

Form 105 (version 7)
UCPR 51.16, 51.18, 51.20

DRAFT NOTICE OF APPEAL

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/250144

TITLE OF PROCEEDINGS

Appellant	Daracon Engineering Pty Ltd in respect of the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work not being work in the course of the first respondent's employment by Daracon Engineering Pty Ltd
First Respondent	David James Kelsall
Number of respondents (if more than two)	6

PROCEEDINGS IN THE COURT BELOW

Title below	Kelsall v Downer EDI Mining Pty Ltd & Ors
Court below	Dust Diseases Tribunal of New South Wales
Case number below	2023/451985
Date of hearing	23 May 2025
Material date	3 June 2025
Decision of	Judge Russell SC

FILING DETAILS

Filed for	Daracon Engineering Pty Ltd in respect of the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work not being work in the course of the first respondent's employment by Daracon Engineering Pty Ltd, Appellant
Filed in relation to	Part of the decision below as specified under orders sought
Legal representative	David Andersen, HWL Ebsworth Lawyers
Legal representative reference	DCA:1288906
Contact name and telephone	David Andersen (02) 9334 8752
Contact email	dcandersen@hwle.com.au

HEARING DETAILS

This notice of appeal is listed for directions at [time, date and place to be inserted by the registry unless otherwise known].

L1316450649.1

*I David Andersen solicitor for the
Appellant Certify this document is
suitable for publication*
DA

TYPE OF APPEAL

Procedure – Fairness

DETAILS OF APPEAL

- 1 This appeal is brought under s 32(1) of the *Dust Diseases Tribunal Act 1989*.
- 2 Leave to appeal was granted on [date].
- 3 The appellant has not filed a notice of intention to appeal.
- 4 The appellant appeals from the part of the decision below in relation to the Appellant's amended notice of motion filed on 20 May 2025.

APPEAL GROUNDS

- 1 The Tribunal erred in point of law by failing to consider and apply s 58 of the *Civil Procedure Act 2005 (CPA)* when ordering, pursuant to s 63(3)(b) of the CPA, that the First Respondent (**Mr Kelsall**) have leave nunc pro tunc to amend his pleading in accordance with the Further Second Amended Statement of Claim filed on 29 April 2025 (**F2ASOC**).

Particulars

- a. At [33] of the decision below (**Decision**), the Tribunal exercised its discretion pursuant to s 63(3)(b) of the CPA to grant leave nunc pro tunc to Mr Kelsall to amend his pleading in accordance with the F2ASOC.
- b. Section 58 of the CPA required the Tribunal, in exercising that discretion, to determine, and act in accordance with, the dictates of justice.
- c. Section 58(2)(a) of the CPA required the Tribunal, in identifying the dictates of justice, to have regard to ss 56 and 57 of the CPA.
- d. In exercising its discretion, the Tribunal failed to consider the matters that s 58 of the CPA required it to consider, and also failed to identify, and act in accordance with, the dictates of justice.
- e. Had the Tribunal identified, and acted in accordance with, the dictates of justice, then it would have properly decided to refuse leave to Mr Kelsall to include in the F2ASOC any claims based on the Appellant's alleged occupier's liability towards Mr Kelsall.

- 2 The Tribunal erred in point of law by failing to afford procedural fairness to the Appellant by failing to consider, or failing to properly engage with, submissions raised by the Appellant.

Particulars

- a. In paragraphs 26 to 49 of its written submissions dated 23 May 2025 (**Submissions**), the Appellant raised in detail the application of ss 56-58 of the CPA to the present dispute, including submissions that:
- i. Mr Kelsall had multiple opportunities over a three-year period to plead a case against the Appellant based on occupier's liability: Submissions [29];
 - ii. If the amendments raising an occupier's liability claim are permitted, then the Appellant would not be able to investigate the claims within the period of time available to it in order for the Appellant to effectively participate in any further settlement discussions or hearing: Submissions [33] and elsewhere;
 - iii. Mr Kelsall had not approached the proceedings with the requisite degree of expedition to warrant leave being granted to him to include new claims very shortly before an expedited hearing: Submissions [34]-[38];
 - iv. Mr Kelsall's solicitors had, prior to the Appellant's motion, failed to provide the full litigation file to the Appellant's solicitors, and this was a failure of Mr Kelsall to comply with his duties pursuant to s 56 of the CPA: Submissions [40]-[41]; and
 - v. Mr Kelsall had failed to provide evidence to explain why the new occupier's liability claim had not been raised in the previous three years that Mr Kelsall's claim had been before the Tribunal: Submissions [47]-[49].
- b. The above submissions were elaborated on in oral submissions by the Appellant's solicitor. This included a submission to the effect that Mr Kelsall had failed to provide evidence to explain the significance or importance of the occupier's liability claim in circumstances where Mr Kelsall had an indivisible claim based on lung cancer, and the material contribution of dust exposure in the context of occupier's liability was likely to be minimal: Transcript 2.5.25 pp 17.48 – 18.9; 23.5.25 pp 47.25 – 50.1.

- c. The Tribunal failed to consider, or properly engage with, the above submissions. It therefore failed to afford procedural fairness to the Appellant, and thereby committed an error in point of law.
 - d. Had the Tribunal properly considered the above submissions, it would have properly decided to refuse leave to Mr Kelsall to include in the F2ASOC any claims based on the Appellant's alleged occupier's liability towards Mr Kelsall.
- 3 The Tribunal erred in point of law by failing to provide adequate reasons for its decision to grant Mr Kelsall leave to include in the F2ASOC claims based on the Appellant's alleged occupier's liability towards Mr Kelsall.

ORDERS SOUGHT

- 1 Leave to appeal granted.
- 2 Appeal allowed.
- 3 The orders in paragraph 33 of the Tribunal's decision be set aside.
- 4 The Court makes orders in accordance with Order 1 of the Appellant's Amended Notice of Motion filed on 20 May 2025 (**Notice of Motion**).
- 5 The proceedings against the Appellant as occupier are dismissed.
- 6 The First Respondent pay the Appellant's costs of the proceedings in the Tribunal and the appeal.

UCPR 51.22 CERTIFICATE

The right of appeal is not limited by a monetary sum.

SIGNATURE OF LEGAL REPRESENTATIVE

This notice of appeal does not require a certificate under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#).

I have advised the appellant that court fees will be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

[eg solicitor on record, contact solicitor]

Date of signature

Note:

- 1. This notice must be served personally unless non-personal service under UCPR 10.18 is permitted.
- 2. A copy of this notice must be filed in the court below in accordance with UCPR 51.42.

L\316450649.1

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.