In 2016, due to the deterioration of the surface of the Land resulting in an elevated risk to safety to the public, the College engaged contractors to seal the surface on the Land for the purposes of car parking.*
- (d) In the Board's view, the use of the Land as a car park is important to the day-to-day functioning of the College and critical to the safe and (so far as possible) efficient flow of traffic around the College, Brigalow Street and the broader Lyneham area, especially during busy school pick-up and drop-off times.*

*2. The Board **notes** that:*

- (a) The Lyneham Community Association Inc (**Association**) has sought a controlled activity order against the College under the Planning and Development Act 2007 (ACT), which would require the College to cease using the Land as a car park and to remediate the land.*
- (b) The Association's application for a controlled activity order is the subject of proceedings AT55/2023 in the ACT Civil and Administrative Tribunal, to which the College was joined on 6 November 2023.*
- (c) In the course of considering the allegations made by the Association in the Tribunal proceedings, the Board has become*



*aware that the use and development of the Land for the purpose of car parking may not, absent an approved development application, be authorised under the ACT planning legislation.*

3. The Board **observes** that [to] remedy the current situation, the Association's view appears to be that the College must (at least):

- (a) *seek and obtain a variation to the Territory Plan such that zoning of the Land is changed from PRZ-1 to a zone in which "car park" is not a prohibited development;*
- (b) *seek and obtain a variation to the Sublease such that "car parking" is acknowledged as a permitted use of the Land; and*
- (c) *make and have approved by the planning authority a development application in relation to the use and development of the Land for the purposes of a car park.*

4. *Having regard to the above matters, and out of a desire to ensure that the College complies with ACT's planning legislation, the Board resolves that the College take necessary steps to ensure that the matters set out in 3(a) – 3(c) are achieved by, in the first instance:*

- (a) *causing a letter to be sent to the ACT Planning and Land Authority requesting a Territory Plan variation in respect of the Land and a variation to the sublease; and*
- (b) *progressing without delay a concurrent development application in respect of the use and development of the Land for the purposes of a car park, including by instructing the College's architects to prepare appropriate plans. (Original emphasis)*

61. Considering the self-serving nature of the statement in 2(c) regarding the time at which, and the circumstances in which, the Board first became aware that the use and development of the land as a car park "may not" be authorised without development approval, and because an issue the Tribunal had to decide was whether the breach of the planning laws was deliberate or inadvertent, the Tribunal directed that the evidence could not be relied upon for a hearsay purpose. Although counsel for the LCA made it clear that the Tribunal would be invited to draw adverse inferences if BCE failed to call Mr Zwajgenberg as a witness, neither he nor any other member of the board gave evidence about the circumstances in which the controlled activity was conducted and whether it involved a deliberate or inadvertent contravention of the planning laws. There was no suggestion that Mr Zwajgenberg or any other board member with relevant personal knowledge was unavailable to give evidence.

62. In oral evidence, Mr Clarke said the early learning centre operates from 7:30am to 6:00pm and requires parents to park and take their children in. The car park is very busy between 8:15am and 9:15am, with parents dropping their children off, and again for school pick-up between 2:30pm to shortly after 3:30pm, with vehicles parked in the laneways and between parking bays. He said it is difficult to find parking within a reasonable walking distance, which he considered was up to a 5-minute walk from the College.
  
63. BCE also tendered a witness statement by Denis O'Brien, a semi-retired person who lives opposite the college campus on Brigalow Street and works casually as a school crossing supervisor including in Brigalow Street. He was previously the Chair of the LCA but left the organisation after he found himself in the minority because of a disagreement with other members about their opposition to BCE's proposal to redevelop the car park and build a sports hall. He opined, among other things, that the majority of people utilising the car park followed the rules and did so in an orderly and responsible fashion. In cross-examination, he agreed that his opinion was based on what he saw from the zebra crossing outside the College, which was 75 to 80 metres from the car park entrance. He agreed that it was too far away for him to observe 'near-misses' and children weaving between cars and that his vision was further restricted because of a curve in the roadway. Mr O'Brien gave his opinion about what he thought would happen if the car park was closed and commented on parts of Mr Hubbard's traffic and road assessment. The gist of his evidence was that he believed it would not be in the best interests of the local community to remove the car park because of the "extreme" problems this was likely to cause with traffic congestion and parking. Mr O'Brien was cross-examined. Noting that the Tribunal is not bound by the rules of evidence, the Tribunal nevertheless has given little weight to Mr Hubbard's opinions and commentary about the wider implications of the closure of the car park.
  
64. BCE's final witness is the mother of two boys currently enrolled at the College, one in year 10 and the other in year 4. The older boy has Type 1 diabetes and has been fitted with an insulin pump and glucose monitor. The younger boy is an asthmatic. Her daughter attended the College in previous years. As a frequent user of the car park over a long period of time, she deposed to the inconvenience

that closure of the car park would cause to her and her family, and expressed opinions about the effect closure would have on the Lyneham community. The Tribunal has given little weight to her opinions on the latter topic. Her witness statement was tendered without objection, and she was not required for cross-examination.

### **The Tribunal's decision**

65. At the end of the second day, after the parties had made their closing submissions, the Tribunal adjourned for a short time to consider its decision. The hearing resumed at 4:30pm and the Tribunal announced its decision that, balancing all relevant considerations, it was in the public interest to make a controlled activity order that would require:
- (a) the use of the land as a car park and a drive-through access point for dropping off and picking up school children to cease from the last day of the current school term;
  - (b) vehicular access to the land to be blocked by a locked chain, steel bollard or the like from the last day of the current school term;
  - (c) the verge crossing to be demolished and the kerb and footpath to be reinstated before the commencement of the next school term in 2024;
  - (d) demolition of the car park and reinstatement of the land by a date that is 12 months from the date of final orders; and
  - (e) the parties to have liberty to apply on 21 days' notice in writing for an order extending the date on which the order for demolition and reinstatement of the car park takes effect, or an order ending the controlled activity order in the event the college obtains development approval to use the land as a car park or other approved use.
66. The Tribunal directed the parties to prepare orders giving effect to the Tribunal's decision by 21 November 2023 and indicated that it would give reasons at a later date.

**Disagreement in relation to scope of the proposed controlled activity order**

67. The applicant notified the Tribunal on 24 November 2023 that the parties were unable to agree to the terms of the controlled activity order. The Tribunal directed the parties to file their respective versions by 29 November 2023, and listed the matter for hearing in the afternoon on 4 December 2023.
68. Each party filed its proposed version of the controlled activity order. BCE also filed written submissions to the effect that the Tribunal did not have jurisdiction to make an order requiring demolition of the verge crossing and reinstatement of the footpath and kerb because the show cause notice given to BCE did not state that it applied to the verge crossing, which is located on unleased territory land, nor that the LCA sought an order for its demolition and reconstruction, both of which were mandatory pre-conditions to the making of the proposed order. BCE also objected to an order requiring it to install permanent or semi-permanent barriers, such as steel bollards and possibly also a chain, because this would require BCE to undertake a development on the land without development approval. Further, BCE contended that the Tribunal did not have jurisdiction to make such an order because the show cause notice issued to BCE did not state that the LCA sought an order of this kind.
69. BCE made oral submissions to similar effect at the hearing on 4 December 2023, at the conclusion of which the Tribunal made orders as follows:
  1. *By 12:00pm on Wednesday, 6 December 2023, any party wishing to do so must file and serve written submissions in relation to the scope of the application for a controlled activity order notified to the first party joined under section 350(3) of the Planning and Development Act 2007 (repealed), specifically whether the description of the controlled activity to which the notice relates is such that the Tribunal lacks jurisdiction to make an order under section 358(3)(g), (h) or (i) requiring the first party joined to demolish the verge crossing and reinstate the footpath and kerb.*
  2. *By 12:00pm on Wednesday, 6 December 2023, any party wishing to apply for leave to re-open their case in relation to whether the verge crossing was constructed without development approval, or permission required or approval granted under a territory law, must file and serve an application for interim or other orders together with any evidence on which the party wishes to rely if leave is granted.*

70. All parties filed submissions in accordance with order 1. No party applied for leave to re-open their case in accordance with order 2.
71. ACTPLA and TCCS filed joint submissions to the effect that the statutory pre-conditions for making a controlled activity requiring the removal of the verge crossing and reinstatement of the footpath and kerb were not met. BCE filed further submissions to the same effect. The key issues identified in the submissions were, first, whether the LCA's application described the matter about which the controlled activity was sought as including the verge crossing, as section 350(2)(b)(ii) of the PD Act required; second, whether it stated that the order sought by the LCA included demolition and remediation of the verge crossing, as section 350(2)(b)(iv) required; and third, whether it indicated that the order was sought in relation to premises that include the unleased territory land on which the verge crossing was situated, as section 350(2)(b)(vi) required.
72. The LCA filed submissions contending that the Tribunal had jurisdiction to order the demolition of the verge crossing and reinstatement of the land on the basis that it is "part of a ... structure ... that encroaches onto [or] over ... unleased territory land without approval granted under a territory law" within the meaning of section 358(3)(h) of the PD Act. The LCA submitted that BCE was on notice of the LCA's concerns regarding the verge crossing, that being the focal point of the LCA's safety concerns regarding interaction between vehicles entering and exiting the car park and pedestrians and cyclists using the footpath. The LCA noted that, although the application referred to Block 23 Section 41 Lyneham specifically, unleased territory land comprising a verge between a leased block and a public road does not have a block and section number and, therefore, cannot be identified using the form ACTPLA requires an applicant for a controlled activity order to complete. The LCA submitted that its application did not draw a distinction between the car park and the verge crossing. The application referred to the verge crossing variously as the "driveway", the "entrance to the car park" or used other descriptors that made it apparent the car park included the verge

crossing. References to the verge crossing appeared more than thirty times, including:

*The Carpark entrance at Block 23, Section 41 creates a dangerous conflict of cars and vulnerable road users, many of whom are school children who use Brigalow Street as TCCSs [sic] designated 'Active Travel' street to and from school.*<sup>22</sup>

*The most alarming design aspect is the pedestrian and vehicle conflict faced at the driveway, an aspect that is addressed in the PVAGC, TIA Guidelines and the Design Standards.*<sup>23</sup>

*In summary, if it's permissible on the site, we would like the car park re-designed so cars and pedestrians don't cross paths, as well as the required traffic calming infrastructure for the surrounding area.*<sup>24</sup> (Emphasis provided in the LCA's written submissions)

73. The submissions also drew attention to parts of the following statement at page 46 of the application (which is reproduced here in full):

*A development application was not lodged for the driveway:*

- (a) The sealed car park includes a driveway across the Brigalow St footpath. There has never been a development application lodged for the car park or driveway (neither the informal and 'temporary' car park in 2009, nor the formal development of the designed and sealed car park in 2016).*
- (b) The driveway crosses over Territory Land. This is part of the ACT roads network that services vulnerable road users who are walking and cycling to school. This is the most egregious and dangerous aspect of the car park design, with conflict of cars and vulnerable active travel road users.*
- (c) The design standards and categories of driveway approvals are detailed on the TCCS website. A TCCS application is required if you are constructing a new driveway, adding a second driveway or modifying an existing driveway under the 'exempt track', or 'code track' categories. You must obtain approval from TCCS. Normally this approval would be sought as part of a larger DA, but if no DA was lodged, then a separate approval would still be necessary from TCCS.*
- (d) In the 2016 DA, [the College] demonstrated understanding that a Verge Management Plan would be required for any driveway development, and assured TCCS that "all statutory requirements will be taken into account".*

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<sup>22</sup> Exhibit A1, page 238

<sup>23</sup> Exhibit A1, page 289

<sup>24</sup> Exhibit A1, page 314

*As a consequence, the car park was developed despite not adhering to the ACT's Parking and Vehicular Access General Code (PVAGC), nor the current Municipal Infrastructure design standards (MIS 11 Off Street Parking), or the historic Design Standards for Urban Infrastructure, and a Transport Impact Assessment guided by the TCCS Transport Impact Assessment (TIA) guidelines was not completed as part of the development process. Cars cross over the footpath to enter and exit the car park when the footpath is busy with local students and families walking and cycling to both schools. It puts young students at risk, who are walking and cycling to school. It degrades and restricts public use of a protected urban space.*<sup>25</sup>

74. The LCA submitted that it was implicit in the wording of section 358(3)(h) of the PD Act that the legislature envisaged a situation where a structure built on leased land without development approval (and therefore the result of a 'controlled activity' within the meaning of the PD Act) may encroach onto adjacent unleased territory land and provided for ACTPLA (and the Tribunal standing in the planning authority's shoes) to have power to order demolition of the encroaching structure as part of a controlled activity order relating to the leased land. Further, the LCA indicated in the application that it sought an order "[t]o restore any land, building or structure that has been altered without development approval or permission required under a territory law" which it submitted "echoes" the wording of section 358(3)(h).
75. Although the Tribunal considered there was substance in the LCA's submissions, the issue is not without difficulty. The Tribunal decided to omit the requirement to demolish the verge crossing and reinstate the footpath and kerb and instead require the installation of temporary construction fencing to block vehicular access to the car park, making it unnecessary to decide the issue. On 6 December 2023, the Tribunal provided its proposed draft controlled activity order to the parties and invited the parties to make any further submissions by 3:00pm on 7 December 2023, with the intention that the Tribunal would make final orders by 5:00pm the same day.

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<sup>25</sup> Exhibit A1, page 262

**BCE's application for leave to re-open**

76. Just before 3:00pm on 7 December 2023, the Tribunal received an application for interim or other orders filed by BCE seeking leave to reopen its case and file evidence in respect to the use of the car park by emergency and waste management services.
77. The application was supported by a witness statement by the business manager, Mr Clarke, deposing that. in the course of searching for evidence relating to the construction of the verge crossing following the Tribunal's orders on 4 December 2023, the College found engineering drawings from 2013 showing the layout of utility services on the College campus, including the location of fire hydrants, that suggested that access to the car park by emergency services was important. Enquiries to ACT Fire and Rescue confirmed that the nearest fire hydrant was inside the car park gate from which all school buildings and facilities could be reached using a three-hose system and the fireboard was located in the main administration area located close to the car park. Blocking access to the car park would mean access to the campus would be from Brigalow Street, which would result in the closure of the street whenever ACT Fire and Rescue responded to a fire alarm at the College. Mr Clarke also deposed that enquiries to Cleanaway Canberra, which provides waste management services to the College, indicated that Cleanaway required its trucks to have access to the car park to obtain access to load and unload large waste bins. A change to smaller bins and street or kerbside waste management would likely result in Cleanaway trucks blocking Brigalow Street while waste was being removed. BCE proposed filing evidence going to these issues by close of business on Friday, 8 December 2023.
78. In support of the application, BCE submitted that the evidence it wished to adduce was highly relevant to whether a controlled activity order preventing access to the car park should be made, a matter that BCE said went to the heart of the public interest in the matter. BCE submitted that the evidence would lead the Tribunal to conclude that a controlled activity order preventing access to the car park would represent a significant and unacceptable risk to lives and wellbeing of the approximately 1,100 children attending the College and that it was not in the public interest for waste management services to be unable to access the College



campus or for emergency and waste management services to be provided in a way that would require closure of Brigalow Street.

79. The Tribunal heard the application at 4:15pm on 7 December 2023. Counsel for BCE accepted that his client's concerns about access for emergency and waste management services were adequately addressed by a variation to the Tribunal's proposed order 8 to permit the temporary construction fencing restricting access to the car park from Brigalow Street to include a locked gate and by the grant of liberty for BCE to apply on 21 days' notice to vary the terms of the order. In those circumstances the Tribunal considered it was not appropriate to grant leave and the application was refused.
80. The Tribunal pronounced final orders at the end of the hearing.

#### **Additional background facts**

81. It is necessary to provide some additional facts by way of background.<sup>26</sup>
82. As noted earlier, BCE constructed the gravel car park shortly after entering into the sublease on 1 July 2009. On 30 July 2009, a local resident lodged a complaint about a controlled activity, complaining that the car park was constructed without development approval and was inconsistent with the PRZ1 zoning. On 29 June 2011, ACTPLA determined that BCE had not undertaken a controlled activity because the construction of the car park was an exempt development. ACTPLA did not seek to defend the correctness of that decision in this proceeding.
83. On 24 January 2012, BCE sought a development application exemption for a proposal to upgrade the gravel car park. On 16 March 2012, ACTPLA advised BCE that the proposal was not exempt from development approval.
84. In 2014, Sports and Recreation Services (as custodian of the Crown Lease over Block 23) attempted to secure Block 21, Section 41 Lyneham (**Block 21**) – a small public car park servicing the oval adjacent to Area 1 – and Block 23 in a new executive lease to facilitate BCE using Commonwealth funding to develop

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<sup>26</sup> The Tribunal's findings are based on the T-docs and the documents tendered as part of Kate Bradley's witness statement, unless indicated otherwise.

the car park and build a sports pavilion to be held and managed by BCE for a period of 29 years, after which it would be gifted back to the Territory. The proposal did not proceed, among other things, because the land was zoned PRZ1 and, considering the management objectives for urban open space, the Land Requests Advisory Committee considered the Lyneham Primary School should have access to the sporting facility and the general public should have access outside of school hours.

85. BCE then lodged development application DA201426427 for a sporting facility and ancillary car park. The development application was withdrawn following public opposition.
86. In October 2014, BCE lodged development application DA20146227 to construct a sports pavilion and associated parking on Area 1, Block 21 and part of Block 23. Following a community forum in November 2014, BCE withdrew the application. BCE revised its development proposal and presented it to a second community forum in June 2015. This resulted in a petition signed by 1,553 residents being lodged and tabled in the Legislative Assembly, expressing opposition to the development. Following further community consultation, the Minister for Sport and Recreation Services announced on 15 September 2015 that the ACT Government would not endorse the lodgement of a revised development application by BCE to build a sports pavilion and associated facilities on Lyneham Neighbourhood Oval.
87. In February 2016, BCE approached the ACT Government with a proposal to purchase part of Block 23 due to growth in student numbers and the general need for car parking on the site. The proposal involved upgrading the existing parking area and constructing two new tennis/basketball/netball courts at the rear of the car park.
88. A consolidated response on behalf of the ACT Government on 4 May 2016 advised that a standalone car park was not endorsed on Block 23 and that a development application for a car park on the site would require assessment in the impact track. The proposed courts would be permissible in PRZ1 as an 'outdoor recreation facility' but whether the parking component could be

considered a permissible use would require detailed assessment at the development application stage. Whether the development would require a Territory Plan variation would not be clear until the assessment was done. However, as Conservator Liaison had advised, the Conservator is unlikely to support the sale, which is viewed as being inconsistent with the management objectives for urban open space Public Land, and, as the Conservator's agreement is required for any sale or development on Public Land, it appeared that a Territory Plan variation to rezone the land to CFZ (Community Facility Zone) would be required in any case. On that basis, the best advice that could be provided at this time was that "EPD could support the direct sale provided there is a successful Territory Plan Variation to rezone the subject land to Community Facility Zone".<sup>27</sup>

89. On 21 June 2016, BCE lodged development application DA201629628 proposing, among other things, the construction on Block 4 Section 41 (ie on the Campus) of a school building comprising 15 classrooms and an assembly area. A parking assessment provided by Northrop Consulting engineers relied on the "Brindabella Existing off-site car park" to demonstrate compliance with the Parking and Vehicular Access General Code. Inexplicably, ACTPLA accepted this and approved the development application.
90. As mentioned earlier, in about mid-2016 the property manager of BCE, Mr O'Meara, was instructed to obtain quotes to seal the car park. Mr O'Meara's evidence that Mr Zwajgenberg said to him several times during 2016 that the school owned the car park and that Mr Zwajgenberg announced at the end of year assembly, to much applause and cheering, that the College had purchased the car park and would be sealing it over the Christmas break went unchallenged and unanswered. The Tribunal accepts Mr O'Meara's evidence. As no application for a Territory Plan variation to rezone the land from PRZ1 to CFZ was ever made and BCE did not pursue the direct sale of Area 1, Mr Zwajgenberg's statements are inexplicable.

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<sup>27</sup> Exhibit A12, also exhibit A13 and page 79 of the hyperlinked document described as "FOI reference EPSDD 19/28355 Part-1" in the Controlled Activity Order Application at page 256 of exhibit A1

91. Whether BCE knew that the use of Area 1 as a standalone car park was a prohibited development is unclear. It is difficult to conceive that BCE could have been unaware that a car park is a prohibited development in PRZ1 considering the history of failed attempts to develop Area 1 and parts of the adjoining land and the nature of community concerns about its development proposals. The ACT Government's response to the direct sale application in May 2016 put BCE on notice that there was a live issue whether the use of the land as a car park, as part of a development that included installing three playing courts at the rear of the existing car park, was permissible without an application to rezone the land as CFZ, which would require detailed assessment at the development application stage and possibly require a variation to the Territory Plan. In those circumstances, on what basis could the use of the land as a standalone car park reasonably be considered permissible while the land remained zoned PRZ1 and considering the restrictions on use in the sublease? Those questions remained unanswered. What is clear is that the board of BCE must have realised that any application for development approval that may trigger a requirement to rezone the land could be expected to encounter stiff community opposition. Whether BCE acted in reliance on professional advice is unknown because neither Mr Zwajgenberg nor any other member of the board was called to give evidence to explain BCE's decisions. Although the evidence does not support a finding of actual knowledge, the Tribunal is satisfied that BCE was reckless as to whether its continued use of Area 1 as a standalone car park without the land being rezoned CFZ was unlawful. That conclusion is more readily drawn because of BCE's unexplained failure to call Mr Zwajgenberg or another member of the board with personal knowledge of BCE's decision making processes, where it was made clear to BCE that the issue whether the contravention of the planning laws was deliberate or inadvertent was a relevant matter for the Tribunal to consider in exercising its discretion.
92. However, it is clear that BCE knew, since March 2012, that upgrading the gravel car park would require development approval. The Tribunal finds that the decision to upgrade the car park in 2016 without development approval was a deliberate breach of the planning laws.

**The principles applying to the exercise of discretion under s 351(2) of the PD Act**

93. Section 351(2) of the PD Act provides three alternatives. The Tribunal may make a controlled activity order of the kind sought, or it may make a controlled activity order, including a different kind of order, that is not more burdensome than the order sought, or it may refuse to make a controlled activity order.
94. The content of a controlled activity order is governed by section 358 of the PD Act. Relevantly, in making a controlled activity order, the Tribunal must decide, among other things, when the order takes effect, the period for compliance with the order and when the order ends.
95. No criteria are provided for the exercise of the discretion.
96. It is well established that the exercise of a statutory discretion is confined by the subject matter, scope and purpose of the enactment under which the discretion is conferred.<sup>28</sup>
97. In *Minister for Immigration and Citizenship v Li*, French CJ said:

*Where the discretion is conferred on a judicial or administrative officer without definition of the grounds upon which it is to be exercised then:*

*“the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.”*

*That view, however, must be reached by a process of reasoning.*

*Every discretion has to be exercised, as Kitto J put it in R v Anderson; Ex parte Ipec-Air Pty Ltd, according to “the rules of reason”. His Honour, paraphrasing Sharp v Wakefield said:*

*“a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself”.*

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<sup>28</sup> *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74 at [27] per Gibbs CJ; *Norbis v Norbis* [1986] HCA 17 at [2] per Brennan J; *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [23] per French CJ; *Re Lambie* [2018] HCA 6 at [49] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ

*Mason J in FAI Insurances Ltd v Winneke quoted Kitto J and linked his words to the general rule “that the extent of ... discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment”.*<sup>29</sup>

98. Section 6 of the PD Act provides:

*The object of this Act is to provide a planning and land system that contributes to the orderly and sustainable development of the ACT—*

- (a) consistent with the social, environmental and economic aspirations of the people of the ACT; and*
- (b) in accordance with sound financial principles.*

99. All of the circumstances of an alleged contravention of the planning laws must be considered in assessing an application for a controlled activity order on its merits, including how the contravention arose and the social, environmental and financial impacts, whether positive or negative. Cases considering section 351 of the PD Act and its statutory predecessor have identified several factors that may be relevant depending on the particular circumstances. These include:

- (a) relevant planning considerations,<sup>30</sup> such as whether a significant planning purpose or objective would be served by making the order sought;<sup>31</sup>
- (b) the public interest in maintaining the integrity of relevant planning policies;<sup>32</sup>
- (c) whether the order would be proportionate to the conduct in question;<sup>33</sup> and
- (d) whether the overriding public interest would be served by making the order sought.<sup>34</sup>

100. In *Australian Hotels Association v ACT Planning and Land Authority*, the Tribunal observed that:

*[A] controlled activity order is not to be made as some sort of punitive response to past events. It should be exercised with an eye to the future, to*

<sup>29</sup> [2013] HCA 18 at [23]-[24] (omitting citations)

<sup>30</sup> *Nb and Nb Marsh Pty Ltd and Minister for Planning* [2003] ACTAAT 11 at [28]

<sup>31</sup> *Haridemos & Ors v ACT Planning and Land Authority* [2012] ACAT 74 at [117]; *Peter Kohlsdorf Golf Distributors Pty Ltd v Liangis Investments Pty Ltd & Anor* [2003] ACTAAT 29 at [72]

<sup>32</sup> *Nb and Nb Marsh Pty Ltd and Minister for Planning* [2003] ACTAAT 11 at [28]

<sup>33</sup> *Haridemos & Ors v ACT Planning and Land Authority* [2012] ACAT 74 at [106] and [117]

<sup>34</sup> *Haridemos & Ors v ACT Planning and Land Authority* [2012] ACAT 74 at [117]

*further the objects of the [PD Act] and with reference to relevant matters including the public interest and planning objectives.*<sup>35</sup>

### **Consideration**

101. In this case, it was common ground that BCE had undertaken and was continuing to undertake a controlled activity and that a controlled activity order should be made in the terms sought by the LCA – i.e. that BCE be required to cease using Area 1 as a car park and restore the land to its condition as at 30 June 2009.
102. The issue the Tribunal had to decide was whether the order should be stayed and, if so, upon what terms.
103. It was common ground that development approval for the use of Area 1 as a car park is not possible without a variation of the Territory Plan to rezone the land from PRZ1 to CFZ. That process could take up to two years.
104. The issue, therefore, was whether BCE should be permitted to continue its use of the land as a car park and drive-through access point for a period of up to two years while it sought approval of a Territory Plan variation and development approval for a car park or other approved use.
105. The Tribunal considers the following circumstances are relevant.
106. The College has no on-site parking. To comply with the PVAGC the College may potentially need to provide up to 135 parking spaces. The College has a ‘kiss and drop’ policy for parents driving school children to school. Parents dropping children off at the early learning centre have to park and sign their child in. While there is spare parking capacity in nearby streets, it is not enough to make up for the loss of capacity if the car park is closed. Although the College is well served by public transport it may be expected that many parents will continue to drive their child to school. Closure of the car park undoubtedly will cause inconvenience to staff and parents of children attending the College and early learning centre.
107. There is, however, substantial car parking capacity at the hockey centre in Mouat Street, Lyneham which, according to Google Maps, is a 2-minute drive or

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<sup>35</sup> [2020] ACAT 98 at [116]

13-minute walk from the College. While this is too far to expect children to walk, the College could arrange for a bus shuttle service to transfer students to and from school.

108. There is also substantial parking capacity at the St Ninians's Uniting Church car park at the corner of Brigalow Street and Boyd Street and Brigalow Street and Mouat Street. The church is located immediately adjacent to the College Campus and the car park appears to be little used during school hours. While this is privately owned land, the College could seek to negotiate terms for its use during the school week.
109. Closure of the car park may be expected to affect the flow of traffic in Brigalow Street particularly at school drop-off and pick-up times. Whether the impact on traffic movement and safety will be worse than currently experienced, as Mr Hubbard opined, is a matter of conjecture. If, for example, the College arranged for a shuttle bus service to transport children from the hockey centre to the school one might expect the traffic flow in Brigalow Street to improve. Or if the College negotiated the use of the Uniting Church car park next door the effect on traffic may be negligible. Of course, if nothing is done and parents are permitted to stop or park on Brigalow Street at drop-off and pick-up times without penalty, it may be expected that the traffic situation will worsen. However, that is a policing and enforcement issue for the Territory, which bears a significant measure of responsibility for the circumstances that have arisen.
110. In the Tribunal's view, the risk that traffic in Brigalow Street may worsen and that the incidence of illegal car parking may increase due to the closure of the car park are second order considerations that are balanced to some extent by reasonable measures that could be taken to ameliorate the risk. The Tribunal considers that the College has a responsibility to inform parents of the need to make alternative travel arrangements for their children and to encourage the use of public transport and to take reasonable steps, such as providing a shuttle bus service from convenient locations where children can be dropped off safely, for those who are unable or unwilling to do so.



111. The fact that the contravention of the planning laws was deliberate or reckless rather than inadvertent is relevant. There is a clear public interest in discouraging persons who may wish to undertake a development from seeking to circumvent the planning laws to achieve their development objectives. However, the Tribunal also sees this as a second order consideration.
112. The determinative consideration, in the Tribunal's view, is that the daily interaction of a large number of young children and cyclists and vehicular traffic entering and exiting the car park presents an unacceptable risk of an accident causing serious injury to a child or cyclist. The Tribunal rejects ACTPLA's submissions that "on balance, the net safety impact of the car park is positive"<sup>36</sup> and that "the current arrangement is significantly better for both child safety and traffic management"<sup>37</sup> than if the car park is closed.
113. The Tribunal considers that the current configuration of the entrance to the car park, the verge crossing and intersecting pedestrian and cycle pathways is unsafe. There is no evidence that it was designed to comply with the PVAGC and relevant Australian Standards. No traffic study has ever been carried out, which would be essential to any planning assessment. No consideration appears to have been given to safely managing the interaction between large numbers of young children and cyclists who cross the entrance to the car park daily on their way to and from the primary school and the large volume of traffic entering and exiting the car park due to its use as a drive-through access point for dropping off and picking up children attending the College and the early learning centre. It is an accident waiting to happen and should not be allowed to continue.

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<sup>36</sup> Respondent's submissions dated 26 September 2023 at [26]

<sup>37</sup> Respondent's submissions dated 26 September 2023 at [40]

114. In the Tribunal's judgement, the overriding public interest is best served by ordering the controlled activity to cease on the last day of the school term, rather than allow it to continue for a period of up to two years while BCE pursues an application to have the land rezoned and for development approval to use the land as a car park or for some other permitted use. It is appropriate to allow time for BCE to pursue those options before requiring it to restore the land to its condition as at 30 June 2009.

.....  
 Senior Member M. Orlov  
 For and on behalf of the Tribunal

Date(s) of hearing:	13, 14 November, 4 December 2023
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Counsel for the Second Party Joined	Mr P Walker SC, Ms M Barnes
Solicitor for the Second Party joined	ACT Government Solicitor
Counsel for the Respondent:	Mr P Walker SC, Ms M Barnes
Solicitors for the Respondent:	ACT Government Solicitor