Supreme Court

New South Wales

Case Name:	McIntosh v Lennon
Medium Neutral Citation:	[2024] NSWSC 169
Hearing Date(s):	5 October 2023
Date of Orders:	29 February 2024
Decision Date:	29 February 2024
Jurisdiction:	Common Law - Administrative Law
Before:	Payne JA
Decision:	(1) Leave to appeal is granted. (2) The summons filed 21 April 2023 is dismissed. (3) The plaintiff is to pay the defendants' costs of the appeal to this Court.
Catchwords:	BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – enforcement of Part 2C statutory warranties against owner-builder – where owner undertook residential building work without an owner-builder permit – whether owner was "owner-builder" STATUTORY INTERPRETATION – definition of "owner-builder" in Home Building Act – where on literal reading definition extends only to those who had an owner-builder permit – whether definition should be extended to those required to obtain an owner-builder permit but did not – purposive construction – whether legal meaning of definition's actual words differs from literal meaning – whether permissible to read definition as if it contained additional words – principles for reading additional words into statute
Legislation Cited:	Building Services Corporation Act 1989 (NSW) Building Services Corporation Legislation Amendment Act 1996 (NSW)

Civil and Administrative Tribunal Act 2013 (NSW) ss 80, 83
Civil Procedure Act 2005 (NSW) s 98
Criminal Procedure Act 1986 (NSW) s 179
Environmental Planning and Assessment Act 1979 (NSW) Pt 1, sch 5, s 6.6
Competition and Consumer Act 2010 (Cth)
Conveyancing Act 1919 (NSW) s 52A
Home Building Act 1989 (NSW) Pt 2C, Pt 3, Pt 4, Pt 6, Pt 6AA, ss 12, 18B, 18C, 18D, 29, 30, 31, 32, 32AA, 90, 92, 95, 96, 98, 99, 100, 102A, 103F, 127A; sch 1 cll 1, 2,
Home Building Amendment Act 2014 (NSW)
Interpretation Act 1987 (NSW) s 33
Land Tax Management Act 1956 (NSW)
Local Government Act 1993 (NSW) Pt 1, s 113
Local Government Act 2020 (Vic) s 224
Motor Accidents Compensation Act 1999 (NSW) s 138
Sentencing Act 1991 (Vic) s 37; sch 3 cl 5
Sentencing Amendment (Community Correction Reform) Act 2011 (Vic) s 21
Work Health Act 1986 (NT) s 3

Conveyancing (Sale of Land) Regulation 2022 (NSW)
Uniform Civil Procedure Rules 2005 (NSW) rr 42.1, 50.12

Cases Cited:

Carr v Western Australian (2007) 232 CLR 138; [2007] HCA 47
Chief Municipal Inspector - Local Government v Mohamud (2021) 66 VR 1; [2021] VSC 787
Ciaglia v Ciaglia (2010) 269 ALR 175; [2010] NSWSC 341
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; [1997] HCA 2
Coal & Allied Operations Pty Ltd v Crossley [2023] NSWCA 182
Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd [2018] NSWSC 761
Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390; [1955] HCA 27
Commissioner of Police, New South Wales Police Force v Fine (2014) 87 NSWLR 1; [2014] NSWCA 327
Cooper Brookes (Wollongong) Pty Ltd v Federal

Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26
Cooper v Owners - Strata Plan No 58068 (2020) 103 NSWLR 160; [2020] NSWCA 250
De Marco v Chief Commissioner of State Revenue (NSW) (2013) 83 NSWLR 445; [2013] NSWCA 86
Department for Health and Ageing v Li (2018) 130 SASR 578; [2018] SASCFC 52
DPP (Vic) v Leys (2012) 44 VR 1; [2012] VSCA 304
Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55
Goldsmith v Bisset (No 3) (2015) 71 MVR 53; [2015] NSWSC 634
Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd (2023) 111 NSWLR 550; [2023] NSWCA 134
Gunn v Steain [2003] NSWSC 1076
HFM043 v Republic of Nauru (2018) 359 ALR 176; [2018] HCA 37
Holden v Nuttall [1945] VLR 171
Igaki Australia Pty Ltd v Coastmine Pty Ltd (1996) 34 IPR 37; (1996) FCA 207
Inco Europe Ltd v First Choice Distribution (a firm) [2000] 1 WLR 586
Jones v Wrotham Park Settled Estates [1980] AC 74
Kelly v The Queen (2004) 218 CLR 216; [2004] HCA 12
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59
Lawson v Western Australia (No 3) (2018) 85 MVR 160; [2018] WASCA 129
Lowe v The Queen (2015) 48 VR 351; [2015] VSCA 327
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Proudman v Dayman (1941) 67 CLR 536; [1941] HCA 28
R v PLV (2001) 51 NSWLR 736; [2001] NSWCCA 282
R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166

	SAS Trustee Corporation v Miles (2018) 265 CLR 137; [2018] HCA 55 Sorbello & Donelly v Whan [2007] NSWSC 951 SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34 Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531; [2014] HCA 9 Thompson v Goold & Co [1910] AC 409 Thompson v Groote Eylandt Mining Company (2003) 173 FLR 72; [2003] NTCA 5 Vitality Works Australia Pty Ltd v Yelda (No 2) (2021) 105 NSWLR 403; [2021] NSWCA 147
Texts Cited:	New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 30 October 1996 at 27-28 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 6 May 2014 at 28221
Category:	Principal judgment
Parties:	Alan Patrick McIntosh (plaintiff) Stephen Mark Lennon (first defendant) Glenda Lennon (second defendant)
Representation:	Counsel: C Simpson (plaintiff) A Crossland (first and second defendants) Solicitors: Shields Legal (plaintiff) Attwood Marshall Lawyers (first and second defendants)
File Number(s):	2023/128831
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	New South Wales Civil and Administrative Tribunal
Jurisdiction:	Appeal Panel
Citation:	[2023] NSWCATAP 83
Date of Decision:	29 March 2023

Before:	Senior Member Curtin SC; Senior Member Fairlie
File Number(s):	2022/305702

HEADNOTE

[This headnote is not to be read as part of the judgment]

The plaintiff, Alan McIntosh, was the beneficial owner of a property at Kingscliff in northern New South Wales. In 2014, he obtained development consent to perform "residential building work" on the property, within the meaning of the *Home Building Act 1989* (NSW) ("the Act"). Although he represented to the consent authority that a licensed builder would perform the work, the plaintiff in fact had the work carried out on his own behalf. The nominated licensed builder took no part in completing the residential building work. This was in breach of s 12 of the Act, which required someone in the plaintiff's position to obtain an "owner-builder permit" before doing residential building work.

In 2016, the property was sold to two buyers. In June 2020, the two buyers sold the property to the defendants, Mr and Ms Lennon. In 2021, the defendants began proceedings in the NSW Civil and Administrative Tribunal, submitting that the residential building work the plaintiff performed on the property breached the statutory warranties in Part 2C of the Act. The Tribunal ordered the plaintiff to pay the defendants $95,199.15 along with costs. That award was upheld in an internal appeal to the Tribunal's Appeals Panel. The Appeal Panel held that, by s 18C of the Act, an "owner-builder" owed the Part 2C statutory warranties to their immediate successor in title; and by s 18D, a subsequent successor in title has the same right to enforce the warranties as an immediate successor in title. Together, ss 18C and 18D would allow successors in title such as the defendants to recover from an owner-builder.

The plaintiff argued ss 18C and 18D had no application because he had never obtained an owner-builder permit and was therefore not an "owner-builder" as defined by the Act (sch 1 cl 1: "a person who does owner-builder work under an owner-builder permit issued to the person for that work"). The Appeal Panel, however, held that the "legal meaning" of this definition extended its operation

to a person who was required to obtain an owner-builder permit. Alternatively, the Appeal Panel held that words should be read in to the definition to the same effect.

The plaintiff appealed to the Supreme Court under s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW). The sole substantive issue was the meaning of "owner-builder" under sch 1 cl 1 of the *Home Building Act*.

Payne JA held, granting leave to appeal but dismissing the appeal:

1. Statutory construction requires analysis of the text of the provision in light of its context and purpose: [71]-[73], [77]-[78]. A construction that would promote the purpose of the enactment is to be preferred: [74]-[76].

> *Interpretation Act 1987* (NSW) s 33; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28; *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390; [1955] HCA 27; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34; *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2023] NSWCA 134.

2. Under ordinary purposive construction, it is permissible to "read in" words to a provision, if necessary to ensure a provision coheres with the legislature's intention: [68], [149], [150]. However, before reading in words, special inhibitory considerations apply: [100], [149]. Other factors referred to in the authorities, like the consistency of the words with the rest of the enactment, may also be relevant: [96]-[97], [100].

> *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9; *Coal & Allied Operations Pty Ltd v Crossley* [2023] NSWCA 182 at [54]; *DPP (Vic) v Leys* (2012) 44 VR 1; [2012] VSCA 304; *Jones v Wrotham Park Settled Estates* [1980] AC 74; *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586.

3. The purpose of the *Home Building Act*, and particularly Part 2C, was to extend statutory warranties to all consumers who acquire property where residential building work has been performed: [103]-[105]. The second reading materials supported that conclusion, as did s 18B, which implies the warranties into every contract for residential building work: [107]-[109].

4. If read with its literal meaning, the Act's definition of "owner-builder" would frustrate the purpose of the enactment as a whole, since successors in title

would no longer enjoy the warranties' wide protection against someone who failed to obtain an owner-builder permit: [132], [148]. That would be a capricious and unjust result: [148]-[152]. It would also improperly allow wrongdoers to take advantage of their own wrong: [79]-[84], [156](2).

> *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26; *Holden v Nuttall* [1945] VLR 171; *Thompson v Groote Eylandt Mining Company* (2003) 173 FLR 72; [2003] NTCA 5.

5. The legislature did not intend to limit successors in title to enforcing the warranties against those who had actually obtained owner-builder permits: [127]-[132]. It was overly onerous to expect successors in title to check a register of insurance details (s 102A of the Act) and, if they discovered a builder had improperly failed to obtain an owner-builder permit, rescind their sale contract before completion. It was also irrelevant that other enactments might "protect" successors in title who would otherwise have no remedy: [133]-[145]

> *Competition and Consumer Act 2010* (Cth); *Conveyancing Act 1919* (NSW) s 52A; *Local Government Act 1993* (NSW) s 113, Pt 1; *Environmental Planning and Assessment Act 1979* (NSW) s 6.6.

6. The Appeal Panel was wrong that the "legal meaning" of the actual words the Act used to define "owner-builder" could extend to a person who was required to obtain an owner-builder permit but failed to do so. The words of the definition, even if read ungrammatically, do not leave that construction reasonably open: [67], [147].

7. However, the Appeal Panel was correct that words should be read into the definition: [68], [147]. Correctly understood, "owner-builder means a person who does owner-builder work under an owner-builder permit issued to the person for that work or is required to hold an owner-builder permit to do that work": [151]. These words were necessary to ensure the purpose of the Act was not frustrated: [152]-[154].

8. Reading these words in was permissible, because *Taylor*'s three "inhibitory conditions" were met: [156]-[157], [158]. First, the definition's purpose was to enable the Act's (and particularly the statutory warranties') general protective scheme: [156](1). Secondly, the definition's current wording was a product of

clear oversight: [156](2). Thirdly, had the legislature realised the unintended consequence, it would have drafted in the words suggested: [156](3). Other "conditions" discussed in the authorities were also met, including the consistency between the suggested words and the rest of the statute, and the requirement the words not be too far a departure from the text of the provision: [157].

JUDGMENT

1 **PAYNE JA:** The plaintiff, Mr Alan McIntosh, seeks leave to appeal from a decision of the Appeal Panel of the NSW Civil and Administrative Tribunal ("NCAT") made on 29 March 2023. The Appeal Panel's decision was an internal appeal from a decision made by Senior Member Ellis SC in the Consumer and Commercial Division of NCAT on 15 September 2022 awarding damages to be paid by Mr McIntosh for breaches of the statutory warranties contained in the *Home Building Act 1989* (NSW) ("the Act").

2 The central question on this appeal is whether Mr McIntosh was an "owner-builder" for the purposes of the statutory warranties in Part 2C of the Act.

Relevant facts

3 In 1995, Mr McIntosh became the owner of a house and land ("the property") at Kingscliff in the far north of New South Wales. The property was purchased and registered in the name of his daughter but was held on resulting trust for Mr McIntosh. Mr McIntosh's son and his family lived for a time in the property.

4 In about 2014, Mr McIntosh obtained development consent from Tweed Shire Council to demolish the existing house and build a new house on the property. In obtaining that development consent, Mr McIntosh represented to the consent authority that the planned residential building work was to be done by a Mr Miller, a builder who was licensed under the *Home Building Act* to do residential building work.

5 Between 2014 and 2016 Mr McIntosh carried out "residential building work" on the Kingscliff property as that term is defined in sch 1 cl 2 of the *Home Building Act*. Mr McIntosh was an "owner" of the property for the purposes of the *Home Building Act*, as defined in sch 1 cl 1. In circumstances I will shortly explain in

greater detail, Mr McIntosh was obliged to obtain an owner-builder permit issued under the *Home Building Act* in relation to this residential building work before commencing that work. It was common ground that Mr McIntosh never obtained an owner-builder permit in relation to this work.

6 Section 12(a) of the *Home Building Act* made it an offence for the plaintiff to do residential building work except as the holder of an owner-builder permit authorising him to do that work. Section 12 of the Act creates a summary offence of absolute liability. Even if the principles in *Proudman v Dayman* (1941) 67 CLR 536; [1941] HCA 28 apply to s 12, Mr McIntosh did not seek to prove any honest and reasonable mistake of fact in relation to his failure to obtain an owner-builder permit prior to doing residential building work on the property. Mr McIntosh has never been prosecuted for a breach of s 12 and, given that more than six months have elapsed since the date any offence occurred, he never will be: *Criminal Procedure Act 1986* (NSW) s 179(1).

7 On 6 December 2016, the property was sold to a Ms Carberry and a Ms Clark. On 2 June 2020, Ms Carberry and Ms Clark exchanged contracts for the sale of the property to the first and second defendants, Mr Stephen Lennon and Ms Glenda Lennon ("the Lennons"). The purchase settled on 24 July 2020.

8 On 18 February 2021, the defendants commenced proceedings in NCAT against Mr McIntosh seeking an award of damages for breach of the statutory warranties contained in Part 2C of the Act.

9 At first instance, Senior Member Ellis SC found that the Lennons were entitled to the statutory warranties in Part 2C in relation to the property. Senior Member Ellis SC found that the dwelling on the property had been constructed in breach of those warranties. Mr McIntosh was found to be an "owner-builder" within the meaning of the *Home Building Act*. The Tribunal awarded $95,199.15 in damages against Mr McIntosh and ordered him to pay the Lennons' costs.[1]

10 The plaintiff appealed the decision of Senior Member Ellis SC to the Appeal Panel. On 29 March 2023, the Appeal Panel dismissed his appeal. The Appeal Panel found, relevantly, that Mr McIntosh was an "owner-builder" for the

[1] And the costs of Mr McIntosh's daughter (the second respondent in those proceedings).

purposes of the *Home Building Act*. On the material before me, it is unclear whether the Appeal Panel ultimately ordered Mr McIntosh to pay the Lennons' costs of the appeal to the Appeal Panel. It is unhelpful to assert, as the plaintiff does, that he seeks that "any order" made for costs by the Appeal Panel be set aside without identifying what order was made and the reasons for making that order.

Relevant legislation

11 The *Home Building Act* commenced operation in full on 21 March 1990 and regulates the residential building industry. "Residential building work" above a nominated value is to be carried out only by a person issued with a licence under the Act to do that work. Residential building work is defined widely in cl 2 of sch 1, and under subcl (2)(1)(a) relevantly includes "the construction of a dwelling". There is no dispute that the work Mr McIntosh performed on the property was "residential building work" within the meaning of the Act. Critically, the Act provides a system of statutory warranties given to subsequent purchasers of a property about the quality of all residential building work.

The licensing scheme and owner-builder permits

12 The Act establishes a regime for the administration of a licensing system: see Parts 3 and 4.

13 One type of licence is an "owner-builder permit", issued under ss 30 and 31. An owner-builder permit must not be granted unless the applicant is over the age of 18, owns the land concerned, will occupy the land as a dwelling-house and has competed relevant education or training: s 31(2). An owner-builder permit authorises its holder to do residential buildering work as described in the permit and on the land specified: s 32(1). The Appeal Panel found that the plaintiff was an "owner" of the land and otherwise met the statutory criteria that would allow him to obtain an owner-builder permit. There was no appeal from those findings and there is no issue before me about any of these matters.

14 As I have said, s 12 prohibits residential building work being carried out unless certain permits have been issued:

> **12 Unlicensed work**

> An individual must not do any residential building work, or specialist work, except—
>
> (a) as, or as a member of a partnership or an officer of a corporation that is, the holder of a contractor licence authorising its holder to contract to do that work, or
>
> (b) as the holder of an owner-builder permit authorising its holder to do that work, or
>
> (c) as an employee of the holder of such a contractor licence or permit.
>
> Maximum penalty—1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

15 Section 12 compels all those who do residential building work to have a relevant licence, or be the employee of someone holding a licence or permit. There is no class of person who can do residential building work without having a contractor licence, or an owner-builder permit, or being a relevant employee.

16 The first type of licence is a contractor licence: subs (a). A contractor licence is granted only to a person who meets the onerous requirements in Part 3 Div 1 and, in particular, s 33C, which requires an applicant for a contractor licence to have or propose to have certain numbers of "nominated supervisors". In effect, an applicant must be a professional builder.

17 Unless a person is eligible for a contractor licence or is the kind of employee envisaged by s 12(c), then the only licence the person can obtain is an owner-builder permit (s 12(b)). As explained, a person is eligible for an owner-builder permit if they meet the criteria in s 31(2).

18 If a person is not eligible for a contractor licence and is not the kind of employee envisaged by s 12(c) and is eligible for an owner-builder permit, then by s 12 they are *required* to obtain an owner-builder permit before carrying out residential work. That is the present case.

The definition of owner-builder

19 The Act in its original form (then called *Building Services Corporation Act 1989*) did not define an "owner-builder". The definition was inserted by *Building Services Corporation Legislation Amendment Act 1996*. Between 1996 and 2014 the definition provided:

> ***owner-builder*** means a person who does owner-builder work (within the meaning of Part 6) and who is issued an owner-builder permit for that work.

20 The Act's current definition of "owner-builder", which applied when Mr McIntosh was carrying out residential building work on the property, is found in clause 1 of sch 1:

> ***owner-builder*** means a person who does owner-builder work under an owner-builder permit issued to the person for that work.

21 There is also a definition of "owner-builder work" contained in s 29 of the Act:

> ***owner-builder work*** means residential building work—
>
> (a) the reasonable market cost of the labour and materials involved in which exceeds the prescribed amount, and
>
> (b) that relates to a single dwelling-house, dual occupancy or secondary dwelling—
>
> (i) that may not be carried out on the land concerned except with development consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, or
>
> (ii) that is complying development within the meaning of that Act.

22 It is notable that the provisions governing "owner-builder permits" (ss 30-32AA) do not use the defined term "owner-builder". Instead, these sections explain in their own language when an owner-builder permit is required and what its function is.

Statutory warranties

23 Part 2C is headed "Statutory warranties".[2] The warranties are implied in every contract to do residential building work. Section 18B provides:[3]

> **18B Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—
>
> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,[4]
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

[2] Part 2C was inserted in 1996.

[3] Inserted by the Home Building Amendment Act 2014.

[4] Amended by the Home Building Amendment Act 2014: "performed in a proper and workmanlike manner" replaced by "done with due care and skill".

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

(2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in a contract under which a person (the ***principal contractor***) who has contracted to do residential building work contracts with another person (a ***subcontractor*** to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

24 Section 18C, crucially, extends the benefit of the statutory warranties to immediate successors in title to (relevantly) owner-builders, as if the owner-builder had carried out the residential building work under a contract with that successor in title:

18C Warranties as to work by others

(1) A person who is the immediate successor in title to an owner-builder, a holder of a contractor licence, a former holder or a developer who has done residential building work on land is entitled to the benefit of the statutory warranties as if the owner-builder, holder, former holder or developer were required to hold a contractor licence and had done the work under a contract with that successor in title to do the work.

…

25 This provision, together with the definition of "owner-builder" is at the centre of the present appeal.

26 Section 18D extends the benefit of s 18B's statutory warranties to further successors in title, in the case of work such as the present, for a period of six years: [5]

[5] Sub-section (1A) and (1B) were inserted in 2010.Subsection (1) originally provided: "A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty, except for work and

18D Extension of statutory warranties

(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

(1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.

27 Section 95, which addresses insurance and which I consider in further detail below, also deals with owner-builders.

The constructional issue

28 The issue at the centre of this appeal is the meaning of "owner-builder" under the statutory warranty provisions of the *Home Building Act*. Mr McIntosh was an "owner" of the property when he carried out the residential building work about which complaint was made. There is no longer any dispute that, (assuming he was an owner-builder) by the work he carried out, Mr McIntosh breached the statutory warranties contained in s 18B of the Act and extended by ss 18C and 18D of the Act.

29 The question is whether the Lennons can enforce those warranties against Mr McIntosh. Their position is that they can do so because:

(1) Mr McIntosh was an "owner-builder" when carrying out the residential work to the property and was bound by the statutory warranties in s 18B;

(2) Ms Carberry and Ms Clark were immediate successors in title to Mr McIntosh, and under s 18C could enforce the s 18B statutory warranties against him, since he was an owner-builder and an immediate predecessor in title; and

(3) The Lennons were successors in title to Ms Carberry and Ms Clark. Under s 18D, the Lennons therefore enjoyed the same rights to enforce the s 18B statutory warranties that Ms Carberry and Ms Clark enjoyed, including their right under s 18C to enforce the s 18B warranties against Mr McIntosh.

30 At all stages of this proceeding, Mr McIntosh has argued that he was never an "owner-builder" within the meaning of the Act. The definition of "owner-builder", he says, by its terms captures only those who carry out owner-builder work

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materials in respect of which the person's predecessor has enforced the warranty." Various amendments, not material to the present case, were made in 2006.

"*under an owner-builder permit issued to the person for that work*". Mr McIntosh never obtained an owner-builder permit for the work he performed on the property. He says that means he was never an "owner-builder". He submitted that neither s 18C nor 18D apply to the Lennons and they are not entitled to enforce the statutory warranties against him.

31 To summarise, before doing the residential building work the subject of this proceeding, Mr Mcintosh was required by the Act to obtain an owner-builder permit. He failed to do so. Whether Mr McIntosh's failure to obtain an owner-builder permit has the effect he contends for is the critical question raised by this case.

Application for leave to appeal to this Court

32 The present appeal arises from an "internal appeal", that is, an appeal heard by the Appeal Panel of NCAT: s 80 of the *Civil and Administrative Tribunal Act*

33 The plaintiff sought leave to appeal to the Supreme Court, purportedly pursuant to r 50.12 of the Uniform Civil Procedure Rules 2005 (NSW), rather than the correct provision, s 83 of the *Civil and Administrative Tribunal Act 2013* (NSW). At the hearing, Mr Simpson, counsel for the plaintiff, accepted that it was necessary, in order for his client to succeed, that leave to appeal be granted pursuant to s 83.

34 Section 83 provides:

> **83 Appeals against appealable decisions**
>
> (1) A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.
>
> (2) A person on whom a civil penalty has been imposed by the Tribunal in proceedings in exercise of its enforcement or general jurisdiction may appeal to the appropriate appeal court for the appeal on a question of law against any decision made by the Tribunal in the proceedings.
>
> (3) The court hearing the appeal may make such orders as it considers appropriate in light of its decision on the appeal, including (but not limited to) the following—
>
> (a) an order affirming, varying or setting aside the decision of the Tribunal,
>
> (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the court.

> (4) Without limiting subsection (3), the appropriate appeal court for an appeal against a civil penalty may substitute its own decision for the decision of the Tribunal that is under appeal.
>
> (5) Subject to any interlocutory order made by the court hearing the appeal, an appeal under this section does not affect the operation of the appealable decision of the Tribunal under appeal or prevent the taking of action to implement the decision.

35 The plaintiff's summons sets out three reasons why leave ought to be granted:

(1) The proceedings concern an issue of wider public importance regarding the interpretation of the *Home Building Act*;

(2) The proceedings concern an issue of wider public importance regarding the interaction between the *Home Building Act* and the *Environmental Planning and Assessment Act 1979* (NSW) as well as instruments made under that Act; and

(3) The plaintiff was not given any, or any adequate, opportunity to "consider and respond to the proposed reading or alternative construction of the definition and ought to be given that opportunity by the grant of leave".

36 A grant of leave may be warranted if the appeal raises a question of public importance: *Commissioner of Police, New South Wales Police Force v Fine* (2014) 87 NSWLR 1; [2014] NSWCA 327 at [3]; *Cooper v Owners - Strata Plan No 58068* (2020) 103 NSWLR 160; [2020] NSWCA 250 at [67]. Leave may also be granted where a matter raises a question rarely heard by the Court: *Vitality Works Australia Pty Ltd v Yelda (No 2)* (2021) 105 NSWLR 403; [2021] NSWCA 147 at [123].

37 I have decided that a grant of leave to appeal is warranted on the first of the plaintiff's reasons set out above. The interpretation of "owner-builder", as used in the *Home Building Act,* is an issue of public importance affecting those performing residential developmental work. As required by s 83(1), this appeal is limited to questions of law only: see *Vitality Works* at [46]-[50]. I should make clear that if I had not reached that conclusion, I would not have granted leave to the plaintiff to agitate the question of whether he was given any, or any adequate, opportunity to "consider and respond to the proposed reading or alternative construction of the definition". A lengthy hearing was held before the Appeal Panel and the correct construction of the term "owner-builder" in the *Home Building Act* was debated by the parties at length. Competing constructions of a statute were proposed. The plaintiff was given a sufficient

opportunity to make submissions in support of the construction he proposed.

There was no denial of procedural fairness by the Appeal Panel.

The Appeal Panel's decision

38 The Appeal Panel's reasons may be summarised as follows:

(1) the plaintiff was the owner of the property. The plaintiff's daughter held 100% of the equity of the property on trust for the plaintiff;

(2) the legal meaning of the definition of "owner-builder" in the *Home Building Act* includes those who (in breach of the *Home Building Act*) do not obtain owner-builder permits before conducting residential building work;

(3) alternatively, the definition of "owner-builder" in the Act should be read as if the words "or is required to do" were inserted in the definition after the word "does" so that the definition would read:

"***owner-builder*** means a person who does, *or is required to do*, owner-builder work under an owner-builder permit issued to the person for that work.";

(4) the plaintiff was an owner-builder who did residential building work;

(5) the plaintiff was bound by the statutory warranties in s 18B of the Act in doing that building work;

(6) Ms Carberry and Ms Clark were successors in title to the plaintiff for the purposes of s 18C(1) of the Act and entitled to the benefit of the statutory warranties from the plaintiff;

(7) the defendants were successors in title to Ms Carberry and Ms Clark and by s 18D, entitled to the benefit of the statutory warranties from the plaintiff; and

(8) by reason of the plaintiff's breach of the statutory warranties in relation to the residential building work the plaintiff was ordered to pay the defendants $95,199.15.

39 Central to this appeal is the Appeal Panel's construction of the Act's definition of "owner-builder". The Appeal Panel determined that there were four possible approaches: Reasons [120]-[124]:

(1) first, that, as the plaintiff contended, the legislature did not intend to include owner-builders who undertook residential building work without a permit within the protective scheme provided to successors in title by the statutory warranties;

(2) secondly, that they must strive to give meaning to all the words of the definition, but not that they *must* give meaning to all the words. It was open to treat certain words as being superfluous or insignificant if there is no other construction by which they may be made useful and pertinent;

(3) thirdly, that the legal meaning given to all of the words may differ from their ordinary, grammatical meaning; or

(4) fourthly, that it was open to interpret the words of the definition as if they contained additional words with the effect of expanding its operation.

40 In relation to the first possibility, the Appeal Panel said that in its favour was the plain meaning of the words, but against it were the "plainly unjust results" that would ensue. That is, "where owner-builders do not do the correct thing and obtain owner-builder permits, any successors in title to those owner-builders under s 18C(1) would be deprived of the benefits of the statutory warranties as would any purchasers from those successors in title pursuant to s 18D(1)". The Appeal Panel found that if this was correct, then a significant and obvious objective of the Act would not be achieved.

41 The Appeal Panel rejected the plaintiff's various arguments that logical or rational reasons could be found for excluding those who failed to obtain an owner-builder permit from the Act's statutory warranty scheme.

(1) The Appeal Panel rejected the submission that a property on which an owner-builder does unpermitted work would be unsaleable, which would protect successors in title and subsequent purchasers. They found that such properties are evidently saleable as evidenced by this case, and that nothing prevents such properties from being sold: Reasons [127]-[128].

(2) The Appeal Panel also rejected the plaintiff's submission that successors in title and subsequent purchasers would have the benefit of the statutory warranties which endured for the benefit of the plaintiff under any contracts he entered into with contractors who undertook some of the work: Reasons [127]. They found that "grave practical problems" would arise for successors in title. First, they would need to find out who those contractors were, a right not afforded to successors in title via s 127A(2) of the Act. Secondly, the terms of the contracts between the owner-builder and the contractors might prove an obstacle: Reasons [129]-[131].

(3) The Appeal Panel did not attach any weight to the plaintiff's submission that purchasers would be protected because they could undertake various searches before a conveyance. They found that there was "no evidence of usual conveyancing practice in that regard, or what searches might reveal": Reasons [132].

(4) The Appeal Panel also gave little weight to the submission that a purchaser would be protected because a contract for sale would be voidable pursuant to s 95(5) of the *Home Building Act* before completion of the contract if the relevant consumer warning was not attached,

because it would require the purchasers to acquire that knowledge: Reasons [133].

42 In relation to the second possibility, the Appeal Panel was unpersuaded that it should treat the words "under an owner-builder permit issued to the person for that work" as superfluous. They found that the words are there, can be given meaning and can be given a pertinent construction. Further, similar phrases appear in other parts of the Act: Reasons [134]-[135].

43 The third possibility, that the legal meaning attributed to the definition of owner-builder should be that owner-builders who do not obtain a permit when required to do so are included, was adopted in *Gunn v Steain* [2003] NSWSC 1076 and, in the Appeal Panel's view, in *Sorbello & Donelly v Whan* [2007] NSWSC 951.

44 The Appeal Panel did not see any substantive difference between the wording of the definition as it stood when *Gunn* and *Sorbello* were decided and the current definition: Reasons [148].

45 The Appeal Panel found that the proper interpretation of the Act was that the legal meaning, as distinct from the grammatical meaning of the definition of "owner-builder", includes owner-builders who do residential building work without being issued an owner-builder permit for that work. The Appeal Panel concluded that the legal meaning of the words in the definition included an owner-builder conducting work without a permit. This legal meaning of the definition was consistent with the purpose of the provisions of the Act, namely "to provide a form of protection for successors in title to owner-builders who undertake owner-builder work, including owner-builders who breach the [Act] and do not obtain owner-builder permits": Reasons [150]-[151]. The Appeal Panel rejected the plaintiff's submission that no policy purpose is served by imposing the obligations in the statutory warranties on owners who do work without a permit. The policy purpose, the Appeal Panel found, was to extend the protection to those who purchase a property on which such work was done where a permit should have been applied for and issued: Reasons [158]. The fact that an owner might be guilty of a criminal offence in conducting such work "is of little comfort to subsequent purchasers": Reasons [159].

46 The Appeal Panel regarded its interpretation of the definition as consistent with the purpose of the provisions of the Act viewed as a whole. They referred to analogous parts of the Act expressly providing for the extension of the statutory warranties to contractors who did not have, but should have had, a licence. The Appeal Panel found that their interpretation contemplated circumstances where owner-builders do the wrong thing and fail to obtain a permit, where "[t]o interpret the definition otherwise would allow the [plaintiff] to take advantage of his own wrong": Reasons [164].

47 In the alternative, the Appeal Panel held that the fourth possibility was an acceptable approach to construing the definition. This approach read words into the definition so as to include owner-builders who do owner-builder work without a permit: Reasons [175]. The Appeal Panel referred to the principles in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 at [22]-[25] and [37]-[38] (Kiefel, Crennan and Bell JJ) permitting the reading of words into legislation. They summarised four conditions which, according to *Taylor*, must be satisfied to read words into a statute. The Appeal Panel found each of these conditions satisfied: Reasons [176]-[177]:

(1) the identification of the precise purpose of the provision;

(2) satisfaction that the drafter and the parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose;

(3) identification of the words that the legislature would have included in the provision had the deficiency been detected before its enactment; and

(4) the modification must be consistent with the wording otherwise adopted by the draftsman.

48 The purpose of the definition was to "identify the class of person who will be subject to various obligations under the" *Home Building Act*. The draftsperson and Parliament inadvertently overlooked a situation where an owner-builder failed to obtain a permit. This was so, "[g]iven the complete absence of any rational or logical reason why successors in title of an owner-builder who did not obtain a permit should be denied rights granted to successors in title of an owner-builder who did obtain a permit, and the manifest injustice in discriminating between the two". The words identified would have been

included had the deficiency been detected and the modification was consistent with the wording otherwise adopted by the legislature.

Grounds of appeal

49 The plaintiff advanced three grounds of appeal against the decision of the Appeal Panel in his summons:

> 1 The Appeal Panel made an error of law in finding that the plaintiff was an "owner-builder" within the definition of that term in clause 1(1) of Schedule 1 to the Home Building Act 1989 (NSW) by:
>
> a. adopting or attributing, in [149] of the Reasons, a "legal meaning" to that term which differed from its ordinary or literal meaning; and
>
> b. determining, in [180] of the Reasons, that the term ought to be construed as if the words "or is required to do" were inserted in the term after the word "does".
>
> 2 The Appeal Panel made an error of law in making the findings that were referred to in appeal grounds 1a. and 1b. as neither finding had been argued for or contended by the defendants either at first instance or before the Appeal Panel.
>
> 3 The Appeal Panel made an error of law by denying procedural fairness to the plaintiff because it:
>
> a. made the finding or determination in appeal ground 1a. without the plaintiff being given any opportunity to respond to it. The first time that specific contention appeared in the proceedings was in the Appeal Panel's published Reasons as the primary basis for the resolution of this issue against the plaintiff;
>
> b. made the finding or determination in appeal ground 1b. without the plaintiff being given an adequate opportunity to respond to it and over objection by the plaintiff. The suggestion that the relevant term in clause 1(1) ought to be read as including the relevant words was first made by the Appeal Panel to the plaintiff during oral submissions.

50 Grounds 2 and 3 were advanced on the sole issue of leave and, leave having been granted, were not pressed.

Plaintiff's submissions

51 The plaintiff submitted that the issue in this application is whether the definition of "owner-builder" in the *Home Building Act* should be construed as including a person who unlawfully does building work without a permit. The plaintiff submitted that, on its face, the definition of "owner-builder" in sch 1 cl 1 does not include owners who unlawfully do work without obtaining a permit.

52 The plaintiff submitted that there were two errors in the Appeal Panel's conclusion that the adoption of the literal meaning of "owner-builder" as defined

in the Act would lead to a plainly unjust result for obvious reasons, being the exclusion of purchasers from the protective scheme in cases where the prior owner failed to obtain a permit:

(1) First, the Appeal Panel erred in finding that purchasers from an owner who performed work without a permit were not afforded the protective scheme provided by the legislation. The plaintiff submitted that the relevant protection was that purchasers had "the opportunity to avoid the purchase of a dwelling constructed in breach of the [Act] rather than extending to them warranties about the quality of an unlawfully built dwelling".

(2) Secondly, the plaintiff submitted that, contrary to the Appeal Panel's findings, there are reasons why the legislature may have chosen not to extend the statutory warranties to work done unlawfully without a permit.

Submissions concerning the "Protective scheme"

53 The plaintiff submitted that the *Home Building Act* and *Conveyancing Act 1919* (NSW) provide detailed schemes for the benefit of purchasers of land on which unlawful or unauthorised building has been carried out "to discover that fact and avoid the contract". He submitted that the Appeal Panel's dismissal of this submission because "there was no evidence of usual conveyancing practice in that regard or what searches might reveal" was incorrect. The Appeal Panel, he submitted, should have been informed by the context and purpose of the *Home Building Act* and related legislation rather than "usual conveyancing practice".

54 The plaintiff relied on the insurance provisions in the *Home Building Act.* The Act requires most residential building work to be insured. For example, s 92 requires work completed by contractors to be insured, while s 96 requires work done otherwise than under a contract to be insured. Such insurance must cover risks associated with breaches of the statutory warranties: ss 99(1)(b), 100(1). Section 95 expressly states that work completed by an owner-builder cannot be insured. Section 96(3)(a) provides an exception to the obligation to obtain insurance, for owner-builder work done by or for the holder of an owner-builder permit.

55 Section 12(b) prohibits the carrying out of residential building work by a person in the position of the plaintiff without first obtaining an owner-builder permit. As such, the plaintiff submitted that s 96 is "wholly or largely limited to owners who

are also licensed builders". The plaintiff submitted that s 96 would still require an owner who does not obtain an owner-builder permit to obtain insurance "because the owner would not then be within the s 96(3) carve out, although such insurance would be impossible to obtain by that lay person owner and most likely unlawful".

56 Section 95(2) requires an owner of land in respect of which an owner-builder permit was issued who sells the land within seven and a half years of the issuing of the permit to include a consumer warning in the sale contract. Section 96(2) requires a person who does residential building work otherwise than under a contract not to enter into a contract to sell the land within the following six years unless an insurance certificate is attached to the sale of land. Failure to adhere to either of these requirements makes the contract for sale voidable at the option of the purchaser prior to completion.

57 Section 102A requires a register of all insurance issued under the Act to be maintained by the State Insurance Regulatory Authority and be publicly available for inspection. The plaintiff submitted that it followed that the register must disclose insurance issued where work is done by a licensed contractor and where it is done otherwise than under a contract by a person lawfully permitted to do that work. The plaintiff submitted that it "will not disclose insurance where work is done under an owner-builder permit and it will not disclose insurance where work is done by an unlicensed owner without a permit (as in both the cases, insurance cannot be obtained)".

58 The plaintiff submitted that it followed that in the case of a purchaser who enters into a contract to purchase land with a recently built or renovated dwelling from an owner who did work on the land without an owner-builder permit, they will be "protected" in the following ways:

(1) The purchaser would know there was no owner-builder permit, based on an absence of a consumer warning in the contract. Since there was no permit, the work would be required to be insured under s 96. If not insured, the purchaser could rescind.

(2) The purchaser can "easily" discern these issues from searching the register and then "be immediately on notice" that work may have been done in breach of the *Home Building Act.*

59 The plaintiff submitted that the Appeal Panel should have had regard to the above insurance-related provisions when construing the definition of owner-builder, and should have asked itself why the Parliament "gave express rights to rescind a contract for sale of land if it was not envisaged there were steps a purchaser could take to ascertain the position prior to completion of the contract, or why parliament provided for the maintenance of public registers of these particulars".

60 The plaintiff submitted that the Appeal Panel erred in rejecting his submission below that a property on which an unlicensed owner had done work without a permit was "unsaleable". It would be a criminal offence under s 96 to sell it without an insurance certificate. He further submitted that the Appeal Panel was wrong to suggest at [133] of its reasons that, in a scenario where an owner conducted work without a permit and failed to give a consumer warning, that the owner could avoid the purchaser rescinding the contract by arguing they were not required to give the warning as they had no permit. The Appeal Panel was wrong, he submitted, because the contract would be voidable under s 96(2), not s 95.

61 The plaintiff further argued that purchasers of land are already "protected" under conveyancing legislation and the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act") in situations where a prior owner has done unauthorised building work. It was submitted that if an owner does building work on land without an owner-builder permit, the work will be unauthorised under the EPA Act, uncertified and liable to an upgrading or demolition order, and that a failure to disclose such matters would allow the purchaser to rescind the contract for sale of the property. It was submitted that the Appeal Panel should have concluded that the purchaser could ascertain this state of affairs from a search of a council register kept pursuant to s 113 of the *Local Government Act 1993* (NSW). The plaintiff submitted that the Appeal Panel, when embarking on a consideration of the context of the relevant provisions of the *Home Building Act*, should have considered this separate scheme.

62 In summary, the plaintiff submitted that, in a situation where an owner does work on the land without a permit, the protections available to the purchaser include the following elements:

(1) it is a criminal offence for the owner to do the work without a permit: *Home Building Act* s 12 ;

(2) it is a criminal offence for the owner to sell the land within the following six years: s 96(2); and

(3) if an owner nonetheless breaches these laws, does the work and seeks to sell the land, then a purchaser is provided with the means to ascertain the status of the building work and is given the right to rescind the contract.

63 As such, the plaintiff submitted that it cannot be said that the definition of "owner-builder" in the legislation literally construed gives rise to an outcome which is absurd, irrational or manifestly unjust.

Submissions about possible reasons not to extend the warranties to unlawful work

64 The plaintiff submitted that there may be reasons why the legislature may not have wanted to extend the statutory warranties to work done by an owner without a permit:

(1) First, because the work "is illegal and done in breach of planning laws". The plaintiff submitted that the Appeal Panel's construction relied too heavily on the facts of this matter, and that there would likely be other scenarios where the work completed is not done under a development approval for the dwelling. He submitted that "the extension of the warranties to purchasers in these kinds of cases would be more irrational and unreasonable than the reverse" and that the inability for such purchasers to sue under the warranties in s 18B "is surely not so manifestly unjust or irrational as to require the court to rewrite the otherwise clear definition of 'owner-builder'".

(2) Secondly, because there may be "innocent" cases where an owner carries out some residential building work without knowing the consequences under the *Home Building Act*, exposing themselves to a claim under the warranties. He submitted that the legislature may have considered it "too punitive" to impose the statutory warranties on lay persons involved in residential building work on their own properties. He argued that the legislature clearly only intended to impose the warranties on "owners who should know their obligations under the [Act]".

65 The Appeal Panel provided two alternative bases for its construction of the definition: that it should be given a legal meaning that included owner-builders who do work without the relevant permit; and that, alternatively, it would read

words into the definition so as to include such persons. The plaintiff submitted that, in this case, the only way that the Panel could have reached its end result was to imply words into the definition, and so in truth there was no difference between the two approaches. Words should not be read into the definition for the following reasons, the plaintiff argued:

(1) First, the words the legislature actually used are clear, precise and "simply do not permit the meaning the Panel attributed to them". The plaintiff cited *SAS Trustee Corporation v Miles* (2018) 265 CLR 137; [2018] HCA 55 at [64] (Edelman J) for the proposition that the clearer the literal meaning of the provision, the more difficult it is to displace it. The plaintiff submitted that the Appeal Panel's construction has "no foothold in the language" of the definition (*Kelly v The Queen* (2004) 218 CLR 216; [2004] HCA 12 at [48]) and is indeed "tortured, unrealistic and wholly unnatural".

(2) Secondly, the plaintiff submitted that the Appeal Panel's construction involves the insertion or implication of words into the definition beyond a simple grammatical drafting error, and thus goes beyond the limits of such a construction set out in *Taylor* at [38]. He said that the words implied by the Appeal Panel are not words of explanation, but remediation, referring to *HFM043 v Republic of Nauru* (2018) 359 ALR 176; [2018] HCA 37 at [24].

(3) Thirdly, he argued that the Appeal Panel's construction offends against the principle of striving to give every word and provision in an enactment a purpose or meaning, referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [71]. He submitted that its definition would make all of the words after "owner-builder" superfluous, as well as some of the words in s 18C.

(4) Fourthly, the plaintiff submitted that the Appeal Panel "fail[ed] to consider the broader consequences of its construction", being the purported impact on the interpretation of s 6.6 of the EPA Act.

(5) Fifthly, the plaintiff submitted that "context and purpose do not require the construction adopted by the Panel". The *Home Building Act* does not solely promote the interests of purchasers, and "[l]egislation rarely pursues a single purpose at all costs": *Carr v Western Australian* (2007) 232 CLR 138; [2007] HCA 47 at [5] (Gleeson CJ). He argued that the legislature might have chosen to extend the statutory warranties to purchasers of unauthorised work done without a permit, but it did not.

66 Finally, the plaintiff repeated submissions he made to the Appeal Panel regarding two earlier cases before this Court in *Gunn v Steain* and *Sorbello*. He submitted that these cases are of limited or no relevance to the issues before me because the text and context of the provisions are materially different, because the construction issue in *Gunn* was the subject of limited attention and

because Price J said in *Sorbello* that he did not consider it necessary to decide whether *Gunn* was correct on this issue.

Consideration

Overview

67 To understand what follows, I will address at the outset the structure of my findings. I have concluded that the application by the Appeal Panel of the principles on "legal meaning" (the third of its four possible approaches) to this case was not correct. The problem with this aspect of the Appeal Panel's reasoning is the intractable language of the definition of "owner-builder". On that language, the Appeal Panel's preferred legal meaning was not reasonably open. The words of the definition, individually or as a whole, do not bear the Appeal Panel's extended meaning, no matter how ungrammatically the definition is read.

68 I have, however, concluded that the Appeal Panel was correct to imply words into the definition of "owner-builder" to give effect to the legislature's clear purpose (the fourth of the four approaches). Implying words is permissible when performing purposive construction. However, as I will explain implying words involves certain special considerations, as required by the High Court in *Taylor*. The words to be implied are those suggested by the defendants at the hearing, which were provided to the Court and the plaintiff had the opportunity to make submissions about the implication of those words.

69 I have limited my consideration to the four possible constructions addressed by the Appeal Panel. It may be that there are other available constructions of the warranty provisions themselves under which the defendants would be entitled to succeed. However, as arguments turning on the construction of the warranty provisions, rather than on the construction of the definition of the term "owner-builder", were not advanced before me, I will not consider them here.

70 To explain why it is that I have concluded that the Appeal Panel's decision should be upheld, but only on the alternative reasoning that words should be read into the definition, I will address:

(1) the general principles of statutory interpretation;

(2) the requirements for reading in words into a statute explained by *Taylo*r;

(3) the subject matter, scope and purpose of the Act, and in particular Part 2C;

(4) the plaintiff's submissions in light of the Act's context and purpose; and

(5) an analysis of whether the requirements in *Taylor* are here met.

General principles of statutory interpretation

71 In *Project Blue Sky*, the majority stated at [69] that the:

> … primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

72 Their Honours referred to *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390; [1955] HCA 27 at 397, in which Dixon CJ stated that:

> … the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.

73 The task that remains is the construction of the words the legislature has enacted. The beginning and end of the task of statutory interpretation is the statute that falls to be construed: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]. The meaning of words and phrases is influenced by the immediate context in which they are used. The correct approach to statutory interpretation uses "context" in its widest sense "to include such things as the existing state of the law and the mischief which, by legitimate means … one may discern the statute was intended to remedy": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2 (Brennan CJ, Dawson, Toohey and Gummow JJ).

74 A construction that would promote the purpose or object underlying the Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to a construction that would not promote that purpose or object: *Interpretation Act 1987* (NSW) s 33.

75 In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34, the majority stated:

> [14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to

> deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

76 See also the observations of Gageler J:

> [35] Mason J said in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*:
>
> > "Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."
>
> [36] Drawing on that statement, and its antecedents, Brennan CJ, Dawson, Toohey and Gummow JJ said in *CIC Insurance Ltd v Bankstown Football Club Ltd*:
>
> > "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."
>
> (citations omitted)

77 The starting point for ascertainment of the meaning of a statutory provision is the text of the provision considered in light of its context and purpose: *Bankstown Football Club* at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky* at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Consolidated Media Holdings* at 519 [39]; *SZTAL* at [14] (Kiefel CJ, Nettle and Gordon JJ); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137; [2018] HCA 55.

78 As explained by the Court of Appeal in *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550; [2023] NSWCA 134 (Bell CJ, Meagher and Kirk JJA agreeing):

> [14] The literal meaning of a statutory provision will not always accord with its legal meaning, which is to be derived from a full consideration of the language of the statute viewed as a whole and the context, general purpose and policy of the statute or a provision within it, to the extent that that is separately discernible: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [78]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR

> 297 at 320; [1981] HCA 26; *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, [1955] HCA 27; *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1; [2021] NSWCA 204 … at [26]; *Park Trent Properties Group Pty Ltd v Australian Securities and Investments Commission* (2016) 116 ACSR 473; [2016] NSWCA 298 at [77]. While the legal and the literal meaning of a statute will often coincide, it is the *legal* meaning of a statutory provision to which this Court must give effect. (Emphasis in original).

79 When interpreting a statute, a court will resist an interpretation that will permit a person to take advantage of his or her own wrong. This principle, often referred to as a "maxim", is well established. In *Holden v Nuttall* [1945] VLR 171, the Supreme Court of Victoria, in dealing with an application for possession of leased premises, was required to take into account "hardship" on the lessee. The lessee acted in a manner specifically designed to enable him to take the benefit of this provision. Herring CJ held at 178 that the word "hardship" should limited as a matter of construction to avoid attributing a legislative intention of bringing about an injustice or allowing a person to benefit from his or her own wrong.

80 In *De Marco v Chief Commissioner of State Revenue (NSW)* (2013) 83 NSWLR 445; [2013] NSWCA 86 a majority of the Court of Appeal considered and rejected the application of the maxim in relation to the *Land Tax Management Act 1956* (NSW) per Basten JA at [76]-[77], Gzell JA at [126]-[127]. The Court considered whether an exemption from land tax where a person owns land "used and occupied by the person as his or her principal place of residence" required that such use and occupation be lawful. *De Marco* emphasised the limitations of the use of the maxim. There must be a clear policy connection with the operation of the statute and the asserted wrongdoing. It is the correct construction of the statute which is critical, and the policy of the legislative provision, in context, is paramount.

81 Similarly, in *Ciaglia v Ciaglia* (2010) 269 ALR 175; [2010] NSWSC 341 at [65]–[84] and *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* [2018] NSWSC 761 at [208]–[209] the Court refused to allow a party to invoke the Statute of Frauds to avoid the effect of their own misconduct.

82 In a case where a question bearing some similarities to the present arose, *Thompson v Groote Eylandt Mining Company* (2003) 173 FLR 72; [2003] NTCA 5, the Northern Territory Court of Appeal held that a literal operation of a

definition would be unjust and would not promote the purposes of the Act as a whole. There, an employer appealed from a decision of the Work Health Court where it was held that an employee was a "worker" under the *Work Health Act 1986* (NT), and thus entitled to compensation under that Act. A "worker" was defined as a natural person "who, under a contract or agreement or any kind … performs work or a service of any kind for another person and who is a PAYE taxpayer".[6] Section 3(1) of the Act relevantly stated "'PAYE taxpayer', in relation to a worker, means that his employer makes deductions from money paid to the worker for work performed or service provided to the employer" in accordance with Commonwealth income tax legislation. The employer never made PAYE deductions from money paid to the employee.

83 The Northern Territory Court of Appeal held that it would be wrong to construe the definition of "PAYE taxpayer" so as to permit the employer to take advantage of their own wrong in circumstances where the employee was innocent of any wrongdoing. The Court found that there was nothing in the legislation, the extrinsic materials or the purpose of the relevant amendment to the legislation which indicated the legislature intended such a result, and that the "language of the definition is not so intractable as to preclude the operation of this rule". If a literal operation were adhered to, it would be unjust and would not promote the purposes of the amendment or the Act as a whole. The Court concluded that the words "employer makes deductions" included those employers who were required by law to make such deductions but who did not do so without the knowledge or authority of the worker: at [31]-[37].

84 As I will shortly explain, it may be, after *Taylor*, that *Thompson* is better understood as a case where it was appropriate to read words into the statute to give effect to a clear legislative purpose.

The requirements for reading in words into a statute explained by Taylor

85 It has long been recognised that "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do": *Thompson v Goold & Co* [1910] AC 409 at 420 (Lord Mersey).

[6] PAYE refers to "Pay As Your Earn" Taxpayers, a statutory predecessor to the current concept applying to most wage and salary earners, PAYG or "Pay As You Go" taxpayers.

86 By the end of the 20th century, a view was sometimes expressed that words were never read into a statute; rather, the statute's words were to be construed purposively: *R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166 at [3]-[31] per Spigelman CJ (Abadee and Barr JJ agreeing); *R v PLV* (2001) 51 NSWLR 736; [2001] NSWCCA 282 at [80]–[92] per Spigelman CJ (Simpson J and Smart AJ agreeing).

87 However, in *DPP (Vic) v Leys* (2012) 44 VR 1; [2012] VSCA 304, the Victorian Court of Appeal considered that Spigelman CJ's dicta concerning implication of words was too restrictive an approach. Redlich and Tate JJA and T Forrest AJA said:

> [92] We do not consider it correct to characterise the process [reading words into a statute] as one of construction *of the words actually used.* Where the literal meaning of a provision does not give effect to its purpose, the need to depart from the literal meaning and adopt a construction which will promote the purpose of the provision arises because the "purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear". Such a purposive construction is adopted because the literal meaning of the words, which may lack any ambiguity or inconsistency, cannot support a construction that reflects the intended purpose of the legislation.

88 The substantive provision in *Leys* was s 37 of the *Sentencing Act 1991* (Vic), which empowered the Court to impose community correction orders. The provision had been inserted by the *Sentencing Amendment (Community Correctional Reform) Act 2011* (Vic) and the question was whether it applied to the respondents' offending conduct which occurred in February 2010.

89 The provision for construction was cl 5 of sch 3 of the *Sentencing Act*: "Section 37 as inserted by s 21 of the *Sentencing Amendment (Community Correctional Reform) Act 2011* applies to a sentence imposed on or after the commencement of that Act, irrespective of when the offence was committed when a finding of guilt was made."

90 The difficulty was the "staggered commencement" scheme applying to the *Sentencing Amendment Act.* Under this scheme, s 21 and certain other sections were proclaimed to commence on 16 January 2012. The balance of the Act was to come into force on 30 June 2013, unless proclaimed otherwise. The literal terms of cl 5 produced some perversity when read in light of that staggered scheme:

> [24] … Reading cl 5 literally, if s 37 of the Act depends on the commencement of the Amending Act as a whole, then s 37 would not now be operative under the terms of that transitional provision and may not be operative until 30 June 2013.

91 The respondents contended, and the Court accepted (applying, inter alia, the *c*onditions set out below at [93] in *Jones v Wrotham Park Settled Estates* [1980] AC 74) that the provision should be read as if the words "of s 21" were inserted after the word "commencement" with the result that s 37 of the *Sentencing Act* would be taken to apply to sentences imposed on or after 16 January 2012. The Court reasoned as follows:

(1) **First condition** (it was possible to ascertain the purpose of the provision)**:** at [113] the Court found:

> the parliamentary intention of the Amending Act was to replace the old regime of CCTOs, ICOs and CBOs with the regime of CCOs. An examination of its context showed that the relevant purpose of the Amending Act (including cl 5) was to effect a substitution of the new regime for that of the old. This was apparent from the Explanatory Memorandum to the Bill and the Second Reading Speech. The intended purpose of cl 5 was unmistakeable; namely, to ensure that the pre-requisites to a CCO provided for by s 37 applied to CCOs regardless of whether the offence was committed or the finding of guilt was made before or after 16 January 2012, the date on which the CCO regime commenced. Other provisions of the Act, inserted or amended by the Amending Act, also anticipate that CCOs would be available, and implicitly anticipate that the pre-requisites would be applicable, once the old regime was repealed, including s 44, the construction of which is the primary subject of these appeals.

(2) **Second condition** (the legislature had in adopting the words enacted overlooked an eventuality which had to be dealt with if the Act was to achieve its purpose): At [114]-[117], the Court found there were absurd and irrational consequences if cl 5 was given its literal effect, including that intermediate community-based sentencing options may be unavailable for a period of 18 months, despite the Second Reading Speech indicating the new CCOs would immediately replace the old scheme.

(3) **Third condition** (it was possible to ascertain the substance of the provision the legislature would have made if it had turned its mind to the overlooked eventuality)**:** The words "of s 21" were clearly those the Parliament would have used.

(4) **Consistency condition** (the added words were consistent with the wider Act in its legislative context):

> [123] Furthermore, we consider that the words used by the drafter in cl 5, in the context of the Act as a whole, can accommodate the words to be "read in" without giving to the provision an unnatural, incongruous or unreasonable construction. The construction of cl 5 *as modified* is

> reasonably open on the statute. The additional words are clearly consistent with the statutory scheme

Taylor and Wrotham Park

92 In *Taylor*, a majority of the High Court, French CJ, Crennan and Bell JJ, approved the view in *Leys*:

> [37] Consistently with this Court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia* [(2007) 232 CLR 138; [2007] HCA 47], the question of whether a construction "reads up" a provision, giving it an extended operation, or "reads down" a provision, confining its operation, may be moot.
>
> [38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature". (footnotes omitted)

93 The majority in *Taylor* then referred to the "test" set out by Lord Diplock in *Wrotham Park* at 105-106:

> My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1971] A.C. 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. **First**, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; **secondly**, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and **thirdly**, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.

94 In *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 at 592, the House of Lords approved this approach in Lord Nicholls' speech on behalf of the House, but reformulated the third condition into a requirement that the Court be certain "the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed".

95 At [38], which I have quoted immediately above, the majority in *Taylor* approved the version of Lord Diplock's test, as reformulated in *Inco.*

96 However, the majority left undecided whether Lord Diplock's tests were both necessary *and* sufficient:

> [39] … [I]t is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' (*Director of Public Prosecutions v Leys* [2012] VSCA 304; (2012) 44 VR 1; 296 ALR 96 at 126 [96]) because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise.

97 Various suggestions have been made for what "more" may be required than Lord Diplock's three conditions before words can be implied. For example:

(1) The alteration in language must not be too far-reaching: any implication must not be too big or too much at variance with the language in fact used: *Taylor* at [38], quoting *Inco Europe* at 592.

(2) The modified construction must be reasonably open in the sense that the provision, as modified, is not unnatural, incongruous or unreasonable and is in conformity with the statutory scheme: *Leys* at [97] and [109]-[110].

98 *Taylor* is now authoritative on the implication of words in statutes. The dissenting judges in that case, Gageler and Keane JJ, were silent on the test for implication. However, their Honours made the following, widely cited, observation:

> [65] Statutory construction involves attribution of legal meaning to statutory text, read in context. 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always.' Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the

> statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
>
> [66] Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies. (citations omitted)

99 Some of the same caution was reiterated by Kiefel CJ, Gageler and Nettle JJ in *HFM043* at [24]:

> The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it.

100 When the majority and minority's observations are considered together, the effect of *Taylor* appears to be to discourage some of the judicial readiness to read words into statutes. In *Coal & Allied Operations Pty Ltd v Crossley* [2023] NSWCA 182, Leeming JA said of Lord Nicholls' formulation in *Inco*, as approved in *Taylor*:

> [54] … To be clear, it may be doubted that Lord Nicholls was seeking to formulate a test of what was sufficient, as opposed to what was necessary, before the power to correct an obvious mistake was enlivened. The formulation in *Inco Europe* naturally invokes a necessary condition ("Before interpreting a statute in this way the court must be abundantly sure of three matters … ") and the tenor of the passage as a whole is one of restraint, as opposed to identifying the circumstances in which the power would without more be exercised.

Cases after Taylor

101 In each of the following cases, words were read into a provision to correct an error that was more than simple or grammatical. Rather, something of substance was omitted from the relevant provision that hampered its operation, when viewed against the provision's purpose in the context of the enactment:

(1) *Lowe v The Queen* (2015) 48 VR 351; [2015] VSCA 327: A provision was engaged if a prosecutor "relies" on evidence of past incriminating conduct. The Victorian Court of Appeal read "relies" as "explicitly relies".

(2) *Lawson v Western Australia (No 3)* (2018) 85 MVR 160; [2018] WASCA 129: Two criminal appeal provisions empowered the Western Australian Court of Appeal to allow an appeal if it believed a "different sentence" should have been imposed or if it believed "an order should have been made". The sections did not, in terms, empower the Court to act if it believed *no order* or a *different order* should have been made. The Court of Appeal implied those words, applying *Taylor.*

(3) *Department for Health and Ageing v Li* (2018) 130 SASR 578; [2018] SASCFC 52: An employment Act allowed workers to claim for psychiatric injury if (a) their employment was a substantial cause and (b) the injury was not "wholly or predominantly" caused by various forms of "reasonable action" under the Act. Subsection (a) clearly excluded recovery if the injury was wholly caused by personal, non-employment factors. Subsection (b) clearly excluded recovery if the injury was caused predominantly by reasonable action. However, if read literally, (a) and (b)'s combined effect was that if a worker's injury was partly caused by non-employment circumstances and substantially (but not predominantly) by "reasonable action", then the worker could recover. The South Australian Full Court applied *Taylor* to correct this outcome, implying the words "to the extent that the employment caused the injury" at the start of (b).

(4) *Goldsmith v Bisset (No 3)* (2015) 71 MVR 53; [2015] NSWSC 634: The *Motor Accidents Compensation Act 1999* s 138(d) prevented "persons" from relying on the general law or enacted law of contributory negligence if they were not wearing a helmet as required. The Court implied the words "(not being a minor)" after "person".

(5) *Chief Municipal Inspector - Local Government v Mohamud* (2021) 66 VR 1; [2021] VSC 787: Section 224 of the *Local Government Act 2020* (Vic) contained several conditions which were to be met before "this Division" applied. Quigley J held that words should be implied extending the effect of s 224 only to some provisions of the Division.

The subject matter, scope and purpose of the Act, and in particular Part 2C

102 As I have said, a literal reading of the definition apparently requires an "owner-builder" to be a person who does "owner-builder work" under an "owner-builder permit issued to the person for that work". The use of the past participle "issued" suggests that the issue of an owner-builder permit is a necessary pre-condition to being a "owner-builder".

103 On the other hand, in context, statutory warranties are *implied in every contract to do residential building work* by s 18B(1) of the Act. Further, s 18C makes clear that a successor in title to an owner-builder is entitled to the benefit of the statutory warranties. Section 18D makes clear that a person who is a successor in title to a person entitled to the benefit of a statutory warranty under the Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty. Sections 18B, 18C and 18D are plainly intended to be read together and as a coherent whole. A coherent reading of the statutory warranties provides a powerful basis to conclude that the legislative purpose of the statutory warranties was that they be "implied in

every contract to do residential building work". This provides a proper basis to consider whether to imply words into the definition of "owner-builder". If the literal meaning of "owner-builder" was applied, without implying words, there would be an immediate conflict created within s 18B, at least, in that there would be a category of consumers *not* entitled to the statutory warranties which s 18B insists are "implied in every contract to do residential building work" (and which warranties ss 18C and 18D extend).

104 Section 12 of the Act also provides relevant context in which to discern the legislative purpose of the Act and its licensing and warranties regime. Section 12, it will be recalled, relevantly provides:

> **12 Unlicensed work**
>
> An individual must not do any residential building work, or specialist work, except—
>
> ….
>
> (b) as the holder of an owner-builder permit authorising its holder to do that work, or

105 An "owner-builder" permit must authorise the holder to do the particular "residential building work" prior to that work being commenced. This provides an explanation for the wording of the "owner-builder" definition, which contemplates a particular owner-builder permit and particular work carried out under that permit. The definition is a belts and braces provision seeking to ensure that only residential building work for which a permit has been granted is conducted. When these sections are read as a whole, there is a textual indication that the assumption the legislature was operating under was that all residential building work would be the subject of the consumer protections, including the statutory warranties, given to purchasers by the Act. This suggests that the purpose of the Act is inconsistent with the literal meaning of the definition of "owner-builder" in the Act.

106 Consideration of the Act as a whole and, as I will explain, the relevant extrinsic material tends strongly against the plaintiff's suggested construction and in favour of the conclusion reached by the Appeal Panel that words should be read into the definition of "owner-builder" so as to cohere with the legislative purpose of the Act's consumer protection provisions.

The statutory warranties

107 In the second reading speech to the Building Services Corporation Legislation Amendment Bill 1996 (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 30 October 1996 at 27-28), which introduced the statutory warranties in s 18B, the Minister for Fair Trading and Minister for Women, Ms Lo Po said, relevantly:

> There appears to be general agreement that the present government-operated insurance system has not worked well. The Dodd review concluded that there were far too many conflicts of interest within the Building Services Corporation to allow it to work properly. On the one hand the BSC was a regulator. As part of that role it was responsible for advising consumers and assisting to resolve disputes. On the other hand, the BSC was an insurer, and was expected to run the scheme on commercial lines. Many conflicts arose between the BSC's regulatory role and that of dispute resolution and insurance. On the election of the Carr Government an inquiry was commenced into longstanding grievances between consumers and the BSC. The inquiry, chaired by Peter Crawford, was required to examine a number of identified cases and to consider whether the consumers had received their entitlement under the legislation and whether the BSC and the former Builders Licensing Board properly discharged their statutory duties to the consumers….[5541]
>
> The legislation spells out specific inclusions and exclusions in building contracts, as well as *statutory warranties which will be common to all building contracts*….
>
> *The new insurance scheme will apply to all residential building work currently requiring a licence and costing over $5,000*. The $5,000 insurance threshold is consistent with the level applying in other States with mandatory insurance schemes. Insurers have, however, advised that insurance cover for work under $5,000 will be available as an option…..
>
> *Owner-builders will be required to arrange for insurance coverage for subsequent purchasers but only where they decide to sell their property within seven years from completion of the work. It will also be a requirement for an owner-builder selling a property within that period to attach a certificate of the insurance to the contract for sale*. The contract for sale will be voidable at the purchaser's option if the owner-builder does not obtain the insurance cover….
>
> …As I have mentioned, *building contracts will have to contain relevant statutory warranties. These warranties are set out in the bill and are given by the builder. They are implied in every contract to do residential building work. The warranties relate to the performance of the work, the materials to be used, compliance with the law, completion time and fitness for occupation. The warranties will apply not only to the consumer who enters the contract but also to subsequent owners of the property. These statutory warranties will not be able to be excluded by any provision of the contract and will last for seven years from completion of the work.* If the work is not completed, the warranties will run from the completion date specified in the contract or, otherwise, the contract date. (italics added)

108 This second reading speech is an important statement of legislative intention. It could not be clearer that the legislature intended, as s 18B explicitly says, that

the statutory warranties were to be implied in *every* contract to do residential building work. The warranties were intended to apply not only to the consumer who enters the contract but also to subsequent purchasers of the property, like the present defendants.

109 If the plaintiff's construction of the Act is correct, then, from the beginning, there was a misfire in the apparent legislative intention that statutory warranties "are implied in every contract to do residential building work", "apply not only to the consumer who enters the contract but also to subsequent owners of the property" and "will not be able to be excluded by any provision of the contract and will last for seven years". If the plaintiff is correct, an owner-builder who, in breach of the legislation, failed to obtain an owner-builder permit, would not be required to give the statutory warranties, would not be liable for defective building work to a purchaser or their successors in title and would be able to avoid the consequences of their defective building work unless the breach was discovered and the contract rescinded before settlement. Even assuming the successful criminal prosecution of an owner-builder in the position of this plaintiff, the key purpose of the statutory warranties – consumer protections for buyers and successors in title against defective residential building work – would not be achieved. Why Parliament should be understood to have acted on such an intention was never satisfactorily explained by the plaintiff.

The insurance provisions

110 Another section of the Act dealing with owner-builders is s 95, which addresses insurance. This section and its legislative history also reflect something of the Act's relevant purpose. As originally enacted following an amendment to the Act in 1996, s 95 required an owner-builder to obtain insurance.[7] In 2014, s 95 was amended to provide that insurance *cannot* be taken out in relation to owner-builder work. Instead, owner-builders were required to include in any contract of sale a disclaimer in the form of "a conspicuous note" stating that an owner-builder permit was issued in relation to the land (and when) and that work done under such a permit is not required to be insured under the Act

[7] The original s 95 dealt with insurance, but not owner-builder insurance. The Act first dealt with owner-builder insurance when s 95 (and the whole of Part 6) were amended in 1996.

unless the work was done by a contractor to the owner-builder. Following a minor amendment in 2017,[8] the provision currently states:

> **95 No insurance for owner-builder work**
>
> (1) A contract of insurance under this Part cannot be entered into in relation to owner-builder work carried out or to be carried out by a person as an owner-builder.
>
> **Note—**
>
> Insurance under this Part cannot be offered or obtained for owner-builder work done by an owner-builder. This does not affect the requirement of section 92 for insurance to be obtained for owner-builder work done under a contract.
>
> (2) A person who is the owner of land in relation to which an owner-builder permit was issued must not enter into a contract for the sale of the land unless the contract includes a conspicuous note (a ***consumer warning***) stating—
>
> (a) that an owner-builder permit was issued in relation to the land (specifying the date on which it was issued), and
>
> (b) work done under an owner-builder permit is not required to be insured under this Act unless the work was done by a contractor to the owner-builder.
>
> Maximum penalty—1,000 penalty units in the case of a corporation and 200 penalty units in any other case.
>
> (3) The requirement for a contract of sale to include a consumer warning does not apply—
>
> (a) to a sale of land more than 7 years and 6 months after the owner-builder permit was issued, or
>
> (b) if the reasonable market cost of the labour and materials involved does not exceed the amount prescribed by the regulations for the purposes of this section, or
>
> (c) if the owner-builder work carried out under the owner-builder permit is of a class prescribed by the regulations.
>
> (4) The requirement for a contract of sale to include a consumer warning applies to a person as the owner of land whether the person is the person to whom the owner-builder permit was issued or a successor in title to that person.
>
> (5) If a person contravenes this section in respect of a contract, the contract is voidable at the option of the purchaser before the completion of the contract.
>
> **Note—**
>
> Prior to its amendment by the *Home Building Amendment Act 2014*, section 95 required an owner-builder to obtain insurance under this Part before selling the land concerned. Schedule 4 provides for the continued application of the

[8] Prior to this 2017 amendment, the first note said "under the Home Building Compensation Fund" rather than "under this Part".

previous requirements of section 95 to sales of land before the amendment to that section.

111 Section 102A was also inserted, requiring the State Insurance Regulatory Authority to maintain a register of insurance contracts relating to the Act:

> **102A Register of insurance and other particulars**
>
> (1) The Authority is to maintain or cause to be maintained a register of particulars relating to contracts of insurance, contracts or arrangements for alternative indemnity product cover and other matters relating to insurance or alternative indemnity product cover under this Act.
>
> (1A) Without limiting the matters that may be included in the register by the Authority, the register may include particulars of the following (whether relating to matters occurring before, on or after the commencement of this subsection)—
>
> (a) certificates issued to evidence contracts or arrangements entered into under this Part or Part 6B,
>
> (b) claims made successfully under those contracts or arrangements.
>
> (2) Particulars included in the register can include information that is personal information under the Privacy and Personal Information Protection Act 1998 unless the regulations under this Act otherwise provide.
>
> (2A) A licensed insurer or licensed provider is authorised to disclose particulars to the Authority for the purposes of the register despite the Privacy and Personal Information Protection Act 1998.
>
> (3) The Authority is to make the contents of the register publicly available in such manner as the Authority considers appropriate.

112 In the second reading speech to the Home Building Amendment Bill 2014, which effected the changes relating to insurance, the Minister stated (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 6 May 2014 at 28221):

> Mandatory home warranty insurance is a key consumer protection mechanism in the legislation. Home warranty insurance is a form of last resort cover for home owners in the event a builder is unable to complete or rectify work due to insolvency, death, disappearance or due to certain licence suspensions. While owner-builders are currently required to take out home warranty insurance, the bill makes them ineligible to obtain home warranty insurance under the statutory scheme before on-selling their home. This is to focus home warranty insurance on the licensed building sector, and to make a clear distinction between homes that are built by qualified licensed builders and those built by owner-builders. *To safeguard subsequent purchasers of properties, contracts for the sale of all properties on which owner-builder work has been carried out in the last six years will be required to include a consumer warning that the work has been undertaken by an owner-builder and that the owner-builder is not providing statutory insurance.* This reform does not preclude private insurers from entering the market and offering insurance to owner-builders

> which they can attach to the contract for the benefit of the subsequent purchaser. In order to combat the use of false insurance certificates, the bill provides for a public register of certificates of insurance to be made available to a home owner or potential purchaser of property. (italics added)

113 The italicised portion of the second reading speech is a further demonstration that the legislature assumed in enacting the statutory amendment regarding insurance that "owner-builder work" would be carried out by an "owner-builder", being a person not holding one of the other types of licence. As I have explained, "owner-builder work" does not rely on the definition of the term "owner-builder". The plaintiff here conducted "owner-builder work" but, if his submission be correct, he was not an "owner-builder" as defined. What the Minster described in the Second Reading Speech as a "safeguard" for subsequent purchasers was no safeguard at all.

114 The plaintiff's remaining submissions about insurance should also be rejected. The rhetorical question posed by the plaintiff about why the Parliament "provided for the maintenance of public registers of these particulars" addresses the wrong issue. As the second reading speech makes clear, providing a register of insurance was designed to "combat the use of false insurance certificates". The extrinsic materials tend strongly against the plaintiff's submission that the provision of a register of insurance was intended by the Parliament to be a sufficient protection for purchasers from owners who had unlawfully done residential building work at the property without a permit.

115 Finally, so far as the insurance provisions are concerned, the plaintiff's submissions, summarised at [54] and [55] above, should be rejected. The plaintiff contends that s 96 has a narrow application, most commonly to licensed builders who do residential building work on their own properties, such as building a "spec house", without an owner-builder permit. Such persons are required to obtain insurance. Contrary to the plaintiff's submissions, a construction of the definition of "owner-builder" which extends to an individual who is required to obtain an owner-builder permit would not obviate the need for such persons to acquire insurance. That is because s 96(3)(a) creates an exception in circumstances only where owner-builder work is being done and where an owner-builder permit has been obtained. The exception does not turn on whether a person is an "owner-builder". A licensed builder who does

residential building work on their own property, such as building a "'spec house"', on the construction preferred by the Appeal Panel, would still have breached this section by being uninsured. The construction preferred by the Appeal Panel does not deem such a person actually to have a permit such that the person would fall within the s 96(3)(a) exception. The contract would still be voidable per s 96(3A).

Other provisions referring to an "owner-builder"

116 The other references to "owner-builder" (rather than "owner-builder permit" or "owner-builder work") in the Act are in ss 90(2), 92(6), 98(2) and 103F. Those sections relevantly provide:

> **90 Definitions**
>
> …
>
> (2) A reference in this Part to the disappearance of a contractor, supplier or owner-builder is a reference to disappearance from Australia and includes a reference to the fact that, after due search and inquiry, the contractor, supplier or owner-builder cannot be found in Australia.
>
> …
>
> **92 Contract work must be insured**
>
> …
>
> (6) To avoid doubt, this section extends to residential building work that is also owner-builder work (when the work is done under a contract between the person who contracts to do the work and the owner-builder).
>
> …
>
> **98 Employees and others not required to insure**
>
> …
>
> (2) Subsection (1) does not apply in the case of a person who contracts to do owner-builder work on behalf of an owner-builder. Such a person must insure that work if otherwise required to do so by section 92.
>
> …
>
> **103F Interpretation**
>
> (1) In this Part—
>
> …
>
> ***builder*** means a contractor or supplier (within the meaning of Part 6), an owner-builder or person who does residential building work otherwise than under a contract.

117 Sections 90, 92 and 98 each appear in Part 6, which contains the Act's insurance provisions. Section 103F appears in Part 6A, which concerns

insolvent insurers. Each of these parts is remedial, designed to protect those who enter contracts for residential building work. The intention of the legislature could not have been to exclude from these Parts' operation those who ought to have, but failed to, obtain an owner-builder permit. None of these provisions, by their use of "owner-builder", militates against reading into the definition of 'owner-builder".

Cases on the earlier version of the definition of 'owner-builder"

118 Prior decisions of this Court also tend in favour of the conclusion reached by the Appeal Panel about statutory purpose. In *Gunn*, Master Harrison considered the earlier version of the definition of owner-builder. That definition read:

> owner-builder means a person who does owner-builder work (within the meaning of Part 6) and who is issued an owner-builder permit for that work.

119 Master Harrison found that the words "who is issued an owner-builder permit" were a "deeming provision" rather than an exclusive prerequisite to being an "owner-builder" within the meaning of the Home Building Act. Her Honour found that to hold otherwise would frustrate the purpose of the legislation.

120 The same, earlier version of the definition was also considered in *Sorbello & Donelly v Whan* [2007] NSWSC 951. At first instance, the Consumer, Trader and Tenancy Tribunal sought to distinguish *Gunn* on the basis that the first respondent there, who had not obtained a permit, would not have been eligible for one had he applied. On appeal, Price J held that the Tribunal was wrong in that conclusion, because a permit may have been issued. Contrary to the plaintiff's submission, Price J acted on the basis that *Gunn* was correctly decided.

121 I do not accept the plaintiff's submission that there is a difference of substance between the wording of the definition considered in *Gunn* and *Sorbello* and the current definition. The substantive change was from "who is issued an owner-builder permit" to "under an owner-builder permit issued to the person". Both refer to owner-builder permits which have been "issued", using a past participle.

122 It is clear that from 2007, two decisions of the Supreme Court have decided that an "owner-builder" under the Act comprised those persons issued with a permit prior to commencing residential building work and persons who were required to apply for a permit prior to commencing residential building work.

123 The High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 made remarks bearing on the present controversy:

> [52] This understanding of the scheme of the Security of Payment Act accords with the earlier decision of the Court of Appeal of the Supreme Court of New South Wales in *Brodyn Pty Ltd v Davenport*. In the present case, the Court of Appeal followed Brodyn in this respect. It was right to do so. It would have been a strong thing for that Court, as indeed it would be for this Court, to have taken any other course. Since the decision in *Brodyn*, the Parliament of New South Wales has twice had occasion to revisit the Security of Payment Act to make substantial amendments to its provisions. No amendment was made to alter the effect of the decision in *Brodyn*. That circumstance is a powerful reason for rejecting any suggestion that the understanding of the legislation adopted in *Brodyn*, and given effect in the decision of the Court of Appeal in this case, was other than a faithful reflection of the intention of the legislature. (Footnotes omitted.)

124 There have been considerable amendments to the Act since the decisions in *Gunn* and *Sorbello*. Parliament must be taken to be aware that the term "owner-builder" in *Gunn* and *Sorbello* had been construed in the Supreme Court as including owners who were required to obtain an owner-builder permit before commencing residential building work but had failed to do so. Yet the legislature did not take action to change the outcome of the construction of "owner-builder" accepted in those cases. Legislative amendment to other provisions in a statute may sustain the inference that a legislature is endorsing the construction given to unamended provisions of the same statute.

125 Despite the fact that both *Gunn* and *Sorbello* were decided before *Taylor*, and were reasoned in a different way to the way the Appeal Panel reasoned, they provide some support for the inference that the legislature intended "owner-builders" in the Act to include owners who were required to obtain an owner-builder permit before commencing residential building work yet had failed to do so.

The plaintiff's submissions in light of the Act's context and purpose

126 The plaintiff made two main submissions in support of the literal meaning of the definition of owner-builder being the governing principle and against the implication of words to give effect to the legislative purpose. In light of the relevant context and the Act's clear purpose, these submissions must be rejected.

127 The principal submission was that purchasers from an owner who did residential building work without an owner-builder permit were afforded sufficient protection by the opportunity to avoid the purchase of a dwelling constructed in breach of the Act. I do not accept that the availability of rescission rather than the statutory warranties is consistent with the carefully constructed consumer protections established by the Act. While, of course, legislation does not pursue a single purpose at all costs, it is not consistent with the extensive protective scheme of the Act for purchasers from an owner who did residential building work without a permit to be excluded from the protection afforded by the statutory warranties.

128 Even if a purchaser discovered that he or she had a right to rescission because an owner had done building work on the land in the previous 7 years and 6 months without a permit, the form of protection afforded to purchasers relied upon by the plaintiff demands of the purchaser that he or she assess the risk of purchase within the time between exchange and completion, and do so without good, or complete, information. This is precisely the situation the statutory warranties were intended to guard against. Contrary to the plaintiff's submission, s 102A of the Act does not require the register to be searchable and does not specify what it might be searchable for, nor where and how the register is to be publicly available. The consumer protection, if any, provided by that section is likely illusory. If the plaintiff intended to rely on the ready searchability of any register as an aid to statutory construction he bore the onus of proving it.

129 The right to rescind is one that may only be exercised before completion and relies upon the purchaser obtaining relevant information before that date. No protection whatever is provided to purchasers in the position of the Lennons

who have purchased a property where defective work has been done by an owner who was required to obtain a permit but failed to do so.

130 The 2014 introduction of the prohibition in s 95(1) against the insuring of work done by owner-builders, and the simultaneous introduction of the consumer warning obligations were amendments made in response to notorious changes in the insurance market. The fact of the introduction of s 95(1)'s prohibition against insurance says nothing about whether purchasers should have the protection of s 18B's statutory warranties vis a vis owners who breach s 12. Accepting that ss 95 and 102A of the Act did arm purchasers with a limited ability to discover that an owner had done owner-builder work without a permit and had thereby breached s 12, and assuming that s 95(5) gave the purchaser a right to rescind a contract for sale in circumstances where the work was done without a permit, the statutory purpose would still be subverted by the plaintiff's construction. It simply does not follow from the existence of limited protections in s 95 of the Act that purchasers do not also have the benefit of the statutory warranties vis a vis owners who carry out works without a permit. The Panel correctly made that point at [158]-[159] of its reasons.

131 Nor was the possibility of criminal sanction intended to afford sufficient protection for the purchaser, contrary to the plaintiff's submission above at [60]. The fact that a person in the position of the plaintiff may have committed two separate crimes provides "protection" for a purchaser only in the most tenuous and remote of circumstances. It is a protection designed for all by the principles of criminal punishment and deterrence. It is not a protection for consumers in the position of the defendants.

132 Contrary to the plaintiff's submission, the definition of "owner-builder" in the legislation literally construed gives rise to an outcome which is absurd, irrational and manifestly unjust. I reject the plaintiff's submissions that the asserted ability to uncover the unlawful conduct and consequent right of rescission are meaningful protections intended by the legislature as a substitute for the statutory warranties.

Asserted reasons the legislature intended not to extend the statutory warranties to work done unlawfully without a permit

133 The plaintiff's submission that "there are reasons why the legislature may have chosen not to extend the statutory warranties to work done unlawfully without a permit" should also be rejected. Simply put there is no indication in the text, context or purpose of the provisions supporting the plaintiff's submission. I reject the plaintiff's suggestion that the legislative intention was that the principle of "caveat emptor" would apply and a purchaser would be required to search a register to determine whether a relevant permit was issued. If the relevant register were searched here, the Lennons would merely have seen the false information given by the plaintiff to the Council, naming Mr Miller as the builder of the property.

134 The plaintiff's suggested additional protections, drawn from other statutes, do not advance the plaintiff's case. I reject the plaintiff's submission that the legislature has enacted a scheme of consumer protection provisions such that it should be concluded that there was a legislative intent to allow owners to conduct residential building work yet escape the giving of statutory warranties to subsequent purchasers by, as in this case, deliberately failing to obtain an owner-builder permit.

135 It may be correct, as the plaintiff submitted, that if an owner of land does residential building work on that land without an owner-builder permit the work will be uncertified and liable to an upgrading or demolition order. That conclusion does not address the critical questions of consumer protection the legislature intended be provided by the Act at the heart of this appeal. The critical mater is the rights of subsequent purchasers including their rights during the period that the statutory warranties implied by the *Home Building Act* apply. An upgrading or demolition order in relation to work done by an unlicensed owner-builder will be a likely expensive burden upon successors in title and is not a consumer protection measure.

136 It is also correct as the plaintiff submitted that the building work must be certified. Sch 5 Part 1 of the *Environmental Planning and Assessment Act 1979* (NSW) sets out various "development control orders" a council, inter alia, may make where there have been various kinds of noncompliance with that Act.

Those provisions provide no relevant rights to relief to subsequent purchasers who buy property from an owner who has done residential building work without a permit. They do not provide consumer protection to subsequent purchasers from sub-standard building work done by an owner-builder. The right to rescind, if sufficient matters are discovered before completion, is no substitute for the statutory warranty rights intended by the legislature to be afforded to every purchaser of residential property.

137 It may also be accepted that s 52A of the *Conveyancing Act 1919* (NSW) and the Conveyancing (Sale of Land) Regulation 2022 (NSW) imply into a contract for sale of land in NSW a warranty to the effect that, except as disclosed in the contract, there is no matter in relation to a building or structure on the land that would justify the making of an "upgrading or demolition" order. Whilst it is true that breach of the warranty confers a right of rescission on the purchaser exercisable prior to completion of the contract, this is a completely different and much less valuable right in the hands of subsequent purchasers than the statutory warranties granted by the Act.

138 Lastly, on allegedly related statutory schemes, s 113 of the *Local Government Act 1993* (NSW) requires a council to keep a publicly available register of approvals given under Part 1 of that Act which register must include, in the case of approvals given in relation to residential building work, names and licence numbers of licensees and names and permit numbers of owner-builders. This protection is distinct from the *Home Building Act* warranties, and much less valuable to consumers, in two ways. The first is that it places a burden on a purchaser to make enquiries while the clear policy of the *Home Building Act* provides that such inquiries should not have to be made in order to benefit from statutory protection. The second is that, as this case illustrates, the so-called protection is illusory where the owner, Mr McIntosh, incorrectly told the Council that the building work was to be carried out by a licensed builder, Mr Miller.

139 I also reject the submission that the legislature should be understood to have baulked at providing the statutory warranties to purchasers from owners who failed in their obligation to obtain an owner-builder permit prior to doing

residential building work. This was asserted to be so by reason of rural owner-builders, said to unaware of their legal obligations. It is not a matter of inference that the legislature intended that the statutory warranties should be implied into all contracts to do residential building work and be available to consumers who are successors in title to purchasers from the person responsible for the residential building work. Sections 18B-18D of the Act provide so in terms. It would be a perverse outcome for purchasers from owners who had complied with the statutory obligation to obtain a permit to have the benefit of the statutory warranties but purchasers who bought property from owners who had unlawfully carried out residential building work to not. Much less do I accept, as the plaintiff submitted, that the legislature contemplated that the tort of deceit or the *Competition and Consumer Act 2010* (NSW) provided sufficient consumer protection in such as case,

140 I reject the plaintiff's submission that each of these "protections" was intended by the legislature as a sufficient substitute for the statutory warranties intended to be given to all purchases of residential property to which residential building work had been done in the preceding 6 years. None of these so-called "protections" address the clear statutory purpose of the Act's statutory warranty provisions to impose statutory warranties for the benefit of purchasers and subsequent purchasers.

141 The plaintiff further argued that the Appeal Panel's construction of "owner-builder" should be rejected because of the effect it would have on the interpretation of s 6.6 of the EPA Act. Section 1.4 of the EPA Act gives "owner-builder" the same meaning it has in the *Home Building Act.*

142 Section 6.6 provides, relevantly, as follows:

> **6.6 Requirements before building work commences**
>
> (cf previous s 81A)
>
> (1) A development consent does not authorise building work until a certifier has been appointed as the principal certifier for the work by (or with the approval of) the person having the benefit of the development consent or other person authorised by the regulations.
>
> (2) The following requirements apply before the commencement of building work in accordance with a development consent—
>
> ….

(c) the person carrying out the building work has notified the principal certifier that the person will carry out the building work as an owner-builder, if that is the case,

(d) the person having the benefit of the development consent, if not carrying out the work as an owner-builder, has—

(i) appointed a principal contractor for the building work who must be the holder of a contractor licence if any residential building work is involved, and

(ii) notified the principal certifier of the appointment, and

(iii) unless that person is the principal contractor, notified the principal contractor of any inspections that are required to be carried out in respect of the building work,

…

(3) A person must not fail to give a notice that the person is required to give under this section.

Maximum penalty—Tier 3 monetary penalty.

143 The plaintiff's submission was made orally and briefly, but appears to have involved the following construction of s 6.6. Subsection 2(c) applies to those who have obtain owner-builder permits. Subsection (2)(d) applies to someone who is doing residential building work and would, under the *Home Building Act*, be required to obtain an owner-builder permit. However, subs (2)(d) explicitly applies where such a person is not an "owner-builder". It followed, the plaintiff said, that the Appeal Panel's construction of "owner-builder" cannot be right: if a person is an owner-builder whether or not they have a permit, then the distinction apparently drawn by subs 6.6(2)(c) and subs 6.6(2)(d) would be otiose.

144 This argument should be rejected, because it rests on a faulty interpretation of s 6.6 of the EPA Act and its interaction with the *Home Building Act* licensing scheme. It will be recalled that, under s 12 of the *Home Building Act*, a person is required to obtain a building licence (including an owner-builder permit) if they intend to carry out residential building work. Section 6.6(2)(c) of the EPA Act engages with that requirement: it applies to a person "*carrying out building work* … as an owner-builder". This language is compatible with a construction of "owner-builder" that includes both a person who has and a person who is required to obtain an owner-builder permit before doing residential building work. If an owner has an owner-builder permit, then that person is an owner-builder and s 6.6(2)(c) clearly applies to them. If an owner carries out building

work, if that building work is residential building work and if the person is not eligible for any other *Home Building Act* licences, then that person is an "owner-builder" and s 6.6(2)(c) again readily applies. Nothing in s 6.6(2)(c) limits the meaning of "owner-builder" to a person who holds an owner-builder permit.

145 Section 6.6(2)(d) of the EPA Act applies to circumstances different from s 6.6(2)(c). It applies not to a person who "carries out building work" but to a person "*having the benefit of the development consent*". If a person who "has the benefit of a development consent" is not carrying out residential building work, then s 12 of the *Home Building Act* does not require them to obtain an owner-builder permit. The conditional clause in s 6.6(2)(d) "if not carrying out the work as an owner-builder" ensures the subsection only applies if the person is not in fact carrying out work as an owner-builder. On the construction I prefer, there is a symmetry with s 6.6(2)(c). A person in the position of the plaintiff would be caught by s 6.6(2)(c) and s 6.6(2)(d) does not apply. The language is thus consistent with the construction of "owner-builder" I prefer.

Conclusion on plaintiff's submissions about reading words into the definition

146 The plaintiff made five points in conclusion in attacking the decision of the Appeal Panel that words should be implied in the definition of "owner-builder". I am not persuaded in isolation or taken together that any error in the Appeal Panel's decision was shown in this respect:

(1) First, I accept the plaintiff's submission that the clearer the literal meaning of the provision, the more difficult it is to displace it. I reject, however, the submission that the Appeal Panel's construction is "tortured, unrealistic and wholly unnatural". The words introduced to the definition of "owner-builder" suggested by the defendants are coherent with the statutory warranty provisions and not inconsistent with any other part of the Act.

(2) Secondly, as I will shortly explain, I reject the plaintiff's submission that the Appeal Panel's construction goes beyond the limits set out in *Taylor*.

(3) Thirdly, I do not accept the plaintiff's submission that the Appeal Panel's definition would make all of the words after "owner-builder" superfluous. Nor do I accept that there is any superfluity created in s 18C. The words inserted are words of explanation: the inserted words simply explain that a person is an owner-builder if they actually have *and* also if they are required by the Act to have a owner-builder permit prior to doing residential building work.

(4) Fourthly, for the reasons I have explained, I reject the plaintiff's submission that there are any broader consequences of the Appeal Panel's construction, being the purported impact on the interpretation of s 6.6 of the EPA Act.

(5) Fifthly, I reject the plaintiff's submission that that "context and purpose do not require the construction adopted by the Panel". Of course, legislation rarely pursues a single purpose at all costs. The present case, however, is striking in that the Appeal Panel's construction of the definition is coherent with the provisions of the Act, and in particular Part 2C. A literal reading of the definition is not. This is one of those rare cases in which words should be read into the statute by way of explanation.

Analysis of whether the requirements in Taylor are here met

147 I accept the plaintiff's submission that that context and purpose alone cannot imbue the definition of "owner-builder" with a range of meanings its language simply does not have. I cannot, however ungrammatically, read the words actually used in the definition to extend to a builder who does not obtain an owner-builder permit.

148 On the other hand, the purpose of the statutory warranty provisions could not be clearer. To deprive a purchaser of the statutory warranties because an owner who was required by the Act to obtain a permit before doing residential building work failed to obtain that permit would give rise to an outcome correctly described as "a capricious and unjust result", to use the language of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 313; [1981] HCA 26. To ensure the operation of the Act in the way the legislature intended requires the Court to read words into the provision. As I have explained, after *Taylor,* reading in words is a distinct aspect of purposive construction, with special principles. If the present case is not one where the principles on "reading in" are necessary, it is difficult to imagine where those principles would ever be necessary. To read in words so is an acceptable act of statutory construction.

149 As I have explained, reading words in involves close application of the principles in *Taylor,* approving *Wrotham Park* and *Inco Europe. Taylor* makes clear that "reading in" is an aspect of purposive construction. However, the Court also endorsed the view that special principles apply to this aspect of purposive construction, being the three considerations in *Wrotham Park*. These

special principles have been described as inhibitory, for example by Leeming JA in *Coal & Allied* as quoted above at [100].

150 The correct approach is first to perform ordinary purposive construction. If that approach suggests words must be read in so that the provision coheres with Parliament's intention, then the inhibitory factors in *Taylor* should be considered and applied. Words should be read in only if the conditions in *Taylor* are met.

151 I would read in to the definition of "owner-builder" the words suggested by the defendant at the hearing which the plaintiff had an opportunity to consider and make submissions about (inserting words underlined):

> ***owner-builder*** means a person who does owner-builder work under an owner-builder permit issued to the person for that work or is required to hold an owner-builder permit to do that work.

152 This is a case where the literal construction of the definition section would produce a "capricious and unjust result". The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.

153 It would be clearly contrary to the statutory purpose of the Act for the warranties not to be available to purchasers from owners who have done their own residential building work but have failed to obtain a permit to do so. It is therefore clear that the literal meaning of the definition cannot have been what the Parliament intended.

154 No different conclusion arises after the amendments in 2014. Whilst, of course, an owner-builder is no longer required to obtain insurance, it is clear that the policy of s 95 is to disclose to purchasers for their benefit that residential building work has been done by an owner-builder and does not have the benefit of insurance. It is equally clear that the legislature intended that the statutory warranties be given to purchasers of residential property in cases such as the present.

155 The words sought to be included meet Lord Diplock's three conditions as reformulated in *Inco Europe* and approved in *Taylor*, as well as the fourth "consistency" condition contemplated by the authorities:

(1) the identification of the precise purpose of the provision;

(2) satisfaction that the drafter and the parliament inadvertently overlooked an eventuality that must be dealt with if the provision is to achieve its purpose;

(3) identification of the words that the legislature would have included in the provision had the deficiency been detected before its enactment; and

(4) the modification must be consistent with the wording otherwise adopted by the draftsperson.

156 For the reasons given at [99]-[133], each of these conditions are satisfied:

(1) **The first condition**: The purpose of the definition of "owner-builder" in the Act is to identify the class of person who will be subject to various obligations under the Act, and in particular the statutory warranties. It could not be clearer that the legislative intention was that the statutory warranties, which used the language of the definition of "owner-builder", were intended to be implied in every contract to do residential building work. These warranties have a broad and remedial function. Parliament intended that the statutory warranties should apply to all contacts of sale for residential property. The definition of 'owner-builder" should be understood in that light, rather than as limited to a narrow distinction between those who obtained a permit and those who did not.

(2) **The second condition**: I have concluded that the draftsperson inadvertently overlooked a situation where an owner-builder failed to obtain a permit. This conclusion is underlined by the absence of any rational or logical reason why successors in title of an owner-builder who did not obtain a permit should be denied rights granted to successors in title of an owner-builder who did obtain a permit, and the manifest and plainly inadvertent injustice in discriminating between the two. Further, because of their breadth and remedial function, it would be perverse to allow the statutory warranties to be frustrated by a builder who by their own wrong fails to obtain a required permit.

(3) **The third condition**: Given my findings about the purpose of the definition in the context of the Act as a whole, and in particular the statutory warranties, I conclude that the proposed implication was, in substance, that which Parliament would have adopted if the issue had been drawn to its attention. The words Parliament would have included are "or is required to hold an owner-builder permit to do that work". I reject the plaintiff's submission that the implication is somehow meaningless. As I have explained at [15]-[17] above, the Act requires a person eligible for an owner-builder permit and ineligible for a different type of building licence is required to obtain an owner-builder permit. In context, the statutory warranties were intended to apply to all contracts

for residential building work and to be available for subsequent purchasers.

(4) **Consistency condition**: The wording is consistent with wording otherwise adopted by the draftsperson, and in particular is consistent with the coherent application of the statutory warranty provisions. The words are consistent with s 12 (see [14] above), which on its proper construction, requires certain types of builder to obtain an owner-builder licence before carrying out residential building work. The words I have read in also mirror the language used in s 18B(1) "a person required to hold a contractor licence". All of the references to "owner-builder" in the Act and those other Acts in which the term is picked up apply in accordance with the statutory intention I have described and no inconsistency is created.

157 As to additional matters which the authorities may require:

(1) The alteration in language is not too far-reaching. The implication is not too big or too much at variance with the language in fact used, instead explaining it in a way consistent with other features of the Act: *Taylor* at [38], quoting *Inco Europe* at 592.

(2) The modified construction is not unnatural, incongruous or unreasonable. It is in conformity with the statutory scheme: *DPP (Vic) v Leys* (2012) 44 VR 1 at [97] and [109]-[110].

158 The words to be implied in the "owner-builder" definition are words of explanation. Viewed as a whole and in context, the plain purpose of the legislation is to extend the statutory warranties in ss 18B-18D to *all* those who acquire property where residential building work has been done, including purchasers from and successors in title to a person in breach of s 12. The implicit words explain the meaning of "owner-builder" must have if the Act's overall purpose is to be achieved. I am therefore satisfied that the words suggested by the defendant (see [151] above) should be read into the definition of "owner-builder" in sch 1 cl 1 of the Act.

159 It follows that the plaintiff is an owner-builder, because he was required to obtain an owner-builder permit before carrying out residential building work on the property. Therefore, under ss 18C and 18D, the defendants could enforce the statutory warranties against him.

160 The Appeal Panel did not err in law in concluding that the requirements in *Taylor* were met. Leave to appeal should be granted, but the summons filed 21 April 2023 dismissed.

Costs

161 Section 98(1) of the *Civil Procedure Act 2005* (NSW) grants the Court a broad discretion to award costs, subject to the rules of the court, that Act, or any other legislation. The general rule is that costs follow the event: Uniform Civil Procedure Rules 2005 (NSW) r 42.1. A party seeking a departure from this general rule bears the onus of convincing the Court that the usual order ought not be made: *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 at 97; *Latoudis v Casey* (1990) 170 CLR 534 at 542-543 (Mason CJ) and 564, 566-567 (McHugh J); [1990] HCA 59.

162 As the defendants have succeeded, they are entitled to an order for costs in this Court. As the defendants did not seek an order for costs of the Appeal Panel proceedings, I will not make that order.

163 Even if I had been persuaded to allow Mr McIntosh's appeal, I would not set aside the order for costs made by Senior Member Ellis SC and would not make any order in favour of Mr McIntosh for the costs of the proceedings before the Appeal Panel or to this Court. Multiple issues were raised before Senior Member Ellis SC. The plaintiff failed on all issues.

164 The only basis relied upon by Mr McIntosh before me is that by reason of his apparently deliberate contravention of the *Home Building Act* he is to be taken not to have given the statutory warranties contained in that Act. As the only arguable basis for success on Mr McIntosh's part is reliance upon his own apparently deliberate unlawful conduct, I would not have exercised my broad discretion to make any order for costs in his favour.

165 In *Igaki Australia Pty Ltd v Coastmine Pty Ltd* (1996) 34 IPR 37; (1996) FCA 207, the trial judge found that some misleading or deceptive conduct was proven, but the successful party was not entitled to their costs. One reason given was that the representations had been induced on the promise of "black money" withdrawn from a restaurant business and not declared for income tax purposes. The Full Court of the Federal Court refused the successful party's appeal on costs and stated at [52]:

> … we consider that the court ought not be involved in any way in condoning conduct which is clearly in contravention of the income tax laws. To award

> costs to [the second respondent] in this case would have that effect. Accordingly, we dismiss the cross-appeal on costs.

166 The same conclusion applies here. On the hypothesis that the plaintiff was entitled to succeed, it was only on the basis of the plaintiff's conduct in breach of the *Home Building Act*. The Court ought not be involved in any way in condoning conduct which is clearly in contravention of the *Home Building Act*.

Conclusion and orders

167 For the foregoing reasons I make the following orders:

(1) Leave to appeal is granted.

(2) The summons filed 21 April 2023 is dismissed.

(3) The plaintiff is to pay the defendants' costs of the appeal to this Court.

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