Garrett v Freeman (No. 5); Garrett v Port Macquarie Hastings Council; Carter v Port Macquarie Hastings Council [2009] NSWLEC 1

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The first judgment handed down in 2009 is relevant to employees of Council. It involves a creek and land at Port Macquarie. In 2003, the Port Macquarie Hastings Council undertook a project to restore the hydrology of an area around Partridge Creek, west of the airport and south of the Hastings River. The project was known as the Partridge Creek Acid Sulphate Soil Hot Spot Remediation Project.

Council owned land in the area and it was earmarked for future development, most likely for residential purposes. In order to construct better access to the Council's land and to assist in its future development, the Council constructed two roads through the habitat of three threatened species; the Eastern Chestnut Mouse, the Grass Owl and the Wallum Froglet. At the time, Mr Freeman was Council's Director of Infrastructure Services.

Port-Macquarie Hastings Council was charged with four offences, three of which were for causing damage to the habitat of a threatened species under the *National Parks and Wildlife Act* 1974 (NSW), being the three threatened species named above. Council was charged with a further offence for a breach of the *Fisheries Management Act* 1994 (NSW). Mr Freeman was charged with two offences of damaging the habitat of a threatened species, being the Eastern Chestnut Mouse and the Grass Owl, as a result of being a "person concerned in the management of a corporation". Council pleaded guilty to its four charges. Mr Freeman pleaded not guilty.

After the closure of the prosecutor case, counsel for Mr Freeman submitted that there was no case to answer as section 731 of the *Local Government Act* excused an employee of council from "*any action, liability, claim or demand*" provided that "*the matter or thing was done in good faith for the purposes of executing this or any other Act ...*". In *Garrett v Freeman* (2006) 147 LGERA 96, James J (with whom McColl JA and Grove J agreed) held that the section must be construed strictly and that the "liability" referred to in section 731 did not extend to criminal liability.

There are four possible statutory defences against a charge of section 175B(1) no knowledge, no influence, due diligence, and that the activity was essential for carrying out an activity within the meaning of Part 5 of the *Environmental Planning and Assessment Act* 1979 (NSW). It was agreed between the parties that the construction of the road was an activity by a determining authority which fell under Part 5 of the *Environmental Planning and Assessment Act* 1979 (NSW).

In convicting Mr Freeman, Justice Lloyd found that Mr Freeman's "Review of Environmental Factors" was severely defective as it had no determination date, it was not signed, it did not adequately identify the proposed activity, there was no mention of the location of the roads or the material to be used or how works were to be undertaken, nor was there mention of the particular threatened species or their habitat: *Garrett v Freeman (No. 4)*.

In *Garrett v Freeman (No 5)*, Justice Lloyd found that the slashing and clearing of the vegetation damaged the habitat of the threatened species to a significant extent and that the newly constructed road afforded the opportunity for predators to access the area. Although Mr Freeman gained no personal benefit from the construction of the road, it is likely the Council did.

The Court ordered that Mr Freeman pay fines totalling $57,000, plus pay the prosecutor's costs of $167,500. Council was ordered to pay fines totalling $45,500, plus the prosecutors costs of $114,000 for the offences against the *National Parks and Wildlife Act* and a fine of $35,000 and the prosecutor's costs of $80,000 for the offence against the *Fisheries Management Act*.