GOVERNMENT CONNECT



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CONTENTS

2 Managing litigation risk: A practical guide for government agencies

5 The new Building Act: What it means for government as owner, client and approval authority

9 MACH Energy: What the High Court's decision means for consent authorities

13 Innovation and tendering. Unsolicited proposals and the NSW Government

16 When a "simple" land right becomes a long-term problem

19 Workplace bullying in NSW: An analysis of five recent decisions



A MESSAGE FROM JAMES MATTSON

Partner, Workplace Law & Culture

NSW Government Cluster Partner – Health, Premier and Cabinet and Communities and Justice

Welcome to our November 2026 issue of Government Connect.

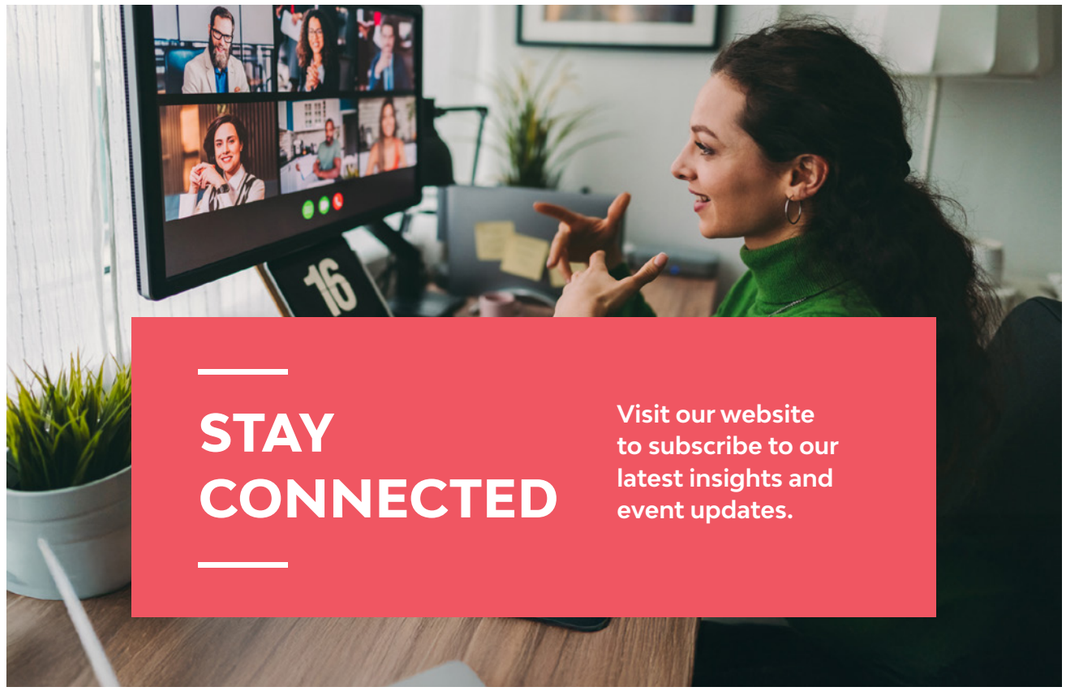
As 2026 draws to a close, NSW Government agencies continue to navigate a period of significant change, with major reforms to planning and building regulation, evolving workplace obligations and an ongoing focus on good governance, effective service delivery and managing risk.

Against this backdrop, this edition of Government Connect explores some of the issues government teams are encountering in practice. We look at how seemingly simple land rights can create long-term problems, recent workplace bullying decisions in NSW, innovation and unsolicited proposals in government tendering, and what the High Court's MACH Energy decision means for consent authorities. We also share practical guidance on managing litigation risk and consider what the new Building Act means for government as an owner, client and approval authority.

If any of these issues are particularly relevant to your department or team, we'd love to continue the conversation. Our lawyers are happy to present on any of the topics covered in this edition, or tailor a session around another legal issue your team is navigating.

As another busy year comes to an end, we hope you have the opportunity to enjoy a well-earned break.

Warm regards,
James



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MANAGING LITIGATION RISK: A PRACTICAL GUIDE FOR GOVERNMENT AGENCIES

Government agencies face disputes arising from procurement, major projects, construction, property, information technology, service delivery, regulatory action and commercial arrangements. Those matters may proceed in courts, tribunals or specialist dispute resolution processes and often involve public money, operational pressures and close scrutiny of how decisions were made.

The strength of an agency's position is often shaped before proceedings commence. Delay in escalating a dispute, incomplete records, unclear authority, uncontrolled communications or a failure to test the legal and factual position can increase cost and narrow the available options.

Effective litigation management requires early assessment, disciplined governance, preservation of evidence and regular review of whether the dispute can be resolved proportionately. Expert evidence remains important, but it should support a coherent litigation strategy rather than drive it.

This guide sets out practical steps agencies can take from the first signs of a dispute through to resolution, with a focus on protecting public resources, maintaining service delivery and preserving a defensible decision-making record.

Identify and escalate disputes early

A matter should be treated as a potential dispute when there is a material disagreement about rights, obligations, performance, payment, liability or the validity of a decision. Agencies should not wait for a formal claim before considering limitation periods, contractual notice requirements, evidence preservation and urgent protective steps.

Early escalation allows the agency to identify the real issues, involve the right stakeholders and avoid inconsistent communications. It also creates an opportunity to resolve the matter before positions become entrenched and significant public resources are committed.

An early merits assessment should address the relevant legal framework, available evidence, likely exposure, prospects of recovery, operational consequences, costs and public-interest considerations. An unfavourable assessment may be valuable if it enables the agency to correct its position or pursue a commercial resolution before the dispute escalates.

Establish governance and authority

Litigation commonly requires input from operational teams, legal advisers, procurement, finance, risk, records management, communications and senior decision-makers. Roles should be allocated early so that instructions are coordinated, deadlines are monitored and strategic decisions are made by officers with appropriate authority.

A litigation management plan should identify who has day-to-day conduct, who may instruct external lawyers, who may approve expenditure and settlement, and what reporting is required to executives, insurers or oversight bodies. It should also identify the internal stakeholders who hold relevant knowledge or will be responsible for implementing any outcome.

Clear governance reduces delay, avoids inconsistent instructions and helps demonstrate that decisions about public resources were made carefully, proportionately and within delegation.

Preserve documents and build the evidentiary record

Agencies should preserve relevant material as soon as a dispute emerges. Depending on the matter, this may include contracts, variations, procurement records, decision papers, site records, photographs, testing data, correspondence, meeting notes, audit trails and electronic system data.

Operational teams should be directed not to delete, alter, repair, dispose of or overwrite important material without considering whether inspection, imaging or forensic capture is required. If urgent work must proceed for safety, service continuity or asset protection, the original condition should be documented carefully.

Potential witnesses should be identified while events remain fresh. Agencies should anticipate staff movement, contractor turnover and the loss of institutional knowledge, and should maintain a clear record of evidence collected, gaps identified and assumptions that change.

Use expert evidence carefully

Expert input may be required where liability, causation, loss or an available remedy depends on specialised technical, financial, valuation or industry knowledge. The scope should be focused on the questions that matter to the dispute, and selection should take account of expertise, independence, conflicts, availability, communication skills, procurement requirements and proportionality.

The risks of compromising expert independence were illustrated in *Cadence (90) Investments Pty Ltd v Aspire Constructions Pty Ltd; Aspire Constructions Pty Ltd v Cadence (90) Investments Pty Ltd* [2026] NSWSC 136, a building dispute involving a geothermal system. Concerns arose about an expert who prepared numerous drafts and incorporated client comments. The Court gave the expert's opinion very little weight where

it differed from the competing expert evidence.

An agency or its lawyers may identify factual errors, missing documents, ambiguity, unanswered questions or non-compliance with an expert code. They should not supply the expert's reasoning, press for a preferred result or reshape an honestly held opinion. Instructions, draft comments and communications should be prepared on the basis that they may later be scrutinised.

Manage privilege and internal communications

Not every document created after a dispute arises is privileged merely because lawyers are involved. Privilege depends on the purpose for which a communication was created and how it is later used. Operational, procurement or commercial material may remain discoverable even if it is copied to the legal team.

The purpose of legal work should be recorded at the outset, and confidential advice should be circulated only to personnel who need it for the relevant legal or decision-making purpose. Internal communications should be factual and measured. Care is also required before advice, investigation material or settlement communications are shared with project partners, insurers, contractors, consultants, auditors or other agencies.

Prepare a coherent case

Once proceedings are likely or underway, the agency should develop a case theory connecting the legal elements, material facts, documents, witness evidence and any expert opinion. Pleadings and affidavits should reflect the case the agency can prove, not merely the position it would prefer to advance.

Where expert opinion is relied upon, section 79 of the *Evidence Act 1995* (NSW) requires specialised knowledge based on training, study or experience and an opinion wholly or substantially based on that knowledge. In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, the NSW Court of Appeal emphasised that an expert must expose the factual and intellectual basis of the opinion so the Court can evaluate it.

The High Court's decision in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 confirms that the witness must identify the relevant specialised knowledge and show how it was applied to the facts. A report should therefore identify the expert's qualifications, instructions, material considered, assumptions, methodology, reasoning and limitations.

Review resolution options throughout

Litigation strategy should be reviewed as evidence, pleadings, expert opinions, costs and operational priorities develop. A defensible legal position may not always justify a contested hearing where negotiation, mediation, expert determination or another agreed process can produce a proportionate outcome.

Settlement decisions should be supported by an updated assessment of prospects, exposure, costs, precedent risk, service delivery and the broader public interest. The agency should define settlement authority and parameters in advance so that representatives can participate meaningfully in negotiations.

A practical checklist

- **Escalate early:** Identify urgent deadlines, notice requirements and preservation steps.
- **Set governance:** Confirm responsibility, authority, reporting lines, budget and settlement approvals.
- **Preserve evidence:** Secure relevant records, identify witnesses and document any unavoidable change to evidence.
- **Assess proportionately:** Revisit merits, exposure, costs, operational impacts and resolution options at key stages.
- **Prepare coherently:** Align pleadings, documents, witnesses and expert evidence with a clear and supportable case theory.

Well-managed litigation is not measured only by the result at hearing. For government agencies, success may involve narrowing the issues, protecting public resources, maintaining service delivery or achieving a defensible resolution before proceedings become necessary. Agencies can strengthen their position by using the checklist above to review current and emerging disputes, confirm ownership and authority, and address any gaps in evidence preservation or case strategy. Early assessment, disciplined governance and continuous review place an agency in the strongest position to achieve those objectives.



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THE NEW BUILDING ACT: WHAT IT MEANS FOR GOVERNMENT AS OWNER, CLIENT AND APPROVAL AUTHORITY

New South Wales has a new building law. The *Building (Approvals and Practitioners) Act 2026* (NSW) (Act) brings building approvals and the registration of building professionals into one place. Most of it is not yet in force, but it will change how agencies and councils plan, contract for, and deliver building projects. Agencies and councils should begin reviewing their project governance, contracts and approval processes now.

At a glance

Construction certificates become **building approvals**, occupation certificates become **completion approvals**, and certifiers become **approval authorities**.

- Government building work has its own pathway (ss 43–46).
- Only the owner, or someone with the owner's consent, can apply for approvals (ss 17, 32).
- Changes on site must be approved **before** the work is done (ss 25–26).
- No completion approval means no lawful occupation (s 42).

Where things stand

The Act passed Parliament in August 2026 and will mostly start on a date yet to be proclaimed (s 2). It will repeal the *Building and Development Certifiers Act 2018* and the *Design and Building Practitioners Act 2020* (s 202) and remove building certification from the *Environmental Planning and Assessment Act 1979* (Schedule 3). Much of the detail, including timeframes, registration classes and insurance, will be set by regulations that Building Commission NSW is consulting on during 2026 and 2027.

This is more than a change of labels. Approval authorities can rely on declarations made by registered professionals, such as a structural engineer (s 54), and the documents relied on become part of the approval itself (s 30). Development consent alone does not authorise building work (s 15).

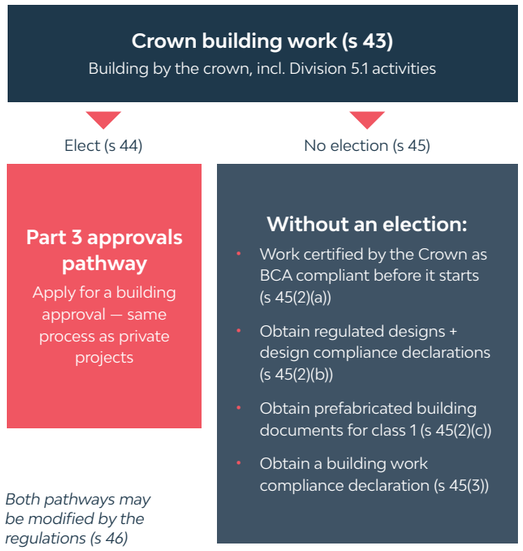
Figure 1: The lifecycle of a building project under the Act



1. Government projects have their own pathway

The Act binds the Crown (s 193) but gives Crown building work its own pathway (s 43). The Crown can **elect** to use the standard approvals process (s 44). If it does not, it takes on more of the compliance responsibility itself (s 45).

Figure 2: The two pathways for Crown building work



Both pathways may be modified by the regulations (s 46)

In practice: Decide the pathway early for each project. Without an election, the agency certifies compliance, so internal sign-off processes matter. Under either pathway, contracts should require the contractor to deliver the designs and declarations the agency needs.

2. The owner controls the application

Only the owner, or someone with the owner's consent, can apply for a building approval. The builder cannot apply unless it is also the owner (s 17). The same applies to completion approvals (s 32). For prescribed buildings, applications must include regulated designs and design compliance declarations for building elements such as fire safety, waterproofing and structure (ss 9, 18).

In practice: Many design and construct contracts make the contractor responsible for certificates. Contracts should now set out who prepares the application, how the agency consents and who appoints the approval authority. Approvals work requires a written contract (s 79) and, as it currently stands, an approval authority can only be replaced with the Secretary's consent (s 76).

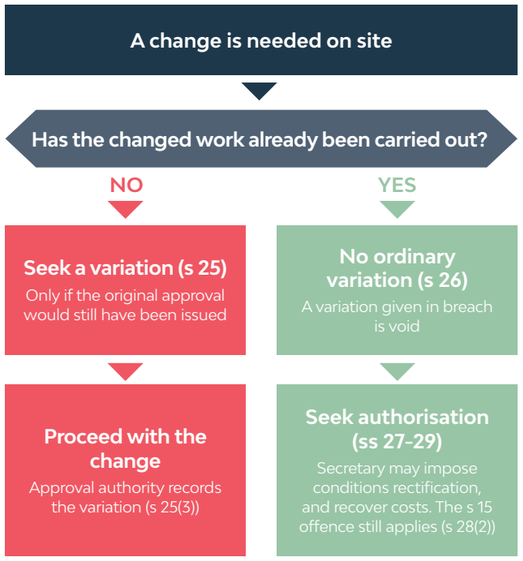
3. Staged approvals

Approvals can be issued in stages (for example, excavation and piling) while later designs are finalised (s 20). This can bring infrastructure forward, but programs should allow for the risk that a later stage is not approved as expected.

4. Approve changes first, then build

Approval authorities can approve variations if the original approval would still have been issued with the change included (s 25). A variation cannot be approved for work already done, and one given in breach is void (s 26).

Figure 3: Dealing with a change on site



In practice: The contract decides who pays for a change; the Act decides whether it can lawfully proceed. Variation clauses should stop changed work until the approval authority consents. The costs of a post-commencement authorisation can be recovered from the owner, not just the builder (s 29).

5. Completion and occupation

For prescribed buildings, the completion approval application must include the principal contractor's building work compliance declaration (s 33). The approval authority must be satisfied that inspections have occurred, the building is safe to occupy and the work matches the approval (s 36). A building cannot lawfully be occupied without a completion approval where one is required (s 42).



In practice: For schools, hospitals and other public buildings with fixed opening dates, build this step into the program and link practical completion to delivery of the s 33 declaration. The completion approval date also generally starts the 10-year long-stop for defect claims (s 192).

6. Prefabricated and modular buildings

Prefabricated and modular components are treated as buildings (s 12). They must not be supplied without the manufacturer's declaration and installation instructions (ss 48–51). Agencies procuring modular classrooms or housing should make supply conditional on these documents.

7. Councils as approval authorities

Councils will often act as the approval authority, and the Act changes how they do so. A council that is nominated as approval authority cannot refuse to accept the application (s 17(6)). Councils do not need to be registered themselves. However, approvals work done for a council must be carried out by an appropriately registered person, and a council can only do approvals work within its own area (s 62).

Councils will also face more oversight. Applicants can appeal to the Land and Environment Court if a council refuses an approval. If an approval is not issued within the prescribed time, it is treated as refused (a "deemed refusal") (ss 71–72). The Secretary can audit and investigate councils acting as approval authorities and, where needed, appoint someone to supervise them (ss 168, 174–175).

In practice: Councils should review their resourcing, delegations, timeframes and record-keeping before the Act starts. They should also make sure the staff who do approvals work hold the right registration.

8. Statutory duty of care

The statutory duty of care, introduced after the Opal Tower and Mascot Towers failures, continues under the new Act. Anyone who carries out construction work owes the current and future owners of the building a duty to take reasonable care to avoid economic loss caused by defects (s 179).

"Construction work" is defined broadly (s 177). It covers more than the builder on site. It includes:

- design work;
- manufacturing or supplying building products; and
- supervising, coordinating or project managing the work, or otherwise having substantive control over it.

The duty cannot be delegated (s 181), and it cannot be excluded or limited by contract (s 182). Owners can therefore pursue designers, suppliers and project managers directly, even where the owner has no contract with them.

Defect claims are subject to a 10-year long-stop. This generally runs from the date the completion approval is issued (s 192). It does not extend any shorter limitation period that would otherwise apply.

In practice: The duty works in two directions for government. As a building owner, an agency benefits from the duty, so it should keep good records and act promptly when defects emerge. The Act also binds the Crown (s 193). Where an agency, or a project manager it engages, has substantive control over the work, the agency should consider whether it owes the duty to future owners as well.

9. Independence, registration and enforcement

Carrying out approvals work with a conflict of interest is an offence and leads to automatic suspension of at least 120 days (ss 55, 57). Improperly influencing an approval authority can attract imprisonment (s 65). Agencies under program or political pressure should keep communications professional and documented.

Only registered people can carry out registered work, and claiming payment for unauthorised work is an offence (ss 85–86). Procurement documents should require evidence of current registration and insurance (s 111).

Enforcement powers include compelling documents, destructive testing and seizure (ss 146–157), and disciplinary penalties of up to $220,000 (s 133). Good records are an agency's best protection.

What agencies should do now

Action	Why it matters
Decide the approval pathway for Crown projects	Determines who certifies compliance
Update contracts and reallocate application responsibility	Only the owner can apply or consent
Align variation clauses	No approval for work already done
Link practical completion to completion approval	No lawful occupation without it
Verify registration and insurance	Unauthorised work is an offence
Track the draft regulations	Much of the detail is still to come

Our construction team can help agencies and councils review their contract suites and processes ahead of commencement.



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MACH ENERGY:
WHAT THE HIGH COURT'S DECISION MEANS FOR CONSENT AUTHORITIES

The High Court's decision in *MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc* [2026] HCA 35 (*MACH Energy*) has attracted considerable attention for its treatment of scope 3 greenhouse gas emissions. However, for consent authorities, the significance of the decision extends beyond climate change.

At its core, the decision concerns the obligation imposed on consent authorities by s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) to take into consideration the matters specified in that provision which are relevant to a development application.

The High Court emphasised that consideration of a mandatory matter must be real and substantive. It must be possible to discern that the consent authority engaged in the required consideration, rather than merely referring to the matter or material associated with it.

The High Court also provides guidance as to how the "likely impacts" of a development are to be assessed, providing clarity as to whether the reference to "in the locality" dictates any parameters with which environmental impacts are to be considered.

More broadly, *MACH Energy* is an important reminder for consent authorities not only of what must be considered under s 4.15(1), but how that consideration should be undertaken and demonstrated in the decision-making process.

Background

The proceedings concerned MACH Energy's proposed expansion of the Mount Pleasant Coal Mine in the Hunter Valley.

In 2022, the Independent Planning Commission (**IPC**) granted development consent to the State Significant Development Application seeking consent for an extension of the existing operating coal mine.

The Land and Environment Court

The Denman Aberdeen Muswellbrook Scone Healthy Environment Group (**The Group**) commenced judicial review proceedings in the NSW Land and Environment Court challenging the IPC's decision.

The Group's judicial review centred on the below two questions regarding the IPCs assessment under section 4.15(1) of the EPA Act:

> **Question One:**
>
> Did the IPC consider cl 2.20(1)(c) of the *State Environmental Planning Policy (Resources and Energy) 2021* **(Resources SEPP)** which, when read with section 4.15(1)(a)(i) of the EPA Act, required the IPC to consider whether consent should be granted subject to conditions?
>
> **Question Two:**
>
> Did the IPC correctly consider the 'likely impacts' of the proposed development including environmental impacts 'in the locality', as required by s4.15(1)(b) of the EPA Act?

It is the first of these questions that gave rise to the issue of 'scope 3 emissions' which has attracted much of the media attention surrounding this case. 'Scope 3 emissions' are the indirect emissions associated with the use of coal from the mine, including its use and combustion overseas. Clause 2.20(1)(c) of the Resources SEPP required the consent authority to consider whether conditions should be imposed to ensure that greenhouse gas emissions, including scope 3 emissions, were minimised to the greatest extent possible.

At first instance, Robson J of the NSW LEC dismissed the proceedings.

In relation to Question One, his Honour considered that, when the IPC's reasons were read as a whole, it could be inferred that the IPC had considered whether to impose conditions concerning scope 3 emissions and had exercised its discretion not to impose them.

In relation to Question Two, his Honour also rejected the Group's challenge, finding that the IPC had correctly understood its statutory obligation to consider the likely environmental impacts of the proposed development.

The Court of Appeal

The Group appealed Robson J's decision to the NSW Court of Appeal.

In relation to Question One, the Court of Appeal agreed that it could be inferred from the IPC's reasoning, including consideration of the national and international climate frameworks, that the IPC had decided against the imposition of conditions in respect of scope 3 emissions.

In relation to Question Two, however, the Court of Appeal found that the IPC had failed to comply with section 4.15(1)(b) of the EPA Act. The Court held that the words "in the locality" required the IPC to consider the impacts of climate change on the environment in the locality of the development, rather than addressing climate change impacts at a broader level.

The Court of Appeal remitted the proceedings back to the Land and Environment Court to consider whether orders could, or should be made, under the *Land and Environment Court Act 1979* (NSW),

specifying terms of compliance to the IPC which could validate the consent.

High Court of Australia

MACH was subsequently granted special leave to appeal to the High Court of Australia.

MACH's appeal was in relation to Question Two, however The Group also raised an argument in respect of Question One.

In relation to Question One, the High Court in a majority 3:2 held that the IPC failed to comply with section 4.15(1)(a)(i), when read with the Resources SEPP. The majority was not prepared to infer from the IPC's reasons that its consideration of broader national and international climate change frameworks amounted to consideration of the specific statutory question required by cl 2.20(1)(c), namely, whether conditions should be imposed to minimise greenhouse gas emissions, including scope 3 emissions, to the greatest extent possible.

The minority dissented, finding that such inferences could be drawn. The dividing line was therefore whether such consideration could be inferred from the reasons and the material.

Importantly, the High Court did not hold that the IPC was required to impose such conditions. Rather, the error was that the IPC's reasons did not demonstrate that it had considered whether such conditions should be imposed.

In relation to Question Two, the High Court unanimously rejected the Court of Appeal's interpretation of section 4.15(1)(b). The High Court held that the statutory focus is on the development and its likely impacts, and that the words "in the locality" do not impose a separate geographical limitation on the impacts that may be considered.

The High Court held that the IPC was not required to isolate and assess distinct climate impacts of the development on the locality and that climate impacts could be considered at a more general level. The appropriate level of specificity at which an impact is considered is a matter for the decision maker. In some cases, an impact may appropriately be considered at a local level whilst, in others, consideration at a broader level may be appropriate.

The key finding is that the words "in the locality" do not dictate a geographical constraint or particular level at which the likely environmental impacts of a development must be assessed.

Ross v Lane

Another potentially significant aspect of *MACH Energy* concerns the Court of Appeal's earlier decision in *Ross v Lane*, which bears on how consent authorities identify the environmental planning instruments relevant to a development proposal.

The issue in *Ross v Lane* depended upon whether the development constituted 'substantial' redevelopment. The Court of Appeal held that this did not involve a jurisdictional fact and that, for the purposes of section 4.15(1)(a)(i), a consent authority is to consider the provisions of an environmental planning instrument which it determined to be relevant.

MACH sought to rely on *Ross v Lane* in the High Court in arguing, in substance, against the proposition that the alleged failure of consideration of the Resources SEPP resulted in invalidity.

In *MACH Energy*, Gageler CJ and Jagot J of the High Court criticised the Court of Appeal's reasoning in *Ross v Lane*. Their Honours considered that the process required by section 4.15(1)(a)(i) necessarily depends upon the consent authority first correctly identifying and construing the environmental planning instruments applicable to the development.

The important finding of the Court in relation to *Ross v Lane* and the interrogation of section 4.15(1)(a)(i) in this case, is that matters of permissibility cannot depend upon a consent authority's potentially erroneous characterisation of a 'relevant' environmental planning instrument.

MACH Energy does not overrule *Ross v Lane*, however the findings of the Court raise caution as to how section 4.15(1)(a)(i) and what constitutes matters of 'jurisdictional fact' are to be treated.

How does a consent authority discharge its statutory duty?

MACH Energy highlights the importance of demonstrating genuine consideration of mandatory relevant matters.

The High Court reasons discuss the need to be able to discern or infer an "active intellectual process" in relation to the relevant consideration. As Edelman J explained, merely stating that regard has been had to a matter does not itself establish that the matter was substantively considered.

At the same time, Beech-Jones J recognised the difficulty in drawing the line between consideration that is so cursory as to be legally inadequate and impermissible judicial scrutiny of the merits of the conclusion actually reached. The required level of engagement ultimately depends upon the statutory context, the subject matter and the circumstances of the case.

For consent authorities, this decision suggests several practical lessons.

1. Identify the mandatory considerations at the outset

Assessment should begin by identifying which matters in s 4.15(1) are relevant to the particular development, including the relevant environmental planning instruments and the provisions within them.

This is particularly important where an environmental planning instrument itself creates a further mandatory consideration, as cl 2.20 of the Resources SEPP did in *MACH Energy*.

2. Address what the provision actually requires

A consent authority's assessment should not stop at identifying a relevant provision.

Rather, it should demonstrate engagement with the specific question that the provision requires the decision-maker to consider.

That distinction explains the problem identified in *MACH Energy*. General consideration of scope 3 emissions and of broader climate policy could not, for the majority, substitute for consideration of the specific statutory question of whether conditions should be imposed to minimise those emissions to the greatest extent possible.

3. Make the consideration discernible

Where a matter is significant to the determination, or where a provision expressly requires consideration of a particular issue, there is obvious value in addressing that matter expressly in the assessment report and reasons for decision. As the High Court demonstrated, the reasons should enable a reader to understand that the right question was identified and genuinely considered.

4. Remember that consideration is not the same as a particular outcome

MACH Energy does not prevent the consent authority from concluding that no particular response, including a condition, is warranted.

The High Court referred to *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221, where the IPC declined to impose conditions relating to scope 3 emissions because those emissions were outside the operator's direct control and could not reasonably be conditioned. The distinction was not the result reached, but that the issue had been expressly considered.

Key takeaways

Although the case has attracted considerable attention because of its discussion of scope 3 emissions, its broader significance for government authorities lies in what it says about decision-making under s 4.15 of the EP&A Act.

For consent authorities, *MACH Energy* reinforces the importance of identifying the correct statutory considerations and ensuring that assessment reports and reasons demonstrate substantive engagement with those matters. Where appropriate, reasons should refer to the material before the consent authority and explain how that material informed the assessment.

The High Court's decision does not dictate what conclusions must be drawn by a consent authority when considering matters under section 4.15. Rather, it highlights the consequences that may arise where it is not apparent that the statutory duty was performed.

Although the immediate consequence of this decision concerns the Mount Pleasant coal mine expansion approval, the NSW Government has itself emphasised that the decision is principally concerned with the manner in which the development application was assessed and determined.

For consent authorities, the clearest practical lesson from *MACH Energy* is that getting the assessment process right matters just as much as the ultimate outcome: the correct statutory questions must be identified, and genuine consideration of them must be apparent in the assessment report and reasons.

Consent authorities should also ensure that the material submitted by proponents in support of a development application adequately addresses the mandatory considerations relevant to the application. While an assessment may appropriately draw upon the proponent's material, the consent authority must itself identify and engage with the relevant statutory considerations. *MACH Energy* reinforces the importance of ensuring that this task is apparent from the assessment report and reasons for decision.

Ultimately, this decision should serve to make the assessment process more transparent by ensuring that consent authorities expressly address each of the mandatory considerations relevant to the development application in their assessment and reasons for decision.



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INNOVATION AND TENDERING. UNSOLICITED PROPOSALS AND THE NSW GOVERNMENT

Competition is the NSW Government's safeguard when it buys goods, services or infrastructure. It tests price, capability and ideas.

But competition may not be available or exist in all situations – for example, land which only one party controls, unique intellectual property, an interface with an existing asset, or a commercial structure the market could not readily reproduce.

The unsolicited proposals framework is designed for that narrow space. It gives government a way to consider an unrequested commercial proposal. The central question is not simply whether an idea is innovative. It is whether the idea and the proponent are sufficiently unique to justify dealing directly.

A defined exception, not a different procurement route

The current NSW Guide uses an optional pre-submission concept review followed by Stage 1A preliminary assessment, Stage 1B strategic assessment, Stage 2 development and assessment of a detailed proposal, and Stage 3 negotiation of a final binding offer.

The assessment criteria are:

- uniqueness
- value for money
- whole-of-government impact
- the proponent's return on investment
- capability and capacity
- affordability; and
- risk allocation.

There can be overlap across the criteria. A proposal will fail if the same outcome can be obtained competitively. A unique asset may justify engagement, but not an excessive return or an unacceptable transfer of risk to government.

Uniqueness

Uniqueness requires more than a first-mover advantage, specialist expertise or a great idea. The framework asks whether only that proponent can deliver the proposal and whether government could achieve the same or a similar outcome by going to market.

Uniqueness may arise from ownership or control of land, indispensable intellectual property, a necessary interface with an existing facility, or a demonstrably unique commercial arrangement. This requires evidence. An agency will test whether substitutes exist and whether the outcome can be framed broadly enough for competition.

That framework works for both. It prevents an incumbent from converting familiarity into exclusivity, while giving a genuine innovator / unique opportunity a path to government.

Value for money – when there is no competition

Direct negotiation removes the easiest price benchmark. As a result, value for money must be assessed through other ways: independent valuation and cost advice, benchmarking, testing the proponent's return, and allocation of delivery, demand, planning and financial risks.

Competition can still be introduced around separable components. NorthConnex began as an unsolicited proposal. The Audit Office found that its assessment adequately considered value for money, supported by independent cost and traffic work and a competitive process for design and construction.

The Governance around an assessment – including probity

The Guide provides for structured governance, including steering and assessment bodies, a proposal manager, specialist advisers and probity oversight. The framework should be scaled to the scope of the proposal, and direct dealing warrants particular focus on conflicts, role separation, approvals, records, due diligence and negotiation strategy.

ICAC is not an approval body for unsolicited proposals. However, its direct-negotiation guidance is important because closed processes carry greater risks than open competition.

Confidential (but not secret)

Proponents need confidence that genuine intellectual property, financial models and commercially sensitive information will not be freely released. The framework keeps Stage 1 confidential and publishes limited information for proposals progressing to Stage 2, after consultation with the proponent.

There is no confidentiality guarantee. Agencies remain subject to the *Government Information (Public Access) Act 2009* (NSW), records obligations and contract disclosure rules. Contracts with private sector entities valued at $150,000 or more, generally require entry on a public register, although confidential information may be withheld where the statutory test is met. Confidentiality and intellectual property mechanisms should clearly identify protected material and its permitted use.

What remedies are available?

Tender cases such as *Hughes Aircraft Systems International v Airservices Australia and Cubic Transportation Systems Inc v State of New South Wales* show that a binding "process contract" can arise where the documents and conduct disclose an intention to create legal obligations. *Hughes* found a duty to follow the agreed evaluation process; *Cubic* recognised fair-dealing obligations but found no breach.

That distinction matters for unsolicited proposals. A competitor excluded from a bilateral proposal process will not ordinarily have the contractual footing of a tenderer that accepted an offer contained in tender documents.

The framework is being used

The public register shows how uniqueness is framed in practice. As at 15 October 2026, it included proposals at Stages 2 and 3. One example is Aqualand's 15 Blue Street proposal, where the stated uniqueness case rests on its leasehold interest and ability to integrate housing, public works and North Sydney Station improvements.

Outside of NSW, currently a private consortium in the ACT (involving Canberra Airport) is exploring the potential for a new Canberra Stadium. This project may ultimately result in a collaborative effort with government (in this instance, possibly the Commonwealth and ACT Governments). This could be an example of using an existing site for an alternative purpose for the benefit of the local community and beyond.

The rise of AI may present a whole suite of tools and platforms that may get tested against the uniqueness criteria as part of unsolicited proposals.

Some closing comments

Unsolicited proposals remove the market mechanics that allow agencies to test whether a fair price is being paid. However, NSW's Guide helps to reconcile the two through staged assessment and a strict uniqueness threshold.

For agencies, a key question will be: "Could competition produce the same or a better outcome?". The answer should be documented early and retested as the proposal develops. Agencies should also protect information carefully, maintain clear decision records and preserve a genuine ability to stop the process or go to market.

For proponents, innovation is only one factor. A genuine proposal will explain why the proponent alone can deliver the outcome and how the government will verify value.

The framework is a controlled exception, not a shortcut around competition. It can capture innovation without sacrificing fairness, accountability or public value – but only where uniqueness is demonstrated and value can be independently verified.





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WHEN A “SIMPLE” LAND RIGHT BECOMES A LONG-TERM PROBLEM

Access and occupation arrangements over government land can look straightforward. A request for access across a site, a service provider occupying part of a building, a telecommunications provider installing rooftop equipment, or a tenant using a loading area may all seem routine.

But the legal character of the right can have significant consequences. An easement may permanently burden title. An arrangement described as a “licence” may in substance be a lease. An unclear plan can create uncertainty about the extent of the grant, access, maintenance and reinstatement.

For NSW Government agencies, three questions should be asked at the outset: What right is actually needed? What are the consequences of granting it? Will the arrangement preserve the flexibility the agency may need in the future?

Don’t create a permanent solution to a temporary problem

An easement is appropriate where an enduring proprietary right is required, but it should not be the default solution to every access request.

If access is required only for construction, investigations, maintenance or a particular project, a contractual access arrangement may provide the necessary rights without permanently burdening the land.

Before granting an easement, consider:

- the land and rights that actually need to be affected
- the purpose and duration of the right
- who requires its benefit
- whether it needs to bind successors in title
- whether existing easements or access rights already address the requirement
- what flexibility the agency may require if the land is redeveloped or its operational use changes.

Ultimately, the nature, extent and duration of the legal right should be no greater than the underlying requirement.

Calling it a licence doesn’t make it one

The distinction between a lease and a licence is not simply one of drafting.

A lease ordinarily confers exclusive possession of defined premises for a term and generally creates an interest in land. A licence is a personal permission to use land without conferring an estate or interest in the land.

That distinction has real consequences. For example, s 129 of the *Conveyancing Act 1919 (NSW)* restricts the enforcement of certain rights of re-entry or forfeiture under a lease for breach and permits a lessee to apply to the Court for relief against forfeiture.

Accordingly, describing an arrangement as a “licence” does not necessarily determine its legal character. If the occupier has exclusive possession of a defined area and can exclude others, the substance of the arrangement must be considered.

If a licence is intended, both the document and the practical occupation should support that position. Relevant matters include whether use is genuinely shared, whether the agency retains control and access, and whether there are meaningful rights to suspend or relocate the use.

The question is not just what the document is called, but what rights it actually gives the occupier.

The plan, the document and the site need to match

The physical extent of the grant is just as important as its legal character.

Is an access road part of leased premises or subject only to an access right? Is a car park exclusively occupied or shared? Are plant rooms, loading areas, roof space and services included in the premises, or does the occupier merely have rights to use or access them?

Those distinctions can affect possession and control, responsibility for maintenance and repair, permitted works and the extent of any make good obligation.

The plan should therefore distinguish between the land actually granted and ancillary rights such as access, parking and services. Where the physical arrangements are complicated, a site inspection and properly marked plan can be as important as the drafting.

If the plan, document and actual occupation tell different stories, problems are likely to follow.

Think about the exit at the beginning

Government land does not remain static. Infrastructure is replaced, operational requirements change and land may later be required for redevelopment or another public purpose.

Where government land is to be burdened by an easement, the agency should consider at the outset whether the terms should allow the right to be relocated, varied or released if, for example:

- the easement is no longer required
- the relevant infrastructure is relocated

- suitable alternative access becomes available
- the agency requires the affected land for an agreed future purpose.

The drafting also needs to deal with the mechanics: who can trigger the right, what constitutes suitable replacement rights, who pays the costs and what happens if the parties cannot agree?

These issues are much easier to address when the right is created than after a third party has acquired an interest in the land.

Make good starts at commencement

"Repair" and "make good" are often treated as interchangeable concepts. They should not be.

The document should separately address the condition in which the premises must be maintained during the term and what must happen to alterations, fitout, equipment and services when the arrangement ends.

The starting condition is critical. Without a condition report, photographs or another agreed benchmark, it can be difficult years later to distinguish pre-existing deterioration from damage or alterations attributable to the occupier.

The drafting should also be clear about structural and non-structural elements, removal of alterations and equipment, repair of damage caused by removal and the standard to which the premises must ultimately be reinstated.

Make good is therefore something to negotiate at commencement, not six weeks before expiry.

Check the agency actually has power to grant the right

There is also a threshold issue before the form of document is considered. What is the status of the land and what power does the agency have to grant the proposed right?

Not all government land is held or managed under the same statutory framework.

The agency should therefore identify the tenure and legislative basis on which the land is held or managed. It should then confirm the statutory power to enter the proposed transaction, together with any applicable delegation, approval or other requirement, before the documentation is settled.

Five questions to ask at the outset

Before granting an easement, lease, licence or access right, ask:

1. What legal right is actually required?
2. Does the proposed document give the occupier more rights than intended?
3. Do the plan, drafting and physical occupation align?
4. Who bears the repair, maintenance and reinstatement obligations?
5. Can the arrangement accommodate future operational or redevelopment requirements?

Good drafting does more than record the commercial deal. It must align the legal character of the right with the physical use of the land and the agency's longer-term operational requirements.

Grant no more than needed, define it properly and deal with the exit at the outset. That can be the difference between a straightforward land arrangement and a constraint on government land that lasts well beyond its original purpose.





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WORKPLACE BULLYING IN NSW: AN ANALYSIS OF FIVE RECENT DECISIONS

Workplace bullying complaints present a difficult challenge for employers. Behaviour that causes distress does not always amount to bullying in the legal sense. Equally, a legitimate management decision can become unreasonable because of the way it is communicated or implemented.

Five recent decisions of the NSW Industrial Relations Commission illustrate how the Commission is approaching its stop-bullying jurisdiction under the *Industrial Relations Act 1996* (NSW). Together, the decisions highlight the importance of repeated behaviour, the statutory meaning of "at work", reasonable management action and the need for a continuing risk of bullying.

The NSW bullying jurisdiction

The stop-bullying jurisdiction provides a mechanism for eligible employees to seek orders to prevent workplace bullying. Section 144C defines an employee as being bullied at work if, while the employee is at work:

- an individual or group repeatedly behaves unreasonably towards the employee; and
- that behaviour creates a risk to health and safety.

Reasonable management action carried out in a reasonable way is excluded.

Under s 144G, the Commission may make appropriate orders to stop bullying if it is satisfied that the employee has been bullied at work and there is a risk the bullying will continue.

The Fair Work Commission jurisprudence is useful

The Commission has drawn on the jurisprudence of the Fair Work Commission in interpreting provisions of the IR Act that closely resemble the Commonwealth anti-bullying provisions.

In *Haigh v Thaler* [2026] NSWIRComm 1053, Commissioner Muir adopted the FWC Full Bench decision in *Bowker v DP World Melbourne Ltd* [2014] FWCFB 9227 and the reasoning in *Mac v Bank of Queensland Ltd* [2015] FWC 774. Those authorities address the meaning of "at work" and the limits of the statutory bullying jurisdiction.

Bowker rejected the proposition that conduct occurs "at work" merely because it has a connection with employment. At the same time, it recognised that a worker may be at work when outside the physical workplace and matters outside of work can enter the workplace.

In *Haigh*, Commissioner Muir preferred the reasoning of the then Vice President Hatcher in *Mac*, which indicated that an employee on sick leave was not necessarily "at work". Applying that reasoning, Commissioner Muir found that the applicant, who was absent on workers compensation, was not at work in relation to the relevant social media allegations.

In *Heslop v Foley* [2026] NSWIRComm 1072, Commissioner O'Sullivan expressly adopted Commissioner Muir's approach in *Haigh*. He found that the applicant was not at work in relation to several allegations because he had been directed not to attend the respondent's workplaces and was not required to perform work duties. He also found that the remaining relevant workplace interaction did not establish repeated unreasonable behaviour at work.

While FWC decisions are not binding on the IRC, they provide important guidance where the statutory language and purpose are substantially the same.



How the Commission is approaching bullying

The five decisions illustrate several important features of the IRC's approach.

First, the conduct must satisfy the statutory definition. In *Haigh* and *Heslop v Foley*, the Commission emphasised that a connection with employment does not, by itself, establish that conduct occurred "at work". The statutory words impose a limit on the jurisdiction:

> *"... the question is quite simply: you are at work or you are not at work. If you have finished work for the day and left your workplace, you are not at work. Logically, if you were on annual leave, you are not at work.*
>
> *If a worker is assailed by an offensive poster at their workplace, that could constitute being bullied at work. If they are assailed by the same poster at the local pub after work hours, they could not have been bullied at work by the poster."*

Secondly, the assessment is objective and contextual. In *Nunes v Verinder* [2026] NSWIRComm 1084, the Commission distinguished between an employee's perception of mistreatment and whether the conduct was objectively unreasonable. The circumstances surrounding each incident, its purpose and the manner in which it was carried out all matter.

Thirdly, repetition is a substantive requirement. An isolated incident may be unreasonable and create a risk to health and safety, but it will not establish bullying without *repeated* unreasonable behaviour. The incidents must be assessed individually and in their broader context.

Fourthly, the manner of management action matters. In *Nunes*, the Commission accepted that management could legitimately investigate a potential concern or introduce a teaching support plan. However, the assistant principal's careless misdirection of a text message discussing a possible allegation against Mr *Nunes* was unreasonable. The support plan was also poorly implemented: the initial document provided little detail about the activities, the standards requiring improvement or how Mr *Nunes* could prepare, and adequate supporting information was not supplied until January 2026, following significant correspondence. A legitimate objective does not automatically excuse unreasonable implementation.

Finally, future risk matters. In *Het v Health Secretary in respect of Health Share NSW* [2026] NSWIRComm 1068, the Commission dismissed an application where the employee was medically unfit for any work and there was no identified timeframe for returning. The absence of a realistic prospect of future workplace contact meant the necessary basis for preventive orders was not established.

What conduct has been found to be bullying?

A significant feature of these five decisions is that none resulted in a final finding that the alleged conduct satisfied the statutory definition of bullying. That does not mean the Commission regarded every allegation as trivial or every respondent's conduct as reasonable.

The clearest example is *Nunes v Verinder*. The Commission found that two incidents were unreasonable and created a risk to health and safety:

- **A misdirected text message:** An assistant principal mistakenly sent Mr *Nunes* a message (intended for another) discussing whether Mr *Nunes* had put his arm around another teacher while offering her chocolates. The assistant principal apologised. Nevertheless, carelessly sending the message to Mr *Nunes* was unreasonable.
- **The teaching support plan:** The plan was a legitimate management measure in principle, but it was introduced without sufficient detail or explanation and was due to commence before adequate information had been provided.

Despite those findings, the Commissioner concluded that the incidents did not establish the required repetition. As he explained at [117], *"the two events are of a sufficiently different character not to constitute the relevant repetition"*.

The first incident concerned a preliminary inquiry into possible misconduct by a single person. The second was a later management decision by the school leadership concerning Mr *Nunes*' teaching performance and capacity to meet required standards. The first issue had also been closed some time before the second arose. Their shared feature — shortcomings in the way management matters were handled — was insufficient to make them a continuing course of repeated unreasonable behaviour.

What conduct was not found to be bullying?

The other decisions illustrate different ways in which allegations can fail to satisfy the statutory test.

In *Heslop v Secretary, Ministry of Health in respect of Central Coast Local Health District and Anor* [2026] NSWIRComm 1094, the only alleged conduct established was a co-worker's refusal to speak to Mr Heslop, professionally and socially. The Commission found that this was not unreasonable in the circumstances. The co-worker had a negative experience from their dealings with Mr Heslop. Mr Heslop had a questionable character such that the co-worker felt uncomfortable with him. The Commissioner considered that, in those circumstances, not speaking to a colleague could be reasonable; she had good reason not to talk to him. While refusing to speak to a co-worker can constitute bullying, here context was decisive.

In *Het*, the Commission did not make findings on most of the alleged historical incidents and found there was no work overload. In looking at alleged conduct, Commissioner Muir observed, *"Behaviour need not be perfect to elude being unreasonable. The fact that there might have been a better way will not automatically make conduct unreasonable"*. The application was also dismissed because the employee was unfit for any work, with no identified timeframe for a return, meaning there was no established risk that the alleged bullying would continue.

Together, these decisions demonstrate that a complaint may fail because the behaviour was not objectively unreasonable and repetition was not established.

Lessons for employers

The Commission has adopted a consistent and well-reasoned approached to bullying. Two take-aways are:

1. Focus on how decisions are implemented, not just whether they are justified.

Nunes v Verinder is a timely reminder that a legitimate investigation, performance management process or other management decision can be undermined by poor communication, inadequate preparation or careless execution. Employers should explain concerns clearly, provide employees with a fair opportunity to respond, document decisions and ensure that management action is undertaken reasonably.

2. Assess complaints cumulatively, but do not assume that every incident counts towards repetition.

The decisions show the importance of identifying whether separate incidents form a persistent course of unreasonable behaviour, rather than simply counting complaints. Employers should examine the nature, timing and context of each incident and address any emerging pattern promptly.



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Thank you for taking the time to read our Government Connect publication.
We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

Please email info@bartier.com.au

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