

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

## COMMUNITY FOR CONSTITUTIONAL REFORM AT BRINDABELLA CHRISTIAN COLLEGE INC V TERRITORY PLANNING AUTHORITY (Administrative Review) [2024]

AT 46/2024

**Catchwords:** **ADMINISTRATIVE REVIEW** – whether the applicant should be released from its Harman undertaking obligations – whether the undertaking is attached to tribunal documents submitted and witness statements provided in accordance with directions and the Tribunal Rules – whether Harman undertaking arises to documents produced by subpoena – parties released from any obligation not to use specific Tribunal Documents for other purposes – the parties are not released from their obligations in respect of specific documents provided on subpoena

**Subordinate**

**Legislation cited:** *ACT Civil and Administrative Tribunal Procedures Rules 2020*  
*ACT Civil and Administrative Tribunal Procedures Rules 2024*

**Cases cited:** *Ashby v Slipper (No 2)* [2016] FCA 550  
*Crest Homes Plc v Marks* [1987] AC 829  
*Harman v Secretary of State for Home Department* [1983] 1 AC 280  
*Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36  
*Helicopter Aerial Surveys Pty Ltd v Robertson* [2015] NSWSC 2104  
*Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576; [1991] FCA 354  
*Smith v Smith* [2000] HCA 5  
*Unicomb v Blais* [2024] NSWSC 903  
*Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 7)* [2020] NSWLEC 140

**Tribunal:** Senior Member B Meagher SC  
Senior Member G Trickett

**Date of Orders:** 02 December 2024  
**Date of Reasons for Decision:** 02 December 2024



AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL ) AT 46/2024

BETWEEN:

COMMUNITY FOR CONSTITUTIONAL REFORM AT BRINDABELLA  
CHRISTIAN COLLEGE INC  
Applicant

AND:

TERRITORY PLANNING AUTHORITY  
Respondent

**TRIBUNAL:** Senior Member B Meagher SC  
Senior Member G Trickett

**DATE:** 02 December 2024

### ORDER

The Tribunal orders that:

1. The parties are released from any obligation not to use the following documents for any purpose other than that for which they were given, provided the use is limited to providing information to the entities referred to below and the purpose of the use is to assist the entities involved in coming to correct decisions in the areas that they are tasked to regulate.
2. The documents are:
  - (a) The Tribunal documents dated 31 May 2024, 19 June 2024 and 16 August 2024.
  - (b) The witness statements of John Clark, Phil Ma, Nicolas Goodwin and Greg Zwajgenberg not being his statement identified as (No 2).
  - (c) Documents produced on subpoena by Icon Water being letter from John Clark (BCEL) to ICON dated 11 June 2024, SQC Group Site Plan conditionally accepted by ICON on 29 July 2024, and Prodraft External Services Plan (24-13-E) in Principle Progress Stamp by ICON dated 26 June 2024, provided any personal information is redacted and provided



that it is for the purposes identified namely: “governance, student occupancy and student projections, adequacy of services and facilities - ICON conditionally accepted drawings for verification with updated site survey and site plan as per ACAT Orders and CAO issued on 4 October 2024 and proposed addition of new demountables where Block C was removed”.

- (d) Documents produced on subpoena by SQC Architects (F).
  - (e) Documents produced on subpoena by Built Pty Ltd (E) as follows:
    - (i) Red text responses to subpoena request (page 1);
    - (ii) Series of email exchanges between John Ramanu (SQC) and Greg Zwajgenberg dated 21 September 2018;
    - (iii) Email exchange between Nick Pleming (BUILT) and Greg Zwajgenberg on 20 December 2018.
  - (f) The release extends to disclosure to any entity that the respondent is required to consult in respect of a development application and includes ACT authorities dealing with building approval, development approval, fire safety, water services, traffic issues, and education.
3. The parties are not released from their obligations in respect of documents provided on subpoena addressed to the party joined (A) and Mr Kilham (C) or the statement of Greg Zwajgenberg identified as (No 2).

  
Senior Member B Meagher SC  
For and behalf of the Tribunal

## REASONS FOR DECISION

1. Community for constitutional reform at Brindabella Christian College Inc (**the applicant or the college**) has sought leave to be released from its Harman<sup>1</sup> undertaking in respect of documents obtained during this case.
2. This obligation was expressed as follows:

*Where one party to litigation is **compelled** either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits.*<sup>2</sup>(emphasis added)

3. Written submissions were provided by the parties. ACT Planning and Land Authority (**the respondent**) did not consent or oppose the application but made submissions that were in general terms supportive of the applicant's request, and Brindabella Christian Education limited (**the party joined**) opposed it.
4. The documents in this case that are or may be the subject of the undertaking are as follows:
  - (a) tribunal documents filed by the respondent;
  - (b) the submissions of the parties;
  - (c) witness statements served by the parties as directed by the Tribunal; and
  - (d) documents produced on subpoena.
5. It is common ground that tribunal documents (**T documents**) are required to be filed by the decision maker by reason of *ACT Civil and Administrative Tribunal Procedures Rules 2020* and *ACT Civil and Administrative Tribunal Procedures Rules 2024* (**the Tribunal rules**) and in addition directions were made about their timing. The applicant refers to two sets the initial being dated 31 May 2024

<sup>1</sup> *Harman v Secretary of State for Home Department* [1983] 1 AC 280

<sup>2</sup> *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [96]



and additional documents dated 19 June 2024. In addition, although not referred to, further T documents were filed relating to the 2016 development application in respect of the Junior School building.

6. It is also common ground that witness statements and submissions were filed and served pursuant to directions of the Tribunal.
7. A preliminary issue is whether the undertaking attaches to T documents submissions and witness statements provided in accordance with directions and the Tribunal rules.
8. None of the proposed evidence was formally read as the matter resolved without embarking on the taking of evidence.
9. Numerous subpoenas were issued, and the parties were given access to the documents produced for all of them except those issued by the respondent to the party joined. There is no doubt that the Harman undertaking applies to the documents produced on subpoena.
10. The Tribunal has published a general statement of policy about access to its files and it includes the following.

*Access by a non-party including the public and members of the media  
The ACAT does not usually allow a non-party to inspect documents and other material on an ACAT case file before the proceedings are heard. There may, however, be some limited access to documents such as the initial application and any response.*

*After a final public hearing and subject to any of the factors [in paragraphs 19-21], non parties can usually inspect:*

- a) *the initial application and any response;*
- b) *the evidence admitted in the proceedings (such as affidavits, statements and other documents); and*
- c) *any order or decision in the proceedings including an interlocutory order, regardless of whether a public hearing was held.*

...  
*No access to an ACAT case file or document or other material is given where:*

- ...
- c) *for a party to the ACAT proceedings, material has been produced under subpoena, but orders have not been made granting the other party or parties access to that material; or*



**What documents are the subject of the undertaking?**

11. The most recent decision referred to on the ambit of a Harman undertaking is *Unicomb v Blais* [2024] NSWSC 903 (*Unicomb*). There the NSW Supreme Court held that witness statements and other material filed in accordance with court directions are not the subject of a Harman undertaking. It is the latest most authoritative decision on the topic.
12. The party joined submits that we should not follow this decision as it is the subject of conflicting decisions and as there is doubt that we should take a conservative approach as did Pepper J in *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 7)* [2020] NSWLEC 140 and Brereton J in *Helicopter Aerial Surveys Pty Ltd v Robertson* [2015] NSWSC 2104.
13. A large part of that debate was about affidavits as opposed to witness statements. McGrath J in *Unicomb* considered all these arguments and analysed all the cases in a detailed and persuasive manner. He found that the parties can choose what if any material they may seek to serve where standard directions are made and where they do no more than provide a timetable. Thus, he reasoned there was no compulsion and thus the documents filed were not the subject of an undertaking.
14. The Tribunal agrees with his analysis. However, the decision, arguably, was not essential for the outcome as the judge held that in his discretion the documents in question should be allowed to be used, in any event. It is strictly “*obiter dicta*”<sup>3</sup> and thus not binding. However, the order he made was a declaration that there was no obligation, not that leave be given.
15. There are two aspects of the decision that are arguable. One is whether the express words of the High Court can be read down and not followed. The second is whether compulsion does not extend to documents filed pursuant to a timetable set by the Court.

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<sup>3</sup> Legal Latin meaning an “things said by the way,” and an unnecessary reason for decision. And so not binding.



16. The party joined submitted that the case was not consistent with earlier decisions and should not be applied. The respondent in its submissions described the law as unsettled.
17. We consider it prudent to take the same approach as Pepper J and Brereton J and assume that we need to grant leave. *Unicomb* also usefully set out the considerations that should be taken into account in deciding whether to grant leave and what limitations might be placed on the leave granted at [253]-[257] referring to *Crest Homes Plc v Marks* [1987] AC 829; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576; [1991] FCA 354.
18. The considerations were summarised as follows:
- (a) the nature of the document;
  - (b) the circumstances under which the document came into existence;
  - (c) the attitude of the author of the document and any prejudice the author may sustain;
  - (d) whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
  - (e) the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);
  - (f) the circumstances in which the document came into the hands of the applicant; and
  - (g) most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.
19. In *Ashby v Slipper (No 2)* [2016] FCA 550, release for matters of public importance was explained.
20. One matter not touched on in the submissions was the course the case took here. There was considerable discussion about the merits of the case and extensive references were made to documents in particular to the T documents. This is all on the public record as the transcript has not been the subject of any non-publication order.



21. Further, we had to consider whether the proposed settlement was appropriate and in doing so had regard to the submissions, the T documents and some aspects of the witness statements.
22. The respondent sets out in general terms what was being considered by the Tribunal.
23. It is necessary to explain the general background, what the likely issues were and what was being argued.
24. Since about 2008, schools were exempt by regulation from the need to seek development approval for Class 3 buildings and Class 9b buildings (relevantly classroom and gymnasium). It is understood that this was the situation in other jurisdictions and was thought desirable to facilitate the “Rudd-Gillard” measures to combat the global financial crisis that affected the world. One measure to encourage activity was capital grants to schools. The exemption however has not been removed in the ACT since, even though it has been elsewhere.
25. This historical anomaly meant that in 2016 and since, generally, the college did not need a development approval for building extra classrooms. However, in 2016, the college wanted to put a new sports centre on the campus and to do so proposed to remove the Junior School to another part of the campus. This involved removing protected trees that required a development application. The application was referred to various entities.
26. This resulted in concerns about extra traffic. The application was approved because the traffic issue was thought to be under control based on the condition imposed of removing the existing Junior School building as well as two demountables and the belief that the college had represented that the student population was not going to increase.
27. In fact, the numbers of students increased continuously and the two demountables were decommissioned but not removed. They were later reintroduced into service as classrooms at another part of the campus. In





addition, the college put in three more demountables to accommodate the extra students.

28. Another condition required that full plans be provided, and it was argued that they had not been. It was for this reason that we approved the settlement that imposed on the college the need to remove the two demountables from the campus and provide further plans.
29. The further three demountables did not require development approval because of the exemption so the traffic problem was compounded and has been the subject of other proceedings in the Tribunal.
30. There were also issues with building approval in respect of all this activity and the applicants have been concerned as to whether all necessary approvals have been given and whether all the correct information has been provided to enable safety issues involving matters such as fire safety, electrical fittings and plumbing connections.

### **Tribunal documents**

31. We have assumed that Tribunal documents are caught by the undertaking as they are provided in accordance with Tribunal rules. In fact, they would have to be provided by the decision maker in any Administrative Review case as the Tribunal stands in its shoes of the original decision maker and must have the information it had. They are an equivalent of part of the pleadings as they provide the outline for what the Tribunal must decide. The respondent who produced them does not oppose them being used outside the proceedings. Much of the material has been discussed publicly and helped form the Tribunal's decision to approve the settlement.
32. The applicant asks for leave to provide them to the respondent but that is not what it means. The party joined points out that the respondent already has the documents. The respondent is a statutory authority and is a separate legal entity from the Construction Registrar and other entities that it must consult with in any development applications. That would include a fire safety authority, a school authority and a traffic authority. It is evident that is what the applicant means.



33. We should point out that the respondent did not seek leave to be released possibly because it thinks it has all necessary information anyway but possibly because it is not proposing to do anything which would concern the applicant.
34. It is evident to us that there is sufficient reason to be concerned with safety issues in respect of the unchecked intensification of the campus and that it is in the public interest that all relevant authorities are properly informed about that.
35. We will give leave to the applicant and release it from its undertaking in respect of the Tribunal documents. We do not see the need to limit it to named entities. It is of limited interest to those not working in the relevant areas and is not of a kind that might be thought to be impliedly confidential.
36. The same can be said about all the witness statements except one.
37. The statements by the witnesses for the party joined all shed light on the issue concerning what the respondent was told how the campus was developed and some technical information about plans and the like. They confirm the way the school population has increased, and these matters are all of public interest in the same way as the T documents. Again, there is nothing inherently secret that might lead to some limit on any disclosure. Whilst we have assumed that the material was provided under compulsion, it was still a matter for the party joined as to what it chose to provide.
38. In respect of the two statements by the Chair of the School board. M Zwajgenberg dated 26 July 2024 one deals with the issues concerning the substance of the matter and the other is of a personal nature and does not. For identification purposes we call the latter (**Statement No2**). The first statement is in the same position of the statements of other witnesses. Statement No 2 is not and we see that is of a different nature. It deals with personal issues and shouldn't have been filed. Counsel for the college agreed and did not intend to read it. There may be matters of concern of a personal nature by individuals associated with the applicant but they were and are irrelevant to the issues that the Tribunal might consider. We do not see any sufficient public interest to release the undertaking in that regard.



39. It was apparent the applicant seeks to make public Statement No 2 and to provide all material not only to the respondent but to other ACT entities involved with the development approval process and the approvals needed for a Certificate of Occupancy and Use and to various arms of the ACT Education Ministry and to the Commonwealth Education Department. The argument about disclosing to the respondent assumes that it is also the Construction Registrar.
40. In respect of the subpoenas, there is no question that leave is necessary as the documents were compelled to be produced.
41. The applicant has sought the views of the entities subpoenaed as to their attitude. The documents of Icon Water (H) for which release was sought were:
- (a) Letter from John Clark (BCEL) to ICON dated 11 June 2024.
  - (b) SQC Group Site Plan conditionally accepted by ICON on 29 July 2024.
  - (c) Prodraft External Services Plan (24-13-E...) In Principle Progress Stamp by ICON dated 26 June 2024.
42. Icon agreed to their release so long as any personal information was redacted. This was on the basis that release was for the purposes identified namely.
43. The information adds to the information already available and assists in making sense of any issues that arise for other entities. It does not seem to be particularly sensitive information, and we see no reason not to release the undertaking with the provisos sought.
44. The purpose identified was:
- Content goes to governance, student occupancy and student projections, adequacy of services and facilities - ICON conditionally accepted drawings for verification with updated site survey and site plan as per ACAT Orders and CAO issued on 4 October 2024 and proposed addition of new demountables where Block C was removed.*
45. The respondent had submitted that it is only the party subpoenaed whose attitude is relevant. We disagree and agree with the party joined that it has a say in this. This is particularly so in respect of its documents that the former director Mr Kilham still has.



46. In respect of the subpoenas issued to the college by the applicant (A)<sup>4</sup> and Mr Kilham (C), we do not see the information as adding much if anything to the matters of public interest and they are mostly inherently confidential. We do not propose to give leave in respect of these subpoenas. There were subpoenas addressed to the party joined by the respondent, but the matter resolved before access was provided and we do not understand the applicant to be requesting any leave in respect of that subpoena. If it is, that leave is not given either.
47. In respect of the other subpoenas, Built Pty Ltd (E) do not consent as it says it is bound by confidentiality to its client, the party joined. It does not do so on its own behalf but for the benefit of the party joined. This response is perfectly appropriate, but we must consider that confidentiality determine the matter. The instructions it received were acted upon and communicated as part of the ongoing developments on the campus. Such information was passed on to the respondent and building section among others. The documents it produced are essentially directly relevant to the matter that the respondent had to consider, and their privacy is not such that it displaces the public interest in them being disclosed. There is nothing in the documents that goes to any other issue and in all the circumstances we feel the need to ensure the campus is appropriately regulated outweighs any contrary consideration and leave should be given. It is noted that only specific documents are identified as follows:

*Red text responses to subpoena request (page 1); Series of email exchanges between John Ramanu (SQC) and Greg Zwajgenberg dated 21/9/18; email exchange between Nick Pleming (BUILT) and Greg Zwajgenberg on 20/12/18.*

48. In respect of Subpoena F to SQC Architects, it did not agree or oppose release but said it had referred the matter to its lawyers. These documents are of the same kind as those produced by Built and we see it as appropriate to give leave.
49. The applicant seeks to use the documents in submissions to the Commonwealth Department of Education. We do not see that these documents would necessarily assist that authority and have not specifically included it in the list of entities that might be provided with such documents. It may be that an ACT

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<sup>4</sup> The subpoenas have been given letters to describe them by the Registry and are kept in separate folders so marked



authority thinks they are, and it will have that information by reason of these orders and might act accordingly.

50. The Tribunal orders that:
1. The parties are released from any obligation not to use the following documents for any purpose other than that for which they were given, provided the use is limited to providing information to the entities referred to below and the purpose of the use is to assist the entities involved in coming to correct decisions in the areas that they are tasked to regulate.
  2. The documents are:
    - (a) The Tribunal documents dated 31 May 2024, 19 June 2024 and 16 August 2024.
    - (b) The witness statements of John Clark, Phil Ma, Nicolas Goodwin and Greg Zwajgenberg not being his statement identified as (No 2).
    - (c) Documents produced on subpoena by Icon Water being letter from John Clark (BCEL) to ICON dated 11 June 2024, SQC Group Site Plan conditionally accepted by ICON on 29 July 2024, and Prodraft External Services Plan (24-13-E) in Principle Progress Stamp by ICON dated 26 June 2024, provided any personal information is redacted and provided that it is for the purposes identified namely: “ governance, student occupancy and student projections, adequacy of services and facilities - ICON conditionally accepted drawings for verification with updated site survey and site plan as per ACAT Orders and CAO issued on 4 October 2024 and proposed addition of new demountables where Block C was removed”.
    - (d) Documents produced on subpoena by SQC Architects (F).
    - (e) Documents produced on subpoena by Built Pty Ltd (E) as follows:
      - (i) Red text responses to subpoena request (page 1);
      - (ii) Series of email exchanges between John Ramanu (SQC) and Greg Zwajgenberg dated 21 September 2018;



- (iii) Email exchange between Nick Fleming (BUILT) and Greg Zwajgenberg on 20 December 2018.
- (f) The release extends to disclosure to any entity that the respondent is required to consult in respect of a development application and includes ACT authorities dealing with building approval, development approval, fire safety, water services, traffic issues, and education.
- 3. The parties are not released from their obligations in respect of documents provided on subpoena addressed to the party joined (A) and Mr Kilham (C) or the statement of Greg Zwajgenberg identified as (No 2).

  
Senior Member B Meagher SC  
For and on behalf of the Tribunal

**Date(s) of hearing:** 25 September 2024

**Applicant:** Ms J Jayatilka, Mr D Stephens & Mr J Deans, Authorised Representative

**Respondent:** Ms L Chandra & Ms S Kivela, ACT Government Solicitors

**Party joined:** Mr J Lambe & Mr S Coyle, Authorised Representatives