October 2020

Volume 12 Issue 3

Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Amendment (COVID-19 Prescribed Period) Regulation 2020 commenced 18 September 2020. The object of this Regulation was to extend the period during which Ministerial exemptions from provisions of the *Environmental Planning and Assessment Act 1979* may have been made in connection with the COVID-19 pandemic.

Environmental Planning and Assessment Amendment (St Leonards and Crows Nest Special Contributions Area) Order 2020 commenced on 31 August 2020. The object of the Order was to create a special contributions area consisting of certain land in St Leonards and Crows Nest.

Environmental Planning and Assessment Amendment (Sydney Metro West) Order 2020 commenced 16 October 2020. The object of this Order was to declare certain development for the purposes of the Sydney Metro West Project to be State significant infrastructure and critical State significant infrastructure. The relevant development included the construction and operation of new passenger rail infrastructure between Westmead and the central business district of Sydney and the modification of existing rail infrastructure.

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 commenced on 1 September 2020. The object of this Act was to prevent developers from carrying out building work that may have resulted in serious defects to building work or result in significant harm or loss to the public or current or future occupiers of the building. In particular, the Act made provision for the following—

(a) to enable the Secretary of the Department of Customer Service (the Secretary) to—

  (i) issue a stop work order if building work was being carried out, or likely to be carried out, in a manner that could have resulted in a significant harm or loss to the public or current or future occupiers of the building, or

  (ii) issue a building work rectification order to require developers to rectify defective building works, or

  (iii) prohibit the issuing of an occupation certificate in relation to building works in certain circumstances,

(b) to impose an obligation on developers to notify the Secretary at least 6 months, but not more than 12 months, before an application for an occupation certificate is intended to be made in relation to building works,

(c) to provide investigative and enforcement powers for authorised officers to ensure compliance with the requirements of the proposed Act,

(d) to establish penalties for the contravention of the requirements of the proposed Act,

(e) to make provision for the recovery of costs associated with compliance with the requirements of the proposed Act by a developer where there was more than 1 developer for the building work, or by the Secretary where the developer failed to comply,

(f) to enact other minor and consequential provisions and provisions of a savings and transitional nature,

(g) to make consequential amendments to other legislation.

Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020 commenced 1 September 2020. The objects of this Regulation were as follows—

(a) to prescribe offences under the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 that may have been dealt with by way of penalty notice and the penalty amounts payable,

(b) to enable local councils to enter into information sharing arrangements with the Secretary of the Department of Customer Service.

Western City and Aerotropolis Authority Amendment (Operational Area) Regulation 2020 commenced 14 August 2020. The object of this Regulation was to expand the operational area, in relation to which the Western City and Aerotropolis Authority had functions, to include all of the Western City. The Western City comprised the local government areas of Blue Mountains, Camden, Campbelltown, Fairfield, Hawkesbury, Liverpool, Penrith and Wollondilly.

- **Land and Environment Court's Jurisdiction:**

The *Land and Environment Court Act 1979* was amended by the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* to permit appeals to be heard by the Land and Environment Court arising as a consequence of a breach of that Act.

- **Local Government:**

Environmental Planning and Assessment (Regions) Order 2020 commenced 11 September 2020. The object of this Order was to declare certain local government areas to be regions for the purposes of Div 3.1 of the *Environmental Planning and Assessment Act 1979* which provided for the preparation of regional strategic plans.

Local Government (General) Amendment (COVID-19) Regulation (No 3) 2020 commenced 18 September 2020. The objects of this Regulation were as follows—

(a) to extend the period during which the COVID-19 pandemic special provisions of the *Local Government Act 1993* (the Act) apply,

(b) to postpone the repeal of the COVID-19 pandemic regulation-making power in the Act.

- **Biodiversity:**

Biodiversity Conservation Legislation Amendment Regulation 2020 commenced 9 October 2020. The object of this Regulation was to amend the Biodiversity Conservation Regulation 2017 as follows—

(a) update certain definitions relating to the protection of marine mammals,

(b) provide for different application fees for different biodiversity conservation licences,

(c) update the time in which a biodiversity certification assessment report must be submitted in connection with an application for an extension of modification of biodiversity certification,

(d) make other minor amendments.

This Regulation also amends the Biodiversity Conservation (Savings and Transitional) Regulation 2017 to make further transitional provisions in relation to the application of the *Biodiversity Conservation Act 2016* in respect of the variation and termination of existing conservation agreements under the *National Parks and Wildlife Act 1974*, trust agreements under the repealed *Nature Conservation Trust Act 2001* and property agreements under the repealed *Native Vegetation Conservation Act 1997*.

- **Water:**

Water Management (General) Amendment (Lower Namoi and Border Rivers Floodplains) Regulation 2020 commenced 11 September 2020. The object of this Regulation was to declare certain land to be the Lower Namoi Valley Floodplain and the Border Rivers Valley Floodplain for the purposes of the *Water Management Act 2000*.

Water NSW Regulation 2020 commenced 1 September 2020. The object of this Regulation was to remake, with minor amendments, the Water NSW Regulation 2013, which will be repealed on 1 September 2020 by s 10(2) of the *Subordinate Legislation Act 1989*.

- **Pollution:**

Waste Avoidance and Resource Recovery (COVID-19) Regulation 2020 commenced 25 September 2020. The object of this Regulation was to postpone the date on which special statutory provisions enacted in response to the COVID-19 pandemic are repealed.

- **Miscellaneous:**

The *Electronic Transactions Act 2000* was amended by the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* to insert pt 2B which provides for the witnessing and attestation of documents by audio visual link.

Evidence Regulation 2020 commenced 7 August 2020. The object of this Regulation was to repeal and remake, with minor amendments, the provisions of the Evidence Regulation 2015, which would otherwise be repealed on 1 September 2020 by s 10(2) of the Subordinate Legislation Act 1989.

Fines Regulation 2020 commenced 7 August 2020. The object of this Regulation was to repeal and remake, with minor amendments, the Fines Regulation 2015, which would otherwise be repealed on 1 September 2020 by s 10(2) of the Subordinate Legislation Act 1989.

Offshore Minerals Regulation 2020 commenced 21 August 2020. The object of this Regulation was to repeal and remake, without any significant amendments, the provisions of the Offshore Minerals Regulation 2013, which would otherwise be repealed on 1 September 2020 by s 10(2) of the Subordinate Legislation Act 1989.

Protection of the Environment Operations (General) Amendment (Native Forest Bio-material) Regulation commenced 14 August 2020. The object of this Regulation was to provide a limited exception to the prohibition on burning native forest bio-material to generate electricity. The exception was only available in respect of premises to which an environment protection licence that authorised the carrying out of scheduled activities (within the meaning of the *Protection of the Environment Operations Act 1997*) applied and that the EPA had nominated for the purposes of the exception. The exception was also limited to native forest bio-material obtained from certain sources, including trees cleared in accordance with development consent or any other approval under the *Environmental Planning and Assessment Act 1979*, trees removed or lopped by a roads authority in accordance with the *Roads Act 1993* and land lawfully cleared as part of recovery or clean-up works in a natural disaster area.

Bills:

Local Land Services Amendment (Miscellaneous) Bill 2020. Introduced into the Legislative Assembly 14 October 2020. The objects of this Bill were as follows—

(a) to remove the application of State Environmental Planning Policy (Koala Habitat Protection) 2019 to land to which Pts 5A and 5B of the *Local Land Services Act 2013* (the Act) apply, while preserving the application of State Environmental Planning Policy No 44—Koala Habitat Protection to certain core koala habitats in the local government areas of Ballina, Coffs Harbour, Kempsey, Lismore and Port Stephens,

(b) to remove requirements imposed by other legislation, including the requirement for development consent under the *Environmental Planning and Assessment Act 1979*, in relation to carrying out private native forestry that is authorised by a private native forestry plan under pt 5B of the Act,

(c) to extend the maximum duration of private native forestry plans made under pt 5B of the Act to 30 years,

(d) to require the Minister for Agriculture and Western New South Wales to consult with the Minister administering pt 7A of the *Fisheries Management Act 1994* and the Minister administering the *Forestry Act 2012* before making a private native forestry code of practice,

(e) to allow native vegetation clearing in certain circumstances on land that is used for agricultural purposes without the need for authorisation under other legislation.

Marine Pollution Amendment (Review) Bill 2020. Introduced into the Legislative Assembly 15 October 2020. The objects of this Bill were to amend the *Marine Pollution Act 2012* (the Act) to—

(a) address recommendations of the 2019 statutory review of the Marine Pollution Act 2012, and

(b) ensure consistency between the Act, the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* of the Commonwealth and the International Convention for the Prevention of Pollution from Ships (MARPOL), and

(c) provide for enforcement powers about the maintenance of sewage pollution prevention equipment, and

(d) provide for preventative action against marine pollution in relation to abandoned, derelict or out-of-commission vessels, and

(e) make other minor and consequential amendments.

Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020. Introduced to the Legislative Assembly 17 June 2020. Amended in the Legislative Council and referred back to the Legislative Assembly 25 August 2020. The objects of this Bill were as follows—

(a) to facilitate the installation of sustainability infrastructure in strata schemes,

(b) to prevent records of secret ballots from being disclosed as part of strata records,

(c) to remove a duplicated requirement to give a tenant a copy of the by-laws for a strata scheme,

(d) to make an owners corporation responsible for the service of notices about applications to the Civil and Administrative Tribunal (the Tribunal) under the *Strata Schemes Management Act 2015* (the principal Act),

(e) to enable applications to the Tribunal for a civil penalty against a person who has contravened an order of the Tribunal,

(f) to enable a person who owns more than 1 lot in a strata scheme to nominate 1 individual to act as a proxy for all the lots,

(g) to provide that a nomination of a proxy for a meeting is not rendered invalid if the meeting is adjourned.

State Environmental Planning Policy [SEPP]:

State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 commenced 1 October 2020. New State Environmental Planning Policy designed to facilitate the Western Sydney Aerotropolis.

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy (Infrastructure) Amendment (Sydney Metro West Interim Corridor) 2020 commenced 2 October 2020. Miscellaneous amendments relating to the Interim Rail Corridor.

State Environmental Planning Policy (Koala Habitat Protection) Amendment (Planning for Bush Fire Protection) 2020 commenced 3 September 2020. Clause 6A inserted and new definition added to the State Environmental Planning Policy (Koala Habitat Protection) 2019 (Koala Habitat SEPP).

State Environmental Planning Policy (Koala Habitat Protection) Amendment (Miscellaneous) 2020 commenced 16 October 2020. Miscellaneous amendments to the Koala Habitat SEPP.

Civil Procedure:

Uniform Civil Procedure (Amendment No 94) Rule 2020 commenced 9 October 2020. The object of this Rule was to amend the Uniform Civil Procedure Rules 2005 to make provision with respect to the certification of reasons for judgment and the use of certified reasons in proceedings.

COVID - 19 Response:

The Interpretation (COVID-19) Regulation 2020 commenced 18 September 2020. The object of this Regulation is to postpone the date on which special statutory provisions enacted in response to the COVID-19 pandemic are repealed.

Judgments:

United Kingdom Supreme Court:

R (on the application of Wright) v Resilient Energy Severndale Ltd and Forest of Dean DC **[2019] UKSC 53** (Hale, President, Reed, Deputy President, Lloyd-Jones, Sales, Thomas LJJ)

(related decision: *R (on the application of Wright) v Resilient Energy Severndale Ltd and Forest of Dean DC* [2017] EWCA Civ 2102)

Facts: Mr Wright challenged an application to the grant of planning permission by the local planning authority (**council**) to change the use of the land at Severndale Farm, Tiddenham, Gloucestershire from agriculture to the erection of a single community-scale 500-kilowatt wind turbine for electricity generation. In its development application, Resilient Energy Severndale Ltd (**Resilient Severndale**) proposed that the wind turbine would be erected and run by a community benefit society. The application included a promise that an annual donation would be made to a local community fund, based on 4% of the society's turnover from the operation of the turbine over its projected life of 25 years.

In its decision to grant development consent, the council took this promised annual community donation into account and imposed a condition of consent, Condition 28, that the development be undertaken by a community benefit society with the community fund donation as part of the scheme. Mr Wright challenged the grant of planning permission on the grounds that the promised annual community donation was not a material planning consideration and that the council had acted unlawfully in taking it into account. Mr Wright succeeded at first instance. The council and Resilient Severndale challenged the first instance decision in the United Kingdom

Court of Appeal, which dismissed the appeal. They subsequently appealed the decision to the United Kingdom Supreme Court.

Issues:

(1) Whether the promise to provide a community fund donation qualifies as a "material consideration" for the purposes of s 70(2) of the *Town and Country Planning Act 1990* (UK) as amended (**1990 Act**) and s 38(6) of the *Planning and Compulsory Purchase Act 2004* (UK) (**2004 Act**); and

(2) Whether the council was entitled to include Condition 28 in the planning permission.

Held: Appeal dismissed:

(1) The community benefits promised by Resilient Severndale did not satisfy the *Newbury* criteria that "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them": at [32], [44]. They did not qualify as a material consideration within the meaning of that term in s 70(2) of the 1990 Act and s 38(6) of the 2004 Act. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought. The community benefits to be provided by Resilient Severndale did not affect the use of the land. Instead, they were proffered as a general inducement to the council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold: at [44]; and

(2) In deciding to grant planning permission for the development, the council relied on matters which did not qualify as "material considerations" for the purposes of s 70(2) of the 1990 Act and s 38(6) of the 2004 Act. That means that the grant of planning permission has rightly been quashed. It is unnecessary to give separate consideration to Condition 28. The imposition of that condition cannot make an immaterial consideration into a material consideration within the meaning of the statutory provisions: at [58].

Victorian Court of Appeal:

Cumming v Minister for Planning **[2020] VSCA 208** (Tate, McLeish, Osborn JJA)

(decision appealed: *Cumming v Minister for Planning* [2020] VSC 811 (Garde J))

Facts: The second respondent to the proceedings, WestWind, operated a wind farm business. It was the proponent of a project to construct a wind farm called the Golden Plains Wind Farm on 16,739 hectares of agricultural land near the town of Rokewood (**project**). This would have been the largest wind farm in Victoria. Mr Cumming (**first applicant**) and Mr Walton (**second applicant**) both sought leave to appeal to oppose this project. The first applicant was critically concerned with the impact of the project on the Brolga, a native Australian crane. The second applicant was concerned with potential noise impacts from the wind turbines.

An extensive public exhibition process was conducted for the project in which both applicants made submissions, which resulted in the Minister making recommendations to exclude certain turbines to protect Brolga-breeding wetlands. WestWind then sent a letter to the Minister, propounding a different set of permit conditions. This letter was not shown to submitters. The Minister then issued a conditional planning permit to WestWind. Later, the Minister, through his delegate, corrected the permit to include revised conditions relating to the monitoring of noise.

The applicants then sought to challenge the decision to permit the project by way of judicial review. The trial judge dismissed the challenge. The applicants appealed the decision.

Issues:

(1) Did the trial judge err in in concluding that the Minister did not deny the applicants procedural fairness;

(2) Did the trial judge err in concluding that the Minister addressed Amendment VC149 (a statutory amendment that required applications for wind energy facilities be accompanied by a mandatory noise assessment) and cl 53.32 of the Golden Plains Planning Scheme (**planning scheme**);

(3) Did the trial judge err in concluding that a permit missing mandatory conditions was not invalid;

(4) Did the trial judge err in concluding that s 71 of the *Planning and Environment Act 1987* (VIC) (**P&E Act**) could be exercised to impose missing mandatory conditions; and

(5) Did the trial judge err in concluding that the Minister's assessment under the *Environmental Effects Act 1978* (VIC) was not unreasonable, irrational or illogical having regard to the habitat model.

Held: Leave to appeal granted on four grounds of appeal. Appeal dismissed:

(1) The successful highlight of a discrepancy did not necessarily mean that the applicants had succeeded in showing that a decision was unreasonable, irrational or illogical: at [74];

(2) Even if the Planning Panel made a mistake of fact it was not unreasonable for the Minister to rely upon the Panel Report, given the process which led to its production and the expertise of the panel: at [85];

(3) The principle espoused in *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1, being that supervisory courts ought to be reluctant to conclude a factual conclusion was not open to an expert planning tribunal, should have been applied to the panel: at [87];

(4) At its highest, the applicants had demonstrated that there was some misapplication of the relevant methodology. This was not sufficient to demonstrate that the decision was perverse: at [92];

(5) There was no statutory requirement that the Minister prepare an assessment of the Environmental Effects Statement as a precondition to the grant of a planning permit: at [100];

(6) A defect in the assessment, if established, would not have necessarily infected the decision to grant a permit and automatically have justified the conclusion that the grant of the planning permit must be quashed: at [105]. Unreasonableness had therefore not been established: at [106];

(7) The mere fact that a letter was received did not demonstrate that it was material to the decision made: at [126];

(8) Ultimately, none of the matters now agitated demonstrate that the failure to disclose the letter to the applicants was material to the Minister's decision. There was no demonstrated practical injustice: at [163]. Leave to appeal should be granted but the appeal dismissed on the ground regarding the letter: at [164];

(9) Whilst the permit conditions did not meet statutory requirements for post-construction noise assessment reports, it could not be inferred that the Minister failed to have regard to amendment VC149: at [180]. Leave to appeal was refused on this ground: at [181];

(10) When the scheme of the P&E Act as a whole was considered, it could not be concluded that a failure to impose a condition required by s 62(1)(a) was intended to render a planning permit null and void: at [190];

(11) The provisions of the P&E Act, both explicitly and implicitly, recognise that from time to time a permit may require correction or amendment in order to bring it into compliance with the planning scheme: at [193];

(12) The objectives of the P&E Act did not favour a construction of provisions that resulted in draconian consequences because of an incidental error of detail: at [195];

(13) When the scheme of the P&E Act was considered as a whole, it demonstrated that a failure to include a condition prescribed by a planning scheme within a permit did not render the permit wholly invalid. The permit remained potentially capable of rectification: at [196]. Leave was granted to appeal on this ground but the appeal was dismissed: at [197];

(14) The P&E Act did not demonstrate an intention that s 71 and s 87(1)(f) were mutually exclusive. The better view was that ss 71, 72 and 97J were powers which fell to be exercisable by the responsible authority. There was no conceptual difficulty with giving remedial provisions an overlapping effect: at [224];

(15) The correction of ancillary noise-monitoring conditions to comply with requirements prescribed by the planning scheme fell squarely within the terms of s 71: at [229]; and

(16) The detailed complexity of the conditions imposed demonstrated the need to give a broad construction to the remedial provision to ensure that it had practical efficacy in the wide range of circumstances in which it may have potentially fallen to be applied: at [231]. Leave to appeal was granted but the appeal dismissed: at [232].

Philip Maguire v Parks Victoria **[2020] VSCA 172** (Ferguson CJ, Kyrou, Niall JJA)

(related decision: *Philip Maguire v Parks Victoria* [2020] VSC 303 (Moore J))

Facts: Philip Maguire (**appellant**) sought injunctive and declaratory relief in the Trial Division to restrain Parks Victoria (**respondent**) from implementing a feral horse (**brumby**) shooting regime in the Alpine National Park (**national park**). It was accepted that the brumby was a feral species and constituted a threat to the fragile ecosystem within the national park. The appellant contended that he had a special connection to the brumbies, as their ancestors were allegedly bred on his land. The appellant challenged the decision on the basis that there was an alleged obligation on the respondent to consult the community before initiating a cull. The trial judge dismissed the challenge on the basis that the appellant had not met the requirement for special interest in the decision and indicated that he would otherwise have dismissed the challenge on its merits. The appellant appealed to the Victorian Court of Appeal.

Issue: Did the appellant have a special interest in the decision below such that he should be conferred standing to challenge the decision.

Held: Leave to appeal refused. Appellant did not have a special interest to constitute standing:

(1) A special interest in the subject matter of the proceedings was not limited to a legal, proprietary or financial interest that the private law protects: at [65];

(2) The requirement identified by Spender J in *Queensland Newsagents Federation Ltd v Trade Practices Commission* (1993) 46 FCR 38 was not to be applied as if it were a discrete additional requirement: at [72];

(3) The special interest test plainly required an intersection between the interest identified by the appellant and the decision that is sought to be impugned in the proceeding. Standing is a threshold requirement and should not depend on whether the grounds might be made out or relief withheld on a discretionary basis: at [76];

(4) Although statutory context is important, it does not control standing. A plaintiff may have standing to challenge the exercise of power because of its practical or legal effect even though the interests of the plaintiff do not coincide with the purpose of the statutory scheme: at [80];

(5) It is thus necessary to identify the nature of the claim and the relief sought: at [81];

(6) The obligation in cl 6.1 of the Statement of Obligations is, on any view, diffuse: To "undertake timely and inclusive engagement" with the broader community. The appellant falls within its scope because he is a member of the broader community. Clause 6.1 does not favour the applicant over and above others in the community. Its terms provide no basis to support standing: at [98];

(7) A recognised history of being consulted and speaking for a matter may support a special interest. However, this is by no means determinative: at [102];

(8) What an applicant intends to do in the future cannot determine the character of his current interest in the subject matter of the decision: at [103];

(9) An economic or financial interest in the subject matter of a proceeding may be sufficient to give a plaintiff standing: at [107];

(10) The proposition that an applicant may at some point in the future operate a business liable to be affected by the impugned decision provides no basis for standing. The relevant interest must exist. It is not satisfied where the interest is one that may be acquired in the future: at [110] to [111];

(11) The claimed amenity is insufficient to establish standing: at [113];

(12) The applicant's connection to the brumbies amounted to a strong emotional and intellectual attachment to them. No matter how keenly felt, those interests do fall within the category that the High Court, in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; [1980] HCA 53, had held are insufficient to establish standing: at [120]; and

(13) Since the applicant had failed to establish standing and therefore failed to establish a properly constituted suit, it was not appropriate to consider the merits of the claim: at [122].

New South Wales Court of Appeal:

Alexandria Landfill Pty Ltd Transport for NSW **[2020] NSWCA 165** (Basten, Macfarlan, Leeming JJA)

(decision under review: *Alexandria Landfill Pty Ltd v Transport for NSW* [2019] NSWLEC 98 (Sheahan J))

Facts: In December 2014, the Roads and Maritime Services, now Transport for NSW (**respondent**) acquired a 15.7-hectare parcel of land, and another small parcel of land, owned by Alexandria Landfill Pty Ltd (**ALF**) for the purpose of constructing a WestConnex interchange. Parts of the land were operated by Dial A Dump Industries (**DADI**), a subsidiary of ALF. A dispute as to the value of the land was heard by Sheahan J in the Land and Environment Court whereby both parcels were cumulatively valued at around $50 million. The appellant was dissatisfied with this valuation and appealed to the Court of Appeal pursuant to s 57 of the *Land and Environment Court Act 1979* (NSW). Nine grounds of appeal were pleaded and are encompassed in the below issues.

Issues:

(1) Whether the primary judge constructively failed to exercise his jurisdiction;

(2) Whether the primary judge's reasons for findings were inadequate;

(3) Whether there was a lack of procedural fairness arising out of the reasons of the primary judge for preferring the evidence of an expert called by the respondent;

(4) Whether the primary judge's judgment gave rise to an apprehension of bias;

(5) Whether the primary judge erred in assessing compensation for disturbance; and

(6) Whether the primary judge erred in assessing special value.

Held: Appeal dismissed with costs (Basten JA; Macfarlan JA agreeing (with qualification on some points); and Leeming JA agreeing (with additional reasons)):

Basten JA

(1) If there was an available process of reasoning from the evidence to the outcome which had been adopted, either expressly or by implication, the appellate court should be slow to reach the conclusion that the function of the trial court had not been exercised according to law: at [29];

(2) Insofar as the manner in which the primary judge dealt with the discount rate as an example of Grounds 1 and 2, those grounds were rejected: at [62];

(3) To the extent that the manner in which the trial judge dealt with Stockpile 21 as the subject of Grounds 1 and 2, those grounds were rejected: at [86];

(4) With regard to the trial judge's treatment of the discount cashflow calculation, there was nothing that suggested that he lost sight of the statutory exercise and did not evaluate how the hypothetical but not anxious buyers and sellers would have likely reached agreement. Grounds 1 and 2 were rejected on this basis: at [89] to [90];

(5) There was no denial of procedural fairness in the adoption of Dr Ferrier's evidence over Mr Samuel's on the basis of qualifications. The reasoning employed was available to the trial judge: at [96] to [97];

(6) The appeal on the basis of a denial of procedural fairness was rejected as the outcome of a case alone is not sufficient to support a claim of reasonable apprehension of bias. An outcome evidences judgment, not pre-judgment. Whilst circumstances may exist in which judgment will confirm a pre-existing apprehension, the case was not put on that basis. Ground 4 was dismissed: at [99] to [101];

(7) In principle, "costs" in s 61(c) of the *Land Valuation (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**) should be construed as limited to expenditure. It follows that s 61(c) provided no basis for reading the term "any other financial costs reasonably incurred" in s 61(f) as including a lost opportunity to obtain profits contingent upon the continued use of the land. Therefore, the approach accepted by this Court, without challenge, in *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33; 199 LGERA 198 should not be followed: at [139] to [140];

(8) No error of law was established in the refusal of the trial judge to uphold an issue estoppel claim, as the basis of a factual assertion that DADI had carried on the activities on the land as the "agent" of the appellant: at [150];

(9) The challenge to a rejected claim of a lost business opportunity for "Bradshaw Hill" was rejected as it was not a claim in relation to the actual use of the land at the date of acquisition: at [154];

(10) All bases for disturbance costs by way of relocation were rejected: at [155] to [160];

(11) The claims based on "special value" failed on appeal, with all grounds of appeal that related to it also failing: at [171];

(12) The appellant failed on all grounds of appeal: at [172];

MacFarlan JA

(13) Many valuation issues were not able to be, and should not have attempted to have been dealt with, with mathematical precision: at [318];

(14) The primary judgment reached the minimum standard required in the present context: at [325];

(15) The judgment did not reveal a wholesale, or indeed any, lack of understanding by the primary judge of the expert evidence or ALF's case: at [326];

(16) The primary judge's reasons on the discount rate, recovery rates, gate fees, deferral of recycling operations, lack of viability for recycling activities, subdivision of land, waste operations in years nine to 29, highest and best use, market value for Lot 2 and the disturbance claim were adequate to discharge the duty to give reasons. Grounds 1 and 2 were rejected: at [330] to [341];

(17) The trial judge was entitled to make comments about the respective qualifications of the valuation experts, given their respective experience (or lack thereof). There was no denial of procedural fairness: at [346] to [349];

(18) A fair-minded lay observer may have considered that ALF suffered a comprehensive loss, but not that the trial judge was not impartial: at [354];

(19) The mere fact that land was used by a subsidiary of a holding company which was the owner of the land in question did not establish actual use of the land by the holding company. In the absence of a finding of agency, the trial judge was correct to hold that ALF was not using the land. Ground 5 was rejected: at [361] to [362];

(20) The estoppel claim failed and the abuse of process argument was not established. Ground 6 was rejected: at [372];

(21) The trial judge did not err in the attribution of loss between ALF and DADI. Ground 7 was rejected: at [377] to [378];

(22) In order to make good a claim for special value, ALF needed to demonstrate that it was using Lot 2 for a waste operations business, which it did not do. Grounds 8 and 9 were rejected: at [382] to [384];

(23) Each ground of appeal was rejected and the appeal was to be dismissed with costs: at [385]; and

Leeming JA agreed with Basten JA with comments

(24) Section 59(f) of the Land Acquisition Act could not have been construed in such a manner as to outflank the precisely crafted and internally qualified other heads of loss: at [415].

***Bobolas v Waverley Council* [2020] NSWCA 201** (Macfarlan JA)

(related decision: *Bobolas v Waverly Council* [2020] NSWLEC 103 (Pain J))

Facts: Members of the Bobolas family (**applicants**) commenced judicial review proceedings seeking to challenge a No 22A order issued by Waverley Council (**council**) under the table to s 124 of the *Local Government Act 1993* (NSW) (**Order**) which required the removal of specified waste from premises in Boonara Avenue, Bondi (**Property**). The proceedings were set down for final hearing on 12 and 13 October 2020. The council gave an undertaking to the Court on 27 March 2020 not to execute the Order by

entering the Property until a final hearing of the matter or discontinuance of the proceedings. On 31 July 2020, Pain J brought forward the hearing dates of the judicial review proceedings to 31 August and 1 September 2020, due to the public health and safety risks created by the state of the Property (see *Bobolas v Waverly Council* [2020] NSWLEC 103 *(**Bobolas No 1**)*). On 31 August 2020, the applicants applied to the Court of Appeal for an order staying the hearing of the substantive proceedings on the same morning these were listed for hearing before Pain J in the Land and Environment Court (**LEC**).

Issue: Should the judicial review proceedings in the LEC be stayed.

Held: The stay was refused and the application dismissed with costs:

(1) The applicants waited until the morning of the substantive hearing to make their application to the Court of Appeal, despite knowing the new hearing dates since Pain J's decision in *Bobolas No 1* on 31 July 2020. The applicants' delay in applying to the Court of Appeal meant the council did not have adequate notice to address the application: at [5];

(2) The substantive matter was before the LEC, which is where any application for adjournment should have been made: at [6];

(3) There were significant public health issues at stake in the LEC proceedings which militated strongly in favour of an early hearing: at [7];

(4) Nothing was put in support of the stay application that suggested the applicants' application for judicial review had any merit: at [8]; and

(5) No error in Pain J's decision to move the hearing dates forward was demonstrated: at [9].

Coffs Harbour City Council v Noubia Pty Ltd **[2020] NSWCA 142** (Bathurst CJ, Bell P, Basten JA)

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

Facts: The Lakes Estate is a residential development south-west of Coffs Harbour which was constructed by Noubia Pty Ltd (**respondent**). The conditions of development consent stipulated that three parcels of land needed to be vested in Coffs Harbour City Council (**applicant**), the consent authority. The respondent sought compensation for these three parcels (Lots 94, 96 and 163). The applicant agreed to pay $110,000 for two parcels (Lots 94 and 163), but not to pay for the third (Lot 96). The respondent claimed that the two lots should be valued at $3,816,000, whereas the applicant contended that the two lots ought to be valued at $220,600. The discrepancy between the two values was caused by the flood constraints of the land. The respondent put forward an alternative hypothetical drainage system which would allegedly allow for the construction of an additional 35 dwellings at a net value of $100,000 per lot, hence the discrepancy. However, there was substantial evidence that the applicant would not have approved the development if not for the drainage scheme as presently envisaged. The trial judge held that the respondent was entitled to compensation for the third lot (at an agreed sum) and assessing the compensation payable for the other two lots as $3,256,000 and $560,000. The applicant appealed this decision.

Issues:

(1) Did the trial judge fail to provide any or adequate reasons with respect to the substantive contested issues;

(2) Did the trial judge constructively fail to exercise jurisdiction in failing to deal with the disputed evidence and competing submissions; and

(3) Did the trial judge deny the applicant procedural fairness by preferring the evidence of the respondent's hydrologist on a basis which had not been foreshadowed in the course of the proceedings.

Held: Appeal allowed. Set aside Orders 1, 2, 3 and 5 made in the Land and Environment Court (**LEC**). Declare that no amount is payable by the applicant to the respondent in relation to Lot 96. Remit the matter to the LEC for assessment of compensation payable for Lots 94 and 163 (Basten JA; Bathurst CJ and Bell P agreeing).

(1) If development would not be permitted absent protection of a specific characteristic, and assuming that the protection could properly be described as being for a public purpose, it is not possible to disregard the public purpose and assume that development consent would have been granted absent protection of the characteristic. In this case, the characteristic involved existing water flows and water quality; that

characteristic did not distinguish whence the water came. It turned on the volume and quality of the water flowing off the undeveloped land: at [89];

(2) Failing to give reasons addressing the issue of public purpose and s 56 of the *Land Acquisition (Just Compensation) Act 1991* (NSW) was critical to the compensation case: at [91];

(3) The trial judge did not assess or otherwise address the discrepancies in the submissions or evidence with regard to valuation: at [98];

(4) A "before and after" valuation may have shown that the approved development was more or less financially advantageous that the alternative hypothetical subdivision. If more, the approved development was the "highest and best" use of the land for the developer. If the alternative proposal provided a more financially advantageous outcome, it would have been necessary to assess the likelihood of it being accepted by council. This artificial exercise was one the hypothetical purchaser would have been expected to undertake: at [100];

(5) The experts differed in their preference for valuation comparisons. Since this issue was barely addressed on the appeal, the matter must be left to the LEC on remittal: at [101];

(6) With regard to Lots 94 and 163, the trial judge did not attempt to resolve the contested issues, a conclusion which may be described as a constructive failure to exercise the jurisdiction of the court. The matter must be remitted to the LEC for determination according to law; the Court of Appeal is not the appropriate forum, as matters of evidence and submission were not analysed in detail on appeal: at [102] to [104];

(7) Where a contributions plan indicated the area in which land was to be dedicated, by marking on a map which fell outside the development site, a court should have been slow to permit a council to claim land to be dedicated free of cost as against a developer: at [110]; and

(8) The Contributions Plan, which allegedly required the dedication of land, must be construed according to its terms and not in a "common sense way so as to give effect to the obvious intention of the draftsperson" and "from a practical viewpoint". The consequence was that there was no obligation for council to pay the respondent for Lot 96: at [112] to [124].

Forrest v Director of Public Prosecutions (NSW) **[2020] NSWCA 162** (Basten, Leeming, McCallum JJA)

Facts: On 21 December 2018, Mark Forrest (**applicant**) was convicted in the Local Court of one offence of dealing with proceeds of crime. The property the subject of the offence was a sum of $165,000 found in cash in a bag in the vehicle the applicant was driving. He was sentenced to intensive correction for a period of 12 months, with an obligation to undertake 250 hours of community service. An appeal to the District Court against this conviction was heard and dismissed.

The solicitor for the applicant e-mailed a letter to the District Court judge's associate, requesting her to state a case to the Court of Criminal Appeal (**CCA**) pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**). The judge declined to state a case as requested. The applicant filed a Summons in this Court for judicial review of the decision to not state a case. The application relied on five propositions. The outcome of these proceedings turned upon the first two, listed below.

Issues:

(1) Was the judge obliged to state a case with respect to a question of law upon receiving a request to do so; and

(2) Did the request identify three questions of law and thus engage the duty to state a case.

Held: No jurisdictional error identified. Application for judicial review refused. Applicant to pay the respondent's costs:

(1) Section 5B of the Criminal Appeal Act does not confer the right of appeal on a question of law to a dissatisfied litigant. Prior to the determination of a matter, a judge has a power to submit a question of law absent the request of a party. Following the determination of a matter, that power turns on the existence of a request: at [43];

(2) The effect of the privative clause in s 176 of the *District Court Act 1973* (NSW) was to confer power to determine all questions of law on the District Court judge, such determinations being unreviewable unless

the judge had mistaken his or her function, and in doing so had exceeded, or failed to exercise, the jurisdiction of the court: at [47];

(3) There is no good reason to limit the factors which a District Court judge can take into account when considering whether to accede to a request to state a question of law. Those factors may include:

(i) whether the question formulated by the applicant states clearly and precisely a question of law;

(ii) whether the answer to that question, favourably to the applicant, might have been dispositive of the appeal;

(iii) any delay in making the request and the absence or strength of any explanation given for the delay; and

(iv) whether the judge has any significant doubt as to the correct answer to the question of law: at [48];

(4) There was an implied requirement that any request to be made, with a draft stated case and containing the relevant question, in sufficient time to allow the judge, if so minded, to submit the questions within the prescribed period. In this case, this request did not comply with this requirement: at [57];

(5) The formula "Did I err in determining" or "Did I err in law in holding that" was generally inapt to identify a question of law: at [59];

(6) The issues in dispute were entirely factual. It was therefore open to the judge to decline to submit the questions to the CCA on the basis that there were no questions of law identified: at [61]; and

(7) There was no jurisdictional error made by the District Court judge in refusing to submit a question of law to the CCA: at [68].

Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council **[2020] NSWCA 137** (Basten, Meagher JJA, Emmett AJA)

(decision under review: *Michael Brown Planning Strategies v Wingecarribee Shire Council (No 2)* [2019] NSWLEC 192 (Moore J); *Michael Brown Planning Strategies v Wingecarribee Shire Council* [2019] NSWLEC 1311 (Dickson C))

Facts: In 2019, the Land and Environment Court dismissed an appeal by refusing to grant consent to a development application on the basis that the proposed development was not "compatible with the flood hazard of the land", as is required by cl 7.9(3)(a) of the *Wingecarribee Local Environmental Plan 2010* (**WLEP 2010**). It was not disputed that, in the form proposed, the development was not compatible with the flood hazard of the land. The nearby culvert was not large enough to convey flood waters from the site. However, there was evidence that the Australian Rail Track Corporation was planning culvert upgrade works, which would have ameliorated flood concerns for the site. These upgrade works were prospective and, at the time of the initial appeal before Dickson C, had not been commenced. As the relevant planning laws specified that the development application must be considered with regard to *present* conditions, the development application was refused. This decision was appealed pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) and subsequently dismissed. The applicants then sought leave to apply to the NSW Court of Appeal.

Issue: Did the trial judge err on a question of law in refusing a development application on the ground that the development was not "compatible with the flood hazard of the land".

Held: Leave to appeal granted. Appeal dismissed. Applicant to pay council's costs (Basten JA, with Meagher JA and Emmett AJA agreeing with additional comments):

(1) The definition of "development" pursuant to s 1.5 of the *Environmental Planning and Assessment Act 1979* (NSW) did not include hypothetical or proposed activities: at [10];

(2) The consent authority was required to assess "the development" proposed by the applicant against the flood hazard applicable to the site. That development did not contain an element by way of mitigation of the risk of flooding and, in particular, did not involve any variation to the capacity of the culvert upon which the applicant sought to rely: at [30];

(3) Neither the commissioner nor the trial judge erred in construing cl 7.9(3)(a) of the WLEP 2010. That provision required that, as assessed at the date of the determination of the development application, the development was compatible with the flood hazard of the land. The fact that it was common ground that the development application was not compatible with the flood hazard, consent was properly refused: at [37];

(4) It was not sufficient that the consent authority could be satisfied that the development as proposed might at some stage in the future be compatible with that hazard *if* certain works occurred, and before the development proceeded, where those works were not part of the development: per Meagher JA at [39]; and

(5) The clause required that the council be satisfied that the proposed development be compatible with the flood hazard of the land, as at the date of the determination of the applicant's development application: per Emmett AJA at [45].

RD Miller Pty Ltd v Roads and Maritime Services NSW **[2020] NSWCA 241** (Bell P, White JA, Preston CJ of LEC)

(decisions under review: *RD Miller Pty Ltd v Roads and Maritime Services NSW* [2019] NSWLEC 129 (Robson J); *RD Miller Pty Ltd v Roads and Maritime Services NSW (No 2)* [2019] NSWLEC 141 (Robson J); *RD Miller Pty Ltd v Roads and Maritime Services NSW (No 2)* [2019] NSWLEC 173 (Duggan J))

Facts: RD Miller Pty Ltd (**Miller**) owned land in Bega that had frontage and access to a road that was formerly part of the Princes Highway but was renamed Newtown Road. Miller subdivided its land into rural residential allotments. In 2013, Roads and Maritime Services NSW (**RMS**) constructed the Bega Bypass which physically limited Miller's access from its land to Newtown Road. Consequently, Miller was required to construct alternative access, which increased the cost of works required for the future subdivision of its land.

On 15 December 2017, the Minister issued an order, published by Gazette, declaring part of the Princes Highway at Bega, including the part adjoining Miller's land, to be a controlled access road under s 49 of the *Roads Act 1993* (NSW) (**Roads Act**). This order restricted Miller's access between its land and the controlled access road under s 67(1) of the Roads Act. Miller was entitled to compensation for any loss or damage arising from the loss of access, under s 68(1) of the Roads Act, and filed a claim for compensation with RMS. When agreement could not be reached between the parties, RMS referred the claim for compensation to the LEC.

Miller pleaded, in its original points of claim, that the compensation to which it was entitled should be assessed by disregarding the decrease in value of the land caused by the carrying out of the Bega Bypass. Miller advanced three alternative scenarios to determine the amount of compensation payable under s 69(1) of the Roads Act. The basis for the first scenario (and the approach pursued on the appeal) was that the phrase in s 69(1) "the market value of the land" immediately before the right of access was restricted or denied should be interpreted in a way that would disregard any decrease in the market value of the land caused by the carrying out of the Bega Bypass works. It argued that such an interpretation was supported by common law principles of assessment of market value such as the *Pointe Gourde* principle.

The second scenario was based on the words "immediately before" in s 69(1) of the Roads Act. Miller argued that, by constructing the Bega Bypass, physically restricting access between Miller's land and the Princes Highway, RMS caused Miller loss or damage because it has had to construct alternative access. Under the Roads Act, however, Miller could not immediately claim compensation for this loss or damage. It was not until the Minister made the order under s 49 declaring the part of the Princes Highway adjoining Miller's land to be a controlled access road, and under s 67(1) restricting access to and from that road, that Miller became entitled under s 68(1) of the Roads Act, to compensation. Miller put that it was appropriate to measure the time at which "market value of the land immediately before…the right of access was restricted or denied" for the purposes of s 69 of the Roads Act as being December 2013, being when the Bega Bypass was completed and physical access restricted.

The third scenario was based on assessment of the market value of the land immediately before and after the Gazettal of the Minister's order on 15 December 2017 on the basis that Miller had had an ability to enforce or negotiate a right of access to the Princes Highway under s 6 of the Roads Act.

RMS applied to have Miller's claims for compensation based on the first and second scenarios struck out. Robson J of the Land and Environment Court (**LEC**) upheld RMS' strike out application, finding that neither of the first and second scenarios had a basis in the Roads Act and disclosed no reasonable cause of action. No challenge was made by RMS to the third scenario.

Miller sought to re-plead its claim for compensation in amended points of claim to replace the struck out scenarios with two new scenarios. The basis of the new scenarios was that the phrase in s 69(1) that "the right of access was restricted or denied" needed to be construed by reference to s 68(1) of the Roads Act. Miller argued that the phrase in s 68(1) "as a result of the road becoming" a controlled access road describes not only the event of the Minister's order under s 49 declaring a road to be controlled access road but also a "course of conduct" whereby a road becomes a controlled access road. In the first new scenario, Miller argued that this course of conduct comprised three events: the physical restriction of access to Miller's land due to the construction of the Bega Bypass in 2013; the 2014 registration of the deposited plan for the part of the Princes Highway that was later declared to be a controlled access road; and the making of the Minister's order, and its publication by Gazette on 15 December 2017, declaring the road to be a controlled access road. In the second, new alternative scenario, Miller argued that this course of conduct comprised the registration of the deposited plan and the Ministerial order. Duggan J of the LEC refused Miller leave to amend its pleadings, finding that, although the two new scenarios were framed using different wording, Miller sought to re-agitate the same essential questions as were determined by Robson J.

Issues:

(1) Whether leave should be granted to Miller to appeal against the two interlocutory decisions by Robson J and Duggan J;

(2) Whether, for the purposes of construing relevant provisions of Div 4 of Pt 5 of the Roads Act and the entitlement to compensation for actions taken under that Act to restrict access to a controlled access road:

   (a) the terms of s 68(1) of the Roads Act "as a result of the road **becoming**" a controlled access road describe not only the event of an order under s 49 of the Roads Act declaring a road to be controlled access road but also a "course of conduct" whereby a road becomes a controlled access road; and

   (b) concepts outside of the Roads Act for the assessment of compensation for the compulsory acquisition of land, including common law principles, such as the *Point Gourde* principle, are relevant and applicable.

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

Bell P, White JA, Preston CJ of LEC

(1) Leave to appeal from the decisions of Robson J and Duggan J should be granted, as important questions of statutory interpretation of the relevant provisions of Div 4 of Pt 5 of the Roads Act are raised by the appeal: at [106], [1], [45];

Preston CJ of LEC, Bell P agreeing

The entitlement to compensation

(2) The combined operation of an order under s 49 of the Roads Act declaring a road to be a controlled access road and restricting access to or from a controlled access road under s 67 of the Roads Act, and the prohibition in s 70(b) of the Roads Act on entering or leaving a controlled access road except by a means of access or route provided for that purpose, constitutes the first circumstance in s 68(1) of the Roads Act that triggers an entitlement to compensation: at [113], [1]. The consequence of restriction or denial of access must be caused by the event of the road becoming a freeway, transitway or controlled access road: at [115], [1];

(3) A road can only be a controlled access road if the Minister makes an order under s 49, declaring the road to be a controlled access road. A "controlled access road" is defined in the Dictionary to the Roads Act to mean "a road that is declared to be a controlled access road by an order in force under s 49". This is the sense in which s 68(1) uses the word "becoming". A road becomes a controlled access road by the Minister making an order under s 49 declaring the road to be a controlled access road: at [116], [1];

(4) Upon a road becoming a controlled access road by the Minister's order, the prohibition in s 70(b) of the Roads Act on entering or leaving the controlled access road comes into effect. Access across the boundary between the land and the public road that has become a controlled access road is restricted or denied: at [117]. Once this consequence of restriction or denial of access occurs, the entitlement to compensation

under s 68(1) is triggered, being "compensation for any loss or damage arising from the loss of access": at [118];

The amount of compensation

(5) The "amount of compensation payable" is fixed by s 69 of the Roads Act and is not at large. The amount of compensation payable is an amount equal to the difference between the market value of the land immediately before and the market value of the land immediately after the specified consequence occurs, namely "the right of access was restricted or denied": at [127]. The word "immediately" signifies that the times at which the market value is to be assessed are to be without any delay before and after the occurrence of the consequence of the right of access being restricted or denied: at [131], [1]. The difference between these market values of the land immediately before and immediately after the right of access was restricted or denied will therefore be the money equivalent of the loss of access: at [133], [1];

(6) The *Pointe Gourde* principle has no application in determining the amount of compensation payable under s 69 of the Roads Act for loss of access as:

(a) the language of s 69 does not expressly incorporate the *Pointe Gourde* principle in the assessment of the market value of the land required by s 69: at [163] to [167], [1];

(b) incorporation of the *Pointe Gourde* principle does not sit comfortably with the method prescribed in s 69 for determining the amount of compensation payable: at [168] to [171], [1];

(c) the *Pointe Gourde* principle has not been applied in assessing compensation for loss not involving the compulsory acquisition of property: at [172] to [176], [1]; and

(d) there is difficulty in identifying the matter which causes any alteration in the value of the land that is to be disregarded in assessing the market value of the land under s 69: at [177] to [189], [1];

White JA, in dissent

The entitlement to compensation

(7) Sections 67, 68 and 69 are to be construed both in their context, and having regard to the purpose of the provisions: at [23]. The purpose of Div 4 of Pt 5 is critical and includes the payment of compensation arising from "Loss of access to a ... controlled access road": at [24]. The critical word in the construction of s 68(1) in the circumstances of the present case is "becoming": at [25]. The better construction is to construe the opening phrase in s 68(1) as encompassing the actual restriction or denial of access that occurred as part of a course of conduct that led to the road "becoming" a controlled access road: at [32];

(8) Nothing in Div 4 stipulates that the restriction for which compensation is payable as a result of the road's becoming a controlled access road is confined to the restriction imposed by the order itself: at [34]. Section 68(1) permits an holistic and not piecemeal interpretation of what constitutes a relevant "restriction" arising from a continuous or periodic conduct of work: at [36]. It suffices to say that "becoming" is a word as apt to describe a process as it is a single event: at [38];

The amount of compensation

(9) The *Pointe Gourde* principle cannot be of direct application to s 69(2) as the provision neither concerns compulsory acquisition nor makes an allowance for adjustment to the assessment of the difference between the market value of the land immediately before and after the declaration was made: at [28], [29], [31]; and

(10) However, the principle can inform by analogy the legislative purpose of Div 4 which indicates that the compensatory nature of the provision ought not to be frustrated by the order in which steps are taken to cause the road to become a controlled access road: at [29], [30].

Zhiva Living Dural Pty Ltd v Hornsby Shire Council **[2020] NSWCA 180** (Meagher and McCallum JJA, Preston CJ of LEC)

(decision under review: *Zhiva Living Dural Pty Ltd (No 3) v Hornsby Shire Council* [2019] NSWLEC 152 (Moore J))

Facts: Zhiva Living Dural Pty Ltd (**Zhiva**) applied to Hornsby Shire Council (**council**) for development consent for a seniors housing development, which was prohibited under the RU2 Rural Landscape under Hornsby Local

Environmental Plan 2013 (**HLEP 2013**). Zhiva had obtained a site compatibility certificate under cl 25(4) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**Seniors SEPP**) which enabled the consent authority to grant consent to the proposed seniors housing development despite the fact that it was prohibited development under HLEP 2013. Zhiva appealed against the council's deemed refusal of its development application to the Land and Environment Court (**LEC**). A commissioner of the court dismissed the appeal on the basis that the proposed development did not include a fire sprinkler system and therefore did not meet the requirements of cl 55 of the Seniors SEPP. Zhiva appealed the commissioner's decision under s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

Zhiva alleged that the commissioner had erred on questions of law in three out of four grounds. The fourth ground alleged that the commissioner had denied Zhiva procedural fairness in deciding the cl 55 issue. Zhiva argued that there was utility in remitting the matter to the commissioner notwithstanding the lapsing of the site compatibility certificate, as a new site compatibility certificate could be issued by either the relevant panel or an application for a new site compatibility certificate could be determined by the commissioner. At the hearing, the judge agreed that it was for the commissioner and not the judge to determine if the commissioner had power to issue a site compatibility certificate under s 39(2) of the Court Act.

The judge found that the commissioner had denied Zhiva procedural fairness by deciding the cl 55 issue. The judge also found that, firstly, there was no utility in remitting the matter to the commissioner because there was no valid development application that could be remitted in the absence of a site compatibility certificate and, secondly, the commissioner did not have power under s 39(2) of the Court Act to determine the second application for a site compatibility certificate by issuing such a certificate. The judge instead determined Zhiva's development application by refusing consent for the seniors housing development. Zhiva sought leave to appeal the judge's decision and orders in the Court of Appeal.

Issues:

(1) Whether the time to file the Summons seeking leave to appeal should be extended and whether leave to appeal should be granted;

(2) Whether the judge erred in law by denying Zhiva procedural fairness in determining the question of whether the commissioner had power to determine a second application to issue a site compatibility certificate;

(3) Whether the judge erred in law by denying Zhiva procedural fairness in determining that the second application for a site compatibility certificate had been made out but not progressed, which caused the development application to become invalid;

(4) Whether the judge erred in law by finding that there was no utility in remitting the matter to the commissioner to determine despite upholding Zhiva's appeal; and

(5) If the appeal is upheld, whether the matter should be remitted to the judge or the commissioner.

Held: Appeal upheld; matter remitted to Chilcott C; respondent to pay 25% of appellant's costs of the appeal:

(1) The time for filing the Summons seeking leave to appeal should be extended: at [51], [52], [122]. Leave to appeal should be granted: at [55], [122];

(2) The judge denied Zhiva procedural fairness in determining that the commissioner had no power under s 39(2) of the Court Act to determine the second application for a site compatibility certificate. This was not raised as a ground of appeal or in issue on the s 56A appeal: at [74], [75]. The judge had no jurisdiction to determine this issue: at [77]. If he were, however, to decide this issue, he was obliged to afford the parties procedural fairness before doing so: at [78]. The judge did not do so: at [80];

(3) The judge denied Zhiva procedural fairness in determining that, in the absence of a current site compatibility certificate, there was no valid development application to which the commissioner could grant development consent. This was not raised as a ground of appeal or in issue on the s 56A appeal: at [74], [76]. The judge had no jurisdiction to determine this issue. If the judge did wish to do so, he was obliged to afford the parties procedural fairness before doing so: at [79]. The judge did not do so: at [79], [86];

(4) The judge also denied Zhiva procedural fairness in exercising the power under s 56A(2)(b) of the Court Act to determine the development application by refusing consent, rather than remitting the matter to the commissioner: at [87]. Whether or not the power under s 56A(2)(b) of the Court Act extended to empower the judge to make the order he made determining the development application by refusing consent, the judge was required to afford procedural fairness to the parties before doing so. Procedural fairness required the judge to notify the parties that he was considering making such an order and affording the parties an

opportunity to be heard as to whether there was power under s 56A(2)(b) of the Court Act to determine the development application by refusing consent and, if so, whether the power should be exercised in the circumstances of the case. The judge did not do so: at [92];

(5) Remitter should be made to the commissioner rather than the judge. Nothing is to be gained by remitting the matter to the judge for determination by him in accordance with the decision of this Court: at [111]. The judge's concern has now been addressed by the issue of the new site compatibility certificate: at [113]. There is no benefit in remitting the matter to the judge for him to determine the grounds of appeal concerning the commissioner's construction and application of cl 55 of the Seniors SEPP, which the judge did not decide. The judge had already decided to uphold the appeal against the commissioner's decision on the ground that the commissioner had denied procedural fairness to Zhiva in making his decision: at [114]. Another reason for not remitting the matter to the judge is that there is no utility in such determination in light of Zhiva's foreshadowed application to amend the development application to ensure that the proposed development does include a fire sprinkler system: at [115]. Once the proposed development is amended to include a fire sprinkler system, the commissioner can be satisfied that cl 55 of the Seniors SEPP is met: at [116].

Supreme Court of New South Wales:

Application by the Planning Ministerial Corporation **[2020] NSWSC 903** (Davies J)

Facts: On 9 August 2018, the Planning Ministerial Corporation (**plaintiff**) entered into a contract to purchase 112-128 Wallgrove Road, Cecil Park (**property**). Under the contract for sale, the property was to be transferred to the plaintiff with vacant possession. The plaintiff took vacant possession and on 30 August 2018, became the registered proprietor of the property. No lease was subsequently entered into for that property. On 19 November 2019, employees of the plaintiff attended the property and discovered two unidentified persons in occupation thereof. They asserted that they held a lease. They did not disclose their identity. Leave was granted to commence the proceedings on 11 June 2020. Leave was required because the plaintiff sought to commence proceedings for possession without naming a defendant.

Issue: Can judgment be given for proceedings for the possession of land without naming a defendant.

Held: Provisions in the Uniform Civil Procedure Rules 2005 (**UCPR**) requiring the naming of a defendant dispensed with. Judgment for the plaintiff for possession of the property. Leave granted to issue writ of possession:

(1) Where occupants of land who had no authorisation to be on the land, refused to identify themselves, and where the proceedings concerned relief that operates *in rem*, it was appropriate to make an order under r 6.1A of the UCPR and commence proceedings without naming a defendant: at [9];

(2) Rules 16.4 and 36.8 of the UCPR assume the existence of a defendant as a party: at [12];

(3) Evidence that appropriate attempts were made to notify the occupants of the land of the existence of the proceedings was sufficient to warrant default judgment being given in the absence of the defendants: at [14]; and

(4) Costs orders were not appropriate or practical where there were no identified defendants: at [15].

Central Coast Council v Pastoral Investment Land & Loan Pty Ltd **[2020] NSWSC 777** (Darke J)

(related decisions: *Central Coast Council v Pastoral Investment Land & Loan Pty Ltd* [2020] NSWLEC 85 (Preston CJ); *Central Coast Council v Pastoral Investment Land & Loan Pty Ltd* [2020] NSWLEC 1135 (Dixon SC))

Facts: Pastoral Investment Land & Loan (**PILL**) was the owner of land on Sparks Road, Warnervale (**land**). On 16 November 2006, PILL entered into a contract (**Deed of Agreement**) with Wyong Shire Council, the statutory predecessor to Central Coast Council (collectively, **council**). The Deed of Agreement provided that

if the council rezoned the land, then PILL would have lodged a development application to provide for a subdivision of the land, with the portion of the land being designated as high environmental conservation value to be transferred to the council for $1. In 2008, an amendment was made to the Wyong Local Environmental Plan 1991 that had the effect of rezoning the land as intended by the Deed of Agreement. This was not disputed.

Seven years later, PILL filed a development application which provided for the subdivision of the land, as well as the clearing of vegetation ancillary to the subdivision. In August 2018, the council approved the subdivision, but did not approve the clearing of vegetation. A few months later, PILL lodged a Class 1 appeal against the council's determination in the Land and Environment Court (**LEC**).

In February 2019, the council commenced proceedings in the Supreme Court seeking an order for specific performance of the Deed of Agreement. The council alleged that by failing to take steps to advance the subdivision, PILL breached an implied term of the contract that it obliged it to cooperate with council to advance the subdivision so that the council would obtain the benefit of the agreement.

Later, the Class 1 appeal was dismissed, resulting in an appeal under s 56A of the *Land and Environment Court Act 1979* (NSW) (this appeal was heard following this judgment where the appeal was upheld, the orders of Dixon SC were set aside, the matter was remitted to Dixon SC for redetermination and costs were awarded for the applicants).

PILL cross-claimed and contended that the Deed of Agreement was void or otherwise unenforceable. PILL claimed that the council entered into the contract *ultra vires* or unlawfully as there was no resolution of the council authorising its execution. Secondly, PILL claimed that the Deed of Agreement constituted an unlawful fetter upon the future exercise of the council's statutory powers. Finally, PILL complained that since the council had not notified PILL about the rezoning for a period of approximately 18 months, the laches or delay amounted to a breach of cl 3.3 of the Deed of Agreement and justified refusal of relief for council.

Issues:

(1) Was the Deed of Agreement entered into validly by the council;

(2) Did the terms of the Deed of Agreement unlawfully fetter the future exercise of the council's statutory powers;

(3) Was there an implied term in the Deed of Agreement to the effect that each party would do all that is reasonably necessary to effect the release of the signed plan;

(4) Was there a breach of the implied term; and

(5) Did the development consent have effect following the dismissal of the appeal in the LEC.

Held: Further Amended Statement of Claim dismissed. Cross-claim dismissed. Each party to bear its own costs unless either party applied otherwise:

(1) At the time of entering into the agreement, the council was a body corporate and had the power to do what was necessary for or incidental to the exercise of its functions. The council had power to acquire land by agreement for the purposes of exercising its functions. The agreement was not entered into by the council *ultra vires*: at [41];

(2) The Deed of Agreement did not include any fettering of the council's powers. The Deed of Agreement cannot be said to lack statutory authorisation, or be incompatible with the statutory powers that are the basis upon which the council entered into the agreement: at [51];

(3) The challenge to the validity and enforceability of the Deed of Agreement has not been made out: at [52];

(4) *Obiter*: The Deed of Agreement includes an implied term to the effect that each party would do all that is reasonably necessary to be done to facilitate the release by the council of the signed plan of subdivision to PILL as required by cl 2.3(b): at [59];

(5) The Deed of Agreement did not prevent PILL from exercising a right of appeal to challenge the conditions of any development consent: at [60];

(6) PILL was not in breach of the Deed of Agreement as alleged as cl 2.3(a) left room for challenges to be made: at [60] to [63];

(7) There was nothing in the Second Reading Speech for the *Environmental Planning and Assessment Act 1979* (NSW) in the 2018 overhaul that suggested that s 8.13 should effect a change to the then existing law. It was strongly arguable that despite the textual changes brought about by the amendments, the

expression "ceases to have effect" found in s 8.13(1) should have been interpreted in a manner that is cognate with the previously understood notion of a suspension: at [77]; and

(8) The view that s 8.13(2) did not identify the only circumstance in which a development consent, that had ceased to have effect pursuant to s 8.13(1), was revived so as to become effective again was preferable to the view that it had identified the only circumstance to revive a development application under the section: at [79].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Hypro (Aust) Pty Ltd v Environment Protection Authority **[2020] NSWLEC 106** (Preston CJ)

Facts: Hypro (Aust) Pty Ltd (**Hypro**) own a pet food manufacturing plant at Wilberforce (**the premises**). The Environment Protection Authority (**EPA**) asserted that Hypro's pet food manufacturing process involves the scheduled activity of "general animal products production", a type of livestock processing activity within cl 23 Pt 1 of Sch 1 to the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Under s 48 of the POEO Act, the EPA asserted that Hypro required a licence for the premises at which this activity is carried out. Hypro brought proceedings in the Land and Environment Court seeking declarations contrary to that asserted by the EPA.

Issues:

(1) Whether the operation of Hypro's pet food manufacturing facility at the premises constitutes a premises-based "scheduled activity" under s 48(1) of the POEO Act;

(2) Whether the carrying on of that activity is a "livestock processing activity" under cl 23 Pt 1 of Sch 1 to the POEO Act; and

(3) Whether an environment protection licence is required for the activity carried out at the premises under s 48 of the POEO Act.

Held: Declaration that the development was not the activity of "general animal products production" or any other activity requiring an environment protection licence; costs reserved:

(1) Hypro's primary construction of the definition of "general animal products production," that animals need to be slaughtered at the premises, is incorrect. The category of "livestock processing activities" is not itself declared to be a scheduled activity: at [26]. The category of "livestock processing" brings together five activities which all concern the processing of animals or animal products in some way: at [27]. Only one of the five activities, being slaughtering or processing animals, involves the slaughter of animals. A construction of the definition of the relevant activity of "general animal products production" in the context of cl 23 establishes that this activity does not involve the slaughter of animals at the premises: at [35]. A textual analysis of the definition of the activity of "general animal products production" supports this construction: at [36] to [39];

(2) Hypro's alternative construction of the definition of "general animal productions production" is correct. The phrase "products derived from the slaughter of animals" in the definition requires that the products be a result of the particular activity of slaughtering animals: at [40]. First, the products are required to be "derived from" the specified activity of "the slaughter of animals": at [41]. The necessary connection is between the product and the specified activity: the specified activity must be the source or origin of the product: at [43]. Second, the phrase "products derived from the slaughter of animals" dictates that the specified activity that is the source or origin of the products is "the slaughter of animals" not the wider activity of "slaughtering or processing of animals": at [46]. The processed products at Hypro's pet food manufacturing premises do not have their source or origin in the activity of the slaughter animals but rather in the activities that process the products of the animals that have been slaughtered: at [47]. The manufacturing of pet foods and stock feeds occurring in the plant on the premises does not fall within the definition of "general animal products production" in cl 23(1): at [48]; and

(3) The premises at which Hypro's pet food manufacturing process is carried out does not require an environment protection licence under s 48 of the POEO Act as it is not any activity referred to in cl 23 of Pt 1 of Sch 1: at [49].

- **Criminal:**

Environment Protection Authority v Albiston **[2020] NSWLEC 80** (Pepper J)

Facts: The defendant, Mr Shaun Albiston, pleaded guilty to an offence against s 144(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Mr Albiston stored waste at the premises leased by 3R-Systems Pty Ltd (**3R**) from Substantia Nominees Pty Ltd (**Substantia**) in the regulated area of the Wollongong City local government area (**premises**) without lawful authority. Mr Albiston's liability arose by operation of s 169(1) of the POEO Act, insofar as he was a person concerned in the management of 3R. Section 48 of the POEO Act requires an environment protection licence (**EPL**) to be issued for a "scheduled activity" to be carried out at a premises. Clause 42(3)(c)(i) of Sch 1 of the POEO Act specified that a waste storage activity is a scheduled activity if more than 1,000 tonnes or 1,000 cubic metres of waste are stored at premises in a regulated area. Under a contract with HydroMet Corporation Pty Ltd (**HydroMet**), 3R was paid to transport HydroMet's battery waste from Murrell's Freight Services Pty Ltd (**Murrell's**) and "take ownership" of it at the premises (**contract**). Between 29 June and 28 September 2016, the waste stored at the premises was between 1,548 and 10,000 cubic metres. The estimated weight of the waste by 28 September 2016 was between approximately 1,500 to 2,312 tonnes. On 23 August 2016, Mr Greg Newman, an Environment Protection Authority authorised officer, discovered the waste stored on the premises. On 13 September 2016, Mr Newman e-mailed Mr Albiston and informed him that his conduct was unlawful and that an EPL was required to store waste on the premises. None was obtained.

Issue: The appropriate sentence to be imposed on Mr Albiston.

Held: Mr Albiston was fined $22,500 and ordered to pay the prosecutor's legal and investigation costs of $37,198 and $2,670, respectively:

(1) The commission of the offence undermined the legislative objectives and integrity of the POEO Act: at [76] and [79];

(2) While no actual environmental harm was caused by the commission of the offence, there was potential for environmental harm, albeit low, because lead contaminants in the waste could have leached into the waters of Port Kembla, particularly since the waste was stored outside in bulker bags and was exposed to the elements. There was also harm caused by undermining the POEO Act's legislative scheme regulating the storage of waste: at [86], [88] and [94] to [95];

(3) The prosecutor did not establish beyond reasonable doubt that the offence was committed recklessly for the period from 29 June to 13 September 2016 because Mr Albiston's unchallenged evidence demonstrated that he had believed that the premises met the requirements to store the waste and that 3R had an EPL to do so. However, after receipt of Mr Newman's e-mail on 13 September 2016, there was no evidence that Mr Albiston had made any enquiries to confirm that an EPL was in place, and therefore, from 13 to 28 September 2016, Mr Albiston's conduct was reckless: at [108] to [109];

(4) The commission of the offence was for financial gain because the waste transport and storage activities were undertaken in the hope of making a profit by on-selling the waste and avoiding financial loss for 3R: at [111], [113] and [118];

(5) Considering Mr Albiston had knowledge that the lead content of the waste was at least 2% to 3%, and given his experience in the waste industry, he should have reasonably foreseen that a failure to ensure that the applicable waste storage limit was not breached had the potential to cause environmental harm: at [121] to [122];

(6) An aggravating factor was that the commission of the offence caused substantial losses to Substantia insofar as it cost Substantia $755,867 to remove and lawfully dispose of the waste: at [133] and [136];

(7) Evidence of any contrition and remorse of Mr Albiston was given limited weight because he did not take full responsibility for his offending and made no attempt to remove the waste or rectify the harm caused by the commission of the offence: at [143] to [147];

(8) The objective seriousness of the offence was in the middle of the lower range of seriousness for breaches of s 144(1) of the POEO Act: at [129]; and

(9) Mr Albiston was of good character and had cooperated with the EPA in the preparation of the sentence hearing. He had no desire to return to work in the waste industry and was unlikely to re-offend. He pleaded guilty at the earliest opportunity and was therefore entitled to the maximum discount of 25%: at [139], [150], [155] and [159].

Environment Protection Authority v Aussie Earthmovers Pty Ltd (No 2) **[2020] NSWLEC 98** (Pain J)

(related decision: *Environment Protection Authority v Aussie Earthmovers Pty Ltd* [2018] NSWLEC 91 (Robson J))

Facts: Aussie Earthmovers Pty Ltd (**defendant**) was charged with two offences of knowingly supplying false and misleading information about waste contrary to s 144AA(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), being the supply of false information about the disposal of asbestos-contaminated waste from a site in Darlington in 2016 (**site**). Peter O'Brien Constructions Pty Ltd (**Peter O'Brien Constructions**) engaged the defendant to dispose of contaminated waste from the site at the SITA Landfill in Kemps Creek, operated by Suez Recycling and Recovery Ltd (**Suez**). The prosecutor alleged the actions and associated state of mind of Mr Paul Mouawad could be attributed to the defendant. It was alleged the defendant, through Mr Mouawad, supplied Peter O'Brien Constructions with a Ticket List Report purportedly created by Suez in relation to the purported disposal of approximately 84 truckloads of asbestos-contaminated soil at the SITA Landfill (**Ticket List Report offence**). It was also alleged the defendant, through Mr Mouawad, caused Peter O'Brien Constructions to be supplied with approximately 29 Waste Disposal Dockets purportedly issued by Suez containing information in relation to the purported disposal of 29 of the 84 truckloads of asbestos-contaminated soil the subject of the Ticket List Report at the SITA Landfill (**Waste Disposal Dockets offence**). The prosecutor alleged both the Ticket List Report and Waste Disposal Dockets were known to be false at the time they were provided to Peter O'Brien Constructions. At the start of the hearing, the prosecutor sought an order that the proceedings be heard and determined in the absence of the defendant. The order sought was made pursuant to s 250 of the *Criminal Procedure Act 1986* (NSW), and the hearing proceeded ex parte.

Issue: Whether the prosecutor proved the four elements of the two offences under s 144AA(2) of the POEO Act beyond reasonable doubt, being:

(a) that the defendant, through Mr Mouawad, supplied information about waste to another person;

(b) that the information was supplied in the course of dealing with the waste;

(c) that the information was false or misleading in a material respect; and

(d) that the defendant, through Mr Mouawad, knew the information was false or misleading in a material respect.

Held: Defendant found guilty of offences:

(1) Mr Mouawad was the controlling mind and will of the defendant at the time of the alleged offences, meaning his conduct and associated mind may be attributed to the defendant (at [46]). The elements of both offences were established beyond reasonable doubt (at [66] to [67]);

(2) In both offences, the prosecutor established beyond reasonable doubt that the defendant, through Mr Mouawad, supplied information about waste as defined in s 144AA(5A) to include "cause or permit information to be supplied": at [66(a)], [67(a)];

(3) In both offences, the prosecutor established beyond reasonable doubt that the information was supplied "in the course of dealing with waste" as defined in s 144AA(3): at [66(b)], [67(b)];

(4) In both offences, the prosecutor established beyond reasonable doubt that the information supplied was false or misleading in a material respect: at [66(c)], [67(c)]; and

(5) The prosecutor established beyond reasonable doubt that the defendant, through Mr Mouawad, knew the information was false or misleading in a material respect: at [66(d)], [67(d)].

Environment Protection Authority v Bartter Enterprises Pty Ltd (No 3) **[2020] NSWLEC 114** (Duggan J)

(related decisions: *Environment Protection Authority v Bartter Enterprises Pty Ltd* [2020] NSWLEC 78 (Duggan J); *Environment Protection Authority v Bartter Enterprises Pty Ltd (No 2)* [2020] NSWLEC 79 (Duggan J))

Facts: Bartter Enterprises Pty Ltd (**defendant**) runs a meat processing facility at Beresfield (**premises**). The premises contain a two-storey freezer/cold store building for storage of processed meat. The top blast freezer contains two identical ammonia refrigeration systems known as the Southern Circuit and Northern Circuit. The defendant engaged Gordon Bros to upgrade the refrigeration facilities including replacement of the fan coil units (**FCUs**). In preparation for these works, a refrigeration mechanic was retained to decommission the system. The base plate on the pressure modulating suction valves at each of the Northern and Southern Circuits was removed for ventilation. Safe Work Method Statements required tests to be undertaken prior to the reintroduction of ammonia to the circuit, and a notification for an intention to reintroduce ammonia. This process was followed for the Northern Circuit. However, for the Southern Circuit, a pressure test and the appropriate notifications were not carried out, and ammonia was reintroduced without a base plate attached, causing an ammonia leak at the premises. The defendant holds an Environmental Protection Licence (**EPL**) in relation to the premises.

Issues:

(1) Did the defendant fail to comply with a condition of its EPL, namely, that all plant and equipment at the premises must be maintained in a proper and efficient condition;

(2) Meaning of "maintain" and "proper and efficient condition"; and

(3) What is the function the plant was designed to perform.

Held: Defendant convicted; matter stood over for sentencing:

(1) The pairing of the term "maintained" (the action) with the objective of "a proper and efficient condition" indicates the meaning of the term used. It is intended, by the text, to be an act (maintained) that produces a state of affairs (condition). This is consistent with the term "maintained" being a reference to the preservation of the state of "proper and efficient condition": at [40]. The reference to proper and efficient condition must be read as not being at large but rather referring to the environmental protective functions of that plant and equipment. The condition is intended to control or limit the capacity of the plant and equipment to cause an unacceptable environmental impact: at [43]. That is, the plant must be preserved in a state that it is able to perform the function of environmental protection that it was designed to perform: at [44], [47]; and

(2) The Southern Circuit was an integrated system, not a series of separate and independently functioning elements. Each of the separate elements of the circuit must, therefore, be considered the relevant plant: at [61]. The Southern Circuit was designed to function, for the purposes of the EPL, as a containment system for the ammonia. It was designed to be capable of containing the ammonia within the circuit whether the circuit was in operation or had been taken off-line such that it was not operating: at [62]. As the Southern Circuit was not in a physical state to appropriately contain the ammonia, the plant was not in a state that enabled it to achieve its design purpose and the condition was breached: at [72].

Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie (No 3) **[2020] NSWLEC 90** (Pain J)

(related decisions: *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* (2019) 238 LGERA 147; [2019] NSWCCA 174 (Preston CJ of LEC, Davies and Adamson JJ); *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2018] NSWLEC 99 (Pain J))

Facts: In *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2018] NSWLEC 99 (***EPA v Grafil***), the defendants, Grafil Pty Ltd (Grafil) and Mr Mackenzie, were found not guilty of charges under ss 144(1) and 169(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for the offence of an occupier of land using it for a waste facility without lawful authority. The charges related to the deposition of material, being building and demolition waste (**Stockpiles 1 and 2**) on land at Salt Ash (**Lot 8**) in 2012 and 2013.

The defendants sought to rely on a resource recovery exemption, the Continuous Process Recovered Fines exemption September 2010 (**CPRF exemption**), made under the Protection of the Environment Operations (Waste) Regulation 2005 (NSW) (**Waste Regulation**). If applicable, the CPRF exemption would have exempted the defendants from the requirement under s 48 of the POEO Act to obtain an Environment Protection Licence (**EPL**) in respect of scheduled activities in cll 39 (waste disposal (application to land)) and 42 (waste storage) of Sch 1 to the POEO Act.

Following a stated case, the Court of Criminal Appeal determined *EPA v Grafil* had been incorrectly decided on a number of issues, in *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* (2019) 238 LGERA 147; [2019] NSWCCA 174 (***Grafil CCA***). The matters were remitted for redetermination by the trial judge. The defendants accepted that, as a result of the findings in *Grafil CCA*, they were not able to mount any defence to the charges against them.

Issues:

In the s 144(1) offence proceedings against Grafil

(1) Was Grafil the occupier of Lot 8;

(2) Did Grafil use Lot 8 as a waste facility;

  (a) was the material "waste" as defined in the legislative scheme;

  (b) was the material disposed of "by application to land" for the purposes of Sch 1 cl 39 of the POEO Act; and

  (c) was the activity of waste storage as identified in Sch 1 cl 42 of the POEO Act carried out;

(3) Was the use of Lot 8 as a waste facility without lawful authority:

  (a) did the defendant meet the onus of proof that the resource CPRF exemption issued under the Waste Regulation operated, such that the use of the land was a non-scheduled activity for which no EPL under the POEO Act was required;

  (b) what was the effect of Grafil's non-compliance with certain conditions imposed on a consumer by the CPRF exemption;

  (c) did Grafil have development consent under the EP&A Act for temporary stockpiling of materials in Stockpiles 1 and 2 during the charge period;

  (d) was a continuing offence proved;

  (e) was there a time bar to the commencement of proceedings; and

  (f) was the material in Stockpiles 1 and 2 asbestos waste; and

In the s 169(1) offence proceedings against Mr Mackenzie:

(1) On the basis that s 169(1) provides that a director of a defendant company is taken to have contravened the same provision as that company, was Mr Mackenzie liable for the s 144 offence as charged.

Held: Grafil liable for the s 144(1) offence with which it was charged; Mr Mackenzie liable for the s 144(1) offence with which he was charged:

In the s 144 offence proceedings against Grafil

(1) Grafil admitted that it occupied the land on which the offence was alleged to have occurred: at [28];

(2) *In relation to (a)-(c):*

> According to *Grafil CCA* at [115] to [132], the material supplied and placed was waste, as defined in the legislative scheme. Further at [153] to [157], the material was applied to land for the purposes of Sch 1 cl 39 of the POEO Act and at [170] to [174] the scheduled activity of application of waste to land occurred in the charge period. Finally, at [187] to [198], the activity of waste storage as identified in Sch 1 cl 42 of the POEO Act was carried out. As a result of these findings in *Grafil CCA*, the second element of the s 144(1) offence of use of land as a waste facility was established by the EPA: at [29] to [33];

(3) *In relation to (a)-(b):*

> According to *Grafil CCA* at [221] to [229], Grafil bore the onus of proving the facts which brought its case within the terms of the CPRF exemption, including proving it had lawful authority to use the land as a waste facility. At [307] to [308], the question whether Grafil was a consumer within the meaning of the CPRF exemption did not need to be answered. The effect of non-compliance by Grafil with conditions imposed on consumers by the CPRF exemption was that the CPRF exemption could not apply for Grafil's benefit in the charge period, at [286] to [298] in *Grafil CCA*. Consequently, an environment protection licence under the POEO Act was required by Grafil during the charge period and Grafil did not have one: at [34] to [42];

(4) *In relation to (c):*

> *Grafil CCA* at [363] to [377] found that Grafil did not have the required lawful authority under the EP&A Act for the purpose of s 144(1) during the charge period: at [43] to [45];

(5) *In relation to (d):*

> As found in *Grafil CCA* at [388] to [394], a continuing offence was proved beyond reasonable doubt by the EPA: at [47];

(6) *In relation to (e):*

> According to *Grafil CCA at [*407-[408], the offences were not time-barred: at [48]; and

(7) *In relation to (f):*

> It is not necessary to determine whether or not the material was asbestos waste, per *Grafil CCA* at [331] to [333], as this was not an element of the offence: at [49].

In conclusion, Grafil was liable for the s 144(1) offence with which it was charged: at [50].

In the s 144(1) offence proceedings against Mr Mackenzie:

(1) On the basis of executive liability as a director of Grafil, Mr Mackenzie was liable by virtue of s 169(1) for the s 144(1) offence as charged: at [52].

Environment Protection Authority v McMullen **[2020] NSWLEC 87** (Pepper J)

Facts: Ms Kate McMullen (**defendant**) pleaded guilty to an offence under the *Contaminated Land Management Act 1997* (NSW) (**Contaminated Land Management Act**) of providing material to the Environment Protection Authority (**EPA**) pursuant to that Act which was false or misleading in a material particular (s 103(1)).

Ms McMullen was employed by Arcadis Pty Ltd (**Arcadis**), which was engaged by Stockland Development Pty Ltd (**Stockland**) to design and project manage the development of premises into 160 residential lots (**development**). The premises consisted of land that was considered to be contaminated under the Contaminated Land Management Act. Arcadis engaged JBS&G as environmental consultants for the development and Ms Rebeka Hall, a site auditor accredited under the Contaminated Land Management Act, to undertake a site audit of the premises. Ms McMullen was the project manager for the development.

Development consent for the subdivision of the premises was granted by Wollongong City Council (**council**) on 13 November 2015 (**consent**). The consent provided that prior to the issue of a subdivision certificate a

Site Audit Statement (**SAS**) be completed by an accredited site auditor certifying that the premises were suitable for the proposed development was required to be submitted to the council. This was also required under the Contaminated Land Management Act.

On 8 September 2017, Ms McMullen submitted a purported SAS and Site Validation Report (**SVR**) to the council. The SAS and SVR were prepared by Ms McMullen but the SAS contained Ms Hall's signature which had been forged by Ms McMullen. The charge related only to the SAS.

Upon the discovery of the offence by the council in May 2018, Ms McMullen admitted to forging the documents and her employment at Arcadis was terminated.

Issue: The appropriate sentence to be imposed on Ms McMullen.

Held: Ms McMullen was fined $30,000 and ordered to pay the EPA's legal costs:

(1) The commission of the offence did not cause any actual or likely physical harm to the environment. Although the commission of the offence caused harm to the regulatory regime, because such harm was inherent in the offence created by s 103(1) it did not constitute an aggravating factor under s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Crimes Sentencing Procedure Act**): at [91] to [97];

(2) The commission of the offence created a low degree of risk of harm because, although the completion of the final stages of remediation work had not been verified by JBS&G or an independent auditor, it was likely that the work had been carried out in compliance with the Remediation Action Plan prepared by JBS&G: at [102] to [103];

(3) The commission of the offence was aggravated pursuant to s 21A(2)(n) of the Crimes Sentencing Procedure Act because it involved a degree of planning which surpassed the threshold of what would usually be expected of an offence under s 103(1). Ms McMullen undertook a number of discrete steps over a period of at least 12 hours, including the creation of the false document, the forging of Ms Hall's signature, and the provision of the documents twice to the council (in hardcopy and by e-mail): at [117] to [122];

(4) The professional consequences of Ms McMullen's commission of the offence were a natural consequence of her conviction, and therefore, should not be taken into account as relevant extra-curial punishment in determining the appropriate sentence: at [161];

(5) Ms McMullen displayed genuine remorse for her actions. However, this was accorded diminished weight because she failed to report the commission of the offence and did not disclose her guilty plea to the charge to her current employer despite the fact that the charge is directly relevant to that employment: at [148] to [150];

(6) The offence fell within the middle range of objective seriousness: at [133]; and

(7) Ms McMullen was of otherwise good character, provided assistance to the authorities and was entitled to a 25% discount on sentence for the utilitarian value of her early guilty plea. This resulted in a fine of $30,000: at [154], [155], [140] and [190].

Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Budvalt Pty Ltd; Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Harris **[2020] NSWLEC 113** (Moore J)

Facts: On 27 July 2018, Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator (prosecutor) commenced four criminal prosecutions alleging breaches of the *Water Management Act 2000* (NSW) (**Water Management Act**) on a property known as Miralwyn Cotton (**site**). On the first day of the hearing, the prosecutor sought leave to rely on an amended Summons containing a rolled-up charge against Budvalt Pty Ltd (**company**). Counsel for the company then pleaded guilty. As a consequence, the prosecutor did not proceed with the charge against Mr Peter Harris personally.

The single rolled-up charge alleged that the company constructed and then used a water supply work and did not hold a water supply work approval for that work, contrary to s 91B(1) of the Water Management Act. The water supply work in question was a channel conveying water extracted from the Macquarie River. This channel was approximately 30 metres wide and two kilometres long. These proceedings were to determine the appropriate sentence for the company in light of its guilty plea.

Issue: The appropriate sentence to be imposed on the company.

Held: Company convicted of a breach of s 91B(1) of the Water Management Act; fined $252,000, with a moiety ($126,000) to be paid to the prosecutor; notice to publicise offence in *The Land* and the *Moree Champion*. No order for costs:

(1) The factor of aggravation of the offence being carried out for financial gain was not established beyond a reasonable doubt: at [49] to [51];

(2) The only harm caused by the offence was to the objectives and integrity of the regulatory system as there was no evidence of actual harm, and regulatory approval was likely to result at the end of 2020: at [55] to [56];

(3) The absence of prior convictions was a matter in favour of the company for the determination of the appropriate sentence: at [59];

(4) The personal acts of Peter and Jane Harris (directors of the company) were not relevant to the determination of the company's *corporate* "good character". The contributions of the company to the cotton industry carried some inference of corporate self-interest. The company was of "good character" but the factors that established that were only of modest weight: at [65] to [67];

(5) The employment of a staff member for the purpose of ensuring compliance was a positive factor for the company, but since there was no opportunity to test the extent of this employee's activities, the positive conclusion was to be given limited weight: at [72];

(6) The company's prospects of rehabilitation were limited: at [74] to [75];

(7) The company did not demonstrate any genuine contrition and remorse for its unlawful conduct: at [86];

(8) The fact that Mr Jack Harris took part in a directed interview and assisted the prosecutor with the preparation of the Agreed Statement of Facts were factors to be taken into account in the company's favour: at [94];

(9) The necessary intention of Parliament, in establishing environmental regulatory regimes, was to ensure regularity, consistency of standards and public supervision of the activities encompassed. Compliance was mandatory, not discretionary for regulated activities: at [120]. Failure to comply with regulatory regimes undermines public confidence in the integrity of that scheme: at [121];

(10) The company's offending conduct was characterised as being above the middle of the low range of such offending conduct: at [126];

(11) The fundamental impact of the offending conduct was the erosion of the regulatory scheme for the management of water resources pursuant to the Water Management Act: at [127]. Specific deterrence was required to ensure the company pay closer attention to the regulatory scheme in the future: at [138]. General deterrence was likewise needed for the rest of the cotton industry: at [141] to [142];

(12) The fact that the proceedings may have been brought in the Local Court did not mitigate the appropriate penalty in this case: at [155];

(13) The decision of *Hongzhi Sun v Grant Barnes* [2018] NSWLEC 196 provided no assistance to the sentencing analysis as the respective contexts were vastly different: at [159] to [164];

(14) The appropriate starting penalty was $280,000: at [166];

(15) The discount to be awarded due to the plea of guilty was determined to be 10%. The appropriate penalty therefore became $252,000: at [173] to [174];

(16) The publication of the notice of offending conduct was appropriate in the *Moree Champion* because of other cotton-farming activities in that region: at [183] to [184]; and

(19) There was no reason to not award that a moiety be paid to the prosecutor: at [194].

Natural Resources Access Regulator v Harris; Natural Resources Access Regulator v Timmins **[2020] NSWLEC 104** (Pain J)

Facts: Mr Peter Harris (**first defendant**) was charged with three offences under s 91I(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**) of taking water when metering equipment was

not operating or not operating properly on the properties known as "Mercadool" and "Four G" (**Mercadool**) near Walgett, occupied by him between 6 and 8 August 2015. The three charges related to three different pumps located on the Barwon River at Mercadool. Mr Justin Timmins (**second defendant**), the farm manager of Mercadool, faced three similar but not identical charges arising from the same circumstances on 6 August 2015. The prosecutor alleged that engine hour meters and MACE meters installed on the pumps at Mercadool were not working properly or at all during the charge periods. The defendants pleaded not guilty to all six charges.

The affidavit of the second defendant read at the hearing stated that, in late July 2015, new digital engine hour meters were installed on the three pumps and were in use during the charge period. The analogue engine hour meters and MACE meters were not being used in the charge periods.

Issue: Whether the prosecutor proved beyond reasonable doubt that:

(a) water was taken from the Barwon River (**Element 1**);

(b) from a water source to which Pt 3 of Ch 3 of the Water Management Act applied (**Element 2**);

(c) by means of a metered work (**Element 3**);

(d) while its metering equipment was not operating properly or at all (**Element 4**); and

(e) on land occupied by the first defendant (**Element 5**).

Held: Prosecutor did not prove Elements 3 and 4 beyond reasonable doubt for all charges. All six charges were dismissed:

Element 1

(1) On the basis of admissions made by the defendants in response to statutory notices issued to them, the prosecutor established Element 1 in all the charges for both defendants beyond reasonable doubt: at [72] to [75]. This was not disputed;

Element 2

(2) The Water Management (Application of Act to Certain Water Sources) Proclamation (No 2) 2012 made on 3 October 2012 applied Pt 3 of Ch 3 of the Water Management Act to the Barwon-Darling unregulated river water source: at [77]. The prosecutor established Element 2 in all the charges for both defendants beyond reasonable doubt: at [79]. This was not disputed;

Element 5

(3) The prosecutor established Element 5 in all the charges in relation to Mr Harris beyond reasonable doubt: at [83]. This was not disputed;

Elements 3 and 4

(4) The prosecutor's case as particularised in the Summonses was that engine hour meters *and* MACE meters were not working properly or at all in the charge periods. In closing submissions, the prosecutor submitted that it could not exclude the reasonable possibility that the pumps had functioning digital engine hour meters installed on them in the charge periods, based on the evidence of the second defendant. The prosecutor conceded that only the MACE meters could be relevant to Element 3: at [85]. Proving its case in the alternative, that the MACE meters were operating or not operating properly, was not open as that did not reflect the case as pleaded in the Summonses. This failure provided a sufficient basis to dismiss all the charges: at [92];

(5) Considering the statutory context and operation of s 91I of the Water Management Act, the following additional submissions made by the defendant as to why the prosecutor's case on Elements 3 and 4 must fail were accepted:

   (a) there is no evidence of any requirement for metering equipment to be installed on any of the pumps or for water to be taken by means of a metered work (at [110]);

   (b) Section 91I(2) is concerned with circumstances at a point in time, not with historic events such as whether equipment had been installed in the past (at [114], [116]);

   (c) the prosecutor did not establish beyond reasonable doubt that the MACE meters were "installed" at the three pumps at the relevant time, as physical presence alone did not amount to installation for use and,

per the second defendant's unchallenged evidence, the MACE meters were not operating from about 2009 due to their unreliability (at [118] to [119]);

(d) the prosecutor did not establish that the MACE meters were "used" or that water was extracted "by means of" the MACE meters during the charge periods (at [124]); and

(e) the prosecutor needed to prove that the meters it relied on (the MACE meters) had to be, or were being, used at the time of the alleged offence, and it did not (at [135]); and

(6) The prosecutor did not establish beyond reasonable doubt that the pumps' metering equipment was not operating properly or at all, within the meaning of that expression in s 91I(2): at [136].

Secretary, Department of Planning Industry and Environment v Williams **[2020] NSWLEC 134** (Pain J)

Facts: Mr Williams (**defendant**) was charged with an offence under s 156A(1)(d) of the *National Parks and Wildlife Act 1974* (NSW) arising from the collection of seeds from approximately 603 *Acacia parvipinnula* plants (**plants**) between 7 and 15 November 2017 in an area of the Werakata National Park (**site**) by members of his company, Diversity Native Seeds (**DNS**). DNS was established in 2001 to supply bulk quantities of high-quality native seeds for mine rehabilitation and other ecological restoration projects using direct seeding. The defendant instructed his employees to collect the seeds, not knowing the site was national park land. The site was previously a mine and was in poor ecological condition. The seed collection involved the cutting of branches of the plants containing seed pods, then laying branches on sheets, so that the seed pods dried and split open. The impact of this activity resulted in the damage of a significant proportion of the plants and temporary modification of the composition and ecological functioning of the stand. Sampling of an area of the site that was not harvested by the defendant revealed similar die off, resilient, regenerating and senescent rates as for the harvested area, except that the harvested area contained a higher proportion of plants that were regenerating.

Issue: Whether in sentencing the defendant the Land and Environment Court should:

(a) find the defendant guilty, record an offence, and impose a fine (prosecutor's position); or

(b) make an order under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Crimes Sentencing Procedure Act**) dismissing the charge (**defendant's position**).

Held: Defendant guilty of the charge with no conviction recorded; defendant to enter into a good behaviour bond under s 10(1)(b) of the Crimes Sentencing Procedure Act for a period of one year: at [75]:

(1) Taking into account the nature of the offence (at [38] to [41]), extent of harm (at [42] to [44]), significance of the reserved land (at [45] to [47]), practical measures to prevent, control, abate or mitigate that harm (at [48]), the foreseeability of the harm caused (at [49]), the extent to which the defendant had control over the causes that gave rise to the offence ([50]), the defendant's state of mind ([51] to [53]), and the defendant's reasons for committing the offence ([54]), the offending was at the low range end of low objective seriousness: at [56]; and

(2) An order can be made under s 10(1)(b) of the Crimes Sentencing Procedure Act if, under subs (2)(a), a court considers that it is inexpedient to impose any more than nominal punishment and that it is expedient to release a person on a conditional release order, compliance with which means that no conviction is recorded: at [63]. Considering that the objects of the statutory scheme were not harmed by the offence, and considering the defendant's considerable conservation work over an extended period and the nature of the work DNS undertakes, an order under s 10(1)(b) was appropriate: at [64] to [72].

Secretary, Department of Planning, Industry and Environment v Wollongong Recycling (NSW) Pty Ltd **[2020] NSWLEC 125** (Preston CJ)

Facts: Wollongong Recycling (NSW) Pty Ltd (**Wollongong Recycling**), wholly owned by Bingo Industries Ltd, operates a waste recycling and reprocessing centre at Kembla Grange (**site**). Development consent was granted by the Minister for Planning in 2016 with three conditions that regulated the volume of waste that could be received and processed on the site. The effect of these conditions was that Wollongong Recycling was

limited to receiving or processing no more than 30,000 tonnes of waste on the site per calendar year. In 2017, Wollongong Recycling received and processed 40,023.98 tonnes of waste on the site and thus did not comply with its limit. The Secretary of the Department of Planning, Industry and Environment prosecuted Wollongong Recycling for committing an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) by carrying out the development on the site otherwise than in accordance with the development consent, contrary to s 76A(1)(b) of the EP&A Act. Wollongong Recycling pleaded guilty to the charge.

Issues:

(1) The extent of harm caused by the commission of the offence;

(2) Whether Wollongong Recycling acted recklessly or negligently;

(3) Whether Wollongong Recycling showed remorse for their actions;

(4) What is the appropriate sentence; and

(5) Whether a publication order should be made as per s 250(1) of the *Protection of the Environment Operations Act 1997* (NSW).

Held: Wollongong Recycling was convicted of the offence against ss 76(1)(b) and 125(1) of the EP&A Act; fined $36,000; and publication order made:

(1) Wollongong Recycling's processing of 10,000 tonnes more waste than their development consent condition allowed did not cause any harm to the environment: at [11]. The harm caused by the commission of the offence was to the integrity of the regulatory system of planning and development control under the EP&A Act: at [12]. Wollongong Recycling's conduct in breaching the 30,000 tonnes waste limit fixed by a condition of development consent was contrary to the legislative objective expressed in the offence and impeded the attainment of the objects of the EP&A Act: at [13];

(2) (a) Recklessness, for the offence against the EP&A Act, refers to the state of mind of an offender who, in carrying out the development, is aware of the risk that the particular consequence or circumstance that the development will not be carried out in accordance with the consent, is likely to result: at [33]. The prosecutor has not established that Wollongong Recycling had this knowledge or foresight that the 30,000 tonne limit was likely to be exceeded in October 2017 when the 30,000 tonne limit was exceeded: at [32], [34];

(b) Negligence, for the offence against the EP&A Act, refers to whether a hypothetical reasonable person in the position of the offender would have known or foreseen that the consequence would be that the development would be carried out not in accordance with the development consent: at [36]. In order to be found negligent in criminal law, the Land and Environment Court (**LEC**), on assessment of all the facts, needed to establish that the degree of departure from the appropriate standard of care warranted criminal punishment: at [37]; and

(c) The most than can be established on the evidence is that some time in December 2017, Wollongong Recycling had knowledge or foresight, and a hypothetical person in the position of Wollongong Recycling would have had knowledge or foresight, that the 30,000 tonne limit would likely be exceeded and was in fact exceeded. This agreed fact is insufficient to establish that Wollongong Recycling committed the offence recklessly or negligently: at [39];

(3) Genuine remorse, along with the utilitarian value of a plea of guilty, is a mitigating factor when it comes to sentencing. The demonstration of remorse is more readily shown by an offender taking actions rather than offering smooth apologies through legal representatives: at [52]. Wollongong Recycling did not establish remorse for its offending as it did not establish, on the balance of probabilities, that it was remorseful for committing the offence. It did not take actions such as an in-person apology from a corporate executive for committing the offence or to avoid breaching conditions of development consent in the future: at [55]. Not hiding or obfuscating the breach is not a demonstration of remorse: at [56];

(4) In determining the appropriate sentence to be imposed for the offence committed by Wollongong Recycling, the LEC should be consistent with the pattern of sentencing for like offences: at [68]. The more appropriate yardstick against which the sentence in this case should be compared is the maximum penalty set by Parliament for the offence under s 125(1) of the EP&A Act of $2 million, in the case of a corporation, rather than the amounts of the fines imposed in previous cases: at [74]. The appropriate monetary penalty for

the offence is $48,000. This amount should be discounted by 25% for the utilitarian value for the plea of guilty. This makes the amount $36,000: at [75]; and

(5) A publication order should be made. People who intend to carry out development must be aware of what is the law and warned of the consequences if they fail to obey the law. Publication of the detection, prosecution and punishment of persons who disobey the law by committing offences against the EP&A Act promotes this awareness of the law and general deterrence from disobeying the law: at [80]. Publication of the notice, therefore, needs to be widespread, as well as in the particular industry. Publication in both a regional newspaper and a trade publication is therefore appropriate in this case: at [81].

- **Appeals from Local Court:**

Bay State Construction Pty Ltd v Woollahra Municipal Council **[2020] NSWLEC 86** (Preston CJ)

Facts: While carrying out a residential development at Darling Point, Bay State Construction Pty Ltd (**Bay State**) affixed an illuminated sign to one of its on-site tower cranes which said 'BAYSTATE.' The sign remained affixed to the crane from the time of its erection in August 2017 until its removal in December 2018. A neighbour complained to Woollahra Municipal Council (**council**) about the illuminated sign in December 2017, stating that it completely spoiled his night-time view over Sydney Harbour.

The council contended that the illuminated sign was both an advertising sign and business identification sign, which constituted prohibited development for the zoned R3 Medium Density Residential land on which it was erected under the Woollahra Local Environmental Plan 2014 (NSW) (**WLEP 2014**) and under cl 10 of State Environmental Planning Policy No 64 - Advertising and Signage (**Advertising and Signage SEPP**) respectively. The council issued Bay State with two penalty infringement notices under s 9.58 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for $6,000 each and a court attendance notice. Bay State elected to have the offences the subject of the two penalty infringement notices determined by the Local Court.

The Local Court determined that Bay State had committed, and convicted it of committing, three offences. That Court fined Bay State $6,000 for the first offence committed on 3 January 2018, $10,000 for the second offence committed on 14 May 2018 and $20,000 for the third offence committed on 5 July 2018. The Local Court ordered Bay State to pay the council's costs in the sum of $8,000. Bay State appealed against these sentences to the Land and Environment Court.

Issues:

(1) Whether the sentences imposed by the Local Court were individually and cumulatively excessive and the fines for each offence therefore warrant a reduction;

(2) Whether the totality principle applies to the three offences;

(3) The appropriate sentence for each offence by reference to their:

  (a) objective seriousness; and

  (b) the nature of the environmental harm caused by the illumination of the sign; and

(4) If Bay State was successful on appeal, whether the council should pay Bay State's costs of the appeal and of the Local Court proceedings.

Held:

(1) The Court is not restricted to a determination of whether the sentences imposed by the Local Court were infected with error or were manifestly excessive, but rather the Court is to redetermine the appropriate sentence for each offence: at [57];

(2) As there are three offences, the totality principle needs to be applied. The overall sentence that would result from aggregation of the individual sentences needs to be reviewed to consider whether the overall sentence is just and appropriate. If the overall sentence exceeds the overall criminality involved in commission of the offences, the individual sentences will need to be adjusted: at [58];

(3) The objective harmfulness of Bay State's commission of the offences is relevant to determining the seriousness of the offences. The mere commission of the offence of carrying out prohibited development did interfere with the integrity of the system of planning and development control. However, the degree of interference in this case was minor. That unlawful development (the illuminated sign) was minor in the context of the otherwise lawful development (residential development) being carried out on the land: at [64];

(4) The real impact resulted from the illumination of the sign. The sign was in the sight line of a neighbour looking over Sydney Harbour towards the Harbour Bridge and the Opera House. This interference with the neighbour's night-time view of Sydney Harbour did constitute harm. Nevertheless, the harm was confined to only one person, for a limited time of each day, and for a limited period of time (around three months): at [65]. This harm caused by the illumination of the sign was established only for the first offence, but not for the second and third offences, as the sign was no longer illuminated: at [66]. In these circumstances, the environmental harm caused by the commission of all of the offences was low, but even lower for the second and third offences than the first offence: at [67];

(5) Having regard to the nature and circumstances of each offence committed by Bay State, the maximum penalty for the offence, the low harm caused by the commission of the offences, the commission of the offences without any proven heightened state of mind, the small degree of foreseeability of risk of harm and practical measures to reduce that risk, and no proven financial gain, each offence is of low objective seriousness: at [71]. The first offence is more serious because of the longer time the advertisement was displayed and the greater harm caused by the sign being illuminated, than the second and third offences: at [75];

(6) Applying the totality principle, the aggregate of the individual fines does exceed what is just and appropriate and the total criminality involved in the commission of the offences. The displaying of the advertising sign on the crane was one continuous course of conduct. It is appropriate to adjust the sentences to reflect the considerable degree of overlap between the offences: at [79]. In total, a just and appropriate sentence is a fine of $36,000. This should be distributed to be $26,000 for the first offence, $6,000 for the second offence and $4,000 for the third offence: at [80]; and

(7) A costs order should not be made with respect to the costs of the appeal. The aggregate of the fines imposed by the Local Court was an appropriate penalty for the offences committed by Bay State, although the distribution of the amounts of the fines between the offences should be different to what the Local Court found. In this event, Bay State has not been successful in establishing that the overall penalty imposed by the Local Court was too severe. A costs order in its favour is not warranted: at [84]. A costs order in the council's favour is also not warranted: at [85]. There is no justification for disturbing the order for costs made by the Local Court. The costs order made by the Local Court should therefore stand: at [87].

- **Contempt:**

City of Canada Bay Council v Frangieh **[2020] NSWLEC 81** (Robson J)

Facts: In two Notices of Motion, City of Canada Bay Council (**council**) sought orders that Mr Frangieh (**respondent**) be punished for contempt of court for carrying out building works contrary to an undertaking that he had given to the Land and Environment Court (**LEC**). The first Notice of Motion (**NOM**) sought orders concerning works conducted in relation to an existing dwelling house, while the second NOM concerned works conducted in relation to an attached studio.

The undertaking given to the LEC on 14 August 2019 by the respondent, through his solicitor, provided that he would not undertake further building work to either the dwelling house or the studio, other than works that were temporary weatherproofing measures; measures to prevent unauthorised access; or works that were exempt development pursuant to State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Codes SEPP**).

The respondent pleaded not guilty to each of the charges.

Issues:

(1) Whether the alleged works had been undertaken; and

(2) Whether the alleged works were exempt development pursuant to the Codes SEPP, such that the works fell within the exception provided by the undertaking.

Held: Notices of Motion dismissed:

(1) Works were undertaken in relation to both the dwelling house and studio at all material times, including both prior to and after the respondent's undertaking to the LEC: at [66];

(2) The respondent was aware of the undertaking: at [67];

(3) The LEC did not accept council's submission that because the works were, in effect, a continuation of allegedly unlawful work that was being conducted prior to the undertaking, the works conducted after the undertaking therefore could not be characterised as exempt development: at [70] to [73];

(4) Council was unable to prove beyond reasonable doubt that the works were not exempt development pursuant to the Codes SEPP: at [87] to [91]; and

(5) Council had not established to the requisite standard that the respondent had breached his undertaking to the LEC: at [92].

***Sutherland Shire Council v Perdikaris* [2020] NSWLEC 111** (Preston CJ)

(related decision: *Sutherland Shire Council v Perdikaris* [2019] NSWLEC 149 (Pepper J))

Facts: Sutherland Shire Council (**council**) first commenced proceedings against Mr and Mrs Perdikaris (**respondents**) to remedy a breach under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). This breach occurred when the first respondent constructed a garage and concrete slab at their house, which required development consent. Development consent was never obtained. On 16 October 2019, the Court found that the garage and concrete slab were constructed in breach of the EP&A Act and ordered their demolition.

The council commenced this contempt proceeding, seeking for the Land and Environment Court (**LEC**) to, first, hold the respondents in contempt for failing to comply with the LEC's order; second, make an order for substituted performance so that the council may demolish the garage and concrete slab, with the respondents to pay the associated costs of doing so; and, third, order the respondents to pay the council's costs of the Notice of Motion (**NOM**).

Issues:

(1) Whether the respondents failed to comply with the LEC's orders made on 16 October 2019 to demolish the garage/concrete slab and, if so, what punishment should be imposed for this contempt;

(2) Whether an order should be made for substituted performance; and

(3) Whether the respondents should be ordered to pay the council's costs of the proceedings.

Held:

(1) The respondents were personally served with the original judgment and orders on 16 October 2019, the NOM and the Statement of Charge filed on 6 February 2019, the order listing the NOM for hearing on 28 July 2019 and the several affidavits and documents throughout the proceeding. The respondents had deliberately chosen not to contest the charge of contempt and the order for substituted performance: at [34];

(2) The garage and concrete slab remained standing at the time of the hearing. Accordingly, the respondents are in contempt for failing to comply with the court order made on 16 October 2019: at [37];

(3) Part 55 of the Supreme Court Rules 1970 (NSW) applies to proceedings in Class 4 of the LEC's jurisdiction (r 6.3 of the *Land and Environment Court Rules 2007* (NSW)): at [39];

(4) Upon consideration of the factors set out in *Wood v Staunton (No 5)* (1996) 86 A Crim R 183**,** the appropriate punishment is a fine of $10,000. In arriving at this amount, the proportionality of the fine must be considered alongside the objective seriousness of the contempt, with personal deterrence and future compliance also being relevant considerations: at [63] to [64];

(5) For the purpose of future compliance, it is appropriate to suspend the punishment of the fine upon the condition that the respondents demolish the garage and concrete slab within a period of three months from the date of the judgment: at [66];

(6) It is also appropriate to direct substituted performance under r 40.6 of the Uniform Civil Procedure Rules. Accordingly, at the conclusion of the three month period, and upon giving 14 days' notice to the respondents, the council is directed to demolish the garage and concrete slab, with the respondents to pay the council's cost of doing so: at [74]; and

(7) Costs of the NOM were awarded to the council on an indemnity basis: at [77].

- **Civil Enforcement:**

Armidale Regional Council v Margaret O'Connor **[2020] NSWLEC 77** (Preston CJ)

(related decisions: *Armidale Regional Council v Margaret O'Connor* [2020] NSWLEC 53 (Robson J); *Armidale Regional Council v Margaret O'Connor (No 2)* [2020] NSWLEC 54 (Robson J))

Facts: Armidale Regional Council (**council**) and its General Manager (Chief Executive Officer), Ms Susan Law, brought proceedings under s 673 and s 674 of the *Local Government Act 1993* (NSW) (**Local Government Act**) to remedy or restrain a threatened breach of the Local Government Act. The threatened or apprehended breach was that the council might deny procedural fairness to Ms Law in threatening to exercise a statutory power to terminate her employment contract. Six councillors lodged a Notice of Motion (**NOM**) on 28 April 2020 calling for an extraordinary meeting of the council to debate and vote on a motion that the council should terminate Ms Law's employment contract.

The council and Ms Law sought orders from the Land and Environment Court (**LEC**) against five councillors (**councillors**) to prevent them from causing the council to not comply with the Local Government Act. The council sought two declarations that:

(i) the councillors be excluded from being present at any meeting at which the NOM dated 28 April 2020 to remove Ms Law from the position of General Manager (Chief Executive Officer) is considered and voted on; and

(ii) Ms Law is entitled to be informed by the council of the allegation against her, the issues and relevant material to be taken into account and be given a reasonable opportunity to present her case before the council exercised its statutory power to terminate her employment contract.

Issues:

(1) Whether there was a breach of the Local Government Act;

(2) Whether there is an implied power to terminate the employment of the general manager under s 334 of the Local Government Act;

(3) Whether the exercise of the implied power is conditioned on according procedural fairness;

(4) Whether there was an apprehension of bias by reason of the councillors being accusers;

(5) Whether there was an apprehension of bias by prejudgment of the councillors; and

(6) Whether there would be a failure to afford Ms Law a fair opportunity for a hearing.

Held: The council and Ms Law have not established any threatened or apprehended breaches of the Local Government Act, including any threatened denial of procedural fairness. Proceedings dismissed:

(1) As the council's threatened action of terminating the contract of employment with Ms Law will be under the terms of the general manager's contract and will not involve the exercise of any statutory power under the Local Government Act, there can be no threatened or apprehended breach of the Local Government Act. The common law attaches the rules of procedural fairness only to an exercise of a statutory power under the Local Government Act, not the exercise of a right under a contract of employment. There can be no breach of the Local Government Act as there is no breach of a statutory provision to which the rules of procedural fairness attach: at [29], [30];

(2) The power in s 334 of the Local Government Act to appoint a person as general manager includes the power to remove the person so appointed by reason of s 47(1)(b)(i) of the *Interpretation Act 1987* (NSW): at [35], [37];

(3) It is well settled that the rules of procedural fairness regulate the exercise of statutory power unless they are excluded by plain words of necessary intendment: at [38]. There are no plain words of necessary intendment in s 334 of the Local Government Act or elsewhere that indicate that the implied power to remove a person appointed to the position of general manager may be exercised without according that person procedural fairness: at [39];

(4) None of the councillors have engaged in the performance of investigative or prosecuting functions against M Law. They have not stepped into the position of an accuser: at [78], [82];

(5) The council has not established that the councillors will have the necessary state of mind described as bias in the form of prejudgment if and when they come to vote on the NOM dated 28 April 2020 for the termination of Ms Law's contract of employment as general manager: at [108]. If none of the councillors can be shown to have prejudged the issue of the termination of the general manager's contract of employment, there can be no apprehension that the council as the collegiate decision-making body is biased: at [111]. Even if any of the councillors could be seen to have prejudged the move, the council has not established that such prejudgment might affect the whole of the decision-making process by the council: at [112]. The council has not established on the evidence how all of the councillors, not just the councillors alleged to have prejudged the issue, will vote at any meeting of the council to consider the NOM dated 28 April 2020: at [115]. The onus is on the council to establish that any decision the council might make on the NOM dated 28 April 2020 might be affected by apprehended bias. The council has not discharged this onus: at [116]; and

(6) The council has not established that it will not afford Ms Law an opportunity be heard before it makes a decision on the NOM dated 28 April 2020 as to whether or not to terminate Ms Law's contract of employment as general manager under subcl 10.3.5 of the contract: at [133], [138].

Blacktown City Council v Hambly **[2020] NSWLEC 132** (Preston CJ)

Facts: Blacktown City Council (**council**) brought proceedings under s 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) to remedy and restrain breaches of the EP&A Act committed by Mr Derek Hambly (**respondent**). The respondent owns several parcels of rural land located in the suburb of Riverstone. The council contended that the respondent erected, or authorised other persons to erect, at least three caravans/camp trailers, three canvas tents, two camping cubicles, multiple temporary shade structures and other standalone temporary shade structures on the land and neighbouring land (together comprising the **unauthorised structures**). The council issued a development control order under Div 9.3 of the EP&A Act, requiring My Hambly to cease the use of the unauthorised structures and to remove all of the unauthorised structures. The council contended that the respondent did not comply with the development control order and thereby breached the EP&A Act. The council brought proceedings in the Land and Environment Court seeking orders to remedy and restrain the breaches. The respondent did not attend the hearing in order to contest the case.

Issues:

(1) Whether the respondent breached s 4.2 of the EP&A Act by, or authorising another person to, erect, occupy and use the structures on the land without development consent;

(2) Whether the respondent breached s 4.3 of the EP&A Act because the erection and use of the structures are prohibited on the land; and

(3) Whether the respondent breached s 9.37 of the EP&A Act by failing to comply with the applicant's development control order.

Held: Declarations that the respondent has carried out prohibited development by:

(a) erecting or authorising other persons to erect unauthorised structures;

(b) occupying and using or authorising other persons to occupy and use the unauthorised structures for human habitation; and that the respondent has failed to comply with the terms of a development control order given to him by Blacktown City Council.

Respondent ordered to:

(a) cease using the unauthorised structures for the purpose of human habitation;

(b) remove all the unauthorised structures from the land;

(c) reinstate the land to the condition or state it was in immediately before the unauthorised structures were erected on the land; and

(d) pay the council's costs of the proceedings:

(1) The only development permitted without consent in the RU4 Zone is "home occupation." The unauthorised structures could not be categorised as being a "home occupation", as defined in the Dictionary to the Blacktown Local Environmental Plan 2015 (NSW) (**BLEP 2015**). The use of the unauthorised structures was not for the purpose of home occupation but, rather, used for human habitation. Accordingly, the development is not permitted without consent under the BLEP 2015: at [55];

(2) The unauthorised structures could not be categorised as falling within any of the potentially relevant types of development that are permitted with consent in the RU4 Zone, as defined in the Dictionary to the BLEP 2015. These developments include "bed and breakfast accommodation", "dwelling houses", "home businesses", "home industries" and "roads". Accordingly, the development is not permitted with consent under the BLEP 2015: at [56] to [69];

(3) The unauthorised structures fall into the innominate category of prohibited development: at [70]. The respondent breached s 4.3 of the EP&A Act by erecting and using, or authorising other persons to erect and use, the unauthorised structures on the land, where such development is prohibited: at [73];

(4) The respondent breached s 9.37 of the EP&A Act by failing to comply with the council's development control order: at [74] to [75]; and

(5) The respondent is to cease using the unauthorised structures, remove all unauthorised structures, reinstate the land to the condition it was in immediately before the unauthorised structures were erected and pay the applicant's costs of the proceedings: at [88]. Three months should be sufficient time to allow the respondent and the other persons to make alternative accommodation arrangements and to undertake the works ordered, including removing the structures: at [84], [88].

Diab v Cavasinni (No 3) **[2020] NSWLEC 119** (Robson J)

(related decision: *Diab v Cavasinni* [2019] NSWLEC 204 (Preston CJ))

Facts: Mrs Diab (**applicant**) sought declaratory and consequential mandatory injunctive relief in relation to the construction of a two-storey house on the respondent's neighbouring property (**Cavasinni Property**). The applicant alleged that the dwelling had been constructed otherwise than in accordance with a development consent granted by the Land and Environment Court (**LEC**) in 2010 (**consent**) and in breach of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

Following the commencement of the proceedings, an application was filed with Hunters Hill Council in September 2018 seeking to modify the consent to regularise the non-compliances alleged by the applicant (**modification application**). An appeal against the council's refusal of the modification application was thereafter filed in 2019 and the respondents consequently sought to vacate the hearing dates set down for these proceedings pending the determination of the modification application appeal. Following orders made by Preston CJ in *Diab v Cavasinni* [2019] NSWLEC 204 pursuant to Pt 28 of the Uniform Civil Procedure Rules 2005 (NSW), the question before the LEC for determination was limited to whether the works undertaken on the Cavasinni Property were in breach of either the consent and/or the EP&A Act, with the question of appropriate remedy and relief to be determined following the conclusion of both these proceedings and the modification application appeal.

Issues:

(1) Whether the roof of the Cavasinni Property has been constructed otherwise than in accordance with the consent or the EP&A Act and, if so, the extent of any non-compliance with the approved plans;

(2) Whether a private electricity pole erected on behalf of the applicant had been removed otherwise than in accordance with the consent or the EP&A Act;

(3) Whether the respondents had excavated a substantial sandstone outcrop located north of the concrete driveway servicing the applicant's property in a manner which constituted a breach of either the consent or the EP&A Act; and

(4) Whether the approved plans permitted the construction of piers, a fence and stone utility cupboard within an easement for support, easement for services and a right of carriageway.

Held: Declaration that works had been undertaken otherwise than in accordance with the consent; issue of remedy and relief reserved; costs reserved:

(1) A number of the breaches alleged by the applicant had been admitted by the respondents in their amended Points of Defence: at [25];

(2) In relation to the alleged breaches concerning the roofline, the ridges of both the lower and main rooflines had been constructed higher than as depicted in the approved plans: at [39] to [40]. The gutter also exceeded the height depicted in the approved plans by half a metre: at [41];

(3) Having regard to the approved plans (which did not provide for an electricity pole to remain), and having considered the oral evidence of the electrician who had removed it, it was not established that the removal of the electricity pole was otherwise than in accordance with the consent or the EP&A Act: at [56];

(4) Given the survey and photographic evidence before the LEC; the oral evidence of Mr Diab in relation to the sandstone formation; and that the approved plans required vegetation in the relevant area to be retained, the excavation of a sandstone outcrop and its replacement with a concrete area for carparking was not in accordance with the approved plans: at [78] to [79];

(5) In relation to the footprints, eaves and gutters of the garage and storage room, the works had encroached upon the easements and right of carriageway despite not having been authorised to do so. The works had therefore been constructed otherwise than in accordance with the approved plans: at [88];

(6) The sandstone piers forming part of a fence had not been constructed in accordance with the approved plans as they had not been clad in the nominated rendered finish: at [94];

(7) Although the fence as constructed did not comply with the form reflected in the approved plans, particularly as it does not have 600-millimetre plinth infills at its base, it was otherwise compliant with the consent in a locational sense: at [95]; and

(8) Despite the stone utility cupboard not having been provided for in the approved plans, it was not appropriate to make a discrete order or finding in relation to this structure as it was unobtrusive and within the design of the approved fence: at [97].

Elanor Investors Limited v Sydney Zoo Pty Ltd (No 5) **[2020] NSWLEC 93** (Pepper J)

(related decisions: *Elanor Investors Limited v Sydney Zoo Pty Limited (No 4)* [2019] NSWLEC 191 (Duggan J); *Elanor Investors Limited v Sydney Zoo Pty Ltd (No 3)* [2019] NSWLEC 172 (Pain J); *Elanor Investors Limited v Sydney Zoo Pty Ltd (No 2)* [2019] NSWLEC 121 (Pain J); *Elanor Investors Limited v Sydney Zoo Pty Limited* [2019] NSWLEC 80 (Pain J))

Facts: Elanor Investors Limited (**applicant**), sought a declaration that Sydney Zoo Pty Ltd (**respondent**), had carried out development otherwise than in accordance with development consent by its distribution of marketing material, contrary to s 4.2(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). The applicant owned Featherdale Wildlife Park (**Featherdale**). Featherdale exhibited Australian native animals and the majority of its visitors were international. The Planning and Assessment Commission of NSW (**PAC**) granted development consent to the respondent on 8 September 2017 to develop and operate a new zoological facility (**consent**) on a site approximately three kilometres from Featherdale. The respondent opened to the public on 6 December 2019. Prior to this date, the respondent engaged Australian Attractions Pty Ltd

(**Australian Attractions**) to advise it in relation to sales and marketing strategies for the international market. Australian Attractions prepared rate cards for the respondent advertising retail rates (the rates which independent visitors would be charged to visit the zoo) and nett (or trade) rates (the rates the zoo charged tour operators for every visitor they brought to the zoo) and distributed them to international tour operators in 2018, 2019, and 2020. Australian Attractions also approached international tour operators including AAT Kings and Gray Line (which were Featherdale's most commercially important day-tour operators) to secure agreements. Australian Attractions attended a number of international industry events on the respondent's behalf. The applicant contended that the marketing material distributed by Australian Attractions on the respondent's behalf breached three differentiation conditions of the consent, namely, that the respondent was required to offer a different type of facility to that of Featherdale, that is, it was required to offer a zoological facility (**type of facility condition**); that the respondent was obliged to price its offering at retail and nett rates that were more expensive than Featherdale and comparable to Taronga Zoo (**pricing condition**); and that the respondent was required to adopt a market position that allowed Featherdale to continue to occupy the niche of getting close to native animals (**animal encounter condition**). These conditions were said to be incorporated into the consent from documents submitted as part of the approval process on behalf of the respondent (**application documents**) by operation of Condition B2 of the consent which stated that the development was to be carried out in accordance with the application documents.

Issues:

(1) Was the distribution of marketing material "carry[ing] out development on the land" for the purposes of s 4.2(1)(b) of the EP&A Act, having regard to the definition of "development" in s 1.5 of that Act;

(2) On the proper construction of the consent, were the type of facility condition, the pricing condition, and the animal encounter condition incorporated into the consent by the operation of Condition B2;

(3) If so, did the respondent breach or threaten to breach those conditions by its distribution of marketing material; and

(4) If so, should the Land and Environment Court (**LEC**) exercise its discretion to grant the relief sought by the applicant in any event.

Held: Summons dismissed with costs:

(1) The distribution of marketing material was not "development" as defined in s 1.5 of the EP&A Act, and therefore, the prohibition in s 4.2(1)(b) was not engaged. The applicant contended that because the material distributed was marketing a use of the land upon which the respondent operated, it constituted "development" for the purposes of the EP&A Act. If such a broad construction of "a use of land" in s 1.5(1)(a) were accepted, it would permit almost any activity to fall within the ambit of "development". This would impermissibly expand the scope of the EP&A Act and the jurisdiction of the LEC: at [105] to [108];

(2) The conditions that the applicant contended were breached never formed part of the consent properly construed. At a general level, the purported conditions derived from discursive and aspirational statements of intent by the respondent that were not transformed into binding obligations by Condition B2. The PAC's concerns about the potential economic impact on the western Sydney locality of the new zoo were addressed in express conditions that imposed differentiation obligations on the respondent, especially Conditions B2 to B9. The conditions that the applicant contended for were not expressly referred to anywhere in the consent. In addition, Condition B3 provided that where there was inconsistency between the conditions of the consent and the application documents, the consent would prevail. If there was inconsistency between the application documents, the most recent would prevail. The most recent application document was a letter from the respondent (**10 August 2017 letter**) wherein the respondent expressly undertook to comply with additional conditions that were ultimately expressly imposed by the consent as Conditions B6 to B9. At a more specific level, the type of facility condition was imprecise, covered matters over which the respondent had no control (such as visitation time) and was directed to the same subject matter as the clearly expressed obligations in Conditions B6 to B9 of the consent. The pricing condition was vague, only expressed in the application documents as an expectation, and compliance with it was impractical given that Featherdale's nett rates were not publicly disclosed; and the animal encounter condition was inconsistent with Condition B8 of the consent and the 10 August 2017 letter: at [122] to [132], [143] to [145], [148] to [152], [155] to [160] and [161] to [168];

(3) Even if the purported conditions were part of the consent, the respondent had complied with them. In relation to the type of facility condition, although the respondent's marketing material highlighted its Australian native animals exhibits, it also featured exotic animals and was consistent with its offering as a

"full service zoological facility". The evidence also established that the respondent was priced more expensively than Featherdale with respect to retail rates and there was no material breach of the alleged pricing condition in respect of nett rates where compliance with the asserted condition was impractical, if not impossible. In relation to the animal encounter condition, there was insufficient evidence to establish that Featherdale did not continue to occupy its niche of "getting close to" native animals or that the respondent's marketing would cause this to change: at [174] to [179], [187] to [195] and [196] to [198]; and

(4) Even if the conditions had been breached, the LEC would have declined to grant the relief sought by the applicant. Although the applicant submitted that the alleged breaches of the consent caused harm to its operations and would continue to do so, the alleged increased competition causing financial detriment to Featherdale did not engage a proper planning purpose. This weighed against curial restraint. The evidence suggested that even if the purported conditions were breached, Featherdale would continue to be profitable and would be able to conduct its socially and environmentally beneficial programs. Any alleged breach would not, therefore, have any actual or potential adverse effect on the adequacy of the facilities afforded to the local community: at [208] to [211] and [220].

Snowy Mountains Brumby Sustainability & Management Group Incorporated v State of New South Wales and Anor **[2020] NSWLEC 92** (Duggan J)

Facts: Following the impacts of the 2019-2020 bushfire season on the physical landscape of Kosciuszko National Park (**national park**), the respondent proposed to reduce the numbers of wild horses in the national park as they may impede the restoration of the bushfire-impacted areas. The reduction in numbers was to be achieved by the removal of all wild horses from the Nungar Plain, and a reduction of numbers in the Cooleman and Kiandra Plains to sustainable levels (collectively, the **targeted areas**). The management of the wild horses was governed by the Kosciuszko National Park Plan of Management 2006 (**Park PoM**) and the Kosciuszko National Park Horse Management Plan 2008 (**Horse PoM**). The applicant south to restrain the respondent from completing the wild horse management activities.

Issues:

(1) Whether there had been a failure to comply with s 5.5(1) of the *Environmental Planning and Assessment Act 1979* (NSW), the duty to consider environmental impact;

(2) Whether the proposed actions comprised an "activity" within the meaning of s 5.1 of the EP&A Act;

(3) Whether the proposed actions were exempt development as per s 1.6 of the EP&A Act;

(4) Whether the carrying out of such "activity" required consideration by the relevant determining authority; and

(5) Whether there had been a failure to comply with s 81 of the *National Parks and Wildlife Act 1974* (NSW) (**NP&W Act**).

Held: Summons dismissed; no order for costs:

(1) To be considered a "use of land" within the meaning of s 5.1, the action must have a purpose that aims to derive some benefit from the land: at [27]. Here, the respondent's proposed actions are for the purpose of the capture and removal of wild horses from the national park. The actions were a s 5.1 activity relating the use of land as they related to the use of the land as a national park with the aim to preserve and protect the environmental and cultural values of the park; a positive, active action on the land was required to achieve the proposed end; the actions had the potential for both positive and negative consequences; and the removal of wild horses required undertaking specific actions: at [28]

(2) The proposed actions were not exempt development. Section 1.6(1), by its terms, set out the effect (or consequence) of development being "exempt development". The terms do not lend themselves to a construction that indicates that it is identifying the means of being characterised as exempt. The provisions of s 1.6(1) are not definitional but operational: at [40];

(3) The proposed actions are not a "new" activity - the geographic location of the proposed actions was within the areas authorised by the Horse PoM, meaning the proposed actions are authorised by the Horse PoM: at [56]. Thus the duty had been discharged and there was no further obligation to consider environmental impacts, as the proposed actions were within the scope of what had already been considered;

(4) As for the argued "intensification" of "use" through an increase in the number of wild horses affected, there is no limitation on horse numbers in the Horse PoM; the Horse PoM in fact anticipates fluctuations in wild horse populations: at [58]. The same applies for any increase in truck movements and trap yards; there is no operational limitation in the Horse PoM: at [59]; and

(5) There was no evidence to suggest that the proposed actions were inconsistent with Horse PoM. As such, there was no failure to comply with s 81 of the NP&W Act: at [69].

Waverley Council v Ash Samadi and Ors **[2020] NSWLEC 67** (Duggan J)

Facts: Mr Samadi (**respondent**) carried out a series of alterations to an existing dwelling in Tamarama authorised by a series of complying development certificates amended over time. The most recent of these authorised changes to the roof of the premises (**2020 CDC**). Following issues relating to the carrying out of construction work at the premises, the council issued a development control order requiring all construction to stop "forthwith" (Stop Work Order (**SWO**)). The council issued two Access Notices for the premises but council officers were unable to gain access. At the commencement of the proceedings, the respondent provided an undertaking to the Land and Environment Court to cease all work on the roof, other than the installation of a tarpaulin. A joint expert report stated that when installing a tarpaulin, no more than six temporary timber trimmers needed to be installed. Later inspection revealed that the work comprised 102 timber rafters, consistent with the 2020 CDC drawings.

Issues:

(1) Whether the SWO was invalid on the basis of service; adequacy of time for compliance; reasons provided; or the factual foundation;

(2) Whether the SWO was breached;

(3) Whether the CDC was invalid;

(4) Whether orders for entry were breached;

(5) Whether discretion to validate the CDC should be exercised; and

(6) Whether general discretion should be exercised.

Held: SWO was valid and breached; the CDC was invalid; no basis for exercise of discretion:

(1) For e-mail transmission to constitute service, the document must be capable of being served "in accordance with arrangements indicated by the person as appropriate for transmitting documents to the person" as required by s 10.11(1)(c) of the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**). With reference to the statutory text and context, to "indicate" an arrangement for electronic submission requires less than formal notice in comparison to "specify" a postal address. As such, a person can, by conduct, indicate e-mail service arrangements: at [82]. The historical conduct of the parties in the use of the respondent's e-mail address evidences an indication of arrangements for e-mail: at [84];

(2) Schedule 5, s 27 of the EP&A Act states that a SWO must specify a "reasonable period" within which the terms are to be complied with. The relevant SWO specified compliance "forthwith". The determination of a "reasonable period" is an objective assessment of relevant facts: at [145]. The surrounding circumstances of previously issued SWOs were relevant when determining the reasonableness of the time period. If it maintains the current state of affairs, compliance "forthwith" was not unreasonable: at [148];

(3) When the SWO is read as a whole, it did more than merely recite the circumstances which enlivened the power to issue the order: at [157]. In any case, the recitation of circumstances enlivening the power can comprise sufficient reasons: at [160];

(4) If the SWO did not permit the carrying out of any nominated work, but work was required to render persons or property safe, particular processes may be pursued to achieve this. However, the respondent did not obtain any of the necessary permissions allowing the construction said to be done for safety reasons: at [183]. Further, legal advice suggesting the work was permissible does not render the work lawful: at [184]. Additionally, the work to the roof comprising installation of timber rafters was "construction work", falling outside the scope of the joint report: at [195]. On both these bases, the SWO was breached;

(5) Particular works on the premises breached the requirements of the Building Code of Australia (**BCA**), therefore the CDC was not permitted to be issued, even if accompanied by a performance-based solution. As such, the consequence was that it was invalid. However, a failure to provide the CDC within two days of its issue would not lead to invalidity: at [210], [215];

(6) The orders for entry were sent via e-mail, determined as an effective means of service. As such there was a failure to comply with the notices for entry, in breach of the obligation not do so: at [246] to [247];

(7) The CDC cannot be validated by the BCA's performance-based requirements as it was a step that was not authorised in the granting of the CDC. As there was an absence of power in issuing the CDC, there were available that would permit the 2020 CDC to be validated. Further, the breach was an integral part of the CDC and there was no reasonable way to sever the non-compliant element of the consent to render it valid: at [254] to [255]; and

(8) Seeking only a declaration and no consequential relief does not make a declaration a bare declaration - the declarations relating to notices of entry serve the public purpose of denouncing the respondent's conduct in failing to facilitate an inspection: at [267].

- **Aboriginal Land Claims:**

NSW Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 - Helensburgh Police Station **[2020] NSWLEC 133** (Pain J)

Facts: The New South Wales Aboriginal Land Council (**applicant**) filed an appeal under s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) (**Land Rights Act**) in response to the refusal by the Minister Administering the *Crown Lands Management Act 2016* (NSW) (**Minister**) of Aboriginal Land Claim (**ALC**) 28490, part ALC 42456 and part ALC 42492. These ALCs related to Lot 995 in Helensburgh consisting of a police station, a residence and a paddock. The ALCs were lodged by the applicant on 13 August 2010 (**first date of claim**) and on 15 December 2016 and 19 December 2016 (**second and third dates of claim**). The applicant pressed the claims with respect to:

(i) the paddock at the first date of claim;

(ii) the paddock at the second and third dates of claim; and

(iii) the residence at the second and third dates of claim.

The Minister refused the claims on the grounds that when they were made, the land was not claimable Crown land as it was lawfully used and occupied and was needed for an essential public purpose as a police station.

The Minister submitted that at the first date of claim, the paddock was used or occupied by NSW Police through an arrangement with a local person who kept a horse on the paddock. The Minister submitted that at the second and third dates of claim, the paddock was used or occupied for the agistment of police horses. The Minister submitted that at the second and third dates of claim, the residence was occupied, in the sense that it was being continuously and actively maintained.

Issue: At the dates of claim, were those parts of Lot 995, the subject of the ALCs, lawfully used or lawfully occupied and therefore not claimable Crown lands within the meaning of s 36(1)(b) of the Land Rights Act.

Held: Claims upheld for that part of Lot 995 with respect to (i) the paddock at the first date of claim; (ii) the paddock at the second and third dates of claim; and (iii) the residence at the second and third dates of claim: at [157]:

(1) The paddock was not lawfully used or occupied as at the first date of claim: at [143]. Although it was probable that a horse was kept in the paddock in August 2010, it was not there lawfully per s 155(1)(d) of the *Crown Lands Act 1989* (NSW): at [134], [142];

(2) The paddock was not used or occupied as at the second and third dates of claim: at [148]. The documentary evidence relied on by the Minister was insufficient to establish that any police horses were located in the paddock in December 2016: at [145] to [147]; and

(3) The residence was not used or occupied at the second and third dates of claim: at [156]. The Minister's evidence was so minimal as to not amount to occupation, meaning continuous and active maintenance, falling well short of what was demonstrated in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 and accepted by the High Court at [28] in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232; [2016] HCA 50 as activity amounting to occupation of the relevant premises: at [155].

- **Section 56A Appeals:**

***Denoci Pty Ltd v Liverpool City Council* [2020] NSWLEC 102** (Preston CJ)

(decision under review: *Denoci Pty Ltd v Liverpool City Council* [2019] NSWLEC 1643 (Chilcott C))

Facts: Denoci Pty Ltd (**applicant**) lodged a development application with Liverpool City Council (**council**) seeking consent for site earthworks and the removal of vegetation to accommodate the future footprint of two warehouse buildings. The earthworks and vegetation removal were proposed on only part of the subject land (the subject site). The applicant appealed under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the council's deemed refusal of the development application for earthworks and vegetation removal. The commissioner dismissed the appeal and refused consent to the development application for earthworks and vegetation removal. The applicant appealed under s 56A(1) of the *Land and Environment Court Act 1979* (NSW) against the commissioner's decision and orders on questions of law.

Issues:

(1) Whether the commissioner misconstrued the proposed development and the land on which it was to be carried out by focusing on the subject site and not the subject land;

(2) Whether the commissioner erred in finding that the applicant's Species Impact Statement (**SIS**) did not comply with the Chief Executive's requirement by not undertaking targeted surveys of the threatened flora species, *Hibbertia fumana*;

(3) Whether in finding that the proposed development was inconsistent with cl 7.6 of the Liverpool Local Environmental Plan 2008 (**LLEP 2008**), the commissioner misconstrued and misapplied cl 7.6, failed to give reasons for the finding and took into account legally irrelevant factors or made a manifestly unreasonable decision;

(4) Whether in finding that the site was an "environmentally sensitive area" under cl 7.31 of the LLEP 2008, the commissioner misconstrued the term "environmentally sensitive area," failed to give reasons for the finding and denied the applicant procedural fairness;

(5) Whether in finding that the proposed development was not compliant with the fifth control in s 4 of Pt 1 of Liverpool Development Control Plan 2008 (**LDCP 2008**), the commissioner misconstrued the development and the land on which it was to be carried out and misapplied the fifth control and misapplied the statutory test in s 4.15(3A) of the EP&A Act; and

(6) Whether the commissioner erred in failing to consider the applicant's proposed purchase of biodiversity credits from registered biobank sites to offset the impacts of the proposed development on biodiversity.

Held: No errors of law established; appeal dismissed; and the applicant to pay the respondent's costs:

(1) The applicant has not established that the commissioner misconstrued the proposed development and the land on which it was to be carried out. The commissioner correctly identified the development the subject of the development application and the land on which the proposed development was proposed to be carried out: at [26], [28]. The commissioner properly considered the development application made by the applicant and the whole of the development proposed in that development application: at [27], [28]. The commissioner did not make a manifestly unreasonable decision that the proposed development as a whole did not avoid or mitigate the impacts: at [29]. The commissioner did not err in his construction or application of the objectives of the IN3 Zone to the proposed development: at [31];

(2) The applicant has not established that the commissioner erred on a question of law in finding that the SIS had not complied with the Chief Executive's Requirement 4.3: at [55]. The commissioner did not

misconstrue the Chief Executive's requirements: at [56]. The purpose of Requirement 4.3 included undertaking targeted surveys during the flowering period, not just undertaking targeted surveys at any time. This was not done: at [57]. The commissioner did not fail to consider Mr Humphries' evidence that the targeted surveys were adequate because they were undertaken by botanists with experience in identifying *Hibbertia fumana*: at [58];

(3) (a) The council did not misconstrue or misapply cl 7.6. The commissioner correctly identified the requirements of cl 7.6, including identifying the relevant matters in cl 7.6(2)(a)-(c) that the commissioner needed to consider in determining the applicant's application to carry out the proposed development. The commissioner considered each of these matters: at [89]. The commissioner did not misapply cl 7.6(2)(a) by not considering the applicant's proposal to purchase biodiversity credits from registered biobank sites to offset the impacts on biodiversity of the proposed development. The commissioner was not legally obliged to refer to the particular parts of Mr Humphries' evidence that the applicant identified in the commissioner's reasons for his findings on cl 7.6: at [90];

(b) The applicant has not established that the Commissioner's reasons on cl 7.6 were inadequate: at [91]; and

(c) The commissioner did not take into account a legally irrelevant matter or make a manifestly unreasonable decision in finding that the proposed development did not comply with cl 7.6: at [92]. The commissioner's decision that cl 7.6 had not been abandoned and hence to consider and give weight to cl 7.6 cannot be said to be manifestly unreasonable: at [93];

(4) (a) The commissioner did not misconstrue the term "environmentally sensitive area" in cl 7.31(3)(g), or ask the wrong question or fail to ask the right question raised by cl 7.31(3)(g): at [109]. The commissioner drew the inference from that fact that the subject site had been mapped as "environmentally significant land" that it could also be classified as an "environmentally sensitive area". That is an inference of fact: at [110]. The commissioner did not conflate the two terms: at [111]. The commissioner's reasons for drawing the inference that the subject site was "environmentally sensitive area" were brief but nevertheless sufficient: at [112]; and

(b) The applicant has not established that the commissioner denied it procedural fairness by considering and making findings on cl 7.31: at [122]. The commissioner was not required, by considerations of procedural fairness, to give notice to the applicant that the evidence it had adduced or the submissions it had made were insufficient to address the matters in cl 7.31(3) generally or the matter in cl 7.31(3)(g) particularly, or to advise the applicant of the potential findings that the commissioner might make about the matters in cl 7.31(3) or the matter in cl 7.31(3)(g) particularly: at [128];

(5) The applicant has not established that the commissioner misconstrued or misapplied the fifth control in s 4 of Pt 1 of LDCP 2008 or s 4.15(3A) of the EP&A Act: at [147]. There is no error of law in making a wrong finding of fact or preferring one expert's evidence over another: at [148]. The commissioner also did not err on a question of law in his consideration of s 4.15(3A) of the EP&A Act. His reasoning process does not reveal that the commissioner misconstrued or misapplied s 4.14(3A): at [149]; and

(6) The applicant has not established that the commissioner failed to consider and decide the issue concerning the offsetting of the impacts on biodiversity by the purchase of biodiversity credits: at [168]. The issue of whether the impacts on biodiversity of the proposed development could be offset by the purchase of biodiversity credits could be described as being a "species" of argument within a genus of a principal contested issue: at [172]. It was unnecessary for the commissioner to consider and decide, and give reasons addressing, each species, each argument in favour or against the resolution of the genus in a particular way: at [175]. It was also unnecessary for the commissioner to consider and decide the applicant's argument that the adverse impacts on biodiversity would be offset by the purchase of biodiversity credits because of the way the commissioner decided the appeal: at [176]. The commissioner found the proposed development should not be approved. In this event, the move of offsetting the significant residual impacts did not arise: at [179]. As the applicant has not established that the commissioner was legally obliged to consider and decide the issue of whether the impacts of biodiversity should be offset by the purchase of biodiversity credits, there was no obligation to give reasons for any such consideration: at [180].

Pastoral Investment Land & Loan Pty Ltd v Central Coast Council **[2020] NSWLEC 85** (Preston CJ)

(decision under review: *Pastoral Investment Land & Loan Pty Ltd v Central Coast Council* [2020] NSWLEC 1135 (Dixon SC))

Facts: Pastoral Investment Land & Loan Pty Ltd (**Pastoral**) appealed on questions of law under s 56A of the *Land and Environment Court Act 1979* (NSW) against the decision of the senior commissioner to summarily dismiss its appeal after refusing its application for an adjournment. Central Coast Council (**council**) determined Pastoral's development application by granting the consent subject to conditions to only part of the development for which consent was sought, namely the boundary realignment subdivision, and therefore excluded proposed native vegetation clearing, land use and all other works.

Pastoral subsequently appealed this decision to the Land and Environment Court (**LEC**). On the first day of the hearing, Pastoral's counsel applied for an adjournment to allow Pastoral to obtain further traffic and ecological evidence and for the applicant's expert to prepare an assessment of significance under s 5A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) in relation to two threatened species of owl. The council opposed the adjournment. The senior commissioner refused the adjournment and summarily dismissed the proceedings under r 12.7 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) for Pastoral's failure to prosecute the proceedings with due despatch. Pastoral appealed against this decision on two main grounds.

Issues: Whether, in summarily dismissing the applicant's proceedings, the senior commissioner erred on questions of law by way of:

(a) misdirection, misconstruction and misapplication of r 12.7 UCPR; and

(b) denial of procedural fairness in applying r 12.7 UCPR without affording Pastoral an opportunity to be heard.

Held: Senior commissioner erred on questions of law; decision and orders set aside and matter remitted for redetermination:

(1) The senior commissioner erred on questions of law in dismissing the proceedings by misconstruing and misapplying r 12.7 and misdirecting herself on its application: at [48]:

   (a) the senior commissioner misdirected herself in applying r 12.7: at [49]. The senior commissioner considered that having the assessment of significance under s 5A of the EP&A Act was necessary to enliven jurisdiction to deal with the matter: at [50]. The error in this reasoning is that any assessment of significance is not jurisdictional: at [52], [59];

   (b) the senior commissioner failed to ask the right question and asked herself the wrong question in applying r 12.7: at [61]. The rule is concerned with want of due despatch in the prosecution of proceedings: at [61]. She failed to identify how, in circumstances where the proceedings had been prosecuted to a final hearing and the application for adjournment of the hearing had been refused, there could be any failure to prosecute the proceedings with due despatch: at [63]. Any default in obtaining the assessment of significance did not cause any delay in the prosecution of the proceedings to final hearing: at [64];

   (c) the senior commissioner asked herself the wrong question and failed to ask herself the right question in relation to the case management principles in ss 56-60 of the *Civil Procedure Act 2005* (NSW): at [65]. The considerations under ss 56-60 did not support summary dismissal of the proceedings. Once the adjournment was refused, the hearing would continue as fixed. There would be no delay in the "timely resolution" of the appeal; the dispute would be resolved justly, quickly and cheaply: at [67];

   (d) the senior commissioner failed to ask whether the council had any complaint about Pastoral's prosecution of the appeal without due despatch or whether the council claimed that it had suffered any prejudice as a consequence of Pastoral's prosecution of the appeal. These matters were fundamental to the exercise of power under r 12.7 to dismiss the proceedings: at [70];

   (e) the senior commissioner failed to ask the question of whether exercise of the power under r 12.7 to dismiss the proceedings would prejudice Pastoral. Clearly, dismissal of the proceedings would prejudice Pastoral: at [71]. In considering the prejudice to Pastoral, the senior commissioner failed to have regard to the nature and extent of the delay caused by the default relied on by the senior commissioner (the absence of an assessment of significance for identified threatened species of fauna), any explanation given by Pastoral for the delay and the default, and Pastoral's lack of personal

fault for the delay and default (the reason being Pastoral's ecological expert had overlooked the need to prepare the assessment of significance): at [72];

(f) the senior commissioner failed to ask the ultimate question of whether, on balancing the prejudice to the respective parties by dismissing or not dismissing the proceedings, justice demanded that the proceedings be dismissed: at [73]; and

(g) the senior commissioner did not consider factors such as those in *Hoser v Hartcher* [1999] NSWSC 527 that provide guidance to a court in deciding whether or not to dismiss proceedings for want of prosecution with due despatch: at [74];

(2) The senior commissioner denied Pastoral procedural fairness by failing to give it a fair opportunity to be heard before the proceedings were dismissed: at [83]. The LEC needs to give the plaintiff a fair opportunity to be heard on the power that is proposed to be exercised and the factual matters that not only enliven the exercise of the power but also make the exercise of the power just in the circumstances: at [85], [89]. Merely giving notice of the possibility of dismissal of the proceedings, without identification of the power and the circumstances for exercise of the power, was insufficient to alert Pastoral to the case it needed to address: at [89]. The senior commissioner thereby denied Pastoral procedural fairness in dismissing the proceedings under r 12.7: at [90].

***Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115** (Preston CJ)

(decision under review: *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (Clay AC))

Facts: SJD DB2 Pty Limited (**SJD**) applied for development consent for demolition of existing buildings and construction of a six-storey shop-top housing development at 28-34 Cross Street, Double Bay (**site**). The proposed development breaches both the height and floor space ratio (**FSR**) development standards in Woollahra Local Environmental Plan 2014 (**WLEP 2014**). SJD appealed to the Land and Environment Court (**LEC**) against Sydney Eastern City Planning Panel's refusal of its development application. A commissioner of the LEC upheld the appeal and granted development consent to SJD's proposed development. Woollahra Municipal Council (**council**) appealed against the commissioner's decision under s 56A of the *Land and Environment Court Act 1979* (NSW).

Issues:

(1) *The desired future character grounds:* Whether the commissioner erred in his construction of the "desired future character" in the objectives of the height and FSR development standards and the objective of the B2 Local Centre Zone by:

(i) failing to have regard to the relevant provisions of Woollahra Development Control Plan 2015 (**WDCP 2015**) dealing with the desired future character of the neighbourhood or area;

(ii) taking into account the legally irrelevant consideration of developments that had been approved or constructed to the east of the site, which exceeded those development standards; and

(iii) misconstruing the desired future character provisions for Cross Street in s D5.4.7 of WDCP 2015 and for Knox Lane in s D5.4.9 of WDCP 2015;

(2) *The visual intrusion ground*: Whether the commissioner misdirected himself and asked the wrong question in assessing whether the proposed development was consistent with objective (d) of the height development standard to minimise the impacts of new development on adjoining or nearby properties from "visual intrusion";

(3) *The inadequate reasons ground:* Whether the commissioner failed to give adequate reasons for being satisfied that SJD's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3) of WLEP 2014; and

(4) *The commercial viability ground:* Whether the Commissioner misconstrued Control C3 in s D5.6.2 of WDCP 2015.

Held:

(1) (a) The commissioner did not err in his construction of the term "desired future character" in the provisions of WLEP 2014: at [45]. The commissioner was not legally obliged to construe the term "desired future

character" in WLEP 2014 by reference to the desired future character provisions of WDCP. The provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan, unless the provisions of the local environmental plan expressly refer to the provisions of the development control plan for that purpose. WLEP 2014 does not refer to WDCP 2015 as explicating the meaning of the term "desired future character" used in provisions of WLEP 2014: at [46]. The commissioner could have had regard to the desired future character provisions in WDCP 2015, but was not bound to do so: at [50];

(b) The commissioner did not take into account an irrelevant consideration in construing and applying the term "desired future character" in WLEP 2014. The term "desired future character" is not defined in WLEP 2014. Its meaning is to be derived from the text and context of the provisions of WLEP 2014 in which it is used and the other provisions of WLEP 2014 that frame the urban character and built form of the neighbourhood or area and shape the desired future character of neighbourhoods and areas in Woollahra: at [52]. The desired future character of the neighbourhood or area can be evaluated by reference to matters other than the building height and FSR established by the height and FSR development standards in cl 4.3 and cl 4.4 and the zoning and Land Use Table for the B2 Zone: at [59]. The application of cl 4.6 of WLEP 2014 to the height and FSR development standards supports a broader not narrower construction of the term "desired future character" used in those development standards: at [60]. The desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP 2014, including the development standards themselves, but also other factors, including approved development that contravenes the development standard: at [63]; and

(c) The commissioner did not misconstrue s D5.4.7 or s D5.4.9. The council's contention is based on a misreading of the commissioner's reasons: at [65];

(2) The commissioner did not take into account an irrelevant consideration or make a manifestly unreasonable decision in finding that the proposed development is consistent with the objective in cl 4.3(1)(d) because the impacts of the proposed development on adjoining or nearby properties from visual intrusion will be minimised. It was factually open to the commissioner to assess the impact of the proposed development on the affected apartments from visual intrusion in the context of all of the views and outlook enjoyed by the affected apartments: at [77]. If a new development does not disrupt any views and only visually intrudes in one outlook in a minor way, as the commissioner found was the nature and extent of impact in this case, it is reasonably open to find that the impacts of the new development on adjoining or nearby properties have been minimised: at [81];

(3) The commissioner did not fail to give reasons for his conclusion that he was satisfied that the applicant's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3): at [91]. It is not sufficient for the council to show that the commissioner's reasons could beneficially have been more detailed in explaining the commissioner's findings of fact and reasons for making those findings of fact: at [92]. The commissioner correctly identified the task he was required to undertake, that is, he asked himself the right question: at [115]. The commissioner's judgment, read fairly and as a whole, is adequate to reveal the grounds for, and provide sufficient reasoning in support of, his factual finding that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). The reasons have reached a minimum acceptable level to constitute a proper exercise of the function being exercised by the commissioner of determining SJD's development application for the proposed development: at [116]; and

(4) The commissioner did not misconstrue Control C3: at [134]. A requirement to "design for" is distinct from a requirement to "construct" or a requirement to "ensure use" of ground and first floor levels for retail and commercial uses: at [135]. "Design" is also distinct from actual use. Designing spaces on the ground and first floor levels that can be used for retail and commercial uses does not ensure that such spaces will actually be used for those uses: at [136]. The notions of "consider" and "promote" are distinct from "ensure" and do not require the result of retail or commercial uses at first floor levels: at [137].

- **Separate Question:**

Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2) **[2020] NSWLEC 74** (Pain J)

(related decision: *Mulpha Norwest Pty Ltd v The Hills Shire Council* [2020] NSWLEC 7 (Pepper J))

Facts: Mulpha Norwest Pty Ltd (**applicant**) had filed an appeal in relation to its development application for development on land in the Castle Hill area (**site**). The site was comprised of two lots, being Lot 22 and Part Lot 2105 (together, **proposed Lot 221**).

Section 4.4 of The Hills Local Envrionmental Plan 2012 (**THLEP 2012)** required that the floor space ratio (**FSR**) of a building on any land not exceed the FSR provided on the Floor Space Ratio Map (**FSR Map**). Section 7.12 of the THLEP 2012 required that, despite s 4.4, the FSR of a building on land to which s 7.12 applied not exceed the FSR provided on the Floor Space Ratio Incentive Map (**FSR Incentive Map**), including land identified as "Area A" on the FSR Incentive Map, if certain conditions were satisfied. Section 4.5 provided a mechanism for how FSR and site area were to be calculated. Under cl 7.12, a maximum permissible FSR of 3.0:1 applied to the portion of the site comprising Lot 22 (**Area A**). No FSR development standard applied to the portion of the site comprising Part Lot 2105.

The parties disagreed as to whether the FSR for the site should be calculated separately for that part of the site comprising Area A from the remainder of the site. The applicant contended that, applying cl 4.5, the calculation of FSR of the building on the site should include the whole of proposed Lot 221, meaning the proposed building had a FSR of 2.98:1:1, complying with s 7.12 of the THLEP 2012. The Hills Shire Council (**council**) contended that s 4.5 had no role to play, and that the calculation of the FSR of the building on the site should be confined to the area of the site within Area A, meaning the proposed building had a FSR of 5.628:1, not complying with s 7.12 of the THLEP 2012.

Issue: The following separate question was ordered under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**): "Whether, on the proper construction of ss 4.4, 4.5 and 7.12 of the THLEP 2012, the FSR of the building on the site must be calculated separately for the land within Area A from the remainder of the site?"

Held: On the proper construction of ss 4.4, 4.5 and 7.12 of the THLEP 2012, the FSR of the building on the site must be calculated separately for that part of the site within Area A from the remainder of the site:

(1) Applying the principle of construction that where words are plain and unambiguous, they should be given their ordinary and grammatical meaning per *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 at 305 (Gibbs CJ) cited in *Roden v Bandora Holdings Pty Ltd* (2015) 213 LGERA 103; [2015] NSWLEC 191 at [42], ss 4.4 and 7.12 addressed the same issue and shared the same drafting: at [56]. The FSR of any building on land had to comply with the maximum FSR limits in the FSR Map in s 4.4(2) or, for buildings on certain land, could comply with a different maximum FSR as identified in the FSR Incentive Map referred to in s 7.12(3). A portion of the site was in Area A identified on the FSR Incentive Map. That the objective of both clauses was to impose a limit on the maximum FSR on specified land was clear in their respective objects. No principle of statutory construction required these clauses to be read as if subject to s 4.5, which dealt with the calculation of FSR based on site area, not land. While s 4.5 specified a mechanism for calculating FSR based on site area as specified in subcl (3), that was not called up by the drafting of ss 4.4 and 7.12. Those clauses were clear in their terms and capable of application without recourse to s 4.5. Essentially ss 4.4/7.12 had different work to do compared to s 4.5, as was clear from the different language each used: at [57];

(2) Clause 4.5 was essentially definitional in its terms: at [58]. The correct approach to s 4.5 applying *Kelly v The Queen* (2004) 218 CLR 216; [2004] HCA 12 was that s 4.5 was an aid to construing the THLEP 2012, and nothing more: at [63];

(3) Where a site extended beyond land identified in the FSR maps, a separate calculation of FSR was required in order not to infringe the FSR Map limits resulting in a breach of an operative provision. The FSR of a building on land defined on the FSR Map or FSR Incentive Map had to be calculated separately from any other land that was part of a development site which fell outside the area identified on the maps: at [64]; and

(4) The applicant's approach would negate the application of s 7.12 as the FSR cap in the FSR Incentive Map would be exceeded. As the council contended, the THLEP 2012 was not intended to operate so that an applicant could define its site area by setting boundaries it chose and applying those boundaries to dictate the FSR on land shown on the FSR Incentive Map. If the applicant's approach to s 7.12 was applied, the express provisions of the clause limiting the FSR on specified land, here Area A, would not be met by that part of the site in Area A. The limits on the maximum FSR for the land identified on the FSR Incentive Map (s 7.12) would be impermissibly exceeded: at [66].

Penrith City Council v Settlers Estate Pty Ltd (No 2) **[2020] NSWLEC 128** (Pepper J)

(related decision: *Penrith City Council v Settlers Estate Pty Ltd* [2020] NSWLEC 99 (Pepper J))

Facts: The proceedings concerned the respondents' construction works of a drainage line, culvert and related channelling (**development**) within a riparian corridor that contained an unnamed creek (**watercourse**). On the first day of these civil enforcement proceedings, it became apparent that the matter could not be completed within the two days allocated. The respondents had given undertakings to halt certain development activity until the proceedings were finalised. Because there was listings pressure during the second half of the year, further delay was inevitable if a full trial took place. If the pleaded breach was established by Penrith City Council (**council**), the parties were confident that agreement could be reached as to the appropriate remedy. As a consequence, it was agreed to proceed by way of separate question on the issue of breach alone.

Council alleged that the development breached s 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) and/or ss 91E or 91G of the *Water Management Act 2000* (NSW) (**Water Management Act**) because it was constructed in breach of the various development consents, construction certificates (**CCs**) and controlled activity approvals (**approvals**) that applied to the land. That is, that the development was built at the wrong height, wrong depth, wrong length, and in the wrong location. A successful application by the respondents for leave to reopen their case to rely upon a "revised works as executed plan" resolved all issues between the parties except that of location.

The relevant development consent and construction certificate (**CC**) approved the construction of the drainage line and culvert terminating on the eastern side of the watercourse. Both the relevant CC and landscape masterplan depicted the notional alignment of the watercourse. However, the respondents excavated the watercourse to varying depths for a length of approximately 100 metres north of the culvert to enable stormwater to flow unobstructed from the culvert downstream. As built, the drainage line ran along the eastern side of the riparian corridor in a north westerly direction towards the watercourse. It traversed the watercourse and discharged from a culvert which is located on the western side of the watercourse. It was an agreed fact that, as constructed, the drainage line and culvert transected the watercourse to its western side in the manner depicted by a site plan drawing. The respondents received correspondence from the Office of Water which indicated that it accepted that the plans, which showed the construction of the drainage line as to its length and depth, satisfied the approvals.

Issues:

(1) Whether the location of the development was authorised by the consents or approvals;

(2) Whether the height, depth, and length of the drainage line meant that the respondents could only construct the development to the western side of the watercourse;

(3) Whether the alignment of the watercourse was wrongly depicted in the relevant CC;

(4) Whether the fact that the development was built in accordance with a site plan drawing meant that it was constructed in an authorised location; and

(5) Whether the fact that the plans were accepted by the Office of Water in satisfaction of the requirements of a condition of the development consent amounted to an authorisation to construct the development to the height, depth, length, and in the location, as that constructed by the respondents.

Held: The development breached the EP&A Act and Water Management Act, the respondents to pay the council's costs for the hearing of the separate question:

(1) The relevant consent and cognate CC did not permit the development to traverse the watercourse and discharge on its western side because it only permitted the development to occur within the limit of works line, which terminated on the eastern side of the watercourse: at [65]-][66] and [69];

(2) There was no evidence that established that in order for the respondents to lawfully construct the development, they had to transect the watercourse to the western side. Nor was there any evidence that the development could not be constructed in accordance with the relevant authorisations. Even if there was, this did not permit the respondents to unilaterally carry out development contrary to their authorisations to do so. A modification could and should have been obtained by the respondents: at [75];

(3) The evidence showed that the alignment of the watercourse had remained constant and consistent and followed that depicted in the relevant CC: at [82];

(4) A site plan drawing could not authorise or approve the construction of the development in a manner that was contrary to the existing approvals, especially the relevant CC: at [86]; and

(5) Merely because the Office of Water had concluded that a condition of the development consent had been satisfied did not amount to an approval to construct the development in a location contrary to the relevant CC, nor could that satisfaction amount to a modification of any existing approval: at [88].

- **Interlocutory Decisions:**

BSM Holdings Pty Ltd v Deane Street Holdings Pty Ltd **[2020] NSWLEC 137** (Pepper J)

(related decisions: *Omaya Investments Pty Ltd v Deane Street Holdings Pty Ltd* [2019] NSWLEC 123 (Moore J); *Omaya Investments Pty Ltd v Deane Street Holdings Pty Limited (No 5)* [2020] NSLWEC 9 (Duggan J))

Facts: BSM Holdings Pty Ltd (**applicant**) filed a Notice of Motion seeking an expedition of Class 4 proceedings. The Class 4 proceedings involved a challenge by the applicant to the validity of a development consent issued by the Burwood Council (**second respondent**) to Deane Street Holdings Pty Ltd (**Deane**) and Mr Patrick Elias (**Elias**), the first and third respondents respectively (**consent**). The consent relates to development on the land at 1-3 Marmaduke Street and 7 Deane Street Burwood (**tower site**), owned by Deane, and land at 4 George Street Burwood (cafe site) owned by Elias. The applicant, as trustee of the Bechara Family Trust, is the legal owner of the land at 8-12 George Street. On 14 July 2020, the Burwood Local Planning Panel on behalf of the council, granted development consent to a development application lodged by Urbanlink Pty Ltd on behalf of Deane (**DA**). A partly built structure occupied the tower site. Two existing development consents (one granted in 2012 and one granted in 2015) authorised the erection of a building on the tower site, although in a different form to that authorised by the consent. Construction of the development approved by the consent had commenced and was approaching completion with the internal fit out scheduled to be completed by 14 December 2020. *Omaya Investments Pty Limited v Dean Street Holdings Pty Limited (No 5)* [2020] NSWLEC 9 (***Omaya* proceedings**) is a related proceeding in which Omaya Investments Pty Limited commenced civil enforcement proceedings in the Land and Environment Court against Deane and Elias. The council and other parties were joined, with the applicant becoming the second applicant in those proceedings. On 5 March 2020, Duggan J made a determination in the *Omaya* proceedings and, on 5 June 2020, the applicant filed a Notice of Appeal against the decision in the New South Wales Court of Appeal. The appeal was listed for hearing on 26 October 2020. On 20 August 2020, the applicant filed the Summons in these proceedings, together with the application for expedition. The Summons sought, first, an order that the proceedings be expedited; second, a declaration that the decision to grant the consent was not validly made; third, an order that the consent and any construction certificates issued with respect to it be set aside; and, fourth, costs.

Issues:

(1) Whether expedition should be granted;

(2) Whether, if the matter was not heard and disposed of this year, the subject matter of the litigation would be lost due to the completion of the works;

(3) Whether there would be disadvantage suffered by the applicant in respect of the appeal of the *Omaya* proceedings absent expedition; and

(4) Whether there were matters of public importance raised by the applicant, that required speedy determination, namely, whether

(a) clarity was required with respect to the proper construction and application of the relevant development standards contained in the Burwood Local Environmental Plan 2015; and

(b) whether there were ramifications for third-party purchasers of units the subject of the development.

Held: Application for expedition refused with costs:

(1) There were no special factors warranting expedition. Due to the backlog of cases resulting from the COVID-19 pandemic, even with a grant of expedition, the works the subject of the consent were likely to be completed by the time the case was disposed of: at [47]. Were the applicant genuinely concerned about preserving the status quo, it should have sought interim injunctive relief or pressed for the motion to be heard expeditiously - neither of which it did: at [48] to [49]. The relief sought in the Summons could be made irrespective of whether the works carried out were authorised by the consent: at [50];

(2) No disadvantage would be suffered in respect of the appeal proceedings. Despite the fact that there would be a valid extant consent in place as at the date of the appeal, the Court would be aware of the challenge in the current proceedings, and, in any event, the Court could not hear and dispose of the proceedings until on or after the hearing of the appeal, even with expedition: at [51];

(3) There were no matters of public importance: at [52] to [56]. No actual or potential development was presently affected by the proceedings or attended to by any urgency that demanded that the proceedings be expedited: at [54]. Any third party would be made aware that no occupation certificate existed for the upper four storeys of the development and that Deane could seek alternative means of obtaining approval for the works yet to be carried out: at [55]; and

(4) There was no real prejudice likely to be suffered by the applicant by reason of a refusal to grant expedition: at [57] to [58]. No witnesses would be lost, but by contrast a grant of expedition would impose a significant resource burden on the respondents given that it would require considerable work at short notice: at [59].

Chief Executive of the Office of Environment and Heritage v Grant Wesley Turnbull (No 4) **[2020] NSWLEC 124** (Duggan J)

(related decisions: *Chief Executive, Office of Environment and Heritage v Grant Wesley Turnbull (No 3)* [2019] NSWLEC 165 (Pain J); *Chief Executive of the Office of Environment and Heritage v Turnbull (No 4)* [2016] NSWLEC 66 (Craig J))

Facts: In the current proceedings, Grant Wesley Turnbull (**defendant**) was charged with clearing native vegetation otherwise than in accordance with a development consent: s 12 of the *Native Vegetation Act 2003* (NSW). The defendant entered a plea of not guilty in these criminal proceedings. Separately, the defendant was the respondent in Class 4 civil enforcement proceedings commenced by the now prosecutor for orders seeking restraint of further land clearing and remediation of the cleared land. The Chief Executive of the Office of Environment and Heritage (**prosecutor**) commenced the current criminal proceedings at the conclusion of the Class 4 proceedings, but prior to judgment. The Class 4 Proceedings concerned the same events as the criminal proceedings. In the Class 4 proceedings the defendant made voluntary admissions related to, and admitting to, the clearing in his filed Points of Defence, by way of affidavit, and during cross-examination. The prosecutor gave notice of its intention to adduce evidence of the admissions in the criminal proceedings. The defendant now sought, by Notice of Motion (**NOM**), a temporary stay of the trial until persons who had access to evidence given by the defendant in the Class 4 proceedings were no longer involved in the prosecution of the defendant in the criminal proceedings. In a preliminary hearing (*Turnbull (No 3)*), Pain J determined that the admissions were admissible in the criminal proceedings.

Issues:

(1) Whether s 247G of the *Criminal Procedure Act 1986* (NSW) was relevant to the applicant;

(2) Whether the prosecutor's reliance on the admissions as evidence in the criminal proceedings would breach the common law principle that criminal proceedings are accusatorial and that the prosecutor must prove the guilt of the accused without assistance from the accused;

(3) Whether the admissions were made under compulsion; and

(4) Whether the admissions were necessary to the defendant's Class 4 defence.

Held: NOM dismissed:

(1) Leave was not required under s 247G to raise the subject matter of the NOM. The preliminary hearing related solely to admissibility and the accusatorial principle was not a rule of evidence but related to criminal process: at [34], [36];

(2) A complete statement of the fundamental common law principle, including reference to "assistance from the accused", referred to as the accusatorial principle by the defendant, related, in fact, to assistance obtained by compulsion. Whilst an accused is afforded certain protections, there was no obligation to ensure that an accused takes advantage of such protections. The principle is not so broad that it prohibits all acts of participation by the accused if the accused so chooses. If the prosecutor uses the material derived from that assistance, it does not offend the fundamental principle. It is the compelling of participation that falls foul of the principle, not the use by the prosecutor of anything obtained by that participation. Compulsory participation is an essential element of the principle: at [44] to [46]; and

(3) The accused did not make the admissions under compulsion; there was no invidious choice as the civil proceedings had been concluded prior to the commencement of the criminal proceedings: at [52].

Chief Executive, Office of Environment and Heritage v Namoi Valley Farms Pty Ltd **[2020] NSWLEC 69** (Pain J)

Facts: Namoi Valley Farms Pty Ltd (**defendant**) was charged with an offence under s 12 of the *Native Vegetation Act 2003* (NSW) for the alleged clearing of native vegetation at a property in Pilliga, New South Wales. Subpoenas were issued to the Office of Environment and Heritage (**prosecutor**) by the defendant. The prosecutor claimed legal professional privilege over a breach report prepared in relation to the investigation of the alleged clearing of native vegetation and sought that the defendant not be granted leave to access the report.

Issue: Whether the breach report should be disclosed to the defendant.

Held: The defendant was not granted leave to inspect the breach report pursuant to r 33.8 of the Uniform Civil Procedure Rules 2005 (NSW):

(1) The prosecutor established, on the balance of probabilities, that the breach report was a confidential document as defined in s 117 of the *Evidence Act 1995* (NSW) (**Evidence Act**): at [14]. The defendant should not be granted leave to access it in light of s 118 of the Evidence Act being a document prepared for the dominant purpose of providing legal advice and/or in light of s 119 of the Evidence Act being a document prepared for the dominant purpose of professional legal services concerning anticipated proceedings in which the client is a party: at [15].

Lu v Walding **[2020] NSWLEC 94** (Pepper J)

Facts: The proceedings concerned a dispute between neighbours over a detached garage with roof terrace and associated landscaping (**development**) constructed by the first and second respondents, Mr Adrian Walding and Ms Alexandra Walding (**Waldings**). The applicants, Ms Lin Lu and Mr Frederick Woo, alleged that the development application (**DA**) and subsequent consent failed to identify that the land upon which the development was built was owned by the Northern Beaches Council (**council**), the third respondent, and that the council's written consent had not been obtained. The applicants had lodged an objection to the DA; however, consent was granted and a construction certificate was issued by the council as the principal certifying authority. The applicants sought an order that the development be demolished. The council took no active part in the proceedings.

During the course of preparing for a pre-trial mention, the trial judge became aware of the identity of a witness engaged by the applicants, Mr Lee Kosnetter, a town planning expert. Mr Kosnetter had affirmed two affidavits in the proceedings that attached expert reports commenting on the town planning environmental impacts of the development. He opined that the planning impacts of the development were unacceptable and unreasonable and that the structure would not have been approved when assessed against s 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW). In particular, that the development failed to satisfy multiple objectives and controls of the Manly Development Control Plan 2013 and its visual impact was abrupt and imposing. The Waldings asserted that Mr Kosnetter's evidence was irrelevant to the issues for determination and objected to it in its entirety. If the evidence was admissible, the Waldings expressed their intention to cross-examine Mr Kosnetter. Until 2019, Mr Kosnetter's spouse was her Honour's associate for over a decade. Since Ms Kosnetter's resignation, her Honour had maintained contact with her. Her Honour had met Mr Kosnetter on several occasions. After disclosure of these facts to the parties, the Waldings made an application for her Honour to disqualify herself.

Issue: Was there a ground of a reasonable apprehension of bias warranting recusal.

Held: Application for recusal granted:

(1) The admissibility of Mr Kosnetter's evidence was a matter for the trial judge: at [11];

(2) The relationship between associate and judge, especially in a workplace essentially comprising three people, is typically a close one: at [16];

(3) Her Honour's recent former employment relationship with Ms Kosnetter, combined with her Honour's indirect association with Mr Kosnetter, was sufficiently problematic that a fair-minded lay observer might reasonably apprehend that her Honour may not bring an impartial and independent mind to the resolution of the issues in the proceedings, in particular, to the acceptance, rejection or weight to be placed on Mr Kosnetter's evidence: at [26];

(4) That apprehension would cause the fair-minded lay observer to reasonably form the view that her Honour would not bring to bear the impartiality and independence required in assessing Mr Kosnetter's evidence: at [27];

(5) Not all circumstances where the partners of former employees of the Land and Environment Court are before a court mean that a reasonable apprehension of bias will arise. Each case turns on its facts: at [28]; and

(6) A relevant factor in the present application was the length of time since the employment relationship with the former employee and the existence of an ongoing relationship with that person. Sixteen months was insufficient to provide the necessary temporal distance required to objectively reject any reasonable apprehension that her Honour might decide the matter otherwise than on an independent and impartial evaluation of the merits of the matter: at [29].

Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Merrywinebone Pty Ltd; Greentree; Harris (No 2) **[2020] NSWLEC 126** (Robson J)

Facts: In a preliminary hearing conducted pursuant to s 247G of the *Criminal Procedure Act 1986* (NSW), each of four defendants sought that the expert evidence of two witnesses be excluded as either inadmissible and/or warranting a discretionary exclusion. The substantive proceedings concern 32 charges brought against the defendants alleging land clearing on a property known as Boolcarrol.

Mr Spiers, a "remote sensing scientist" employed by the prosecutor, prepared two expert reports which concerned "aerial photograph interpretation of vegetation changes" on the northern and southern parts of Boolcarrol respectively. Mr Mazzer, an "ecologist and zoologist" also employed by the prosecutor, similarly prepared two reports "concerning alleged clearing of native vegetation" with respect to the northern and southern parts of Boolcarrol. Both witnesses were extensively cross-examined during the course of the preliminary hearing.

Issues:

(1) Whether the expert evidence of Mr Spiers satisfied s 79 of the *Evidence Act 1995* (NSW) (**Evidence Act**) or otherwise ought to be excluded on the specific grounds of lack of impartiality, lack of expertise, failure to disclose material relied upon, and/or an absence of methodology and reasoning; and

(2) Whether the expert evidence of Mr Mazzer satisfied s 79 of the Evidence Act or otherwise ought to be excluded due to a lack of independence and specialised knowledge, a failure to disclose material relied upon, and/or a lack of reasoning and methodology.

Held: Evidence subject to objection admitted:

(1) Mr Spiers' skills in aerial photograph interpretation were not "simply viewing aerial photographs in the usual sense" but involved a process of selecting, preparing and viewing photographs in a manner which allowed him to observe characteristics and features of ground surface cover: at [52];

(2) The procedures utilised by Mr Spiers were responsive to training courses which Mr Spiers had undertaken in relation to a computer mapping system known as ArcGIS and were also based upon over 20 years of practical experience using that program: at [54];

(3) Even though there was no formal course of study for aerial photograph interpretation and accepting that this field may not be a "science", the techniques used by Mr Spiers nonetheless indicated that he has specialised knowledge: at [55];

(4) Further, the exercise undertaken by Mr Spiers involved applying this specialised knowledge to "what may be an otherwise unexceptional photographic image": at [61];

(5) Mr Spiers had not deviated from his obligations of independence or impartiality: at [62]. Even if there had been a breach of the Expert Witness Code of Conduct, that would have been a matter affecting weight but not admissibility: at [68];

(6) There was sufficient exposure of Mr Spiers' reasoning process to demonstrate that his opinions were based upon his specialised knowledge: at [71];

(7) Irrespective of the fact that Mr Mazzer is not a member of a professional body; that some time had passed since he undertook study or training; that he may not be bound by a code of ethics in the discharge upon his employment duties; and that he was employed by the prosecutor, these factors were not sufficient to suggest that Mr Mazzer did not possess expertise: at [77];

(8) A personal or business relationship between the prosecutor and the witness was insufficient of itself to lead to the rejection of Mr Mazzer's evidence: at [78];

(9) Mr Mazzer had specialised knowledge in relation to the identification of vegetation species based upon his specialist zoological, botanical and ecological qualifications: at [82];

(10) Mr Mazzer sufficiently identified the source of the information he relied upon and the basis upon which he expressed his opinions: at [89]. The photographs attached to his reports also assisted in disclosing his reasoning process: at [90];

(11) Although Mr Mazzer's reports appropriately disclose his reasoning process when read as a whole, the adequacy of that disclosure may nonetheless be relevant as a matter of weight: at [92]; and

(12) The expert reports of Mr Spiers and Mr Mazzer satisfied the requirements of s 79 of the Evidence Act and were therefore admissible: at [94].

Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Greentree; Merrywinebone Pty Ltd; Harris (No 3) **[2020] NSWLEC 129** (Robson J)

Facts: During opening address on the first day of trial, the Secretary, Department of Planning, Industry and Environment (**prosecutor**) filed a Notice of Motion seeking leave to file amended notices under s 247J of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) to rely upon further evidence comprising nine affidavits and three evidentiary certificates. Each of the four defendants are charged with eight offences (being 32 total charges) of unlawfully clearing native vegetation at a property known as Boolcarrol.

The prosecutor claimed the further evidence which it sought to rely upon fell within four general but overlapping categories: evidence in relation to native vegetation and species thereof; evidence concerning whether the

defendants were landholders; evidence regarding the provenance of aerial and satellite images; and evidence which was otherwise responsive to objections taken by the defendants to earlier evidence filed by the prosecutor. The prosecutor submitted that much of the further evidence was required to prove facts which the defendants had previously indicated through their notices of defence response (issued in accordance with s 247K of the Criminal Procedure Act) were not in dispute, but which now appeared to be in issue between the parties. In response, each of the defendants argued that a grant of leave to the prosecutor to rely upon the further evidence would result in prejudice to the defendants and extend the length of the trial.

Issue: Whether to grant leave to the prosecutor to rely upon each of the four categories of further evidence.

Held: Leave granted to the prosecutor to rely upon some, but not all, of the further evidence:

(1) The question of whether leave ought to be granted to the prosecutor to rely upon the further evidence required consideration of: first, whether the evidence was relevant and admissible; second, whether the evidence would cause irremediable prejudice to the defendants; and third, whether it was fair and just between the parties for leave to be granted: at [35];

(2) The disclosure and case management provisions contained within Div 2A of the Criminal Procedure Act were important considerations as they have the effect of abrogating a defendant's long-enshrined right to silence to a substantial degree: at [36];

(3) As the trial would certainly have not completed in the time allocated in any event (irrespective of the further evidence sought to be relied upon by the prosecutor), any prejudice to the defendants relating to the late introduction of the further evidence was able to be accommodated: at [50];

(4) In allowing the prosecutor to rely upon the further evidence regarding native vegetation and the status of the defendants as landholders, his Honour considered that as the defendants did not dispute these facts at the time of their s 247K notices but more recent indications suggested that these facts were now in issue between the parties, the prosecutor's conduct in seeking to rely upon that further evidence was understandable: at [53] to [59];

(5) The prosecutor was not permitted to rely upon further evidence in relation to the provenance of aerial and satellite images as evidence of this nature had not been discretely raised or objected to by the defendants in their s 247K notices. In those circumstances, and noting that Mr Spiers already explained in his earlier evidence how he selected certain material which he relied upon, the lateness of the evidence meant that leave should not be allowed: at [60] to [61];

(6) In relation to the further evidence which the prosecutor claimed was responsive to objections, the further evidence was held to be properly responsive to objections communicated by the defendants and that any prejudice was mitigated because the primary material had already been provided to the defendants. As such, the interests of justice required that leave be granted to the prosecutor to rely on this material: at [62] to [66];

(7) In considering other evidence sought to be relied upon, the prosecutor was allowed to rely upon the evidence of Mr Black as the prejudice to the defendants was not of such magnitude that the interests of justice and fairness would not be served by granting leave to rely on the evidence: at [69];

(8) Nonetheless, the prosecutor was not permitted to rely upon further evidence provided by Mr Spiers as the prosecutor conceded this evidence may be unnecessary; was not responsive to objection; and as Mr Spiers had already given evidence and been cross-examined during the prior preliminary hearing: at [70]; and

(9) Subject to the rulings made in relation to each of the four discrete categories of evidence, the interests of justice and fairness did not warrant a blanket refusal of leave to the prosecutor to rely upon the further evidence: at [73].

Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Merrywinebone Pty Ltd; Greentree; Harris (No 4) **[2020] NSWLEC 130** (Robson J)

Facts: During the course of the trial, the Secretary, Department of Planning, Industry and Environment (**prosecutor**) sought to tender documents produced by the NSW Rural Fire Service (**NSW RFS**) regarding recorded fire events. A NSW RFS district manager gave oral evidence explaining the process through which the documents sought to be tendered were created.

The defendants objected to the tender on the basis that the documents were created by telephonists who received emergency calls and thus did not have personal knowledge of the fact of the fire. The prosecutor sought to rely upon the documents pursuant to the business records exception contained within s 69 of the *Evidence Act 1995* (NSW) (**Evidence Act**) as the information contained within the documents was "directly or indirectly" supplied by a person who had personal knowledge of the asserted fact.

Issue: Whether the records kept by the NSW RFS satisfied the requirements of s 69 of the Evidence Act and were therefore admissible.

Held: Evidence subject to objection allowed:

(1) Although there had been limited consideration of the requirements of s 69(2) of the Evidence Act, the Victorian Court of Appeal had previously held that the words "directly or indirectly" were of wide import and that the exception was not confined to first or second-hand hearsay: at [10]. This approach had also been recently considered and accepted in the Supreme Court of NSW: at [12];

(2) It will be sufficient if the representation was made on the basis of information supplied by someone with personal knowledge of the fact: at [11];

(3) It is not necessary for the original supplier of the representation to be identified: at [12]; and

(4) The NSW RFS documents therefore satisfied the business records exception and the material was to be admitted: at [13].

***Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWLEC 136** (Moore J)

(related decisions: *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2017] NSWLEC 109 (Moore J); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2018] NSWCCA 202 (Bathurst CJ; Fullerton and Campbell JJ); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2019] HCASL 86; *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2019] NSWLEC 182 (Moore J); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74 (Harrison, Hamill and Wilson JJ))

Facts: On 13 January 2015, the then Cooma-Monaro Regional Council - now the Snowy Monaro Regional Council (**council**) - granted development consent to Tropic Asphalts Pty Ltd (**Tropic**) to operate a temporary mobile asphalt batching plant. A number of conditions were imposed pursuant to the development consent. The prosecutor lodged an application pursuant to the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) seeking information from the Roads and Maritime Services (**RMS**) concerning the activities of the company in supplying materials from the plant to the RMS for its projects. Whilst the GIPA Act request became contested, this was ultimately resolved by consent.

Later, the prosecutor issued a notice to the RMS pursuant to s 119J (**s 119J notice**) of the *Environmental Planning and Assessment Act 1979* (NSW) (as it then was) seeking information regarding alleged breaches of the development consent. The prosecutor commenced three prosecutions against Tropic. Shortly thereafter, subpoenas were issued to the RMS seeking the provision of documents substantially the same as the documents sought in the s 119J notice.

On 1 February 2017, Tropic filed a Notice of Motion (**NOM**) alleging that the charges were duplicitous and challenging the validity of the subpoenas issued to the RMS – submitting that the subpoenas were an abuse of process. Judgment was handed down on the first element of this NOM resulting in one of the charges being dismissed and the other two being reformulated (following multiple appeals). The question of the validity of the subpoenas was adjourned to a later date. These proceedings dealt with that adjourned matter.

Issues:

(1) Was the dual approach of issuing the s 119J notice and a subpoena which both sought substantially the same documents an abuse of process; and

(2) Did the documents produced in the s 119J notice provide a sufficient foundation for the subpoena.

Held: Subpoenas not to be set aside:

(1) The question of whether a subpoena was valid was distinct from the question of admissibility of any of the documents produced pursuant to that subpoena: at [66] to [67];

(2) The answer to Question 5 given by the High Court in *Environment Protection Authority v Caltex Refining Co Pty Limited* (1993) 178 CLR 477 (***EPA v Caltex***) is determinative of the remaining elements of Tropic's NOM: at [80];

(3) The first of the remaining elements of the NOM must therefore be rejected on the basis of *EPA v Caltex*: at [87];

(4) The issuing of a penalty notice for any of the matters contained in Sch 5 to the Environmental Planning and Assessment Regulation 2000 cannot be an activity undertaken personally by an authorised officer. It must be on behalf of a council and in support of that council's regulatory functions: at [148];

(5) Section 121B did not provide a basis for the issuing of a s 119J notice, given the terms of the notice: at [151];

(6) The s 119J notice was validly issued. Therefore, in accordance with *EPA v Caltex*, the s 119J notice did not provide a basis for the setting aside of the subpoena: at [153];

(7) Material contained in an affidavit which evidenced breaches of the relevant development conditions provided a sufficient basis upon which the prosecutor issued the subpoena to the RMS. This basis stood alone from any other potentially valid basis. Tropic's submission that the subpoena ought to be set aside must be rejected on this basis alone: at [158] to [162];

(8) The material contained in another affidavit provides the same basis for the issue of a subpoena as that in the first affidavit: at [170];

(9) The GIPA Act material also provided a further and separate basis to uphold the subpoena to the RMS as there were gaps in the material: at [176];

(10) There are therefore four separate bases for providing a proper foundation for the issuing of the subpoena. The proposed orders sought in the NOM were rejected: at [177]; and

(11) It was self-evident that weighbridge dockets and associated other documents were "adjectively relevant" to issues arising in the charge. This was true for the nominated charge date, as they demonstrated actual tonnages delivered on other dates for the purpose of tendency and coincidence evidence. There was therefore no reason to limit the information to be made available to the prosecutor by the RMS to the two specific dates nominated in the remaining charges: at [184] to [187].

- **Parties to Proceedings:**

The Next Generation Pty Ltd v Independent Planning Commission **[2020] NSWLEC 70** (Pain J)

Facts: The Next Generation Pty Ltd (**applicant**) filed an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) following refusal of its development application (**DA**) for a waste energy generation facility by the Independent Planning Commission (**IPC**). The DA was for State Significant Development that would otherwise have been designated development but for s 4.10(2) of the EP&A Act. Jacfin Pty Ltd (**Jacfin**) objected to the proposed development and filed a Notice of Motion (**NOM**) seeking determination of questions of law in relation to the scope of s 8.12(3) of the EP&A Act, introduced by way of the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (**EP&A Amendment Act**), which came into force on 1 March 2018, in relation to whether it had the rights equivalent to that of a party in the proceedings.

Section 8.12(3) entitles objectors given notice of an appeal under s 8.12(1), on application to the Land and Environment Court within 28 days after the notice is given, to be heard at the hearing of the appeal if not already a party to the proceedings.

Issues: Jacfin's NOM asked whether, on the true construction of the EP&A Act:

(1) Jacfin was a party referred to in s 8.12(3) of the EP&A Act and had all the rights equivalent to that of a party to the proceedings;

(2) Jacfin, as an objector referred to in s 8.12(3) of the EP&A Act, had all the rights equivalent to that of a party to the proceedings; and

(3) Jacfin could not be lawfully excluded from any part of the hearing, including any part of the conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

The key procedural aspect of this question was whether Jacfin and its experts could participate in any confidential communications at any conciliation conference between the parties. In the course of argument, the ability of Jacfin to otherwise participate in the case management for the final hearing was also identified as an issue.

Held: On the construction of the EP&A Act, Jacfin was a party referred to in s 8.12(3) and could not be lawfully excluded from any part of the hearing, including any part of the conciliation conference under s 34 of the Court Act:

(1) Considering the legislative context, history and purpose of s 8.12(3), since the commencement of the EP&A Act in 1979, third-party objectors have always been able to participate as a party in proponent appeals concerning designated development, under former ss 97(4) and 97A(4): at [50] to [51]. The lack of explanation about the introduction of s 8.12(3) by way of the EP&A Amendment Act suggested that the amendment was not intended to limit or reduce the rights of an objector: at [53];

(2) Considering the text of s 8.12(3), the words were ambiguous in meaning and scope: at [58]. The change in words to "if not already a party to the proceedings" contemplated rights akin to those of a party: at [60]; and

(3) On whether the statutory right of Jacfin under the EP&A Act referred only to the ability to be heard at a final hearing, the word "final" did not appear before "hearing" in the text of s 8.12(3). As there was no specific provision in the EP&A Act which did so distinguish, and hearing was not defined, a restrictive approach to the word "hearing" was not warranted. The only legislative definition of "hearing" that could apply was in the *Civil Procedure Act 2005* (NSW), where the definition included final and interlocutory hearing processes: at [61]. These considerations of legislative history and text suggested that the correct construction of s 8.12(3) was that Jacfin was a party in the applicant's appeal: at [63].

- **Costs:**

Blacktown City Council v Paciullo; Liang **[2020] NSWLEC 75** (Pain J)

Facts: Blacktown City Council (**council**) commenced civil enforcement proceedings against two respondents seeking declarations of the illegal use of premises in Seven Hills as a brothel, following the issuing of a brothel closure order. Mr Paciullo (**first respondent**), the owner of the premises, entered into consent orders in February 2020 and agreed to pay costs of $4,000 within seven days of those orders. Ms Liang (**second respondent**), lessee of the premises, also entered into consent orders not to use the premises for any business involving the provision of sexual acts inter alia. The question of costs against the second respondent was reserved.

Issue: Whether the second respondent should be ordered to pay costs of $5,000 as sought by the council.

Held: First, the second respondent was ordered to pay the council's costs and disbursements of $3,826.52 within 28 days and ordered to pay the council's costs of the costs hearing:

(1) The Land and Environment Court has a wide discretion as to costs under s 98 of the *Civil Procedure Act 2005* (NSW) and r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW). Costs are compensatory not punitive per *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59: at [28];

(2) The council was put to the expense of commencing proceedings when its brothel closure order was not complied with. Where a party submits through the making of orders in the terms claimed by another party, the usual costs order is that the submitting party will pay costs in the absence of disentitling conduct per *Kiama Council v Grant* (2006) 143 LGERA 441; [2006] NSWLEC 96 at [80]: at [30]; and

(3) The council claimed costs incurred before proceedings commenced. Only those costs incurred in the preparation for litigation that were sufficiently connected to the commencement of proceedings and directly relevant to the subject matter of litigation were awarded: at [33] to [37].

David Goode v Gwydir Shire Council (No 2) **[2020] NSWLEC 118** (Pain J)

(related decision: (*David Goode v Gwydir Shire Council* [2020] NSWLEC 33 (Pain J))

Facts: In *David Goode v Gwydir Shire Council* [2020] NSWLEC 33, Mr Goode (**applicant**) was unsuccessful in Class 4 judicial review proceedings alleging errors or shortcomings in Gwydir Shire Council's (**council**) determination to grant development consent for a truck-wash facility in Warialda. Costs were reserved. The applicant argued the proceedings were brought in the public interest, justifying departure from the general rule that costs follow the event.

Issue: Should the Land and Environment Court (**LEC**) be satisfied that the proceedings were brought in the public interest under r 4.2 of the Land and Environment Court Rules 2007 (NSW) justifying an exercise of the LEC's discretion to depart from the general rule that costs follow the event.

Held: Applicant ordered to pay the council's costs in the proceedings as agreed or assessed:

(1) Principles for determining whether to depart from the general rule include:

  (a) whether the litigation is properly to be characterised as "public interest litigation";

  (b) whether, if it is, there is "something more" than such a characterisation to warrant departure from the general rules; and

  (c) whether there are any relevant countervailing circumstances: *People for the Plains Incorporated v Santos (NSW) Eastern Pty Ltd (No 2)* [2017] NSWCA 157 at [5] citing C*aroona Coal Action Group Ltd v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280; [2010] NSWLEC 59: at [38], [60] to [61];

(2) The litigation was not brought in the public interest: at [35];

(3) The litigation did not contribute "something more" as both of the applicant's grounds of judicial review were unsuccessful; the litigation did not raise any novel issue of general importance; did not contribute to the development or understanding of administrative law; and did not obviously affect a significant section of the public or protect a component of the environment of significance: at [36]; and

(4) The council's submission that a countervailing circumstance was that the applicant persisted with litigation despite being aware that if he lost he would be likely to be ordered to pay costs was not accepted: at [37]; and

(5) The applicant did not demonstrate any basis for not applying the usual costs rule: at [40].

Hossein Yamini v The Council of the City of Sydney (No 2) **[2020] NSWLEC 120** (Duggan J)

(related decision: *Hossein Yamini v The Council of the City of Sydney* [2020] NSWLEC 26 (Duggan J))

Facts: Mr Yamini (**appellant**) had successfully appealed against his conviction in the Local Court of a failure to comply with a prevention notice given pursuant to s 97 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). In the current proceedings the Appellant sought an order that the council pay his costs of the appeal.

Issue: Whether costs may be awarded against a public prosecutor.

Held: Council to pay the appellant's costs of the appeal:

(1) The council unreasonably failed to investigate a relevant matter that it ought to have been reasonably aware of and that suggested that the Appellant might not be guilty, as per s 70(1)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW): at [19];

(2) Whilst the council was entitled to rely upon the statutory presumption in s 258 of the POEO Act, the appellant (and others), at multiple times prior to the commencement of the proceedings, alerted the council to the probability that the presumption could be rebutted. As such, it was unreasonable for the council to choose not to investigate the identity of the occupier of the location of the leak in circumstances where the investigation would reveal that the presumption was likely to be rebutted: at [21]; and

(3) The residual discretion to not award costs in the appellant's favour does not stand. Whilst the council asserted the consequences of the leak requirde remedial action, here the relevant remedial action was the issuing of the Prevention Notice - criminal proceedings are punishment for a failure to comply, not a means of obtaining compliance with the Prevention Notice: at [26].

Inner West Council v Saad **[2020] NSWLEC 116** (Preston CJ)

Facts: The prosecutor, Inner West Council (**council**), brought proceedings against Mr Steven Saad (**defendant**) for a breach of the former s 109H(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) - that he had issued an occupation certificate at a time when preconditions to the issue of the certificate that were specified in a development consent had not been met. Section 109H(2) was contained in Pt 4A of the EP&A Act and continued in force for a period of time even after the EP&A Act was amended in 2018. The provisions of Pt 4A remained in force throughout 2018. The defendant pleaded guilty to having committed an offence by breaching s 109H(2) on two occasions, brought as two separate charges.

At the hearing, the prosecutor identified a defect in each Summons. The former s 125 of the EP&A Act caused a person who had breached a provision of the EP&A Act to have committed an offence. However, when the EP&A Act was amended in March 2018, s 125 of the EP&A Act was repealed. It was replaced by new provisions in ss 9.51 to 9.54 of the EP&A Act, which deal with offences against the Act and the bringing of proceedings for offences against the EP&A Act. The language of the new provisions differed from that in the former Pt 4A of the EP&A Act. The provisions of the former Pt 4A of the EP&A Act, including s 109H, did not contain this new style of specifying a Tier 1, Tier 2 or Tier 3 penalty at the end of the provision. That style was not introduced until the EP&A Act was amended in March 2018. Accordingly, the prosecutor identified that, although there was no doubt a breach of s 109H in the former Pt 4A of the Act had occurred, it did not become an offence by s 9.51 of the EP&A Act. It also did not become an offence by s 125 because when the defendant breached 109H in the period April to July 2018, s 125 had already been repealed on 1 March 2018. Accordingly, the prosecutor sought to withdraw each of the Summons against the defendant.

The defendant sought an order for costs against the prosecutor on the basis that the prosecutor brought these criminal proceedings against the defendant in circumstances where there was no offence against the EP&A Act. It argued that this was an exceptional circumstance justifying the awarding of costs under s 257D(1)(d) of the *Criminal Procedure Act 1986* (NSW).

Issue: Whether the prosecutor should pay the defendant's costs of the proceedings.

Held:

(1) The circumstance in s 257D(1)(d) is not satisfied: at [17]. The point fairly raised by the prosecutor on the sentence hearing was of its own initiative. The defendant did not identify that there was this potential lacuna in the transition from the old Act to the new Act. But for the prosecutor raising it, the sentence hearing would have proceeded and the defendant would have been sentenced for its undoubted breach of s 109H of the EP&A Act: at [18]. If there is this lacuna, it is a lacuna created by Parliament: at [19]. Perhaps because there was a change in drafting style between s 125 and s 9.51, a breach of the provisions of Pt 4A, which were continued in force, did not become an offence. That had nothing to do with the prosecutor: at [22]. It is therefore not a circumstance relating to the conduct of the proceedings by the prosecutor: at [23]; and

(2) In any event, it would not be just and reasonable to award professional costs in favour of the defendant, having regard to the nature of the problem that the prosecutor has identified and the Court accepted, and that justified the prosecutor withdrawing the Summonses in this case: at [24]. A costs order against the prosecutor was declined: at [25].

- **Merit Decisions (Judges):**

Cicek v Department of Customer Service **[2020] NSWLEC 83** (Robson J)

Facts: Ms Cicek (**applicant**) brought an appeal pursuant to s 135J of the *Real Property Act 1900* (NSW) against Boundary Determination AN763260 made by the first respondent, Department of Customer Service

(**Department**), which concerned the position of the common boundary between her property (Lot 7) and the property of the second and third respondents (Lot 8). The applicant claimed that the Department's determination of the boundary position adopted an inappropriate methodology and thereby incorrectly positioned the common boundary closer to her dwelling than where she claimed the boundary ought to be located.

In making its determination, the Department conducted a survey investigation of the surrounding area and found that an "excess of land" existed (being land not accounted for in the title dimensions of a deposited plan) across several lots, which included the lots owned by the applicant and the second and third respondents. As the Department was unable to determine precisely to which lots that excess of land belonged, the Department proportionally distributed that excess of land (through a process known as mathematical apportionment) across all of the relevant lots located within the area where the excess was found. Relevantly, the same survey investigation conducted by the Department to determine the boundary between Lots 7 and 8 was similarly used to determine the common boundary between two other lots located on the same street (being Lots 10 and 11). Although the two boundary positions were investigated concurrently, their respective determinations were, nonetheless, made separately.

The applicant claimed that the Department's use of the mathematical apportionment methodology to distribute the excess of land across all relevant lots was inappropriate in circumstances where the applicant claimed that a set of field notes prepared by a surveyor in 2002 appeared to show that the excess of land was specifically attributable to her lot and, therefore, the boundary position should reflect the allocation of the excess to her lot. The applicant also made a number of other criticisms relating to the methodology adopted by the Department.

Issues:

(1) The relevance of Boundary Determination AN615264, which concerned the common boundary between Lots 10 and 11, to the determination of the common boundary between Lots 7 and 8;

(2) Whether the available evidence in relation to the position of the common boundary between Lots 7 and 8 was inconclusive, such that the boundary could be determined on the basis of what was just and reasonable in the circumstances; and

(3) Whether the apportionment of an excess of land across all relevant lots was the most appropriate methodology to determine the position of the boundary in the circumstances.

Held: The prior determination of the common boundary made by the Office of the Registrar General was the correct position of that boundary:

(1) As a preliminary matter, although Boundary Determination AN615264 (relating to Lots 10 and 11) used the same method of mathematical apportionment to distribute excess as was used to define the boundary between Lots 7 and 8 in Boundary Determination AN763260, the applicant did not have standing to challenge Boundary Determination AN615264 as she was not an adjoining owner and, in any event, this determination did not affect the definition of the boundary between Lots 7 and 8 as the application of an "apportionment fabric" over an area does not define the position of any boundaries other than the specific boundary involved in that determination: at [73];

(2) Both the processes followed by the Department, and the existence of discrepancies between measurements depicted in various plans, showed that an excess of land existed: at [84];

(3) The historical field notes relied upon by the applicant were insufficient to demonstrate that the excess ought to be allocated to the applicant's lot: at [90];

(4) The position of the boundary was inconclusive, such that the determination was required to be made on the basis of what appeared to be fair and reasonable in the circumstances: at [93];

(5) The use of mathematical apportionment to distribute excess was fair and reasonable in the circumstances as this method resulted in the least disturbance to presently existing fences, dwellings and occupations, and because the methodology was applied both proportionally and consistently across all of the lots which occupy the land within which the excess was found: at [97] to [98]; and

(6) It would not have been fair and reasonable for the benefit of the excess to be predominantly allocated to the applicant's lot in circumstances where the evidence as to where that excess ought to be located was inconclusive: at [104].

HP Subsidiary Pty Ltd v City of Parramatta Council **[2020] NSWLEC 135** (Preston CJ)

Facts: The Carter Street Priority Precinct at Lidcombe is undergoing urban renewal and being transformed from an industrial site into a high-density residential suburb. HP Subsidiary Pty Ltd (**HP Subsidiary**) applied for development consent in relation to one of the lots in the Carter Street Priority Precinct for the demolition of the existing structures, construction of three residential flat buildings with four basement levels and a neighbourhood shop on the ground level of one of the buildings and construction of a new private road and replacement bridge connecting the development to Hill Road. Sydney Central City Panel refused consent to HP Subsidiary's development application. HP Subsidiary appealed to the Land and Environment Court (**LEC**). HP Subsidiary was granted leave to amend its development application on a number of occasions. The amendments to HP Subsidiary's development application and plans reduced the issues in contention between the parties from 16 to two.

Issues:

(1) The need for satisfactory arrangements to be made for contributions to designated state public infrastructure in relation to the proposed development;

(2) The impact of traffic generated by the proposed development on the local road network and the need to undertake traffic management works to mitigate such impacts; and

(3) The disputed conditions of consent.

Held: Appeal upheld; development consent granted subject to conditions

(1) Although the parties were in agreement, the LEC itself needed to be satisfied that all jurisdictional preconditions to granting consent were met:

(a) in relation to arrangements for contributions to designated state public infrastructure, the City of Parramatta Council (**council)** accepted a certificate issued to HP Subsidiary by the Secretary of the Department of Planning, Industry and Environment (**DPIE**) confirming that, in accordance with cl 6.8(3) of the Auburn Local Environmental Plan 2010 (**ALEP 2010**), "satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure in relation to" the proposed development": at [12] to [14];

(b) upon HP's tender of an updated BASIX certificate and Architectural Plans, the council was satisfied that cl 2A of Sch 1 to the Environmental Planning and Assessment Regulation 2000 was satisfied: at [17] to [19];

(c) the LEC held that on the basis of the risk assessments and letters of the pipeline operators withdrawing their objections, it was satisfied the matters in cl 66C(1) of the State Environmental Planning Policy (Infrastructure) 2007 (**Infrastructure SEPP**) were met: at [26] to [27];

(d) the LEC was satisfied that, as required by cl 102(2) and (3) of the Infrastructure SEPP, the proposed development for the purposes of residential accommodation would take appropriate measures to ensure that the specified acoustic levels will not be exceeded: at [32];

(e) having considered evidence on traffic, the LEC was satisfied that the accessibility of the site, and any potential traffic safety, road congestion and parking implications for the proposed development, will be acceptable having regard to the amendments to the proposed development that have been made and provided the proposed conditions of consent are imposed. This was sufficient to meet the requirements of cl 104 of the Infrastructure SEPP: at [33] to [38];

(f) having considered the Detailed site Investigation and Remediation Action Plan and the council report, as required by cl 7(2) of the *State Environmental Planning Policy No 55 - Remediation of Land* the LEC was satisfied that, although the land was contaminated, it would be made suitable, after remediation, for the purpose for which the development is proposed to be carried out, namely residential use, as required by cl 7(1): at [39] to [42];

(g) the LEC considered the amended development application, including the amended architectural drawings, the SEPP 65 Report and the SEPP 65 Design Verification Statement. It also took into consideration the design quality of the proposed development (as amended), when evaluated in accordance with the design quality principles, and the Apartment Design Guide as required by cl 28(2) of the *State Environmental Planning Policy No 65 - Design Quality of Residential Apartment*

Development (**SEPP 65**). Based on this evidence, the LEC was satisfied that the proposed development demonstrated that adequate regard has been given to the design quality principles and the objectives specified in the Apartment Design Guide for the relevant design criteria as required by cl 30(2) of SEPP 65. The Court held that a condition of consent would require design verification by a registered architect to be provided with the application for an occupation certificate verifying that the residential flat development as constructed achieves the design quality of the development as shown in the approved plans and specifications: at [48];

(h) the LEC was satisfied under cl 4.6(4) ALEP 2010 that HP Subsidiary's written request had adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development would be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the R4 High Density Residential Zone, for the reasons given in the request: at [60];

(i) the LEC was satisfied for the purposes of cl 6.1(3) ALEP 2010, having regard to the Acid Sulfate Soils Management Plan, that appropriate measures would be taken for groundwater management and disposal to ensure that the proposed development does not cause environmental damage. The Court also held that a condition of consent would require implementation of the Acid Sulfate Soils Management Plan: at [65];

(k) having regard to the evidence, the LEC was satisfied that the parts of the proposed development that would be carried out below the foreshore building line, being the landscaped walking trail along the stormwater channel and the replacement bridge and road approaches across the stormwater channel, would meet the criteria in cl 6.4(4) ALEP 2010, including that the development is not likely to cause environmental harm in any of the ways referred to in paragraph (c) and that any change of flooding patterns as a result of climate change will not adversely affect the proposed development, including the replacement bridge and road approaches as designed; and

(l) the LEC was satisfied that the services in cl 6.5(1) ALEP 2010 that are essential for the proposed development were available or that adequate arrangements were made to make them available when required: at [91];

(2) The council's argument that the proposed development should not be approved until the additional traffic management works suggested by the council have been carried out was not accepted. The only traffic management works that are necessary to be carried out are the installation of the traffic control devices of a median island limiting movements to and from the site to left in/left out and the installation of a No U-turn sign at the intersection of Hill Road and Carter Street. The other traffic management works suggested by the council to prevent illegal manoeuvres in Hill Road or Carter Street were unnecessary: at [104]. It is not necessary to impose a deferred commencement condition and it will be sufficient to impose an operational condition of consent that the traffic control devices must be installed before an occupation certificate can be issued for the proposed development. This will ensure that there will be no resident-generated traffic from the development before the traffic control devices are operational to control such traffic: at [112]. However, installation of the traffic control devices once authorised and approved should be to the satisfaction of the council's Traffic and Transport Manager prior to the issue of any occupation certificate: at [114]; and

(3) Although the parties largely agreed the conditions on which consent should be granted, two of the conditions in dispute related to the issue of traffic. The council sought to condition the operation of the consent or the commencement of construction of the development on the completion of its suggested traffic management works and the agreed traffic control devices, while HP Subsidiary contested the need for such conditions of consent. Having accepted HP Subsidiary's arguments on these issues, the LEC also accepted HP Subsidiary's version of the conditions: at [115], [116] to [129].

- **Merit Decisions (Commissioners):**

Fitzgerald v Central Coast Council **[2020] NSWLEC 1445** (Dixon SC)

Facts: Mr Fitzgerald (**applicant**) brought an appeal pursuant to s 8.8 of the *Environment Planning and Assessment Act 1979* (NSW). The appeal concerned the applicant's dissatisfaction with the

Central Coast Council's (**first respondent**) grant of development consent to the expansion of the processing capacity of the resource recovery (concrete recycling) facility (**development**) operated by Recycled Concrete Products Pty Ltd (**second respondent**) at 18A Tathra Street, West Gosford (**site**). The site is zoned IN1 within the Gosford Local Environmental Plan 2014 and located on the south-western side of Tathra Street immediately adjacent several commercial/industrial premises and a place of worship. The development had operated at the site as a concrete batching plant since 2005. The second respondent held an environment protection licence for the integrated development under the *Protection of the Environment Operations Act 1997* (NSW). The applicant owns the adjoining property at 16 Tathra Street, where his tenant mechanic runs a car repair business, and sought refusal of any expansion of the development's processing capacity at the site.

Issues: Whether the development application should be refused on the basis of:

(a) air quality;

(b) visual impact;

(c) scale of operations - zone objectives; and

(d) undesirable precedent.

Held: Appeal upheld; development consent granted subject to conditions:

(1) Regarding air quality: the inputs of wind erosion, silt loading, and unsealed haulage road distances were accurately approached by the second respondent's expert compared to the applicant's expert and were therefore considered reliable. The second respondent's expert evidence was accepted, that the development will not generate unacceptable adverse air quality impacts for the applicant's property or the area more generally. There is no scientific uncertainty about the relevant impact and the precautionary principle is not invoked: at [63] to [69];

(2) The development has minimal, if any, visual impact when viewed from the public domain as the view is limited behind the properties fronting Tathra Street; is accessed via a long access road; and the owners of 21 and 18 Tathra Street, with views of the stockpiles, support the development. The imposition of conditions on the consent for a 10-metre-height limitation on the stockpiles; the proposed vegetation maintenance plan; and the two-metre acoustic walls on the eastern boundary will improve the visual impact from the applicant's land, such that the industrial development within an industrial zone is satisfactory: at [77] to [78];

(3) The second respondent's proposed conditions of consent requirements to operate the facility according to stockpile height controls; maintenance of vegetation on the eastern boundary; and various plans of management, including air quality monitoring and a complaint register, coupled with the licence requirements, ensure the development will be strictly monitored for compliance and the existing operation of the site will be improved. Therefore, the development is consistent with the zone's objectives to reduce any adverse effect of industry on other land uses: at [88] to [90]; and

(4) Given the locality, there is little prospect of a similar development occurring in the industrial estate, although if there was, the presently proposed development is satisfactory in that it complies with all relevant controls; does not have adverse air quality or visual impacts; and concerns expressed by objectors (including the applicant) have been addressed by the second respondent's final plan and conditions of consent. the development is in the public interest and does not set an undesirable precedent: at [91] to [92].

***Kovacs v Council of the City of Sydney* [2020] NSWLEC 1258** (Dixon SC)

(related decision: *Kovacs v The Council of the City of Sydney* [2018] NSWLEC 1675 (Gray C))

Facts: Kovacs (**applicant**) lodged two Integrated Development Applications (**IDAs**) with the Council of the City of Sydney (**council** and **first respondent**) for alterations and additions to a pair of NSW State Heritage Register-listed Victorian terraces at Millers Point (**site**). The alterations and additions included a prefabricated multipurpose platform in the rear courtyard and the extension of a dumbwaiter to the first floor. The site was subject to a Conservation Management Plan (**CMP**). The first respondent refused the IDAs in accordance with s 4.47(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), as the Heritage Council of NSW (**second respondent**) had given the same response. The applicant appealed this decision pursuant to s 8.7 of the EP&A Act.

Issue: Whether the alterations and additions provided an acceptable level of contemporary living whilst managing the site's heritage and compliance with the building codes.

Held: Appeal upheld; development consent granted subject to conditions:

(1) The multipurpose platform was consistent with the intent of the CMP and planning controls as an appropriate adaptation of the rear yard contributing to utility, amenity and function for contemporary residential use. The alterations would not visually dominate the rear yard and would have little impact on the fabric of the site, being fully reversable: at [95] and [96];

(2) It was possible to maintain the yard's "landscape space" pursuant to the CMP by accommodating garden pots around the platform: at [98]; and

(3) The extension of the dumbwaiter was necessary to allow for the reasonable residential use with as minimal as possible impact on heritage significance: at [99].

Pritchard v Northern Beaches Council **[2020] NSWLEC 1310** (Gray C)

Facts: The applicants lodged a development application (**DA**) with Northern Beaches Council (**council**) for alterations and additions to a dwelling that was in the process of construction. The approval to construct the dwelling was given through a Complying Development Certificate (**CDC**), and the approved design included void areas on the lower ground floor due to the topography of the site. The alterations and additions sought in the DA were to fill the void with floor area with three bedrooms and a bathroom, as well as the addition of terraces and a bin storage area. Following the expiry of the period after which a development application is deemed to be refused, the applicants lodged an appeal to the Land and Environment Court (**LEC**) pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The council argued that the LEC, in exercising the functions of the consent authority, has no power to determine the DA because a development consent granted under the EP&A Act cannot amend or modify a CDC. The council also opposed the grant of the DA because the additional floor area sought created a breach of the floor space ratio (**FSR**) development standard and the request concerning that breach was not adequate to satisfy the matters required by cl 4.6 of the Manly Local Environmental Plan 2013 (**MLEP 2013**). The applicants disputed both of these points.

Issues:

(1) Whether the LEC has the power to grant a DA for alterations and additions to a dwelling approved by a CDC; and

(2) Whether development consent should be granted in circumstances where there is a breach of the FSR development standard.

Held: Appeal dismissed, with the commissioner finding there is power to grant the DA but refusing it on the basis of the written request concerning the FSR development standard:

(1) There is power to grant consent to the DA:

  (a) a development application, and a development consent, concern prospective development: at [45];

  (b) the development proposed in the DA is for alterations and additions to a dwelling house, and is not an application to modify the CDC. The proposed development, if approved, would have the consequence of modifying the dwelling approved by the CDC, but that is not its purpose: at [46] to [47];

  (c) the EP&A Act has a threefold classification of development - development that does not need consent (s 4.1), development that needs consent (s 4.2) and development that is prohibited (s 4.3): at [48]. The proposed development falls within the definition of "development" and is for a purpose that is permissible with development consent in the zone. Section 4.2(2) of the EP&A Act allows development consent to be obtained in two ways, either by the granting of development consent, or by the issue of a CDC. The parties agree that the development proposed in the DA is not complying development, which means that a CDC is not available to the applicants. Therefore, development consent can be obtained pursuant to s 4.2(2)(a) and Div 4.3, which requires the making of a development application (see s 4.12): at [49] to [50];

(d) as a development application and consent is for prospective works, the fact that other works are required to take place prior to the proposed development is not an impediment to the making of an application and the granting of consent for the proposed development: at [51]; and

(e) any number of development consents and CDCs can operate with respect to the same parcel of land: at [52];

(2) The written cl 4.6 request did not adequately address that there were sufficient environmental planning grounds to justify contravening the FSR development standard: at [68]:

(a) many of the described benefits and descriptions of the development in the written request did not constitute environmental planning grounds: at [69];

(b) with respect to the described benefits that could form environmental planning grounds, those benefits were not tethered to the breach of the FSR development standard and therefore they did not justify or inform the contravention of the standard: at [70] to [72];

(c) the environmental planning grounds advanced were not qualitatively or quantitatively sufficient to justify the actual contravention, which was a variation of 40% or an additional area of 84.76m2 above the development standard of 0.4:1, and included the entire floor space added by the proposed development: at [73]; and

(d) having not reached the state of satisfaction required by cl 4.6(4)(a)(i), cl 4.6(4) of the MLEP 2013, development consent could not be granted for the proposed development: at [74].

Shapkin v The Council of the City of Sydney **[2020] NSWLEC 1309** (Dixon SC)

Facts: This appeal concerned the revocation of Vasiliy Alexandrovich's (**applicant**) Busking Permit by the Council of the City of Sydney (**council**). The applicant held a "low impact permit" under the council's City of Sydney Local Approvals Policy for Busking and Aboriginal and Torres Strait Islander Cultural Practice (**Busking Permit**). On 2 August 2019, the applicant allegedly breached a condition of the Busking Permit, that his performance must not be heard more than 50 metres from his busking position. The council caused an e-mail to be sent to the applicant in which the applicant was advised that his Busking Permit had been revoked. The council sent a further two e-mails on 6 August 2019 communicating the revocation. On 20 August 2019, the applicant attended a meeting to show cause why the Busking Permit should not be revoked. A formal revocation letter was sent to the applicant by the council on 30 October 2019.

Issue: Whether the decision to revoke the Busking Permit, based on the breaches said to have occurred on 2 August 2019, were made after the requisite notice had been given under s 110 of the *Local Government Act 1993* (NSW) (**Local Government Act**).

Held: Appeal was upheld. The purported instruments of revocation on 2 August 2019, 6 August 2019 and 30 October 2019 were cancelled:

(1) The council failed to notify the applicant of the proposed revocation of the Busking Permit before the first suspension on 2 August 2019, and the next on 6 August 2019. The effect of the e-mail on 2 August 2019 was that the applicant's Busking Permit was revoked, and he had therefore not been allowed to busk in the local government area since that date. The meeting on 20 August 2019 post dated the notice of revocation. Thus, the revocation was issued contrary to s 110(3) of the Local Government Act: at [29].

Zoro Developments Pty Ltd v Northern Beaches Council **[2020] NSWLEC 1349** (Gray C)

Facts: Northern Beaches Council (**council**) issued a stop work order on a steep battle-axe site on the harbour foreshore at Seaforth, on which a dwelling house was under construction. Zoro Developments Pty Ltd (**Zoro**) appealed against the order pursuant to s 8.18 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The site benefited from a development consent issued by Manly Council (as it then was) on 15 October 2007 for the construction of a two-storey detached dwelling with double-car hardstand parking, inclinator and landscaping works (**development consent**). The approved hardstand parking and part of the inclinator was

on the neighbouring property, in an area over which the site benefited from an easement. A condition of consent required that a report from a qualified geotechnical engineer regarding the stability of the site be provided to the council prior to the issue of a construction certificate.

On 28 June 2018, Dix Gardner Group Pty Ltd issued the construction certificate (**CC**) in respect of the consent. The CC plan did not depict the western boundary of the site accurately. When the survey data was overlaid on the CC plan, the CC plan showed building works that encroached upon the neighbouring property and that were outside the area of the easements. Further, the CC was issued without compliance with the condition requiring the geotechnical report.

Works were then undertaken at the site, including extensive excavation. Following an inspection by the council, the council issued an emergency order to remove unauthorised fill from the site. Zoro obtained advice that geotechnical support piles would be required to stabilise the site, and piling cases were installed but were not filled prior to the issue of the stop work order.

The council argued that the geotechnical piles were not approved by the development consent or the CC, and the works undertaken on the site differed from the CC plans. This included the location of the lift core and stairway, the construction of openings in external walls leading to balconies that were not in the CC plans, the construction of the western external wall further to the east than in the CC plans to accommodate the balcony on the western elevation, a set of external concrete stairs that were not in the CC plans, the location of a retaining wall and the extent of excavation. The building works had also created an encroachment of the dwelling house onto the adjoining land in an area outside the easements, and if works continued in accordance with the CC plans, a number of additional encroachments would be constructed.

Zoro conceded that development had been carried out contrary to the CC plans, but argued that the stop work order should be substituted with a compliance order that required Zoro to comply with the development consent and remove the encroachments or obtain an easement.

Issues:

(1) Whether the statutory basis for a stop work order was met;

(2) Whether the Land and Environment Court (**LEC**) should exercise its discretion to substitute the stop work order with a compliance order; and

(3) Whether the LEC should exercise its discretion to modify the order.

Held: Allowing the appeal for the purpose of modifying the stop work order:

(1) Both the building works with respect to the construction of the dwelling, and the structural works with which the geotechnical piles are associated, were carried out in contravention of s 4.2(1)(b) of the EP&A Act: at [74] to [77]. The statutory basis for the making of the stop work order is therefore met: at [73];

(2) Even though the statutory requirements for the issue of the order are met, the LEC has a broad discretion as to whether to issue an order (s 9.34(1) of the EP&A Act) and to determine the appropriate orders on the hearing of an appeal (s 8.18(4) of the EP&A Act): at [9] and [73];

(3) There is no evidence that the building works could continue on the site in a manner that was consistent with the CC, and as such the stop work order should remain in place and ought not be substituted with a compliance order: at [73] to [83];

(4) In addition, although the CC is valid until such time as it is set aside, it is nonetheless voidable or liable to be set aside by reason of it having been issued outside of power, contrary to the EP&A Act or unreasonably, by virtue of it purporting to authorise building work on land outside of the land the subject of the development consent. It would not be appropriate to substitute the stop work order with a compliance order where the CC, which forms part of the planning approval with which the compliance order would compel compliance, is liable to be set aside: at [84];

(5) The stop work order should continue to apply to all of the works on the site: at [86];

(6) The stop work order should be modified to exclude works required by the emergency order and any other order that is issued concerning the site: at [87];

(7) The financial hardship suffered by Zoro is not a sufficient basis upon which to revoke or modify the order in circumstances where there is no evidence that the building works can continue on the site in a manner consistent with the CC: at [88];

(8) Whilst the evidence clearly establishes that the structural works on the site needed to be carried out as soon as possible in order to stabilise the site, the LEC's power in ss 8.18(4)(b) or (f) of the EP&A Act did not extend to making orders that compel compliance with specified conditions of the development consent in circumstances where the LEC has determined that the stop work order should remain in place: at [89]; and

(9) The LEC's discretion ought to be exercised so that the stop work order remains in place until such time as Zoro could carry out the remaining works without contravening the EP&A Act. This could be done by a modification of the consent and the issue of a construction certificate in accordance with the modified consent: at [90].

Court News

Appointments/Retirements:

The following Acting Commissioners were appointed, with terms commencing on 9 November 2020:

- Acting Commissioner Alan Bradbury
- Acting Commissioner Paul Rappoport
- Acting Commissioner Gary Shiels
- Acting Commissioner Deborah Sutherland
- Acting Commissioner Emma Washington.