



**Supreme Court**  
of New South Wales

Allens Lawyers  
DX 105 Sydney NSW

Law Courts Building, Queens Square Level 5 184 Phillip Street SYDNEY NSW  
2000  
GPO Box 3 SYDNEY NSW 2001  
DX ,  
Telephone: 1300 679 272  
Facsimile:  
TTY Phone:  
Email: [costsassessment@justice.nsw.gov.au](mailto:costsassessment@justice.nsw.gov.au)  
Website: [www.supremecourt.justice.nsw.gov.au](http://www.supremecourt.justice.nsw.gov.au)  
ABN: 77 057 165 900

Your Ref:

31 July 2020

Case Number: 2019/00310194  
Case Title: Ballina Shire Council v Kate Singleton Pty Ltd  
Proceeding Type Costs Assessment Party Party Application

---

Find attached the certificate(s) of determination dated 13 July 2020.

  
for Manager, Costs Assessment

Version as at 27 June 2017

Form C3

**CERTIFICATE OF DETERMINATION OF MANAGER'S ASSESSMENT COSTS**

*Legal Profession Uniform Law Application Act 2014 (NSW) s 71*

Assessment Number: 2019/00310194

**Ballina Shire Council**

Costs Applicant

**Kate Singleton Pty Ltd and SJ Connelly CPP Pty Ltd t/as Planners North**

Costs Respondents

The following determinations are made under the *Legal Profession Uniform Law Application Act 2014 s 71*:

1. Costs incurred by the costs assessor and the Manager, Costs Assessment	\$0
2. Costs related to remuneration of costs assessor (Costs Order of 02/05/17)	\$1,690.30
3. Costs related to remuneration of costs assessor (Costs Order of 25/10/17)	\$3,380.60
4. Costs related to remuneration of costs assessor (Costs Order of 22/06/18)	\$11,832.00
5. Total of the above	\$16,902.90
6. Payable by costs applicant	\$0
7. Payable by costs respondents	\$16,902.90

A statement of reasons accompanies this certificate.

Signature of costs assessor:



Name of costs assessor: Maurice Castagnet



Certificate issued by the costs assessor and sent to the Manager, Costs Assessment on:

13 July 2020

Certificate sent by the Manager, Costs Assessment to the parties on: 31 July 2020

**For completion by the Manager, Costs Assessment**

*Legal Profession Uniform Law Application Act 2014 s 71(3)(a)*

Certified as follows:

\*The costs respondent has paid the amount at item 7 of this certificate.

Manager, Costs Assessment

Date: 31 July 2020



\* Delete or modify as appropriate. Manager's certification requires stamp or seal.

Version as at 27 June 2017

Form C4

**CERTIFICATE OF DETERMINATION OF COSTS  
ORDERED COSTS ASSESSMENT**

*Legal Profession Uniform Law Application Act 2014 (NSW) ss 70, 78*

Assessment Number: 2019/00310194

**Ballina Shire Council**

Costs Applicant

**Kate Singleton Pty Ltd and SJ Connelly CPP Pty Ltd t/as Planners North**

Costs Respondents

The amounts determined in the assessment are as follows:

<u>Costs payable by costs respondents to costs applicant</u>	
<i>Land and Environment Court of New South Wales, proceeding 27368/2017 – Ballina Shire Council v Kate Singleton Pty and SJ Connelly CPP Pty Ltd t/as Planners North – Costs Order 02/05/2017</i>	
1. Amount of costs assessed (no GST allowed)	\$30,783.18
2. Interest on costs <sup>1</sup> to date	\$7,215.02
<i>Land and Environment Court of New South Wales, proceeding 27368/2017 – Ballina Shire Council v Kate Singleton Pty and SJ Connelly CPP Pty Ltd t/as Planners North – Costs Order 25/10/2017</i>	
3. Amount of costs assessed (no GST allowed)	\$80,600.27
4. Interest on costs <sup>2</sup> to date	\$15,990.69
<i>Land and Environment Court of New South Wales, proceeding 27368/2017 – Ballina Shire Council v Kate Singleton Pty and SJ Connelly CPP Pty Ltd t/as Planners North – Costs Order 22/06/2018</i>	
5. Amount of costs assessed (no GST allowed)	\$275,391.93
6. Interest on costs <sup>3</sup> to date	\$41,057.10
7. Subtotal of above costs and interest payable by costs respondents to costs applicant	\$451,038.19

<sup>1</sup> Under Civil Procedure Act 2005 s 101.

<sup>2</sup> Under Civil Procedure Act 2005 s 101.

<sup>3</sup> Under Civil Procedure Act 2005 s 101.



8. <b>Add</b> costs of costs assessment for Costs Order of 02/05/17	\$4,277.88
9. <b>Add</b> costs of costs assessment for Costs Order of 25/10/17	\$8,555.76
10. <b>Add</b> costs of costs assessment for Costs Order of 22/06/18	\$29,945.16
11. Total amount specified in this certificate, payable by costs respondents to costs applicant	<b>\$493,816.99</b>

Costs related to the remuneration of the costs assessor and costs incurred by the costs assessor or the Manager, Costs Assessment are not included in the amounts certified above. Those costs are certified separately.

Subject to allowance for amounts that may have been paid in respect thereof, the total amount specified in this certificate is payable as indicated above.

A statement of reasons accompanies this certificate.



Signature of costs assessor:

Name of costs assessor: Maurice Castagnet

Certificate issued by the costs assessor and sent to the Manager, Costs Assessment on:

13 July 2020

Certificate sent by the **Manager, Costs Assessment** to the parties on: 31 July 2020



**COSTS ASSESSMENT REASONS**

Costs ordered by court/tribunal

**APPLICANT:** Ballina Shire Council

**RESPONDENTS:** Kate Singleton Pty Ltd and SJ Connelly CPP Pty Ltd  
t/as Planners North

**Number:** 2019/00310194

**Assessor's Details:** Maurice Castagnet  
PO Box 931 Byron Bay NSW 2481  
law@castagnetlaw.com.au

I, Maurice Castagnet, Costs Assessor, set out as follows my Reasons for determination of costs payable by the respondents.

Date: 13 July 2020

A handwritten signature in black ink, appearing to be 'M. Castagnet', written over a horizontal line.

Assessor's Signature

Completion of assessment

1. I have completed the assessment.
2. Only this document, Schedules 1 – 5 and my certificates comprise my Reasons for determination.

Terminology

3. The "Application" means Application for Assessment of Ordered Costs filed with the Manager Costs Assessment on 4 October 2019 and received by me on 16 October 2019.
4. "Council" means the Costs Applicant. I shall sometimes refer to Council in plural terms such as "they" or "their".
5. "Planners North" means the Costs Respondents.
6. Where appropriate, a reference to Council or Planners North should be taken to include a reference to their respective legal representatives.
7. The "LPUL" means the *Legal Profession Uniform Law (NSW) 2014 No 16a*;
8. The "LPULA Act" means the *Legal Profession Uniform Law Application Act 2014 No 16*;
9. The "LPULA Regulation" means the *Legal Profession Uniform Law Application Regulation 2015*;
10. The "Uniform Legislation" means the LPUL, the LPULA Act, the LPULA Regulation and the whole of the new legislation applying to the legal profession NSW and costs assessment.
11. "Costs Order A" means the orders made by the Land and Environment Court of New South Wales on 2 May 2017 in proceedings number 2017/27368<sup>1</sup> in the following terms:
  1. *Leave is granted to the Applicant to amend the development application in accordance with Order 1 of its Amended Notice of Motion dated 2 May 2017.*
  2. ...
  3. *The Applicant is to pay the First Respondent's costs thrown away as a result of the amendments, as agreed or assessed pursuant to s97B Environmental Planning & Assessment Act.*

---

<sup>1</sup> Council was the "first respondent" and Planners North were the "applicant(s)" in those proceedings.

4. ....

12. "Costs Order B" means the orders made by the Land and Environment Court of New South Wales on 25 October 2017 in the same proceedings in the following terms:

1. *Leave be granted to the Applicant to amend the Development Application by withdrawing its request to assess the development as a concept development under section 83B(3) of the Environmental Planning and Assessment Act 1979, and revert to a development application under section 78A of the Environmental Planning and Assessment Act 1979.*
2. ...
3. *Pursuant to section 97B of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the costs of the First Respondent thrown away as a result of the Applicant amending the Development Application, as agreed or assessed.*
4. ...

13. "Costs Order C" means the orders made by the Land and Environment Court of New South Wales on 22 June 2018 in the same proceedings in the following terms:

1. *The appeal is upheld.*
2. ...
3. ...
4. *The Applicant is to pay the costs of the (first) Respondent, under s.8.15 of the Environmental Planning and Assessment Act 1979, as agreed or as assessed.*

14. The "Bill" means the itemised bill of costs submitted in the Application in the amount of \$702,880.43 comprising of items 1 -907 claimed for professional costs, disbursements and the costs of the assessment in relation to the three costs orders.

Documents Received

15. I received the following documents:

- a) The Application which included the Bill, submissions, copies of the three costs orders, the Notice of Objection, a schedule of interest and disbursement invoices which included counsel's fees (779 pages).

- b) Email and letter from Council dated 6 November 2019, enclosing submissions in response to the Notice of Objection and copies of correspondence (in a zip file and sealed envelope) between the parties directed to costs (67 pages).
- c) Email from Council dated 6 November 2019, attaching copies of costs agreements with their solicitors, senior counsel and counsel (15 pages).
- d) Email from Planners North dated 20 November 2019 attaching their Reply submissions to Council's submissions in response to the Notice of Objection (13 pages).
- e) Email from Planners North dated 12 March 2020 enquiring about the status of the assessment (1 page).
- f) Email from Council dated 20 May 2020, attaching a bundle of solicitor/client invoices (various).
- g) Email from Council dated 25 June 2020, enquiring about the status of the assessment (1 page).

16. I considered all the documents I received.

Opportunity to make submissions

17. I must ensure that each of the parties and any other person concerned have had a reasonable opportunity to make written submissions to me.

18. In conformity with section 69 (1) of the LPULA Act, I provided the parties with a timetable to make further submissions. Both parties made further submissions.

Applicable legislation

19. I am required to assess costs payable as a result of the three costs orders.

20. The Land and Environment Court proceedings 2017/27368 (the LEC proceedings) were commenced after 1 July 2015. Thus, the assessment of costs pursuant to the costs orders are governed by and has been conducted in accordance with, the provisions of the Uniform Legislation.



Background

21. The LEC proceedings concerned an appeal filed by Planners North against the deemed refusal of development consent by Council for the residential subdivision of land known as the Cumbalum Urban Release Area Precinct A (Cura A).
22. Cura A is a major urban release area in the Ballina local government area.
23. Planners North as town planners for the developer, lodged the development application (DA) on 15 April 2016.
24. In October 2016, Planners North revised the DA as a staged development application pursuant to section 53E of the *Environmental Planning and Assessment Act 1979*, ("the EPA Act"). The first stage of the development was substantial. It was for the creation of 642 residential allotments, nine resulting lots and associated works and dedications. The second stage of the development sought consent for the development of Crown land including a road closure application and boundary adjustments of certain lots.
25. On 27 January 2017, Planners North commenced the LEC proceedings appealing the deemed refusal of the DA.
26. On 14 February 2017, Council issued a Completion of Assessment letter to Planners North outlining the main issues with the DA, including ecology, hydrology, planning, road design, contamination, bushfire safety, owner's consent and arboricultural issues.
27. On 25 April 2017, Council filed its Statement of Facts and Contentions, which largely reflected the issues set out in Completion of Assessment letter.
28. On 2 May 2017, Planners North was granted leave to amend the DA which raised further contentions.
29. The Court made Costs Order A.
30. On 29 May 2017, the conciliation conference process pursuant to section 34 of the *Land and Environment Court Act 1979 (NSW)* commenced, involving Planners North, Council and their legal representatives.
31. The process occurred over a period of three months and then adjourned to allow Planners North to further amend their plans and reports. The amended plans and reports were provided on 30 June 2017. The section 34 conference was terminated on 31 August 2017.

32. During the period of the section 34 conference process, there were informal joint conferences between the parties' experts.
33. On 25 October 2017, Planners North was granted leave to formally amend their DA for the second time. Planners North agreed that they would pay Council's costs thrown away pursuant to section 97B of the EPA Act as agreed or assessed. The Court made Costs Order B to that effect.
34. Joint conferencing of the experts commenced in late October 2017 and ended on 12 January 2018. During this period, there were further amendments made to the DA.
35. On 31 January 2018, Planners North provided a revised plan set Revision I, and this was two weeks before the hearing was due to commence. This plan set was followed by revisions J, K and L.
36. Between 25 January 2018 and 11 February 2018, further joint conferencing took place. During this period, further mapping and updated materials were requested of Planners North.
37. The matter was listed for hearing between 12 to 16 February 2018. The first day of the hearing was held on site. At the request of Planners North, the hearing did not proceed on 13 to 16 February. Instead, a number of meetings occurred during those days, involving the parties, Council staff, and experts engaged for each of the parties, to resolve a number of outstanding issues in relation to the DA.
38. On 22 February 2018, Planners North provided Revision M of the Plan Set and further outstanding materials.
39. Between 1 May 2018 and 7 May 2018, further joint conferencing between the experts took place, resulting in the preparation of addendum expert reports.
40. The matter was set down for a one day hearing on conditions of consent on 15 May 2018.
41. On the day before the hearing, Planners North provided Revision N of the Plan Set.
42. At the hearing before Commissioner Brown, the focus was essentially on the one matter that remained in dispute between the parties, whether a stewardship agreement under the *Biodiversity Conservation Act 2016* (NSW) or a covenant on the titles of the relevant

lots and a condition of consent requiring compliance with certain Plans would be sufficient to protect rehabilitated environmental lands.

43. On 1 June 2018, the parties had largely reached agreement on conditions of consent following negotiations which occurred during the four months since February 2018.

44. Judgment was delivered on 22 June 2018, with the Court upholding the appeal and making Costs Order C.

**Basis of the assessment**

45. Costs Order C was made by the Land and Environment Court under subsection 8.15 (3) of the EPA Act and Costs Orders A and B were made by the Court under its predecessor, section 97B, which contained similar terms. All three orders concern the costs thrown away as a result of amendments made to the DA.

46. Subsection 8.15 (3) provides that if in a Class 1 appeal by an applicant, the Court allows the applicant to file an amended application for development consent (other than to make a minor amendment), the Court must make an order for the payment by the applicant of those costs of the consent authority that have been thrown away as a result of the amendment of the application.

47. Failing agreement between the parties, the task is then left to the costs assessor to determine what costs, if any, have been thrown away in these circumstances.

48. Planners North made a number of amendments to their DA in the LEC proceedings and this provides the reason why the Court made the multiple costs orders regarding costs thrown away.

49. In this Application, Council claims that the costs submitted in the Bill have all been thrown away as a result of those amendments.

50. The basis of my assessment was to firstly consider whether all of the costs claimed were costs thrown away or wasted costs as a result of those amendments. This included a consideration of whether part of an item of costs claimed, was costs thrown away or wasted costs. The meaning of costs thrown away is noted by Quick on Costs, Roger Quick, LBC Information Services, 1996 as: "*Costs thrown away are such costs as the taxing officer determines have been reasonably incurred and relate to work done which has been wasted as a result of the successful application: Andromeda*

*Handelsaktieselskab v Holme (1924) 130 LT 329; Fashion Warehouse Pty Ltd v Pola [1984] 1 Qd R 251 at 254."*

51. When conducting an assessment of court ordered costs, I am required, pursuant to section 76 of the LPULA Act, to determine what is a fair and reasonable amount of costs for the work concerned.
52. The basis of my assessment was therefore to secondly consider whether the amount claimed for each item of costs which I determined as costs thrown away, was a fair and reasonable amount of costs for the work concerned.
53. In conducting the second aspect of the assessment, I had regard to the following factors which are found in sections 172 of the LPUL:
- (a) The level of skill, experience, specialisation and seniority of the lawyers concerned;
  - (b) The level of complexity, novelty or difficulty of the issues involved;
  - (c) The extent to which the matter involved a matter of public interest;
  - (d) The labour and responsibility involved;
  - (e) The circumstances in acting on the matter, including (for example) any or all of the following-
    - (i) the urgency of the matter;
    - (ii) the time spent on the matter;
    - (iii) the time when business was transacted in the matter;
    - (iv) the place where business was transacted in the matter;
    - (v) the number and importance of any documents involved;
  - (h) The quality of the work done.

**What amount has been assessed?**

54. In the Bill, Council has claimed a total amount of **\$702,880.43** for professional costs, disbursements and the costs of the assessment in relation to the three costs orders.
55. In my calculation, the total of the Bill arrived at **\$702,930.53**. I was unable to reconcile this total with the total amount claimed by Council.

56. Given the small amount of difference and to save costs of the assessment, I did not pursue an in-depth mathematical investigation of the discrepancy. I assessed the Bill in the amount of \$702,930.53.

GST

57. The applicant did not make a claim for GST. My determination therefore does not include any allowance for GST on the fees or disbursements claimed.

Rates

58. Council claimed for the work carried out by a supervising partner at an hourly rate of \$590; by a planning special counsel at an hourly rate of \$590; by a senior solicitor at the hourly rate of \$550; by three solicitors at the hourly rates of \$325, \$380 and \$390 respectively, and by paralegals at the hourly rate of \$160. The hourly rates claimed were exclusive of GST.

59. Planners North did not object to these hourly rates.

60. Considering the nature and complexity of the proceedings, the jurisdiction in which they were conducted and the guidelines provided by the *Costs Assessment Rules Committee* for costs payable between parties under court orders on a party/party basis<sup>2</sup>, I considered that the hourly rates claimed, were appropriate in the circumstances and applied them when assessing fair and reasonable costs.

The objections and the assessment

61. In assessing the Bill, as well as considering the criteria which I have outlined in paragraphs 50 and 53 above, I considered both parties' submissions and the material before me.

62. I considered both the general objections and the specific objections when I conducted the assessment of each item of costs objected to.

63. I have dealt with the objections regarding the costs of the assessment and interest under separate headings further below.

<sup>2</sup>See Costs Assessment Rules Committee Guideline – Cost payable between parties under court orders- published on the Supreme Court of NSW website- 16.3.16

64. As to the remaining general objections, the following matters were of significance.
65. Planners North submitted that the scope of an order awarding costs "thrown away" is narrow and only covers costs wasted as a result of amendment to the DA. I agreed with that submission.
66. However, I did not accept Planners North's submission that such costs are only retrospective in nature, relating to work already done and should not include costs incurred following the date of the costs order.
67. I found that the amendments resulted in costs thrown away for work done retrospectively as well further work that had to be redone by Council's experts and legal representatives as a result of such amendments.
68. Notably, on their own submission, Planners North acknowledged that costs thrown away can include additional costs incurred as a consequence of the amendments. They relied upon Commissioner Murrell's description of costs thrown away in *Meehan v North Sydney Council* [2006] NSWLEC 598 at [37] as *'what can be described as the additional costs incurred as a consequence of the amended plans and costs thrown away in vacating hearing dates'*.
69. When assessing many items in this matter, the challenge was to determine the extent to which additional work could be described as costs thrown away as a result of the amendments or whether the work would have been done as part of the normal development application assessment process.
70. Overall, I did not accept the suggested apportionments submitted by either party. Doing the best I could, many of those items were apportioned as 50% costs thrown away as a result of the amendments. This included some of the work carried by the experts. Similarly, I formed the view that most of counsel's fees should be apportioned as 40% as costs thrown away.
71. I agreed with Planners North's submission that the "timeliness" issue was irrelevant for the purpose of my task. My task is solely concerned with whether the costs claimed were costs thrown away as a result of the amendments and whether the amount claimed for such costs was fair and reasonable.
72. I had no difficulty in conducting the assessment because of "insufficient details" provided in the Bill. To the contrary, I found that the particulars of work provided for each item in the Bill were quite detailed. I also drew upon my own experience in litigation matters to

determine what fair and reasonable attendances would be in the circumstances of the matter. Master Malpass (as he then was) in *Turner v Prids* 1999 NSWSC 850 indicated that a costs assessor is to conduct each assessment on a case by case basis and is entitled to rely on his/her experience.

73. There were some items of work which I regarded as solicitor/client costs in nature and these were reduced or disallowed accordingly.
74. I did not consider that there were any items of work carried out by inappropriate personnel. There were quite a few items with which I formed the view that excessive time was taken to carry out the particular task concerned. These items were reduced accordingly.
75. There were quite a few items claiming for the review of third-party invoices which I considered as administrative in nature for the purpose of determining fair and reasonable party/party costs. In my view, these costs should be factored in the professional hourly rates allowed and treated as administrative overheads. These items were disallowed accordingly.
76. My determination of professional costs and disbursements for Costs Order A is **\$30,783.18**. Details of the assessment are contained in **Schedule 1**. The legends/comments contained in the schedule should be read in conjunction with these reasons.
77. My determination of professional costs and disbursements for Costs Order B is **\$80,600.27**. Details of the assessment are contained in **Schedule 2**. The legends/comments contained in the schedule should be read in conjunction with these reasons.
78. My determination of professional costs and disbursements for Costs Order C is **\$275,391.93**. Details of the assessment are contained in **Schedule 3**. The legends/comments contained in the schedule should be read in conjunction with these reasons.
79. The total of my determination of professional costs and disbursements for all three costs orders is **\$386,775.38**.

Proportionality

80. In conducting an assessment of court ordered costs, section 172 of the LPUL provides that I may have regard to the issue of proportionality in determining fair and reasonable costs, namely, whether those costs were proportionately and reasonably incurred; and whether those costs were proportionate and reasonable in amount.

81. The costs orders concerned in this Application were not costs for the whole of the proceedings but rather specifically, for costs thrown away as a result of amendments to the development application.

82. In these circumstances, I did not consider that the issue of proportionality was a significant factor in determining a fair and reasonable amount for those costs.

The Indemnity Principle

83. A costs assessor can consider the terms of a costs agreement to ensure that the costs allowed are not greater than the costs that the applicant has paid or is liable to pay to their legal representatives for the legal services rendered. However, no costs agreement is conclusive as to what is the fair and reasonable amount of costs for the work concerned in an assessment of ordered costs.<sup>3</sup>

84. Council provided me with a copy of a fee proposal issued by their solicitors. I requested and received copies of solicitor/client invoices rendered to Council in the period between January 2017 and July 2018 pursuant to that fee proposal.

85. I was satisfied that the indemnity rule has not been breached.

Interest

86. Council has made a claim for interest.

87. The LEC proceedings were commenced after 24 November 2015.

88. Section 101(4) of the *Civil Procedure Act 2005* provides that unless the court orders otherwise, interest is payable on an amount payable under an order for the payment of costs. Section 101(5) provides that such interest is to be calculated at the prescribed rate or at any other rate that the court orders, as from the date of the order was made or any other date that the court orders. The costs orders did not order otherwise and I have not been provided with any further alternative costs orders.

---

<sup>3</sup> ss77(2) LPULA Act.



89. Pursuant to ss 70(1) (c) (ii) of the LPULA Act, I must include s101 interest in my determination. I have no discretion in that regard. I have therefore allowed section 101 interest from the date of each costs orders to the date of my determination. The amount for Costs Order A is \$7,215.02. The amount for Costs Order B is \$15,990.69. The amount for Costs Order C is \$41,057.10. My calculations for interest is attached to these reasons as Schedule 5.

Costs of the Assessment

90. At item 907, Council has made a claim for their costs of a costs consultant to compile the Bill in the amount of \$38,899.90 and at items 810 to 811, they have made a claim for the costs of their legal representatives to deal with the assessment process in the amount of \$12,718.80. For reference, these claims have been reproduced in Schedule 4 attached to these reasons.

91. Within the Bill, there were items claimed as costs thrown away which in my view related to the costs of the assessment rather than costs arising from the costs orders. For reference, these items have been highlighted in Schedule 3 attached to these reasons. The total of these items is \$18,081.90.

92. In determining under section 71 (1) (c) of the LPULA Act by whom and to what extent the costs of the assessment of ordered costs are to be paid, the costs assessor may have regard to the following:<sup>4</sup>

(a) the extent to which the determination of the amount of fair and reasonable ordered costs differs from the amount of those costs claimed in the application for assessment,

(b) whether or not, in the opinion of the costs assessor, either or both of the parties to the application made a genuine attempt to agree on the amount of the fair and reasonable costs concerned,

(c) whether or not, in the opinion of the costs assessor, a party to the application unnecessarily delayed the determination of the application for assessment.

93. Neither party, in my view, delayed the determination of the application.

---

<sup>4</sup> Reg 40 of the LPULA Regulation

94. At the conclusion of my assessment, I read a deal of correspondence exchanged between the parties between March 2019 and August 2019, regarding negotiations to settle the costs dispute.
95. On 25 March 2019, Council made an offer of \$767,250 to settle the dispute.
96. In reply, on 26 April 2019, Planners North sought supporting documents and requested particulars in order to respond to the offer.
97. On 24 May 2019, Council provided a response and the documents sought. At the same time, Council submitted a revised offer of \$697,500.
98. On 17 June 2019, Planners North requested more time to respond, so that they may receive further advice from their costs consultant.
99. On 17 July 2019, Planners North responded with an offer of \$290,000.
100. Despite further correspondence being exchanged between the parties, neither party resiled from their respective position.
101. Nevertheless, in their last correspondence on 5 August 2019, Council advised Planners North that there would be utility in having the parties' costs consultants meet to discuss their respective assessments of the costs thrown away with a view to narrowing the gap between the parties' position.
102. It does not appear that Planners North responded to this invitation. Council filed their application for assessment on 4 October 2019.
103. In these circumstances, it is my view that Planners North, as the liable party, fell short of making a genuine attempt to agree on the amount of the fair and reasonable costs concerned.
104. My assessment of fair and reasonable costs (without factoring in the costs of the costs assessment and interest) is **\$386,775.38**.
105. I consider that the matter could have been capable of resolution if Planners North accepted the invitation. I therefore consider that Council was reasonably justified in proceeding with the assessment. In these circumstances, Planners North must bear Council's costs of the assessment and my costs as the assessor.

106. I allow Council the amount of \$9,750 (30 hours at \$325 per hour) for their costs of dealing with the assessment process as fair and reasonable. I allow Council the amount of \$26,000 (80 hours at \$325 per hour) for their costs consultant's costs to compile the Bill, making a total of \$35,750.

107. Given the amount of costs I determined for each costs order, I determine the Council's costs of the assessment in the following apportionments:

\$3,575 for Costs Order A (10%);

\$7,150 for Costs Order B (20%);

and \$25,025 for Costs Order C (70%)

108. I have also applied the same apportionments for my costs as the assessor in respect of each costs order.

Filing fee

109. For the same reasons, I allow Council the whole of the filing fee paid by them to lodge the Application and based on the same apportionments.

110. As the filing fee has been paid, it has been added to the amount of costs allowed to Council in the Certificate of Determination of Costs.

Summary and Section 70 of the LPULA Act

111. The amount of costs I have determined for costs payable pursuant to Costs Order A is calculated as follows:

a. Fees determined (exclusive of GST)	\$ 17,575.72
b. Expenses determined (exclusive of GST)	\$ 13,207.46
c. Total of amount costs determined	<u>\$ 30,783.18</u>
d. Interest	\$ 7,216.02
e. Plus costs of compiling the claim for costs	\$ 3,575.00
f. Plus the filing fee	\$ 702.88
<b>Total in Certificate of Determination of Costs for Costs Order A</b>	<b>\$ 42,276.08</b>

112. The amount of costs I have determined for costs payable pursuant to Costs Order B is calculated as follows:

g. Fees determined (exclusive of GST)	\$ 52,035.27
h. Expenses determined (exclusive of GST)	\$ 28,565.00
i. Total of amount costs determined	<u>\$ 80,600.27</u>
j. Interest	\$ 15,990.89
k. Plus costs of compiling the claim for costs	\$ 7,150.00
l. Plus the filing fee	\$ 1,405.76
<b>Total in Certificate of Determination of Costs for Costs Order B</b>	<b>\$ 105,146.72</b>

113. The amount of costs I have determined for costs payable pursuant to the costs order is calculated as follows:

m. Fees determined (exclusive of GST)	\$ 117,521.08
n. Expenses determined (exclusive of GST)	\$ 157,870.85
o. Total of amount costs determined	<u>\$ 275,391.93</u>
p. Interest	\$ 41,057.10
q. Plus costs of compiling the claim for costs	\$ 25,025.00
r. Plus the filing fee	\$ 4,920.16
<b>Total in Certificate of Determination of Costs for Costs Order C</b>	<b>\$ 346,394.19</b>

I have issued a Certificate of Determination of Costs and a Certificate of Determination of Costs of Manager's Assessment Costs in accordance with these reasons.





**Registered post and email**

General Manager  
Ballina Shire Council  
PO Box 450  
BALLINA NSW 2478

Our reference: CCMS 201900882  
Contact: Luke Williams 02 6670 8611  
Date: 14 May 2019

Attention: Mr Paul Busmanis – Manager Engineering Works

Dear Mr Busmanis

**PENALTY NOTICE – NATIONAL PARKS AND WILDLIFE ACT 1974 – SECTION 86 (2) A  
PERSON MUST NOT HARM AN ABORIGINAL OBJECT AND SECTION 89A NOTIFICATION  
OF SITES OF ABORIGINAL OBJECTS**

**RE: Ballina Shire Shared Path Project Lot 3 DP 573169 The Coast Rd, Ballina, NSW ‘the site’**

The Department of Planning, Industry and Environment (the Department) is responsible for assuring compliance with the *National Parks and Wildlife 1974* (NPW Act) with the aim of preventing unlawful harm or desecration to Aboriginal object/s or Aboriginal places.

It is an offence under Section 86(2) of the NPW Act to harm Aboriginal objects and an offence under Section 89A to not notify the Department of sites of Aboriginal objects within a reasonable time. Section 86(2) offence carries a maximum penalty of 2000 penalty units for a corporation and Section 89A offence carries a maximum penalty of 200 penalty units.

The Department became aware of the alleged harm to Aboriginal objects on 19 September 2019 resulting from works associated with the Ballina Shire Council (Council) Shared Path project. The alleged breach first came to the attention of Council on 19 September 2019. Enquiries identified that Aboriginal objects were harmed due to the unearthing and the subsequent movement of a cluster of objects between 21 August 2019 and 19 September 2019.

From our investigation of this matter DPIE has established that:

- Council did not hold an Aboriginal Heritage Impact Permit (AHIP) for the site.
- 23 November 2016 Archaeologist Graham Knuckey of Remnant Archaeology completed a Cultural Heritage Assessment for the Shared Path East stage of the Shared Path project. The assessment stated;
  - A *Stop Work Procedure* is to be employed where “any works that may reveal or disturb cultural heritage objects or sites will require an AHIP”.
  - “Monitoring by representation of the RAPs (Registered Aboriginal Party) should take place during initial ground disturbance” and;
  - That “Council maintain consultation with the RAPs. Ongoing consultation should be for the duration of the Shared Path East construction phase and include updates on progress”.
- 21 August 2019 earth works were undertaken by B&S landscaping, contracted by Council for the Shared Path project. The works unearthed objects identified by the RAP’s on site as Aboriginal objects that were then moved.



**Planning,  
Industry &  
Environment**

- The Stop Works Procedure was not followed, the Department was not notified of the location of the Aboriginal objects until 19 September 2019.
- Further objects identified as Aboriginal objects by the RAP's on site were unearthed and moved between 21 August and 19 September 2019.
- Council contacted Archaeologist Julian Travaglia and Departmental Archaeologist Rodger Mehr identified the objects unearthed and moved between 21 August and 19 September 2019 as Aboriginal objects defined under the NPW Act.

The Department considers the actions undertaken by Council were not exempt under the NPW Act or *National Parks and Wildlife Regulation 2009* and a defence to the offence is not available to you. Consequently, the Department has reasonable grounds to believe that you have committed an offence under Section 86(2) and Section 89A of the NPW Act and as such we have issued you with the enclosed **Penalty Notice** 3149061549 (Penalty Notice) for Section 86(2) and a Warning for Section 89A.

In relation to the Penalty Notice, you may now:

1. Pay the amount in full by one of the payment methods listed in the Penalty Notice, or
2. Elect to have the matter dealt with by a Court (if convicted, the Court may impose a higher penalty), or
3. Request a review of the decision to issue the Penalty Notice. An application for review must be in writing and include your mailing address, the grounds on which you are seeking review and supporting evidence. You can send your request for review to Revenue NSW (<https://www.revenue.nsw.gov.au/finer-and-fees/request-a-review>), or
4. Contact Revenue NSW to discuss your various options for payment.

Prior to undertaking any subsequent environmental assessment, development or activity, the Department of Planning, Industry and Environment encourages you to familiarise yourself with the requirements of the NPW Act as any future breaches may result in the Department of Planning, Industry and Environment requiring remedial action or prosecution. Information and fact sheets about protecting Aboriginal cultural heritage are available from either the Department of Planning, Industry and Environment's Information Centre on telephone: 131 555 or from the Department of Planning, Industry and Environment's internet site at:  
<https://www.environment.nsw.gov.au/nswcultureheritage/AboriginalPeopleAndCulturalLife.htm>.

If you have any additional questions or wish to discuss this matter, please contact Luke Williams on (02) 6659 8204.

Regards,

**Senior Team Leader, Compliance and Regulation North East  
Biodiversity and Conservation Division**

Contact officer: LUKE WILLIAMS  
(02) 6659 8204

Locked Bag 914 Coffs Harbour 2450 | [dpie.nsw.gov.au](http://dpie.nsw.gov.au) | 2



**Registered post & email**

Ballina Shire Council  
PO Box 450  
BALLINA NSW 2478

Our reference: DOC20/367875-2  
CCMS 201900882  
Contact: Luke Williams 02 6670 8611  
Date: 14 May 2020

Attention: Mr Paul Busmanis – Manager Engineering Works

Dear Mr Busmanis

**WARNING LETTER – NATIONAL PARKS AND WILDLIFE ACT 1974**

**RE: Notification of sites of Aboriginal Objects - Ballina Shire Shared Path Project Lot 3 DP 573169 The Coast Rd, Ballina, NSW 'the site'**

The Department of Planning, Industry and Environment (the Department) is responsible for assuring compliance with the *National Parks and Wildlife 1974* (NPW Act) with the aim of preventing unlawful harm or desecration to Aboriginal object/s or Aboriginal places. The Department became aware of an incident involving the alleged harm to Aboriginal object/s associated with earthworks at the site. We consider all alleged breaches of the NPW Act very seriously and conducted an investigation into this matter.

*It is an offence under s.89A of the NPW Act for failing notification of sites of Aboriginal objects. This offence carries a maximum penalty of (a) in the case of an individual—100 penalty units and, in the case of a continuing offence, a further penalty of 10 penalty units for each day the offence continues, or (b) in the case of a corporation—200 penalty units and, in the case of a continuing offence, a further penalty of 20 penalty units for each day the offence continues. The Department may decide to prosecute a person or corporation for committing this offence.*

Investigations revealed Council took responsibility for failing to notify the Department within a reasonable time, being thirty days from becoming aware of the location of Aboriginal objects. The Department considers that the activity undertaken by Council at the site was not defensible or exempt under the NPW Act or *National Parks and Wildlife Regulation 2009*. We have decided that a formal warning is sufficient in this case. Consequently, we will not be taking any further action with this matter.

The issuing of this warning letter does not prevent us from taking alternative enforcement action for the alleged offence, if it becomes apparent that an alternative response is more appropriate. This warning letter will be recorded in the Department's compliance database and may be used to inform any regulatory actions that we may consider for any future breaches of the NPW Act.

We encourage Council to become familiar with the requirements of the NPW Act as any future breaches may result in the Department issuing a penalty notice, requiring remedial action or prosecution. Information and fact sheets about protecting Aboriginal cultural heritage are available from either the Department's Information Centre on telephone: 131 555 or from the Department of

Locked Bag 914 Coffs Harbour NSW 2450 ABN 20 770 707 468





**Planning,  
Industry &  
Environment**

Planning, Industry and Environment's internet site at:  
<https://www.environment.nsw.gov.au/nswcultureheritage/AboriginalPeopleAndCulturalLife.htm>

Our Regional office can provide you advice on obtaining an Aboriginal Heritage Impact Permit (AHIP) in the event that you propose to impact Aboriginal object/s during the course of conducting your business operations in the future. Contact details are available at:  
<https://www.environment.nsw.gov.au/licences/ahips.htm>

If you wish to discuss incentives to manage, conserve and protect Aboriginal cultural heritage, our Regional Heritage Operations Team can be contacted on 02 6659 8259.

I appreciate that our inquiry may have been of concern to you and I thank you for your cooperation in bringing this matter to a close. If you have any questions about this warning letter, Luke Williams, Senior Operations Officer, can be contacted on 02 6659 8204 or via email at [luke.williams@environment.nsw.gov.au](mailto:luke.williams@environment.nsw.gov.au)

Yours sincerely

A handwritten signature in black ink, appearing to read "Troy Northey".

**Troy Northey**  
**Senior Team Leader**  
**Compliance and Regulation, North East**  
**Biodiversity & Conservation Division**

Locked Bag 914 Coffs Harbour NSW 2450 ABN 20 770 707 468

enquiries refer  
**John Truman**  
in reply please quote  
**Doc No: 20/38251, 20/43070**



16 June 2020

Revenue NSW

Dear Sir/Madam

**Re: Request to Review Penalty Notice Decision**  
**Your Reference: CCMS 201900882**

I refer to the attached Penalty Notice 3149061549 issued by Department of Planning, Industry and Environment. As per the options contained within the Notice, we are seeking a review of the decision.

The Council requests the Penalty Notice be withdrawn. The reasons for our request are set out below.

- At no stage in this matter has the Council denied a cluster of Aboriginal objects were unearthed and moved as per the DPIE investigation comments in the Notice. Council is deeply sorry for this outcome.
- As soon as Council's officers became aware of the alleged breach on 19 September 2019, it was immediately reported to DPIE.
- The works involve the construction of a shared pathway and the work is being completed by a contractor, B and S Landscaping and Earthworks. Council has planning approval for the works. This planning approval did not require Council to hold an Aboriginal Heritage Impact Permit (AHIP) for the site. Rather, as per the Notice, a cultural heritage assessment established a stop work procedure is to be employed in the event any works may reveal or disturb cultural heritage objects. The cultural heritage assessment also required Registered Aboriginal Parties (RAPs) to provide monitoring representation during initial ground disturbance.
- Council officers organised an induction for the contractor and subcontractors in respect of the cultural heritage assessment and this induction was conducted by one of the project RAPs as recommended by the Local Aboriginal Land Council.
- The contractor was obliged to follow project requirements and ensure a stop work procedure is to be employed in the event any works may reveal or disturb cultural heritage objects
- Council officers attended the site on a regular basis to ensure ongoing liaison or consultation with the contractor and the RAPs. At no point prior to the 19 September 2019 were Council officers advised of the unearthing and movement of these artefacts by either the contractor or RAPs. The artefacts were not destroyed, they were securely stored by the contractor in their onsite facilities. Regrettably, this storage was not visible to Council's officers.

40 cherry street, po box 450, ballina nsw 2478  
t 1300 864 444 e council@ballina.nsw.gov.au w ballina.nsw.gov.au abn 539 29 887 369

Page 2  
Planning Industry & Environment  
12 June 2020

---

- Further to responding to the discovery, Council immediately organised the preparation of an AHIP application for the site in consultation with the local Aboriginal community and this application was approved by DPIE. This AHIP facilitates the collection and management of the Aboriginal objects for the areas affected and for the remaining section of the path as proposed originally for the works in the approved plans.
- The development of this project has involved extensive consultation with representatives from the local Aboriginal community over many years. Therefore Council itself is very disappointed that the cultural heritage assessment procedures were not followed as expected.
- Furthermore, the Council has a number of projects occurring concurrently with the subject works, and these projects are being managed in accordance with relevant AHIPs. The Council has a record of delivering many projects each year which have involved careful consultation with the Aboriginal community and full compliance with planning and statutory requirements, including cultural heritage.
- Also, it is the case, Council undertakes many programs and activities in support of the Aboriginal community. A few examples include:
  - regular liaison with the Aboriginal community
  - employment of Indigenous Trainees and Apprentices in an ongoing program
  - employment opportunities in our construction contracts
  - direct support to NAIDOC week
  - provision of infrastructure maintenance services for community housing
  - provision of land for a community child care facility
  - environmental works on Aboriginal owned land.
- The subject works are a stage of a broader coastal shared path project. This stage, and earlier stages, have included a substantial investment to recognise cultural heritage as a major part of the project. This recognition has involved the construction of interpretative signage and education sites, and the inclusion of Aboriginal art in the landscape design.

Examples of this work are shown in the images below.

40 cherry street, po box 450, ballina nsw 2478  
t 1300 864 444 e council@ballina.nsw.gov.au w ballina.nsw.gov.au abn 539 29 887 369



40 cherry street, po box 450, ballina nsw 2478  
t 1300 864 444 e council@ballina.nsw.gov.au w ballina.nsw.gov.au abn 539 29 887 369



40 cherry street, po box 450, ballina nsw 2478  
t 1300 864 444 e council@ballina.nsw.gov.au w ballina.nsw.gov.au abn 539 29 887 369

Page 5  
Planning Industry & Environment  
12 June 2020

---

- We have also advised our project managers that supervision of our contractors should involve, to the extent possible, further checks on their compliance with project documentation in respect of heritage matters.

In summary, we regret this incident has occurred, however we also submit the Council has an active program in respect of cultural heritage, we provide direct support and consultation with the local Aboriginal community, and we have successfully completed many projects involving sensitive cultural heritage issues. Also, as per the above, the harm was mitigated by the actions of the RAPs to store the objects on site and a subsequent AHIP approval was achieved. Finally, we have responded by reviewing our procedures to determine how this type of incident can be avoided in the future.

We have already received a warning letter in respect of s 89A pertaining to this matter and we understand, and agree with, the DPIE's advice in respect of Council's obligations to comply with s 86(2). It is therefore our respectful submission, in light of the above response, the penalty be withdrawn and our apology in respect of this matter be noted.

Yours faithfully

John Truman  
**Director**  
**Civil Services Division**

40 cherry street, po box 450, ballina nsw 2478  
t 1300 864 444 e council@ballina.nsw.gov.au w ballina.nsw.gov.au abn 539 29 887 369



**Planning,  
Industry &  
Environment**

Our Reference: DOC20/567250  
CCMS 201900882  
Date: 15 July 2020

**Registered Post**

Mr John Trueman  
Director  
Civil Services Division  
Ballina Shire Council  
PO Box 450  
BALLINA NSW 2478

RECEIVED  
22 JUL 2020  
RECORDS

Dear Mr Trueman

**Subject: Request to review PENALTY NOTICE 3149061530 – Local Land Services Act 2013**

I refer to representations regarding the Penalty Notice 3149061549 issued to Ballina Shire Council by the Department of Planning, Industry and Environment (the Department) on 14 May 2020 for a breach of Section 86 (2) of the *National Parks and Wildlife Act 1974*.

The Department has conducted an internal review of the decision to issue the Penalty Notice. The review was undertaken in accordance with the Attorney General's *Internal Review Guidelines under the Fines Act 1996*, by a Departmental officer who was not involved with the investigation which led to the issuing of the Penalty Notice. Your request for a review outlined council's cooperation during the investigation, the remorse by council over the breach, the subsequent repatriation of the Aboriginal objects, changes to procedures to improved future protection measures and the past positive record of council in dealing with Aboriginal cultural heritage

The review found that enough evidence demonstrates that between 21 August 2019 and 19 September 2019 Ballina Shire Council harmed Aboriginal objects during the construction of a pathway.

The issues raised were given consideration and the Department provides the following advice:

- *at no stage in this matter has council denied a cluster of Aboriginal objects were unearthed and moved as per the investigation comments in the notice. Council is deeply sorry for this outcome. As soon as council's officers became aware of the alleged breach on 19 September 2019, it was immediately reported to the Department.*

Council's acknowledgement of the circumstances of the breach, sorrow at the occurrence, and cooperation during the investigation are acknowledged and appreciated.

- *The planning approval did not require council to hold an Aboriginal Heritage Impact Permit (AHIP) for the site. Rather, as per the notice, a cultural heritage assessment established a stop work procedure is to be employed in the event any works may reveal or disturb cultural heritage objects. The cultural heritage assessment also required Registered Aboriginal Parties (RAPs) to provide monitoring representation during initial ground disturbance.*

Level 8, 24 Moonee Street, Coffs Harbour, NSW 2450 | Locked Bag 914, Coffs Harbour Ph (02) 6659 8200 | [dpie.nsw.gov.au](http://dpie.nsw.gov.au) |

Page 1 of 3

It is acknowledged that the council elected not to hold an Aboriginal Heritage Impact Permit and instead was to rely on a due diligence approach for this section of the work. This was to involve monitoring, implementation of stop work procedures and reporting to consultant archaeologists and the Department when Aboriginal objects were encountered. Unfortunately, these measures were not effectively implemented by council resulting in the breach.

- *Council officers organised an induction for the contractor and subcontractors in respect of the cultural heritage assessment and this induction was conducted by one of the project RAPs as recommended by the Local Aboriginal Land Council.*

While induction training was provided by a member of the RAP on behalf of council, council could not provide details of the induction training. Council could not confirm if this included making those contractors involved in soil disturbance activities and those undertaking the monitoring, aware of the stop work and reporting procedures. From the actions of those involved, and the failure to implement these measures, it appears they may not have understood the requirements.

- *The contractor was obliged to follow project requirements and ensure a stop work procedure is to be followed in the event any works may reveal or disturb cultural heritage objects.*

Council was in control of the project and responsible to ensure protection of Aboriginal cultural heritage through implementation of the stop work and reporting protocol. Council sought to implement the requirements using a contractor. Council retained responsibility for performance against the cultural heritage requirements.

- *Council officers attended the site on a regular basis to ensure ongoing liaison or consultation with the contractor and the RAPs. At no point prior to the 19 September 2019 were council officers advised of the unearthing and movement of these artefacts by either the contractor or RAPs. The artefacts were not destroyed, they were securely stored by the contractor in their onsite facilities. Regrettably, this storage was not visible to council's officers.*

While council officers attended the site on a regular basis, it appears this was not effective in overseeing the implementation of cultural heritage aspects of the project. This was shown with the first find occurring on 21 August 2019 and not being reported to council until 19 September 2019.

It is acknowledged that the objects were not destroyed, but the moving of these objects from the original location can lose context within the landscape and compromise valuable interpretive information. With the intervening construction of the path, any opportunity to conduct further examination was lost. In addition, one of the objects was found to have sustained damage.

- *Further to responding to the discovery, council immediately organised the preparation of an AHIP application for the site in consultation with the local Aboriginal community and this application was approved by DPIE. This AHIP facilitates the collection and management of the Aboriginal objects for the areas affected and for the remaining section of the path as proposed originally for the works in the approved plans.*

The actions in arranging the AHIP are acknowledged and appreciated.

- *The development of this project has involved extensive consultation with representatives from the local Aboriginal community over many years. Therefore Council itself is very disappointed that the cultural heritage assessment procedures were not followed as expected.*

The council's engagement with the Aboriginal community in developing the project, regret that the heritage assessment procedures were not followed is acknowledged and appreciated.



- *Council has a number of projects occurring concurrently with the subject works, and these projects are being managed in accordance with relevant AHIPs. The council has a record of delivering many projects each year which have involved careful consultation with the Aboriginal community and full compliance with planning and statutory requirements, including cultural heritage.*
- *Council undertakes many programs and activities in support of the Aboriginal community.*

The council's record of consultation and support to the Aboriginal community and commitment to cultural heritage considerations is appreciated and acknowledged.

- *We have also advised our project managers that supervision of our contractors should involve, to the extent possible, further checks on their compliance with project documentation in respect of heritage matters. Finally, we have responded by reviewing our procedures to determine how this type of incident can be avoided in the future.*

We are pleased to hear of the future adoption of compliance checks against the project documentation in respect of cultural heritage matters. Council's actions to avoid future breaches is appreciated.

As a result of the review, the Department reaffirms the issuing of the penalty notice was the most appropriate regulatory response to the incident, and the penalty notice will not be withdrawn.

If you have any question to this matter, Robert Monteith, Senior Team Leader, can be contacted on 02 6022 0628 or via email at [rob.monteith@environment.nsw.gov.au](mailto:rob.monteith@environment.nsw.gov.au)

Yours sincerely,



**Russell Madeley**  
**Director, North East**  
**Biodiversity and Conservation Division**