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Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Amendment (Building and Subdivision Certification) Regulation 2019 - will commence on 1 December 2019, except Sch 2[2] which commenced on 1 September 2019. The object of this Regulation is to make amendments, including additional savings and transitional provisions, that are consequential on the enactment of Sch 6 to the *Environmental Planning and Assessment Amendment Act 2017* (which revised and consolidated provisions dealing with building and subdivision certification in a new Pt 6 of the *Environmental Planning and Assessment Act 1979*). This includes amendment of Environmental Planning and Assessment Regulation 2000 and amendment of Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Amendment (Local Strategic Planning Statements) Regulation 2019 - commenced 28 June 2019. The object of this Regulation is to provide councils in the Greater Sydney Region with additional time to prepare and make a local strategic planning statement.

Local Government Amendment Act 2019 (**Local Government Act**) - assented to 25 July 2019. The Act commenced on the day of assent, except Sch 1[4], [15]-[20] and Sch 2[2] which will be appointed by proclamation. Relevant changes include:

- Sch 1[13] enables regulations to be made to prescribe a scheme for the mutual recognition of council approvals for regulatory activities;
- Sch 1[4] enables regulations to be made for the purposes of conferring jurisdiction on the Land and Environment Court (**LEC**) to deal with appeals relating to council decisions about the recognition of approvals under a scheme prescribed under powers to be inserted by Sch 1[13];
- Sch 2[2] amends s 18 of the *Land and Environment Court Act 1979* (**Court Act**) to include that appeals will be in the Class 2 jurisdiction of the LEC.
- Section 178A appeals relating to mutual recognition of approvals:

  (1) The Regulation may make provision for, or with respect to, appeals to the LEC by applicants or approval-holders who are dissatisfied with a determination of a council under a scheme prescribed by the Regulation for the mutual recognition of approvals;

  (2) The regulations may also confer on the LEC a discretion to award compensation, that is payable by a council, in circumstances of a kind referred to in s 179;

- Sch 6 Regulations

  Insert after item 8:

  8AA A scheme for mutual recognition by councils of approvals under Part 1 of Chapter 7.

- **Biodiversity:**

Biodiversity Conservation Act 2016 - final determination regarding Monaro Tableland Cool Temperate Grassy Woodland in the South Eastern Highlands Bioregion commenced 28 June 2019.

Biodiversity Conservation Act 2016 - final determination regarding Werriwa Tablelands Cool Temperate Grassy Woodland in the South Eastern Highlands and South East Corner Bioregions commenced 28 June 2019.

Protection of the Environment Operations (General) Amendment (Fees and Native Forest Bio-material) Regulation 2019 - commenced 21 June 2019. The objects of the Regulation are to:

(a) prescribe fee units and fees under the Protection of the Environment Operations (General) Regulation 2009 for the 2019-2020 financial year and subsequent years:

  (i) an administrative fee unit used to calculate the administrative fee for environment protection licences,

  (ii) a pollutant fee unit used to calculate load-based fees,

  (iii) fees payable in respect of clean-up notices, prevention notices and noise control notices, and

(b) amend certain categories of bio-material that are excluded from the definition of native forest bio-material consequent on the repeal of the *Native Vegetation Act 2003* and the commencement of Pts 5A and 5B of the *Local Land Services Act 2013*.

Protection of the Environment Operations Legislation Amendment (Scheduled Activities) Regulation 2019 - commenced 5 July 2019. The objects of this Regulation are as follows:

(a) to provide that the scheduled activity of cement or lime handling does not apply to concrete batching,

(b) to provide that the scheduled activity of crushing, grinding or separating does not apply to activities occurring as part of the scheduled activity of railway infrastructure construction or road construction,

(c) to abolish the distinction between land-based and water-based activities in the scheduled activity of extractive activities and to provide that the scheduled activity applies only to extraction and processing of material where the primary purpose for the activity is the sale of extracted material,

(d) to clarify the meaning of dairy animal accommodation for the purposes of the scheduled activity of livestock intensive activities,

(e) to include a new scheduled activity of road tunnel emissions (but to limit that activity to emissions into the air from ventilation stacks) and to provide a licence fee for the activity,

(f) to exclude from the scheduled activity of petroleum products and fuel production the activity of blending additives with fuel at a service station,

(g) to omit the scheduled activity of railway systems activities and replace it with three separate scheduled activities: railway activities—railway infrastructure construction, railway activities—railway infrastructure operations and railway activities—rolling stock operations,

(h) to extend the scheduled activity of road construction by including ancillary activities,

(i) to clarify that the scheduled activity of contaminated soil treatment applies to contaminated sediment,

(j) to modify the manner of determining the licence fees for the scheduled activities of extractive activities, railway activities—railway infrastructure construction, railway activities—railway infrastructure operations, railway activities—rolling stock operations and road construction,

(k) to make consequential savings and transitional provisions.

Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2019 - commenced 1 September 2019. The object of this Regulation is to remake, with minor changes, the provisions of the Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2014, which will be repealed on 1 September 2019 by s 10(2) of the *Subordinate Legislation Act 1989* (**Subordinate Legislation Act**). This Regulation includes provisions about the following:

(a) the commissioning and decommissioning of underground storage systems (Pt 2),

(b) the installation of leak detection systems (Pt 3),

(c) the use of underground storage systems (Pt 4),

(d) reports (Pt 5),

(e) record-keeping (Pt 6),

(f) other minor, consequential or ancillary matters (Pts 1 and 7).

Protection of the Environment Operations (Waste) Amendment Regulation 2019 - commenced on 20 September 2019, with the exception of Sch 1.2 which commences on 1 December 2019. The objects of this Regulation are:

(a) to provide for the contributions payable by occupiers of scheduled waste disposal facilities in respect of residual waste generated from the shredding of scrap metal, and

(b) to provide that a penalty notice may be issued for the offence under the *Waste Avoidance and Resource Recovery Act 2001* of supplying a beverage in a container without a refund marking under the container deposit scheme and to specify the amount payable.

- **Water:**

Access Licence Dealing Principles Amendment (Nomination of Water Supply Works and Extraction Points) Order 2019 - commenced 19 July 2019. The objects are to amend the Access Licence Dealing Principles Order 2004:

(a) to enable new and additional works and extraction points to be nominated under a local water utility access licence and access licences of the subcategory town water supply,

(b) to enable nominated works and extraction points to be withdrawn from such licences, including in circumstances where such withdrawal means that no works or extraction points will then be nominated, and

(c) to clarify that access licence dealing rules may not prohibit the withdrawal of nominated works or extraction points from access licences.

Made under s 71Z of the *Water Management Act 2000* (**Water Management Act**).

Water Management (General) Amendment (Exemption) Regulation 2019 - commenced 2 August 2019. The object of this Regulation is to enable the Minister administering the Water Management Act to exempt public authorities who supply water to the public from the requirement under the Act to hold a water supply work approval to construct and use a water supply work. The Minister may only grant an exemption in time of drought, if satisfied the exemption is in the public interest. An exemption is for 12 months or another period (including an extended period) determined by the Minister. This Regulation is made under the Water Management Act 2000, including s 400 (the general regulation-making power).

- **Miscellaneous:**

Aboriginal Land Rights Amendment (Elections) Regulation (No 2) 2019 - commenced on 4 October 2019. This Regulation amends the Aboriginal Land Rights Regulation 2014 to make further provision with respect to the election of members to the New South Wales Aboriginal Land Council including:

(a) postal voting, and

(b) the appointment of polling places.

Administrative Arrangements (Administrative Changes- Miscellaneous) Order 2019 - commenced on 1 July 2019 except the following: cl 4 commenced on 28 June 2019, cll 5 and 7 are taken to have commenced on 1 May 2019 and cl 6(1) commenced on 30 June 2019. Nominates which ministers are responsible for listed legislation reflecting the changes in administrative arrangements of the New South Wales Government.

Administrative Arrangements (Administration of Acts- Amendment No 1) Order 2019 - commenced 28 June 2019. Allocates the administration of Acts to Ministers indicated in Schedule 1 of the Order. The Minister for Planning and Public Spaces administers the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) (except Pt 6, jointly with the Minister for Better Regulation and Innovation), *Growth Centres (Development Corporations) Act 1974* (except parts relating to the Regional Growth NSW Development Corporation which is administered by the Premier and the Deputy Premier, Minister for Regional New South Wales, Industry and Trade). The Minister for Energy and Environment administers the *Gas Industry Restructuring Act 1986*, *Northern Rivers County Council (Undertaking Acquisition) Act 1981*, *Pipelines Act 1967*, *Radiation Control Act 1990*, *Roads Act 1993*, insofar as it relates to Lord Howe Island and s 252 (insofar as it relates to the functions of the Minister for Energy and Environment under *Roads Act 1993*). The Minister for Local Government administers the *Roads Act 1993*, Div 2 of Pt 3 (insofar as it relates to the widening of an unclassified public road for which a council is the roads authority) and ss 175 (insofar as it relates to the power to enter land along or near a public road for which a council is the roads authority), 178 (2) and 252 (insofar as it relates to the functions of the Minister for Local Government under the *Roads Act 1993*).

Administrative Decisions Review Regulation 2019 - commenced 16 August 2019. The object of this Regulation is to repeal and remake, with minor amendments, the Administrative Decisions Review Regulation 2014, which would otherwise be repealed on 1 September 2019 by s 10(2) of the Subordinate Legislation Act. Relevantly, there are changes to the *Building Professionals Act 2005*, including that a decision to make a finding or to take action of a kind referred to in s 33 of that is excluded from the application of s 49 of the *Administrative Decisions Review Act 1997*. Also, the administratively reviewable decisions specified in the table to cl 5 of the Administrative Decisions Review Regulation 2019 are excluded from the application of s 53(11)(b) of the *Administrative Decisions Review Act 1997*.

Civil Procedure Amendment (Fees) Regulation 2019 - commenced 11 July 2019. The object of this Regulation is to increase certain fees payable in respect of civil proceedings and the functions exercised by the Sheriff. Part 1 of Sch 1 of the Regulation stipulates updated fees for the Land and Environment Court (**LEC**) civil matters.

Coal Mine Subsidence Compensation Amendment (Certificates) Regulation 2019 - commenced 27 September 2019. This Regulation provides that a certificate issued under the repealed *Mine Subsidence Compensation Act 1961*, that was conclusive evidence that certain requirements of that Act had been complied with, continues to be able to be used for that purpose.

Contaminated Land Management (Adjustable Amounts) Notice 2019 - operative date of 1 September 2019. Made under the Contaminated Land Management Regulation 2013. Adjusts the amount or fee prescribed to the following clauses: cl 4, cl 6 and cl 7(a).

Criminal Procedure Amendment (Fees) Regulation 2019 - commenced 11 July 2019. The object of this Regulation is to increase certain fees payable in relation to the following:

(a) the conduct of criminal proceedings,

(b) the provision of copies of transcripts of evidence, recorded statements and witnesses' statements,

(c) the retrieval of, and provision of access to, files or boxes of files from off-site storage facilities,

(d) the functions exercised by the Sheriff in relation to criminal proceedings.

Particularly relevant is the update to the filing of an application for Class 5, Class 6 and Class 7 proceedings in the LEC to $973.

Fisheries Management (General) Regulation 2019 - commenced 1 September 2019. The object of this Regulation is to remake, with amendments, the provisions of the Fisheries Management (General) Regulation 2010, which is repealed on 1 September 2019 by s 10(2) of the Subordinate Legislation Act. This Regulation makes provision with respect to the following:

(a) prohibited size fish, bag limits and protected fish and waters,

(b) the lawful use of fishing gear, including commercial and recreational nets and traps,

(c) rights of priority between commercial and recreational fishers in the use of fishing gear,

(d) recreational fishing fees,

(e) general matters relating to fisheries management, including offences and restrictions on certain fishing gear and species of fish,

(f) share management fisheries,

(g) licensing for commercial fishers and fishing boats,

(h) the sea urchin and turban shell restricted fishery, the southern fish trawl restricted fishery and the inland restricted fishery,

(i) fishing business transfer rules,

(j) fish receivers, fish records and fishing business cards,

(k) charter fishing management,

(l) the protection of aquatic habitats,

(m) threatened species conservation,

(n) the composition and functions of ministerial advisory councils,

(o) enforcement, including the offences under the Act and the regulations for which penalty notices may be issued and the amounts of the penalties payable,

(p) other minor and savings provisions.

Justice Legislation Amendment Act 2019 - assented to 26 September 2019. Commenced on the day of assent, except the following: Sch 1.4[1] and [2], 1.15 and 1.16 to commence on days to be appointed by proclamation, Sch 1.14 commences on 7 December 2019. This Bill makes various amendments to Acts and Regulations relating to courts, crimes and other Stronger Communities portfolio matters. Relevant to the LEC is the below amendment:

1.14 Land and Environment Court Act 1979 No 204 Section 18

Class 2—local government and miscellaneous appeals and applications

Insert after section 18(i)

18 Class 2—local government and miscellaneous appeals and applications

The Court has jurisdiction (referred to in this Act as "Class 2" of its jurisdiction) to hear and dispose of the following:

…

(j) despite any other provision of this Division—appeals under any Act to the Court against building product rectification orders made under the Building Products (Safety) Act 2017.

Land Acquisition (Just Terms Compensation) Act 1991 - notice under the Act. Pursuant to Sch 1A of the Act, the maximum amount of compensation in respect to disadvantage resulting from relocation: $79,416.00 for acquisitions of land on or after 1 July 2019.

National Parks and Wildlife Regulation 2019 - the object of this Regulation is to remake, with minor modifications, the National Parks and Wildlife Regulation 2009, which is to be repealed on 1 September 2019 by s 10(2) of the Subordinate Legislation Act. This Regulation makes provision for or with respect to the following:

(a) the regulation of the use of national parks and other areas (Pt 2),

(b) the preservation of public health in Kosciuszko National Park (Pt 3),

(c) the enforcement of obligations of the Snowy Hydro Company (Pt 4),

(d) the management of Aboriginal land, objects and places and exemptions for Aboriginal people from prohibitions under the National Parks and Wildlife Act 1974 (the Act) (Pt 5),

(e) advisory committees constituted under the Act (Pt 6),

(f) trustees of state conservation areas and regional parks (Pt 7),

(g) other matters of a minor, consequential or ancillary nature (Pts 1 and 8).

Natural Resources Access Regulator Amendment Regulation 2019 - commenced 20 September 2019. The objects of this Regulation are:

(a) to prescribe additional information that may be included in the register of information about enforcement actions taken by the Natural Resources Access Regulator,

(b) to amend the Natural Resources Access Regulator Act 2017 to specify as additional functions of the Natural Resources Access Regulator certain enforcement functions of the Minister for Water, Property and Housing under the Water Management Act 2000 (and to make consequential amendments to the Natural Resources Access Regulator Regulation 2018).

Subordinate Legislation (Postponement of Repeal) Order (No 2) 2019 - commenced 30 August 2019. Postpones repeal of certain statutory rules from 1 September 2019 to 1 September 2020, including Heritage Regulation 2012, Public Interest Disclosures Regulation 2011, Water NSW Regulation 2013.

Trees (Disputes Between Neighbours) Regulation 2019 - commenced 16 August 2019. The object of this Regulation is to repeal and remake, without substantive changes, the Trees (Disputes Between Neighbours) Regulation 2014, which would otherwise be repealed on 1 September 2019 by s 10(2) of the Subordinate Legislation Act. Prescribes bamboo, tiger grass and any plant that is a vine as trees, for the purposes of the *Trees (Disputes Between Neighbours) Act 2006*. This Regulation is made under that Act, including s 3(1) (the definition of tree) and s 20 (the general regulation-making power).

State Environmental Planning Policy Amendments:

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing Code) 2019 - commenced 1 July 2019. Main change is to amend cl 2.78 Development standards by inserting after cl 2.78(c): "(c1) not comprise or include masonry construction higher than 1m from ground level (existing), and".

State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment (Heritage Conservation Areas Exemption) 2019 - commenced 16 August 2019. Inserts after cl 4A(3), "(3A) This clause does not apply to land in the North Sydney local government area."

State Environmental Planning Policy (Vegetation in Non-Rural Areas) Amendment 2019 - commenced 23 August 2019. Amends cl 27(1) by omitting "25 August 2019" and inserting "25 August 2020" of State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017.

Bills:

Planning Legislation Amendment Bill 2019 - currently in the Legislative Council, introduced 6 August 2019. The object of this Bill is to make miscellaneous amendments to the EP&A Act and EPIs and to make minor amendments to the *Land and Environment Court Act 1979* (**Court Act**). Key points:

- amends the Court Act and EPIs to update the references to the EP&A Act to reflect the renumbering of those sections that came into effect in 2018 (eg omit "sections 75K …" from s 17(d) of the Court Act and insert instead "sections 4.54…");
- makes consequential amendments to update references in EPIs to reflect the repeal of the *Crown Lands Act 1989* (**Crown Lands Act**) and its replacement by the *Crown Land Management Act 2016* and the commencement of Standard Instrument (Local Environmental Plans) Amendment (Primary Production and Rural Development) Order 2019;

- corrects an inconsistency in the public exhibition period of EISs provided in EP&A Act: s 5.8 of the EP&A Act provides that a determining authority shall give notice that a copy of an EIS is available for inspection and that the inspection period shall be a minimum of 30 days - however Sch 1 provides that the minimum period is 28 days. Section 5.8 is to be amended to state "the period specified in clause 11 of Schedule 1" (28 days);
- amends provisions concerning the standardisation of LEPs to allow mandatory provisions to be altered in minor ways such as to correct incorrect numbering or punctuation;
- miscellaneous amendments to standardised provisions of environmental planning instruments updating references consequent to the Crown Lands Act repeal and EP&A Act renumbering;
- the renaming of "staged state significant infrastructure application" to be a "concept state significant infrastructure application", omitting s 5.20(1) from the EP&A Act and inserting instead:

  (1) For the purposes of this Division, a concept infrastructure application is an application for approval of State significant infrastructure that sets out concept proposals for the proposed infrastructure, and for which detailed proposals for the infrastructure or for separate parts of the infrastructure are to be the subject of a subsequent application or applications.

Judgments

High Court of Australia:

Northern Territory v Sangare **[2019] HCA 25** (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ)

Facts: The respondent unsuccessfully brought defamation proceedings against the appellant in the Supreme Court of the Northern Territory. Before the issue of costs was determined at first instance, the respondent appealed to the Court of Appeal. The respondent was unsuccessful on this appeal and the Court of Appeal was left to determine the issue of costs for the proceedings at first instance and on appeal.

The Court of Appeal accepted that the appellant had been wholly successful in both proceedings and would normally be entitled to its costs. However, the Court of Appeal exercised its discretion not to order costs, taking into account the impecuniosity of the respondent. The Court of Appeal determined that a costs order in favour of the appellant would be futile.

Issues: Whether, in the exercise of the judicial discretion as to costs at the conclusion of litigation, the impecuniosity of the unsuccessful party is a consideration that, without more, may justify a decision to deny the successful party costs.

Held: Appeal allowed; respondent to pay the appellant's costs of the proceedings in the Supreme Court of the Northern Territory, Court of Appeal of the Northern Territory and High Court of Australia:

(1) The power to award costs is a discretionary power, but it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation: at [24]; a guiding principle to the exercise of the discretion is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party: at [25];

(2) The impecuniosity of the respondent and perceived futility of the order was not relevant: at [34], [35]; the circumstance that the appellant was a public authority was also irrelevant: at [28]; the Court of Appeal erred in declining to make the order sought because it perceived that the award would be futile: at [34]; the decision could not be supported as an exception to the general principle that a wholly successful party should be entitled to an order for costs: at [36]; and

(3) (*Obiter*) The considerations as to the discretion to order costs discussed in the decision of the High Court in *Oshlack v Richmond River Council* (1998) 193 CLR 72, where the unsuccessful party was motivated by a desire to ensure obedience to environmental law and there was a public interest in the

outcome of litigation, are not relevant to this case: at [33]: it could also be said in favour of that order that it was not unfair to require the local authority to bear its own costs where it had an interest in resolving uncertainty attending the valid exercise of its powers, and wide standing provisions facilitated the bringing of such litigation: at [33].

New South Wales Court of Appeal:

Barrak v City of Parramatta Council **[2019] NSWCA 213** (Payne JA, White JA and McCallum JA)

(decision under review: *Barrak v City of Parramatta Council* [2019] NSWLEC 59 (Moore J))

Facts: On 20 February 2019, Mr Benjamin Barrak (**appellant**), a councillor of the City of Parramatta Council (**Council**), was expelled from a meeting of the Council by its Lord Mayor (**mayor**). That expulsion, was followed by expulsions on 25 February, 6, 11 and 25 March, and 8 April.

During the 20 February meeting, the appellant called the mayor a "clown" and alleged that the Council had misled the Supreme Court in proceedings. The mayor threatened to expel the appellant from the meeting, at which point the appellant absented himself. As he was doing so, the mayor directed that the appellant leave the chamber and return certain confidential papers and handwritten notes (**Confidential Papers**) taken at the meeting. A hurried motion was also moved requiring councillors present at the meeting to return the Confidential Papers. The appellant left with them still in hand.

The next meeting took place on 25 February 2019. By Council's resolution, the appellant was called on to apologise for his "acts of disorder", particularised as: (a)(i) not complying with a direction from the mayor to leave the Confidential Papers at the table in the room, (a)(ii) not complying with the resolution that the Confidential Papers be returned, (a)(iii) calling the mayor a "clown", and (b), alleging that the solicitor acting for the Council (**Mr Gardner**) had misled the Supreme Court in earlier, unrelated proceedings. The resolution also separately required the appellant to return the Confidential Papers. After he refused to abide by any part of the resolution, the appellant was expelled by resolution from the meeting and stripped of his position on the Council's committees.

The appellant sought relief in respect of the expulsions in the Land and Environment Court (**LEC**). He argued that the resolution on 20 February 2019 that he return the Confidential Papers was unlawful, that his conduct at that meeting did not constitute an "act of disorder" within the meaning of clause 256 of the Local Government (General) Regulation 2005 (NSW), and that his subsequent expulsions and removal from committees were also unlawful. The primary judge found that the mayor had no power to expel the appellant on 20 February 2019 because the Council had not resolved to give the mayor that power, and that the appellant had left the meeting before the resolution for the return of the Confidential Papers was passed. The primary judge found that the later expulsions were effective and he dismissed the appellant's Summons with costs.

Issues:

(1) Whether it was inappropriate for the LEC to entertain the appellant's complaint as other avenues of redress were available to him;

(2) Whether the characterisation of an act as an "act of disorder" was a fact to be determined by a court;

(3) Whether the appellant's description of the mayor as a "clown" and the accusations made against Mr Gardner constituted acts of disorder;

(4) Whether the appellant's removal from various committees of the Council was valid; and

(5) If the Council could lawfully demand the return of the Confidential Papers in the 25 February 2019 meeting, whether a failure to abide by such a resolution was an "act of disorder", and whether the Council was entitled to expel the appellant for such a failure.

Held: Appeal allowed in part; orders of the LEC made on 29 April 2019 set aside and, in lieu, thereof the following declarations and orders made:

- declare that the appellant was not bound by the Council's resolution at the triggering meeting that the appellant return documents,
- declare that, at the meetings of the subsequent expulsions, the Council was entitled to require that the appellant apologise unreservedly to the Chair and councillors for insulting and making personal reflections on the mayor at the triggering meeting, and was entitled to require the appellant to return confidential papers provided to him for the triggering meeting:

Per White JA, Payne and McCallum JJA agreeing (at [1] and [149(a)]):

(1) Although it was possible for a Code of Conduct complaint to have been made, any resolution of that complaint through the Procedures for the Administration of the Model Code of Conduct would not resolve the question of the validity of the appellant's expulsion from council meetings. The primary judge was correct to entertain the appellant's complaint and LEC's jurisdiction was properly invoked: at [77], [83];

Per White JA, Payne and McCallum JJA agreeing (at [1] and [149(c)]):

(2) The question under r 256 of whether a councillor has committed an "act of disorder" at a meeting is a matter of fact to be determined by the Court where necessary: at [94];

Per White JA, Payne JA agreeing (at [1]):

(3) The appellant's use of the word "clown" was an insult and hence an act of disorder. It is not necessary that defined acts of disorder in r 256(1)(a)-(d) led to disorder. It is irrelevant whether the insult was true or was provoked: at [99], [100]-[102], [104], [108]-[110];

Per McCallum JA contra:

(4) Whether an insult is an "act of disorder" is informed by the inquiry as to whether that act is inconsistent with maintaining order at the meeting or is calculated to disrupt it. The import of the term "clown" was that the mayor was reducing the debate to the atmosphere of a circus. In context, the use of the word would not have been taken by an objective observer to amount to an act calculated to bring disorder: [151], [159], [163]-[164];

Per White JA, Payne and McCallum JJA agreeing (at [1] and [150(a)]):

(5) As to the allegations against Mr Gardner, a better construction of the words used by the appellant was that they were an allegation that the Council, rather than Mr Gardner, had misled Supreme Court in earlier unrelated proceedings. In any event, no comment disparaging of Mr Gardner could be an act of disorder within the meaning of clause 256(1)(d) as he was not a councillor, nor was there any evidence that the other paragraphs in clause 256 were satisfied: at [113], [114];

Per White JA, Payne JA agreeing; McCallum JA not deciding (at [1] and [149]):

(6) Whether or not the appellant was entitled to be heard before his removal from committees, he was not denied procedural fairness. He had notice before the meeting of 25 February 2019 of the mayor's proposal that he be removed from committees and had the opportunity to address that issue: at [135]-[137]; and

Per White JA, Payne and McCallum JJA agreeing (at [1] and [150(b)]):

(7) As the primary judge found, the 20 February 2019 resolution was not made before the appellant left the meeting. There was no basis for requiring him to apologise for not complying with it: [116].

Cappello v Roads and Maritime Services **[2019] NSWCA 227** (Payne, Brereton JJA, Emmett AJA)

(decision under review: *Cappello v Roads and Maritime Services & Anor.* [2019] NSWSC 439 (Campbell J))

Facts: On 18 January 2019, Roads and Maritime Services (**RMS**) issued two proposed acquisition notices (**PANs**) to the Cappellos (**appellants**) for adjoining parcels of land they owned in Haberfield. RMS proposed to acquire the land to construct a tunnel as part of the WestConnex project between Haberfield and St Peters. A road was to be constructed in the tunnel and that road was to be a tollway.

The PANs stated that the land was to be acquired "for the purposes of the [Roads Act 1993 (NSW)] in connection with the construction, operation and maintenance of WestConnex M4-M5 Link tunnels". The appellants challenged the validity of the PANs on the basis that the acquisitions were outside the scope of the purposes of the *Roads Act 1993* (NSW) (**Roads Act**) and therefore unauthorised.

On 18 April 2019, the primary judge held that RMS was empowered to acquire private land for the purpose of the construction of a tollway and dismissed the proceedings. On 3 May 2019, RMS became the registered proprietor of the land. On 2 July 2019, the appellants appealed the decision and sought the return of the land.

Issues: Whether the acquisitions of the land were outside the scope and purposes of the Roads Act.

Held: (Payne, Brereton JJA and Emmett AJA agreeing) Leave to appeal granted; nunc pro tunc; appeal dismissed; appellants to pay costs.

(1) The "purposes" of the Roads Act referred to in s 177 are not limited only to the objects described in s 3 of the Act and are to be determined by reference to the provisions of the Act read as a whole: at [39], [42]; and

(2) Section 177 of the Roads Act does not distinguish between the RMS acquiring property voluntarily or compulsorily, it only provides the power to acquire. The power to acquire land under s 177 of the Roads Act, coupled with the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), gave the RMS the power to acquire land, such as the appellants, compulsorily: at [44].

G Capital Corporation Pty Ltd v Roads and Maritime Services **[2019] NSWCA 234** (Meagher, Gleeson, McCallum JJA)

(decision under review: *G Capital Corporation Pty Ltd; Gertos Holdings Pty Ltd; Marsden Developments Ltd v Roads and Maritime Services* [2019] NSWLEC 12 (Pain J))

Facts: On 9 February 2018, Roads and Maritime Services (**RMS**) compulsorily acquired properties of each of the applicants for the WestConnex Stage 3 M4/M5 Link project. At that time, each property was the subject of a contract for sale exchanged on 28 June 2016 which provided for settlement on 28 June 2018. The consideration payable under those contracts was $56.5 million.

The Valuer General determined the market value of the three properties at the date of acquisition to be $33.1 million. The applicants objected to that amount, maintaining that the market value of their land on that date was not relevant to the determination of compensation to which each was entitled under s 54 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**). Instead, the applicants' claims for compensation were directed to the unpaid purchase price due under the contracts for sale, framed as a "loss attributable to disturbance" within s 59(1)(f).

Two preliminary questions determined in in the LEC were:

(1) Whether there was any "actual use of land" by the applicants that would entitle them to any compensation under the Just Terms Act s 59(1)(f); and

(2) Whether, on the basis of the contracts for sale, the compensation to be paid to the applicants in respect of their interests in the acquired land was said to be confined to calculation of compensation having regard only to matters arising under Just Terms Act ss 55(d) and 59(1)(f).

Pain J answered each question in the negative. In relation to Question 1, her Honour found that at the time of acquisition there was no "actual use of land" by the applicants because the properties were the subject of leases to retail and commercial tenants. In relation to Question 2, there was no "actual use of the land" to which any "financial costs reasonably incurred" could relevantly relate. Further accepting that the loss claimed was capable of answering the description "other financial costs", the applicants had not established that each purchaser would have had the financial ability to pay the balance of the purchase price due on completion, and accordingly not proved that the claimed loss was the direct consequence of the compulsory acquisition. The applicants sought leave to appeal from those orders.

Held: (Meagher JA, Gleeson and McCallum JJA agreeing) Leave granted to appeal in relation to Question 1, appeal dismissed and leave refused to appeal in relation to Question 2.

Question 1

(1) The question should be understood as being whether there was any "actual use of land" that "could" entitle the applicants to compensation under s 59(1)(f). So construed it has utility to the parties, justifying a grant of leave to appeal: at [8], [13], [14]. There was no actual use of the land, or any area of it, by the applicants. They did not themselves occupy the land or conduct any business activities on or from it. In leasing the land and receiving rental income in return, each conferred exclusive rights of occupation to its respective tenants. The spending of money on the land for the benefit of the tenants, or the entry of the applicants' agents for the purpose of performing obligations under the lease agreements, does not constitute actual use of the land. The applicants did not identify any business activity of which "holding" the land formed a part and their general rights and responsibilities under the leases or contracts for sale could not describe any use of the land or any area of it: at [17], [26], [27], [28]; and

Question 2

(2) This question required the Court to determine the whole of each applicants' claim for compensation without regard to all of the relevant matters in s 55, those matters including the "market value" of the land: at [10], [30].

Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council **[2019] NSWCA 147** (Basten, Gleeson JJA, Preston CJ of LEC)

(decision under review: *Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd (No 2)* [2018] NSWLEC 153 (Molesworth AJ))

Facts: From about 1915, the State Rail Authority (**SRA**) operated the Martins Creek Quarry near the town of Paterson in the Hunter Valley on land referred to as the eastern lands. In 1991 the SRA obtained a further area of land, referred to as the western lands. The western lands contained two lots, Lot 5 and Lot 6. The SRA applied for development consent for the operation of a quarry on Lot 5 of the western lands with ancillary processing to occur on the eastern lands. Dungog Shire Council (**Council**) granted consent for a quarry "winning materially primarily for railway ballast" subject to conditions. Condition (i) required the development to be conducted in such a manner as not to interfere with the amenity of the neighbourhood. Condition (vi) required "not greatly more than 30%" of the quarry products to be transported by road.

The Development Application (**DA**) was submitted with an environmental impact statement (**EIS**), as required by the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). The EIS included an attachment, "Plan 2" and stated that "Plan 2 shows the location of the proposed quarry, haul road and details of the quarry faces and benches". Plan 2 contained a dotted line outlining an area of approximately 10 hectares within Lot 5.

An environment protection licence (**EPL**) granted under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) restricted the quantity of rock permitted to be extracted. In 2007, the Environment Protection Authority (**EPA**) granted a variation to the EPL permitting the extraction of 2 million tonnes of extractive material per annum, a fourfold increase from the previous permitted quantity of 500,000 tonnes.

In 2012, the appellants became the lessee and licensee of the eastern and western lands. The second appellant commenced operating the quarry. By this time, quarrying far exceeded the area outlined on Plan 2. Quarrying had continued across most of Lot 5 and northward into Lot 6. More than 80% of quarry products were being transported by road after being processed on the eastern lands.

The Council became concerned that the quarry was being operated in breach of the EP&A Act and commenced proceedings in the Land and Environment Court (**LEC**) to restrain and remedy the alleged breaches. The Council also sought judicial review of the licence variation granted in 2007, on the basis that it did not comply with the requirements in s 50 and/or s 58 of the POEO Act.

The primary judge found that consent had been granted for quarrying of an area of five hectares within Lot 5, subject to conditions. The development consent was granted with a limiting purpose, being the "winning of material primarily for railway ballast". Construing the scope of the 1991 consent, the

primary judge had regard to the DA, Plan 2 and the EIS. The primary judge found that the conditions of the consent were validly imposed and had been breached. Additionally, the variation to the EPL was invalid.

The decision was challenged on appeal to the Court of Appeal, with 50 grounds of appeal raised.

Issues:

(1) Whether existing use rights on the eastern lands qualified the 1991 consent;

(2) Whether the grant of consent and imposition of conditions were valid;

(3) Whether the Court could refer to the DA and EIS in construing the consent;

(4) Whether the consent had been breached by:

(i) failing to comply with the limiting purpose of the consent;

(ii) quarrying outside the area for which consent was granted;

(iii) extracting a volume of material greater than permitted;

(iv) breaching Condition (i), relating to the amenity of the neighbourhood;

(v) breaching Condition (vi), requiring not greatly more than 30% of the quarry products to be transported by road;

(vi) breaching Condition (vii), requiring compliance with environmental safeguards;

(5) Whether the 2007 variation of the environment protection licence was invalid;

(6) Whether the conditional stay ordered by the primary judge was appropriate.

Held: Appeal dismissed subject to a reformulation of the primary judge's orders:

Per Basten JA (Gleeson JA and Preston CJ of LEC agreeing)

(1) The existing use rights that attached to the eastern lands did not govern the scope or nature of activities currently conducted permitted by the 1991 consent: at [26]; the existing use rights were for a quarry for a railway undertaking and terminated prior to the appellant taking control of the quarry, when the railway undertaking ceased: at [30], [224], [265];

(2) The grant of consent subject to conditions was valid. The grant of consent was not complete until the second resolution of the Council granted consent subject to the revised conditions that complied with the statutory requirement to receive written approval of the SRA: at [45], [224], [317];

(3) Use of material on the statutory register of consents to construe a development consent, including the DA, EIS and attachments, was not inconsistent with the proposition that consent has an enduring function which runs with the land: at [56], [224], [265];

Per Preston CJ of LEC

(4) There is a central relationship between the development consent and the DA for which consent is sought that is mandated by the statutory scheme: at [295]; an exercise of the power to grant consent is not valid unless it constitutes a granting of consent to the DA for which consent was sought: at [296]; development consent cannot be granted for development of a nature different to or to an extent or with other features greater than the development for which consent was sought in the application: at [298];

Per Basten JA (Gleeson JA and Preston CJ of LEC agreeing)

(5) It is generally permissible to have regard to the DA and an EIS to determine the scope, nature and extent of the development for which consent was sought or obtained: at [59], [62], [224], [310];

(6) Consent was granted for a quarry with a limited purpose, being a quarry for the purpose of winning material primarily for railway ballast: at [88], [224], [313];

(7) The appellants breached the terms of the 1991 consent by operating a quarry that was not 'primarily for railway ballast': at [104], [224], [313];

(8) The appellants breached the terms of the 1991 consent by operating the quarry outside of the area for which consent was granted: at [121], [224], [312]; extraction was limited to the area of about 10 hectares within Lot 5 indicated generally on Plan 2: at [114], [121], [224], [312];

(9) The consent did not limit the volume to be extracted from the quarry, only the area in which quarrying could occur. To the extent that the primary judge made orders on this basis they should be set aside: at [118], [224], [334];

(10) As no order addressing a breach of Condition (i) was sought, it was unnecessary to consider whether that condition had been breached: at [124], [224], [322];

(11) Condition (vi) was breached by the appellants permitting greatly more than 30% of quarry products to be transported by road: at [135], [224], [326]; the condition continued to apply to products extracted on the western lands but dispatched from the eastern lands as the condition bound the operator of the western lands not to permit the products to be transported onto public roads except in compliance with Condition (vi): at [135], [224], [325];

(12) Condition (vi) did not affect any continuing use rights on the eastern lands. It regulated the activity on the western lands and not any activity on the eastern lands: at [135], [138], [224], [325];

(13) It was not proven that the Council had approved a variation to or waived compliance with Condition (vi): at [165], [224], [326];

Per Preston CJ of LEC

(14) There was no utility in making orders to address contraventions of Condition (vii) as the condition did not add to any of the requirements in the development consent. There could be no different contravention of the consent by not complying with Condition (vii): at [331];

Per Basten JA (Gleeson JA and Preston CJ of LEC agreeing)

(15) The conditions in ss 50(2) and 58(6) of the POEO Act constituted jurisdictional facts: at [186], [224], [339], [340];

(16) The primary judge was correct to find that the variation to the EPL was invalid on the basis that the jurisdictional facts had not been satisfied (for s 50(2)) or had been satisfied (for s 58(6)): [194], [204], [224], [339], [343]; and

(17) As the appellants did not adduce any evidence to demonstrate a change of circumstances, the challenge to the discretion of the primary judge should be refused subject only to the reformulation and simplification of the orders: at [219], [224], [344], [347].

Malifa v Georges River Council **[2019] NSWCA 139** (McCallum JA, Emmett AJA)

(decision under review: *Georges River Council v The Congregational Christian Church in Samoa, Parish of Sydney Incorporated* [2018] NSWLEC 200 (Moore J))

Facts: Georges River Council (**Council**) brought proceedings in the Land and Environment Court (*Georges River Council v The Congregational Christian Church in Samoa, Parish of Sydney Incorporated* [2018] NSWLEC 200) to enforce prevention notices issued against the Congregational Christian Church in Samoa, Parish of Sydney Incorporated (**Church**) and Mr Malifa under s 96(2) of the *Protection of the Environment Operations Act 1997* (NSW) regarding the emission of "offensive noise". Mr Malifa, a member of the Church, appeared on behalf of the Church before the primary judge, and was unrepresented in the present proceedings.

On the first morning of the hearing, the proceedings were resolved by way of consent orders against the Church. The proceedings against Mr Malifa were dismissed, also by consent. The Council sought an order for costs against both the Church and Mr Malifa. The primary judge made a costs order against both defendants jointly and severally.

Issue: Whether the applicant would be granted leave to appeal from consent orders.

Held: Applicant was refused leave to appeal and ordered to pay the respondent's costs:

(1) During the primary hearing the judge directed Mr Malifa's attention to the proposed orders and sought Mr Malifa's confirmation that he consented to those orders on the Church's behalf, and also gave Mr Malifa the opportunity for a short adjournment to confer with church members present, which he declined. Thus, nothing in the material before the Court established any reason to grant leave to appeal from the consent orders: at [15], [16], and [19].

***Muriniti v King* [2019] NSWCA 153** (Gleeson JA; Emmett AJA)

(related proceedings: *Young v King (No 13)* [2018] NSWLEC 150 (Sheahan J); *Young v King* (Nos 1-12) (NSWLEC); various related decisions of other Courts)

Facts: The appellants, Mr Leonardo Muriniti and Mr Robert Newell (collectively, **the lawyers**) sought leave to appeal costs orders made by Sheahan J in the Land and Environment Court (**LEC**) in September 2018: *Young v King (No 13)* [2018] NSWLEC 150. Those costs orders required the lawyers personally to indemnify Brendan and Kristina King (**Kings**) for costs orders made against the lawyers' client, Margo Young (**Young**), in favour of the Kings, in February 2016. Under s 58(3)(c) of the *Land and Environment Court Act 1979* (NSW), leave was required to appeal a decision as to costs in Class 4 of the LEC.

The convoluted history of the proceedings, and the litigation between the Kings and Young, was summarised in the judgment at [7]-[29]. The litigious history can be traced back to a dispute between Young and the Kings, which involved alleged unlawful works undertaken by the Kings on their property. Subsequently, various legal proceedings were commenced in the LEC and other courts.

In making the September 2018 costs orders, Sheahan J again rejected arguments made by the lawyers and Young in various proceedings, that the Council, the Kings and other persons were involved in a conspiracy against their interests, and ordered that the lawyers indemnify the Kings against the costs payable to them by Young.

In the present application for leave, the lawyers relied upon various grounds, including whether the primary judge applied the correct test in making the costs orders, whether the conclusion of the primary judge was based on findings that were not open on the evidence, whether there was bias on the part of the primary judge, and whether there was a denial of procedural fairness.

Issues:

(1) Should leave be granted to appeal against the costs orders made in September 2018;

(2) Did the primary judge apply the correct test for the making of an order under s 99 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**);

(3) Was there bias on the part of the primary judge; and

(4) Was there a denial of procedural fairness.

Held: Summons dismissed; the lawyers were ordered to pay the Kings' costs of the application for leave: at [72]:

(1) There was no substance to the ground that the primary judge did not apply the correct test for the application of s 99 of the Civil Procedure Act, as he applied the test adopted by the Court of Appeal: at [51];

(2) There would be no utility in allowing earlier issues (i.e. fraud, conspiracy), which were the subject of other related proceedings to be re-agitated by granting leave to appeal in the present case: at [66]'

(3) There was no basis for a grant of leave on the ground of bias or apprehended bias in relation to the primary judge. The matters raised by the lawyers, which they argued would support a reasonable apprehension of bias, did not demonstrate bias on the part of the primary judge: at [68]-[69]; and

(4) There was no basis for a grant of leave arising from the lawyers' other two proposed grounds, namely that the lawyers were denied procedural fairness, or that the primary judge did not identify "reliable or plausible integers" for the costs claimed by the Kings: at [70]-[71].

Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd **[2019] NSWCA 216** (Basten, Macfarlan, Leeming JJA)

(decisions at first instance: *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3)* [2018] NSWLEC 193 (Robson J) and *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 4)* [2019] NSWLEC 56 (Robson J))

Facts: On 3 August 2017, Muswellbrook Shire Council (**Council**) commenced judicial review and civil enforcement proceedings in the Land and Environment Court (**LEC**) in relation to a mining rehabilitation strategy (**Rehabilitation Strategy**) prepared by Hunter Valley Energy Coal Pty Ltd (**HVEC**), the first respondent, and approved by the Secretary of the Department of Planning and Environment (**Secretary**), the second respondent. Council challenged the Secretary's approval of the Rehabilitation Strategy, seeking a declaration that it did not comply with Condition 42 of the Modified Project Approval for the Mt Arthur Coal Mine (**Modified Project Approval**). On 30 November 2018, Robson J rejected Council's case and dismissed the Summons. By supplementary judgment of 18 April 2019, Robson J ordered Council to pay the costs of the proceedings of HVEC and the Secretary.

Issues:

(1) Whether Condition 42 of the Modified Project Approval specified objective criteria, satisfaction of which was a precondition to the exercise of the Secretary's power of approval of the Rehabilitation Strategy under Condition 42;

(2) Whether the Secretary's satisfaction with the Rehabilitation Strategy was legally unreasonable; and

(3) Whether Council should have been ordered to pay the Secretary's costs of the proceedings in the LEC.

Held: Council's appeal from the judgment of 30 November 2018 dismissed; Council's appeal from the costs order made in favour of the Secretary in the LEC on 18 April 2019 allowed and in place thereof no order as to costs between Council and the Secretary made; Council ordered to pay HVEC's costs in the Court of Appeal; Secretary ordered to pay 20% of Council's costs in the Court of Appeal:

(1) The Court rejected Council's contention that paragraphs (a) to (d) of Condition 42 were jurisdictional facts and stated pre-conditions to the exercise of the Secretary's function under the Condition which were required to exist as a matter of objective fact. It was part of the Secretary's function to satisfy herself about those matters: at [134];

(2) Council did not establish that the Secretary's state of satisfaction with the Rehabilitations Strategy was manifestly unreasonable given the nature of the function being exercised by the Secretary and the indeterminate criteria to be applied. To the extent that the Secretary adopted a view of the construction of Condition 42 or the facts contrary to Council's submissions, the Secretary took a fairly arguable stance and did not act unreasonably: at [44], [153], [205];

(3) Council did not require leave to appeal the costs order made by the primary judge: at [63], [172], [206];

(4) There was no reasonable basis to doubt that Council brought the proceedings in the public interest, thereby engaging r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) (**LEC Rules**): at [89];

(5) The Secretary had no interest in costs following the event because she stood on neither side of an adversarial dispute which was resolved by judgment of the Court. Given that both she and the Council were espousing public interest roles, r 4.2(1) of the LEC Rules gave an additional reason why no order should have been made for costs as between the two governmental authorities: at [93];

(6) The question should have been whether the unsuccessful party should be ordered to pay more than one set of the opposing parties' costs: at [173], [207];

(7) The order that Council pay the Secretary's costs at first instance was set aside, with the consequence that no order as to the Secretary's costs of the proceedings at first instance was made: at [94], [176]; and

(8) The Secretary was ordered to pay 20% of Council's costs in the Court of Appeal: at [97], [178].

NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd **[2019] NSWCA 182** (Macfarlan JA, Leeming JA and White JA)

(decisions under review: *Rabbits Eat Lettuce Pty Ltd v New South Wales Commissioner of Police* [2018] NSWLEC 181 (Moore J); *Rabbits Eat Lettuce Pty Ltd v New South Wales Commissioner of Police (No 2)* [2018] NSWLEC 189 (Moore J))

Facts: For a number of years, Rabbits Eat Lettuce Pty Ltd (**first respondent**) held two music festivals per year in northern New South Wales. It had done so in compliance with development consent granted by Richmond Valley Council (**second respondent**). One of the conditions of the consent, Condition 7 (**C7**) stipulated that an event under the consent "must not proceed if either NSW Police (Commissioner of Police), New South Wales Rural Fire Services or Richmond Valley Council advises it is unsafe to do so."

In October 2018, after a site visit, the Chief Inspector (Crime Manager) of NSW Police for the region advised the NSW Commissioner of Police (**appellant**) support for an event scheduled for 23-25 November 2018 had been "withdrawn". The first respondent commenced proceedings in Class 1 of the jurisdiction of the Land and Environment Court (**LEC**) later that afternoon seeking the appellant advise that it was not unsafe to proceed with the planned November event. The proceedings purported to invoke s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW), which is a renumbered and reworded version of the former s 97.

Jurisdiction was contested by the Commissioner of Police in this case, and this was addressed on the first day of the hearing. The primary judge gave a short extempore judgment dismissing the objection to jurisdiction (*Rabbits Eat Lettuce Pty Ltd v New South Wales Commissioner of Police* [2018] NSWLEC 181). In the substantive judgment, the primary judge allowed the appeal (*Rabbits Eat Lettuce Pty Ltd v New South Wales Commissioner of Police (No 2)* [2018] NSWLEC 189). Pursuant to s 57(1) of the *Land and Environment Court Act 1979* (NSW), the appellant appealed the decision, submitting that there was a significant difference between s 8.7 and its predecessor.

Issues:

(1) Whether the LEC lacked jurisdiction to hear and determine the matter; and

(2) Whether the scope of s 8.7 was confined by s 97, notwithstanding the altered language and structure of s 8.7.

Held: Appeal allowed; orders made by the LEC on 20 November 2018 set aside and Class 1 application dismissed for want of jurisdiction:

(1) Irrespective of whether s 8.7 expanded the scope of the right of appeal previously available under s 97, only if there could be identified an aspect of which was "required to be carried out to the satisfaction of" consent authority or some other person, was the right to appeal available: [39]. Therefore, only if the appellant was required to be satisfied about an aspect of the use of the land was an appeal under s 8.7 available, however C7 was not expressed in terms of the appellant being satisfied and therefore s 8.7 was not available: at [41],

(2) Although not sought in this case, the decision of the appellant in relation to C7 would amount to an exercise of public power which would be susceptible to judicial review: at [46]; and

(3) This was not a case where it was appropriate to determine the second issue, which was quite contestable. Both of the respondents filed submitting appearances and it is ordinarily desirable for questions of law to be determined in contested litigation inter partes: at [48]-[56].

Pollak v Yapp **[2019] NSWCA 150** (Bell P, Payne JA and White JA)

(decision under review: *Yapp v Pollak* [2019] NSWSC 449 (Darke J))

Note: Only a portion of this decision may have interest to the readers of this newsletter. That which is set out below addresses the matters which may be of interest.

Facts: Mr Pollak (**appellant**) appealed from the orders of a judge of the Equity Division of the Supreme Court requiring that he specifically perform a contract for the sale of land, in which he was the purchaser. A dispute between the parties supervened before the contract proceeded to completion. The dispute concerned Special Condition 49 of the contract (**SC 49**). The clause required that Mr Yapp (**respondent**), as vendor, agree to ensure the replacement of the lower staircase in accordance with the Development Approval annexed to the contract prior to settlement.

Only some of the work authorised by the Development Approval had been completed. The stairs were replaced so as to be in accordance with the Development Approval and an interim occupation certificate was issued in respect of internal demolition and the renovation done to the stairs only. Of relevance, the primary judge found that the vendors' obligation to provide an occupation certificate prior to settlement was satisfied by the provision of an interim certificate.

Issues:

(1) Whether the primary judge erred in finding that SC 49 did not require a final occupation certificate; and

(2) Alternatively, whether, given the limited scope expressed on the face of the interim certificate, it authorised the purchaser to occupy lawfully the whole of the premises or only the stairs.

Held: Appeal dismissed with costs:

(1) In the case of an alteration to a portion of an existing building, there is no inference under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) that a final certificate can only be issued when all of the works permitted by the development approval have been completed: at [41],

(2) Further, as observed by the primary judge, SC 49 could not be read as requiring only a final occupation certificate. Both an interim and final occupation certificate fell within the definition of occupation certificate under s 109H of the EP&A Act and it was from this section that the clause took its meaning: at [42],

(3) The interim occupation certificate was not confined only to authority to occupy the staircase. The occupation certificate, when read in light of the relevant record of inspection, demonstrated that the certifier was satisfied that all works undertaken pursuant to the development consent was compliant: at [79]-[81]. It authorised occupation of all areas for which an occupation certificate may have been required: at [92], and

(4) Further, the issues relevant to whether the occupation certificate authorised occupation of the whole of the building were not ventilated at trial and were not to be permitted to be raised on appeal: at [84]-[91].

RebelMH Neutral Bay Pty Limited v North Sydney Council **[2019] NSWCA 130** (Gleeson, Payne JJA, Preston CJ of LEC)

(decision under review: *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWLEC 191 (Moore J))

Facts: The appellant, RebelMH Neutral Bay Pty Limited (**Rebel**), sought consent to consolidate four allotments of land, demolish existing buildings and erect a five-storey residential flat building with basement car-parking. North Sydney Council (**Council**) failed to determine the Development Application (**DA**) within the prescribed time and Rebel appealed the deemed refusal of consent under s 8.7 of the

Environmental Planning and Assessment Act 1979 (NSW) (**EP&A Act**). The appeal was heard in the Class 1 jurisdiction of the Land and Environment Court (**LEC**) against the Council's refusal of consent.

The proposed residential flat building would contravene the height development standard under cl 4.3(2) of the North Sydney Local Environmental Plan 2013 (**NSLEP 2013**). A consent authority may grant consent to a development that contravenes a development standard subject to the requirements of cl 4.6 of NSLEP 2013. Clause 4.6(3) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and (b) that there are sufficient environmental planning grounds to justify contravening the development standard. Clause 4.6(4)(a) provides that consent cannot be granted unless the consent authority is satisfied that the written request "adequately addresses" the matters required to be demonstrated by cl 4.6(3), and that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Rebel submitted an amended written request (**request**) to the LEC pursuant to cl 4.6. The primary judge dismissed the appeal as he was not satisfied that the request had adequately addressed the matters required to be demonstrated by cl 4.6(3) of NSLEP 2013.

The primary judge also found that the proposed development was not in the public interest because it was not consistent with objectives (b) and (f) of the height development standard. Objective (b) was to promote the retention and, if appropriate, sharing of existing views. Objective (f) was to encourage an appropriate scale and density of development that was in accordance with, and promoted the character of, an area.

Rebel appealed against the primary judge's decision under s 57 of the *Land and Environment Court Act 1979* (**Court Act**) on questions of law.

Issues:

(1) Whether the primary judge misconstrued and misapplied cl 4.6 by finding that to "adequately address" the matters required to be demonstrated in cl 4.6(3), the request must actually demonstrate those matters, rather than merely seek to demonstrate those matters;

(2) Whether the primary judge erred by finding that any inadequacy in relation to any argument in the request invalidated the request as a whole and not addressing other arguments in the request;

(3) Whether the primary judge misconstrued objective (b) of the height development standard by finding that a "pleasant verdant outlook" was a "view" within the meaning of the objective;

(4) Whether the primary judge misconstrued objective (f) of the height development standard by addressing only the immediate streetscape as representative of the relevant "area";

(5) Whether the primary judge denied the appellant procedural fairness by not affording it the "amber light approach" to permit it to amend the DA before dismissing the appeal.

Held: (Preston CJ of LEC, Gleeson and Payne JJA agreeing) Appeal dismissed; appellant to pay the respondent's costs of the proceedings:

(1) The primary judge did not misconstrue or misapply cl 4.6. In order for a consent authority to be satisfied that an applicant's request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient that the request merely seeks to demonstrate or covers those matters: at [45];

(2) The primary judge did not in fact find that any inadequacy in any argument invalidated the request as a whole or fail to address the arguments raised in the request: at [47]-[48];

(3) The primary judge did not misdirect himself as to the meaning of "views" in objective (b): at [66]; the meaning of "views" in objective (b) is not limited to significant views: at [66];

(4) It was a question of fact and not law whether the 'pleasant verdant outlook' identified fell within the meaning of a "view": at [67]; even if a finding of fact was perverse or unreasonable, or the reasoning whereby the finding of fact was reached was demonstrably unsound, there is no error on a question of law: at [67];

(5) The primary judge's analysis of the consistency of the proposed development with the scale and density of development in the area was factual and no error on a question of law arises: at [92];

(6) The primary judge did not deny the appellant procedural fairness by not providing it an opportunity to amend the application before dismissing the appeal: at [101]; that certain commissioners have used an "amber light approach" does not give rise to a legitimate expectation that others will do so where the approach has no statutory basis and is of questionable legality: at [101]; and

(7) The particular statements of the primary judge at the hearing asking the parties to address him on the appropriateness of an "amber light approach" could only give rise to an expectation that the parties would be given the opportunity to address the primary judge during the hearing and not after: at [102]; the appellant was invited to address the primary judge on the issue and could have done so: at [104].

Stamford Property Services Pty Ltd v Mulpha Australia Ltd **[2019] NSWCA 141** (Leeming JA, McCallum JA and Emmett AJA)

(decision under review: *Mulpha Australia Limited v Central Sydney Planning Committee* [2018] NSWLEC 179 (Molesworth AJ))

Facts: Stamford Property Services Pty Ltd (**Stamford**) owned a parcel of land in central Sydney. Part of that parcel was occupied by the "Old Health Department Building", listed on the State Heritage Register. A more modern building also stood on the same lot. The two buildings were immediately adjacent to each other and internally connected. Stamford applied for development consent to demolish the more modern building and erect a much larger tower in its place. The Old Health Department building was to be preserved under the proposal.

Mulpha Australia Ltd (**Mulpha**) owned land immediately to the south of Stamford's land, and objected to the Development Application, relevantly on the basis of its heritage impacts. The Heritage Council (**Council)** took the view that its role did not extend to determining approval for the proposed tower on the more modern building's site. Mulpha commenced proceedings in the Land and Environment Court to prohibit Stamford's application from being approved, and to compel the Council to remake its decision according to law.

The essential basis for Mulpha's challenge was that the Council had misconstrued s 57(1)(e) of the *Heritage Act 1977* (NSW) (**Heritage Act**), which prohibited the carrying out of any development "in relation to" the "land" on which a heritage listed building was situated without the approval Council.

The primary judge found in Mulpha's favour, concluding that Council approval was required where, through a factual and qualitative assessment taking account of the contextual setting of the proposed development, there was found to be a "relevant nexus" between the listed building and the proposed development. Thus, the primary judge found that the Council had misconstrued s 57(1)(e) in finding that its role was limited to providing approval with respect to the aspects of the development involving alterations to the Old Health Department Building itself.

In so finding this, the primary judge rejected both parties' primary contentions which became issues in the current proceedings. Issue 1 was brought by Mulpha by notice of contention, and Issue 2 was brought by Stamford.

Issues:

(1) Whether s 57(1)(e) operated by reference to the ownership of the parcel of land, and therefore applied to development on the parts of the land not occupied by the Old Health Department Building, and

(2) Whether the prohibition in s 57(1)(e) applied only insofar as development was proposed on the part of the lot on which the listed building stood.

Held: Appeal allowed. Set aside orders 1, 2 and 3 of 12 November 2018 and those proceedings dismissed with costs:

(1) Section 57(1)(e) of the Heritage Act does not require a determination by way of qualitative assessment of whether there is a sufficient "nexus" between the proposed development and the heritage listed item: at [73]-[74]. [100], [155] (unanimous);

(2) The prohibition on carrying out development without heritage approval in s 57(1)(e) of the Heritage Act applies only to the part of the land on which the heritage listed building stands, and not to the whole of the cadastral lot: at [93], [148]-[149], [159] (Leeming JA and Emmett AJA, (McCallum JA dissenting));

(3) The word "land" in the phrase "the land on which the building, work or relic is situated:" in s 57(1)(e) means the whole of cadastral lot: at [102], [113], [119] (McCallum JA dissenting).

Strike Australia Pty Ltd v Data Base Corporate Pty Ltd **[2019] NSWCA 205** (Bell P, Basten, Ward JJA)

(decision under review: *Data Base Corporate Pty Ltd v Strike Australia Pty Ltd* [2019] NSWSC 271 (Darke J))

Facts: Strike Australia Pty Ltd (**appellant**) subleased from Data Base Corporate Pty Ltd (**respondent**) premises at King Street Wharf, Sydney (**premises**) from which Strike Australia operates a ten-pin bowling alley, bar and entertainment venue. The sublease was for a term of 10 years commencing mid-2007 and terminating mid-2017, with two options to renew (each for a further term of five years).

In February 2017, the appellant gave the respondent notice that it was exercising the first option to renew. An independent valuer was to be obtained for a rent review at the commencement of the further term. The key provision to the first schedule of the sublease stated that the valuer must have regard to market rents for "comparable premises in the vicinity of the Premises".

In the valuer's determination of the market rent, he had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD, and identified four properties which he said provided "the best guide" to the market rent for the premises. Two of the properties were located at Macquarie Park and at Bondi Beach.

The primary judge held that the valuer did not comply with the requirements of the sublease as he erroneously included market rents for premises "not in the vicinity of the Premises". The primary judge made a declaration that the determination of market rent was not binding upon the parties.

Issues:

(1) Did the primary judge err in finding that the valuer did not carry out his determination of the market rent in accordance with the mandatory considerations outlined in the first schedule to the sublease,

(2) If ground 1 was not made out, had the primary judge nevertheless erred in finding that the valuer erroneously considered market rents for premises "not in the vicinity of the Premises", and

(3) If either Grounds 1 or 2 were accepted, had the primary judge also erred in finding that the determination of market rent by the valuer was not binding on the appellant or respondent as parties to the sublease.

Held: Appeal dismissed with costs:

Basten and Ward JJA agreeing:

(1) Under the sublease, the valuer was obliged to take into account comparable premises in the vicinity of the premises only and not other premises they might consider comparable elsewhere: at [52], [135];

Bell P dissenting:

(2) As a matter of construction, having regard to the natural meaning of the phrase "have regard to", its context in the sublease and the nature of valuation the sublease was not exhaustive as to the matters to which regard was permitted to be had: at [22]-[29];

Bell P, Basten and Ward JJA agreeing:

(3) The other premises taken into account by the valuer were objectively outside the vicinity of the premises. It was not open to the valuer to determine the limits of "in the vicinity" in the sublease. Although the valuer was required under the sublease to have regard to the written submissions of the parties that were provided to him, he was also required to disregard anything in the submissions that was inconsistent with the mandatory requirements in the sublease: at [2], [44], [158], and

Ward JA:

(4) The Court did not consider it necessary to determine Ground 3 as Grounds 1 and 2 had not been made good: at [163].

New South Wales Court of Criminal Appeal:

Environment Protection Authority v Grafil Pty Ltd **[2019] NSWCCA 174** (Preston CJ of LEC, Davies, Adamson JJ)

(decision under appeal: *Environment Protection Authority v Grafil Pty Ltd* [2018] NSWLEC 99 (Pain J))

Facts: The Environment Protection Authority (**EPA**) prosecuted Grafil Pty Ltd (**Grafil**) under s 144(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for using land described as Lot 8 as a waste facility without lawful authority. Mr Robert Mackenzie (**Mackenzie**), as the director of Grafil, was also charged for the offence against s 144(1), by virtue of s 169 of the POEO Act.

Grafil extracted sand on Lot 8 pursuant to a development consent granted in 1977. In 2009, approval was granted under Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for extraction of sand on the nearby Lots 218 and 220, and the construction of various access roads.

Between 29 October 2012 and 15 May 2013, Grafil received various loads of material from recycling facilities. The material was stockpiled in 2 or 3 stockpiles on Lot 8, pending use as road base. The precise volume of material was not established beyond reasonable doubt; however a range of 24,000 - 44,000 tonnes was identified. Asbestos was also detected in the stockpiles.

Grafil and Mackenzie pleaded not guilty to the charges in the Land and Environment Court (**LEC**). The proceedings raised the construction of various provisions of the POEO Act and Protection of the Environment Operations (Waste) Regulation 2005 (NSW) (**Waste Regulation**).

The terms "waste" and "waste facility" were defined in the Dictionary to the POEO Act. Waste facility was defined to mean "any premises used for the storage, treatment, processing, sorting or disposal of waste (except as provided by the regulations)". The definition of "waste" involved five limbs, including relevantly paragraph (d): "any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations". Clause 3B(1) of the Waste Regulation prescribed those circumstances as the application to land by the methods in 3B(1)(a)(i)-(iii), including relevantly "depositing on the land".

The parties also joined issue as to whether Grafil had proceeded without lawful authority. Section 48 of the POEO Act provided that "premises-based scheduled activities" required an environment protection licence (**EPL**). Schedule 1 Pt 1 of the POEO Act listed premises-based scheduled activities, including relevantly cl 39 "waste disposal by application to land" and cl 42 "waste storage". Grafil contended it did not require an EPL due to the operation of two notices of exemption granted under cll 51 and 51A of the Waste Regulation. Section 144(2) provided that "the defendant bears the onus of proving that there is lawful authority to use the land concerned as a waste facility", however the parties disagreed as to who bore the onus of proving the applicability of the exemptions. Grafil also contended that its activities were ancillary to the 1977 development consent and Pt 3A approval.

In the LEC, the trial judge found that the defendants were not guilty, but did not make final orders. The EPA alleged various legal errors in the findings of the trial judge, particularly concerning the construction of the relevant provisions of the POEO Act and Waste Regulations. The trial judge, at the request of the

EPA, submitted questions of law arising from the proceedings for determination by the Court of Criminal Appeal, pursuant to s 5AE(1) of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**).

Issues:

(1) Whether s 5AE of the Criminal Appeal Act allowed the EPA to make a second request substantially different to the request as first made and, whether the EPA waived or otherwise abandoned the right to make a s 5AE request in those circumstances;

(2) Was the material in the stockpiles "waste" as defined;

(3) Was the activity of stockpiling material the scheduled activity of "waste disposal (application to land)" so as to require a licence;

(4) Was the activity of stockpiling the material the scheduled activity of "waste storage" so as to require a licence;

(5) Was the activity of stockpiling the material exempted so as to be a non-scheduled activity for which a licence is not required;

(6) Who bore the onus of proving that the activity was exempted due to the operation of the notices of exemption;

(6) What was the legal consequence of the presence of asbestos in the material in the stockpiles;

(7) Was the activity of stockpiling material without the lawful authority of a development consent;

(8) Was a continuing offence proven; and

(9) Were the charged offences time barred.

Held: LEC to redetermine the proceedings in accordance with the answers given by the Court of Criminal Appeal to the questions submitted to it:

In relation to (1):

(1) Section 5AE of the Criminal Appeal Act permits the EPA to make a request before the completion of the proceedings: at [80], [411], [414]; the form of question first submitted is not relevant to the competency of the final request under s 5AE(1): at [81], [411], [412]; the form of the questions can change, even substantially, between the first and final submitted questions: at [83], [411], [419]; section 5AE did not limit the EPA to make only one request: at [84], [411], [412]; delay in settling the questions finally submitted did not affect the competency of the questions: at [85], [411], [412];

(2) Unless a proposed question of law is "so obviously frivolous and baseless that its submission would be an abuse of process", the trial judge is obliged on request by the Crown to submit a question of law: at [81], [411], [412]; the obligation on the trial judge to submit a question of law is not dependent on the identification of any particular question of law, but only on the request: at [82], [411], [417];

(3) Grafil did not prove that the EPA had waived its right to submit a s 5AE request: at [84], [411], [412];

(4) The EPA's conduct was not an abuse of process: at [86], [411], [421];

In relation to (2):

(5) The trial judge misconstrued the definition of "waste" in the Dictionary to the POEO Act by finding that if material was "processed, recycled, re-used or recovered" it could only fall into paragraph (d) of the definition: at [115], [132], [411], [412]; the paragraphs of the definition of waste are not mutually exclusive: at [115], [411], [412];

(6) The trial judge misconstrued paragraph (d) of the definition of waste and cl 3B of the Waste Regulation by finding that paragraph (d) and cl 3B raised an independent first question of whether a substance is applied to land before the question of whether a substance is applied to land by one of the methods prescribed by cl 3B(1)(a)(i)-(iii): at [153], [411], [412]; clause 3B(1)(a)(i)-(iii) prescribes what is application to land for the purposes of paragraph (d) of the definition of waste: at [153], [411], [412];

(7) On the facts found by the trial judge, the material in the stockpiles was waste within the meaning of paragraph (d) as there was "depositing on the land" within the meaning of cl 3B(1)(a) of the

Waste Regulation: at [157], [411], [412]; the trial judge erred by holding that the material was not waste, as the facts necessarily fell within the statutory description: at [157], [411], [412];

In relation to (3):

(8) The trial judge erred by importing a two-step inquiry into the definition of waste disposal by application to land: at [171], [411], [412]; the scheduled activity labelled as "waste disposal by application to land" is conclusively and exhaustively defined to be the application to land by the methods in (a)-(c) of cl 39(1): at [171], [411], [412];

(9) The material received off site and deposited in the stockpiles involved application to land by the method specified in paragraph (a) of cl 39(1), "depositing on the land": at [173], [411], [412];

In relation to (4):

(10) The trial judge erred in construing the concept of "storage" as excluding temporary stockpiling of material; the temporary storage of waste in stockpiles pending the transfer of the waste to another place amounted to the scheduled activity of waste storage in cl 42 of Sch 1 to the POEO Act: at [189]-[193], [411], [412];

In relation to (5):

(11) The general rule that the burden of proving every element of an offence rests on the prosecutor is subject to any statutory exception: at [222], [411], [412];

(12) The express language in s 144(2) of the POEO Act indicates a legislative intention that the matter of lawful authority is an exception upon which the defendant bears the onus of proof: at [226], [411], [412];

(13) Grafil bore the onus of proving that it had lawful authority to use the land as a waste facility due to the operation of the notices of exemption granted under cll 51 and 51A of the Waste Regulation: at [228], [411], [412];

(14) There are not different principles for construing statutory instruments to the principles for construing legislation or delegated legislation: at [257], [411], [412]; practical considerations do not permit a rewriting of the statutory instrument to provide a practical outcome: at [257], [411], [412]; the trial judge erred in construing the notices of exemption by adopting a practical approach inconsistent with the language of the statutory instruments: at [271]-[272], [411], [412];

(15) The exemptions did not apply to Grafil's activities as Grafil failed to comply with the conditions of the exemptions: at [294], [411], [412];

In relation to (6):

(16) The trial judge erred by finding that whether waste "contains asbestos" was a matter of fact and degree depending on the nature of the waste and the volume: at [323], [411], [412]; the definition of asbestos waste, being "any waste that contains asbestos", does not depend on the absolute or proportionate amount of asbestos contained in the waste: at [325], [329], [411], [412]; waste that includes asbestos or has asbestos as its contents or constituent parts is asbestos waste: at [325], [411], [412];

In relation to (7):

(17) The offence element "without lawful authority" includes not only an absence of lawful authority under the POEO Act, but also not obtaining and carrying out development in accordance with a development consent under the EP&A Act: at [336], [411], [412]; the trial judge erred in finding that the stockpiling of material was ancillary or subordinate to the 1977 consent or the original Pt 3A approval as there was no evidentiary foundation for so finding: at [363], [373], [411], [412];

In relation to (8):

(18) The trial judge misdirected herself in determining whether the EPA had proven a continuing offence by wrongly focusing on the deposition of "non-exempt waste": at [388], [411], [412]; the trial judge failed to exercise jurisdiction by not addressing the manner of breach of storing waste on the land: at [393], [411], [412]; and

In relation to (9):

(19)The trial judge misdirected herself in determining whether the offences were time barred by asking whether "non-exempt waste" was deposited on the relevant dates: at [407], [411], [412].

***J Cmunt v New South Wales Commissioner of Police; M Cmunt v New South Wales Commissioner of Police* [2019] NSWCCA 177** (Simpson AJA, Walton J and Adamson J)

(decision under review: *J Cmunt v Commissioner for Police, New South Wales Police Force; M Cmunt v Commissioner for Police, New South Wales Police Force* [2018] NSWLEC 156 (Moore J))

Facts: Mr and Mrs Cmunt (**appellants**) were convicted on several counts of contravening s 277(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW) in Queanbeyan Local Court. The offences were within the meaning of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**) "environmental offences".

On the advice of the staff at the Local Court, the appellants lodged Notices of Appeal to the District Court on 30 June 2017 and 9 August 2017 respectively. That was incorrect. Section 31 of the Appeal and Review Act stipulated that the Land and Environment Court (**LEC**) was the only avenue of appeal for a person who had been convicted or sentenced with respect to an "environmental offence". By subs (2)(a) of s 31, an appeal must be made within 28 days after the sentenced had been imposed. Section 33 gave power for the LEC to grant leave within three months of the relevant order.

In November 2017, the Appellant's appeals to the District Court were disposed of by Graham ADCJ on jurisdictional grounds. Graham ADCJ made an order that "all appeals are struck out for want of jurisdiction". In mid-December 2017, each appellant appealed against their convictions and sentences in the LEC. Each Summons came before the primary judge on 25 September 2018. The primary judge concluded that the LEC had no jurisdiction as the Summonses were filed out of time and the orders entered in the District Court were final and dispositive of the appeals. Before the primary judge struck out each Summons, he utilised the procedure of s 5BA(1) of the *Criminal Appeal Act 1912* (NSW) to ask the Court of Criminal Appeal a stated question regarding his order to strike out the Summons.

Issues: Whether the primary judge erred in striking out each of the Summons of the appellants.

Held: The question was answered in the negative:

(1) The decision to strike out the purported appeals to the LEC was inevitable and plainly correct: at [16]; and

(2) Part 7 of the Appeal and Review Act may be of future use to the appellants: at [18].

Supreme Court of New South Wales:

***Cornish v Secretary, Department of Planning, Industry and Environment* [2019] NSWSC 1134** (Basten J)

(decision under review: *Chief Executive, Office of Local Government v Cornish* [2018] NSWCATOD 110 (R C Titterton, Principal Member))

Facts: Mr Cornish (**applicant**) was a councillor on Penrith City Council (**Council**). A complaint was made against the applicant after two meetings in 2014 regarding consent to a development application, about the applicant's conduct at the meetings. The applicant's conduct was then referred to the Council's conduct reviewer. The reviewer found that the applicant had breached the Council's Code of Conduct (**Code**). The Council adopted the findings and resolved that the applicant should publically acknowledge the findings; offer an unqualified apology; undertake not to make negative or derogatory comments; and attend training within three months of the report.

Upon the applicant's failure to comply with the resolution of the Council, the matter was referred to the Office of Local Government, which then lodged an application with NSW Civil and Administrative Tribunal (**NCAT**). NCAT found that the applicant had breached the Code by failing to comply with the resolution and suspended the applicant's pay for three months. The applicant appealed to the Supreme Court.

Issues:

(1) Whether the Council had the statutory power to impose the disciplinary sanctions; and

(2) Whether NCAT should have considered the reasonableness of the conduct underlying the breach of the Code, rather than only if the Code was breached.

Held: NCAT orders set aside; proceedings commenced in NCAT set aside; respondent to pay costs:

(1) The Council resolution purporting to exercise expansive discretionary powers was not authorised by the statute, and such powers could not be conferred by a code of conduct or a procedural code: at [51]; and

(2) The jurisdiction of NCAT allowed for the consideration of the underlying facts of the alleged breach. This was supported by the language of the statutory scheme, past authority and the need for an opportunity for merits review in the investigation process: at [81].

Harris v Mathieson (in his capacity as an authorised officer under the Water Management Act 2000) (NSW) **[2019] NSWSC 1064** (Davies J)

Facts: Mr and Mrs Harris (**plaintiffs**) operated two farms in the vicinity of Bourke, Latoka and Janbeth. They held water approvals for water supply works and water use at those properties. In January 2019, Mr Mathieson (**defendant**), on behalf of the Natural Resources Access Regulator (**NRAR**), issued notices to the plaintiffs requiring the provision of information and documents stipulated in the notices. The notices were issued as part of an investigation by NRAR into the plaintiffs' water access and use at their two farms and were said to have been issued for the purpose of determining whether there had been compliance with or contravention of identified conditions of the access licence for each of the properties.

After receiving the notices, the plaintiff's solicitors wrote to NRAR alleging that certain paragraphs of the notices were not relevant to any investigation of the alleged contraventions and asking NRAR to re-issue properly confined notices. NRAR rejected this proposal and the plaintiffs subsequently commenced proceedings in the Supreme Court seeking orders that the notices be declared void and of no effect or, in the alternative, that they be set aside.

Issues: Whether the defendant was entitled to require the plaintiffs to furnish the information and records stipulated in the NRAR notices.

Held: Notices issued by the defendant on 8 February 2019 purportedly pursuant to s 338A of the Water Management Act in respect of properties known as Latoka and Janbeth set aside; defendant to pay plaintiffs' costs.

(1) It was necessary to set aside the Latoka Notice because the lack of clarity about the interrelationship of the contraventions was confusing and had an impact upon the appropriateness of what was required of the plaintiffs: at [91];

(2) It was also necessary to set aside the Janbeth Notice because, although it was possible to excise the questions deemed beyond power, the notice would have to be reissued as there was unresolved questions about the appropriateness of only referencing the 2017/2018 water year in some but not all of the questions in the notices and, further, the inconsistency in the questions regarding the 2014/2015 water year: at [92]; and

(3) As the plaintiffs were successful in challenging the notices, even though not all their arguments were successful, the defendant should pay the plaintiff's costs of the proceedings: at [94].

***Jarosz v State of New South Wales* [2019] NSWSC 692** (Darke J)

(related decision: *Jarosz v State of New South Wales (No 2)* [2019] NSWSC 861 (Darke J))

Facts: Mr Jarosz and Mrs Jarosz (**plaintiffs**) each owned a parcel of land that lay within the Burragorang State Conservation Area (**Conservation Area**). The Conservation Area also contained two other parcels of land and was under the care, control and management of the National Parks and Wildlife Service. The four parcels together formed an area that was completely surrounded by the Conservation Area.

Vehicular access to that landlocked area could be achieved by means of a series of roads or trails that passed through the Conservation Area and across two privately owned lots that are themselves located within the Conservation Area. One such road is referred to as W10 and was the focus of these proceedings.

The plaintiffs sought declaratory relief in respect of W10, including a declaration that it was a public road, and declarations that one or other of the State of New South Wales (**first defendant**) or the Wollondilly Shire Council (**second defendant**) was a road authority for W10 under the *Roads Act 1993* (NSW) (**Roads Act**) with responsibility for its maintenance. The underlying concern of the plaintiffs was that W10 was not maintained to a standard which they regarded as adequate. The plaintiffs alleged that the condition of the road was such that it constituted a nuisance. The plaintiffs also sought a mandatory injunction to require either the first or the second defendant to be the responsible authority to remedy the nuisance by removing or repairing hazards on W10.

Issues:

(1) Whether W10 was a public road for the purposes of the Road Act; and

(2) Whether the applicants could claim a private nuisance against the first defendant as occupier of W10.

Held: Amended Statement of Claim dismissed; costs reserved:

(1) The evidence adduced was not sufficient to give rise to a presumption or inference, that there had been a dedication of W10 as a public road: at [27];

(2) In essence, the plaintiffs failed to identify what the State failed to do such that its conduct should have been regarded as unreasonable: at [63]. Thus the plaintiffs failed to establish that the State had acted unreasonably (or in any sense negligently) in relation to its management of W10: at [64]; and

(3) The relief sought by the plaintiffs in relation to the claim in nuisance was problematic. The declaration to the effect that the condition of W10 "constitutes a nuisance" to the plaintiffs lacked utility. The mandatory injunction, which would have required the nuisance to be remedied "by removing and/or repairing hazards", was so lacking in content and clarity that it would not have been appropriate for the Court to issue it: at [65].

***Jarosz v State of New South Wales (No 2)* [2019] NSWSC 861** (Darke J)

(related decision: *Jarosz v State of New South Wales* [2019] NSWSC 692 (Darke J))

Facts: In *Jarosz v State of New South Wales* [2019] NSWSC 692 (**substantive hearing**) the Land and Environment Court (**LEC**) rejected Mr and Mrs Jarosz's (**plaintiffs**) claim that a certain road became a public road at common law in the mid-nineteenth century. The LEC also rejected the plaintiffs' claim in private nuisance and an order was made also dismissing the plaintiffs Amended Statement of Claim. Rule 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) stipulated that costs follow the event unless it appears to the court that another order should be made. The plaintiffs sought for each party to pay their own costs of the proceedings. The State (**first defendant**) sought that the plaintiffs pay its costs of the proceedings on the ordinary basis and the Council (**second defendant**) sought that the plaintiffs pay its costs, or at least some of them, on an indemnity basis.

Issues: Whether there was cause to depart from the usual costs rule in favour of unsuccessful plaintiffs.

Held: Unsuccessful plaintiffs ordered to pay costs of the defendants; second defendant's costs on an indemnity basis from 24 April 2019:

(1) Even though the proceedings involved questions that fell within the realm of public law, the central purpose of the proceedings was to establish that one or the other of the defendants was legally responsible for maintaining the road to a higher standard than was the case, thereby improving access to the plaintiffs' properties: at [8]; and

(2) The plaintiffs ought to have been aware of the problematic nature of their evidence: at [15]. The content of the letter provided to the plaintiffs from the second defendant's solicitor dated 10 April 2019 (**letter**) stated it was inappropriate for the plaintiffs to pursue their claim against the second defendant as it was clear that the first defendant, at all relevant times, had the care, control and responsibility for the maintenance of the relevant land. Thus the plaintiffs conduct from 24 April 2019 (about a month before the hearing and by which time the plaintiffs ought to have considered the contents of the letter) amounted to a relevant delinquency which warranted the sanction of indemnity costs: at [16].

The Owners - Strata Plan No 61233 v Arcidiacono; The Owners - Strata Plan No 17719 v Arcidiacono **[2019] NSWSC 1307** (Henry J)

Facts: The plaintiffs, The Owners - Strata Plan No 61233 (**first plaintiff**) and the Owners - Strata Plan No 17719 (**second plaintiff**) sought various easements based on the use of land located between buildings on York Street in the Sydney CBD (**passage**) dating back to the late 1800s and under s 88K of the *Conveyancing Act 1919* (NSW). The evidence in the proceedings indicated that occupants of the buildings on what is now 71 York Street and 104-118 Clarence Street had been using the passage for at least 100 years to obtain access to the rear of their land.

Issues:

(1) Whether an easement based on long use could arise when the identity of the owners of the passage were unknown from the late 1880s until 2008, when the defendants became the registered proprietors,

(2) Whether the first plaintiff was able to obtain easements to allow structures on its building to overhang the passage, and easements to allow access to the passage for repairs and services,

(3) Whether the first plaintiff was able to obtain easements over the passage for light, air, or drainage of sewerage and water, and

(4) Whether the second plaintiff had the benefit of a right of way over the passage based on deeds of conveyance dating back to 1839.

Held: First plaintiff pay the defendant $2,000 as compensation for the imposition of each easement relating to overhang and encroaching structures and for services and repair granted; parties directed to provide Short Minutes of Order to agree on precise terms of easements and also as to costs:

(1) An easement based on long use did arise. The use of the passage was open and obvious, and an owner acting diligently and taking reasonable care for their interests would have been aware of it: at [43(b)];

(2) The easements sought by the plaintiff regarding structures on its buildings to overhang the passage and access for repairs and services was reasonably necessary: at [43(e)];

(3) The first plaintiff did not satisfy the Court that easements for light, air or drainage of sewerage and water were reasonably necessary: at [43(e)]; and

(4) The land to which the rights of way attached was not land that presently belonged to the second plaintiff and therefore the second plaintiff did not have any existing rights of way over the passage on the basis of a historical grant: at [279]-[280].

Wilson v Lord Howe Island Board **[2019] NSWSC 724** (Ward CJ in Eq)

Facts: Ms Wilson (**plaintiff**), a resident of Lord Howe Island, sought declaratory and final relief to stop a rat and mouse baiting program that had been begun by the Lord Howe Island Board (**respondent**). The respondent had commenced a Rodent Eradication Project (**REP**) to deal with rodents threatening native plants and animals found on Lord Howe Island and adjacent islands. The REP was the subject of a permit obtained from the Australian Pesticides & Veterinary Medicines Authority (**Permit**).

Issues:

(1) On the proper construction of Conditions 20 and 21 of the Permit, how did the bait stations need to be covered and secured;

(2) On proper construction of the Permit, whether it allowed only the use of a maximum 42 tonnes of bait; and

(3) Whether, if the proposed means of implementation of the REP would contravene the Permit in one or more of those respects, injunctive relief should be granted as a matter of discretion.

Held: Plaintiff's claim dismissed with costs.

(1) For Condition 20, on the ordinary meaning of the words "adequately covered", was effected by the closing of the lid and there was no requirement for an additional cover: at [238]. Further, the words "to prevent access to bait by birds" explained the purpose of the requirement contained in Condition 20, and they did not impose a separate condition that it should be impossible for any bird to have access to bait contained in the bait station: at [239];

(2) For Condition 21, the ordinary meaning of "secured" was "fastened", "attached" or a synonym to that effect. The fact that the condition did not apply where bait stations were placed on impervious ground gave some indication that in other areas what was contemplated was the securing or attaching of bait stations by some means that could penetrate the ground and affix the bait station: at [241];

(3) There was no express condition providing for maximum tonnage, nor would such a condition be implicit in the terms of the Permit and therefore the respondent was not limited to a maximum tonnage of bait: at [244]; and

(4) Balancing the public interest in compliance with the conditions of the Permit against the public interest in the eradication of the rodents from the island (having regard to the potential for the rats to develop resistance to the baits if the REP was delayed), discretion to grant the relief sought would not have been exercised even if Conditions 20 and 21 had been breached as pleaded by the plaintiff. The overwhelming lack of evidence of harm to the bird population and to humans from the baiting and time and effort that went into the preparation for and commencement of implementation for the REP and the considerable sunk cost likely to be wasted if the REP was not completed (noting that the last factor was given the least weight): at [247].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Canterbury-Bankstown Council v Sydney Tools Pty Ltd **[2019] NSWLEC 103** (Sheahan J)

Facts: These two Class 4 proceedings (heard together) involved allegations of unlawful use, and breaches of development consents, in respect of two adjacent lots in Riverwood (or Roselands). The site was comprised of three "units", with Unit A occupying one of the lots, and Units B and C the other. The land upon which the three units were housed were owned by the second respondent, and the site was occupied and used by the first respondent for its warehousing and distribution operations in respect of its business "Sydney Tools". The site was situated at the interface between residential and light industry zones, and had frontages to a residential street. The Canterbury-Bankstown Council (**Council**) sought

declaratory and injunctive relief to remedy or restrain the respondents' alleged breaches of the *Environmental Planning and Assessment Act 1979* (NSW). The central concerns of the Council involved complaints made by neighbouring residents, particularly in relation to traffic and noise generated by Sydney Tools. Council also complained that the first respondent sold retail goods to the general public from Unit C, in the absence of consent.

The first respondent conceded that it had undertaken various unlawful works throughout the site. However, the respondents, in defending the case, relied upon various historical consents which had been granted in respect of each lot, for prior uses of the subject premises, as authorising the uses and works of which Council complained. They relied upon the finding of Talbot J in *Waverley Council v Hairis Architects* (2002) 123 LGERA 100 ("*Hairis*"), in which His Honour held that there may be more than one valid and operating consent in existence at any one time. The respondents sought to invoke the exercise of the Court's discretion, and ultimately argued that no declarations or orders should be made.

Issues:

(1) Did the respondents' use of the premises constitute breaches of the relevant development consent(s);

(2) Were the respondents able to rely upon the historical development consents granted in respect of each of the units; and

(3) Should any declaratory or injunctive relief be granted.

Held: The declaratory and injunctive relief sought by the Council was declined; the first and second respondents were ordered, jointly and severally, to pay the costs of both proceedings, as agreed or assessed: at [186]:

(1) Based on the evidence of both lay and expert witnesses, the Court was not satisfied of any current or continuing breaches of the development consents properly construed: at [160]. The first respondent had taken a number of measures and made genuine attempts to alleviate the amenity impacts upon the neighbouring residents: at [148];

(2) The reasoning of Talbot J in *Hairis*, in that more than one consent may be operating at any one time, was applied: at [157];

(3) Relying upon the reasoning of Preston CJ in *Great Lakes Council v Lani* (2007) 158 LGERA 1, and in the exercise of the Court's discretion, the declaratory and injunctive relief sought by the Council was declined: at [178]. If strict compliance with the nominated development consents were ordered, it would "inappropriately restrict" the ability of either respondent to use the premises in accordance with any of the development consents applying to the site: at [176];

(4) The Court held that the Council brought these proceedings in order to achieve a legitimate outcome, and found that it was appropriate that the Council should receive its costs: at [185].

***Satmell Holdings Pty Ltd v Blacktown City Council* [2019] NSWLEC 94** (Pepper J)

(related decision: *Blacktown City Council v Satmell Holdings Pty Ltd* [2019] NSWLEC 93 (Pepper J))

Facts: Two sets of related proceedings came before the Court arising from the same factual matrix. First, a Class 4 matter in which Satmell Holdings Pty Ltd (**Satmell**) challenged the validity of two contributions plans (**Contributions Plans**) approved by Blacktown City Council (**Council**) pursuant to s 7.11(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Second, the Class 1 matter of *Blacktown City Council v Satmell Holdings Pty Ltd* [2019] NSWLEC 93 summarised elsewhere in this newsletter.

Between 2012 and 2018, the Minister for Planning (**Minister**) issued a number of directions pursuant to s 94E (now s 7.17) of the EP&A Act ("the amended 2012 Direction") which capped the amount of contributions payable under s 7.11(1) of the EP&A Act; introduced the concept of an "IPART reviewed contributions plan", which could exclude the operation of the caps for contributions conditions that were imposed in accordance with such a plan; and subsequently made provision for phasing out the contributions caps.

In January 2018, the Secretary of the Department of Planning and Environment published the *Secretary's Practice Note: Local Infrastructure Contributions* (**Practice Note**) which contained a number of provisions that dealt with the timing of the adoption of the contributions plans that were to be IPART reviewed.

Issues:

(1) Whether the Contributions Plans required prior Ministerial approval or the completion of the IPART review process set out in the amended 2012 Direction to be valid;

(2) Whether the Council had unconditionally approved the Contributions Plans pursuant to s 7.18 of the EP&A Act and cl 26(1) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EP&A Regulation**), or whether it had approved the Plans subject to IPART assessment and approval by the Minister;

(3) Whether the Contributions Plans made provision for contributions which exceeded the monetary caps set out in the amended 2012 Direction;

(4) Whether the Council, by approving the Contributions Plans prior to completion of the IPART review process, had failed to comply with a direction given to it by the Minister, and therefore, had failed to comply with cl 26 of the EP&A Regulation. And moreover, if so, whether this rendered the Contributions Plans invalid; and

(5) Whether the Council had failed to have regard to the Practice Note, and moreover, if so, whether this rendered the Contributions Plans invalid.

Held: The Contributions Plans were valid:

(1) It was only necessary for a contributions plan to be reviewed by IPART, and therefore, received by the Minister for the provision of advice, if the Council sought to levy contributions above the cap imposed by the amended 2012 Direction. The Contributions Plans expressly recognised that any excess levies could not be imposed until the IPART review process had been completed. Further, the amended 2012 Direction expressly stated that IPART review was not necessary for all new contributions plans: at [67]-[77];

(2) The Council resolution adopting the Contributions Plans when read in its entirety and construed in context with a number of measures taken by the Council intended to adopt the Contributions Plans unconditionally: at [90]-[91];

(3) Read as a whole, the Contributions Plans did not make provision for contributions which exceeded the monetary cap despite the fact that they may have permitted contributions which would exceed the monetary cap after 1 July 2020 when the caps were phased out: at [94]-[96];

(4) Having regard to the proper construction of the statutory regime, even if the Contributions Plans required IPART assessment and approval by the Minister, it was not the legislative purpose of that regime that the Council's failure to obtain IPART assessment and Ministerial approval would result in the invalidity of the Contributions Plans: at [103]-[105]; and

(5) Compliance with the Practice Note was not necessary for the validity of the Contributions Plans because:

   (a) the Practice Note did not constitute an "instrument" in accordance with which ss 7.17 or 7.18 of the EP&A Act and cl 26(1) of the EP&A Regulation must be construed: at [114];

   (b) the phrase "having regard to" in cl 26(1) of the EP&A Regulation was not prescriptive, and therefore, the Council was not obliged to adhere strictly to the Practice Note: at [119]; and

   (c) even if a breach of cl 26(1) of the EP&A Regulations was demonstrated by the Council's failure to comply with the Practice Note, this did not result in the Contributions Plans being rendered invalid (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [91]-[93]): at [121].

Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd **[2019] NSWLEC 117** (Sheahan J)

Facts: These Class 4 judicial review proceedings concerned works done at the 1821 Hotel, located in a five-storey building located on Pitt Street in the Sydney CBD. The premises is owned by 122 Pitt Street Pty Ltd (**first respondent**) and is leased to Universal 1919 Pty Ltd (**applicant**), who operates the hotel business. The impugned works consisted of a large representation of the Greek national flag, etched into one of the internal hotel walls. The flag representation was achieved by removing render on the wall in order to expose brick work and produce an outline in the shape of the flag, which measured 8m x 5m in size.

The flag became the subject of a Development Control Order (**DCO**) issued by the second respondent, the Council of the City of Sydney (**Council**). Council contended that the flag required planning approval, but none was obtained, and that it seriously compromised the heritage value of the premises. The DCO required the restoration of the premises "to the condition in which they were before unlawful building or other works occurred". Relevantly, the DCO was issued to the first respondent, rather than the applicant.

There were various heritage considerations surrounding the premises, which had been the subject of a Permanent Conservation Order since 1988, as well as being listed as a State Heritage Item on the State Heritage Register, and as a Local Heritage Item in the Sydney Local Environmental Plan 2012.

The applicant challenged the validity of the DCO on three grounds. It argued that, by issuing the DCO to the first respondent rather than to the applicant, there was denial of procedural fairness. It also contended that the DCO was invalid on its face, on the basis that, inter alia, the flag was not "development". Finally, the applicant argued that the DCO was manifestly unreasonable, in the *Wednesbury* sense.

Issues:

(1) Should the DCO be declared invalid on the basis of denial procedural fairness to the applicant; and/or

(2) On the basis that the DCO was invalid on its face; and/or

(3) On the basis that the DCO was manifestly unreasonable.

Held: Proceedings dismissed; applicant to pay the Council's costs as agreed or assessed:

(1) The DCO was not invalid on its face: at [83]. The removal of the render to create the flag representation was "development" and required the consent of Council: at [90];

(2) The statutory requirements to afford procedural fairness were satisfied: at [86]. While the Council may, in its discretion, have chosen to issue the DCO to the applicant, as the tenant of the premises, it chose not to, and instead issued it to the owner (first respondent), which it was required to do: at [84];

(3) The issuing of the DCO in the circumstances was not unreasonable, let alone so unreasonable that no authority would do it, and accordingly, the *Wednesbury* ground also failed: at [89]; and

(4) Proceedings dismissed: at [93].

- **Criminal:**

Chief Executive, Office of Environment and Heritage v Brummell **[2019] NSWLEC 114** (Preston CJ)

Facts: Mr Brummell (**defendant**) owned a rural agricultural property in New South Wales of approximately 606 hectares. From 11 July 2013 to 23 November 2015, the defendant cleared 423 hectares of native vegetation on the property. The clearing was not carried out in accordance with a development consent or property vegetation plan, in breach of s 12(1) of the *Native Vegetation Act 2003* (NSW) (**Native Vegetation Act**). The defendant pleaded guilty to an offence against s 12(1).

The prosecutor submitted that the defendant carried out the clearing negligently or recklessly. The defendant accepted that he had not looked into the legality of the clearing, however submitted that he had

relied on a statement made by his local member of State Parliament that they were "going to get rid of the native vegetation laws". The defendant submitted that he believed that any relevant laws had been repealed. The defendant submitted that this level of carelessness fell below the standard of negligence or recklessness.

The prosecutor sought an order that half of the fine imposed be paid to the prosecutor pursuant to s 122(2) of the *Fines Act 1996* (NSW) (**Fines Act**).

Issues:

(1) What was the appropriate sentence for the offence committed by the defendant;

(2) Whether the Land and Environment Court, in proceedings in which a fine or other penalty is imposed, can order half of the fine imposed be paid to the prosecutor pursuant to s 122(2) of the Fines Act.

Held: Convicted of offence as charged; fined $248,000, one half of the fine to be paid to the prosecutor pursuant to s 122(2) of the Fines Act, defendant to pay the costs of the prosecutor in the amount of $48,000.

(1) The offence was in the low to middle range of objective seriousness: at [73]; the conduct offended against the legislative object expressed in the offence and thwarted the attainment of the objects of the Native Vegetation Act: at [12]; the clearing of the native vegetation caused a medium level of actual environmental harm, which was substantial for the purposes of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**): at [38]; the offence was committed for financial gain, an aggravating factor under s 21A(2)(o) of the Sentencing Act: at [67]; the risk of environmental harm was foreseeable: at [69]; Mr Brummel could and should have taken practical measures to prevent the risk of harm: at [70]; Mr Brummel had control over the causes that gave rise to the offence: at [72]

(2) The heightened mental states of negligence or recklessness apply to the mental element of the offence of clearing native vegetation under s 12(1) of the Native Vegetation Act, being the absence of lawful authority in the form of a development consent or a property vegetation plan: at [50]; an offence is committed recklessly when the offender had knowledge or foresight of the likelihood of the consequence or circumstance occurring: at [52]; an offence is committed negligently when a reasonable person in the position of the offender would have knowledge or foresight of the risk of the consequence or circumstance, regardless of whether the offender subjectively foresaw the risk: at [53]; the degree of departure from the appropriate standard or care, in order to be negligent under the criminal law, must be sufficient for the court to conclude that the failure to take relevant precaution warrants criminal punishment: at [54];

(3) The defendant was not aware of the risk that the clearing of the native vegetation might not be in accordance with the law: at [56]; an objective reasonable person in the position of the defendant would have foreseen the likelihood that the proposed clearing of native vegetation might be in breach of the law and would have made enquiries as to the lawfulness of the clearing: at [59]; the defendant's conduct fell so short of the standard of care of an objectively reasonable person in his position that it was criminally negligent: at [59];

(4) The subjective circumstances of the offender taken into account included that the defendant had no prior convictions: at [75]; had otherwise been a person of good character: at [76]; pleaded guilty: at [78]; demonstrated genuine remorse and took responsibility for the clearing: at [91]; and had assisted the authorities: at [93];

(5) Taking into account the relevant objective and subjective circumstances of the offence and the defendant as the offender and the purposes of sentencing, the appropriate sentence was $320,000, reduced to $248,000 for the utilitarian value of the guilty plea: at [101]; and

(6) The power in s 122(2) of the Fines Act is able to be exercised by the Land and Environment Court in proceedings in which a fine or other penalty is imposed for a statutory offence and at the time of imposition of the fine or other penalty: at [111].

Chief Executive, Office of Environment and Heritage v Traikaero Pty Ltd; Chief Executive, Office of Environment and Heritage v Woods **[2019] NSWLEC 90** (Preston CJ)

Facts: Traikaero Pty Ltd (**Traikaero**) owned a rural property in New South Wales used for farming. Mr Woods was the sole director of Traikaero. Between 29 November 2015 to 6 April 2016, Traikaero and Mr Woods directed a contractor to clear native vegetation on the property. The total area cleared was approximately 264 hectares, with an additional 218 paddock trees cleared elsewhere on the property.

The clearing was not carried out in accordance with a development consent or property vegetation plan, in breach of s 12(1) of the *Native Vegetation Act 2003* (NSW) (**Native Vegetation Act**). Traikaero and Mr Woods were each charged with an offence against s 12(1). Each pleaded guilty.

Issues: What were the appropriate sentences for the offences committed by Traikaero and Mr Woods.

Held: Traikaero convicted of offence as charged; Traikaero fined $170,000; Mr Woods convicted of offence as charged; Mr Woods fined $170,000; the defendants to pay costs of the prosecutor:

(1) The offences against s 12 of the Native Vegetation Act were in the low to middle range of objective seriousness: at [58];

   (a) the actions taken by the defendants offended against the legislative objective expressed in the statutory offence and thwarted the attainment of the objects of the Native Vegetation Act: at [16];

   (b) the clearing of the native vegetation on the property caused actual environmental harm in removing the particular native vegetation cleared and by removing habitat for other species of fauna and flora, including threatened species: at [32]; the environmental harm caused was of medium significance and substantial for the purposes of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**);

   (c) while the motive for clearing is often financial gain, financial gain is not an inherent characteristic of the offence against s 12 of the Native Vegetation Act: at [46]; the offences were committed for financial gain, an aggravating factor for the purposes of s 21A(2)(o) of the Sentencing Act: at [52];

   (d) the risk of harm caused or likely to be caused to the environment was foreseeable: at [53]; practical measures could and should have been taken to prevent the risk of harm: at [55];

   (e) the defendants had control over the causes that gave rise to the offence and the environmental harm: at [57];

(2) The subjective circumstances of the offenders taken into account included:

   (a) neither defendant had any prior convictions, a mitigating factor under s 21A(3)(e) of the Sentencing Act: at [60];

   (b) Mr Woods has otherwise been a person of good character, a mitigating factor under s 21A(3)(e) of the Sentencing Act: at [61];

   (c) the defendants pleaded guilty at an early opportunity, although some delay reduced the utilitarian benefit of the plea: at [68]; the appropriate discount for the pleas of guilty was slightly lower than the maximum, at 22.5%: at [70];

   (d) the defendants accepted responsibility for their actions and endeavoured to make reparation for the harm caused by the offences they committed: at [76]; the defendants showed genuine remorse, a mitigating factor under s 21A(3)(i) of the Sentencing Act: at [71], [76];

   (e) the defendants provided assistance to the prosecutor, a law enforcement authority: at [77];

(3) Taking into account the objective circumstances of the offences, the subjective circumstances of the offenders and the purposes of sentencing including punishment, retribution and denunciation, the appropriate sentence was $300,000, reduced to $232,500 for the utilitarian value of the guilty plea: at [84];

(4) Where the offenders are an individual and company that the individual owns, the total penalties may need to be adjusted to recognise that the multiplicity of offenders is accidental and unrelated to the

merits of the case: at [90]-[91]; the aggregate of the two penalties should be reduced to lessen, but not eliminate the effect on the individual by him having to pay both of the fines: at [93]; an appropriate allowance for the effect of the total penalties, while still reflecting the total criminality before the Court was to reduce the aggregate of the fines from $465,000 to $340,000: at [98]; where no particular reason has been advanced to justify any particular apportionment between the defendants, an equal split is appropriate: at [105].

Environment Protection Authority v CPB Contractors Pty Limited **[2019] NSWLEC 134** (Pain J)

Facts: CPB Contractors Pty Ltd (**defendant**) pleaded guilty to four offences against s 129(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The defendant was the holder of an environmental protection licence which permitted it to undertake road construction at the new M5 St Peters Interchange (part of the WestConnex motorway scheme) at St Peters in Sydney (**premises**). The premises was formerly used for waste landfill. The offences occurred when the defendant caused an offensive odour to be emitted from the premises, associated with leachate resulting from water coming into contact with waste at the premises.

Issue: What were the appropriate sentences for the offences against s 129(1) of the POEO Act.

Held: Defendant convicted of four offences against s 129(1) of the POEO Act; pursuant to s 248(1) of the POEO Act; defendant to pay prosecutor's costs and expenses reasonably incurred during the investigation of the offences in the amount of $10,000; pursuant to s 257B of the *Criminal Procedure Act 1986* (NSW); defendant to pay prosecutor's costs in the agreed amount of $140,000; pursuant to s 250(1)(e) of the POEO Act; defendant to pay $295,000 to the Environmental Trust; defendant to publish details of the offences in various ways pursuant to subs 250(1)(a) and (b) of the POEO Act: at [91].

(1) The objective seriousness of the offences was at the upper end of the mid-tier range: at [61]:

(a) *Maximum penalty* - $1,000,000 pursuant to s 132(a) of the POEO Act: at [37];

(b) *Reasons for committing the offences* - no allegation of intention, recklessness or negligence was made by the prosecutor: at [39];

(c) *Environmental harm* - harm caused was substantial and extensive: at [41]-[50];

(d) *Foreseeability of harm - practical measures to prevent harm*; *control over causes of the offences* - defendant had ultimate control of the premises from which the offensive odour emanated and the odour was caused by waste beneath the premises being exposed to air by works carried out by the defendant. The measures the defendant had in place to prevent the odour harm were inadequate to deal with the level of leachate that was foreseeable in the event of heavy and sustained rainfall: at [51]-[60]. A matter within the defendant's control was ensuring that it had appropriate expertise on such a large and complex project on a challenging site: at [60].

(2) Subjective circumstances:

(a) *Early plea of guilty* early plea of guilty entered (albeit not at the earliest opportunity): at [63]-[66];

(b) *No prior convictions* the defendant had no prior convictions for environmental offences: at [67];

(c) *Good character* the defendant was found to be of good character: at [68]-[69];

(d) *Unlikely to reoffend* no prior convictions and considerable resources were made available to deal with the substantial operational challenges which resulted in the offences: at [70];

(e) *Genuine remorse* the defendant was found to be remorseful for the offences: at [71]-[72]; and

(f) *Assistance to authorities* full cooperation with the prosecutor's investigation, and cooperation through agreeing to a statement of facts and the agreed expert position statement: at [73].

Environment Protection Authority v Davis **[2019] NSWLEC 79** (Pain J)

(related decision: *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWLEC 72 (Pain J))

Facts: Mr Davis (**defendant**) pleaded guilty to five charges under s 66(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) arising from the provision of false information in four quarterly reports and an annual return to the Environment Protection Authority (**EPA**) as required by conditions of an environment protection licence over a 12-month period. Pursuant to s 169(1) of the POEO Act, the defendant's liability for these charges arose from five s 66(2) charges of Wollondilly Abattoirs Pty Ltd (**Wollondilly Abattoirs**). At the time of the offences, the defendant was a person concerned in the management of Wollondilly Abattoirs as the general manager. The maximum penalty for an offence under s 66(2) of the POEO Act is $250,000, in the case of an individual.

Issue: What were the appropriate sentences for the offences against s 66(2) of the POEO Act.

Held: Defendant convicted of five offences under s 66(2) of the POEO Act; fined $12,000 in total; ordered to pay $40,000 for the EPA's costs:

(1) The objective seriousness of the offences was at the high end of low objective seriousness: at [72]:

(a) *Nature of the offence* - the supply of false or misleading information undermined the regulatory objectives of the POEO Act: at [36];

(b) *Defendant's state of mind in committing the offences* - there was no evidence of who created all the false documents the subject of the charges. The then office manager of Wollondilly Abattoirs admitted that they created two false quarterly reports and the annual return. The then office manager was responsible for the provision (but not necessarily preparation) of all the false information to the EPA. The defendant did not check any of the reports before they were sent off. The defendant was not reckless because according to the evidence he did not suspect that any unlawful activity was occurring. He was adamant that he obtained all the necessary samples and believed these had been sent off by the then office manager for analysis at the lab and that appropriate invoices were in the office computer records. Neither was the defendant criminally negligent: at [41]-[62];

(c) *Environmental harm* - no evidence of actual environmental harm over the charge period because Wollondilly Abattoirs did not provide the EPA with any genuine results of analysis of effluent samples collected on the premises throughout this period: at [66];

(d) *Practical measures that could have been put in place to prevent harm and control over the cause of the offence* - the defendant could have ensured testing carried out was sent to Australian Laboratory Services and put in place a series of checks and balances to ensure no false information could be included in the reporting documents. Fraudulent reporting to this extent was not an obvious risk that the defendant could have been expected to be aware of: at [68], [70];

(e) *Foreseeability of risk of harm* - the defendant could have reasonably foreseen that if false reporting information was provided to the EPA there was a real possibility that harm could be caused to the environment as any potential pollutants would be unmonitored: at [69];

(2) *Subjective circumstances*: The defendant had no prior convictions; was found to be of good character; had good prospects of rehabilitation; was unlikely to reoffend; there was an absence of expression of genuine remorse; he had pleaded guilty at an early stage in the proceedings, and provided assistance to the EPA by making admissions of facts for the purposes of the hearing on sentence and voluntarily engaged in an interview with the EPA: at [80]-[87].

Environment Protection Authority v Ridley AgriProducts Pty Limited **[2019] NSWLEC 119** (Robson J)

Facts: Ridley AgriProducts Pty Limited (**Ridley**) pleaded guilty to two charges against s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) in that it failed to operate a pump installed at its premises in a proper and efficient manner, contrary to a condition in an environment protection licence it held. The contraventions arose from two separate incidents in June and October 2017 in which wastewater containing ammonia flowed into Dalgetys Creek from the premises where Ridley operated a rendering plant (respectively the **June offence** and the **October offence**). While there was some factual overlap, there were two distinct proceedings before the Land and Environment Court for two discrete offences and the circumstances of each incident and the consequential harm were different.

It was agreed between the parties that, based on water samples from Dalgetys Creek at a sampling point in Marramarra National Park, the water quality of the creek was already significantly degraded prior to the offences.

Issue: What were the appropriate sentences for the offences against s 64(1) of the POEO Act.

Held: Ridley convicted of each offence; in lieu of a fine for each offence, Ridley ordered to pay $52,500 to the Environmental Trust, $40,000 for the prosecutor's professional costs and $2,385 for the prosecutor's investigation costs; publication orders made:

(1) The actions of Ridley and the consequences thereof in relation to each offence offended against the legislative objectives enshrined in s 3 of the POEO Act: at [49];

(2) Given the Statement of Agreed Facts on Environmental Harm, the discharge arising from the June offence caused actual environmental harm. While the evidence was not sufficient to establish beyond reasonable doubt that the harm caused was substantial for the purpose of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**), s 241(1)(a) of the POEO Act was engaged: at [59], [62];

(3) The October offence had the potential to cause harm to aquatic organisms, notwithstanding the fact that the extent of the harm was uncertain. It was not proved beyond reasonable doubt that the October offence resulted in actual environmental harm: at [66];

(4) The prosecutor failed to establish beyond reasonable doubt that Ridley acted recklessly or negligently in committing the June offence. The October offence was committed negligently, but not recklessly: at [74]-[75];

(5) The harm caused or likely to be caused to the environment in the event of discharges occurring was foreseeable: at [77];

(6) Given the circumstances that led to the offences, and in particular the fact that there were no processes or procedures in place to respond to dam-overflow events or manage dam water levels, and given that appropriate procedures and practices were later adopted, there were practical measures to prevent the risk of harm: at [81];

(7) Ridley had ultimate control over the causes that gave rise to the offences: at [82];

(8) Each offence was in the middle range of low objective seriousness: at [85];

(9) Ridley was entitled to the maximum discount of 25% to the sentence otherwise imposed in each matter for its early guilty pleas: at [88];

(10) It was accepted that Ridley took relatively expeditious action subsequent to each incident and that such actions were indicative of contrition and remorse: at [95];

(11) Ridley did not have prior convictions for any environmental offence: at [96];

(12) Ridley cooperated with the prosecutor at all stages during the investigation of the proceedings, a mitigating factor pursuant to s 21A(3)(m) of the Sentencing Act: at [98];

(13) Ridley was unlikely to reoffend, given the actions it subsequently took - a mitigating factor under s 21A(3)(g) of the Sentencing Act: at [100];

(14) While specific deterrence was less relevant, given the finding regarding Ridley's likelihood of reoffending, general deterrence was an important consideration: at [102];

(15) While there may not have been a "continuity of conduct" normally considered when applying the principle of totality, there was some overlap between the offences which was taken into account when determining the appropriate penalties: at [110];

(16) The appropriate penalty for each offence was $70,000. The amounts were reduced for the utilitarian value of Ridley's early guilty pleas. The aggregate amount of the fines, being $105,000, was just and appropriate in the circumstances: at [114];

(17) The monetary penalties imposed were to be paid to the Environmental Trust established under the *Environmental Trust Act 1998* (NSW) for general environmental purposes pursuant to s 250(1)(e) of the POEO Act: at [115]; and

(18) It was appropriate to make a publication order in respect of each offence, generally, and in the form sought by the prosecutor: at [116].

Environment Protection Authority v Sydney Water Corporation **[2019] NSWLEC 100** (Pepper J)

Facts: Sydney Water Corporation (**Sydney Water**) pleaded guilty to two water pollution offences under s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and one offence of failure to comply with an environment protection license (**EPL**) condition under s 64(1) of the POEO Act (**EPL offence**). All three offences related to an incident during which Sydney Water caused untreated sewage to discharge into Mill Stream near Botany, which then travelled downstream to Foreshore Beach in Botany Bay. The discharges occurred during desilting works on the Southern and Western Suburbs Ocean Outfall Sewer (**sewer**). In order to carry out the desilting works safely, Sydney Water installed flow isolations around the section of the sewer to be desilted. The presence of the flow isolations caused the sewer to overflow and discharge into Mill Stream overnight when no workers were present.

Sydney Water held an EPL for the premises for the licensed activity of "sewage treatment". The EPL permitted sewage discharges into Mill Stream during wet weather but not during dry weather. The total discharge period was from 22 May to 16 June 2017; however, there was a period of wet weather from 6 to 10 June 2017 during which the discharges were lawful under the EPL. Sydney Water became aware of the discharges on 5 June 2017. However, due to the subsequent wet weather, it was unable to fully remove the flow isolations, thereby stopping the unlawful discharges, until 16 June 2017.

The first water pollution offence related to the unlawful discharges which occurred between 22 May and 6 June 2017. The second water pollution offence related to the unlawful discharges which occurred between 11 and 16 June 2017. The EPL offence was for a breach of a condition of the EPL that Sydney Water must carry out the licensed activity in a competent manner.

Issues:

(1) Determination of the appropriate sentences to be imposed on Sydney Water;

(2) Whether the principle in *R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383 applied to the EPL offence preventing the Court from considering Sydney Water's state of mind in the commission of that offence; and

(3) Whether Sydney Water was criminally negligent in the commission of the offences.

Held: Sydney Water to pay $150,000 to Bayside Council for the purpose of a local bushland regeneration project; pay $119,500 to the Environmental Trust for general environmental purposes; pay the Environment Protection Authority's investigation and professional costs; and publish the details of its conviction and sentence in three newspapers, as well as on its Facebook, Twitter, and Instagram accounts:

(1) The *De Simoni* principle prevented the Court from taking into account whether or not Sydney Water was criminally negligent in the commission of all three offences because negligence was an element

of a more serious offence with which Sydney Water had not been charged, namely, the offence of wilful or negligent discharge of a substance in a manner that harms the environment under s 116 of the POEO Act. The existence of s 116 precluded the Court from taking into account Sydney Water's state of mind in respect of the EPL offence (*Environment Protection Authority v Orica Australia Pty Ltd (Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 at [145] reconsidered). However, the *De Simoni* principle did not preclude taking into account Sydney Water's mental state in determining the objective seriousness of the offences: at [166]-[167];

(2) Sydney Water, in any event, had not acted negligently in the commission of the three offences. A more preferable articulation of the test for criminal negligence was whether there has been such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that harm would follow that the doing of the act or omission merited criminal punishment: at [188]. While Sydney Water had failed to take a number of reasonable steps which could have prevented the incident, because it had a plan in place to manage the risk of overflow (albeit inadequate) and because it was unaware of the overflows until 5 June 2017, its conduct could not be characterised as criminally negligent: at [190]-[191];

(3) Despite the degraded state of the receiving waters, the first water pollution offence caused substantial harm to the environment (including amenity impacts) and had the potential to harm human health. The discharges lasted for 16 days during which hundreds of millions of litres of sewage entered Mill Stream. The harm was foreseeable and could have been avoided if practical measures were taken. Therefore, the offence was at the upper end of the moderate range of objective seriousness: at [281];

(4) The second water pollution offence was of slightly lower objective seriousness than the first due to the shorter duration and the influence of the intermediate wet weather, but was still characterised as moderately objectively serious: at [282];

(5) The EPL offence was characterised as within the upper range of moderate objective seriousness, for reasons similar to those for the water pollution offences: at [283];

(6) Sydney Water benefited from a number of factors in mitigation, including that it was genuinely contrite and remorseful; it had assisted the EPA; it had entered an early plea of guilty; and it was of good character: at [294]-[296] and [310];

(7) Sydney Water's four prior convictions constituted a factor in aggravation: at [307]; and

(8) Because all three offences arose from the same incident, and because the first and second water pollution offences would have constituted a single offence were it not for the period of wet weather from 6 to 10 June 2017, the totality principle applied to reduce the monetary penalty imposed for the second water pollution offence and the EPL offence.

***Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWLEC 72** (Pain J)

(related decision: *Environment Protection Authority v Davis* [2019] NSWLEC 79 (Pain J))

Facts: Wollondilly Abattoirs Pty Ltd (**Company**) pleaded guilty to five charges concerning the supply of false reports over a 12-month period required by conditions of an environment protection licence (**EPL**) to the Environment Protection Authority (**EPA**), an offence under s 66(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The Company also pleaded guilty to a further charge under s 211(2) concerning the knowing supply of false information in response to a s 193 notice issued by the EPA under the POEO Act requiring the provision of information. The maximum penalty for corporations for offences against ss 66(2) and 211(2) of the POEO Act is $1,000,000.

Issue: What were the appropriate sentences for the offences against ss 66(2) and 211(2) of the POEO Act.

Held: Pursuant to s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**), Wollondilly Abattoirs was convicted of five offences against s 66(2) of the POEO Act and an offence against s 211(2) of the POEO Act; ordered to pay $40,000 for the EPA's costs: at [79]:

(1) The objective seriousness of the offences was at the low end of the low range of objective seriousness: at [56].

(a) *Nature of the offence* - the offences undermined the regulatory framework of the POEO Act: at [34]-[37];

(b) *Defendant's state of mind in committing the offences* - the Company's state of mind was gauged by reference to its directors as s 169C of the POEO Act enables. The directors were unaware of the provision of false information in relation to all the offences. The behaviour of the fraudulent employees who supplied the false reports was well outside what could reasonably be anticipated by them, particularly in a small office of a longstanding local business operating in the area in which they all lived: at [38]-[46];

(c) *Environmental harm* - no evidence of actual environmental harm over the charge period because the Company did not provide the EPA with any genuine results of analysis of effluent samples taken on the premises throughout this period: at [50]-[51];

(d) *Practical measures that could have been put in place to prevent harm and control over the cause of the offence* - practical measures could have been taken by the board of the Company to put in place a series of checks and balances to try to ensure no false information could be included in the reporting documents. It was not reasonably foreseeable that the Company's employees would engage in the kind of fraudulent behaviour over a lengthy period of 12 months which gave rise to the offences: at [52], [54];

(2) Subjective circumstances:

(a) *No prior convictions* the defendant had no prior criminal convictions: at [66];

(b) *Good character* the unusual circumstances of the offences were entirely different from those resulting in penalty infringement notices the Company received for breaches of s 64 of the POEO Act: at [67]-[68];

(c) *Unlikely to reoffend* the Company, by its substantial actions taken since the commission of the offences, demonstrated that it was unlikely to reoffend. The implementation of a new and comprehensive system of management for compliance with its EPL was particularly relevant: at [73];

(d) *Remorse* the Company's speed and efficiency in taking remedial action to address the cause of the offences supported the conclusion that the Company was contrite: at [74];

(e) *Early plea of guilty* pleaded guilty at the first reasonable opportunity: at [75];

(f) *Assistance to authorities* directors of the Company voluntarily took part in interviews with officers of the EPA: at [76].

***Georges River Council v WK Strong Pty Limited; Georges River Council v Awada* [2019] NSWLEC 97** (Preston CJ)

Facts: A builder, Mr Awada, and his company, WK Strong Pty Ltd (**WK Strong**), pleaded guilty to five offences against the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) relating to cutting trees without development consent and breaching conditions of a development consent concerning tree protection measures.

WK Strong was carrying out a dual occupancy development. WK Strong engaged contractors to lop specified branches of two Blackbutt trees, referred to as Tree 1 and Tree 2. The contractor cut additional branches of both trees. Development consent had not been granted for the lopping of the additional branches, in breach of the EP&A Act. Mr Awada participated in instructing the contractor to prune Tree 2 and was also charged with an offence against the EP&A Act.

The development consent for the dual occupancy development included conditions that required tree protection measures to be taken for specified trees. One of these trees, a magnolia tree referred to as Tree 12, was required to be transplanted from one location to another location anywhere on the property. Another condition of the consent prohibited construction in the structural root zone and tree protection

area of another Blackbutt tree, referred to as Tree 9. These conditions were not complied with. WK Strong attempted to transplant Tree 12, but it did not survive the transplantation process. Excavation works were carried out in the structural root zone of Tree 9.

Trees 2 and 9 remained in good health following the works. Tree 12 died during the transplantation. Two years later, Tree 1 died. The prosecutor alleged that the death of Tree 1 was substantially caused by the unlawful pruning of the tree.

Issues: What were the appropriate sentences for each of the offences against the EP&A Act.

Held: WK Strong convicted of four offences against the EP&A Act; fined $15,000 in relation to the offence concerning Tree 1; fined $30,000 in relation to the offence concerning Tree 2; fined $45,000 in relation to the offence concerning Tree 9; fined $5,000 in relation to the offence concerning Tree 12; Mr Awada found guilty of the offence against the EP&A Act as charged; proceedings against Mr Awada dismissed pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**); WK Strong and Mr Awada to pay the costs of the prosecutor:

(1) The four offences committed by WK Strong and the one offence committed by Mr Awada were of low objective seriousness: at [49]; actual environmental harm was caused to Trees 1 and 2 by their branches being lopped: at [20], [28]; the prosecutor did not prove beyond reasonable doubt that the death of Tree 1 was caused by the commission of the offence: at [27]; actual environmental harm was caused to Tree 9 by the severing of six roots greater than 100 millimetres in diameter: at [35]; the harm caused by the death of Tree 12 was mostly offset by planting a replacement magnolia tree: at [40]; the harm caused by the commission of these offences was not substantial for the purposes of s 21A(2)(g) of the Sentencing Act: at [27], [31], [35], [40]; the evidence did not establish that the offences were committed intentionally, negligently or recklessly: at [42]; the evidence did not establish that the offences were committed for financial gain: at [43]; that the actual harm caused to the trees was small did not mean that there was not a foreseeable risk of harm: at [44]; there were practical measures that could have been taken to minimise the risk of harm to the trees: at [45]-[47]; the offenders had control over the causes that gave rise to the offences: at [48];

(2) The subjective circumstances of the offenders included that the offenders had no prior convictions: at [57]; had otherwise been of good character: at [58]; pleaded guilty at an early time: at [60]; demonstrated genuine remorse: at [67]; were unlikely to reoffend: at [67]; and had assisted the authorities: at [68];

(3) The purposes of sentencing included punishment, retribution, denunciation, restoration and reparation: at [72]-[73];

(4) Synthesising the objective circumstances, subjective circumstances, and the purposes of sentencing, the appropriate sentences for WK Strong were $80,000 for the offence concerning Tree 9, $60,000 for the offence concerning Tree 2, $40,000 for the offence concerning Tree 1, and $20,000 for the offence concerning Tree 12: at [78]; the appropriate discount for the utilitarian value of the early guilty plea was 25%: at [60];

(5) The totality principle required the court to review the aggregate sentence for multiple offences and consider whether it is just and appropriate, reflecting the total criminality before the court: at [80]; for the offences concerning Trees 1 and 2, the considerable degree of overlap between the two offences committed by WK Strong lopping branches of two nearby trees in the one course of conduct required an adjustment of the aggregate sentence: at [84]; for the offences concerning Trees 12 and 9, a smaller adjustment was appropriate to reflect that the particular conduct involved breaching the same condition of the development consent, in different ways: at [85]; and

(6) Having regard to the particular circumstances of the offence committed by Mr Awada, and the particular circumstances of Mr Awada, a dismissal pursuant to s 10 of the Sentencing Act was appropriate: at [95].

Office of Environment and Heritage v Swansbel (Pastoral) Pty Ltd **[2019] NSWLEC 69** (Pain J)

Facts: Swansbel (Pastoral) Pty Ltd (**Swansbel**) pleaded guilty to a charge of clearing 320 hectares of native vegetation in 2013 contrary to s 12(2) of the *Native Vegetation Act 2003* (NSW) (**Native**

Vegetation Act) on its property located in Merah North, near Narrabri (**Property**). The maximum penalty for an offence under s 12(2) of the Native Vegetation Act was $1,100,000 per s 126 of the *Environmental Planning and Assessment Act 1979* (NSW) at the date of the offence and s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**).

Issue: What was the appropriate sentence for the offence against s 12(1) of the Native Vegetation Act.

Held: Swansbel convicted and fined $300,000; ordered to pay one half of the fine to the prosecutor pursuant to s 122(2) of the *Fines Act 1996* (NSW); ordered to pay the prosecutor's costs in the amount of $40,000:

(1) The offence was at the mid-range of moderate objective seriousness: at [38]:

(a) *Nature of the offence* Swansbel's conduct was contrary to nearly all the objects of the Native Vegetation Act outlined in s 3. Swansbel's submission that the clearing promoted the principles of ecologically sustainable development because the cleared land would be farmed using sustainable practices was rejected. Clearing land to crop cotton is diametrically contrary to the objectives of the Native Vegetation Act: at [25]-[28];

(b) *Environmental harm* Swansbel's clearing caused significant harm to the environment by loss of native vegetation and impact on ecological communities, including critically endangered, endangered and vulnerable species. Because the environmental harm was substantial, it was considered to be an aggravating factor under s 21A(2)(g) of the **Sentencing Act**: at [29]-[31];

(c) *Defendant's state of mind in committing the offence* the director of Swansbel (and therefore Swansbel) knew that approval was required before clearing but deliberately did not gain approval: at [32]-[34];

(d) *Reasons for committing the offence* it could be inferred that Swansbel committed the offence for financial gain because it cleared the land to make it available for crops, an aggravating factor pursuant to s 21A(2)(o) of the Sentencing Act: at [35];

(e) *Foreseeability of risk of harm* high: at [36];

(f) *Practical measures that could have been put in place to prevent harm and control over the cause of the offence* Swansbel had complete control of the cause of the offence and should have refrained from clearing the native vegetation on the Property until authority in the approved form was obtained: at [37].

(2) Subjective circumstances:

(a) *No prior conviction* Swansbel had no record of prior convictions: at [41];

(b) *Good character* Swansbel was found to be of good corporate character. It is a family run company that has grown from years of hard work and sensible land management. Swansbel is well-liked by its employees. Swansbel's directors are upstanding members of their local community and the Australian cotton industry. Swansbel is committed to sustainable agricultural practices: at [42];

(c) *Prospects of rehabilitation* efforts to rehabilitate land as a consequence of the offence is material to demonstrating whether an offender has good prospects of rehabilitation as a defendant charged with s 12(2) of the Native Vegetation Act. Swansbel demonstrated an intention to work with the prosecutor to ensure that all remaining vegetation on the Property is preserved for the benefit of the environment into the future. However, this did not directly address rehabilitation to ameliorate the environmental impacts of the offence. There was no evidence of efforts being taken to manage native vegetation on neighbouring land: at [43]-[44];

(d) *Unlikely to reoffend* Swansbel was found to be unlikely to reoffend in light of a director's affidavit and character references: at [45];

(e) *Remorse* a director of Swansbel expressed regret on behalf of the company for the decision to unlawfully clear native vegetation and described the impact that the proceedings had on him and his family. This did not unequivocally convey remorse concerning the substantial environmental harm that the clearing caused. No remediation plan was proposed by Swansbel and the remediation order issued by the prosecutor was appealed. Swansbel's expression of remorse was therefore qualified: at [46]-[49];

(f) *Early plea of guilty* Swansbel pleaded guilty at the first reasonable opportunity and therefore obtained a 25% discount in penalty: at [50]-[51];

(g) *Assistance to authorities* Swansbel cooperated with the prosecutor at all stages during its investigation: at [52];

(3) *Extra-curial punishment* Swansbel's submission that the Land and Environment Court, in sentencing, should consider the cost associated with remediating the land (as it is compelled to do so by the remediation order) as a form of extra-curial punishment (*R v Daetz; R v Wilson* [2003] NSWCCA 216; *Einfeld v The Queen* [2010] NSWCCA 87 at [86]) was rejected. Any cost associated with compliance with the remediation order is an inevitable outcome of the various statutory powers available to the prosecutor. Any cost or inconvenience incurred in taking steps to return the land to its former state cannot be viewed as a form of punishment (extra-curial or otherwise), rather it represents the undoing of the detriment caused by Swansbel's conduct. Whether regulatory action outside a sentencing process amounts to extra-curial punishment will need to be determined in each case: at [57]-[60].

***Secretary, Department of Planning and Environment v Sell & Parker Pty Ltd (No 2)* [2019] NSWLEC 73 (Robson J)**

(related decision: *Department of Planning and Environment v Sell & Parker Pty Ltd* [2019] NSWLEC 48 (Robson J))

Facts: The Secretary, Department of Planning and Environment (**prosecutor**) filed a motion seeking leave to further amend the Amended Summons filed in respect of the 2016 charge as a result of Robson J's earlier decision in *Secretary, Department of Planning and Environment v Sell & Parker Pty Ltd* [2019] NSWLEC 48, wherein, having found that the formulation of the Amended Summonses in respect of each of the 2016 charge and the 2017 charge was duplicitous, he allowed the prosecutor the opportunity to seek leave to further amend the Summonses.

Sell & Parker Pty Ltd (**defendant**) agreed to the amendments sought in respect of the 2017 charge and the prosecutor was granted leave to further amend the Amended Summons in respect of the 2017 charge. Only the motion in respect of the 2016 charge was before the Land and Environment Court.

The Summons in respect of the 2016 charge relevantly contained the following particulars:

> **Manner of breach of the Development Consent**
>
> …
>
> Contrary to Condition A8, the defendant received more than 90,000 tonnes of waste (on a weekly pro rata basis) at the Site between 26 May 2016 and 31 December 2016, as set out in Sch A to this Summons.

The Summons annexed Sch A, a three-column table, containing the defendant's waste data. For each week stipulated in the first column, the amount of waste alleged to have been received was stated in the second column, and the corresponding alleged "exceedance of 90,000 limit on weekly pro-rata basis (tonnes)" was stated in the third column. Schedule A also contained data on the number of weeks the weekly pro rata amount was exceeded, being 31 weeks during the 2016 charge period.

The prosecutor relied on ss 16(2), 20(1)(a) and 21(1) of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) and/or s 68(1) of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) to amend the Amended Summons by removing Sch A in its entirety and amending the particulars to the charge so it was clear that a breach of the annual limit was pleaded. The defendant opposed the amendment on the basis that it would result in a new charge being brought outside the prescribed statutory limitation period. The defendant submitted that Condition A8 imposed a single annual limit on the receipt of waste and that the Amended Summons pleaded multiple breaches of the weekly pro-rata limit, not a breach of the annual limit such that the further Amended Summons creates a new charge, being a breach of the annual limit. The defendant also submitted that the Amended Summons could not be cured by further amendment as it disclosed no offence whatsoever.

Issue: Whether the amendment sought created a new charge outside the prescribed statutory limitation period.

Held: Prosecutor granted leave further to amend the Amended Summons in respect of the 2016 charge; costs reserved:

(1) In the earlier judgment, it was held that the schedules annexed to each of the Summonses caused the Summonses to be duplicitous. By abandoning the tabular formulation in the annexure, the prosecutor changed one aspect of the particulars and did not seek to add any new material or lay a fresh charge: at [39];

(2) Schedule A, although not felicitously worded or presented, did provide for a "total" annual alleged tonnage exceedence of waste received during the 2016 charge period: at [42];

(3) The Amended Summons could not be characterised as one that disclosed "no offence whatsoever" on a proper reading of the earlier judgment given the finding that it was duplicitous on the grounds that it pleaded both breaches of the weekly pro-rata limit and a breach of the annual limit for receiving waste: at [45];

(4) Injustice would not result from the amendment primarily because there was no change to the essential nature of the offence and the proceedings were still in their early stages: at [46];

(5) While there was a distinction between a charge alleging breaches of the pro rata weekly limit on receipt of waste and a charge alleging a breach of an annual limit on receipt of waste, the Amended Summons, properly construed, did not necessarily or otherwise abandon a charge alleging a breach of the annual limit: at [47];

(6) As a new offence was not charged by granting leave to the prosecutor to amend further the Summons in the form proposed, the time limit provided by the *Environmental Planning and Assessment Act 1979* (NSW) was not relevant and did not require consideration: at [48];

(7) The proposed amendments, properly understood, simply removed references to any breaches of the weekly limit so that the only charge remaining was a breach of the annual limit, a charge which was always pleaded albeit in a different form: at [49];

(8) Even if his Honour was not of the view expressed at [49], he would have considered that leave could be granted to the prosecutor to amend the Summons further pursuant to either ss 20 or 21 of the Criminal Procedure Act, as the Summons could be amended without any injustice to the defendant to meet the circumstances of the case. Further, s 16(2) of the Criminal Procedure Act applied: at [50]; and

(9) The proposed amendment was necessary in the interests of justice, pursuant to s 68(1) of the Court Act: at [51].

- **Appeals from Local Court:**

Lau v NSW Department of Industry **[2019] NSWLEC 77** (Pain J)

Facts: On 1 February 2019, the Batemans Bay Local Court convicted Mr Lau (**appellant**) of one count of possessing more than the "possession limit of any fish", pursuant to s 18(2) of Pt 2 General fisheries management of the *Fisheries Management Act 1994* (NSW) (**Fisheries Management Act**). He was fined $2,000 and ordered to pay $3,383 for the prosecuting authority's professional costs.

On 1 March 2019, the appellant filed a Summons commencing Class 6 proceedings in the Land and Environment Court (**LEC**) to appeal his conviction and sentence in the Local Court. The matter was listed in the usual Friday list on the first return date of 10 May 2019. The NSW Department of Industry (**respondent**) filed a Notice of Motion on 10 May 2019 seeking orders that the proceedings be remitted to the District Court, relying on ss 77 or 31 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) or the LEC's inherent jurisdiction. An alternative order that the appeal be dismissed was also sought. The respondent submitted that the LEC had no power to hear an appeal from the Local Court in relation to offences under s 18(2) of the Fisheries Management Act. Any appeal of Mr Lau must be to the District Court.

Issue:

(1) Whether the LEC had jurisdiction to hear the appeal; and

(2) If not, whether it had power to transfer the proceedings to the District Court.

Held: Appeal dismissed; no order as to costs:

(1) The LEC has jurisdiction to hear appeals from the Local Court with respect to an "environmental offence" pursuant to s 31 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**). "Environmental offence" is defined in s 3 of the Appeal and Review Act as "an offence for which summary proceedings may be taken before the Land and Environment Court … and includes any offence arising under the environment protection legislation within the meaning of the *Protection of the Environment Administration Act 1991*". The only Fisheries Management Act offences which may be dealt with summarily before the LEC are offences under Pts 7 Protection of aquatic habitats and 7A Threatened species conservation or regulations under those parts per s 277(1)(c) of the Fisheries Management Act as referred to in s 21(gb) of the Court Act. Further, environment protection legislation within the meaning of s 3 of the *Protection of the Environment Administration Act 1991* (NSW) does not include the Fisheries Management Act. The LEC has no jurisdiction to hear the appellant's appeal: at [3].

(2) Under s 11 of the Appeal and Review Act, the appellant had an appeal as of right to the District Court. The LEC has no power under the Court Act or any other Act to transfer or remit proceedings to the District Court. The Notice of Motion referred to ss 77 and 31 of the Court Act. Section 77 does not provide a power to transfer proceedings to another court and is concerned with the conduct of the court's internal business. The LEC's power to make an order under s 31 is confined to ensuring that the proceedings are dealt with appropriately according to the class of jurisdiction to which they belong. This section also does not empower the LEC to transfer or remit matters to the District Court. Nor does the LEC have inherent power to remit proceedings to another court. The only order available was to dismiss the proceedings: at [4]-[6].

Maund v Shoalhaven City Council **[2019] NSWLEC 89** (Preston CJ)

Facts: The appellant was convicted in the Local Court of an offence against s 91(5) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) of failing to comply with a clean-up notice.

The appellant had a verbal arrangement with the owner of some land to store items there. The items stored on the property included a range of second hand/scrap materials such as tyres, car doors, shipping containers and assorted pieces of machinery.

Shoalhaven City Council (**Council**) became concerned that the premises were being used as a waste facility in breach of the POEO Act and *Environmental Planning and Assessment Act 1979* (NSW). The Council issued Mr Maund (**appellant**) with a clean-up notice pursuant to s 91(1) of the POEO Act, directing that "[a]ll items brought onto the subject property by or at the direction of [the appellant] are to be removed from the subject property."

Section 91(1)(a) empowered the appropriate regulatory authority to issue a "clean-up notice" directing "an owner or occupier of premises at or from which the authority reasonably suspects that a pollution incident has occurred or is occurring" to take such clean-up actions as specified in the notice within the period specified in the notice. "Pollution incident" was defined in the dictionary to the POEO Act to mean "an incident or set of circumstances during or as a consequence of which there is or is likely to be a leak, spill or other escape or deposit of a substance, as a result of which pollution has occurred, is occurring or is likely to occur. It includes an incident or set of circumstances in which a substance has been placed or disposed of on premises, but it does not include an incident or set of circumstances involving only the emission of any noise."

The appellant removed some, but not all, of the items from the property. The Council issued the appellant with a penalty infringement notice for failing to comply with the clean-up notice. The appellant elected to have the matter dealt with by the Local Court. After being convicted of the offence, the appellant appealed pursuant to s 31(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and**

Review Act). The appellant alleged that the clean-up notice was invalid and therefore the conviction should be set aside.

Issues:

(1) Whether the clean-up notice was not validly issued because the appellant was not an occupier of the premises;

(2) Whether the clean-up notice was not validly issued because the Council did not in fact form the subjective opinion of suspicion that a pollution incident had occurred or was occurring;

(3) In the alternative to (2), whether the clean-up notice was not validly issued because the Council had no evidentiary basis on which to form an opinion of suspicion that a pollution incident had occurred or was occurring; and

(4) Whether the Council had failed to prove that the clean-up notice had not been complied with.

Held: Appeal upheld; conviction set aside:

(1) The appellant was an occupier of the premises: at [23]; it was not necessary to show that he was the only occupier: at [23]; the evidence that the appellant had a verbal arrangement with the owner of the premises to store materials at the premises was sufficient to establish that he was a person with management and control of the premises: at [23];

(2) The Council was required to form a subjective opinion of suspicion that a pollution incident had occurred or was occurring before a clean-up notice could be issued: at [14]; the evidence did not establish that the Council had formed the required subjective suspicion: at [26];

(3) The evidence provided no basis on which a reasonable regulatory authority, in the position of the Council, could suspect that a pollution incident had occurred or was occurring at the premises, so as to enliven the power to issue a clean-up notice: at [31];

(4) The clean-up notice was invalid: at [32]; the conviction should be set aside as the appellant could not be convicted of failing to comply with a clean-up notice that was invalidly issued: at [32]; and

(5) The Council's evidence, that the appellant had removed some but not all of the materials from the property, did not demonstrate that the remaining materials included those that fitted the description in direction 1 of the clean-up notice: at [34]-[35]; the evidence did not establish that the clean-up notice had not been complied with: at [35].

Parry v Andrews **[2019] NSWLEC 86** (Preston CJ)

Facts: Mr Michael Parry (**appellant**) was convicted, in the Local Court at Wentworth, of two offences against s 201(1) of the *Fisheries Management Act 1994* (NSW) (**Fisheries Management Act**) of carrying out reclamation work, without the authority of a permit issued by the Minister. Section 201(1) also made it an offence to carry out dredging work.

Reclamation work was defined in s 198A as "any work that involves: (a) using any material (such as sand, soil, silt, gravel, concrete, oyster shells, tyres, timber or rocks) to fill in or reclaim water land, or (b) depositing any such material on water land for the purpose of constructing anything over water land (such as a bridge), or (c) draining water from water land for the purpose of its reclamation."

The first offence related to the construction of a timber retaining wall inside the banks of the Murray River at Gol Gol. The second offence related to the construction of a concrete boat ramp on the bank of the Murray River which encroached into the river.

The prosecutor contended that the actions taken by the appellant either "filled in" or "reclaimed" water land, under limb (a) of the definition in s 198A. The appellant submitted that to reclaim water land required an element of accretion onto the water land, and to fill in water land required that the water land be filled to the top, thus bringing the material used for filling in above the water.

The appellant had the right to appeal against the conviction under s 31(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**). However, due to an error of his solicitor

commencing the appeal in the wrong court, the appellant did not do so within the prescribed time. The appellant therefore sought leave to appeal pursuant to s 33(1)(a) of the Appeal and Review Act.

Issues:

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

(2) Whether the actions taken by the appellant amounted to "reclamation work" as defined.

Held: Leave to appeal granted; appeal dismissed; appellant to pay respondent's costs of the appeal:

(1) In circumstances where the delay was the result of a simple error made by the appellant's solicitor, it was in the interests of justice to grant leave to appeal: at [5];

(2) Reclaiming water land involves bringing land formerly under water, whether permanently or intermittently, into a condition for cultivation or other use: at [47];

(3) Filling in of water land refers to using material in or on water land, of a nature, in a volume or to an extent that is less than what is involved in reclaiming water land: at [48]; to put any materials as contents into water land, including the water of water land, fills in water land: at [48];

(4) The actions of filling in and reclaiming water land should be construed in the context of the statute and the conservation objectives of the Fisheries Management Act and relevant division: at [52];

(5) The concept of water land includes the water of the water land: at [54]; and

(6) The actions taken by the appellant amounted to "reclamation work": at [55]; the construction of the retaining wall reclaimed water land by transforming the water land formerly under water into a condition for cultivation or other use: at [56]; the construction of the retaining wall filled in part of the water land, being the three dimensional space occupied by the retaining wall structure: at [56]; the construction of the boat ramp covered the soil of the riverbed and riverbank and displaced water, altering the habitat of fish and aquatic vegetation in that area: at [59]; the construction of the boat ramp filled in but did not reclaim the water land: at [59].

- **Contempt:**

***Georges River Council v Stojanovski* (No 3) [2019] NSWLEC 139** (Moore J)

(related proceedings: *Georges River Council v Stojanovski* [2018] NSWLEC 125 (Pepper J); *Georges River Council v Stojanovski (No 2)* [2019] NSWLEC 53 (Sheahan J))

Facts: On 24 March 2018, Georges River Council (**Council**) commenced Class 4 civil enforcement proceedings against Mr Steven Stojanovski (**first respondent**) and Mr Robert Stojanovski (**second respondent**) concerning development at a property in Mortdale where development had been undertaken without development consent and where, pursuant to the *Environmental Planning and Assessment Act 1979* (NSW), such consent was required (*Georges River Council v Stojanovski* [2018] NSWLEC 125). In those proceedings, Pepper J heard the matter and made the declaration that the first respondent had carried out or permitted development without the requisite consent, and ordered that the first respondent be restrained from using sheds on the property without obtaining consent for such a use and that, within 28 days of the order, the first respondent must demolish all unlawfully erected structures on the property.

The first respondent did not demolish the works and, on 30 October 2018, the Council commenced contempt proceedings against the first respondent and was heard by Sheahan J on 15 April 2019 (*Georges River Council v Stojanovski (No 2)* [2019] NSWLEC 53. His Honour found the first respondent guilty of contempt on two counts (**orders 1 and 2**), ordered the first respondent, within 28 days of the order, to demolish all unlawfully erected structures on the property (**order 3**) and also directed that if the first respondent did not comply with the demolition order imposed on him, the Council was directed, within 21 days of that period, to carry out the demolition of unlawfully erected structures (**order 4**). The Council was awarded costs and sentencing was stood over for further directions.

The present proceedings were the sentencing contempt proceedings. As with the earlier proceedings, the first respondent was not present, nor legally represented but, again, as with the earlier proceedings, had been adequately notified of the proceedings. Affidavit evidence provided by the Council showed that the first respondent had significantly (but not completely) complied with the demolition and removal orders made by Sheahan J. This left the Council in an unusual position, in that it was in breach of order 4, which it had sought from the Land and Environment Court (**LEC**). The Council sought an extension of time from the LEC to comply with order 4.

Issues:

(1) Whether the Council should be granted an extension of time to comply with order 4 of the contempt proceedings,

(2) What was an appropriate punishment for the first respondent for his contempt, considering both parties had breached the contempt orders, and

(3) Whether the Council should be awarded costs.

Held: Pursuant to s 98(4)(c) of the *Civil Procedure Act 2005* (NSW), the first respondent ordered to pay Council's costs in the gross sum of $23,083.80; Council's motion that the first respondent be punished for contempt otherwise dismissed:

(1) It was appropriate in the circumstances to grant the Council the extension of time it sought to comply with order 4 of the contempt proceedings: at [27];

(2) Due to the Council advising the LEC, on the final day of hearing, the works mandated by the contempt orders had been completed, and the Council advising the LEC it no longer sought that the first respondent be punished for his failure to comply with the court-ordered timetable in the contempt orders, it was appropriate for the element of the Council's contempt motion regarding punishment be dismissed: at [30]-[33]; and

(3) It was appropriate to make a gross sum order for the lower amount sought by the Council, which excluded costs relating to the Council addressing and rectifying its own breach of order 4 of the contempt proceedings: at [42].

Shoalhaven City Council v Knight **[2019] NSWLEC 138** (Moore J)

Facts: Mr Knight (**respondent**) was the owner of a residential allotment (**site**) on the New South Wales South Coast, within the Shoalhaven City Council (**Council**) local government area. Prior to 2015, the respondent erected a dwelling on the site without development consent being granted by the Council. In addition, the respondent accumulated a number of vehicles, a boat, a caravan and other items on the site.

On 24 January 2014, the council commenced Class 4 proceedings against the respondent, for the construction and occupation of the dwelling without consent under the *Environmental Planning and Assessment Act 1979* (NSW). These proceedings were settled at a mediation resulting in Consent Orders made by Pain J on 1 September 2014, ordering the respondent to comply with obligations including either removing the dwelling or obtaining development consent for the dwelling and removing a number of items from the site, as noted above. The respondent had 12 months to comply with the obligations and, if he did not do so, Council was able to enter the site and remove the identified items in the Consent Orders, and was also able to recover reasonable costs of doing so from the respondent as a debt. On 12 November 2018, the Council filed a Notice of Motion in the Class 4 proceedings seeking that the respondent be punished for contempt of the Consent Orders of 1 September 2014 and punished on a daily penalty basis until he complied with the obligations put on him by those orders.

During the respondent's oral evidence in the proceedings, he admitted his contempt. Also during the taking of the respondent's evidence, it became clear that the respondent had limited financial means and any significant penalty would put a potentially crushing burden on him, his one asset was the site. The respondent did have a potential buyer for the land at an approximate price of $180,000.00. However, the respondent owed the Council, $37,000.00 in back rates, the cost of the clean-up of the site (which the

Council did during the course of proceedings) totalling $17,000.00 and the Council also pressed for their costs of the proceedings, which was approximately $160,000.00.

Issue

(1) What was the appropriate starting penalty for the respondent's contempt;

(2) What was the relevance, if any, of the respondent's capacity to pay any sums resulting from these proceedings; and

(3) What was the appropriate costs order.

Held: The respondent convicted of contempt; fined $1,000; ordered to pay the Council's site clean-up costs; ordered to pay the Council's costs in the gross sum of $158,387.38 within 90 days of the date of the orders:

(1) Although the respondent's contempt was contumacious, his personal circumstances gave some insight into how the contempt occurred: at [70]-[71]. The respondent's conduct was therefore to be characterised as being the middle of the lower range of such offending conduct and the appropriate starting penalty was a fine of $15,000. This should then be reduced by a 15% discount to reflect the guilty plea and the starting penalty was therefore $12,750: at [80].

(2) In the circumstances, and having regard to s 6 of the *Fines Act 1996* (NSW), the fine should be significantly reduced to have appropriate regard to the respondent's immediate financial circumstances and the fact there was no real prospect that those circumstances will improve in any significant fashion. Therefore the appropriate fine was $1,000: at [86]-[87]; and

(3) The Council should be awarded costs on the indemnity basis as the Council was acting within its role as a public authority responsible for the administration of planning laws within its local government area and was not only seeking to punish the respondent for his breach of the orders but, also, to send a message of general deterrence to warn others against doing so: at [96].

- **Civil Enforcement:**

Elanor Investors Limited v Sydney Zoo Pty Limited **[2019] NSWLEC 80** (Pain J)

Facts: Elanor Investors Ltd (**applicant**) runs Featherdale Wildlife Park at Doonside. It commenced Class 4 proceedings seeking declarations of breaches of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) and consequential orders restraining the use of certain marketing material by Sydney Zoo Pty Ltd (**Sydney Zoo**). Sydney Zoo has development consent for a new zoo which is presently under development and has yet to open.

The applicant sought, by Notice of Motion, leave to rely on an Amended Summons and an Amended Points of Claim (**APOC**) which was opposed by Sydney Zoo. The breaches of the EP&A Act were expanded to include the hours of operation and the size of the Australian native animals display upon the opening of the zoo which were said to arise from marketing in breach of conditions.

The Amended Summons sought a declaration that conduct of Sydney Zoo amounted to a breach of the development consent. "Conduct" was not defined in the Summons. Additional declarations of breaches of conditions were sought in the Amended Summons and orders including the cessation of the distribution of marketing material attached to the Summons and a catch-all for additional market material.

According to the applicant, the marketing material included a statement that earlier opening hours can be negotiated which was not in accordance with the conditions of consent. According to Sydney Zoo, a modification application had been made which would allow for earlier opening hours for certain activities if approved.

The APOC alleged conduct described as being in breach of the development consent concerning the number of Australian species and the requirement that two thirds of the nominated exotic species be displayed upon the opening of the new zoo.

The applicant submitted the amendments would clarify the scope of the case and address the mismatch identified between the Summons and the Points of Claim. Sydney Zoo submitted that the allegations of the APOC were too vague and had no basis in fact, and the amendments would facilitate a wasteful exercise.

Issue: Whether leave to rely on an Amended Summons and an APOC should be granted to the applicant.

Held: Applicant's Notice of Motion refused and leave to replead within 14 days granted; applicant to pay Sydney Zoo's costs of the Notice of Motion:

(1) In the APOC, the matter was pleaded as a broad claim of marketing in breach of conditions in relation to the type of facility, pricing, type of Australian animal encounter, amount of Australian species, the requirement that two thirds of the nominated exotic species be displayed upon opening, koala interaction and size of Australian native animals display. From this generalised pleading, Sydney Zoo could not determine the case it had to meet. The applicant had to specify what marketing conduct it sought to restrain. The specific relief sought in the Summons had to link better to the APOC: at [28];

(2) Regarding the hours of operation, Sydney Zoo had made a modification application which would allow for earlier opening hours for certain activities if approved, the respondent's marketing material was premature: at [27]; and

(3) Regarding the size of the Australian native animal display upon the opening of the new zoo, there was no direct link between the facts alleged and a breach of any conditions. The pleading did not allege an intention on Sydney Zoo's part to breach the conditions of consent when the new zoo opens, the key date for compliance at [29].

Inner West Council v Findlay **[2019] NSWLEC 96** (Moore J)

(related decision: *Findlay v Ashfield Council* [2019] NSWLEC 2119 (Hussey AC)

Facts: In 2016, Mr Findlay (**respondent** in the current proceedings) brought proceedings against the Inner West Council (**Council**) in a Class 2 appeal of council orders requiring Mr Findlay to cease keeping his pony at his premises (*Findlay v Ashfield Council* [2019] NSWLEC 2119). Acting Commissioner Hussey (**commissioner**) made orders requiring Mr Findlay to cease keeping his pony at his premises by 21 October 2016. These orders were made with the commissioner standing in the shoes of the Council and exercising the power given to him by s 180 of the *Local Government Act* (NSW) (**Local Government Act**) to make orders in substitution for the orders that had originally been made by the Council.

On 13 November 2017, the Council brought enforcement proceedings against the respondent for continuing to keep the pony on the premises in contravention of the orders of the commissioner in 2016 and sought an order that the respondent by restrained from housing the pony. There was an issue in the proceedings as to the status of the 2016 decision, whether it was a judgment in rem or not. However, the Court found that it was unnecessary to consider this issue, as under s 676(1) of the Local Government Act, the proper exercise of discretion was not to require the removal of the pony from the respondent's residence.

Issue: Whether, as a matter of discretion, pursuant to s 676(1) of the Local Government Act, compliance with the Class 2 orders was required.

Held: Summons dismissed; applicant to pay Council's costs as agreed or assessed:

(1) Factors weighing against the respondent included: the conclusion and orders of the commissioner in the Class 2 proceedings; the current proceedings were enforcement proceedings undertaken by a public authority for the purpose of upholding the integrity of the planning system; and the extent of complaints from the neighbouring property owner: at [79];

(2) Factors weighing in favour of the respondent included: no existing council policy that a pony would not be allowed on the premises; evidence of recent inspections showed no real impact on neighbouring properties; the ameliorative steps taken by the applicant to remove impacts on the neighbouring property owner; veterinary evidence the pony was well cared for; the neighbouring

property owner was an unimpressive witness; no evidence of specific complaints from the neighbouring property owner to Council after the commissioner's decision; evidence from other neighbours was consistent with the conclusion that there were no adverse impacts arising from the pony: at [80]; and

(3) Overall, the factors weighed in favour of permitting the pony to continue to reside with the applicant: at [81].

Noubia Pty Ltd v Coffs Harbour City Council **[2019] NSWLEC 113** (Sheahan J)

Facts: In these civil enforcement proceedings Noubia Pty Limited (**applicant**) sought declarations in respect of its transfer of lots from its subdivision development near Coffs Harbour, known as the "Lakes Estate", to Coffs Harbour City Council (**Council**).

In accordance with Condition 1 of the development consent (**DC**) for the subdivision, the applicant was required to transfer or dedicate certain lots to the Council. Condition 1 was modified prior to the grant of consent. Two of the lots, Lots 94 and 163, were transferred to Council, and were used to fulfil the public purpose of water quality management, and stormwater and flooding control within the subdivision. Upon those lots, artificial lakes had been constructed as part of an interconnected five lakes' system which characterised the "Lakes Estate" subdivision. The five lakes' system served to manage the site's drainage issues. Under Condition 1 of the development consent (as modified), compensation was to be paid to the applicant, calculated in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**). While the Council did not deny its obligation to pay compensation for the transfer of these lots, the parties disagreed on the amount of compensation.

In making their case for the compensation to be paid for Lots 94 and 163, the applicant contended that, had the lands not been required for the public purpose, they could have been developed for residential development, and should be valued on that basis. They devised an alternative hypothetical subdivision, complete with an alternative trunk drainage scheme, to demonstrate how the lands may have been developed for residential purposes, had they not been transferred to the Council. On the other hand, the Council valued the subject lots on the basis that they were so constrained that they could not be developed, and contended for a much lower award of compensation.

A third lot, Lot 96, was also transferred to Council. However, the Council contended that, under Condition 1, this lot fell into the category of "additional lands" which were volunteered to the Council. Accordingly, it contended that there was no requirement to pay compensation for Lot 96. In contrast, the applicant contended that Lot 96, as with Lots 94 and 163, was land set aside for acquisition, and required to be transferred or dedicated to the Council. The issue in respect of Lot 96 was, therefore, a question of the construction of Condition 1 of the DC. The parties did, however, agree upon the value of Lot 96, in the event compensation was found to be payable.

Both parties relied on expert witnesses, in the fields of hydrology, town planning and valuation, to support their respective positions.

Issues:

(1) In accordance with the Just Terms Act, what was the correct amount of compensation to be awarded in respect of Lots 94 and 163;

(2) Whether Lot 96 was required to be transferred to the Council in accordance with Condition 1, and, therefore, gave rise to the obligation to pay compensation to the applicant;

(3) Was there an obligation to pay to the applicant other amounts for interest and stamp duty; and

(4) What orders should be made in respect of costs of the proceedings.

Held: Applicant's claims, with the exception of those relevant to stamp duty, upheld; Council to pay the Applicant's costs:

(1) The highest and best use of Lots 94 and 163 was determined in accordance with the evidence of the applicant's expert valuer: at [225]. The Land and Environment Court rejected the Council's position that the subject land was so constrained that it was not capable of residential development (at [224]),

and instead found that the applicant's alternative hypothetical subdivision was both "feasible and achievable": at [216];

(2) On the whole, the evidence demonstrated that Lot 96 was required to be transferred to the Council. A non-legalistic and commonsense approach to the interpretation of Condition 1 supported the conclusion that Lot 96, which was noted as "public reserve" on the approved plan of subdivision, was required to be transferred into public ownership (ie to the Council): at [226]-[228];

(3) The applicant's claims for stamp duty were rejected, as it was unable to establish a "relocation" basis for it: at [232]-[233];

(4) The parties agreed that interest would be payable: at [235]; and

(5) As the applicant was successful in the majority of its claims, it was appropriate that it should receive an order for costs: at [236].

Tweed Shire Council v Taylor (No 2) **[2019] NSWLEC 102** (Preston CJ)

(related decision: *Tweed Shire Council v Taylor* **[2019] NSWLEC 45** (Preston CJ))

Facts: On 5 April 2019, Mr Taylor and his daughter, Ms Taylor, were ordered by the Land and Environment Court (**LEC**) to demolish and remove a treehouse on their land that had been unlawfully erected and used as a serviced apartment. The date by which the Tree House was to be demolished and removed was three months from the date of the order, 5 July 2019.

Mr Taylor applied to the LEC for an extension of time in which to comply with the order, seeking the absolute maximum extension available, or at least two years.

Mr Taylor had no particular plans for complying with the orders of the LEC or proposed timeframes within which it could be achieved. Instead of commencing demolition of the Tree House, Mr Taylor had recommissioned the Tree House as a habitable dwelling by putting the plumbing back in and reconnecting the electricity. He and his wife had been living in the Tree House since the LEC had ordered its demolition.

Mr Taylor submitted that he and his wife needed to live in the Tree House and that there was no other house on the property in which they could live. The dwelling in which they had been previously living, known as "the Hut", had burned down in a fire in December 2018. Their other habitable dwelling, known as "the Harvest Moon house", was being rented on Airbnb and was their sole source of income. A further dwelling on the property, known as the "building certificate house", was being renovated for Ms Taylor to move into. Mr Taylor submitted that, following the burning down of the Hut, they had been living in a granny flat. The granny flat was now occupied by their daughter, Ms Taylor.

Mr Taylor also submitted that he had injured his hands in a recent fire while carrying out work on the property. He submitted that it would take him a couple of months to recover before he could resume physical work.

Issues: What extension of time for compliance with the order for demolition, if any, was appropriate.

Held: Time for demolition extended by four months:

(1) In the circumstances of Mr Taylor, it was appropriate to grant some extension of time, although nothing close to the two years sought: at [25]; the circumstance that the Hut burnt down was not a circumstance that arose following the court order: at [25]; there were a number of options available to Mr Taylor, including rebuilding the Hut that burnt down, expediting the renovation of the building certificate house and applying for permission to build another house. However, he had taken no steps to resolve his own dilemma: at [26]; and

(2) An extension of time of four months was appropriate, allowing Mr Taylor time to recover from his injuries, make arrangements for finding a place to live, and demolish the Tree House: at [28].

- **Valuation/Rating:**

Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales **[2019] NSWLEC 110** (Sheahan J)

Facts: These two valuation appeals, brought by the landholder, concern challenges to the valuation decisions of a property located in Burwood of the Valuer-General (**VG**), in respect of base dates 1 July 2015 and 1 July 2016. The subject property, located in Burwood, is one component of a single-storey duplex dwelling, and its present use is hosting a medical practice. The property fronts a narrow street and has no vehicular access.

The agent appearing for the appellant company, Dr Ragusa, contended that the valuation of the subject property inexplicably increased by 80% in one year, and that this error was perpetuated. He challenged the VG's valuation on the basis that the subject property was constrained, and amalgamation with a neighbouring property was not available at the time. He argued that its highest and best use is its current use as professional rooms. In contrast, the VG argued that the highest and best use of the property is for "landbanking", for future amalgamation purposes, and a commercial development, seven storeys in height, was the best possible hypothetical development scenario.

The valuation figures under appeal were $1.33 million (as at base date 1 July 2015) and $2.2 million (as at base date 1 July 2016). The appellant company contended that the values should be $800,000 and $900,000 as at the respective base dates, but its expert valuer arrived at valuation figures of $1.05 million and $1.51 million.

Issues: What was the correct value of the subject property at base dates 1 July 2015 and 1 July 2016, based on its highest and best use.

Held: Appeals upheld; the property values were to be the amounts nominated by the appellant company's expert valuer:

(1) In looking to what was reasonable, and genuinely capable of achievement, the Court found that site enlargement, by amalgamation of the subject property with neighbouring properties, did not appear to be a viable option at the present time: at [123]; and

(2) The VG's development scenario relied upon "unrealistic expectations of amalgamation" and "bordered on the fanciful": at [129].

- **Section 56A Appeals:**

Arrage v Inner West Council **[2019] NSWLEC 85** (Preston CJ)

Facts: Mr Arrage applied to modify a development consent for shop-top housing pursuant to s 4.55(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). The Council refused the modification application and Mr Arrage appealed the refusal to the Land and Environment Court (**LEC**).

The appeal was heard by a commissioner of the LEC who dismissed the appeal. Before modifying the consent, s 4.55(2)(a) of the EP&A Act requires the consent authority to be satisfied that the development to which the consent as modified relates would be substantially the same development as the development for which consent was originally granted. The commissioner identified a number of quantitative and qualitative changes that would result from the proposed modification, including a 30% increase in the number of residential units, reduction in internal communal room space, and changes that altered the utility of the communal space. The commissioner found that these changes caused the modified development not to be substantially the same development as that approved, thereby precluding the grant of consent.

Mr Arrage appealed the commissioner's decision under s 56A of the *Land and Environment Court Act 1979* (NSW) on a question of law.

Issues:

(1) Whether the commissioner asked the wrong question or applied the wrong test in determining whether the proposed modified development would be substantially the same as the development originally approved;

(2) Whether the commissioner failed to take into account relevant considerations;

(3) Whether the commissioner took into account an irrelevant consideration;

(4) Whether the commissioner failed to determine a principal contested issue or the reasons for refusal were inadequate; and

(5) Whether the commissioner made a finding without evidence.

Held: Appeal dismissed; appellant to pay respondent's costs of the appeal:

(1) The commissioner was not required to apply a "test" or reasoning set out in the dicta of another judgment, but rather the test described in s 4.55(2)(a) of the EP&A Act: at [18], [21]; judicial decisions may guide, but do not control, the meaning of the legislative provision to be construed and applied by the LEC: [18]; the comparison required by s 4.55(2) was between the development as modified and the development as originally approved: at [24];

(2) The matters that a consent authority must consider in making a decision under s 4.55(2)(a) are to be determined by a construction of that statutory provision in its context: at [41]; that other judicial decision-makers might have considered whether a proposed modification was "quantitatively appropriate" by reference to compliance with the applicable controls in the local environmental plan does not make that matter a mandatory relevant consideration in all cases: at [41];

(3) Mr Arrage did not prove that the commissioner had taken into account an irrelevant consideration: at [54]; there was no express or implied limitation on a consent authority having regard to whether the proposed modification may be beneficial or facultative: at [55];

(4) Mr Arrage's contention that the commissioner failed to determine or give adequate reasons for a principal contested issue was merely a repackaging of the arguments relating to the wrong test or failure to consider relevant considerations: at [66]; the commissioner was not obliged to consider or give reasons for determining whether there were any essential elements of the consent readily identifiable from the circumstances of the grant of consent: at [66]; and

(5) Provided there was some evidence for a finding of fact, no error on a question of law arises: at [79]; there was some evidence for the commissioner to find that the development as modified would be qualitatively different: at [80].

Blacktown City Council v Satmell Holdings Pty Ltd **[2019] NSWLEC 93** (Pepper J)

(decision under appeal: *Satmell Holdings Pty Ltd v Blacktown City Council* [2018] NSWLEC 1256 (Dickson C))

Facts: This case arose from the same factual matrix as *Satmell Holdings Pty Ltd v Blacktown City Council* [2019] NSWLEC 94. Pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), Council appealed the decision of a commissioner in *Satmell Holdings Pty Ltd v Blacktown City Council* [2018] NSWLEC 1256. The case before the commissioner concerned the refusal by Blacktown City Council (**Council**) of development consent for a residential complex consisting of a residential apartment building and multi-unit housing development. At issue was the acceptability of requiring contributions towards the provision or improvement of amenities or services as a condition of consent pursuant to s 7.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Satmell Holdings Pty Ltd (**Satmell**) argued that such a condition could not be imposed unless it was determined in accordance with a contributions plan (s 7.13 of the EP&A Act) and that the relevant contributions plans on which the Council sought to rely (**Contributions Plans**) were not properly made. The commissioner agreed with Satmell (at [113]-[121]).

Because the issues raised in the Class 4 proceedings that were common to both sets of proceedings were resolved wholly in the Council's favour, the s 56A appeal was upheld for the reasons set out in the

Class 4 proceedings. However, the LEC went on to determine the discrete issues raised in the s 56A appeal.

Issues:

(1) Whether the commissioner had jurisdiction in Class 1 to determine whether a contributions plan sought to be relied upon by a consent authority for the purpose of imposing a contributions condition was correctly made within the meaning of the EP&A Act;

(2) Whether the presumption that all conditions and preliminary steps precedent to the making of the Contributions Plans had been complied with and performed had been displaced by the existence of "evidence to the contrary" pursuant to s 7.20(2) of the EP&A Act; and

(3) Whether the commissioner was required to take judicial notice of the Contributions Plans pursuant to s 7.20(1) of the EP&A Act.

Held: Appeal was upheld and the matter remitted to the commissioner for redetermination:

(1) Pursuant to s 7.13 of the EP&A Act, the commissioner was required to determine the existence of a contributions plan in order to exercise the function conferred upon her to impose the relevant condition: at [29]. However, by determining that the Contributions Plans did not exist because they were not properly made, the commissioner transgressed into reviewing the lawfulness of the exercise of functions conferred under a planning or environmental law which was a matter within the exclusive province of Class 4 of the LEC's jurisdiction: at [30];

(2) The commissioner erred by regarding the amended 2012 Direction and Practice Note as evidence to the contrary rebutting the presumption that all conditions and preliminary steps precedent to the making of the Contributions Plans had been complied with and performed. The error arose because the Contributions Plans in fact did make reference to, and were in conformity with, the Practice Note and amended 2012 Direction: at [53];

(3) The legal effect of the Practice Note and the amended 2012 Direction was not a matter of evidence and the commissioner erred by regarding it as such: at [57];

(4) The commissioner erred by regarding the Council resolution adopting the Contributions Plans as evidence to the contrary because the resolution did no more than record the determination of the Council: at [58];

(5) Having regard to the proper construction of s 7.20 as a whole, the legal dictionary definition of "judicial notice", and the fact that the presumption in s 7.20(2) had not been rebutted, the commissioner was required to take judicial notice of the Contributions Plans: at [59]-[61].

Gary Abrams v The Council of the City of Sydney (No 4) **[2019] NSWLEC 71** (Robson J)

(related decision: *Abrams v The Council of the City of Sydney* [2018] NSWLEC 1648 (Dickson C))

Facts: On 22 December 2017, Mr Gary Abrams (**appellant**) lodged a development application (**DA**) for the demolition of an existing commercial building and the construction of a new four-storey building containing 14 residential units at 9 Power Avenue, Alexandria.

On 15 February 2018, after the Council of the City of Sydney (**Council**) was deemed to have refused the DA, Mr Abrams appealed to the Court. The appeal was heard by Commissioner Dickson on 13 and 14 November 2018 and, on 17 December 2018, the commissioner delivered judgment dismissing the appeal.

On 19 December 2018, Mr Abrams commenced these appeal proceedings pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) raising two purported errors of law in the primary judgment. The first error related to a purported failure to provide reasons for dismissing the appeal and the second error related to the commissioner confining her assessment of the appellant's "environmental planning grounds" to only that part of the cl 4.6 request so headed.

Issues:

(1) Whether the commissioner erred at law in failing to provide reasons for dismissing the appeal, in particular by failing to explain how or in what manner or to what extent the appellant's cl.4.6 written request did not satisfactorily demonstrate that there were sufficient environmental planning grounds to justify contravening the development standard; and

(2) Whether the commissioner erred at law in confining her assessment of the appellant's "environmental planning grounds" to only that part of the written cl 4.6 request so headed, rather than having regard to the totality of the written request.

Held: Appeal upheld; proceedings remitted to commissioner; respondent ordered to pay appellant's costs:

(1) While it was clear that the commissioner set out the relevant test in cl 4.6(4)(a)(i), stated that she considered the evidence and the submissions of the parties and the written request, referenced and incorporated the environmental planning grounds proposed in the written request, the text of her judgment had not disclosed the reasoning process she adopted which led to her conclusion. A restatement of Mr Abrams' submissions and the relevant section of the cl 4.6 request without any analysis or articulation of the rationale which led to the final decision was not sufficient: at [57];

(2) The commissioner did not explicitly adopt either of the parties' submissions in relation to the request seeking to vary the FSR standard. The judgment read as a whole did not indicate the commissioner's reasons as to why the appellant's cl 4.6 request did not satisfactorily demonstrate that there were sufficient environmental planning grounds to justify contravening the development standard: at [63];

(3) Although the appellant succeeded in relation to the first ground in the appeal, and despite the oral submissions made on behalf of the appellant to the effect that if he enjoyed success on the first ground, then the second ground did not require consideration, for completeness, he had not established that the commissioner did not have regard to the whole of the written request. While the commissioner may have given particular consideration to the environmental grounds under that part of the request so headed, this did not negate the fact that she considered the request in its entirety: at [66]-[68];

(4) While it was possible to exercise its power to grant development consent pursuant to s 56A(2)(b) of the Court Act, it would require embarking upon a consideration of the cl 4.6 request and the plans and receive submissions, at least in relation to the jurisdictional issue about which the appeal was concerned. For that reason, such a course was not appropriate: at [69]; and

(5) An exclusionary remitter order was not appropriate in the circumstances: at [72]-[73].

- **Separate Question:**

Sciacchitano v The Council of the Municipality of Kiama **[2019] NSWLEC 104** (Preston CJ)

Facts: Mr Sciacchitano (**applicant**) lodged a development application (**DA**) with Kiama Municipal Council (**Council**) for the construction of a detached dual occupancy development where a single dwelling existed. Following the refusal of the application by the Council, the applicant appealed to the Land and Environment Court.

The land was part of a large lot residential estate accessible by a shared right of carriageway. If the dual occupancy were approved it would also share this right of way. The Council's first contention was that the DA must be refused because the owner's consent to the making of the application to use the shared right of carriageway had not been provided from all respective owners.

The proceedings were fixed for conciliation hearing on 12 and 13 August 2019, commencing on site in Kiama, pursuant to s 34AA of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

On 1 July 2019, the Council filed a Notice of Motion seeking that Contention 1 be heard as a separate question. The Council submitted that a hearing of the separate question would only require part or whole

of one day in Sydney, thus saving time and expense in travelling to Kiama. The Council submitted that a hearing of the separate question would be dispositive of the proceedings.

Issues: Whether it was appropriate to order a hearing of Contention 1 as a separate question.

Held: Notice of Motion dismissed:

(1) In the circumstances of the case a separate question was not appropriate: at [22]; the question as articulated did not adequately expose the relevant issues and was therefore not appropriate to be fixed for hearing as a separate question, as it required amendment: at [22]; there was no clear advantage in ordering a hearing on Contention 1 separate to the other issues in the proceedings: at [28]; the late stage at which the separate question was brought reduced any savings of time and costs in ordering a separate question: at [29]; the hearing on the separate question would only be dispositive of the proceedings if it were decided in favour of the Council and would add cost and increase delay if it were decided contrarily: at [30]; the advantage of ordering a hearing on the separate question for determination by a judge could still be achieved by fixing the proceedings before a commissioner with legal qualifications: at [31]; the proceedings concerned a small scale residential development governed by s 34AA of the Court Act, with the expectation that the proceedings would first proceed to conciliation and that all issues would be dealt with at the same time: at [32].

Williams v Shellharbour City Council **[2019] NSWLEC 135** **(**Pepper J)

Facts: The parties to a Class 1 appeal sought the determination of a separate question prior to the final hearing of the appeal under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). The question related to the interpretation of the phrase "development for any purpose" as used in cl 5.10(10) of the Shellharbour Local Environmental Plan 2013 (**SLEP 2013**). The parties agreed that if the proposed development, which was the subdivision of land to create six community title allotments, was not "development for any purpose" under the SLEP 2013, then the development would be prohibited under cl 4.1AA of the SLEP 2013 due to the size of the lots proposed to be created. The question sought to be determined was therefore a confined legal question as to the meaning of "development for any purpose".

Issue: Whether the hearing of a separate question should be ordered.

Held: Hearing of a separate question ordered:

(1) The parties' consent to the ordering of a separate question is not determinative: at [35]-[36];

(2) The separate question should be ordered because: at [40]:

(a) if answered in favour of the Council, it would result in significant savings in time and cost because it would dispose of the matter thereby avoiding a three day hearing;

(b) no expert evidence and only limited lay evidence would be needed to determine the question;

(c) if answered in favour of Mr Williams, a significant legal issue raised by the Council in its Statement of Facts and Contentions would be resolved saving time in the Class 1 appeal;

(d) the resolution of the separate question would clarify the state of the law; and

(e) the hearing of the separate question would not affect the allocated hearing date. Although the parties may not receive judgment on the separate question in sufficient time to avoid commencing preparation for the hearing on 25 February 2019, there may be some costs thrown away if the separate question disposes of the proceedings. But, if dispositive, there would nevertheless be a saving in time and cost in avoiding further preparation for, and hearing of, the appeal.

- **Strata Schemes Redevelopment:**

Application by the Owners - Strata Plan No 61299 **[2019] NSWLEC 111** (Pain J)

Facts: The Owners – Strata Plan No 61299 (**applicant**) sought an order that a strata renewal plan be given effect under the *Strata Schemes Development Act 2015* (NSW) (**Strata Schemes Development Act**). The applicant was the Owners Corporation (**OC**) for a large serviced apartment complex at 252-258 Sussex Street Sydney in SP No 61299. This was the first time the Land and Environment Court (**LEC**) was asked to make an order under this relatively new legislation. The LEC under s 19(g6) of the *Land and Environment Court Act 1979* (NSW) heard this matter in its Class 3 jurisdiction (which refers to applications and proceedings under Divs 6-8 of Pt 10 of the Strata Schemes Development Act). The scheme established under the Strata Schemes Development Act enables a whole of strata sale where there is not unanimous support by all lot owners in a strata plan for such a sale. The scheme proposed in this case was a collective sale of all lots in SP No 61299, not a redevelopment.

The building comprises a 159-lot strata title development with 119 serviced apartments, a retail lot used as a café and basement car spaces, inter alia. Thirty-six lots are "utility lots", lots used for storage, signage and car spaces (*Strata Schemes Management Act 2015* (NSW) (**Strata Schemes Management Act**), s 4). The premises are largely leased to Seasons Harbour Plaza Pty Ltd which runs a serviced apartment business for all but one of the units in the building. There were no other parties to the proceedings.

Issue:

(1) Whether the strata renewal plan for the collective sale of SP No 61299 should be given effect; and

(2) If so what orders should be made.

Held: Strata renewal plan given effect, binding on the OC, lot owners, registered mortgagees of lots and the purchaser; lot owners required to sell their lots in accordance with the deed of agreement with the purchaser; the unit entitlements for the strata plan reallocated in accordance with s 186(1) of the Strata Schemes Development Act: at [123]:

(1) The Court was satisfied of the following matters in s 182 of the Strata Schemes Development Act, requiring it to make an order giving effect to the strata renewal plan:

  (a) relationship between lot owners and purchaser did not prevent the preparation of the plan in good faith (s 182(1)(a)): at [28]-[30];

  (b) steps taken in preparing the plan and obtaining the required level of support were carried out in accordance with the Strata Schemes Development Act (s 182(1)(b)): at [31]-[73]:

    (i) a strata renewal proposal was prepared and submitted to the committee of the OC (Strata Schemes Development Act, s 156; Strata Schemes Development Regulation 2016 (NSW) (**Strata Schemes Development Regulation**) cl 30);

    (ii) within 30 days, the strata committee considered the proposal (Strata Schemes Development Act, s 157);

    (iii) the strata committee was supportive of the proposal and it convened a general meeting of the owners within 30 days (Strata Schemes Development Act, s 158) complying with subs (4) (14 days' notice of the meeting) and minutes were sent to the lot owners within 14 days after the meeting (s 157(5)) which included a complete copy of the strata renewal proposal and detailed reasons for the decision (s 157(4));

    (iv) the general meeting of the owners was supportive of the proposal and a strata renewal committee (**SRC**) was formed (Strata Schemes Development Act, s 160). Written notice of this decision was given to all lot owners within 14 days of the establishment of the SRC (Strata Schemes Development Act, s 162; Strata Schemes Development Regulation, reg 31);

    (v) the SRC prepared a strata renewal plan (s 164(1)). Valuations on two bases were prepared - the individual lots within the strata scheme and the whole building and its site

(Strata Schemes Development Act, ss 170-71; Strata Schemes Development Regulation, cl 33);

(vi) the strata renewal plan was considered by an OC general meeting, notice of which complied with the Strata Schemes Development Act, s 172(2) and Sch 7 cl 3. The OC decided by special resolution to give the strata renewal plan to the owners for their consideration (s 172(5)). This was done within 14 days of the decision being made (s 173);

(vii) at least 75% of non-utility lot owners supported the strata renewal plan (s 154). Notice was given to all non-utility lot owners and the Registrar-General of the OC secretary's receipt of the required level of support within 14 days of such receipt (s 176(2));

(viii) support notices (Strata Schemes Development Act, s 174(1)) were received from at least 75% of the owners of non-utility lots (Strata Schemes Development Act, s 154) and the OC at a general meeting resolved to apply to the Court to have the strata renewal plan made (s 178(1)). The application to the Court contained the required documents per Strata Schemes Development Act, s 179 and Strata Schemes Development Regulation, cl 35. The application was served on all required to be served per Strata Schemes Development Act, ss 178(4), 179(2);

(c) service of notices on lot owners, each mortgagee of a dissenting owner's lot and the purchaser (s 182(1)(c)): at [74]-[77];

(d) just and equitable terms of sale and distribution of proceeds (s 182(1)(d), (g) and Strata Schemes Development Regulation, cl 36): at [78]-[81].

(2) Several lots including the café had values significantly higher than the serviced apartments. Section 171(1) of the Strata Schemes Development Act specified that the amount paid for the sale of the lots in the strata scheme must be apportioned among lot owners in the same proportions as the unit entitlements of the owners' lots. Section 182(1)(d) requires that the distribution of the proceeds of sale apportioned to each lot is not less than the compensation value of the lot and the terms of the settlement under the plan are just and equitable in all the circumstances. As the unit entitlements do not reflect the difference in lot values, these sections are in conflict as they cannot both be achieved. Consistent with the requirement that legislation should be read harmoniously and as a whole, the mechanism by which the legislature has given scope for the practical conflict between s 171(1) and s 182(1)(d) to be resolved are the broad and facultative powers to make ancillary orders pursuant to s 186. Section 186(2)(e) contemplates the reallocation of unit entitlements. The Court ordered that a small proportion of the unit entitlements of each serviced apartment and car-parking lot be reallocated: at [100]-[114].

- **Interlocutory Decisions:**

Aesthete No 9 Pty Limited v Blue Mountains City Council **[2019] NSWLEC 81** (Preston CJ)

Facts: Aesthete No 9 Pty Limited (**Aesthete**) applied to modify a development consent for subdivision of land. Blue Mountains City Council (**Council**) refused the application and Aesthete appealed the refusal to the Land and Environment Court (**LEC**).

After a conciliation conference was held pursuant to s 34 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) the parties reached agreement. A commissioner of the LEC disposed of the proceedings under s 34(3) of the Court Act in accordance with the parties' decision.

Aesthete later applied to reopen the proceedings by Notice of Motion. Aesthete wished to have the LEC determine an issue relating to a condition of consent that required Aesthete to prepare and submit a Vegetation Management Plan (**VMP**) for Council approval. Aesthete became concerned that the VMP submitted had not been approved by the Council. Aesthete alleged that before entering into the s 34 agreement, the Council's solicitor had represented that the VMP would be considered by 10 April 2019. Aesthete alleged that it entered into the s 34 agreement relying on the Council's representation that it would determine the VMP. It later transpired that the Council did not determine the VMP by this date.

Aesthete contended this was a repudiation of the agreement and Aesthete was entitled to terminate the agreement.

By Amended Notice of Motion, Aesthete applied to set aside the s 34 agreement, reopen the proceedings and limit the proceedings to determine the issue of ecology. At the hearing, Aesthete also submitted that the commissioner's judgment and orders should be set aside.

Issues:

(1) Whether there was any basis for setting aside the commissioner's judgment and orders; and

(2) If the judgment and orders could be set aside, whether the s 34 agreement could be set aside and the proceedings reopened.

Held: Notice of Motion dismissed:

(1) There was no basis for setting aside the LEC's judgment and orders: at [40]; Aesthete did not establish any circumstance prior to the judgment being given that would justify setting aside the judgment and orders: at [42]; and

(2) It was unnecessary to consider whether the s 34 agreement could be set aside and proceedings reopened as the judgment and orders were not to be set aside: at [46].

Black Hill Residents Group Incorporated v Marist Youth Care Limited **[2019] NSWLEC 112** (Robson J)

Facts: By Notice of Motion, the first respondent, Marist Youth Care Limited (**Marist Youth**) sought an order setting aside the Further Amended Notice to Produce (**Notice to Produce**) issued by the applicant, Black Hill Residents Group Incorporated (**Black Hill**).

The substantive proceedings were brought by Black Hill against Marist Youth and the second respondent, Minister for Families, Communities and Disability Services (**Minister**) seeking declaratory and consequential injunctive relief in relation to the use and/or proposed use of land at Black Hill (**premises**) by Marist Youth for the Newcastle Intensive Therapeutic Care Hub. Black Hill alleged that such development was prohibited or required consent. Black Hill alleged that the Newcastle Intensive Therapeutic Care Hub did not constitute a "transitional group home" for the purposes of the Newcastle Local Environmental Plan 2012 and the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP**) as it included health service facilities, office premises and/or other uses. Marist Youth alleged that the premises were being used as a transitional group home within the meaning of cl 43 of the SEPP and that the premises were operated on behalf of the Minister, making the development permissible without consent. Marist Youth denied using the premises for any of the purposes suggested by Black Hill.

As far as relevant, the Notice to Produce sought the following categories of documents:

…

2. All records, including resumes, identifying the qualifications and experience of any Staff Member who entered the premises during the Period.

3. Any Document which records or refers to the name and/or address of any Staff Member who entered the premises at any time during the Period.

4. All Documents, including staff rosters, which records or refers to the date and/or duration of each attendance at the premises by any Staff Member who entered the premises during the Period.

"Document", "Premises", "Staff Member" and "Period" were defined.

Marist Youth sought to set aside the Notice to Produce on the basis that it was a fishing expedition; it did not specify with sufficient precision the documents which needed to be produced; it was oppressive; and, it sought documents which were confidential and would breach the privacy of numerous persons without their consent.

Issue: Whether the Notice to Produce should be set aside.

Held: Notice to Produce amended; costs reserved:

(1) The documents sought in the Notice to Produce, even if relevant, could have been sought at an earlier stage. Despite this, subject to a constraint regarding the identity of staff members, the material sought in categories (2) and (4) may be of relevance such that it outweighed Marist Youth's concerns in relation to tardiness and inconvenience: at [14];

(2) The documents sought went to matters which related to the characterisation of the use of the premises and that a legitimate forensic purpose had been made out. The documents called for in categories (2) and (4) were relevant to the issue in dispute and it was "on the cards" that the documents would materially assist the issuer's case: at [15];

(3) Marist Youth's concern regarding the precise identification of documents sought was not determinative and could be addressed by amendments: at [21];

(4) Balancing the privacy and confidentiality concerns of Marist Youth, the relevance of the material sought and the timing of the Notice to Produce with the burden imposed, it was appropriate that category (2) be narrowed by the deletion of certain words; category (3) be deleted altogether; and material produced pursuant to the amended categories (2) and (4) be subject to a confidentiality undertaking: at [22]; and

(5) Justice between the parties would be achieved by the following:

(a) the words "all", "including resumes" and "and experience" were deleted from category (2);

(b) category (3) was struck out completely;

(c) category (4) was allowed, however to the extent that the documents in this category and category (2) disclosed information of a personal nature, concerns about privacy and confidentiality were to be met by entering into a confidentiality agreement: at [23].

Black Hill Residents Group Incorporated v Marist Youth Care Limited (No 2) **[2019] NSWLEC 137** (Robson J)

(related decision: *Black Hill Residents Group Incorporated v Marist Youth Care Limited* [2019] NSWLEC 112 (Robson J))

Facts: Marist Youth Care Limited (**Marist Youth**) filed a motion seeking orders pursuant to r 42.21 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) that the applicant, Black Hill Residents Group Incorporated (**Black Hill**), give security for Marist Youth's costs of the proceedings and in the absence of such security being provided by a certain date, that the proceedings be dismissed.

The substantive proceedings were brought by Black Hill against Marist Youth and the second respondent, Minister for Families, Communities and Disability Services (**Minister**) seeking declaratory and consequential injunctive relief in relation to the use and/or proposed use of land (**premises**) by Marist Youth for the Newcastle Intensive Therapeutic Care Hub. Black Hill alleges that such development is prohibited or requires consent. Marist Youth alleges that the premises are being used as a "transitional group home" within the meaning of cl 43 of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP**) and that the premises are operated on behalf of the Minister, making the development permissible without consent.

Issue: Whether security for costs should be ordered.

Held: Black Hill to provide security for costs of Marist Youth in the amount of $40,000 to be paid in two tranches of $20,000 each on or before 31 October 2019 and 29 November 2019; proceedings to be stayed permanently or until further order of the Court if security not provided; costs reserved:

(1) Marist Youth's conduct was not indicative of disentitling delay. Although Marist Youth raised security for costs as a matter of concern early in the proceedings, its conduct in not pursuing it at a time when the parties agreed to a relatively expedited hearing was understandable: at [47];

(2) The evidence was that a limited number of members of the association had been able to make not insubstantial contributions towards the legal costs of Black Hill. In these circumstances, an order for

security for costs (in what might be seen to be a modest amount) would not necessarily stifle the proceedings: at [54];

(3) The proceedings could not properly be characterised as public interest proceedings sufficient to displace a security for costs order. While Black Hill raised matters that involved the public interest, this of itself did not mean that it would not be ordered to pay costs in the event that it was unsuccessful at the hearing: at [56];

(4) The requisite public interest was not served by the litigation so as to trigger the discretion under r 4.2(2) of the Land and Environment Court Rules 2007 (NSW) to refuse to make a security for costs order because the primary interest of Black Hill (and its members) related to the planning consequences of the use of the premises and there was little evidence of concerns extending beyond those planning impacts: at [57];

(5) Balancing the hardship Marist Youth might suffer in the absence of a security for costs order against the hardship Black Hill might suffer if it was ordered to give security, and having regard to the relevant considerations in r 42.21(1A) of the UCPR, it was appropriate to make a security for costs order: at [59]; and

(6) The amount of security that the Court considered to be appropriate was well short of the costs that Marist Youth anticipated it would incur (approximately $142,500) to prepare for and attend the hearing. Security in the amount of $40,000 was appropriate and such security should be paid by two instalments, each of $20,000. The first instalment was to be paid on or before 31 October 2019 and the second instalment was to be paid on or before 29 November 2019. The quantum was not such that would cripple Black Hill's capacity to continue, and was sufficient a measure of security to Marist Youth: at [60]-[62].

Burwood Council v Iglesia Ni Cristo **[2019] NSWLEC 75** (Robson J)

Facts: Iglesia Ni Cristo (**Church**), the respondent in Class 4 proceedings commenced by Burwood Council (**Council**) filed a Notice of Motion seeking an order that the hearing dates of 18 to 21 June 2019 be vacated.

The substantive proceedings brought by Council concerned the use of land at 10 Daisy Street, Croydon Park (**premises**) by the Church as a place of public worship. The premises are zoned R2 Low Density Residential pursuant to the Burwood Local Environmental Plan 2012 and use of the premises as a place of public worship is prohibited in that zone.

It was submitted on behalf of the Church that the hearing dates should be vacated because it commenced Class 1 appeal proceedings from the deemed refusal by Council of a Development Application (**DA**) that would regularise the use of the premises and it had or would address the amenity impacts in the interim, that is, until the Class 1 proceedings had been decided, by giving an undertaking. It also stated that the determination of the issues in the Class 1 proceedings, amongst other things, provided for a better environmental outcome than that which would be achieved in the Class 4 proceedings. Council opposed the application for vacation of the hearing dates in the Class 4 proceedings.

Issue: Whether the hearing dates in the Class 4 proceedings should be vacated.

Held: Notice of Motion dismissed; costs reserved:

(1) While a hearing of the Class 1 proceedings may provide for an optimum "environmental outcome", the good intentions of the Church and its desire to regularise its conduct in relation to its effect upon the local residents defeat Council's entitlement to have the hearing of the Class 4 proceedings proceed as per the allocated dates: at [26];

(2) Given the uncontested evidence of local residents in relation to ongoing concerns regarding amenity impacts caused by the Church, the matter deserved a relatively quick determination: at [29];

(3) There had been an unexplained delay in relation to the Church's conduct in lodging the DA in an attempt to regularise its conduct. The Class 4 proceedings were filed in April last year, were set down for hearing from 18 to 21 June 2019 over five months ago, and the Church's DA was lodged on

20 March this year. As the Class 1 hearing would not proceed until early next year, the Class 4 hearing dates should not be vacated: at [30]; and

(4) The undertaking proffered by the Church was a bona fide attempt to address amenity concerns that the Church was desirous of an amicable relationship with its neighbours. The undertaking did not adequately address the residents' concerns: at [31].

Cavanagh v Wollondilly Shire Council **[2019] NSWLEC 105** (Pepper J)

Facts: Mr Cavanagh (**applicant**) filed an application for the determination of a separate question of law prior to the hearing, which was opposed by Wollondilly Shire Council. The substantive proceedings concerned a Class 1 merits review appeal by the applicant against the deemed refusal of a Development Application for the subdivision of land zoned E4 Environmental Living.

The separate question was "whether the proposed development is prohibited under cl 4.1B of the Wollondilly Local Environmental Plan 2011." If determined in the affirmative, the separate question would have been completely dispositive of the substantive proceedings. It was agreed that expert evidence was not required to determine the separate question, only documentary evidence, which was unlikely to be voluminous or contentious. However, expert evidence in a number of disciplines would be required to address the merits issues raised in the substantive proceedings if a substantive hearing was required.

Issues: Whether to make an order for the determination of a separate question.

Held: Separate question ordered:

(1) If determined in the affirmative, the separate question would be entirely dispositive of the proceedings, thereby avoiding the need to prepare voluminous and costly expert evidence: at [30]-[31];

(2) The separate question was a clearly defined question of law which would require minimal evidence to determine: at [33];

(3) Even if answered in the negative, the determination of the separate question would reduce the length of the final hearing because a principal contention in the substantive proceedings would be determined: at [34];

(4) The hearing of the substantive proceedings was not imminent and no orders had been made for the filing and serving of expert evidence: at [35]; and

(5) Bifurcating the proceedings would not result in inconsistent judgments relating to the construction of the Wollondilly Local Environmental Plan 2011 because the commissioner determining the substantive proceedings would be bound by the Land and Environment Court's reasoning and decision with respect to the separate question to the extent of any overlap: at [36].

Dungog Shire Council v Hunter Industrial Rental Equipment Pty Limited **[2019] NSWLEC 132** (Duggan J)

(related decisions: *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147; *Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd (No 2)* [2018] NSWLEC 153 (Molesworth AJ)).

Facts: The applicant on the motion, Hunter Industrial Rental Equipment Pty Ltd (**Hunter Industrial**), sought a 12-month extension to the stay of proceedings given by the Court of Appeal. The applicant submitted that this extension was sought to provide further opportunity to progress the State Significant Development Application (**SSDA**) currently pending for their quarrying sites located in Martins Creek, New South Wales.

Hunter Industrial adduced evidence that the delays in process were caused by community consultation and impact assessments at the site and nearby communities. Further, that there would be a significant impact upon the company, the local community, employees and third-party customers in the marketplace

should the stay not be extended, as the quarry could be deemed commercially unviable and closed following proceedings.

The respondents on the motion, Dungog Shire Council (**Dungog**) submitted that the Land and Environment Court (**LEC**) should not exercise the discretion under s 9.46 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) on grounds that Hunter Industrial had not seriously furthered its SSDA application in the time since the Court of Appeal ordered the original stay. Additionally, there was a public duty to carry out developments in accordance with the laws as set by the Parliament, and that, for many years, Hunter Industrial had profited from the sites without proper consents.

Issues: Whether the LEC should exercise its discretion under the EP&A Act and grant an extension to the stay granted by the Court of Appeal.

Held: Notice of Motion seeking an extension of the stay dismissed; applicant on the motion ordered to pay respondent's costs:

(1) A refusal to exercise the discretion to extend the stay could result in the closure of the quarry, and all the attendant commercial and personal outcomes that this could manifest for customers, employees and the local community: at [23] to [35]. Nonetheless, in accordance with the intention of Parliament, and guided by relevant precedent, such as *Warringah Shire Council v Sedevcic* 10 NSWLR 335, it was imperative that the interests of the community in the enforcement of planning laws and adherence to the process of assessment be followed, this being of greater weight in the circumstances: at [51].

***Environment Protection Authority v Minto Recycling Pty Ltd* [2019] NSWLEC 91** (Moore J)

Facts: The Environment Protection Authority (**prosecutor**) prosecuted Minto Recycling Pty Ltd (**defendant**) for a breach of its environment protection licence (**EPL**) under s 64(1) of the *Protection of the Environment Operation Act 1997* (NSW) (**POEO Act**). At the commencement of the hearing, counsel for the defendant made an application for a ruling that the prosecutor may not rely on evidence of environmental harm as the defendant had solely been charged with a breach of licence offence.

Issues:

(1) Whether the prosecutor could rely on evidence of environmental harm and the consequences of that harm as an aggravating factor under s 64(1) of the POEO Act without also charging the defendant with an environmental harm offence under that Act; and

(2) Whether the separate pollution offences under the POEO Act should be regarded as involving a higher degree of moral culpability than solely a breach of licence offence.

Held: Proposed exclusionary ruling rejected:

(1) The availability of pollution offences under the POEO Act does not, in itself, constitute a *De Simoni*-type barrier to the potential of evidence being adduced on a s 64(1) offence for the purposes of establishing environmental harm as relevant to s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* or s 241(1)(a) of the POEO Act: at [43]; and

(2) Offending conduct which attacks the integrity of the EPL licensing regime involves greater moral turpitude than any of the specific pollution offences provided for in the POEO Act: at [42].

***Environment Protection Authority v Newcastle Port Corporation* [2019] NSWLEC 92** (Robson J)

Facts: The Environment Protection Authority (**prosecutor**) alleged that Newcastle Port Corporation (**defendant**) committed an offence against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) by polluting waters. The matter before the Land and Environment Court (**LEC**) in these proceedings concerned a subpoena filed by the defendant seeking production by the prosecutor of three draft reports (being an incomplete draft, a first draft and second draft) of Dr Fleur Pablo, an expert eco-toxicologist retained by the prosecutor to provide an expert opinion in relation to the

environmental harm allegedly caused by the offence. The drafts contained material relating to the analysis of water samples collected from a location known as "AMS Culvert", which was excluded from Dr Pablo's final report at the request of the prosecutor's legal officer. The prosecutor objected to the inspection of the drafts by the defendant on the grounds of legal professional privilege.

The prosecutor submitted that it was not alleging that the defendant polluted waters at the AMS Culvert given that the waters at that location were some metres upstream from the point at which it alleges sediment laden water was discharged into the table drain. While the defendant had been provided with laboratory analysis of the water collected at the AMS Culvert, it contended that Dr Pablo's expert analysis and opinion thereof was relevant to its defence of the charge.

Issues:

(1) Whether the draft reports were privileged; and

(2) If so, whether privilege had been waived by the prosecutor.

Held: Privilege claim upheld and access not granted to the defendant to inspect the draft reports:

(1) The drafts were privileged pursuant to s 119 of the *Evidence Act 1995* (NSW) (**Evidence Act**) as they were prepared for the dominant purpose of the prosecutor being provided with professional legal services relating to an anticipated proceeding: at [38];

(2) Given the intercourse that took place between the prosecutor's lawyers and Dr Pablo and in particular the comments of Dr Pablo in the e-mails accompanying the drafts which were before the LEC, it was clear that the three reports were in draft form and were to be the subject of further advice and comment by the prosecutor's lawyers. The drafts could not have been considered to have been brought into existence for the purpose of being laid before the Court as at the time they were produced, proceedings had not yet commenced, the charges had not been articulated and lay evidence had not been finalised: at [40];

(3) In addition to finding that the drafts were privileged under s 119 of the Evidence Act, the prosecutor was being provided with "advice" in relation to a suspected breach of the POEO Act, such that s 118 of the Evidence Act was also engaged: at [42];

(4) Disclosure of the drafts was not necessary so that a comparison of the effect of the exclusion of the material on the expert's conclusions could occur, that disclosure was necessary to avoid unfairness and to allow a proper assessment of the weight and credibility of Dr Pablo's conclusions, or that the exclusion of the relevant sampling material required an explanation: at [61];

(5) The focus in s 122 of the Evidence Act was on whether the service of the final report could be considered acting inconsistently with the maintenance of privilege over the drafts. It could not be so characterised: at [62];

(6) The drafts were not reasonably necessary to understand the final report pursuant to s 126 of the Evidence Act. The defendant failed to discharge its onus in this regard: at [65], [67]; and

(7) The drafts were each subject to legal professional privilege and that privilege over those documents had not been waived. As such, the defendant was not granted leave to inspect the drafts: at [68].

Hayward v Sydney Water Corporation **[2019] NSWLEC 87** (Pepper J)

Facts: By Notice of Motion filed 13 June 2019, Ms Rochelle DeMarco and Mr Brian Hayward (**applicants**) moved the Court to vacate the final hearing of Class 3 compulsory acquisition compensation proceedings listed on 25 and 26 June 2019. The substantive proceedings concerned the compulsory acquisition by Sydney Water Corporation (**Sydney Water**) of an easement for water supply purposes over the applicants' property in Marsden Park (**site**). The applicants sought the vacation because they wanted the parties' town planning experts and valuation experts to amend their respective joint reports (**experts' reports**) to consider an additional development scenario for the site and there was insufficient time to make this amendment before the hearing. More than four weeks had passed between the date that the joint town planning report was filed (10 May 2019) and the date that the additional scenario was raised by the applicants (12 June 2019).

Issues: Whether or not to vacate the final hearing listed on 25 and 26 June 2019.

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

(1) When determining whether or not to vacate or adjourn hearings, the Court must have regard to the statutory scheme constituted by the *Civil Procedure Act 2005* (NSW) (in particular, ss 56 to 59, and 66); the prejudice to the parties; the circumstances in which the application is brought; and the efficient administration of justice (*Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 at [24] and [27]): at [31]-[38];

(2) The inclusion of the additional development scenario (namely, development for commercial use only) in the experts' reports would be of limited utility because it was similar to a development scenario that had already been considered in the experts' reports (namely, development for shop-top housing): at [50];

(3) The applicants did not identify any new fact, matter, or circumstance which gave rise to the need to consider the additional development scenario: at [51];

(4) The applicants provided no explanation for the delay in seeking to rely on the further development scenario: at [52]; and

(5) The prejudice to Sydney Water was largely that of costs only. However, this would not warrant the vacation of the hearing because in Class 3 compulsory acquisition proceedings, the acquiring authority typically pays the dispossessed party's costs even where it is not wholly successful. Therefore, it was likely that Sydney Water would not recover its costs thrown away as a result of the vacation of the hearing: at [54].

Karimbla Constructions Services (NSW) Pty Ltd v Premier of New South Wales **[2019] NSWLEC 76** (Moore J)

Facts: In 2018, Karimbla Construction Services (NSW) Pty Limited (**applicant**) was given a Gateway Determination (**process**) as the first step to permitting it to seek an alteration to the Ryde Local Environmental Plan 2014 (**RLEP 2014**) applying to its development site on Talavera Road, Macquarie Park. The proposed alterations sought would permit a significantly larger development to be capable of being approved for construction on the site.

The subsequent processes for progressing the proposals under the Gateway Determination were stalled due to a New South Wales Government policy determination triggered by a request from the Premier of New South Wales for a moratorium on changes to planning controls in the Ryde local government area pending the conduct by the Greater Sydney Commission of an assurance review relating to increases in development densities. The moratorium was in effect at the time these proceedings were commenced.

The applicant nominated the Premier of New South Wales (**first respondent**), New South Wales Minister for Planning (**second respondent**), Secretary of the Department of Planning and Environment (**third respondent**) and Greater Sydney Commission (**fourth respondent**) as respondents in the proceedings to force a determination to effect the outcome of the process. The fourth respondent filed a submitting appearance.

During the course of proceedings, three Notices of Motions were filed. The applicant sought leave to rely on an Amended Summons and an order for each of the respondents to provide discovery to it. The material sought for discovery included all correspondence between 27 July 2018 and 12 April 2019 prepared, sent or received by any of the respondents relating to the applicant's request for amendment to the RLEP 2014, the fourth respondent's assurance review or the applicant's property at Talavera Road. The first respondent sought to be removed as a respondent in the proceedings. Leave to rely on an Amended Summons was not opposed by the respondents and was granted.

Issues:

(1) Whether the respondent's should be required to provide the discovery sought by the applicant per r 21.2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), and

(2) Whether the first respondent should be removed as a respondent in the proceedings per r 6.29 of the UCPR.

Held: First respondent's motion seeking removal from proceedings granted with costs to the first respondent; applicant's motion seeking discovery dismissed with costs for the active respondents:

(1) Permitting discovery to allow the applicant to establish a case outside the Amended Summons rather than seeking material in support of the case actually pleaded would have been condoning a "fishing expedition" and was inappropriate: at [69]-[70];

(2) Even if the discovery sought was permissible, on balance between potential relevance and the likely time and costs' burden for the respondents, complying with the proposed discovery orders would create a real risk that the set hearing dates would not be able to be held and would be contrary to the just, quick and cheap resolution of the issues genuinely in dispute between the parties: at [71], [76]-[77]; and

(3) It was not appropriate for the first respondent to remain a party to the proceedings. First, the first respondent did not assert that any of her rights or liabilities had been called into question by the proceedings. Secondly, the Amended Summons went directly to quite confined questions as to the function of the fourth respondent and did not seek any relief in any way directed to the first respondent: at [55].

Omaya Investments Pty Ltd v Dean Street Holdings Pty Ltd (No. 2) **[2019] NSWLEC 136** (Duggan J)

Facts: The substantive proceedings relate to a claim by Omaya Investments Pty Ltd (**applicant**) that the Development Consent (**DC**) relied upon by Dean Street Holdings Pty Limited and others (**respondents**) had lapsed and also that the Construction Certificates (**CC**) which had relied upon that DC were therefore ineffective to permit work.

The applicant filed a Notice of Motion seeking leave to amend to add a claim for judicial review of the second development consent granted on 3 March 2016 (and judicial review of CC1 issued on 8 March 2018). The respondents opposed leave being given to extend time to commence proceedings on the basis it would have a prejudicial effect upon their case, and that the applicants had delayed in bringing the motion.

Issues: Whether discretion should be exercised pursuant to r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) and grant the applicant's motion for an extension of time to commence judicial review proceedings.

Held: Leave given to commence proceedings for judicial review of the decision to grant CC1 and time to commence proceedings extended to 25 September 2019:

(1) The applicant was given leave to rely upon the Third Further Amended Summons and handwritten amendments. Costs of the motion were reserved. The motion was otherwise dismissed: at [36];

(2) The principles in *Wingecarribee Shire Council v Uri Turgeman trading as Uri T Design* [2018] NSWLEC 173 were applied in considering the motion. The applicant had a right under the open standing provisions to bring proceedings, pursuant to the legislative scheme and Div 9.5 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**): at [18]. On the question of prejudice to the respondents, concluding that while an extension would have some material financial impact, the circumstances surrounding the necessary fact finding were a reasonable explanation for the period of the delay by the applicant: at [22]-[25]. There was a genuine public interest and arguable case: at [26]-[30].

RD Miller Pty Ltd v Roads and Maritime Services NSW **[2019] NSWLEC 129** (Robson J)

Facts: RD Miller Pty Ltd (**RDM**) commenced proceedings seeking compensation from the Roads and Maritime Services (**RMS**) pursuant to ss 68(1) and 226(3) of the *Roads Act 1993* (NSW) (**Roads Act**) for loss or damage arising from its right of access across the boundary between its land and the road formerly known as the Princes Highway (**Road**) being restricted and/or denied and the ensuing order declaring part of the Road to be a controlled access road published in the *New South Wales Government Gazette* (**Order**).

These proceedings concerned a Notice of Motion filed by RMS seeking orders pursuant to r 14.28(1)(a) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) that paragraph 37 of RDM's Points of Claim (**POC**) which posited three approaches to the determination of compensation be struck out. In the motion, RMS also sought orders pursuant to r 13.4 of the UCPR that if paragraph 37 comprised RDM's claim for relief in the proceedings that that claim be dismissed.

RDM contended that the time at which the "right of access was restricted or denied" referred to the time at which physical access was restricted and that the time "immediately before" the right of access was restricted or denied could be some years prior to the making of the Order when physical access was denied. RMS contended that the time at which the "right of access was restricted or denied" referred to the time at which the restriction effected by the Order came into effect, being the making of the Order. .

Issue: Whether paragraph 37 of RDM's POC should be struck out and dismissed pursuant to rr 14.28(1)(a) and 13.4 of the UCPR.

Held: Paragraphs 37(a) and 37(b) of RDM's POC struck out and minor amendment allowed (by consent) to paragraph 37(c); costs reserved:

(1) The issue in dispute could be characterised as a question of law and to the extent that it found the construction propounded by RMS to be correct (and it could not be said that any other construction had a real prospect of being correct), this was sufficient to warrant granting the relief sought in the motion: at [68];

(2) The relevant sections of the Roads Act were determinative and the text of the provisions at issue readily yielded to the construction favoured by RMS: at [78];

(3) Consideration of compensation to be paid for the loss or damage resulting from the denial or loss of access needed to begin and end with consideration of the relevant statutory provisions. Reference to the common law was only useful if it assisted in construing the applicable statutory provisions. In this case, the common law did not assist: at [80];

(4) Section 69(1) of the Roads Act had to be construed in the context of its surrounding provisions and it did not consider that s 67, given its context in Div 4 of the Act and adopting what RMS submitted was a "textual thread running through ss 67, 68 and 69", could be read as referring to a physical restriction on access. It was held to be a restriction in law directed to restrictions on the right of access: at [81];

(5) The Roads Act, unlike the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) did not provide for a statutory "disregard" in relation to the determination of market value. To the extent that RDM sought to rely upon the common law concept of "market value" deriving from *Spencer v The Commonwealth of Australia* [2010] HCA 28 which incorporates s 56(1) of the Just Terms Act including the *Pointe Gourde* (or *Sans Sebastian*) principle to support paragraphs 37(a) and 37(b) of its POC, this was not accepted, primarily because the concept captured in s 56(1) of the Just Terms Act was different in any event from the *Pointe Gourde* principle: at [86];

(6) There was no textual foothold in the Roads Act for the incorporation of something akin to the *Pointe Gourde* principle: at [87];

(7) Par (37)(b) of RDM's POC which relied on the principle that an interpretation of an Act will not be adopted that will allow a person to take advantage of their own wrong was found to be untenable. The submission of RMS was that if there was a "wrong" under s 6 of the Roads Act, the remedy would be a suit under s 6. Paragraph (37)(b) was found to disclose no reasonable cause of action: at [90]-[91];

(8) Although not determinative, it was clear that there would be a material saving in terms of time and costs if the matters raised in the Motion were dealt with prior to the substantive hearing: at [93]; and

(9) The prospects of the first and second scenarios (in paragraphs 37(a) and 37(b) of RDM's POC respectively) were not even "slim". There was "certainty of outcome" because paragraphs 37(a) and 37(b) disclosed no reasonable cause of action. RMS was entitled to the relief it sought in the motion and it was appropriate to exercise discretion and strike out paragraphs 37(a) and 37(b): at [94].

RD Miller Pty Ltd v Roads and Maritime Services NSW (No 2) **[2019] NSWLEC 141** (Robson J)

(related decision: *RD Miller Pty Ltd v Roads and Maritime Services NSW* [2019] NSWLEC 129 (Robson J))

Facts: RD Miller Pty Ltd (**RDM**) commenced proceedings seeking compensation from the Roads and Maritime Services (**RMS**) pursuant to ss 68(1) and 226(3) of the *Roads Act 1993* (NSW) for loss or damage arising from its right of access across the boundary between its land and the road formerly known as the Princes Highway (**Road**) being restricted and/or denied and the ensuing order declaring part of the Road to be a controlled access road published in the *New South Wales Government Gazette*.

RMS filed a Notice of Motion seeking orders that certain paragraphs of RDM's Points of Claim (**POC**) which posited three approaches to the determination of compensation be struck out (**strike-out motion**). On 12 September 2019, Robson J gave judgment striking out certain paragraphs of RDM's POC and reserving costs. In light of the determination in the strike-out motion, RDM filed a Notice of Motion seeking to vacate the hearing dates listed for 21 to 25 October 2019, and sought to file a further Notice of Motion seeking leave to amend its POC (**amendment motion**).

Issue: Whether the hearing dates listed for 21 to 25 October 2019 should be vacated.

Held: Hearing dates listed for 21 to 25 October 2019 vacated; leave granted to file Notice of Motion seeking leave to file a further Amended Points of Claim, with the hearing of that motion set down for 21 October 2019; costs reserved:

(1) It was unfortunate, but appropriate that the hearing dates be vacated for the following reasons: at [41], [46]:

   (a) although RDM chose to delay the preparation of its evidence pending the outcome of the strike-out motion, its conduct was understandable as if the strike-out motion was successful (as it was), the nature and extent of the evidence was likely to be narrower than it would otherwise have been. This decision was justified on the basis that costs may well have been saved: at [42];

   (b) if the hearing dates were not vacated and RDM further hastened the marshalling of its evidence, if that evidence was obtained, it is unlikely that it would be available to RMS until at or shortly before the hearing. This would likely in turn result in an application for the rejection of that evidence and/or vacation of the dates to allow RMS to consider and respond to the late service of that material: at [43];

   (c) the Land and Environment Court was aware that a Notice of Motion was being filed by RDM seeking leave to file a further Amended Points of Claim based upon legal advice received after judgment was handed down. That motion would be required to be heard either shortly before the hearing or on the first day of the hearing. The success or otherwise of that motion would likely affect the nature and extent of the evidence that would then be sought to be relied upon by RDM to support the POC as subsequently configured: at [44]; and

   (d) while conscious of the prejudice that flowed to RMS from RDM's conduct, such prejudice was not be determinative: at [45];

(2) Leave granted to RDM to file the amendment motion and set it down for hearing on 21 October 2019, the date that would have otherwise been the first day of the hearing: at [47]; and

(3) As no argument was heard in relation to costs, costs were reserved: at [48].

UTSG Pty Ltd v Sydney Metro (No 5) **[2019] NSWLEC 107** (Pepper J)

(related decisions: *UTSG Pty Ltd v Sydney Metro* [2018] NSWLEC 128 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 2)* [2018] NSWLEC 199 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 3)* [2019] NSWLEC 49 (Pepper J) *UTSG Pty Ltd v Sydney Metro (No 4)* [2019] NSWLEC 51 (Pepper J))

Facts: Ms Singh, director of the applicant (**UTSG**), applied, by way of ex parte e-mail communication to vacate hearing dates for the resumption of part-heard Class 3 compensation for compulsory acquisition proceedings. The e-mail was sent on 18 July 2019 and the part-heard hearing was listed to recommence

on 29 July 2019 for five days. The LEC decided to consider the e-mail as an application to vacate the hearing dates despite its irregularity, due to the urgency of the application and the fact that Ms Singh was unrepresented. Attached to the e-mail was a letter from Ms Singh's treating psychiatrist, Dr Fukui, stating that she was "medically unfit to represent herself in Court". It provided no details of the medical condition she was suffering from or why it rendered her unfit to appear. Dr Baig, also a director of UTSG and who had represented UTSG at three of the first seven days of hearing in the matter, deposed an affidavit in support of the application stating that Ms Singh had been hospitalised and that the treating medical specialist had advised that she could not leave the facility. Annexed to the affidavit was a letter from a social worker, Mr Istanbouli, stating that Ms Singh was currently hospitalised and that the treating team could not predict when she would be discharged. UTSG submitted that Ms Singh's illness prevented her from representing UTSG at the hearing and, moreover, that Dr Baig did not possess adequate knowledge of the financial affairs of the company to adequately represent UTSG and, therefore, that the hearing dates had to be vacated. Sydney Metro (**respondent**) did not oppose the application on the condition that the LEC made timetabling orders for the matter so that proceedings would not lay dormant for an unnecessarily extended period of time. The hearing had adjourned during the re-examination of Ms Singh.

Issues: Whether the Court should grant the application to vacate the hearing.

Held: Application to vacate the hearing dates was granted:

(1) Although the LEC has the discretion to adjourn proceedings under s 66 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**), the discretion is not unfettered. The LEC must consider the dictates of justice pursuant to s 58 of the Civil Procedure Act as well as the overriding purpose of the Civil Procedure Act, contained in s 56(1): at [38]-[40];

(2) Medical evidence in support of an application to vacate hearing dates must explain why the medical condition will prevent a litigant from participating in a court hearing either in person or by some other means. The medical evidence therefore needs to identify the medical condition, the symptoms of the condition, insofar as they are relevant to participation in a court hearing, the severity of the condition, and it's expected duration: at [42]-[43];

(3) Each piece of medical evidence supplied by UTSG, standing alone, was inadequate to warrant the vacation of the hearing dates. However, taken together the letters from Dr Fukui and Mr Istanbouli together with the contents of Dr Baig's affidavit were sufficient for the LEC to find that Ms Singh would be unable to participate in the scheduled hearing: at [52]-[55];

(4) Dr Baig was capable of representing UTSG in the absence of Ms Singh. His conduct of the last three days of the initial hearing demonstrated that he had a sufficiently detailed understanding of the financial affairs of UTSG and there was nothing to suggest that Ms Singh would be unable to give Dr Baig instructions during the course of the hearing: at [61]-[63]; and

(5) However, taking into account the dictates of justice, the hearing dates had to be vacated because the finalisation of the re-examination of Ms Singh could impact the future conduct of the proceedings, in particular, the preparation by UTSG for the respondent's expert witnesses, especially their cross-examination. To proceed with the expert evidence without concluding Ms Singh's re-examination could result in forensic disadvantage to UTSG: at [64]-[67].

- **Costs:**

Carter v Minister for Resources **[2019] NSWLEC 83** (Preston CJ)

Facts: The first respondent, the Minister for Resources (**Minister**), purported to grant a mining lease to the third respondent, EMC Metals Australia Pty Ltd (**EMC**). However, the grant of the lease was in breach of the *Mining Act 1992* (NSW) (**Mining Act**). The parties accepted that the lease was invalid and of no effect.

The breach of the Mining Act occurred due to the failure of the Secretary of the Department (**second respondent**) to determine an agricultural land objection made by the applicant (**applicant**). Part of the land the subject of the mining lease was a rural property owner by the applicant. The applicant

objected to the grant of the mining lease on the ground that his property was agricultural land. He lodged an objection in writing to the second respondent pursuant to cl 22 of Sch 1 of the Mining Act. The Mining Act required the second respondent to determine the objection in accordance with Sch 2 of the Act. Section 63(4) of the Mining Act provided that a mining lease "may not be granted under this section otherwise than in accordance with Pt 2 of Sch 1".

The objection was overlooked. The objection was not determined in accordance with Sch 2 of the Act as required. As such, the Minister had no power to grant the mining lease.

The applicant sought a declaration that the mining lease was invalid. The applicant submitted that the declaration would have a constitutive effect; the declaration would cause the lease to become invalid. The third respondent filed a submitting appearance. The first and second respondents initially filed a submitting appearance, but were later granted leave to file submissions.

The first and second respondents submitted that the mining lease was void ab initio. They submitted that there was no reason for the LEC to declare the mining lease invalid. The respondents later accepted that even if the lease was void ab initio there may be some utility in the making of the declaration sought by the applicant. The respondents consented to the making of the declaration.

The applicant applied for an order for costs on an indemnity basis. The applicant submitted that the respondents had acted unreasonably by delaying their consent to the LEC making a declaration. The applicant also submitted that the respondents' argument, that there was no need for a declaration of invalidity, was itself unreasonable.

Issues: Whether the first and second respondents should pay the costs of the applicant on an indemnity basis.

Held: Mining lease declared invalid and of no effect; first and second respondents to pay the applicant's costs of the proceedings:

(1) The first and second respondents' conduct was not so unreasonable as to justify the making of a costs order in favour of the applicant on an indemnity basis: at [22]; the first and second respondents' submitted position was reasonably arguable: at [25].

- **Merit Decisions (Judges):**

Catholic Healthcare Limited v Randwick City Council **[2019] NSWLEC 99** (Robson J)

Facts: Two Class 1 appeals were brought by Catholic Healthcare Limited (**applicant**) concerning the deemed refusal by Randwick City Council (**Council**) of two development applications (Concept Development Application and Stage 2 Development Application) which sought consent for the demolition of existing structures and the construction of a seniors housing development at 481-499 Malabar Road, Maroubra (**site**). The site is currently occupied by the Maroubra RSL Memorial Bowling Club and comprises three grass bowling greens and a small clubhouse.

The proposed development comprised a four-storey residential care facility accommodating 108 beds (**RACF Building**), one three-storey building (**Building A1**), a mixed three-and-four-storey building (**Building A2**) and a mixed one-, two-, three-and-four storey building (**Building B**) containing a total of 56 independent living units (**ILUs**), basement car-parking, ancillary services in a community hub, associated landscaping works and a through-site pedestrian link.

Pursuant to the Randwick Local Environmental Plan 2012 (**RLEP 2012**), the site is zoned RE2 Private Recreation. Seniors housing is not a permitted use in the RE2 zone. To enable development of the site for the purpose of seniors housing, a Site Compatibility Certificate was obtained pursuant to cll 4 and 24 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**SEPP HS**).

Issue: Whether development consent should be granted to the proposed development, having regard to its compatibility with the surrounding environment, neighbourhood amenity and streetscape, design quality, design excellence and public interest.

Held: Appeals upheld; development consent granted in each matter subject to conditions:

(1) While the proposal was relatively similar to that of its surrounding neighbours, it appropriately addressed each of its immediate and more distant neighbours. The built form utilised a smaller scale around the northern and eastern edges which appropriately responded to the context. Where the ILUs had a fourth storey, they were generally set back and RACF building was furthest away from the built form around the site: at [44];

(2) While the SEPP HS determined use and not form, one could not escape the fact that that which was proposed had, to some extent, a form driven by its function. While the proposal did not replicate the surrounding development in the neighbourhood, it was compatible with the existing character: at [47];

(3) The proposal was compatible with its surrounding environment pursuant to cll 24(2)(b) and 25(5)(b) of SEPP HS: at [54];

(4) The proposal was found to recognise the desirable elements of the location's current character pursuant to cl 33 of SEPP HS: at [55];

(5) Given the agreement between the experts as to the compliance with various aspects of the NSW Department of Planning and Environment, "Apartment Design Guide" and setback requirements of the Randwick Comprehensive Development Control Plan 2013, adequate regard had been given to neighbourhood amenity and streetscape (as well as visual and acoustic privacy, solar access and design for climate, stormwater, crime prevention, accessibility and waste management): at [57];

(6) In considering design excellence pursuant to cl 6.11(4) of the RLEP 2012, the proposal displayed a high standard in relation to architectural design, materials and detailing, improved the quality and amenity of the public domain, achieved an acceptable relationship between buildings on the site and on neighbouring sites, met sustainable design principles and did not unacceptably impact view corridors or landmarks: at [62]-[67]; and

(7) The proposal and the conditions agreed between the parties adequately addressed the concerns raised by the objectors: at [70].

Eastern Suburbs Leagues Club Ltd v Waverley Council **[2019] NSWLEC 130** (Moore J)

Facts: On 18 December 2018, Eastern Suburbs Leagues Club Ltd (**Club**) applied to Waverley Council (**Council**) for development consent to redevelop the precinct occupied by Waverley Bowling Club (**Bowling Club**). There was great community resistance to the development and Council identified a range of issues that were in contention between the parties including town planning and urban design, traffic and parking, heritage and acoustics issues.

During the course of proceedings the parties collaborated extensively through the joint conferencing process on amendments to the development to ameliorate the issues in contention between them. This left one merit issue to be decided.

Issues:

(1) Whether the Club needed to make a request pursuant to cl 4.6 of the Waverley Local Environmental Plan 2012 (**WLEP 2012**) as the development did not comply with the standards set by cll 4.3 and 4.4 of the WLEP 2012; and

(2) Whether Building A should remain, as proposed by the Club, a seven-storey building in the north-western corner of the site.

Held: Proposed building to be reduced in height; revised plans and conditions and a revised BASIX certificate to be provided; consent to be granted when plans and conditions provided:

(1) Although in broad terms, a "line of best fit" approach might be appropriate, the line drawn by the Club's architect was rejected because a properly crafted "line of best fit" would be somewhat lower than that proposed by the Club's architect: at [134];

(2) No cl 4.6 required, cl 5.3 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ousts the need for such a request: at [103]-[105]; and

(3) On balance, the appropriate and preferable outcome was to remove one residential level and redesign the penultimate residential level to mimic the footprint of the presently proposed uppermost residential level. This would be consistent with the future character of the area: at [142], [150].

Huajun Investments Pty Ltd v City of Canada Bay Council (No 3) **[2019] NSWLEC 42** (Moore J)

(related decisions: *Huajun Investments Pty Ltd v City of Canada Bay Council* [2018] NSWLEC 1087 (Smithson C); Huajun Investments Pty Ltd v City of Canada Bay Council (No 2) [2018] NSWLEC 194 (Robson J); *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Basten, Leeming JJA and Preston CJ of LEC))

Facts: Huajun Investments Pty Ltd (**applicant**) applied to City of Canada Bay Council (**Council**) for approval to develop a residential flat building at Strathfield (**site**). The proposed development included three basement parking levels and residential apartments above. The site was zoned R4 High Density Residential under the Canada Bay Local Environmental Plan 2013 (**CBLEP 2013**). It is in an area bounded by Leicester Avenue, Parramatta Road and the railway line. The area is known as the Strathfield Triangle (**Triangle**).

The applicant commenced a Class 1 appeal after the Council's deemed refusal. Smithson C conducted the conciliation conference between the applicant and the Council in February 2018. At the conciliation conference the parties entered into an agreement to which the commissioner gave effect (*Huajun Investments Pty Ltd v City of Canada Bay Council* [2018] NSWLEC 1087).

Al Maha Pty Ltd (**Neighbouring Owner**) owned the property immediately to the south of the site. The plans which were purportedly granted by Smithson C nominated the Neighbouring Owner's property as a future access point for the applicant's proposed development but nominated that the access to be constructed to give effect to the development was to be from Leicester Avenue, a controlled road requiring consent from Roads and Maritime Services (**RMS**). The RMS gave consent for temporary access on the provision that future access would be across the Neighbouring Owner's property. Thus, the Neighbouring Owner's consent was needed for development on its property as being a future access point and which it did not give.

The Neighbouring Owner then commenced proceedings in the Supreme Court, in its general supervisory jurisdiction, pursuant to s 69 of the *Supreme Court Act 1970* (NSW), and successfully had the purported consent set aside. The matter was then remitted to the Land and Environment Court (**LEC**) for redetermination (*Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Basten, Leeming JJA and Preston CJ of the LEC)). The Neighbouring Owner then successfully applied, pursuant to s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) to be joined as a party to the remitted proceedings. Initially the joinder order was restricted to certain topics, however the Neighbouring Owner was granted leave at the beginning of the substantive hearing to participate fully in the proceedings as a respondent *(Huajun Investments Pty Ltd v City of Canada Bay Council (No 2)* [2018] NSWLEC 194).

There were three jurisdictional issues pressed by the Council and the Neighbouring Owner and if any were found against the applicant, this would prohibit the granting of consent. The first two jurisdictional issues related to cl 101(2) of the State Environmental Planning Policy (Infrastructure) 2007 (**SEPP**). This clause required that a consent authority must not grant consent to development that has a frontage to a classified road unless it is satisfied of various factors. The respondents pressed cl 101(2)(a), which states that, where practicable and safe, vehicular access to land is provided by a road other than the classified road and cl 101(2)(b)(i) requiring safe, efficient and ongoing operation of the classified road will not be adversely affected as a result of design of the vehicular access to the land. The third jurisdictional issue related to the applicant's cl 4.6 request to dispense with compliance with building height limits. The respondents also pressed two merit matters, which together would warrant refusal of the development appeal if the Court found against them on the jurisdictional issues.

Issues:

(1) Whether cl 101(2)(a) of the SEPP acted to prohibit giving consent to the proposed development having access from Leicester Avenue;

(2) Whether cl 101(2)(b)(i) of the SEPP acted to prohibit giving consent to the proposed development having access from Leicester Avenue;

(3) Whether cl 4.6 of the CBLEP 2013 could be engaged for the applicant to dispense with compliance with the mandated building height limit set by cl 4.3 of that CBLEP 2013; and

(4) Whether the merit matters involving access and vehicle servicing and solar access together warranted refusal of the development.

Held: The request pursuant to cl 4.6 of the CBLEP 2013 not to comply with the development standard applicable to the site pursuant to cl 4.3 Height of Buildings was refused. Development appeal refused. No order for costs pursuant to s 8.15(3) of the EP&A Act and all other costs were reserved:

(1) The LEC did not have jurisdiction to grant the appeal because the applicant did not pass the necessary jurisdictional tests: at [3];

(2) The lack of practicability of access had not been explored in a fashion to demonstrate that practicable access to the site could not be obtained from Hilts Road, Strathfield: at [136];

(3) Although a design change could ameliorate the safety concern regarding obstruction of a sign, as the proposed development failed to satisfy other jurisdictional tests and lacked merit for approval on unrelated grounds, it was unnecessary to consider doing so: at [148];

(4) The cl 4.6 request did not demonstrate why the Court should conclude that the applicant's proposed development would be in the public interest because it was compatible with the first of the objectives of the height of buildings development standard, therefore the request to be permitted not to comply with that development standard must be rejected as failing that jurisdictional test: at [198];

(5) The LEC was unable to accept that, if the development was approved, an effective regime could be imposed that would entirely prevent any delivery or servicing of the development being sought to be undertaken: at [267], and

(6) The solar impacts on the amenity of residents of the proposed development had significant non-compliance with the solar access in the Australian Design Guidelines. Too many apartments would have poor internal amenity and that, in and of itself, warranted refusal. Therefore the merit matters were not made out: at [310], [312].

Karimbla Constructions Services (NSW) Pty Limited v The Council of the City of Sydney **[2019] NSWLEC 78** (Robson J)

Facts: Karimbla Constructions Services (NSW) Pty Limited (**applicant**) appealed against the Council of the City of Sydney's (**respondent**) deemed refusal of modification application D/2015/1901 which sought to amend a condition (**Condition 3A**) of a development consent granted by the respondent in relation to land known as 5-13 Rosebery Avenue, Rosebery. Condition 3A provided for the payment of local infrastructure contributions which were determined pursuant to ss 7.11 and 7.13(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

On the second day of the hearing, the parties indicated that subject to the Land and Environment Court's (**LEC**) approval, they had reached agreement as to a determination of the contribution and a modified wording of Condition 3A.

Issue: Whether the LEC would approve the determination of the contribution and a modified wording of Condition 3A as per the parties' agreement.

Held: Appeal allowed; development consent modified by deleting Condition 3A and substituting Condition 3A in the form agreed; no order as to costs:

(1) Having considered the expert material and the manner in which it was agreed that Condition 3A be recast, and having heard submissions from senior counsel for each of the parties, his Honour was content to the extent that he was required to be to exercise his discretion pursuant to s 7.13(3) of the EP&A Act. The contribution under Condition 3A was unreasonable and the contribution under the amended Condition 3A would be reasonable and appropriate in the circumstances: at [9].

Rosewood Australia Pty Ltd v Ku-ring-gai Council **[2019] NSWLEC 84** (Robson J)

Facts: Rosewood Australia Pty Ltd (**applicant**) appealed against Ku-ring-gai Council's (**Council**) deemed refusal of DA0063/18 for the demolition of existing dwellings and ancillary structures and the construction of a seniors living development comprising seven self-contained dwellings of one-to-two storeys over a basement garage and associated works on land at 116-118 Junction Road, Wahroonga (**site**). The site is zoned R2 Low Density Residential under the Ku-ring-gai Local Environmental Plan 2015 (**KLEP 2015**). The proposed development, being a residential care facility, is prohibited in that zone. As such the applicant relied on the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**SEPP**) for permissibility.

Council submitted that the development was prohibited because part of the site was mapped "biodiversity" under cl 6.3 of the KLEP 2015, and by operation of cl 4(6) and Sch 1 (b) and (d) of the SEPP, the SEPP did not apply to the site.

Issues:

(1) Whether the proposed development was on land described as "environmentally sensitive land" within the meaning of Sch 1 of the SEPP, thereby rendering the proposed development prohibited; and
(2) Whether there was a public interest concern that militated against the granting of development consent.

Held: Appeal upheld; development consent granted subject to agreed conditions:

(1) Schedule 1 of the SEPP required identification of land by either the descriptions therein, by like descriptions, or by descriptions that incorporated any of the words or expressions in the schedule. As the enquiry was one of identification of land in the KLEP 2015, the sole identifier in the KLEP 2015 was "biodiversity". Given that there was nothing in the words or phrases used in (a) through to (m) of Sch 1 that incorporated "biodiversity", the only enquiry was whether "biodiversity" was a like description to the nominated descriptors in the schedule: at [42];

(2) The objectives in cl 6.3(1) of the KLEP 2015, when read both textually and contextually, perform an identification function for the purpose of Sch 1 of the SEPP. Even if Council sought to rely upon the objectives of cl 6.3, the task of identifying the land was complete before cl 6.3 was further engaged: at [52];

(3) While Council submitted that the subject land was a "biodiversity corridor" pursuant to the Terrestrial Biodiversity Map (**map**), the map merely identified part of the land as "biodiversity" as per cl 6.3(2) of the KLEP 2015 and that "biodiversity corridor" was used throughout cl 6.3 in the context of the operation of that clause, rather than for an identification purpose: at [53];

(4) While Council sought to rely on the context in which "biodiversity" was used in the KLEP 2015, including the heading "Biodiversity protection" in cl 6.3, to submit that it was a like descriptor for "conservation" and/or "environment protection", "environment" could not be separated from "protection" to identify the land as being a like descriptor thereof and "biodiversity" was different in meaning from "environment protection" and "conservation": Further, pursuant to s 35(2)(a) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**), the heading in cl 6.3 could not be taken to form part of the instrument: at [60], [66];

(5) Although the heading in Sch 1 of the SEPP, being "Environmentally sensitive land", was taken to form part of the instrument pursuant to s 35(1)(b) of the Interpretation Act, cl 4(6) of the SEPP is engaged by what follows after the heading to the schedule, not by merely enquiring as to whether the land is environmentally sensitive: at [66];

(6) The description, "biodiversity", as used in the KLEP 2015 to identify a portion of the site, was not a "like description" for the expressions "environment protection", "conservation" or "critical habitat" in Sch 1 of the SEPP. The identification of the site on the map did nothing more than identify that the land had "biodiversity" as an attribute. Therefore, cl 4(6)(a) of the SEPP was not engaged and the SEPP applied to the site: at [65], [67];

(7) The residual concerns raised in the objectors' submissions were satisfactorily dealt with by amendments made to the earlier plans and by proposed conditions of consent: at [73]; and

(8) In circumstances where the SEPP applied and that the objectors' concerns had been adequately addressed, it was appropriate to grant development consent subject to conditions which had been agreed between the parties: at [74].

- **Merit Decisions (Commissioners):**

Abrams v The Council of the City of Sydney (No 5) **[2019] NSWLEC 1368** (Dickson C)

(related decisions: *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85 (Robson J); *Abrams v The Council of the City of Sydney* [2018] NSWLEC 1648 (Dickson C); *Gary Abrams v The Council of the City of Sydney (No 4)* [2019] NSWLEC 71 (Robson J))

Facts: Mr Gary Abrams (**applicant**) lodged a development application for the demolition of an existing commercial building and the construction of a new four-storey residential flat building at 9 Power Avenue, Alexandria in December 2017. The Council of City of Sydney (**Council**) was deemed to have refused the Development Application (**DA**), and the applicant appealed to the Land and Environment Court (**LEC**) on 15 February 2018 pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW). The appeal was dismissed by Dickson C on 17 December 2018 who held that the applicant's cl 4.6 written request, that argued for a variation of the floor space ratio (**FSR**) standard in the Sydney Local Environment Plan 2012 (**SLEP 2012**), had not demonstrated sufficient 'environmental planning grounds' to justify a contravention of the development standard.

The applicant appealed the decision of Dickson C pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) and argued that:

(1) The commissioner had failed to provide reasoning for refusing the appeal; and

(2) The commissioner had confined her assessment of the applicant's "environmental planning grounds" to only that part of the cl 4.6 written request that was so headed, and had not regarded the whole of the cl 4.6 written variation request.

Robson J upheld the appeal and found that Dickson C had erred on a question of law in failing to provide reasoning for the decision. The case was remitted to Dickson C for redetermination.

The applicant lodged a Notice of Motion to reopen the case, and asked for leave to be granted to amend the DA with the following material:

(1) Clause 4.6 request - Height prepared by ABC Planning Pty Ltd dated June 2019; and

(2) Clause 4.6 request - Floor space ratio (FSR) prepared by ABC Planning Pty Ltd dated June 2019.

The motion to reopen and the application for leave were not opposed by the Council.

No other expert evidence was provided, and the case proceeded on the previous evidence and submissions.

Issues:

(1) Whether a variation to the maximum height standard of 15 metres to provide for a proposed building height of 15.25 metres should be upheld; and

(2) Whether the proposed variation to the FSR standard could be supported.

Held: Development application for the demolition of the existing commercial building at 9 Power Avenue, Alexandria and the construction of a new four-storey residential flat building refused:

(1) The applicant had demonstrated that compliance with the height standard would be unreasonable or unnecessary in the circumstance of the case because the proposed height standard had achieved the objective of the development standard despite the non-compliance (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42] (Preston CJ); *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 8 at [22] (Preston CJ)): at [20]. The development was held to be in the public interest because it was consistent with the objective of the Height Standard (cl 4.3, SLEP 2012) and the objective of the zone pursuant to cl 4.6(4)(ii) of the SLEP 2012: at [23].

Furthermore, the variation was not prevented by cl 4.6(5): at [25]. Finally, the applicant's written request had complied with cl 4.6(4)(a): at [26]-[27]; and

(2) The written request had established that compliance with the FSR standard would be unreasonable or unnecessary in the circumstance of the case (cl 4.6(3)(a)) because of the following: at [69]:

(a) the proposed building is responsive to the three-to-five storey scale of the existing context and provided for a building that is consistent with the street-edge perimeter block form;

(b) the proposed building provided for a strong corner expression that reinforced the corner of the adjacent building and enabled more deep-soil planting on Power Avenue;

(c) the amended plan had improved the amenity of the building;

(d) the ground level is activated and "balances" the other corner and improved the activity that is opposite to Alexandria Park; and

(e) the unique site reduced the precedential effect of any approval of an FSR variation: at [36];

(3) The applicant's written request had not demonstrated sufficient "environmental planning grounds" to justify a contravention of the development standard (cl 4.6(3)(b)): at [81]. The reasoning is detailed as follows: the written request lacks clarity as to how the FSR variation is concurrent with the benefits argued; the written request does not adequately justify how compliance with the relevant planning controls is sufficient environmental planning grounds to warrant the variation; the written request does not adequately establish that the urban design benefits detailed could not equally apply to a development compliant with the standard: at [86]; and

(4) Collectively the environmental planning grounds argued are not sufficient to justify varying the FSR standard: at [87].

EZRA 1 Pty Ltd v Georges River Council **[2019] NSWLEC 1275** (Horton C)

Facts: The appeal was brought by Ezra 1 Pty Ltd (**applicant**) against Georges River Council's (**Council**) deemed refusal of Development Application DA2018/0071 for the demolition of existing structures and the construction of eight two-storey in-fill self-care housing units to be used as seniors living housing, basement car-parking and other ancillary works at 10-12 Mimosa Street, Oatley.

The Council contended that the proposed development was prohibited under cl 26 of the State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (**SEPP**) which requires a consent authority to be satisfied that residents of the proposed development will have access to shops, bank service providers and other retail and commercial services that residents may reasonably require, community services and recreation facilities, and the practice of a general medical practitioner.

Subclause 26(2) provides that access complies if there is a public transport service available to the residents at a distance of not more than 400 metres from the site, and the distance is accessible by means of a suitable access pathway that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and which is available between certain times of the day, and if the gradient along the pathway from the site to the public transport services is considered accessible.

The Council submitted that the public bus services relied on by the applicant did not comply with subcl 26(2)(b)(iii) of the SEPP and, furthermore, the applicant's request to contravene the provisions under cl 4.6 of the Kogarah Local Environmental Plan 2012 (**KLEP 2012**) by the provision of a private bus service should be refused as the pedestrian link provided for residents to access the bus service was neither obvious or safe as required by cl 38 of the SEPP.

Issues:

(1) Whether the proposed development demonstrated that adequate regard had been given to providing obvious and safe access to transport and facilities in accordance with Pt 3 of the SEPP;

(2) Whether a written request to contravene cl 26 of the SEPP in relation to the location and access to facilities adequately addressed the relevant provisions of clause 4.6 of the KLEP 2012; and

(3) Whether adequate provision had been made for landscaping to the west of the site.

Held: Appeal dismissed:

(1) The applicant did not demonstrate that access to the proposed bus stop complied with the access so described in cl 38 of the SEPP, and for which adequate regard must be demonstrated under cl 32 of the SEPP in order for consent to be granted: at [77];

(2) For the reasons set out in [78] it could not be said that the applicant had provided a suitable access pathway as defined by cl 26(4) of the SEPP: at [80]; and

(3) The applicant's written request to contravene cl 26 of the SEPP did not adequately address the matters required to be demonstrated by cl 4.6(3)(a) of KLEP 2012 as it exceeded an appropriate degree of flexibility in applying the development standard as it would impose on a small number of residents (as few as eight) an ongoing logistical and financial burden for the life of the development and, furthermore, as it failed to address adequately the means of pedestrian access to the proposed bus stop or to consider any provision for the bus service to the site itself: at [107].

K Capital Pty Ltd v City of Parramatta Council **[2019] NSWLEC 1292** (O'Neill C)

Facts: K Capital Pty Ltd (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the refusal by the City of Parramatta Council (**Council**) to grant consent to a Stage 1 Concept Development Application made pursuant to Div 4.4 of the EP&A Act for the restoration and refurbishment of part of the former Roxy Theatre and forecourt, demolition of the rear portion of the Roxy Theatre, a basement level at the rear of the site and tower building envelope for 29 storeys at 69 George Street, Parramatta.

The site was listed on the State Heritage Register. The former Roxy Theatre building fully occupied the site. The site was in the central business district of Parramatta. The floor space ratio development standard for the site was 10:1 and there was no relevant numerical height limit for the site, other than a requirement that a proposal could not pierce the conceptual plane that would result in the winter solstice lunchtime overshadowing of the nearby Lancer Barracks and Jubilee Park.

Issues:

(1) Whether the proposed concept development would have an adverse impact on the heritage significance of the Roxy Theatre and whether the Conservation Management Plan (**CMP**) submitted with the application was inadequate;

(2) Whether cl 7.10(5) of the Parramatta Local Environmental Plan 2011 (**PLEP 2011**), requiring a competitive design process for a development in respect of a building that will have a height above ground level greater than 55 metres, applied to a concept proposal;

(3) Whether the concept proposal exhibited design excellence under cl 7.10 of PLEP 2011.

(4) Whether the concept proposal would have an unacceptable impact on the streetscape and Civic Link;

(5) Whether the proposed vehicular access, which relied on the Council's Civic Link Framework to be implemented and was not presently available, was acceptable; and

(6) Whether the wind study submitted with the application was adequate.

Held: Appeal dismissed:

(1) The intactness of the volume of the former theatre space was an essential element of the heritage significance of the former Roxy Theatre and the integrity of the overall form of the theatre building was one of the bases for its listing as an item of State heritage significance, evidenced in the statement of significance: at [89];

(2) The concept proposal had not struck a reasonable balance between developing the site and retaining and conserving the heritage item, because the extent of demolition proposed by the concept proposal would have destroyed the theatre auditorium space of the Roxy Theatre. In doing so, it would have resulted in an unacceptable impact on its identified heritage significance as a good and relatively intact representative example of the "Picture Palaces" of the interwar period, and on its overall form

and surviving original fitout and fabric which displayed the major attributes of this building type: at [87];

(3) The current division of the dress circle and the stalls by the floor inserted between the two spaces during the 1970s, as well as the removal of some of the stucco plaster decoration in the stalls and stage area, had diminished the intactness of the interior of the theatre, but it had not extinguished the potential for the theatre space to be recovered. The unsympathetic 1970s alterations to the building did not justify the permanent loss of the theatre space: at [89];

(4) The proposed containment of the dress circle as a room and preservation of its decorative stucco plaster decoration would not have retained the heritage significance of the Roxy Theatre. Instead, it would merely have preserved the remnant physical fabric of an element of the former theatre, devoid of its context as part of the volume of the theatre space and it would have significantly eroded its ability to be interpreted as a part of the whole. This was an unacceptable level of intervention for a State listed heritage item, where the integrity of the form of the theatre building, both externally and internally, had been identified as an important component of its heritage significance: at [90];

(5) The CMP was inadequate. It was necessary to understand fully what the benefits of the proposal were in relation to the applicant's justification of economic viability and a development consent granted to fund a worthwhile conservation project should include an unambiguous commitment to the conservation works proposed: at [96]; and

(6) Unnecessary to resolve issues: at [2], [3], [4], [5], [6].

Oxford Street Holdings Pty Ltd v Mid-Coast Council **[2019] NSWLEC 1283** (Dickson C)

Facts: Oxford Street Holdings Pty Ltd (**applicant**) lodged a development application with Mid-Coast Council (**Council**) in 2017 to construct a home estate. The proposed development included provision for 87 sites and a boundary adjustment to allow a 16-metre wide access road from 1 Bottlebrush Close to 6 Waratah Close, Green Point. The Development Application (**DA**) was refused by Council on 25 July 2018.

The applicant commenced proceedings under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW), appealing the refusal.

Issues:

(1) Whether the development would be provided with adequate transport services;

(2) Whether sufficient access to community facilities and services was available; and

(3) Whether the form and density was compatible with the relationship with the surrounding land.

Held: Appeal dismissed; DA refused:

(1) The current level of transport services accessible to the site was inadequate for the proposed development of a manufactured home estate: at [81]. Transport services were found to be insufficient despite the proposal from the applicant to provide a bus service from the site to the Forster Town Centre in accordance with SEPP 36 cl 9(1): at [80]. The finding of insufficiency was based on the low frequency of bus services; limited ability for residents to travel to and from Forster in a day; distance of the bus stops from the subject site and; the lack public buses on weekends and school holidays: at [81];

(2) The failure to satisfy "access to services and facilities including shops, banks, community services and doctors" under cl 9(1)(c) was a reason sufficient to warrant refusal: at [101]. The availability of some facilities and services, such as the proposed community bus and grocery store, was not found to be within the definition of "reasonably accessible" under SEPP 36, cl 9(1): at [100]. The proposals for these services were also found to be a condition which lacks finality or is uncertain so that, in substance, there is not effective consent to the application (*Mison and ors v Randwick Municipal Council* (1991) 23 NSWLR 734 (Priestley JA) at 736): at [978]; and

(3) The form and density of the development and its relationship with the surrounding land were not supportable with regard to the relevant planning instruments: at [156]. The land was found to be an

appropriate location for a manufactured home estate but the proposal did not adequately maintain the rural landscape character: at [151]-[152]. The proposed development was also inconsistent with SEPP 71 cl 8(d) because of the detrimental impact on the locality of Green Point: at [153].

***The Bunker 2017 Pty Ltd v North Sydney Council* [2019] NSWLEC 1365** (O'Neill C)

Facts: The Bunker 2017 Pty Ltd (**applicant**) appealed under ss 8.7(1), 8.9 and 8.25 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the deemed refusal by North Sydney Council (**Council**) of the Development Application (**DA**) for the use of Lots 148 and 167 in SP63731 for the purposes of office premises and parking; the deemed refusal of the modification application to modify a development consent to incorporate works-as-executed into the development consent and authorise the use of Lot 167 to provide car-parking and bicycle storage for the office; and the refusal of the building information certificate application in relation to the existing structures within the cubic space of Lot 148 at 30 Glen Street, Milsons Point. The modification application was not pressed by the applicant.

The existing building at 30 Glen Street, Milsons Point, is a mixed-use development known as "The Colonnades" and consists of predominantly residential development, with two residential towers above several lower common levels. Street level is Level 10 and Lot 148 is in the basement of the existing building, nine levels below the entry foyer. Access to Lots 148 and 167 was via one of the lift banks that also accessed the residential apartments in one of the towers.

The owners of the common property in the strata plan were joined to the proceedings and contended that the proposed use and existing works relied on the common property and owners' consent had not been provided by the Owners Corporation as owner of the land to which the development and existing works related.

Issues:

(1) Whether the consent of the Owners Corporation is required for the making of a building information certificate application in respect of works within a lot in the strata plan;

(2) Whether works that rely or encroach on common property require the consent of the Owners Corporation as the owner of land to which the development related; and

(3) Whether the proposal for the use of a commercial lot as an office had an unacceptable impact on the amenity and security of the residents of the mixed use building.

Held: Upholding the DA appeal and directing the Council to issue a building information certificate for works within the cubic space of Lot 148:

(1) The fixings to the common property to support the building works within Lot 148 and the use of existing services were not works to common property and did not require the consent of the Owners Corporation to the making of the building information certificate application: at [53];

(2) The DA did not relate to common property and related to the use of the lots and was wholly contained within those lots and therefore the owner of the lots was not obliged to obtain the consent of the Owners Corporation to the making of the DA: at [61];

(3) The reference to owner in s 6.22(a) of the EP&A Act referred to the owner of the lot in the strata plan for the purpose of the building information certificate application: at [57]; and

(4) The proposed use as office premises did not have an unacceptable amenity and security impact on the residents of the existing building: at [64].

***Trustees of the Marist Fathers for the Province of Australia v Hunters Hill Council* [2019] NSWLEC 1255** (Dickson C)

Facts: On 24 November 2017, the Trustees of the Marist Fathers for the Province of Australia (**applicant**) lodged a Development Application (**DA**) to subdivide the St Peter Chanel Church land in Hunters Hill. The DA included building envelopes and plans for future residential lots. It also proposed

that the Church and its functions would be retained. The Hunters Hill Council (**respondent**) refused the DA on 27 February 2018. The applicant appealed this decision under s 8.7 of the *Environmental Planning and Assessment Act 1970* (NSW) (**EP&A Act**).

Issues:

(1) The suitability of the land for the proposed development given the sites known contaminants; and

(2) Whether the proposed development will affect the heritage significance of St Peter Chanel Church.

Held: Appeal dismissed; proposed development refused:

(1) To exercise the powers under s 80(1) of the EP&A Act, two preconditions must be met in order for consent authority to action a DA (*Moorebank Recyclers Pty Ltd v Benedict Industries Pty Ltd* [2015] NSWLEC 40 (Preston CJ) at [58]). First, if the land is contaminated, the consent authority must be satisfied the land is suitable in its contaminated state or will be suitable after remediation, for the development to be carried out. Second, if the land requires remediation to be made suitable, the consent authority must be satisfied the land will be remediated before it is used. It was accepted by both parties and their experts that the proposed development land was contaminated with lead-contaminated fill and building rubbish including asbestos. It was found that the proposed drainage works would require site remediation and environmental management. The current proposed DA did not include remediation for the proposed development land: at [36];

(2) The consideration of the suitability of the proposed development land without remediation is a discretionary matter: at [45]. Based on levels of contamination, where the nominated residential, community and childcare uses of the land are permissible with consent, they would not be able to be undertaken on the site without remediation: at [53]. Therefore, the current development plan, the future permissible purposes or use of the land and its possible effects, are uncertain as the extent and scale of remediation has not been determined: at [57];

(3) The site is occupied by the sandstone St Peter Chanel Church which was built from 1890-1901. It is a listed Heritage Item and surrounded in the immediate vicinity with other heritage items. The proposed developments will have a detrimental impact on the significance of the St Peter Chanel Church. The development would impact on its immediate setting when viewed from Futuna Street and its setting when viewed from the Lane Cove River: at [101]. Both of these impacts will reduce the setting of the church, its distinctive presence on the escarpment and its overall landmark quality; and

(4) The site is unsuitable for the development due to its impacts on heritage significance of the St Peter Chanel Church by the reduction of setting and curtilage of the item: at [102].

***Vella v Penrith City Council* [2019] NSWLEC 1247** (Bish C)

Facts: Appeal of refusal of a Development Application (**DA**) to construct a 45-place childcare centre with basement parking.

The site is a regular, rectangular-shaped corner lot which is currently vacant and surrounded by relatively new residential development of single- and double-storey dwellings.

After notification, four objections were received, including a petition signed by 49 residents. The issues raised included: traffic and pedestrian safety; and amenity impacts such as noise, solar access and privacy. These residents were also heard at the site view of the conciliation and hearing on the same issues.

The parties agreed that, based on the DA plans amended following conciliation, the contentions that formed the refusal of the DA under appeal, and issues raised by the objectors, had been resolved. However, they agreed that the proposed development does not quantitatively comply with outdoor space requirements of seven square metres per child. The requirement to establish sufficient outdoor floor space based on the number of children in a childcare centre is provided in reg 108 of the Education and Care Services National Regulations. In developments where the outdoor and indoor space is quantitatively not complied with, as is the case for the proposed development under appeal, concurrence

from the regulatory authority is required, pursuant to cl 22(1)(b) of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017.

Prior to the hearing, the Department of Education, Early Childhood Education Directorate (**Department**) was joined as a party as second respondent in the public interest, pursuant to s 64(1) of the *Land and Environment Court Act 1979* (NSW). The Department had refused to grant concurrence, pursuant to s 4.13(8)(b) of the *Environmental Planning and Assessment Act 1979* (NSW), based on its view that the non-compliance with the outdoor space detrimentally impacts children at play.

Issues: Whether the proposed outdoor space is sufficient for a 45-place childcare centre to grant consent to the DA.

Held: Appeal dismissed; development consent refused:

(1) The outdoor play schedule provided in the Plan of Management is complex. The schedule divides the children into (age) groups and then sub-(age)groups in order to comply with the limit of 22 children outside at a time. For example, there are proposed to be 27, three-to-five-year-olds at the centre. At any one time, only a portion of this group can be outside. The same pattern is provided for the two-to-three-year-old age group, where, although there are only 18 of this age group proposed, they are not all scheduled to play outside at any one time. Therefore, neither of the age groupings will all play together outside at any time during the day. In addition, the maximum period of play outside is one hour for the older group, and 50 minutes for the younger group. However, the bulk of the (outdoor) play sessions are 30-minute periods: at [35];

(2) Based on the outdoor play schedule in the Plan of Management, on which the applicant relies to ensure only 22 children play outside at a time (to limit noise impacts), the children in a 45-place childcare centre at this site will not have equal access to outdoor and indoor play spaces. The time allocated for outdoor play for each child is limited to a maximum of 2.5 hours per day over the course of the day in short intervals. This is not equivalent to the time the children will spend indoors at play. In addition, the very limited periods of play, particularly the half-hour timeslots are insufficient for the children to "play on a large scale": at [41]; and

(3) The requirements for "Quality Area 3" of the National Quality Standard for Early Childhood Education and Care (NQS), which "focuses on the physical environment and ensuring that it is safe, suitable and provides a rich and diverse range of experiences that promote children's learning and development", is not achieved by the proposed development for a 45-place childcare centre and, in particular, Standard 3.1 and Element 3.1.3 of the Australian Children's Education and Care Quality Authority's (ACECQA) Guide to the National Quality Standard 2017 are not satisfied by the proposed outdoor (play) space: at [42].

Registrar Decisions:

Winten (No 21) Pty Ltd v Lake Macquarie City Council **[2019] NSWLEC 1426** (Froh R)

Facts: On 1 August 2019, Newcastle City Council sought, by way of Notice of Motion (**motion**), to be joined as a respondent to these Class 1 proceedings initiated by Winten (No 21) Pty Ltd (**applicant**) in respect of Lake Macquarie City Council's (**Council**) deemed refusal of Development Application No DA/2087/2018 lodged with the Council on 22 November 2018 (**application**). The application seeks approval for 1,063-lot residential subdivision, including construction of roads, utilities, stormwater infrastructure, landscaping and associated clearing, and bulk earthworks.

The motion was opposed by the applicant.

Newcastle City Council sought to be joined to the proceedings pursuant to s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) and r 6.24 of the Uniform Civil Procedure Rules 2005 (NSW).

In its Statement of Facts and Contentions (**SOFAC**), Newcastle City Council proposed to raise the following issues:

(1) Failure to satisfy the mandatory precondition to the grant of consent required by cl 3B(2)(d), Sch 2 of the Environmental Planning and Assessment (Savings, Transition and Other Provisions) Regulation 2017 (NSW);

(2) Impacts of the proposed subdivision on the current and future operation of the Summerhill Waste Management Facility (**SWMC**);

(3) Implications and adequacy of traffic routes utilised or the waste vehicles associated with the SWMC, including B-double and semi-trailers transporting "Special Waste" in accordance with the SWMC's environment protection licence; and

(4) Adverse amenity issues for future residents of the proposed subdivision and the operational functions of the SWMC.

Newcastle City Council contended that these issues are not likely to be addressed, or sufficiently addressed, if it is not joined as a party to these proceedings.

Issue: Whether to join Newcastle City Council as a party to these proceedings.

Held: Joinder ordered:

(1) The issues proposed to be raised by Newcastle City Council in its SOFAC were not before the LEC and were not capable of being addressed without an order for joinder being made: at [12]; and

(2) The fact remains that there is no contention or evidence before the LEC in these proceedings about the issues which Newcastle City Council wishes to raise. Accordingly, the LEC considered these issues to be relevant matters that should be before the LEC for its consideration on this appeal: at [16].

District Court:

R v Kennedy **[2019] NSWDC 283** (Grant DCJ)

Facts: Mr Martin Kennedy (**defendant**) was sentenced for five offences under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**Environment and Biodiversity Act**) and one offence under the *Criminal Code Act 1995* (Cth) (**Criminal Code**). Four of the offences under the Environment and Biodiversity Act related to the import and export of wildlife on three separate occasions between July and October 2016. The defendant posted packages containing live animals from Australia to Sweden and from Thailand to Australia using false sender and receiver details. The fifth Environment and Biodiversity Act offence relates to two pythons which the defendant possessed without a license. The defendant was also found to be in possession of $43,550 in cash, being the suspected proceeds of crime for which he was charged with the offence under the Criminal Code.

In initial police interviews, the defendant denied or refused to comment on his involvement in large parts of the offending conduct. However, after negotiation, the defendant pleaded guilty to all charges.

The maximum penalty was 10 years imprisonment and/or a fine not exceeding $180,000 per ss 303DD1, 303EK1 and 303GN2 of the Environment Protection and Biodiversity Conservation Act 1999, for other two offences, a lower maximum penalty applied.

Issues: Determination of the appropriate sentence to be imposed on the defendant, having regard to the objective and subjective circumstances of the offence.

Held: An aggregate sentence (pursuant to s 68(1) of the *Judiciary Act 1903* (Cth) and s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Crimes Sentencing Act**)) was imposed of three years' imprisonment, to be served by way of an intensive correction order (pursuant to s 7 of the Crimes Sentencing Act):

(1) Applying the test for objective gravity in wildlife smuggling cases outlined in *Henri Robert Morgan v R* [2007] NSWCCA 8 (at [12]), the attempted exportation offences were objectively serious because the defendant was the principal actor and the offences were committed for financial gain: at [100]-[101]. However, the offending conduct was not particularly sophisticated; the offences were not aggravated

by undue cruelty to the specimens, which were transported using an accepted method of transportation of reptiles; the species were not rare or endangered; and no actual harm occurred to the specimens: at [102]-[106];

(2) The importation offences were objectively more serious than the attempted exportation offences, because:

(a) the defendant alone organised and executed the import;

(b) the offending was more sophisticated (the defendant made an initial "scoping trip" to Thailand and addressed the packages to various hotels in Sydney);

(c) a large number of specimens were imported, although they were not rare or endangered;

(d) a large number of the specimens died, although it could not be proved beyond reasonable doubt that there was undue cruelty involved; and

(e) three of the five foreign species imported posed a risk to Australian biodiversity as they were invasive species which could threaten native fauna through predation, competition, or spread of disease and pathogens: at [112]-[125];

(3) The "possession of pythons" offence and the offence relating to the suspected proceeds of crime were of low objective gravity: at [126] and [129];

(4) In relation to the subjective circumstances of the offence (s 16A(2)(m) of the *Crimes Act 1914* (Cth) (**Crimes Act**)), the defendant had antecedents for prior improper conduct relating to the attempted use of banned substances while he was a professional rugby player. The costs he incurred as a result of ensuing legal proceedings, together with a failed business venture, resulted in the defendant experiencing financial hardship. The defendant subsequently suffered depressive episodes. The defendant's offending conduct must therefore be viewed in the context of his "financial failure" and banning from football: at [143]-[151];

(5) The sentence must reflect a strong element of general deterrence and some degree of specific deterrence pursuant to ss 16A(2)(j), 16A(2)(ja), and 16A(2)(m) of the Crimes Act: at [140]-[141]; and

(6) The defendant benefited from some mitigating factors on sentence, namely:

(a) he was genuinely contrite and remorseful (s 16A(2)(f) of the Crimes Act): at [134];

(b) he was granted a 25% discount for the utilitarian value of his early guilty plea (s 16A(2)(g) of the Crimes Act): at [138]; and

(c) he had a low likelihood of reoffending and excellent prospects for rehabilitation (s 16A(2)(n) of the Crimes Act) due to his current full-time employment, stable family life, and stable mental state, together with a new insight into the danger to the ecosystem as a result of such offences: at [162].

New South Wales Civil and Administrative Tribunal:

Charitable Islamic Association of Beirut City Incorporated v The Owners-Strata Plan No 75506 **[2019] NSWCATCD 53** (G J Sarginson, Senior Member)

Facts: These proceedings in the NSW Commercial and Consumer Division of the NSW Civil and Administrative Tribunal (**NCAT**) involved a dispute under the *Strata Schemes Management Act 2015* (NSW) (**Strata Schemes Management Act**) between a lot owner, Charitable Islamic Association of Beirut City Incorporated (**applicant**) and an owners corporation, The Owners-Strata Plan No 75506 (**respondent**).

The applicant purchased Lot 2 (**lot**) of the six lots owned by the respondent in March 2016. Between the purchase date and March 2017, the applicant conducted significant modification of the lot and surrounding common property to transform the lot into premises for use as a prayer hall. These modifications to common property were conducted, without the knowledge or consent of the respondent,

any development application being approved by the local council. From 31 March 2017, the applicant conducted prayer meetings at the lot. Other than the lot relevant to these proceedings, the other five lots that comprise the registered strata plan continue to be used for light industrial purposes, as per the local council zoning of that area.

On 5 December 2017, the respondent held its annual general meeting and considered two relevant motions during this meeting. Motion 15 was that a special privilege by-law be passed pursuant to s 141 of the Strata Schemes Management Act authorising the "past works" conducted by the applicant. Motion 16 was that the respondent would consent to the applicant lodging a development application with the local council regarding the modifications to the lot and common property and would provide written consent to such an application. Both motions failed to pass.

Also, there are currently separate proceedings in NCAT relating to the removal of all the unauthorised alterations of the common property. As this issue is not relevant to the current proceedings, NCAT gave no weight to it in these proceedings.

Issues:

(1) Whether it was unreasonable for the respondent to refuse to pass the special privileges by-law sought by the applicant; and

(2) Whether the respondent must provide consent to the applicant lodging a development application with the local council.

Held: Application dismissed; order as to costs unless application made:

(1) Although the applicant tried to suggest that s 149 of the Strata Schemes Management Act should be construed to focus on the physical alterations and modifications of the Lot, s 149(2)(a) of the Strata Schemes Management Act refers to the "interests of all owners in the use and enjoyment of their lots and common property" being considered. Therefore, it was fair to consider that the large number of persons attending the strata scheme for the purpose of prayer had the practical effect of restricting access to the other lots and the ability to park on the common property: at [51]-[52];

(2) The applicant did not establish, on the balance of probabilities, that the decision of the respondent not to pass the proposed special privileges by-law on 5 December 2017 was unreasonable within the meaning of s 149 of the Strata Schemes Management Act: at [64]; and

(3) The order sought by the applicant was that the respondent consent to the Development Application (**DA**) "in the form considered by the respondent in the general meeting on 5 December 2017". As the applicant has lodged a further DA, it was unclear if it was the same as the application being considered at the general meeting on 5 December 2017. There was therefore no utility to make an order that the respondent give consent to the applicant's DA: at [71]-[72].

Dubow v Mid-Western Regional Council **[2019] NSWCATAD 142** (P H Molony, Senior Member)

Facts: Ms Dubow (**applicant**) made five applications to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (**NCAT**). In four of the applications, the applicant sought administrative review under the *Administrative Decisions Review Act 1997* (NSW) (**Decisions Review Act**) of four separate decisions made by the Mid-Western Regional Council (**Council**) to take and secure, or impound, seven alpacas found on public roads in Spring Hill under s 116(3) of the *Local Land Services Act 2013* (NSW) (**Local Land Services Act**). The applicant did not dispute that the alpacas were hers. The fifth application was made as a general application to the Administrative and Equal Opportunity Division of NCAT of an event in early 2019 when the applicant's alpacas were taken and impounded in abatement of a nuisance under s 125 of the *Local Government Act 1993* (NSW) (**Local Government Act**). In each of the applications the applicant sought to rely on s 38 of the *Impounding Act 1993* (NSW) as a basis for administrative review under the Decisions Review Act as to the legality of the impounding. The applicant also sought administrative review of the decision of abatement of nuisance under the Local Government Act.

Issues:

(1) Whether the Local Land Services Act contained any provision authorising NCAT to review the Council's decisions to impound the applicant's alpacas under that Act;

(2) Whether the Local Government Act contained any provision authorising NCAT to review the Council's decision to impound the applicant's alpacas as an abatement of nuisance under that Act, and

(3) Whether either party should be awarded costs.

Held: Under s 50(4) of the *Civil and Administrative Tribunal Act 2013* (NSW), NCAT determined a hearing was not required; each of the five applications dismissed; each party to bear own costs:

(1) The Local Land Services Act contained no provision that identified a decision to impound under s 116(3) as conduct over which NCAT had administrative review jurisdiction: at [40];

(2) The Local Government Act contained no provision that identified abating a nuisance under s 125 of that Act as conduct over which NCAT had administrative review jurisdiction: at [42]; and

(3) It was not unreasonable for the applicant to have proceeded to the point of obtaining a formal ruling on jurisdiction in the circumstances of the case. There were no special circumstances warranting an award of costs, thus each party bear their own costs: at [54]-[55].

***Shenhua Watermark Coal Pty Limited v Department of Planning and Environment* [2019] NSWCATAD 19** (K Ransome, Senior Member)

Facts: In October 2008, Shenhua Watermark Coal Pty Ltd (**Shenhua**) was granted a mining exploration licence in the Liverpool Plains region of New South Wales. Shenhua had renewed this licence multiple times, most recently on 13 July 2018, for a term ending 22 October 2021 (**renewal**). An organisation called "Lock the Gate Alliance" (**Lock the Gate**) made an application to the Department of Planning and Environment (**Department**) under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) seeking access to documents regarding the application for renewal.

In accordance with s 54 of the GIPA Act, Shenhua was consulted by the Department to ascertain whether Shenhua objected to the release of certain information in which it had an interest and ultimately objected to the release, either in full or in part, of some documents. The Department made a decision on 4 September 2017 to release some documents in full to Lock the Gate, to release others partially and to refuse access to some documents. Shenhua sought an internal review of that decision which was subsequently affirmed. Shenhua then applied for review of the Department's decision by the Information Commissioner, who concluded that the Department's decision was justified and did not make any recommendations. Shenhua then sought review of the decision by NCAT.

Normally, in review proceedings under the GIPA Act (s 105(1)), the onus falls on a government agency to establish that its decision is justified. However, where review is sought of a decision to provide access to government information, the burden to establish that there is an overriding public interest against disclosure lies on the applicant seeking review (s 105(2)), in this case Shenhua. The application related to Documents 1, 8 10, 14, 15 and 17 in the proceedings. Shenhua argued specifically that cll 1(g) (breach of confidence by an agency) and 4(c) (diminution of the competitive commercial value of information) and 4(d) (prejudice any legitimate business, commercial, professional or financial interests) of the table to s 14 of the GIPA Act applied to the noted documents as public interest considerations against disclosure.

Issue: Whether, on balance, public interest considerations against disclosure outweighed public interest considerations in favour of disclosure.

Held: Decision under review affirmed, apart from consent orders regarding the redaction of some personal information on the documents:

(1) In relation to Document 1, part of the information sought to be redacted was already publicly available and there was no basis for it not to be released: at [48]. Another part of the document had information that was not as readily ascertainable. However, upon request, the information could be accessible to the public. Shenhua provided only broad statements about the commercial value and

confidential nature of that information. Such general statements did not sufficiently discharge the burden placed on it to establish public interest against disclosure: at [51]-[55];

(2) In relation to Documents 8 and 10, there was nothing to indicate that the information was provided in confidence. In particular, the information in the e-mails concerning the term of the renewed licence was information that was in the public domain and did not fall within cl 1(g): at [57];

(3) In relation to Document 14, Shenhua failed to provide any evidence of how the information was commercially sensitive, would prejudice its interests or was provided to the Department in confidence: at [63];

(4) In relation to Documents 15 and 17, Shenhua again failed to provide evidence, or make any detailed submission, about why there was an overriding public interest against disclosure of that information, again not discharging the burden placed on it to establish public interest against disclosure: at [67], [68], [70]; and

(5) As Shenhua did not discharge the onus placed on it to establish that there was an overriding public interest against disclosure, there was no need to engage in the balancing act of interests envisaged in s 13 of the GIPA Act: at [71].

Turner v Department of Planning and Environment **[2019] NSWCATAD 166** (K Ransome, Senior Member)

Facts: In mid-2017, Mr Turner (**applicant**) made an application under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) for access to certain reports concerning the impacts arising from operations at the Dendrobium Coal Mine in the Illawarra. The Department of Planning and Environment (**Department**) provided the applicant with several documents. After a series of internal agency decisions to refuse the applicant's requests for further documents, and external reviews by the Information and Privacy Commissioner, four documents remained in dispute between the parties.

The first document in issue was a draft report prepared by Pells Sullivan Meynink (**PSM**) in October 2016 (**October 2016 report**) for the Department. PSM met with Professor Galvin and Dr Mackie (**peer reviewers**), who had been engaged to peer review the report, to discuss the findings. PSM provided a further draft report on 11 November 2016 (**November 2016 report**). The November 2016 report was provided to the peer reviewers and they provided their report in February 2017. PSM provided their final report in March 2017. The final report by PSM was publicly available.

The applicant sought review of the Information and Privacy Commissioner by the NSW Civil and Administrative Tribunal (**NCAT**). During the course of the proceedings, the Department released the November 2016 report, along with the February 2017 and March 2017 reports, leaving the October 2016 report to be the only document to which access had been refused. With the consent of the parties, NCAT made an order under s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) to dispense with a hearing. The remaining issue in dispute was determined on the papers. The Department submitted that the decision should be varied in respect of the documents already provided to the applicant. The applicant pressed for the October 2016 report.

Issues: Whether, on balance, public interest considerations against disclosure outweighed public interest considerations in favour of disclosure of the October 2016 report.

Held: Decision under review affirmed, except in relation to the November 2016 report and February 2017 peer review report by Professor Galvin and Dr Mackie which were released to the applicant.

(1) The release of the October 2016 report would have unfairly prejudiced the effective exercising of the Department's functions (a public interest consideration against disclosure in cl 1(f) of the table in s 14 of the GIPA Act): at [58]; and

(2) The Department satisfied the burden placed on it by s 105 of the GIPA Act that the public interest against disclosure outweighed the public interest in disclosure. The likelihood that disclosure could reasonably be expected to prejudice the Department's ability to obtain reliable expert opinion and advice to assist in the performance of its functions was a serious matter and would undermine the Department's ability to provide advice to the government, community and industry: at [61].

Court News

Appointments/Retirements

On 16 August 2019, Justice Terence Sheahan retired as a judge of the Land and Environment Court (having served since his appointment on 9 April 1997).

On 4 September 2019, Attorney General Mark Speakman announced the appointment of barrister Sandra Duggan SC as a judge of the Land and Environment Court. View the media release.
Ms Duggan SC was sworn in on 10 September 2019.

Mr Phillip Clay SC has been appointed an acting commissioner from 4 September 2019.

Ms Maureen Peatman has been appointed an acting commissioner from 4 September 2019.