Land and Environment Court
of New South Wales

March 2024 / Vol 16 Issue 1

Judicial Newsletter

COURT NEWS ... 1

- Court Conference ... 1
- Appointments/Retirements ... 1

JUDGMENTS ... 2

- Kenyan Court of Appeal ... 2
- Supreme Court of New Zealand ... 3
- Federal Court of Australia ... 5
- Queensland Court of Appeal ... 6
- New South Wales Court of Appeal ... 6
- Supreme Court of New South Wales ... 15
- Land and Environment Court of NSW ... 16
  - Criminal ... 16
  - Judicial Review ... 21
  - Aboriginal Land Claims ... 22
  - Compulsory Acquisition ... 23
  - Section 56A Appeals ... 24
  - Costs ... 26
  - Merit Decisions (Commissioners) ... 27
  - Tree Decisions (Commissioners) ... 30
  - Registrar Decisions ... 31
  - Procedural Matters (Application to Vary Orders) ... 32

LEGISLATION ... 33

- Statutes and Regulations ... 33
  - Climate Change ... 33
  - Waste ... 33
  - Water ... 33

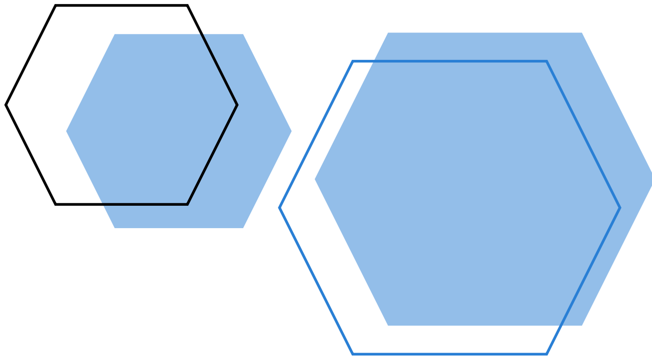
COURT NEWS

COURT CONFERENCE

The Land and Environment Court Conference will be held on 23 and 24 May 2024.

APPOINTMENTS/RETIREMENTS

Dr Paul Adam retired as Acting Commissioner on 21 February 2024. Dr Adam was the Court's longest serving Acting Commissioner, having first been appointed in 2007.



JUDGMENTS

KENYAN COURT OF APPEAL

National Environment Management Authority & Ors v KM (Minor suing through Mother and Best friend SKS) & Ors (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (23 June 2023) (SG Kairu, P Nyamweya and JW Lessit JJA)

(Decision on appeal: *KM & 9 others v Attorney General & 7 others,* Mombasa ELC Petition No 1 of 2016; [2020] eKLR (Omollo J))

Facts: Residents of Owino-Uhuru village in Kenya (**residents**) and the Centre for Justice, Governance and Environmental Action (**CJGEA**) filed a petition in the Environment and Land Court (**trial court**) against 17 state and private entity respondents, contending that a factory operated by the 16th respondent (**Metal Refinery**) was polluting the environment with waste containing lead particles. The residents contended that since the commencement of the factory's operations, studies conducted in the village revealed unacceptably high levels of lead poisoning and contamination in human blood, soil, air and dust. CJGEA also claimed that the owner of the property, the 17th respondent, Penguin Paper and Book Co (**Penguin**), had been issued with a licence by the Export Processing Zones Authority (**EPZA**) to operate as an export processing zone company, in violation of the Export Processing Zones Act (**EPZ Act**). Penguin had leased part of the land to Metal Refinery, which was issued with a trading licence by the Mombasa County Council to construct and operate a factory dealing with toxic lead. The residents and CJGEA contended that the government respondents were responsible for constitutional infractions as a consequence of their regulation of Metal Refinery and Penguin.

The trial court upheld the petition, declaring that the residents' rights to a clean and healthy environment, the highest attainable standard of health, clean and safe water and to life were violated by the actions and omissions of the respondents. The trial court awarded the residents 1.3 billion Kenyan shillings for personal injury and loss of life, apportioning the liability between the respondents respectively. The trial court ordered the respondents to clean up the waste in the village and the state authorities to develop and implement stronger policies regarding lead factories. The National Environment Management Authority (**NEMA**) and EPZA appealed.

Issues:
(1) Whether the state and state agencies were exempt from the application of the polluter pays principle;
(2) What was the scope of the state's liability in relation to the right to a clean and healthy environment;
(3) Whether the EPZA assumed the legal risk for any shortcomings by NEMA in approving operations of Metal Refinery's factory before it was issued with an environment impact assessment licence;
(4) What was the nature and application of the precautionary principle in environmental matters; and
(5) What were the principles to be considered in deciding whether an appellate court could disturb the quantum of damages awarded by a trial court.

Held: Appeal partially upheld, only in relation to the apportionment of liability and the quantum of damages (per SG Kairu, P Nyamweya and JW Lessit JJA):
(1) The trial court did not exclusively rely on the polluter pays principle to establish liability on the part of NEMA, EPZA and the other state agencies: at [68]. In any event, it is not a hard and fast rule that the state and state agencies are exempt from the application of the polluter pays principle. The Environmental Management and Co-ordination Act 1999 required the trial court to be guided by principles of sustainable development, including the polluter pays principle: at [71];
(2) The Constitution of Kenya places positive obligations upon the state and state agencies to promote and protect the right to a healthy environment by taking "all necessary measures". State liability may thus derive from an administrative authorisation, an absence of regulation or from inadequate measures relating to activities of the private actors, which result in harm to the environment: at [72];

(3) The EPZA was under a specific duty, under the EPZ Act, to ensure that business entities licensed under the Act did not have a damaging impact on the environment or engage in unlawful activities. EPZA was therefore not only in direct violation of the EPZ Act but also assumed the legal risk and responsibility for any shortcomings by NEMA in its process of issuing the environmental impact assessment licence (EIA) to Metal Refinery: at [19];

(4) The precautionary principle does not permit the taking of risks in unknown cases; instead, it requires caution to be taken even where there is no evidence of harm. Scientific analysis of risks should form the core of environmental rules and decisions and within EIA processes: at [90]; and

(5) The Court of Appeal determined that the trial court failed to properly account for the relevant factors and principles of law in determining the quantum of the damages. Only a sample of the residents were tested for lead levels in their blood, creating the possibility for free riders and opportunists to make personal gain from the tragedy. Although the Court of Appeal Rules 2022 allowed the Court to vary an order made by a superior court, it was necessary in this case that all claimants be identified, ascertained and compensated before a new quantum be determined. The matter was therefore remitted for re-determination of the quantum of damages: at [92]-[108].

SUPREME COURT OF NEW ZEALAND

***Smith v Fonterra Co-operative Group Limited* [2024] NZSC 5** (Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ)

(Decision under review: *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 (Court of Appeal), on appeal from *Smith v Fonterra Co-operative* Group Ltd [2020] NZHC 419, [2020] 2 NZLR 394 (High Court))

Facts: In 2019, Mr Smith, a Ngāpuhi and Ngāti Kahu elder, filed a statement of claim in the High Court (New Zealand's highest court of original jurisdiction) against the seven respondents. Each of the respondents were a New Zealand company involved in industries which either emitted greenhouse gases (**GHGs**) or supplied products which emitted GHGs when burned.

Mr Smith raised three causes of action: public nuisance; negligence; and a "proposed climate system damage tort". This proposed new tort involved a duty to cease materially contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change.

Mr Smith alleged the respondents had materially contributed to the climate crisis and sought a declaration that the respondent unlawfully breached a duty to him, or caused or contributed to a public nuisance, and had caused or would cause him loss. He also sought an injunction requiring the respondents to achieve peak emissions by 2025, a linear reduction in emissions by the ends of 2030 and 2040, and net zero emissions by 2050.

Mr Smith's claim was also based on tikanga Māori, which were Māori customary practices or behaviours. Mr Smith argued that tikanga informed the legal basis of the causes of action and the development of the common law in New Zealand. Under tikanga, environmental harm was itself a harm and, where such harm had occurred, steps must be taken to restore balance.

In 2020, the High Court ruled the public nuisance and negligence claims were not reasonably arguable and these claims were struck out. The proposed climate system damage tort was not struck out. Mr Smith appealed to the Court of Appeal, and the respondents cross-appealed. The Court of Appeal, in a unanimous bench of three judges, struck out all three causes of action. In relation to using tort claims to address climate change, the Court of Appeal stated that:

> … the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination: at [16] of [2021] NZCA 552; [2022] NZLR 284, quoted at [8] by the Supreme Court.

In relation to the proposed climate system damage tort, the Court of Appeal's view "was that the 'bare assertion of the existence of a new tort without any attempt to delineate its scope' was insufficient to withstand strike out 'on the basis of speculation that science may evolve by the time the matter gets to trial'": at [9] of the Supreme Court, quoting Court of Appeal at [124].

Mr Smith appealed to the Supreme Court in 2021 and was granted leave to appeal in 2022.

Issues:

(1) Whether the standard for strike out was met;
(2) Whether common law actions over GHG emissions were excluded by statute;
(3) Whether the public nuisance claim was bound to fail;
(4) The status of the remaining causes of action; and
(5) Whether tikanga can inform the formulation of tort claims.

Held: Appeal upheld (unanimously with reasons given by Williams and Kós JJ):

(1) The standard for strike out for the public nuisance claim was not met. Where a claim is novel, but founded on seriously arguable non-trivial harm, the common law should lean towards hearing the claim even if attribution to individual respondents remained difficult. Strike out is only appropriate where a case is bound to fail, regardless of the facts proved or the arguments and policy considerations argued at trial: at [83]-[85], [143];
(2) There was no basis to conclude that legislation had displaced tort law in relation to climate change actions. New Zealand's main climate change legislation, the Climate Change Response Act 2002, which provided the legal framework to meet its international emissions reduction obligations and set out its emissions trading scheme, was "inherently unlikely" to exclude tort actions as there was no clear language to that effect nor was it a necessary implication of that Act's operation. Further, common law rights of action were expressly preserved in New Zealand by virtue of s 23 of the Resource Management Act 1991, the Act which governed the environmental effects of human activity: at [92]-[101];
(3) In considering whether the public nuisance claim was bound to fail, the Supreme Court agreed with the Court of Appeal as to the four appropriate questions to address regarding strike out, but came to different conclusions.
    (a) First question: Whether actionable rights were tenably pleaded: the rights pleaded by Mr Smith (to public health, public safety, public comfort, public convenience and public peace) fell within rights previously identified (i.e. to life, health, property and comfort) as being a foundation for a public nuisance pleading: at [144]-[145].
    (b) Second question: Whether independent illegality was required: public nuisance does not require the act or omission to be independently unlawful. Rather, what matters is that the act or omission causes common injury: at [146]-[147].
    (c) Third question: Whether the special damage rule was met or required: the special damage rule is a rule of standing, judged by the question of whether the damage suffered by the plaintiff was different from the damage suffered by other members of the community. The High Court found that Mr Smith had a tenable claim to meeting the rule because of his pleading of damage to coastal land, where he and others claimed legal and distinct tikanga interests: at [148]-[152].
    (d) Fourth question: Whether there was a "sufficient connection" between the pleaded harm and the respondents' activities: the Supreme Court acknowledged that the "common law has not previously grappled with a crisis as all-embracing as climate change". However, there have been numerous cases in which public nuisance has been found due to defendants' actions in discharging into rivers. In these cases, not all of the polluters were before the court and it was not realistic to identify a finite number of known contributors. The question of how the "law of torts should respond to cumulative causation in a public nuisance involving newer technologies and newer harms (specifically GHG emissions] is a matter that should not be answered pre-emptively". Suppliers of fuels producing GHG should not be eliminated as parties until these questions have been answered. For the strike out application, it must be assumed that harm to the land and Mr Smith's other pleaded interests were a consequence of the GHG emissions from the respondents' activities. Further, the Supreme Court noted that Mr Smith "may face obstacles in obtaining any remedy requiring cessation (by injunction): at [153]-[171].
(4) Where the primary cause of action is not struck out, as a point of principle any remaining causes of action generally should not be struck out unless they meet the criteria both for striking out and are likely to materially add to costs, time, and deployment of court resources. As the three causes of actions alleged the same relevant facts, striking out the remaining two causes of action (negligence and proposed climate system damage tort) would be unlikely to save on cost, time or resources: at [174]-[176]; and
(5) The trial court will need to grapple with tikanga, which has been applied to tort actions previously: at [188].

FEDERAL COURT OF AUSTRALIA

***Munkara v Santos NA Barossa Pty Ltd* (No 3) [2024] FCA 9** (Charlesworth J)

(Related decisions: *Munkara v Santos NA Barossa* (No 2) [2023] FCA 1421 (Charlesworth J); Munkara v Santos NA Barossa [2023] FCA 1348 (Charlesworth J); *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838 (Bromberg J); *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (Bromberg J))

Facts: Santos NA Barossa Pty Ltd (**Respondent**) was authorised, by licences issued under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), to conduct a project, the 'Barossa Project', consisting of gas extraction and exportation from the Timor Sea. An activity forming part of the Barossa Project entailed the construction of a 262km gas export pipeline between the Bonaparte Basin to a liquified natural gas plant in Darwin, which was expected to pass, at its closest approximately 7kms, to the west of the Tiwi Islands. The **Applicants**, Simon Munkara, Carol Puruntatameri and Maria Purtaninga Tipuamantumirri, all of whom were Indigenous Australians from the Tiwi Islands, alleged that the construction of the pipeline and its embedding in the sea created a risk to their cultural heritage, both tangibly and non-tangibly. In particular, the pipeline was said to adversely impact the archaeological records of the Jikilaruwu, Munupi and Malawu peoples on the seabed and two Dreaming stories concerning a rainbow serpent known as Ampiji and the Crocodile Man known as Jirakupai founded in ancient oral tradition as well as 'potentially adapted beliefs': at [1018]-[1028]. Following two previously granted injunctions by Charlesworth J (*Munkara* and *Munkara* (No 2)), the most recent of which took effect on 15 November 2023 and prevented the Respondent from conducting work on the Barossa Project on all but the northernmost 86km of the pipeline route, the Applicants submitted that the obligation imposed by reg 17(6) of the Offshore Petroleum and Greenhouse Gas Storage (Environment Regulations) 2009 (Cth) (**Environmental Regulations**) – since repealed and substituted by the Offshore Petroleum and Greenhouse Gas Storage (Environment Regulations) 2023 (Cth), though in substance largely same – enlivened the requirement for a revised environmental plan responsive to a 'new or increased environmental impact of risk'.

Issue: Whether the Respondent's activity in the construction of the gas export pipeline triggered the obligation under reg 17(6) of the Environmental Regulations.

Held: The application was dismissed; the injunction of 15 November 2023 was discharged:

(1) The proper construction of reg 17(6) of the Environmental Regulations entailed an evaluative assessment of the environmental risk in question, having regard to its significance, probability of occurrence, nature and magnitude: at [1298]. Accordingly, reg 17(6) provided for a process of submission, consideration and acceptance by the relevant consent authority, the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**), of an environmental plan where a new and significant environment risk arose from an activity, as was advanced, essentially, by the Respondents: at [232];
(2) The environmental risk was not relevantly 'significant': at [1298]-[1310]. In particular, the evidence did not bear out, to the requisite standard of the balance of probabilities, that any artefacts of archaeological significance resided on the seabed, in respect of which the pipeline would otherwise have posed a threat. The possibility of such artefacts, and any attendant risk, was instead characterised as 'negligible': at [1306];
(3) Moreover, the environmental risk was not relevantly 'new': at [1311]-[1314]. 'New' was held not to include the discovery of a previously unknown risk, as was submitted by the Applicants, but rather an objective fact or set of circumstances that came in existence after the approval of the initial environmental plan: at [238], [1312]. In this case, the evidence did not support the conclusion that any such facts or circumstances had occurred after the approval of the initial environmental plan by the NOPSEMA in March 2020; and
(4) As to the evidence before the Court, Charlesworth J made critical comments of certain aspects of the expert evidence led by the Applicants, in particular its veracity and independence: at [1198], as well as the conduct of instructing solicitors, which was characterised, generally by way of conclusion, as assuming the role of 'an actor in the factual landscape' of the proceedings and, in particular, to 'synthesiz[ing]' anthropological and ethnographic material: at [248], organising workshops the evidentiary products of which were to be treated with 'consideration caution': at [1027] and 'witness coaching': at [1135].

QUEENSLAND COURT OF APPEAL

***Brisbane City Council v Leahy & Ors* [2023] QCA 133** *(Flanagan and Boddice JJA, Ryan J)*

(Decision under review: *Leahy v Brisbane City Council* [2022] QSC 200 (Davis J))

Facts: Brisbane City Council (**Council**) approved the exhibition of an electronic advertising sign (**sign**) pursuant to the *Advertisements Local Law 2013* (Qld) (**Local Law**) and the *Advertisements Subordinate Local Law 2005* (Qld) (**Subordinate Local Law**), which have since been consolidated and replaced by the *Advertising Devices Local Law 2021* (Qld). Section 10(1) of the Local Law mandates what the Council must have regard to in deciding an application for a sign. These considerations included the public interest. Section 10(2)(e) required that the approval be consistent with the Subordinate Local Law, which identified neighbouring properties as a class of persons who may be affected by the approval.

Mr Leahy was the registered owner of residential premises adjoining the location of the proposed sign. Mr Leahy was unaware of the application for the sign and given no opportunity to make submissions or object to the application. Mr Leahy sought an order to have the decision set aside and remitted to the Council for further consideration on the basis of six grounds of review. Relevantly, these included a failure to afford Mr Leahy procedural fairness and a failure to take into account relevant considerations.

The primary judge upheld the appeal, determining that the Council was required to afford Mr Leahy procedural fairness and had failed to do so, and that, in making its decision, it had failed to take into account the relevant consideration of whether the views of neighbouring properties might be obscured, dominated or overcrowded by the sign. The Council appealed the primary judge's finding.

Issue: Whether the primary judge erred in finding that a subclass of those affected by the decision (the owners of neighbouring properties) were entitled to procedural fairness and that the identified subclass of neighbours was limited and identifiable.

Held: Appeal dismissed with costs (per Flanagan JA at [60], Boddice JA agreeing at [61] and Ryan J agreeing at [62]):

(1) The legislative framework expressly recognised that the interests of distinct classes of persons would be affected differently. The relevant inquiry was what the content of the obligation to afford procedural fairness ought to be as it applied to the particular identifiable class of which Mr Leahy was a member, namely the neighbouring properties whose views might be obscured, dominated or overcrowded: at [40];

(2) In circumstances where the legislative framework did not specify the extent to which procedural fairness must be afforded to affected persons, the content of that obligation falls to be determined by having regard to the size and nature of the distinct classes to which the duty was owed and the interests which may be affected: at [42], [47];

(3) The Council may only approve the exhibition of an advertisement if the dimensions of the advertisement bear a reasonable relationship to the dimensions of surrounding buildings and allotments in such a way that the advertisement's presence was not unduly dominating or oppressive and did not unreasonably obstruct existing views: at [57];

(4) In deciding to approve the exhibition of an advertisement, the Local Law and the Subordinate Local Law required the Council to have regard to whether the relevant advertisement respected the amenity of other property owners and did not obscure, dominate or overcrowd the views of existing or prospective development on neighbouring properties: at [58]-[59]; and

(5) Any difficulty associated with identifying the class of "neighbouring properties" informed only the content of the obligation to afford procedural fairness. It did not demonstrate any clear intendment that the principles of natural justice and procedural fairness were excluded: at [59].

NEW SOUTH WALES COURT OF APPEAL

***Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2023] NSWCA 264** (Gleeson JA, Basten AJA, Preston CJ of LEC)

(Decision under review: *Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2022] NSWLEC 150 (Moore J))

Facts: Hinkler Ave 1 Pty Limited (**the applicant**) lodged an appeal to the Land and Environment Court in respect of a

deemed refusal of a development application by Sutherland Shire Council (**the respondent**). The applicant sought approval for the demolition of existing structures and construction of a mixed use development in Caringbah.

On 26 November 2021, the State Environmental Policy (Housing) 2021 (**2021 SEPP**) repealed and replaced the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**2009 SEPP**). The applicant by Notice of Motion sought to have a separate question heard. The separate question heard was whether the development application was made on or before 26 November 2021 for the purpose of cl 2(1)(a) of Schedule 7A of the 2021 SEPP (**savings provision**). The primary judge determined that the development application had not been made on or before 26 November 2021 for the purpose of the savings provision, meaning that the development application could not be assessed and determined pursuant to the now repealed 2009 SEPP.

The applicant sought leave to appeal against the primary judge's determination of the separate question. The applicant challenged the primary judge's decision on four questions of law. The applicant contended that the judge erred as to when a development application is made (**Ground 1**); in finding that lodgment was not complete until the fee was paid (**Ground 2**); in not determining for himself whether the development application met the statutory requirements (**Ground 3**); and in identifying the requirements for the plan to accompany the development application (**Ground 4**).

Issues:

(1) Whether the applicant should be granted leave to appeal; and

(2) Whether the primary judge erred in determining that the development application had not been made on or before 23 November 2021 for the purpose of the savings provision.

Held: Leave to appeal granted; appeal dismissed; applicant to pay the respondent's costs arising from the appeal and the application for leave to appeal (per Preston CJ of LEC at [71], Basten AJA agreeing at [2] and Gleeson JA agreeing at [1]):

(1) Leave to appeal should be granted on the basis that the question of the applicable legal regime to the proposed development was reasonably arguable: at [6];

(2) A development application is made when it is lodged. That purpose is effected by notification of lodgment on the NSW planning portal. The planning portal recorded the date of notification of lodgment as 13 December 2021. The primary judge correctly found that the application had not been "made" on or before 26 November 2021: at [27]-[29], [33];

(3) A development application unaccompanied by information and documents that were required by the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**) was incomplete. This means that the development application had not been "made" for the purpose of the savings provision: at [113]-[114];

(4) A development application is taken not to be lodged until the fee to accompany the development application was paid: at [37], [43], [129], [160];

(5) The primary judge's function, in hearing an appeal from the deemed refusal of a development application, was to make the decision which should have been made by the consent authority. The primary judge did not fail to determine whether the development application had been made by the critical date: at [67], [147]; and

(6) The primary judge did not misdirect himself in having regard to a cross-reference within cl 2(1)(d) of Sch 1 to cl 56(2)(b) of the EPA Regulation which demanded the availability of the prescribed information "in a concise visual form". The primary judge was correct to focus on those public purposes in considering the need for compliance with the requirements of the EPA Regulation: at [68], [150]-[152].

***Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2023] NSWCA 275** (Leeming, Payne and Mitchelmore JJA)

(Decision under review: *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2023] NSWSC 262 (Basten AJ)) (Related decisions: *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2019] NSWLEC 28 (Sheahan J); *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2020] NSWLEC 66 (Moore J); *Mangoola Coal Operations Pty Limited v Muswellbrook Shire Council* [2021] NSWCA 46 (Bell P; Macfarlan and Brereton JJA); and *Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council (No 2)* [2022] NSWLEC 129 (Moore J))

Facts: Mangoola Coal Operations Pty Ltd (**appellant**) appealed from the dismissal of one of the two proceedings heard concurrently in the Common Law Division of the Supreme Court (referred to as the class 4 proceeding and the

common law proceeding). The various earlier decisions related to the categorisation of land surrounding an open-cut coal mine which was owned by the appellant. Muswellbrook Shire Council (**Council**) assessed rates payable by the appellant on the basis that the land was categorised as "mining". The appellant challenged the Council's categorisation, which eventually led to an appeal before the Court of Appeal, which found in the appellant's favour. The land was subsequently recategorized as "farmland" with retrospective effect from 1 July 2016.

The proceedings the subject of this appeal sought the recovery of rates overpaid by the appellant to the Council between the 2016/17 and 2020/21 financial years. The appellant obtained judgment in its favour to recover the last payment it made to the Council based on its entitlement at common law. The appeal did not seek to disturb the common law proceeding judgment.

In the class 4 proceeding the appellant sought either a refund or credit for the overpaid rates under s 527 of the *Local Government Act 1993* (NSW) (**Local Government Act**). The primary judge held that the appellant's claim was barred by the 12-month limitation period under s 2(1) of the *Recovery of Imposts Act 1963* (NSW) (**Imposts Act**) which related to the commencement of proceedings to recover overpaid tax that was "recoverable on restitutionary grounds". On appeal, the appellant argued that its claim was not one to "recover" money or was not for the recovery of money on "restitutionary grounds".

Issues:

(1) Whether the appellant had a right under s 527 of the Local Government Act to recover the overpaid rates in addition to its right at common law; and
(2) If so, whether that right was subject to the 12-month limitation period imposed by s 2(1) of the Imposts Act.

Held: Appeal dismissed with costs (per Leeming JA, Payne and Mitchelmore JJA agreeing):

(1) There were difficulties in reading "recoverable on restitutionary grounds" as involving a distinction between common law and statutory claims. Rather, the words invoked a dichotomy between payments sought to be recovered because they were overpaid and payments sought to be recovered to compensate for loss caused by breach of contractual, tortious or statutory duty: at [80]-[83];
(2) A consideration of text, context and purpose made clear that s 2(1) of the Imposts Act applied to both the class 4 proceeding and common law proceedings. It was difficult to reconcile the width of the Imposts Act and its purpose of safeguarding revenue with a narrow construction being given to "recoverable on restitutionary grounds". The Court was required to prefer a construction that promoted the purpose underlying the Act: at [84]-[88];
(3) While extrinsic material showed that a purpose of the various amendments to the Imposts Act was to safeguard against common law claims, it did not follow that the Imposts Act was to be construed as being confined to such claims: at [89];
(4) To read "recover" under s 2(1) of the Imposts Act as requiring the payment of money to the exclusion of a claim for credit would lead to improbable consequences and would frustrate the purposes of the Imposts Act. Where an enactment prohibited the doing of a thing, the prohibition was taken to extend to the doing by indirect or roundabout means: at [99]-[101]; and
(5) It was unnecessary to resolve the issue of whether the appellant enjoyed a right under the Local Government Act to a refund or credit. However, the Court in obiter stated that s 527 of the Local Government Act considered alone did not confer such a right: at [105]-[111].

***Ramsay v Minister for Lands and Water; Hospitality and Racing, The Minister administering the Water Management Act 2000* [2023] NSWCA 299** (Bell CJ, Payne and Adamson JJA)

(Decision under review: *Ramsay v The Minister for Lands and Water; Hospitality and Racing, The Minister administering the Water Management Act 2000* [2023] NSWLEC 66 (Pain J))

Facts: The appellants owned two properties located on a floodplain subject to the Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2016 (NSW). In 2014 the appellants registered their interest with the respondent Minister to obtain floodplain harvesting (regulated river) access licences (**FH licences**). The appellants were informed they were eligible to be issued FH licences in 2015. The Minister sent draft share component determinations to the appellants in September 2022. The appellants then sent letters to the Department of Planning and Environment in October 2022 asserting that the share components for each property should exceed 7,500/ 8,000 ML. In February 2023 the Minister notified the appellants of the final share component determinations for

the FH licences. The share components of water were less than the amount sought by the appellants in the letters dated October 2022. The appellants commenced two Class 1 proceedings purporting to appeal the Minister's decisions not to grant FH licences with the share component sought in the letters dated October 2022. The appellants relied on appeal rights in s 368(1)(a) of the *Water Management Act 2000* (NSW) (**WM Act**) regarding refusal to grant an access licence and s 368(1)(c) regarding imposition of discretionary conditions on an access licence. The Minister filed two notices of motion seeking summary dismissal of the proceedings under r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) on the basis no reasonable cause of action was identified. The primary judge held that the Minister's decisions were not refusals of FH licences and that the share components were not discretionary conditions so no appeal right under s 368 of the WM Act available. The primary judge dismissed both proceedings. The appellants appealed to the Court of Appeal.

Issues:

(1) Whether the primary judge erred in finding that the determination of the Minister to grant the appellants' FH licences with only a portion of the share components applied for were not decisions refusing to grant an access licence within the scope of s 368(1)(a) of the WM Act (**Grounds 1 and 2**); and

(2) Whether the primary judge erred in not finding that the share components of the FH licences granted were 'discretionary conditions' in relation to s 368(1)(c) of the WM Act (**Grounds 3 and 4**).

Held: Appeal dismissed with costs (per Bell CJ at [74], Payne JA agreeing at [75] and Adamson JA agreeing at [76]):

(1) The primary judge was correct to find that s 368(1)(a) of WM Act was not engaged. To construe the letters as applications was at odds with the WM Act scheme. Nothing was refused. Once the appellants were held to be eligible for FH licences, the Minister was obliged to determine the share components under reg 23B(5) of the Water Management (General) Regulation 2018 (NSW) (**WM Regulations**). The FH licences took effect when the appellants were notified of the determination (Grounds 1 and 2): at [51], [57]; and

(2) The primary judge was correct to find that the share components were not discretionary conditions. The WM Act distinguished between share components and conditions of access licences. By definition an FH licence must include a share component which can only be amended in accordance with s 68A of the WM Act. Share components must be determined using models the Minister was required to follow under reg 23G of WM Regulations (Grounds 3 and 4): at [63], [65]-[69].

***Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5** (Payne, Kirk JJA and Griffiths AJA)

(Related decision: *G&J Drivas Pty Ltd v Sydney Metro* [2023] NSWLEC 20 (Duggan J))

Facts: The Appellant, Sydney Metro, was a State statutory corporation and the proponent of the Sydney Metro West, being the metro train line project intended to run between Westmead and Sydney CBD. The Respondents, G&J Drivas Pty Ltd and Telado Pty Ltd, jointly own a large block of land in the Parramatta CBD. Despite their initial intention to develop the site, the Respondents, between February and March 2019, began to slow preparatory work (referred to as the 'Discontinuance Decision') due to a suspicion that the site would be compulsorily acquired by the Respondent. Work ceased on the site (referred to as 'Stop Work Decision') on 21 October 2019, following a telephone call from the Appellant that it would be so acquired for the proposes of Sydney Metro West project. Compulsory acquisition of the site did not occur, however, until 19 March 2021, some seventeen months later. In the proceedings the subject of the appeal, in the Land and Environment Court of NSW, Duggan J determined both the market value of the site ($179 million) and the loss attributable to disturbance ($10.8 million) pursuant to, respectively, s 55(a) and ss 55(d) and 59(1)(f) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Act**). Her Honour relevantly determined the market value of the site by reference to the decrease in value caused by the proposal to carry out the public purpose caused by the decision not to progress the development by the Respondents (by means, for example, of obtaining development consents and undertaking demolition work). Her Honour treated the issue of entry into a construction contract differently, determining that that did not affect the site's market value. Sydney Metro appealed that decision, and the Respondent brought a cross-appeal.

Issues:

(1) Whether, in respect of the appeal, Duggan J erred in determining the market value of the site by taking into account the decrease in value caused by the proposal to carry out the public purpose as a consequence of the Respondents' Discontinuance and Stop Work decisions;

(2) Whether, in respect of the cross-appeal, Duggan J erred in excluding from the determination of the site's market value the benefit of the Respondents having entered a construction contract for their proposed development; and

(3) Whether, further to the appeal, Duggan J erred in allowing the Respondents' disturbance claim for supposed stamp duty cost and mortgage costs in acquiring a replacement site.

Held: The Court upheld the appeal, and dismissed the cross-appeal (per Kirk JA, Payne JA and Griffiths AJA agreeing):

(1) The Court held that textual and contextual considerations of s 56(1)(a) of the Act belied Duggan J's construction, as adopted by the Respondents. The causal inquiry that section 56(1)(a) is directed towards, as part of the assessment of the market value of the land in question, was the effects on such value of the actual or proposed carrying out of the public purpose, as distinct from the effect of the proposed acquisition: at [37]-[39]. In this case, it was the Respondents' decisions in light of the acquisition of their land that caused the relevant effect on the value of the land, not the Appellant in carrying out the public purpose of the Project, rendering the relevant causal link too indirect or remote. The construction of the relevant section adopted by the Court, which resisted treating 'caused by' in an overly broad factual manner, was further supported by purposive considerations, in particular the aim of providing just recompense for compulsorily acquired land, which militated against a situation in which former owners such as the Respondents stood to receive a net benefit, and hence the possibility of significant, unjust over-compensation: at [51];

(2) It was held that a construction contract was an instance of an effect on the market value of the site attributable to the Respondents' own decisions, not the acquisition for the public purpose: [93]. To the extent that Duggan J disregarded such an issue pursuant to s 56(1)(a) of the Act, her reasoning was upheld. Otherwise, the Respondents' cross-appeal raised questions of fact in and were not appealable: s 57(1) of the *Land and Environment Court Act 1979* (NSW): at [94]; and

(3) The Respondents' claim for stamp duty and mortgage costs under s 59(1)(f) of the Act was rejected. That section, read purposively and in context, could not sustain a claim for stamp duty in respect of replacement land of equivalent value said to be reasonably incurred as a direct and natural consequence of the acquisition of the land in question and its actual use: at [120]. Decisive was the apparent absence of reason as to why Parliament would see fit to place caps on the amounts compensable for stamp duty and financial costs where a claimant had relocated, or at least proposed to, subsequent to compulsory acquisition, as provided for under s 59(1)(d) and (e), but not in instances where they had not done so, as in this case.

***Anderson v Indigenous Land and Sea Corporation* [2024] NSWCA 9** (Kirk, Stern JJA and Simpson AJA)

(Related decision: *Indigenous Land and Sea Corporation v Anderson* [2022] NSWSC 1650 (Griffiths AJ))

Facts: The appeal concerned a dispute that arose between the Appellants, the first of which was a ceremonial elder of the Ghurrie clan, and the Respondent, the Indigenous Land and Sea Corporation (**ILSC**), a Federal statutory body established under the *Aboriginal and Torres Strait Islander Act 2005* (Cth) (**ATSI Act**). The properties the subject of the dispute were rural stations, one of which was in NSW known as Mogila, and the other in Queensland known as Currawillinghi. The Appellants were occupants of the subject properties, both of which were owned by the Respondent. The Respondent sought orders for the possession of the properties and, in the alternative, injunctive relief restraining the Appellant's from trespassing. The Respondent was unsuccessful in both respects, and subsequently appealed.

Issues:

(1) The legislation applicable to the ILSC that authorised the imposition of conditions on grants of land;

(2) Who owned the Land at relevant times;

(3) Whether the Appellants had adverse possession;

(4) An allegation of unconscionable conduct on the part of the Respondent;

(5) Whether relevant parts of the ATSI Act were supported by the Commonwealth's 'race power' under the Commonwealth Constitution; and

(6) A claim, under general law, for traditional Indigenous title distinct from native title.

Held: The Court dismissed the appeal, with costs (per Kirk JA, Stern JA and Simpson AJA agreeing):

(1) The Court held that while there may be some question as to which provision of ATSI Act empowered the ILSC to issue conditions attaching to grants of land, deciding that question, or any challenge to the deeds themselves, to which the Appellants were not parties, was

ultimately unnecessary in light of the principle of indefeasibility: at [52]-[53]. The Respondents were the registered proprietors of the subject properties whose title was, subject to recognised exceptions, indefeasible: at [54]. No exception, in particular that of fraud, which overlaps with the issue of unconscionability (below), applied: at [54];

(2) The Court held that the primary judge did not erroneously reject any claim as to adverse possession: at [71]. There was no evidence that Ngurampaa, who held legal and beneficial title in the subject properties until April 2019, did not consent to the Appellants' occupancy: at [68]. In any case, the time by which the Respondent's had withdrawn any such consent occurred well within the relevant limitation period: at [68];

(3) The Appellants' allegations regarding unconscionable conduct were not pleaded with sufficient clarity to be characterised as properly before the Court: at [75], [78]. Moreover, no error was demonstrated in the primary judge's reasoning in this respect: at [86];

(4) The Court observed that the Appellants' challenge in respect of s 51(xxvi) of the Constitution to Pt 4A of the ATSI Act was unsatisfactorily framed, as it was not obviously referrable to particular sections thereof: at [87] Arguments regarding race notwithstanding, the legal status of s 51(xxvi) as authorising Parliament to make special laws that it deems necessary in respect of Aboriginal people has been settled by the High Court: at [95]. The constitutional validity of the relevant Part of the ATSI Act, as well as the *Native Title Act 1993* (Cth), which was also impugned notwithstanding adverse High Court authorities, was not doubted: at [97]; and

(5) The Court denied the first Appellant's purported right of ownership pursuant to traditional laws and custom referred to as Euahlayi Celestial law that was said to be distinct from native title but nonetheless recognised under common law. The Court observed that such putative title fell within the scope of native title and that, outside of the latter, judicial recognition of traditional Indigenous title was not open to the Court: at [110].

***Carver v State of New South Wales* [2024] NSWCA 10** (Meagher, Gleeson JJA and Griffiths AJA)

(Related decision: *State of New South Wales v Carver* [2023] NSWSC 828 (Hammerschlag CJ in Eq))

Facts: The Appellant, since approximately 1996, occupied a cottage on Crown land along the Georges Rivers at Illawong. The same cottage was the subject of a permissive occupancy (**PO**) granted in 1935 by the Crown to the Respondent, Mr Price, whose wife lived in the cottage until 1980 and son (Mr Hood) subsequently rented the property out to third parties, including, relevantly, the Appellant. The Respondent sought orders for possession of the Land upon which the cottage stood. In the proceedings below, the Appellant argued that the Respondent was statute-barred from the cause of action pursuant to ss 27(1) and 38 of the *Limitation Act 1969* (NSW) (**Limitation Act**). The Appellant claimed that the PO had terminated upon Mrs Price's death and that Mr Hood (in 1981) and thereafter himself (in 1996) took adverse possession of the cottage pursuant to s 38 of the Limitation Act. The primary judge, Hammerschlag CJ in Eq, granted the orders sought by the Respondent and rejected the Appellant's arguments. The primary judge found both that the PO had not terminated upon Mrs Price's death and that s 13.1 of the *Crown Land Management Act 2016* (NSW) (**Crown Land Management Act**) precluded the appellant from establishing that the Crown's cause of action was statute-barred.

Issues:

(1) Whether the primary judge erred in finding that s 13.1 of the Crown Land Management Act precluded the Appellant's defence that the Respondent's claim for possession of the Land was statute-barred pursuant to ss 27 and 38 of the Limitation Act;

(2) Whether, if s 13.1 does not so operate, the Land was in continuous adverse possession for 30 years, first by Mr Hood and his wife and then by the Appellant, for the purposes of s 38 of the Limitation Act; and

(3) Whether, if the appeal was unsuccessful, the Appellant should be granted additional time to vacate the Land before a writ for possession was issued.

Held: The Court dismissed the appeal, with costs (per Griffiths AJA, Meagher and Gleeson JA):

(1) The Court held that the Appellant's defence pursuant to ss 27 and 38 of the Limitation was precluded by s 13.1 of the Crown Land Management Act: at [57]-[59]. By s 13(3), from which 'reserved land' within the meaning of s 170(5) of the *Crown Lands Act 1989* (NSW) was exempt. Therefore, the limitation period did not run in favour of the Appellant's claim to possessory title: [59]. Moreover, the Court rejected the Appellant's alternative formulation of his defence that s 65 of the *Limitation Act* operated narrowly to extinguish the Respondent's possession to the land against him

personally (as opposed to the world at large), such an interest not being one known at law: at [61];

(2) The Court held that the primary judge did not err in finding that the PO did not terminate upon Mrs Price's death, there being either want of evidence to demonstrate such a finding or, where evidence did exist, it was ultimately adverse to that conclusion: at [71]. The primary judge's findings regarding the claim for possessory title in respect either of Mr Hood or the Appellant were upheld: at [73], [83]. In neither case was the requisite *animus possidendi* made out; and

(3) The Court held that there was no basis to interfere with the primary judge's orders regarding the period of time by which the Appellant had to vacate the land: [85]. No error was demonstrated in respect of those orders, which otherwise stood with the exception of the date of their effect, which was amended to reflect the date of judgment in the present appeal.

***M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd* [2024] NSWCA 17**
(Ward P, Mitchelmore JA and Preston CJ of LEC)

(Decisions under review: *M&S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd* [2023] NSWLEC 65 (Pepper J); and *M & S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (No 2); M & S Investments (NSW) Pty Ltd v Boutros; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Boutros* [2023] NSWLEC 111 (Pain J))

Facts: M. & S. Investments (NSW) Pty Ltd (**M&S**) was granted leave in September 2021 to institute proceedings in the Land and Environment Court for the prosecution of numerous defendants. The proceedings related to alleged unlawful dumping of asbestos waste at a property in south western Sydney, which was jointly owned by M&S and an entity in liquidation.

The respondents sought dismissal of the proceedings and/or for the summonses to be struck out on the basis that the summonses were time-barred under s 216(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The issue turned on whether two persons, each Senior Land Development Engineers employed by the relevant council, were appointed as authorised officers under s 187(2) of the POEO Act for the purpose of s 216 of the POEO Act regarding the time limit to commence proceedings. The respondents argued that the individuals were authorised officers, relying on an instrument of delegation which identified s 378 of the *Local Government Act 1993* (NSW) (**LG Act**) as the authority to delegate. Pepper J (**first primary judge**) made orders striking out the summonses and dismissing the proceedings, finding that the persons were relevant authorised officers and therefore M&S was time-barred from bringing the proceedings.

While the first primary judge's judgment was reserved, M&S issued a subpoena to Optus Mobile Pty Ltd, seeking call and phone related records for two identified numbers which M&S asserted were relevant to obtain various evidence. Two motions were filed in response, seeking to set aside the subpoena. Pain J (**second primary judge**) set aside the subpoena on two grounds: first, that the subpoena was premature and secondly, because of the broad nature of the subpoena.

M&S sought leave to appeal, and filed summonses seeking judicial review of, the decisions of the two primary judges. The grounds of appeal against the first decision were threefold: first, misconstruction of the provisions of the POEO Act concerning the appointment of two persons as authorised officers for the purposes of the POEO Act; secondly, failing to draw various *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 inferences from the failure of the defendants to call the two individuals to give evidence; and thirdly, wrongly finding that the offences against ss 142A(1) and 144(1) of the POEO Act charged in the summonses were not continuing offences.

Mr Domenic Carbone, one of the respondents, applied to the Court to dismiss both of M&S's applications for leave to appeal under s 5F(3) of the Criminal Appeal Act 1912 (NSW) (Criminal Appeal Act) as incompetent or inutile. Mr Carbone's submissions were adopted by Ms Angela Carbone, another respondent. M&S applied to the Court under s 5F(4) of the Criminal Appeal Act for leave to adduce additional evidence, being an affidavit of M&S's solicitor annexing documents produced by Liverpool City Council.

Issues:

(1) Whether the first primary judge erred in finding that the two individuals holding the position of Senior Land Development Engineer were authorised officers under s 187(2) of the POEO Act for the purpose of s 216 of the POEO Act, by relying on the instrument of delegation identifying s 378 of the LG Act;

(2) Whether the second primary judge erred in setting aside the subpoena;

(3) Whether both primary judges' decisions should be judicially reviewed;
(4) Whether the appeals against both primary judges' decisions were incompetent or inutile; and
(5) Whether M&S's application for leave to adduce additional evidence should be granted.

Held: Appeal against the first primary judge's decision upheld; appeal against the second primary judge's decision dismissed; summonses for judicial review of both primary judges' decisions dismissed; application to dismiss the appellant's applications for leave to appeal against both primary judges' decisions dismissed; and leave to adduce additional evidence granted (per Preston CJ, Ward P and Mitchelmore JA agreeing):

In relation to M&S's appeal of the first primary judge's decision to strike out summonses commencing proceedings and dismissing the proceedings – upholding the appeal

(1) The first primary judge constructively failed to deal with the question of whether the two individuals were authorised officers and misdirected herself regarding ss 187 and 216 of the POEO Act and s 378 of the LG Act: at [103] (Preston CJ of LEC);
(2) The statutory powers in s 378 of the LG Act and s 187(2) of the POEO Act, being different powers under different statutes, were mutually exclusive. An exercise of one power cannot constitute, by itself, an exercise of the other power: at [88] (Preston CJ of LEC);
(3) The nature of each statutory power was fundamentally different. Whereas the power in s 378 of the LG Act was to delegate authority, the power in s 187(2) of the POEO Act was to grant authority. The delegation of a function to a person under s 378 of the LG Act cannot constitute the appointment of a person as an authorised officer under s 187(2) of the POEO Act and the grant of the corresponding functions to that person: at [89], [92] (Preston CJ of LEC);
(4) The instrument of delegation did not purport to appoint people who were Senior Land Development Engineers as authorised officers for the purposes of the POEO Act. The instrument of delegation was clearly an exercise of power under s 378 of the LG Act, not an exercise of power under s 187(2) of the POEO Act: at [93] (Preston CJ of LEC);
(5) Even if the instrument of delegation could be construed as delegating the functions of the CEO of the Council (being the general manager for the purpose of s 378 of the LG Act) to an authorised officer for the purpose of the POEO Act, proof that the CEO of the Council had been appointed as an authorised officer would be required. There was no such evidence: at [94] (Preston CJ of LEC);
(6) The functions of an authorised officer for the purpose of the POEO Act are non-delegable and can only be exercised by a person appointed as an authorised officer under s 187 of the POEO Act. Therefore, even if the CEO of the Council had been appointed as an authorised officer, which was not proven, the CEO of the Council did not have authority to delegate the functions as an authorised officer: at [95]-[96] (Preston CJ of LEC);

In relation to M&S's appeal against the second primary judge's decision to set aside the subpoena – refusing leave and dismissing the appeal

(7) The two grounds on which the second primary judge set aside the subpoena were reasonable on the facts and the decision involved a reasonable exercise of judicial discretion: at [116] (Preston CJ of LEC);
(8) There was no obligation on the second primary judge to re-draw the subpoena if it was too broad: at [34] (Ward P);
(9) There was no *House v The King* (1936) 55 CLR 499; [1936] HCA 40 error established in relation to the second primary judge's decision: at [35] (Ward P);

In relation to the application for judicial review of both primary judges' decisions

(10) Assuming both primary judges' decisions were judicially reviewable, the Court's determination of the appeals made it unnecessary to determine the applications: at [108], [117] (Preston CJ of LEC);

In relation to Mr Carbone's application to dismiss M&S's applications – dismissing the application

(11) The decisions of both primary judges were interlocutory: at [46]-[48] (Preston CJ of LEC); and

In relation to M&S's application to adduce additional evidence – leave granted

(12) M&S articulated a sufficient basis of relevance and explanation for why the evidence was not tendered in the Court below for leave to be granted: at [58] (Preston CJ of LEC).

Coffs Harbour City Council v Noubia Pty Ltd [2024] NSWCA 19 (Payne JA, Kirk JA and Preston CJ of LEC)

(Decision under review: *Noubia Pty Limited v Coffs Harbour City Council No 3* [2023] NSWLEC 36 (Pain J))
(Related decisions: *Coffs Harbour City Council v Noubia Pty Limited* [2022] NSWCA 32 (Leeming JA, Simpson AJA and

Preston CJ of LEC); *Noubia Pty Limited v Coffs Harbour City Council (No 2)* [2021] NSWLEC 142 (procedural ruling of Pain J); *Coffs Harbour City Council v Noubia Pty Ltd* [2020] NSWCA 142; (2020) 246 LGERA 56 (Bathurst CJ, Bell P and Basten JA); *Noubia Pty Ltd v Coffs Harbour City Council* [2019] NSWLEC 113 (Sheahan J))

Facts: Noubia Pty Ltd (**Noubia**) obtained development consent (**Consent**) in 2003 from Coffs Harbour City Council (**Council**) to construct 160 residential lots, a community centre lot and land for public reserve (**Lakes Estate**) in North Boambee Valley. Noubia sought and obtained the Consent on the basis it would build a "five lakes" scheme to address stormwater and drainage issues, including by creating two lakes on land which became Lot 94. In 2006, condition 1 of the Consent was amended to require Noubia to transfer land, including what became Lot 94, to the Council, which occurred in 2007. The Council was to compensate Noubia for the transferred land, the value of which was to be determined in accordance with ss 54(1) and 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**).

The Council offered $110,000 in compensation to Noubia for Lot 94, which it claimed was the value of the constrained plot bearing two lakes as at the date of transfer. Noubia sought greater compensation and brought proceedings in the Land and Environment Court (**LEC**). After the initial judgment of Sheahan J was successfully appealed and the proceedings remitted to the LEC, the primary judge awarded market value of $2,965,000 for Lot 94 pursuant to s 56(1)(a) of the Land Acquisition Act. The Council appealed this decision.

Issues:

(1) How s 56(1)(a) of the Land Acquisition Act was to be applied, given there was no compulsory acquisition of Lot 94;
(2) What the Council's public purpose in "acquiring" Lot 94 was;
(3) Whether the Council's public purpose caused a decrease in the value of Lot 94; and
(4) Whether the primary judge erred in failing to reach a factual conclusion on whether Noubia's hypothetical alternative development proposal would have been granted.

Held: Appeal allowed (per Payne JA, with Kirk JA agreeing at [130] and Preston CJ of LEC agreeing with additional reasons):

Issue 1: Application of s 56(1)(a) of the Land Acquisition Act

(1) Section 56(1)(a) of the Land Acquisition Act only applies to land that has been compulsorily acquired: Payne JA at [54], Preston CJ of LEC at [132]. Lot 94 was never compulsorily acquired, since under the Consent, Noubia was only required to transfer Lot 94 if it voluntarily carried out the Lakes Estate development: Payne JA at [54]; Preston CJ of LEC at [133]-[135].
(2) However, because the parties litigated on the basis that s 56(1)(a) could apply, the Court would do its best to give effect to the parties' decision to litigate on that basis: Payne JA at [55]; Preston CJ of LEC at [142]. Three assumptions were required. One, the transfer of Lot 94 was assumed to be an acquisition within the Land Acquisition Act. Two, the date of acquisition was assumed to be 17 May 2007, the date Noubia transferred Lot 94 to the Council. Three, there was a public purpose for acquiring Lot 94, which is the purpose for which condition 1 of the Consent was imposed: Preston CJ of LEC at [142].

Issue 2: Public purpose in "acquiring" Lot 94

(3) In applying s 56(1)(a), there are no "clear rules" for determining the relevant public purpose at an appropriate level of generality. Factors will include the degree of continuity of various elements of what is proposed and done, as well as fairness to both the claimant and acquiring authority. In addressing the "fairness" factor, an important touchstone is the concept of "compensation on just terms": Payne JA at [62]-[65]; Preston CJ of LEC at [144]-[146].
(4) The Council's suggested public purpose - that Lot 94 was acquired for managing the developed, and only the developed, upstream flows of water - was correct: Payne JA at [109]; Preston CJ of LEC at [144]-[146].

Issue 3: Decrease in value of Lot 94

(5) Section 56(1)(a) requires the court to disregard any change in value caused by carrying out the public purpose or the proposal to do so. Changes in value caused only by an owner's choices made prior to acquisition cannot be regarded as changes in value "caused" by the public purpose. There must be a "direct" (and not indirect) causal connection between the change in value and the carrying out of the public purpose: Payne JA at [59]-[67]; Preston CJ of LEC at [147]-[148].
(6) The primary judge was wrong to find that causation was established by the simple fact that Noubia transferred Lot 94 for the public purpose: Payne JA at [76]-[77], [84], [86]. Noubia had to show that, but for the actual or proposed public purpose, Lot 94 would have been

available for a more lucrative purpose at the date of transfer in 2007 and therefore more valuable: Payne JA at [77]-[80]; Preston CJ of LEC at [147]-[148].

(7) Noubia had to demonstrate that but for the public purpose, Lot 94 would not have been the site of two lakes. It was Noubia's own choice to propose the "five lakes scheme" and to build two lakes on what became Lot 94. The Council's public purpose did not compel Noubia to take this course; Noubia failed to prove its case: Payne JA at [83]-[86]; Preston CJ of LEC at [147]-[148].

Issue 4: Hypothetical alternative development proposal

(8) The primary judge erred in holding that the test was whether a hypothetical party to a sale of Lot 94 thought it likely Noubia would obtain consent to its hypothetical alternative development. Proving a decrease in value was a matter of mixed fact and law, and required the court to reach a conclusion, on the balance of probabilities: Payne JA at [120]-[121]; Preston CJ of LEC at [149]-[150].

SUPREME COURT OF NEW SOUTH WALES

***Fairfield City Council v Bastow Civil Constructions Pty Ltd* [2023] NSWSC 1143** (Mitchelmore JA)

(Decision under review: *Bastow Civil Constructions Pty Ltd v Fairfield City Council* (Local Court of NSW, Atkinson LCM, 5 August 2022))

Facts: Fairfield City Council (**Council**) appealed against the decision of a Local Court magistrate. In the court below, Bastow Civil Constructions Pty Ltd (**respondent**) brought proceedings for damages after the Council impounded its truck and subsequently sold the truck at auction. Prior to the sale, the respondent approached the Council numerous times to recover the truck. The respondent's approaches should have been, but were not, recorded in the Council's Customer Request Management System. The respondent contended that the truck was sold for much less than market value and claimed the difference as damages.

The magistrate held that the Council owed a statutory duty to act with reasonable care in relation to the sale of the truck under s 45(3) of the *Impounding Act 1993* (NSW) (**Impounding Act**), and that the Council breached that duty. Further, the magistrate held that the elements of negligence had been established but dismissed the claim on the basis that the Council was protected by ss 43 and 43A of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**).

In the appeal, the Council contended that s 45(3) of the Impounding Act did not create a cause of action and the magistrate erred in finding otherwise. The respondent filed a notice of contention asserting that the magistrate erred in relation to its claim in negligence.

Issues:

(1) Whether s 45 of the Impounding Act gave the respondent a cause of action against the Council for breach of statutory duty;
(2) Whether, by concluding that s 43 of the Civil Liability Act applied to an action in negligence, the magistrate erred in the construction and/or application of the provision;
(3) Whether the magistrate's conclusion that s 43A of the Civil Liability Act applied rested on an erroneous construction of the provision; and
(4) If s 43A applied, whether the Council's decision to sell the truck was so unreasonable that no authority could properly consider it to be a reasonable exercise of statutory power.

Held: Summons dismissed:

(1) Section 45(2) extinguished any right of action in relation to the sale or disposal of an item, except as specifically provided for under the Impounding Act. However, the proper construction of the section did not require such an exception to positively confer a cause of action. Such an inference would be an anathema to the accepted approach to statutory construction by which a court strives to give meaning to every word of a provision: at [59]-[60];
(2) The magistrate erred by concluding that s 45(3) of the Impounding Act gave the respondent a cause of action against the Council. Such a conclusion was not consistent with the terms or statutory purpose of the provision: at [58], [61];
(3) Section 45(3) operated to protect impounding authorities from actions for damages unless it was established that an authority acted without good faith or reasonable care: at [58]-[59];
(4) Section 43 of the Civil Liability Act applied only to claims for breach of a statutory duty. The magistrate erroneously applied s 43 in considering the negligence claim. The error was apparent from the fact that the magistrate awarded damages to the respondent on its

claim for breach of s 45(3) of the Impounding Act: at [68];

(5) To determine whether s 43A was engaged involved two stages:
   (a) The identification of whether and to what extent the liability upon which the defendant was sued "is based on" the exercise of a statutory power conferred on the defendant;
   (b) Whether the power identified is a "special statutory power": at [89], [96]-[97], [102];

(6) The magistrate's conclusion that the interpretation of the words "based on" in the provision meant the precautions fell "within the exercise of the Council's statutory power" did not reflect the statutory language or approach adopted in the earlier authorities. The question the magistrate should have asked was whether the liability for which the respondent was suing the Council was "based on" an exercise of or failure to exercise a special statutory power: at [101]; and

(7) There were multiple failures of the Council's policy in relation to the exercise of power of sale under s 24 of the Impounding Act. No authority could properly consider the sale of the truck a reasonable exercise of power in the face of the Council's omissions: at [108]-[110].

***Grocon Group Holdings Pty Limited v Infrastructure NSW (No 4)* [2023] NSWSC 1545** (Ball J)

(Related decision: *Grocon Group Holdings Pty Limited v Infrastructure NSW (No 2)* [2023] NSWSC 1144 (Ball J))

Facts: The first, second and third plaintiffs (**plaintiffs**) by notice of motion, sought production of two categories of document from Infrastructure NSW (**defendant**). The defendant made a claim for public interest immunity in relation to the first category (**Category 4 Documents**) and a claim for legal professional privilege for the second (**Category 6 Documents**). The plaintiffs were the successful tenderer for development rights of the area known as Central Barangaroo. The defendant was the successor to the rights and liabilities of the Barangaroo Development Authority (**authority**) who had responsibility over management of the development of the Barangaroo area.

The defendant's claim for public interest immunity in relation to the Category 4 Documents was advanced by the Cabinet Office and arose under s 130 of the *Evidence Act 1995* (NSW) (**Evidence Act**) due to the assertion that the documents related to deliberations of Cabinet. The defendant's claim for legal professional privilege related to advice received by the authority.

Issues:

(1) Whether the public interest in the production of the documents outweighed the public interest in preserving the confidential nature of Cabinet deliberations and documents; and

(2) Whether the defendant waived privilege in relation to legal advice it had received.

Held: Notice of motion dismissed save as to costs:

(1) There was public interest in maintaining the immunity in order to protect the processes of Cabinet, which was not outweighed by the public interest in ensuring that all relevant evidence was before the Court: at [24];

(2) Neither the defendant's list response nor affidavit evidence involved a waiver of privilege over advice received by the authority. It was plainly not correct that whenever a party asserted a particular proposition in a pleading, it would waive privilege in relation to legal advice it received on that matter: at [32]-[33];

In relation to Category 4 Documents

(3) Deliberations of Cabinet do not attract absolute immunity but such documents fall within a class of documents where there are strong considerations of public policy mitigating against their disclosure regardless of their contents: at [14]; and

(4) Upon examination of documents to which the claim for public interest immunity was made, the Court determined that none would assist the plaintiffs in their case, nor provide further information beyond what the plaintiffs already knew: at [23].

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

***M & S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (No 2); M & S Investments (NSW) Pty Ltd v Boutros; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Boutros* [2023] NSWLEC 111** (Pain J)

(Related decisions: *M & S Investments (NSW) Pty Ltd v Carbone* [2023] NSWLEC 87 [2023] NSWLEC 87 (Pain J); *M&S*

Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd [2023] NSWLEC 65 (Pepper J))

Facts: M&S Investments (NSW) Pty Ltd (**prosecutor**) commenced private prosecutions in September 2021 of five defendants for breaches of s 144AAA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) concerning unlawful disposal of asbestos waste. The five charges particularised events in 2016. Section 144AAA was introduced by the *Protection of the Environment Operations Amendment (Asbestos Waste) Act 2018* (NSW) and commenced on 25 January 2019. The offence did not exist in 2016. Notices of motion filed by the defendants sought orders that all remaining charges be quashed and dismissed as a nullity under s 17(1) of the *Criminal Procedure Act 1986* (NSW) (**CP Act**). The prosecutor then filed a notice of motion which sought to amend all five summonses by changing the date of the offences from 2016 to 30 August 2019.

Issues:

(1) Whether charges should be quashed and dismissed as a nullity under s 17(1) of the CP; and

(2) Whether date of the offences in the summonses could be amended under s 68 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

Held:

(1) Charges quashed under s 17 of the CP Act. The offence provision relied on did not exist at time of alleged offences, a fundamental defect giving rise to nullity. The defect could not be cured by amendment. The charges were unknown to the law: at [36]-[37]; and

(2) No summonses existed for amendment as the charges were quashed. If the summonses had not been quashed, the Court considered: at [40]:

  (a) Section 68 of the Court Act did not support the prosecutor's application to amend. Section 68(2) was not enlivened by s 21(a) of the Court Act: at [40];

  (b) Section 144AAA was not a continuing offence. The factual basis of the charges were events in 2016. No action of the defendants within definition of 'dispose' in s 144AAA(2) had been identified in 2019: at [41]-[42]; and

  (c) Amendments were not in the interests of justice or efficiency: at [44].

Environment Protection Authority v Sydney Water Corporation **[2023] NSWLEC 119** (Moore J)

Facts: The Environment Protection Authority (**the prosecutor**) commenced three prosecutions (**the proceedings**) against Sydney Water (**the defendant**) alleging breaches of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The summonses alleged one breach of failing to furnish the prosecutor with information and records upon request and two breaches arising from an incident involving a split in the pressurised rising main leading from a sewage pumping station in Strathfield.

On 26 May 2023, the prosecutor served a subpoena on the defendant to produce documents including: pipe condition inspections; CCTV footage recorded during the inspection of the rising main; and numerous reports detailing the results of sewer pipe pressure tests, canine odour detection trials, acoustic leak detection surveys and gas pocket detector tools. The defendant by Notice of Motion **(the motion**) sought to set aside the subpoena on the basis that the documents sought were voluntary environmental audits pursuant to s 172 of the POEO Act and thereby protected documents for the purpose of s 181 of the POEO Act.

Issue: Whether the documents sought in the subpoena were voluntary environmental audits pursuant to s 172 and therefore protected documents for the purposes of s 181 of the POEO Act.

Held: Motion granted in part. The CCTV footage of the rising main, CCTV inspection report (**the log**) and any communications containing instructions for the log sought in paragraphs 2(g), (k), 3, 4 and 5 of the subpoena were not protected documents within the terms of s 181 of the POEO Act; all other documents sought in paragraphs 2(a), (b), (c), (d), (e), (f), (h), (i), (j) and (l) of the subpoena were protected documents within the terms of s 181 of the POEO Act:

(1) The concept of a voluntary environmental audit is to be understood by considering the language and the context within which it is used: at [140];

(2) Chapter 6 of the POEO Act makes a clear distinction between the two types of environmental audit: mandatory and voluntary. Provisions setting requirements for mandatory audits cannot be shoehorned into the voluntary audit provisions: at [156];

(3) There was no obvious deficiency in the voluntary audit provisions warranting the insertion of additional requirements proposed to be necessary for voluntary

environmental audits. The highly prescriptive, structured and formalised approach marshalled by the prosecutor through expert opinion as to the process necessary to give effect to the nature of a "voluntary environmental audit" was rejected: at [157], [160];

(4) An environmental audit was to be regarded as a voluntary environmental audit if it was prepared for the sole purpose of a voluntary environmental audit and was a documented evaluation of an activity for one or both purposes in s 172(a) and (b) of the POEO Act. If a document satisfied these criteria, it was afforded protection under s 181 of the POEO Act. The protection was subject to the defendant waiving it within the terms of s 183(1) of the POEO Act: at [160]-[161];

(5) The log of the pipe cam investigation of the sewage reticulation system and the associated CCTV footage contained no explanation of the purpose for which the examination was undertaken. Each of these documents offered no evaluation of what might be drawn from consideration of that footage and did not recommend or propose any course of action to intervene or examine further the portions of the pipe within which the camera had been inserted: at [207]-[208]; and

(6) All the documents sought by paragraph 2 of the subpoena - other than the CCTV footage, the log of the pipe cam investigation and the relevant communications containing instructions for the log - were properly characterised as documents arising from the carrying out of processes that satisfied a proper understanding of the concept of voluntary environmental audit in s 181(1) of the POEO Act: at [205].

***Environment Protection Authority v Geagea* [2023] NSWLEC 125** (Preston CJ)

Facts: Ghossayn Group Pty Ltd (**Ghossayn Group**), was contracted by Didomi Pty Ltd (**Didomi**) to excavate and remediate a site in Dulwich Hill containing asbestos waste. Ghossayn Group wished to avoid the cost of lawfully disposing of the waste at a licensed waste facility. Mr Ghossayn, the sole director of Ghossayn Group, approached the Defendant, Mr Geagea, and asked if he could arrange for someone to provide false waste delivery dockets for waste disposal. Mr Geagea agreed to do so. He arranged for Mr Killick to provide the false dockets. Mr Badr, of Ghossayn Group, emailed Mr Geagea a spreadsheet containing the requisite information for the false dockets, which Mr Geagea provided to Mr Killick. When the dockets were produced, they were sent to Mr Badr. Mr Geagea received three phone calls from Mr Badr after the dockets were produced, requesting amendments. Mr Geagea provided Mr Killick with payment on behalf of Ghossayn Group. Ghossayn Group sent an invoice to Didomi, using the false dockets. Didomi discovered that the dockets were false and did not pay the invoice. Mr Geagea pleaded guilty to committing an offence against s 144AA(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), by reason of s 168(1)(c) of the POEO Act, in that he conspired with others to supply information about waste to another person in the course of dealing with the waste, being information that he knew was false or misleading in a material respect.

Issue: Taking into account the objective seriousness of the offence and the subjective circumstances of the offender, what is the appropriate sentence for the offence committed by Mr Geagea.

Held: Mr Geagea was convicted under s 144AA(2) of the POEO Act, as charged, and fined $54,000, with one half to be paid to the prosecutor. Mr Geagea was to pay the prosecutor's costs of the proceedings. Mr Geagea was also to publish a notice of his sentence in *The Daily Telegraph* and *Inside Waste* magazine, at his own expense:

Objective seriousness

(1) Mr Geagea offended against the legislative objectives of s 144AA(2) of the POEO Act, undermining the regulatory objectives and scheme for environmental protection: at [23]-[24].The maximum penalty for the offence was, at the time, $240,000 or imprisonment for 18 months or both: at [25]. Although Mr Geagea did not directly cause harm to the environment, but for Mr Geagea's assistance, Ghossayn Group may have been impeded in its quest to voluntarily dispose of the waste material: at [27]-[28]. The practical measure to prevent the harm was not to do the very act that constituted the commission of the offence: at [30]. It was reasonably foreseeable that Mr Geagea's conduct would facilitate the unlawful transportation and disposal of waste material and cause some degree of harm to the environment, by reason of the site not being licensed: at [32]. Mr Geagea had complete control over the causes giving rise to the offence: at [34]. Mr Geagea did not gain financially from his conduct: at [36]-[37]. Mr Geagea's planning did not exceed the degree of planning that would ordinarily be expected in an offence of this kind. There was no planned or organised criminal activity: at [39]-[40]. Accordingly, the

objective seriousness was in the lower end of the mid-range of offending: at [41]; and

Subjective circumstances

(2) Mr Geagea plead guilty to the offence eight months after the proceedings commenced. The discount to be afforded for the utilitarian value of the plea should be reduced from the maximum of 25%, to 20%: at [46]-[47]. Mr Geagea had no record of previous convictions: at [48]. Mr Geagea was shown to be of good character. Two character references, described him as an honest, hard-working person, committed to his family, community and religion: at [49]. Mr Geagea assisted the prosecutor in this matter and in investigations of other potential offences, reducing his penalty by a further 5%: at [50]-[51]. Mr Geagea expressed remorse and contrition for committing the offence: at [52]. Given his guilty plea and remorse, Mr Geagea was unlikely to reoffend: at [53].

***Environment Protection Authority v Ghossayn Group Pty Ltd; Environment Protection Authority v Ghossayn* [2023] NSWLEC 127** (Preston CJ)

Facts: Ghossayn Group Pty Ltd (**Ghossayn Group**) was contracted by Didomi Pty Ltd (**Didomi**) to excavate and remediate a site in Dulwich Hill (**site**). The site contained general solid waste and asbestos waste. Ghossayn Group wished to avoid the cost of lawfully disposing of the waste at a licensed waste facility and instead, disposed of the waste at a property in Luddenham, sub-leased by Mr Cannuli, which was not licensed to receive waste (**Luddenham property**). Mr Ghossayn, the sole director of Ghossayn Group, acquired false delivery dockets to provide to Didmoni, showing that the waste had been disposed of at a licensed waste facility (**first dockets**). Didomi noticed the dockets were false and notified Ghossayn Group. Mr Ghossyan thereafter intended to remove the waste material, unlawfully disposed of at the Luddenham property, however, was falsely informed by Mr Cannuli that the material had been moved to a different property in Bringelly (**Bringelly property**). Mr Ghossyan did not make inquiries to confirm this. Ghossayn Group moved waste material, which was not originally from the Dulwich Hill site, from the Bringelly property to a licensed Suez landfill. Ghossayn Group issued a second invoice to Didomi, which stated erroneously that the waste from Dulwich Hill had since been lawfully disposed of (**second dockets**). Ghossayn Group and Mr Ghossayn (by virtue of s 169(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**)) were charged with and pleaded guilty to offences against ss 142A(1) (pollution offence), 143(1) (transport offence), 144AAA(1) (disposal offence), 144AA(1) (second dockets offence) and/or (2) (first dockets offence) of the POEO Act. Mr Ghossayn was also charged with, and pleaded guilty to, an offence contrary to s 169A of the POEO Act.

Issue: What are the appropriate sentences for Ghossayn Group and Mr Ghossayn (**the Defendants**), taking into account the objective seriousness of the offences and the subjective circumstances of the offenders.

Held: The Defendants were convicted of all charges. Ghossayn Group and Mr Ghossayn were fined a total of $550,000 and $132,625 respectively. The Defendants were to pay the prosecutor's costs of the proceedings. The Defendants were also to publish a notice detailing the sentence:

Objective seriousness of the offence

(1) The offences committed by the Defendants undermined the regulatory framework for environmental protection created by the provisions: at [48]-[51];

(2) The Defendants intentionally committed the transport and disposal offences, as the intention was to avoid paying the cost of lawful waste disposal. The Defendants recklessly committed the pollution offence, being aware that the waste contained asbestos and would be disposed of on land not licensed to receive it. The Defendants committed the second docket offence negligently, being unaware of the false information contained in the dockets, however, failing to take reasonable steps to verify the information: at [58]-[73];

(3) The disposal and pollution offences caused actual environmental harm to the soil of the Luddenham property and had the potential to cause a risk to human health, exceeding the relevant health and ecological criteria. The transporting offence led to this harm to the environment. The first dockets offence had the potential to cause harm to the environment, as the purpose of the commission of the offence was to conceal the unlawful deposit of waste: at [74]-[78];

(4) The practical measures that should have been taken by the Defendants to prevent the harm was not to do the very conduct that constituted each offence: at [79]-[80];

(5) The Defendants could have reasonably foreseen the harm caused or likely to be caused to the environment by the commission of the offences: at [82];

(6) The Defendants had complete control over the causes that gave rise to the transport, disposal, pollution and

first dockets offences. Ghossayn Group's control over the second dockets offences was less: at [84];

(7) All the offences were committed for financial gain, even if such gain did not eventuate, rendering the offence objectively more serious: at [86]-[91];

(8) The Defendants' planning involved no more than what was necessary to undertake the conduct constituting the commission of the offence, being no evidence of planned or organised criminal activity: at [95];

(9) The pollution offence was of a low range, the transport and disposal offences were of a low to mid-range, the first dockets offence was at the lower end of mid-range and the second dockets offence was at the lower end of low range: at [96];

Subjective circumstances of the offenders

(10) A 20% discount, below the 25% maximum, for the utilitarian value of the plea of guilty is appropriate due to the delay of up to eight months in the Defendants entering their pleas: at [99]-[102];

(11) Ghossayn Group did not have a record of previous convictions and Mr Ghossayn did not have a significant record of previous convictions: at [104]-[105];

(12) The Defendants accepted responsibility for and acknowledged the impacts of their actions. The Defendants expressed remorse and had implemented initiatives to review Ghossayn Group's systems and installation of GPS trackers in the transport fleet: at [108]-[112];

(13) The Defendants provided some assistance to the prosecutor in this case and will provide other assistance to the Environment Protection Authority in their future investigations, justifying a 5% reduction in the penalty: at [113]-[118];

(14) Ghossayn Group was of good character, evidenced by no previous environmental offences, its charitable works and sponsorship of programs. Mr Ghossayn was of good character, evidenced by the awards and recognition he had received, and his active community and charitable involvement: at [119]-[122]; and

(15) Given the Defendants' pleas of guilty and remorse, they were unlikely to reoffend: at [123]-[124].

***Natural Resources Access Regulator v Lidokew Pty Ltd* [2023] NSWLEC 130** (Duggan J)

Facts: The Natural Resources Access Regulator (**prosecutor**) prosecuted Lidokew Pty Ltd (**defendant**) on six charges alleging breaches of various provisions of the *Water Management Act 2000* (NSW) (**WM Act**). Three of the charges alleged that the defendant knowingly took water otherwise than in accordance with a water allocation licence contrary to s 60C(1)(b) of the WM Act (**Water Take Charges**). The remaining three charges alleged that the defendant took water from a water source when metering equipment was not operating properly contrary to s 91I(2) of the WM Act (**Metering Charges**). The prosecutor pleaded an alternative charge for the Water Take Charges under s 60C(2) and the Metering Charges under s 91H(2) of the WM Act. The defendant pleaded not guilty to all six charges.

The defendant was the registered owner of a property in Wee Waa NSW, which was used primarily for cotton production. The defendant's annual water allocation was 988ML. The water take recorded on three meters located on the property at groundwater bore sites showed the water taken was less than the defendant's allocation. However, the prosecutor alleged that the defendant took water in excess of its allocation, contrary to the amount recorded on the meters. As a result, the prosecutor's case relied upon circumstantial evidence to establish the amount of water alleged to actually have been taken by the defendant. The Court was asked to draw inferences from expert evidence in relation to, amongst other things, water demand of the cotton crop and water available from rainfall and runoff.

In relation to the Metering Charges, the defendant argued that although the meters were affected by fair wear and tear they were still operating properly within the meaning of s 91I(2) of the WM Act. This was because the manufacturers of the meters identified a level of inaccuracy by design. Therefore, the meters did not provide an assurance of 100% accuracy.

Issues:

(1) Whether the prosecutor established beyond reasonable doubt the elements of the Water Take Charges or the alternative charges;

(2) Whether the term "operating properly" under s 91I(2) of the WM Act excluded fair wear and tear; and

(3) Whether the prosecutor established beyond reasonable doubt the elements of the Metering Charges or the alternative charges.

Held: The defendant found to be not guilty of the Water Take Charges and the charges were dismissed. The defendant was found to be guilty of the Metering Charges under s 91I(2) of the WM Act:

(1) The prosecutor did not prove beyond a reasonable doubt that the defendant took water in excess of its allocation as it could not establish that such an

inference could be drawn on the evidence nor exclude all reasonable hypotheses consistent with innocence: at [183], [192];

(2) The pumps were not operating properly within the manufacturer's guaranteed error rate, which was likely caused by wear and tear over time. It was not accepted that such diminution was not to be considered in the assessment of whether the pump was operating properly. A diminution of the accepted error rate to double or triple that sum was more than a de minimis change and not consistent with the context of the legislative scheme: at [301]-[302];

(3) The prosecutor established beyond reasonable doubt that the three meters were not operating properly contrary to s 91I(2) of the WM Act: at [305];

(4) The meaning of "operating properly" was taken as the ordinary and natural meaning determined by having regard to the context and objects of the WM Act. The context of the WM Act dictated a degree of accuracy for metering equipment: at [286], [289];

(5) The equitable allocation and efficient use and economic return provided for by the WM Act would have been undermined if metering devices were left to deteriorate through normal wear and tear such that they no longer served the function of measuring the take of water in relation to compliance with a licence: at [290]; and

(6) Proper operation did not mean perfection. The WM Act would permit a reduction in operation below perfection such that there was no material under recording of water. Material meant something of consequence and not de minimis having regard to the context and purpose of the functioning of the metering device: at [291]-[292].

JUDICIAL REVIEW

***North East Forest Alliance Incorporated (INC1601738) v Forestry Corporation of NSW* [2023] NSWLEC 124** (Pritchard J)

Facts: On 16 and 30 May 2023, the respondent, Forestry Corporation NSW (**FCNSW**), by its planning supervisor Mr Matthew Howat, approved two "operational plans" within the meaning of condition 53 of the *Coastal Integrated Forestry Operations Approval 2018* (**CIFOA**) granted under Part 5B of the *Forestry Act 2012* (NSW) for the purpose of carrying out forestry operations in the Braemar State Forest and Myrtle State Forest. The operational plans were also referred to by FCNSW as "harvest and haul plans" (**HHPs**). FCNSW had ceased forestry operations in the regions the subject of the CIFOA (including the Braemar and Myrtle State Forests) since 13 December 2019 upon the request of the Environment Protection Authority (**EPA**) due to the bushfires that took place in NSW in 2019/2020 (**2019/2020 bushfires**).

Condition 14 of the CIFOA set out the general objectives of the CIFOA. One of those objectives was to authorise the carrying out of forestry operations "in accordance with the principles of ecologically sustainable forest management" (**ESFM**). Condition 23.4 of the CIFOA provided that if applying a condition of the CIFOA at a specific site would result in a "poor environmental outcome", or if in a "specific and unique circumstance" FCNSW would not be able to comply with the conditions of the CIFOA, then prior to commencing the relevant forestry operation FCNSW may submit a report to the EPA and obtain from the EPA "site-specific operating conditions" (**SSOCs**) to be implemented by FCNSW in the carrying out of forestry operations.

The applicant, North East Forest Alliance Incorporated (**NEFA**) commenced Class 4 judicial review proceedings challenging the approval of the HHPs in circumstances where FCNSW had not obtained SSOCs from the EPA, but had developed "voluntary conditions" for implementing forestry operations in the Braemar and Myrtle State Forests. The applicant contended that the approval of the HHPs failed to address condition 14.1 of the CIFOA, namely the carrying out of forestry operations in accordance with principles of ESFM.

Issues:

(1) Whether NEFA had standing to bring the proceedings;

(2) Whether the Court had jurisdiction to hear and determine the proceedings;

(3) Whether expert ecologist evidence adduced by both parties was admissible in the proceedings;

(4) Whether the HHPs failed to address matters that were mandatory pre-conditions to the exercise of the power to approve an operational plan in accordance with condition 53 of the CIFOA:

   (a) specifically the requirement in condition 14.1 of the CIFOA that forestry operations be carried out in accordance with the principles of ESFM; and

   (b) operational requirements in sufficient detail to enable the person proposing to undertake forestry operations to comply with the conditions of the CIFOA, specifically condition 14.1 (**Ground 1**);

(5) Whether, in purporting to approve the HHPs, FCNSW (Mr Howat) failed to consider a mandatory relevant consideration, namely the ability of a person to carry out forestry operations in accordance with the principles of ESFM (**Ground 2**); and
(6) Whether FCNSW (Mr Howat) had power to approve the HHPs in circumstances where following the 2019/2020 bushfires, the circumstances described in condition 23.4 of the CIFOA were engaged, requiring FCNSW to comply with the requirements of condition 23.4 and Protocol 5 to the CIFOA in relation to obtaining SSOCs, but failed to do so (**Ground 3**).

Held: Summons dismissed:
(1) NEFA had standing at common law to bring the proceedings: at [15(1)], [131]-[136];
(2) The decision of a FCNSW planning supervisor to approve an operational plan made pursuant to the embedded authority in condition 53 of the CIFOA enlivened the power of the Court to entertain an application for judicial review of the decision: at [15(2)], [154];
(3) The evidence of neither expert was relevant to the issues raised in the proceedings and was therefore inadmissible: at [15(3)], [178]-[180];
(4) In relation to Ground 1, Condition 14.1 was an objective of the CIFOA and not an operative condition. Consideration of the achievement of the principles of ESFM in the making of an operational plan was not a jurisdictional fact to be determined by the Court with the function of reviewing a decision of FCNSW to approve an operational plan: at [15(4)], [218]-[222];
(5) In relation to Ground 2, the effect of condition 53 of the CIFOA was not to make the capacity of a person carrying out a proposed forestry operation to comply with the CIFOA in the manner contended by NEFA a mandatory consideration. Condition 14 which set out the general objectives of the approval was not a mandatory consideration in the determination by the FCNSW planning supervisor to approve an operational plan: at [15(5)], [228]-[229]; and
(6) In relation to Ground 3, NEFA did not establish that the process of obtaining SSOCs in condition 23.4 of the CIFOA applied to the approval of operational plans which authorised forestry operations. Properly construed, each of conditions 53 and 23 of the CIFOA involved a distinct exercise of power. Nor were circumstances referred to in the chapeau to condition 23.4 jurisdictional facts: at [15(6)], [273].

Aboriginal Land Claims

Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 ("Doyalson") **[2023] NSWLEC 134** (Pepper J)

Facts: Darkinjung Local Aboriginal Land Council (**Darkinjung**) lodged a claim pursuant to s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**), appealing the decision of the Minister administering the *Crown Land Management Act 2016* (**Minister**) to refuse a land claim over Lot 169 in DP 726293 (**the claimed land**) which was lodged on 20 February 2019 (**claim date**). The Minister's refusal was on the basis that when the claim was made, the land was not claimable Crown land because it was protected under cl 8, Sch 4 of the ALR Act and was subject to Special Lease 1965/21 (**SpL 1965/21**), which was issued to Kenneth Graham (**Graham**) prior to the enactment of the ALR Act and which remained in force as at the claim date.

The claimed land was demised to Graham on 27 April 1967 under SpL 1965/21, which was granted pursuant to s 75 of the *Crown Lands Consolidation Act 1913* (NSW) (**CLC Act**) for the purpose of a "poultry farm" for a term of 19 years. Upon Graham's application for an extension of the lease, SpL 1965/21 was extended until 31 December 1996. Since its expiry, Graham had remained in possession of the claimed land until 24 July 2018 and continued to pay rent until 3 August 2021, with the knowledge of the relevant department. From 1989, various communications between the EPA, the Council, and various statutory bodies indicated that the claimed land was being used for the disposal of waste materials contrary to the terms of the special lease.

The Minister advised Darkinjung that the claim was refused on 4 December 2020. Darkinjung filed an appeal on 1 April 2021.

Issues:
(1) Whether the claimed land was subject to SpL 1965/21 as at the claim date;
(2) Whether the claimed land was the subject of a lease that had "ceased to be in force" for the purposes of cl 8, Sch 4 of the ALR Act; and
(3) Whether the land was lawfully occupied pursuant to s 36(1)(b) of the ALR Act.

Held: The appeal was upheld, and the respondent was ordered to transfer the claimed land to the applicant within 12 months of the date of the orders:

(1) The claimed land was not subject to SpL 1965/21 as at the claim date because there was a 40 year term limit on special leases when the special lease was granted under the CLC Act, which was not displaced by s 41 of the *Crown Lands Act 1989* (NSW), which repealed the CLC Act and allowed for a 100 year term of a lease of Crown land: at [122];
(2) SpL 1965/21 was not continued as a monthly periodic tenancy pursuant to cl 6, Pt 5, Sch 2 of the *Crown Lands (Continued Tenures) Act 1989* (NSW) because no ministerial consent was given to Graham's continued occupancy of the claimed land: at [146]-[156];
(3) Graham's occupancy of the claimed land after the expiration of the term of SpL 1965/21 on 31 December 1996, was a new and different interest as a matter of statutory construction: at [134]-[141];
(4) The savings provision in cl 8, Sch 4 of the ALR Act therefore did not apply to deem the claimed land as not "claimable Crown lands" under that Act: at [142]-[143];
(5) The land was not lawfully occupied by Graham because there was no actual occupation by Graham as at the claim date, and even if there was, the illegal activities carried out upon the land rendered the occupation not lawful: at [194]-[199]; and
(6) The claimed land was therefore "claimable Crown lands" under s 36 of the ALR Act: at [220].

Compulsory Acquisition

***oOh!media Fly Pty Limited v Transport for NSW* [2023] NSWLEC 26** (Moore J)

(Related decision: *oOh!media Fly Pty Limited v Transport for NSW (No 2)* [2023] NSWLEC 112 (Moore J))

Facts: On 18 September 2020, the leasehold interest held by oOh!media Fly Pty Limited (**the applicant**) in 18 static billboards located along the northern boundary of Qantas Drive at Mascot (**acquired land**) was compulsorily acquired by Transport for NSW (the respondent). The billboards displayed outdoor advertising of products and messages to passing motorists on the public road connecting the international and domestic terminals of Sydney's Kingsford Smith Airport. The land was acquired by the respondent for the purposes of the *Roads Act 1993* (NSW) (**Roads Act**) in connection with the construction, operation, and maintenance of the Sydney Gateway Project (the public purpose).

On 10 February 2021, the Valuer General determined that the compensation to be paid to the applicant for the acquisition of its leasehold interest was $3,797,993. The applicant exercised its right pursuant to s 66 of the *Land Acquisition Act (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) to commence proceedings in the Land and Environment Court seeking to have a judicial determination of what should be the correct compensation for the loss of its leasehold interest in the acquired land.

Issues:

(1) How many of the acquired signs would have been digitised prior to the date of acquisition;
(2) Whether there was a tax gross up to be paid on the compensation payable for market value;
(3) Whether the applicant was entitled to compensation for special value pursuant to s 57 of the Just Terms Act for the:
    (a) digital advantage;
    (b) "Halo effect"; and
(4) Whether the applicant was entitled to be reimbursed for disturbance costs pursuant to s 59(1)(a) of the Just Terms Act.

Held:

(1) The reasoning of Dixon CJ in *Turner v Minister for Public Instruction* (1956) 95 CLR 245; [1956] HCA 7 (***Turner***) at [268]-[269] made it clear that, when seeking to value potentiality, a hypothetical model based on the expected net return after deduction of costs and allowing for risk is to be rejected: at [48];
(2) The Applicant was only entitled to direct compensation for the lost opportunity of digitisation of the acquired signs. The applicant was not entitled to have its market value compensation determined as if any of the acquired signs had been digitally converted prior to the date of acquisition: at [2], [49];
(3) The proposition that tax gross ups should be allowed in the context of the statutory codified compensation scheme provided by the Just Terms Act had been rejected in the past: *Canal Aviv Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 52 (***Canal Aviv***). This element of the applicant's market value claim was rejected: at [387]-[388];
(4) There is persuasive dicta discussing what might be the extremely limited circumstances within which a claim

for special value was capable of being established: *Boland v Yates Property Corporation Pty Ltd and Another* (1999) 167 ALR 575 (***Boland***);

(5) There were no idiosyncratic features of the acquired signs that would amount to anything special in the *Boland* sense. The digital advantage claim was rejected: at [397]-[399];

(6) The Halo effect was submitted to arise on the basis that the applicant had existing contracts which gave it a package of additional advertising rights in Qantas lounges, in-flight advertising on Qantas aeroplanes and a range of other Australian airports, including in the immediate vicinity of these airports: at [400]-402]. There was nothing explicit or inferential in the evidence adduced to factually support the existence of, or quantification of the Halo effect;

(7) The applicant failed to demonstrate a proper evidentiary basis for the existence of the Halo effect beyond the mere assertion of its existence. The special value claim said to arise from the Halo effect was rejected: at [450]-[455], [457]; and

(8) The applicant was entitled to be compensated for the pre-acquisition disturbance costs arising from the charging of legal fees pursuant to s 59(1)(a) of the Just Terms Act: at [2].

SECTION 56A APPEALS

***Willoughby City Council v Blanc Black Projects Pty Limited* [2023] NSWLEC 54** (Robson J)

(Decision under review: *Blanc Black Projects Pty Limited v Willoughby City Council* [2022] NSWLEC 1135 (Bradbury AC))

Facts: On 9 April 2021, Blanc Black Projects Pty Limited (**Blanc Black**) lodged a development application with the Willoughby City Council (**Council**) seeking development consent to demolish two existing dwelling houses and erect a four-storey residential flat building comprising 12 apartments at 58-60 Eastern Valley Way, Northbridge (**site**). On 11 June 2021, Blanc Black commenced a Class 1 appeal against the Council's refusal of the development application. On 17 March 2022, the commissioner handed down judgment upholding the appeal and granting consent for the demolition of existing buildings and the construction of a new residential flat building comprising 11 apartments over basement carparking at the site. Relevantly, the development consent was subject to a number of conditions, but did not include a condition proposed by the Council, namely that: "The applicant shall make a monetary contribution for the purpose of providing Affordable Housing" (**Condition 27**).

The Council appealed the commissioner's decision pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) advancing six grounds of appeal mostly concerning the interpretation and application of relevant legislative provisions regarding the imposition of affordable housing conditions.

Issues:

(1) Grounds 1, 2, 3 and 5 raised a number of interrelated issues relating to the relationship between s 7.32 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and cl 6.8 of the Willoughby Local Environmental Plan 2012 (**WLEP 2012**) and turned on the statutory construction to be given to such provisions. In particular, whether cls 6.8(2) and 6.8(3) imposed jurisdictional preconditions (by virtue of s 7.32)(3)(b)) such that an affordable housing condition had to be "authorised" by the WLEP 2012 in order to be lawfully imposed under s 7.32; and whether cl 6.8(2) imposed any requirements in relation to the inclusion of conditions when that provision was stated to be concerned with the granting of development consents (**The jurisdictional precondition issue**);

(2) Ground 4 addressed whether cl 6.8(2)(b) of the WLEP 2012 required, as a precondition to imposing Condition 27, the provision of specific evidence relating to the impact the development would have on the existing mix and likely future mix of residential housing stock in Willoughby (**The preconditional evidence issue**); and

(3) Ground 6 raised whether the commissioner's decision not to impose Condition 27 was legally unreasonable (**The legal unreasonableness issue**).

Held: Appeal upheld, with costs; the part of the commissioner's judgment concerning Condition 27 was affected by errors on questions of law. The matter was remitted to the commissioner for determination: at [3], [151]-[154]:

The jurisdictional precondition issue

(1) Grounds 1-3 upheld: Clause 6.8(2) of the WLEP 2012 does not set out jurisdictional preconditions to the imposition of affordable housing conditions in circumstances where the provisions were expressly directed to the task of determining development applications. Additionally, Condition 27 was authorised

by cl 6.8 as it fell within the range of affordable housing conditions that could be imposed: at [76]-[77];

(2) The commissioner was not bound to be satisfied, in accordance with cl 6.8(2) of the WLEP 2012, that the development would have any "material" or "discernible" impact upon the present or future mix of housing in Willoughby before a condition could be imposed: at [90]. Furthermore, the express words used in cl 6.8(2)(b) of the WLEP 2012 were clear and appropriate to give effect to the aim of the WLEP 2012, being to facilitate the provision of adaptable and affordable housing insofar as it ensured that the imposition of an affordable housing condition would be considered by a consent authority in granting consent to a development proposal: at [94];

(3) The language of s 7.32(3) of the EPA Act was permissive and allowed the commissioner discretion to consider whether the proposed condition complied with the second limb of the test set out in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 as a matter incidental to the commissioner's consideration of s 7.32(3)(c): at [105];

(4) Ground 5 dismissed: Section 7.32(3)(a) of the EPA Act required, as a precondition to the exercise of the power to impose a condition, that the proposed condition complied with the requirements made by an applicable State environmental planning policy with respect to the imposition of an affordable housing condition. The applicable State environmental planning policy was sufficiently considered by the commissioner: at [133] and [138];

The preconditional evidence issue

(5) Ground 4 dismissed. The commissioner did not err on a question of law. The commissioner did not treat s 6.8(2)(c) of the WLEP 2012 or 7.32(3)(c) of the EPA Act as creating a positive obligation to adduce evidence in relation to the impact the proposed development would have on the existing mix and likely future mix of residential housing stock in Willoughby. The commissioner found that the evidence adduced before the court was unconvincing as to the likely impact of the development on the mix of residential housing stock in Willoughby: at [120] – [122]; and

The legal unreasonableness issue

(6) Ground 6 dismissed. The commissioner's decision did not lack "an evident and intelligible justification": at [148].

***Muscat Developments Pty Ltd v Wollondilly Shire Council* [2023] NSWLEC 121** (Preston CJ)

(Decision under review: *Muscat Developments Pty Ltd v Wollondilly Shire Council* [2022] NSWLEC 1682 (Bish C))

Facts: Muscat Developments Pty Ltd (**Muscat**) lodged a development application with Wollondilly Shire Council (**Council**) seeking development consent for a change of use of existing sheds, construction of a new shed and hardstand, remediation works, earthworks and landscaping at a property in Cawdor (**site**). The land was contaminated with asbestos and would need to be remediated. Muscat appealed against the deemed refusal of the development application to the Court under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The commissioner determined that the appeal should be dismissed and the development application refused. Muscat appealed against the commissioner's decision under s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

Issues:

(1) Whether the commissioner erred in her interpretation and application of ss 4.6, 4.10 and 4.14 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (NSW) (**SEPP Resilience**) in assessing the suitability of the contaminated land and the relevant contamination guidelines? (Grounds 1 to 10, 16 and 17)

(2) Whether the commissioner misdirected herself in interpreting and applying the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**)? (Grounds 11 to 15)

(3) Whether the commissioner erred in her assessment and findings on the public interest under s 4.15(1)(e) of the EPA Act and her application of cl 7.5(3) and the zone objectives in cl 2.3 of the Wollondilly Local Environmental Plan 2011 (**LEP**)? (Grounds 18 to 27)

Held: Appeal upheld; decision set aside and proceedings remitted to a different commissioner to be determined in accordance with law and the reasons for judgment:

The Resilience SEPP grounds

(1) The development application did not seek consent to carry out any development in relation to, or for the purpose of, the existing dwellings on the land. The commissioner misdirected herself by including residential purpose as a purpose for which the development was proposed to be carried out: at [15]-

[16], [21]. The commissioner also erred in overlooking the critical oral evidence of the parties' contamination experts given at the hearing that the site would be suitable, after remediation, for the purposes for which the development was proposed to be carried out, not being residential: at [45];

(2) The commissioner erred in law by failing to consider whether the proposed remediation work would be carried out in accordance with the Managing Land Contamination Guidelines SEPP 55 – Remediation of Land 1998 (**CLM Guidelines**), National Environment Protection (Assessment of Site Contamination) Measure 1999 and a plan of remediation prepared in accordance with the CLM Guidelines: at [59], [61];

(3) Muscat did not establish that the commissioner's findings of fact concerning the inadequacy of the Remediation Action Plan and the remediation approach to address the risks to human health were not open on the evidence before the commissioner. Even if the commissioner's findings were wrong, that would not involve an error of law: at [71], [73]. Muscat also did not establish that that the commissioner denied Muscat procedural fairness. The Council and commissioner raised concerns about the adequacy and uncertainty of the remediation action proposed by Muscat sufficient to put Muscat on notice: at [96];

(4) The commissioner did not misinterpret or misapply s 4.10(1) of the Resilience SEPP in finding that there would be a more significant risk from carrying out the remediation work than there would be from not carrying out the remediation work. Muscat did not establish that the commissioner did not undertake the risk comparison required by s 4.10(1) or that her finding was unsupported by evidence or vitiated by legal unreasonableness: at [117];

The POEO Act grounds

(5) The commissioner erred on a question of law in framing, as a jurisdictional requirement for the determination of the development application for the proposed remediation works under the EPA Act, the lawfulness of those remediation works under ss 142A and 144AAB of the POEO Act and in thereafter undertaking an inquiry and making findings that the remediation works would be in breach of those sections of the POEO Act: at [159];

(6) The commissioner erred in law by asking the wrong question of whether the proposed remediation works satisfied the objects of the POEO Act. That inquiry was not relevant to the exercise of the power in s 4.16 of the EPA Act to determine the development application: at [162];

The EPA Act and LEP grounds

(7) The commissioner was only obliged to consider the environmental impacts of the development that was the subject of the development application, being onsite remediation of unauthorised fill, and did not err in law by not considering the environmental impacts of development that was *not* the subject of the development application before the Court, being the removal and disposal offsite of the unauthorised fill: at [178]. The commissioner did not err in considering the risk of harm to human health of the development the subject of the development application, as this was a contention raised by the Council: at [179];

(8) Grounds 20 to 27 did not raise errors on questions of law. The errors claimed by Muscat concerned factual findings of the commissioner which, even if wrong, would raise errors of fact, not law. Provided there was some evidence to support the commissioner's findings, no error of law arises: at [195], [210], [217], [221], [225], [229], [234], [236];

Materiality of the established errors on questions of law

(9) The commissioner's errors on questions of law in her consideration of the provisions of the SEPP Resilience and the POEO Act infected the commissioner's considerations under the EPA Act and LEP. The errors were therefore material and vitiated the commissioner's decision as a whole: at [243]; and

(10) It was appropriate to make an exclusionary remitter order as any change in the findings vitiated by error on rehearing would require the commissioner to revisit the other findings influenced by those findings vitiated by error: at [247].

COSTS

Australian Wildlife Ark Limited v Secretary, Department of Planning and Environment [2023] NSWLEC 139 (Preston CJ)

Facts: On 27 October 2023, the Court upheld two appeals and granted two biodiversity conservation licences under the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) to the applicant, Australian Wildlife Ark Limited (**Aussie Ark**) to establish an ex-situ insurance populations of the Broad-toothed Rat (**BTR**) and the Broad-headed Snake (**BHS**). The applications for licences were initially filed with the respondent, the Department of Planning and Environment (**Department**) on 16 July 2021 for the BHS and 13 January 2022 for the BTR. The Department refused to consider the

licence applications due to Aussie Ark's alleged non-compliance with the BC Act. Aussie Ark re-submitted the applications on 16 September 2022, which the Department also refused to consider or determine for the same reason. Aussie Ark filed an appeal against the deemed refusal of the re-submitted applications on 12 January 2023. The Department's Statement of Facts and Contentions (**SOFAC**) filed in the proceedings were inadequately pleaded. Following multiple requests from Aussie Ark and several reviews of drafts by the Court, the Department was granted leave to file and rely on an amended SOFAC. The amended SOFAC raised the following contentions: (1) that the applications were substantially the same as the ones already submitted; (1A) the applications were not duly made; (2) the applications contained insufficient information; (3) the proposed conservation work was inconsistent with the Department's work; and (4) Aussie Ark's allegedly unlawful conduct was a relevant factor in considering the application. Aussie Ark filed evidence 3 weeks before the hearing detailing information in response to contentions 1A and 2. The Department maintained that Aussie Ark had still provided insufficient information. At the first day of the hearing, the Department conceded in respect of the grant of a licence for the BHS. The Department withdrew contentions 1A and 2 in relation to the BHR before conceding to the grant of licences for both applications, which was ordered by the Court. Aussie Ark applied for an order that the Department pay its costs of both proceedings.

Issues:

(1) Whether it was fair and reasonable in the circumstances for a costs order to be made under r 3.7(2) of the Land and Environment Court Rules 2007 (**Court Rules**); and

(2) Whether Aussie Ark's conduct disentitled them to a costs order.

Held: The Department was to pay Aussie Ark's costs of the proceedings, including the application for costs:

(1) Contentions 1 and 1A raised questions of law that were unmeritorious and, if upheld, determinative of the proceedings (r 3.7(3)(a)) of the Court Rules): at [94]. There was no statutory bar to Aussie Ark making substantially the same licence applications nor was there an approved published form or required information with which the application had to comply. Therefore, there was no reasonable prospect of contentions 1 and 1A succeeding and it was unreasonable for the Department to raise and maintain them in the lead up to and during the proceedings (r 3.7(3)(c), (d) and (f)): at [95], [98], [115];

(2) Contention 2 was framed such that the Department was identified as the arbiter of the alleged insufficiency of information in the applications, not the Court: at [70]. Moreover, Aussie Ark demonstrated that there was sufficient information for the Court to assess the application: at [71]. The Department's capitulation was not due to Aussie Ark's affidavit evidence, as the information could not resolve the contention and the Department had already rejected the affidavit as insufficient: at [118]. Contention 2 had no reasonable prospect of success and maintaining it was unreasonable (r 3.7(3)(c), (d) and (f)): at [115];

(3) Contention 3 had no reasonable prospects of success as there could not be inherent inconsistency between the conservation work of Aussie Ark and the Department, merely because the Department did not undertake the conservation work Aussie Ark proposed: at [72], [115];

(4) Contention 4 lacked merit as even if the Department had proved Aussie Ark had unlawfully collected species from the wild (which it did not), there was no statutory authority for the Department to refuse to determine the applications due to an ongoing compliance investigation. To do so was a failure of its statutory duty. This was the operative cause of Aussie Ark needing to re-submit their applications and appeal to the Court: at [103]. The contention lacked merit, was unreasonable to maintain and constituted unreasonable conduct in the lead up to and during the proceedings (r 3.7(3)(a), (c), (d), (f)): at [115]; and

(5) There was no disentitling conduct on the part of Aussie Ark. Any failure to provide sufficient information was not the cause of the Department's refusal to consider the application: at [126]. Moreover, the alleged illegal collection of species cannot disentitle Aussie Ark to a costs order: at [131]-[132].

Merit Decisions (Commissioners)

***Trustees of the Church Property for the Diocese of Newcastle v Newcastle City Council* [2023] NSWLEC 1220** (Horton C)

Facts: St Andrews Church, Mayfield, was owned by the Trustees of Church Property for the Anglican Diocese of Newcastle (the Trustees). The church occupied a site that it shared with three other buildings, and certain landscape features including: mature tree plantings; a driveway and carpark; a low stone wall fronting the street; and a

sandstone memorial (**the site**). Relevantly, the site had also operated as a cemetery (**the former cemetery**).

The site was identified in Schedule 5 of the Newcastle Local Environmental Plan 2012 (**NLEP**) as a place of local heritage significance.

The Trustees sought consent to subdivide the land from one lot into two lots. One lot would comprise the church, two dwellings, existing mature trees, the driveway and the car park. The other lot would comprise a weatherboard parish hall, a brick parish hall and the former cemetery.

The former cemetery operated between 1862 and 1902. In 1957, the 'St Andrews Church of England, Mayfield, Cemetery Act 1957 No.39' provided for the repurposing of the cemetery site, sometime after which headstones and other structures were removed. Around the same time, a sandstone monument was erected in memory of those interred in the former cemetery.

In the early 1970's, the land on which the church stood was subdivided. Lots 1 and 2, located to the east of the church, were sold. Lot 3 included the church building, and it was retained, at which time a new rectory and two dwellings were built east of the church.

Issue: The Respondent's primary contention was that the proposal would have an unacceptable impact on the heritage significance of the church. In particular, by subdividing the land, ownership of the church and cemetery was de-coupled which, by that act, broke the historical association between the cemetery and the church.

Held: Appeal upheld:

No impact arises from subdivision

(1) The subdivision of the land did not involve the use of the site, for the reasons elucidated by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827, at [28]. Instead, consent for subdivision was consent for subdivision simpliciter and did not import any approval for subsequent use for any purpose: at [30];

(2) Clause 5.10(3) of the NLEP did not require consent for development in a cemetery or burial ground where the proposed development would not cause disturbance to human remains or relics, the last burial was recorded in 1902, and all headstones and other evidence of a cemetery had been removed;

(3) When regard was had to the definition of 'cemetery' in the Dictionary of the NLEP, the site did not answer the description of a cemetery as it had not been used primarily for the interment of deceased persons, pets, or their ashes for well over a century: at [64];

(4) To the extent that consent was required for subdivision, under cl 5.10(2)(f) of the NLEP, it was the effect of the subdivision on the heritage significance of the St Andrews Church building that was to be considered: at [67]. The entry on the State Heritage Register was confined to the built form of the church. It did not include reference to the grounds, landscape elements, stone walling, paths, gates or driveway. Most relevantly, it did not reference the former cemetery: at [62];

(5) The subdivision itself did not have any effect on the heritage significance of the church. The subdivision did not materially affect the fabric, settings, views or curtilage of the church. The consequence of subdivision was likely to be a change in ownership of the 'new lot' did not, of itself, give rise to an impact on the heritage significance of the church, nor of its fabric, settings, views or curtilage. The former cemetery did not contribute to the setting of the church other than in the physical space and relief it provides around the church, which is unaffected by the subdivision: at [69]; and

(6) Even if the cemetery were part of the heritage item, the subdivision had no effect upon the heritage significance of the site. All visible signs of the area of the former cemetery on the subject site were gone. The area presented as a cleared grassed field on which the weatherboard parish hall stood: at [70]-[71]. The proposal conformed to the objective at section 5.05.05 of the NDCP to conserve the important characteristics of the subdivision pattern and allotment layout by retaining significant features such as trees, gardens, and outbuildings associated with the heritage item (control 2) and enabling the continuation of the significant building pattern associated with the heritage item (control 3).

***Karimbla Properties (No. 59) Pty Limited v City of Parramatta Council* [2023] NSWLEC 1365; *Karimbla Properties (No. 59) Pty Limited v City of Parramatta Council (No 2)* [2023] NSWLEC 1509** (O'Neill C)

Facts: The applicant appealed under ss 8.7(1) and 8.9 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**) against the refusal of a modification application and two development applications by the City of Parramatta Council at 37-41 Oxford Street, Epping.

A concept approval had been granted by the Sydney Central City Planning Panel on 12 March 2018 for a "30 Storey Mixed Use Tower Building with 4 Storey Basement (Concept Approval Only)". The modification application sought to modify the concept approval to add an additional level of basement, to change the apartment configuration and other changes to the tower of the approved development. The development applications were for Stage 1 works being the early works associated with the development including excavation, and Stage 2 being the development. The proposal was amended in response to agreed expert evidence during the hearing. By operation of the savings provisions in the Parramatta LEP 2023 and Parramatta DCP 2023, the Hornsby LEP 2013 (**LEP 2013**) and Hornsby DCP 2013 continued to apply to the relevant land.

Issues:

(1) Whether the modified proposal was substantially the same development as the development for which consent was originally granted, pursuant to s 4.55(2)(a) of the EPA Act;

(2) Whether the concept approval included a specified number of car parking spaces;

(3) Whether the proposal exhibited design excellence, pursuant to cl 6.8 of the LEP 2013 because it was likely to accommodate excessive car parking;

(4) Whether the provision of car parking in excess of the maximum car parking rates in Part 1C.2.1 of the Hornsby Development Control Plan 2013 contributed to the gross floor area and resulted in a contravention of the floor space ratio development standard pursuant to cl 4.4 of LEP 2013. A variation to the FSR development standard was not permitted pursuant to cl 4.6(8A) of LEP 2013; and

(5) Whether a cl 4.6 written request was required to contravene the height of buildings development standard.

Held:

(1) The modified development proposed was substantially the same development as the originally approved development: at [31];

(2) The concept approval included a specified number of car parking spaces because the requisite number of car parking spaces was referred to in a report that was incorporated into the concept approval by conditions of consent, therefore the addition of a basement level to accommodate the specified number of car parking spaces did not change the planned density of the concept approval: at [36];

(3) The amended proposal achieved the objective of design excellence: at [41];

(4) The provision of car parking in excess of the maximum car parking rates in the Hornsby Development Control Plan 2013 did not contribute to the gross floor area because the amended proposal was consistent with the concept approval (as modified): at [54]; and

(5) A cl 4.6 written request was not required to contravene the height of buildings development standard because the amended proposal was consistent with the concept approval which exceeded the height of buildings development standard: at [48]-[50].

Jancewicz v Wagga Wagga City Council [2023] NSWLEC 1695 (Dixon SC)

Facts: The applicant operated a medical centre with car parking for up to 24 vehicles on land known as 290-292 Edward Street and 11 Gormly Avenue, Wagga Wagga (**site**). The applicant sought development consent for the construction of a public car park on adjoining land at 292 Edward Street and use of the car park in conjunction with the medical centre, and as an independent car park, with EV charging stations (**proposed car park**).

290-292 Edward Street was zoned R3 Medium Density Residential (**R3 zone**) under the Wagga Wagga Local Environmental Plan 2010 (**WWLEP**). 11 Gormly Avenue was zoned R1 General Residential.

The Land Use Table for the R3 zone was structured so as to permit, with development consent, "any other development not specified in item 2 or 4". Item 4 specified the nominated purposes of development that were prohibited and included "commercial premises". There was no express reference to a "car park" in the R3 Land Use Table.

The respondent contended that the proposed car park was a "business premises" as it provided a "service" directly to members of the public on a regular basis (at [19]). "Business premises" was a species of "commercial premises" which was prohibited in the R3 zone. The applicant argued that the proposed car park was an innominate use permissible with consent.

Issue: Whether the use of the proposed car park was properly characterised as a "business premises", a use which was prohibited in the R3 zone pursuant to the WWLEP.

Held: Appeal dismissed and development consent refused:

(1) The proposed development was properly characterised as development for a "business premises", which was a species of "commercial premises" and was therefore prohibited on that part of the site that was zoned R3 Medium Density Residential under the WWLEP: at [42];
(2) The provision of car spaces, the operation of the automatic boom gate, ticketing systems and the offer of EV charging were facts that were collectively a helpful act for customers, which fell within the definition of "service" as defined in *Sevenex Pty Limited v Blue Mountains City Council* (2011) 183 LGERA 1; [2011] NSWCA 223 at [32]: at [25]-[26] and [38]-[41]; and
(3) The decision of the Court in *Kingdom Towers 1 Pty Ltd v Liverpool City Council* [2021] NSWLEC 1074 was distinguished on its facts.

Tree Decisions (Commissioners)

El-Ammar v Cheaitani (No 2) **[2023] NSWLEC 1475** (Douglas AC)

(Related decision: *El-Ammar v Cheaitani* [2023] NSWLEC 1034 (Gray C))

Facts: In an application made under s 14B of Pt 2A of the *Trees (Disputes Between Neighbours) Act 2006* (**the Trees Act**), Anthony and Diane El-Ammar (**the applicants**) sought orders for tree pruning in a neighbouring property (**the respondents**) in Greenwich. The applicants proposed pruning existing trees, and those planted in future, to a height that would recover and preserve 'iconic' views they claimed were severely obstructed, whilst retaining privacy for the respondents.

From the applicant's dwelling, located on a hillside with a south-easterly aspect, views may be gained of the Sydney CBD and broad district views, across the parties' common side boundary and the respondents' property.

Gray C heard a previous Pt 2A application with the same parties on 27 January 2023 (*El-Ammar v Cheaitani* [2023] NSWLEC 1034 (***El-Ammar***), where the applicants contended that four Leyland Cypress trees formed a hedge on the respondents' land. Three of the trees were removed prior to the hearing. As the residual tree could not constitute a hedge in satisfaction of s 14A(1) of the Trees Act, Commissioner Gray dismissed the application.

The new application included different trees from those in *El-Ammar,* except for the remaining Leyland Cypress (Tree 1). Hedge 1 comprised the 8m tall Tree 1, and, along the common boundary, a Lilly Pilly about 7m tall (Tree 2), and two or three trees with a height around 3m. Hedge 2, growing along the respondents' other side boundary comprised a Large Leaf Privet, a senescent Bottlebrush and three Murraya trees.

The respondents requested the Court dismiss the application as the circumstances were the same as in *El-Ammar*.

Issues:

(1) Whether the Court should dismiss the application;
(2) Whether the trees formed hedges in satisfaction of s 14A(1); and
(3) If s 14A(1) was satisfied for one or both of the alleged hedges, whether the resulting obstruction of views from a dwelling was severe such that s 14E(2)(a) was satisfied; and, if so, whether s 14E(2)(b) was also satisfied.

Held:

(1) When the Court has made a decision on a tree application, even if the application was refused, it is possible for an applicant to make a subsequent or fresh application only where circumstances have changed since the Court determined the earlier application (*Hinde v Anderson & anor* [2009] NSWLEC 1148 (***Hinde***): at [32]-[36]). Regardless that different trees were included in the subsequent application and that the majority of the applicants' evidence was available in *El-Ammar*, the application should not be dismissed. Firstly, the applicants were unaware of the respondents' tree removals, prior to *El Ammar*'s site inspection. As the parties were not legally represented procedural fairness may have been compromised. Secondly, in *El Ammar*: at [7], Gray C found that: "…The views are iconic views to the Sydney city skyline and the top of the Sydney Harbour Bridge. From a living area and lower balcony, the views were completely obstructed from a sitting and standing position in the centre of the balcony and from within the living area. The applicants contended that they enjoyed uninterrupted views from both those areas to the Sydney city skyline prior to the growth of the hedge." As this commentary likely raised the applicants' expectation that their view obstruction would be considered severe, and orders made had s 14A(1) been engaged, they were highly motivated to

satisfy the requirements of the Trees Act. Consequently, should the hearing not proceed, further similar application/s were likely;

(2) Section 14A(1) applies only to groups of 2 or more trees that; (a) are planted (whether in the ground or otherwise) so as to form a hedge, and; (b) rise to a height of at least 2.5m above existing ground level. As to Hedge 1, T2 was significantly older than T1 and thus had been planted years prior. Considering *Johnson v Angus* (2012) 190 LGERA 334; [2012] NSWLEC 192 (***Johnson***): at [43], T2 could not be considered to form a hedge with T1. The different form, appearance, and species of T1 and T2 was also relevant (*Johnson*: at [41]). A large gap between T1 and T2 and dogleg shape of Hedge 1 (*Wisdom v Payn* [2011] NSWLEC 1012 (***Wisdom***): at [44]-[45]), reinforced that Hedge 1 failed to engage s 14A(1)(a). As to Hedge 2 the Large Leaf Privet was a "self-sown tree" (*Johnson*: at [30]-[31]) and the senescent Bottlebrush was considerably older than the other trees. For the same reason as T2 in Hedge 1, the Bottlebrush failed to satisfy s 14A(1)(a). Two of the three Murraya trees were about 2m tall, which failed to engage s 14A(1)(b). As with T1 in Hedge 1, the remaining 4m Murraya cannot form a hedge (*Wisdom*; at [66]). Consequently, s 14A(1) of the Trees Act is not satisfied for either Hedge 1 or Hedge 2; and

(3) With s 14A(1) not engaged for either hedge, the Court had no power to make orders. Consequently, there was no requirement to consider or assess the obstruction of views from the applicants' dwelling (s 14E(2)(a)(ii)), nor subsequent sections of Pt 2A. The application was refused.

REGISTRAR DECISIONS

Reid v Woollahra Municipal Council **[2023] NSWLEC 1611** (Orr Dep Reg)

Facts: By notice of motion, the applicants sought leave to amend their development application to rely on amended plans and documents. The respondent, Woollahra Municipal Council (Council) opposed the application for leave to amend. The substantive proceedings were an appeal brought pursuant to ss 8.7 and 8.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against Council's deemed refusal of development application DA54/2023/1. Subsequent to the commencement of the appeal and prior to the filing of the motion, the Council determined to actually refuse the development application. The development application originally sought consent for demolition of an existing attached dual occupancy and construction of a new attached dual occupancy with swimming pools, basement parking and associated siteworks and landscaping. The amended plans and documents sought a change to the erection and use of the development from an attached dual occupancy to a single dwelling.

Issues:

(1) Whether ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (**EPA Regulation 2021**) had the same effect as cl 55 of the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation 2000**);

(2) What is meant by "at any time before a development application is determined" and whether the application, the subject of the notice of motion, was submitted before such time. As such, whether there was power for the applicants to apply to the Court to amend their development application once the Council had determined to actually refuse the development application, enlivening the Court's power to exercise the consent authority's function under s 38 of the EPA Regulation 2021; and

(3) Whether the amendments sought to the application had the effect of constituting a fresh application before the Court.

Held: Notice of motion dismissed:

(1) Whilst the EPA Regulation 2021 separates out the steps of "application" (s 37) and "determination" (s 38) for an amendment to a development application, these were corresponding regulations to the former power in cl 55 of the EPA Regulation 2000. It was jointly submitted and held that the reasoning of the authorities relating to cl 55 of the EPA Regulation 2000 apply to ss 37 and 38 of the EPA Regulation 2021 and that the power and scope was the same: at [12];

(2) The "time" before a development application is determined is any time up to the date the development application is finally determined by the Court. The Council's argument reading s 37(1) of the EPA Regulation 2021 as preventing the applicants from applying to amend a development application in circumstances where there has been an actual refusal by a consent authority is to misunderstand the Court's power in re-exercising a consent authority's functions when on appeal to the Court. The Court had power by

operation of s 39(2) of the *Land and Environment Court Act 1979* (NSW), to exercise the function of the Council as the consent authority, under s 38(1) of the EPA Regulation 2021, to determine applications made pursuant to s 37, and that power was available to the Court up until the Court's final determination of the appeal, at which time the decision of the Court was substituted for the decision of the consent authority and was deemed to be the "final decision" of the consent authority: at [25]-[26]; and

(3) By operation of s 4.19 of the EPA Act, the original development application being for the specified purpose of an attached dual occupancy, was limited to that use. As the amendment proposed the erection and use of a single dwelling house, the development application as amended could never be said to answer the description of the original development application: at [49].

Procedural Matters (Application to Vary Orders)

Jiang v Sydney Metro **[2023] NSWLEC 126** (Pritchard J)

Facts: By notice of motion filed 15 November 2023, Laiwen Jiang and Siu Yu Chan (**applicants**) sought to vacate the hearing listed for four days commencing 29 November 2023 (**notice of motion**). The Class 3 proceedings were commenced on 30 May 2023 by claim objecting to a compensation notice dated 3 March 2022 issued by Sydney Metro (**respondent**) on 1 October 2021 in respect of the compulsory acquisition of the freehold interest in land at 70-74 Kent Road, Orchard Hills NSW 2746 (Lot 43 in Deposited Plan 29388). The proceedings were initially listed for hearing for four days commencing on 21 August 2023. On 2 June 2023, the Court acceded to a notice of motion filed by the applicants seeking that the hearing dates be vacated due to slippage in the preparation of expert evidence. The Court made timetabling orders for the preparation of expert evidence and relisted the matter for hearing for four days commencing 29 November 2023. On 23 October 2023, the Court made revised timetabling orders for the preparation of expert evidence, including that the parties were to serve on each other expert evidence in the field of valuation on which they wish to rely by 10 November 2023. On 13 November 2023, the applicants sent a communication to the Court foreshadowing slippage in the Court's timetabling orders of 23 October 2023 in relation to the filing of expert valuation evidence. On 14 November 2023, the applicants sent a further communication to the Court indicating that they would be filing a notice of motion seeking to vacate the hearing set to commence on 29 November 2023 due to the applicants' expert valuer not being in a position to file his expert evidence until 22 November 2023. The matter was listed for mention on 15 November 2023, and the notice of motion was heard on 17 November 2023. At the hearing of the notice of motion, the applicants orally sought to amend the notice of motion to also seek leave to adduce new expert evidence from an aerial photographer and new lay evidence. The respondent opposed the relief sought by the applicants in the notice of motion.

Issues:

(1) Whether the Court should vacate the hearing dates pursuant to s 66 of the *Civil Procedure Act 2005* (NSW) (**CP Act**); and

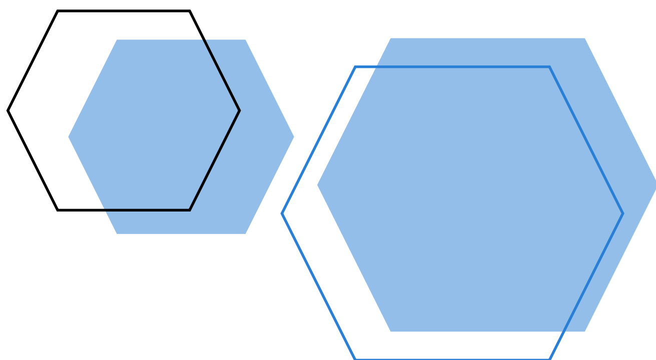
(2) Whether the applicants should be granted leave to adduce new expert evidence from an aerial photographer and new lay evidence pursuant to r 31.19 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

Held: Notice of motion dismissed:

(1) The applicants did not provide a satisfactory explanation for the slippage in complying with the Court's timetabling orders so as to warrant the vacation of the hearing: at [64];

(2) In circumstances where the matter could be prepared for the hearing listed to commence on 29 November 2023, the vacation of the hearing would not give effect to the overriding purpose in s 56 of the CP Act to "facilitate the just, quick and cheap resolution of the real issues in the proceedings". There was no evidence that the applicants' valuer would not provide his expert report before the relisted hearing dates. The applicants had provided no reason why the hearing could not commence on 29 November 2023, other than it would be "tight": at [65(2), (4) and (7)]; and

(3) The applicants provided no satisfactory explanation to displace the public interest in the efficient dispatch of the business of the Court, having regard to the "main purposes" of Division 2 of Part 31 of the UCPR in relation to expert evidence (r 31.17 of the UCPR). As submitted by the respondent, the matter was "not complex" and the proposed additional evidence was "not necessary": at [65(5), (6) and (10)].



LEGISLATION

STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between October 2023 and February 2024.

Climate Change

Climate Change (Net Zero Future) Act 2023 No 48 (Assented to 11 December 2023)

(1) The purpose of this Act is to give effect to the international commitment established through the 2015 Paris Agreement to—
   (a) hold the increase in the global average temperature to well below 2°C above pre-industrial levels, and
   (b) pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, and
   (c) increase the ability to adapt to the adverse impacts of climate change.

(2) The Parliament of New South Wales, in enacting this Act, recognises—
   (a) there is a scientific consensus that human activity is causing abnormal changes to the climate, and
   (b) action is urgently required to reduce greenhouse gas emissions and to address the adverse impacts of climate change.

(3) The Parliament of New South Wales, in enacting this Act, is committed to effective action on climate change to ensure a sustainable and fair future for the people, economy and environment of New South Wales.

It legislates:

- guiding principles for action to address climate change that consider the impacts, opportunities and need for action in NSW;
- emissions reduction targets for NSW:
  - 50% reduction on 2005 levels by 2030;
  - 70% reduction on 2005 levels by 2035;
  - net zero by 2050;
- an objective for NSW to be more resilient to a changing climate; and
- establishing an independent, expert Net Zero Commission to monitor, review, report on and advise on progress towards these targets."

(Source: NSW Climate and Energy Action (accessed: 22/02/2024)

Waste

Protection of the Environment Operations (Waste) Amendment (Mixed Waste Organic Outputs) Regulation 2023 (Commenced 27 October 2023)

The object of this regulation is to amend the Protection of the Environment Operations (Waste) Regulation 2014 to extend, to 1 September 2024, the exemption of mixed waste organic outputs from the calculation of waste contributions payable by approved scheduled waste disposal facilities under the *Protection of the Environment Operations Act 1997*. The exemption is limited to certain waste processed at facilities approved by the Environment Protection Authority.

This regulation is made under the *Protection of the Environment Operations Act 1997*, including sections 88(5), 286 and 323, the general regulation-making power.

Water

Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation (No 2) 2023 (Commenced 8 December 2023)

The object of this regulation is to amend the Water Management (General) Regulation 2018—

(a) to deal with the determination of the share component for certain replacement floodplain harvesting licences, and
(b) to clarify that the Minister must adopt the current conditions model, eligible water supply works scenario model and plan limit compliance scenario model only after considering the submissions received from a landholder on the proposed share component of a replacement licence, and
(c) to require the Minister to give further written notice to the landholder if the proposed determination of the share component is less than the proposed amount first

notified to the landholder, and to consider submissions received from the landholder on the proposed determination, and

(d) to clarify that the category of replacement licence is a floodplain harvesting (regulated river) access licence for an eligible landholder if, on or before 3 July 2008, a regulated river access licence was in force in relation to land on which the landholder's eligible water supply work is located, and

(e) to declare only certain floodplains designated under the *Water Act 1912*, Part 8 to be floodplains for the *Water Management Act 2000*.

This regulation is made under the *Water Management Act 2000*, including section 57A.