Civil and Administrative Tribunal

New South Wales

Case Name:	Benoit De Tarle v The Owners Corporation Strata Plan 576
Medium Neutral Citation:	[2022] NSWCATAP 77
Hearing Date(s):	17 January and 21 February 2022
Date of Orders:	22 March 2022
Decision Date:	22 March 2022
Jurisdiction:	Appeal Panel
Before:	I Coleman SC ADCJ, Principal Member D Fairlie, Senior Member
Decision:	(1) The appeal is dismissed. (2) Any party seeking an order for costs shall file written submissions not exceeding 5 pages in length within 7 days identifying the basis upon which such order is sought and any submissions in opposition to the application for costs being determined on the papers and without an oral hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013. (3) Any party resisting an application for costs shall file written submissions in opposition to such application not exceeding 5 pages in length within 14 days and any submissions in opposition to the application for costs being determined on the papers and without an oral hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013.
Catchwords:	STRATA TITLES- access to CCTV footage - application of s 180 and 182 of the Strata Schemes Management Act 2015 - jurisdiction of the Appeal Panel to give an advisory opinion or grant declaratory relief

Legislation Cited:	Civil and Administrative Tribunal Act 2013 Strata Schemes Development Act 2015 Strata Schemes Management Act 2015 Supreme Court Act 1970 Surveillance Devices Act 2007
Cases Cited:	Ainsworth v Criminal Justice Commission [1992] HCA 10; (1992) 195 CLR 56 Bass v Perpetual Trustee Co Ltd [1999] HCA 9; (1999) 198 CLR 334 Multiplex Ltd v Qantas Airways Ltd [2006] QCA 337 Re Barrow [2017] HCA 47
Category:	Principal judgment
Parties:	Benoit De Tarle - Appellant The Owners Corporation Strata Plan 576 - Respondent
Representation:	Appellant self-represented Respondent self-represented through a Strata Committee Member
File Number(s):	2021/302754
Publication Restriction:	Unrestricted
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	29 September 2021
Before:	G Ellis SC, Senior Member
File Number(s):	SC21/22660

REASONS FOR DECISION

1 By Notice of Appeal filed on 25 October 2021 Benoit De Tarle ("the Appellant") appealed against orders made by the Tribunal on 29 September 2021 in proceedings between the Appellant and The Owners - Strata Plan Number 576

("the Respondent"). By Reply filed on 15 November 2021 the Respondent sought the dismissal of the Appellant's appeal.

2 The appeal was listed for hearing on 17 January 2022. For reasons which do not assume significance, the appeal was adjourned part-heard on that day until 21 February 2022, at which time the hearing of the appeal proceeded and was concluded. Judgment was then reserved.

3 These are our reasons for the decision of the Appeal Panel with respect to the Appellant's appeal.

4 The Appellant has represented himself. Pursuant to leave granted on 17 November 2021, the Respondent was granted leave to be represented by Mr Darren Ford, who is a member of the Respondent's strata committee.

5 Prior to the hearing of the appeal on 17 January 2022, each party filed extensive submissions and documentation. Subsequent to the hearing on 17 January 2022, and in accordance with directions then made, each party filed further submissions, the Respondent on 24 January 2022, and the Appellant on 31 January 2022. The parties each filed further documentation. The Appellant filed documentation which he submitted had been before the Tribunal at first instance, but which he submitted had not been considered by the Tribunal in reaching its decision of 29 September 2021. That material was found at Tab 9 of the volume of documents provided by the Appellant. It was not suggested by either party that any document of possible relevance in the appeal was not before the Appeal Panel.

6 As will be seen, and as the transcript of the hearing of the appeal would confirm, however articulated, the Appellant's grounds of appeal complained that the Tribunal at first instance had failed to have regard to a material consideration, and had as a result, erred in law by failing to grant him access to closed circuit television (CCTV) footage which he asserted existed and was in the possession or under the control of the Respondent, and also had failed to make an order that he be entitled to further CCTV footage on request by him. We accept that, if established, either of those challenges would raise a "question of law" within s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) ("the CAT Act").

The reasons for the decision at first instance

7 In accordance with the Covid protocols then in place, the proceedings at first instance were conducted by telephone. It is apparent from the transcript of the hearing that there were no challenges to any of the extensive evidence relied upon by each party to the proceedings at first instance. No person was cross-examined in relation to any of that material.

8 The Tribunal made orders in the following terms:

> "(1) Pursuant to s 188(2) of the *Strata Schemes Management Act* 2015, on or before 20 October 2021 (being 21 days from the date of today), the Respondent is to make available to the Applicant for inspection at a time and place agreed between the parties:
>
> (a) The levy register of each Lot from 6 March 2014 to 31 December 2015 and, if available, from 1 January 2010 to 30 June 2012.
>
> (b) Any document whereby the Respondent obtained legal advice in regard to the behaviour and actions of Ms Newland.
>
> (c) Any list of documents which record any action taken in regard to the behaviour of Ms Newland of Unit 56 during the period from 4 January 2019 to 4 January 2021.
>
> (d) The email from Platinum Strata Management sent to the Strata Committee on 10 May 2021 at 6.24 p.m.
>
> (2) The application is otherwise dismissed."

9 No part of order 1 has been appealed against. It is the dismissal of the Appellant's application for access to CCTV footage, both retrospectively and prospectively which gives rise to the appeal. In those circumstances, we need only refer to those parts of the reasons for the decision of the Tribunal at first instance which are relevant to the Appellant's grounds of appeal.

10 The Tribunal at first instance identified the relief sought by the Applicant with respect to "specific CCTV footage" and other documents under s 182 of the *Strata Schemes Management Act* 2015 ("SSMA"), and an order under s 232 in relation to the provision of CCTV footage in future (reasons at [1]). For the reasons which followed, the Tribunal at first instance held that the Appellant was entitled to inspect the documents which were referred to in order 1 but "otherwise rejected the application".

11 The Tribunal recorded (at [4]) the documents which were admitted in evidence, which comprised "Exhibit "A", Applicant's documents, received on

13 September 2021 and Exhibit “R”, Respondent’s documents received on 10 August 2021”. All of those documents were also before the Appeal Panel.

12 The Tribunal recorded (at [5]) that documents submitted by the Appellant on 10 June 2021 were “superseded by those which became Exhibit A”. That finding was disputed by the Appellant on appeal. For the reasons which follow, and given that there is no suggestion that any material relied upon, or intended to be relied upon by the Appellant at first instance was not before the Appeal Panel, and cannot be relied upon, it is unnecessary for us to say more about the dispute with respect to this topic.

13 The Tribunal, accurately, distilled the issues requiring determination (at [7]), being, relevantly for present purposes, “(1) the request for CCTV footage” and “(4) the position in relation to CCTV footage in future”.

14 The Tribunal accepted (at [6]) that the SSMA applied to the parties’ dispute, and that the Tribunal had jurisdiction to hear and determine the proceedings. Those findings are not controversial in the appeal. The Tribunal recorded “The relevant law” (at [9]-[11]). There is no suggestion that the Tribunal erred in what it there recorded.

15 The Tribunal recorded (at [12]) the evidence relied upon by the Appellant ,and the evidence relied upon by the Respondent ([at 13]).

16 The Appellant’s first complaint asserts that the Tribunal failed to have regard to evidence which was before it, to which we will later refer. The crux of the Appellant’s submission, properly understood by the Appeal Panel, and the Respondent, was that the Tribunal at first instance failed to have regard to evidence upon which he relied which was before it and that, had it done so, the Tribunal should, or was likely to have come to a different decision. The Respondent did not dispute that the material relied upon by the Appellant was before the Tribunal at first instance, but did not concede that the Tribunal at first instance had failed to take it into consideration or, that, if it did fail to do so, consideration of the material could have resulted in a different decision at first instance.

17 The Tribunal considered the Appellant's requests for past CCTV footage (at [15]-[17]). The Tribunal there recorded, accurately (at [15]), that the Appellant had made a total of 12 requests for CCTV footage. Those requests are found at the commencement of Tab 9 of the Appellant's "first bundle" submitted on 13 July 2021. Those documents were uncontroversially before the Appeal Panel.

18 The Tribunal at first instance referred to the contention of the Respondent, based upon emails generated on or about 15 June 2021, that the CCTV footage sought to be accessed by the Appellant "no longer existed as it is overwritten after 6 weeks". The Tribunal found (at [17]) that "Having considered the available evidence and the submissions of the parties, the Tribunal is not satisfied that any of the CCTV footage sought by the Applicant exists and there is no utility in making an order for the production of records that do not exist".

19 The last issue before the Tribunal at first instance which assumed significance in the appeal was considered by the Tribunal under the heading "Future Requests for CCTV Footage". The Tribunal set out its reasons (at [33]-[40]) for rejecting the Appellant's application for "an order in relation to future requests for access to the CCTV footage". The Tribunal referred (at [34]) to a number of decisions upon which the Appellant relied which he asserted supported his contention.

20 The Tribunal found (at [35]) that those cases did not "provide support for a right to inspection in relation to CCTV footage that does not relate to a matter that has been reported to the police".

21 The Tribunal recorded a number of reasons for finding that, in the exercise of discretion provided by s 232 of the SSMA, the Tribunal "may" refuse the Appellant's request (at [36]). Those reasons assume significance in the context of the appeal with respect to access to future CCTV footage.

22 The first of those reasons (at [37]) was that sections 182 and 188 of the SSMA "only entitle inspection of existing documents", noting that the Appellant sought an order under s 232 of the SSMA which would "entitle him to view CCTV footage at any time in the future".

23 The Tribunal at first instance further recorded (at [38]) that the policy of the Respondent, as recorded earlier in its reasons, was that CCTV footage would not be made available unless there had been "a formal request from strata or NSW Police of [sic] the AFP is received". The Tribunal at first instance recorded that such policy "appears reasonable, reflects legitimate privacy concerns and seems directed towards the use of CCTV footage to detect illegal activity and not provide potential support for a [sic] lesser reasons, such as a personal vendetta".

24 Finally, the Tribunal at first instance recorded that:

> "If there is to be any change in the Respondent's current policy in relation to access to CCTV footage then that should be considered at a meeting of the Respondent so as to provide all Lot owners with an opportunity to be heard in relation to what should be the policy in relation to access to CCTV footage. Such a meeting would provide an opportunity for relevant statutory provisions, such as the *Surveillance Devices Act* 2007, to be considered".

25 For those reasons the Tribunal ([at [40]) recorded that it was "not willing to make an order which suggests the Applicant is entitled to view any CCTV footage at any time."

The grounds of appeal

26 As we have earlier recorded, albeit not formerly so articulated, debate on 17 January 2022 and, in much greater detail, on 21 February 2022, revealed that the Appellant raised two complaints. The first of those was that the Tribunal at first instance failed to have regard to material which was relevant to the determination of the proceedings or to consider his contentions in reliance upon that material.

27 The Appellant identified the material which he submitted the Tribunal at first instance had failed to consider in reaching its decision. That material is found at Tab 9 of the Appellant's bundle. In support of his contention that the Tribunal at first instance should have found that CCTV footage for the periods covered by his application for access to such footage existed, the Appellant identified a number of emails which he submitted, essentially admitted, or accepted, that the Respondent had retained footage obtained by its CCTV.

28 On 14 November 2019 (Tab 19, p32) the Appellant emailed the Manager of the building in which the Appellant was an owner and asked "If the CCTV is

working following installation?" and "What is the procedure to follow; to either obtain a copy of the CCTV footage or to request that Luna/Vital/OC save a copy?". It is not in doubt that, at the time of that request, CCTV had been installed in the building. The entities referred to by the Appellant "Luna/Vital" were apparently managing agents and/or entitles associated with the management of the building. The reference to "OC" is an obvious reference to the Owners Corporation.

29 Shortly after the Appellant's email, the Building Manager responded to his email and said "Yes the CCTV is operational, in the past I have provided a copy to people, I'll let you know when I am next on site".

30 The next email exchange to which the Appellant referred was on 12 February 2020 (Tab 9, p34). On that day, as a result of an alleged incident involving the Appellant's motor vehicle, the Appellant asked the managing agent for the building whether it would "provide me with a copy of just after the rear car park where my car is located" so that he could "review" CCTV footage which he perceived would evidence what occurred with respect to his motor vehicle. Shortly after the Appellant's email, Sebastian Matthews, Operations Manager, Luna Management, responded saying "I will go through the footage and retrieve anything I find. For privacy and out of respect for residences, I would prefer to review the footage and follow up any action item with you after that. I will be there tomorrow to collect this."

31 The next email upon which the Appellant relied was on 21 April 2020 from Brad Louis of Vital Strata Management, who apparently had assumed management of the building from Luna. In his email to the Appellant, Mr Louis relevantly said "I have asked Sebastian to review footage and keep a copy on file, if required later." The email proceeded to say in the passage which the Tribunal at first instance recorded in its reasons (at [15]):

> "We don't just hand over footage, if a formal request from strata or NSW Police or the AFP is received, we respond accordingly and sign a statement of the footage being downloaded, while we have CCTV to review incidents, taking a copy must be via appropriate channels. If Jan did engage in a conflict with you then this matter should be taken to police whereby, they will formally request a copy of the footage and take necessary action."

32 As is not in doubt (Tab 9, p37), that email resulted from the Appellant's email earlier that day (Tab 9, p37) requesting such CCTV footage.

33 A considerable number of other emails during 2020 were also contained behind Tab 9. Save for the emails to which we have referred, and the emails to which we will shortly refer, the Appellant did not suggest that any of those other emails advanced the present challenge. We have looked at that material. We simply record that, on a number of occasions during that year, it was suggested on behalf of the Owners Corporation that CCTV footage no longer existed.

34 The Appellant relied upon emails (Tab 9, pages 45-46) on 22 December 2020, 23 December 2020 and 24 January 2021. On 22 January 2021 the Appellant requested "access to - and save a copy of - all CCTV footage from cameras facing Anderson Street from 4.00 p.m. on 20 December to 1.30 p.m. on 22 December 2020. In response, on 23 January 2021, Sebastian Matthews, Operations Manager, Luna Management, said "I will retrieve the requested footage do you have any images of the damage to the car".

35 On 24 January 2021 the Appellant again emailed Mr Matthews, stating "I need access to this footage. As you are aware over the past 3 years my car and trailer have been damaged and interfered with on numerous occasions."

36 Other than to the extent recorded above, we have not been referred to any other evidence upon which the Appellant relies with respect to this issue.

37 The reasons of the Tribunal at first instance do not expressly refer to the emails which we have reviewed. Although that does not mean that the Tribunal at first instance failed to have regard to them, in fairness to the Appellant, we have considered whether the failure to have regard to them was erroneous in law. To properly determine that issue involves consideration of the basis upon which the Tribunal declined to find (at [17]) that "any of the CCTV footage sought by the Applicant exists". That in turn requires consideration of what CCTV footage was in fact "sought" by the Appellant.

38 The 12 requests identified by the Tribunal at first instance, and set out in table form in the first two pages of Tab 9 of the Appellant's bundle, establish that the

first request for access to CCTV footage was on 14 November 2019 and the last was on 8 February 2021. That timeframe is important in considering this challenge.

39 The critical finding of the Tribunal (at [17]) was in reliance upon a number of emails between the Strata Manager and Mr Ford. It is not in doubt that these emails were before the Tribunal at first instance. Further copies of them were provided by the Respondent to the Tribunal and the Appellant on 24 January 2022, and are referred to in the Appeal Panel's papers at Tab B. The transcript of the hearing (at lines 385 and following, to which the Appeal Panel was specifically referred) leave no room for doubting that the emails were before the Tribunal at first instance.

40 The emails between Mr Ford and "Danyelli", the Building Manager, representing Luna, who managed and had access to the CCTV system in June 2021, commenced with Mr Ford emailing Danyelli Rosa in relation to the Appellant's request for access to CCTV footage. Mr Ford asked "What is the legality of obtaining footage, and how does one go about it?" and, more relevantly for present purposes, "How long has the footage been kept? What dates are able to be accessed?" The email concluded by asking whether the Appellant had "given you the dates he wants, and what has been your response? Have you looked for any of the footage requested".

41 Ms Rosa replied "We can definitely review and provide CCTV footage for a resident if they provide us with a police event number for the incident. The footage is kept for 6 weeks. As for today, we can access any previous footage until 4th May 2021".

42 The email concluded that some of the footage sought by the Appellant "was not reviewed and not downloaded as we didn't obtain a police event number for those incidents".

43 Mr Ford responded asking "All of his [the Appellant's] requests had been for earlier than that. Is the footage destroyed, stored somewhere else or definately [sic] not available? Is having a police event number the only way to obtain footage? Basically asking is there any way of the OC assisting Benoit".

44 Ms Rosa replied “They’re just not available anymore as the system will replace the old footage with a new one. The police event number would just be necessary in order for us to download the footage and provide the footage to the resident. I can review them if requested, but the date needs to be available for review”.

45 Neither Mr Ford nor Ms Rosa was cross-examined in relation to the questions asked by Mr Ford and Ms Rosa’s answers to them. Accepting that, as the Appellant contends, the earlier emails establish that CCTV footage was retained, inferentially indefinitely, does not in our view establish that the finding made by the Tribunal at [17] was “wrong” as that term is understood in law. Taking that evidence into consideration would not in our view have been likely to, or should have resulted in a different decision to that made by the Tribunal.

46 The evidence establishes that the CCTV footage last requested by the Appellant (on 8 February 2021) would, having regard to Ms Rosa’s evidence, have ceased to be available as and from on or about 22 March 2021. In those circumstances, and in the absence of any evidence to contradict Ms Rosa’s statements, and we have not been referred to any, the failure of the Tribunal at first instance to consider the emails relied upon by the Appellant, if it in fact failed to consider them, was not erroneous given that consideration of those emails was not inconsistent with or contrary to the finding recorded by the Tribunal at first instance. As we have said there is nothing in those emails which would have led to a different result, or the likelihood of one. This challenge fails.

47 Before the Tribunal and in this appeal, the Appellant also submitted that the CCTV footage was a record of the Respondent which was required to be retained for seven years pursuant to s 180(1)(a) of the SSMA. That sub section is in the following terms:

> “(1) An owners corporation must cause the following to be retained for 7 years–
>
> (a) any records, notices and orders required to be kept under this Division or Part 10 of the Strata Schemes Development Act 2015.”

48 Section 180 is in Division 1 of Part 10 of the Act and is comprised of ss 176 - 181. S 177 requires an owners corporation to prepare a strata roll and s 178

sets out the information that must be recorded in the strata roll. Section 179 specifies that notices and orders given to an owners corporation under this or any other Act or any order made by a court or tribunal and given to an owners corporation must also be kept.

49 Section 180(1) contains further sub sections after sub section (a) which refer to other classes of documents which must be retained. These are:

> "(b) minutes of meetings;
>
> (c) financial statements and accounting records;
>
> (d copies of correspondence received and sent by the owners corporation;
>
> (e) notices of meetings of the owners corporation and its strata committee;
>
> (f) proxies;
>
> (g) voting papers;
>
> (h) any strata managing agent agreement; records given to the owners corporation by the strata managing agent relating to the exercise of the functions by the agent;
>
> (i) records given to the owners corporation by the strata managing agent relating to the exercise of functions by the agent; and
>
> (j) any other documents prescribed by the regulations."

50 There are no further classes of documents so prescribed by the regulations, Also for completeness, we note that Part 10 of the *Strata Schemes Development Act* 2015 (NSW) relates to the renewal process for freehold strata schemes and does not specify any additional classes of documents that must be kept.

51 The Appellant submits that at the time the Owners Corporation resolved to install CCTV cameras on 30 August 2019, it also, by implication, resolved that all CCTV footage thereby created was a record of the Owners Corporation and further that it should be retained for seven years. We accept that any CCTV footage so created can be categorised as a record of the Owners Corporation. However we reject the proposition that the footage is a record of the kind specified in s 180(1)(a) or in any other provision in Part 10 Division 1 of the Act. In other words there is no requirement in the Act that the footage be retained for seven years and this argument also fails.

52 So far as access to future CCTV footage is concerned, to the extent that the Appellant maintained that challenge, nothing to which the Appellant referred us

establishes that the Tribunal erred in finding as it did. The Tribunal adequately explained the reasons for its decision in the passages of its reasons to which we have earlier referred. We have not been referred to any relevant matter which the Tribunal is asserted to have failed to consider in reaching its decision. We have not been referred to any matter to which the Tribunal at first instance had regard in reaching its decision which was irrelevant. We have not been referred to anything with respect to the reasons for the decision of the Tribunal at first instance which involved any error of law.

53 As the transcript of debate in the appeal would confirm, both parties are anxious, and legitimately so, to have clarification of the rights and entitlements of strata owners to access CCTV footage. As the Tribunal at first instance recorded (at [39]), that is really a matter for the Owners Corporation to resolve, and is not without complexity having regard to statutory provisions, such as the *Surveillance Devices Act* 2007 (NSW).

54 In reality, the parties invited the Appeal Panel to provide either an advisory opinion, or grant declaratory relief. The Appeal Panel has no jurisdiction to grant declaratory relief, our role being limited to determining appeals in accordance with the provisions of s 80 of the CAT Act. If the Appeal Panel has jurisdiction to provide advisory opinions, which we doubt, we would not do so, for the reasons recorded below.

55 Section 75 of the *Supreme Court Act* 1970 (NSW) provides that the Court may "make binding declarations of right whether any consequential relief is or could be claimed or not". The CAT Act contains no provision investing the Tribunal with jurisdiction to grant declaratory relief. In proceedings before it, the Tribunal will regularly need to determine "rights" in reaching its decision, but that does not involve making binding or other "declarations of right".

56 Even if the Appeal Panel had jurisdiction to grant declaratory relief, doing so in this case would be inappropriate. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, Mason CJ, with whom Dawson, Toohey and Gaudron JJ said (at [589]) that declaratory relief would not be granted if the question is "purely hypothetical", if relief is claimed "in relation to circumstances that [have] not occurred and might never happen" or if the declaration "will produce no

foreseeable consequences for the parties". Each of those reasons for declining declaratory relief applies in this case.

57 In *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 (at [47]) ("*Bass*"), the High Court held that a court should not make a determination that does not give "a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy" and (at [45]) thus should not give hypothetical or advisory opinions.

58 The reasons articulated by Edelman J in *Re Barrow* [2017] HCA 47 (at [10]) for declining to provide an advisory opinion which does not "amount to a binding decision raising a res judicata between the parties", apply to the present circumstances.

59 As the Queensland Court of Appeal explained in *Multiplex Ltd v Qantas Airways Ltd* [2006] QCA 337 (at [26]) to provide an advisory opinion in breach of the considerations identified in *Bass* is "merely providing legal advice".

60 Although we understand the desire of both parties to obtain clarity with respect to access to future CCTV footage, even if we had power to attempt to provide such clarity, for the reasons identified in the authorities referred to above, we could not effectively do so.

Conclusion

61 In the circumstances, neither of the Appellant's challenges having merit, his appeal will be dismissed. Properly understood, as we have recorded above, the Appellant's grounds of appeal potentially raised "questions of law". That being so, there is no occasion for consideration of whether to grant the Appellant leave to appeal. We simply record that, having regard to the absence of merit in the Appellant's challenges, to the extent that leave may have been required, we would not have granted it, as doing so could have no utility.

Costs

62 Although both parties are unrepresented, and the Appellant raised issues of practical substance, and did so in a timely and concise manner, we will make directions with respect to the provision of written submissions in support of or opposition to any application for costs which either party may make.

Order

(1) The appeal is dismissed.

(2) Any party seeking an order for costs shall file written submissions not exceeding 5 pages in length within 7 days identifying the basis upon which such order is sought and any submissions in opposition to the application for costs being determined on the papers and without an oral hearing pursuant to s 50(2) of the *Civil and Administrative Tribunal Act* 2013.

(3) Any party resisting an application for costs shall file written submissions in opposition to such application not exceeding 5 pages in length within 14 days and any submissions in opposition to the application for costs being determined on the papers and without an oral hearing pursuant to s 50(2) of the *Civil and Administrative Tribunal Act* 2013.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar