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Land and Environment Court of NSW Judicial Newsletter

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Revised COVID-19 Pandemic Arrangements Policy
effective 18 February 2022.

Legislation

Statutes and Regulations:

- **Planning:**

Note: Various amendments made to the Environmental Planning and Assessment Regulation 2000 (**2000 EPA Regulation**) since the Environmental Planning and Assessment Regulation 2021 (**2021 EPA Regulation**) was made on 17 December 2021 have been incorporated into the 2021 EPA Regulation by way of the Environmental Planning and Assessment Amendment Regulation 2022.

Environmental Planning and Assessment Amendment (Complying Development Certificates) Regulation 2021 - this Regulation prescribed documents that must accompany an application for a complying development certificate for certain complying development in relation to industrial and business buildings under Pt 5A of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. This was done by inserting a new cl 4AA to Sch 1 of the 2000 EPA Regulation.

Environmental Planning and Assessment Amendment (Consultation, Concurrence and Approval) Regulation 2021 - this Regulation amended the 2000 EPA Regulation to require consent authorities to consult with, or obtain the concurrence of, a relevant authority under ss 4.13(1) and 4.64(1)(i) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) by using the NSW Planning Portal.

Environmental Planning and Assessment Amendment (Development Levy) Regulation 2021 - this Regulation provided for a maximum percentage of the cost of a proposed development in Central Sydney that may be imposed as a levy as a condition of development consent.

Environmental Planning and Assessment Amendment (Housing) Regulation 2021 - this Regulation prescribed conditions of development consent involving boarding houses, co-living housing, in-fill affordable housing, certain residential flat buildings, and seniors housing.

Environmental Planning and Assessment Amendment (Norwest Innovation Precinct) Regulation 2021 - this Regulation specified the maximum rate of the contributions levy for development on land subject to a contributions plan for the Norwest Innovation Precinct.

Environmental Planning and Assessment Amendment (Owner's Consent and BASIX Certificates) Regulation 2021 - this Regulation provided that consent of the land owner is not required for infrastructure applications or modification requests relating to certain State significant infrastructure, and requires that a development application for State significant development must be accompanied by a BASIX certificate if the application is for BASIX affected development.

Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 - this Regulation repealed and remade provisions of the 2000 EPA Regulation related to certification of development for the purposes of Pt 6 of the EPA Act, including compliance certificates, construction certificates, subdivision works certificates, occupation certificates and subdivision certificates, fire safety of buildings and obligations on persons relating to fire and building safety, and other minor related matters.

Environmental Planning and Assessment Amendment (Compliance Cost Notices) Regulation 2021 - this Regulation removed the requirement for specific matters relating to the costs and expenses claimed under a compliance cost notice to be included in the notice. It also removed the cap on the amount payable under a compliance cost notice in relation to an investigation that leads to the giving of the development control order to which the compliance cost notice relates. The Regulation also increased, from $500 to $750, the cap on the amount payable under a compliance cost notice in relation to the preparation or serving of the notice of the intention to give the development control order to which the compliance cost notice relates.

Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation (No 2) 2021 - this Regulation amended the Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation 2021 to allow the letting agent of a dwelling used for the purposes of short-term rental accommodation to register the dwelling (including renewing registration). The amendments also require the host or letting agent of a dwelling to provide the Planning Secretary with certain information on fire safety and letting arrangements within 5 days, or on the day, on which each letting arrangement commences.

Environmental Planning and Assessment Amendment (Upper South Creek Advanced Water Recycling Centre) Order 2021 - this Order declared certain development for the purposes of the Upper South Creek Advanced Water Recycling Centre project to be State significant infrastructure and critical State significant infrastructure.

Environmental Planning and Assessment Amendment (Beaches Link and Gore Hill Freeway Connection) Order 2021 - this Order declared certain development for the purposes of the Beaches Link and Gore Hill Freeway Connection project to be State significant infrastructure and critical State significant infrastructure. The relevant development involves the construction and operation of twin motorway tunnels and connections to existing roads, the upgrade of existing road infrastructure, and ancillary development.

- **Local Government:**

Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment (Displaced Persons) Regulation 2021 - this Regulation permits the manager of a caravan park or camping ground to authorise a displaced person, including a person displaced as a result of a natural disaster or the COVID-19 pandemic, to stay in the caravan park or camping ground for up to two years. It also enables councils to extend, by a local approvals policy, the period within which a moveable dwelling or associated structure can remain installed, where it is installed without the need for council approval to accommodate a displaced person.

- **Water:**

Water Management (General) Amendment (Advertising Requirements and Compliance Audits) Regulation 2021 - this Regulation amended the Water Management (General) Regulation 2018 to provide that the Minister must advertise an application for an approval under the *Water Management Act 2000* (**Water Management Act**) by a notice published on the Department's website or a publicly available website maintained by WaterNSW or the Natural Resources Access Regulator. It also provides for compliance audits to be undertaken by the holder of an access licence or an approval at the direction of the Minister under s 326A of the Water Management Act, including providing for the payment of the costs of compliance audits by holders, requirements for the form and content of compliance audits, certification of compliance audits, and persons who are qualified to undertake compliance audits.

Water Management (General) Amendment (Metering Equipment) Regulation 2021 - this Regulation amended the Water Management (General) Regulation 2018 to provide for a temporary exemption, in certain circumstances, until 1 December 2024 to the mandatory metering equipment condition for water supply works used to take water pursuant to a domestic and stock access licence, or both a basic landholder right and a domestic and stock access licence.

Water Management (Application of Act to Certain Water Sources) Proclamation 2022 - this Proclamation declared that Ch 3, Pt 2 of the *Water Management Act 2000*, which provides for water management by access licences, applies to certain listed water sources. The Proclamation also declared that Ch 3, Pt 2 applies to certain categories and subcategories of access licences relating to those water sources, specifically, floodplain harvesting (regulated river) access licences and floodplain harvesting (unregulated river) access licences.

Note: The following Regulation was tabled in the Legislative Council on 22 February 2022. The Regulation was published on the NSW legislation website on 17 December 2021 but was disallowed in the Legislative Council on 24 February 2022.

Water Management (General) Amendment Regulation 2021 - this Regulation amended the Water Management (General) Regulation 2018 to provide for replacement floodplain harvesting access licences. Clause 23B sets out the circumstances in which a landholder may be eligible for a replacement floodplain harvesting access licence. Part 2A, Divs 2 and 3 provides for the determination of the share components of replacement floodplain harvesting access licences by the Minister for Water, Property and Housing and applicable models for a water source for determining share components. Part 10, Div 3A was inserted to impose mandatory conditions on a work approval in relation to a water supply work nominated for the purpose of capturing or storing water taken under different arrangements. The Regulation also provided for exemptions from requirements under the *Water Management Act 2000* for a landholder to hold a water supply work approval to use a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field that is part of the land, and to hold a water access licence to take water from a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field that is part of the land, except during a period in which a work on the land, other than a tailwater drain, takes overland flow water.

- **Miscellaneous:**

Electric Vehicles (Revenue Arrangements) Act 2021 - as part of the NSW Government's Electric Vehicle Strategy, this Act provides for a system of distance-related road user charges for zero and low emissions vehicles and amends the *Duties Act 1997* to exempt certain zero and low emissions vehicles from vehicle stamp duty.

Community Land Development Regulation 2021 - this Regulation sets out requirements (for example, requirements to do with labelling, diagrams, boundaries) relating to:

- community, precinct, and neighbourhood plans;
- plans and instruments relating to certain transactions, including community, precinct and neighbourhood plans of consolidation and subdivision, boundary adjustment plans, acquisition plans, the severance of development lots, and the conversion of development or neighbourhood lots to association property;
- development contracts;
- management statements;
- the amalgamation of a precinct scheme or neighbourhood scheme with the community scheme of which it forms part; and
- other minor matters.

Pesticides Amendment Regulation 2021 - this Regulation created exemptions to certain provisions of the *Pesticides Act 1999* and the Pesticides Regulation 2017, including exemptions pertaining to waterproofing products containing pesticides, remotely piloted aircraft applicator pilot licences, possession and storage of unregistered pesticides, and the use of pesticides contrary to an approved label. It also provides that a licence to carry out prescribed pesticide work may have a term of duration of 1 year or 5 years and prescribes fees to apply for or renew the licence. The Regulation also makes prescriptions regarding timber pest management technician work and licences.

Strata Schemes Management Amendment (COVID-19) Regulation (No 3) 2021 - in response to the COVID-19 public health emergency, this Regulation provides for altered arrangements for convening and voting at meetings of an owners corporation or a strata committee. It also allows instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed and witnessed by those persons.

Strata Schemes Management Amendment (Information) Regulation 2021 - this Regulation inserted cl 43 into the Strata Schemes Management Regulation 2016, requiring owners corporations for strata schemes to give certain information about the strata scheme to the Secretary of the Department of Customer Service (**Secretary**). This information must be given by 30 September 2022 if the first annual general meeting of an owners corporation is held on or before 30 June 2022, or otherwise within 3 months after the first annual general

meeting of an owners corporation. An owners corporation must also give the information in each subsequent calendar year within 3 months after its annual general meeting. The information that must be provided is specified in cl 43A, and there is an obligation introduced under cl 43B to notify the Secretary if the information changes or is incorrect in a material particular. Under cl 43C, the Secretary is permitted to publicly disclose certain information received about a strata scheme. This Regulation commences on 30 June 2022.

Snowy Hydro Corporatisation Amendment (Savings and Transitional Provisions) Regulation 2022 - this Regulation amended cl 7(1) in Sch 4 of the *Snowy Hydro Corporatisation Act 1997* to extend by 12 months the period during which s 81(4) of the *National Parks and Wildlife Act 1974* does not operate to prohibit operations being undertaken in relation to the Snowy 2.0 project that are not in accordance with the Kosciuszko National Park Plan of Management 2006.

State Environmental Planning Policy (SEPP):

All existing SEPPs and Regional Environmental Plans (**REPs**) were consolidated into 11 new SEPPs, commencing 1 March 2022 (with the exception of the State Environmental Planning Policy (Housing) 2021, which commenced 26 November 2021). The new consolidated SEPPs are as follows:

- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- State Environmental Planning Policy (Industry and Employment) 2021
- State Environmental Planning Policy (Resources and Energy) 2021
- State Environmental Planning Policy (Primary Production) 2021
- State Environmental Planning Policy (Precincts—Eastern Harbour City) 2021
- State Environmental Planning Policy (Precincts—Central River City) 2021
- State Environmental Planning Policy (Precincts—Western Parkland City) 2021
- State Environmental Planning Policy (Precincts—Regional) 2021

State Environmental Planning Policy (Housing) 2021 - this SEPP is aimed at delivering more affordable and diverse housing. Changes include the introduction of two new housing types (co-living housing and independent living units) and the introduction of various provisions pertaining to boarding houses, build-to-rent housing, and seniors housing, amongst other subject matters. This SEPP also consolidated the following five former housing-related SEPPs:

- State Environmental Planning Policy (Affordable Rental Housing) 2009
- State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004
- State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)
- State Environmental Planning Policy No 21—Caravan Parks
- State Environmental Planning Policy No 36—Manufactured Home Estates

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy (Educational Establishments and Child Care Facilities) Amendment 2021 - this amendment introduced various reforms aimed at facilitating effective delivery of educational establishment and early education and care facilities. The reforms generally allow more facilities to be built without a development application, within strict rules. For example, changes have been made to capital investment value (**CIV**) thresholds for educational establishments to be considered State significant development, with the CIV threshold for certain alterations and additions to existing educational establishments raised to $50 million. Other changes include the express allowance of campus student accomodation development, new development controls pertaining to certain early education and care facilities, and an increase in maximum height of certain school building developments to two storeys without the need for a development application.

State Environmental Planning Policy (Infrastructure) Amendment (Solar and Wind Energy) 2021 - introduces a clause at the end of Pt 3, Div 4 of the State Environmental Planning Policy (Infrastructure) 2007 which applies to developments in regional cities for the purposes of solar or wind electricity generating works that are State signficant development or regionally significant development. Subclauses (1) and (2) provide that development consent must not be granted unless the consent authority is satisfied that the development is located to avoid

significant conflict with existing or approved residential or commercial uses of land surrounding the development, and is unlikely to have a significant adverse impact on the regional city's capacity for growth or scenic quality and landscape character. Subclause (3) provides that in determining whether to grant development consent, the consent authority must consider measures proposed to be included in the development to avoid or mitigate the conflicts or adverse impacts referred to in subclause (2).

Judgments

United Kingdom:

Environment Agency v Southern Water Services **(Sentencing Remarks)** **[Unreported, Canterbury Crown Court, 9 July 2021]** (Johnson J)

Facts: Southern Water Services Limited (**SWS**) discharged untreated sewage into controlled coastal waters at 17 different sites along the North Kent coast and the Solent. These sites include areas of great scientific and ecological significance. The discharges occurred on 6,971 occasions from January 2010 to December 2015 and were in breach of SWS's environmental permits under reg 12(1) of the Environmental Permitting (England and Wales) Regulations 2010 (UK) SI 2010/675. The discharges had a profound impact on the ecosystems along the North Kent and Solent coastlines, human health and the businesses that depend on the coastal waters. The Defendant pleaded guilty to 51 counts of knowingly permitting untreated sewage to enter controlled waters and the matter came before the Canterbury Crown Court (**Court**) for sentencing.

Issue: The appropriate sentence to impose on SWS.

Held: SWS was fined £90 million; the fine amount was determined by applying the principles in the Definitive Guideline on Environmental Offences 2014 (**Guidelines**) of the Sentencing Council of England and Wales as follows:

(1) *Culpability and harm*: The Guidelines set out four categories of culpability for organisational offenders: deliberate, reckless, negligent and low or no culpability. The Court held "that each of counts 1-50 was committed deliberately, in that there was an intentional breach of, or flagrant disregard for, the law by the Defendant's board of directors, and/or a deliberate failure by the board of directors to put in place and enforce such systems as could reasonably be expected in all the circumstances to avoid the commission of the offences": at [31]. Some factors which led the Court to reach this conclusion were the "sheer scale of the offending" and that "many different employees, at site level, recognised the inadequacies of the sites and had reported these up the management chain, but to no avail": at [32].

The Guidelines set out four categories of harm: major, significant, minor and a risk of harm. The Court focused on a "single representative count" of offending and was "sure" that "this representative count, and the majority of other like counts" caused major harm (ie, Category 1 in the Guidelines) "because the offending had a major adverse effect on or damage to water quality or amenity value": at [37]-[39];

(2) *Starting point and range of fine*: The starting point and range of fine set by the Guidelines are based on the annual turnover of the offending organisation. The Guidelines list four categories of organisation: large (annual turnover of £50 million or more), medium (annual turnover of £10-£50 million); small (annual turnover of £2-£10 million) and micro (annual turnover of less than £2 million). SWS's annual turnover in 2019-20 was £0.88 billion, which is "higher than the £50 million threshold for a large company": at [43]. The Court held that it was "necessary to move outside the suggested range in order to achieve a proportionate sentence" as "[a]pplying the guideline figures for a large company would not achieve the principles" in the Guidelines: at [45];

(3) *Aggravating and mitigating factors*: The Court held that SWS's offences were "aggravated by its previous persistent pollution of the environment over very many years": at [9]. The Court considered SWS's "previous convictions", "underreporting of spills" and "serious obstruction" of an investigation by the Environment Agency as factors which increased the seriousness of the offending: at [46].

The "main thrust of the mitigation" considered by the Court related to an expression of remorse by SWS's chairman: at [52]. The Court held that the impact of the chairman's statement was, among other reasons, "attenuated by its late arrival… and the fact that similar statements of remorse have no doubt been given on many previous occasions when the company has been convicted, only to be subsequently shown to be all warm words and no action": at [52];

(4) *Proportionality of the fine to the means of the offender*: While the Court noted that the fine amounted to "a very substantial proportion" of SWS's annual net profits, it considered that it was proportionate as it fell within the range of fines contemplated by the Court of Appeal in *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960 for this type of offending: at [59]; and

(5) *Reduction for plea*: The Court reduced SWS's fine by one-third to reflect its guilty pleas: at [63].

Queensland:

Michelmore v Hail Creek Coal Holdings Pty Limited & Ors **[2021] QLAC 4** (Crow J, Isdale M, Preston AM)

(decisions under review: *Hail Creek Coal Holding Pty Limited & Ors v Michelmore* (No 2) [2021] QLC 23 (Stilgoe M)

Facts: Hail Creek Coal Holding Pty Limited (**Hail Creek**) lodged an application for a mining lease over part of Mr Michelmore's land on which was constructed an accommodation village that houses workers at the Hail Creek Mine (an area of 138 hectares). The proposed term of the mining lease was 20 years. Under s 279(1)(a) of the *Mineral Resources Act 1989* (Qld) (**Mineral Resources Act**), the mining lease cannot be granted unless "compensation has been determined (whether by agreement or by determination of the Land Court) between the Applicant and each person who is the owner of land the surface of which is the subject of the application and any surface access to the mining lease land." Mr Michelmore and Hail Creek were unable to reach agreement on the compensation payable. In particular, the parties disagreed as to the valuation method to be used to calculate the value of the land for an accommodation village.

The Chief Executive of the Department of Resources referred the proceeding to the Land Court for it to determine the amount of compensation. The Land Court determined compensation in the sum of $530,530, inclusive of the 10% statutory uplift under s 281(4)(e) of the Mineral Resources Act. Mr Michelmore considered this sum to be insufficient compensation and appealed the decision.

Mr Michelmore did not appeal within the 20-day time period in s 282(1) of the Mineral Resources Act and applied for an extension of time to appeal.

Issues:

(1) Whether Mr Michelmore's application for extension of time to appeal should be granted;

(2) Whether the primary member misapplied the *Raja* principle (referring to the Privy Council's decision in *Raja Vyricheria Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (***Raja***);

(3) Whether the primary member failed to apply the principles for valuing a commercial opportunity in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4 (***Sellars***);

(4) Whether the primary member erred in accepting the direct comparison method of valuation of Hail Creek's valuer;

(5) Whether the primary member erred in failing to accept the net present value (**NPV**) method of Mr Michelmore's valuer;

(6) Whether the primary member erred in failing to find that the evidence of Hail Creek's valuer did not meet the criteria for admissibility of expert evidence in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 (***Dasreef***); and

(7) Whether the primary member erred in failing to apply the principle in *Commonwealth of Succession Duties (SA) v Executor Trustee and Agency Co South Australia Ltd* (1947) 74 CLR 358; [1947] HCA 10 that doubts be resolved in favour of a more liberal estimate favouring the claimant.

Held: Time to appeal extended; appeal dismissed; Appellant to pay Respondent's costs (Preston AM, Crow J and Isdale M agreeing):

(1) Mr Michelmore's application for extension of time to appeal should be granted. Factors favouring an extension of time to appeal are the shortness of the delay, the adequacy of the explanation for the delay, the injustice to Mr Michelmore if time to appeal were not to be extended, and the lack of material prejudice to Hail Creek if time to appeal were to be extended. A factor tending against granting an extension is the poor prospects of success of the appeal, however, it is sufficient that the appeal can be said to be fairly arguable: at [8], [11], [25], [31], [37]-[39];

(2) The primary member did not misunderstand or misapply any principle established in *Raja.* *Raja*'s case, which addresses valuation of a potentiality of land that is of value to the acquirer, was not directly applicable.

The "potentiality" claimed by Mr Michelmore in the present case, the accommodation village constructed on the land that is used for the mine workers of the Hail Creek mine, was in fact an "actuality", which formed part of the market value of the land. The fact that there might be only one possible purchaser of the land, the acquiring authority or person, does not mean that the purchaser would have to pay whatever price the owner might nominate; that would be inconsistent with the *Spencer* requirement that the purchaser is not so anxious to buy that they would overlook any ordinary business consideration: at [60], [62], [64];

(3) The primary member did not err in applying *Sellars* to determine the compensation payable to Mr Michelmore under the Mineral Resources Act. The market value of the land should not be assessed on the basis that it would continue to be used by Hail Creek as an accommodation village, without any or any significant discount for the risk that it would not be so used or that there would be changes to the existing DA to permit the accommodation village to be used by workers not employed by Hail Creek. The market value was to be determined by application of the *Spencer* test, which does not involve application of any principle deriving from *Sellars* for an assessment of damages for the loss of a commercial opportunity: at [78];

(4) In circumstances where different valuation methods are equally available on the evidence, the choice of one valuation method over another as being the appropriate methodology to be applied in the particular circumstances, does not involve any error of law or principle of assessment. Having chosen the valuation method of the direct comparison method, the choice of which sales transactions were comparable and the respects in which they were or were not comparable were questions of fact. A court will not err in law by selecting or rejecting a sale transaction as comparable, unless in doing so the court ignores a principle of assessment of compensation or rejects as wholly irrelevant to the assessment of compensation, a transaction which prima facie affords some evidence of value and rejects it for reasons which are not rational: at [94], [95];

(5) The primary member was faced with a choice between competing valuation methods, Mr Cavanagh's direct comparison method or Mr Caleo's NPV method, and she chose the former over the latter. No error of law or principle of assessment was involved in doing so. Having chosen to apply the direct comparison method instead of the NPV method, there was no warrant to make any findings of fact regarding any inputs to the NPV method, including the number of rooms, the gross applied room rate or any additional discount. The primary member cannot have erred in law or fact in not making findings regarding inputs to a valuation method, the NPV method, that she did not apply: at [107];

(6) The primary member did not err in accepting and giving weight to the evidence of Mr Cavanagh in preference to the evidence of Mr Caleo. Mr Michelmore's reliance on *Dasreef* is misplaced. First, no objection was taken at the hearing before the primary member or on the appeal to this Court as to the admissibility of Mr Cavanagh's evidence, either generally or in relation to the NPV method particularly, on the ground that his evidence failed to disclose the basis or reasoning for his expert opinion. Second, the objection now taken is to Mr Cavanagh's evidence on the NPV method, but that method was not accepted by the primary member. It matters not whether Mr Cavanagh's evidence on the NPV method did or did not state the basis or reasoning for his opinions in circumstances where the primary member did not rely on the NPV method and hence on any evidence on that method. Third, it was reasonably open to the primary member to prefer, and to give weight to, the evidence of one expert over that of another expert. In making that evaluation of competing evidence, the primary member took into consideration the content of the evidence and the manner in which the evidence was given. That is what Mr Michelmore contended ought to have been done. The fact that it was done in a different manner with a different result to how Mr Michelmore contended it should have been done is immaterial: at [113]; and

(7) Mr Michelmore had not established that the primary member erred in failing to apply the principle that doubts should be resolved in favour of a more liberal estimate of compensation, including for the reasons given by Hail Creek. Mr Michelmore had not identified any particular issue on which there was doubt and in respect of which the primary member should have resolved it in favour of Mr Michelmore. The liberal estimate principle did not dictate either the valuation method or the evidence of one valuer over another that the primary member should accept. The primary member was required to evaluate the evidence of the competing witnesses and make findings from the evidence in the usual way. The liberal estimate principle did not demand that the primary member apply a valuation method that she found to be inappropriate in the circumstances or the evidence of a valuer in which she had no confidence and to which she could give little or no weight, just because to do so might award a greater amount of compensation to Mr Michelmore: at [117].

New South Wales Court of Appeal:

Black Hill Residents Group Inc v Marist Youth Care Ltd **[2021] NSWCA 314** (White JA)

(decision under review: *Black Hill Residents Group Incorporated - INC1900196 v Marist Youth Care Limited (t/as Marist180) (No 6)* [2021] NSWLEC 113 (Pain J))

Facts: Marist Youth Care Limited (**Marist**) applied for security for costs of an appeal instituted by Black Hill Residents Group Incorporated (**Black Hill**) against a decision of Pain J in the Land and Environment Court. Marist is a not-for-profit seeking to positively change the lives of at-risk young people. It established homes providing Intensive Therapeutic Transition Care in the suburb of Black Hill. Black Hill brought proceedings arguing that development consent was required. Pain J rejected this contention. Black Hill provided $40,000 as security for costs in the first instance proceedings and Pain J ordered that sum to be paid to Marist. Marist's evidence was that its legal costs were around $500,000 in the proceedings to date. Marist applied for a "security for costs order" against Black Hill in relation to the appeal. It submitted that, were it successful in resisting the appeal, it was concerned that Black Hill would not be able to pay costs and money would be lost for Marists' charitable purposes.

Issue: Whether the Court of Appeal should grant security for costs of the appeal under rr 42.21 and 51.50 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

Held: Black Hill to give security for Marist's costs of the appeal in the sum of $70,000; if not provided, appeal dismissed:

(1) Under r 42.31(1)(d), which is relevant in an appeal by virtue of s 51.50(3) of the UCPR, security of costs may be ordered where there is reason to believe Black Hill, a corporation, will be unable to pay the costs of the Respondent: at [12]-[13];

(2) Black Hill did not dispute that it could not pay the costs of the appeal if unsuccessful, meaning r 42.21(1)(d) was enlivened and it was unnecessary to show special circumstances under r 51.50(1): at [14];

(3) The evidence fell short of establishing the fact, critical to resisting a security for costs application, that those standing behind Black Hill have no means to provide the security sought : at [16]-[19];

(4) In any case, the prospects of success on appeal were not more than arguable: at [21]; and

(5) Black Hill accepted that if security were ordered it would not provide it and did not dispute that the order for security should be self-executing such that if it were not paid the proceedings would be dismissed: at [23].

Di Liristi v Matautia Developments Pty Ltd **[2021] NSWCA 328** (Macfarlan, Gleeson and Brereton JJA)

(related decisions: *Di Liristi v Matautia Developments Pty Ltd (No 6)* [2021] NSWSC 663 (Cavanagh J); *Di Liristi v Matautia Developments Pty Ltd (No 7)* [2021] NSWSC 760 (Cavanagh J))

Facts: Mr Antonio Di Liristi (**Appellant**), entered into a residential tenancy agreement in respect of premises at Austral with Matautia Developments Pty Ltd (**Respondent**), for a period of three years commencing 1 August 2019.

The Appellant permitted a large quantity of soil to be brought onto the property to level it between June and November 2019. In December 2019, Liverpool City Council (**Council**) issued a Clean-Up Notice to the Respondent requiring it to have the fill classified and analysed prior to its removal. The Respondent, through a consultant, commissioned Aargus Pty Ltd (**Aargus**) to conduct a soil assessment. Following a site inspection and collection of soil samples by representatives of Aargus on 7 January 2020, Aargus provided a report dated 24 January 2020, authored and signed by Mr Balakrishnan, an environmental engineer, and reviewed and signed by Mr Kelly, an environmental manager (**first Aargus report**). Mr Kelly did not attend the property as part of the site inspection. The report attached laboratory certificates from Australian Safer Environment & Technology Pty Ltd (**ASET**) stating that asbestos had been detected in six of the 17 soil samples.

On 5 March 2020, Appellant commenced proceedings in the Supreme Court against the Respondent in relation to disputes concerning the property.

Although no orders were made for the service of expert reports, both parties served expert reports on the issue of whether the imported fill was contaminated: The Respondent served the first Aargus report; the Appellant served a report by Geotech Soil Solutions Pty Ltd (**Geotech report**) and the Respondent served a report in reply by Aargus (**second Aargus report**). Both the Geotech report and the second Aargus report were served late.

Note: This case is reported only with respect to the issue of the availability of s 69 of the *Evidence Act 1995* (NSW) (Evidence Act) as a basis for admission of expert evidence.

Issue: The admissibility of, or weight to be given to, the two expert reports prepared by Aargus.

Held: Appeal dismissed (Gleeson JA, Macfarlan and Brereton JJA agreeing):

(1) The first Aargus report was admissible as a business record of the Respondent pursuant to s 69 of the Evidence Act: The report belonged to or was kept by the Respondent in the course of, or for the purpose of, its business of owning and leasing the property (s 69(1)(a)); the report was made for the purposes of its business (s 69(1)(b)); and statements made in the report were made by Mr Balakrishnan who had the requisite degree of personal knowledge of the asserted facts, or were made on the basis of information directly or indirectly supplied to Mr Balakrishnan by ASET who had or might reasonably be supposed to have had personal knowledge of the asserted facts concerning the analysis of the soil samples (s 69(2)): at [46]-[53];

(2) The carve out in s 69(3) was not engaged with respect to the first Aargus report. No reliance was placed by the Appellant on s 69(3)(b) that this report contained a representation made in connection with an investigation relating or leading to a criminal proceeding. Nor were civil proceedings "likely" or "reasonably likely" at the time the representations in the report were prepared or obtained (s 69(3)(a)): at [55]-[59];

(3) The primary judge did not err in giving weight to the first Aargus report: it was not to the point that Mr Kelly did not attend the site inspection, and the weight to be given to the previous representations contained in the report was not lessened by the absence of Mr Balakrishnan or Mr Zhang of Aargus, or the author of the ASET certificates for cross-examination: at [61]-[65]; and

(4) Although the primary judge did not use the words "exceptional circumstances" when admitting the second Aargus report, which was served less than 28 days prior to the hearing, his Honour can be taken to have considered that such circumstances were established for the purposes of r 31.28(4) of the Uniform Civil Procedure Rules 2005 (NSW), as both parties had served expert reports despite no directions being made for expert reports; both reports had been served late; the report was in reply to the Geotech report; and both parties had a fair opportunity to cross-examine the other's expert: at [69]-[71].

Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2) **[2021] NSWCA 246** (Bathurst CJ, Bell P and Leeming JA)

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

Facts: Representative Plaintiffs (**Plaintiffs**) sued both the Murray Darling Basin Authority (**Authority**) and the Commonwealth (**Defendants**) in negligence for damage allegedly caused by water releases made in breach of duty. The Defendants relied upon certain provisions in Pt 5 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) in their defence. Those provisions only applied if the Authority or its delegates were a "public or other authority" within the meaning of s 41. Before Adamson J (**primary judge**) in the Supreme Court of New South Wales, the Plaintiffs successfully moved to strike out certain paragraphs in the Authority's defence based upon provisions of Pt 5. The Authority and the Commonwealth sought leave to appeal. However, the parties thereafter agreed upon facts and identified questions for separate determination, which were removed to the New South Wales Court of Appeal (**Court**) and heard concurrently with the appeal.

Issues:

(1) Whether the Authority was a "public or other authority" within the meaning of s 41 of the Civil Liability Act;

(2) Whether the Authority's delegates were a "public or other authority" within the meaning of s 41 of the Civil Liability Act; and

(3) If the answer to (1) or (2) was "yes", whether Pt 5 of the Civil Liability Act was nonetheless inoperative in this proceeding, and specifically, whether its application would have been inconsistent with s 64 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) for the purposes of:

   (a) Section 79 of the Judiciary Act; or

   (b) Section 109 of the *Commonwealth of Australia Constitution Act* (Cth) (**Constitution**).

Held: Issues (1) and (2) answered in the negative and issue (3) did not arise; Defendants ordered to pay Plaintiffs' costs related to the separate questions (Leeming JA, Bathurst CJ and Bell P agreeing):

(1) The Authority was not a "public or other authority" for the purposes of s 41 and Pt 5 of the Civil Liability Act. It did not fall within the description of "any public or local authority constituted by or under an Act" in s 41(e):

at [73]. The Authority did not fall within s 41(e1) either as s 41(e1) was confined only to natural persons: at [74]-[82];

(2) The Authority's delegates, though natural persons, were not a "public or other authority" for the purposes of s 41 and Pt 5 of the Civil Liability Act. Section 41(e1) was confined to persons having "public official functions" of the State of New South Wales, rather than "public official functions" of other polities which happened to occur within New South Wales. When the Authority's delegates were exercising powers conferred upon the Authority by the *Water Act 2007* (Cth), they were not exercising public official functions of the State of New South Wales: at [83]-[84];

(3) The Authority did not exercise State governmental power by mere fact of its compliance with conditions of permits granted under ss 87 and 90 of the *National Parks and Wildlife Act 1974* (NSW) concerning the course of the operation of Lake Victoria. Compliance with general provisions of State criminal law did not convert the Authority's performance of its functions into State governmental power: at [85]-[87];

(4) Consequently, the question of inconsistency for the purposes of either s 79 of the Judiciary Act or s 109 of the Constitution did not arise: at [90]; and

(5) The Authority was not entitled to rely on a defence based on various provisions in Pt 5 of the Civil Liability Act: at [12].

***Eliezer v Sydney Water Corporation* [2021] NSWCA 300** (Gleeson and McCallum JJA, Preston CJ of LEC)

(decisions under review: *Eliezer v Sydney Water Corporation* [2021] NSWDC 66 (Abadee DCJ); *Eliezer v Sydney Water Corporation* (unreported) (Assessor Harvey))

Facts: Ms Eliezer (**Appellant**) brought proceedings seeking to judicially review the decisions and orders of two courts: the Local Court of New South Wales, sitting in its Small Claims Division, and the District Court of New South Wales. The decisions concerned an action in debt in the Small Claims Division of the Local Court by Sydney Water against the Appellant for her non-payment of charges for water, sewerage and stormwater drainage services provided to the Appellant's premises. The Local Court found that Sydney Water had made out its claim and ordered the payment of the principal sum, filing fees and interest, and an award of costs. The Appellant appealed against the decision of the Local Court to the District Court, which dismissed the appeal and ordered the Appellant to pay costs. The Appellant sought to judicially review the decisions and orders of the Local Court and District Court, but needed an extension of time to commence the proceedings for judicial review of the Local Court.

Issues:

(1) Whether time should be extended to commence proceedings against the Local Court's decision; and

(2) Whether the District Court fell into jurisdictional error or error of law on the face of the record.

Held: Extension of time refused; Summons dismissed; Appellant to pay Respondent's costs (Preston CJ of LEC; Gleeson and McCallum JJA agreeing):

(1) One relevant consideration in considering applications for an extension of time to appeal is whether the Applicant has a fairly arguable case. The Appellant did not have a fairly arguable case for judicial review of the Local Court's decision. First, the Court of Appeal cannot quash the decision of the Local Court on the grounds concerning lack of jurisdiction and denial of procedural fairness while the District Court's decision stands. Second, the other grounds did not raise jurisdictional error or error of law on the face of the record: at [16]; [32] and

(2) The Appellant did not establish that the District Court fell into jurisdictional error or error of law on the face of the record, or error in any of the other respects claimed in the grounds of review: at [37], [46], [47], [71].

***Huang v Nazaran* [2021] NSWCA 243** (Basten, Macfarlan and Meagher JJA)

(decision under review: District Court of New South Wales, 15 March 2021, file number 2019/00378892 (Conlon SC ADCJ))

Facts: Chenlong Huang and Xuejing Li (**Applicants**) commenced proceedings in the Local Court of New South Wales (**Local Court**) against their neighbour Dr Fatemeh Nazaran (**Respondent**) seeking a noise abatement order under s 268 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). That application was made in the Local Court's special jurisdiction under Pt 4 of the *Local Court Act 2007* (NSW) (**Local Court Act**) and was dismissed with costs. The Applicant appealed from those orders to the District Court

of New South Wales (**District Court**). That appeal was dismissed by the primary judge on the basis that s 70(1)(b) of the Local Court Act did not confer a right of appeal to the District Court from those orders. The Applicants sought judicial review of the District Court's decision.

Issue: Whether the District Court had jurisdiction under s 70(1)(b) of the Local Court Act to hear the Applicants' appeal from the Local Court's orders dismissing the application for a noise abatement order and ordering that the Applicants pay costs of the application.

Held: Appeal allowed; District Court's orders set aside other than the dismissal of the Respondent's application for costs; District Court declared to have had jurisdiction to determine the appeal from the Local Court; matter remitted to the District Court for hearing and determination of the Applicants' appeal (Meagher JA, Basten and Macfarlan JJA agreeing):

(1) Section 290 of the POEO Act conferred no right of appeal to the Land and Environment Court of NSW or to the District Court from the Local Court orders which dismissed the application notice and required that the Applicants pay the costs of that application. However, ss 70(1)(b) and 70(2) of the Local Court Act continued to confer a right of appeal to the District Court from "any order" made in the Local Court's special jurisdiction "arising from" an application notice, except where prohibited by the POEO Act pursuant to which the order was made. In this case, the POEO Act did not prohibit such an appeal and s 70(1)(b) captured the Local Court's orders dismissing the Applicants' proceeding with costs: at [22];

(2) The closing words of s 70(1)(b) provided that the appeal was to be made in accordance with Pt 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) "in the same way as such an … appeal may be made in relation to a conviction arising from a court attendance notice" dealt with under Pt 2 of Ch 4 of the *Criminal Procedure Act 1986* (NSW). The primary judge erred in finding that this language restricted or qualified the subject matter of such an appeal so that it was limited to a conviction or sentence appeal. The proper effect of that language was that the appeal was to be dealt with as if it were an appeal from a conviction made in the summary criminal jurisdiction. In other words, the form of the appeal and procedure to be applied was that which would have applied to an appeal against a conviction: at [19]-[21], [23]-[26]; and

(3) The primary judge's conclusion that the District Court did not have jurisdiction to hear the appeal was a jurisdictional error. The Applicants did not have to establish that the error was material: at [27].

***Veira v Cook* [2021] NSWCA 302** (Basten and Meagher JJA, Emmett AJA)

(decision under review: *Lopes v Cook* [2020] NSWSC 1776 (Adamson J))

Facts: In June 2018, Maria Veira (**Applicant**) entered a poultry farm, removed chickens from their cages, and took them from the property. The Applicant was subsequently charged and convicted in the Local Court of New South Wales (**Local Court**) of the offence of "entering inclosed lands without lawful excuse and interfering with a business" under s 4B(1)(a) of the *Inclosed Lands Protection Act 1901* (NSW) (**ILP Act**). The Applicant's only defence was that her otherwise criminal conduct was excused by the defence of necessity. The Applicant relied on the fact that the chickens were being subjected to cruelty, including by being deprived of food and water, and that her conduct was done to protect them from further harm. The Local Court rejected that defence, concluding that there was no "situation of imminent peril" that would enliven the defence, and that the Applicant's actions were not "proportionate". RSPCA officers had attended the property earlier that day and ensured the chickens were provided with sufficient feed and water. An appeal to the Supreme Court of New South Wales was dismissed by the primary judge. Her Honour held that the "purpose" and "proportionality" elements of the defence of necessity were not satisfied. The Applicant sought leave to appeal from the primary judge's orders.

Issues:

(1) Whether the primary judge erred in proceeding on the basis that the Applicant bore the evidentiary onus of raising the defence of necessity, whilst the Prosecutor bore the legal burden of disproving it;

(2) Whether it was sufficient for the defence of necessity that the otherwise unlawful conduct be in response to threatened harm to an animal or property, provided that the Applicant honestly and reasonably believed that the harm sought to be avoided was not less than any harm involved in the proposed wrongdoing; and

(3) Whether the Applicant honestly believed on reasonable grounds that her actions were necessary to respond to a threat of the kind described.

Held: Leave to appeal refused; Applicant to pay Respondent's costs (Meagher JA, Basten JA and Emmett AJA agreeing):

(1) Section 4(1) of the ILP Act made clear that the accused bore the onus of establishing, on the balance of probabilities, that it had a "lawful excuse" for entering the inclosed lands. Accordingly, the primary judge

erred in proceeding on the basis that the Applicant had the evidentiary onus of raising the defence, and the Prosecutor had the legal burden of disproving it. However, that error made no difference to the primary judge's conclusion: at [34], [36];

(2) The defence of necessity was only available where the Applicant's otherwise unlawful conduct was in response to a threat of death or serious injury to them or some other person. The authorities did not support the defence as extending to conduct undertaken to avoid threatened harm to animals or property. Such an extension would have been inconsistent with the defence only being available where the circumstances overwhelmingly impel disobedience to the law: at [39]-[43];

(3) The Applicant must have honestly believed on reasonable grounds that her actions were necessary to respond to a threat of the kind described. Whether there were reasonable grounds for that belief required consideration of the reasonableness and proportionality of the Applicant's responding conduct, and in particular whether the threatened harm could have been avoided by some other lawful means: at [44]-[46]; and

(4) The agreed facts did not establish that there was a threat of death or serious injury which meant the Applicant had no real choice, in protecting her safety or that of some other person, than to engage in the conduct sought to be excused. Consequently, the defence could not be made out, and there was no utility in granting leave to appeal: at [48]-[49].

New South Wales Court of Criminal Appeal:

Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator **[2022] NSWCCA 9** (Preston CJ of LEC, Price and Adamson JJ)

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

Facts: The Appellant, Budvalt Pty Ltd (**Budvalt**) had directed the construction of a water supply channel on its land and used it for holding or conveying water sourced from the Macquarie River without a water supply work approval. Budvalt pleaded guilty to an offence contrary to s 91B(1) of the *Water Management Act 2000* (NSW) (**Water Management Act**). Moore J subsequently imposed a fine of $252,000 and ordered publication of a prescribed notice in two newspapers under s 353G(1)(a). He held that Budvalt's conduct was "above the middle of the low range" of offending conduct, and that its fundamental impact was the undermining of the overall regulatory scheme for water resource management under the Water Management Act. Budvalt appealed against the fine.

Issues:

(1) Was the fine of $252,000 manifestly excessive;

(2) Did the primary judge err in:

(a) not finding that the offending conduct fell at or near the lowest range of conduct prohibited by s 91B of the Water Management Act, and in doing so, failed to give proper weight or consideration to various matters including those relevant to assessing the objective seriousness of Budvalt's conduct;

(b) not having proper regard to, and attributing any or proper weight to, relevant subjective features of Budvalt in arriving at the figure of $252,000;

(c) adopting the two-stage and mathematical approach disapproved of in *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 (***Markarian***) in determining the quantum of the fine; and

(d) finding that the making of publication orders under s 353G of the Water Management Act and Budvalt's lack of opposition to such an order were irrelevant to a determination of the quantum of any fine, and proceeding to determine the quantum of the fine without regard to those matters.

Held: Appeal dismissed (Price J, Preston CJ of LEC and Adamson J agreeing):

(1) The primary judge did not adopt the impermissible two-stage approach disapproved of in *Markarian*. In determining the quantum of the fine, he had expressly referenced "instinctive synthesis" and comprehensively considered the objective circumstances of the offence, the subjective circumstances of Budvalt, and the competing arguments of the parties: at [49]-[50];

(2) The primary judge was not obliged to consider the deterrent effect of publication orders made under s 353G of the Water Management Act when determining the quantum of s 363B penalties. Publication orders serve not only a deterrent effect, but also a remedial and educative effect. Furthermore, the Water Management

Act separated provisions regarding orders and penalties into distinct Parts (Pts 3A and 5, respectively). The language of s 353A(2) also contemplated that Pt 3A orders could be determined independently of Pt 5 penalties. None of the s 364A(1) considerations for imposing a penalty expressly required a court to consider orders it might have made under Pt 3A: at [59]-[68];

(3) The primary judge was not obliged to compare the gravity of the offence with a hypothetical offence when assessing its objective seriousness. The primary judge was also not required to consider the absence of aggravating features as elevating objective seriousness. The primary judge did not confine his assessment of objective seriousness to the dimensions and required excavation of the channel; to the contrary, he had considered a range of relevant factors. The primary judge was entitled to emphasise that the substantial scale of the construction work undertaken without consent undermined the regulatory scheme under the Water Management Act. Matters personal to Budvalt were also irrelevant to the assessment of objective seriousness. Ultimately, it was open to the primary judge to conclude that Budvalt's conduct was "above the middle of the low range" of offending conduct: at [80]-[86];

(4) The primary judge had not failed to give proper weight to certain subjective features of Budvalt's case. The primary judge did not fail to account for Budvalt's lack of intention in committing the offence as required by s 364A(1)(h) of the Water Management Act, nor was he bound to accept that Budvalt's manager's mistaken belief that the works were permissible was a mitigating factor. In the absence of sworn testimony, it was also open to the primary judge to conclude that Budvalt had failed to establish genuine remorse and contrition: at [99]-[122]; and

(5) The fine of $252,000 was not manifestly excessive, as it was not "unreasonable or plainly unjust". The primary judge had given careful consideration to the objective gravity of the offence and Budvalt's subjective case. Water is a precious resource and it was fundamental to water resource management in New South Wales that landowners understand and comply with their obligations under the Water Management Act. In this case, Budvalt's conduct had undermined the regulatory regime's objects: at [129]-[134].

Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd **[2021] NSWCCA 289**
(Preston CJ of LEC, Price and Adamson JJ)

(decisions under review: *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* [2021] NSWLEC 37; *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd (No 2)* [2021] NSWLEC 48 (Pepper J))

Facts: 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* (**POEO Act**) for discharging partially treated effluent from the Resort's sewage treatment plant (**STP**) into a tributary and spraying partially treated effluent on the snow around the STP.

The Resort filed a Notice of Motion by which it sought orders to set aside the Summons on the basis of duplicity, or, in the alternative, requiring the Prosecutor to elect to seek leave to amend the Summons to avoid the duplicity. In addition, the Resort applied for leave to withdraw its plea of "guilty" to the charge.

At the request of the parties, the primary judge adjourned the application for the withdrawal of the plea of "guilty" until after the determination of the duplicity argument. The primary judge held that the Summons was duplicitous in *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* [2021] NSWLEC 37 and in *Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd (No 2)* [2021] NSWLEC 48 ordered that the Summons be stayed until the Prosecutor elected and particularised the single offence upon which it would proceed. The Prosecutor appealed pursuant to s 5F(1)(c) of the *Criminal Appeal Act 1912* (NSW). On appeal the Prosecutor no longer pressed the discharge of effluent by means of a snow gun as an instance of the water pollution offence.

Issues:

(1) Whether the primary judge erred in finding that the second exception to the rule against duplicity for single criminal enterprises did not apply; and

(2) Whether the primary judge erred in ordering the Prosecutor to elect and particularise a single offence upon which it would proceed prior to determining the Resort's application to withdraw its guilty plea.

Held: Appeal upheld (Preston CJ of LEC, Price and Adamson JJ agreeing):

(1) Whether a statute attaches criminality to an ongoing criminal enterprise is a question of statutory construction. Undertaking this task with respect to relevant provisions of the POEO Act and an

environmental protection licence (**EPL**) in water pollution cases ordinarily reveals that multiple acts of pollution resulting from an EPL activity will be sufficiently connected to amount to a single instance of offending: at [48]-[50];

(2) The acts of discharging effluent from the STP into the tributary were sufficiently similar (the second indicia of the single criminal enterprise exception identified in *Walsh v Tattersall* (1996) 188 CLR 77 at 108 (***Walsh***)) because each act of water pollution involved the discharge of untreated or partially treated sewage as a result of the scheduled activity of sewage treatment carried on at the STP. The discharges also occurred at the same place (the third indicia in *Walsh*). These unifying characteristics meant that the acts of discharge were sufficiently connected so as to constitute the same criminal enterprise of water pollution, notwithstanding that the volume of the discharged effluent and the concentration of pollutants in it may have varied throughout the charge period: at [53]-[55], [61];

(3) The other two indicia in *Walsh* were more equivocal. However, neither precluded a finding that the single criminal enterprise exception applied. With respect to the first indicia in *Walsh*, the events were sufficiently connected in point of time because the discharges all occurred during, and as a necessary consequence of, the operation of the STP. With regard to the fourth indicia in *Walsh*, the intention of the Resort in discharging the effluent remained constant, namely, to discharge effluent treated at the STP into the tributary. The relevant intention was not the Resort's intention in committing the offences: at [57]-[58], [63];

(4) The Resort's application to withdraw its plea of "guilty" should have been dealt with before the duplicity determination. The primary judge's decision to stay the proceedings until the Prosecutor elected and particularised a single offence of polluting waters upon which it would proceed could have resulted in an incompatibility between the Resort's extant plea of "guilty" to the charge of water pollution on multiple occasions and the newly particularised charge of committing the offence of polluting waters on a single occasion: at [67], [70]; and

(5) The primary judge should not have ordered the Prosecutor to elect and particularise a single charge before dealing with the application for the Resort to withdraw its guilty plea. Where a court has found a Summons to be duplicitous, leave will not automatically be granted for a Defendant to withdraw its guilty plea even in circumstances where, as in the present case, the Prosecutor agreed that if the charge was found to be duplicitous it would not oppose leave being granted to withdraw the plea: at [67]-[68], [75].

Supreme Court of New South Wales:

Donnellan v Cadeddu **[2021] NSWSC 1600** (White J)

Facts: Eamonn Donnellan and Sibeal Ni Mhaille (**Plaintiffs**) had planted a lilli pilli hedge adjacent to the dividing fence on their property which from time to time overhung the property of their neighbours, Maria Cadeddu and Caterina Cadeddu (**Defendants**). The Plaintiffs alleged various acts of trespass by the Defendants, including that up until the commencement of the proceedings the Defendants had trimmed overhanging parts of the hedge back to the fence line and deposited cuttings and leaves on the Plaintiffs' property. This was admitted by the Defendants. The Plaintiffs also alleged that on one occasion the Defendants had vandalised the hedge by cutting branches and creating gaps in it over the Plaintiffs' side of the boundary. Caterina Cadeddu admitted to cutting the hedge on the relevant day, but denied that she cut the hedge on the Plaintiffs' side. The Plaintiffs brought claims in trespass and sought injunctive relief and "equitable damages" under s 68 of the *Supreme Court Act 1970* (NSW). The Defendants pleaded that the Plaintiffs were not entitled to equitable relief on the ground of unclean hands, relying upon various alleged acts of trespass and nuisance by the Plaintiffs. The Plaintiffs had also brought two claims in nuisance in relation to other conduct, though these were not pressed in final submissions.

Issues:

(1) Whether the Defendants had the right to cut overhanging parts of the hedge back to the fence line;

(2) Whether the Defendants' deposition of green waste cut from the overhanging hedge back onto the Plaintiffs' property constituted an act of trespass; and

(3) Whether injunctive relief or "equitable damages" could be granted for the vandalisation of the hedge and, if so, whether the defence of "unclean hands" could apply.

Held: Proceedings dismissed with costs:

(1) The Defendants were entitled to remove the branches and leaves of the hedge overhanging their land without notice to the Plaintiffs and without entering the Plaintiffs' land. This was because the hedge's

encroachment was an actionable nuisance that the Defendants were entitled to abate as owners or occupiers of the property over which branches hung. This right to cut overhanging branches and leaves did not depend upon them having caused or being likely to cause damage. Furthermore, the right had not been abolished by the *Trees (Disputes Between Neighbours) Act 2006* (NSW): at [23]-[30];

(2) The Plaintiffs owned the encroaching branches and leaves because they were owners of the land on which the hedge was planted. The green cuttings remained in the Plaintiffs' ownership even after severance by the Defendants. The Defendants, having exercised their right to abate the nuisance by cutting off encroaching hedge material, had an incidental right to return the severed branches and leaves to the land on which the hedge stood. The Plaintiffs therefore had no claim in trespass for the depositing of severed branches and leaves back onto their property: at [31], [33]; and

(3) It was more probable than not that Caterina Cadeddu or her companion cut the hedge over the Plaintiffs' side of the boundary. However, White J did not grant injunctive relief because there was no apprehension of future trespassory acts. Of relevance were the facts that the vandalisation of the hedge had occurred 22 months ago, the Plaintiffs had installed CCTV that was or could be trained on the hedge, and the circumstances that had transpired around the court proceedings meant that the Defendants had become aware that vandalisation of the hedge would be an actionable trespass. Given injunctive relief was not available, the claim for "equitable damages" was also not available and it was unnecessary to consider the defence of unclean hands: at [47]-[51].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Anglican Church Property Trust Diocese of Sydney v Camden Council **[2021] NSWLEC 118** (Pepper J)

Facts: The Anglican Church Property Trust Diocese of Sydney (**Church**) challenged the imposition of condition 16 (**condition**) of DA2016/1462/1 issued on 27 July 2018 (**consent**) by the Sydney Western City Planning Panel (**Panel**). The condition required the payment of an infrastructure contribution for the staged construction of a 500-seat place of worship and associated works at 30 Heath Road, Leppington (**property**). The development was carried out pursuant to development applications lodged on 20 May 2016 (**first DA**), for which consent was obtained in 2016 (**2016 consent**), and 19 December 2016 (**second DA**).

The contribution was levied pursuant to s 7.11 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) and the *Camden Growth Areas Contributions Plan 2017* (**CP**). The Church sought an order for a refund of the amounts paid by it to Camden Council (**Council**) on 4 and 30 September 2020 in compliance with the condition. The Church's letter accompanying its first payment stated that the sum was paid under protest. The contributions were subsequently spent by the Council.

Issues:

(1) Whether the condition was valid; and

(2) Whether the Court had the power to order the refund sought by the Church.

Held: The condition was valid and, if this was incorrect, no power existed to order a refund:

(1) The first and second DAs, the 2016 consent and the consent were part of the same continuous staged development of the entirety of the property for public worship. Therefore, there was only one "development" of the property for the purpose of cl 1.8 of the CP: at [79], [81], [83]-[86];

(2) When regard was had to its text and context, the preferable meaning of the term "land" in cl 1.8 of the CP was the area defined by its cadastral boundary. This was more harmonious with other references to the word in that clause. In any event, the sufficient overlap in the areas of development the subject of the two consents meant that they related to the same land: at [90]-[91];

(3) The documents revealed that the Panel was aware of its power to depart from the calculation of contributions under the CP pursuant to s 7.13(2) of the EPA Act, notwithstanding that it was silent in its reasons as to the statutory basis for the imposition of the contributions sum it determined: at [102]-[105];

(4) Even if the Panel's decision was infected by error the Church failed to demonstrate that this error was material to the Panel's ultimate decision: at [106];

(5) The Panel can be assumed to have been aware of s 7.11(2) of the EPA Act, notwithstanding that the dispensing power in s 7.13(2) of that Act was not expressly brought to its attention. Nothing in the decision-making documents indicated that the Panel failed to consider the question of the reasonableness of the contributions: at [108]-[109];

(6) There was no power under s 9.46 of the EPA Act to require the Panel to redetermine the issue of the appropriate contributions as it was *functus officio*: at [113];

(7) It was not apparent why, pursuant to s 25B of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), the Court could not suspend the relevant part of the consent pending the redetermination of the contribution sum by the Panel. However, making a s 25B order was inapposite in the circumstances. It is generally inappropriate to make s 25B orders in cases, such as this, where to do so would result in a substantial part of the decision-making process having to be redone: at [123], [125]-[127];

(8) Consistent with Court of Appeal authority, the Court had no power to order a refund of the contributions paid by the Church to the Council. The power of the Court under ss 9.45 and 9.46 of the EPA Act was limited to making orders against the entity that breached that Act. Under the amended Summons there was no allegation of breach of the EPA Act made by the Church against the Council: at [155];

(9) Whether the Court had ancillary jurisdiction pursuant to s 16(1A) of the Court Act to order a refund was not fully argued before the Court and it was inappropriate to determine such a large question. In any event, there being no alleged breach of the EPA Act by the Council, the repayment of monies by it was not ancillary to any relevant matters: at [153], [156];

(10) No evidence was adduced by the Church that permitted the Court to make the necessary finding under s 4(1) of the *Recovery of Imposts Act 1963* to allow the claim: at [162], [165];

(11) The Church failed to establish a legal entitlement to a refund as the payment was not coerced. The voluntary nature of the payment also precluded a restitutionary claim by the Church: at [173]-[174]; and

(12) There were discretionary factors militating against an order for a refund being made, namely, the delay which resulted in the funds being spent and the Church's acquiescence to the condition: at [175]-[180].

Bathurst Regional Council v Department of Planning, Industry and Environment trading as Natural Resources Access Regulator **[2021] NSWLEC 109** (Preston CJ)

Facts: Bathurst Regional Council (**Council**) brought proceedings to judicially review the decision of an officer of the Natural Resource Access Regulator (**NRAR**) to give an official caution to the Council with respect to an alleged breach of the *Water Management Act 2000* (NSW) (**Water Management Act**). The alleged breach was that the Council, who was the holder of a water supply work approval for the Winburndale Dam, used the water supply work otherwise than in accordance with a condition of the water supply work approval, in breach of s 91B(2) of the Water Management Act.

During the hearing of the proceedings, the issue of the Land and Environment Court's jurisdiction to hear and dispose of the proceedings was canvassed. The Court enquired as to what was the Council's response to NRAR's submission that this Court lacked jurisdiction to review NRAR's decision to give the official caution. After a short adjournment, the Council applied under s 149B(1) of *Civil Procedure Act 2005* (NSW) for this Court to transfer the proceedings to the Supreme Court.

Issue: Whether the Court had jurisdiction to review the exercise of the decision of NRAR to give the Council an official caution.

Held: The Court lacked jurisdiction; proceedings transferred to the Supreme Court:

(1) The decision of NRAR to give the Council an official caution, which is the decision that the Council seeks to review, was made in exercise of NRAR's functions under ss 11(1)(e) or (f) of the *Natural Resources Access Regulator Act 2017* (NSW) (**NRAR Act**) and s 19A of the *Fines Act 1996* (**Fines Act**). The Court does not have jurisdiction to review the exercise of NRAR's functions under s 11(1)(e) or (f) of the NRAR Act and s 19A of the Fines Act. The Court has the same civil jurisdiction as the Supreme Court would, but for s 71 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), to hear and dispose of proceedings to enforce any right, obligation or duty conferred or imposed by a planning or environmental law; to review or command the exercise of a function conferred or imposed by a planning or environmental law; or to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function. Neither the NRAR Act nor the Fines Act is included in the list of statutes defined as a "planning or environmental law" in s 20(3) of the Court Act: at [8]; and

(2) The Court does not have jurisdiction to hear and dispose of the proceedings. The Supreme Court does, however, have jurisdiction to hear and dispose of the proceedings. It was therefore appropriate to make an order under s 149B(1) of the Civil Procedure Act to transfer the proceedings to the Supreme Court: at [13].

Bowers v Northern Beaches Council **[2022] NSWLEC 8** (Robson J)

Facts: Mr Bowers challenged the validity of a development consent granted by Northern Beaches Council (**Council**) for development comprising a "caretaker's flat" on land zoned industrial in Brookvale, owned by the Second Respondent, Grigull Custodian Pty Ltd (**Grigull Custodian**). Mr Bowers' two grounds of review were:

(i) that Council's decision was tainted by fraud; and

(ii) that Council did not have power to grant consent as the proposed use of part of the premises as a caretaker's residence was impermissible under the Warringah Local Environmental Plan 2011 because it was not ancillary to an industrial use.

Prior to Grigull Custodian seeking approval for the caretaker's flat, the Council was aware that Mr Grigull, a director of Grigull Custodian, had been using part of the existing building as a residence without development consent since mid-2017. A development application (**DA**) was lodged in June 2020 for approval of alterations and additions to an industrial building to facilitate the residence, effectively regularising the unauthorised use. Following preparation of a detailed assessment report which concluded the residence was "ancillary" to the industrial use, consent was granted subject to conditions on 22 January 2021. Conditions required:

- an operational plan of management detailing requirements and responsibilities relating to a full-time caretaker;
- the residence only be occupied by a person working on the premises permanently involved in the daily role of caretaker;
- a positive covenant on title to that effect;
- amendments to all approved plans to refer to the residence; and
- a register of occupants of the caretaker's residence.

Issues:

(1) Whether Council's decision to grant development consent (and/or the DA itself) was "affected by fraud" or bad faith; and

(2) Whether the development the subject of the DA (or, more particularly, the caretaker's residence component thereof) was permissible development ancillary to the use of the premises for the purpose of industrial use.

Held: Proceedings dismissed; costs reserved:

(1) Mr Bowers did not establish that the DA itself, and/or Council's consideration and determination thereof, were tainted by fraud, or that the fact that a director of Grigull Custodian may have resided at the premises unlawfully and "intends to continue to do so", was relevant to Council's determination. There was no evidence that someone acted, or was acting, fraudulently in "intending" to use the premises in breach of the development consent and, even if that were the case, it did not affect Council's consideration of the DA as Council did not act in bad faith because it was aware of the illegal occupation at the time of the determination and had sufficient information to consider the application: at [36]-[46]; and

(2) The Council was satisfied, and was entitled to be so satisfied in all the circumstances, that characterisation of the development as a caretaker's residence and ancillary to the use of the premises for the purpose of industrial use, and the proposal was therefore permissible - as evidenced by the operational plan of management setting out the role of the caretaker, the conditions of consent, and the residence's small size compared to the total area and location wholly within and accessed only through the industrial complex: at [54], [56].

Club Marconi Limited v Fairfield City Council **[2021] NSWLEC 132** (Duggan J)

Facts: Club Marconi Limited (**Applicant**) was the registered proprietor of five lots of land known as 121-133 Prairie Vale Road, Bossley Park (**land**) located in the Fairfield City Council (**Council**) local government area. The land was used by the Applicant for the purposes of a registered club known as "Club Marconi" and zoned RE2 Private Recreation under the Fairfield Local Environmental Plan 2013 (**FLEP 2013**). On 27 June 2019, the Applicant applied to the Sydney Western City Planning Panel for a Site Compatibility Certificate in support of a proposed development for a seniors housing development comprising in-fill self-care housing, car parking

and landscaping on the land. A Site Compatibility Certificate was issued for the proposed development which will expire on 13 August 2022. On 21 May 2021, Restifa & Partners Pty Ltd (on behalf of the Applicant) lodged a development application (**DA**) seeking consent for the proposed development and on 19 July 2021, the Applicant commenced Class 1 appeal proceedings against the Council's deemed refusal of the DA. As the existing use of the land was an existing registered club, development for the purposes of seniors housing and, in particular, in-fill self-care housing, was not permissible within the RE2 zone unless the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**Seniors SEPP**) applied. As a result, these Class 4 proceedings sought a declaration that the land was zoned primarily for urban purposes pursuant to cll 4(1) and 4(5) of the Seniors SEPP.

Issues:

(1) Whether the land was zoned primarily for urban purposes pursuant to cl 4(1) of the Seniors SEPP; and

(2) Whether most of the land adjoined was land zoned for urban purposes pursuant to cl 4(1) of the Seniors SEPP.

Held: Declared relevant land zoned primarily for urban purposes:

(1) Applying principles of statutory construction, "urban" meant pertaining to or constituting a city or town and "primarily" means chiefly or principally: at [35]; and

(2) Utilising an impressionistic rather than a numeric approach, the determination of the purpose of the RE2 zone in the FLEP 2013 included a consideration of the objectives of the zone, the nature and range of uses that are permitted in the zone as relevantly defined, leading to the observations that:

   (a) the necessary built form of the use combined with the type of recreational facility (private recreation) reinforces the conclusion that there was a population to support such uses, rather than it being a "destination" based recreational use;

   (b) the additional compatible land uses (community facilities, centre-based child care facilities, function centres, restaurants or cafes etc) gave a character to the recreational zone as one that was more akin to uses pertaining to a town or city than some other non-urban purpose; and

   (c) when viewed as a whole, the character of the permitted use in the zone was one that chiefly or primarily had a relationship to the density of a population of a town or city, and therefore, an urban purpose: at [50-[51].

Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd **[2021] NSWLEC 110** (Preston CJ)

Facts: A community action group, Mullaley Gas and Pipeline Accord Inc (**MGPA**), brought judicial review proceedings challenging the decision of the Independent Planning Commission (**IPC**) to grant development consent to the Narrabri Gas Project (**Project**). The Project proposed the development of a new coal seam gas (**CSG**) field and associated infrastructure in Narrabri in north-western New South Wales. Santos NSW (Eastern) Pty Ltd (**Santos**) was the proponent of the Project.

Issues:

(1) Whether the IPC misconstrued s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) by failing to consider the environmental impacts of the greenhouse gas (**GHG**) emissions of the Project and to balance them against the benefits of the Project;

(2) Whether the IPC misunderstood or misconstrued ss 4.15(1)(a)(i) and (b) of the EPA Act and cl 14(1) of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**) by failing to impose a condition of consent to regulate downstream or Scope 3 GHG emissions because they were outside of the direct control of Santos;

(3) Whether the IPC's failure to impose a condition of development consent to regulate downstream or Scope 3 GHG emissions was legally unreasonable; and

(4) Whether the IPC failed to consider a relevant matter under s 4.15(1)(b) of the EPA Act of the environmental impacts of the construction of the proposed transmission pipeline conveying gas from the Project to domestic (east coast) markets.

Held: Summons dismissed; costs reserved:

(1) MGPA has not established that the IPC erred in law by considering the expected emissions advantage of CSG compared to coal. The IPC's consideration of this factor was part of its evaluation of the acceptability of the impacts of the GHG emissions of the Project. This evaluation of the GHG emissions involved three steps: first, identifying the extent of the GHG emissions; second, assessing the impacts of those emissions;

and third, evaluating the acceptability of these impacts. The expected emissions advantage of CSG over coal was one way in which the IPC sought to evaluate the acceptability of the likely impacts of the GHG emissions of the Project under s 4.15(1)(b) of the EPA Act. The consideration of the emissions advantage of CSG compared to coal for electricity generation was relevant in assessing the potential benefits of carrying out the Project, the particular benefit being any reduction in total GHG emissions intensity in the energy sector and for New South Wales generally: at [55], [79], [80];

(2) MGPA has not established that the IPC misunderstood or misconstrued cl 14(1) of the Mining SEPP or the task of deciding whether the consent should be issued subject to conditions to ensure that GHG emissions of the Project are minimised to the greatest extent practicable. The IPC did consider whether the consent for the Project should be issued subject to conditions to ensure that Scope 1 and 2 GHG emissions are minimised to the greatest extent practicable. The IPC also considered whether to impose conditions to ensure that Scope 3 conditions are minimised to the greatest extent practicable, but decided not to do so: at [94], [109], [110];

(3) The concept of "greenhouse gas emissions" in both cl 14(2) and cl 14(1)(c) of the Mining SEPP includes all three scopes of emissions, not only the direct (Scope 1) emissions but also the indirect (Scopes 2 and 3) emissions: at [103];

(4) MGPA has not established that the IPC's decision not to impose conditions in relation to the Scope 3 GHG emissions of the Project was legally unreasonable. As required by cl 14(1)(c), the IPC did consider whether the consent for the Project should be issued subject to conditions to ensure GHG emissions, including downstream or Scope 3 emissions, are minimised to the greatest extent practicable: at [118]; and

(5) In the circumstances of this development application (**DA**) for the Project, the IPC was not required, in its consideration of the likely impacts of the Project, to consider the likely impacts of any potential gas transmission pipeline. The phrase "the likely impacts of that development" in s 4.15(1)(b) includes both the direct on-site impacts and the direct and indirect off-site impacts of the proposed development. In the present case, the impacts of any potential gas transmission pipeline are neither on-site nor off-site impacts of the Project that is the subject of the DA: at [137], [140], [145]

Weston Aluminium Pty Limited v Environment Protection Authority **[2021] NSWLEC 131** (Pepper J)

Facts: Weston Aluminium Pty Limited (**Weston**) is the owner and occupier of 129 Mitchell Avenue, Kurri Kurri (**property**). At the property, Weston operates a thermal treatment plant for the destruction of hazardous waste, liquid waste, special waste and other general solid waste as permitted under its environmental protection licence (**EPL**). Thermal treatment reduces the original weight of the waste by 85%-90% and results in the generation of a small proportion of residual ash which Weston recycles.

Weston sought a declaration that it was exempt from the requirement to pay contributions pursuant to s 88 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) by the operation of cll 20(3)(a) and 20(4)(a) of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) (**Waste Regulations**) on the basis that the waste received at the property was merely processed and not disposed of.

Issue: Whether Weston was exempt from the requirement to pay contributions pursuant to s 88 of the POEO Act by the operation of cll 20(3)(a) and 20(4)(a) of the Waste Regulations.

Held: Weston was not exempt from the requirement to pay the contributions:

(1) The evidence indicated that the entire property was being used as a waste facility, and therefore, Weston was prima facie liable to pay the contribution under s 88 of the POEO Act: at [54]-[57];

(2) In accordance with its ordinary and natural meaning, to "dispose" of a substance is to definitively get rid of a matter or thing. Nothing in the POEO Act or the Waste Regulations displaced that ordinary meaning: at [64]-[66];

(3) As a matter of construction, the combustion and incineration of the various forms of waste received at the property by thermal treatment involved the disposal of that waste. The purpose of the treatment was to get rid of that waste. To the extent that residual ash or gases were produced as a result of treatment, these were incidental. Moreover, the definition of "waste" in the Dictionary of the POEO Act included the discharge or emission of gas into the environment. The venting of gases into the atmosphere provided another basis for concluding that the property was used for the disposal of waste. Therefore, Weston could not rely on the exemptions under cll 20(3)(a) and 20(4)(a) of the Waste Regulations: at [67]-[69], [72], [93], [96];

(4) The distinction Weston sought to draw between the processing of waste and its disposal was artificial. One activity could be encompassed within the other. In any event, Weston's planning documents indicated that it received waste at the property for the purpose of its disposal and that disposal occurred: at [73]-[74];

(5) The environmental planning regime reinforced the conclusion that what occurred on the property was the disposal of waste. For example, the definitions of "thermal treatment of hazardous and other waste" and "thermal treatment" in the POEO Act provided that the permitted scheduled activity of "waste disposal (thermal treatment)" in the EPL included processing by "burning" and "incineration". Similarly, the definition of "waste disposal by application to land" in cl 39 of Sch 1 to the POEO Act did not refer to "disposal" but to the application to land by a range of methods that includes spraying, spreading, depositing, injecting and filling: at [86], [90], [92];

(6) The small amount of residual ash to be recycled and reprocessed did not change the fact that overwhelmingly waste was disposed of by incineration at the property: at [88]; and

(7) The property was not a scheduled waste facility *only* in respect of the storage, treatment, processing or sorting of the various types of waste identified in cl 20(4)(a) of the Waste Regulations because Weston stored and processed paper documents, oily rags and scrap aluminium at the property (that is, general solid waste (non-putrescible)). For that additional reason, cl 20(4)(a) of the Waste Regulations did not operate to render Weston exempt from its obligation to pay contributions: at [101].

- **Compulsory Acquisition:**

***Azizi v Council of the City of Ryde; Alnox Pty Limited v Council of the City of Ryde (No 2)* [2022] NSWLEC 3** (Moore J)

(related decisions: *Azizi v Council of the City of Ryde; Alnox Pty Ltd v Council of the City of Ryde* [2021] NSWLEC 40 (Moore J); *Council of the City of Ryde v Azizi* [2021] NSWCA 165 (Basten, Meagher and Payne JJA))

Facts: Mr Azizi and Alnox Pty Ltd (**Applicants**) purchased three contiguous lots of land along the southern side of Epping Road in North Ryde (**site**). The site was made subject to planning controls pursuant to the Ryde Local Environmental Plan 2014 (**RLEP 2014**), which zoned the site predominantly R2 Low Density Residential and set applicable maximum height of building and maximum floor space ratio development standards, amongst other planning controls. The Applicants lodged with the Council of the City of Ryde (**Council**) a planning proposal seeking that the controls be amended to rezone the site to R4 High Density Residential and to increase the maximum values of the development standards. The Council resolved to not support the planning proposal. The Applicants lodged a Rezoning Review with the (then) Department of Planning and Environment (**Department**). The Applicants' planning proposal was forwarded to the East Sydney Joint Regional Planning Panel, who rejected the proposal at pre-Gateway review. The Department informed the Applicants that their planning proposal was unsuccessful and would not be submitted for a Gateway determination. On 25 July 2017, the Council resolved to acquire the site. The RLEP 2014 was then amended to rezone most of the site to RE1 Public Recreation and remove development standards for building height and floor space ratio. On 24 August 2018, the Council compulsorily acquired the site. The Valuer-General of New South Wales issued determinations for compensation for the acquisition of the site, payable by the Council to the Applicants. These determinations for compensation were remade after successful Supreme Court judicial review proceedings instigated by the Council. The Applicants commenced proceedings in the Land and Environment Court in objection to the amounts of compensation offered by the Council in accordance with the new determinations.

Issues:

(1) Whether there was, at the date of the Council's acquisition, a prospect of up-zoning the site that had to be taken into account for the purposes of assessing the basis for a compensation valuation and, if there was such a potential, what would have been the development parameters applicable for the assessment of such compensation;

(2) Whether Mr Azizi was entitled to receive a payment pursuant to s 59(1)(d) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**) for the stamp duty liable to be incurred in the acquisition of a replacement residence and, if so, how this was to be calculated; and

(3) What was the appropriate quantity to require the Council to pay Mr Azizi for disadvantage resulting from relocation pursuant to s 60 of the Land Acquisition Act.

Held: Findings and directions made as to the agreed valuation to be applied to the determined development potential and Mr Azizi's entitlement to compensation; Council to pay the Applicants' costs unless an alternative costs order was sought:

(1) At the date of acquisition and absent the public purpose, the site had a future development potential at a density greater than its R2 Low Density Residential zoning, being a hypothetical R3 Medium Density Residential zoning. There was no absolute planning barrier, in a broadly strategic sense, to considering the possibility of medium density development south of Epping Road at the time of the site's acquisition. However, there was sufficient site-specific merit to conclude that it would have been appropriate only to adopt a hypothetical R3 Medium Density Residential development potential: at [282], [358], [391];

(2) The appropriate development potential value to be adopted could be derived from the agreed valuers' table in the planners' joint expert report and the agreement as to the area to which the valuers' rate was to be applied: at [282];

(3) Mr Azizi did not have any entitlement to a stamp duty equivalent compensation payment pursuant to s 59(1)(d) of the Land Acquisition Act since s 61(b) of the same Act operated to bar such a claim where the site should have been valued on a basis other than the R2 Low Density Residential zoning for assessing the compensation quantum to which the Applicants were entitled. If such a claim had not been barred, the quantum of the compensation should have been calculated solely by reference to the amount of market value compensation to which Mr Azizi was entitled: at [412]-[441], [458]; and

(4) Based on a cumulative assessment of the criteria contained in s 60(3) of the Land Acquisition Act, it was appropriate to award Mr Azizi the statutory maximum quantum of compensation for disadvantage resulting from relocation: at [502]-[504].

- **Criminal:**

Natural Resources Access Regulator v Maules Creek Coal Pty Ltd **[2021] NSWLEC 135** (Pain J)

Facts: Maules Creek Coal Pty Ltd (**Defendant**) pleaded guilty to the offence of taking water from a water source without an access licence contrary to s 60A(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**). The offence arose from the unlawful take of 1000ML of water from rainfall runoff from 1 July 2016 to 30 June 2019 by the mine's water management systems without a water access licence. Drought conditions prevailed in the area during the 2017-2018 and 2018-2019 water years, but not during the 2016-2017 water year. The Maules Creek Coal Mine is an open cut coal mine near Boggabri. Back Creek flows past the mine site and is a tributary of Maules Creek. Maules Creek is a tributary of the Namoi River. An unnamed southwest tributary also flows into the Namoi River from the mine site. The Prosecutor initially sought to prove environmental harm to all of those water sources. Environmental harm to water sources other than Back Creek was not ultimately pressed. Nor was harm to other water users ultimately pressed.

Issue: The appropriate sentence to be imposed.

Held: Defendant convicted; fined $187,500; Defendant to pay 60% of Prosecutor's costs as agreed or assessed; Defendant to comply with publication order; moiety of 50% of the fine to the Prosecutor:

Objective circumstances

(1) The offence, having taken place over three years as a result of the carrying out of a large coal mine project, does significantly undermine the regulatory scheme for water in New South Wales: at [176];

(2) In relation to environmental harm under s 364A(1)(c) of the Water Management Act, the Prosecutor's hydrologist was wrong to assess the environmental impact of the offence on the basis that 1000ML was withheld from Back Creek; only 660ML was withheld from Back Creek: at [190]. The evidence did not establish that the offence exacerbated harm to the environment caused by the drought: at [196]. It was not proved beyond reasonable doubt that the offence caused significant harm to Back Creek's surface water systems. The loss of the volume of surface water that otherwise would have reached Back Creek caused an unquantifiable degree of harm to Back Creek surface water: at [204]. The evidence established likely minor, short-term impacts and harm to the aquatic ecology of Back Creek: at [216]. The Prosecutor did establish a case of actual or likely harm to groundwater: at [207]. The Prosecutor did not establish a case of likely harm to vegetation: at [212];

(3) There were practical measures the Defendant could have taken to prevent, control, abate or mitigate harm for the purposes of s 364A(1)(d) of the Water Management Act: at [222];

(4) The harm was foreseeable for the purposes of s 364A(1)(e) of the Water Management Act: at [225];

(5) The Defendant had control over the causes that gave rise to the offence for the purposes of s 364A(1)(f) of the Water Management Act: at [226];

(6) The Prosecutor failed to prove other aggravating factors to the requisite standard. It failed to establish that the water was used for mining operations: at [178]. The Prosecutor did not prove that the water had a market value for the purposes of s 364A(1)(b) of the Water Management Act: at [178]. Financial gain as an aggravating factor under s 21A(2)(o) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) was not proved: at [236];

(7) The effect of the drought cannot be 'double counted' under s 364A(2) of the Water Management Act as it was relevant to environmental harm under s 364A(1)(c): at [232];

(8) The offence was at the low end of the medium range of objective seriousness: at [239];

Subjective circumstances

(9) The full discount of 25% was awarded for a plea of guilty at the earliest opportunity: at [241]. The Defendant's evidence in relation to remorse, in particular that it had negotiated an enforceable undertaking with the Prosecutor, was accepted. However the costs of complying with the enforceable undertaking were not taken into account as that was regarded as essentially the cost of doing business: at [247] The Defendant's evidence that it was of good character was accepted as some of it related directly to the Defendant, not the Defendant's parent company: at [250]; and

Costs

(10) The hearing could have been run more efficiently by the Prosecutor. The Prosecutor could have sought to agree facts on environmental harm. It pressed and abandoned evidence and submissions during the hearing and served substantial evidence prior to the hearing that was not ultimately relied on: at [294]-[299]. The cost of expert reports which were foundational to the proceedings being commenced but were not ultimately relied upon during the sentencing hearing, can be claimed: at [299]. The Defendant should pay 60% of the Prosecutor's costs: at [300].

- **Appeals from Local Court:**

Moore v Environment Protection Authority (No 2) **[2021] NSWLEC 146** (Pain J)

(related decision: *Moore v Environment Protection Authority* [2021] NSWLEC 87 (Pain J))

Facts: Mr Moore (**Appellant**) appealed against the severity of a sentence imposed in the Local Court for a strict liability offence under s 10(1)(a) of the *Pesticides Act 1999* (NSW) of causing injury with pesticide use. The complainant was driving along a public road and injured as a result of exposure to the pesticide Diazinon emanating from the Appellant's farm.

The Local Court recorded a conviction against the Appellant and imposed a fine of $2,000. Professional costs of $10,000 were ordered to be paid to the Environment Protection Authority (**EPA**).

Issue: Whether an order pursuant to s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) should be made.

Held: Sentence appeal dismissed; Appellant to pay the EPA's costs:

(1) The offence was in the mid-level of the low range of objective seriousness. The offence was certainly not trivial given that injury to the complainant resulted from exposure to diazinon. The spraying was carried out in the course of a commercial operation which calls for a high standard of care. The Appellant took substantial steps to minimise the risk of spray drift of chemicals, but he did not notify all the neighbours he should have notified in accordance with relevant codes of practice before spraying. The Appellant had complete control over the decision to spray in adverse weather conditions: at [24]-[49];

(2) The Appellant was 75 years old and of good character. The offence was not trivial and in comparative cases referred to by the EPA a conviction was recorded and fine imposed. It was not appropriate not to record a conviction and discharge the Appellant under a conditional release order as provided for by s 10(1)(b) of the CSP: at [50]-[74].

- **Contempt:**

Blacktown City Council v Jason Gabriel Saker (No 3) **[2021] NSWLEC 148** (Pepper J)

(related decisions: *Blacktown City Council v Saker* [2017] NSWLEC 46 (Preston CJ); *Blacktown City Council v Saker (No 2)* [2018] NSWLEC 71 (Molesworth AJ))

Facts: Blacktown City Council (**Council**) brought contempt proceedings against Jason Saker (**Saker**) for failure to comply with the final orders made in *Blacktown City Council v Saker (No 2)* [2018] NSWLEC 71 (**Saker (No 2)**). The orders required Saker to prepare a Waste Removal and Remediation Plan (**Plan**) and to provide that Plan to the Council. During the contempt proceedings, Saker appeared as an unrepresented litigant and sought an adjournment on the grounds that he only received the Council's submissions and material the day before. Saker also submitted that, despite the Council personally serving the final orders made in *Saker (No 2)*, he had not read the orders.

Issue:

(1) Whether Saker was aware of the orders and statement of charge;

(3) Whether he had been served with all of the material that the Council intended to rely upon at the hearing; and

(2) Whether Saker was guilty of contempt.

Held: Adjournment refused; Saker found guilty of contempt:

(1) Saker had been personally served the final orders from *Saker (No 2),* the statement of charge, and all of the necessary documents well in advance of the commencement of the contempt hearing: at [19], [33], [34]; and

(2) Saker was guilty of contempt because he had failed to comply with the final orders made in *Saker (No 2)*, namely, to prepare the Plan and provide it to the Council within the time period specified in those orders: at [38]. Saker's wilful blindness upon receipt of the final orders did not assist him insofar as he was still required to comply with those orders: at [30], [38].

- **Civil Enforcement:**

Environment Protection Authority v Pullinger **[2021] NSWLEC 144** (Pain J)

Facts: Section 105(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) provides for the recovery of costs, the subject of compliance cost notices issued under s 104(2), in respect of clean-up action undertaken by an authority in response to a pollution incident pursuant to s 92(2). The Environment Protection Authority (**Applicant**) sought orders pursuant to s 105(1) of the POEO Act that Mr Pullinger (**Respondent**) pay to the EPA the amount incurred as a result of clean-up action in relation to PFAS contamination of water at a premises in Rutherford during two incidents, one being in 2018 and the other in 2020. The factual matrix was complicated. Mr Pullinger, who was self-represented, primarily argued that the costs incurred by the EPA were unreasonable because:

- the facilities to which the waste was taken were not licensed to store or dispose of the waste;
- the waste the subject of the 2018 incident was stored in trucks on the premises for almost seven weeks rather than being emptied into the waste storage system on the premises;
- the EPA failed to engage Enviropacific Services Pty Ltd (**EPS**) to dispose of the waste on the premises for what he argued would have been a much lower price in 2018; and
- the EPA failed to consider further more cost-effective options for on-site treatment during the 2020 incident.

There was no dispute that Mr Pullinger was at all times the occupier of the premises; that a pollution incident did occur (in 2018); or that the EPA reasonably suspected that it occurred (in 2020); and that the EPA did pay its contractors the relevant sums incurred for work undertaken in connection with the clean-up action.

Issues:

(1) Whether the assessment of "reasonable costs and expenses" of s 104(2) requires or enables the Court to determine if the works for which clean-up costs are payable were themselves a reasonable response to a pollution incident;

(2) If so, whether the EPA's clean-up actions were reasonable, and if not, whether the costs incurred were reasonable costs and expenses for the actions actually carried out; and

(3) Whether pre-judgment interest should be awarded under s 100 of the *Civil Procedure Act* (NSW) (**Civil Procedure Act**) against the Respondent.

Held: Respondent to pay Applicant: sum of $1,178,940.78; pre-judgment interest in the sum of $63,326.77; and costs:

(1) No other cases had considered the question of statutory construction for determination previously: at [128]-[131]. Discussion of the modern approach to statutory interpretation, including the legislative injunction to prefer a construction that would promote the purpose underlying the Act to one which would not do so, in s 33 of the *Interpretation Act 1987* (NSW): at [132]-[135];

(2) The Respondent's interpretation would have been inconsistent with the objects of the POEO Act and the legislative regime, which was to facilitate the speedy and effective clean-up of pollution incidents, and would essentially require reading the word "reasonable" into s 92(2) when there was no basis to do so: at [136]-[140];

(3) The Court cannot second guess the EPA's approach to a clean-up incident: at [140]. This meant that the Respondent's arguments about the reasonableness of the EPA's actions were not relevant: at [141]-[150]. In any case, the Respondent did not prove, on the evidence, that the EPA's clean-up actions were unreasonable: at [146], [150];

(4) It was open to find in an appropriate case that costs and expenses were unreasonable for the actual work performed under s 104(2): at [151]. However, no basis for finding that the costs incurred were not reasonable for the work performed could be identified on the evidence: at [152]-[155]; and

(5) In the exercise of discretion available under s 100 of the Civil Procedure Act, pre-judgment interest should be awarded until the final hearing date of 23 September 2021: at [164].

***Hika Tarawa Te-Kowhai v Transport for New South Wales* [2021] NSWLEC 145** (Duggan J)

Facts: As part of the environmental assessment process for the proposed Moruya Bypass upgrade to the Princes Highway (**proposed bypass**), Transport for New South Wales (**Respondent**), by its consultants, was undertaking an assessment process to assess the extent of any impacts of the proposed bypass upon Aboriginal Cultural Heritage in the area. As part of stage 3 of this process, subsurface archaeological test excavations and investigations were required on previously identified potential archaeological deposits (**PADs**). Hika Tarawa Te-Kowhai (**Applicant**) contended that the Respondent required a valid Aboriginal heritage impact permit (**AHIP**) pursuant to s 90 of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) in order to undertake the test excavations as the location of the PADs was within an area containing significant cultural features including burial sites, shell middens and conflict sites. An AHIP was only required if the test excavations were not being carried out in accordance with the "Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales" as published by the Department of Environment, Climate Change and Water in the Gazette of 24 September 2010 (**2010 Code**).

Issues:

(1) Whether the test excavations were excluded from the definition of harm in the NPW Act by virtue of requirement 14 of the 2010 Code, because the test pits were, on the balance of probabilities:
   (a) in or within 50 metres of an area where burial sites were known or were likely to exist;
   (b) in or within 50 metres of a shell midden;
   (c) in areas known or suspected to be conflict sites;

(2) Whether the test excavations were being carried out contrary to the NPW Act in that they were not being carried out in accordance with the principles of ecologically sustainable development (**ESD**); and

(3) Whether the Applicant was denied procedural fairness due to either the Respondent's refusal of access to the site during excavations or the onus placed on an Applicant to establish a case and the way in which the 2010 Code allows for breaches of the NPW Act in an unregulated manner.

Held: Test excavations in line with 2010 Code and NPW Act; no AHIP required; NPW Act consistent with principles of ESD; no denial of procedural fairness; Summons dismissed:

(1) Whilst it was possible that the burial site was located in an area 50m from a PAD, due to the generality and uncertainty of the evidence, the requisite level of satisfaction of "known" or "likely" was not reached: at [63];

(2) Based on the oral history of the Applicant; evidence and knowledge of the Elders called by the Respondent; investigations undertaken by the Respondent in consultation with the local communities; and the physical surface and subsurface investigations of archaeologists and Aboriginal Site Officers, the Applicant (bearing the onus) did not establish the test excavations were within 50m of a shell midden: at [86];

(3) Whilst rising tensions between local Aboriginal communities and non-indigenous occupiers of land were evident on the historical evidence provided, these tensions could not fall within the definition of "conflict site" which imports a notion of acts of opposition: at [113];

(4) The assessment process contained in the NPW Act, together with the National Parks and Wildlife Regulation 2019 (NSW) and the 2010 Code provided for an appropriate process of building layers and forming a knowledge base in order to minimise destructive activity and so was consistent with the principles of ESD: at [120]-[122];

(5) No relevant decision was raised by the Applicant to which he was entitled to be heard and denied that opportunity: at [125];

(6) The process set out in the 2010 Code for exclusions to the definition of harm followed an adequate process for notification and submissions and no claim or evidence was brought to counter this: at [125]; and

(7) The Applicant did not identify any right or power that permitted or required access or attendance to the site: at [126].

- **Section 56A Appeals:**

***Georges River Council v S A F Group Pty Ltd* [2021] NSWLEC 151** (Pain J)

(decision under review: *S A F Group Pty Ltd v Georges River Council; 3R Investments Pty Ltd v Georges River Council* [2021] NSWLEC 1237 (Espinosa C))

Facts: Georges River Council (the Council) appealed pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) against a commissioner's decision to grant a development consent for the change of use of an existing factory building in Carlton (zoned IN2 Light Industrial under the Kogarah Local Environmental Plan 2012) to office premises with an associated depot, including an acoustic barrier.

Issues:

(1) Whether the Commissioner failed to engage with a substantive integer of the Council's case concerning likely impacts to amenity of surrounding residences arising from (a) inadequacies in the traffic survey, (b) inadequate vehicle allocation and (c) past failure to manage traffic impacts (ground 1 of appeal); and

(2) Whether the Commissioner failed to give adequate reasons for the decision, specifically with respect to principal contested issues of (a) traffic/parking, (b) the placement of the acoustic wall and (c) overreliance on a plan of management (ground 2 of appeal).

Held: Appeal dismissed; Appellant to pay Respondent's costs of appeal:

(1) The Commissioner did not constructively fail to exercise jurisdiction: at [58]. Particular (a) of this ground of appeal was not made out as the Commissioner simply preferred the other party's (the Respondent's) expert's traffic evidence, as is usual in a merits appeal: at [51];

(2) In relation to particular (b), the Commissioner also preferred the evidence of the Respondent: at [52];

(3) In relation to particular (c), the Commissioner was aware of the issues of unallocated fleet and staff parking; permissibly relied upon the positive effects of an interim plan of management and accepted the evidence of the Respondent's traffic expert: at [53];

(4) The provision of what were considered to be adequate reasons, although a separate issue, did go some way to meeting this ground of appeal: at [56]. This ground of appeal was an attempt impermissibly to review the merits of the Commissioner's decision: at [57]; and

(5) The reasons given were adequate: at [79]. A fair reading of the judgment in light of the evidence and submissions suggested the reasons in relation to parking and the plan of management (particulars (a) and (c) of the second ground of appeal) were adequate and at least reached the minimum standard required in this context: at [75];

(6) In relation to particular (b), the complaint was difficult to discern given the Commissioner's entirely orthodox examination of the issue at [43]-[45] of her judgment, in light of the site visit and evidence during the hearing: at [78]; and

(7) The commissioner was aware of the setback control in the Kogarah Development Control Plan 2013 and chose not to adopt it for the reasons given: at [78].

L & G Management Pty Ltd v Council of the City of Sydney **[2021] NSWLEC 149** (Duggan J)

(decision under review: *L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 1084 (Horton C))

Facts: L & G Management Pty Ltd (**Appellant**) appealed pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) against the decision of Horton C to dismiss its appeal against the Council of the City of Sydney's (**Council**) deemed refusal of their development application (**DA**) for a proposed development at 191-195 Botany Road, Waterloo. In connection with the DA, the Appellant made what it described as a public benefit offer of a dedication of a 2.4-metre strip of land along the site's frontage (**proposed dedication**) which it contended was an offer of "Green Square Community Infrastructure" in accordance with cl 6.14 of Sydney Local Environmental Plan 2012 (**SLEP 2012**), meaning it would operate to permit the DA to have a base floor space ratio exceeding that provided for in cl 4.4 of SLEP 2012. The grounds of appeal related to the manner in which the commissioner satisfied himself as to the source of power of the Court to give effect to the proposed dedication. The commissioner considered he only had power to approve the proposed dedication if it met the requirements either for a voluntary planning agreement (**VPA**) or a dedication pursuant to ss 7.4 and 7.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), whereas the Appellant contended the source of power was cl 6.14 of SLEP 2012.

Issues:

(1) Whether the commissioner erred in law by asking the wrong question as to whether the Court had power to give effect to the dedication pursuant to a condition under Div 7 of Pt 7 of the EPA Act; and

(2) Whether the commissioner erred in law by concluding that absent a VPA, or the land being identified under a contributions plan, the Court had no power to give effect to the Appellant's offer to dedicate the land.

Held: Appeal dismissed; Appellant to pay Council's costs of appeal:

(1) The commissioner's finding that the Court could not impose a VPA or a condition in respect of the proposed dedication was not a finding that the Court had no power to approve it, but rather that the nature of the proposed dedication as formulated (including the payment of monies) was beyond the scope of the power. As the commissioner recognised that cl 6.14 of SLEP 2012 was before him as an alternative source of power, no error was apparent: at [31]-[35];

(2) Any condition requiring the payment of money or the dedication of land free of cost, even when authorised by s 4.17 of the EPA Act, must meet the preconditions set out in s 7.11. There being no residual power in s 4.17, the only power to impose a condition approving the DA as formulated was that available under ss 7.11 or 7.4 (Div 7 of Pt 7). As that power was not engaged, the Court could not impose a condition reliant on cl 6.14: at [37] and [40];

(3) The power to impose conditions was an inherent discretion not a duty and so to establish an error of law, the Appellant would have had to demonstrate the commissioner was obliged to do so. No such error comprising a question of law was identified: at [65]; and

(4) The submission that the commissioner could have imposed a condition requiring a VPA in accordance with the Appellant's original written offer of the proposed dedication was not made out. By the close of the case before the commissioner, the Appellant had abandoned its reliance on that original offer or any later unwritten formulation that would or could be the subject of a VPA and so the commissioner was not in error by failing to undertake a course of action not put to him: at [66]-[70].

- **Easements:**

Diro Group Pty Ltd v Leuzinger **[2021] NSWLEC 107** (Robson J)

(related decision: *Diro Group Pty Ltd v Sutherland Shire Council* [2019] NSWLEC 00 (Dickson C))

Facts: Diro Group Pty Ltd (**Applicant**) sought an order imposing an easement to drain water (**proposed easement**) through land owned by Bernard Leuzinger (**Respondent**) for the benefit of land owned by the Applicant. The Applicant sought the proposed easement to satisfy a deferred commencement condition imposed on a multi-dwelling housing development (**proposed development**) granted by Sutherland Shire

Council (**Council**) on its land - with the easement to facilitate the construction of a stormwater pipe from the Applicant's land into the Respondent's land and (eventually) onto an existing stormwater pipe owned by Council. The Respondent opposed the easement.

Issues:

(1) Whether the proposed easement was 'reasonably necessary for the effective use or development', such that the Court had power to impose the proposed easement pursuant to s 88K(1) of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**);

(2) Whether the Court could be satisfied for the purposes of s 88K(2)(a) of the Conveyancing Act that granting the proposed easement would not be contrary to the public interest, the Respondent could be adequately compensated, and the Applicant had made all reasonable attempts to obtain the easement; and

(3) Whether the Court should exercise its discretion to impose the proposed easement.

Held: Easement to be imposed; compensation to be paid; Applicant to pay Respondent's costs:

(1) The proposed easement was "appropriate, reasonable, feasible, proper, and preferable to the other options" because the proposed development (for a higher and better use of the Applicant's land) was economically rational and, pursuant to the Council's consent, appropriate to the area; and the alternatives to the proposed easement were not as equally efficacious as the stormwater drainage system proposed to utilise the proposed easement: at [83]-[84], [87], [96];

(2) The Court was satisfied that: the public interest favoured the imposition of the proposed easement in that it would effectively result in less water in the ground at the Applicant's land and neighbouring properties; the parties had agreed to an adequate quantum of compensation; and the Applicant had made all reasonable attempts to obtain the easement: at [95], [113], [117]-[118];

(3) It was appropriate for the Court to exercise its discretion because the proposed easement facilitated "the reasonable, orderly and economic development" of the Applicant's land; and the Respondent was able to be adequately compensated: at [119]-[120]; and

(4) Parties directed to confer, prepare, and file with the Court short minutes of order to provide for the imposition of the proposed easement, for compensation to be paid to the Respondent, and for the Respondent's costs to be paid: at [124].

- **Interlocutory Decisions:**

Anderson v Byron Shire Council **[2021] NSWLEC 127** (Pain J)

Facts: Mr Anderson (**Applicant**) commenced judicial review proceedings seeking a declaration that a decision by Byron Shire Council (**the Council**) to exclude him from the Council's premises for 12 months from 19 May 2021 (**banning notice**), was invalid because it breached the *Local Government Act 1993* (NSW) (**Local Government Act**). The banning notice was based on alleged unruly behaviour by the Applicant including in relation to a councillor who had obtained an Apprehended Personal Violence Order (**APVO**) against the Applicant. The Applicant sought an interlocutory order that the Council be restrained from preventing him from firstly, attending meetings open to the public in accordance with s 10 of the Local Government Act and secondly, attending Council chambers to access materials and information concerning Council business in accordance with s 11 of the Local Government Act.

Issue: Whether an interlocutory order stopping the Council from preventing attendance at open meetings of the Council and to access materials and information in Council chambers should be made.

Held: Interlocutory application refused; Applicant to pay the Council's costs of the application:

(1) There is a serious question to be tried, albeit the parties identified the issue in different terms: at [21]. The Applicant submitted that the banning notice traversed his rights under ss 10 and 11 of the Local Government Act: at [13]. The Council submitted that the banning notice was supported by its power under s 4(1) of the *Inclosed Lands Protection Act 1901* (NSW) to withdraw consent for entry onto Council property and at issue was the relationship if any between this Act and the Local Government Act: at [16]; and

(2) The Applicant failed to discharge his onus of proof of demonstrating the balance of convenience favoured granting interlocutory relief: at [22]. Attendance at Council meetings in person would likely breach the APVO the councillor had in place against him: at [23]. The application for interlocutory relief was delayed given the banning notice was issued on 19 May 2021 and the proceedings commenced on 5 November 2021: at [24]. The Applicant was still able to participate in Council meetings remotely and

obtain information as the Council gave an undertaking it would provide materials for viewing at the office of the Applicant's solicitor one day after any Council meeting: at [26]. Given the then current caretaker mode of the Council pending elections in early December 2021, no evidence of irredeemable harm from not participating in meetings in person was evident: at [22].

- **Procedural Decisions:**

Arcadia Investment Holdings Pty Ltd v Environment Protection Authority **[2021] NSWLEC 2** (Duggan J)

Facts: These Class 4 proceedings related to a challenge by Arcadia Investment Holdings Pty Ltd (**Arcadia**) to a clean-up notice variation issued to it by the Environment Protection Authority (**EPA**) in respect of a property it owned at 22 Geelans Road, Arcadia (**property**). A court-ordered mediation was undertaken during which certain material (**mediation material**) was disclosed by Arcadia for the purposes of that mediation. As per the mediation agreement between the parties, the EPA agreed not to disclose information disclosed to it during or in connection with the mediation unless compelled by law to do so. In separate class 5 proceedings brought by the EPA as Prosecutor, Mr Paul Mouawad was charged with offences related to the importation of fill to the property (**class 5 proceedings**). The solicitor for the EPA in both proceedings deposed an affidavit stating that, based on his knowledge of the mediation material, he had formed the view that the mediation material could directly or indirectly affect the assessment of the probability of one or more facts in issue in the class 5 proceedings. By Notice of Motion (**NOM**), the EPA sought orders by the Court allowing it to disclose the mediation material to the Defendant in the class 5 proceedings.

Issues:

(1) Whether the Court had jurisdiction to make a determination relating to the disclosure of any document produced in a mediation noting the confidentiality provisions in either s 31 of the *Civil Procedure Act 2005* (NSW) or by operation of the mediation agreement; and

(2) Whether the prosecutorial obligation of disclosure pursuant to general law or ss 247E, 247I, 247J and 247O of the *Criminal Procedure Act 1986* (NSW) applied.

Held: Declaration that disclosure was required; NOM otherwise dismissed:

(1) Matters in dispute arising from a court-ordered mediation in proceedings otherwise within the jurisdiction of the Court were matters relating to the hearing and disposal of those proceedings pursuant to ss 16 and 20 of the *Land and Environment Court Act 1979* (NSW) and therefore within jurisdiction. Even if this was not the case, the matters raised were clearly ancillary to the matters that fell within jurisdiction as they arose in the context of those proceedings and related to issues relating to the making of interlocutory orders and the consequences of those orders: at [28];

(2) The question of whether the EPA as Prosecutor in the class 5 proceedings was required to disclose the mediation material to the Defendant in those proceedings did not turn on whether the mediation material would have been admissible as evidence in those proceedings, but rather on whether it was material that would be regarded as relevant to the prosecution or defence case: at [29]; and

(3) It was for the Prosecutor, not the Court, to characterise the mediation material as either "material" or "relevant". It was not for the Court to review or enforce the exercise of this duty outside the powers it exercises to control its own processes. Once the solicitor for the EPA made his determination, the obligation to disclose the mediation material either by operation of the statutory disclosure requirements or the general law prosecutorial disclosure duty was engaged: at [31].

Aul v Department of Customer Service **[2021] NSWLEC 140** (Robson J)

Facts: John and Cheryl Aul (**Applicants**) filed a claim pursuant s 12 of the *Mine Subsidence Compensation Act 1961* (NSW) with the Department of Customer Service (**Department**) regarding mine subsidence damage to their property in Tahmoor, New South Wales. In January 2018, the Department refused the claim on the grounds that the property damage was not attributable to mine subsidence and, in August 2018, following reconsideration of the refusal and assessment by an independent assessor, the Department upheld the refusal. In April 2021, the Applicants were advised by a friend and electrical engineer that the property had "clearly" been affected by mining. The Applicants sought an extension of time pursuant to r 7.1(1)(a) of the Land and Environment Court Rules 2007 (NSW) to commence an appeal in Class 3 proceedings against the Department's refusal.

Issue: Whether time to commence an appeal from the Department's determination should be extended.

Held: Motion dismissed; costs reserved:

(1) The Applicants' "considerable" delay of 34 months in commencing the appeal was "intentional". Whilst the delay was not excessive or gross given the Applicants' reasons for delay (which, as accepted by the Court, included the Applicant's lack of financial means to begin proceedings at the time notice was received; it was not until the inspection in April 2021 that there was impetus to appeal; the appeal was subsequently commenced promptly), the Applicants nevertheless were aware that they could appeal the refusal and made a "specific and deliberate decision not to appeal": at [76], [79]-[85];

(2) Although the Applicants demonstrated that they would be prejudiced (by being unable to pursue their claim and the appeal to resolve the damage and degradation of structures on the property) if the extension of time was not granted, the Department demonstrated prejudice (in the form of wasted costs and resources and, although not material, the impact of the passage of time on any assessment of the property) may have arisen if the appeal was granted, including if time was extended to permit the appeal had no merit: at [86]-[90], [95]; and

(3) The Applicants did not satisfy the Court that it had a "fairly arguable" case on appeal, such that the appeal would be allowed - their "case on appeal [did not go] higher than the *possibility* of causation being made out": at [95], [98]-[99].

Barr Property and Planning Pty Ltd v Cessnock City Council **[2021] NSWLEC 108** (Duggan J)

Facts: By Notice of Motion (**NOM**), Barr Property and Planning Pty Ltd (**Barr**) sought leave to amend the stages and phasing of its development application (**DA**) relating to the subdivision of industrial land into industrial lots and have part of the application considered a concept development application pursuant to s 4.22 of the *Environmental Planning and Assessment Act 1979* (NSW). The DA originally lodged with Cessnock City Council (**Council**) was for a single development consent which was to produce a completed development of the whole of the site and all infrastructure as a single package. Barr's proposal to amend sought a reduced form of development where stage 1 was to be completed and released prior to the completion of the balance of the development on the land which would be subject to a concept plan and later development applications.

Issues:

(1) Whether the essence of the proposed amended development was the same as required by cl 55 of the Environmental Planning and Assessment Regulation 2000 (NSW); and

(2) Whether the Court's discretion under s 39 of the *Land and Environment Court Act 1979* (NSW) should be exercised.

Held: Proposed changes significant; discretion not exercised; NOM dismissed; Barr to pay costs of NOM:

(1) Whilst completion of the development of the balance of the site area through separate and discrete development applications might produce the same ultimate development as that presently proposed, the process for the subdivision of the whole was markedly different and significant: at [17];

(2) The changes would effect material changes to the manner of assessment of the DA and would require the consent authority to reassess the application and determine whether, and at what stage, future development applications would trigger the requirement for future infrastructure and the delivery of this infrastructure without the certainty of a development application: at [18]; and

(3) Barr's application to amend was significantly deficient in both a statement as to the particulars of the amendment sought and an identification of the DA to which the amendment was to apply. As cl 55 required particulars sufficient to indicate the nature of the changed development, the Court's discretion was not be exercised in the circumstances: at [25]-[27].

Bilotta v Inner West Council **[2021] NSWLEC 129** (Pain J)

Facts: Mr Bilotta (**Applicant**) filed two appeals against the refusal by the Inner West Council of two applications for the modification of development consents concerning a lift overrun (**lift overrun appeal**) and general modifications (**general modification appeal**) under s 8.9 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Two neighbours (**Applicants for Joinder**) filed motions for joinder in each proceeding under s 8.15(2) of the EPA Act or r 6.24 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). The Applicant opposed the motions for joinder.

Issues:

(1) Whether the Applicants for Joinder should be joined to the proceedings because they are able to raise issues that should be considered but are unlikely to be sufficiently addressed; and

(2) Whether joinder is in the interests of justice or the public interest.

Held: The Applicants for Joinder joined as Second and Third Respondents to both sets of proceedings; leave given to serve Statements of Facts and Contentions and for expert evidence and participation in joint conferencing:

(1) Consideration of s 8.15(2) requires firstly considering whether the requirements are met and secondly whether in exercise of the Court's discretion joinder should be granted: at [57]. The Applicants for Joinder will raise issues unlikely to be sufficiently addressed if they were not joined as a party: at [68]. The Applicants for Joinder will raise jurisdictional issues arising from s 4.55(1A)(a) and (b), such as that the plans the subject of both appeals did not identify that approval was being sought for structures already built unlawfully, which is not legally possible as identified in *Ku-ring-gai Council v Buyozo Pty Ltd* (2021) 248 LGERA 300; [2021] NSWCA 177: at [40]-[41] and [58];

(2) Assurances that the Commissioner presiding in a s34AA conference must direct their mind to jurisdictional questions in the lift overrun appeal could provide little comfort to the Applicants for Joinder if no other party would be presenting evidence or making submissions about those matters: at [62]. As to merit contentions in the lift overrun appeal, the Applicants for Joinder proposed to raise unaddressed contentions in relation to height, bulk and scale in relation to the lift overrun appeal: at [63]. In the general modification appeal, jurisdictional matters proposed in the contentions of the Applicants for Joinder as well as merits issues were not raised by the Council: at [64]-[67]. The Applicants for Joinder would raise issues that should be considered in relation to the appeals and would be unlikely to be sufficiently addressed if they were not joined: at [68].

(3) It was in the interests of justice to make an order for joinder: at [68]. It was therefore unnecessary to consider r 6.24 of the UCPR: at [69].

Water NSW v Kiangatha Holdings Pty Limited; Water NSW v Laurence Natale **[2022] NSWLEC 6** (Robson J)

(related decisions: *Water NSW v Kiangatha Holdings Pty Limited; Water NSW v Laurence Natale* [2019] NSWLEC 185 (Robson J); *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263 (Hoeben CJ at CL, Rothman and Fagan JJ))

Facts: By four separate Summons dated 27 September 2018 by Water NSW (**Prosecutor**), Kiangatha Holdings Pty Limited (**Kiangatha**) and Mr Laurence Natale (collectively, the **Defendants**) were each charged with two offences against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) relating to the pollution of water during the construction of an unsealed road on land owned by Kiangatha in Gangbenang, New South Wales. Mr Natale, as the director of Kiangatha, was charged pursuant to the special executive liability provisions in s 169 of the POEO Act. The original Summons alleged Kiangatha and Mr Natale each committed:

(i) "likely pollution" for placing disturbed soil (**pollutant**) in a position where it was likely to be introduced into waters; and

(ii) "actual pollution" for introducing the pollutant into waters.

Pursuant to the decision of the Court of Criminal Appeal in *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263, the Prosecutor sought leave to rely upon amended Summonses, which each elected and particularised a single offence contrary to s 120 of the POEO Act. The amended Summons has the effect that the two Summonses for the "likely pollution" charges and the two for the "actual pollution" charges no longer related to the same locations.

Issues:

(1) Whether the proposed amended Summonses were so different to the original Summonses that they constituted "fresh" charges;

(2) Whether the statutory requirements and common law requirements for the amendment of Summonses had been fulfilled; and

(3) Whether the manner in which the proposed amended Summonses were prepared (that is, attendances by authorised Water NSW offices and the use of a drone to take aerial photography) constituted trespass onto Kiangatha's property, being unfair or disentitling conduct by the Prosecutor.

Held: Leave granted to rely on the proposed amended Summonses:

(1) The proposed amended Summonses were not so different to the original Summonses that they constituted "fresh" charges. A comparison between the different versions of the Summonses revealed no material change in the locations of the offences and the inclusion of the actual pollution in the likely pollution charges effectively allowed the Prosecutor to rely on additional evidence rather than constituting a material change in the Summons: at [133]-[134], [136], [160]-[162];

(2) The Summonses could be amended without injustice and it was necessary in the interests of justice for the Summonses to be amended. No common law requirements stood in the way of exercising the power to amend because: there was no material change in the location of offences; the charges were not fresh charges; the factual matrix of the offences had been restricted; the Defendants remained able to understand the conduct constituting the offences despite the expiration of the statutory time limit; the delineation of offences would assist the Defendants' defence; and the Defendants were adequately notified of the true nature of the offences and their nature did not change as a result of the amended Summonses. Furthermore, it is in the public interest to make the amendments to facilitate the proper conduct of criminal trials: at [163], [165]-[173], [178]; and

(3) The material was obtained without trespass and did not constitute unfair or disentitling conduct. Neither the Land and Environment Court Rules 2007 (NSW) nor the Uniform Civil Procedure Rules 2005 (NSW) applied to confer jurisdiction on the Court to order access for a Prosecutor. The POEO Act (ss 196 and 198) is drafted in broad terms which empower authorised officers to access land after criminal proceedings have commenced. Whilst that provided an advantage to the Prosecutor, accessing the property and using a drone was not the only method of producing material available to the Prosecutor: at [184]-[192], [203]-[211], [214].

- **Costs:**

Crescent Newcastle Pty Ltd v Newcastle City Council and Friends of King Edward Park Inc **[2021] NSWLEC 143** (Robson J)

(related decision: *Crescent Newcastle Pty Ltd v Newcastle City Council* [2020] NSWLEC 88 (Moore J))

Facts: On the fourth day of Class 1 proceedings concerning an appeal against the deemed refusal a development application (**DA**) by Newcastle City Council (**Council**) (**appeal proceedings**), Crescent Newcastle Pty Ltd (**Applicant**) filed a Notice of Discontinuance. The DA was for the proposed demolition of structures, earthworks and construction of residential accommodation and associated works at land known as 11-17 Mosbri Crescent, The Hill. The Second Respondent, Friends of King Edward Park Inc (**FOKEP**), filed a Notice of Motion seeking its costs in the appeal proceedings.

Issues:

(1) Whether it was fair and reasonable for FOKEP to be awarded costs of the appeal proceedings;

(2) Whether the Applicant's conduct in progressing the appeal proceedings was unreasonable in light of "jurisdictional issues" raised by FOKEP;

(3) Whether the hearing of the appeal proceedings was the first time that FOKEP raised "new merit matters"; and

(4) Whether "other issues" made it fair and reasonable for FOKEP's costs to be paid.

Held: Motion dismissed:

(1) Applicable to issues (1) to (3) above, the Court was bound by the language of s 3.7 of the Land and Environment Court Rules 2007 (NSW) and something more than the discontinuance itself was necessary to establish that it is fair and reasonable to make a costs order. The Applicant's conduct, in taking a different position to FOKEP in relation to the jurisdictional issues raised by FOKEP and progressing the appeal proceedings accordingly, was not unreasonable and the Applicant's discontinuance should not be treated as if FOKEP would have succeeded on those issues: at [72]-[73], [84], [86], [88];

(2) The Applicant's decision to discontinue the appeal proceedings was not unreasonable conduct because:

(a) while the Applicant was already on notice of the general kinds of issues raised by FOKEP, it was not on notice of specific issues prior to the hearing;

(b) the Applicant's position, until the third day of hearing, was that it had the requisite evidence to obtain development consent;

(c) it was reasonable for the Applicant to be responsive to the position of the Commissioner hearing the appeal proceedings in relation to the other parties' submissions and the evidence required to obtain consent; and

(d) it was open to the Applicant to take a tactical decision regarding the prospects of the appeal proceedings: at [91], [95];

(3) None of the other issues made it fair and reasonable for FOKEP's costs to be paid because:

(a) failure to obtain a judgment in the appeal proceedings was not a reason for costs in favour of FOKEP;

(b) while the discontinuance ended FOKEP's participation in the appeal proceedings, it would be open for FOKEP to participate in any further court proceedings in relation to any future development application;

(c) it was not the case that Council did not actively participate in the appeal proceedings;

(d) FOKEP voluntarily assumed risk in relation to the appeal proceedings when it was joined as a party;

(e) there was a time and costs saving for the other parties and Court due to the Applicant's discontinuance: at [96]-[103]; and

(4) It was not fair and reasonable to make an order that the Applicant pay FOKEP's costs of the appeal proceedings: at [109].

Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd (No 2) **[2021] NSWLEC 147** (Preston CJ)

Facts: A community action group, Mullaley Gas and Pipeline Accord Inc (**MGPA**), was unsuccessful in proceedings to judicially review the decision of the Independent Planning Commission (**IPC**) to grant development consent to the Narrabri Gas Project in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110. The proponent, Santos NSW (Eastern) Pty Ltd (**Santos**), sought an order that MGPA pay its costs of the proceedings or, alternatively, a limited costs order to pay Santos' costs incurred in respect of the expert evidence in the proceedings. MGPA submitted that the Court should exercise its discretion under r 4.2(1) of the Land and Environment Court Rules 2007 (**LEC Rules**) not to make an order for the payment of costs.

Issues:

(1) Whether the Court is satisfied that the proceedings have been brought in the public interest; and,

(2) If so, whether or not to make an order for the payment of costs against the unsuccessful Applicant.

Held: No order as to costs:

(1) The considerations identified in *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365; [2004] NSWLEC 434 and the factors identified in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280; [2010] NSWLEC 59 assist in characterising the nature of the proceedings and the purpose for which the proceedings have been brought. In the circumstances of this case, the Court was satisfied that the proceedings had been brought in the public interest: at [46], [56];

(2) The conduct of MGPA in adducing expert evidence did not amount to unreasonable conduct of the proceedings, and was not a reason not to exercise the discretion in r 4.2(1) to decide not to make an order for costs against MGPA: at [58]; and

(3) As the Court was satisfied that the proceedings have been brought in the public interest, and there were no countervailing considerations regarding MGPA's conduct of the proceedings, it was appropriate not to make an order for the payment of costs against MGPA, even though it was unsuccessful in the proceedings: at [63].

The Trustee for Whitcurt Unit Trust v Transport for NSW (No 2) **[2021] NSWLEC 134** (Pain J)
(related decision: *The Trustee for Whitcurt Unit Trust v Transport for NSW* [2021] NSWLEC 82 (Pain J))

Facts: The Trustee for Whitcurt Unit Trust (**Applicant**) commenced proceedings under s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**) in relation to the compulsory acquisition of land at Tempe on which it conducted a golf driving range under a leasehold interest arranged with the landowner, the Inner West Council. The Applicant unsuccessfully argued that it was entitled to compensation for critical infrastructure that it did not own such as nets, lights and buildings. The Applicant was awarded compensation of $118,380.98 which was less than the Valuer-General's determination and much less that the amount of approximately $4 million sought. The Applicant sought its costs of the proceedings. The Respondent submitted it should pay the Applicant's costs up to and including 7 April 2021 when the Respondent's solicitors sent a *Calderbank* letter offering to settle the proceedings for the amount determined by the Valuer-General plus reasonable costs.

Issue: Appropriate costs order in compulsory acquisition case where Applicant was unsuccessful.

Held: Respondent pay the Applicant's costs; costs argument as agreed or assessed:

(1) In compulsory acquisition cases an unsuccessful claimant is generally entitled to recover costs of the proceedings if they have acted reasonably: *Dillon v Gosford City Council* (2011) 184 LGERA 179; [2011] NSWCA 328: at [70]-[72] per Basten JA (Macfarlan and Handley JJA agreeing). Applicants are entitled to rely on legal advice: *Brock v Roads and Maritime Services (No 3)* (2012) 191 LGERA 267; [2012] NSWCA 404: at [93] per Tobias AJA (Beazley and Meagher JJA agreeing); and

(2) Whether the Applicant acted reasonably in pursuing its claim depended upon whether it was reasonable for it to rely on legal advice that it had a claim under the Land Acquisition Act. The argument was novel, arguable, not hopeless and was guided by competent lawyers: at [22]. Given the unusual nature of the claim and the necessity for the Applicant to rely on legal advice to bring the claim, it was appropriate to exercise its discretion to award costs to the Applicant: at [31]. The *Calderbank* letter was merely part of the various matters that may be considered on costs: at [23]-[30].

- **Merit Decisions (Judges):**

Planners North v Ballina Shire Council **[2021] NSWLEC 120** (Preston CJ)

Facts: Planners North (**Applicant**) lodged a development application (**DA**) with Ballina Shire Council (**Council**) for a manufactured home estate. The site of the development application was zoned R2 Low Density Residential in the northern part of the site and RU2 Rural Landscape in the southern part of the site under Ballina Local Environmental Plan 2012. The southern part of the site was subject to a Biobanking Agreement. The proposed development was to carry out a manufactured home estate on the R2-zoned land and biodiversity conservation in the RU2-zoned land.

The permissibility of the development for the purposes of the manufactured home estate depended on State Environmental Planning Policy No 36 - Manufactured Home Estates (**Manufactured Home Estates SEPP**).

The Coastal Wetlands and Littoral Rainforests Area Map, which identifies areas of coastal wetlands and littoral rainforest for the purposes of the State Environmental Planning Policy (Coastal Management) 2018 (**Coastal Management SEPP**) and *Coastal Management Act 2016* (NSW), identified a large area of the site as "coastal wetlands" and "proximity area for coastal wetlands".

Issues:

(1) Whether the proposed development was to be carried out partly on excluded land under cll 6(a) and 5 of Sch 2 of the Manufactured Home Estates SEPP;

(2) Whether the proposed development met the precondition to grant of consent under cl 9(1) of the Manufactured Home Estates SEPP;

(3) Whether the proposed development met the precondition to grant of consent under cl 11(1) of the Coastal Management SEPP; and

(4) Whether the proposed development met the precondition to grant of consent under s 7.16 of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**).

Held: Appeal dismissed; consent refused:

(1) Parts of the site are excluded lands under cl 6(a) and cl 5 of Sch 2 of the Manufactured Home Estates SEPP. Clause 6 permits development for the purposes of a manufactured home estate to be carried out except on certain land. Excluded land includes categories in Sch 2, cl 5 of the Manufactured Home Estates SEPP, one category of which is land identified in an environmental planning instrument, by certain words or descriptions, including land identified as "littoral rainforest" and "wetlands". The inquiry required by cl 6(a) and cl 5 of Sch 2 is whether the site includes land identified as being within the coastal wetlands and littoral rainforests area by the Coastal Management SEPP. The mapping of subareas of "coastal wetlands" and "proximity area for coastal wetlands" is not relevant in determining whether land within these subareas is excluded land for the purposes of Sch 2, cll 6(a) and cl 5: at [28], [29];

(2) Land identified as coastal wetlands and littoral rainforests area by the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP meets the description in cl 9(1) of the Manufactured Home Estates SEPP of being "land having special landscape, scenic or ecological qualities, which is identified in an environmental planning instrument applicable to the land concerned". The Court was not satisfied, as required in order to be able to grant development consent under cl 9(1)(d) of the Manufactured Home Estates SEPP, that the development will not have an adverse effect on any land having special ecological qualities, being land within the coastal wetlands and littoral rainforests area: at [42], [45];

(3) The Court was not satisfied, as required in order to be able to grant development consent under cl 11(1) Coastal Management SEPP, that the proposed development on land identified as "proximity area for coastal wetlands" by the Coastal Wetlands and Littoral Rainforests Area Map will not significantly impact on the biophysical, hydrological or ecological integrity of adjacent coastal wetlands, being the area identified in the centre of the southern part of the site as "coastal wetlands" on the Coastal Wetlands and Littoral Rainforests Area Map, or the quantity and quality of surface and ground water flows to and from that adjacent coastal wetland: at [51].

(4) The development is likely to have serious and irreversible impacts on biodiversity values, pursuant to s 7.16(2) of the Biodiversity Conservation Act. The first step in the determination of whether the development is likely to have serious and irreversible impacts on biodiversity values is to identify any threatened species or endangered ecological communities that might be impacted by the development. Three endangered ecological communities and five threatened species occur on and adjacent to the development site. Having identified the endangered ecological communities and threatened species likely to be impacted by the development, the next step is to evaluate the likely significance of the impacts that would remain after the measures proposed to avoid or minimise the impact on these endangered ecological communities and threatened species have been taken. The Applicant proposed no measures to avoid or minimise the impacts of the development on the endangered ecological communities or threatened species. The non-development of the Biobanking area, otherwise required by law, is not an avoidance measure: at [156]-[158], [164], [171]-[173]; and

(5) Consideration of these jurisdictional requirements requires the Court to refuse the application for development consent. In this circumstance, it is unnecessary to consider other issues of merit joined between the parties: at [6], [195].

- **Merit Decisions (Commissioners):**

Mirvac Retail Sub SPV Pty Limited v City of Canada Bay Council **[2021] NSWLEC 1598** (Dixon SC)

Facts: Mirvac Retail Sub SPV Pty Limited and Mirvac Capital Pty Limited (together **Mirvac**) had appealed the City of Canada Bay Council's (**Council**) refusal of Development Application No 2020/0206 (**DA**) which sought consent for "blanket approval" to carry out "fitout works" to a number of retail tenancies within the mixed use development known as Birkenhead Point Shopping Centre, Drummoyne (**site**).

The term "blanket approval" is not a defined planning term. However, Mirvac explained that it described the purpose of the application, that is, to circumvent the need for multiple development applications to carry out fitout works at the site as and when new tenants require new or altered fitouts.

Mirvac submitted that the type of works contemplated in the application would ordinarily be those procured under the exempt and complying development regime under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Exempt and Complying Development SEPP**). However, Mirvac accepted that the Exempt and Complying Development SEPP did not apply in this case, as the site had been identified as a local heritage item in the Canada Bay Local Environmental Plan 2013.

The Council argued that the application should be refused development consent on the basis that there was simply insufficient information to understand what was being approved and the likely impacts of the proposed development.

Issue: Was there sufficient information to enable the Court to undertake the requisite assessment under s 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to determine the application.

Held: Appeal dismissed

(1) The requisite assessment of the application under s 4.15 of the EPA Act could not be undertaken as there was simply insufficient information to understand what was being approved, what were the likely impacts of the proposed development and the extent of those relevant impacts. The design of the fitout would vary between shops, and the materials used would similarly vary depending on the needs of the future tenant. The future tenants of the site were unknown at the time: at [3], [4], [14], [15];

(2) Without detailed knowledge of the proposed works, it was not possible to know whether the ultimate development would be sympathetic to the existing heritage fabric or have any adverse impact: at [19], [21];

(3) The consideration called up by s 4.15 of the EPA Act was not confined to the impact of the proposed development on the heritage fabric in each retail lot. This section requires a consideration of all "the matters of relevance to the development the subject of the application". Construction impacts also needed to be addressed. The fact that a construction certificate would need to be issued in the future did not absolve a consent authority from assessing the relevant impacts at the date of consideration of the application (applying *Baron Corporation Pty Limited v Council of the City of Sydney* (2019) 243 LGERA 338; [2019] NSWLEC 61): at [22];

(4) What constitutes as sufficient detail for assessment purposes of an application needs to be considered in its context: at [23]; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3: at [26]; and

(5) Failure to provide a sketch showing proposed works does not necessarily invalidate the application, but it does make the application incomplete. In this case, Mirvac's failure to specify any detail of the proposed works necessarily frustrated any attempt for the consent authority, in this case, the Court on appeal, to perform its statutory duty under the EPA Act when determining the application: at [5], [6], [23]; *SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66 at [15]; *Weal v Bathurst City Council* (2000) 111 LGERA 181; [2000] NSWCA 88: at [13];

***Muscat Developments Pty Ltd v Wollondilly Shire Council* [2021] NSWLEC 1738** (Horton C)

Facts: Muscat Developments Pty Ltd (**Applicant**) was the owner of a rural site near Picton on which an equestrian centre was proposed and for which vehicular access was required. To that end, six Class 1 appeals were brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) following the deemed refusal by Wollondilly Shire Council (**Respondent**) of development applications seeking consent for:

(i) an equestrian centre with associated sheds, horse stables, horse walkers, internal driveways, earthworks, drainage works and landscaping (**Equestrian Centre appeal**);

(ii) the upgrade of an existing creek crossing, sealing of driveway and installation of drainpipe (**Crossing Upgrade appeal**);

(iii) the upgrade of an existing onsite driveway with associated earthworks, construction of retaining walls, rock revetment, stormwater drainage and tree removal (**RU2 Road appeal**);

(iv) the upgrade of an existing driveway with associated earthworks, road drainage, retaining walls, and tree removal (**E4 Roads appeal**);

(v) the construction of an internal driveway and creek crossing, associated earthworks and tree removal (**New Crossing appeal**); and

(vi) modification and construction of internal driveways, dam alterations, construction of a wheel wash bay, tree removal, stormwater drainage by construction of a swale, inclusion of retaining walls and rock revetment and associated earthworks (**Internal Roads appeal**).

Additionally, the Applicant also appealed the deemed refusal of an application for a Building Information Certificate (**BIC**) for an existing concrete culvert bridge spanning a watercourse, a wheel wash bay, a toilet enclosure and a water tank, all of which were already constructed on the site.

Relevantly, the site is accessed from two roads;

- Mount View Close to the north, and
- Remembrance Drive to the south.

It was agreed that a substantial volume of fill had been brought on to the site without development consent and this had changed the levels on the site. The fill had been used to build up roads and to create a large earthen platform in the vicinity of the proposed equestrian centre.

While the Statement of Environmental Effects stated the fill was "virgin excavated natural material", a Detailed Site Investigation Report noted the presence of building waste (including asbestos-impacted fill material requiring remediation).

Issues:

(1) Whether the proposed development demonstrated compliance with cl 7.3 of the Wollondilly Local Environmental Plan 2011 (**WLEP 2011**) to protect the hydrological functions of riparian land and waterways;

(2) Whether the Biodiversity Development Assessment Reports (**BDARs**) adequately addressed the requirement to "avoid" and "minimise" the impact on biodiversity values of the site in the manner set out in Section 7.1.1 of the Biodiversity Assessment Method 2020 (**BAM**);

(3) Whether the land could be made suitable for the purpose for which the development was proposed to be carried out, in accordance with cl 7 of State Environmental Planning Policy No 55 - Remediation of Land (**SEPP 55**); and

(4) Whether the proposed development ensured that the proposed earthworks would not have a detrimental impact on environmental functions and processes in accordance with cl 7.5 of the WLEP 2011.

Held: All appeals dismissed:

(1) For the reasons set out at [244]-[249], the BDARs did not demonstrate compliance with cl 7.3 of the WLEP 2011 as Section 6 of the BDARs did not adequately consider the biodiversity impacts of the proposed new crossing on the Racecourse Creek: at [250]. The extent and scale of excavation and engineering works proposed for Racecourse Creek required an assessment of aquatic biodiversity: at [254]. The failure to undertake such an assessment was a relevant consideration, especially as the BDARs identified Racecourse Creek as a key fish habitat potentially for threatened species: at [255]. Without an assessment of biodiversity including aquatic biodiversity in Racecourse Creek, it was not possible to conclude that the BDARs properly assessed the impact of the proposed development on the biodiversity values of the land in accordance with s 6.12 of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**): at [264]. Absent a proper biodiversity assessment, it was not possible to be satisfied that the proposed development was designed or sited to avoid or minimise any adverse environmental impact as required by cl 7.3(3) of the WLEP 2011: at [265].

(2) With respect to the BIC appeal, works to construct development appeared to be within the area of the Cumberland Plain Woodland Endangered Ecological Community (**CPW EEC**). A BDAR was required by s 7.7(2) of the Biodiversity Conservation Act to accompany an application if it was likely to significantly impact threatened species. Without an assessment of the impacts, if any, on the biodiversity values of the CPW EEC, the impact of the proposed development, activity or clearing on the biodiversity values of the land or what measures might be taken to avoid or minimise those impacts and the number and class of biodiversity credits, if any, that were required to be retired to offset impacts on biodiversity values to which the biodiversity offsets scheme applied, were matters required to be addressed in a BDAR by s 6.12 of the Biodiversity Conservation Act: at [327]; and

(3) Absent consent for development of the equestrian centre, there was no location at which approximately 1,200 cubic metres of material to be excavated for the RU2 Road and E4 Road appeals could be buried or capped as required by the Remediation Action Plan: at [296]. Absent such a remediation strategy for the asbestos-containing material identified in the RU2 Road and E4 Road appeals, the contaminated land could not be made suitable for the purpose for which development is proposed to be carried out in accordance with cl 7 of SEPP 55: at [297];

(4) There was no evidence about possible steps which might be taken to locate the proposed development to avoid or minimise direct and indirect impacts on native vegetation, threatened species, threatened ecological communities and their habitat in accordance with Section 7.1.1 of the BAM. As a result, it was not possible to conclude that earthworks would not have a detrimental impact on environmental functions and processes because of the proximity of the earthworks to, and potential for adverse impacts on, an environmentally sensitive area, a matter required to be considered by cl 7.5(3)(g) of the WLEP 2011. There was also inadequate information concerning the structures subject if the BIC appeal. These matters necessitated dismissal of this appeal: at [329] to [339].

***Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v Newcastle City Council* [2022] NSWLEC 1043** (Horton C)

Facts: The appeal was brought by the Trustees of the Roman Catholic Church for the Diocese of Maitland (**Applicant**) against the refusal by Newcastle City (**Council**) of a development application (**DA**), DA 2020/959, for the demolition of a Place of Public Worship listed as a local heritage item known as St Columban's Church (**Church**) at 39 Church Street, Mayfield on a site that is shared with a local parish school.

The Council contended that the proposal to demolish a listed heritage item lacked sufficient justification and did not demonstrate adequate investigation of options for reuse.

The parties agreed that the demolition of the Church would have an irreversible adverse impact on the heritage significance of the heritage item, and would alter the setting of other heritage items nearby.

Nevertheless, the Applicant submitted that demolition was an option of last resort, justified on the advice of its expert structural engineer that the Church was structurally unsound, and on the evidence of its expert quantity surveyor, that the costs of remediation were an unacceptable burden on the Applicant as the costs were beyond the capacity of the Parish to fund.

In respect of structural remediation, the structural engineering experts agreed on a new structural system that, once constructed alongside the existing structural system, would render the existing compromised structure redundant.

In respect of the likely costs of structural remediation, the Council considered allowances made by the Applicant's quantity surveyor to be excessive, reflecting an unrealistic level of risk and difficulty assumed that results in an inflated estimate of works required to retain the Church.

Issue: Whether the effect of the proposal on the heritage item would be acceptable in accordance with cl 5.10 of the Newcastle Local Environmental Plan 2012.

Held: Appeal dismissed:

(1) The Applicant's estimate of costs to rectify the structure of the Church exceeds the scope of works agreed by the structural experts as being necessary: at [71(1)];

(2) The Applicant's assessment of options for reuse failed to assist in understanding the degree of alteration that may flow from potential reuses, and which may or may not be acceptable in terms of heritage impact: at [71(2)];

(3) The burden on whom the costs would fall was not the Parish, whose finances were in evidence, but the owner of the building - the Applicant - whose financial position was pertinent to the Court's consideration, but was not in evidence: at [71(3)];

(4) Accordingly, whether the cost of structural remediation was an unacceptable or unreasonable burden on the Applicant could not be ascertained on the basis of the evidence before the Court: at [73]; and

(5) The principles set out in *Helou v Strathfield Municipal Council* (2006) 144 LGERA 322; [2006] NSWLEC 66 to weigh the retention and restoration of a heritage item against demolition were applied: at [75].

Court News

COVID-19 continues:

- The Court revised its COVID-19 Pandemic Arrangements Policy on 18 February 2022, which sets out the requirements for masks, vaccination status, public gathering and distancing etc.

Save the Date: The Land and Environment Court Anniversary Conference and Dinner:

- The long-deferred conference to celebrate the Land and Environment Court and its contributions to environmental law and the legal system over the last four decades is to be held on Monday 29 August 2022. The conference will be held in the Theatrette at NSW Parliament House, followed by a dinner in the Strangers' Dining Room.
- The conference will explore the Court's contribution in three fields: function, doctrine and process. A book, An Environmental Court in Action: Function, Doctrine and Process (Hart Publishing, 2022) edited by Professor Elizabeth Fisher and Justice Brian Preston, exploring these fields of contribution by the speakers, will be launched at the conclusion of the conference.
- Further information regarding the conference programme, together with booking and pricing details, will be published to the Court's website in the coming months.

Court Wi-Fi Network:

- The Land and Environment Court now has publicly accessible Wi-Fi available for use by Court clients and visitors. A user guide for connecting to the wireless network is available here.