TASCAT
TASMANIAN CIVIL & ADMINISTRATIVE TRIBUNAL

Citation:	Insight (TAS) Pty Ltd v Latrobe Council (No 2) [2024] TASCAT 78
Division:	General
Stream:	Resource & Planning
Parties:	Insight (TAS) Pty Ltd (Appellant) Latrobe Council (Respondent)
Hearing Date:	28 November, 2023; 29 November 2023 & 6 May 2024
Hearing Location:	Hobart
Date of Orders:	6 May 2024
Date Reasons Issued:	10 May 2024
Panel:	Presiding Member F Brimfield Member K Loveday
Decision:	1. Appeal dismissed; 2. The Appellant is ordered to pay the Council's costs on and from 3 April 2024, to be calculated at 90% of the Scale of Fees in Part 1, Schedule 1 of the *Supreme Court Rules 2000* as at the date the relevant work was undertaken and are to be agreed or in the absence of an agreement taxed by the Principal Registrar of the Tribunal or his nominee; and 3. The costs are to be paid within 28 days of agreement, or if not agreed, then within 28 days of the issue of a Certificate of Taxation.
Catchwords:	Building order appeal – appeal against emergency order issued under section 245 of the *Building Act 2016* – classification of buildings under the National Construction Code – fire safety.
Legislation Cited:	*Tasmanian Civil and Administrative Tribunal Act* 2020, *Building Act 2016*
Cases Cited:	*Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292, *Launceston City Council v Tasmanian Water and Sewerage Corporation Pty Ltd (No. 2)* [2015] TASSC 29, *State of Tasmania v Anti-Discrimination Tribunal* in [2008] TASSC 23, *Insight (TAS) Pty Ltd v Latrobe Council* [2024] TASCAT 49

Representation:	G Williams of Glynn Williams Legal (Appellant) G Tremayne of Tremayne Fay Rheinberger (Respondent)
File No:	P/2023/19
Publication Restriction:	Nil

REASONS FOR DECISION

1. This proceeding was heard over three days on 28-29 November 2023 and 6 May 2024. At the conclusion of the evidence and the submissions on the final day of hearing, we gave brief oral reasons dismissing the application and indicating that written reasons would be provided at a later date.

2. These are our written reasons for dismissing the proceeding.

3. The Appellant is the owner of 30 Arthur Street, in Shearwater, Tasmania (the **Property**).

4. On the land, there are two residences, the first being a two-storey dwelling with an approximate floor area of 365 square metres. The second residence is a single-storey two-bedroom dwelling, of a smaller 78 square metres.

5. In February 2023, the larger dwelling was being used to house approximately 40 seasonal workers from Vanuatu, who were temporarily residing at the property under the Pacific Australia Labour Mobility Scheme. The seasonal workers were temporarily employed as fruit pickers by someone unrelated to the Appellant.

6. On 15 February 2023, an unannounced inspection occurred of the property by officers employed by the Latrobe Council (the **Respondent**). At this inspection was two employees of the Council, Mr Alexander Hayes and Ms Glenys Nicholls. Accompanying them were Mr Wayne Wilson and Mr Chris Devlin, both building surveyors. Additionally, Mr Dean Graue, the acting district officer of the Mersey Division of the Tasmanian Fire Service, was present, along with a number of Tasmanian police officers who were there solely to facilitate access.

7. Their unexpected entry to the property was authorised by the general manager of the Latrobe Council under Section 20A of the *Local Government Act* 1993.

8. In addition to being confronted with the 40 odd seasonal workers that were residing at the property, it was also discovered that a significant number of rooms in the larger dwelling had been converted into bedrooms. There were approximately 10 bedrooms with 56 total bunk beds available throughout the dwelling, although the first floor of the larger dwelling was apparently off limits to the seasonal workers. The most densely populated bedroom was a converted sunroom (which appeared to have been added to the building at some time after its construction) with an approximate floor space of 58 square metres which had 18 bunk beds and a mattress on the floor.

9. There were four toilets on the ground floor of the dwelling where the seasonal workers were permitted to reside, along with two portable toilets outside one of the bedrooms.

10. The inspection of the property was captured by body-worn camera footage taken by Mr Devlin and Mr Hayes. The footage shows Mr Hayes, a compliance officer employed by the Council, asking various seasonal workers how they found the living conditions. Not all of them spoke English and had to answer through other members of the group that

did. Various workers described the living conditions as cramped, hot and too crowded. The footage also recorded those who were attending for the inspection remarking how hot and stuffy some of the bedrooms were when they were inspected.

11. The footage showed that in many of the bedrooms, the seasonal workers had various cooking appliances plugged in close to their bunk beds. These appliances were often connected to power boards, which in turn were connected to other power boards.

12. What fire safety equipment was on site at the property was inspected and tested, such as fire alarms, fire blankets and fire extinguisher bottles.

13. The inspection was conducted after the Council were tipped off by a member of the local community of their concerns about the number of people residing at the property.

14. Two days after the inspection, the general manager of the Council signed an emergency order under Section 245 of the *Building Act 2016*. That provision provides as follows:

> **245. Emergency order**
>
> (1) A general manager may make an emergency order if satisfied, on reasonable grounds, that a threat to life may arise out of the condition or use of a building, temporary structure or plumbing installation.
>
> (2) An emergency order may –
>
> (a) require an owner or occupier of a building, temporary structure or plumbing installation to –
>
> (i) evacuate all persons from the building, temporary structure or the building or temporary structure housing the plumbing installation; or
>
> (ii) stop, or perform, building work or other work; and
>
> (b) prohibit the occupation of a building or temporary structure.
>
> (3) An emergency order –
>
> (a) is to be in an approved form; and
>
> (b) is to contain any specified matter; and
>
> (c) may specify how emergency work is to be performed under the order, including that the work must be performed other than in accordance with the regulations.
>
> (4) A person served with an emergency order must comply with the order.

15. The emergency order issued by the Council on 17 February 2023 ordered the appellant as follows:

> *"To immediately evacuate all persons who are occupying, or staying, in or residing in the building as boarders, users of a guest house, or staying in dormitory-style accommodation, or workers' quarters, persons who are unrelated to the owner. I further order that the building is not to be occupied for other than a class 1A building for domestic dwelling purposes. For the purpose of this order, a class 1A building is a building classified under the National Construction Code of Australia."*

16. By this proceeding, the Appellant has appealed that emergency order. Section 278 of the *Building Act 2016* permits a person affected by an emergency order to appeal that order to the Tribunal.

17. In appeals of this nature, the Tribunal stands in the shoes of the original decision-maker and is to make the correct or preferable decision. The Tribunal is not bound by the same material that was put before the original decision-maker: *Tomaszewski v Hobart City Council (No. 2)* [2021] TASSC 15 at [15]. However, the Tribunal is not obliged to go outside the issues raised by the parties to the appeal: *Sandy Bay Developments v Loring* [1991] TASSC 34 at [37-39].

The Appeal Grounds

18. The appellant raised two appeal grounds, as follows:

Ground 1

That the Emergency Order dated 17th February be set aside on the basis that the dwelling at 30 Arthur Street Shearwater was at that date lawfully occupied as a Class 1a building with no threat to life from such occupation.

Particulars

i. *occupation of the house building has been as a standalone dwelling by way of a residential tenancy to a group of associated persons from Vanuatu living in the premises as a common household being visa holders under the Pacific Australia Labour Mobility Scheme is consistent with a classification of the property as a Class 1a building under the National Construction Code;*

ii. *The definition for a Class 1 buildings as extracted from the National Construction Code – Volume 2 – 2019 including Amendment 1 (NCC) [1] includes the subclassification of Class 1a;*

iii. *there is no limit on the floor area of a Class 1a building or on the number of occupants that may be present; and*

iv. *Class 1a classification permits a single tenancy such as a group of university students, or a group of friends or a shared house for people that are initially unfamiliar etc., here the occupants were familiar to each other.*

Ground 2

That there are no reasonable grounds on which to determine that a threat to life may arise out of the condition or use of the house building on the property.

The Witnesses

19. The Appellant called a sole witness at the hearing, being Mr Stephen Kip, an experienced Victorian based building surveying and regulatory expert witness.

20. The Appellant also produced a statement from a Mr James Redgrave, employed by the appellant as the caretaker of the property. When the hearing commenced in late November 2023, the Tribunal was told that Mr Redgrave would be called to give evidence and would be cross-examined. In between the first two hearing dates and the final hearing date in May 2024, the Appellant changed their position and decided not to call Mr Redgrave. Accordingly, we have ignored his witness statement that was filed with the Tribunal.

21. The Council called the following witnesses:

    a. Mr Alexander Hayes, Compliance Officer of the Council;

    b. Mr Adam Jones, Building Surveyor employed by Trident Building Surveying;

    c. Wayne Wilson, a Building Surveyor employed by Building Surveying Services Pty Ltd;

    d. Ms Esther Fletcher-Jones, Assistant Manager for the Building Safety Unit at Tasmanian Fire Service;

    e. Mr Andrew McGinnis, Manager of the Building Safety Unit of the Tasmanian Fire Service;

    f. Mr Christopher Devlin, Building Inspector employed by Building Surveying Services Pty Ltd; and

    g. Ms Glenys Nichols, Environmental Health Officer of the Council.

22. Each of the witnesses, save for Ms Nichols, provided written witness statements or expert reports.

Mr Stephen Kip

23. Mr Kip produced a written expert report dated 22 November 2023. Mr Kip did not visit the property. His instructions were comprised by a letter of instruction given to him by the Appellant's solicitor, which enclosed a copy of the emergency order, the grounds of appeal, some plans and drawings, as well as other statements of evidence filed in the Tribunal by the Council's witnesses.

24. In respect of the first appeal ground, Mr Kip concluded that the dwelling that was being used to house the seasonal workers was a Class 1A building under the National Construction Code (NCC).

25. The definition of a Class 1 building in the NCC is as follows:

A6G2 – Class 1 buildings

(1) A Class 1 building is a dwelling.

(2) Class 1 includes the following sub-classifications:

a. Class 1A is one or more buildings, which together form a single dwelling including the following:
   i. A detached house.
   ii. One of a group of two or more attached dwellings, each being a building, separated by a fire-resisting wall, including a row house, terrace house, town house or villa unit.
b. Class 1B is one or more buildings which together constitute—
   i. a boarding house, guest house, hostel or the like that—
      1. would ordinarily accommodate not more than 12 people; and
      2. have a total area of all floors not more than 300 m^2 (measured over the enclosing walls of the building or buildings); or
   ii. four or more single dwellings located on one allotment and used for short-term holiday accommodation.

26. Mr Kip specifically disavowed the suggestion that the dwelling was being used as a Class 3 building, which is defined in the NCC as follows:

A6G4 – Class 3 buildings

(1) A Class 3 building is a residential building providing long-term or transient accommodation for a number of unrelated persons.

(2) Class 3 buildings include the following:

a. A boarding house, guest house, hostel, lodging house or backpacker accommodation.
b. A residential part of a hotel or motel.
c. A residential part of a school.
d. Accommodation for the aged, children, or people with disability.
e. A residential part of a health-care building which accommodates members of staff.
f. A residential part of a detention centre.
g. A residential care building.

27. The importance of the difference between the two classifications in this case relates squarely to the requirements for fire prevention and fire safety, with Class 3 buildings in generally having more onerous requirements when it comes to fire safety than Class 1A dwellings. Unlike Class 3 buildings, Class 1A buildings do not have requirements for emergency lights, exit signs and most importantly, fire separation. Mr Kip reasoned that the use of the property could not be a Class 3 building under the NCC because that class requires the people who are being accommodated in that building to be "unrelated persons".

28. Mr Kip drew a distinction between what he considered to be related persons and unrelated persons. Examples he gave of related persons were a family, a primary school

camp group, friends sharing a dwelling on a holiday together, or a shared rental property where all occupants are on a single lease or rental agreement.

29. Mr Kip also gave examples of who he thought unrelated persons could be, including neighbours in adjoining dwellings, occupants of adjoining hotel rooms, or a jail or juvenile detention centre amongst others.

30. Mr Kip said the seasonal workers were "related persons" and therefore the use of the dwelling could not be classified as a Class 3. He acknowledged that 40 people to the property was a very large number but noted that there were no restrictions on Class 1A dwellings as to how many people can reside in the property.

31. On the second appeal ground, Mr Kip expressed an opinion that based on the documents he saw, the fire threat to life at the property was not so apparent as to have justified the issuing of the emergency order by the general manager of the Council. He identified that each bedroom on the ground floor had a door directly to the outside of the dwelling (although whether any of these doors were blocked by bunk beds he could not say). He did, however, acknowledge that there were a number of works that could have been undertaken to reduce the fire risk at the property, including inspection of electrical wiring, interconnected smoke alarms, compliant fire extinguishers and fire blankets, evacuation procedures, amongst other matters.

Alexander Hayes

32. Mr Hayes gave evidence to having carried out the inspection on 15 February 2023 in the company of others and having spoken to the seasonal workers at the property, later preparing a map and a report for the general manager of Council.

33. His body-worn camera footage was tendered and viewed by the Tribunal at the hearing and he gave his own observations as to there being minimal ventilation in the bedrooms, with doors and windows of some of the bedrooms being blocked off by bunk beds.

34. He was told by the seasonal workers during the inspection that the kitchen only had one burner that was working, which was not sufficient for the 40 people that were living there, hence, the existence of the kitchen appliances in the bedrooms.

Wayne Wilson

35. Mr Wilson spoke to a detailed statement of evidence dated 31 October 2023. His curriculum vitae revealed that he had been a building surveyor for nearly two decades and before that a building inspector employed by various local councils.

36. He deposed to having attended the inspection on 15 February 2023 and having had reviewed the Council records as to the building and occupancy permits that had been granted in respect of the property. He noted that a number of the additions to the property such as bathrooms, toilets and other areas of the home did not have the relevant approvals. He opined that from all of the information he concluded that the use of the building was best classified as a Class 3 building under the NCC.

37. He considered that the seasonal workers were living in poor and unsafe conditions.

38. He identified that the classification of a building under the NCC was determined for the purpose for which it is designed, constructed or adapted to be used. Whilst he considered that the use of the dwelling in reality was a Class 3 under the NCC, the building did not meet the requirements of a Class 3 constructed building with respect to fire separation, fire safety, amenities, minimum floor requirements per person and other items of noncompliance.

39. In addition to his concerns about fire separation (or lack thereof), he also was concerned about the number of rooms that had overloaded power boards with kitchen appliances, phone chargers and other power appliances connected to them and the proximity of those electrical devices to flammable bedding material in the densely packed bedrooms.

Adam Jones

40. Mr Jones is a building surveyor of two decades' experience, registered in both Victoria and Tasmania. He did not attend the property but gave his opinions as to the two appeal grounds.

41. He opined that a Class 1A building was a standalone residential structure that is intended for use by a family unit or similar. Whilst he agreed that the classification did not put a limit on the number of occupants in a Class 1A dwelling, the intended use was not for short or long-term accommodation of many unrelated people. He came to this conclusion on the basis that there were more appropriate classifications suitable to the level of risk associated with housing such a large number of people as this group of seasonal workers. He considered that Class 1B was also not appropriate given that the NCC specifically limited Class 1B to a boarding or hostel type of residence housing, not more than 12 individuals.

42. Mr Jones considered that a Class 3 building was most appropriate to the use of the dwelling by the seasonal workers, because it was designed for occupants that are generally unfamiliar with the building and have minimal control over the safety of the building, which represents a higher level of risk to the occupants, hence the need for higher levels of safety.

43. Mr Jones also gave evidence to being personally involved in building permit applications for bespoke construction of seasonal worker accommodation under federal schemes with other Pacific Island nations, where the Commonwealth has set minimum requirements for those seasonal workers. He gave evidence that those minimum accommodation requirements published by the Commonwealth were consistent with Class 3 buildings in the NCC.

44. As to Ground 2, he considered that the fire protection requirements of a Class 1A building were simply not robust enough to protect such a large number of occupants in the space they were housed in the event of a fire. He noted that the type and number of fire safety systems required by the NCC increases proportional to the risks associated with the use of the building. He noted that a Class 3 building would have a combination of active and passive fire systems that would be used to alert people of an emergency,

provide safe evacuation, restrict the spread of fire and prevent the structural failure of the building during a fire. He considered that the dwelling did not meet those requirements.

Andrew McGuinness

45. Mr McGuinness is the manager for the Building Safety Unit at the Tasmanian Fire Service, which he explained undertakes statutory functions on behalf of the Chief Officer of the Fire Service. His role is to develop and implement building fire safety-related policy and business practices.

46. He did not attend the inspection on 15 February 2023 but had had regard to the body-worn camera footage taken by both Mr Hayes and Mr Wilson.

47. Mr McGuinness gave evidence as to the importance of the different classifications under the NCC of a building for firefighting purposes. He said that it was much rarer to see fire fatalities within prescribed buildings that have modern fire safety features which are provided in line with the requirements of the NCC and various Australian standards.

48. He also noted that the area where the property is located is serviced by a volunteer fire brigade. Whilst noting that volunteer firefighters are trained to a high level, if they were faced with a fire with 40 occupants inside, they could very quickly become overwhelmed.

49. In response to Appeal Ground 1, he noted the differences between the fire safety requirements between a Class 1A and a Class 3 building.

50. In response to Ground 2, he remarked of considerable concern regarding the cooking appliances being used in bedrooms and how they were plugged into the power, especially in bedrooms with bunk beds where there was an elevated fuel loading from all of the fabric and bed sheets.

51. Mr McGuinness did note that from his review of the footage, there had been some attempt by the appellant to comply or elevate some of the fire safety features that would normally not be found in a Class 1A building, including fire exit signage throughout the dwelling, which he noted indicated that there was some form of acknowledgement by the appellant that there was an elevated fire risk with the building. However, he noted that the level of risk from fire to the occupants of this building was high and the challenges that would be presented to a volunteer fire brigade if tragedy were to strike and the building were to set on fire were significant.

Esther Fletcher-Jones

52. Ms Fletcher-Jones was the assistant manager for the Building Safety Unit at the Tasmanian Fire Service. Like Mr McGuinness, she did not attend the property at the inspection on 15 February 2023 but had regard to the same material as Mr McGuinness including the video footage taken by Mr Hayes and Mr Wilson.

53. She provided a similar opinion to that of the Council's building surveying witnesses, that a Class 1A building was generally occupied by a family or related people or rented out to

occupants intending to use it for a home. She noted that a Class 3 building was more suitable to being used as fruit-picker accommodation.

54. Ms Fletcher-Jones had previously been employed as a building surveyor prior to her commencement with the fire service and noted that there has traditionally been some confusion between a Class 1B building and a Class 3 building, given that there can be a degree of overlap between those two classes, with Class 1B being limited to less than 12 occupants and a floor size of less than 300 square metres. We are of course not concerned with a Class 1B building in this case.

55. Ms Fletcher-Jones noted that when determining the classification of the building, the classifications in Part A6 of the NCC should be read in their entirety. She noted that the classification must be determined based on the classification that most accurately reflects the intended purpose or use of the building, not by which classification is the least stringent.

56. Ms Fletcher-Jones considered that there was a very significant fire safety risk to the occupants of the property, where so many of them were being housed in a building that was designed and approved as a Class 1A building. Like with Mr McGuinness, Ms Fletcher-Jones noted the increased fire safety requirements of a Class 3 building.

57. Like Mr McGuinness, Ms Fletcher-Jones also noted from review of the footage, , that there had been some attempt to elevate the fire safety measures in the dwelling above and beyond what a regular Class 1A building would typically require but noted that the fire safety provisions were still not compliant with a Class 3 building.

Christopher Devlin

58. Mr Devlin is a building inspector employed by Mr Wilson's company and was present at the inspection on 15 February 2023.

59. He gave only very brief evidence about video footage and photos taken by him and noted a particular difficulty accessing one of the exit doors to the largest room that was being used to house the seasonal workers, being the converted sunroom.

Glenys Nichols

60. Ms Nichols was employed as an environmental health officer by the Council and attended the inspection on 15 February 2023. She prepared a memorandum that was provided to the general manager of the Council, which was before him when he made the decision to issue the emergency order.

61. Ms Nichols did not provide a witness statement but was called at the request of the appellant to be cross-examined. She gave evidence about how the investigation into the Appellant's property commenced (from the Council's perspective) and what information the Council had received from members of the public, which led to the inspection on 15 February.

Consideration – Appeal Ground 1

62. The decision that we make as the Tribunal, standing in the shoes of the general manager of the Council, is to determine whether we are satisfied, on reasonable grounds, that a threat to life may arise out of the condition or use of the building, particularly, the dwelling being used to house the 40 seasonal workers.

63. The first appeal ground presupposes that if we were satisfied that the dwelling was being used as a Class 1A building under the NCC, then we should be satisfied that there was no threat to life.

64. Whilst not developed fully, presumably, the argument goes that because there was no suggestion that the fire safety measures in place at the dwelling did not comply with those required of a Class 1A dwelling, that we should conclude that there is no threat to life.

65. That argument is flawed for obvious reasons. It does not follow that if a building complies with its deemed building classification insofar as fire safety is concerned that there cannot be any threat to life.

66. Putting aside that matter for one moment, to the extent that the building classification is relevant to the question of whether or not there was a threat to life, we do not agree with the appellant that the use of the building is properly classified as a Class 1A building.

67. It was very clear that Mr Kip's opinion that the use of the building fitting best within a Class 1A use rested upon the notion that the seasonal workers were not "unrelated" which was in part a requirement of a Class 3 building under the NCC.

68. Mr Kip was instructed by the Appellant in his brief to assume that the seasonal workers were related.

69. Specifically, in his letter of instruction drafted by the Appellant's solicitor and annexed to Mr Kip's report, he was told to assume that the occupants were familiar with one another and were from a *"single locality in the Pacific"* and were *"likely to have a stronger sense of group protection and are therefore likely to assist others to evacuate if necessary"*.

70. Much ink has been spilled about the importance of an expert identifying assumed facts on which their opinion relies. The learned authors of *Cross on Evidence*, have expressed the principle as follows:

> *"It follows as a matter of principle that the oral testimony, affidavit, statement or report of the witness giving the expert opinion must identify the facts to which the expert applies specialised knowledge in order to arrive at the expert opinion in question. Some of these facts may be provable by the expert, some may only be assumed. But unless those facts, (either testified to by the expert or assumed) bear some relationship with the facts eventually found by the trier of fact, the expert opinion given in relation to the facts either testified to or assumed by the expert will be too remote from the primary facts found by the trier of fact to be capable of useful employment by the trier of fact."*

71. The "basis rule" provides that an expert opinion is not admissible unless evidence has been, or will be admitted whether from the expert or from some other source which is capable of supporting findings of primary fact which are sufficiently like the factual assumptions on which the expert has been asked to assume so as to render their opinion of value: *Commissioner for Government Transport v Adamcik (*1961) 106 CLR 292 at 298.

72. Whilst it is well known that the Tribunal is not bound by the rules of evidence (section 79(b)(i) of the TASCAT Act), we are required to act according to the substantial merits of the case (section 79(c) of the TASCAT Act), which will often mean taking into account evidentiary rules: *Secretary to the Department of Infrastructure v Williamstown Bay and River Cruises Pty Ltd* [2011] VSC191.

73. This is even more important when the evidence put forward before the Tribunal is expert evidence which is subject to compliance with the Tribunal's expert witness code of conduct which requires, amongst other things, expert witnesses to identify the assumptions upon which their opinion relies.

74. If the Appellant intended for the Tribunal to place reliance on Mr Kip's opinion on this topic, the Appellant was required to lead evidence to satisfy us that the seasonal workers were "related" as opposed to "unrelated" persons. That required the calling of lay evidence to prove that fact (for example, by calling one of the workers or calling a lay witness who had observed the workers over a period of time and how they interacted), or by way of the admission of an agreed fact.

75. The Council did not agree that the seasonal workers were related persons. It was urged upon us by Mr Williams on behalf of the Appellant that it was a safe assumption for the Tribunal to make that the seasonal workers were related and enjoyed a degree of kinship with one another. Mr Williams submitted that that much was obvious from the evidence before the Tribunal.

76. We disagree.

77. The only evidence before the Tribunal of the relatedness of the seasonal workers was the body-worn video camera footage. That footage showed little more than a large group of understandably discombobulated Vanuatuan men who were undoubtedly concerned as to why there were uniformed police officers, fire service officers and other inspectors at their leased premises carrying out, what must have seemed to them to be a raid.

78. The only evidence from that footage that the seasonal workers were united on anything were their dim views about the conditions they were presently living in.

79. Apart from that, there was nothing that gave us any comfort in concluding that the workers were related like members of family or friends who would ordinarily reside in a Class 1A building.

80. Having been satisfied that the seasonal workers are best regarded as "unrelated" people, we are satisfied that a Class 3 classification under the NCC is more appropriate to the building the seasonal workers were living in. Subsection 2 of Class 3 provides examples of what a Class 3 building includes. It is not an exhaustive definition but includes a boarding house, guest house, hostel, lodging house or backpacker accommodation. The

2022 version of the NCC also includes explanatory information as to what a Class 3 building may or may not include. It specifically includes the following example:

> *"Class 3 buildings include…workers' quarters, including shearers, or fruit pickers' accommodation, or hotel workers' accommodation".*

81. It was not in contest that the seasonal workers were employed to pick fruit. When questioned as to why the Tribunal should ignore the explanatory information in the NCC for Class 3 buildings which specifically contemplates fruit pickers' accommodation, the Appellant submitted that a Class 3 definition should only apply to fruit pickers' accommodation where those fruit pickers were being accommodated on the same site that they worked.

82. That would have us read words into the explanatory memorandum that simply do not exist. The explanatory memorandum does not draw a distinction where the workers' quarters are located, either off-site from the place in which they work, or on-site. Any such distinction would be completely artificial.

83. Lastly, we are reinforced in our conclusion that a Class 1A classification is not appropriate in the circumstances by a wider reading of Part A6 of the NCC, which deals with building classifications generally. Particularly, Class 1B, which sits immediately after Class 1A, is defined as being a boarding house, guest house or hostel or the like that would ordinarily accommodate not more than 12 people and have a total area of all floors not more than 300 square metres.

84. There is undoubtedly an overlap between Class 1B and Class 3 classifications in certain cases, with Class 1B limited to under 12 people and a certain floor size. But the fact that the drafters of the NCC included a person limit of 12 people in Class 1B, which follows immediately after Class 1A, suggests that the drafters considered that a Class 1A dwelling would typically accommodate less than 12 people. That is consistent with the size of most families and share houses.

85. We are comfortably satisfied that the use of the building was a Class 3 classification under the NCC. We also accept the evidence of the Council's various witnesses who deposed to the fire safety measures in the dwelling not being robust enough to meet the requirements of a Class 3building.

86. It follows that this appeal ground is not made out.

Consideration – Appeal Ground 2

87. In respect of Appeal Ground 2, which related squarely to whether or not there were reasonable grounds on which to determine that there was a threat to life based on the condition or use of the dwelling, we note that Mr Kip disagreed that there was a threat to life based on a reasoning process that the fire safety requirements of a Class 3 building in this particular case would not have been a great deal more onerous than that of a Class 1A dwelling. Mr Kip opined that because the building was under 500 square metres, the more onerous fire safety requirements of a Class 3 building were not engaged.

88. However, in our view, that underestimated the effect of the evidence from the Council's various witnesses, who gave evidence of being concerned by the fire risk posed by a cooking appliances being used in densely populated bedrooms next to highly flammable bedding material, as well as existing fire safety measures such as fire alarms not being interconnected, fire blankets and hydrants not being compliant with standards and lack of evacuation plans. Many of the Council's witnesses who gave that evidence attended the site on 15 February 2023. Mr Kip did not. That was a natural limitation of the instructions he was given.

89. It was also clear that Mr Kip was also given a limited bundle of documentation as a part of his letter of instruction. He was not given the full Council file, which ran to over one thousand pages, nor was he given the same documentation that was put before the general manager of the Council when the decision to issue the emergency order was made on 17 February 2023.

90. Whilst we found Mr Kip to be a professional and cautious witness who did his best to assist the Tribunal, and who worked through the questions asked of him in cross examination logically, his evidence cannot be preferred because of the limitations placed on him by the Appellant, by not instructing him to visit the Property, and not giving him the same bundle of information that the general manager of the Council had when the emergency order was made.

91. All of the evidence of the Council's witnesses who attended the property and those who informed the general manager of the Council about the condition of the property and their opinions as to the dangers that could befall the seasonal workers if there was a fire in the property, comfortably lead us to the conclusion that the general manager was justified in considering that there was a threat to life which might arise out of the condition or the use of the building.

92. The threat to life arose purely and simply by reason of the Appellant's decision to house a large number of people in a building that was clearly not designed for that purpose, with minimal upgrades to protect their safety in the event of a fire.

93. Accordingly, this appeal ground is not made out.

Conclusion

94. We are not persuaded to disturb the emergency order that was issued on 17 February 2023.

95. The potential risk to the seasonal workers that were housed in the dwelling was obvious. The emergency order insofar as it required those workers to evacuate was necessary to prevent the possibility of a tragic loss of life if there was a fire.

96. The ongoing aspect of the emergency order, which confines the appellant to using the property as a Class 1A dwelling is also justified in order to prevent the property from being used to house such a large number of people in the future, without substantial upgrades to the building from a safety perspective.

97. At the conclusion of the hearing and once the Tribunal delivered its oral reasons, the Council made an application for its costs to be paid by the appellant. The Appellant resisted that application and submitted that each party should bear their own costs.

98. The Tribunal's jurisdiction in respect to costs is set out at Clause 12 of Part 8 of Schedule 2 of the TASCAT Act, being the cost provisions relevant to the Resource and Planning stream.

99. The rules provide that each party is to bear its own costs but that the Tribunal may make an order for costs if it is satisfied that it is fair and reasonable to do so.

100. The clause also includes factors that the Tribunal may take into account when determining whether it should exercise its discretion as to costs. They include the merits of the claims made by the parties, whether in the Tribunal's opinion a party has unnecessarily or unreasonably prolonged the proceeding or increased the costs of the proceeding and the nature, complexity and outcome of the proceedings.

101. It has been made clear that those considerations are not mandatory for the Tribunal to consider when exercising its discretion: *Launceston City Council v Tasmanian Water and Sewerage Corporation Pty Ltd (No. 2)* [2015] TASSC 29 at [27]. The power to order costs is a broad power but the discretion must be exercised judicially and not arbitrarily or capriciously: *State of Tasmania v Anti-Discrimination Tribunal* in [2008] TASSC 23 at [14].

102. The Council's solicitor, Mr Tremayne, submitted that the merits of the Appellant's appeal were minimal and that the appellant should pay costs on that basis. Mr Williams submitted in response that the appeal was not completely hopeless and matters such as the classification of buildings and the interpretation of the NCC were matters of public importance and for which there was a dearth of judicial authority on.

103. We have determined that it is fair and reasonable for the appellant to be made to pay some but not all of the respondent's costs.

104. As can be seen from our reasons, much turned in this appeal on the question of whether or not the seasonal workers were related or unrelated. Even if it had been established that the workers were related, that would not necessarily have turned the tide of the appeal. But had the Appellant established, as a matter of fact, that the workers were related, then it would have meant that there was an evidentiary basis for at least accepting as arguable Mr Kip's opinions expressed in his report. This relates however to only one of the two grounds of appeal.

105. We note that the statement of evidence of Mr Redgrave, the caretaker of the property, filed by the appellant, gave some detail about his observations of the seasonal workers whilst they were on site. Whilst we have not taken Mr Redgrave's statement into account in our determination of the appeal, because he was not called ultimately to give evidence or be cross-examined, the fact that his statement was filed with the Tribunal demonstrates to us that it was at least possible for the Appellant to call the evidence which may have established the crucial assumptions which Mr Kip was instructed to accept as true.

106. At a directions hearing held on 3 April 2024, (for the purposes of resolving the Tribunal's concerns as expressed in *Insight (TAS) Pty Ltd v Latrobe Council* [2024] TASCAT 49), Mr Williams informed the tribunal that Mr Redgrave would no longer be called. It therefore seems that there was a forensic decision in between the first two hearing days and the final hearing day by the Appellant not to call any lay evidence. At the point, the Appellant made that forensic decision, the Tribunal considers that the Appellant should have realised that the appeal no longer enjoyed sufficient prospects of success, and that it should have been discontinued.

107. Whilst it could fairly be said that the appeal was always difficult from the outset, at the point where the appellant decided not to call any lay evidence, it became a near impossibility for the appeal to have succeeded.

108. Therefore, we consider it fair to order that the appellant pay the Council's costs on and from 3 April 2024 (being the date the Tribunal was informed by the Appellant that no lay evidence was to be called).

109. The usual order for costs in this division of the Tribunal is that professional fees are to be taxed at 90% of the Supreme Court scale. We see no reason to apply a different rate.

110. Accordingly, the orders of the Tribunal are as follows:

    1. Appeal dismissed;

    2. The appellant to pay the Council's costs on and from 3 April 2024, to be calculated at 90% of the scale of fees in Part 1, Schedule 1 of the *Supreme Court Rules 2000* as at the date the relevant work was undertaken and are to be agreed or in the absence of an agreement taxed by the principal registrar of the Tribunal or his nominee; and

    3. The costs are to be paid within 28 days of agreement, or if not agreed, then within 28 days of the issue of a Certificate of Taxation.