February 2018

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Land and Environment Court of NSW

Judicial Newsletter

Legislation

Statutes

- Planning:

Environmental Planning and Assessment Amendment Act 2017 No 60 (**the EP&A Amendment Act**) - commenced 1 March 2018. The principal immediately operative provisions are:

(1) The numbering system for provisions of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) has been changed to a decimal system and the existing provisions re-arranged;

(2) The existing Pt 3A transitional provisions cease to have effect;

(3) The EP&A Act now requires that a construction certificate be consistent with the development consent;

(4) Development applications lodged with councils in the Greater Sydney region or with Wollongong City Council will not be determined by councillors but will be determined either by council staff under delegation or by local planning panels.

Other provisions are expected to come into effect over the next 12 months or so.

Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017 No 39 - commenced 1 March 2018 and omitted Sch 4A (Development for which regional panels may be authorised to exercise consent authority functions of councils) of the EP&A Act as they have been replaced by provisions in the amending legislation noted at the commencement of this section.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 - published in Sch 13 to the EP&A Act – made the necessary savings, transitional and other provisions as a consequence of the amendments to the EP&A Act in the amending legislation noted at the commencement of this section.

Environmental Planning and Assessment Amendment Act 2014 No 79 - previously uncommenced provisions in respect of copyright provisions of documents on the planning portal have now come into effect from 1 March 2018.

Environmental Planning and Assessment Amendment (Universities) Regulation 2017 - published 15 December 2017, amended a provision that prescribes specified universities as determining authorities under Pt 5 of the *Environmental Planning and Assessment Act 1979* for certain development that may be carried out without consent under SEPP (Infrastructure) 2007 and SEPP (Educational Establishments and Child Care Facilities) 2017 on land vested in a specified university, to include land that is leased by or otherwise under the control or management of a specified university.

Environmental Planning and Assessment Amendment (Maitland Hospital) Order 2017 - published 1 December 2017, declared development for the purposes of a health services facility and associated car-park with a capital investment value of more than $100 million on specified land in Maitland to be State Significant Infrastructure.

- Local Government:

Local Government (General) Amendment (Minimum Rates) Regulation 2018 - published 2 February 2018, increased the statutory limit from $514 to $526 on the minimum amount that may be specified by a council when levying an ordinary rate.

Local Government Amendment (Regional Joint Organisations) Act 2017 - published and commencing 15 December 2017, expanded the basis on which councils may operate cooperatively by exercising functions through joint organisations with other councils.

- Biodiversity:

Biodiversity Conservation (Savings and Transitional) Amendment Regulation 2017 - published 24 November 2017, extended from three months to six months, the period after the commencement of the *Biodiversity Conservation Act 2016* on 25 August 2017 during which the new biodiversity offsets scheme under that Act does not apply (and the former planning provisions under the *Environmental Planning and Assessment Act 1979* continue to apply) to the determination of an application for development consent (except for SSD) made before or during that period (that is not otherwise a pending or interim application to which the new biodiversity offsets scheme does not apply). The Regulation also extends, from three months to six months after that commencement, the period during which the Minister may by order extend to other local government areas (**LGAs**) (apart from Camden, Campbelltown, Fairfield, Hawkesbury, Liverpool, Penrith and Wollondilly) the extension to 12 months after that commencement of the deferral of the biodiversity offsets scheme for non-SSD development applications.

Biodiversity Conservation (Savings and Transitional) Amendment (Previous Biodiversity Offsets) Regulation 2017 - published 15 December 2017, excludes the need for further biodiversity assessment of, and offsetting for, the impacts on biodiversity of projects the subject of a concept plan approval under former Pt 3A of the *Environmental Planning and Assessment Act 1979*, or of development the subject of other relevant planning arrangements, if biodiversity assessment and offsetting were previously done in connection with the concept plan approval or other arrangement.

Biodiversity Conservation (Savings and Transitional) Amendment Regulation 2018 - published 23 February 2018, prescribes further areas in which the former planning provisions continue to apply to applications for development (other than State significant development) made after the commencement of the *Biodiversity Conservation Act 2016* instead of the new planning provisions of *Pt 7* of that Act (namely, the LGAs of Central Coast, Cessnock, Coffs Harbour, Lake Macquarie, Maitland, Newcastle and Port Stephens and the West Dapto Urban Release Area). The period during which the former planning provisions continue to apply in relation to the existing and those further areas is extended from the date ending 25 August 2018 to the date ending 25 November 2018. The Regulation also extends, from six months to 18 months from the repeal of the *Native Vegetation Act 2003*, the period within which proposed land clearing may be carried out by a landholder or another authorised person if the landholder notified the Minister before the repeal of that Act under cl 43 of the Native Vegetation Regulation 2013.

- Mining:

Mining Amendment (Fees) Regulation 2017 - published 1 February 2018, removed certain fees relating to exploration licences, assessment leases, mining leases and mineral claims under the *Mining Act 1992*.

Petroleum (Onshore) Amendment (Fees) Regulation 2017 - published 1 February 2018, removed a number of administrative fees payable in relation to petroleum titles.

The *Coal Mine Subsidence Compensation Act 2017* commenced on 1 January 2018.

The Coal Mine Subsidence Compensation Regulation 2017 - published 8 December 2017, made provision for certain matters under the *Coal Mine Subsidence Compensation Act*. The Regulation:

(a) excludes certain historical coal mining areas from the definition of "active coal mines" for the purposes of that Act;

(b) makes clear that bridges, weirs, tunnels and culverts are "infrastructure" for the purposes of that Act;

(c) deals with extensions of the time within which certain claims for compensation under that Act must be made;

(d) prescribes the persons who are to be "qualified valuers" for the purposes of that Act;

(e) requires the provision of reports by proprietors of active coal mines to the Chief Executive of Subsidence Advisory NSW about ground movement and ongoing subsidence;

(f) provides that functions of the Secretary of the Department of Finance, Services and Innovation under that Act may be delegated to a person who is a retired Supreme Court or District Court judge;

(g) prescribes certain offences under that Act and this Regulation as penalty notice offences and sets out the penalty notice amounts for those offences; and

(h) contains other savings, transitional and machinery provisions.

- Miscellaneous:

Liquor Amendment (Special Licence Conditions) Regulation (No 2) 2017 - published 24 November 2017, changed the list of licensed premises that are subject to the special licence conditions set out in Sch 4 to the *Liquor Act 2007*.

On 1 December 2017, provisions in the *Local Land Services Amendment Act* 2017 that regulate the governance and management of Local Land Services commenced.

Natural Resources Access Regulator Act 2017 - partially commenced on 14 December 2017 (with respect to administrative transfers of staff and establishment of the Regulator. However, Div 2 *Objectives and functions of Regulator* and related provisions have not yet commenced.

Acts assented to but not yet in force:

Vexatious Proceedings Amendment (Statutory Review) Bill 2018 - assented to 20 February 2018, will amend the *Vexatious Proceedings Act 2008* to give effect to recommendations arising from the statutory review of that Act, by:

(a) making it clear that references to proceedings include civil proceedings, criminal proceedings and proceedings before a tribunal and also include any interlocutory proceedings or applications, or procedural applications, taken in connection with or incidental to such proceedings;

(b) making it clear that a court determining whether or not to make a vexatious proceedings order is to have regard to the effect that the conduct of the person who will be subject to the order had on earlier proceedings, and not just to the intention of the litigant, and may have regard to evidence of decisions or findings of fact of another Australian court or tribunal (which would ordinarily be inadmissible);

(c) providing that, unless a vexatious proceedings order expressly states otherwise, the order prohibits the making of interlocutory and procedural applications within civil proceedings (as well as prohibiting the initiation of proceedings) but does not prevent a person from making applications, or conducting proceedings, within criminal proceedings that have been brought against that person or from making bail applications;

(d) allowing a court to decline to consider a vexatious litigant's application to vary or set aside an existing vexatious proceedings order, or application for leave to institute proceedings otherwise prohibited by the order, if the applications are not materially different from an earlier, unsuccessful application;

(e) making it clear that a court considering an application by a person who is subject to a vexatious proceedings order for leave to institute proceedings that are otherwise prohibited by that order is not required to hold an oral hearing before dismissing the application; and

(f) providing that, unless a grant of leave to institute proceedings that are otherwise prohibited by a vexatious proceedings order expressly states otherwise, the grant of leave extends to allow the person the subject of the order to make interlocutory or procedural applications within those proceedings.

Bills:

Justice Legislation Amendment Bill 2018, will inter alia, amend *the* *Land and Environment Court Act 1979* to provide that proceedings under the following provisions are to be dealt with under Class 4 of the Court's jurisdiction:

(a) s 202 of the *National Parks and Wildlife Act 1974*;

(b) ss 13.22 and 13.27 of the *Biodiversity Conservation Act 2016*;

(c) s 57 of the *Dangerous Goods (Road and Rail Transport) Act 2008*; and

(d) s 353D of the *Water Management Act 2000*.

The proceedings involve the recovery of costs, expenses and compensation from an offender against whom an offence against the Act concerned has been proved, and in the case of the *Biodiversity Conservation Act 2016* proceedings relating to the enforcement of undertakings are also included.

State Environmental Planning Policy [SEPP) Amendments:

SEPP (Infrastructure) Amendment (Review) 2017 - published 15 December 2017, made changes to definitions in a number of Infrastructure SEPPs as well as changes to complying/exempt development.

SEPP No 64 - Advertising and Signage (Amendment No 3) - published 29 November 2017, updated the definitions in the SEPP and made it unlawful to place advertising signs on trailers parked on a road or road related property.

SEPP Amendment (State and Regionally Significant Development and Law Revision) 2018 - published 28 February 2018, updated, inter alia, references to sections of the EPAA in respect of the new numbering system.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Jerrys Plains Prohibition) 2017 - published 22 December 2017, prohibits open-cut mining on Jerry Plains.

Judgments

United Kingdom:

***R (on the application of Graham Williams) v Powys County Council* [2017] EWCA Civ 427** (Lindblom and Irwin LLJ)

(related decision: *R (on the application of Graham Williams) v Powys County Council* [2016] EWHC 480 (Admin) (Ockelton VP of the Upper Tribunal))

Facts: On 21 May 2015, Powys County Council (**the Council**) granted planning permission for the erection of a wind turbine on a farm at Upper Pengarth, Llandeilo Graban. The wind turbine was erected on a 0.2-hectare site at the side of a hill called "the Garth" and was 41.8 metres in height (to the blade tip). A Grade II listed building, Llanbedr Church, was located on the other side of the Garth, about 1.5 kilometres from the wind turbine. There were also several other scheduled monuments in the surrounding area.

Mr Graham Williams (**the applicant**), a local resident, objected to the proposed wind turbine and subsequently commenced judicial review proceedings challenging the decision of the Council to grant planning permission. On 11 March 2016, the High Court dismissed the proceedings, but permission to appeal was granted on 15 August 2016.

Issues:

(1) Whether the Council failed to comply with a requirement, under Art 14 of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (**the order**), to consult the

Welsh Ministers on the application for planning permission because the wind turbine development was "likely to affect the site of a scheduled monument" by affecting the setting of, or "otherwise have a visual impact on the site of", two scheduled monuments;

(2) Whether the Council failed to perform the duty under s 66(1) of the *Planning (Listed Buildings and Conservation Areas) Act 1990 (UK)* (**the Act**) to determine whether the proposed development would affect Llanbedr Church or its setting and have special regard to the desirability of preserving the setting of Llanbedr Church as a listed building; and

(3) If the Council did fail to perform the duty under s 66(1), whether it is "highly likely" that the outcome would not otherwise have been "substantially different".

Held: Appeal allowed.

(1) The Council did not have an obligation under the order to consult the Welsh Ministers on the planning permission application for the wind turbine: at [40]; The concept of development "likely to affect the site of a scheduled monument" would not naturally be understood as meaning development "likely to affect the site *or the setting* of a scheduled monument". The word "site" describes the area of land on which a monument is physically located and does not equate to the "setting" of the monument, which encompasses the monument's surroundings. Hence, development "likely to affect the site" of a monument would not normally include development likely to affect its setting: at [31]; The relevant statutory context reinforces this literal interpretation. The relevant definition of a "scheduled monument" does not go beyond the monument itself: at [32]; Even if the Council routinely understood the requirement under the order to extend to proposals likely to affect the setting of a "scheduled monument", this could not mean that the Council was obliged to do so under the order: at [39];

(2) The Council failed to discharge its duty under s 66(1) of the Act to determine whether the proposed development would affect Llanbedr Church or its setting and have special regard to the desirability of preserving the setting of Llanbedr Church as a listed building: at [58]-[69]; Nowhere in the advice the decision-makers were given on the proposal was there any mention of Llanbedr Church (or of the affect that the wind turbine development might have on its setting), including taking into account both views in which it and the proposed wind turbine would or might be visible (covisibility) and views from Llanbedr Church towards the wind turbine and vice versa (intervisibility). The decision-makers were not invited to consider the impacts of the development on the surroundings in which Llanbedr Church was experienced: at [64]; The lack of relevant advice amounted to an error of law: at [65]; Absent any evidence of the Council heeding and performing the duty under s 66(1) of the Act, it must be concluded that the Council failed to discharge its duty and that its decision was deficient and unlawful: at [66];

(3) (*obiter*) The Council would have been lawfully entitled to conclude that there would be no harmful effect on the setting of Llanbedr Church or that, even if harmful, the effect would not be significantly or decisively so. These are classically questions of fact and planning, or aesthetic judgement, for a decision-maker that the Court will not interfere with unless on public law grounds: at [67];

(4) (*obiter*) The circumstances in which the s 66(1) duty has to be performed where the setting of a listed building is concerned will vary considerably, and with a number of factors, including: the nature, scale and siting of the proposed development; its proximity and likely visual relationship to the listed building; the architectural and historic characteristics of the listed building itself; local topography; and the presence of other features, both natural and manmade, in the surrounding landscape or townscape: at [52]; If a proposed development is to affect the setting of a listed building, there must be a distinct visual (more than remote or ephemeral) relationship between the two which bears on one's experience of the listed building in its surrounding landscape or townscape. The mere possibility of seeing both listed building and development at the same time is insufficient: at [55]; and

(5) In the exercise of its discretion, the Court should not withhold a remedy on the basis that the decision on the planning permission would have been "highly likely to have been the same" if the error of law had not been made. In exercising its discretion in a case where the critical issue involves matters not merely of fact and planning judgement but of aesthetic judgrment as well, in the performance of a duty imposed by statute, the Court should be very careful to avoid trespassing into the domain of the decision-maker: at [71];

R (Scarisbrick) v Secretary of State for Communities and Local Government **[2017] EWCA Civ 787**
(Lindblom and Irwin LLJ)

(Note: This case is included to show that the approach adopted in judicial review proceedings in planning cases in the United Kingdom is generally similar to that in this Court.)

Facts: This matter was a claim for judicial review of a decision, made on 19 May 2015, by the Secretary of State for Communities and Local Government (**the defendant**) to make a development consent order (**White Moss Landfill order**). The White Moss Landfill order, issued on 30 June 2015, was for the construction of a hazardous waste landfill facility with a capacity of 150,000 tonnes per annum, and the continuation of filling with hazardous waste of the adjacent landfill site.

Pursuant to ss 104(2) and 104(3) of the *Planning Act 2008 (UK)* (**the Planning Act**), the defendant was required to have regard to any relevant national policy statement and decide the development application in accordance with any such statement. The 2013 National Policy Statement for Hazardous Waste: A framework document for planning decision on nationally significant hazardous waste infrastructure (**NPS**) had effect in this case.

Mr Scarisbrick (**the claimant**) owned land next to the site of the proposed development and lived nearby. The claimant challenged the development consent order. Permission to apply for judicial review was permitted on a single ground: whether, in making the development consent order, the defendant erred in his approach to the assessment of the need for the project by misconstruing and misapplying the policy in Pt 3.1 of the NPS, which says that relevant applications will be assessed "on the basis that need has been demonstrated". The claimant submitted that the defendant misdirected himself in his understanding and application of the policy in Pt 3.1 of the NPS by failing to consider:

(a) whether a facility of the particular size proposed was actually needed;

(b) whether there was a compelling case in the public interest for Whitemoss Landfill Ltd to be given powers of compulsory acquisition over third party land; and

(c) whether the development and the compulsory acquisition of land would be a proportionate interference with the landowners' human rights.

Issues:

(1) Whether the defendant erred in his approach to the assessment of the need for the project by misconstruing and misapplying the policy in Pt 3.1 of the NPS, which says that relevant applications will be assessed "on the basis that need has been demonstrated";

(2) Whether the defendant erred in his determination that the adverse impacts of the proposal were outweighed by the need for relevant hazardous waste infrastructure identified in s 3.1, and the presumption in favour of relevant proposals in Pt 4.1.2], together with any considerations weighing in favour of the project; and

(3) Ultimately, whether the government's policy for "nationally significant hazardous waste infrastructure" was properly interpreted and lawfully applied in the making of the White Moss Landfill order under s 114 of the Planning Act.

Held: Claim for judicial review dismissed.

(1) Pt 3.1 of the NPS stated "the Secretary of State will assess applications for infrastructure covered by this NPS on the basis that need has been demonstrated": at [15]; The existence of this need for the project did not depend on the scale, capacity and location of the development proposed, or on the planning history of the existing landfill site: at [58]; nor did the NPS set any minimum or maximum level of need for the facilities to which it related: at [64]; Therefore, the starting point in making a decision on a relevant project was that there was a general need for such facilities: at [22], [24], and [27], wherever it was proposed: at [23]-[25];

(2) Weight to be given to particular considerations was a matter for the exercise of the defendant's planning judgment: at [31]; The weight to be given to the need identified in Pt 3.1 is not prescribed by the NPS and must be determined according to the individual project: at [31]; "Considerable weight" was given to the need for the proposal: at [63];

(3) The proposal was subject to a balancing exercise set out in Pt 4.1.3: at [28]. In balancing the relevant considerations, the defendant's planning judgement was exercised lawfully: at [72];

(4) The defendant neither misinterpreted nor misapplied any policy of the NPS in making the development consent order-nor did he otherwise err in law: at [77];

Pakistan:

Maple Leaf Cement Factory Ltd v Environmental Protection Agency **[Lahore High Court] W. P. No.115949/2017** (Syed Mansoor Ali Shah CJ)

Facts: These proceedings concerned expansion of a cement plant. The petitioner company (**the Company**) filed an Environmental Impact Assessment (**EIA**) with the Punjab Environmental Protection Agency (**EPA**). A Committee of Experts examined the case and recommended issuance of Environmental Approval. The recommendations were placed before the EPA for approval but no order was passed within the relevant statutory period provided by s 15 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations 2000 (**the Regulations**). The Regulations contained a deemed approval provision.

After the lapse of the statutory period, the Company considered it to be a deemed approval of the EIA and commenced construction of Line-III of the concrete plant. The EPA issued an impugned order to cease carrying out construction work on the ground that the Company had started construction without obtaining a written environmental approval under s 12(4) of the *Pakistan Environmental Protection Act 1997* (**the Act**). The Company challenged the impugned order passed by the EPA.

Issues:

(1) What were the relevant principles to be applied;

(2) Whether the EIA submitted was deemed to be approved;

(3) If yes to (2), whether the scope of the deemed approval enabled the Company to commence construction; and

(4) Did application of the precautionary principle and that of *In dubio pro natura* warrant preservation of the *status quo* pending the outcome of an environmental survey of the mining concession area being carried out under the supervision of the Supreme Court of Pakistan..

Held: Petition allowed; impugned order to be set aside but *status quo* preserved pending outcome of environmental survey of the mining concession area.

(1) The purpose of the Act set out in its preamble is the protection of the environment and the promotion of sustainable development. "Sustainable development means, development that meets the needs of the present generation without compromising the ability of future generation to meet their needs. The idea of sustainability or sustainable development is hinged on four legal elements: "First, the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity)". Second, the aim of exploiting natural resources in a manner which is 'sustainable', or 'prudent', or 'rational', or 'wise', or 'appropriate' (the principle of sustainable use). Third, the 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intergenerational equity). And fourth, the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying the environmental objectives (the principle of integration). "The fourth element of sustainable development is the commitment to integrate environmental considerations into economic and other development and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations." Sustainable Development creates a balance between development and environmental protection and conservation. This also forms the central policy and purpose of the Act. "The aim of interpretation in law is to realize the purpose of the law. Law is thus a tool designed to realize a social goal. It is intended to ensure the social life of the community, on the one hand, and human rights, equality, and justice on the other. The history of law is a search for the proper balance between these goals, and the interpretation of the legal text must express this balance. Indeed, if a statute is a tool for realizing a social objective, then interpretation of the statute must be done in a way that realizes this social objective." "The central theme of sustainable development is, therefore, the best interpretative tool" for considering the operation of the Act or the Regulations: at [12];

(2) The Act and the Regulations provided a strict timeline to be followed by the EPA: at [13]; Failure of the EPA to adhere to the statutory timeline resulted in a deemed approval of the EIA: at [13];

(3) Deemed approval cannot be interfered with by the EPA on the sole ground that written environmental approval was not granted under s 12(4) of the Act: at [16]; As a result of the EPA's failure to pass an order on the EIA, the EIA was deemed to be approved and the Company was free to proceed with the construction and operation of the project: at [17]; and

(4) However, as a further survey being undertaken of the area where the petitioner's mining concessions were proposed may reveal adverse environmental impacts, the precautionary principle arose for consideration. Further, the principle of *In dubio pro natura* (the IUCN World Declaration on the Environmental Rule of Law (2016)) ie " in cases of doubt, all matters before courts, administrative agencies, and other decision makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom" was applicable. Applying these principles, the status quo was to be maintained until the survey had been completed and considered by the EPA. If there was no impediment revealed and no restraining order made by the Supreme Court of Pakistan (which was overseeing the survey), the deemed approval would stand: at [19].

NSW Court of Appeal:

***Fagin v Australian Leisure and Hospitality Group Pty Limited* [2017] NSWCA 306** (McColl JA)

(related decision: *Sally-Anne Maree Fagin v Australian Leisure and Hospitality Group Pty Limited* [2017] NSWLEC 59 (Robson J))

Facts: Australian Leisure and Hospitality Group Pty Limited (**Australian Leisure**) sought security for the costs of an appeal brought by Ms Fagin (**the applicant**) against a decision of Robson J dismissing Class 4 proceedings brought in the Land and Environment Court.

Australian Leisure had operated the Charles Hotel (**the hotel**) in Fairy Meadow since 2012, pursuant to a lease from the owner Laundy (Exhibition) Pty Ltd. The applicant had lived not far from the hotel since 2005. In 2016, the applicant commenced Class 4 proceedings seeking orders compelling Australian Leisure to comply with condition 17 of Development Consent DA-2006/918 (**the 2006 Consent**) granted by Wollongong City Council (**the Council**) on 14 November 2006, and other orders, relevantly, in relation to audio speakers installed in the beer garden in the hotel grounds. Condition 17 prohibited "live or recorded music or amplified sound … within the beer garden".

The applicant failed before the primary judge.

On 25 August 2017 Ms Fagin filed a Notice of Appeal (**the original Notice of Appeal**).

The Notice of Motion seeking security for costs was filed on 23 October 2017. It sought security for costs of the appeal pursuant to r 51.50 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) in the amount of $72,500.

In support of the motion, Australian Leisure read the affidavit of a solicitor employed by its solicitors. The affidavit annexed various e-mails from the applicant stating, in substance, that she did not "care about costs" and that she was "judgment proof" as her only income was Centrelink payments which she asserted could not be garnisheed. Based on copies of the relevant costs agreements, counsel estimated Australian Leisure's total costs of the appeal were $67,500-$72,500 (GST exclusive).

Issues: Whether there were "special circumstances" to justify a security for costs order that would effectively stifle the applicant's appeal where the appellant is impecunious.

Held: Notice of Motion dismissed, with costs.

(1) Rule 51.50 of the UCPR gave power in "special circumstances" to order that security be given for the costs of an appeal. UCPR r 51.50 does not affect the powers of the Court under UCPR r 42.21 to order security for the costs of proceedings. However, Australian Leisure eschewed reliance upon any power of the Court other than that conferred by UCPR r 51.50: at [53];

(2) The discretion to order security for costs is unfettered and should be exercised having regard to all the circumstances of the case without any predisposition in favour of the award of security: at [54];

(3) To demonstrate "special circumstances", the applicant for security for costs must establish circumstances which are "'special', that is, 'out of the ordinary', 'unusual' … although the specialness

must be adjudged in the particular circumstances under consideration". The question whether special circumstances exist must be judged on its own merits in each case: at [55];

(4) The applicant had an arguable complaint that the primary judge erred in failing to deal with the audio speakers issue as an independent basis of relief and in considering it as an alternative basis for refusing her relief in the exercise of his discretion. Accordingly, grounds 40-42 in the Amended Notice of Appeal could not be said to be hopeless, unreasonable or of an harassing nature: at [68];

(5) Other circumstances impacted upon this conclusion and weighed against making the order sought. First, the fact that an order for security for costs would stifle the proceedings is "a powerful factor" to be taken into consideration. Secondly, the applicant's appeal involved a matter of public interest, at least insofar as the residents of Fairy Meadow in the vicinity of the hotel were concerned. They, too, were clearly affected by loud noise emanating from the beer garden, transmitted through the audio speakers: at [69];

(6) The only factor Australian Leisure had established was that the applicant was impecunious. That usually does not constitute a special circumstance and in the circumstances of this case did not tip the balance in Australian Leisure's favour: at [70]; and

(7) The Notice of Motion was dismissed with costs: at [74];

Inghams Enterprises Pty Ltd v Belokoski **[2017] NSWCA 313** (McColl, Basten JJA, and Bellew J)

(related decision: *Inghams Enterprises Pty Ltd v Belokoski* [2017] NSWWCCPD 15 (Snell DP))

Facts: Mr Belokoski's (**the respondent**) claimed to have suffered an injury on 25 March 2009, affecting his cervical spine and right shoulder. A first set of proceedings was commenced in the Workers' Compensation Commission (**the Commission**) by the respondent in 2012, and was discontinued in March 2014. A second set of proceedings was commenced in August 2014.

On 11 August 2014, the Commission conducted a telephone conference involving Mr Macken on behalf of Inghams Enterprises Pty Ltd (**Inghams**), and Mr Dougall on behalf of the respondent. The conference was conducted by Mr Snell, who was then a senior arbitrator. The proceedings were resolved by agreement on 25 September 2014. Third proceedings were commenced subsequently and referred to an arbitrator who made a decision on them.

According to the written submissions filed by the appellant in the Court of Appeal, Mr Macken had made a report to Inghams in relation to the telephone conference. In that report he had "included a statement by Senior Arbitrator Snell that there was no real issue as to 'injury'". It was on the basis of that comment that Inghams submitted that Mr Snell, now a deputy president of the Commission, should not sit on the appeal brought by Inghams from the decision of the arbitrator of October 2016.

On the recusal application, the deputy president, with reasons provided, reached the conclusion that the recusal application should be refused.

The proceedings were commenced by application for leave to appeal in the Court of Appeal.

Issues: Whether there was a reasonable apprehension of bias on the part of the deputy president.

Held: Leave granted; appeal dismissed.

(1) As explained in *Johnson v Johnson* ((2000) 201 CLR 488; [2000] HCA 48 at [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) the question is "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide". It was not submitted that a different test should apply to the deputy president of the Commission, although it was accepted that the application of the test must have regard to the statutory function of an arbitrator and the role played by a deputy president on an appeal: at [15];

(2) It was clear during the course of submissions that three matters of complaint were relied upon which were convenient to be described as "grounds": at [20];

(3) The first ground relied upon a comment said to have been made by the deputy president as arbitrator in the course of a telephone conference. However, no affidavit was sworn by the solicitor who had reported this comment, nor did they give oral evidence. If there had been a record of the report, it should have been put in evidence. It was not. In these circumstances, it would have been open to the deputy president to dismiss the application on the ground that there was no evidential basis for concluding that such a comment was made: at [26];

(4) In addition to the lack of evidence, the application was made without providing context for the alleged comment. Without the context, it would be pure speculation to draw any inference from the comment. A fair-minded observer would not do so. The application could and should have been rejected on that basis: at [27];

(5) The second ground contained three issues to be dealt with. First, the idea that a tribunal demonstrates a possibility of prejudgement by drawing the attention of one party to an authority which may be against its position was hard to comprehend. Second, the deputy president did not take a narrow and technical approach but identified that Inghams was seeking to substitute grounds of appeal in a way which was apt to cause procedural unfairness to the respondent. Third, the refusal of the Commission to "propose" the course then thought appropriate by Inghams, an oral hearing, after the event could not possibly give rise to an apprehension of prejudgement: at [28]-[38];

(6) The third ground was that Inghams sought to rely upon the fact that as conciliator, the deputy president, had "managed" the earlier proceedings to resolution. There was no direct evidence that he had done anything of the sort; nor was it explained what steps he had taken (if any) to achieve a consensual outcome of the earlier proceeding. How such a course, whatever it may have involved, could form the basis of a reasonable apprehension of prejudgement was not explained, no doubt because the factual basis was unknown. The matter was resolved by consent, and there was no evidence that it was resolved against Inghams' interests: at [39];

(7) Assuming that some steps were taken by the arbitrator which involved active management of the case through a process of conciliation, the appellant was confronted by the statutory provision in s 355(2) of the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*. In other words, the fact that an arbitrator has used his or her best endeavours to bring about a settlement will not form the basis of a challenge to an award or determination if conciliation fails and an arbitrated outcome is required. The provision was a contextual factor which the fair-minded observer would have been entitled to take into account: at [40]-[41]; and

(8) The recusal application was properly determined by the deputy president in dismissing the appeal before him: at [44].

***Liverpool City Council v Moorebank Recyclers Pty Ltd* [2018] NSWCA 7** (Basten and Leeming JJA, Emmett AJA)

(related decisions: *Liverpool City Council v Moorebank Recyclers Pty Limited; Benedict Industries Pty Ltd v Minister for Planning (No 2)* [2017] NSWLEC 53 (Robson J); *Liverpool City Council v Moorebank Recyclers Pty Limited; Benedict Industries Pty Ltd v Minister for Planning (No 3)* [2017] NSWLEC 83 (Robson J))

Facts: Moorebank Recyclers Pty Ltd (**the respondent**) had applied under Pt 3A of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) for approval to construct and operate a materials recycling facility. Under the Liverpool Local Environmental Plan 2008 (**the LLEP 2008**), the land to which the application applied was zoned E2 - Environmental Conservation (**the zone**). The application was granted by the Planning Assessment Commission (**the PAC**) subject to conditions. Liverpool City Council (**the Council**), Benedict Industries Pty Ltd, and Tanlane Pty Ltd appealed the PAC's decision in the Court. Robson J (**the primary judge**) upheld the PAC's decision, again subject to conditions. In the course of his judgment, the primary judge found that the application did not fit comfortably within the objectives of the zone, but gave this conclusion little weight as the zone objectives did not need to be taken into account pursuant to cl 11 in Sch 1 of the LLEP 2008. The objectors appealed to the Court of Appeal.

Issues: The appellants raised a number of grounds:

(1) The primary judge failed to take into account the objectives of the zone;

(2) The primary judge failed to consider the context, general purpose and policy of clause 11 in Sch 1 of the LLEP 2008;

(3) The primary judge failed in differentiating between development that was permissible under cl 2.5 of the LLEP 2008 and development that was only permissible having regard to cl 11 in Sch 1;

(4) The primary judge failed to take into consideration cl 11(3) of Sch 1 of the LLEP 2008;

(5) The primary judge failed to give adequate reasons for holding that the proposed materials recycling facility was consistent with the LLEP 2008;

(6) The primary judge erred in finding that the noise impacts of the proposal could be appropriately managed by way of conditions of consent;

(7) The primary judge erred in finding that the mitigation measures taken in respect of the noise impacts of the proposal were reasonable in the circumstances; and

(8) The primary judge erred in coming to a decision that was legally unreasonable.

Decision: Basten JA and Emmett AJA delivered separate judgments. Leeming JA delivered a short judgment which agreed with both Basten JA's and Emmett AJA's judgments, and made some additional remarks.

Held: Appeal dismissed with costs.

(1) The primary judge was permitted rather than mandated to take the LLEP 2008 into account: at [35] (per Basten AJA), at [112] (per Emmett AJA). Further, the primary judge's findings with respect to the LLEP 2008 were not capable of constituting a legal error because it was not necessary to give significant weight to the zone objectives on the proper construction of clause 11 in Sch 1: at [55] (per Leeming JA), at [133] (per Emmett AJA);

(2) Because the Moorebank land was spot-zoned for a materials recycling facility, anything in the LLEP 2008 contrary to that use, including the zone objectives, was to be disregarded: at [136] (per Emmett AJA);

(3) The primary judge was correct in holding that the planning history should not be used to interpret cl 11 in Sch 1 of the LLEP 2008 because the clause has a "clear, natural and ordinary" meaning: at [129] (per Emmett AJA);

(4) Pursuant to cl 11 of Sch 1, a resource recovery facility was permitted on the land: at [36] (per Basten JA), at [148] (per Emmett AJA);

(5) The primary judge gave adequate reasons for his decision: at [55] (per Leeming JA), at [148] (per Emmett AJA);

(6) The primary judge was entitled to find that the noise mitigation measures were adequate and in so doing did not commit any legal error: at [42] (per Basten JA), at [56] (per Leeming JA), at [163] (per Emmett AJA); and

(7) In order for a decision to be found to be "legally unreasonable", it is necessary to show that the decision is one that falls outside that which was reasonably open to the decision maker. The decision to approve the application was open to the primary judge: at [47] (per Basten JA), at [57] (per Leeming JA), at [171] (per Emmett AJA).

Mailey v Sutherland Shire Council **[2017] NSWCA 343** (Macfarlan JA, Meagher JA and Preston CJ of LEC)

(decision at first instance: *Mailey v Sutherland Shire Council* [2017] NSWLEC 145 (Pain J))

Facts: The three appellants own land at 2 Marlo Road, Cronulla ('the land'). In between the land and Mitchell Road there is a series of five walls, which retain an elevated road for pedestrian access to the land. One of the walls (**wall D**) became unstable and Sutherland Shire Council (**the Council**) issued an order (**the order**) under item 21 of the table to s 124 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) requiring the appellants to take action to ensure the safe condition of the land.

The appellants took some steps to comply with the order but then challenged the validity of the order and sought damages for expenses incurred in complying with the invalid order. Pain J dismissed the proceedings and ordered the appellants to pay the Council's costs.

On appeal to the Court of Appeal, the appellants submitted the order was ultra vires of the power in item 21 of the table to s 124 of the Local Government Act in both the narrow and broad senses. First, in the narrow sense, the appellants contended the land was not land "not in a safe or healthy condition" as required in the "in what circumstances" section of item 21 because the cause of the lack of safety was wall D, which was mostly located on the Council's land. The appellants also submitted that orders under item 21 can only require the occupier or owner of the unsafe land to undertake work on that land, whereas the order required the appellants to do work on the Council's land. Second, in the broad sense, the appellants submitted the order was uncertain due to the wording of the works specified in the "to do what" section of the order and the basis of the appellants' liability to comply with the order. The

appellants also argued that the order was issued for the improper purpose of having the appellants bear the cost of building and maintaining the wall for the Council's benefit.

Issue: Whether the primary judge made an error by finding the order was not made ultra vires of the power under item 21 of the table to s 124 of the Local Government Act, and that damages should not be awarded to the appellants for expenses incurred in complying with the invalid order.

Held: Appeal dismissed with costs.

(1) There is no justification in the text, context or purpose of item 21 for limiting the circumstance to where the cause of the lack of safety or health of the land is on that land (at [15]); it was clearly open to both the Council and the primary judge to find on the evidence that the appellants' land was not in a safe or healthy condition because of the imminent risk of collapse of wall D onto the appellants' land: at [16];

(2) A wide and beneficial construction of item 21 empowers a council to give an order requiring things to be done or not to be done on any land, and not only the land owned or occupied by the recipient of the order, provided that the purpose of requiring the doing of or refraining from doing the things is to ensure that the land owned or occupied by the recipient of the order is placed or kept in a safe or healthy condition (at [47]); the order can be construed as subject to an implied condition that any requisite authority, at common law or under statute, to enter upon and carry out the work specified in the order be obtained before doing the works specified: at [48];

(3 The appellants have not established that the order is uncertain in the various ways alleged (at [73]); it is not to the point whether the wording was over and above what was required (ie superfluous), the question was whether the wording made the specification of the work required so uncertain as not to be a valid specification of the thing to be done for the purposes of item 21 (at [77]); the order does particularise in concise terms what it requires to be done (at [81]); the appellants could not reasonably, and in fact did not, have any doubt about the basis for their liability to comply with the order: at [83];

(4) The appellants have not established that the order was issued for an improper purpose (at [95]); the exercise by the Council of the power to issue an order requiring the doing of things that are within power cannot be seen to be for an improper purpose (at [96]); an exercise by the Council to issue an order within power does not become for an improper purpose by reason of the potential for the Council to benefit in some way from the recipient of the order carrying out the work required by the order: at [97];

(5) Tthe appellants have not established that the order is ultra vires, in either a narrow or a broad sense, and, hence, that it was issued in breach of s 124 of the Local Government Act; there is no basis, therefore, to make any order under s 676(1) of the Local Government Act to remedy a breach of this Act, including awarding damages to a person who has incurred expense as a consequence of a breach of the Act: at [107].

Ross v Lane Cove Council **[2017] NSWCA 299** (Macfarlan and White JJA)

(related decision: *Lane Cove Council v Ross (No 16); Lane Cove Council v Chami (No 6)* [2017] NSWLEC 26 (Pain J))

Facts: This was an application by Mr Raymond Ross (**the applicant**) for leave to appeal against orders that he pay the costs of the Lane Cove Council (**the Council**) in two sets of Class 4 proceedings brought by the Council in the Land and Environment Court. The litigation between the Council and the applicant was extensive. It arose from the unauthorised construction by the applicant of building works to a residential property in Bayview Street, Northwood.

Issues: Whether leave to appeal should be granted.

Held: Leave refused, costs ordered in favour of the Council.

(1) After consideration of the applicant's extensive submissions, and the Council's responses, the Court's view was that Mr Ross did not have any significant prospect of establishing an error of the *House v The King*-type (*House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40) if leave to appeal were granted. In large measure, his submissions sought to have the Court take a different view to that taken by the primary judge regarding the reasonableness of the parties' conduct in the proceedings below. It is not the function of the Court to engage in such an exercise on an application such as the present: at [4]; and

(2) The various conclusions reached by her Honour were ones that were reasonably open to her. In those circumstances, and because it did not raise any question of principle or general importance, the applicant's application for leave to appeal was dismissed with costs: at [4].

Stoylar v Towers **[2018] NSWCA 6** (Gleeson, Simpson and White JJA)

(related decision: *Towers v Stolyar* [2017] NSWSC 526 (Darke J))

Facts: This was an appeal from a decision of Darke J who declared that a right of vehicle parking and garaging (**the easement**) upon land owned by Mrs Faina Stolyar (together with Mr Ian Stolyar - **the appellants**) is valid and enforceable.

The appellants' property and Mr Barrie Towers and Mrs Celia Towers' (**the respondents**) property share a common boundary. The 1990 easement grants a right of vehicle parking and garaging which burdens the appellants' property, Lot A (**the servient tenement**), and benefits the respondents' property, Lot B (**the dominant tenement**).

The easement is approximately three metres wide and 16 metres long. A single garage has been built on the easement area, with a double-garage located adjacent and to the west on the servient tenement which was used by the appellants. The single garage had no door and had space in front of the garage to park another vehicle. The respondents had parked vehicles in the single garage and in the area in front of the garage for many years. From September 2015, there were ongoing disputes about parking and garaging. The respondents brought proceedings against the appellants claiming wrongful interference with their rights under the easement. The appellants denied these allegations and contended that the easement was invalid, bringing a cross-claim seeking a declaration that the easement was not valid or enforceable and an injunction restraining the respondents from parking within the area of the easement.

The primary judge held the easement to be valid. Upon appeal, the appellants contended that the primary judge erred:

(1) In holding that the easement was valid;

(2) In failing to hold that the rights conferred by the easement were so extensive that they amounted to joint occupation of that part of the servient tenement contained within the area of the easement, and substantially deprived the appellants of proprietorship and possession of that part of the appellants' property; and

(3) In failing to restrain the respondents from parking within the area of the easement.

Issues:

(1) Whether the appellants demonstrated that motor vehicles could not be turned around in the driveway without encroaching upon the easement;

(2) Whether use of the easement area amounted to joint occupation and whether the right of vehicle parking and garaging substantially deprived the appellants of their rights of proprietorship or possession of the servient tenement to such a degree as to render the grant of the easement invalid;

(3) If "yes" to (2), whether the alternative relief sought in the Notice of Appeal should be granted.

Held: Leave to appeal granted; appeal dismissed; and appellants to pay the respondents' costs.

(1) The right to use land for the purpose of parking a motor vehicle amounted to a permissible easement: at [43]. The appellants bore the onus of proof of establishing the invalidity of the easement: at [56];

(2) The appellants failed to establish that it was not possible to turn vehicles around: at [65], [69]. The absence of evidence relating to the inability to turn motor vehicles around led to a conclusion that the rights given to the respondents did not substantially deprive the appellants of rights of proprietorship or possession in respect of the easement area: at [73]. Following the approach taken in *Registrar-General of New South Wales v JEA Holdings (Aust) Pty Ltd* [2015] NSWCA 179, the appellants retained reasonable use of the servient tenement in its entirety: at [73]; and

(3) Due to the conclusion in respect of issue (2), it was unnecessary to determine the issue of alternative relief.

Supreme Court of NSW:

Julian Edward Canny v The Owners-Strata Plan No 4983 **[2018] NSWSC 80** (Rein J)

Facts: These proceedings concerned a property in Elizabeth Bay known as Elizabeth Bay Gardens (**EBG**). Julian Edward Canny and 42 others (**plaintiffs**) are all owners of parking lots who are not owners of residential lots within Strata Plan 4983 (**Strata Plan**) EBG.

The 1970 development consent (**Consent**) for EBG included the provision of free-parking for 104 cars by occupants of the building and 15 cars by visitors. The Strata Plan comprised 87 parking lots. Between 1970 and 2014, parking lots were bought and sold by both residential lot owners and non-residents. In December 2014, the Owners Corporation Strata Plan 4983 (**Owners Corporation**) passed a resolution to create a new by-law entitled Special By-Law 7 Car Spaces (**SBL7**). SBL7, which referenced a letter from the City of Sydney Council (**Council**) to the Owners Corporation dated 12 September 2012, stated that parking spaces within the building should only be used by occupants of residential lots and worked to preclude non-resident owners from using their parking lots.

Issues:

(1) Did the Consent, by its terms, permit use of the allocated parking spaces by non-residents;

(2) If the answer to (1) was no, did the approval by the Council of subdivision for EBG, which contained both residential lots (78) and parking lots (87), thereby permit the use of the parking lots by owners of those lots, whether or not they also were resident in EBG; and

(3) If the answer to both (1) and (2) was no, should the Owners Corporation be granted injunctive relief to prevent the plaintiffs from parking their cars in their respective lots.

Held: Each of the plaintiffs was entitled to park their vehicle on their respective parking lot; SBL7 was invalid and was to be removed from the Register.

(1) Any use permitted as at 1970 was continued by later planning schemes: at [34]. The use of "occupants", in contrast to "visitors" or "residents", should be given its ordinary meaning: at [32]; "Occupants of the proposed building", as used in the Consent, was intended to refer to people who would reside in the building: at [40]; The provision of parking for non-residents is not a residential use of EBG: at [43];

(2) Approval of subdivision is not approval of use: at [61]; However, by approving the subdivision of the building which created 87 lots for the parking of cars, Council thereby approved the occupation of those parking lots for parking: at [67]; Council's approval of the creation of separate parking lots entailed separate occupation of those lots: at [68]; and must be taken to have accepted that whoever became the owner of a parking lot created by the Strata Plan approved by Council, whether a resident or not, could use the parking lot for its intended purpose: at [69];

(3) SBL7 was invalid: at [71]; and

(4) Due to the conclusion in respect of issue (2), it was unnecessary to determine the issue of injunctive relief.

Lawcover Insurance Pty Ltd v Leonardo Carlo Muriniti & Robert Duane Newell **[2017] NSWSC 1557** (Sackar J)

(related decision: *Young v King (No 11)* [2017] NSWLEC 34 (Sheahan J))

Facts: The proceedings concerned a dispute about whether Lawcover (**the plaintiff)** was entitled not to pursue an appeal in respect of a personal costs order made against the defendants by Sheahan J in the Land and Environment Court in *Young v King (No 11)* [2017] NSWLEC 34 (**judgment No 11**) and whether the defendants were prevented from conducting such appeal in person and without the consent of the plaintiff.

The plaintiff contended on a proper construction of the contract of insurance (**the policy**) that, first, the defendants were deemed to have consented to the plaintiff's decision not to appeal; second, the plaintiff was not obliged to appeal; and, third, that the defendants had no right to institute or conduct any appeal in their own right. As a result, the plaintiff sought declaratory and other relief based on the terms of the policy they said were the material facts.

The defendants, by way of a cross-summons, filed on 23 August 2017, challenged the plaintiff's position. The defendants said that the plaintiff was not entitled to rely on its decision not to pursue an appeal and were not entitled to prevent them from conducting the appeal themselves. They based that argument partly on matters of construction but also alleged the plaintiff acted in bad faith, thereby preventing it from relying upon its decision not to appeal under the terms of the policy.

Issues:

(1) Whether the defendants were deemed to have consented to the plaintiff's decision not to appeal;

(2) Whether the plaintiff was obliged to appeal; and

(3) Whether the defendants were entitled to pursue any appeal.

Held:

(1) The policy, properly construed, meant the defendants had been deemed to have consented to the plaintiff's decision not to appeal. The plaintiff was entitled to reach that decision, and the defendants were entitled to challenge that decision pursuant to cl 22 of the policy. The defendants chose not to exercise that contractual right, and were therefore deemed to have consented to the plaintiff's decision and were thus prevented from pursuing an appeal: at [220];

(2) The defendants' allegations of bad faith, the argument concerning "contracting out" of the *Insurance Contracts Act 1984 (Cth)*, and the claim they could nonetheless run the appeal on its own costs carried no substance: at [222]; and

(3) The plaintiff was entitled to a permanent injunction restraining the defendants from taking any further steps to prosecute their appeals from judgment No 11, and an order requiring the defendants take all steps reasonably required to ensure a solicitor appointed by the plaintiff be recorded as the solicitor on the record for the defendants in the appeals: at [223].

Land and Environment Court of NSW

- Judicial Review:

***Mailey v Sutherland Shire Council* [2017] NSWLEC 145** (Pain J)

Facts: Mailey (**the applicant**) commenced proceedings against Sutherland Shire Council (**the Council**) challenging an emergency order issued with respect to a retaining wall. The retaining wall was located on a common boundary between the applicant's land and Mitchell Road Cronulla. The reason for the emergency order was that the wall was about to collapse. The order required the applicant to erect a fence around the wall, obtain two engineering reports and do the work specified in the reports once approved by the Council's engineers. The applicant sought a declaration that the order was void on three grounds.

Issues:

(1) Was the order ultra vires;

(2) Was the order uncertain; and

(3) Was the order issued for an improper purpose.

Held: Summons dismissed; applicant to pay the Council's costs.

(1) The order was not ultra vires as it was generally issued within the power conferred by item 21 of s 124 of the *Local Government Act 1993 (NSW)*: at [83]; at the time of issuing the order, the applicant's land was unsafe: at [77]; the wall was partly located on the applicant's land: at [79]; and the failing section of the wall was located on the applicant's land: at [79];

(2) The order was not uncertain: at [109]; the order did not leave the applicant in the position of not knowing if it was in breach: at [104]; a distinction can be drawn between orders which allow flexibility in how the recipient achieves an outcome and orders which present a risk of continuing breaches due to uncertainty: at [106]; and

(3) Improper purpose not established: at [116]; the applicant's evidence that the Council was attempting to make him responsible for a Council asset in the road was largely unsubstantiated and therefore given little weight: at [111].

Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd (No 2) **[2017] NSWLEC 186** (Pain J)
(related decisions: *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2017] NSWLEC 97)

Facts: Tanlane (**the respondent**) owned a 22-hectare parcel of land on the Georges River on which it intended to undertake residential subdivision and a marina development. It lodged a planning proposal with Liverpool City Council (**the Council**) seeking to change the Liverpool Local Environmental Plan 2008 (**the LLEP 2008**) to adjust a boundary to allow an additional small area of residential use (**rezoning**) and to allow the use of the proposed marina buildings for residential development (**Sch 1 Amendment**). Moorebank (**the applicant**) challenged the validity of two decisions concerning the planning proposal on the basis:

(1) They did not comply with cl 6 of the State Environmental Planning Policy No 55-Remediation of Land (**SEPP 55**); hence,

(2) The resolutions of the Council to support, "in principle", the planning proposal and to forward it to the Greater Sydney Commission (**GSC**); and

(3) The making of a gateway determination under Pt 3 Div 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) by a delegate of the GSC that the planning proposal should proceed subject to certain conditions,

were invalid.

Clause 6 of SEPP 55 requires contamination and remediation of land to be considered in zoning or rezoning proposals. It came into effect in 1998 and is largely unamended. Part 3 Div 4 was substantially amended in 2009.

Issues:

(1) Did cl 6 SEPP 55 apply to the preparation and/or adoption of the planning proposal by the Council including the Council resolutions and the making of the gateway determination by the GSC delegate;

(2) Did cl 6 SEPP 55 apply to the Sch 1 Amendment allowing a change of use of marina buildings; and

(3) Was the gateway determination invalid because the delegate made the determination under a misapprehension of material matters of fact and/or law.

Held: Summons was dismissed; the applicant to pay the respondent's costs unless a Notice of Motion seeking alternative orders was filed within 30 days of the judgment.

(1) The wording of current Pt 3 Div 4 of the EP&A Act and cl 6 SEPP 55 did not intersect: at [61]; it followed that any obligation to consider contamination by a planning authority by virtue of SEPP 55 arose separately from Pt 3 Div 4: at [69]. As cl 6 SEPP 55 did not apply, the issues raised by Moorebank as to whether the resolutions or gateway determination complied with cl 6 and whether the gateway determination was valid did not strictly arise: at [88];

(2) Clause 6 did not apply to the Sch 1 Amendment: at [87]; SEPP 55 would only apply where the planning authority was preparing an environmental planning instrument that included land in a particular zone which permitted a change in use: at [84]; the change of use permitted by the Sch 1 Amendment was not expressed to be a change in the zoning of the land: at [85]; and

(3) While the validity of the development consents provided context for the decision to proceed with the planning proposal, it was not materially relevant in the sense that it made the determination invalid: at [97].

- Compulsory Acquisition:

Qasabian Family Investments Pty Ltd v Roads and Maritime Services (No 2); Fishing Station Pty Ltd v Roads and Maritime Services (No 2) **[2017] NSWLEC 179** (Moore J)

(related decision: *Qasabian Family Investments Pty Ltd v Roads and Maritime Services; Fishing Station Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 73 (Moore J))

Facts: Roads and Maritime Services (**the respondent**) was the authority responsible for construction of roadwork upgrades requiring the acquisition of land at Frenchs Forest for the construction of a 12-lane-wide road. Both Qasabian Investments and Fishing Station, entities associated with the

Qasabian family, became entitled to compensation for their interests in the acquired site and, exercising their rights under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)*, commenced proceedings to have their claims determined (see related decision).

This further hearing was held on 11 October to deal with two outstanding issues:

(a) one element of the Fishing Station claim (compensation for increased rental at the premises to which it had relocated); and

(b) costs of the proceedings, in each instance.

In addition, Fishing Station sought correction of the earlier decision by allowing a further $15,000 for fitout costs at Mona Vale. Fishing Station submitted that the non-inclusion of this amount should be treated as a 'slip' pursuant to r 36.15 of the Uniform Civil Procedure Rules 2005.

The related decision determined that Fishing Station was entitled to compensation for its relocation to Mona Vale. Fishing Station's rent at Mona Vale, on a proportionate floor area basis, was increased when compared to the "grace and favour", non-commercial rental basis upon which Fishing Station had occupied its portion of the Frenchs Forest site.

Although the earlier proceedings were heard together, there were, in fact, two separate proceedings relating to distinctly different claims. As a consequence, there might be different outcomes for costs in each of them.

Issues:

(1) Whether Qasabian Investments was entitled to costs for proceedings contesting the value of its interest in the acquired site;

(2) How to derive an appropriate compensation amount for Fishing Station for the forgone rental benefit;

(3) Whether the non-inclusion of the $15,000 in the compensation for Fishing Station was a deliberate or inadvertent omission and whether the offered amount was payable; and

(4) Whether Fishing Station was entitled to costs of proceedings, despite having failed in one claim as argued by the applicant, but succeeding in obtaining increased compensation on the respondent's argument.

Held: Fishing Station was entitled to its costs; compensation for rental differential on the basis of the agreement of the land valuers and an additional $15,000 compensation for fitout at Mona Vale. Qasabian Investments was to have its costs paid up to the time the joint expert report of the land valuers was provided to its legal advisers.

(1) A claimant for compensation in respect of compulsory acquisition should usually be entitled to recover the costs of the proceedings, provided they have acted reasonably in pursuing the proceedings (*Dillon v Gosford City Council* (2011) 184 LGERA 179; [2011] NSWCA 328 (Basten JA): at [70]). The claim for the value of Qasabian Investments' interests in the acquired site was determined by the agreement of the land valuers: at [54]. Up until that agreement was made known to Qasabian Investments' legal advisers, it was reasonable to continue to pursue that aspect of the claim. Qasabian Investments was entitled to its costs up until that time, but not thereafter: at [56];

(2) The quantum of the rental compensation to which Fishing Station was to be entitled was a matter for consideration and determination by the land valuers: at [17]. The land valuers agreed that the appropriate discount factor to be applied for the purposes of forgone rental valuation calculation was 7.11%: at [26]; Compensation was awarded in accordance with the agreement: at [61];

(3) The non-inclusion of the $15,000 for fitout was an inadvertent omission and was included in the compensation to which Fishing Station is entitled: at [33]; and

(4) To deny Fishing Station its costs of the proceedings when it obtained a better outcome and had not advanced an entirely hopeless case would be contrary to the principle of permitting a disposed owner of an interest in land to mount a reasonable challenge to the basis upon which compensation was assessed to be paid for that dispossession: at [59]. Fishing Station was entitled to its costs of the proceedings: at [60].

- Criminal:

Burwood Council v Abdul-Rahman (No 2) **[2017] NSWLEC 177** (Moore J)
(related decision: *Burwood Council v Abdul-Rahman* [2017] NSWLEC 103 (Moore J))

Facts: Mr Abdul-Rahman (**the defendant**) was convicted in December 2017 of a charge of carrying out development for which consent was required without first obtaining consent from Burwood Council (**the Council**), in breach of s 76A(1)(a) of the *Environment Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) (see related decision). The work carried out by the defendant was the removal of a mature Lemon-Scented Gum tree in a heritage conservation area. These proceedings concerned the sentencing of the defendant.

Issues: What was the appropriate penalty for the defendant's offence.

Held: The defendant was fined $50,000 and ordered to pay the prosecutor's costs.

(1) By reason of the tree's health, maturity and prominence in the streetscape and there being no arboricultural reason to support removal, the offending conduct demonstrated environmental harm of some significance and was thus an aggravating factor: at [38];

(2) There was a need for specific deterrence to reinforce the defendant's understanding of the requirement to obey conditions of development consent: at [50]. The defendant's extensive known experience with the planning system was taken into account for this purpose: at [16]. There was also a need for general deterrence to reinforce the necessity of obtaining development consent when required: at [56];

(3) The defendant's two relevant prior convictions were further factors to be taken into account in determining the appropriate starting sentence: at [40]. The defendant did not receive any benefit of being regarded as of good character: at [44]; and there was a risk of reoffending: at [49]; The defendant did not express genuine remorse: at [51]; and maintained a plea of not guilty: at [18]; and

(4) The offending conduct is classified as a Tier 2 offence falling under s 125B of the EP&A Act and the maximum penalty was $500,000: at [9]. The conduct was toward the bottom of the mid-range of such offences: at [67]. The appropriate starting penalty was $50,000: at [72]. The defendant did not establish that he would be unable to pay the penalty: at [77]. The absence of any positive subjective factors prevented any discount to the starting penalty: at [83]. The defendant was fined $50,000: at [84].

Chief Environmental Regulator of the Environment Protection Authority v The Forestry Corporation of New South Wales **[2018] NSWLEC 10** (Robson J)

Facts: The Forestry Corporation of New South Walesl (**the defendant**) was carrying out forestry work in the Badja State Forest pursuant to an Approval. As a consequence of being granted the Approval, the defendant was taken to hold a Threatened Species Licence under the (now repealed) *Threatened Species Conservation Act 1995 (NSW)* (**the licence**). One of the conditions of the licence was that the defendant was not to log within 20 metres of a "cliff". A cliff was defined in the licence as being a "rocky slope", with a height of at least three metres, and a steepness of at least 70 degrees. It was agreed by the parties that the defendant had logged within 20 metres of a rock feature which was, at least in parts, taller than three metres with a steepness of greater than 70 degrees. The defendant was charged with a breach of its licence condition.

Issues: Was the rock feature a "cliff" for the purposes of the licence.

Held:

(1) The defendant's approach to statutory interpretation should be preferred, as it conforms with the ordinary and natural meaning of the word "slope": at [42];

(2) The rule of strict construction of criminal statutes is a rule of last resort, but in circumstances where the defendant's definition is the less strained, it has no application: at [55]; and

(3) On the application of the prosecutor that it wished to submit a question of law for determination by the Court of Criminal Appeal, the matter be stood over for 28 days: at [57].

Environment Protection Authority v Steggles Foods Mt Kuring-gai Pty Ltd **[2017] NSWLEC 178** (Pain J)

Facts: Steggles (**the defendant**) pleaded guilty to breaching a condition of its environmental protection licence (**EPL**) contrary to s 64(1) of the *Protection of the Environment Operations Act 1997(NSW)* (**the POEO Act**). The defendant failed to maintain a flange joint in their refrigeration system, resulting in anhydrous ammonia leaking from the joint. The person who contravened the licence condition was unknown but was likely to have been an employee of the defendant's specialist maintenance contractors.

Issues: What were the appropriate penalties for the defendant's offence against s 64(1) of the POEO Act.

Held: Defendant fined $84,000; ordered to pay the prosecutor's costs; and place and pay for a publication notice.

(1) *Objective circumstances*: The offence thwarted the objectives of the POEO Act. The contravention of the EPL condition was particularly serious as it involved a breach of public trust: at [21]. Section 241(1) of the POEO Act establishes factors the Court must consider in imposing penalties under the Act. The level of harm (s 241(1)(a)) was serious and therefore an aggravating factor: at [30]. The defendant had a positive obligation to take precautions, but could not have been reasonably expected to anticipate or control the poor work of its specialist contractor which resulted in the equipment failure (s 241(1)(b)): at [33]; the mere presence of an emergency system did not suggest the harm was reasonably foreseeable (s 241(1)(c)): at [37]; the defendant contracted the work to a specialist in accordance with industry practice and was entitled to expect it would be done competently (s 241(1)(d)): at [39]; the offence was at the high end of the low range of objective seriousness: at [48];

(2) *Subjective circumstances*: The defendant entered an early guilty plea, entitling it to a discount of 25%: at [56]; the defendant cooperated with the prosecutor: at [57]; the defendant had no prior record: at [58] and showed remorse and contrition: at [60]; and

(3) *Purposes of sentencing*: General deterrence was important in light of the objects of pollution control legislation: at [51]; there was no basis for considering specific deterrence as the defendant implemented systems stricter than what was industry practice following the offence: at [52]; retribution and denunciation were taken into account: at [53].

Environment Protection Authority v Toll Global Forwarding Pty Limited **[2018] NSWLEC 11** (Robson J)

(related decision: *Environment Protection Authority v Hill; Environment Protection Authority v Stockwell International Pty Ltd* [2017] NSWLEC 72 (Pain J))

Facts: Toll Global Forwarding (**the defendant**) had pleaded guilty to an offence under s 9 of the *Dangerous Goods (Road and Rail Transport) Act 2008 (NSW)* (**the Dangerous Goods Act**), namely, that it failed to ensure that dangerous goods were transported safely by road. The defendant was the consignor of flammable polymeric beads (**the goods**), and failed to provide the necessary dangerous goods paperwork to its contractor Stockwell International Pty Ltd (**Stockwell**) who proceeded to transport the goods in a manner contrary to the Dangerous Goods Act, and other dangerous goods legislation and policies. Stockwell, and the driver it engaged, Mr Hill, also pleaded guilty and were sentenced in separate proceedings before Pain J: *Environment Protection Authority v Hill; Environment Protection Authority v Stockwell International Pty Ltd* [2017] NSWLEC 72. The only outstanding question was what constituted an appropriate sentence.

Issues:

(1) The objective seriousness of the offence;

(2) Whether the defendant was less culpable because it did not have physical control over the goods;

(3) Whether it was less culpable under the circumstances than Stockwell; and

(4) What was the appropriate penalty.

Held: Defendant convicted; fined $75,000 and ordered to pay the prosecutor's costs.

(1) The case was in the moderate range of objective seriousness: at [81];

(2) Whilst the defendant did not have physical control over the goods, it exercised a degree of constructive control. However, this was not highly significant in the circumstances because the defendant nevertheless met the definition of a consignor and the circumstances of the offence were within its control: at [86];

(3) Stockwell was marginally more culpable than the defendant in the commission of the offence, but the offence arose from a "collective failure" of all of the parties: at [113];

(4) The appropriate starting penalty was $100,000; but the defendant was entitled to a discount of 25% for the early guilty plea: at [122]; and

(5) The defendant was fined $75,000, and ordered to pay the prosecutor's costs as agreed or assessed: at [123].

Environment Protection Authority v Wambo Coal Pty Ltd **[2017] NSWLEC 152** (Pain J)

Facts: Wambo Coal (**the defendant**) pleaded guilty to two charges under the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**):

(a) polluting waters between about 5 and 11 January 2016 contrary to s 120(1); and

(b) contravening an environmental protection licence (EPL) condition between about 28 November 2015 and 11 January 2016 contrary to s 64(1) of the POEO Act.

The offences related to the partial failure of a dam (**the dam**) on the defendant's premises at the Wambo Mine at Warkworth. The collapse of part of the dam wall following a significant rainfall event led to discharge of material from the wall and sediment-laden waters entering a tributary to Waterfall Creek.

The Environmental Protection Authority (**the prosecutor**) submitted, in relation to the first charge, that the defendant introduced a pollutant into waters and placed the pollutant in a position where it was likely to be washed into waters. In relation to the second charge, the prosecutor contended that the defendant constructed the spillway of the dam so that it had inadequate capacity for the inflow of water during a significant rainfall event and failed to ensure the dam was suitably constructed.

The defendant submitted that its prior record should not be considered an aggravating factor, as the circumstances giving rise to this offence differed from those of the two prior offences. Additionally, the defendant contended that its prior record had to be considered in the context of the nature of its business, where environmental accidents often occurred.

Issue: What were the appropriate penalties for the defendant's offences against s 120(1) and s 64(1) of the POEO Act.

Held: Defendant convicted; defendant fined $62,000; defendant ordered to pay the prosecutor's costs and investigation costs; defendant to place and pay for publication notice.

(1) *Objective circumstances*: The offences thwarted the objectives of the POEO Act. The contravention of the EPL condition was particularly serious as it involved a breach of public trust and undermined the integrity of the regulatory system: at [29]. Section 241(1) of the POEO Act establishes factors the Court must consider in imposing penalties under the Act. The level of harm (s 241(1)(a)) was relatively minor: at [39]. While Wambo could not control the significant rainfall event, it had control over the inadequacies of the construction of the Dam and did not take measures to prevent the harm (s 241(1)(b)): at [45]. Following the incident, the defendant instituted a range of measures to prevent a recurrence: at [43]. The defendant accepted that the harm was reasonably foreseeable (s 241(1)(c)): at [46]; the defendant accepted that it had control over the causes of the offences (apart from the storm) (s 241(1)(d)): at [47]. The objective seriousness of the water pollution offence was at the low end of the low range of objective seriousness. The breach of licence offence was at the high end of the low range of objective seriousness, as the defendant had control over some of the causes of the offence: at [51]; and

(2) *Subjective circumstances*: The defendant had two prior convictions for odour offences in 2014 and 2016: at [52]. The defendant made an early guilty plea, entitling it to a discount of 25%: at [56]. The defendant showed contrition and remorse for its actions, in addition to fully cooperating with the prosecutor during its investigation: at [57]-[58].

***Secretary, Department of Planning and Environment v T W Perram & Partners Pty Ltd* [2017] NSWLEC 170** (Pain J)

Facts: T W Perram & Partners (**the defendant**) pleaded guilty to a charge under s 125 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), that it failed to disclose, as required by s 147(3) of that Act, reportable political donations made by persons with a financial interest in an application to modify the approval of a major project application when the defendant ought reasonably to have known that political donations had been made.

The defendant was engaged by Elf Farm Supplies to assist in a major project application. Mr Perram, director of the defendant, prepared an application form and political donations disclosure statement and forwarded these for completion to Mr and Mrs Tolson, directors of Elf Farm Supplies. Between 10 December 2013 and 26 May 2014, Mr and Mrs Tolson made a series of donations to the NSW Liberal Party. Mr Perram lodged an application on 23 September 2014 to modify the major project approval and failed to disclose the donations made by Mr and Mrs Tolson. The defendant pleaded guilty.

Issues: Should s 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**the Sentencing Procedure Act**) be applied.

Held: The defendant was found guilty; the charge was dismissed pursuant to s 10(1)(a) of the Sentencing Procedure Act; the defendant ordered to pay the prosecutor's costs.

(1) *Objective circumstances*: The defendant was unaware of the donations made by Mr and Mrs Tolson until these were disclosed at a later date: at [27]; the question regarding political donations on the departmental online application system to modify the major project was pre-set to the answer "no": at [28]; there was no facility to review and print the online application before submitting it: at [34]; the defendant was not dishonest in committing the offence and showed no intention to lodge a false political declarations statement: at [30]; the prosecutor did not prove the state of mind necessary for criminal negligence beyond a reasonable doubt: at [34-35]; the legislative objective in s 147(1) of preventing corruption and undue influence was not undermined as there was no failure to disclose the donations before the modification application was approved: at [37]; the need for general deterrence was confirmed by the objects in ss 4A(a) and 4A(c) of the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)*: at [39]; the need for specific deterrence was not warranted: at [40]; and

(2) *Factors in s 10(3) of the Sentencing Procedure Act:* Mr Perram was elderly and transitioning to retirement: at [50]; he had no prior convictions: at [50]; he was aware of the public policy importance of disclosing political donations and took care in his professional activities: at [51]; although the offence was not trivial, it arose from a mistake and no more: at [51]; the operation of the Department's online application form having the preset answer of "no" to the political donation question was an extenuating circumstance: at [52]; Mr Perram obtained no financial benefit from the offence and rectified the situation when he was able to: [at 52].

***Willoughby City Council v Rahmani* [2017] NSWLEC 166** (Moore J)

Facts: Mr Parviz Rahmani (**the defendant**) was charged with the offence of removing trees contrary to the requirement of development consent, pursuant to s 125(1) of the *Environmental Planning and Protection Act 1979 (NSW)* (**the EP&A Act**). The relevant work carried out by the defendant was the removal of three mature trees which had been assessed by the Council's consulting arborist as having as having a long Safe Useful Life Expectancy and being worthy of protection.

On 9 May 2011, the Council granted the defendant development consent for the proposed subdivision and erection of a new dwelling, subject to a condition to retain Trees 1, 8, and 9 which were comprised of two Sydney Blue Gums and a Smooth Bark Apple. These trees formed part of the species assemblage know as Sydney Blue Gum High Forest, a critically endangered ecological community. The condition imposed a legal obligation on the defendant to retain the trees.

The defendant arranged for a tree removal contractor to remove Trees 1, 8, and 9 in early November 2015. A guilty plea was entered at the earliest available opportunity.

Issues: What was the appropriate penalty for the defendant's offence pursuant to s 125(1) of the EP&A Act.

Held: The defendant was convicted; fined $60,000; and ordered to pay the prosecutor's costs in an agreed sum.

(1) The removal of these three trees in circumstances where there was no genuine arboricultural reason to support their removal caused environmental harm of some significance and was thus an aggravating factor: at [31]. Although the defendant's belief that the 10/50 Rule permitting the removal of the trees under Pt 4, Div 9 of the *Rural Fires Act 1997 (NSW)* was incorrect, his examination of the Rural Fire Service's website in forming this belief was not reckless and therefore this did not constitute an aggravating factor: at [36];

(2) The defendant did not have any prior convictions: at [38]; and had otherwise been of good character: at [39]. The defendant expressed genuine contrition and remorse and agreed to an order requiring him to plant two replacement trees: at [42]. The defendant was entitled to a 25% discount given in recognition of entering his guilty plea at the earliest possible opportunity: at [27];

(3) There was a need for specific deterrence to reinforce the defendant's understanding of the requirement to obey conditions of development consent: at [41]. There was also a need for general deterrence to reinforce the necessity to observe requirements of conditions of development consent: at [43];

(4) The defendant did not establish that he would be unable to pay the fine or the prosecutor's costs: at [52]; and

(5) The offending conduct is classified as a Tier 2 offence falling under s 125B of the EP&A Act. The maximum penalty applicable for the offending conduct was $500,000: at [9]. The conduct was at top of the low range of such offending: at [58]. The appropriate starting penalty was $90,000: at [61]. A total discount of one-third was applied as a consequence of the defendant's early guilty plea and having regard to the other positive subjective factors: at [63].

- Appeals From Local Court:

***Soukkar v Blacktown City Council* [2017] NSWLEC 161** (Molesworth AJ)

(related decision: Local Court decision under appeal: *Soukkar v Blacktown City Council* (Local Court, Brown LCM, 14 March 2017))

Facts: From May 2016 to September 2016, Mr Elias Soukkar (**the appellant**) carried out various works to an extant general store building in Shanes Park (**the premises**), including the construction of a new concrete slab and the replacement of an existing roof. Some years prior to the Soukkar family acquiring the premises in 2013, the long-standing use of the premises as a general store and takeaway restaurant business ceased. After being issued with a penalty notice in the amount of $3,000 by Blacktown City Council (**the Council**) for the offence of "carry[ing] out development forbidden with or without consent" on 15 September 2016, the appellant elected to have the matter determined by the Local Court. On 14 March 2017, the Local Court, following the appellant's plea of guilty, convicted the appellant of the offence of carrying out development in contravention of s 76B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) (**the offence**) and sentenced the appellant to pay a fine of $40,000. On 7 April 2017, the appellant commenced proceedings appealing the sentence imposed by the Local Court on the basis that the sentence was too severe. The appellant was time-barred from appealing the conviction under the *Crimes (Appeal and Review) Act 2001 (NSW)*.

Issues:

(1) Whether the use of the premises for the purpose of a general store and restaurant was permissible with consent (rather than prohibited) due to the continued operation of historical development consents under s 109B of the EP&A Act;

(2) Whether, consequently, the offence was based on legal error because the works carried out by the appellant were permissible with consent (rather than prohibited) under the applicable planning regime;

(3) What was the appropriate sentence for the offence under s 125(1) of the EP&A Act of carrying out development for a prohibited purpose in contravention of s 76B of the EP&A Act; and

(4) Whether it was appropriate to vary the sentence imposed by the Local Court by making an order under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**the Sentencing Procedure**

Act) that the charge against the appellant be dismissed and, for that purpose, the conviction be set aside (without setting aside the finding of guilt upon which that conviction was based) ('a s 10 order');

Held: Appeal allowed; sentence varied by making a s 10 order.

(1) The appellant was never guilty of the offence for which he was charged, being an offence against s 125(1) of the EP&A Act of carrying out prohibited development in contravention of s 76B, despite his plea of guilty: at [132]. The effect of s 109B of the EP&A Act was that the historical development consents for (inter alia) a general store and restaurant were saved with the consequence that, under the applicable planning regime, the works carried out by the appellant were permissible with consent rather than prohibited: at [100]-[101], [103], [117] and [132];

(2) As the appellant was, in effect, inadvertently convicted for an offence that he did not commit, it would be manifestly unjust for the appellant to be sentenced to pay a fine: at [133];

(3) In all of the circumstances, it was appropriate for the Court to make a s 10 order: at [138] and [153]. First, the extraordinary and unfortunate circumstances of the case, including the appellant being given erroneous planning advice by the respondent, warranted the making of a s 10 order: at [142]. Secondly, with respect to the considerations under s 10(3) of the Sentencing Procedure Act, although the conduct of the appellant was not trivial, it was of low objective seriousness (at [145]); the appellant and his family suffered from the erroneous planning advice provided by the respondent (at [147]-[148]); and the appellant maintained his good character despite difficult circumstances, including impecuniosity and serious depression (at [149]-[151]). Additionally, whilst the objective of general deterrence is important (at [127]) and the making of a s 10 order is rare, the objective of general deterrence cannot render impotent the power under s 10: at [127] and [139]-[141];

(4) In order to make a s 10 order, the Court must act strictly in accordance with the power available under that section. Accordingly, and despite the Court being of the view that the appellant was wrongly charged for, and convicted of, contravening s 76B of the EP&A Act, the original finding of guilt was sustained and the appellant was found to be guilty of the offence: at [134] and [138];

(5) Despite the Court's conclusion that the appellant was never guilty of the offence for which he was charged, it was appropriate to make observations relating to the conventional sentencing considerations to reinforce the fact that offences of carrying out building works in contravention of planning controls are serious: at [104];

(6) *Objective seriousness*: the carrying out of the works without the requisite consent undermined the attainment of the objectives of the EP&A Act (at [103]); the maximum penalty was $500,000 (at [106]); the works did not cause any environmental harm (at [107]); the appellant's decision to risk carrying out the works understanding that this was a probable breach of the planning controls would have increased the objective seriousness of the offence (at [110]); the works were carried out for financial gain, which would have increased the objective seriousness of the offence (at [111]); and overall, the appellant's conduct was of low objective seriousness: at [119];

(7) *Subjective circumstances*: the appellant did not have any significant prior convictions (at [120]); the appellant was of good character (at [121]); the appellant was unlikely to offend in the future (at [122]); the appellant entered into an early plea of guilty (at [123]); and the appellant expressed genuine contrition and remorse for his conduct (at [124]);

(8) Given the exceptional nature of this case, there was no readily comparable decision for the purposes of considering consistency in sentencing: at [129]; and

(9) (*obiter*) Council bears the responsibility to carefully consider the relevant planning history and controls prior to the service of a penalty notice or any subsequent prosecution: at [154].

Sun v Randwick City Council **[2017] NSWLEC 188** (Molesworth AJ)

Facts: Mr Xiaohui Sun (**the appellant**) was one of the registered proprietors of an ostensibly residential property in Kingsford, Sydney (**the Premises**). On 15 March 2016, following a complaint from a constituent, a Randwick City Council (**the Council**) officer conducted an inspection of the Premises, and concluded that the Premises were being used as a boarding house. The Council, on 18 March 2016, therefore issued a penalty infringement notice (**the PIN**) in the amount of $1,500 for the offence of contravening s 76A(1)(a) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) by carrying out "[d]evelopment without development consent-class 1a or 10 building-individual".

The appellant did not pay the PIN, and on 9 March 2017, before a magistrate of the Local Court in Waverley, he was prosecuted by the Council for the charged offence. At the conclusion of the hearing, the Magistrate found the offence proved and imposed a fine of $2,000 for the offence and ordered that the appellant pay the Council's costs of $18,000.

On 5 April 2017, the appellant lodged a written Notice of Appeal with the Local Court Registry at Waverley, appealing the conviction and the penalty amount.

On 6 December 2017, the appeal proceedings were heard by the Court under s 39(1) of the *Crimes (Appeal and Review) Act 2001 (NSW)* (**the Appeal and Review Act**). During that hearing, the appellant formally withdrew his appeal against the sentence imposed by the Local Court.

Issues:

(1) Whether the application for appeal was commenced in the Court out of time, and therefore, required the applicant to seek leave to appeal;

(2) Whether the premises were being used as a boarding house;

(3) If so, whether such a use was in contravention of s 76A of the EP&A Act, and therefore an offence under s 125 of that Act; and

(4) Whether either to set aside the conviction or dismiss the appeal pursuant s 39(1) Appeal and Review Act.

Held: Appeal dismissed; appellant to pay the Council's costs.

(1) The application was commenced within time. The lodgement of the Notice of Appeal with the Local Court Registrar at Waverley constituted the making of an appeal under ss 31 and 34 of the Appeal and Review Act [18];

(2) The appellant was carrying on boarding house at the premises. This was evidenced by, among other things:

   (a) the fact that the appellant was directly managing the occupation of the building such that his relationship with each occupant was inconsistent with a landlord/tenant relationship and more properly characterised as a boarding house manager/lodger relationship: [79]-[84]; and

   (b) the physical structure and internal layout of the building at the Premises effectively constituted only lockable bedrooms and essential communal facilities: [85]-[86];

(3) Such a use required consent under s 76A(1)(a) of the EP&A Act, and no such consent had been obtained: [71]-[73]. Consequently, the appellant was guilty of an offence under s 125 of the EP&A Act: [69]; and

(4) The appellant's appeal against his conviction in the Local Court was dismissed: [69];

- Civil Enforcement:

***Inner West Council v Krelja* [2018] NSWLEC 4** (Molesworth AJ)

Facts: Mr Romano Krelja and Mrs Zora Krelja (**the respondents**) owned and occupied a residential property in Leichhardt (**the premises**). The premises consisted of one half of a duplex single storey house, at the back corner of which was a tall brick chimney (**the chimney**).

On 20 December 2016, Inner West Council (**the Council**) issued an order under s 124 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) which required the respondents, on the basis that the chimney was not in a safe condition, to take such measures as required to repair and make safe the chimney (**the s 124 order**).

The respondents did not take any such measures, and on 13 July 2017 the Council applied to the Court, pursuant to s 678(10) of the Local Government Act, for orders that:

(1) The Council carry out the works and actions required by the s 124 order;

(2) The respondents pay the expenses incurred by the Council in carrying out those works and actions;

(3) The respondents pay the Council's costs of and incidental to the proceedings; and

(4) Any such order the Court sees fit.

The respondents did not appear at the hearing.

Issues:

Was empowering the Council to enter upon private property and carry out structural work to a private residence appropriate and, if so, was the Court satisfied that:

(1) There was a failure by the respondents to carry out the works required by the s 124 order; and

(2) Should the Council be authorised to carry out the requisite works on the basis that it is urgent to do so in order to avoid an unsafe situation.

Held: Order pursuant to s 678(10) of the Local Government Act was granted.

(1) The respondent failed to carry out the works required by the s 124 order: at [15]; and

(2) It is essential that the Court adopt a precautionary approach in matters of this nature, where the land or premises are not in a safe or healthy condition and there is a risk to the respondents and their neighbours, even in circumstances where the level of risk is unknown: [16]-[17].

Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd; Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd (No 2) **[2017] NSWLEC 147** (Moore J)

(earlier decision: *Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd; Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* [2017] NSWLEC 37 (Moore J))

Facts: This decision follows from the earlier decision and concerns a road constructed by Caverstock Pty Limited (**Caverstock**), at Hakea Holdings Pty Limited's (**Hakea**) instigation, on adjoining land owned by Louisiana Properties Pty Limited (**Louisiana**) for the purported satisfaction of a condition of development consent.

Louisiana subdivided a parcel of land, retaining Lot 102 and selling Lot 101 to Hakea. The original, single parcel had been subject to development consent for the combined development of an aged care facility on the south-western portion of the land and a medical centre on the north-western portion. Following subdivision, the two elements of the proposed development were severed.

In August 2013, Hakea obtained development consent from the Council for the erection of an aged persons care facility on Lot 1. As part of Hakea's development consent, the Council required that there be a link between the Hakea land and the eastern boundary of the land that remained within Louisiana's ownership. Under instructions from Hakea, Caverstock constructed a road across Lot 102.

In the earlier decision, it was concluded that Hakea had trespassed by having Caverstock construct the road on Louisiana's land. Hakea argued that construction of the road, and the clearing of the land for that purpose, was authorised by its development consent. Alternatively, Hakea relied upon Louisiana's consent.

Issues:

(1) Whether the construction of the road was in compliance with Hakea's development consent;

(2) Whether owner's consent was necessary to construct the road independently of Louisiana's development consent;

(3) Whether Hakea could rely on Louisiana's development consent;

(4) If Louisiana's development consent were available to Hakea, whether Caverstock's construction of the road was compliant with Louisiana's consent; and

(5) Whether discretion ought to be exercised pursuant to s 124(1) of the the *Environmental Planning and Protection Act 1979 (NSW)* (**the EP&A Act**) to order removal of the road and revegetation of the corridor.

Held: Hakea and Caverstock were both in breach of s 76A(1)(a) of the EP&A Act. Louisiana's cross-claim was dismissed; removal of the road and revegetation of the road corridor ordered; the cost of the removal was the joint and several responsibility of Hakea and Caverstock, with liability for Hakea and Caverstock capped at the estimated cost of removal of the road (including revegetation) contained in the Total Earth Care quotation in the evidence.

(1) Construction of the road was not in compliance with Hakea's consent: at [33]; as the route followed by the road was not the route approved by Council: at [27];

(2) Both Caverstock and Hakea shared an awareness that further steps were necessary to permit Hakea to have the road lawfully constructed: at [29]-[32]; [191];

(3) Louisiana had not given Hakea approval for the construction, and thus Hakea could not rely on Louisiana's approved consent: at [28];

(4) Breach of condition 16 of Louisiana's development and failure to construct the road along the alignment approved by Council: at [34]-[81]; demonstrated that construction of the road is noncompliant with Louisiana's consent and thus in breach of s 76A(1)(b) of the EP&A Act: at [82]-[84]; and

(5) The road, as constructed by Caverstock, was not adequately constructed in terms of usability, durability and functionality: at [140]; and acted as a barrier to the implementation of Louisiana's approved development of the medical centre: at [181]. To avoid giving Hakea an impermissible private advantage as a result of unlawful conduct: at [178] and due to the lack of utility of the road, removal of the road and revegetation of the corridor was ordered to be carried out by Louisiana, at the expense of Hakea and Caverstock: at [191]-[192].

- Section 56A Appeals:

David Casson trading as Casson Planning & Development Services v Upper Hunter Shire Council (No 2) **[2017] NSWLEC 149** (Moore J)

(related decision: *David Casson trading as Casson Planning & Development Services v Upper Hunter Shire Council* [2017] NSWLEC 1279 (Dixon C))

Facts: On 7 April 2016, Mr David Casson, a town planning consultant retained by Mr and Mrs Hayne (**the appellants**), lodged a development application with the Upper Hunter Shire Council (**the Council**). The Council refused the proposal on 22 August 2016. Class 1 proceedings were commenced pursuant to s 97 of the *Environmental Planning and Protection Act 1979 (NSW)* (**the EP&A Act**).

The development application was for the subdivision of rural land into two lots, with each proposed lot size below the minimum lot size requirements of cl 4.1 of the *Upper Hunter Local Environmental Plan 2013* (**the UHLEP 2013**). The proposed development would have resulted in Lot 1 being wholly zoned RU4 with a size of 1.6 hectares and Lot 2 partly zoned RU4 and partly zoned RU1 with a lot size of 183.75 hectares.

At first instance, Mr Casson contended that the Court could be satisfied that the rural subdivision fell within the provisions of cl 4.2 and/or the exceptions to the minimum lot size requirements under cl 4.2A of the UHLEP 2013. The Commissioner concluded that she did not have power under cl 4.2 or cl 4.2A to permit the subdivision and that, if she had power under cl 4.2A, she was not satisfied of the matters in cl 4.2A(a) and (b).

Issues:

(1) Whether the Commissioner made an error of law by concluding that cl 4.2 of the UHLEP 2013 was not a pathway available for the approval of the proposed subdivision;

(2) Whether the Commissioner made an error of law by concluding that cl 4.2A of the UHLEP 2013 was not a pathway available for the approval of the proposed subdivision; and

(3) Whether cl 4.2(1) and cl 4.2(3) of the UHLEP were satisfied so as to permit approval of the proposed subdivision.

Heard: Appeal upheld; orders of 31 May 2017 set aside; development application refused; appellants to pay the respondent's costs as agreed or assessed.

(1) The Commissioner's conclusion that cl 4.2 was not available was not based on a proper application of the tests contained in the provision: at [168]. The Commissioner's cl 4.2(3) conclusion was infected by error and to be disregarded: at [184];

(2) Clause 4.2A could not be used to approve the proposed subdivision and consequently the second and third conclusions expressed by the Commissioner were not available as potential pathways to approval: at [176];

(3) The appellants were ordered to pay the Council's costs of the appeal, on the basis of the rule that costs generally follow the event: at [5]; and

(4) The proposed subdivision did not satisfy the gateway test set by cl 4.2(1) of the LEP, rendering it unnecessary to apply the tests in cl 4.2(3): at [204]. The correct application of the facts to the UHLEP 2013 provision required refusal of the proposed development: at [216]. Pursuant to s 56A(2)(b) of the *Land and Environment Court Act 1979 (NSW)*, development consent was refused: at [221]; and

(5) These errors arose because of the way the appellants' case had been advanced before the Commissioner. The errors in her reasoning arose solely because of this: at [134]-[135].

***Dive v Lin and Liu* [2017] NSWLEC 153** (Preston CJ)

(related decision: *Dive v Lin* [2017] NSWLEC 1348 (Galwey AC))

Facts: The applicant, Mr Dive, applied under s 7 of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**the Trees Act**) for a Sydney Blue Gum tree to be removed from the respondents' property, two properties away from the applicant's property. The tree had previously dropped branches on the applicant's property and caused damage to his dwelling.

Under s 7 of the Trees Act, an owner of land can apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree that is situated on "adjoining land". The Court has jurisdiction under s 9(1) to make such an order in relation to a tree that is the subject of a s 7 application (that is to say, a tree on "adjoining land"). The Commissioner found the Sydney Blue Gum tree was "principally situated" two properties away from the applicant's property and dismissed the application for want of jurisdiction: *Dive v Lin* [2017] NSWLEC 1348.

The applicant appealed the Commissioner's decision and order under s 56A(1) of the *Land and Environment Court Act 1979 (NSW)*. The applicant contended that the Commissioner erred in construing the phrase "adjoining land" in s 7 of the Trees Act too narrowly. The applicant submitted that "adjoining land" is not limited to land which is contiguous or touching, but extends to land with relevant connection, where the connecting factor is that the tree growing on one property is capable of causing damage to the other property or injuring persons on that other property.

The applicant also submitted that the Commissioner erred in elevating the factual situations referenced in *P Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128 (***P Baer***) and *Robson v Leischke* [2008] NSWLEC 152 (***Robson***) into statements of principle, and in not attempting a purposive interpretation of the phrase "adjoining land" in the Trees Act.

Issues: Whether the Commissioner erred on a question of law in the construction and application of the phrase "adjoining land" in s 7 of the Trees Act.

Held: appeal dismissed; no costs awarded;

(1) The Commissioner did not err in his consideration and application of the decisions in *P Baer* and *Robson*: at [32]; he made a finding of fact that the situations in *P Baer* and *Robson* were different to the present case: at [32]; he did not err in limiting the dicta in *P Baer* and *Robson* to situations where the intervening land was a public road or an easement and not including other situations, such as the present case; at [33]; neither decision held that other situations, and in particular the situation where the intervening land is a developed residential allotment, will not cause separated properties not to be adjoining: at [33]; indeed, no judicial decision so far under the Trees Act has held that the circumstance involved in the present case results in the separated properties being adjoining: at [34];

(2) The Commissioner did not err in his interpretation of the phrase "adjoining land" in the Trees Act: at [35]; the applicant's construction of "adjoining land" is not supported: at [50];

   (a) first, the statement in *Robson* at [157], that land can be adjoining provided that a tree growing on one property is capable of causing damage to the other property or injuring persons on that other property, did not, and was not intended to, substitute a different test for the requirement of the Trees Act: at [37];

   (b) second, the applicant's construction of "adjoining land" would give the words "adjoining land" in s 7 of the Trees Act no work to do: at [40]; Pt 2 of the Trees Act already sets the jurisdictional requirement that the tree concerned cause damage to the applicant's property or a risk of injury to any person on that property: at [40]; and

   (c) third, the applicant's construction of "adjoining land" has no relevance or applicability to applications under Pt 2A of the Trees Act, which must satisfy a different criteria of impact of the tree than applications under Pt 2: at [42]; nothing in the text, context or purpose of the Trees Act would support construing "adjoining land" differently in Pt 2 and Pt 2A: at [45]; and

(3) The ordinary rule is that costs follow the event: at [53]; costs are confined to money paid or liabilities incurred for professional legal services: at [54]; the respondents were not legally represented in the proceedings and are not entitled to legal costs: at [55]; the most the respondents could recover are

any out-of-pocket expenses incurred in and for the purpose of the appeal: at [56]; the respondents have not identified or proven by admissible evidence any such expenses: at [56] and [57];

DM & Longbow Pty Ltd v Willoughby City Council **[2017] NSWLEC 173** (Preston CJ)

(decision at first instance: *DM & Longbow Pty Ltd v Willoughby City Council* [2017] NSWLEC 1358 (Dixon C))

Facts: DM & Longbow Pty Ltd (**the applicant**) applied for development consent for, first, alterations to an existing dwelling including conversion to a dual occupancy, and second, the strata subdivision of that dual occupancy into two individual lots and one common lot. Development for the purpose of dual occupancies is permitted with consent in the Land Use Table for the applicable Zone E4 Environmental Living (**Zone E4**) in the *Willoughby Local Environmental Plan 2012 (NSW)* (**WLEP 2012 2012**). Land can also be subdivided, but only with development consent under cl 2.6 of the WLEP 2012 2012. Willoughby City Council (**the Council**) refused to grant consent to both proposed developments.

The applicant appealed the Council's decision to this Court under s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). At a conciliation conference, the Council agreed to approve the proposed dual occupancy development subject to conditions of consent. However, the Council opposed the strata subdivision on the basis that the two individual lots and the common lot would each have a size less than the minimum subdivision lot size for Zone E4 required by cl 4.1(3) of the WLEP 2012. The grant of development consent to a subdivision in Zone E4 that will result in two or more lots of less than this minimum size is prohibited under cl 4.6(6) of the WLEP 2012 2012. The applicant submitted that cl 4.1 did not apply to the applicant's proposed strata subdivision due to the exception in cl 4.1(4) that cl 4.1 "does not apply in relation to the subdivision of individual lots in a strata plan or community title scheme".

At the hearing, the Commissioner dismissed the appeal, finding that the minimum subdivision lot size in cl 4.1 of the WLEP 2012 did apply to the applicant's proposed strata subdivision. The Commissioner held that, due to the absence of a definition in the WLEP 2012, the definition of "Subdivision of land" in the EP&A Act applies to the use of the word "subdivision" in cl 4.1 of the WLEP 2012, such that the exemption in cl 4.1(4) only applies to the subdivision of individual lots in an existing strata plan.

The applicant appealed the Commissioner's decision under s 56A(1) of the *Land and Environment Court Act 1979 (NSW)*. The applicant contended that "the most obvious reading" of cl 4.1(4) is one which includes all strata subdivision, not only the subdivision of individual lots in an existing strata plan but also the creation of individual lots under a new strata plan. The applicant submitted, in the alternative, that cl 4.1(4) is ambiguous and that this construction is the most accurate having regard to its context, purpose, and the consequences that would flow from each construction of the clause. The applicant submitted that a narrow construction would have "peculiar consequences", including making strata subdivision in these circumstances practically impossible.

Issues: Whether the Commissioner erred in construing and applying cl 4.1(4) of WLEP 2012.

Held: Appeal dismissed; applicant to pay the respondent's costs.

(1) The Commissioner's construction of cl 4.1 of WLEP 2012 is correct and no error on a question of law is revealed in her reasons for reaching that conclusion: at [18];

(a) the text of cl 4.1(4) is clear and unambiguous; if there is no strata plan yet in existence, there can be no individual lots "in a strata plan" that can be subdivided (at [20]); the applicant's proposed subdivision does not answer the description of being "individual lots in a strata plan"; any individual lots in a strata plan will only result from the registration of a plan as a strata plan that creates the lots: at [21];

(b) consideration of the language of the phrase in the context of cl 4.1(4) particularly and cl 4.1 generally, as well as other provisions of WLEP 2012, and the objective which cl 4.1 is designed to promote, do not lead to a different conclusion; the draftsperson has precisely specified the types of subdivisions to which the development standard of the minimum subdivision lot size applies; separate provision is made for certain types of subdivisions in certain zones to be subject to different development standards: at [22];

(c) the draftsperson has been precise in the choice of language in cl 4.1(4) of WLEP 2012 and accordingly, this is not a case where it might be appropriate "to give rather less weight to precise textual considerations": at [23]; and

(d) the potential consequences, alleged by the applicant, that might flow if the phrase in cl 4.1(4) were to be construed in the manner held to be appropriate, do not justify construing the phrase differently; first, it is not clear that those consequences would occur; second, these consequences may be the intended result of planning policy decisions; third, it is not for the Court to substitute its preference for what might be the "fairer or more convenient" operation of the clause and then choose an interpretation of the clause that better enables that operation: at [24].

Sessions v Penrith City Council **[2017] NSWLEC 171** (Preston CJ)

(decision at first instance: *Sessions v Penrith City Council* [2017] NSWLEC 1328 (Gray C))

Facts: Ms Sessions and Mr Drew (**the applicants**) operate a gym on the ground floor of a mixed use building. The residents living above the gym complained to Penrith City Council (**the Council**) about noise from the gym. The Council issued a notice ("the prevention notice") under s 96 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) requiring the applicants to take preventative action, including providing Council with a report on the acoustic impacts of the gym, providing Council with a proposed management plan, and, after receiving Council's approval, implementing this management plan.

The applicants appealed the prevention notice under s 289 of the POEO Act. The hearing of the appeal commenced onsite, on 22 May 2017, where the Commissioner attended a residential unit above the gym accompanied by legal representatives of both parties and the Council's acoustic engineer. Mr Weller, the solicitor for the applicants, indicated his intention to apply for an adjournment to provide his expert with the opportunity to undertake noise testing at the unit. At the resumption of the hearing in Court, before making this adjournment application, Mr Weller requested a 10 minute adjournment to allow the parties to have discussions. When the hearing resumed, the parties agreed that the Court issue, by way of consent orders, an amended prevention notice, involving revised dates for the applicant's report on acoustic impacts and management plan. The Council then admitted into evidence a joint report of the parties' acoustic experts. The Commissioner reserved her decision on whether to make the consent orders subject to the parties providing to the Court the agreed notes of the evidence given at the onsite hearing and the proposed amended prevention notice. The parties did not provide the amended prevention notice by the timetabled date. Accordingly, the Commissioner relisted the matter for mention.

At the mention on 9 June 2017, a barrister, Mr McAuley, appeared for the applicants. Mr McAuley submitted that the applicants did not agree to the proposed amended prevention notice and that they required more time to consider the report of their acoustic expert. Mr McAuley tendered a copy of this report, which answered the description of the acoustic report required by the prevention notice. The Commissioner noted that she was reserved on the matter as the parties had already reached an agreement at the hearing on 22 May 2017. The Commissioner granted the applicants' an adjournment to allow Mr Weller to reappear before the Court.

At the subsequent mention on 14 June 2017, Mr Weller did not appear, and instead he briefed Mr McAuley to appear. Mr McAuley submitted once again that the applicants did not agree to the amended prevention notice. The Council opposed this submission, arguing that the parties had already reached an agreement and that they were bound by their forensic decisions. The Commissioner decided the appeal by making orders upholding the appeal and issuing the amended prevention notice. The Commissioner subsequently published her reasons.

The applicants appealed the Commissioner's decision and order under s 56A(1) of the *Land and Environment Court Act 1979 (NSW)*, raising 28 grounds of appeal. The applicants contended the parties did not reach an agreement at the hearing on 22 May 2017 as to the conduct of the hearing by way of consent orders and the determination of the appeal. The applicants submitted that Mr Weller's understanding of what had been agreed was simply the fixing of a timetable for the exchange of further expert reports.

Issues: Whether the Commissioner erred on a question of law by.

(1) Denying the applicants natural justice (grounds 1-4, 8, 11, 12 and 14);

(2) Determining that there was an agreement between the parties for the matter to be heard as a consent orders hearing and for the amended prevention notice to be issued (grounds 5-7 and 9-10);

(3) Issuing the prevention notice and in applying s 96 of the POEO Act (grounds 11, 13, 21-28); and

(4) Relying on the joint report of the acoustic experts and the weight placed upon it (grounds 15-20).

Held: Appeal dismissed; applicants to pay the respondent's costs.

(1) There has not been a denial of natural justice in the ways suggested; the applicants had reached agreement with the Council as to the terms of the decision to be made by the Commissioner and that agreement overcame any requirement to take the steps said by the applicants to be necessary to be taken to afford natural justice to the applicants (at [49]); the only evidence of Mr Weller is what is recorded on the transcript, which is inconsistent with Mr Weller's purported understanding (at [51]); Mr Weller did not hold the understanding the applicants now say he held: at [56];

(2) The applicants' contentions are factually incorrect; the evidence establishes, beyond doubt, that the applicants and the Council reached agreement that the Court should uphold the appeal and issue a modified prevention notice (at [68]); both parties then conducted and concluded the hearing on that basis (at [69]); Mr Weller did not foreshadow obtaining and later tendering any further evidence, including a further expert report; he expressly stated that he had no submissions to make (at [70]); even if the Commissioner were to have misunderstood the applicants' position, such misunderstanding would not be on a question of law: at [73];

(3) The Commissioner correctly identified and applied the statutory requirements governing the exercise of the power to issue a prevention notice (at [75]); the Commissioner did make a factual finding that the gym was being operated in an "environmentally unacceptable manner", as required by s 96(1) of the POEO Act (at [78]); only if there is no evidence in support of a finding of fact is there an error of law (at [79]); also, the applications did not submit in the court below that the Commissioner could not issue a prevention notice because she could not be satisfied of the requirements of s 96(1) of the POEO Act (at [80]); the applicants are bound by the forensic decisions they made at and in the conduct of the hearing before the Commissioner (at [81]); the applicants on this appeal cannot complain that the Commissioner has made an error on a question of law by not giving reasons with respect to a matter which was not the subject of any submission before the Commissioner: at [82]; and

(4) The applicants' contention that the Commissioner erred in relying, and placing weight, on the joint expert report, in the circumstance where the applicant's expert had been unable to access and undertake noise testing at the residential units above the gym, is rejected; the applicants are bound by their conduct at the hearing in the court below; they made no objection to Council tendering the joint expert report; they made no submission that the Commissioner should not rely on and give weight to the joint expert report; also, there is no error of law in making a wrong finding of fact or misattributing the weight to be given to evidence: at [85].

Terra Ag Services Pty Limited v Griffith City Council **[2017] NSWLEC 167** (Preston CJ)

(decision at first instance: *Terra Ag Services Pty Limited v Griffith City Council* [2017] NSWLEC 1355 (Martin SC))

Facts: Griffith City Council (**Council**) refused to grant Terra Ag Services Pty Ltd (**the applicant**) development consent to establish a rural supplies business, including an administration building and two sheds, one for processing, mixing and storing fertilisers and the other for storing chemicals. Senior Commissioner Martin dismissed the appeal, finding that the proposed development was for the prohibited purpose of "heavy industrial storage establishment".

In the Dictionary of the *Griffith Local Environmental Plan 2014 (NSW)* (**GLEP 2014**), "heavy industrial storage establishment means a building or place used for the storage of goods, materials, plant or machinery for commercial purposes and that requires separation from other development because of the nature of the processes involved, or the goods, materials, plant or machinery stored, and includes any of the following: (a) a hazardous storage establishment, (b) a liquid fuel depot, and (c) an offensive storage establishment". The Senior Commissioner held the proposed development would involve two uses, with part of the development falling within this definition and the rest being for the purpose "rural supplies". Although she did not specify which parts were for which uses, she seemingly characterised one or both of the sheds as being for "heavy industrial storage establishment" and the administration building as being for "rural supplies". Development for "heavy industrial storage establishment" is prohibited development in the applicable B6 Enterprise Corridor Zone under the GLEP 2014. Development for "rural supplies" is an innominate development that is permitted with consent under item 3 of the Land Use Table for this zone, which permits "any development" with consent where it is not specified as prohibited. The Senior Commissioner held that the use for the purpose of "heavy industrial storage establishment" was not

subservient to the use for "rural supplies", and accordingly, the proposed development was for a prohibited purpose.

The applicant appealed the Senior Commissioner's decision under s 56A(1) of the *Land and Environment Court Act 1979 (NSW)*. The applicant contended that the proposed development was for the permitted purpose of "rural supplies".

Issues: Whether the Senior Commissioner erred on a question of law in characterising the proposed development as being for the prohibited purpose of "heavy industrial storage establishment".

Held: Appeal upheld; the Senior Commissioner's decision and orders are set aside; the proceedings remitted to be determined according to law; the applicant to pay the respondent's costs.

(1) (a) The Senior Commissioner erred in law by failing to ask and determine whether the whole of the land would be used for one purpose or instead for two or more purposes, before asking the posterior question of whether, if there were uses for more than one purpose, use for one purpose was subordinate to use for another purpose (at [33]); she constructively failed to exercise jurisdiction to determine, and to give reasons for the determination of, the applicant's primary argument that the proposed development was for only one purpose of "rural supplies" (at [41]); she inappropriately confined and compartmentalised the characterisation task and did not consider the use of the sheds in the context of the whole use proposed by the applicant of the whole site: at [44];

(b) the Senior Commissioner constructively failed to exercise jurisdiction to determine whether, if the development could be characterised as being for more than one purpose, the use for the purpose of heavy industrial storage establishment was subservient to the use for the purpose of rural supplies (at [58]); she did not embark on the analysis and reasoning required to exercise the function of determining the issues (at [50]); she asked the wrong questions in asking whether the proposed development "could function without" the fertiliser storage or chemical storage shed and whether these facilities were "an essential part" of the development: at [52];

(2) (a) The Senior Commissioner constructively failed to exercise jurisdiction to determine whether part of the proposed development is a heavy industrial storage establishment (at [74]); she failed to undertake, according to law, the task of determining whether part of the proposed development met each element of the descriptive criterion in the definition of "heavy industrial storage establishment" in Sch 2 of the GLEP 2014 (at [89]); the only reason given for her finding was a recital of parts of this definition: at [61];

(b) the Council's submission that the Senior Commissioner did not make an error of law because these matters were not the subject of submissions by the applicant is rejected (at [90]); the issue of whether the development, or part of the development, was to be categorised as a heavy industrial storage establishment (a use prohibited in the zone) was the first and foremost contention in the case (at [91]); the applicant rebutted the Council's submissions on this issue and the fact that the applicant's response was brief was not evidence that this issue was no longer in dispute: at [94];

(3) The Senior Commissioner used the evidence that the type and volume of dangerous goods to be stored on the premises complies with the setback provisions in the relevant Australian Standards to establish, for the purpose of the element of the definition of "heavy industrial storage establishment", that the buildings were required to be separated from other development because of the nature of the goods stored in those buildings; she did not substitute the test in the Australian Standards for the test in the definition of "heavy industrial storage establishment": at [105];

(4) (a) The Senior Commissioner did not err in construing the definition of "heavy industrial storage establishment" in the ways submitted by the applicant (at [130]); the definition should not be construed by reference to the words "heavy industrial" in the name given to the particular type of development (at [130]); the inclusion of the three specified developments in the definition does not change the meaning of the descriptive criterion (at [131]); the three specified developments do not assist in determining whether the proposed development falls within the definition (at [132]); the fact that the Land Use Table couples heavy industrial storage establishments and heavy industries as both being permitted or prohibited in certain zones does not assist in construing the meaning of "heavy industrial storage establishment" as being limited to places of a heavy industrial nature (at [133]); any limitation must derive from the definition itself, not from how the defined term is used in the Land Use Table: at [134];

(b) the Senior Commissioner did not address the element of the definition of "heavy industrial storage establishment" of whether a building would be used "for commercial purposes"; her failure to do so was an error of law, addressed in the second ground of appeal, not any error in construction of the phrase in the definition: at [135]; and

(5) The Senior Commissioner misdirected herself and asked the wrong question in having regard to the objectives of the zone in determining whether the proposed development met the requirement in the definition of "heavy industrial storage establishment" that the goods stored require separation from other development because of their nature (at [141]); this discussion was material to her conclusion that the development was a heavy industrial storage establishment: at [143].

- Separate Question:

RBFI Pty Limited v Wollongong City Council **[2017] NSWLEC 174** (Moore J)

Facts: RBFI Pty Limited (**the applicant**) appealed against Wollongong City Council's (**the Council**) deemed refusal of a development application.

The applicant had applied for and had been granted development consent to subdivide its allotment, located in the catchment of American Creek along its southern bank, into 22 individual residential allotments. Some 250 metres to the east of the eastern boundary of the allotment, American Creek flowed through a substantial culvert underneath the F6 Freeway. The applicant also applied to Council for development consent to erect a single dwelling on its allotment, which would become one of the individual residential allotments following subdivision. The applicable flood planning policy mandated that habitable rooms in the dwelling must be above the 12.2 AHD, determined by reference to the flood level that would occur if debris carried downstream by flooding in American Creek were to block the culvert under the F6 Freeway. The applicant sought approval to construct a dwelling with the ground floor habitable rooms being at 11.2 AHD.

To have this lower level rendered compliant, the applicant proposed to build a debris control structure on Council land across the path of American Creek, some 250 metres downstream from the allotment, with the effect of lowering flood planning levels by one metre. The Council rejected this proposal.

Under the *Wollongong Local Environmental Plan 2009* (**the WLEP 2009**), any innominate development is prohibited unless it can be characterised for some reason as serving a purpose which renders it permissible. The applicant argued that the structure served the purpose of its proposed development of a dwelling house-which is permissible development under the WLEP 2009-and was consequently permissible. Conversely, the Council said that the proposed structure, properly characterised, would serve the separate and distinct purpose of a flood mitigation work and, as development for the purpose of a flood mitigation work was prohibited in the R2 - Low Residential zone (where the structure was proposed to be located), the development application must be refused. There was no dispute between the parties that the proposed structure fell within the definition of flood mitigation work in the WLEP 2009.

The parties agreed that if characterised as development for the purpose of a flood mitigation work, the appeal ought to be dismissed.

Issues: Whether the proposed debris control structure was to be characterised as serving the purpose of the proposed dwelling house or as serving the broader purpose of flood mitigation.

Held: The proposed debris control structure served the purpose of flood mitigation. Appeal dismissed and development consent refused.

(1) While the construction of the proposed debris control structure would facilitate the erection of the dwelling house, ultimately that was not the purpose served by the proposed structure; but rather, the purpose served was flood mitigation within the wider American Creek catchment: at [68]; The proposed debris control structure was prohibited: at [69];

- Strata Scheme Redevelopment:

The Owners - Strata Plan 6877 v 2-4 Lachlan Avenue Pty Ltd [2018] NSW LEC 13 (Molesworth AJ)
(related decision: *The Owners - Strata Plan 6666 v Kahu Holdings Pty Ltd* [2018] NSWLEC 15 (Molesworth AJ))

Facts: On 20 December 2017, the applicant owners corporation, then described as The Owners Corporation Strata Plan 6877, commenced proceedings (**the s 179 proceedings**) under s 179 of the *Strata Schemes Development Act 2015 (NSW)* (**the Development Act**) to give effect to a strata renewal plan relating to a property in Macquarie Park, Sydney (**the renewal plan application**).

On 20 December 2017, GSA Australia Acquisition No. 2 Pty Ltd (**GSA Australia**), the prospective purchaser and developer of the strata scheme, sought an order under r 6.24 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) to be joined as an applicant to the s 179 proceedings.

On 12 January 2018, 2-4 Lachlan Avenue Pty Ltd (**Lachlan**), the owner of two lots in the relevant strata scheme, filed an objection with the Court in relation to the renewal plan application. In early February 2018, Lachlan filed a Notice of Motion with the Court seeking to be joined in the s 179 proceedings.

Issues:

(1) Whether Lachlan ought to be joined to the proceedings;

(2) Whether GSA Australia ought to be joined to the proceedings;

(3) What is the appropriate designation for each of the joined parties;

(4) What is the appropriate name for the applicant;

(5) What should the position as to costs be with respect to each applicant on the motion; and

(6) Whether conciliation under s 34 of the *Land and Environment Court Act 1979 (NSW)* (**the LEC Act**) is appropriate in matters of this kind.

Held: Applications for joinder granted.

(1) Lachlan is a party who has satisfied the preconditions set out at ss 179(2) and 180(1), and who is likely to be materially affected by the outcome of the s 179 proceedings (in that it may, if the strata renewal plan is approved, lose ownership of its lots in the strata scheme). It is in the interests of fairness and justice that Lachlan be joined as party to the proceedings: at [7]-[15];

(2) GSA Australia is the prospective purchaser and developer of the strata scheme should the strata renewal plan be given effect to by way of the s 179 proceedings, and as such has a monetary investment in the subject matter of the s 179 proceedings: at [17]; Although there is no direct contemplation in the Development Act that a prospective purchaser or developer be joined to proceedings under s 179 (as is the case with objectors under s 181(6)(a)), s 181(6)(b) gives the Court discretion to direct a person to be joined: at [20]; GSA Australia's material interests in the outcome of the proceedings is a sufficient basis to join GSA Australia to the proceedings: at [23];

(3) Both Lachlan and GSA Australia are to be joined as respondents, Lachlan as respondent (Dissenting Owner) and GSA Australia as respondent (Supporting Purchaser) to make their respective positions plain: at [24]-[25];

(4) Notwithstanding that the applicant was originally identified as "The Owners Corporation of Strata Plan 6877", the legal name of the applicant pursuant to s 8 of the *Strata Schemes Management Act 2015 (NSW)* is "The Owners - Strata Plan 6877". The name of the applicant to the proceedings and the name of the proceedings are to be altered to reflect this: at [26]-[29];

(5) The applicant was directed to cover the costs of Lachlan, the Dissenting Owner: at [33]; No order as to costs was made with respect to GSA Australia, the Supporting Purchaser: at [36]; and

(6) The newly commenced s 181(3A) of the Development Act addressed a former inconsistency between s 34 of the LEC Act and the role of the Court in s 179 of the Development Act. It is therefore now appropriate for s 179 matters to be referred to conciliation under s 34 of the LEC Act: at [41];

- Interlocutory Decisions:

Belongil Action Group Association Incorporated v Byron Bay Railroad Company Limited **[2017] NSWLEC 187** (Preston CJ)

Facts: The applicant, Belongil Action Group Association Inc (**the applicant**), has commenced civil enforcement proceedings to restrain an alleged breach of s 76B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) by Byron Bay Railroad Company (**the respondent**).

The respondent operates a heritage passenger train on a three-kilometre railway line between North Beach Byron (**Sunrise Beach**) and the Byron Bay town centre. The railway line is owned by Transport NSW, which operated railway services on the line until 2004. After 2004, Transport NSW undertook maintenance of the railway line. On 31 October 2014, Transport NSW granted the respondent a licence to operate the heritage passenger train on the railway line and the respondent commenced operations on 16 December 2017.

On 21 July 2014, the *Byron Local Environmental Plan 2014 (NSW)* (**the BLEP 2014**) came into force, which introduced zoning for a section of the railway line where it crosses Belongil Creek. Under the Land Use Table for the applicable zone, W1 - Natural Waterways, use of the land for the purpose of railway or rail infrastructure facilities is an innominate prohibited use. The applicant submits that the use of the part of the railway line that crosses Belongil Creek is, therefore, prohibited and in breach of s 76B of the EP&A Act. The respondent argues that the use of this part of the railway is not in breach of s 76B of the EP&A Act because it is an existing use within the meaning of s 106 of the Act. The respondent contends that immediately before the BLEP 2014 came into force, there was an actual use of the railway for the purpose of railway or rail infrastructure facilities by virtue of the maintenance activities conducted by Transport NSW. The applicant argues that Transport NSW not only suspended rail services but also closed the railway line and, accordingly, actual use had ceased.

The applicant sought an interlocutory injunction restraining the respondent from operating rail services on the section of the railway line that crosses Belongil Creek.

Issues: Whether, in the circumstances of this case, the Court should grant a prohibitory interlocutory injunction until the final hearing on the basis that:

(1) There is a serious question to be tried; and

(2) The balance of convenience favours the grant of the interlocutory injunction.

Held: Notice of Motion dismissed.

(1) Although, the evidence relied on by both parties for their respective contentions was sparse (at [16]), it is sufficient to find that there is, at least, a serious question to be tried that there might not have still been an actual use of the railway bridge for the purpose of railway or railway infrastructure facilities as at 21 July 2014: at [17];

(2) In balancing all of the factors which are relevant in the particular circumstances of this case (outlined below), the balance of convenience favours not granting an interlocutory injunction between now and the final hearing: at [19] and [59]:

   (a) if the interlocutory injunction were not to be granted, any irreparable injury either to the environment or to the orderly enforcement of the planning laws would be slight: at [25];

   (b) based on the evidence provided, the grant of the interlocutory injunction will cause prejudice to the respondent (at [31]); the respondent gave evidence as to the loss that would be incurred if the interlocutory injunction were to be granted, including loss of revenue, reputational damage, and loss of transport services for nearby businesses and residents: at [26] to [30];

   (c) the applicant has not given an undertaking to pay damages incurred by the respondent by reason of the grant of the interlocutory injunction, if ultimately the applicant's claim is unsuccessful (at [32]); there is some force in the applicant's argument that the proceedings are brought in the public interest and that, accordingly, it may not be appropriate to require the applicant to give an undertaking as to damages (at [34]); the appropriateness of whether an applicant should be required to give an undertaking as to damages varies depending upon the nature of the proceedings; it is not, as submitted by the respondent, limited to circumstances where "a strong prima facie case" has been made out: at [36];

(d) the grant of the interlocutory injunction may have adverse effects on some of the matters that define the status quo in this case (at [41]); the status quo includes not only the state of the environment but, more generally, the whole state of affairs that existed when the applicant commenced proceedings and sought interlocutory injunctive relief; by this time, the respondent had already undertaken considerable work: at [39];

(e) the evidence at this stage is sparse and it is therefore difficult to form a view as to the relative strength of each party's case: at [43];

(f) the applicant has delayed for almost a year before bringing proceedings (at [52]); the evidence establishes that the respondent has been working on this project for many years (at [44]); the use of the land for the purpose of railway or rail infrastructure facilities can be carried out through undertaking activities other than the running of trains along the railway line, including the physical acts of repairing and maintaining the railway infrastructure; once this is appreciated, it can be readily seen that the applicant has known for some considerable time that the respondent was carrying out the use of the land for that purpose: at [51];

(g) some prejudice to the public might be suffered by the grant of the interlocutory injunction; members of the public use this service to access a resort, tavern, residential area and an industrial estate; however, there are other ways for the public to access these areas; use of the train service is not a necessity, but rather it is a convenience or a desirability: at [54]; and

(h) the relatively short period of time between the application for the interlocutory injunction and the final hearing, in the circumstances of this case, tends towards refusing interlocutory injunctive relief (at [58]); the harm that would be done to the applicant, the environment and the public interest by the carrying out of the development in that period of time will be relatively slight; on the other hand, if an interlocutory injunction were to be granted, the prejudice to the respondent may be quite significant; the next few months is the busiest period for the respondent's operations and the respondent would stand to lose considerable revenue during this period: at [57].

Strathfield Municipal Council v C & C Investments Trading Pty Ltd **[2017] NSWLEC 155** (Sheahan J)

Facts: This was an application made by the Strathfield Municipal Council (**the Council**) for an interlocutory injunction against C & C Investments Trading Pty Ltd and Grand City Constructions (**the first and second respondents**) pending the hearing of its Class 4 civil enforcement proceedings against three respondents (the third respondent, Mr Spyrou, a private certifier, did not appear at the hearing). A development located at 51-55 Homebush Road, Strathfield (the Development) was constructed in contravention of the conditions of development consent. In particular, the first and second respondents constructed balconies, nib walls, and a courtyard, as well as two enclosed outdoor areas, none of which were included in the approved plans for the Development. The Council claimed that the first and second respondents removed from their proposal certain elements to which Council objected, but, after obtaining an approval from the Land and Environment Court ('the Court') they departed from the Court-approved plans to re-incorporate the objectionable elements in the project, thereby undermining the development approval regime, and causing potential harm to neighbourhood amenity, especially the adjacent school. Council also fined the first respondent $6,000 for allowing tenants to reside within the heritage building, located on the Development site.

The first respondent lodged a s 96 modification application under the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) to regularise the non-compliances. The s 96 application was refused by Council, which proceeded to issue a s 121B order under the EP&A Act regarding the unauthorised works.

The relief claimed by Council in the injunction application included orders that:

- the first respondent cease the use of the development for any residential purpose;
- within seven days of the date of the making of orders (2 November 2017), the first respondent would cause all occupants to vacate the premises; and
- will not to cause, permit or allow the premises to be occupied until further order of the Court.

Additionally, the Council sought an order restraining the first and second respondents from undertaking any work at the premises not in accordance with the development consent.

At the time of the interlocutory hearing, a s 34 conciliation conference under the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**) was listed, and two Class 1 appeals were pending: one by the first respondent disputing the refusal of the modification application, and an appeal against the Council's s 121B order.

Issue: Whether to issue an interlocutory injunction against the first and second respondents to restrain a breach under s 76A of the EP&A Act.

Held: The first and second respondents ordered not lease, cause, permit, or allow any further elements of the Development, or any elements which were to become vacant, to be leased or occupied, for residential or any other purpose; the first and second respondents not to cause, permit, or allow any further advertising of "rooms to let"; and the first and second respondents restrained from undertaking any work at the premises not in accordance with the development consent. Hearing of the substantive proceedings expedited.

(1) *Principles*: The Court must find that there is a serious issue to be tried, and that the balance of convenience favours the grant of interlocutory relief to preserve the status quo: at [25]. The issues in the present case were, indeed, "serious", and in dispute: at [26]. The balance of convenience favoured the grant of interlocutory relief, but, upon the exercise of "judicial balancing", ordering the removal of present occupants of the premises was justified in all the circumstances: at [29]; and

(2) *Undertaking as to damages*: The Council was not required to proffer an undertaking as to damages in this case, as the Council was found to be acting in the public interest as the relevant regulator of development in the area, seeking to uphold the planning laws: at [30]. ;

***The Hills Shire Council v Needham* [2017] NSWLEC 180** (Moore J)

Facts: Ms Norma Needham (**the respondent**) was the proprietor of premises at Kenthurst (**the premises**). The premises are zoned RU6 Transition under The Hills Local Environmental Plan 2012 (**the THLEP 2012**). The Hills Shire Council (**the Council**) sought, on an interlocutory basis, three orders requiring the respondent be restrained from using, causing or permitting the land to be used, or advertised, for the purposes of a function centre or commercial premises.

Issues:

(1) Whether the premises were being used for a prohibited purpose; and

(2) Whether the orders sought ought to be made.

Held: Interlocutory injunction restraining the respondent from advertising or promoting the premises as being available for use for the purposes of a function centre pending resolution of the substantive proceedings.

(1) The respondent failed to demonstrate there were commercial activities being undertaken at the premises: at [5]. An event took place at the premises on 25 November 2017 which fell within the illustrative scope of the definition of 'function centre' contained within the THLEP 2012: at [10]-[11];

(2) The respondent was aware of and condoned the holding of the event: at [13]; and

(3) The respondent restrained from using premises as a function centre or advertising its use for that purpose until 7 February 2018: at [16].

- Recusal for Apprehended Bias:

***Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 148** (Sheahan J)

Facts: The applicants sought the recusal of Sheahan J from hearing this Class 3 matter. The applicants also sought an order that Maston AC not sit with whomever the Chief Judge of the Court allocated to hear the case in place of Sheahan J. The ground on which the two orders were sought was "apprehended bias on account of prejudgment", based on the Court's decision in *Carlewie Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 78 (***Carlewie***). *Carlewie* was determined by Sheahan J, with the assistance of Maston AC. It was a Class 3 matter involving the compulsory acquisition of land adjoining the land in the present case. Alexandria Landfill Pty Ltd, Boiling Pty Ltd, and Carlewie Pty Ltd were all members of a

group of companies with common shareholders and/or common directors. Several, but not all of the witnesses who gave evidence in *Carlewie* were expected to be involved in the hearing of the subject case. The respondent opposed the recusal motion, and argued that the applicants had waived any rights to object to Sheahan J and Maston AC hearing and disposing of the case, on the basis of ostensible bias, due to the applicants' delay in bringing its recusal motion, which was filed 3 weeks after learning of the allocation of His Honour and the Acting Commissioner, and 3 weeks before the commencement of the hearing.

Issue: Whether the applicants had waived their right to bring the recusal motion due to delay, and whether apprehended bias on account of prejudgment was present to the extent that the Judge should recuse himself and make orders to prevent Maston AC from assisting with the case.

Held: The Court held that the applicants were not precluded from bringing their recusal motion, but that it should be dismissed.

(1) The "double might" test: The listing of the Judge and Commissioner must stand unless the apprehended bias test is satisfied: at [38]. The High Court said, in *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63: "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide": at [29]. This principle has come to be known as the "double might" test: at [30]. The hypothetical observer is presumed to be fair-minded and to be aware of relevant elements of context: at [50]. The hypothetical observer may see the utility in engaging decision-makers familiar with locations and issues: at [50]; and

(2) The observer would consider the various cited comments in *Carlewie*, but in their appropriate context, and recognise that the Judge and Acting Commissioner assessed the competing legal arguments, the gaps in the evidence, and the variation in the itemised costings prepared by the experts in coming to their joint conclusions: at [51].

Randren House Pty Ltd v Water Administration Ministerial Corporation (No 2) **[2017] NSWLEC 185** (Molesworth AJ)

(related decision: *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2017] NSWLEC 151 (Molesworth AJ))

Facts: On 22 June 2015, Randren House Pty Ltd (**the applicant**) commenced judicial review proceedings against the Water Administration Ministerial Corporation and the State of New South Wales (**the respondents**) challenging five categories of decisions concerning, inter alia, the regulation and management of Yanco Creek (a tributary of the Murrumbidgee River). After a number of interlocutory matters, including joining a second applicant and the amending of the applicants' application to challenge seven decisions of the respondents, the Court listed the matter for hearing.

On the first day of the hearing, 27 November 2017, Counsel for the applicants informed the Court that the applicants intended to make a recusal application with respect to Molesworth AJ. A Notice of Motion to that effect was filed later that day.

Issues:

(1) Whether the test for recusal on the ground of apprehended bias applied to the applicants' first ground arguing that Molesworth AJ, due to being an Acting Judge, did not have jurisdiction to hear the matter; and

(2) Whether a fair-minded lay observer might reasonably apprehend that his Honour might not bring an impartial mind to the resolution of the issues, on any of the following grounds:

   (a) that his Honour might decide the matter other than on its merits because, as a person appointed to act as a judge, he did not have jurisdiction to hear the trial in the proceedings;

   (b) that his Honour might decide matter involving the State as a respondent other than on its merits because, as a person appointed to act as a judge, his Honour had the potential to be reappointed or permanently appointed by the State; and

   (c) that his Honour might decide matters other than on their merits because his Honour had already prejudged the issue of the relevance of the issue of environmental damage in an interlocutory decision and/or prematurely listed the matter for hearing and/or inappropriately excluded potential (relevant) evidence such as potential environmental impact statements.

Held: Notice of Motion dismissed; applicants to pay respondents' costs of the Notice of Motion:

(1) The applicants' application was for his Honour to make an order recusing himself from the trial of the matter. Accordingly it was not open to the applicants, as part of the recusal application, to challenge whether or not his Honour had jurisdiction simpliciter and the first ground would be determined in the same manner as the further two grounds involving the apprehended bias test: at [64], [67] and [69];

(2) That a fair minded lay observer would not reasonably apprehend that Molesworth AJ might not bring an impartial mind to the resolution of the issues:

(a) With respect to the first ground, inter alia, there is no logical or rational connection between the issue of jurisdiction and apprehended bias and further, the fair-minded lay observer would accept that his Honour did have jurisdiction under the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**) (by dint of being appointed to act as a judge of the Court) unless there was some evidence to indicate otherwise: at [78];

(b) In the absence of any relevant evidence to suggest otherwise, the fair-minded lay observer could not reasonably apprehend that his Honour might not bring an impartial mind to the resolution of the proceedings against the State simply because his Honour was an acting judge of the Court rather than being a judge of the Court: at [81]; and

(c) A conclusion could not properly be drawn that his Honour had prejudged the proceedings by confining the parameters of its future consideration of the issues in the proceedings to the legality of decisions. At most, he expressed a predisposition that the judicial review proceedings, as is traditionally the case with judicial review proceedings, *centrally* (but not exclusively) concerned the legality of particular decisions: at [88].

Young v King (No.12) **[2017] NSWLEC 150** (Sheahan J)

(related decisions: The lengthy list of related decisions in this Court, the Supreme Court and the Court of Appeal are not reproduced here.)

Facts: The legal practitioners who have appeared for Ms Young throughout the history of these proceedings, Mr Leonardo Muriniti and Mr Robert Newell, sought the recusal of Sheahan J from hearing the remaining issues on costs. The proceedings arose from a dispute in about 2001, between Ms Young and her immediate neighbours, Brendan King and Kristina King (**the Kings**). Ms Young alleged that the Kings had carried out unlawful works on their property, including on its boundary with her property. In 2004, consent orders were made in the substantive matter by McClellan CJ, largely in favour of Ms Young, and in reliance on an undertaking by the Kings to carry out certain works. The Kings were ordered to pay Ms Young's costs. Ms Young became dissatisfied with the 2004 Consent Orders, and alleged that she was the victim of some conspiracy, involving the Kings, the Council and the parties' respective advisers. She has, since 2004, sought to have the 2004 Consent Orders set aside, in the Land and Environment Court (**the Court**), and in the Supreme Court. She has also commenced many related proceedings - against her advisers and representatives from those days, and others. Her attempts in all courts have failed, and her appeal to the New South Wales Court of Appeal was also dismissed with costs ([2016] NSWCA 282). Sheahan J's earlier judgment in the litigation - *Young v King (No.11)* [2017] NSWLEC 34 (**judgment No.11**) - dealt with a number of motions for indemnity and/or personal costs orders against Ms Young's lawyers. The remaining issues before this Court, in late 2017, included the making of personal costs orders against Mr Muriniti and Mr Newell in respect of the Kings' costs of the substantive proceedings, as well as an application by Mr Warwick Davies, who was the eighth respondent to Ms Young's earlier costs motion, seeking a lump sum costs order in satisfaction of the order made in his favour in Judgment No.11. On the day of the hearing of the recusal motion, Mr Newell made an oral application that Sheahan J also recuse himself from dealing with Mr Davies' motion. The Court adjourned the two Davies' matters - the costs application and the lawyers' recusal application - but proceeded to hear the lawyers' application for recusal on the Kings' application.

Issue: Whether apprehended bias on account of prejudgment was present and whether the judge should recuse himself.

Held: Recusal applications in respect of the Kings' personal costs orders against Mr Muriniti and Mr Newell dismissed; Mr Muriniti and Mr Newell pay Mr Davies' costs of appearing at the hearing at which Mr Newell made the oral application seeking recusal of Sheahan J.

(1) *The "double might" test*: As the High Court stated in *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63: "a judge is disqualified if a fair-minded lay observer might

reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide": at [27]. The test applied by the Court in this case was: "would a fair-minded lay observer, acquainted with the relevant facts, reasonably apprehend that it was possible that [Sheahan J] would not bring an independent mind to the determination of the Kings' application for personal costs orders against Ms Young's lawyers?": at [35]; and

(2) The lawyers were not able to satisfy the "double might" test on their application: at [67]. The Court acknowledged that the lawyers may well feel "unease" or "disquiet" about Sheahan J's continued involvement in the matter, but was doubtful that the hypothetical bystander would feel that way: at [66], and criticism in a judgment does not automatically amount to prejudgement of a question yet to be argued and determined: at [68]. A hypothetical observer would read all remarks made in his Honour's earlier judgments in their respective contexts: at [69].

- Practice and Procedure:

***Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services (No 2)* [2017] NSWLEC 175** (Sheahan J)

Facts: During the course of the scheduled 35 day hearing for this Class 3 compulsory acquisition matter, the respondent sought to make amendments to evidence provided by its contamination expert, Mr Clay, within his written reports, and in his contribution to his joint reporting with the applicants' expert. The respondent sought to tender an amended version of their contamination expert's Statement of Evidence; and, a Supplementary Statement of Evidence. Mr Clay adjusted his estimate of the potential cost of managing non-compliant stockpiles by approximately $9 million, explained his assumptions, and prepared a table to explain his amended position in greater detail. The applicants objected to the tender of revised evidence.

Issue: The Court was required to determine whether to admit the additional evidence and allow amendments to the evidence from the respondent's expert contamination witness.

Held: Tender allowed.

(1) Necessary correction: the Court accepted the respondent's submission that the change was required by the expert code, i.e., to bring forward a correction to the expert opinion when it is regarded as being necessary by the expert: at [7]; and

(2) Potential for prejudice: the Court recognised that the new evidence was being tendered very late in the course of the proceedings, and that Counsel for the applicants might be able to satisfy the Court that, armed with only their present expert and facing a $20 million impact on their claim, the applicants are prejudiced and may require an expert in resource recovery orders: at [8]; The Court recognised that, considering that the hearing for the proceedings continued into March and April 2018, the applicants had enough time to consider whether further evidence in relation to the stockpile and contamination issue was required and to seek that evidence, as necessary: at [9]-[10].

***David DeBattista v Minister for Planning* [2018] NSWLEC 8** (Robson J)

Facts: The proceedings concerned a planning proposal to reduce the approved building height under the *Shoalhaven Local Environmental Plan 2014* (**the SLEP 2014**) of land owned by Mr DeBattista (**the applicant**). The applicant contends that Shoalhaven Council (**the Council**) failed to discharge its duties under s 117(3) of the *Environmental Planning and Assessment Act 1979 (NSW)* in preparing the planning proposal. Specifically, the applicant says that the Council did not provide the Minister for Planning (**the Minister**) with documentation to justify the planning proposal's contravention of certain planning directives. In these discrete proceedings, the applicant sought leave pursuant to rr 22.1 and 31.19(2) of the Uniform Civil Procedure Rules 2005 (NSW) to issue specified interrogatories to the Minister, and to adduce expert evidence to show why the planning proposal is inconsistent with the planning directives. The Minister and the Council argued that these were not relevant to the pleaded case properly understood.

Issues:

(1) Whether leave should be granted to issue the interrogatories; and

(2) Whether leave should be granted to adduce expert evidence.

Held: Interrogatories and expert evidence permitted.

(1) In light of the fact that the matter was pleaded as civil enforcement proceedings rather than judicial review, the interrogatories were not impermissibly directed at a decision not under review and therefore leave should be granted: at [36];

(2) Similarly, because the proceedings were pleaded as civil enforcement, the usual reluctance to adduce expert evidence had less weight and therefore leave should be granted: at [35]; and

(3) The admissibility of the evidence was a matter which should be left for the trial judge: at [35], [38].

Randren House Pty Ltd v Water Administration Ministerial Corporation **[2017] NSWLEC 151** (Molesworth AJ)

Facts: On 22 June 2015, Randren House Pty Ltd (**the applicant**) commenced judicial review proceedings against the Water Administration Ministerial Corporation and the State of New South Wales (**the respondents**) challenging five categories of decisions concerning, inter alia, the regulation and management of Yanco Creek (a tributary of the Murrumbidgee River). The Court listed the matter for hearing for 27-30 November 2017.

On 1 November 2017, the respondents filed a Notice of Motion to set aside, in part, a Notice to Produce to Court filed by the applicant on 23 October 2017, which required the respondents to produce 17 categories of documents and other materials. At the hearing of the Notice of Motion, on 3 November 2017, the applicant sought leave to file an affidavit in Court, to which a draft proposed Further Amended Summons was attached (containing several material amendments). The applicant applied for leave to rely on this Further Amended Summons and to join Mr Paul Andrews as an applicant.

Issues:

(1) Whether the joinder of Mr Paul Andrews was proper or necessary;

(2) Whether the joinder of the Minister administering the *Water Management Act 2000 (NSW)* (**the Minister**) as a respondent in the proceedings was proper or necessary;

(3) Whether the various categories of documents and materials sought in the Notice to Produce to Court were sought for a legitimate forensic purpose;

(4) Whether the Notice to Produce to Court was unacceptably burdensome in the context of the imminent substantive hearing;

(5) Whether the proposed amendment of the Summons to include an additional order restraining the respondents from directing particular water flows into Yanco Creek or unreasonably using the waters of Yanco Creek was for the purpose of determining the real questions raised by or otherwise depending on the proceedings; and

(6) Whether the proposed amendment of the Summons was so late such that it would be inconsistent with the overriding purpose of civil litigation to allow the amendment to be made.

Held: Respondents' Notice of Motion granted with costs; applicant's joinder applications granted; applicant's amendment application dismissed.

(1) The joinder of Mr Paul Andrews and the Minister as parties to the proceedings was proper: at [54]-[55]. Mr Andrews, as the occupier of the relevant land, was directly affected by the orders sought. The Minister was alleged to have made an impugned decision;

(2) The respondents should be excused from producing the categories of items that they object to because the applicant did not establish that the items were sought for a legitimate forensic purpose or that it was "on the cards" that the items would materially assist the applicant's case: at [56] and [58]-[61];

(3) The sought production of the broad categories of documents amounted to an unacceptable (and, additionally, extremely late) fishing expedition that effectively sought discovery of unspecified documents in the mere hope that some of the relevant documents would assist the applicant's case: at [56];

(4) As the Notice to Produce to Court was served shortly before the trial and imposed a considerable obligation and thus disruption on the respondents, the Notice to Produce to Court was unreasonably burdensome and undermined the overriding purpose of civil litigation: at [57];

(5) The proposed amendment to the Summons was not for the purpose of determining a real question raised or otherwise depending on the proceedings: at [64]. The proceedings, as judicial review proceedings, centrally concern the legality of various decisions alleged to be made by the respondents rather than centrally concerning whether or not the respondents have caused environmental damage and how they should be restrained: at [64]; and

(6) Given the unexplained lateness of the application to amend, made 12 working days before the commencement of the trial (in circumstances where the Summons was dated 25 months earlier), the respondents would likely suffer prejudice if the amendment were allowed and the making of the amendment would not be consistent with the overriding purpose of civil litigation: at [66].

Tweed Shire Council v Reysson Pty Ltd (No 2) **[2017] NSWLEC 159** (Molesworth AJ)

Facts: On 21 November 2017, Tweed Shire Council (**the applicant**) filed a Notice of Motion seeking an order that Reysson Pty Ltd (**the respondent**) produce various documents in accordance with an informal Notice to Produce served on the respondent on 6 November 2017. The respondent objected to producing these documents as they were subject to a claim of client legal privilege. The documents subject to the claim of client legal privilege were e-mails (prepared in 2015) between Mr Warren Beveridge (the respondent's manager), Mr Steven Connelly (the respondent's town planner), and Mr Christopher Gough (the respondent's former solicitor). At the hearing of the Notice of Motion, the Court made orders enabling it to inspect the relevant documents subject to the claim of privilege for the purpose of scrutinising and testing the claim.

Issue: Whether, on the evidence, the relevant documents were prepared for the dominant purpose of Mr Gough providing legal advice to the respondent.

Held: Notice of Motion granted in part.

(1) The respondent failed to establish that the first tranche of relevant documents were prepared for the dominant purpose of Mr Gough providing legal advice to the respondent: at [50] and [57]. The material evidence of Mr Connelly was equivocal as to whether or not he prepared his e-mails to Mr Beveridge for this dominant purpose: at [52]-[53]. In light of both the pre-existing relationship between Mr Connelly and Mr Beveridge and the recommencement of their e-mail correspondence some considerable time after the retainer of Mr Connelly by Mr Gough (on behalf of the respondent), it was equally likely that Mr Beveridge and Mr Connelly prepared their e-mails for the dominant purpose of seeking and providing town planning advice respectively: at [55]. It was significant that no evidence was provided that the relevant e-mails were responsive to any instruction from Mr Gough, sent to Mr Gough or contributed to any document provided to Mr Gough: at [56]. The Court's inspection of the documents supported its conclusion on the claim of privilege: at [58]; and

(2) The respondent established that most of the second tranche of relevant documents were prepared for the dominant purpose of Mr Gough providing legal advice to the respondent: at [59]-[62]. The balance of evidence tipped in the respondent's favour because the second tranche of e-mails were sent either immediately before a joint conference with Mr Gough or immediately after (with some post conference e-mails being sent to Mr Gough): at [62]. The Court's inspection of the documents supported its conclusion on the claim of privilege save for two e-mails, in respect of which it was plainly apparent that the documents were not prepared for the necessary dominant purpose: at [64]-[65].

- Costs:

Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel (No 3) **[2017] NSWLEC 146** (Robson J)

(related decisions: *Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel and ors* [2017] NSWLEC 1278 (O'Neill C); *Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel* [2017] NSWLEC 51 (Robson J); *Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel (No 2)* [2017] NSWLEC 55 (Robson J))

Facts: The third respondent in the proceedings, Byron Shire Council (**the Council**) filed a Notice of Motion seeking an order that Butler Street Community Network Incorporated (**the applicant**) pay its costs of a Notice of Motion filed by the applicant on 13 April 2017 (**the motion**).

The costs application related to Class 1 objector appeal proceedings brought by the applicant appealing the grant of development consent to Council by the Northern Region Joint Regional Planning Panel (**the Panel**) for construction of a road and associated works referred to as the Byron Bay Bypass. The applicant filed the motion on 13 April 2017 seeking, inter alia, orders that the proceedings be dismissed as the Court had no jurisdiction to determine the development application before it. The motion was dismissed, and the matter proceeded to hearing before O'Neill C, with the commissioner granting consent to the development subject to conditions and dismissing the applicant's appeal.

Issues:

(1) Whether the circumstances are such that it is warranted to depart from the presumptive rule against costs in Class 1 proceedings enshrined in r 3.7(3) of the Land and Environment Court Rules 2007 (NSW) (**the Court Rules**);

(2) Whether it is fair and reasonable in the circumstances to award costs;

(3) Whether Council acted unreasonably in the conduct of the proceedings; and

(4) Whether the proceedings were brought in the public interest.

Held: Motion dismissed.

(1) The facts fit within circumstances provided in r 3.7(3)(a)(i)-(ii) of the Court Rules, in that the motion was potentially determinative of the proceedings and was preliminary to an evaluation of the merits in the substantive hearing. However, in the circumstances it would not be fair and reasonable to reimburse Council its costs: at [26];

(2) The form of order sought by the applicant in the motion was unusual, given it was seeking dismissal of proceedings that it itself had instituted. However, in the circumstances the applicant's conduct and response was not unreasonable. Rather, the applicant filed the motion so as to clarify the scope of the proceedings, and was aimed at facilitating the just, quick and cheap determination of the proceedings: at [29];

(3) The applicant did not act improperly or unreasonably in filing the motion: at [30]; and

(4) In the circumstances, there are not sufficient reasons to depart from the presumptive rule against costs in Class 1 proceedings: at [31].

***Hunter v Central Coast Council* [2017] NSWLEC 154** (Pain J)

(related decision: *Norman McDonald v Central Coast Council* [2017] NSWLEC 1207 (O'Neill C))

Facts: The applicants were successful in a Class 1 appeal obtaining development consent for alterations to the Avoca Beach Theatre. The applicants sought the costs from the appeal, pursuant to r 3.7 of the Land and Environment Court Rules 2007 (NSW), and costs of the Amended Notice of Motion. Rule 3.7 states that a court is not to make an order for costs unless it is "'fair and reasonable in the circumstances". The Central Coast Council (**the Council**) sought the costs of the motion.

Issues:

(1) Did the Council defend the appeal to oppose the development application for an extraneous purpose;

(2) Did the Council fail to comply with Court orders and unduly extend proceedings; and

(3) Did the Council act unreasonably in raising contentions without reasonable justification.

Held: It was not fair and reasonable to make a costs order; applicant's Amended Notice of Motion dismissed; applicant to pay Council's costs for Amended Notice of Motion.

(1) The applicant's submission that the Voluntary Planning Agreement (**the VPA**) contention should not have been pursued by the Council, despite the fact the Council's argument, which was accepted by the commissioner, lacked any foundation for that reason alone: at [108]; the submission that the commissioner incorrectly determined the issue was impermissible in a costs application: at [109];

(2) The Council's conduct in making the quantum of material available to the applicants was measured: at [79]; due to the volume of material (some 7,000 documents), it was not possible to meet the Practice Note timeframe of 14 days: at [80]; there was no evidence that the applicants incurred "substantial" costs in requesting further details in relation to privilege: at [82]; and

(3) There was no unreasonable conduct by the Council in relation to the heritage contention: at [112]; there was no demonstrated delay in advising, close to the hearing, that the flooding engineer was not required for cross-examination: at [113]; the Council withdrew the contention regarding the Independent Design Review Panel in a timely manner: at [114].

Karimbla Properties v Council of the City of Sydney; Bayside City Council; and North Sydney Council (No 2) **[2018] NSWLEC 3** (Sheahan J)

(related decisions: *Karimbla Properties v Council of the City of Sydney; Bayside City Council; and North Sydney Council* [2017] NSWLEC 75 (Sheahan J))

Facts: This was the second judgment in a case involving 12 matters brought by 10 Karimbla Properties' companies (**the applicants**) seeking to alter the categorisation of various Meriton development sites for rating purposes. The main dispute was whether land was being "used for residential accommodation" when it was in the process of being "developed for residential purposes", prior to the issue of an occupation certificate. The applicants had paid rates levied by the Councils on a basis higher than "residential", and argued that the affected lands should have been recategorised as "residential", once relevant development work had commenced pursuant to consent.

In the primary judgment, the Court followed Pain J's decision in *Meriton Apartments Pty Limited v Parramatta City Council* [2003] NSWLEC 309 (***Parramatta***), finding that the Court has the power to order repayment, by the respondent councils, of monies paid to them on a rating basis later found to have been incorrect.

This second judgment dealt with matters outstanding from the primary decision, which were: a possible stay of the proceedings pending the planned appeal; costs; and the applicants' claim for interest. With regard to the question of a "stay", the parties agreed that a personal undertaking provided by Mr Harry Triguboff AO, managing director of the Meriton group of companies, which includes the applicants, was sufficient to avoid the requirement for the Court to decide any such "stay" question. North Sydney Council accepted liability to pay the applicants' costs on the ordinary basis; however, both City of Sydney and Bayside Councils resisted any costs order being made against them. The applicants sought orders for their costs in each matter. All three councils argued against any obligation to pay interest under s 100 of the *Civil Procedure Act 2005 (NSW)* (**the Civil Procedure Act**), pressed by the applicants.

Issues: The Court was required to determine whether the applicants should be awarded costs for the proceedings under r 3.7 of the Land and Environment Court Rules 2007 (**the Court Rules**), and whether, under s 100 of the Civil Procedure Act, to make orders for interest on any repayment of monies by the councils, on account of rates levied on a basis altered by the findings in the primary judgment.

Held: The applicants entitled to their costs of the proceedings, but not to interest.

(1) *Costs*: Rule 3.7 of the Court Rules embodies a presumption against costs orders in Class 3 cases, but the Court retains a discretion to rebut that presumption in appropriate cases: at [27]. The applicants made genuine attempts to resolve the proceedings and, at hearing, they succeeded on the central legal issue: at [28]. The facts were agreed, and the central issue at the first hearing was the legal question of the correctness of *Parramatta*: at [31]. That issue was determinative of the proceedings: at [31];

(2) *Interest*: Section 100 of the Civil Procedure Act presupposes a judgment for money, on the basis of a "cause of action" successfully pursued: at [42]. The applicants sought to contend that even if only s 100(1)(a) was engaged, the interest claim could be upheld. The Court held that claims such as these do not involve a cause of action - citing Preston CJ's decision in *Wilpinjong Coal Pty Limited v Mid-Western Regional Council; Ulan Coal Mines Limited v Mid-Western Regional Council* [2012] NSWLEC 277: at [50]. The applicants' submission paid no regard to the use of the word "and" between subss (a) and (b) of s 100(1), and Preston CJ's decision was fatal to the applicants' claim for interest. Section 100 was not enlivened: at [52]; and

(3) *Costs of the costs and interest hearing*: North Sydney Council did not contest the issue of costs, and City of Sydney and Bayside Councils were unsuccessful on the argument of costs, but all three councils were successful on the issue of interest: at [54]. Each party should pay its own costs of the 19 October 2017 hearing leading to this judgment, with regard to the issues of costs and interest: at [55].

Local Democracy Matters Inc v Minister for Local Government **[2018] NSWLEC 9** (Robson J)

Facts: The proceedings had been concerned with the proposed amalgamation of the local government areas of Woollahra, Waverley and Randwick (**the proposed amalgamation**). After a challenge to a similar proposed amalgamation was successful in *Kur-ring-gai Council v West as delegate of Acting Director-General, Office of Local Government* [2017] NSWCA 54, Local Democracy Matters Inc (**the applicant**) sought to bring the same grounds of review in this matter. At the same time, Woollahra Council was granted special leave to appeal to the High Court in a challenge to the proposed amalgamation which raised the same issues. A separate question was ordered to determine whether the applicant should have leave to bring the matter out of the time period for judicial review, as set in the Uniform Civil Procedure Rules 2005 (NSW). The separate question was heard and the decision reserved. The proceedings were rendered otiose by the Premier of New South Wales' announcement that the proposed amalgamation was not to go ahead.

The applicant sought its costs in the proceedings on the grounds that the Minister had been unreasonable in seeking to agitate a separate question in circumstances where the applicant had been content to wait to see whether a separate High Court proceeding resolve the issues in the case. The Minister sought her costs on the grounds that the applicant had no prospects of success and had only continued in the proceedings to avoid a default costs order.

Issues: What costs order, if any should be made.

Held: No order for costs.

(1) Whilst it may, in some cases, be desirable to resolve a case where the outcome has become redundant, for the purposes of resolving the question of costs, this was not such a case because the separate question may not have disposed of the proceedings: at [51];

(2) Neither party's conduct had been so unreasonable as to warrant a departure from the usual course in proceedings rendered futile that there be no order as to costs: at [54]; and

(3) The proceedings should be dismissed with no order as to costs: at [60].

Thomas v Holmes (No 3) **[2017] NSWLEC 156** (Moore J)

(related decisions: *Thomas v Holmes* [2017] NSWLEC 1192 (Fakes AC); *Thomas v Holmes (No 2)* [2017] NSWLEC 1443 (Fakes AC))

Facts: These proceedings concerned a costs hearing following determination of a Tree Dispute Application.

Mr Peter Thomas (**the first applicant**) and Amartrin Pty Ltd (**the second applicant**) were owners of a property in Cammeray. Mr and Mrs Holmes (**the respondents**) owned a property over which the applicants enjoyed a registered right-of-way. A tree grew on the respondents' property near the right-of-way. The applicants applied to the Court, pursuant to Pt 2 of the *Trees (Dispute Between Neighbours) Act 2006 (NSW)*, seeking removal of the tree, rectification of damage and payment of compensation. Two hearings were held. The applicants had limited success in the substantive proceedings, and failed to obtain the primary remedy sought, namely, the removal of the tree at the cost of the respondents.

On 5 September 2017, the first applicant filed a Notice of Motion seeking an order for costs of the proceedings. The Notice of Motion was stated as being brought on the first applicant's behalf and on behalf of the second applicant. Rule 3.7(1)(b) of the Land and Environment Court Rules 2007 (NSW) (**the Court Rules**) imposed the relevant test of whether it was fair and reasonable to make the costs order, necessitating consideration of the circumstances set out in r 3.7(2).

On 16 October 2017, the respondents made a Calderbank offer, open for a period of seven days, that if proceedings were finalised by the first applicant discontinuing his application for costs, that discontinuance would be able to be on the basis that each part would bear its own costs of the costs applications. The first applicant did not reply to the offer, which subsequently lapsed.

Issues:

(1) Whether there was any proper basis for the first applicant to initiate the Notice of Motion on behalf of the second applicant or give evidence on its behalf;

(2) Whether it was fair and reasonable in the circumstances of the proceedings to make a costs order in favour of the first applicant; and

(3) Whether the respondents were entitled to their costs of the costs motion on an indemnity basis from the time of expiry of the Calderbank offer.

Held: Costs application, made on behalf of the second applicant, dismissed as incompetent; the costs application, made by the first applicant, dismissed; and the first applicant to pay the respondents' costs of the costs application.

(1) The first applicant was not a lawyer or director of the second applicant and was not authorised by the Board of the second applicant to represent it as the second applicant's agent pursuant to the Court Rules: at [39]-[49]. Without a subsequent resolution of the Board of the second applicant providing that some other person, who was a director of the second applicant, was to replace Mr Jenkin Thomas, or was authorised, in addition to Mr Jenkin Thomas, to speak for the second applicant for the purposes of these proceedings; only Mr Jenkin Thomas had authority to speak or act on behalf of the second applicant: at [48]. Consequently, the first applicant had no standing to initiate a costs application on behalf of the second applicant: at [49]; and the element of the costs application on behalf of the second applicant was dismissed as incompetent: at [49];

(2) There was no proper foundation pursuant to r 3.7(2) of the Court Rules for a costs application to be made concerning either the first or second phase of the proceedings in the first applicant's favour: at [92] and [103]; the costs application had no merit and was dismissed: at [121];

(3) The usual presumption (in costs applications made in Class 2 proceedings) that costs will follow the event on an ordinary costs basis applied: at [101]. The "event" was rejection of the costs application: at [101]. As costs proceedings were not validly commenced on behalf of the second applicant, the costs order arising from the costs proceedings was only applicable to the first applicant: at [102]; and

(4) The Calderbank offer was a genuine offer of compromise: at [114] and [121]; but the offer was not reasonable, as the length of time the offer was open for acceptance was too short in the circumstances: at [117], [121]. The respondents' indemnity costs application was rejected: at [117]; and the first applicant was to pay the respondents' costs of his costs application, as agreed or assessed: at {121].

- Easements:

RVA Australia Pty Ltd v Rosemary Elizabeth Marzouk **[2017] NSWLEC 160** (Robson J)

(related decisions: *RVA Australia Pty Ltd v Sutherland Shire Council* [2017] NSWLEC 1161 (O'Neill C))

Facts: RVA Australia Pty Ltd (**the applicant**) commenced Class 3 proceedings seeking an order for the grant of an easement. The proceedings arose from Class 1 proceedings heard by O'Neill C, being appeals from two related decisions of Sutherland Shire Council (**the Council**) to refuse the proposed development of a recreation camp/eco-tourist accommodation at Bundeena (*RVA Australia Pty Ltd v Sutherland Shire Council* [2017] NSWLEC 1161) (**Class 1 decision**)). The Class 1 Decision approved the development, subject to certain procedural and merit issues being addressed, including requiring the applicant to obtain a right of access to create an asset protection zone (**APZ**) that would serve as a buffer zone between bushfire hazards and the proposal.

The registered proprietor of the land upon which the easement is sought (**the burdened land**) is the late Edith Lucy Wolstenholme (**Edith**), with the then executors of the estate initially being the respondents. However, after the Class 3 proceedings were commenced, the applicant sought, from the Supreme Court, and was granted, probate of the will of Marjorie Lucy Maybank Wolstenholme (**Marjorie**). Marjorie was the beneficiary of Edith's estate. The respondent subsequently became the sole executor of the estate. The respondent filed a submitting appearance in the proceedings.

Issues:

(1) Whether it is reasonably necessary for the purposes of s 88K of the *Conveyancing Act 1919 (NSW)* for the Court to impose an easement over the respondent's land;

(2) Whether the use of the land having the benefit of the easement will not be inconsistent with the public interest;

(3) Whether the respondent can be adequately compensated for any loss or other disadvantage that would arise from imposition of the easement; and

(4) Whether the applicant has made reasonable attempts to obtain the easement.

Held: Application upheld; easement ordered; compensation of $5,600 to be paid; and applicant to pay respondent's costs.

(1) Section 40(1)(a) of the *Land and Environment Court Act 1979 (NSW)* is satisfied as the Class 1 decision determined that the proposal can be granted consent if certain outstanding issues, including access to the burdened land for the purposes of maintaining an APZ, can be satisfactorily addressed: at [31];

(2) The proposed development is one that is appropriate to the land on which it is situated. Further, there is no realistic prospect that the few alternative uses permitted in the zone would be commercially viable on the land, and the proposal involves the use of the land for the specific purpose for which it is zoned. Accordingly, the easement is reasonably necessary for the effective use and development of the applicant's land: at [38]-[42];

(3) There is nothing in the proposed easement that would be inconsistent with the public interest: at [43];

(4) The evidence before the Court included a valuation report, which concluded that given the land the subject of the easement has an area of approximately 3,420 square metres, is presently used as a right-of-way and has no other practical use of any substance, the easement is not likely to materially impact on the land. Accordingly, the respondent can be adequately compensated for any loss or disadvantage arising from the imposition of the easement: at [46]; and

(5) There is evidence before the Court of the applicant's reasonable attempts to obtain the easement: at [49]-[51].

- Merit Decisions (Judges)

Nessdee Pty Limited v Orange City Council **[2017] NSWLEC 158** (Preston CJ)

(related decision: *Nessdee Pty Limited v Orange City Council (No 2)* [2017] NSWLEC 182 (Preston CJ))

Facts: In Fredericks Valley, south of the City of Orange, Nessdee Pty Ltd (**the applicant**) operates a private "helipad" with development consent for seven flight movements per week. Orange City Council (**the Council**) refused to grant the applicant development consent to operate a public "heliport" with up to 90 flight movements per week.

The land on which the heliport is proposed is zoned E3 - Environmental Management (**E3**) in Pt 2 of the Orange Local Environmental Plan 2011 (NSW) (**the OLEP 2011**). Under the Land Use Table for E3, air transport facilities, including heliports, are development permitted with consent.

The Council opposed the grant of development consent on the basis that the heliport will have an unacceptable impact on the locality by reason of the acoustic and visual impacts that cannot be suitably ameliorated by conditions of consent. Further, the Council contended that the proposed heliport is not justified, having regard to the availability of similar services at Orange Airport.

The applicant appealed the Council's decision pursuant to s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**).

In accordance with s 97A of the EP&A Act, two objectors applied to be, and were, joined as the second and third respondents. The second and third respondents objected to the proposed heliport due to their concerns about its acoustic and visual impacts, its incompatibility with the rural character of the area, the regulation of flights after take-off, the enforcement of conditions of consent, the safety of its operations and its impact on the heritage significance of "Wellwood", a nearby heritage house.

Issues: Whether the impacts of the proposed heliport can be appropriately managed, with regard to (a) acoustic; (b) visual impacts; and (c) other objections.

Held: Development consent to be granted once parties finalise the documentation (such as the plans of management) and conditions of consent.

(1) The proposed heliport, as amended during the hearing and with mitigation measures that will be taken and required by conditions of consent, will not have unreasonable or unacceptable acoustic

impacts on the aesthetic values of Fredericks Valley or the amenity of residents in the area: at [23] and [82];

(a) the acoustic impacts of the heliport will be minimised by conditions of consent that specify the types of helicopters that can used at the heliport (at [25]); the number of flights per day and per week (at [30]); the hours of operation of the heliport (at [37]); the minimum distance that helicopters using the heliport must keep clear from identified residential receivers (at [45]); the flight paths that must be followed by helicopters using the heliport (at [48]); the numeric noise criteria with which heliport operations must comply (at [58]); the types of activities that can be undertaken at the heliport (at [64]) and that require the preparation and implementation of a plan of management regulating the operation of the heliport and helicopters using the heliport (at [65]); and acoustic compliance testing after helicopter operations commence: at [68];

(b) the availability of Orange Airport to accommodate the proposed activities will not cause the acoustic impacts of the proposed heliport to be unreasonable (at [77]-[81]); if development on land is permissible and acceptable (having regard to all the relevant matters) it should be approved and it does not become unacceptable because it could also be carried out acceptably on other land (at [80]); the proposed heliport is permissible with consent under the OLEP 2011 (at [77]); the OLEP 2011 does not include any provisions confining the location of such development or restricting the carrying out of such development until Orange Airport reaches capacity: at [80]; and

(c) the proposed operations at the heliport will not cause sufficient vibration to the windows at the "Wellwood", the nearby heritage house, to necessitate undertaking any noise control measures interfering with the fabric of the house and the heritage values of the house: at [86];

(2) The proposed heliport, with the particular limitations proposed including on the number of helicopter movements, flight paths, landing sites and hours of operation, will not result in unacceptable visual impacts to the reasonable person in the locality: at [90];

(3) For the same reasons that the proposed heliport will not result in unacceptable noise impacts or visual impacts, the combination of the noise impacts and visual impacts will not be unacceptable: at [91];

(4) The Environmental Impact Statement (**the EIS**) did, as a whole, include an adequate analysis of the need for, and justification of, the proposed heliport at the existing site, feasible alternatives and the consequences of not carrying out the development, in accordance with cl 3(8) of Sch 2 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**) (at [199]); cl 7(1)(c) of Sch 2 of the EP&A Regulation requires the EIS to include an analysis of any feasible alternatives to the carrying out of the development "having regard to its objectives"; carrying out the proposed heliport on a site other than the proposed site, namely, Orange Airport, would not achieve its objectives of co-location and diversification of business operations on the existing site: at [120];

(5) The public interest does not favour refusing the application for the proposed development (at [125]); the Council is in error in asserting that because the proposal is designated development, the public interest is served by refusing the development (at [123]); the capacity of Orange Airport to accommodate the helicopter operations is not a reason to refuse the application (at [124]); the proposed heliport would have acceptable environmental impacts (including noise and visual impacts): at [124]; and

(6) The proposed heliport is an appropriate use of the land and the impacts of the development will be acceptable and can be managed satisfactorily by appropriate conditions of consent (at [126]); these include the noise mitigation measures outlined in 1(a) above, restrictions on pilot training areas and student numbers (at [128]); a condition requiring the finalisation and implementation of the Stormwater Management Report (at [132]); and other conditions requiring the operator of the heliport to comply with the general terms of approval issued by the Environment Protection Authority: at [134].

Note: At the subsequent hearing, *Nessdee Pty Limited v Orange City Council (No 2)* [2017] NSWLEC 182, Preston CJ made orders granting the applicant leave to amend its development application; ordering the applicant to pay the first respondent's costs incurred as a result of amending the application; and upholding the appeal and granting development consent for the proposed heliport on conditions.

Omid Mohebati-Arani v Ku-ring-gai Council **[2017] NSWLEC 143** (Robson J)

Facts: Mr Omid Mohebati-Arani (**the applicant**) sought development consent to demolish an existing dwelling house and construct a single-storey childcare centre with basement level car-parking at 24 Bayswater Road, Lindfield. The application was refused by Ku-ring-gai Council (**the Council**) on 27 July 2016, and the applicant appealed that refusal. On 14 June 2017, Loyal Henry Community Association Inc (**the second respondent**), being a group of concerned neighbours, were joined to the proceedings by order of Moore J (*Omid Mohebati-Arani v Ku-ring-gai Council* [2017] NSWLEC 85).

Childcare centres are permissible on the site pursuant to the Ku-ring-gai Local Environmental Plan 2015. While the Council filed an initial Statement of Facts and Contentions on 23 November 2016 articulating a number of concerns, as a result of amended plans and supporting material filed by the applicant on 10 March 2017, the Council filed an Amended Statement of Facts and Contentions on 12 April 2017, which significantly reduced the issues in contention. The second respondent pressed matters no longer advanced by the Council.

Issues:

(1) Whether the proposed development would result in congestion impacts on collector roads and adjacent intersections, giving rise to consequent safety and amenity concerns;

(2) Whether the proposed development would result in unacceptable geotechnical impacts arising from the proposed excavation of the basement car-park;

(3) Whether there would be unacceptable noise impacts arising from the outdoor play areas, indoor play areas, ancillary spaces and excavation of the basement car-park; and

(4) Whether the proposed development would have unacceptable town-planning impacts on the streetscape, including the side setback and landscaping.

Held: Appeal upheld. Parties directed to finalise the conditions of consent to reflect the Court's findings.

(1) The traffic impacts of the proposal will not warrant refusal of the proposal. There will be a relatively low level of generated trips, and the additional traffic would not have an unacceptable impact on the local road network: at [79];

(2) While there will be noise impacts generated from the construction and operation of the childcare centre, such impacts can be effectively managed, and the acoustic experts agreed on the manner in which this could be achieved: at [81];

(3) The proposal would not involve excessive excavation, nor would the excavation have unacceptable impacts on nearby neighbouring properties. Further, the noise generated from the proposed excavation would be addressed by incorporating the appropriate guidelines into the design and construction methodology: at [83]-[84];

(4) There is no significant concern in relation to the location of the proposal, and the applicant was not required to marshal evidence in relation to the proposed childcare centre meeting the "needs of residents": at [86]-[88];

(5) The proposal was properly integrated, both in relation to the scale and character of the surrounding area. The street and general area did not have one particular streetscape, nor were the proposal's setbacks significantly different from other developments in Bayswater Road such as to warrant refusal on the basis of design or streetscape. Further, the landscaping controls were appropriately achieved in the plans: at [89]-[96]; and

(6) There was no compelling evidence to suggest that the proposal, even with the restriction of 14 children playing outside, triggered any non-compliance with the controls relating to outdoor play spaces for a childcare centre: at [98].

TK Commercial Property Holdings Pty Ltd v Canterbury-Bankstown Council **[2017] NSWLEC 144** (Robson J)

Facts: TK Commercial Property Holdings Pty Ltd (**the applicant**) appealed the decision of Canterbury-Bankstown Council (**the Council**) to refuse development consent for a "multi-dwelling housing" proposal at 18, 20 and 22 Northcote Street, Canterbury. The proposal involved the consolidation of the three allotments, demolition of two existing single-storey brick dwellings and associated structures, the construction of nine townhouses and the retention of an existing residential flat

building (**RFB**). Further, the proposal provided for integrated basement car-parking, landscaping and a garbage disposal area, as well as communal open space and a separate private open space for each of the townhouses.

Relevantly, the RFB, located on allotment 18, was constructed pursuant to an approval given on 11 July 1963 (**the 1963 Consent**). However, RFBs, such as the RFB, were prohibited in the R3 - Medium Density Residential zone under the Canterbury Local Environment Plan 2012 (**the CLEP 2012**). Whether or not the RFB enjoyed existing use rights for the purposes of Pt 4, Div 10 of the *Environmental Protection Assessment Act 1979 (NSW)* (**the EP&A Act**) required determination. Further, cl 4.4 of the CLEP 2012 provided a development standard requiring the maximum floor space ratio (**FSR**) to be 0:5:1. The Council contended that this standard had been breached, and that that the written request for an exception to the standard prepared by the applicant, under cl 4.6 of the CLEP 2012, was not well-founded. The Canterbury Development Control Plan 2012 (**the CDCP**) also contained relevant controls relating to landscaping, deep soil planting and setback.

Issues:

(1) Whether the RFB enjoys existing use rights;

(2) How the FSR development control is to be applied to the proposal, including in circumstances where the RFB enjoys either existing use rights as defined under s 106 of the EP&A Act, or as a saved consent pursuant to s 109B of the EP&A Act;

(3) Whether in circumstances where the FSR control is not met, a well-founded request for variation pursuant to cl 4.6 of the CLEP has been provided, such that an exception should be granted to the FSR control; and

(4) Whether the cl 4.6 request is required and well-founded, and if so, whether the proposal should on its merits be granted consent.

Held: Appeal is dismissed.

(1) The definition of existing use for the purpose of s 106 of the EP&A Act requires identifying the time at which RFBs were prohibited in the locality. The applicant has not been able to identify this period with certainty, and the definition in s 106 of the EP&A Act has not been satisfied: at [74]-[77];

(2) While there is some suggestion that RFBs were prohibited in 1970, there is no evidence of any use of the RFB in or around 1970: at [78]-[79];

(3) Though the RFB does not enjoy existing use, as defined in s 106 of the EP&A Act, the RFB does have the benefit of a saved consent pursuant to s 109B of the EP&A Act. However, a saved consent under s 109B does not enjoy the benefit of the non-derogation provisions in s 108 of the EP&A Act. Accordingly, allotment 18 is subject to current development standards, including, therefore, the FSR control: at [82];

(4) For the purpose of applying the FSR control, the definition of the site is to include allotments 18, 20 and 22, and the definition of the ground floor area is to include all buildings within the site, including the RFB and the multi-dwelling housing. Accordingly, the development exceeds the FSR control by 13.7%: at [96]-[97];

(5) In the circumstances, the applicant is required to make a request under cl 4.6 of the CLEP 2012 for the consent authority to grant an exception to the development standard: at [100];

(6) In order to grant consent to the proposal, the Court must be satisfied that the cl 4.6 request demonstrates that compliance with the development standard is unreasonable or unnecessary and that there are sufficient environmental grounds to justify contravening the FSR standard. Further, the Court must be satisfied that the development will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development within the R3 Zone: at [107];

(7) In the circumstances, the proposed development is not consistent with the objectives in cl 4.4(1)(a), (b) and (c) of the CLEP 2012, being to provide effective control over bulk, to protect the environmental amenity and future character of the area and to minimise the adverse impacts on adjoining properties: at [110];

(8) While the exceedance of the FSR standard is partly based upon the retention of the RFB, this does not provide a justification for the variation or exceedance: at [112];

(9) There are no site constraints that would preclude a compliant development, and there are likely effects upon the amenity of the neighbours to the rear of the proposal, as well as solar access concerns and internal amenity concerns generated by the exceedance of the FSR control: at [115];

(10) The proposal is not in the public interest as it is not consistent with the objectives of the standard: at [117]; and

(11) Given the cl 4.6 request is not well-founded, the applicant has not satisfied the "jurisdictional gateway", and it is therefore not necessary to consider the merits of the proposal: at [118].

- Commissioner Decisions:

Bazzi v Sutherland Shire Council **[2017] NSWLEC 1662** (Adam AC)

Facts: Mr Bazzi (**the applicant**) appealed against the refusal by Sutherland Shire Council (**the Council**) of an application for subdivision of one lot into three lots at 24-26 Wonga Road, Yowie Bay, and the construction of an access driveway and associated works to service the proposed lots.

The site is irregular in shape, with a total area of approximately 3,760 square metres. The site is zoned E3 - Environmental Management, and subdivision is permitted with consent. The land falls about 46 metres from Wonga Road to Alcheringa Creek. The lower part of the site supports continuous native vegetation known as the Coastal Enriched Sandstone Dry Forest. There are numerous rock outcrops and rock retaining walls on the site. The existing dwelling is close to Wonga Road and would be retained on Lot 1. Lots 2 and 3 would be situated below Lot 1. The lower part of Lot 3 is below the Foreshore Building Line (**FBL**). Access to Lots 2 and 3 would be by an elevated carriageway constructed on the eastern side of the site.

Issues:

(1) What weight should be given to Sutherland Shire Development Control Plan 2015 (**the SSDCP 2015**) and the Draft Coastal Management State Environmental Planning Policy (**the Coastal SEPP**);

(2) Whether the provisions of cl 6.7 (Environmentally Sensitive Land - Riparian Land and Watercourses) and cl 6.8 (Environmentally Sensitive Land - Environmental and Scenic Quality of Natural Landforms) of the Sutherland Shire Local Environmental Plan 2015 **(the SSLEP 2015)** were applicable of the proposal;

(3) Whether the cl 4.6 variation concerning the size of proposed Lot 2 should be upheld;

(4) Whether the proposed building footprint for Lot 1 was appropriate;

(5) Whether the impacts of the proposed carriageway were acceptable;

(6) Whether other impacts on the environment were acceptable; and

(7) Whether the General Terms of Approval (**GTAs**) issued by the Rural Fire Service (**RFS**) and size of the necessary Asset Protection Zones (**APZ**) were appropriate.

Held: Appeal dismissed; development application refused.

(1) SSDCP 2015 came into force on 2 August 2017 (before the hearing commenced). The draft of SSDCP 2015 had been on public display on two occasions and should be given significant weight: at [17]. The SEPP had been on public display from November 2016 until 20 January 2017 but had not been finalised. It was neither imminent nor certain, and should be given little weight: at [22];

(2) Clause 6.7(2) of SSLEP 2015 restricts application of cl 6.7 to land mapped as Environmentally Sensitive Land on the Riparian Land and Watercourses map in SSDCP 2015. The landscape feature along the eastern boundary is not shown on the relevant map and therefore cl 6.7 does not apply to it: at [65]. To engage cl 6.8 of SSLEP 2015, the site must be identified as Environmentally Sensitive Land on the Natural Landforms map. The site was not included on the map: at [75], and so cl 6.8 does not apply to the site: at [77];

(3) Under cl 4.1(A) of SSLEP 2015, the minimum permitted lot size for internal lots in the E3 Environmental Management zone is 1000 square metres. Proposed Lot 2 would be 900 square metres. The site area would have accommodated three lots, meeting the required standard. The objective in proposing to reduce the size of Lot 2 was to move the boundary between Lots 2 and 3 uphill, moving the indicative building footprint of any subsequent building on Lot 3 further from the FBL. The indicative building footprint for Lot 3 was situated over an area of rock outcrop. There were insufficient data to assess the impacts on the environment of the rock outcrop. In these circumstances the variation request was rejected: at [222]-[223];

(4) The application was for a subdivision. Other than the access carriageway and associated works no buildings were proposed. Nevertheless, the applicant recognised that the environmental sensitivity of the site was such that application of a planning principle in *Parrott v Kiama* [2004] NSWLEC 77 was appropriate and proposed a building footprint for the proposed Lot 3: at [17]-[18]. The building footprint would be subject to the creation of a suitable instrument pursuant to s 88B of the *Conveyancing Act 1919 (NSW)*. Lack of evidence prevented assessment of the likely impacts of a building constructed within the proposed footprint, so the appropriateness of any approval for the footprint was uncertain: [222]-[223] and [250];

(5) The proposed elevated carriageway potentially had a range of impacts on one neighbouring property. The planning principle in *Davies v Penrith City Council* [2013] NSWLEC 1141 provided a framework for assessing the impact: at [121]. Although data were limited, the possible impacts would not cross the threshold of requiring refusal: at [143]. However, if approval were to be given, conditions regarding any visual screening along the boundary would have been required: at [144]-[145];

(6) There were no currently listed threatened species or ecological communities known to be present on the site. The site was mapped as Greenweb core, and most of the natural vegetation on the site was agreed to be in good condition. The site is zoned E3 - Environmental Management, and the objectives for the zone stress environmental protection, while allowing some form of development. The objective of cl 6.5 is to maintain terrestrial biodiversity. Adopting a precautionary approach (at [250]), the three-lot subdivision proposal would have had undesirable impacts on the integrity of the Greenweb habitat and did not meet the objectives of the E3 zone and thus could not be approved: at [251]; and

(7) Proposed Lot 3 is mapped as bushfire-prone land. The Council referred the development application to the RFS, seeking GTAs. The RFS indicated what their requirements for APZs would be, but there was no document entitled General Terms of Approval (**GTA**). The RFS had advised that, in assessing risk, the worst case scenario should be adopted. This approach had been followed by Council in determining the APZ to be imposed for a building situated in the indicative footprint of Lot 3. The APZ required by the Council extended below the FBL. Even if formal GTAs had not been issued, the Court may, when standing in the shoes of council, make its own decision regarding matters that would normally require issuing of GTAs by another approval authority: at [148]. In reaching a decision, regard was had to the opinions of the RFS, as expressed in correspondence, and to the opinions of the parties' experts: at [171]. The purpose in requiring APZs is the protection of life and property; therefore, the Council's conservative position of requiring a 25-metre APZ for the building footprint on Lot 3 was preferred over the smaller APZ advocated by the applicant: at [173].

***D L Newport Pty Ltd v Northern Beaches Council* [2017] NSWLEC 1661** (Dixon SC)

Facts: This matter concerned a modification application filed under the then s 96(2) (now at s 4.55) of the *Environmental Planning and Assessment Act 1979 (NSW)* **(the EP&A Act)** to move the constructed driveway and vehicular access from Barrenjoey Road to The Boulevard at Newport, and make a number of other modifications intended to either make the development consent consistent with the "as built" structure, or the construction certificate plans, or to attempt to address Council's concerns about the "as built" structure.

Issues:

(1) Whether the owner's consent to use the channel land for a new driveway adequately meets the requirements of s 115(1)(h) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulations**) as a jurisdictional prerequisite to a valid application;

(2) Whether the development, as modified, was substantially the same development as that originally approved; and

(3) Whether the balance of the modification application might be approved.

Held: Appeal dismissed; modification to development consent refused.

(1) The letter from the body corporate, and the correspondence (at [14]) from Ms Emma Pate dated 17 April 2017, as the owner of that part of the site, and a letter dated 30 June 2016 from the Department of Lands (at [27]), satisfy all relevant owners' (being ASIC and the Crown) consents for the lodgement of this application, and there ceases to be jurisdictional impediment to determination of this matter for want of owner's consent: at [37];

(2) Based on the expert evidence of Ms Collier (at [49]) about the increased flood levels and the unacceptable risk to life generated by the modification, the essence of the development will be radically transformed and therefore not substantially the same development required by s96(2)(a) of the EP&A Act: at [77]; and

(3) Due to determination that the development was not substantially the same, jurisdictional requirements precluded assessment of the merits of the balance of the application as filed. The flexibility afforded by s 80(4)(b) (now at s 4.16) of the EPA Act to allow for the approval of part of a development application does not extend to the approving of a part of this modification application: at [80].

***Kallinosis v Woollahra Municipal Council* [2017] NSWLEC 1673** (Gray C)

(related decision: *Kallinosis & Anor v Woollahra Council* [2017] NSWLEC 1290 (Morris C))

Facts: Mr and Mrs Kallinosis (**the appellants**) operated a boarding house which, below it, had a lower ground floor residential unit. On 8 May 2017, Woollahra Council (**the Council**) granted development consent for the change of use of the premises from a dwelling and a boarding house to two attached boarding houses. If the consent was to be carried out, it had the effect of changing the categorisation of the building, under the Building Code of Australia (**the BCA**), from a Class 2 dwelling and Class 3 boarding house to two attached Class 1b boarding houses. The grant of consent was subject to conditions, including a condition requiring the installation of a residential fire sprinkler system in each of the boarding houses. The appellants appealed against that condition. It was common ground that the BCA did not require the installation of a residential sprinkler system in Class 1b boarding houses. The relevant experts agreed that the proposal can achieve total compliance with the fire safety requirements of the BCA through the deemed-to-satisfy solutions. Prior to the grant of development consent, in *Kallinosis & Anor v Woollahra Council* [2017] NSWLEC 1290, Morris C had confirmed an order issued under s 121B of the *Environmental Planning and Assessment Act 1979* requiring the installation of a residential sprinkler system in the Class 3 boarding house.

Issues:

(1) Whether development consent should be granted for the change in use of the premises to two attached boarding houses;

(2) Whether cl 94 of the Environmental Planning and Assessment Regulation 2000 (**the EP&A Regulation**) allows a consent authority to conduct a holistic risk assessment of the premises and determine what must be done to ensure that the building is adequate to protect persons using the building and facilitate their egress in the event of a fire;

(3) Whether the deemed-to-satisfy solutions for the fire safety requirements are adequate in law;

(4) Whether the deemed-to-satisfy solutions for the fire safety requirements are adequate in fact;

(5) Whether there is any other policy that requires the installation of a fire sprinkler system; and

(6) The extent to which the findings of the commissioner concerning the order appeal are relevant to the grant of development consent.

Held: Appeal upheld and the contested condition deleted.

(1) The proposal was permissible: at [16]; complies with the standards and is consistent with the objectives of the zone: at [21]; and therefore is to be granted development consent: at [68];

(2) The extent of the assessment of inadequacy of the building to restrict the spread of fire, referred to in cl 94(1), is to determine if the clause applies. If it does, cl 94(2) requires a consent authority to consider whether the existing building should be brought into total or partial conformity with the BCA: at [39]. Clause 94 of the EP&A Regulation does not allow conditions to be imposed on the grant of consent that are more onerous than the requirements of the BCA: at [40];

(3) The BCA is a performance-based code that establishes performance requirements that can be met either by a performance solution (also called an alternative solution) or by using a deemed-to-satisfy solution: at [42]. Given that the deemed-to-satisfy solutions for Class 1b boarding houses can be met with the current proposal, those solutions are sufficient to bring the building into compliance with the applicable fire safety performance requirements of the BCA, and are therefore adequate in law: at [50]. Where they are adequate in law, to prescribe the installation of a residential fire sprinkler system performance solution where none may be necessary would be outside the scope of cl 94(2): at [50];

(4) The deemed-to-satisfy measures in the BCA for a Class 1b building are sufficient and adequate to restrict the spread of fire between buildings and to allow safe egress: at [55]. In circumstances where the evidence is that those deemed-to-satisfy measures can be carried out, it is not appropriate for a condition to be imposed requiring a specified performance solution which may be more onerous, such as the installation of a fire sprinkler system: at [55];

(5) There is no policy in place by the Council or at a state or national level that forms part of the s 79C consideration and could require the installation of a residential fire sprinkler system as a condition of development consent for the application. The dissatisfaction with the adequacy of the deemed-to-satisfy provisions of the BCA cannot be resolved by a commissioner in exercising the functions of the consent authority conducting an assessment under s 79C. In carrying out that assessment, the development application must be considered in accordance with the law and the commissioner is bound by that law. If the condition was imposed as sought, the commissioner would be creating an "uncomfortable" precedent which would more appropriately be the subject of a policy decision made by the governing authority rather than by a consent authority: at [57]; and

(6) The consideration by Morris C in the order appeal was distinguishable from the present proceedings, first, because the power under s121B is sufficiently broad to allow an order requiring the installation of a fire sprinkler system and, second, because Morris C was considering a different class of building. The existence of the order did not mean that the terms of the order needed to be incorporated in the conditions of development consent: at [65]

Sheesha (NSW) Pty Ltd v Canterbury-Bankstown Council **[2017] NSWLEC 1658** (Dickson C)

Facts: These proceedings relate to a proposed four-storey hotel at 433-437 Canterbury Road, Campsie. The proposal is split over two buildings, separated by a central courtyard area. Sheesha (NSW) Pty Ltd (**the applicant**) appealed, pursuant to s 97(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* **(the EP&A Act)**, against the deemed refusal by Canterbury-Bankstown Council (**the Council**).

Canterbury Local Environmental Plan 2012 (**the CLEP 2012**) applies to the site. Pursuant to CLEP 2012 the site is zoned B6 - Business Enterprise. Development for the purpose of "hotel or motel accommodation" is permissible with consent in the zone. The application also sought a "commercial premises" on the ground floor which is a permissible use in the zone.

Relevantly, one of the objectives of the B6 zone is to facilitate the revitalisation of Canterbury Road and create an attractive streetscape supported by buildings of a high standard of design.

The development is subject to the requirements of Canterbury Development Control Plan 2012, amendment 3, (**CDCP 2012**), which has a range of specific controls in relation to building design and streetscape presentation of buildings.

Issues: Whether the application responded appropriately to the planning controls in regard to built form and streetscape presentation.

Held: Appeal dismissed and development consent refused.

(1) The height of buildings development standard in CLEP 2012 and the maximum number of storeys control in CDCP 2012 for the site are consistent and compatible: at [56];

(2) A variation to the three-metre floor-to-ceiling height control in CDCP 2012 at cl 3.1.6(vii) is warranted as it is unlikely that the hotel levels of the proposed building could feasibly be retrofitted to another permissible use and the commercial space has a range of ceiling heights across its floor plate from 2.8 metres to 4.32 metres: at [58];

(3) The application does not warrant a variation to cl 3.1.8(i) in CDCP 2012 to achieve a fourth storey on the basis that:

(a) the "trade-offs" made within the design to achieve this yield fail to achieve the high standard of design sought by the zone objectives to facilitate the revitalisation of Canterbury Road: at [59]; and

(b) the development fails to achieve the objective 03 of cl 3.1.8 in CDCP 2012 to minimise building size and bulk by setting back upper storeys: at [59];

(4) The proposed entry to the commercial space does not comply with the requirements of cl 3.2.2 Street Address in CDCP 2012, namely, to locate entries so that they relate to the street. The pedestrian experience proposed by the application fails to meet the objective to create a positive interaction between the private and public domain: at [59];

(5) The provision of pedestrian access to the site fails to activate the streetscape. The entries to the hotel foyer and commercial space being sited below the footpath level do not promote pedestrian activity and fail to meet the objective to facilitate revitalisation and create an attractive streetscape: at [60];

(6) The applicant had not provided sufficient evidence to demonstrate that a passenger lift suitable for the proposed development is able to be sourced that does not require a lift overrun: at [62];

(7) The applicant had not provided sufficient information to allow the Court to impose an operational condition in relation to the lift: at [62]; and

(8) The imposition of a deferred commencement condition to allow for the required specification to be sourced for a lift with no overrun defers an essential matter within the assessment of the application (relying on *Weal v Bathurst City Council & Anor* [2000] NSWCA 88): at [62].

- Registrar Decisions:

Jomasa Pty Limited v City of Ryde Council **[2017] NSWLEC 1636** (Froh R)

Facts: Viva Energy Australia Pty Limited (**Viva**) sought to be joined as a respondent to the Class 1 proceedings instituted by Jomasa Pty Limited (**the applicant**) in respect of the refusal of the City of Ryde Council (**the Council**) to approve its proposed stormwater drainage works and, accordingly, issue an occupation certificate for its site at 146 Bowden Street, Meadowbank (**the site**).

Viva was previously known as The Shell Oil Company of Australia.

Viva is the owner and operator of the Gore Bay Oil Pipeline (**the pipeline**) which carries diesel, marine fuel oil, jet fuel and gasoline from Viva's Gore Bay Terminal to the Clyde Terminal in Rosehill.

The pipeline passes through the site within an easement, of which Viva is the beneficiary (**the easement**).

As owner of the pipeline, Viva has statutory obligations and responsibilities to ensure the safe operation and continued maintenance of the pipeline.

The development consent for the site requires the development to be carried out in accordance with the plans for stormwater drainage, subject to the developer bearing all costs associated with the "approval and relocation of any utility services, including the Shell [Viva] oil pipeline".

The stormwater drainage works were proposed to be carried out in the easement.

Viva contends that the stormwater drainage works were unacceptable due to insufficient information being provided as to the impact of those works on the integrity of its pipeline.

Issue: Viva, the applicant on the motion, sought to be joined to the proceedings.

Held: Viva was joined as second respondent to the proceedings.

(1) The relevant principles for joinder are set out in s 39A (since repealed) of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**) which states:

> "On an appeal under section 96(6), 96AA(3), 96A(5), 97 or 98 of the Environmental Planning and Assessment Act 1979, the Court may, at any time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:
>
> (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
>
> (b) that:
>
> (i) it is in the interests of justice, or
>
> (ii) it is in the public interest,
>
> the person be joined as a party to the appeal."

(2) At the hearing of this motion, Viva submitted that it be joined on all three bases: at [15];

(3) In regards to the first test, it was held that although issues relating to the pipeline and easement had been raised by the Council in its Statement of Facts and Contentions, those issues were only able to be sufficiently addressed by Viva: at [21]-[23]. It was the uncontested evidence of Viva that all engineering expertise concerning the pipeline resided with it and that no evidence had been provided by any party to the proceedings as to how works were to be carried out in the easement and the integrity of the pipeline maintained: at [26]; and

(4) The Court also held that, as Viva's property rights and statutory responsibilities for the maintenance and safety of the pipeline would likely be impacted by the stormwater drainage works proposed to be carried out in the easement, it was therefore appropriate for it to be joined as a party to the proceedings: at [25] and [27].

NSW Civil and Administrative Tribunal:

Auld v Independent Liquor and Gaming Authority **[2018] NSWCATAD 25** (Senior Member Ransome)

(Note: This decision is included in the newsletter with respect to matters dealt with by the Tribunal concerning planning law.)

Facts: Mr Auld was the holder of a liquor licence for premises in the town of Young. The class of licence that was held was for a "hotel". This class of licence permitted the sale of liquor for consumption on the premises or for being taken away from the premises. An application was made to the Independent Liquor and Gaming Authority (**the Authority**) to remove (that is, transfer) the licence held by Mr Harper to an Aldi supermarket located in the town of Young. The Aldi supermarket did not propose to sell liquor for consumption on the premises, nor did it proposed to sell refrigerated liquor which would be capable of immediate consumption off the premises. A number of issues were considered by the Authority at first instance and the Authority determined to refuse to permit the transfer of the licence to the Aldi supermarket. Mr Auld appealed to the Civil and Administrative Tribunal (**the Tribunal**) seeking to have the Tribunal, standing in the shoes of the original decision-making Authority, determine that the correct and preferable decision was that the transfer of the licence should be permitted.

At the hearing before the Tribunal, the Senior Member hearing the matter permitted fresh evidence to be admitted, including some material that was restricted because of its commercial sensitivity. Matters of social impact and, particularly, the interrelationship between the requirements of the relevant provisions of the *Liquor Act 2007 (NSW)* (**the Liquor Act**) and the operation of planning legislation required consideration. The Tribunal concluded that the correct and preferable decision was that the transfer of licence should be permitted. One of the matters which the Authority, and subsequently the Tribunal, was required to address was whether or not the Aldi supermarket had a development consent that would permit the transferred licence, if approved, to be operated at the supermarket premises. This gave rise to the question of whether the actual proposed operation of the "hotel" licence at the Aldi supermarket would be consistent with the development consent granted to the supermarket. The development consent granted to the supermarket was not for the purpose of a hotel, but did permit use of the supermarket premises for the purposes of the sale of packaged liquor on a takeaway basis.

Issue: Whether the transfer of a "hotel" licence granted pursuant to the Liquor Act was appropriate to be permitted in circumstances where the development consent held by the premises to which it was proposed that the licence would be transferred only granted approval for the supermarket premises to be used for the purpose of the retail sale of packaged liquor only and not for the purpose of a hotel.

Held: The correct and preferable decision was that the transfer of the licence should be permitted:

(1) Although the licence that was proposed to be transferred was for a hotel (as classified under the Liquor Act), what was required to be considered for the purposes of the development consent requirements at the premises to which it was proposed to transfer the licence was the purpose to be served by the use of the hotel licence at those premises: at [18]-[20];

(2) The use to which the hotel licence would be put at the premises to which it was proposed to be transferred would be to serve the purpose of retailing packaged liquor, a purpose permitted pursuant to a hotel licence: at [21];

(3) There was in place an appropriate development consent, which would permit the transfer of the hotel licence to be used to serve the proposed purpose: at [29]; and

(4) (The Tribunal, having considered, in addition, the other non-planning issues and determined that they did not act as an impediment to the proposed transfer), the transfer of the licence should be permitted: at [112].

Johnson v Dibbin; Gatsby v Gatsby **[2018] NSWCATAP 45** (President Wright J; Deputy President Boland ADCJ; and Senior Member Dr J Renwick SC)

(Note: An appeal has been lodged with the Court of Appeal.)

Facts: The first instance decisions before the NSW Civil and Administrative Tribunal (**NCAT**) involved three residential tenancy disputes (RT 15/41349, RT 15/44353 and RT 15/56639) brought under the *Residential Tenancies Act 2010 (NSW)* (**the Residential Tenancies Act**) between landlord and tenant. In each dispute, one party resided in Queensland and the other party resided in New South Wales. Appeals were filed against NCAT's two original decisions and attention was called to the issue of whether NCAT had authority to hear and determine the proceedings.

The appeals were heard together as substantially the same issue concerning proceedings between residents of different states arose. The Appeal Panel ordered that the following separate questions be determined before each appeal be otherwise heard:

> "1. Prior to the appeal in matter AP15/66120 [the Johnson appeal] otherwise being heard, the following questions are to be separately determined:
>
> Did the Tribunal at first instance have authority to hear and determine the applications under the Residential Tenancies Act 2010 (NSW) in proceedings RT 15/41349 and RT 15/44353:
>
> (a) because in doing so it was exercising administrative and not judicial power?
>
> (b) if the answer to question (a) is "no", because the Tribunal is a court of a State for the purposes of Chapter III of the Constitution and s 39 of the Judiciary Act 1903 (Cth)?"

and

> "1. Prior to the appeal in matter AP15/67274 [the Gatsby appeal] otherwise being heard, the following questions are to be separately determined:
>
> Did the Tribunal at first instance have authority to hear and determine the applications under the Residential Tenancies Act 2010 (NSW) in proceedings RT 15/56639:
>
> (a) because in doing so it was exercising administrative and not judicial power?
>
> (b) if the answer to question (a) is "no", because the Tribunal is a court of a State for the purposes of Chapter III of the Constitution and s 39 of the Judiciary Act 1903 (Cth)."

Issues:

(1) Whether NCAT exercised administrative power when determining matters under the Residential Tenancies Act; and

(2) If the answer to (1) is "no", whether NCAT is a "court of a State" for the purposes of Ch III of the *Constitution*.

Held: NCAT exercised judicial power when hearing and determining matters under the *Residential Tenancies Act 2010 (NSW)* (**the Residential Tenancies Act**) and had authority to do so because it is a "court of a State" for the purposes of Ch III of the *Constitution* and s 39 of the *Judiciary Act 1903 (Cth)*.

(1) When dealing with matters under the Residential Tenancies Act, NCAT did exercise judicial power: at [47]. In determining that NCAT had exercised judicial power: at [47]; the Appeal Panel concluded:

- the way in which NCAT's orders take effect and may be enforced support the conclusion that NCAT was acting judicially and exercising judicial power: at [84];
- Sections 29 to 33 of the *Civil and Administrative Tribunal Act 2013 (NSW)* (**the NCAT Act**), which deal with jurisdiction conferred on NCAT, are consistent with NCAT's processes being judicial in nature: at [70];
- neither s 38(4) nor cl 10 of Sch4 of the NCAT Act indicated that NCAT had exercised executive, and not judicial, power in proceedings under the Residential Tenancies Act, or more generally: at [93].
- even though NCAT was not bound by the rules of evidence, its processes and procedures, and the nature of its predominant functions, point to the conclusion that NCAT was exercising judicial power when it dealt with matters in its general jurisdiction: at [98];
- the requirement of s 45 of the NCAT Act that leave for legal representation is required in certain cases does not provide any substantial basis for concluding that NCAT has not exercised judicial power: at [105];

- the fact that a member who hears a Residential Tenancies Act matter may not be legally qualified does not mean that NCAT is not exercising judicial power when determining such matters: at [111];
- NCAT was created with the power to punish for contempt and to imprison and fine: at [201];
- the Federal Circuit Court, in *Dattilo v Commonwealth of Australia* [2017] FCAFC 17, held that it could perform all necessary functions under the Residential Tenancies Act since doing so involved the exercise of judicial power, not executive or administrative power: at [189];

(2) Relying on *Condon v Pompano Pty Ltd* [2013] HCA 7, the Appeal Panel determined that there were four (illustrative rather than exhaustive: at [306]) defining characteristics that could be used to determine whether NCAT was a "court of a State" for the purposes of Ch III of the *Constitution*:

- decisional independence and impartiality: at [231]-[258];
- the application of procedural fairness: at [286]-[293];
- adherence as a general rule to the open court principle: at [294]-[296]; and
- the provision of reasons for decisions: at [297]-[305].

These four matters were satisfied: at [308]; and, on this basis, the Appeal Panel determined NCAT should be held to be a "court of a State" within the meaning of Ch III of the *Constitution*: at [310]; and

(3) The separate questions were answered as follows: at [381]-[382]:

"(1) Did the Tribunal at first instance have authority to hear and determine the applications under the Residential Tenancies Act 2010 (NSW) in proceedings RT 15/41349 and RT 15/44353:

(a) because in doing so it was exercising administrative and not judicial power?

NO

(b) if the answer to question (a) is "no", because the Tribunal is a court of a State for the purposes of Chapter III of the Constitution and s 39 of the Judiciary Act 1903 (Cth)?

YES"

and

"(1) Did the Tribunal at first instance have authority to hear and determine the applications under the Residential Tenancies Act 2010 (NSW) in proceedings RT 15/56639:

(a) because in doing so it was exercising administrative and not judicial power?

NO

(b) if the answer to question (a) is "no", because the Tribunal is a court of a State for the purposes of Chapter III of the Constitution and s 39 of the Judiciary Act 1903 (Cth)?

YES"

***Port Stephens Council v Webb* [2017] NSWCATAD 341** (Senior Member Dr J Lucy)

Facts: This was an application under s 110 of the Government Information (Public Access) Act 2009 *(NSW)* (**the GIPA Act**) for an order restraining Ms Webb (**the respondent**) from making any further access application without first obtaining the Tribunal's approval.

Issues:

(1) Whether the past access applications lacked merit;

(2) Whether discretionary factors favoured the making of a restraint order?

(3) Whether the proportion of Council's resources taken up by the access applicant was a relevant discretionary factor?

(4) Whether the alleged conduct of the applicant in writing voluminous correspondence to Council and making defamatory statements was a relevant factor?

Held: The criteria for the making of the order were satisfied. However, as a matter of discretion, the order should not be made.

(1) The respondent had made four applications which lacked merit in the past two years. As a consequence, the Tribunal had power to make the orders sought by the Council: at [23];

(2) The member had hestitation in taking into account the proportion of the Port Stephens Council (**the Council**) resources which were taken up by the respondent's access applications. However, the member decided to assume that this factor was relevant and give this factor some weight: at [40]-[41];

(3) The alleged conduct of the respondent, upon which the Council relied, was not to be taken into account as a factor in favour of granting the restraint order. Similarly, the alleged conduct of the Council's officers upon which the respondent relied was not to be taken into account: at [43]-[49];

(4) The respondent was exercising a statutory right to apply for access to information. Her access applications, considered, as a whole, were not vexatious. Section 110 would allow the Tribunal to restrict that right in future, if the relevant criteria were met and the Tribunal determined that was appropriate. However, the member was not satisfied that she should restrain the resondent's right to make access applications in the circumstances of the case: at [57]; and

(5) Having regard to the number of access applications made by the respondent since early 2016, the amount of information the respondent had received in response and the nature and number of her applications which were lacking in merit, the member decided to exercise her discretion against the making of a restraint order: [58].

Court News

Arrivals/Departures

Justice Pepper continues on leave of absence from the Court until 9 May 2018 to chair the NT Scientific Inquiry into Hydraulic Fracturing of Unconventional Reservoirs and Associated Activities.

Acting Justice Molesworth AO QC was reappointed to act as a Judge of the Court until 31 December 2018.

Commissioner Susan Dixon was appointed Senior Commission from 29 January 2018 for a term expiring on 5 July 2023.

Mr Peter Walsh appointed a Commissioner of the Court from 29 January 2018 for a period of seven years.

Ms Sue Morris has been appointed an Acting Commissioner of the Court from 22 December 2017 for a period of two years.

Mr John Douglas has been appointed as an Acting Commissioner of the Court from 22 December 2017 for a period of two years.

Professor Edward Blakely has been appointed an Acting Commissioner of the Court from 1 February 2018 for a period of two years.

The following Acting Commissioners were all reappointed until 26 February 2019:

- Acting Commissioner Paul Adam
- Acting Commissioner Megan Davis
- Acting Commissioner David Galwey
- Acting Commissioner Jeffrey Kildea
- Acting Commissioner Norman Laing
- Acting Commissioner John Maston
- Acting Commissioner David Parker
- Acting Commissioner Bob Smith
- Acting Commissioner Ross Speers

Acting Commissioner Judy Fakes resigned as an Acting Commissioner of the Court from 9 December 2017.