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FILED

11 JUL 2025

BS

APPLICANT'S SUMMARY OF ARGUMENT

COURT DETAILS

Court	Supreme Court of New South Wales
List	Court of Appeal
Registry	Sydney
Case number	2025/00250144

TITLE OF PROCEEDINGS

Applicant	**Daracon Engineering Pty Ltd, for the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work not being work in the course of the plaintiff's employment by Daracon Engineering Pty Ltd.**
First Respondent	**David James Kelsall**
Second Respondent	**Downer EDI Mining Pty Ltd (ACN 004 142 223)**
Third Respondent	**Workers Compensation Nominal Insurer, for the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work in the course of the plaintiff's employment by Daracon Engineering Pty Ltd in work not being work in and about a coal mine in New South Wales.**
Fourth Respondent	**Coal Mines Insurance Pty Ltd, for the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work in the course of the plaintiff's employment by Daracon Engineering Pty Ltd, in and about a New South Wales coal mine only.**
Fifth Respondent	**Tarrawonga Coal Pty Ltd (ACN 100 742 185)**
Sixth Respondent	**Boggabri Coal Pty Ltd (ACN 122 087 398)**

FILING DETAILS

Filed for	**Daracon Engineering Pty Ltd, for the first respondent's alleged exposure to silica dust, coal dust and mixed dust in work not being work in the course of the plaintiff's employment by Daracon Engineering Pty Ltd**, Applicant
Filed in relation to	Applicant's claim
Legal representative	David Andersen, HWL Ebsworth Lawyers
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I David Andersen solicitor for the Appellant Certify this document is suitable for publication.

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Supreme Court of New South Wales - Court of Appeal

Daracon Engineering Pty Ltd[1]
Applicant

David James Kelsall
First Respondent

APPLICANT'S SUMMARY OF ARGUMENT

The nature of the Applicant's case and questions involved

1. Pursuant to s 32(1) of the *Dust Diseases Tribunal Act 1989* (**Tribunal Act**) the Applicant (**Daracon**) seeks leave to appeal the decision of the Dust Diseases Tribunal (**Tribunal**) constituted by Russell SC DCJ.[2] The central issues concern the Tribunal's failure to: (1) properly consider s 58 of the *Civil Procedure Act 2005* (**CPA**); (2) provide adequate reasons for its decision to permit the First Respondent (**Mr Kelsall**) to raise entirely new claims against Daracon based on an alleged occupier's liability; and (3) disallow those amendments.

2. Mr Kelsall's proposed amendment was granted despite Daracon, in unchallenged evidence from its legal representative, making clear to the Tribunal that it could not adequately prepare in time for it to meaningfully participate in the urgent hearing that Mr Kelsall's deteriorating health necessitates. The Tribunal did not meaningfully engage with the submissions raised by Daracon in this respect. It failed to explain in its reasons why it did not accept Daracon's unchallenged evidence about its inability to prepare in time for an urgent hearing.

3. Notwithstanding the applicable principles concerning appellate restraint with regard to decisions of practice and procedure, the drastic impact of the amendments on Daracon's ability to properly prepare to defend itself in the urgent hearing necessitates this Court's intervention.

4. Daracon contends that the following questions arise:

   (a) Did the Tribunal fail to identify and act in accordance with the dictates of justice as required by s 58 of the CPA?

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[1] (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)
[2] *Kelsall v Downer EDI Mining Pty Ltd & Ors* [2025] NSWDDT 2 (**J**) White Folder (**WF**) 7

(b) Did the Tribunal fail to afford Daracon procedural fairness by failing to properly consider and engage with Daracon's submissions concerning s 58 of the CPA and the dictates of justice as they applied to Mr Kelsall's amendments to his claim?

(c) Did the Tribunal fail to provide adequate reasons for its decision to grant leave to Mr Kelsall to amend his claim to raise allegations of occupier's liability against Daracon?

The Applicant's argument

Background to Mr Kelsall's amendments

5. Mr Kelsall is about 70 years old. He alleges that he suffers from silicosis, primary lung cancer with metastatic spread and rheumatoid arthritis. He alleges that these conditions were caused by his exposure to silica dust, coal dust and mixed dust during his employment in a variety of roles in mining and civil engineering projects.

6. He was from time to time an employee of Daracon. He has sued Daracon in that capacity and there is no issue on this appeal as to his entitlement to do so. This appeal concerns only whether he should be permitted to also sue Daracon in its capacity as an occupier of work sites where he was employed by other entities.

7. The relevant periods of employment during which Mr Kelsall claims to have been exposed to hazardous dusts span from about 2006 to about 2022.[3]

8. Mr Kelsall commenced proceedings in the Tribunal on 13 December 2023. Although Mr Kelsall sued Daracon in respect of liability arising from his employment in two coal mines and other civil engineering projects, he did not raise any question of occupier's liability against Daracon. There is no suggestion that he was unaware of Daracon's role as an occupier during the relevant periods and indeed he pleads that Daracon directed, supervised and controlled his work activities at those times.

9. On about 26 April 2024, the solicitors for Daracon in respect of its coal miner's insurance liability (**Daracon CMI**) served an extensive request for further and better particulars on Mr Kelsall's solicitors.[4] Paragraph 3.1 of that request required Mr Kelsall to identify the circumstances, nature and frequency of dust exposure outside of the workplace. Mr Kelsall's solicitors responded on 1 May 2024.[5] Despite this request for particulars prompting Mr Kelsall to carefully consider all sources of exposure, nothing was done by

[3] J [5]-[6] **WF 9-11**
[4] Andersen 19.5.25 Annexure A **WF 334-341**
[5] **WF 342-346**

Mr Kelsall to amend his claim to include an allegation of occupier's liability against Daracon.

10. Mr Kelsall filed an amended statement of claim on 19 December 2024. Again, no mention was made of occupier's liability.

11. On 14 April 2025 the matter came before the Tribunal for directions. The Court heard the Defendants' complaints that the employment history put forward by Mr Kelsall had changed from time to time, and ordered Mr Kelsall to file an affidavit that would allow the Defendants to understand the cases that were being put against each of them. The Court also ordered that Mr Kelsall file a further amended statement of claim "to make clear to each defendant the case to be run against it".[6]

12. Also at that directions hearing, the parties indicated that Mr Kelsall's evidence would be taken by AVL on 1 May 2025, and that the continuation of the trial would likely be in the week of 10 June 2025.[7]

13. It is clear from the hearing on 14 April 2025 that the scope of the amendment to Mr Kelsall's claim was limited; it certainly did not extend to permitting Mr Kelsall to introduce entirely new claims that had not previously been pleaded. Notwithstanding that, the F2ASOC filed on 24 April 2025, with a minor amendment on 29 April 2025, introduced brand new claims of occupier's liability against Daracon.[8]

14. There was a further directions hearing on 28 April 2025. Given the F2ASOC had been filed, the Tribunal vacated the evidentiary hearing on 1 May 2025[9] and also indicated that the matter would not be heard in the week of 10 June 2025.[10]

15. On 5 May 2025, Daracon brought a notice of motion that essentially sought to set aside or strike out the claims of occupier's liability in the F2ASOC. On 20 May 2025, it amended its notice of motion.

16. In support of its notice of motion, Daracon relied upon affidavit evidence of its solicitor, Mr Andersen, who has extensive experience in dust diseases matters.[11] Mr Andersen

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[6] J [12]-[13] **WF 13**
[7] T14.4.25 p 15.15 – 16.4 **WF 80-81**
[8] F2ASOC, [6A]-[6C] **WF 165-166**
[9] T28.4.25 p 13.30 **WF 158**
[10] T28.4.25 p 15.1-4 **WF 160**
[11] Andersen 1.5.25 [2] **WF 217**

gave evidence that he was first instructed by Daracon on 29 April 2025.[12] He stated that as at 1 May 2025 he had little more than "a superficial knowledge of the...litigation, in particular as it relates to [Daracon]".[13] That superficial knowledge was acquired as a consequence of Mr Andersen representing a party unrelated to Daracon in these proceedings before that party settled the claim against it.[14]

17. At [17], Mr Andersen stated that Daracon could not, even with his assistance, have a proper opportunity to investigate and prepare for the hearing in less than six months. Moreover, this was the first Tribunal claim that Daracon had faced, and so there was no 'corporate knowledge' upon which Daracon could draw.[15] Mr Andersen raised the fact that he and his partners had other dust disease claims and other work to attend to, and it would be impossible for him to have the time and resources necessary to protect Daracon in a timeframe accommodating Mr Kelsall's life expectancy.[16]

18. Finally, at [20] of his affidavit Mr Andersen set out some of the steps that Daracon would have to undertake in order to adequately defend the proceedings and also stated that those steps could not be properly addressed "within the plaintiff's expected lifetime"[17] (which at the time was estimated to be August 2025).[18]

19. On 19 May 2025, Mr Andersen provided a further affidavit. He updated the Tribunal as to the limited investigations that Daracon had undertaken since his previous affidavit.[19] He also foreshadowed the need for expert evidence from an occupational hygienist.[20]

20. Mr Andersen was not cross-examined on any of his evidence. Mr Kelsall did not adduce any evidence to dispute what Mr Andersen stated about Daracon's inability to adequately prepare for a hearing within a period of less than six months.

21. The prospect of Daracon being adequately prepared for the Tribunal's intended expedited hearing grew even more remote the day after the Tribunal's orders when (despite having been requested about a month earlier)[21] Mr Kelsall first provided to the

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[12] Ibid [4] **WF 217**
[13] Ibid [9] **WF 218**
[14] Ibid [6]-[8] **WF 217**
[15] Ibid [17] **WF 221**
[16] Ibid [18] **WF 222**
[17] Ibid [20] **WF 222-223**
[18] Ibid [10] **WF 218**
[19] Andersen 19.5.25 [2]-[5] **WF 331-332**
[20] Ibid [5] **WF 332**
[21] Andersen 5.5.25 Annexure B **WF 227**

Applicant the litigation file, which turned out to be 13,602 pages in length. Had Mr Kelsall complied with his s 56 CPA obligations and provided this material prior to the hearing of Daracon's motion, rather than waiting until after judgment, it would undoubtedly have impacted on the exercise of the Tribunal's discretion. The Applicant seeks leave to tender the transmitting email and index to this file as fresh evidence to support this Court's re-exercise of the discretion concerning the occupier's liability amendments.

22. On 23 May 2025, Daracon provided written submissions in support of its notice of motion. Those written submissions went into considerable detail about ss 56-60 of the CPA, and how those sections should be applied in the context of Mr Kelsall's new occupier's liability claims. The written submissions set out why each of those sections stood against leave being granted to Mr Kelsall. They emphasised, based on Mr Andersen's evidence, that Daracon would simply not be able to be prepared for the urgent hearing within Mr Kelsall's life expectancy that the Tribunal intended to conduct.

23. At the hearing of the motion, Daracon also submitted that Mr Kelsall had failed to adduce any evidence to explain the necessity or importance of the occupier's liability amendments, in circumstances where the material contribution of dust exposure in the context of occupier's liability was likely to be minimal.[22]

24. In its decision, the Tribunal (correctly) rejected Mr Kelsall's contention that the Tribunal's order of 14 April 2025 permitted the introduction of brand-new claims into the F2ASOC.[23]

25. The Tribunal then considered whether it should make an order pursuant to s 63(3)(b) of the CPA to grant Mr Kelsall leave nunc pro tunc to amend his claim to include the new occupier's liability claims against Daracon.

26. If the Tribunal was going to make an order under that section, then it was required by s 58 of the CPA to seek to act in accordance with the dictates of justice. Moreover, it was obligated to have regard to the matters in ss 56 and 57 of the CPA.[24]

27. The Tribunal's consideration of those mandatory statutory considerations appears to be confined to J28:

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[22] T23.5.25 p 47.29 – 50.1 **WF 439-442** and see *Allianz Australia Limited v Sim* [2012] NSWCA 68 [133]-[145]
[23] J [22] **WF 15**
[24] CPA s 58(2)(a) and see ***Hans Pet*** *Constructions Pty Limited v Cassar* [2009] NSWCA 230 [38] per Allsop ACJ

> The power to amend documents generally is to be found in s 64 of the CPA. Section 58 of the CPA requires the court to follow the "dictates of justice". Having regard to the stage that the proceedings have reached, and because Mr Andersen can be given sufficient time to properly prepare any defence of [Daracon], I propose to make an order nunc pro tunc under s 63(3)(b) and s 64 of the CPA for Mr Kelsall to have leave to amend in accordance with the pleading already filed on 29 April 2025.

28. Although J29 – J31 contain further remarks about Daracon's notice of motion, those paragraphs do not refer to ss 56 or 57 of the CPA or the factors within those sections.

Proposed appeal ground 1 – failure to apply s 58 of the CPA

29. The fundamental problem with the Tribunal's decision is that although his Honour acknowledged at J28 that in making an order under s 63 of the CPA his Honour was required to follow the dictates of justice, the decision does not identify the matters that were required to be considered by the dictates of justice. In particular, in breach of s 63(2)(a) of the CPA, the Tribunal did not have regard to the provisions of ss 56 and 57 of the CPA. Section 56 of the CPA was not discussed in the context of Daracon's notice of motion,[25] and s 57 CPA was not mentioned in the Tribunal's decision at all.

30. The Tribunal's decision does not explain why granting leave to Mr Kelsall to raise new claims of occupier's liability against Daracon would facilitate the just, quick and cheap resolution of the real issues in the proceedings: CPA s 56(1). The Tribunal's decision also does not explain, as required by s 57(1) CPA, why granting leave would be consistent with the principles in that section. That is despite Daracon's written submissions directly contending that granting such leave to Mr Kelsall *would not* be consistent with ss 56 or 57 of the CPA.[26]

31. The Tribunal's failure to have regard to these mandatory considerations is an error in point of law.[27]

32. 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 Daracon's alleged occupier's liability towards Mr Kelsall. This is further developed below.

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[25] It is referred to incidentally in J [48(1)] **WF 23** in the context of a separate motion for discovery.
[26] Daracon's written submissions below [27]-[31] **WF 387-388**
[27] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39

Proposed appeal ground 2 – failure to consider Applicant's submissions

33. Daracon provided detailed written and oral submissions, supported by Mr Andersen's evidence, as to why the factors in s 58 of the CPA would not be met if the Tribunal were to grant Mr Kelsall leave to amend his claim to plead new allegations of occupier's liability against Daracon. The Tribunal's reasons do not show that the Tribunal properly engaged with or considered those submissions.

34. In addition to the submissions about ss 56 and 57 of the CPA discussed above, Daracon also provided detailed submissions about each of the factors in s 58(2)(b) of the CPA.[28] Although, as *Hans Pet* [38] makes clear, the factors in s 58(2)(b) are not a mandatory consideration (in contrast to s 58(2)(a) CPA), they give content to the phrase 'the dictates of justice': *Hans Pet* [37]. Nothing in the Tribunal's decision suggests that it found the factors in s 58(2)(b) to be irrelevant to the case at hand; it appears that the Tribunal simply did not consider those factors.

35. A failure to address a submission centrally relevant to the decision being made may found a basis for concluding that the submission has not been taken into account, and this may amount to an error in point of law.[29]

36. Given that Daracon addressed all of the criteria in s 58 of the CPA, the Tribunal was obliged to consider and deal with those submissions or at least explain why it considered that the factors in s 58(2)(b) CPA were not relevant to the case before it. The Tribunal failed to do so. This is an error in point of law.

37. Had the Tribunal properly considered Daracon's submissions, it would have properly decided to refuse leave to Mr Kelsall to include in the F2ASOC any claims based on Daracon's alleged occupier's liability towards Mr Kelsall. This is further developed below.

Proposed appeal ground 3 – failure to give adequate reasons

38. The Tribunal is a court of record,[30] and it is required to give reasons for its decisions.[31] The content of the duty to give reasons will vary according to the nature of the jurisdiction

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[28] Ibid [32]-[49] **WF 388-390**
[29] e.g. *Soliman v University of Technology Sydney* [2012] FCAFC 146; (2012) 207 FCR 277, 295 [55]-[56]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088, 1092 [24] (Gummow and Callinan JJ), 1101 [87] (Kirby J) and 1102 [95] (Hayne J)
[30] Tribunal Act s 4(2)
[31] see e.g. *Allianz Australia Insurance Ltd v Bluescope Steel Ltd* [2014] NSWCA 276; (2014) 87 NSWLR 332, 388 [300] per Ward JA (as her Honour then was) and ***Amaca** Pty Ltd v Tullipan* [2014] NSWCA 269 [11]-[14]

that the Tribunal is exercising and the particular matter that is the subject of the decision.[32]

39. Although decisions of the Tribunal are sometimes attended by urgency, his Honour reserved for a little more than a week before delivering judgment on the motion, and so time constraints do not appear to have impacted on the decision.

40. Although the Tribunal's decision concerned practice and procedure, which sometimes carries with it a less-extensive duty to give reasons,[33] the motion was critical for Daracon. If it succeeded, then the claim against it would be dismissed; if it failed, then it would be exposed to the real risk of being unable to defend itself adequately in the context of a hearing that was going to be set down on an expedited basis. This factor obligated the Tribunal to give more comprehensive reasons than a run-of-the-mill procedural dispute.

41. In particular, Daracon relied on the evidence of its experienced solicitor Mr Andersen, which evidence was not challenged either directly in cross-examination, or by evidence adduced by Mr Kelsall. Nevertheless, the Tribunal did not accept Mr Andersen's unchallenged evidence that he would not be able to prepare Daracon's case to accommodate an expedited hearing having regard to Mr Kelsall's terminal prognosis.[34]

42. The Tribunal did not explain *why* it did not accept that evidence, except to say that "Mr Andersen has achieved a considerable amount of progress already, even though he has only had a short time".[35] That statement does not bear upon the *future* matters that must be attended to before Daracon can properly participate in a hearing and it does not bear on Mr Andersen's statement, backed by his extensive experience in this type of matter, that these things cannot be done within Mr Kelsall's life expectancy.[36]

43. The Tribunal's failure to give reasons that address Daracon's submissions about ss 56-58 of the CPA, and which fail to explain why it did not accept Mr Andersen's unchallenged evidence that Daracon could not properly prepare for the hearing if leave were granted to Mr Kelsall, amount to an error of law.

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[32] *Amaca* [14]
[33] see e.g. *Hassan v Sydney Local Health District (No 2)* [2021] NSWCA 122 [16]
[34] J [26] **WF 16**
[35] J [29] **WF 17**
[36] Andersen 1.5.25 [20] **WF 222-223**

The Court should apply ss 56-58 of the CPA and refuse leave to Mr Kelsall

44. To address the errors of law set out above, the Court should itself apply the principles in ss 56-58 of the CPA. A proper application of those principles would lead the Court to refuse leave to permit Mr Kelsall to introduce brand new claims of occupier's liability. This is for the reasons set out by Daracon in its submissions to the Tribunal, which in summary were as follows:

45. Mr Kelsall has not provided any evidence to explain the failure to raise those claims at any point in the three years since he provided a comprehensive statement to his solicitors on 31 May 2022[37]. Mr Kelsall's submissions on this issue[38] are not supported by any evidence. This of itself means that the Court should not grant the significant indulgence sought by Mr Kelsall.[39]

46. The amendment does not facilitate the *just*, quick and cheap resolution of the real issues in the proceedings as required by s 56 of the CPA. It would not be just to place Daracon in a position where it must seek to defend itself in complex and expedited proceedings without sufficient time to be able to do so, because Mr Kelsall had inexplicably failed to include these claims at a much earlier stage.

47. The Tribunal's statement that the Tribunal will consider "any indulgence being granted to Mr Andersen so that he can properly represent his client"[40] provides only illusory reassurance to Daracon and does not amount to proper consideration of the dictates of justice in this matter. Although formally the matter has not been set down for hearing,[41] the Tribunal has made it clear that it intends to hear this matter while Mr Kelsall is alive.[42] Despite the first sentence in J [30], that will involve more than just the taking of Mr Kelsall's evidence.

48. Daracon has already provided evidence to demonstrate why it will be prejudiced if Mr Kelsall were permitted to bring his new occupier's liability claims. That evidence was rejected by the Tribunal without explanation. Daracon is pessimistic about the prospect of the Tribunal taking a different attitude towards a future application to postpone or

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[37] **WF 231**
[38] J [16] **WF 14**
[39] *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175, 215 [103]
[40] J [29] **WF 17**
[41] J [26] **WF 16**
[42] i.e. before September 2025 – **WF 482**

vacate the hearing, given Mr Kelsall's further-reduced life expectancy and that his future economic loss claim will not survive him.

49. Mr Kelsall's amendment does not facilitate the efficient or timely use of the Tribunal's resources. The nature of the Tribunal's jurisdiction is that it is frequently required to deal with matters in an expedited fashion. Mr Kelsall's conduct of these proceedings to date, including this last-minute amendment, fails to comply with the principles in s 57 of the CPA.

50. Finally, the factors in s 58(2)(b) of the CPA stand against leave being granted to Mr Kelsall, for the reasons set out in Daracon's written submissions (which do not appear to have been considered or addressed by the Tribunal).

Reasons why leave should be granted

51. Although this Court exercises particular appellate restraint in appeals from the Tribunal on questions of practice and procedure, it will intervene where necessary in the interests of justice.[43] Leave should be granted to appeal an interlocutory decision where there is a reasonably clear injustice going beyond something that is merely arguable.[44] The Tribunal's failure to apply mandatory statutory considerations, and its failure to properly consider Daracon's submissions and unchallenged evidence give rise to a reasonably clear injustice that make it appropriate for this Court to grant leave.

52. The significant consequences of Daracon's motion[45] for Daracon provide a further justification for leave being granted.

Reasons why an order for costs should not be made in the respondent's favour if leave is not granted

53. If the application for leave is refused, Mr Kelsall should have his costs.

Mode of hearing

54. Daracon respectfully requests an oral hearing and does not consent to leave being determined on the papers.

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[43] *Bovis Lend Lease Pty Ltd v Tacon* [2003] NSWCA 79 [16]; [20]
[44] e.g. *Hastwell v Parmegiani* [2024] NSWCA 55 [14]
[45] See above at [40]

Whether there should be a concurrent hearing

55. The factors in Practice Note SC CA 1 [7] support a concurrent hearing being granted:

    (a) The matter is urgent having regard to Mr Kelsall's state of health, and a bifurcated hearing will lengthen the time required to resolve this appeal.

    (b) The argument on the application for leave will require significant reference to the merits of the appeal, given that Daracon submits that there is a reasonably clear injustice arising from the Tribunal's decision.

    (c) The Court will not need to consider a wide range of documents beyond the judgment below and the affidavit evidence.

    (d) There is no identifiable prejudice that may be suffered from a delay flowing from a separate leave application.

List of authorities and legislation relevant to leave

56. The following are relevant to the issue of leave:

    (a) *Dust Diseases Tribunal Act 1989* s 32

    (b) *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175

    (c) *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230

10 July 2025

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