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Land and Environment Court of NSW Judicial Newsletter

Legislation
- Statutes and Regulations
  - Commonwealth
  - New South Wales
  - Planning
  - Water
  - Local Government
  - Pollution
- Bills
- State Environmental Planning Policies [SEPP] Amendments

Judgments
- Supreme Court of Pakistan
- Supreme Court of Canada
- Hague District Court
- Germany - Federal Constitutional Court
- High Court of Australia
- Federal Court of Australia
- New South Wales Court of Appeal
- New South Wales Court of Criminal Appeal
- Supreme Court of New South Wales
- Land and Environment Court of New South Wales
  - Judicial Review
  - Compulsory Acquisition
  - Criminal
  - Criminal Appeals from Local Court
  - Civil Enforcement
  - Valuation/Rating
  - Interlocutory Decisions
  - Costs
  - Merit Decisions (Judges)
  - Merit Decisions (Commissioners)
  - Procedural Matters
    - Evidence
    - Right to be Heard
    - Subpoenas/ Notices to Produce

Court News
- Appointments/Retirements
- Obituary
- COVID-19 Continues
- Other

Legislation

Statutes and Regulations:

- **Commonwealth:**

Hazardous Waste (Regulation of Exports and Imports) Amendment Act 2021 - the substantive amendments within this Act (Schs 1-5) will amend the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (**principal Act**) to implement Australia's obligations under the *Basel Convention on the Control or Transboundary Movements of Hazardous Wastes and their Disposal*. The amendments contained within the schedules have yet to commence, with Schs 1-3 and Sch 4, Pts 1 and 2 and Sch 5 commencing either by proclamation or, if no proclamation is made, then they will automatically commence six months and one day after the date of assent. Schedule 4, Pt 3 will commence on the later of immediately after Schs 1-3, Pts 1 and 2 of Sch 4 and Sch 5, or immediately after commencement of the *Federal Circuit and Family Court of Australia Act 2021*, assented 1 March 2021 but to commence upon proclamation.

The Act will insert references to the standard provisions of the *Regulatory Powers (Standard Provisions) Act 2014* into s 4. The Act will also add new audit powers; will update existing criminal offences; and will introduce new strict liability offences and civil penalties to cover non-compliance relating to the export, import, and transit of hazardous waste. The Act will introduce new offences where non-compliance results in injury or damage to humans or the environment (subss 33B(3)(g), 33D(3)(g), 33F(4)(g), 38D(1)(d)). Amendments will authorise information sharing between Commonwealth, State and Territory governments; amend record keeping requirements; and information-gathering powers to protect, use and disclose information. The Hazardous Waste Technical Group will be replaced with a requirement for the Minister to consult with one or more of the following: a person identified by the Minister who is considered to have the expertise or qualifications relevant to the decision; an industry group; an environmental group or a state or territory government body (Pt 6 - New Consultation Mechanism).

Schedule 1 will insert plastic as a hazardous waste through its inclusion in the definition (s 4):

> or (e) plastic wastes, including mixtures of such wastes, covered by Annex II to the "Basel Convention" to s 4 of the Act.

Schedule 2 concerns Regulatory Powers, and will insert definitions for "audit", "Australian Jurisdiction", "civil penalty provision", and "evidentiary material" into s 4. Sections will be added to the principal Act that will outline the extraterritorial operation of the Act (s 9A) and the geographical operation for offences (s 9B). Schedule 3 will insert provisions relating to record keeping, information, and confidentiality. Schedule 4 will make amendments to the offence and civil penalty provisions of the Act. Part 1 of Sch 4 will incorporate the definitions for "executive officer", "OECD country", and "recovery operation" into s 4 of the principal Act.

The provisions will also insert amendments to the *Environment Protection and Biodiversity Conservation Act 1999* to harmonise the legislative instruments.

National Radioactive Waste Management Amendment (Site Selection, Community Fund and Other Measures) Act 2021 - this amendment listed the land that has been approved for National Radioactive Waste Management Facilities (**NRWMF**) to permanently dispose of low-level radioactive waste and store temporarily intermediate-level radioactive waste. This Act amended the *National Radioactive Waste Management Act 2012* to allow for this land to house NRWMFs. This Act specified that the sites selected in South Australia are areas at Pinkawillinie, Moseley, and in the Flinders Ranges. The amending Act enabled the acquisition of additional land for the facility; abolished the National Repository Capital Contribution Fund and established a Community Fund (Sch 2) to provide economic and social sustainability for the community in which the facility will be located.

- **New South Wales:**

  - **Planning:**

Environmental Planning and Assessment Amendment (Subdivision Certificates) Regulation 2021 - amended the Environmental Planning and Assessment Regulation 2000 to make it clear that a subdivision certificate application must be accompanied by a certificate of compliance under the *Water Industry Competition Act 2006* relating to the provision of water and sewage services.

Subclause 157(6) was inserted identifying as water authorities Sydney Water Corporation, the Hunter Water Corporation, a water supply entity as provided for in the *Water Management Act 2000*, or a council (including a county council) that exercises authority over water supply, sewerage, or stormwater drainage pursuant to the *Local Government Act 1993*.

Environmental Planning and Assessment Amendment (Inland Rail) Order 2021 - declared that certain development related to the Inland Rail Network Project is State Significant and Critical State Significant Infrastructure. Schedule 1 amended Sch 5 of the State Environmental Planning Policy (State and Regional Development) 2011 and identifies the projects to which the order applies. Subclause 7(5) was amended to list those activities that do not constitute development for all but the Parkes to Narromine project. For all other projects, development is designated not to include: surveys, test drilling or excavations, geotechnical investigations, or other survey or sampling investigations that were carried out for the purposes of the project (subcl 7(5)(a)(i)). Other activities not included in "development" are the use of the existing railway corridor and its associated structures for storage of equipment (sleepers, tracks, etc; subcl 7(5)(a)(ii)), and the upgrade or replacement of existing utility infrastructure unless these would permanently affect existing water flows within, or that flow through, the rail corridor (subcl 7(5)(a)(iii)). Subclause 7(5)(b) included relocation, upgrade, replacement, or adjustment of existing utilities infrastructure the occurred before the start of the project as activities that would not be considered development for these rail projects. The exception to subcl 7(5)(b) is for activity that will involve the clearing of native vegetation that is "likely to significantly affect threatened species within the meaning of Pt 7 of the *Biodiversity Conservation Act 2016*."

Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021 - created compulsory and optional (special) flood planning considerations for development in flood planning areas. Amendments were made to the necessary considerations that a consent authority must take into account before development consent can be granted: these were inserted as cl 5.21 (of Pt 5 of the Standard Instrument (Local Environmental Plans) Order 2006). Considerations include the assessment of projected changes in flood behaviour resulting from climate change, the intended scale and design of the building, whether or not the development has provisions to mitigate risk to life and for evacuation, and whether the development can be modified if the surrounding area is an area susceptible to floods or coastal erosion.

Optional special flood considerations were inserted as cl 5.22. Subclause 5.22(2) includes the identification of development activities to which the provision applies. The relevant development activities listed are sensitive and hazardous development for land between the probable maximum flood and the flood planning area; for development that is not sensitive or hazardous, in the event of a flood; land which the consent authority has identified as posing a risk to life, would require evacuation of people, or require other safety considerations. Subclause 5.22(3) lists the conditions in which development consent cannot be granted under cl 5.22 unless the consent authority is satisfied that the development has mitigating conditions incorporated. These conditions include that, in the event of a flood, the safe occupation and evacuation of people will not be impacted; measures to mitigate risk to life are incorporated; and the environment will not be adversely affected.

Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation 2021 - was to commence on 30 July 2021 but commencement was postponed until 1 November 2021 by the Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation 2021.

This regulation will amend the Environmental Planning and Assessment Regulation 2000 by inserting Div 7D. The amendment will require short-term rental accommodation to comply with fire safety and evacuation controls. The amendments will make it a requirement to register short-term accommodation on the Register established by the Planning Secretary of NSW.

Subclauses 284(5)(b)-(c), under Penalty notice offences, will be replaced by new subcl 284(5)(b) which lists the offences which are related to an offence under cl 283A.

- **Water:**

Water Management (General) Amendment (Miscellaneous) Regulation 2021 - changed the mandatory conditions required for access licences and the necessary reporting on access licences in relation to water taken under the Water Management (General) Regulation 2018. Subclause 244(2B) superseded the existing subcl 244(2B) and requires those holders of authorities that are the subject of a mandatory metering equipment condition to provide the Minister with records of the amount of water taken during any month. If no water is taken during any month, a statement to that effect must be forwarded to the Minister. These requirements must be completed within 14 days of the end of the relevant month.

Subclause 244(2C) qualifies subcl 244(2B) by allowing the holder to provide the Minister with a "no-take" notice (a notice to the Minister that the holder "does not intend to cause or permit water to be taken" under the authority subcl 244(2C)(a)). This must be completed no less than 14 days prior to the commencement of the month in which the "no-take" notice will come into effect. This will alleviate the need to provide the reports required under subcl 244(2B) and will prevent a breach of that provision from occurring.

The amendments allow for a "no-take" notice to be for a period greater than one month (subcl 244(2D)). The holder of the authority must not take water during the notified "no-take" period, and the "no-take" notice cannot be for a period greater than six months (subcl 244(2C)). A "no-take" notice will cease to operate at the time that water is again taken under the holder's authority.

Where a "no-take" notice has expired, the holder will have 14 days in which to provide a statement to the Minister confirming that water was not permitted or caused to be taken during the time the "no-take" notice was in effect (subcl 244(2F)).

Clause 244A was amended to allow the same exceptions to the reporting requirement for authority holders but where telemetry equipment is not required.

- **Local Government:**

Local Government Amendment Act 2021 - commenced 24 May 2021 for Schs 1.1[1] [5] [6] [12] [16] [18] and [32], 1.2 and 1.3; not yet in force are Sch 1.1[2]-[4], [7]-[11], [13]-[15], [17], [19]-[31] and [33] to be commenced on a day or days to be appointed by proclamation.

This Act incorporated some of the recommendations made by the Independent Pricing and Regulatory Tribunal. These recommendations related to strengthening the rating system through the increase of the equity and efficiency of the rating system and through the increase in a council's ability to enact long-term, sustainable fiscal policies.

Provisions in force

The *Local Government Act 1993* (**Local Government Act**) has been amended to permit previously amalgamated Councils to advance proposals to demerge and to have such de-merger proposals assessed (s 218CC). This provision permits a written business case for demerger to be submitted to the Minister within 10 years of the creation of the amalgamated council (subs 218CC(1)). Subsection 218CC(2) requires the Minister, within 28 days, to refer the proposal to the Boundaries Commission for an inquiry into the proposal.

The Boundaries Commission will report its findings on the proposal and will make a recommendation supporting, rejecting, or supporting an alternative deamalgamation proposal (subs 218CC(3)). Council demerger may result in the former constituent councils being re-formed or completely different Councils being created.

- Subsection 505(a)(vii) makes fire and emergency service levies payable under the *Fire and Emergency Services Levy Act 2017* exempt from inclusion in "general income" for a council under s 505;
- Subsection 506(2) specifies how Orders of the Minister may vary the general income calculation for a council;
- Subsection 529(2) – a rate may be the same or different within a category - the amendment expanded the factors that may be considered when determining sub-categories for the farmland, residential, mining, and business land categories;
- Subsection 529(5) permits a council to determine those factors that may or may not be considered for a sub-category's determination and requires a council to follow public consultation requirements as part of the process; and
- Section 530 lists the special provisions relating to residential land sub-categories.

Provisions not yet in force:

The provisions not yet in force will make changes to land categories for special rates and categorisation of land for ordinary rates. Amendments will include the modification of s 493 of the Local Government Act by changing the number of categories for rates from 4 to 5 and adding an environmental land category into s 514. Section 515A will be inserted to set out when land is to be classified in the environmental land category. Land will be classified as "environmental land" if it is rateable land, but its uses are constrained as development cannot occur on the land or it has "low development potential for business, residential, mining or farming activity" or it has geographical or regulatory restrictions. The land must also not be more appropriately classified under a different category. A council, when assessing the land's development potential, will be required to consider if activities allowed on the land are consistent with "the protection, management and restoration of areas of high ecological, scientific, cultural or aesthetic values". A council will also be required to consider whether any development would "destroy, damage or otherwise have adverse effects" on the protection, management and restoration of areas of high ecological, scientific, cultural or aesthetic values.

Definitions for "geographical restrictions" and "regulatory restrictions" will be included. "Regulatory restrictions" will be those that are imposed by an Act, environmental planning instrument, conservation agreement, or some other regulatory instrument. "Geographical restrictions" will be recognised as those that pertain to restrictions that occur because of physical limitations of the terrain, including water courses, mud flats, or topography.

Schedule 1.1[32] , of the Amending Act, will insert a section on existing exemptions for conservation agreements. Schedule 1.1[33] will add "conservation agreement" to the dictionary.

Community Land Development Act 2021 - assented on 26 March 2021. The date of commencement will be given by proclamation.

The *Community Land Development Act 2021* repeals and replaces the *Community Land Development Act 1989* and the Community Land Development Regulation 2018 to align it with the *Strata Schemes Development Act 2015*.

When commenced, the following sections relating to the Land and Environment Court (**LEC**) will be amended:

- *amendment with approval of planning authority and association* (s 50(4)): a planning approval given under this Part by the LEC to an amendment of a development contract will have the same effect as if the approval were given by an association;
- *notice of decision of planning authority and appeal* (s 51): where a planning authority does not approve an amendment of a development contract, the applicant will be able to appeal to the LEC against the refusal within 12 months after receiving the notice of refusal. On appeal:
  - the LEC will be able, if it considers it appropriate in the circumstances, to extend the period for making the appeal (subs 51(3)); and
  - a decision of the Court will be taken to be the final decision of the planning authority and will be given effect as if it were the decision of the planning authority (subs 51(4));

- *amendment with approval of the Court* (s 52): A developer will be able to apply to the LEC for an order approving an amendment of a development contract if the approval by the relevant association has not been given under this Part because:

  (a) a motion for giving the approval has been defeated, or

  (b) the notice relating the motion has been given but a meeting to consider the motion has not been held within a reasonable time after the giving of the notice. On appeal, the Court will be able to approve the amendment, approve a different amendment or refuse to approve the amendment (subs 52(4));

- *Orders of the Court for breach* (s 54): If proceedings are brought by an association, or a member of an association, under s 9.45 of the *Environmental Planning and Assessment Act 1979* for a breach of a condition of a planning approval constituted by a breach of a development contract, the Court will be able to make an award of damages under s 20(2)(d) of the *Land and Environment Court Act 1979* instead of making a restraining order under s 9.46 of the *Environmental Planning and Assessment Act 1979*, or instead of, or in addition to, making an order under that section other than a restraining order.

  If proceedings are brought under subs 20(2)(d) of *the Land and Environment Court Act 1979* for a breach of the agreement implied by s 49 of the amending Act in relation to a development contract, the Court will be able to make an order under s 9.46 of the *Environmental Planning and Assessment Act 1979* instead of, or in addition to, making an award of damages, or the Court will be able to order specific performance of the development contract instead of making an award of damages.

Community Land Management Act 2021 - assented on 26 March 2021. The date of commencement will be given by proclamation.

The *Community Land Management Act 2021* will repeal and replace the *Community Land Development Act 1989* and the Community Land Management Regulation 2018 to align with the *Strata Schemes Management Act 2015*. The objectives of the amendments are "to provide for the management of community, precinct and neighbourhood schemes" and provide dispute resolution mechanisms that may arise through the management of the various schemes. The amendments also outline the functions of associations and their committees as they relate to the management of community, neighbourhood, or precinct schemes.

When commenced, s 4.9 will amend the *Land and Environment Court Act 1979* to align with relevant sections of the new Act as follows:

- in s 18 (Class 2), "section 107 of the *Community Land Management Act 1989*" will be omitted from s 18(f). Instead, "section 52 of the *Community Land Development Act 2021*" will be inserted;
- in s 20 (Class 4), "an agreement implied by section 15 of the *Community Land Management Act 1989* or" will be omitted from the definition of development contract in s 20(5). Instead, "a development contract within the meaning of the *Community Land Development Act 2021* or an agreement implied by" will be inserted.

- **Pollution:**

Marine Pollution Amendment (Review) Act 2021 – commenced 26 March 2021. Schedule 1.1[6] [66]-[70], [93], and 2.5[2] will commence on a day appointed by proclamation.

Of the amendments to the *Marine Pollution Act 2012* (**Marine Pollution Act**) that have commenced, one incorporated a statement of the Act's object to protect the waters of NSW from marine pollution and to align the Act with the *International Convention for the Prevention of Pollution from Ships* (MARPOL) (s 2A).

This Act also amended s 13 of the Marine Pollution Act to provide that a person is not liable to prosecution for an offence where the discharge does not occur in State waters but enters State waters and is regulated under a provision of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth). New offences were created relating to defective, modified, or altered sewage systems of vessels and discharge from these systems (s 55A and s 55B).

Division 4A in Pt 16 of the Marine Pollution Act was inserted (Pt 16 deals with Marine Environment Protection Notices). A notice can be given to the owner of a derelict, abandoned, or out of commission vessel to undertake specified preventative or remedial action within a period of time specified in the notice. An offence has been

created for a failure to comply, without reasonable excuse, with the terms of the notice and prosecution of these offences may heard in the LEC or the Local Court (s 234 Marine Pollution Act).

Schedule 2 contained a range of consequential amendments of other acts or regulations, including the Marine Pollution Regulation 2014.

The provisions that have not commenced will make changes relating to sewage pollution prevention certification and definitions relating to this process (updating those definitions to reflect other relevant legislative provisions; the provisions of MARPOL; or recognising requirements imposed by other States or the Northern Territory).

Bills:

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 – the second reading of this Bill was moved in the Senate on 3 August 2021. This Bill, when passed and given assent, will establish a framework for the making, varying, revoking and application of National Environmental Standards (Sch 1, s 6). Section 6 of the Bill will insert Ch 3A which will identify how the National Environmental Standards will be created, amended, or varied. The amendments proposed are in response to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) which identified a need for legally enforceable standards to underpin the effective operation of the Act.

The Bill will establish an Environment Assurance Commissioner (Sch 2) to undertake transparent monitoring or auditing (or both) of the operation of bilateral agreements with the States and Territories and Commonwealth processes under the Act for making and enforcing approval decisions.

The Bill currently provides for a staggered commencement to the proposed amendments. Sections 1 to 3 will commence on the day the Bill receives assent; Sch 1, Pt 1 and Sch 2 will commence the day after the Bill receives assent, and Sch 1, Pt 2 (contingent amendments) will commence after the later of immediately after the day of assent or immediately after Sch 5 to the *Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Act 2021* (**EPBCA (Streamlining) Act**). If item 2 of Sch 5 of the EPBCA (Streamlining) Act does not commence, then Sch 1, Pt 2 of this Bill will not commence at all.

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy (Activation Precincts) Amendment (Wagga Wagga) 2021 - commencement: 21 May 2021. Schedule 1[2] commenced on 16 July 2021. Schedules 1[15] and 2 commence on 31 December 2021.

This amendment made changes to the State Environmental Planning Policy (Activation Precincts) 2020 (**SEPP Activation Precincts**) regarding development in and around pipelines and activation precincts (hazardous or offensive industries), inserted consultation requirements, and provisions for the preservation of trees/vegetation. Amendments were made to complying and exempt developments.

Schedule 1[15] will insert Schs 2 and 3 and will commence on 31 December 2021. Schedules 2 and 3 will further amend the provisions concerning Wagga Wagga Activation Precinct.

Judgments

Supreme Court of Pakistan:

D.G. Khan Cement Company Ltd v Government of Punjab through its Chief Secretary, Lahore etc. **C.P.1290-L/2019**, **Supreme Court of Pakistan** (Manzoor Ahmad Malik and Syed Mansoor Ali Shah JJ)

Facts: DG Khan Cement Company (**petitioner**) owned and ran a cement company. The Government of Punjab (**Government**) issued Notification 8.3.2018 (**notification)** under the Punjab Industries (Control on Establishment and Enlargement) Ordinance 1963 (**ordinance**) establishing a "negative area" in the Districts Chakwal and Kushab in which no new cement plant could be set up and no enlargement or enhancement of an existing plant allowed. The petitioner appealed against the notification.

Issues:

(1) Whether the Government had jurisdiction to issue the notification;

(2) Whether the Government issued the notification in "undue haste" without a hydrological study of the area;

(3) Whether there were legal ramifications because the petitioner was not given the opportunity of a hearing;

(4) Whether the petitioner's right to freedom of trade, business and profession under Art 18 of the *Constitution of the Islamic Republic of Pakistan* (**Constitution**) was infringed; and

(5) Whether the Government had discriminated against the petitioner in breach of Art 25 of the Constitution.

Held: Notification upheld and petition dismissed:

(1) The Government had jurisdiction to issue the notification under the ordinance. Section 3 of the Ordinance regulates planning in the public interest. The zoning of areas into "positive areas" and "negative areas" was not absolute and could be reversed at the discretion of the Government. Local governments must operate within the framework established by the Ordinance: at [4]-[7];

(2) The right to freedom of trade, business and profession under Art 18 of the Constitution is "subject to such qualifications that have been prescribed by law" and the notification was a legitimate restriction on the right. The notification was a reasonable discrimination and a reasonable limit on Art 25 of the Constitution: at [8];

(3) The notification was issued in the public interest in line with the objectives of the ordinance. Studies had shown that the groundwater table had been depleted. It was not within the Court's jurisdiction to look behind the Government's decision in accepting this evidence: at [9]-[15];

(4) The Government had complied with the precautionary principle in undertaking studies assessing the effect of industry on groundwater. The environment needed to be protected in its own right, as demonstrated by legal personhood approaches: at [16];

(5) Principles of water justice should be applied in adjudicating water-related matters: at [17]; and

(6) The fragility of the "negative area" must be examined in the context of climate change, including climate justice, intergenerational justice and climate democracy: at [18]-[19].

Supreme Court of Canada:

References re Greenhouse Gas Pollution Pricing Act **2021 SCC 11**, Supreme Court of Canada (Wagner CJ and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ)

(decisions under review: *Reference re Greenhouse Gas Pollution Pricing Act* 2019 SKCA 40, 440 DLR (4th) 398; *Reference re Greenhouse Gas Pollution Pricing Act* 2019 ONCA 544, 146 OR (3d) 65; *Reference re Greenhouse Gas Pollution Pricing Act* 2020 ABCA 74, 3 Alta LR (7th) 1)

Facts: The *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (**GGPPA**) required provinces and territories of Canada to implement carbon gas pricing systems by January 1, 2019 or adopt one imposed by the federal government. The GGPPA comprised four parts and four schedules. Part 1 established a fuel charge that applied to producers, distributors and importers of various types of carbon-based fuel. Part 2 set out a pricing mechanism for industrial greenhouse gas emissions (**GHG**) by large emissions-intensive industrial facilities. Part 3 authorised the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. Part 4 required the Minister of the Environment to prepare and table an annual report.

The provinces of Saskatchewan, Ontario and Alberta each challenged the constitutionality of the first two parts and the four schedules of the GGPPA by references to their respective courts of appeal. The courts of appeal for Saskatchewan and Ontario held that the GGPPA was constitutional, while the Court of Appeal of Alberta held that it was unconstitutional. The Attorney General of British Columbia, who had intervened in the Court of Appeal of Alberta, the Attorney General of Saskatchewan and the Attorney General of Ontario appealed to the Supreme Court where the three appeals were heard concurrently.

Issues:

(1) What were the relevant principles of federalism;

(2) What was the subject matter or "pith and substance" of the GGPPA;

(3) Whether the GGPPA fell within a relevant head of power under the *Constitution Act 1867* (Canada) (**Constitution**); and

(4) Whether the GGPA was a tax.

Held:

Per Wagner CJ and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ:

(1) Federalism is a foundational principle of the Constitution. It was a legal response to the underlying political and cultural realities that existed at Confederation, and its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures. Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: at [48]-[51];

(2) Review of legislation on federalism grounds consists of a two-stage analytical approach. At the first stage, the court must consider the purpose and effects of the challenged statute or provision with a view to characterising the subject matter or "pith and substance". The second stage involves classifying the subject matter with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament: at [47];

(3) The true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. The national minimum standards would serve as a national backstop to give effect to the federal government's purpose of ensuring GHG pricing applies broadly across Canada: at [51]-[88];

(4) Parliament has jurisdiction to enact the GGPPA as a matter of national concern under the peace, order, and good government (**POGG**) clause of s 91 of the Constitution. The application of the "national concern doctrine" is strictly limited in order to maintain the autonomy of the provinces. However, the federal government has the authority to act in cases where there is a matter of genuine national concern and where

the recognition of that matter is consistent with the division of powers. There is a three-step test for identifying matters of national concern: the threshold question; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. The GGPPA passed each of these tests: at [145]-[159]

(5) Federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. The court cited the Land and Environment Court of New South Wales decision of *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257; [2019] NSWLEC 7 in support of its finding that a province's failure to act or refusal to cooperate would in this case have "grave consequences for extraprovincial interests": at [189];

(6) While the GGPPA did impact on provincial autonomy, the impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level. The GGPPA's impact on the provincial sphere was minimal because the GGPPA only creates an emission pricing floor, retaining provinces and territories' abilities to create their own polices to meet emission reduction targets, including carbon pricing: at [196]-[206]; and

(7) The term "carbon tax" is often used to describe the pricing of carbon emissions. However, the GGPPA was not a tax as understood in the constitutional context. The fuel and excess emission charges imposed by the Act were constitutionally valid regulatory charges and not taxes: at [212]-[219].

Per Côté J (dissenting in part):

(8) The GGPPA cannot be said to accord with the matter of national concern because the breadth of the discretion conferred on the Governor in Council results in the absence of any meaningful limits on the power of the executive. The Governor in Council's power to determine whether a province's carbon pricing mechanisms are sufficiently stringent vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing schemes: at [222]-[260]; and

(9) The provisions in the GGPPA that permit the Governor in Council to amend and override the GGPPA itself violate the Constitution, and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers: at [262]-[295].

Per Brown J (dissenting):

(10) The GGPPA is not supported by any source of federal authority, and it is therefore wholly *ultra vires* Parliament. The GGPPA's subject matter falls squarely within provincial jurisdiction. The GGPPA is better characterised as falling under the property and civil rights power, which is vested in the provinces under s 92(13) of the Constitution. The fact that the GGPPA's structure and operation is premised on provincial legislatures having authority to enact the same scheme is fatal to the constitutionality of the GGPPA under Parliament's residual authority to legislate with respect to matters of national concern for the peace, order, and good government of Canada under the Constitution: at [342]-[351]; and

(11) Allowing the legislation of "minimum national standards" to be deemed a national concern involves the "modernisation" of the national concern doctrine and opens the floodgates to more easily invade provincial jurisdiction, and has the potential to upset the fundamental distribution of legislative power under the Constitution: at [415]-[427].

Per Rowe J (dissenting):

(12) The national concern doctrine is a residual power of last resort and should only be used where the matter does not fall under any enumerated heads and cannot be distributed among the existing heads of powers. Faithful adherence to the doctrine leads to the conclusion that the national concern branch of the POGG power cannot be the basis for the constitutionality of the GGPPA. The scope of the national concern doctrine must be limited to matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap: at [474]-[534]; and

(13) The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not strictly applied to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would disappear. An expansive interpretation of the national concern doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority: at [535]-[615].

Hague District Court:

Milieudefensie et al. v. Royal Dutch Shell plc. **ECLI:NL:RBDHA:2021:5337** (Hague District Court)

Facts: Milieudefensie/Friends of the Earth Netherlands and six other plaintiffs alleged Royal Dutch Shell (**RDS**) had violated its duty of care under Dutch law by emitting greenhouse gas emissions that contributed to climate change. The plaintiffs sought a ruling from the Hague District Court (**HDC**) that Shell must reduce its greenhouse gas emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Climate Agreement.

Article 7(II) Regulation (EC) No 864/2007 (**EC Regulation**) stated that non-contractual obligations arising from environmental damage should be determined pursuant to Art 4(I) EC Regulation, unless the person seeking compensation for the damage chose otherwise. Article 4(1) EC Regulation held that the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Issues:

(1) Whether the class actions were admissible under the Dutch Civil Code (**Code**);

(2) Whether Art 7(II) EC Regulation and therefore Art 4(I) EC Regulation was applicable; and

(3) Whether RDS had an emissions reduction obligation.

Held:

(1) Class actions cannot be brought under the Code on behalf of current and future generations worldwide. However, Dutch residents and inhabitants of the Wadden region may be part of the class action under the Code. One plaintiff, ActionAid, had objectives directed overseas and is therefore not admissible, however other plaintiffs operating in the Netherlands are admissible: at [4.2.4], [4.2.5];

(2) The concept of protection underlying Art 7(II) and that the general rule of Art 4(I) is applicable insofar as the class actions seek to protect the interests of the Dutch residents, also leads to the applicability of Dutch law. [4.3.7];

(3) Under Book 6, s 162 of the Code, RDS has an obligation to reduce greenhouse gas emissions. This stems from an unwritten standard of care laid down in the Code which means that acting in conflict with what is generally accepted according to unwritten law is unlawful: at [4.4.1];

(4) The standard of care includes the need for companies to take responsibility for Scope 3 emissions, especially where these emissions form the majority of a company's emissions, as is the case for companies that produce and sell fossil fuels: at [4.4.19];

(5) The claim that a reduction obligation would have no effect because such emissions would be substituted by other companies is rejected. It is acknowledged that RDS cannot solve this global problem on its own. However, this does not absolve RDS of its individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence: at [4.4.33];

(6) The EU Emissions Trading System (**ETS**) would have no effect on orders made by the HDC because the ETS applies only to some of the emissions within the EU and does not cover emissions outside the European Union. The standard of care requires RDS to reduce all global emissions that will harm Dutch citizens: at [4.4.47]; and

(7) RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions. It is up to RDS to design the reduction obligation, taking account of its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. This obligation includes the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible: at [4.4.55].

Germany - Federal Constitutional Court:

Neubauer et al v Germany **(2021) 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20**

Facts: Germany's Federal Climate Protection Act, the *Bundesklimaschutzgesetz* (**KSG**), aims to implement Germany's obligations under the Paris Agreement. Under s 3(1) KSG, greenhouse gas (**GHG**) emissions must be reduced by at least 55% by 2030, relative to 1990 levels. Section 4(1) KSG, in conjunction with Annexure 2 KSG, sets out the annual allowable GHG emission amounts for various sectors in line with reduction quotas for the target year 2030. There were no provisions in the KSG for targets beyond 2030. Rather, s 4(6) KSG provided that in 2025 the Federal Government must set annually decreasing emission amounts for further periods after the year 2030 by means of ordinances.

The Basic Law, *Grundgesetz* (**GG**), is the constitution of Germany. Article 2(2) GG sets out a right to personal freedoms, including a right to life and physical integrity. Article 14(1) GG sets out the right to property and Art 20a GG sets out rights to the protection of "natural sources of life", including the right to freedom and right to life and physical integrity. A group of youth complainants challenged the KSG on the basis that the emission reduction targets were insufficient and violated their human rights as protected by the GG.

Issues:

(1) Whether the complainants had standing to lodge a constitutional complaint;

(2) Whether risks posed by climate change violated protection of Art 2(2) GG and Art 14(1) GG;

(3) Whether, in failing to mandate emission reductions targets beyond 2030, the KSG unacceptably limited the freedoms protected by the GG;

(4) Whether s 3(1) and s 4(1) KSG violate Art 20a GG; and

(5) What were the obligations of the legislature in setting emissions targets.

Held:

(1) The complainants who are natural persons have standing. However, the two environmental organisations do not have standing to lodge a constitutional complaint. Standing is not available under the GG to environmental organisations acting as "advocates of nature": at [52]-[53];

(2) The complainants failed to show violation of Art 2(2) GG and art 14(1) GG. The state's duty to protect under Art 2(2) GG includes the obligation to protect life and health from the impacts of climate change. It also establishes an obligation to protect future generations. However, the legislature has broad discretion in fulfilling these duties. The claimants failed to show that the legislature has exceeded its decision-making scope by basing its approach on targets set out in the Paris target: at [144]-[153];

(3) The emission targets in the KSG fail to satisfy the principle of proportionality in that they create disproportionate risks of interference with future fundamental freedoms. The failure to set emissions targets beyond 2030 limits intertemporal guarantees of freedom. Fundamental rights under Art 20a GG protect the complainants against threats to freedom caused by the greenhouse gas reduction burdens being unilaterally offloaded onto the future. The legislature failed to take precautionary steps to ensure a transition to climate neutrality: at [182]-[183];

(4) The provisions have an advance interference-like effect on the freedoms protected by the GG. The possibility to exercise protected freedoms in ways that directly or indirectly involve GHG emissions come up against constitutional limits because GHG emissions make a largely irreversible contribution to climate change and, under the GG, the legislator may not allow climate change to progress without taking action. Any exercise of freedom involving GHG emissions will be subject to increasingly stringent, and constitutionally required, restrictions. In order to be constitutional, the advance interference-like effect of current emission provisions − an effect that arises not only de facto, but also de jure − must be compatible with the objective obligation to take climate action as enshrined in the GG: at [184]-[187];

(5) The claimants failed to show that s 3(1) and s 4(1) KSG violated Art 20a GG. The obligation to take climate action arising from Art 20a GG is not invalidated by the fact that the climate change is a global phenomenon which cannot be resolved by the mitigation efforts of any one state on its own. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. However, the legislature has discretion in implementing its duties under Art 20a, and it was not established that it violated the obligation to take climate action arising from Art 20a GG: at [199]-[207]; and

(6) The KSG provided for the updating of the reduction pathway for greenhouse gas emissions in a manner that is insufficient under constitutional law. The procedural requirements of this process were not stringent enough and did not set down all necessary aspects of developing the targets within the required timeframe. The legislature must, at a minimum, determine the size of the annual emission amounts to be set for periods after 2030 itself or impose more detailed requirements for their definition by the executive authority responsible for issuing the ordinance: at [261].

High Court of Australia:

MZAPC v Minister for Immigration and Border Protection **[2021] HCA 17** (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

Facts: The appellant, a citizen of India, had applied to the Refugee Review Tribunal (**Tribunal**) for a merits review of a decision refusing him a protection visa under the *Migration Act 1958* (Cth) (**Migration Act**). The Secretary of the Department of Immigration and Border Protection made a s 438 notification to the Tribunal under the Migration Act in relation to the appellant's criminal record, which included a dishonesty offence. This notification was not disclosed to the appellant and was not referenced in the Tribunal's decision.

The Federal Circuit Court dismissed an application for judicial review of the Tribunal's decision. The appellant appealed to the Federal Court (**FCA**). Before the FCA, the Minister for Immigration and Border Protection (**Minister**) conceded that the Tribunal's failure to disclose the notification to the appellant constituted a breach of procedural fairness, however, contested the materiality of that breach. The FCA found that the question of materiality turned on whether disclosure could realistically have resulted in the Tribunal having made a different decision, and that this could only be answered in the affirmative if it found that the Tribunal had taken into account information contained in the notification in making its decision. The FCA held that the appellant bore the onus of proof to establish materiality. The FCA dismissed the appeal because it was unable to find on the evidence before it that the Tribunal had taken the information in the notification regarding the appellant's dishonesty offence into account. The appellant appealed to the High Court of Australia.

Issues:

(1) Who bore the onus of establishing materiality;

(2) Whether the FCA erred by acting on a presumption of fact that the Tribunal did not take information covered by the notification into account because there was no reference to that information in its reasons; and

(3) Whether the FCA erred in confining its consideration of the materiality of the non-disclosure of the notification to the offence of dishonesty.

Held: Appeal dismissed with costs (unanimously); appellant bore the onus of establishing materiality (per Kiefel CJ Gageler, Keane and Gleeson JJ):

Kiefel CJ Gageler, Keane and Gleeson JJ

(1) The decision in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 (***SZMTA***) was correctly applied below. The Tribunal's breach of procedural fairness did not result in jurisdictional error: at [4];

(2) The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was breached could not be answered without determining the basal factual question of how the decision was in fact made. The counter-factual fell to be determined as a matter of reasonable conjecture within the parameters set by the historical facts determined on the balance of probabilities: at [38];

(3) The burden was on the appellant to prove on the balance of probabilities the historical facts necessary to enable the FCA to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with the requirement for procedural fairness: at [39], [60];

(4) There was no basis in the evidence to ground a finding that the Tribunal took the appellant's dishonesty offence into account in assessing the appellant's credit to reject the appellant's claim to fear harm if he was returned to India: at [73]-[74]. Nothing in the Tribunal's statement of reasons or in the evidence adduced contained any indication that the Tribunal had taken an adverse view of the appellant's credit that was incapable of explanation other than by reference to it having treated him with distrust because he had been convicted of the offence of dishonesty: at [75]-[76]. The Tribunal's statement of reasons did not include any real assessment of the appellant's honesty: at [77]; and

(5) With respect to the question of whether the FCA erred in only considering the dishonesty offence, similarly, there was no evidential basis to ground a finding that the Tribunal took any part of the information covered by the notification into account in making its decision: at [80].

Gordon and Steward JJ

(6) For the purpose of materiality, the appellant only had to identify an error and establish that the identified error *could* realistically have resulted in a different decision. Establishing the latter proposition did not necessarily involve leading evidence and demonstrating what is possible on the balance of probabilities. Rather, the task should be characterised as one of persuasion: at [85];

(7) Once that error was identified by the appellant, the respondent bore the onus of proving that the error was immaterial to the decision reached: at [85]-[86], [90], [123]. To the extent that such a finding was inconsistent with *SZMTA*, it was important to note that onus was not the subject of submissions and was not decisive of the result in that decision*: at [*88];

(8) This conclusion was compelled by fundamental principles, namely, the rule of law; the constitutional relationship between the Executive and the judicial branch; the relationship between individuals and the State; and, in particular, the role of the judicial branch in the protection of the individual against incursions of executive power: at [99], [103]. It was also consistent with the ordinary rule that the burden of proof should be allocated to the party seeking to rely on an additional or special matter in support of a ground of defeasance or exclusion to deny a right to another party in a particular case, the approach taken in other areas of public law, and with practical considerations: at [109]-[123];

(9) The Tribunal's reasons did not disclose any real assessment of the appellant's honesty: at [149]. The Minister thus established that the denial of procedural fairness was immaterial: at [152]; and

(10) It was unnecessary to decide whether the FCA erred in holding that only dishonesty offences were capable of impacting upon the credibility of the appellant before the Tribunal: at [151].

Edelman J

(11) For reasons of history, authority, principle, and coherence, the reasons of Gordon and Steward JJ were favoured: at [155]. Any finding to the contrary in *SZMTA* was not authoritative because that issue was not argued in that case: at [198];

(12) Any conclusion on onus will depend on the relevant statute and irrespective of the location of the onus, the FCA has a duty to determine whether the judgment was infected by error: at [156]-[157];

(13) While the FCA was wrong to impose an onus of proof to establish materiality on the appellant, ultimately, the FCA's findings of fact were correct: at [200]; and

(14) The following matters supported the inference that the information contained in the notification had no effect on the Tribunal's reasons: there was no express reference to the notification information in the Tribunal's reasons; the Tribunal made no mention of the exercise of its discretion under s 438(3)(a) of the Migration Act; the information itself was of marginal relevance to the issues before the Tribunal; the Tribunal did not reach any positive conclusion that the appellant had lied in relation to any issue; and the Tribunal accepted significant parts of the appellant's evidence: at [202]-[205].

Federal Court of Australia:

Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7) **[2021] FCA 237** (Yates J)

Facts: Mr Sanda was one of a class of persons (**applicant group**) within a class action and lived in the Rote/Kupang Region of Indonesia. The applicant group alleged that PTTEP Australasia (**respondent**) was negligent in allowing an uncontrolled oil spill to occur at their well in the Montara oil field in the region of Ashmore Reef and Cartier Islands, which started in August 2009. The oil spill was alleged to have continued unabated for more than 10 weeks. The applicant group, who are red seaweed (***Rhodophyta***) farmers, alleged that the oil from the oil spill made it to their coastline and caused the loss of their seaweed crops. The applicant group alleged that the respondent owed them a duty of care, breached that duty, and lost their crop as a result of the respondent's negligence. The applicant group claimed damages for the loss of their seaweed crop and loss of production between 2009 and 2014. The applicant group had the limitation period extended under s 44 of the *Limitation Act 1981* (NT). The applicant group brought the proceedings to the Federal Court of Australia (**FCA**) under Pt IVA of the *Federal Court of Australia Act 1976* (Cth).

Issues:

(1) Were factors, other than Montara oil, responsible for the loss of the seaweed crop in the Rote/Kupang Region;

(2) Was the evidence given by the local community members reliable due to the length of time since the incident in question;

(3) Did Montara oil cause, or materially contribute to, the loss of the seaweed crop in the Rote/Kupang Region: at [1008]-[1019];

(4) Did a duty of care exist between the respondent and the applicant group of the Rote/Kupang Region;

(5) Was an uncontrolled release of oil (hydrocarbons) reasonably foreseeable to impact the coast of the Rote/Kupang Region: at [1027]-[1040];

(6) If a duty of care existed, did the respondent breach that duty;

(7) Did the applicant group suffer a loss or damage;

(8) Could a surrogate species, brown kelp (***Phaeophyta***), be used to determine the effect of oil, weathered or "fresh", on the target species of red algae; and

(9) If Montara oil was responsible for the loss or damage of the seaweed crop in the Rote/Kupang Region, what was the quantum of damages.

Held: Respondent breached duty of care to applicants; respondent to pay damages; further submissions on geographic impact for further hearing:

(1) The lay witness evidence was considered to be valid, even with the length of time between the event and the hearing, as the event would have been so remarkable, the effects so rapid, and experienced by many people among whom it would have been a topic of discussion, that the event "fixed in their minds": at [217];

(2) Other factors, such as ice-ice, climate change, high sea surface temperatures, ship traffic, coral spawning, natural oil seeps, or ocean acidification were responsible for the death and damage to the seaweed crop in Rote/Kupang: at [1002], [1007], [1009];

(3) The oil from the blowout at the Montara Oil Well reached the coast of Rote/Kupang: at [1008], [1165];

(4) The oil from the Montara Oil Well blowout caused, or, at least, materially contributed to the loss of the seaweed crop in the Rote/Kupang Region: at [1008], [1019];

(5) There are multiple mechanisms/pathways by which seaweed can be damaged or killed by fresh or weathered oil and a precise mechanism of death was not required: at [1010], [1014], [1019];

(6) Brown kelp cannot be used as a surrogate for red algae because they are very different groups of organisms: at [1012];

(7) A duty of care was owed to the people of the Rote/Kupang Region by the respondent and included the "avoidance of physical harm (not merely the avoidance of pure economic loss"): at [1040], [1043];

(8) The fact that the respondent had not modelled a long-term, uncontrolled spill did not absolve the respondent from a duty of care; had the respondent conducted the modelling for an uncontrolled, long-term spill, the respondent would have seen the very high likelihood (90%) of oil reaching the coast of Rote/Kupang: at [1038]-[1039];

(9) It was reasonably foreseeable to a person in the respondent's position that a failure to properly suspend operation of the well could lead to an uncontrolled release of oil (hydrocarbons) further illustrating that the respondent owed a duty of care to the people of the Rote/Kupang Region: at [1040], [1164];

(10) The respondent breached its duty of care owed to the applicant group: at [1050];

(11) The oil from the Montara Oil Well caused, or materially contributed to, the death and loss of the seaweed crop in the Rote/Kupang Region: at [1051];

(12) Even though riddled with uncertainty, the loss suffered by the applicant group could be calculated: at [1058];

(13) The quantum of damages was determined to be 421,662,000 Indonesian Rupiah (**IDR**), however, this was discounted by 40% due to the uncertainty inherent within many of the production projections for the years 2009-2014, resulting in a final amount of 252,997,200 IDR to be converted into Australian Dollars: at [1161], [1170]; and

(14) Interest on damages would be heard should this be a contentious issue.

Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment **[2021] FCA 560** (Bromberg J)

Facts: Eight Australian children (**children**) represented by their litigation representative, Sister Marie Brigid Arthur, brought proceedings against the Minister for the Environment (**Minister**). The children claimed that the Minister owed them a duty of care when exercising her power under s 130 and s 133 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to decide whether to approve an extension to a coal mine in northern New South Wales, the Vickery Coal Project (**Extension Project**).

Issues:

(1) Whether there was reasonable foreseeability of harm;

(2) Whether there was control, responsibility and knowledge on the part of the Minister;

(3) Whether vulnerability, reliance and recognised relationships pointed toward a duty of care;

(4) Whether the posited duty of care is incoherent with administrative law principles;

(5) Whether the extent and potential indeterminacy of liability pointed to the rejection of a duty of care;

(6) Whether no duty of care should be owed in respect of the exercise of power by a statutory authority involving matters of public policy;

(7) Whether there was a duty of care; and

(8) Whether an injunction should be issued.

Held: Injunction refused:

(1) A reasonable person in the Minister's position would foresee that the children are exposed to a real risk of death or personal injury from both heatwaves and increasing extent and ferocity of bushfires caused by climate change. However, the children did not demonstrate a real risk of climate change induced personal injury in relation to "indirect impacts", comprising changes to physical systems, biological systems and ecosystem structure and function, or "flow-on impacts", described as being brought about by social, economic and demographic disruption: at [204], [246], [225], [235];

(2) The CO2 emissions from the Extension Project increases the risk of the children being exposed to harm, particularly in the context of the risk profile which plausibly arises should the "tipping cascade" be triggered and engage a 4℃ trajectory. Although the risk of exposure to harm made by the approval of the extraction

of coal from the Extension Project may be characterised as small, in the context of there being a real risk that even an infinitesimal increase in global average surface temperature may trigger a 4℃ Future World trajectory, the Minister's prospective contribution is not so insignificant as to deny a real risk of harm to the children. These conclusions are bolstered by principles of ecologically sustainable development and the precautionary principle: at [74]-[90], [249], [252]-[257];

(3) The Minister has direct control over the foreseeable risk because it is her exercise of power upon which the creation of that risk depends. There a direct relation between the exercise of the Minister's power and the risk of harm to the children resulting from the exercise of that power. The Minister has substantial and direct control over the source of harm and also control which flows from the situation of responsibility which the Minister occupies. Her control is enhanced by her knowledge of the potential consequences of the conduct within her control. The salient features of control, responsibility and knowledge tend strongly in support of the existence of relations between the Minister and the children sufficient for the common law to impose a duty of care: at [271], [273]-[274], [284], [288];

(4) The children are extremely vulnerable to a real risk of harm from a range of severe harms caused by climate change. The vulnerability of the children has a nexus with the Minister because the source of their exposure to risk includes the impugned conduct of the Minister. The scope of the recognisable duty of care cannot, in this case, extend beyond personal injury. However, those risks of harm are sufficient in themselves to establish especial vulnerability. That the children rationally look to the Minister for assistance in relation to their vulnerability demonstrates that, in their relations with the Minister, there exists a form of dependency encapsulated by reliance as a salient feature. The innocence of the children is also deserving of recognition and weight in a consideration of the relationship between the children and the government they look to for protection: at [289], [295], [299], [312];

(5) A duty of care may co-exist with a statutory discretion. The concern of the EPBC Act for human health and safety is reflected expressly in provisions of that Act. Human safety is a relevant mandatory consideration in relation to a controlled action which may endanger human safety. The lives and safety of the children must be taken into account by the Minister when determining whether to approve or not approve the controlled action. When weighed and taking into account that statutory discretion is subordinate to statutory purpose, there is no observable incoherence or, at least, no sufficient incoherence to regard this salient feature as determinative. However, the scheme of the EPBC Act contains no suggestion that property damage or economic loss must be considered by the Minister: at [357], [398], [399], [403]-[410], [414], [416];

(6) The size of a class of potential claimants may be very wide. There are three matters which serve to deny a determinative negative role for indeterminacy. First, the posited duty of care is only concerned with personal injury where indeterminacy commonly has no role to play. Second, the Minister is informed (including by this proceeding) or has the capacity to be sufficiently informed, at least in global terms, about the likely number of potential claimants and the likely nature of their claims. Third, the fact that others would share responsibility greatly diminishes the ubiquitous cry of immense liability which underpinned the Minister's submission about indeterminacy. It may well be the case that the fractional increase in global average surface temperature attributable to the impugned prospective conduct of the Minister may reflect the fractional responsibility that will be attributable to the Minister for that conduct: at [437], [469]-[471];

(7) A common law duty of care would not interfere with the statutory task given to the Minister. The imposition of a duty of care does not mandate the Minister's decision. The EPBC Act itself imposes an obligation upon the Minister to take into account the personal safety of the children. The intervention of the common law would not render tortious all or a multitude of activities that involve the generation of greenhouse gases. It does not follow from the recognition of a duty of care based on the relationship between the Minister and the children that the Minister owes a duty of care to others or that anyone else involved in contributing to greenhouse gas emissions owes the same duty: at [481], [488];

(8) Coherence, control, vulnerability and reliance all assume especial relevance in an assessment of whether a novel duty of care should be recognised. Coherence was agnostic, but even if it is to be treated as tending against the recognition of a duty of care, control, vulnerability and reliance are affirmative of a duty being recognised. Indeterminacy and the policy considerations are also largely agnostic but if they tend in any direction it may be said that they tend against a duty being recognised. Reasonable foreseeability strongly favours the recognition of duty of care. In totality, the relations between the Minister and the children answer the criterion for intervention by the law of negligence: at [490]; and

(9) An injunction should be refused. A more nuanced response from the Minister, something short of unconditional approval, was necessarily unavailable as a reasonable response to the foreseeable harm to

the children. By pre-empting the Minister's decision, the injunction which is sought may deny rather than induce the reasonable response which the duty of care requires: at [501], [502].

New South Wales Court of Appeal:

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces **[2021] NSWCA 112** (Meagher and Leeming JJA, Preston CJ of LEC)

(decision under review: *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2020] NSWLEC 159 (Duggan J))

Facts: AQC Dartbrook Management Pty Ltd (**Dartbrook**) had made an application to modify a development consent for an underground coal mine (**Dartbrook Mine**) in the upper Hunter Valley. The modification application (**Mod 7 Application**) was made under s 75W of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) by means of legislation that saved these (now repealed) provisions. The Independent Planning Commission (IPC), as delegate of the Minister for Planning and Public Spaces (**Minister**) approved in part and refused in part the Mod 7 Application. Dartbrook appealed to the Land and Environment Court against the IPC's decision.

Dartbrook and the Minister participated in a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) and an agreement was reached. After the agreement was published online, Hunter Thoroughbred Breeders Association (**HTBA**) applied to be joined as a party to the proceedings. The primary judge ordered that HTBA be joined as a party to the proceedings under s 8.15(2) of the EPA Act. The primary judge's main basis for joinder was to allow HTBA to raise the contention that the decision, agreed under s 34(3) of the Court Act, was not a decision that the Court could have made in the proper exercise of its functions. Dartbrook sought leave to appeal against the primary judge's decision to join HTBA.

Issues:

(1) Whether power of joinder was available under s 8.15(2) of the EPA Act;

(2) Whether joinder was capable of being supported by an alternative source of power, being r 6.24 of the Uniform Civil Procedure Rules (**UCPR**);

(3) Whether the primary judge erred in joining HTBA on the basis that it would raise contentions regarding the question of jurisdiction;

(4) Whether the primary judge erred in concluding that merit considerations warranted joinder;

(5) Whether joinder was legally unreasonable.

Held: Appeal upheld; second respondent to pay appellant's costs of appeal:

Per Preston CJ of LEC, Meagher and Leeming JJA agreeing:

(1) Section 8.15(2) of the EPA Act is not available to support HTBA's application for joinder. The right of appeal provided by s 75W(5) of the EPA Act continued in force by the transitional provisions and this constituted a distinct right of appeal. The consequence is that Dartbrook's appeal against the IPC's determination of the request to modify the development consent was an appeal under s 75W(5), which is not an appeal under Div 8.3 of the EPA Act: at [3], [142]-[154].

Per Meagher and Leeming JJA:

(2) Rule 6.24 of the UCPR is an available source of power for HTBA's joinder: at [3];

(3) Following the agreement between Dartbrook and the Minister, the Court must be satisfied that the decision to which the parties have agreed is one which the Court could have made in the proper exercise of its jurisdiction: at [9];

(4) A person who contends that a court lacks power to dispose of proceedings pursuant to s 34(3) is not thereby a necessary party to those proceedings. The fact that an objector wishes to make submissions on whether a decision is one which the Court could have made in the proper exercise of its powers, which would not otherwise have been raised by the parties, does not make the objector a necessary party: at [12];

(5) HTBA was not a "necessary" party within the meaning of the second limb of r 6.24. First, HTBA does not enjoy any legal interest which is affected by the outcome of the litigation. Second, the statutory scheme reflected in s 34 would be subverted if, by reason of a willingness to make a submission on the precondition to the power, an objector was entitled to become a party. Thirdly, there are other mechanisms for addressing the position where there is doubt whether the decision is one which could have been made in the proper exercise of its functions short of joining the objector as a party. One is by participation as an amicus. [15], [17], [19].

(6) Having allowed the appeal on Ground 1A, it is inappropriate to address Ground 1. There is no good reason to resolve a point which the appellant would prefer not to be decided, in circumstances where that point was not advanced at first instance and where it was not as fully argued as it might be in this Court, and which (as is noted below) may not need to be decided at all. The Court below can determine on remitter whether the decision reached following the conciliation conference is one which the Court could have made in the proper exercise of its functions; if so, then the Court must dispose of the proceedings in accordance with that decision: at [20], [28]

Per Preston CJ of LEC:

(7) The validity of the primary judge's decision to join HTBA as a party to the appeal is not necessarily affected by the primary judge mistaking the source of power to make the decision: at [155];

(8) Rule 6.24(1) UCPR is not an available source of power capable of supporting the primary judge's decision to join HTBA to the proceedings because the primary judge did not consider and form an opinion of satisfaction regarding all of the requirements upon which a valid exercise of power in r 6.24(1) depends: at [175];

(9) The jurisdictional question raised by HTBA was a matter in dispute in the proceedings, regardless of whether it was a matter in dispute between the parties: at [179]-[181];

(10) Circumstances in which courts have held joinder of a person as a party is "necessary" fall into two main categories: first, where the determination of the matters in dispute in the proceedings will affect the person to be joined in some material respect, such as directly affecting their rights or interests, and secondly, where the person to be joined can assist the Court in the determination of the matters in dispute: at [187];

(11) Besides being joined as a party, there are two potential other modes of presence of a person in an administrative or merits review appeal in the Court - under s 38(2) Court Act, and as an amicus curiae. The availability of these powers to allow a person to be present at the conciliation conference in order to assist the Court in the determination of the matters in dispute in the proceedings has the consequence that the joinder of a person as a party, the particular mode of presence allowed by r 6.24(1), may not be necessary to the determination of the matters in dispute in these proceedings: at [196], [197], [199].

(12) The jurisdictional question raised by HTBA was that the Court had no jurisdiction to dispose of the appeal in accordance with the decision agreed between the parties because the terms of that decision require the Court, first, to grant leave to Dartbrook to amend the application it had made under s 75W(2) requesting the Minister to modify the development consent and, second, to approve the application to modify the consent as so amended. The primary judge did not err in joining HRBA to raise this jurisdictional question as it was reasonably arguable: at [207];

(13) Contrary to the assumption of the parties, there is no power to amend a request or an application to modify a development consent or an approval. No question therefore arises as to the scope of the power to allow the amendment of the request to modify the development consent sought by Dartbrook and the Minister: at [227];

(14) There is no express or implied authority in the EPA Act allowing a proponent to amend its application to modify a development consent or an approval, or to allow a proponent to amend an application to modify a development consent or an approval prior to determining the application. The Court, on an appeal against the determination of a consent authority of an application or request to modify a development consent or an approval, therefore has no power to allow an applicant to amend the application to modify the development consent or approval. Nor does the Court have any power under s 64 of the *Civil Procedure Act 2005* (NSW) or Pt 19 of the UCPR to amend, or to allow the amendment of, the application or request for modification of a development consent or an approval: at [228], [252], [256], [260];

(15) The decision to allow the "minor amendments" of the application to modify the development consent is not a decision that the Court could have made in the proper exercise of its functions. The primary judge,

therefore, committed no error in holding that HTBA's contention that the Court lacked jurisdiction to allow the amendment of the application to modify the development consent was reasonably arguable. Indeed, it was more than reasonably arguable, it was correct. Despite being for incorrect reasons, the outcome is the same: at [270];

(16) The reasoning of the primary judge has a logic and a foundation in the operation of s 34(3) and (4) of the Court Act. It does not reveal a material error of law sufficient to warrant appellate intervention in a discretionary decision on a matter of practice and procedure. Even if there were to be error, it would not be vitiating: at [306], [307]; and

(17) Dartbrook has not established that the primary judge made an error of law of a kind sufficient to found an appeal under s 57(1) of the Court Act. The primary judge did not fail to consider the fact that HTBA did not have a right of appeal to the Court, and did not misunderstand that the parties sought for the Court to grant approval on conditions: at [319].

New South Wales Court of Criminal Appeal:

Tropic Asphalts Pty Ltd v Snowy Monaro Regional Council **[2021] NSWCCA 24** (Macfarlan JA, Button and Ierace JJ)

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

Facts: Tropic Asphalts Pty Ltd (**Tropic**) was granted development consent by Snowy Monaro Regional Council (**Council**) on 13 January 2015 to operate a temporary, mobile, batching plant at Rock Flat. This plant was to supply asphalt for a nearby RMS roadwork operation. Conditions placed on the development consent limited asphalt production to less than 150 tonnes per day throughout the life of the operation (**Condition 4**) and limited the number of trucks entering/exiting the site to no more than 12 per day (**Condition 6**). The mobile plant was removed in May 2015 after the completion of the roadworks. On 3 February 2015, the Council Planning Manager from the Cooma office had discussions with someone who was described as Tropic's Plant Manager. From that conversation, there were suggestions of multiple breaches of conditions 4 and 6 of the development consent. On 11 February 2015, RMS's Works Manager e-mailed the Council with information on the tonnage supplied by Tropic during the period of 21 January to 6 February 2015. In May of 2015, the Council sought information through the *Government Information (Public Access) Act 2009* (NSW) to obtain documents from RMS regarding the supply of asphalt by Tropic to the RMS. The request resulted in only a limited number of documents being supplied to the Council. The documents were redacted regarding business and financial information. On 3 September 2015, the Council served a notice upon the RMS under s 119J of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), as it was then enumerated. The notice required the production of documents related to compliance with conditions 4 and 6 of the development consent. The requested documents included "contracts between RMS and Tropic, delivery records and records of conversations in relation to the delivery of asphalt by Tropic to RMS". A notice was served upon Tropic on 1 December 2015. Tropic replied to the notice through their solicitors stating that the 119J notice was "beyond power and therefor a nullity". The Council commenced proceedings against Tropic in the LEC on 19 December 2016 alleging breaches of s 76A(1)(b) and charged under s 125(1) of the EPA Act. The Council served a subpoena on 23 December 2016 requesting the same documents that were the substance of the 119J notice; the subpoena is the matter under appeal. On 25 August 2017, Moore J found "that the Council's charges were in part defective for duplicity but that leave to amend might be able to be given". On 27 November, Moore J found that leave to amend could be given, but on a limited basis; the Council was limited to alleged breaches of conditions 4 and 6 for a single day with respect to each. On 1 February 2017, Tropic filed a Notice of Motion to have the subpoena from the Council set aside or to deny the Council access to documents that were the subject of the Council's subpoena. The application was refused by Moore J on 16 September 2020 and formed the basis for the appeal to the NSWCCA.

Issues:

(1) Was the issue of the subpoena for a legitimate forensic purpose;

(2) Should the scope of the subpoena have been limited and did its scope constitute an abuse of process;

(3) Could the issue of the subpoena been appropriate to overcome inadequacies;

(4) Was the issue of the subpoena an abuse of process; and

(5) Is it an abuse of process to issue two separate notices requesting the same information.

Held: Leave to appeal refused (Macfarlan JA, Button and Ierace JJ agreeing):

(1) The subpoena was issued to obtain documents that would be relevant to the Council's "proof of its charges" and this is a legitimate purpose for the issuing of a subpoena: at [34];

(2) It is common practice in litigation to rectify inadequacies, since the applicant continually expressed that the information request pursuant to a s 119J notice of the EPA Act was invalid; it was reasonable to remedy that potential position by requesting documents through an appropriate avenue, such as a subpoena: at [35]-[38];

(3) The issuance of a subpoena to access documents was for valid forensic purposes: at [39];

(4) It is not an abuse of process to issue two notices requesting the same information if there is a *bona fide* reason: at [44]; and

(5) There was no abuse of process by not limiting the subpoena to require the production of documents for the two days that were alleged to have breaches: at [54];

(a) Because limiting documents to the two days in question would not necessarily provide proof of the breach, the documents that covered a wider range of days was a cautious approach for the Council and gave the Council "more than one means of proving its case" by allowing estimation/calculation of tonnage and truck movements on the days in question: at [50];

(b) A wider date range for the documents would allow for tendency or coincidence evidence to be examined: at [51];

(c) The wider range of dates covered by the documents requested would allow the Council to refute a defence of honest and reasonable mistake, should Tropic raise that defence: at [52]; and

(d) The wider date range for the requested documents would likely be relevant in a sentencing hearing: at [53].

Supreme Court of New South Wales:

Doyle's Farm Produce Pty Ltd as trustee for Claredale Family Trust v Murray Darling Basin Authority **[2021] NSWSC 369** (Adamson J)

Facts: Doyle's Farm Produce Pty Ltd, John Doyle, Coobool Downs Pastoral Co Pty Ltd, Rodney Dunn, and Valerie Dunn (**plaintiffs**) filed an amended Statement of Claim on 1 December 2020 against the Murray-Darling Basin Authority (**Authority**; **first defendant**) and the Commonwealth (**second defendant**; **vicarious liability**) under the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**). The plaintiffs were agriculturalists in the Central Murray Region who had allocated water entitlements for irrigation under the *Water Management Act 2000* (NSW). The plaintiffs alleged that the first defendant was negligent when exercising its powers and functions. The allegations were that the Authority released water from the Menindee Lakes and the Hume and Dartmouth Dams, which resulted in overland transfers of water through the Barmah-Millewa Forest at various times between October and December of 2017, 5 September 2018, and 2 January 2019. The defendants filed a defence against the further amended Statement of Claim that relied upon ss 42, 43A, 44, and 46 of the Civil Liability Act, which limits the liability of public authorities. The defendants also submitted that they did not owe a duty of care to the plaintiffs. The plaintiffs by way of a Notice of Motion sought to have the paragraphs of the defence relating to the protections limiting liability of public authorities struck from the defence.

Issues:

(1) For the purpose of s 41 of the Civil Liability Act, are the Murray-Darling Basin Authority, its delegates, or the Commonwealth (**defendants**) "public or other authorities";

(2) Does Pt 5 of the Civil Liability Act provide protection for the Murray-Darling Basin Authority, its delegates, or the Commonwealth regarding negligent acts or omissions;

(3) Does the notion of "no reasonable defence" operate in this matter; and

(4) Should parts of the defence be struck out.

Held: Impugned paragraphs of the defendants' defence struck out; defendants to pay the plaintiffs' costs of the motion:

(1) The Murray-Darling Basin Authority and its delegates do not fall within the definition of a public authority for the purposes of s 41 of the Civil Liability Act, because the appropriate authorities for the Act are those of the New South Wales Government: at [10], [40]-[41];

(2) Because the defendants do not fall under the definition of "public authority" in the Civil Liability Act, Pt 5 does not operate: at [10], [40]-[41];

(3) "No reasonable defence" does not mean a defence that can be reasonably argued, but means a defence that is not available at law and may be struck out pursuant to r 14.28(1)(a) of the UCPR: at [48]; and

(4) It was appropriate for those paragraphs contained within the defence to be struck out as the defences referred to were not available at law to the defendants: at [62].

GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3) **[2021] NSWSC 252** (Stevenson J)

(related decisions: *GC Group Co Pty Ltd v Bingo Holdings Pty Ltd* [2020] NSWSC 598 (Stevenson J); GC Group Co Pty Ltd v Bingo Holdings Pty Ltd (No 2) [2020] NSWSC 1360 (Stevenson J))

Facts: GC Group (**plaintiff**) purchased recycled aggregate from Bingo Holdings (defendant) for a residential development in Albion Park. The plaintiff alleged that the defendant supplied contaminated aggregate and the plaintiff was required to carry out "substantial reconstruction works at its own cost" because of the contamination, which resulted in loss and damage. The plaintiff brought action against the defendant for breach of contract and breaches of "alleged representations and consumer warranties under the *Australian Consumer Law*". On 20 May 2020, Stevenson J ordered that specific paragraphs be struck out from the defendant's response alleging that this was an apportionable claim matter for the purpose s 34 of the *Civil Liability Act 2002 (NSW)* (**Civil Liability Act**). On 31 July 2020, the defendant sought leave to amend its response and re-plead apportionable liability; leave was refused on 6 October 2020. The defendant filed a further Notice of Motion to amend its response again to plead apportionable liability after supplying a closed class of "persons" who could be concurrent wrongdoers.

Issues:

(1) If apportionable liability is pleaded as a defence, must a particular, concurrent wrongdoer be identified;

(2) Can a closed class of defendants be used as concurrent wrongdoer in apportionable liability matters;

(3) What are the proper constructions of ss 34(2) and 35 of the Civil Liability Act regarding the identification of concurrent wrongdoers in an apportionable liability matter; and

(4) Must the plaintiff plead a cause of action against the concurrent wrongdoer in an apportionable liability matter.

Held: Leave to amend refused; defendant to pay plaintiff's costs of the motion:

(1) The defendant in an apportionable liability matter must be able to show that there is at least one other "person" whose acts, or omissions contributed to the loss/damage of the plaintiff: at [22];

(2) A closed class of persons cannot be used as the concurrent wrongdoer because the plaintiff would not be able to identify and subsequently join a "person" to the proceedings for the wrongful act or omission: at [30];

(3) The proper construction of ss 34(2) and 35 of the Civil Liability Act does not permit the use of an unidentified concurrent wrongdoer in an apportionable liability matter: at [33]-[53]; and

(4) It is necessary for the defendant to show that the plaintiff has a cause of action against the concurrent wrongdoer: at [55].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Black Hill Residents Group Incorporated v Marist Youth Care Limited (t/as Marist180) (No 5) **[2021] NSWLEC 43** (Pain J)

Facts: The Black Hill Residents Group (**applicant**) commenced civil enforcement proceedings to restrain Marist Youth Care Limited (**Marist**) from carrying out an activity at residential premises in Black Hill (**property**). Marist was providing intensive therapeutic transitional care (**ITTC**) services at the property pursuant to an agreement with the second respondent Minister for Families, Communities and Disability Services (**Minister**) acting through the Department of Family and Community Services (**FACS Agreement**). The applicant argued that the activity conducted at the property required development consent under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) because, first, the use was not correctly characterised as a "transitional group home" as defined in cl 42(1) of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP Affordable Rental Housing**) and, second, that the activity was not being carried out "on behalf of a public authority" for the purposes of cl 43(1)(a) of the SEPP Affordable Rental Housing. The property was zoned E4 Environmental Living pursuant to the Newcastle Local Environmental Plan 2012.

Issues:

(1) Whether the activity being conducted at the property was a transitional group home; and

(2) If the activity was a transitional group home, was the transitional group home being conducted on behalf of a public authority.

Held: Summons dismissed; costs reserved:

(1) The activity being conducted at the property was appropriately characterised as a transitional group home as defined in cl 42(1) of the SEPP Affordable Rental Housing. The property operated as a single household of less than 10 bedrooms with paid supervision: at [64]. The primary purpose of the property was as a refuge providing temporary accommodation for vulnerable young people. A transitional group home was permitted in the E4 zone by operation of the SEPP Affordable Rental Housing: at [129]-[143]; and

(2) The Department of Family and Community Services was a public authority (**FACS**): at [8]. The structure of the FACS Agreement and the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**Care Act**) placed highly prescriptive obligations on Marist. The Minister had ultimate responsibility for these young people under the Care Act and had delegated this responsibility to Marist. Marist was acting on behalf of FACS in providing an ITTC facility at the property: at [144]-[150].

Blues Point Hotel Property Pty Ltd v North Sydney Council **[2021] NSWLEC 27** (Duggan J)

Facts: Blues Point Hotel Property Pty Ltd (**applicant**) sought a declaration that the first-floor external terrace of Blues Point Hotel at McMahons Point benefits from existing use rights for the purposes of a "pub" as defined under the North Sydney Local Environmental Plan 2013 (**NSLEP 2013**). The premises is on land zoned R3 Medium Density Residential under the NSLEP 2013 which designates development for the purposes of a pub, hotel or licensed premises as prohibited. The premises consists of a public bar, lounge, dining area and external terrace on ground floor level, and a public bar, private dining room and short-term accommodation on the first floor. A Publican's Licence (**PL**) was issued to the premises in 1959, and in 2016 Justice Liquor & Gaming New South Wales advised there was no evidence to confirm that the first-floor external terrace was licensed.

Issues:

(1) Whether the whole of the premises, including the first-floor external terrace, benefited from an existing use, pursuant to s 4.65 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), for the purpose of a hotel as defined under the North Sydney Planning Scheme Ordinance 1963 (**NSPSO**);

(2) Whether the use of the first floor external terrace at the relevant date, being 19 April 1963 when the NSPSO was commenced and first prohibited hotels in the zone, is a continuation of an existing use by s 4.66(2)(b) of the EPA Act; and

(3) Whether the use of the first-floor external terrace for hotel patrons is an enlargement, expansion or intensification of an existing use which requires development consent pursuant to s 4.66(2) of the EPA Act.

Held: Summons dismissed; costs reserved:

(1) At the relevant date, the whole of the premises was being used for the purposes of a hotel as defined in the NSPSO. The planning use is defined by reference to the *Liquor Act 2007* (NSW), so the enquiry is whether the premises specified in the PL is the whole of the premises. It was appropriate to draw the inference that the whole of the land and building was specified in the PL, and further that the hotel was not being used for two separate and independent uses of hotel and accommodation: at [66];

(2) There is no evidence as to the actual physical use of the first-floor external terrace at the relevant date, therefore there is no continuing existing use. The question of whether s 4.66(2)(b) limits the use of the first-floor external terrace at the relevant date requires a determination on the evidence of the extent to which the area of the first-floor external terrace was actually physically used prior to the relevant date. If there is an increase in that area, then it does not comprise a continuation of an existing use for s 4.66: at [88]; and

(3) As the first floor external terrace was not being used at the relevant date, and the evidence discloses that the first floor external terrace has been made available for seating, consuming food and beverages and is serviced by hotel staff, the current use represents an intensification or enlargement of an existing use contrary to s 4.66(2)(c). This finding was made as a matter of completeness: at [107].

Lu v Walding (No 2) **[2021] NSWLEC 21** (Pain J)

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

Facts: Ms Lu and Mr Woo (**applicants**) commenced judicial review proceedings challenging the grant of a development consent (**DC**) by the Northern Beaches Council (**Council**) to their neighbours, Mr and Mrs Walding (**Waldings**) for a detached garage with roof terrace. The Council filed a submitting appearance. The Waldings' garage was substantially built but not complete when proceedings were commenced. The garage is located on land at the front of the Waldings' property owned by the Council. The Waldings and the Council were unaware of this fact at the time the DC was granted by the Council. The public notice of determination of the DC was published in July 2017 for the purposes of former s 101 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act)**. The applicants commenced these proceedings outside the three-month period in s 101 of the EPA Act.

Issues:

Judicial review challenge

(1) Whether the absence of the landowner's consent, the development being on the Council's land, was an absence of a jurisdictional fact that was required to enliven the Council's power to grant the DC under the EPA Act;

Time bar

(2) Whether proceedings brought by the applicants are time-barred pursuant to s 101 of the EPA Act. The Attorney-General of New South Wales intervened to make submissions on the scope of s 101 in light of *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 422 (***Pallas Newco***) and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1 (***Kirk***);

Exercise of discretion to allow JR proceedings out of time

(3) Whether the applicants have demonstrated that the Court should exercise its discretion to extend the time to commence proceedings pursuant to r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**);and

Exercise of discretion to grant relief

(4) If the DC is invalid, whether the Court should exercise its discretion to order demolition of the garage or make alternative orders.

Held: Extension of time to commence proceedings granted; Council's failure to provide landowner's consent rendered consent invalid; timetable set for consideration of remedial final orders and costs:

Jurisdictional error found

(1) No written consent was provided by the Council for the garage to be built on the Council's land. In granting the DC, the Council was not implicitly providing landowner's consent because it was unaware that it needed to do so: at [57]-[62];

(2) The Council's failure to provide landowner's consent was a jurisdictional error: at [63]-[66];

Time bar

(3) In *Pallas Newco*, the Court of Appeal held that s 101 of the EPA Act protected development consents from challenges on grounds of jurisdictional error, save only for errors identified in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53 (***Hickman***). The High Court's decision in *Kirk* does not require a change from the approach in *Pallas Newco*. As *Pallas Newco* continues to apply, the *Hickman* principles must be considered*: at [*103]-[122];

(4) Whilst the applicants' challenge was time-barred by s 101 of the EPA Act, the jurisdictional error comes within the *Hickman* principles because landowner's consent is an "essential" prerequisite to a consent authority's determination of a development application (**DA**). It is not an error protected by s 101 of the EPA Act: at [123], [135];

Commencing proceedings out of time allowed under the UCPR

(5) The Waldings applied for DC over land which they did not own. Their error was compounded by the Council's inadequate records which meant Council staff did not identify the error. No boundary survey or site plan was lodged with the DA. The use of the rooftop terrace was having substantial privacy impacts on the applicants. There would be substantial financial prejudice to the Waldings caused by the passage of time if the relief sought of demolition was granted given building was almost complete. The applicants only became aware that the DC allowed the Waldings to build on the Council's land once building commenced: at [251]-[263];

(6) Leave to commence and continue these proceedings should be granted under r 59.10 of the UCPR: at [264];

Final orders for consequential relief yet to be made

(7) The Court did not consider that demolition was warranted. Measures to ameliorate the privacy impacts on the applicants should be implemented. The parties were to discuss ameliorative measures to propose to the Court to enable final orders to be made: at [265]-[276].

- **Compulsory Acquisition:**

Eureka Operations Pty Ltd v Transport for New South Wales **[2021] NSWLEC 41** (Duggan J)

Facts: Eureka Operations Pty Ltd (**applicant**) held a leasehold interest in 131-133 Cobra Street, Dubbo (**site**) on which it operated a Coles Express fuel station and convenience store. The site is located on the south-eastern corner of an intersection. On 21 June 2019, the respondent compulsorily acquired part of the site comprising 15.3 square metres for the purposes of upgrading the intersection. Prior to the acquisition, the configuration of the intersection permitted relatively free access to and from the site in all directions of travel.

As a result of the public purpose works, vehicles were no longer able to undertake various manoeuvres to and from the site, resulting in a consequential net decrease of 47.2% of the numbers of vehicles attending the site. The respondent awarded the applicant compensation for the acquisition and the applicant objected to the amount of compensation offered pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**).

Issues:

(1) The determination of the appropriate valuation approach to determine the claim under s 55(f) of the Land Acquisition Act;

(2) The determination of the length of the applicant's lease for the purposes of the hypothetical transaction;

(3) Whether the hypothetical purchaser is an independent or "networked operator" of service stations;

(4) The determination of the date when the public purpose manifested impact on the subject property; and

(5) The assessment of disturbance costs for legal fees and valuation costs.

Held: Respondent to pay compensation of $633,070.72 plus statutory interest; respondent to pay applicant's costs:

(1) The appropriate valuation methodology is a "before and after" assessment of the value of the applicant's lease, having regard to the discounted cashflow of the service station use, and adopting the applicant's potential earnings before interest taxes depreciation and amortisation (**EBITDA**) as the indication of the base earnings capacity the market would utilise to determine that value: at [103];

(2) The applicant lease term for the purposes of the hypothetical transaction required to be assumed for the purposes of s 55(f) is the term provided for in the registered lease: at [109];

(3) The hypothetical purchaser would be a well-resourced networked operator. While the service station use would be attractive to both networked and independent operators, in a competition between the two, a networked operator would pay more the entitlement to occupy and use the site and therefore, would likely be the successful purchaser is offered to the market: at [20];

(4) Due to the proximity of the acquisition date to the date published for commencement of works, any reasonable purchaser would have determined value of the land on the assumption that the impacts would immediately commence with the commencement of construction. Whilst the full consequence on access may not have been felt until completion some 12 months later, it would not be unreasonable in circumstances where there was no quantification of the immediate impacts, to value the land as if the impacts were to manifest from the date of acquisition: at [140]; and

(5) In relation to legal costs, the costs of the traffic engineer were claimable as disturbance under s 55(a) of the Land Acquisition Act. Where a legal practitioner determines that further advice is required from another qualified person to enable them to provide the legal services of advising on the offer, it would be inconsistent with the legislative purpose to compensate the dispossessed owner for only part of the fees required to be incurred to enable the legal advice to be provided. In relation to valuer fees, the fees incurred by a person who was not a qualified valuer at the time are not recoverable. To be recoverable all of the fees must be fees of a "qualified valuer" as defined in s 59(2) which does not include someone who has not effected registration at the date of providing the valuation advice.

***Raymond Boutros Azizi v Council of the City of Ryde; Alnox Pty Limited v Council of the City of Ryde* [2021] NSWLEC 40** (Moore J)

Facts: The Council for the City of Ryde (**Council**) compulsorily acquired three parcels of land in North Ryde on 24 August 2018. One parcel was acquired from Mr Raymond Azizi (**Mr Azizi**) while the other two were acquired from Alnox Pty Limited (**Alnox**)(collectively, the **Azizi interests**). The land was acquired by the Council pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**). The land was acquired because the Council rezoned the land from R2 Low Density Residential to RE1 Public Recreation as defined in the Ryde Local Environment Plan 2014 (**RLEP 2014**) in order to increase the area of Blenheim Park. The Azizi interests then applied to the Council seeking relief under the hardship provisions of Div 3, Pt 2 of the Land Acquisition Act to progress the acquisition. On 20 November 2019, the process undertaken by the Valuer General (**VG**) to determine the compensation payable to Azizi interests was deemed

to be "effective" as was ordered to be completed again: *Council of the City of Ryde v Azizi* [2019] NSWSC 1605, per Payne J. One consequence of the Supreme Court proceedings was the production of Consent Orders that stated that funds would be advanced to the Azizi interests directly and some funds would be transferred to a third party on behalf of the Azizi interests. Additional funds ($5 million) were also held in trust pending the outcome of a further determination of the value of the Azizi interests' lands by the VG. The Council continued to maintain funds in the trust account even though it was no longer necessary, after the revaluation of the land; these revaluations were contested by the Azizi interests pursuant to s 66 of the Land Acquisition Act: the VG's revaluation was $3,981,185 for Mr Azizi and $5,994,438 for Alnox, while the Azizi interests contended that $7,364,060 was payable in total to Mr Azizi and $11,335,940 to Alnox. These differences in valuation were the result of the Azizi interests' town planner submitting that the up-zoning potential was to R4 High Density, while the Council stated that the R2 zoning did not have "any appropriate probability of being disturbed" These differences in the potential up-zoning of the land affected the compensation amounts provided by the parties and was the subject of two appeals. While the Council has no statutory right to challenge the VG's determination, it may when there is a contested claim from the dispossessed owner. The Council, therefore, argued that the VG's valuation is too high in the circumstances as a result of these proceedings.

The Azizi interests were concerned that the advanced payment regime of the Land Acquisition Act - ss 48 and 68(2)(a) - had not been carried out by the Council. On 14 January 2021, each Azizi interest filed a Notice of Motion seeking orders that the Council be required to make additional payments to fulfil the balance for the acquisition of land pursuant to s 68(2)(a) of the Land Acquisition Act. The Azizi interests sought payment of 90% of the value of the land allowable under the Land Acquisition Act for the difference between the VG's determination and the initial, advance payments already paid, interest from the date of acquisition (24 August 2018), and costs.

Issues:

(1) Does s 48(2)(a) mandate the Council to pay the additional funds to the Azizi interests being the difference between the amount already paid and 90% of the values contained in the Compensation Notice of 10 March 2020;

(2) Does the Court have the power to order the maintenance of the trust account as a financial, protective mechanism on a statutory basis; and

(3) Does the Court have the power to order the maintenance of the trust account as a financial, protective mechanism on a discretionary basis.

Held: Respondent ordered to pay each Azizi interest the amount necessary to bring the advance payments to 90% of the VG's determination (plus statutory interest); payment to be made within 14 days; respondent to pay costs of the Azizi interests:

(1) The Court did not have the power, on statutory grounds, to order the maintenance of the "protective measure" proposed by the Council: at [67], [73];

(2) If the Court had the power to order the maintenance of the trust account for protective measures, it would not be appropriate for the Court to exercise its discretion because there was no certainty that Mr Azizi would not be able to satisfy an order for repayment, should one arise: at [109]; and

(3) If the Court had the power to order the maintenance of the trust account for protective measures, it would be appropriate in the circumstances for Alnox because of the potential shortfall that would be faced by Alnox should an order for repayment arise: at [118].

- **Criminal:**

***Burwood Council v Mehedin Abdul-Rahman* [2021] NSWLEC 46** (Pepper J)

Facts: Mr Abdul-Rahman pleaded guilty to two offences of contravening s 4.2(1) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) and one offence of procuring the contravention of that provision pursuant to s 9.50(3A) of the EPA Act.

The offences arose as a result of Mr Abdul-Rahman undertaking development on his land in Croydon Park (**land**) absent development consent as required under the applicable environmental planning instruments

(**EPIs**). The first Summons charged Mr Abdul-Rahman with having procured the removal of seven trees on the land (**tree offence**). The second Summons related to Mr Abdul-Rahman's demolition of a dwelling and garage on the land (**demolition offence**). The third Summons particularised Mr Abdul-Rahman's construction of a single-storey dwelling and in-ground swimming pool on the land (**construction offence**).

Issue: The appropriate sentence to be imposed on Mr Abdul-Rahman.

Held: Mr Abdul-Rahman fined $40,000; ordered to pay prosecutor's costs:

(1) The unlawful development undertaken by Mr Abdul-Rahman offended both the objects of the EPA Act and the relevant EPIs and subverted the integrity of the planning regime established by those statutory instruments: at [51].

(2) The three offences caused minimal harm, namely, to amenity and to the integrity of the planning regime: at [57]-[64].

(3) There was no evidence to the criminal standard that Mr Abdul-Rahman committed the tree offence intentionally, recklessly, or negligently: at [69]. Mr Abdul-Rahman conceded that he carried out the demolition and construction offences intentionally. That is, he knew that he required consent to carry out those works but had not obtained it: at [70].

(4) The tree offence was committed for financial gain. Mr Abdul-Rahman conceded that it was carried out to "save money": at [72]. There was no evidence, however, to the criminal standard that the demolition and construction offences were also committed for this reason: at [73].

(5) An aggravating factor in the sentencing exercise was that the tree offence was committed for financial gain: at [84].

(6) The objective seriousness of the tree offence was low: at [79]. Because the demolition and construction offences were committed intentionally, the objective seriousness of those offences was moderate: at [80].

(7) Mitigating factors weighing in Mr Abdul-Rahman's favour included that the harm to the environment was not substantial; he had no prior convictions; he entered a plea of guilty at the earliest opportunity, entitling him to the total discount of 25%; he demonstrated contrition and remorse; he had good prospects of rehabilitation; and he was otherwise of good character: at [85]-[98].

(8) A consideration of general deterrence was warranted so as to ensure that owner-builders obtain all requisite consents to carry out development: at [104].

(9) Although Mr Abdul-Rahman demonstrated contrition and remorse, an element of specific deterrence was warranted in the imposition of an appropriate sentence, particularly because the demolition and construction offences were committed intentionally: at [106].

(10) Evidence regarding Mr Abdul-Rahman's home loan and the fact that he had earned no income in the 2019 financial year was insufficient to ground any finding that Mr Abdul-Rahman would be unable to pay any monetary penalty likely to be imposed upon him by the Court: at [113].

(11) The tree offence was of a slightly different character to the demolition and construction offences having been charged as an offence of procuring a contravention of s 4.2(1) of the EPA Act pursuant to s 9.50(3A) of that Act. However, the totality principle nevertheless applied to all three offences because they all involved a breach of s 4.2(1) of the EPA Act and related to the same course of conduct, that is, Mr Abdul-Rahman's development of the land for the purposes of the construction of a new dwelling: at [119]-[120].

(12) After the application of a 25% discount for Mr Abdul-Rahman's early guilty plea and the totality principle, Mr Abdul-Rahman was fined $15,000 for the tree offence; $15,000 for the demolition offence; and $10,000 for the construction offence: at [121]-[124].

Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd **[2021] NSWLEC 37** (Pepper J)

Facts: In separate Summonses, Charlotte Pass Snow Resort Pty Ltd (**Resort**) was charged with one offence of polluting waters between 9 July and 24 September 2019 in contravention of s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) (**pollute waters offence**) and one offence of breaching

a condition of its Environment Protection Licence (**EPL**) from 9 July to 18 September 2019 in contravention of s 64(1) of the POEO Act (**breach of licence offence**).

The pollute waters offence arose after the Resort discharged partially treated effluent containing elevated levels of ammonia and nitrogen from its sewage treatment plant (**STP**) through a pipe, into an unnamed tributary of Spencers Creek in order to avoid an uncontrolled discharge. On 26 and 27 July 2019, a Resort employee also sprayed effluent onto the snow surrounding the STP with a snow gun.

The breach of licence offence Summons alleged that the Resort contravened Condition O2.1(a) of its EPL by failing to maintain diffusers installed in three tanks in the STP in a proper and efficient condition.

By way of Notices of Motion, the Resort sought orders to set aside the Summonses on the basis of duplicity, or in the alternative, requiring the prosecutor to elect to seek leave to amend the Summonses to avoid the duplicity.

Issues: Whether the Summonses were bad for duplicity.

Held: The pollute waters offence Summons was bad for duplicity; the licence offence Summons was not duplicitous:

(1) Adopting the reasoning in *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263, each instance of discharge of effluent into the tributary or onto the snow was a complete offence against s 120(1) of the POEO Act as at the moment of discharge. The discharges were not one continuous offence because each discharge was discrete, planned, and manually carried out: at [99].

(2) The alleged conduct could not be unified into a single criminal enterprise because the discharges took place over three months, were not uniform in volume, and resulted in different quantities of pollutant entering the environment surrounding the STP: at [101]. The fact that the method of discharge was almost uniformly consistent and that the Resort's intention remained the same throughout the charge period was not enough to establish a single criminal enterprise: at [102].

(3) The snow gun discharges on 26 and 27 July 2019 were not close in time, space, or method, to the other alleged offences. This alone was enough to ground a finding of duplicity in respect of the pollute waters offence Summons: at [104].

(4) In relation to the breach of licence offence Summons, as a matter of construction, each diffuser was not a separate piece of "plant" for the purpose of Condition O2.1(a) of the EPL. Critically, the diffusers were part of an integrated aeration system and could not be operated individually: at [123]-[127], [128].

(5) Additionally, it was clear that a duty was imposed upon the Resort as the holder of the EPL to maintain all plant in a proper and efficient condition as per Condition O2.1(a) of the EPL. The failure by the Resort to do so contravened that condition and constituted a continuous contravention of s 64(1) of the POEO Act: at [137]-[139].

(6) That the poor condition of the diffusers pre-existed the commencement of the charge period did not matter provided that the condition continued uninterrupted into, and throughout, the charge period, which it did: at [142]-[144]. Therefore, the offence was one known to law and was not statute-barred: at [145].

(7) No formal orders were entered regarding the pollute waters offence pursuant to the prosecutor's request that in the event the Court found against it, the Court refrain from making formal orders to enable it to review the judgment and consider whether it would request the Court to submit a question of law arising at or in reference to the proceedings to the Court of Criminal Appeal for determination pursuant to s 5AE of the *Criminal Appeal Act 1912* (NSW): at [153].

Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd (No 2) **[2021] NSWLEC 48** (Pepper J)

(related decisions: *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* [2021] NSWLEC 37 (Pepper J))

Facts: Charlotte Pass Snow Resort Pty Ltd (**resort**) was charged with a pollute waters offence against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

By Notice of Motion (**NOM**), the resort sought to quash and set aside the Summons on the grounds that it was duplicitous. In the alternative, the resort sought orders to put the prosecutor to an election to amend the Summons to avoid the duplicity, if possible.

Before the Court delivered its judgment on the NOM the prosecutor requested that in the event that the Court found against it, the Court refrain from making formal orders to enable the prosecutor to consider whether it would approach the Court to submit a question of law arising at or in reference to the proceedings to the New South Wales Court of Criminal Appeal (**NSWCCA**) for determination pursuant to s 5AE of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**).

In *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* [2021] NSWLEC 37 (***Charlotte Pass***), the Court found that the Summons was bad for duplicity and, consistent with the prosecutor's request, refrained from making formal orders with respect to the Summons.

On the basis of the prosecutor's earlier request, and in light of the decisions in *Environment Protection Authority v Riverina Australia Pty Ltd* (2015) 90 NSWLR 57; [2015] NSWCCA 165 (***Riverina***) and *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* (2018) 362 ALR 359; [2018] NSWCCA 202 (***Tropic Asphalts***), the Court drafted two questions of law for submission to the NSWCCA pursuant to s 5AE of the Criminal Appeal Act.

The prosecutor subsequently filed a NOM requesting that the Court enter formal orders with respect to the Summons and certify that its judgment in *Charlotte Pass* was a proper one for determination on appeal to the New South Wales Court of Criminal Appeal (**NSWCCA**) pursuant to s 5F(3) of the Criminal Appeal Act.

Issues:

(1) Whether a question of law should be submitted to the NSWCCA pursuant to s 5AE of the Criminal Appeal Act or whether it was more appropriate to seek leave to appeal or certification by the trial judge under s 5F(3) of that Act; and

(2) The meaning of "question of law" in s 5AE of Criminal Appeal Act.

Held: It was appropriate to proceed by way of s 5F(3) of the Criminal Appeal Act because neither of the proposed questions was a "question of law" for the purpose of s 5AE of the Act:

(1) Applying the reasoning in *Orr v Cobar Management Pty Ltd* (2020) 103 NSWLR 36; [2020] NSWCCA 220 (***Cobar***) an appeal under s 5F(3) of the Criminal Appeal Act was the correct process to follow. The submission of a question of law to the NSWCCA pursuant to s 5AE of that Criminal Appeal Act was incorrect: at [17].

(2) The Court should proceed cautiously in responding to entreaties by prosecuting authorities not to make formal orders upon the delivery of reasons in interlocutory determinations in criminal matters: at [17].

(3) The fact that the resort would not be entitled to its costs were it successful in an appeal instituted under s 5F of the Criminal Appeal Act (whereas it would have been under a s5AE appeal) was not relevant to the question of whether the NSWCCA had jurisdiction under s 5AE of that Act to consider the proposed questions: at [25]-[26].

(4) It was clear that both proposed questions were not "pure questions of law", and therefore, did not enliven the NSWCCA's jurisdiction under s 5AE of the Criminal Appeal Act. This was because the legal principles in *Charlotte Pass* were settled and were not in dispute. Rather, it was the application of those principles to the facts as found by the Court that the prosecutor contested. The draft questions of law constituted questions which may ultimately disclose an error of law depending upon the analysis of facts, but required scrutiny of those facts. In other words, they did not constitute a "question of law" for the purpose of s 5AE of the Criminal Appeal Act: at [39].

(5) The Court was not bound by the NSWCCA's acceptance of similar questions of law regarding duplicity pursuant to s 5AE of the Criminal Appeal Act in *Riverina* and *Tropic Asphalts*. Those cases were decided prior to *Cobar* and without the benefit of the issue being raised and discussed before the Court: at [40].

(6) The judgment in *Charlotte Pass* was a proper one for determination on appeal given the vexed question of whether or not the Summons was duplicitous: at [41].

Environment Protection Authority v Eastern Creek Operations Pty Limited (No 2) **[2021] NSWLEC 39** (Pain J)

(related decision: *Environment Protection Authority v Eastern Creek Operations Pty Limited* [2020] NSWLEC 182 (Pain J))

Facts: Eastern Creek Operations Pty Limited (**defendant**) was charged by the Environment Protection Authority (**EPA**) with two offences under s 211(1) and (2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) of failing to comply with a Notice to Provide Information and/or Records (**notice**) issued to the defendant by the EPA pursuant to s 191(1) of the POEO Act. In order to progress a preliminary hearing under s 247G of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**), the defendant filed a Notice of Motion (**NOM**) seeking orders to dismiss the proceedings as the notice was invalid. In *Environment Protection Authority v Eastern Creek Operations Pty Limited* [2020] NSWLEC 182 (***Eastern Creek (No 1)***), Pain J held that the notice underpinning the two charges was invalid. No final orders were made as the parties disagreed on what those should be.

Appropriate final orders were the subject of this judgment. The defendant sought summary dismissal of the charges. The EPA filed a NOM seeking a determination or finding pursuant to s 247G(2) that the notice was invalid by reason of it being ultra vires s 191(1) of the POEO Act. In the alternative, the EPA proposed that a question of law should be submitted to the New South Wales Court of Criminal Appeal (**NSWCCA**) in accordance with s 5AE(1) of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**) as to whether summary dismissal could be ordered.

Issue: If the preliminary question determined pursuant to s 247G of the Criminal Procedure Act concerns a matter that is fundamental to the success of a prosecution so that a charge could not succeed if the matter were to proceed to trial, can a charge be summarily dismissed.

Held: Question of law submitted to the NSWCCA:

(1) The conclusion in *Eastern Creek (No 1)*, that the notice (as amended) which was the subject of the two charges had not been proved to be valid, meant that both charges must fail if the matter was to proceed to trial: at [28];

(2) The judgment in *Eastern Creek (No 1)*, while containing reasons, does not have a finding which enabled the outcome to be recorded as a formal act of the Court: at [30];

(3) Section 247G is part of Ch 4, Pt 5, Div 2A of the Criminal Procedure Act case management provisions. The purpose of these provisions is to allow for preliminary matters to be considered which reduce issues in dispute. A summary dismissal order would bring proceedings to a close, avoiding a costly trial: at [31], [36]-[38];

(4) There is limited case law on issues arising under s 247G of the Civil Procedure Act. *Tweed Shire Council v Furlonger* [2014] NSWLEC 156; *Lismore City Council v Ihalainen* [2013] NSWLEC 149; and *Liverpool City Council v Cauchi* [2005] NSWLEC 675 suggest that making summary dismissal orders is lawful and appropriate in these circumstances: at [40]-[43]; and

(5) At the request of the EPA, a question of law was submitted to the NSWCCA pursuant to s 5AE(1) of the Criminal Appeal Act: at [47]:

> Do I have the power to summarily dismiss a summons prior to the commencement of any trial/hearing under Chapter 4 Part 5 Division 3 of the *Criminal Procedure Act 1986* (NSW), in circumstances where, following a preliminary hearing conducted pursuant to s 247G of the Act, I have determined that a Notice to Provide Information and/or Records is invalid and the validity of the Notice is critical to an element of the charge pleaded in summons?.

Environment Protection Authority v Koppers Carbon Materials & Chemicals Pty Ltd (the Spill Incident) **[2021] NSWLEC 12** (Robson J)

(related decision: *Environment Protection Authority v Koppers Carbon Materials & Chemicals Pty Ltd (the Emission Incidents)* [2021] NSWLEC 13 (Robson J))

Facts: Koppers Carbon Materials & Chemicals Pty Ltd (**Koppers**) pleaded guilty to an offence under s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), in that it breached a condition of its Environment Protection Licence (**EPL**) requiring plant and equipment to be maintained in a proper and efficient condition. The offending conduct related to a spill of 20,000 kilograms of partially processed heated coal tar pitch at its chemical manufacturing plant. This resulted in the release of fumes containing polycyclic aromatic hydrocarbons, causing a number of people to experience short term exposure to the fumes, and the area in the vicinity of the plant to be impacted by strong odours.

The spill occurred after a power disruption to the plant, when coal tar pitch spilled out of a hole in a suction valve that had seized in a throttled position (being part way between closed and open). Koppers was aware the value had seized, had unsuccessfully sought to open it on earlier occasions, and knew it was to be later replaced.

Issue: The appropriate sentence for the offence.

Held: Koppers ordered to pay $30,000 to an environmental organisation; publication order made; ordered to pay prosecutor's costs:

(1) A breach of a condition of an EPL undermines the integrity of the regulatory scheme and the objects of the POEO Act: at [45];

(2) The offence resulted in environmental harm, but it was not substantial harm: at [53];

(3) The risk of a maintenance error causing a spill, and that harm would be caused, was reasonably foreseeable by Koppers (noting the precise cause of an incident is not required to be foreseen). Koppers was aware of the seized valve and knew it was to be replaced: at [58];

(4) There were a number of measures which, had they been implemented by Koppers prior to the incident rather than afterward, could have prevented the harm: at [60];

(5) Koppers had control over the maintenance of the plant and equipment which caused the offence: at [61];

(6) The offence is of low objective seriousness: at [63];

(7) Koppers expressed contrition and took responsibility for its actions: at [71];

(8) Koppers has no prior convictions and was of good character, which was a mitigating factor. The Court considered minimal weight was to be attributed to prior penalty notices issued to Koppers: at [72], [81], and [83];

(9) General deterrence was appropriate to emphasise that holders of EPLs need to maintain plant and equipment in a proper and efficient condition: at [86];

(10) Koppers was unlikely to reoffend and has good prospects of rehabilitation. Further it cooperated fully with the EPA investigations: at [87]-[89]; and

(11) The spill incident was not part of the same continuous course of conduct and was conceptually and temporally distinct from two other offences relating to emissions: at [97].

Environment Protection Authority v Koppers Carbon Materials & Chemicals Pty Ltd (the Emission Incidents) **[2021] NSWLEC 13** (Robson J)

(related decision: *Environment Protection Authority v Koppers Carbon Materials & Chemicals Pty Ltd (the Spill Incident)* [2021] NSWLEC 12 (Robson J))

Facts: Koppers Carbon Materials & Chemicals Pty Ltd (**Koppers**) pleaded guilty to two offences of causing air pollution by failing to operate plant in a proper and efficient manner contrary to s 124(b) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

When soft pitch is processed at Koppers' chemical manufacturing plant, fumes containing polycyclic aromatic hydrocarbons are generated. Koppers' Environment Protection Licence required these fumes to be "wet scrubbed" by a "scrubber" and then either discharged via the "scrubber stack", or directed to the "furnace" for "thermal oxidation" and then discharged.

At the time of the offences, Koppers was in the process of upgrading and automating its plant. The offences resulted from errors in the operation of valves on two consecutive days, when the flame in the furnace was extinguished. As a result, fumes were released into the atmosphere without being treated by either the furnace or the scrubber. Local workers were exposed to soft pitch fumes, and local residents complained of strong odours.

Issue: The appropriate sentence for the offences.

Held: Koppers ordered to pay a total of $52,500; publication order made; ordered to pay prosecutor's costs:

(1) A breach of s 124(b) tends to undermine the objects of the POEO Act: at [58];

(2) The emission incidences caused harm to the environment, to the extent that this harm incorporates consideration of the offensiveness of the odour produced, care should be taken when considering this potentially aggravating circumstance as a result of the *De Simoni* principle: at [68]-[69];

(3) It was reasonably foreseeable to Koppers that the flame in the furnace could go out, and that a failure to open the correct valve would cause the build-up of fumes and the subsequent release of fumes into the atmosphere, causing air pollution and harm to individuals: at [76];

(4) There were practical measures that would have prevented the risk of harm (including automation of further valves, adoption of better operating procedures, and more extensive training of operators): at [84]-[85];

(5) Koppers had control over the plant and the equipment which caused each of the offences: at [88];

(6) Each offence is of low objective seriousness: at [89];

(7) Koppers expressed contrition by taking actions in a genuine attempt to prevent further incidents from occurring, and took responsibility for its actions: at [97];

(8) Koppers has no prior convictions and was unlikely to reoffend. Koppers cooperated fully with the EPA's investigation, which is a mitigating factor: at [98], [109];

(9) Koppers was a corporation of good character which is a mitigating factor. The Court considered minimal weight was attributed to the prior penalty notices issued to Koppers: at [106], and [108];

(10) General deterrence was taken into account to emphasise that occupiers of premises must operate plant in a manner that that does not cause air pollution: at [111]; and

(11) The totality principle applies with respect to the two emission incidents as they concern the same, or very similar, course of conduct: at [117].

Environment Protection Authority v Mouawad (No 3) **[2021] NSWLEC 16** (Pain J)

(related decision: *Environment Protection Authority v Mouawad (No 2); Environment Protection Authority v Aussie Earthmovers Pty Ltd (No 3)* [2020] NSWLEC 166 (Pain J))

Facts: Mr Paul Mouawad (**respondent**) pleaded guilty to 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**). In 2016, Peter O'Brien Constructions Pty Ltd (**Peter O'Brien Constructions**) engaged the respondent's employer, Aussie Earthmovers Pty Ltd, to dispose of 84 truckloads of asbestos-contaminated waste from a building site in Darlington. The waste was to be disposed of at a landfill operated by Suez Recycling and Recovery Ltd (**Suez**). Aussie Earthmovers Pty Ltd, through the respondent, supplied Peter O'Brien Constructions with a false Ticket List Report (**Ticket List Report offence**) and Waste Disposal Dockets (**Waste Disposal Dockets offence**), purportedly created by Suez. Apart from one truckload that was correctly disposed of, the disposal location of the asbestos waste is unknown. A concurrent custodial sentence of 12 months or suitable alternative was warranted by the circumstances of the respondent's offences. Final orders on sentencing, costs and publication of the offences to be made.

Issue: The appropriate sentence for the respondent.

Held: Respondent convicted; sentenced to an aggregate term of imprisonment of 12 months for the offences; sentence to be served by way of intensive correction in the community; ordered to perform 250 hours of community service; publication order made; ordered to pay the prosecutor's costs:

(1) The respondent was assessed by the Parramatta Community Corrections Office as at a low risk of reoffending and therefore suitable for an intensive correction order: at [2]; and

(2) Separate terms of imprisonment that would have been imposed were eight months for the Ticket List Report offence and four months for the Waste Disposal Dockets offence per s 53A(2) of the *Crimes Sentencing Procedure Act 1999* (NSW): at [4].

Environment Protection Authority v Sam Abbas (also known as Osama Abbas) **[2021] NSWLEC 57** (Pain J)

Facts: Mr Abbas (**defendant**) pleaded guilty to three offences in contravention of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**)), being land pollution (s 142A(1)), transporting waste to an unauthorised location (s 143(1)); and unlawful use of a place as a waste facility (s 144(1)). From about February 2015 to May 2016, the defendant caused about 21,990 tonnes of building waste (including asbestos) to be brought onto a property adjacent to the Hawkesbury River predominantly in a flood zone. The defendant submitted that he was trying to improve and level the property, he thought it was "clean fill" and that he did not receive payment for fill brought to the property. With the former owner's agreement, the local council had deposited waste material on the property for about 40 years on a much lesser scale than the defendant. Clear environmental risks resulted from the deposition of waste on the property. The defendant acknowledged the property should be remediated and was in receipt of a draft clean-up notice under s 91(1) of the POEO Act requiring remediation estimated to cost about $661,000.

Issue: Appropriate sentences for the defendant.

Held: Defendant convicted and fined $100,000; ordered to pay the prosecutor's costs; and ordered to pay investigation costs of $80,157.24. A publication order to be made following further submissions:

Objective circumstances

(1) The principle from *R v De Simoni* [1981] HCA 31 prevented the defendant's state of mind from being taken into consideration in relation to offences against ss 143(1) and 144(1) as to do so would expose him to punishment for a more serious offence under s 115. In relation to s 142A(1), it was accepted that the defendant was trying to improve the property and not acting for financial gain. The defendant intended for material to be brought onto the property, but the EPA had not proved the land degradation offence was committed recklessly or negligently beyond a reasonable doubt: at [52].

(2) Considering factors in s 241(1) of the POEO Act, actual harm to vegetation was significant. Actual harm could not be considered caused in relation to water pollution given the limitations on what can be considered under *De Simoni*: at [45]. The likelihood of environmental harm due to potential for water pollution and land degradation was apparent: at [63]-[67];

(3) Section 241(1)(f) may be construed as requiring greater weight be given to the presence of asbestos in the environment. This provision commenced after the offences occurred and cannot be applied retrospectively: at [73]-[81]. Regardless, asbestos was relevant to considerations of environmental harm: at [82];

(4) The defendant's willingness to undertake remediation was not relevant to determining objective seriousness. Aggravating factors of financial gain and organised criminal activity were not established beyond a reasonable doubt: at [83]-[93]. Overall, the offences were in the low-to-mid range of the medium range of objective seriousness: at [97];

Subjective circumstances

(5) The defendant's late pleas of guilty attracted a 15% discount: at [99]. His expression of remorse and willingness to remediate were accepted as mitigating factors subject to a lack of evidence of any remedial action being taken to date: at [103]-[103]; and

Sentencing principles

(6) The totality principle applied as the offences were temporally and conceptually connected: at [119].

Environment Protection Authority v Sydney Water Corporation **[2021] NSWLEC 17** (Robson J)

Facts: These proceedings relate to the sentencing of Sydney Water Corporation (**Sydney Water**) for two offences of polluting water under s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) resulting from discharges of untreated sewage into Toongabbie Creek near its confluence with the Parramatta River. The offences occurred in the context of the collapse of an internal "wet well" within a pumping station that was part of Sydney Water's sewage treatment system, causing the pumping station to crack and the pumps to become inoperable and submerged by flooding.

The offences relate to two sewage discharge periods that occurred during "dry weather", which were separated by a sewage discharge during "wet weather" that was permitted under the Environment Protection Licence (**EPL**) held by Sydney Water.

Issue: The appropriate sentences for the offences.

Held: Sydney Water ordered to pay $175,500.00 to the City of Parramatta Council for the purposes of environmental projects; publication orders for newspapers, on Facebook, Twitter and Instagram; and pay prosecutor's investigation and legal costs:

(1) By polluting water in contravention of its EPL, Sydney Water undermined the objects of the POEO Act: at [81];

(2) While the parties agreed the pollution caused actual, likely and potential harm to the environment and the community, they disagreed about the extent of that harm: at [87]. The fact the water was polluted by permitted discharges was relevant to the assessment of harm, but does not mitigate the Sydney Water's objective culpability: at [91]-[92]. The comparison to be made is between the condition of the receiving environment before and after the discharge the subject of the offence: at [92]. The Court was not satisfied that the extent of the harm caused by the offences was substantial: at [100].

(3) As the owner and occupier, Sydney Water had control over the failure of the pumping station: at [113];

(4) Sydney Water was not required to foresee the precise cause of the pumping station collapse, but rather, that harm would occur as a result of a failure of the pumping station: at [123]. It was reasonably foreseeable that harm would occur as a result of a pumping station failure during peak dry weather flows, causing the discharge of sewage: at [124];

(5) Sydney Water could have undertaken practical measures (being inspection of the pumping station and rising mains) which could have prevented the harm: at [128];

(6) Each of the offences is at the mid-range of objective seriousness. The offence relating to the first discharge is of more objective seriousness than the offence relating to the second discharge: at [132];

(7) General deterrence was appropriate to ensure that large-scale sewage utilities operate in a manner that does not harm the environment: at [136]. Specific deterrence was also appropriate to reinforce Sydney Water's responsibility undertake activities without causing pollution: at [139].

(8) Sydney Water's prior convictions are suggestive of a continuing attitude of disobedience of the law, or a propensity to reoffend, which was an aggravating factor: at [144];

(9) Sydney Water accepted responsibility, acknowledged the harm caused, and therefore demonstrated genuine remorse for the commission of the offences: at [148]; and

(10) Sydney Water is of good corporate character: at [151]. It took steps to mitigate the harm caused by the offences and improve its environmental performance more generally showing good prospects of rehabilitation, however it cannot be said that Sydney Water is unlikely to reoffend: at [152]-[153]. Sydney Water cooperated with authorities: at [156].

Grant Barnes, Chief Regulatory Officer Natural Resources Access Regulator v Lidokew Pty Ltd **[2021] NSWLEC 53** (Pepper J)

Facts: Grant Barnes, Chief Regulatory Officer Natural Resources Access Regulator (**prosecutor**) filed three Summonses alleging that Lidokew Pty Ltd (**Lidokew**) committed offences contrary to s 91I(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**), or in the alternative, contrary to s 91H(2) of that Act (**meter offences**). The prosecutor filed a further Summons alleging that Lidokew committed an offence against s 60C(1)(b) of the Water Management Act, or in the alternative, an offence contrary to s 60C(2) of that Act (**allocation offence**). The charges arose from Lidokew's alleged taking of groundwater for the purpose of cotton irrigation at a rate higher than the amount reflected on the meters installed on its property and in amounts exceeding its water allocation.

Lidokew filed Notices of Motion (**NsOM**) in all four proceedings seeking to set aside the Summonses, or alternatively, an order that the prosecutor be put to an election to amend the Summonses, on the grounds that the Summonses were duplicitous and/or contained offences not known to law.

The prosecutor filed NsOM by which it proposed certain amendments to the Summonses to remedy drafting errors.

Issues:

(1) Whether the use of alternative offences in each Summons was duplicitous;

(2) Whether the s 91I(2) meter offences charges were duplicitous and/or pleaded an offence unknown to law insofar as they pleaded particulars drawn from another offence, namely, s 91H(2) of the Water Management Act;

(3) Whether the s 60C(1) allocation offence charge was duplicitous because the particulars pleaded alternative formulations of liability (namely, knowledge and a reasonable cause to believe);

(4) Whether the s 60C(1)(b) and s 60C(2) allocation offence Summons was duplicitous and/or an offence not known to law insofar as it rolled up three different water years in the one charge; and

(5) Whether the Summonses were amenable to amendment.

Held: The meter offences Summonses were not duplicitous and did not plead offences unknown to law. Leave was granted to the prosecutor to amend defects in their pleading: at [132]. The allocation offence Summons was duplicitous and proceedings on that Summons were stayed pending the prosecutor's election of a single offence: at [134]:

(1) With respect to all Summonses, there was nothing impermissible about the prosecutor charging alternative offences in the one Summons: at [48], [85]. The prosecutor's proposed amendments were permitted to remove any ambiguity: at [53], [86];

(2) With respect to the meter offences Summonses, the s 91I(2) offence charge was known to law despite the inclusion of wording from s 91H(2) in that charge. The inclusion of that wording constituted a drafting error confined to the particulars that was amenable to amendment by deletion without any prejudice to Lidokew: at [78]. The error did not raise genuine doubt about the nature of the offence with which the defendant had been charged because all elements of the offence had been pleaded in the Summonses: at [74]-[75];

(3) That the meter offences Summonses pleaded different charge periods for each alternative offence did not mean that the alternative offences did not arise out of the same event: at [81]. There was nothing impermissible or unfair in the prosecutor amending the meter offences Summonses to clarify the applicable charge periods: at [80];

(4) The pleading of alternative formulations of liability (that is, knowledge and a reasonable cause to believe) in the allocation offence Summons was not duplicitous. This was because the pleadings used the statutory language contained in s 60C(1)(b) of the Water Management Act which did not create two separate offences but created a single offence that could be established by proof beyond reasonable doubt of either knowledge or reasonable cause to believe: at [94];

(5) Having regard to the text, statutory context, and purpose of s 60C(1)(b) and (2) of the Water Management Act, there was nothing impermissible about the prosecutor framing the water allocation offence charges by reference to a time period of some months within a water year, a period covering the

duration of the water year, or a period traversing more than one water year. This did not infringe the rule against duplicity or mean the offence pleaded was unknown to law: at [120]-[122];

(6) However, having regard to the elements of the offences created by s 60C of the Water Management Act, and the manner by which the allocation offence Summons was pleaded and particularised, as conceded by the prosecutor there were three discrete occasions where the prosecutor alleged that the water taken by Lidokew exceeded its water allocation under its access licence, that is, three breaches of the Water Management Act: at [123];

(7) Given that the rule against duplicity is fundamentally concerned with fairness, there was force in Lidokew's submission that, as charged, the water allocation offence would result in prejudice to it. This was because Lidokew's state of mind could have varied over the three year charge period and therefore, as charged, it was deprived of an opportunity to rely upon any defences that were available in one water year but not in another year: at [126]-[127];

(8) The single criminal enterprise exception to the rule against duplicity did not apply to the water allocation offence because there was not a sufficiently proximate connection between the criminal acts pleaded by the prosecutor in circumstances where the commission of the alleged offences were separate in time; concerned different amounts of water; resulted in different crop volumes; comprised different conduct; and were committed with differing knowledge or beliefs: at [125]-[128]; and

(9) Because the prosecutor had been able to identify three discrete instances of a breach of s 60C of the Water Management Act the offences should have been separately charged: at [130].

Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 7) **[2021] NSWLEC 26** (Pepper J)

Facts: Leda Manorstead Pty Ltd (**defendant**) was found guilty of three charges against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for the contravention of conditions of its project approval for the development of Cobaki Estate. The approval authorised the defendant to conduct earthworks to a maximum disturbed area not exceeding 5.59 ha. From 31 July 2015 to 7 March 2017, between 40.3 to 55.4 hectares of earthworks was exposed across the defendant's development site. The prosecutor amended the second Summons five working days prior to the sentencing hearing.

The defendant also pleaded guilty to a fourth charge, namely, that it had committed an offence against s 125(1) of the EPA Act for having commenced subdivision work without a construction certificate.

Issues:

(1) Whether the offences were committed negligently or recklessly by the defendant.

(2) Whether environmental harm was occasioned or likely to be occasioned by the commission of the offences.

(3) Whether the Court ought to convict the defendant but impose no penalty.

(4) Whether the Court ought to make a publication order.

(5) Whether the defendant should pay the prosecutor's costs.

Held: Defendant convicted; fined $170,000; and publication orders made with respect to three of the offences:

(1) The offences were not committed negligently or recklessly, in fact, the defendant genuinely believed that other historical consents onsite allowed the bulk earthworks to take place: at [164]-[165], [166], [168].

(2) Between 4,891 and 9,690 tonnes of sediment mobilised offsite as a result of the defendant's conduct: at [307]. Of the sediment that mobilised offsite, some was deposited and settled in the Cobaki Broadwater in the sediment deposition zone and some remained suspended and was washed out to sea. It was impossible to determine how much settled and how much washed out to sea: at [357]-[361].

(3) Having regard to contemporaneous photographs, there was no doubt that sediment mobilised offsite into the sensitive ecosystem of the saltmarsh near the site as a consequence of the commission of the offences. How much sediment was deposited was unquantifiable: at [362].

(4) The defendant's ecologist had failed to disclose the extent of his commercial relationship with the defendant and his work on the project and therefore breached his duty of impartiality as an expert and very little to no weight could be placed on his evidence: at [406], [415], [443]-[448].

(5) Actual harm was caused to up to 28 hectares of the saltmarsh communities adjacent to the site as a result of the offending: at [450], [455].

(6) There were dust emissions that caused actual and likely harm to the amenity of residents to the north of the site occasioned by the commission of the offences: at [489].

(7) The harm occasioned by the commission of the offences was reasonably foreseeable: at [512].

(8) There were a number of practical measures the defendant should have taken to avoid the harm. The defendant should have taken positive steps to reconcile the project approval with the historical consents to verify its belief that it was permitted to exceed the 5.59-hectare limit; obtained advice from its lawyers regarding the approval; done more to ensure the timely maintenance of erosion sediment controls; and ceased operations when southerlies were prevalent to prevent excess dust emissions: at [517]-[544].

(9) In relation to the first and second Summonses, the objective seriousness of the offences was low to moderate. In relation to the third and fourth Summonses the objective seriousness of the offences was low: at [548]-[549].

(10) General deterrence was needed to ensure that developers did not assume that the works that they are undertaking are lawful. Specific deterrence was needed for the same reason and because work continued onsite: at [587]-[588].

(11) An order under ss 10(1) or 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was not appropriate given the defendant's prior offending; its non-entry of guilty pleas; it had the capacity to ensure the offences were not committed; and the need for deterrence: at [644], [650].

(12) After the application of the totality principle, the total monetary penalty imposed on the defendant for the commission of the offences was $170,000: at [656].

(13) It was appropriate to make a publication order with respect to the charges the subject of the second, third and fourth Summonses was rejected. No such order could be made in relation the first Summons because s 126(2A) of the EPA Act had not commenced prior to 30 July 2015, that is, the end of the relevant charge period provided for in the first Summons. The publication order was stayed from operation pending the outcome of any appeal: at [658], [666].

(14) The defendant's submission that the prosecutor's late amendment to the second Summons disentitled the prosecutor to costs with respect to the first and second Summonses. This was because there was no evidence that the defendant would have entered a different plea or conducted its defence differently if the amendment had been made earlier. In any case the defendant would have had to adduce evidence regarding environmental harm, this evidence being necessary to assess the objective seriousness of the offences. The defendant also did not seek an adjournment of the sentence hearing due to any prejudice. Finally, the changes to the second Summons merely amended the particulars under a provision that resulted in a lesser maximum penalty and did not go to liability: at [611].

- **Criminal Appeals from Local Court:**

McClelland v Environment Protection Authority **[2021] NSWLEC 25** (Pain J)

Facts: Mr McClelland (**appellant**) was convicted in the Local Court of an offence against s 211(3) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for wilful delay of an authorised officer in taking and removing samples per s 198(2)(b) of the POEO Act. The appellant was sentenced to pay a fine of $10,000 and ordered to pay the Environment Protection Authority's (**EPA**) costs of $25,000. The charge arose from circumstances where the appellant locked the front gates to his premises at Shanes Park preventing two EPA officers driving their car off the premises until police arrived. The appellant argued that his intention was to clarify the officers' powers to come on to his premises, not to delay them from taking and removing samples. The appeal against conviction and sentence was made pursuant to s 39 of the *Crimes (Appeal and Review) Act 2001* (NSW).

Issues:

(1) A preliminary issue arose at the outset of the appeal hearing of whether the EPA's case in the Local Court had relied on wilful delay in the taking of samples only, or in the taking and removing of samples;

(2) Whether the evidence before the Court was sufficient to establish beyond reasonable doubt that the appellant's intention in locking the front gates was to delay an EPA officer from taking and removing samples from his premises; and

(3) Severity of the sentence.

Held: Conviction and sentencing appeals dismissed and appellant ordered to pay the EPA's costs: at [114]:

Preliminary issue

(1) The EPA's case before the Local Court included reliance on delay in the taking *and removal* of samples. The EPA's case on appeal was consistent with the case that was presented in the Local Court: at [71];

Conviction issue

(2) The appellant's action of locking the gates did delay the EPA officer in carrying out the taking and removing of samples. The appellant had knowledge that this is what the officers were attempting, and he intended through his actions to prevent them or was wilfully blind to the consequences of his actions in locking the front gates until the police arrived: at [84];

Sentencing issue

(3) The matter fell within the upper end of the low range of objective seriousness. The offence was committed against a legislative provision aimed at strengthening the regulatory framework for environmental protection, had a maximum penalty of $250,000 in the Land and Environment Court and the appellant acted wilfully. The penalty imposed by the Local Court was appropriate: at [98]-[112]; and

(4) Considering the appellant's antecedents, the fact that this was not a trivial offence and there were no extenuating circumstances, dismissal of the charge or conviction with no penalty under ss 10(1)(b) or 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was not appropriate: at [107]-[108].

- **Civil Enforcement:**

***J.K. Williams Staff Pty Limited v Sydney Water Corporation* [2021] NSWLEC 23** (Preston CJ)

(related decisions : *J.K. Williams Staff Pty Limited v Sydney Water Corporation* [2018] NSWSC 981 (Hallen J); *J.K. Williams Staff Pty Ltd v Sydney Water Corporation* [2020] NSWSC 220 (Robb J))

Facts: Water flows from a creek, Boundary Creek, were significantly eroding the bank within land owned by J.K. Williams Staff Pty Ltd (**Williams**). The applicant claimed that the material cause of this erosion was discharges of treated effluent by Sydney Water Corporation (**Sydney Water**) from its sewerage treatment plant at Penrith (**Penrith STP**). The volume of discharges from Penrith STP into Boundary Creek had increased substantially after a Replacement Flows Project was commenced. Penrith STP contributed to the flows in Boundary Creek in two ways: first, it released a relatively steady baseflow and, second, it released increased flows during storm events due to unintentional entry of stormwater into the wastewater system.

Issues:

(1) What was the cause of the erosion;

(2) Whether Sydney Water had breached the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**);

(3) Whether Sydney Water had breached the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**);

(4) Whether Sydney Water had breached the *Sydney Water Act 1994* (NSW) (**Sydney Water Act**);

(5) Whether Sydney Water had breached the duty of care in relation to support for land under s 177 of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**); and

(6) Whether Sydney Water had caused private nuisance.

Held: Declaring breach of EPA Act; finding breach of s 177 of Conveyancing Act; and adjourning for determining injunctive relief:

(1) Discharges from Penrith STP were the dominant cause of the erosion: at [5]-[38];

(2) Sydney Water had carried out the Replacement Flows Project in breach of the EPA Act. Condition 1.1 of the Replacement Flows Project approval required Sydney Water to carry out the Replacement Flows Project "generally in accordance with" various documents including an Environmental Assessment of the Replacement Flows Project and a Preferred Project Report. A commitment in the Statement of Commitments in the Preferred Project Report stated: "No degradation of bed or bank stability would occur within Boundary Creek downstream of Penrith STP as a result of the Project". In causing erosion, Sydney Water had not carried out the project generally in accordance with this commitment and had breached s 75D(2) of the EPA Act in carrying out the Replacement Flows Project in breach of Condition 1.1 of the Replacement Flows Project approvals. Sydney Water was not, however, in breach of Condition 1.5 of the Replacement Flows Project approval, which was construed as capping only highly treated recycled water, which referred to water sent back to Penrith STP after further treatment at a different water treatment plant, and not all flows released from Penrith STP: at [39]-[106];

(3) Sydney Water had not caused the Williams' land to be polluted in breach of s 142A(1) of the POEO Act. The discharge of liquid from Penrith STP had not caused degradation of land within the meaning of the definition of "land pollution" or "pollution of land" in the Dictionary to the POEO Act. This was because the mere contact of the treated effluent on the surface of the bank did not cause the "degradation" of the land; the land on which the liquid was placed or introduced was not the same land that suffered the degradation; and erosion of land is not "degradation" for the purposes of the definition of "land pollution": at [107]-[144];

(4) Sydney Water had not breached its operating licence by failing to comply with a condition which required Sydney Water to meet the objectives and other requirements imposed on it in the Sydney Water Act. The objectives of the Sydney Water Act did not give rise to directly enforceable duties. The principal objectives (in s 21 of the Sydney Water Act) and special objectives (in s 22 of the Sydney Water Act) were statements of objectives of Sydney Water as a statutory corporation, rather than any identified action that Sydney Water was required to undertake. The principal objectives and special objectives were expressed as broad aspirations rather than specific actions. Even if any "duty" were to be imposed by the principal and special objectives, and by Condition 1.1 of the operating licence to meet these objectives, any such duty would be one of "imperfect obligation", having political but not legal force: at [145]-[173];

(5) Sydney Water owed Williams a duty of care imposed by s 177(2) of the Conveyancing Act "not to do anything on or in relation to land (the supporting land) that removes the support provided by the supporting land to any other land (the supported land)". The relevant action of Sydney Water ("to do anything") was the discharge of treated effluent from Penrith STP into Boundary Creek. The supporting land was the lower bank of Boundary Creek within Williams' land and the supported land was the land above and behind the lower bank that was supported by the lower bank. Sydney Water's action of discharging treated effluent from Penrith STP into Boundary Creek, from whence it flowed downstream to erode the bank of Boundary Creek in Williams' land, was "in relation to" the supporting land of the lower bank. Sydney Water's actions of discharging treated effluent from Penrith STP into Boundary Creek was a cause of the removal of the support provided by the lower bank of Boundary Creek within Williams' land to the land above and behind the lower bank. The flow of discharged treated effluent was a cause of the erosion of the lower bank, which in turn removed the support the lower bank provides to the land above and behind the lower bank: at [174]-248]

(6) No defence under s 43A of the *Civil Liability Act 2002* (NSW) was engaged. The act of discharging treated effluent from Penrith STP into Boundary Creek did not require the exercise of any special statutory power. The statutory authorisation for this discharge into Boundary Creek was sourced in the Replacement Flows Project approval granted under the EPA Act and the Environment Protection Licences (**EPLs**) granted under the POEO Act: at [249]-[262].

(7) Sydney Water did not establish the common law defence of statutory authority. The relevant statutory authorities and EPLs permitted but did not require Sydney Water to operate Penrith STP and carry out the Replacement Flows Project, or to discharge treated effluent into Boundary Creek.

Sydney Water did not establish that the erosion of the bank of Boundary Creek within Williams' land was an inevitable consequence of the carrying out of the activities of operating Penrith STP and the Replacement Flows Project: at [263]-[260];

(8) Because Sydney Water was liable in negligence under s 177 of the Conveyancing Act, Williams' right at common law to bring an action in nuisance against Sydney Water in respect of this removal of the support provided by the supporting land to the supported land was abolished: at [291]-[301]; and

(9) The Court gave directions to the parties to propose the orders they consider appropriate to remedy and restrain the breach of the EPA Act and the duty of care in relation to support of land under s 177 of the Conveyancing Act: at [302]-[318].

Lismore City Council v Gurpal Kaur Singh **[2021] NSWLEC 49** (Duggan J)

Facts: Lismore City Council (**Council**) commenced civil enforcement proceedings seeking orders and declarations in relation to its intention carry out "sewer renewal works" at 4 Zambelli Drive, Lismore. Mr Singh (**respondent**), the owner of the property, denied the Council entry to carry out the works. The proposed works included the decommissioning of the existing sewer line which ran through the respondent's backyard and leaving the decommissioned pipe in situ, the installation of a new sewer pipe to the west of the existing pipe via below surface directional drilling, and the digging of a small trench to connect the residence to the new pipe.

Issues: Whether the proposed works by the Council are capable of being characterised as works to "operate, repair, replace, maintain, remove, extend, expand, connect, disconnect, [or] improve" its works under s 59A(2) of the *Local Government Act 1993* (NSW) (**Local Government Act**).

Held: Summons dismissed; Council to pay respondent's costs:

(1) The Council submitted that the proposed works should be characterised as works to "replace" its works. The proposed works are new works and do not "replace" the existing pipe on the property as they entail the introduction of a second pipe in a significantly different location on the Respondent's property. The result would mean the respondent would be burdened with two pieces of infrastructure owned by the Council in two locations in the rear of her dwelling. The construction of the word "replace", in light of its text, context and purpose, could not entail the introduction of a second pipe in a significantly different location. The Council could not undertake the proposed works relying upon s 59A(2) as a source of power: at [42] and [45].

Queanbeyan-Palerang Regional Council v O'Connell **[2021] NSWLEC 19** (Robson J)

Facts: Queanbeyan-Palerang Regional Council (**Council**) initiated civil enforcement proceedings against Mr O'Connell (**applicant**) in relation to the importation and deposition of materials, including building waste and asbestos-containing material, and the undertaking of earthworks, on land he owned. The applicant did not appear in the proceedings, however the Court was satisfied that he had been provided with details of, and was aware of, the proceedings.

Issues:

(1) Whether the applicant failed to comply with a prevention notice issued pursuant to s 96 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**);

(2) Whether the applicant used the land as a "waste facility" without lawful authority, contrary to s 144 of the POEO Act;

(3) Whether the applicant used the land as a "waste disposal facility" (or alternatively for "disposal of waste by landfill"; or for "disposal of the materials"), in breach of s 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**);

(4) Whether the applicant undertook earthworks without development consent, in breach of s 4.2 of the EPA Act;

(5) Whether the applicant failed to comply with a stop use order issued pursuant to s 9.34 of the EPA Act; and

(6) If so, whether Council is entitled to relief.

Held: Declaratory and injunctive relief granted; respondent ordered to pay applicant's costs:

(1) The applicant did not comply with the prevention notice, as erosion and sediment controls were not installed on the land, and imported waste materials were not removed: at [91] and [92];

(2) The applicant used the land, or caused or permitted the land to be used, as a waste facility without lawful authority, as a result of the materials on the land and time period over which the materials have been on the land: at [98] and [101];

(3) The applicant used the land for "disposal of waste" and as a "waste disposal facility", being development which is prohibited under the Palerang Local Environmental Plan 2014 (**PLEP 2014**), and in breach of s 4.3 of the EPA Act: at [121];

(4) The applicant undertook earthworks on the land without development consent (where the works were not exempt development) in breach of s 4.2 of the EPA Act: at [129];

(5) The applicant did not comply with the stop use order as he continued to use the land as a waste disposal facility and continued to import further materials: at [138]; and

(6) Declaratory and injunctive relief was granted, on the basis of the seriousness of the breaches (including the sheer volume and extent of the importation and deposition of materials); the fact that the breaches are not merely technical; the continuing nature of the conduct of the applicant (who was on notice of the breaches and Council's concern for a significant time); the likely environmental harm caused by the breaches of the POEO Act and EPA Act; and the need for the orderly enforcement of public duties: at [151].

- **Valuation/Rating:**

Peter Sleiman Property Investments Pty Ltd and Anor v Valuer General of New South Wales (No 2) **[2021] NSWLEC 47** (Robson J)

Facts: The applicants appealed against two determinations by the Valuer General of New South Wales (**VG**) of objections to the valuations of a parcel of land which operated as a service station under the *Valuation of Land Act 1916* (NSW) (**Valuation Act**). The applicants contended that the VG's determinations of the land values at the relevant dates were too high.

Although all parties accepted that the land was to be valued in accordance with s 6A of the Valuation Act, the parties differed in respect of the application of this section and the resulting determination of land values.

Issues:

(1) The material that was available at the relevant dates in relation to contamination of the land (including the cost of remediation of any contamination), and the effect of this material on the valuation of the land;

(2) The effect of the applicable planning controls on the likely achievable floor space where a mixed-use development is the highest and best use on the valuation of the land;

(3) The highest and best use of the land at the relevant dates for the purposes of determining the land values;

(4) The appropriate valuation methodology to be adopted when determining the land values; and

(5) The resulting land values for the land to be determined by the Court.

Held: VG's determinations of the land values of the land were too high; land values adjusted to $4,883,000 and $5,165,000 at the relevant dates respectively:

(1) Pursuant to s 6A of the Valuation Act, when valuing the land on the basis that the highest and best use is a mixed-use development, the fact that there was, and had been, a service station on the land must be disregarded. However, when valuing the land on the basis that the highest and best use is its continuing use as a service station, the fact there was, and had been a service station on the land can be considered: at [64] and [65];

(2) The evidence before the Court demonstrates that on the relevant dates the material available indicates the existence and extent of contamination was likely to be minimal, and the cost of remediation of that contamination was likely to be relatively low. This conclusion remains the same whether or not regard is had to the evidence that a service station was, and had been, on the land: at [67];

(3) The likely cost that would be attributed to the contamination and remediation of the land (and risk thereof) where the highest and best use of the land is as a mixed-use development would be $330,000: at [75];

(4) There is no inconsistency between the relevant planning controls, meaning that the likely achievable floor space for a mixed-use development at the relevant dates (if that was the highest and best use of the land) was limited by the need to ensure compliance with the 45-degree height plane required by the Burwood Development Control Plan 2013: at [108];

(5) As a result of the findings on contamination and remediation and the applicable planning controls, the highest and best use of the land at the relevant dates was as a mixed-use development: at [135]; and

(6) The better methodology for determining the land values of the land is the direct comparison approach based on comparable sales: at [190].

- **Interlocutory Decision:**

Black Hill Residents Group Incorporated v Marist Youth Care Limited (t/as Marist 180) (No 4) **[2021] NSWLEC 11** (Pain J)

(related decisions: *Black Hill Residents Group Incorporated v Marist Youth Care Limited* [2019] NSLWEC 112 (Robson J); *Black Hill Residents Group Incorporated v Marist Youth Care Limited (No 2)* [2019] NSWLEC 137 (Robson J); *Black Hill Residents Group Incorporated v Marist Youth Care Limited (t/as Marist 180)* [2020] NSWLEC 82 (Pain J))

Facts: By Notice of Motion (**NOM**), Black Hill Residents Group Incorporated (**applicant**) sought leave to file a third further amended Summons under s 64(1) of the *Civil Procedure Act 2005* (NSW). The principal ground alleged in the proposed Summons was that the activity being conducted by Marist Youth Care Limited (**first respondent**) of an intensive therapeutic transitional care (**ITTC**) service requires development consent under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and does not have it. There is no dispute that development consent has not been granted, which would be required under the Newcastle Local Environmental Plan 2012. The first respondent and Minister for Families, Communities and Disability Services (**Minister; second respondent**) argued that the premises were being used as a transitional group home within the meaning of cl 43(1) of the State Environmental Planning Policy (Affordable Rental Housing) 2009 making the development permissible without consent. The applicant argued in the alternative that under Pt 5 of the EPA Act the activity was not being conducted on behalf of the Minister.

The amendments sought by the applicant introduced an additional ground in relation to an alternative Pt 5 argument, namely, that the agreement between the first respondent and the Minister to provide ITTC services was made in breach of s 5.5(1) of the EPA Act duty to consider environmental impact when approving an activity. Consequential orders restraining use of the land were also sought.

Issues:

(1) Whether the history of proceedings militated against allowing the amendment; and

(2) Whether the additional ground in the third further amended Summons had reasonable prospects of success.

Held: NOM to file a third further amended Summons dismissed:

(1) The applicant included a similar ground in an earlier version of the Summons which was subsequently removed. The applicant had already had adequate opportunity to plead its case: at [79]-[83]; and

(2) The new ground had no reasonable prospects of success and lacked utility. The applicant did not adequately articulate how an agreement between the first respondent and the Minister to conduct ITTC services, which did not identify any "activity" at a particular location, could have been made in breach of s 5.5(1) of the EPA Act. It was debatable whether the relief sought could be granted: at [73]-[78].

NSW Crown Holiday Parks Land Manager trading as Reflections Holiday Parks Terrace Reserve v Byron Shire Council **[2021] NSWLEC 35** (Pain J)

Facts: Reflections Holiday Parks Terrace Reserve (**applicant**) appealed the deemed refusal of its activity approval application lodged with Byron Shire Council (**Council**) to operate an existing caravan park and camping ground in Brunswick Heads. The activity application was made pursuant to s 68, Pt F of the *Local Government Act 1993* (NSW) (**Local Government Act**). A preliminary issue arose of whether the applicant could rely on an amended site plan. Minor amendment of an activity application before determination is permitted under s 87(1) of Local Government Act.

Issues:

(1) Whether the site plan was part of the activity application or material accompanying the activity application for the purposes of s 87(1) of the Local Government Act; and

(2) If the site plan did form part of the application, was the amendment sought minor.

Held: The site plan was material accompanying the activity application; applicant permitted to rely on the amended site plan:

(1) The applicant had completed the Council's "approved form" when lodging its activity application per s 79 of the Local Government Act. Under s 81 of the Local Government Act, such an application must be accompanied by any matters prescribed by the regulations. None are specified in the Local Government (Manufactured Homes Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (NSW) (**Local Government Regulation**) or elsewhere. The Council may specify matters to enable it to determine the application. No matters were specified by the Council for the purposes of s 81 of the Local Government Act. The initial site plan was not lodged as part of the activity application. It had been supplied by the applicant later following the Council's request for more information: at [30]-[31];

(2) That the approval requirements in cl 72 of Local Government Regulation include a community map showing the numbers, sizes and locations of sites, does not mean one was required for the purposes of the activity application: at [32]-[33]; and

(3) The word "minor" in s 87(1) does not qualify an amendment that may be made to the accompanying materials: at [36].

Penrith City Council v Dincel Construction System Pty Limited (No 5) **[2021] NSWLEC 22** (Robson J)

(related decision: *Penrith City Council v Dincel Construction System Pty Limited* (No 4) [2021] NSWLEC 1 (Robson J))

Facts: In *Penrith City Council v Dincel Construction System Pty Limited* (No 4) (***Dincel (No 4)***), the Court found that unlawful development was undertaken at the relevant land, and Penrith City Council (**Council**) was entitled to declaratory and injunctive relief against the respondents, Gaonor Pty Limited (**Gaonor**) and Dincel Construction System Pty Limited (**Dincel**).

In these proceedings, the respondents brought a motion seeking orders varying or "correcting" certain orders made in *Dincel (No 4)* pursuant to rr 36.16(3A) and/or 36.17 of the Uniform Civil Procedure Rules 2005 (New South Wales) (**UCPR**), a stay of the operation of certain orders pending the determination of an appeal in the Court of Appeal, and an alternative costs order.

Issues:

(1) Whether certain orders in *Dincel (No 4)* requiring the removal of the unlawful works, fill and restoration of land should be amended, so that they do not operate if development consent is granted to regularise the use of the land for storage or a warehouse or distribution centre by a nominated date;

(2) Whether certain orders in *Dincel (No 4)* should be stayed pending the determination of an appeal; and

(3) Whether the costs order made by the Court should be varied so that costs are not awarded against Gaonor.

Held: Notice of Motion dismissed; respondents to pay applicant's costs of the motion:

(1) The orders in *Dincel (No 4)* regarding the removal of the unlawful works, fill and restoration at certain land were not varied pursuant to r 36.16(3A) and/or r 36.17 of the UCPR. The orders reflected the Court's actual and deliberate intention, and no "conflict" or "inadvertent error" in the orders was made out by the respondents: at [56], [75] and [79];

(2) While there is an arguable case in the appeal, the balance of convenience falls against granting a stay of orders pending the determination of the appeal. In particular, while the Court accepted that there is a risk of sunk or lost costs if the appeal is successful, the appeal will not be rendered nugatory simply because some works pursuant to the orders have commenced, prior to the appeal being determined: at [89]-[91]; and

(3) An alternative costs order that excludes Gaonor is not appropriate, in circumstances where Gaonor was a "necessary party" to *Dincel (No 4)* as the owner of certain land; there were proposed alternative orders against Gaonor (which were not pursued where Dincel accepted its conduct breached the *Environmental Planning and Assessment Act 1979* (NSW)); Gaonor's solicitors failed to respond to enquiries as to the proper respondent; Gaonor and Dincel are related parties and that both have been closely involved with relevant land; and Gaonor and Dincel mostly spoke with one tongue and Mr Dincel was the controlling mind of both entities: at [99]-[105].

Seek Justice Pty Ltd v Blue Mountains City Council **[2021] NSWLEC 42** (Moore J)

(Note: An application to the Court of Appeal on 12 May 2021, seeking an injunction pending an appeal against the interlocutory decision, was rejected (*Seek Justice Pty Ltd v Blue Mountains City Council* [2021] NSWCA 87 (Macfarlan JA).)

Facts: Seek Justice Pty Ltd (**applicant**) commenced Class 4 proceedings on 30 April 2021, seeking to have development consent granted by Blue Mountains City Council (**Council**) to USM Events Pty Ltd (**company**) declared invalid. The applicant alleged that the Council's notification process was defective. The development consent granted approval for parking and other facilities associated with an ultra-trail running event, to be conducted over four days, with the first day being on 13 May 2021.

The applicant sought an interim injunction to restrain the holding of the event pending determination of the substantive issues in the Class 4 proceedings. An interlocutory hearing was held on 7 May 2021. The Council filed a submitting appearance.

Mr Jeray, the director of the applicant appearing for it, advanced two reasons why the event should not be permitted to go ahead pending determination of the substantive proceedings. These were that:

(i) the event would have significant adverse impact on the community of Katoomba as a consequence of the traffic and parking generated during the event; and

(ii) there would be environmental damage to the grassed surface of the former Katoomba Golf Course, the golf course having been approved for spectator and participant parking during the event.

Counsel for the company conceded, for the purposes of the interlocutory injunction application only, that there was a serious question to be tried. Affidavit and oral evidence was adduced from the Managing Director of the company to the effect that cancellation of the event on short notice would have significant adverse impacts on:

- the company and its local staff employed to assist in the conduct of the event;
- volunteers who had agreed to come to Katoomba to assist with the conduct of the event;
- the more than 7000 participants who had registered to compete in the event; and
- the businesses in the Katoomba region given that, on the basis of survey information from past events, the estimated economic benefit to businesses in the Katoomba region was of the order of $3.24 million.

Mr Jeray declined to give the usual undertaking as to damages and costs on behalf of the applicant on the basis that the Class 4 proceedings were in the public interest.

Counsel for the company submitted that the balance of convenience clearly favoured refusing an injunction, particularly in circumstances where the adverse impacts that would arise from cancellation of the event

significantly outweighed prevention of what were submitted to be limited impacts of the event going ahead. It was also submitted that the fact that the applicant had been incorporated as a $1.00 company only some 15 days before commencing the Class 4 proceedings, in circumstances where neither the applicant nor its director offered the usual undertaking as to costs and damages, also weighed against granting the injunction.

Issues: Should in interlocutory injunction be granted.

Held: Injunction refused; applicant to pay the company's costs of the motion:

(1) The potential for environmental harm if the event proceeded was not a factor of significance in favour of granting an injunction: at [69];

(2) It was appropriate to assume that the proceedings had been brought in the public interest: at [73];

(3) In the absence of an undertaking as to costs and damages, something more than mere characterisation as public interest litigation was required (citing *Save Our Figs v General Manager Newcastle City Council* (2011) 186 LGERA 346; [2011] NSWLEC 207). The applicant had not demonstrated that there was "something more" for the purposes of these interlocutory proceedings to be afforded the protection given by r 4.2(3) of the Land and Environment Court Rules 2007: at [76];

(4) The refusal of the applicant to offer the usual undertaking as to damages and costs weighed against the granting of an injunction: at [77];

(5) Had the applicant offered such an undertaking, the fact that it was recently incorporated with a paid-up capital of one dollar would lead to the inference that the undertaking would have been of no functional effect if offered: at [78];

(6) There was no factor weighing in favour of preservation of the status quo pending determining the substantive proceedings; at [81];

(7) The potential adverse economic impacts weighed significantly against the granting of an injunction: at [92];

(8) The potentially broad public impacts, going well beyond impacts on the Company, weighed in the public interest against the granting an injunction: at [98];

(9) The balance of convenience was overwhelmingly in favour of refusing the injunction: at [105]; and

(10) As "something more" than the assumption that this was simply public interest litigation was not demonstrated, it was appropriate that the applicant be ordered to pay the Company's costs of the Notice of Motion: at [112].

- **Costs:**

***Natural Resources Access Regulator v Harris; Natural Resources Access Regulator v Timmins (No 2)* [2021] NSWLEC 18** (Pain J)

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

Facts: Mr Harris and Mr Timmins (**defendants**) were each charged with three offences under s 91I(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**) in relation to the use of operating metering equipment installed at three pumps at a property known as Mercadool. The offences were alleged to have been committed in August 2015. Proceedings were commenced in August 2018. The prosecutor could not exclude the possibility that digital engine hour meters were operating in the charge periods. All charges were dismissed.

The defendants sought their costs of the proceedings pursuant to ss 257C and 257D of the *Criminal Procedure Act 1986* (NSW). According to the prosecutor, the reading of Mr Timmins' affidavit after the close of the prosecution case was the first time that the prosecutor's officers became aware of the presence of digital engine hour meters at Mercadool in the charge periods. The defendants' responses to notices to provide information and records about metering equipment (**notices**) did not disclose the presence of digital engine hour meters during the charge periods. The defendants argued that the prosecutor's officers had failed to make appropriate

enquiries, particularly of Mr Timmins, and that officers knew about the presence of digital engine hour meters as a result of visits to Mercadool in August 2015 and in 2017.

Issues:

(1) Whether the proceedings were conducted by the prosecutor improperly or unreasonably;

(2) Whether the investigation into the alleged offences was conducted improperly or unreasonably;

(3) Whether the proceedings were initiated without reasonable cause; and

(4) Whether other exceptional circumstances justified an award of costs.

Held: Application for costs was dismissed:

(1) The defendants did not establish that the proceedings were conducted in an improper manner. The prosecutor made substantial efforts to disclose material information during pre-trial disclosure processes. This included disclosing a photograph taken in August 2015 showing the presence of digital engine hour meters. The prosecutor's failure to make the connection between the presence of digital engine hour meters in 2015 and 2017 and the charges really sounded in the adequacy of the investigation, rather than an improper failure to disclose material which, from the prosecutor's point of view, never became relevant: at [99]-[108];

(2) The defendants did not establish that the investigations were conducted improperly or unreasonably. Whether the prosecutor's officers should have been alerted to the presence of digital engine hour meters from conversations with Mr Timmins is not known from the evidence. The defendants' answers to the notices did not give any hint to the use of digital engine hour meters in the charge periods. No further investigations were apparently considered necessary. The necessary steps in an investigation are a matter of judgement on the part of investigating officers: at [109]-[115];

(3) Failure of proceedings does not mean that they were initiated without reasonable cause. The facts at the time the prosecutions were initiated did not suggest they were doomed to fail. The proceedings also raised a number of statutory construction issues in relation to the Water Management Act for the first time: at [116]-[119]; and

(4) The proceedings were commenced within the three-year limitation period specified in s 364(2) of the Water Management Act. The prosecutions were not unduly delayed. The interlocutory matters during litigation (including extensions for the prosecutor to file disclosure notices and argument on a motion for separation of the trials) also did not give rise to exceptional circumstances that would justify an award for costs: at [120].

- **Merit Decisions (Judges):**

NSW Crown Holiday Parks Land Manager trading as Reflections Holiday Parks Terrace Reserve v Byron Shire Council (No 2) **[2021] NSWLEC 51** (Pain J)

Facts: Reflections Holiday Parks Terrace Reserve (**applicant**) appealed the deemed refusal of its activity approval application lodged with Byron Shire Council (**Council**) to operate an existing caravan park and camping ground on Crown land in Brunswick Heads (**park**). The activity application was made pursuant to s 68 (Pt F) of the *Local Government Act 1993* (NSW) (**Local Government Act**). The park operates across an area divided into northern, central and southern precincts. At issue was the use of the southern precinct as a camping ground because of on-going serious harm to the Coastal Cypress Pine Forest (**CCPF**) community, an endangered ecological community (**EEC**) under the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**). The applicant manages the park under a plan of management (**POM**) approved by the Minister pursuant to s 114 of the *Crown Lands Act 1989* (NSW) (since repealed and replaced by the *Crown Land Management Act 2016* (NSW)). The POM includes a vegetation management plan (**VMP**).

Issues:

(1) Whether pursuant to s 89 of the Local Government Act, approval of the camping ground in the southern precinct was consistent with principles of ecologically sustainable development (**ESD**); and

(2) Whether the objections lodged pursuant to s 82(1) of the Local Government Act complied with requirements in the Local Government (Manufactured Homes Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (NSW) (**Local Government Regulation**).

Held: Approval of the activity application to be granted subject to conditions, including compliance with a revised VMP:

(1) There is very little intact EEC in the southern precinct. In the course of the hearing a new VMP was proposed and refined. Consistency with the principles of ESD could be achieved through the management approach included in the revised VMP. Once further changes to the VMP are made as identified by the Council's experts, the Court will grant approval subject to conditions: at [90]-[97]; and

(2) The applicant's objections in relation to several provisions in the Local Government Regulation had been accepted by the Council. The Court was satisfied for the purposes of s 89(1)(a) of the Local Government Act that the non-compliances were acceptable or could be dealt with appropriately in the conditions of consent: at [72].

Tomasic v Port Stephens Council **[2021] NSWLEC 56** (Preston CJ)

Facts: Michael and James Tomasic (**applicants**) wished to subdivide their land at 4 Kuranga Avenue, Raymond Terrace into residential lots, remove vegetation on the site, and construct driveways to access the lots. The applicants lodged a development application to subdivide their land, originally into 12 lots, but later into 11 lots, with Port Stephens Council (**Council**). The Council refused consent and the applicants appealed to the Court.

The Council raised two contentions as to why development consent should be refused: first, that the proposed subdivision did not comply with the applicable Port Stephens Development Control Plan 2014 (**PSDCP 2014**) because the proposed driveways were not consistent with the street layout and traffic network in the PSDCP 2014; and second, that the proposed subdivision would impact adversely on an area of endangered ecological community, the Hunter Lowland Redgum Forest in the Sydney Basin and New South Wales North Coast bioregions (**EEC**), and an area of vegetation mapped as preferred koala habitat.

Issues:

(1) Whether the proposed subdivision was inconsistent with the PSDCP 2014;

(2) What weight should be given to the PSDCP 2014;

(3) Whether there was sufficient justification for inconsistency with the PSDCP 2014; and

(4) Whether there would be unacceptable impacts on the EEC and koala feed trees.

Held: Appeal dismissed; development consent refused:

(1) The applicants' amended subdivision plan was inconsistent with the PSDCP 2014. Where the PSDCP 2014 required a local street and bus route through the site, the applicants' amended subdivision plan proposed two disconnected driveways: at [23], [27];

(2) The PSDCP 2014 had been amended in 2019 to identify a local street and bus route through the site. The applicants argued that that less weight should be given to the PSDCP 2014 as amended because they had purchased the property and lodged their development application before the amended PSDCP 2014 came into force. This argument was at odds with the statutory obligation to determine the development application in accordance with the law that exists at the time of the hearing and determination of the appeal. In the absence of a savings provision, the current law must be applied. To afford little or no weight to the current PSDCP 2014 2014 would offend against this obligation to apply the current PSDCP 2014: at [44];

(3) No less weight was to be given to the PSDCP 2014 because of the process by which it was amended. First, it was not relevant that the applicants purchased the property and lodged the development application before the amendment of the PSDCP 2014 was exhibited. Secondly, the purpose for which the current DCP was adopted was to bring about an appropriate planning solution. Thirdly, the current PSDCP 2014 was adopted after consultation with affected landowners, including the applicants, and the affected community. Fourthly, it was irrelevant that the Council has not adopted a local infrastructure contributions

plan that allowed for the imposition of a condition of consent requiring the dedication of that part of the land on which the local street and bus route was shown in the amended PSDCP 2014: at [87], [88], [92], [97];

(4) No less weight was to be accorded to the PSDCP 2014 because it did not reasonably relate to the subdivision. A development control plan can make provision to achieve particular strategic planning outcomes, such as the desired street layout and transport network, provided that those provisions are not inconsistent with the provisions of an environmental planning instrument applying to the same land. The need for a reasonable and fair relationship with the development the subject of a development application does not arise upfront in the development application process, but only at the end of the process if the consent authority determines the development application by the grant of consent. At this juncture, the consent authority is constrained to impose conditions of consent that reasonably and fairly relate to the development the subject of the development application and that are not otherwise manifestly unreasonable. But the existence of this constraint at the later stage of the imposition of conditions of consent to the carrying out of development does not impact on the earlier strategic planning stage of a development control plan providing guidance on the planning outcomes to persons proposing to carry out development: at [103]; [107]-[109];

(5) Clause D13.2 of Pt D13 of the DCP permitted variations from the required street layout where a variation would achieve the objectives in cl D13.A of the DCP and a variation would satisfy other requirements of the DCP, including requirements for connectivity and transport movement hierarchy. The applicants had provided insufficient justification for variation of the street layout in the DCP: at [113]-[124];

(6) The applicants had advanced no reasonable alternative solution to the DCP in their development application. This proposed alternative access, even if it could be described as an "alternative solution", is not a "reasonable" alternative solution or one that achieves the objects of the standards for dealing with street layout and transport network in the DCP: at [128], [132]-[136]; and

(7) The proposed subdivision would have unacceptable impacts on the EEC and preferred koala habitat on the site. The biodiversity mitigation hierarchy requires, in order, avoiding impacts, minimising impacts and only then offsetting or compensating for residual impacts that remain after all steps are taken to avoid or minimise these impacts. The proposed subdivision failed to take all appropriate avoidance and minimisation measures. In relation to the koala habitat on the site, the proposed subdivision did not achieve the performance criteria in the relevant Port Stephens Council Comprehensive Koala Plan of Management 2002, as the proposed subdivision does not minimise the removal or degradation of native vegetation within Preferred Koala Habitat; minimise the removal of koala feed trees, the Forest Redgums; make appropriate provision for the restoration and rehabilitation of sufficient areas of koala habitat; or make provision for long-term management and protection of sufficient areas of koala habitat, including both existing and restored habitat: at [169], [175].

- **Merit Decisions (Commissioners):**

90 Croatia Properties Pty Ltd v Liverpool City Council **[2021] NSWLEC 1177** (Walsh C)

Facts: 90 Croatia Properties Pty Ltd (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the deemed refusal by Liverpool City Council (**Council**) to grant development consent for a multi dwelling housing development on a site in Edmondson Park, in an area undergoing transition from rural to suburban. This proposal involved 45 two-storey townhouses, permissible under Liverpool Local Environmental Plan 2008 (**LLEP 2008**) with the proposal also relying on State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW) (**SEPP Affordable Rental Housing**). The site has biodiversity certification status under the *Biodiversity Conservation Act 2016* (NSW). A high voltage electricity transmission line and associated easement abut the development area.

The proposal involved the general removal of trees on the site. The agreed arboricultural evidence was that eleven of these trees had a high retention value and a life expectancy in excess of 40 years. Liverpool Development Control Plan 2008 (**LDCP 2008**) includes objectives relating to the "(promotion of) landscape planning and design as part of a fully integrated approach to site development" (LDCP 2018, Pt 1, cl 3), with associated controls seeking protection and incorporation of existing trees in developments, with which

the proposal did not comply. Council also contended that the tree removal was incompatible with existing and envisioned future character of the area (relevant to cl 15 of SEPP Affordable Rental Housing).

The applicant argued that the local character was founded on removing existing vegetation and relying on street tree planting to establish landscape presence in the streetscape and neighbourhood. Regular and extensive tree removal was undisputed in respect to other nearby developments, evidencing that the provisions of LDCP 2018 had not then been implemented. A similar "flexible" and "facilitative" approach to the application of LDCP 2018 was required in this instance, mindful of both ss 3.42(1) and 4.15(3A)(b) of the EPA Act, according to the applicant. Proposed future landscaping would exceed the number of trees proposed to be removed. It was also submitted that it was unsafe to retain trees of this kind in developments of this form. Tree retention also meant housing would be more expensive, mindful of LLEP 2008 and zone objective relating to meeting housing needs.

Both parties cited the Minister for Planning's Second Reading Speech to the Environmental Planning and Assessment Amendment Bill 2012 (NSW) on 24 October 2012, which provided for the incorporation of now s 4.15(3A) into the EPA Act.

Issues:

(1) The character of the local area for the purposes of consideration of cl 16A of SEPP Affordable Rental Housing, given the history of local tree removal;

(2) Whether the manner in which LDCP 2018 has been applied in previous development applications can be considered mindful of s 4.15(3A)(c) of the EPA Act;

(3) The reasonableness of retaining trees in multi dwelling housing development mindful of safety and economics; and

(4) Flexible application of LDCP 2018 provisions mindful of ss 3.42(1) and 4.15(3A)(b) of the EPA Act.

Held: Appeal dismissed:

(1) The character of the local area has been established over recent years as one of removing existing trees and replanting new trees, with which the proposal was aligned: at [69];

(2) Section 4.15(3A)(c) of the EPA Act says that the provisions of a development control plan may only be considered in connection with the assessment of the development application at hand. The Minister's Second Reading Speech confirmed that the ordinary meaning of the words aligned with the legislative intention. There was no power to consider how the provisions in LDCP 2018 have been applied previously when considering the current development application: at [62];

(3) There was no arboricultural evidence suggesting retention of nominated trees was unsafe. It is reasonable to accept a baseline position that some trees are able to be retained in development sites with appropriate design responsiveness. There was no evidence to suggest the economic benefits of tree removal should sit above other LLEP 2008 aims and zone objectives: at [71];

(4) The "guidance" function of development control plans under s 3.42(1)(b) does not reach as far as "facilitating development" per se, and the flexibility in s 4.15(3A)(b) includes a concern with achieving the objects of development control plan standards: at [71]; and

(5) When applying the necessary flexible approach, the departures from LDCP 2018, Pt 1, cl 3 provisions are unreasonable in the circumstances of this case. This is due to beneficial amenity outcomes associated with retaining the tree copse which skylines when viewed from nearby public and private land and the opportunities to have some canopy trees remaining to filter views of the high voltage electricity stanchions and cables: at [72].

Australian Village No. 12 - Gladstone St Pty Ltd v Inner West Council [2021] NSWLEC 1080 (Clay AC)

Facts: On 8 April 2020, the Court granted development consent (**consent**) to Australian Village No. 12 - Gladstone St Pty Ltd (**applicant**) for construction of a mixed use development comprising ground and first floor level creative use commercial tenancies and 21 community housing dwellings and external open space with associated basement parking.

The applicant made a further development application (**DA**) to change the first floor creative use commercial tenancies approved by the consent to community housing dwellings. There was an issue between the parties as to the proper characterisation of the DA.

The dwellings were proposed to be for "supportive accommodation" and would be managed by a charity whereby the dwellings would be available for low cost rental to women who were being assisted to join or re-join the workforce. The applicant had entered a commercial arrangement with the charity for that purpose and offered that a condition be imposed that the dwellings be used for affordable housing for 25 years, rather than the statutory 10 years.

The Marrickville Local Environmental Plan 2011 (**MLEP 2011**) provided that "not less than 60% of the total gross floor area of the building will be used for non-residential purposes". The proposal, if approved, would mean the building comprised only 24.6% non-residential purposes.

The Council characterised the DA as a form of "amending development application - the development proposed being limited to changes to the building and uses approved by the consent. The applicant characterised the DA as seeking development consent for the whole of the building, including that which had already been approved (and upon the grant of a new consent the earlier consent would be surrendered).

Issues:

(1) What is the proper characterisation of the DA;

(2) Is cl 6.13 of MLEP 2011 a development standard or a prohibition; and

(3) If cl 6.13 MLEP 2011 is a development standard, is the objection pursuant to cl 4.6 properly made out.

Held: Appeal dismissed; development application refused consent:

(1) The question of the proper characterisation of the DA was one of substance over form. A description itself does not necessarily determine the scope of a development application. The description may be wrong, and it was important to identify the actual development which was proposed by reference to the plans of the development and potentially other supporting documents: at [56].

(2) The analysis must start with the plans in respect of which consent was sought. The better view was that the plans identified that the development proposed was changes to the approved development rather than the whole of the proposed development. The plans identified what was the approved development. The plans then showed that which was to be changed - that was the language used - "Proposed changes". That meant that something which exists was to be changed by the new work which was proposed: at [59].

(3) Whilst it is not unknown that architectural plans for an entirely new development might show or overlay a development which had already been approved, that is done for comparison purposes, and is clearly shown as such. The plans here did not demonstrate a comparison between that which had been approved and that which was proposed. The plans did not identify differences between what had been approved and what was proposed, rather the plans showed how that which had been approved was to be changed. The approved development was proposed to be changed, not replaced: at [61].

(4) The DA was for development the effect of which would be to require alteration to the development the subject of the original consent. It was not a DA for the whole of the building.

(5) What is described as the 2-step approach in *Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319; [2001] NSWCA 270 (***Poynting***) as defined by Jagot J in *Laurence Browning Pty Ltd v Blue Mountains City Council* [2006] NSWLEC 74 was the preferred approach to determine whether a provision is a prohibition or development standard: at [73].

(6) The provision does not prohibit a mixed use development under any circumstances. The development for the purpose of office premises and residential flat buildings are permissible uses in the zoning table. The provision precludes development in particular cases but does not prohibit mixed use development on B7 land in all circumstances. That was the first step: at [76].

(7) The second step was whether the minimum requirement of 60% non-residential use specifies a requirement or fixes a standard in respect of an aspect of the development. The aspect of the development concerned was the proportion of the mix of uses within the development. It is a numerical requirement which clearly relates to the carrying out of the development : at [77].

(8) The requirement in cl 6.13(3)(c) that not less than 60% of the total gross floor area of the building will be used for non-residential purposes is a development standard: at [79].

(9) The assessment of the DA, including the cl 4.6 objection in relation to the development standard, involved an examination of the whole of the proposed development, the approved building as it was to be modified by the development the subject of the DA, not just the development the subject of this DA: at [105].

(10) The first objective of the control is that of "limited residential development in association with non-residential uses". "Limited" in this context means "some" or a "reduced amount". The applicant simply submitted that because there was a finite number of units then the residential development was limited. That failed to give a proper meaning to the phrase in this context. The objective is that residential development is the minor element of a mixed use development - it is limited, rather than becoming the dominant element of the development: at [109].

(11) Here the residential component would become the dominant component of the overall development, about 75% of the gross floor area would be residential development. The objective required that the residential element not be the dominant element in the overall development and the proposed development did not meet that objective .A four storey building comprising three residential floors above the sole commercial level on the ground floor would not achieve the objective of the standard to limit residential development: at [110].

(12) The second objective of the standard is to assist in the revitalisation of employment areas. The applicant said that the provision of residential accommodation for those who were seeking employment assists in the revitalisation because they would be provided with training and seeking employment. That was not correct - it was the provision of non-residential floor space which assists in revitalisation rather than the provision of residential accommodation: at [115].

(13) If it was the residential component that was the driver for revitalisation then the residential component would not be required to be limited as an objective of the standard. It followed that the provision of residential accommodation rather than non-residential floor space, by the mix of uses being dominated by residential uses, did not meet the objective of revitalisation of employment areas: at [116] and [117].

(14) The social benefit of the additional residential accommodation of the proposed development was a planning ground but was not a sufficient planning ground to justify the non-compliance, because the residential component was not of itself an employment driver, which is the foundation of the zone and the standard. It is the non-residential floor space which is to achieve that goal: at [125].

Barbara St Pty Ltd v Fairfield City Council **[2021] NSWLEC 1145**; ***Barbara St Pty Ltd v Fairfield City Council (No 2)*** **[2021] NSWLEC 1208** (Gray C and Bradbury AC)

Facts: These two appeals concerned a relatively new building for which development consent was granted in 2012 for a six-storey mixed use development, comprising a retail shop on the ground floor, a commercial suite on the first floor, six two-bedroom apartments, and associated car-parking. The building was completed in late 2014 and is owned by the applicant, Barbara St Pty Ltd (**applicant**).

A series of inspections were carried out by officers of Fairfield City Council (**Council**) in late 2017 and early 2018, as a result of which it became apparent that a number of alterations had been made to the building contrary to the approved plans and without development consent having first been obtained. The unauthorised works included the construction of separating walls and infill floors within stair voids to create additional apartments, and the residential use of the commercial space on the first floor.

The result of the unauthorised works was that there were 11 residential apartments rather than six, as approved, with four apartments located on Level 1, two apartments on Level 2, two apartments on Level 3, two apartments on Level 4, and a three-bedroom apartment on Level 5.

The orders appeal

The Council issued two development control orders under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The first order (**cease use development control order**) required the residential use of six of the units to cease and the removal of cooking facilities from those units. The second order (**fire safety order**) required the removal of combustible cladding from the building and additional work to address the Council's fire safety concerns. The Council contended that the separating wall and floor construction, which created the additional dwellings, did not comply with the fire resistance construction requirements of the Building Code of Australia (**BCA**).

The Council also contended that there was no evidence concerning the structural integrity of the infill floor over the former stair voids. The Council argued that this resulted in a risk to the safety of the residents who were living in the residential rooms created by the infill floor and separating walls, and sought orders that the use of the six affected units cease until such time as the BCA compliance and structural integrity could be achieved and certified. The applicant instead sought orders to allow continuing use of the units, but requiring works and/or certification of BCA compliance and structural integrity.

The applicant initially appealed against both development control orders. However, on the second day of the hearing, the applicant sought, and was granted, leave to amend its Class 1 Application to limit the scope of the appeal to the cease use development control order. This appeal (**order appeal**) therefore then related only to the cease use development control order.

During the course of the hearing, the Court drew the parties' attention to the provisions of s 2 of Pt 4 of Sch 5 of the EPA Act which provides that:

> *(1) If a development control order will or is likely to have the effect of making a resident homeless, the relevant enforcement authority proposing to give the order must consider whether the resident is able to arrange satisfactory alternative accommodation in the locality.*
>
> *(2) If the resident is not able to arrange satisfactory alternative accommodation in the locality, the relevant enforcement authority must provide the resident with—*
>
> *(a) information as to the availability of satisfactory alternative accommodation in the locality, and*
>
> *(b) any other assistance that the relevant enforcement authority considers appropriate.*

The Council tendered a letter sent by the Council to the applicant on 5 February 2020 which it said satisfied s 2 of Pt 4 of Sch 5 of the EPA Act. That letter requested that the applicant refer affected residents to DCJ Housing and several proprietary websites for assistance in finding alternative accommodation. As this issue was raised by the Court at the hearing, and was not raised in the applicant's Statement of Facts and Contentions in Reply, the Council requested that, if the Court was minded to make a stop use order and was not satisfied by the letter dated 5 February 2020, it be provided with the opportunity to provide evidence to the Court concerning the availability of alternative accommodation in the area.

The development appeal

Prior to the giving of the orders, the applicant made a development application for the conversion of the building to a 14-room boarding house. That application was refused by the Council and the applicant appealed from that decision (**development application appeal**). As a result of the amendment of the development application and the expert evidence on the appeal, the Council agreed that all of the contentions in the development application appeal had been addressed and that there was nothing that warranted refusal of the development application. The Council also sought the imposition of a deferred commencement condition requiring the applicant to obtain a building information certificate for the unauthorised works on the site.

Both the development control order appeal and the development application appeal were heard together.

On the development control order appeal

Issues:

(1) Whether an order should be issued for the owner to cease the use of the six affected residential apartments; and development consent should be granted; and

(2) Whether the order was likely to make residents of the building homeless and, if so, whether the requirements of Pt 2 of Sch 5 of the EPA Act had been satisfied.

Held:

(1) The statutory basis for a stop use order is met, as works have been carried out in contravention of the consent that is in operation, the use of the building for residential dwellings is in contravention of that planning approval, and there is no development consent that authorises occupation of the additional residential apartments created by the unauthorised works: at [56]-[58];

(2) Discretion should be exercised to issue a stop use order in circumstances where there is a potential fire and safety risk: at [60]-[61];

(3) A stay of the stop use order is appropriate to give the applicant an opportunity to obtain a building information certificate and development consent for the use of the residential apartments as built: at [62]-[67];

(4) The making of these orders would require the occupants of seven apartments to vacate their homes either permanently, or while work is carried out, to ensure that the walls and floors are BCA-compliant. In this regard, the reference in s 2(1) of Sch 5, Pt 4 to making a resident "homeless" means no more than that the residents will be required to vacate their existing home, rather than that they will be rendered without a home at all: at [71];

(5) There was no evidence before the Court in relation to whether the residents of any of the seven affected units would be able to arrange satisfactory alternative accommodation in the locality: at [71]-[72];

(6) The letter sent by the Council to the applicant did not assist the Court in considering whether the affected residents will be able to arrange satisfactory alternative accommodation in the locality. The letter contained no information about the availability of other accommodation: at [73]; and

(7) An adjournment should be granted to allow the Council to file and serve evidence that addressed Pt 2 of Sch 5 of the EPA Act: at [75].

In Barbara St Pty Ltd v Fairfield City Council (No 2), a cease use order for seven residential apartments was made but stayed for a period of six weeks:

(8) The evidence subsequently filed to address the requirements of Pt 2 of Sch 5 of the EPA Act was satisfactory to establish that any residents who are required to vacate their homes as a result of a stop use order will be able to arrange satisfactory alternative accommodation in the locality, if required: at [3]-[4]; and

(9) A self-executing order was made so that, if a building information certificate was obtained demonstrating that all structural and fie resistance requirements of the BCA had been met, the cease use order was revoked: at [7].

On the development application appeal

Issues:

(1) Whether development consent should be granted; and

(2) Whether a deferred commencement condition should be imposed requiring the applicant to obtain a building information certificate.

Held: Development application appeal upheld and development consent granted:

(1) The development is permissible in the zone and complies with the relevant development standards, and there is no evidence that the approval of a boarding house in this location would result in adverse social impacts: at [31]-[33];

(2) The concerns of the objectors have been adequately addressed through the amended plans and the proposed conditions, including a deferred commencement condition requiring the applicant to obtain an accessibility report: at [35];

(3) The proposed development is an appropriate response to the applicable controls, the location of the site and its urban context: at [36]; and

(4) There is no requirement to obtain a building information certificate as a deferred commencement condition as any issues concerning compliance with the BCA are already dealt with in the consent conditions, and it was a matter for the applicant to decide whether to apply for such a certificate to prevent the risk of further compliance action by the Council: at [38].

Gallagher v Council of the City of Ryde **[2021] NSWLEC 1106** (Clay AC)

Facts: The gaming room of the Royal Hotel at Ryde had an approval to trade until 2.00 am the following day on Monday to Saturday. The conditions on that approval including that alcohol was not to be served after midnight, and the maximum number of patrons in the gaming area was 50. No other part of the hotel was able to open after midnight.

The hotelier, Mr Gallagher (**applicant**) made a development application to further extend the hours from 2.00 am until 4.00 am the following day Monday to Saturday. During the hearing a condition was offered that the number of patrons in the gaming area would not exceed 25 after 2.00 am. It was not proposed that patrons could not be admitted to the gaming room after 2.00 am.

The hotel has a frontage to Blaxland Road, a busy road in daytime particularly, on its corner with Edward Street, and is within a mixed-use neighbourhood. There are residential apartments across the road in Edward Street and more generally in the vicinity.

Issues:

(1) Whether the proposed extension of hours was a compatible land use given its proximity to residential premises, the present operation and likely future impacts, including noise of patrons and smoke escape; and

(2) Whether the extension of hours would operate as a precedent such as to excite other applications to extend hours, the cumulative impact of which would be a change in character from the desired future character.

Held: Appeal upheld; extension of hours granted with conditions:

(1) The proper principle to apply is if a proposed development is unobjectionable but there is a sufficient probability that there will be further applications of a like kind, then the fact that a consent may operate as a precedent may be taken into consideration. The oft-quoted ratio in *Goldin v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* (2002) 121 LGERA 101; [2002] NSWLEC 75 at [110], incorrectly says "objectionable in itself" when it should say "unobjectionable in itself", based on prior authority and the earlier observations by Lloyd J in that case: at [79] and [87];

(2) An approval for a period of 12 months was highly unlikely to operate as a sufficient precedent to attract other like applications. There had not been any application for an extension of hours past midnight by any commercial premises in the 4 years since the hotel was granted late trading to 2.00 am: at [88];

(3) There were not likely to be repeated applications if the hours are extended and precedent is not a reason for refusal: at [88];

(4) There was no evidence beyond speculation that there would be an impact from the escape of smoke, and the potential for such an impact was not a reason for refusal: at [90] and [91];

(5) The relevant objective of the zone is to provide for a compatibility of land uses. Although the Ryde Local Environment Plan 2014 does not require a finding of compatibility the parties conducted their cases on the basis that compatibility of uses ought to be achieved: at [93];

(6) There is no control on the hours of operation in any relevant planning document: at [96];

(7) The power to grant consent for a "trial period" was an exercise of the power in s 4.17(1)(d) of the *Environmental Planning and Assessment Act 1979* (NSW) to limit the period during which development may be carried out in accordance with the consent so granted. The assessment was to be made based upon, amongst other things, an expectation of human behaviour. Whilst generally predictable, there is no certainty about such a prediction, and a trial period was necessary if development consent was to be granted and the full significance of the DA cannot be known with precision. It is not, however, the case that a trial period is simply a "suck it and see" approach. The assessment must be made on the basis that the likely impacts are acceptable for a period of 12 months, noting that the impacts are reversible and that the impacts, if any, will cease at the end of the 12-month-period: at [97];

(8) The planning regime called for an assessment of the impacts of the proposed trading from 2.00 am to 4.00 am, then to determine whether the proposed operation was compatible with its surrounding largely residential land uses, having regard to the objectives of minimising noise intrusion and protecting the amenity of the residential neighbours: at [99];

(9) In assessing the present operation, it was important to distinguish between the pre-midnight operation when the whole of the hotel was trading and the post midnight operation when only the gaming room was operating with no alcohol being served and a maximum of 50 patrons: at [100];

(10) The acoustic evidence about noise from departing patrons made it clear that there was the potential for noise disturbance cause by patrons, even those who do not engage in antisocial activity. The act of slamming a door can occur in the normal course of human endeavour. So can the starting of a motor vehicle and driving off. These are not of themselves anti-social activities and yet they can cause noise disturbance. No matter how well run a hotel is, there can be such noise impacts which are unacceptable depending upon their time and frequency: at [108];

(11) The operation past 2.00 am has the potential to disturb the sleep of nearby residents. It is nonsense to suggest, as did the acoustic experts, that provided such sleep disturbance was not so regular as to cause health impacts then it was acceptable. The annoyance of awakening from disturbance was a real impact, whether or not it leads to health or wellbeing impacts over a longer time: at [110];

(12) Whilst the proposal now sought to reduce the maximum number of patrons to 25 as the maximum number within the premises at any one time, it would not be the total number of patrons present at or in the vicinity of the hotel during the period from 2.00 am to 4.00 am and shortly thereafter. There is more patron activity likely than that simply generated by 25 patrons in total over that period. The assessment is not of simply 25 patrons, but a number in excess which is not known with any certainty, which includes arrivals after 2.00 am to "replace" those who are leaving, and then leave themselves later in the night/early morning : at [118];

(13) In the absence of a lock out the proposal was unacceptable but the extension of hours for a 12-month trial period was acceptable if conditions were imposed providing for:

- a "lockout" at 2.00 am - no patrons to be admitted after 2.00 am;
- two security guards to be at the hotel from 2.00 am to 4.00 am;
- one security guard shall have the responsibility to accompany leaving patrons to their transport and to ensure there is no noise disturbance;
- the same security guard is to patrol the vicinity of the premises, particularly Edward Street, to ensure there is no noise or other disturbance; and
- no liquor to be consumed on the premises after 2.00 am: at [129].

Joint Venture Pty Ltd v Mid-Coast Council **[2021] NSWLEC 1138** (Dickson C)

(related decision: *Joint Venture Pty Ltd v Mid-Coast Council* **[2020] NSWLEC 1440** (Dickson C))

Facts: Joint Venture Pty Ltd (**applicant**), appealed pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) following the refusal of its development application DA99/2019 by Mid-Coast Council (**respondent**). The development application sought consent for the development of a manufactured home estate (**MHE**) and ancillary buildings and works on Lot 3 DP 242332, 303 Blackhead Road, Tallwoods.

At the time of the hearing, the development application had been amended by leave of the Court, on several occasions, to address the Respondent's contentions and the evidence of the various experts. During the hearing the applicant was further granted leave to amend their development to reduce the number of MHE sites and increase the number of trees retained on the site.

The development is proposed on land that is partly within the RE1 - Public Recreation zone, and partly within the R1 General Residential zone under the Greater Taree Local Environmental Plan 2010 (**GTLEP 2010**).

Clause 7 of State Environmental Planning Policy No 55—Remediation of Land (**SEPP 55**) was a precondition to the granting of consent for the development application. Despite the issue of contamination not being raised as an issue in contention between the parties, it was necessary for the Court to be satisfied that the precondition is met. The Court wrote to the parties in late January 2021 seeking further information and submissions in relation to whether cl 7(4) of SEPP 55 applied to the development, and how the precondition to consent was satisfied by the proposed development. The parties were given an opportunity to provide additional information or submissions, and following receipt of submissions from the applicant, the respondent provided their consent to the applicant being granted leave to prepare and rely on a preliminary site investigation (**PSI**) for the subject site, which was filed on 22 February 2021.

Issues:

(1) Whether the proposed development was permissible within the RE1 and R1 zoned land under GTLEP 2010;

(2) Was the land suitable for the proposed use and free of contamination having regards to cl 7 of SEPP 55, particularly in circumstances where the development would involve significant disturbance of the site;

(3) Whether the land was potential or core koala habitat pursuant to State Environmental Planning Policy (Koala Habitat Protection) 2020 (**SEPP Koala**);

(4) Whether the jurisdictional preconditions raised by the respondent, and contained in the various applicable planning instruments (e.g. *Rural Fires Act 1997* (NSW), *Local Government Act 1993* (NSW), Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 (NSW), and GTLEP 2010) had been met;

(5) Whether the Biodiversity Development Assessment Report (**BDAR**) complied with the requirements of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**);

(6) Whether the proposed development would have an unacceptable impact on significant vegetation and wildlife habitat on the site, including that of threatened species;

(7) Would the impacts of cut-and-fill in proximity to trees that have been identified for retention be acceptable;

(8) Would the proposed development have an adverse visual impact on the adjoining and proximate properties that overlook the site;

(9) Was the proposed intensification of residential development out of character with adjoining development; and

(10) Was the density of the proposed development an overdevelopment of the site that would result in poor planning, social and environmental outcomes.

Held: Appeal dismissed:

(1) The proposed development was permissible with consent in both the RE1 Public Recreation zone and the R1 General Residential Zone of GTLEP 2010: at [76] and [94];

(2) The Court could not be satisfied whether the land of the subject site was contaminated and, if it was, whether the land was either suitable for the proposed use in that state or able to be made suitable prior to the commencement of the use. As this precondition was not met, the Court had no power to approve the development under cl 7 of SEPP 55: at [110];

(3) The remaining jurisdictional preconditions raised in the respondent's contentions and contained in the various applicable planning instruments were met: at [126]-[145];

(4) The land was not core koala habitat within the meaning of SEPP Koala: at [125];

(5) The BDAR met the requirements of the Biodiversity Conservation Act: at [196];

(6) The proposed development would result in unacceptable environmental impacts: at [306]-[321];

(7) The proposed development would place a density of development and facilities on the site that would not be compatible with the existing character of the locality, and the development would have an adverse visual impact: at [322]; and

(8) On merit, the cumulative likely impacts of the development were unacceptable and warranted the refusal of the application even if the precondition regarding contamination was satisfied: at [339].

Kingdom Towers 1 Pty Ltd v Liverpool City Council **[2021] NSWLEC 1074** (Walsh C)

Facts: Kingdom Towers 1 Pty Ltd (**applicant**) sought consent for a Concept Development Application (**application**) under s 4.22 of the *Environmental Planning and Assessment Act 1979* (NSW). The application was for a mixed-use development on a site near Liverpool town centre. The appeal was against the deemed refusal of the application.

Clause 7.5A(2) of Liverpool Local Environmental Plan 2008 (**LLEP 2008**) provides for uplift in floor space and building height controls provided certain preconditions are met. The application sought this uplift, proposing a building height of 105 metres (in the form of a 30-storey-high tower) and a maximum floor space ratio (**FSR**) of 10:1. The otherwise applicable maximum building height is 28 metres and FSR is 3:1. The determinative precondition for securing the uplift is at cl 7.5A(2), reproduced in part below:

> *"…at least 20% of the gross floor area of a building is used for the purposes of business premises, …, food and drink premises, …"*

The plans indicated a ground floor area of 880 square metres to be used as a pub (a type of "food and drink premises" under LLEP 2008's Dictionary). For Levels 2 to 7, the use "Hotel/Business" was shown on the plans, with the applicant acknowledging an intended use for hotel accommodation. It would be necessary for the gross floor area for Levels 2 to 7 (6000 square metres) to be used for a purpose described in cl 7.5A(2) for the application to qualify for the uplift. Relevantly, the use "hotel or motel accommodation" was not referenced in cl 7.5A(2). The applicant argued cl 7.5A(2) of LLEP 2008 as beneficial and facultative and warranting the "widest interpretation that its language will give" and indicated the proposed use at levels 2 to 7 qualified as "business premises" and "food and drink premises".

Issues:

(1) Whether cl 7.5A(2) of LLEP 2008 is beneficial and facultative and warrants "widest interpretation that its language will give";

(2) Whether use of Levels 2 to 7 properly characterised as "business premises"; and

(3) Whether use of Levels 2 to 7 properly characterised as "food and drink premises".

Held: Appeal dismissed:

(1) There is an explicit structure within LLEP 2008 which defines whether an application qualifies for the benefit of FSR and building height uplift or not, differentiating on the basis of expected returned planning benefits from defined uses. There was nothing to suggest clear beneficial purpose, or otherwise achievement of legal intentions, which would go with the widening of the nominated uses targeted for uplift beyond the plain language of cl 7.5A(2): at [39], [41], [46];

(2) Hotel accommodation involves the use of land for the relatively generic and static purpose of accommodation of people. Central to the use business premises is the provision of services to individual customers in accordance with their particular requirements. The proposed use of Levels 2 to 7 is not properly characterised as "business premises": at [66];

(3) The required common sense assessment would give emphasis to the LLEP 2008's Dictionary reference to "the principal purpose" of a pub as "the retail sale of liquor for consumption on the premises". The additional phrase to the definition "whether or not the premises include hotel or motel accommodation" is a supplementary descriptive addition to the principal purpose. It cannot be reasonably found that the 6000 square metres of hotel accommodation shown over Levels 2 to 7 could be characterised as a pub: at [82]; and

(4) The application exceeds LLEP 2008's development standards relating to building height and FSR. There was no jurisdiction to approve it.

Ko v Strathfield Municipal Council [2021] NSWLEC 1099 **(26 February 2021) (Gray C)**

Facts: Ms Ko (**applicant**) sought development consent for the construction of a two-storey, five-bedroom dwelling with lower ground level (**basement**) garage and front boundary fencing at 6 Heyde Avenue, Strathfield. She lodged a development application with Strathfield Municipal Council (**Council**) on 4 August 2020. Following the expiry of the period after which a development application is deemed to be refused, Ms Ko appealed to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

The land of the proposed development was mapped as flood-affected, and the basement proposed to be located below the 1-in-100-year flood level. In the area near the basement entrance, the 1-in-100-year flood level was (around) 22.5 AHD, and the finished floor level of the basement was proposed to be 20.45. The proposed development relied on a driveway crest at the 1-in-100-year flood level, and a 500-millimetre high self-closing flood barrier at the basement entrance. In support of these measures, the applicant relied upon a Flood Assessment Report that incorporated double-brick fences into the flood model that were not located on the site.

Clause 6.3 of the Strathfield Local Environmental Plan 2012 (**SLEP 2012**) prevents development consent from being granted unless the Court, exercising the functions of the consent authority, is satisfied that the development is compatible with the flood hazard of the land (subcl (3)(a)), and incorporates appropriate measures to manage risk to life from flood (subcl (3)(c)). The Strathfield Consolidated Development Control

Plan 2005 (**SCDCP 2005**) requires that flood affected properties comply with the Council's Interim Flood Prone Lands Policy, which requires that non-habitable floors be no lower than the 1-in-100-year flood level. The objective of this control includes to "appropriately manage stormwater and overland flow to minimise damage to occupants and property" (s 10.1(G)).

The Council's position was that the driveway crest and the flood barriers were not sufficient, and that there should instead be a driveway crest that is 0.5 metre above the 1-in-100-year flood level. The Council also disputed the modelled flood levels.

Issues: Whether the proposed flood mitigation measures were adequate.

Held: Appeal dismissed and development consent refused:

(1) In considering whether the matters in cl 6.3(3) of the SLEP 2012 are satisfied the focus is on the acceptability of the proposed development and the associated flood mitigation measures, and not on whether a better, alternative proposal for flood mitigation should be pursued: at [57];

(2) The applicant bears the persuasive burden of satisfying the matters set out in cl 6.3(3) of the SLEP 2012: at [58];

(3) This burden has not been discharged, and the proposed flood mitigation measures do not meet the objectives of the SCDCP 2005: at [59];

(4) The modelling in the Flood Assessment Report could not be relied upon to consider the future flood risk, as it relies on the ongoing presence of a brick dividing fence that is not located on the site: at [60];

(5) The proposed development does not comply with the applicable controls concerning the floor level for the basement garage: at [61], but the Court must "be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards" (s 4.15(3A)(b) of the EPA Act): at [62];

(6) The mechanical solution in the form of the self-closing flood barriers is not an appropriate means to protect the basement from flood water in a residential dwelling. It is not a failsafe method for flood protection in a dwelling, where parked cars can stop the gate lifting and the gates can be damaged or poorly maintained by residents or occupants over time: at [63];

(7) The flood protection for the basement is the driveway crest (at 22.1 AHD) and the site drainage. This is not adequate to manage risk to life from flood, or to manage stormwater and overland flow to minimise damage to occupants and property, for two reasons: firstly, there is insufficient information in support of the stormwater plan to demonstrate the flood levels that the site drainage can accommodate; and secondly, the proposed crest level of the driveway is, in fact, below the 1-in-100-year flood level on the basis of the evidence: at [66];

(8) Accordingly, water will enter the basement in a flood event that occurs more often than the 1-in-100-year event. This creates a risk to life, as residents enter the basement to try to move vehicles to prevent damage. It also creates a risk to property, given that there are cars, storage and a cellar contained in the basement: at [67];

(9) Therefore, the alternative solution offered by the applicant in lieu of compliance with the requirement to build the non-habitable floor at the 1-in-100-year flood level does not meet the objective of that requirement: at [69];

(10) For the same reasons, contrary to cl 6.3(3)(a) and (c) of the SLEP 2012, the basement of the proposed development is not compatible with the flood hazard of the land, and does not provide appropriate measures to manage risk to life from flood. Accordingly, cl 6.3(3) precludes the grant of development consent for the proposed development: at [70].

Nicholas Tang Holdings Pty Ltd v Woollahra Municipal Council **[2021] NSWLEC 1227** (Dickson C)

Facts: On 17 January 2020, Nicholas Tang Holdings Pty Ltd (**applicant**) lodged a development application (**DA**) with Woollahra Municipal Council (**Council**) for demolition of an existing dwelling, excavation of rock shelf and sandstone wall, removal of trees, Torrens title subdivision of the site into four allotments, and construction of a semi-detached dwelling on each allotment. The DA was determined by way of refusal. The applicant appealed under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) against

Council's deemed refusal on 12 March 2020. The site is zoned R3 Medium Density Residential (**R3 Zone**) under the Woollahra Local Environmental Plan 2014 (**WLEP 2014**) and the proposed development is permissible with consent. The minimum lot size for the site is 700 square metres. The proposal seeks to subdivide the land into four allotments: Lot 1 is 230 square metres, Lot 2 is 233 square metres, and Lots 3 and 4 are 232 square metres.

Issues:

(1) Whether the DA meets the minimum subdivision lot size standard;

(2) Whether the written request to vary the standard should be upheld;

(3) Whether the private open space provision for the proposed dwellings is satisfied; and

(4) Whether the proposal is in public interest.

Held: Appeal upheld; development consent granted:

(1) There were two conflicting clauses of the WLEP 2014 in contention. Clause 4.1 of the WLEP 2014 provides that the minimum subdivision lot size is 700 square metres and cl 4.1B of the WLEP 2014 provides exceptions to minimum subdivision lot sizes in the R3 Zone. Clause 4.1B is a permissive provision and specifies development in the R3 Zone for three specific types of residential development, including semi-detached dwellings. The criteria of cl 4.1B must be met before there can be a variation to the minimum lot size under the clause. The development satisfied the criteria and therefore the development was permissible under cl 4.1B: at [42]-[43];

(2) If the conclusion at [42]-[43] is in error, to grant consent a written request to vary the standard under cl 4.6 of the WLEP 2014 would need to be considered. The applicant had made such a written request. The written request is upheld: at [45];

(3) As the subdivided lots are greater than 225 square metres, under the Woollahra Development Control Plan 2015 the size for private open spaces must be at least 35 square metres, with a principal area that has a minimum dimension of 16 square metres. The minimum area requirement and numerical controls were met, therefore the private open space provision was satisfied: at [57]-[60]; and

(4) Twelve members of the public raised concerns in relation to the proposed development. The issues were in relation to the impacts from construction and excavation on the site. The concerns raised did not warrant refusal of the DA on the basis of the evidence given by the experts: at [61].

***Sawaqed v City of Ryde Council* [2021] NSWLEC 1070** (Walsh C)

Facts: Samir Sawaqed (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the refusal by City of Ryde Council (**Council**) to grant development consent for alterations and additions to an existing mixed use building in Ryde. The building comprised a long-term medical centre along with other shops and an upstairs flat. The proposal would increase the number of residential units by three and increase the area available for medical experts practicing from the site.

The major concern of Council was the proposal's reliance on use of nine parking spaces, located in the front setback area and perpendicular to Blaxland Road, a classified road. The Council held safety concerns, and ambitions for improvements to streetscape character. The applicant pointed to the long-term prior use of this front setback parking.

The applicant argued that improving the current arrangement would be of benefit to the local community. The proposed changes were said to be modest and thus not triggering a need for underground parking.

In accordance with the provisions of s 64 of the *Land and Environment Court Act 1979* (NSW), Transport for NSW (**TfNSW**) appeared in this matter.

Issues:

(1) Whether the parking works safely and conveniently now; and

(2) Whether the general community assistance provided by the existing (and proposed) easy access parking directly in front of shops and medical services, especially for senior citizens and those with disability warranted consent being given.

Held: Appeal dismissed:

(1) In accordance with expert evidence presented to the hearing, the parking configuration is unsafe for pedestrians as it requires vehicles to reverse out over a footpath which is subject to a large volume of pedestrian traffic. Vehicles entering and exiting the parking spaces also pose a road safety risk for through traffic due to restricted range of vision for reversing traffic: at [28]; and

(2) The convenience of the current parking configuration for users does not overcome the risk to pedestrian and traffic safety. It would be inappropriate to regularise this configuration through approval of the application: at [48], and [55].

***Stock v Wingecarribee Shire Council* [2021] NSWLEC 1066** (O'Neill C)

Facts: Ms Stock (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**) against the refusal by Wingecarribee Shire Council (**Council**) of a development application for the construction of a secondary dwelling at 506 Greenhills Road, Werai.

The property has an area of 85 hectares and includes a principal dwelling and equine facilities known as "Werai Park". The principal dwelling is on a hill approximately 350 metres from Greenhills Road. The equine facilities are clustered approximately 160 metres to the north of the principal dwelling.

The proposal was for a secondary dwelling located in a paddock in the north-eastern corner of the property, to the east of the equine facilities and 400 metres from the principal dwelling. The secondary dwelling was a single-storey dwelling to be constructed from a building kit for the purpose of housing a farm manager.

A secondary dwelling was a permissible use in the zone. "Secondary dwelling" was defined in the Dictionary of the Wingecarribee Local Environmental Plan 2010 as "a self-contained dwelling that is established in conjunction with another dwelling (**principal dwelling**); and is on the same lot of land as the principal dwelling; and is located within, or attached to, or is separate from, the principal dwelling". The Council submitted that the proposed dwelling was not established in conjunction with another dwelling because it was located a substantial distance from the principal dwelling.

Issues:

(1) Whether the proposal was properly characterised as a secondary dwelling;

(2) Whether the siting of the proposal would have an unacceptable impact on the rural landscape character of the area; and

(3) Whether the proposal would result in land use conflicts with surrounding agricultural activities.

Held: Appeal dismissed:

(1) The proposal was properly characterised as a secondary dwelling within the meaning of the dictionary definition of "secondary dwelling": at [31]-[34] and [47];

(2) The construction of the phrase "in conjunction with", in *Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190 and *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189, is distinguishable by the textual context and purpose of the provisions being construed in those cases: at [42];

(3) Locating the proposal closer to the principal dwelling would not necessarily transform the use from what the Council characterised as a detached dual occupancy in the proposed location, to a secondary dwelling, in the new location: at [45];

(4) The siting of the proposal, isolated from the existing clusters of development on the site, had an unacceptable impact on the rural landscape character of the area and was inconsistent with the objective of the planning control to maintain the rural landscape character: at [51]; and

(5) The substantial excavation required for the proposal did not respond to the topography of the site and was insensitive to the existing landform. The proposal was inconsistent with the objectives of the planning control for cut-and-fill: at [52].

The Owners - Strata Plan No 84411 v The Council of the City of Sydney; The Owners - Strata Plan No 84717 v The Council of the City of Sydney **[2021] NSWLEC 1347** (O'Neill C)

Facts: the applicants appealed under s 21(1) of the *Building Products (Safety) Act 2017* (NSW) (**BPS Act**) and s 8.18(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), against two building product rectification orders (**Orders**), given by the Council of the City of Sydney (**Council**) and made pursuant to s 20(1) of the BPS Act and Sch 5 to the EPA Act.

The complex is located on the block bounded by Ascot Avenue, Hutchinson Walk and Defries Avenue, Zetland, and contains five residential towers set around a central courtyard located over a common podium level containing residential townhouses, a retail tenancy and car parking. The five residential towers, known as Buildings A, B, C D and E, are a "united building" as defined in the National Construction Code 2019, Building Code of Australia - Volume One.

Building B of the complex has a separate strata scheme and a different address from the remainder of the complex. The first appeal related to the buildings identified as A, C D and E, at 5 Defries Avenue, Zetland. The second appeal related to Building B, at 5 Hutchinson Walk, Zetland.

The complex includes a building product which was cladding constructed with an aluminium composite panel (**ACP**) with what was agreed to be a core of 100% polyethylene (**PE**), which is combustible. The ACP cladding was used in discrete locations on the façades and plant rooms of the complex. A building product use ban had been issued under s 9(1) of the BPS Act by the Commissioner for Fair Trading and remains in force. The ban prohibited the use of ACP cladding with a core of greater than 30% PE by mass in any external cladding, external wall, external insulation, façade or rendered finish in Class 2, 3 and 9 buildings of two or more storeys and Class 5, 6, 7 and 8 buildings of three or more storeys (with some exceptions).

Each of the Orders required the banned ACP cladding on the exterior of the complex to be removed and replaced so as to eliminate or minimise the safety risk posed by the ACP cladding in the event of a fire.

The applicants sought that the terms of the Orders be modified pursuant to s 8.18(4)(b) of the EPA Act to require the applicants to carry out the scope of work detailed in a Cladding Assessment Report.

Issue: Whether the terms of the Orders should be modified to require the applicants to carry out the scope of works detailed in a Cladding Assessment Report.

Held: Appeal dismissed:

(1) The complex was an affected building within the meaning of s 17 of the BPS Act because the combustible cladding attached to or forming parts of the façade of the complex was a building product the subject of a building product use ban made pursuant to the Pt 3 of the BPS Act and in force: at [109];

(2) The combustible cladding posed a safety risk in the complex within the meaning of s 4 of the BPS Act in the circumstance of a fire: at [111];

(3) Section 26 of the BPS Act was relevant to the appeals because it described, for the purposes of Pt 4 of the BPS Act, when a building was made safe. A building was made safe if the safety risk posed by the use of a building product to which a building product use ban applied was eliminated, or if it was not reasonably practicable to eliminate the safety risk, was minimised as far as practicable: at [112];

(4) The operation of s 26 of the BPS Act was not dependent on the Secretary issuing an affected building notice: at [112];

(5) The term, "reasonably practicable" in s 26 of the BPS Act meant the requirements involved in the measures necessary to eliminate the risk can be weighed against the safety risk as defined in s 4 of the BPS Act. It was not necessary to take into account the likelihood of the risk occurring in weighing up whether it was reasonably practicable to eliminate the safety risk posed by the use of the banned combustible cladding in the façade of the complex. A risk can be considered to arise from the use of a building product in a building even if the risk will only arise in certain circumstances or if some other event occurs, such as a fire: at [113];

(6) Only if it is not reasonably practicable to eliminate the safety risk, was it acceptable to minimise the safety risk as far as practicable: at [114];

(7) In the circumstances of the appeals, it was reasonably practicable to eliminate the safety risk by removing and replacing the external combustible cladding: at [121]; and

(8) The applicants' position of leaving the majority of the combustible cladding in place and limiting potential ignition sources did not meet the requirements of s 20(2) of the BPS Act to do such things as are necessary to eliminate or minimise the safety risk posed by the use of ACP cladding: at [114] and [117].

- **Procedural Matters:**

Evidence:

***Mullaley Gas and Pipeline Accord Inc (MGPA) (Mullaley Gas INC9894330) v Santos NSW (Eastern) Pty Ltd; Independent Planning Commission* [2021] NSWLEC 24** (Pain J)

Facts: Mullaley Gas and Pipeline Accord Inc (**applicant**) commenced judicial review proceedings challenging, on numerous grounds, approval of the State Significant Development application of Santos NSW (Eastern) Pty Ltd for the Narrabri Gas Project determined by the second respondent Independent Planning Commission (**IPC**). The IPC filed a submitting appearance. The applicant sought leave under r 31.19 of the Uniform Civil Procedure Rules 2005 (**UCPR**) to rely on expert evidence of a climate scientist. The applicant also sought to adduce this evidence orally under r 59.7 of the UCPR. The evidence sought to be adduced was the elucidation of several technical concepts otherwise referred to in evidence before the IPC.

Issue: Whether the applicant should be granted leave to rely on expert evidence.

Held: Applicant given leave to rely on limited expert evidence:

(1) Evidence may be admitted in judicial review proceedings where it is required to explain factors relevant to the determination (*Caldera Environment Centre Inc v Tweed Shire Council* [1993] NSWLEC 102 (***Caldera***)) or to understand technical terms used in material before the decision maker (*Haughton v Minister for Planning and Macquarie Generation* [2011] NSWLEC 217 (***Haughton***)): at [16]-[17];

(2) The expert evidence will enable the applicant to put its case better and it may be essential to hear such evidence to permit understanding of central issues in the judicial review proceedings. The evidence came within the exceptions identified in *Caldera* and *Haughton*: at [19]-[20]; and

(3) The evidence must be provided in writing as is the usual course: at [21].

Right to be Heard:

***Barr Property and Planning Pty Ltd v Cessnock City Council* [2021] NSWLEC 20** (Pepper J)

(related decisions: *Stevens Holdings Pty Limited trading as Stevens Group v Newcastle City Council (No 2)* [2020] NSWLEC 1287 (Horton C))

Facts: By Notice of Motion, three objectors, Black Hill Industrial Pty Ltd (**Black Hill**), Hunter Land Industrial Pty Ltd, and Stevens Holdings Pty Ltd (**objectors**), sought orders that they be notified of Class 1 proceedings between Barr Property and Planning Pty Ltd (**Barr Properties**), Cessnock City Council, and Transport for NSW (**TfNSW**) (**proceedings**) pursuant to s 8.12(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**); in the alternative, that they be joined to the proceedings under s 8.15(2) of the EPA Act or r 6.24(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**); and further in the alternative, that Black Hill be heard pursuant to s 38(2) of the *Land and Environment Court Act 1979* (NSW).

The proceedings related to an appeal brought by Barr Properties against the Hunter and Central Coast Regional Planning Panel's refusal of an application for consent to a 39-lot industrial subdivision of land and the creation of a single environmental conservation lot on John Renshaw Drive. Each of the objectors had an interest in a parcel of land adjoining the land the subject of the proceedings. The objectors submitted that a number of matters would not be properly considered in the proceedings absent their joinder and that they would suffer prejudice if not joined. The orders sought by the objectors were opposed by Barr Properties.

Issues:

(1) Whether upon the proper construction of s 8.12(1)(a) of the EPA Act the objectors were entitled to be given notice of the appeal proceedings; and

(2) If not, whether Black Hill ought to be joined as a party to the proceedings under s 8.15(2) of the EPA Act or r 6.24(1) of the UCPR.

Held: Black Hill was joined to the proceedings; otherwise dismissed:

(1) The objectors were not entitled to be given notice of the appeal pursuant to s 8.12(1)(a) of the EPA Act because, upon the proper construction of that provision, a right of appeal only existed where there had been a determination to grant consent and, in this instance, consent had been refused: at [31], [35], [42];

(2) Section 56 of the *Civil Procedure Act 2005* (NSW) did not confer a power on the Court sitting in Class 1 of its jurisdiction to make an order requiring notification: at [45];

(3) If joinder was available under s 8.15(2) of the EPA Act, it was likely also available under r 6.24(1) of the UCPR: at [49];

(4) Black Hill was joined to the proceedings because, first, it would agitate a number of significant issues unlikely to be heard if they were not joined: at [63]-[64]. Second, in relation to ss 8.15(2)(a) and 8.15(2)(b) of the EPA Act, the Black Hill concept plan approval had made a significant contribution to environmental planning in New South Wales which would be prejudiced by an inconsistent consent being granted: at [65]. Any risk to Black Hill's ability to develop its land in accordance with the Black Hill Concept Plan approval was not in the interests of justice having regard to the dedication of approximately 545 hectares of land for that purpose: at [65]. Further, if Barr Properties" proposal was approved, Black Hill would be forced to redesign its development and would suffer financial detriment due to its inability to implement fully and market lots in the subdivision: at [66]. It was therefore in the interests of justice that Black Hill be joined as a party to the proceedings pursuant to s 8.15(2)(b)(i) of the EPA Act: at [67]; and

(5) Pursuant to s 8.15(2)(b)(ii) of the EPA Act, it was also in the public interest that Black Hill be joined as a party to the proceedings. Having regard to the judgment of Horton C in *Stevens Holdings v Newcastle City Council (No 2)* [2020] NSWLEC 1287, it was clear that a coordinated approach to access to John Renshaw Drive was in the public interest: at [68].

Subpoenas/Notice to Produce:

***Jong Mi Hong v Blacktown City Council* [2021] NSWLEC 38** (Pepper J)

Facts:

By Notice of Motion. the Secretary, New South Wales Department of Planning, Industry and Environment (**Secretary**) sought to set aside a subpoena to produce issued to it at the request of Blacktown City Council (**Council**). The subpoena was issued in principal proceedings brought in Class 3 of the Court's jurisdiction for the determination of compensation for the Council's compulsory acquisition of land belonging to Jong Mi Hong and Min Kyung Hong (**Hongs**) (**principal proceedings**).

The Secretary sought to set aside the subpoena on the grounds that it lacked legitimate forensic purpose. In the alternative, the Secretary resisted production on the grounds of public interest immunity claimed over the subpoenaed documents on the basis that they related to matters of state.

Issues:

(1) Whether the Council had a legitimate forensic purpose for seeking the subpoenaed documents; and

(2) Whether the documents attracted public interest immunity.

Held: Council had a legitimate forensic purpose for seeking the documents; Secretary's claim for public interest immunity rejected:

(1) The test for whether or not a subpoena is valid differs depending on whether the subpoena was issued in criminal or civil proceedings: at [37]. The expression "on the cards" should be employed cautiously when

formulating the legitimate forensic purpose test in civil matters. However, ultimately, it may not matter if "on the cards" is construed to mean "likely" as in "a reasonable probability": at [51]-[52], [56].

(2) In order to establish a legitimate forensic purpose the Council had to demonstrate that it was likely, or that there was a reasonable basis beyond speculation, that the documents would materially assist on an identified issue: at [62]-[63].

(3) There was a legitimate forensic purpose in the Council seeking the documents because, first, it was necessary for the Court in the principal proceedings to determine what alternative zoning the Minister would have applied to the land: at [64]. The difference in the valuation pleaded by each party, based on different zonings was approximately $7.8 million: at [65]. The documents sought would materially assist on an identified issue, that is, what would the land have been zoned disregarding the acquisition: at [69]-[70]. Second, there was a subsidiary issue between the parties as to what was known about the acoustic environment as at the date of the rezoning. It was more than likely that the documents sought would materially assist with this rezoning issue: at [72].

(4) The concession made by the Secretary that the subpoenaed documents would disclose factors that the Minister considered in making his rezoning decision was sufficient to dispose of the legitimate forensic purpose ground: at [70].

(5) The Council was not required to demonstrate that the documents were likely to reveal that the Minister would have selected an option favourable to it: at [71].

(6) The consideration of a claim for public interest immunity compelled a balancing exercise to determine whether the prevailing public interest lay in the disclosure of the documents. In the interests of the administration of justice, the balance favoured disclosure in this case: at [97]. This was because the documents were not especially sensitive, would have been susceptible to production in judicial review proceedings, their disclosure could not reasonably be expected to prejudice the proper functioning of the government of the State, and the sensitivity of documents had become attenuated by the passage of time: at [98]-[102]. Additionally, having regard to the nature of the principal proceedings, namely, Class 3 merits review proceedings, the documents would be central to carrying out the evaluative function under the relevant legislation in the principal proceedings: at [103]. Finally, a critical issue for the parties, and the Court in exercising its role as judicial valuer, was to determine what alternative zoning the Minister would have applied to the land: at [104].

Residents Against Intermodal Developments Moorebank Incorporated v Independent Planning Commission and Anor **[2021] NSWLEC 55** (Robson J)

Facts: Transport for NSW (**TfNSW**) filed a Notice of Motion seeking to set aside an item of a subpoena under r 33.4 of the Uniform Civil Procedure Rules 2005 (NSW). The subpoena had been issued to TfNSW by Residents Against Intermodal Development Moorebank Incorporated (**RAID**), the applicant in Class 1 appeal proceedings against the approval of a large intermodal terminal facility in Moorebank.

The item in the subpoena sought documents and correspondence between TfNSW and the proponent of the development that related to the calibration, validation or performance of traffic modelling, and the calculation of apportionment of the proponent's contribution under a voluntary planning agreement with TfNSW (**contested documents**).

Issues: Whether there is a legitimate forensic purpose for the production of the contested documents sought in the subpoena.

Held: The relevant item in the subpoena set aside:

(1) The relevant legal principles in relation to legitimate forensic purpose were set out by Ward CJ in Eq in *Rinehart v Rinehart* [2018] NSWSC 1102: at [58];

(2) It is apt to start with the identification of the issues in the proceedings: at [59]. The issues in these appeal proceedings are the traffic and other impacts of the development: at [65];

(3) As the contested documents relate to the issues in contention in the appeal proceedings, the materiality of the contested documents to those issues becomes determinative: at [65]. The nature and extent of

material which has already been produced to (or is otherwise available to) RAID means the production of the contested documents will not materially assist RAID: at [75];

(4) Additionally, documents sought as evidence of an error, inaccuracy or miscalculation in the previous decision-making process undertaken by TfNSW are not necessarily pertinent where the Court is remaking the decision *de novo*: at [76];

(5) As a result, RAID has not demonstrated a reasonable basis beyond speculation that the contested documents will materially support RAID's case on an identified issue, where mere relevance is insufficient. Rather, RAID sought to examine the contested documents to ascertain whether they would in fact assist RAID's case: at [85]-[86]; and

(6) While using the terminology "in respect of" tends to import an element of imprecision in relation to documents being sought in a subpoena, the inclusion of the specific points of reference through a detailed description of the matters which the documents must be in respect of, regulates and narrows that terminology: at [95].

Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Greentree; Merrywinebone Pty Ltd; Harris (No 6) **[2021] NSWLEC 28** (Robson J)

Facts: The prosecutor sought to set aside a notice to produce (**notice**) issued by two of the four defendants in these Class 5 criminal proceedings relating to alleged land clearing offences. The notice sought documents that were relied on in the preparation of two evidentiary certificates issued pursuant to the *Native Vegetation Act 2003* (NSW) and *Biodiversity Conservation Act 2016* (NSW) and associated regulations, which effectively deemed the defendants to be "landholders" in the absence of evidence to the contrary.

The defendants sought the documents in the notice to adduce evidence contrary to the facts in the evidentiary certificates, rather than to mount a collateral challenge to the evidentiary certificates. In this way, the defendants characterised the legitimate forensic purpose of the notice as obtaining documents relevant to the weight that should be given to the evidentiary certificates. The prosecutor submitted that the notice should be set aside because it was not issued for a legitimate forensic purpose.

Issues:

(1) The formulation of the test for legitimate forensic purpose in criminal proceedings; and

(2) Whether the defendants had established that it is "on the cards" that the documents sought in the notice to produce would materially assist the defendants.

Held: Notice to Produce was set aside:

(1) Mere relevance to an issue in the proceedings is not sufficient to meet the test for legitimate forensic purpose: at [44];

(2) The formulation of whether it is "on the cards" that the documents sought in the notice would materially assist the defendants' case is the appropriate test for legitimate forensic purpose: at [48];

(3) The notice cannot be used to obtain documents to check whether or not certain facts exist. This was the purpose for which the defendants seek the documents: at [50] and [51];

(4) While there may be documents that meet the description in the notice, there was no evidence to suggest that there is any concern or inconsistency regarding the evidentiary certificates or that there is an error in relation to the certification process: at [53];

(5) The most that can be said is that the documents sought in the notice "might or might not" support an argument by the defendants that an alternative conclusion in relation to a defendant's status as a landholder should be reached. Therefore, the defendants have not established a legitimate forensic purpose for the notice: at [55].

Court News

Appointments/Retirements:

The following Acting Commissioners resigned:

- Mr Paul Rappoport, 23 April 2021
- Mr Norman Laing, 30 June 2021

Obituary:

Acting Commissioner Ross Speers passed away peacefully on 6 July 2021 following a long illness. A celebration of the life of the Acting Commissioner is to be arranged at a later date.

COVID-19 continues:

- Revised COVID-19 Pandemic Arrangements Policy issued on 10 December 2020.
- Mask mandate issued on 8 January 2021 was removed on 8 July 2021.

Other:

- Court fees increased as of 1 July 2021