



## "Substantially the same": Court dismisses modification application for failure to satisfy statutory test

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A recent decision by the Land and Environment Court of New South Wales has provided clarification on the statutory test for modification applications involving several elements.

### Key Takeaways

- Any proposal to modify an original development must ensure that the modified development be 'substantially the same' as the original development
- The statutory exercise of determining whether the modified development is 'substantially the same' is not a numeric "tick a box approach", but rather an assessment of all elements of the proposed modification
- Section 4.56 of the *Environmental Planning and Assessment Act 1979* (NSW) outlines the test adopted by the court in deciding whether a modification should be modified

### Background

In November 1994, development consent was granted by the Court for the construction and operation of a power plant known as the Redbank Power Plant. In March 1997, prior to the commencement of construction, the Court modified the consent to limit the source of coal tailings to an adjacent mine.

The Redbank power plant ceased operating in October 2014, and is now running in care and maintenance mode.

In May 2021, the applicant launched Class 1 proceedings against Singleton Council ("**Council**") for the refusal of a Modification Application. The Modification Application was lodged by the applicant to permit the use of biomass fuel as an alternative, organic fuel source for the operation of the power plant.

The applicant proposed to source the biomass from a radius of up to 300km, but did not propose to co-fire the biomass and coal tailings.

### Was the development "substantially the same"?

In resolving whether the Modification Application ought to be allowed, the Court considered the relevant test contained in section 4.56 of the *Environmental Planning and Assessment Act 1979* (NSW).

Section 4.56 requires that, once amended, the development be "substantially the same" as the development for which consent was originally granted. The Court confirmed that the phrase "substantially the same" has also been held to mean "essentially or materially having the same essence" in earlier decisions.

The Applicant contended that the development would remain "substantially the same", on the basis that its fundamental processes would be largely unchanged.

Following careful consideration all of the characteristics forming part of the original consent, Justice Duggan concluded that the proposed modification was not substantially the same as the 1994 consent.

In refusing the application, Justice Duggan noted that the burning of coal tailings was an essential requirement of the 1994, whilst the modification application grants the operator discretion to burn either biomass or coal tailings as fuel. In consequence, the modification application altered the development in such a fundamental manner that it would lose the essential and material relationship to the disposal of coal tailings from the associated mine operations.

### Conclusion

This case acts as a fundamental reminder to developers and councils seeking to lodge a modification application that the original development consent must be viewed as a whole, particularly in circumstances where the application involves several elements.