

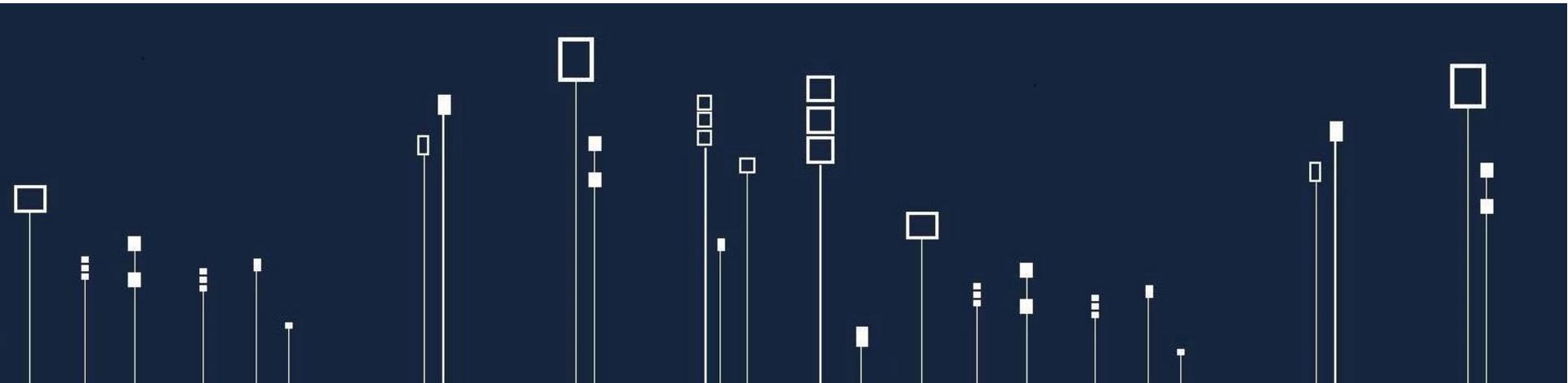


**lindsaytaylorlawyers**  
planning • environment • local government

## **LTL Lunchtime Seminar Series**

# **Issuing Valid Notices for Information**

9 & 16 April 2020



# Preliminary matters

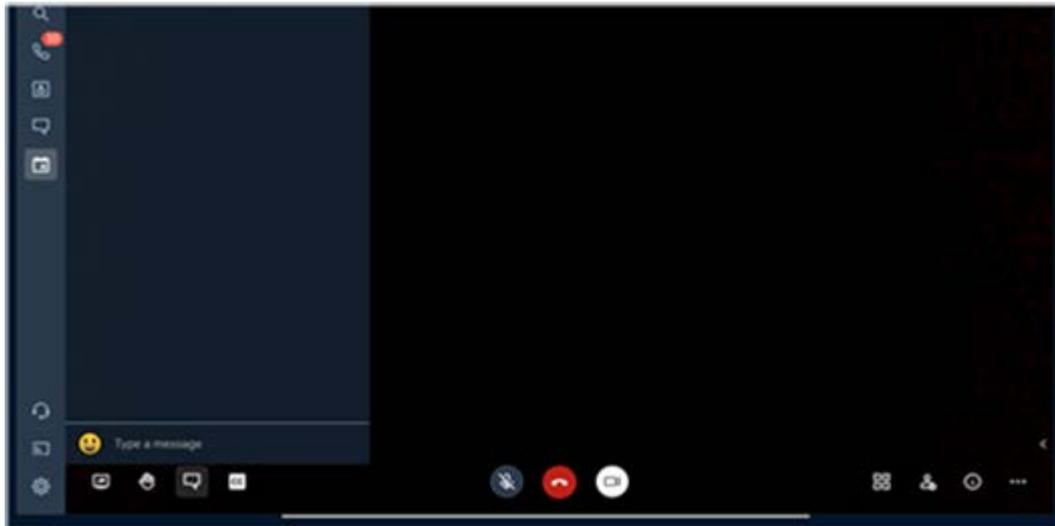
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- This seminar is being recorded, and we have muted all participants for the purpose of the recording. If for some reason you become unmuted, then please re-mute yourself, or we may do this for you
- You can turn off your computer camera to save bandwidth
- We will answer all questions during the Q&A at the end of the seminar

# Preliminary matters

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- Please send through your questions here:



- Please note that your questions will be seen by the group

# Issuing Valid Notices for Information

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## Contents

- *Why* – for what purpose are notices issued
- *When* – at what point in time should you issue the notice
- *How* – principles and the practicalities of drafting notices

# Issuing Valid Notices for Information

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## Why?

The Notice is issued:

- Under s9.22, EPA Act, 'in connection with an investigation purpose'
- An 'investigation purpose' is a purpose for which a power may be exercised under Division 9.2. Section 9.15 lists those purposes
- Under s193, POEO Act 'in connection with any matter within the responsibilities and functions of the regulatory authority that appointed the officer'

### Case Study:

- *Port Macquarie-Hastings Council v Mansfield* [2019] NSWCCA 7

# Issuing Valid Notices for Information

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## When?

- At what time can a notice be issued?
- Does it matter that Council intends to prosecute?
- Does it matter that you have commenced to prosecute?
- Does it matter the notice is drafted from information provided under objection?

### Case Studies:

- *Zhang v Woodgate and Lane Cove Council* [2015] NSWLEC 10
- *Ku-ring-gai Council v John David Chia (No 4)* [2018] NSWLEC 75

# CASE STUDY

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## *Zhang v Woodgate and Lane Cove Council*

### Timing

- Facts: notice requiring attendance to answer questions issued to a contractor, after Local Court proceedings commenced against Mr Zhang
- The function of commencing a prosecution is not a function conferred on councils by the EPA Act
- Issuing a notice for the purpose of a prosecution is outside the powers provided by Division 9.2, as the council is not exercising any function under the EPA Act
- Only when an investigation has led to a council 'bringing' a prosecution, that a s9.22 notice cannot be issued

# CASE STUDY

## *PMHC v Mansfield*

### 'Investigation Purpose'

- Powers may be exercised, to enable the council to exercise its functions under the Act. This includes acting as:
  - relevant planning authority
  - consent authority
  - certifying authority
  - giving orders or issuing PINs
  
- Notices may be issued to investigate whether there has been a breach of the EPA Act
  
- The EPA Act makes no distinction between investigating an alleged breach which results in a criminal prosecution, and one which results in some other outcome (i.e. DCO or class 4)

# CASE STUDY

## *Ku-ring-gai Council v Chia*

Drafting from information provided under objection

- Facts: interview occurred with Mr Chia where objection made on grounds of self-incrimination. Subsequent interviews occurred with contractors, where questions were based on Mr Chia's answers
- Section 9.31(5) operates to make any further information gathered as a result of a council receiving that information, not inadmissible
- You are entitled to use information obtained under objection, to gather further evidence in respect of a suspected contravention

# Issuing Valid Notices for Information

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## How?

- Legal Principles
- Practicalities

### Case Study:

- *Harris v Mathieson (in his capacity as an authorised officer under the Water Management Act 2000 (NSW) [2019] NSWSC 1064*

# CASE STUDY

## *Harris v Mathieson*

### Legal Principles

- The notice must disclose the relationship between the information sought and the matter in respect of which the information is sought
- The notice must convey with reasonable clarity to the recipient what information he/she is required to furnish or what documents are required to be produced
- These requirements are not to be applied in a precious, over-technical or hypercritical way

# CASE STUDY

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## *Harris v Mathieson*

### Legal Principles

- Provided the necessary relationship exists between the matter and the information and documents required, the notice is not open to objection on the ground that it is burdensome to furnish the information or to produce the documents
  
- The power conferred is in aid of a function of investigation, not of proof of an allegation, and it is not possible to define ... the limits of an investigation which might properly be made. In that way the power should not be narrowly confined
  
- The power may properly be exercised to ascertain facts which may merely indicate a further line of inquiry

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## How?

The practicalities: Who is the notice issued to?

- A notice can be issued to anyone within power – check the source of the power to see if any limitations
- Can you issue the same notice on different persons?
- Should you issue a notice against a Company involved in an offence, a director of the Company or both?
- Can you issue notices for documents that you already have?

# Issuing Valid Notices for Information

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## How?

The practicalities: The form

- Questions must be clear and concise
- Single issue to be raised in each question
- Words used must be unambiguous
- Requirements to be detailed
- Do not use words of general meaning e.g. 'details of person providing fill'

# Issuing Valid Notices for Information

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## How?

Further practicalities

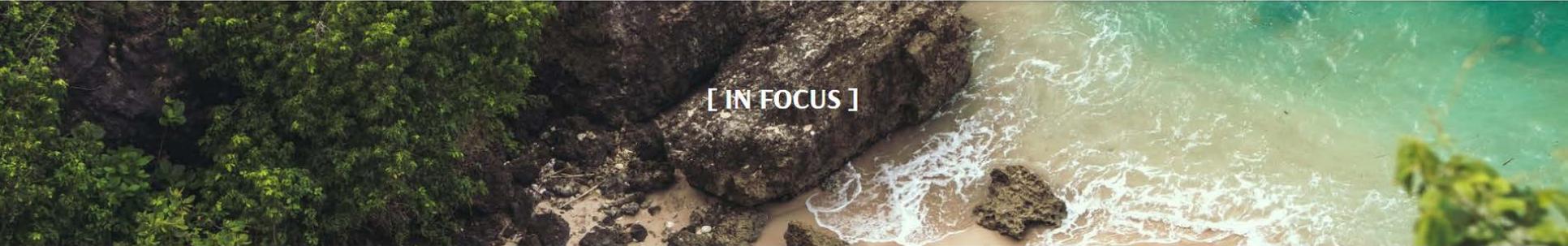
- Don't forget warnings that are required
- How much time should you allow for compliance?
- How do you serve the notice?
- What do you do if there is no response, or the response is not complete?
- What is a *reasonable excuse* for non-compliance?



# Issuing Valid Notices



Questions?



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