Land and Environment Court of New South Wales

October 2023 / Vol 15 Issue 3

Judicial Newsletter

COURT NEWS

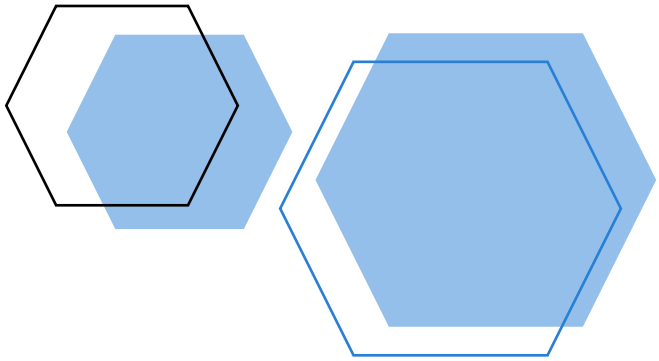
APPOINTMENT OF THE HON JUSTICE MOORE AS A MEMBER OF THE ORDER OF AUSTRALIA

His Honour Justice Moore was appointed as a Member (AM) in the General Division of the Order of Australia in the 2023 King's Birthday Honours for his significant service to the law, to the Parliament of New South Wales, and to industrial relations.

APPOINTMENTS/RETIREMENTS

Senior Commissioner Susan Dixon was reappointed as the Senior Commissioner for the period commencing 6 July 2023 and expiring on 5 July 2030. Commissioner Danielle Dickson was reappointed as a Commissioner for the period commencing 18 July 2023 and expiring on 17 July 2030. Acting Commissioner Shona Porter was appointed as a Commissioner for the period commencing 7 August 2023 and expiring on 6 August 2030.

Commissioner Michael Chilcott retired as a Commissioner on 21 July 2023.



JUDGMENTS

UNITED KINGDOM SUPREME COURT

Hillside Park Ltd v Snowdonia National Park Authority **[2022] UKSC 30**; [2022] 1 W.L.R. 507; [2023] 1 All E.R. 521 (Lord Reed PSC, Lord Briggs JSC, Lord Sales JSC, Lord Leggatt JSC and Lady Rose JSC)

(Decision under appeal: *Hillside Park Ltd v Snowdonia National Parl Authority* [2020] EWCA Civ 1440 (Lord Justice Richards, Lord Justice Singh and Lady Justice Davies))

Facts: In 1967, planning permission was granted for the development of 401 dwellings (**the 1967 permission**) based on a specific design on a site in Snowdonia National Park. Hillside Parks Limited (**Hillside**) acquired the site in 1988 and was the current owner and developer of the Site. Between 1967 and 1973, the Council made seven further grants of planning permission in respect of the site, each of which departed from the original development authorised by the 1967 permission. Since the 1967 permission was granted, only 41 houses had been built on the Site but none in accordance with the 1967 permission. In 1985, proceedings were brought in relation to these dwellings, which did not conform with the 1967 permission. The High Court issued a declaration that development under the 1967 permission could still be lawfully completed in accordance with the 1967 permission 'at any time in the future' (**the 1987 Declaration**). Further development was undertaken after the 1987 Declaration which again departed from the 1967 permission. In 2017, Snowdonia National Park Authority (**the Authority**) ordered Hillside to cease construction on the basis that the developments carried out under the various later permissions meant the 1967 permission could no longer be carried out. Hillside brought proceedings seeking declarations that the 1967 permission remained valid and could be carried out to completion set out in the 1987 Declaration. Hillside's claim was dismissed by the High Court and the Court of Appeal. Hillside appealed to the Supreme Court.

Issues:

(1) Whether the granting of subsequent planning permissions that differ significantly from the 1967 permission would make the 1967 permission physically impossible to carry out; and

(2) whether the 1967 permission could be interpreted in a way that allowed for the construction of any subset of the buildings, making it severable.

Held: Appeal dismissed:

(1) The decision in *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283 could not be explained on the basis of abandonment and there was no planning law whereby a planning permission could be abandoned. The development carried out under the later permission for the site had rendered the earlier permission physically impossible and the test of physical impossibility applied to the whole site: at [33],[45];

(2) Unless there was express permission making a development consent severable into disaggregated parts, a permission was not to be interpreted as authorising further development if compliance with the permission becomes physically impossible. The 1967 permission was an integrated scheme which could not be severed: at [54]-[55];

(3) Although the six later planning permissions were expressed to be variations of the 1967 permission, the development that took place under them had been substantially different from the 1967 permission and there was no authorisation to a new development scheme for the whole site. Further, unless the permission said otherwise, it should be regarded as self-contained: at [81]-[91]; and

(4) Further development permissions were inconsistent with the 1967 permission. Development consents do not authorise development that is physically impossible to enact. Further, the High Court correctly ruled that the permission granted in 1967 was for a single development scheme and could not be interpreted as separate parts: at [72], [100].

Fearn v Board of Trustees of the Tate Gallery **[2023] UKSC 4**; [2023] 2 W.L.R. 339; [2023] 2 All E.R. 1 (Lord Reed PSC, Lord Lloyd-Jones JSC, Lord Kitchin JSC, Lord Sales JSC and Lord Leggatt JSC)
(Decision under appeal: *Fearn v Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104 (Lord Justice Lewison and Lady Justice Rose DBE))

Facts: In 2016, the Tate Modern Gallery opened a new 10-story extension, including a viewing platform on the top floor attracting half a million visitors each year. The claimants were the owners of flats in a residential building neighbouring the Tate. From the viewing platform, visitors could see directly into the claimants' glass-walled flats, with photographs being taken and posted online. The claimants sought an injunction requiring the Tate to prevent its visitors from viewing their flats or, in the alternative, damages, on the basis of nuisance. The trial judge dismissed the claims, finding that although the public viewing could in principle amount to nuisance, in this instance it could not because the viewing platform was a reasonable use of the gallery's land and the owners' vulnerability was partly self-induced given that the flats were glass-walled. The claims were also dismissed by the Court of Appeal for different reasons. The claimants appealed to the Supreme Court.

Issue: Whether the Tate viewing platform was a reasonable use of the art gallery's land.

Held: Appeal allowed (majority: Lord Reed PSC, Lord Lloyd-Jones JSC and Lord Leggatt JSC, dissenting: Lord Kitchin JSC and Lord Sales JSC):

(1) The majority found that the trial judge made errors in applying the wrong legal test by asking whether the viewing platform was an unreasonable use of the gallery's land: at [54]-[55];
(2) The trial judge erred in concluding that the appellant's exposure was self-induced. Although the flats were glass-walled, which made easier the interference from another, it did not change the rules that determined their rights and responsibilities towards them: at [62]-[63]. Lastly, the trial judge erred in suggesting that it was reasonable to expect the claimants to use curtains to avoid being seen from the viewing platform. This would place the responsibility on the flat owners to mitigate the impact of the defendant's unusual actions: at [81]-[88];
(3) The majority established that in deciding a claim for nuisance, the interference must be substantial and involve a defendant acting beyond a common and ordinary use of its own land. The public benefit or utility may be considered in deciding what remedy to grant and may justify awarding damages rather than an injunction, but it does not justify denying a victim any remedy at all: at [121]-[122]; and
(4) The majority found that the constant observation of the claimants' living space, together with the taking of photographs from the neighbouring land, was an intolerable interference of their freedom to enjoy their property. Inviting the public to observe from the viewing platform the owners' flat was an exceptional use of the Tate's land, and therefore not an ordinary incident of operating an art gallery. The majority found that the Tate was liable to private nuisance and remitted the case to the High Court to determine the appropriate remedy: at [131]-[132].

UNITED KINGDOM COURT OF APPEAL

R (on the application of Thurston Parish Council) v Mid Suffolk District Council and Bloor Homes Ltd **[2022] EWCA Civ 1417**; (Lord Justice Lewison, Lord Justice Singh and Lady Justice Whipple)

(Decision under appeal: *Thurston Parish Council v Mid Suffolk DC* [2022] EWHC 352 (Judge Mould))

Facts: The local planning authority, Mid Suffolk District Council (**District Council**), and the developer, Bloor Homes Ltd, appealed against the primary judge's decision, quashing planning permission for a residential development. The developer had applied for planning permission to build up to 210 dwellings in a village outside the settlement boundary of Thurston, but within the Parish Council. The Parish Council opposed the proposed development on the basis that new development should be focused within the "settlement boundary" of the village, in accordance with Policy 1 of the Neighbourhood Development Plan (**NDP**). In determining the developer's application for planning permission, the District Council's Planning Referrals Committee (**Committee**) considered a planning officer's report (**report**), which advised that the NDP should not be interpreted as treating the defined settlement boundary as a barrier to housing development on sites outside that boundary, and that the development application should be granted permission. The District Council adopted the report,

and its recommendations, and granted outline planning permission to the developer.

The Parish Council challenged the District Council's decision in judicial review proceedings. The primary judge upheld the challenge, finding that that the District Council had been materially misled by the report that the development was not in conflict with the NDP, and quashed the planning permission. The District Council and the developer appealed to the Court of Appeal, submitting that the primary judge had erred in law in his construction of Policy 1 in the NDP.

Issue: Whether the primary judge erred in law in his construction of Policy 1 of the NDP.

Held: Appeal allowed, setting aside the primary judge's order, which quashed the planning permission:

(1) The question of whether a proposed development was "in accordance with" a planning policy can involve both interpreting the policy and applying it. Only the interpretation of the planning policy is a question of law and therefore available for the court to determine. The application of policy is not a question of law and is entrusted to the decision-maker, subject to review only on the ground of irrationality: at [42]-[43];
(2) The Court rejected the Parish Council's submission that if the District Council had correctly understood Policy 1, it would have concluded that there was a conflict between the policy and the proposed development because it was outside the settlement boundary. This argument assumed that Policy 1 was absolute, which it was not. The word "focused" does not mean that there can never be any development outside a settlement boundary. The NDP also recognised the existence of significant housing needs: at [54];
(3) This case concerned the proper application of Policy 1 of the NDP to the proposed development, not its interpretation. The Court of Appeal found that the report did not contain any interpretation of Policy 1: at [53]-[56]; and
(4) The Court held that there was no misinterpretation of Policy 1 by the Committee, and that the primary judge incorrectly included that the Committee had been materially mislead by the report. At issue was the application of planning policy to the circumstances of the particular case. The Committee was entitled to weigh up the benefits and disadvantages of the proposed development against the conflict with the Policy and reach the conclusion it did that planning permission should still be granted: at [57]-[63].

The King (on the application of Ashchurch Rural Parish Council) v Tewksbury Borough Council [2023] EWCA Civ 101; [2023] PTSR. 1377 [2023]; [2023] Env. L.R. 25 (Lady Justice Andrews, Lady Justice Liang and Lord Justice Warby)

(Decision under appeal: *R (on the Application of Ashchurch Rural Parish Council) v Tewkesbury Borough Council* [2022] EWHC 16 (Justice Lane))

Facts: In 2019, Tewkesbury Borough Council (**the Council**) was awarded 'Garden Town' status for development of over 10,000 new homes and related infrastructure. The construction of a bridge was proposed to unlock land for this new Masterplan development. The proposal for the garden town was outlined in the Tewkesbury Area Draft Concept Masterplan Report (**the Masterplan**). However, the Masterplan was not a development plan and the proposal was yet to be included in the Joint Core Strategy for the area. Planning permission for the bridge was sought early to take advantage of government funding. An environmental impact assessment screening opinion found that the bridge would have little effect. The Planning Officer's Report to the Planning Committee (**the Report**), which informed the Planning Committee's decision, concluded that the benefits of the bridge, and the wider development project, outweighed any harms and recommended that permission be granted. Ashchurch Parish Council (**the Parish Council**) challenged the grant of permission, on the basis that there was unlawful failure to consider the harms occasioned by the wider development which the bridge was to unlock. The Parish Council appealed against the decision of the primary judge dismissing the Council's claim for judicial review.

Issues:

(1) Whether the judge erred in his interpretation of the Report, and in not finding that the planning committee acted irrationally when it only considered the public benefits of the development but not the concomitant harms; and
(2) Whether the judge erred in finding that the development of the bridge and its supporting

infrastructure was a single project for the purpose of the EIA Regulations.

Held: Appeal allowed:

(1) The Planning Committee attributed significant weight to the prospective benefits of the wider development, however, failed to consider the potential harms. Whilst it was open to the decision-maker to treat the prospective benefits of the development as material factors, it was irrational to do so without considering any of the harms, which could have been material: at [64]. The principle that materiality is up to the decision-maker did not apply here, as the Report's instruction was a misdirection in law: at [69]; and

(2) Where specific development for which permission had been sought clearly forms an integral part of an envisaged wider future development, whether the application is part of the larger project can still be assessed even if planning permission for the larger project has not been obtained: at [88]. The Committee did not take a legally correct approach in determining that the bridge was a stand-alone project and whether an EIA was required: at [104]. The primary judge erred in finding that the Committee lawfully considered that the bridge was a single project for the purpose of the EIA regulations: at [100].

SUPREME COURT OF THE NORTHERN TERRITORY

Rallen Australia Pty Ltd v Sweetpea Petroleum Pty Ltd **[2023] NTSC 36** (Barr J)

Facts: Rallen Australia Pty Ltd (**appellant**) sought leave to appeal against a decision of the Northern Territory Civil and Administrative Tribunal (**Tribunal**). The appellant was the lessee of land under the *Pastoral Land Act 1992* (NT). The respondent was the holder of a petroleum exploration permit under the *Petroleum Act 1984* (NT) (**Petroleum Act**). Section 29 of the Petroleum Act set out the rights conferred on the respondent by an exploration permit. Relevantly, cl 12 of the Petroleum Regulations 2020 (NT) (**Regulations**) provided that the respondent could not commence operations on the appellant's land other than in accordance with an access agreement. The appellant and the respondent could not agree upon the terms of an access agreement. As a result, the respondent applied to the Tribunal to determine the terms of the access agreement.

It was the task of the Tribunal to determine an access agreement with reference to the requirements of cl 14 of the Regulations. The contents of the agreement needed to be either in the same or similar terms as the 25 standard minimum protections set out in Sch 2, or in terms that reflected a standard greater than that in Sch 2.

During the proceedings before the Tribunal, the appellant made various objections, including to the Tribunal's exercise of jurisdiction under s 58(j) of the Petroleum Act. The appellant argued that the Tribunal could not determine the terms of an agreement that resulted in the interference of lawful rights and activities of the pastoral lessee. The Tribunal dismissed all the appellant's objections and determined that it had jurisdiction to determine the agreement and proceeded to do so.

Issues:

(1) Whether the access agreement determined by the Tribunal was unlawful as it affected the appellant's lawful rights and activities contrary to s 58(j);

(2) Whether the Tribunal erred by failing to address the appellant's evidence and submissions that the respondent's activities and operations under the agreement would substantially interfere with the appellant's lawful rights and activities;

(3) Whether the in-ground pipes of the appellant's water reticulation system came within the meaning of "artificial accumulations of water" under s 111(1)(a)(iii) of the Petroleum Act;

(4) Whether the Tribunal misconstrued the Regulations in determining an access agreement with an expiration date beyond the period of the existing term of the exploration permit;

(5) Whether the Tribunal erred by misunderstanding cl 57(2) of the Regulations by failing to find a reasonable balance between the interests of the appellant and the respondent;

(6) Whether the Tribunal erred by failing to provide reasons as to why the terms of the appellant's alternative access agreement were not included in the finally approved agreement;

(7) Whether the Tribunal erroneously determined that s 82A of the Petroleum Act precluded it from exercising

jurisdiction under cl 29(1) of the Regulations to determine whether the access agreement should include provisions relating to compensation under s 81 of the Petroleum Act;

(8) Whether the Tribunal constructively failed to exercise its jurisdiction, which was to determine the compensation payable as a result of the activities to be carried out on the land; and

(9) Whether the Tribunal erred by misconstruing the Regulations and determining a provision of the access agreement which did not reflect the relevant standard minimum protections in Sch 2.

Held: Appeal dismissed:

(1) An error must be such to vitiate the Tribunal's decision. The Tribunal did not make errors of law as contended for by the appellant: at [11], [102];

In relation to ground 1

(2) The "lawful rights" referred to in the s 58(j) condition to an exploration permit meant the lawful rights subject to the grant of the exploration permit: at [35], [61];

(3) The legal framework of the Petroleum Act clearly anticipated that the operations of the respondent would impact on the appellant. Further, it encouraged and promoted exploration for and development of petroleum: at [62]-[63];

(4) It would be inconsistent with the objects of the Petroleum Act to read the s 58(j) statutory condition as precluding the exercise of the rights expressly conferred by s 29 whenever they interfered with the lawful rights and activities of the appellant: at [64];

In relation to ground 2

(5) It was not the task of the Tribunal to identify and assess the detail of all the respondent's operations and activities on the land and then undertake a process of considering the extent to which they might interfere with the appellant's cattle operations and potentially refuse to determine the provisions of an access agreement: at [68];

(6) The Tribunal was not bound to give consideration to the appellant's evidence and submissions beyond the extent that it did: at [71]-[72];

In relation to ground 3

(7) The proper construction of the expression "any artificial accumulation of water" under s 111(1)(a)(iii) was "a body of water gathered or heaped up in mass or quantity". Therefore, s 111(1)(a)(iii) referred to "an entity rather than a process of accumulation…to water that has already been accumulated". In-ground pipes (whether on their own or as components of the appellant's water infrastructure) could not necessarily come within the description of an artificial accumulation of water: at [78], [80]-[81];

In relation to ground 4

(8) Clause 25 of the standard minimum protections gave the Tribunal a choice between setting a fixed term or one lasting until the expiration of the petroleum interest. The fact that the Tribunal made a discretionary decision was not susceptible to an appeal: at [101];

In relation to ground 5

(9) The Tribunal's obligation under cl 57(2) of the Regulations was qualified by cl 57(3), which provided that the Tribunal must ensure the petroleum interest holder is not prevented from carrying out any operations authorised under the relevant permit and was consistent with the Petroleum Act. Inconsistency with cl 57(3) would arise if the Tribunal was required to have a more detailed understanding of the extent of the respondent's likely operations before it had commenced such operations under the exploration permit: at [108], [110];

In relation to ground 6

(10) The duty to give reasons will vary according to the nature of the jurisdiction in which a court (including a tribunal) exercised its powers and the nature of the question being decided. It would be unrealistic for the Tribunal in this case to give more detailed reasons that set out and addressed each provision sought by the appellant and engaged in a discussion of the relevant merits when compared to the respondent's competing clauses: at [120];

In relation to ground 7

(11) Contrary to the appellant's argument, the approved access agreement did include provisions relating to compensation that were referable to s 81 of the Petroleum Act. Therefore, there was no basis for the appellant's complaint that the Tribunal failed to exercise jurisdiction under cl 29(1) of the Regulations regarding inclusion of provisions relating to compensation under s 81(1) of the Petroleum Act in the approved access agreement. Such was so regardless of

the correctness of the Tribunal's construction of s 82A: at [126], [128];

In relation to ground 8

(12) If the Tribunal failed to consider a relevant matter, it would not be a vitiating error of law. The Tribunal's indication as to the anticipated decrease in the market value of the land was hypothetical and had no effect in law on the rights, entitlements, or liabilities of the parties: at [144]; and

In relation to ground 9

(13) Clause 27 did not preclude recourse to the minimum standard clause (**clause 25**) in the event of a dispute. Clauses 27 and 25 should have been read harmoniously, such that they were both available to the parties: at [150].

NSW COURT OF APPEAL

Bronger v Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy **[2023] NSWCA 104** (Brereton JA, Beech-Jones JA and Mitchelmore JA)

(Decision under review: *Bronger v Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy* [2022] NSWLEC 91 (Pain J))

Facts: Catherine and John Bronger (**appellants**) appealed the primary judge's dismissal of an application for declarations and injunctive relief against Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy (**respondent**) to restrain it from conducting a "retail pharmacy" at a medical centre in a large shopping complex in the B5 business development zone under the Fairfield Local Environmental Plan 2013 (NSW) (**FLEP**). Retail premises were prohibited development under the FLEP. The respondent's occupation certificate (**OC**) issued 25 June 2020 excluded the conduct of a "retail pharmacy (not including a medical pharmacy)" on the premises. Any member of the public could purchase items from the respondent's pharmacy that fell within six categories being: (a) prescription or controlled medicines, (b) pharmacy only substances, (c) over the counter pharmaceuticals, (d) therapeutic goods, complementary or alternative medicines, (e) occupational therapy, mobility and physiotherapy products, and (f) items "described as complementary and ancillary to the maintenance or improvement of human health or the prevention of disease in humans." The primary judge found the premises were not being use as a shop under the FLEP and that a "retail pharmacy" was not being conducted.

Issues:

(1) Whether the respondent was engaged in the prohibited use of the premises as a "shop" contrary to the FLEP and s 4.3 of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**) (**Ground 1**);
(2) Whether current provisions of Pt 6 of the EPA Act as amended by the *Environmental Planning and Assessment Amendment Act 2017* (NSW) applied to the OC in light of reg 18A of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (NSW) (**Transitional Regulation**). Under reg 18A, Pt 4A of the EPA Act prior to amendment continued to apply if an OC was in force before 1 December 2019 (**Ground 2**); and
(3) Whether the primary judge erred in not finding that the premises was being used as a "retail pharmacy" contrary to the exclusion of such a use in the OC and whether that contravened ss 6.9(1)(a) or 6.3(2) of the EPA Act (**Ground 3**).

Held: Appeal allowed and injunctive relief granted per Beech-Jones JA at [76], Brereton JA agreeing at [1] and Mitchelmore JA agreeing at [76]:

(1) The premises were used as a shop contrary to the FLEP and s 4.3 of the EPA Act. Items in categories (a)-(e) constituted "merchandise" and "items sold by retail." Professional obligations did not alter the characterisation of transactions. A pharmacy can answer the description "medical centre" and also the descriptions "retail premises" and "shop" (**Ground 1**): at [47]-[49], [52];
(2) Part 6 of the EPA Act as amended did apply. Regulation 18A of the Transitional Regulation was not engaged as no OC was in force immediately before 1 December 2019. (**Ground 2**): at [58]-[59]; and
(3) The premises were used for a "retail pharmacy" contrary to the OC and s 6.3(2) of the EPA Act. The OC to be construed in the context of, and consistent with, the FLEP. "Retail pharmacy" reflected the definitions of "retail premises" and "shop." "Medical pharmacy" was an ancillary, non-independent use of a pharmacy or dispensary for out-patients of a medical centre. No

contravention of s 6.9(1) of the EPA Act likely as s 6.9(1) did not engage any condition of the OC. (**Ground 3**): at [62], [73].

Verde Terra Pty Ltd v Central Coast Council **[2023] NSWCA 121** (Ward P, White and Kirk JJA)

(Decision under review: *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Environment Protection Authority (No 9)* [2022] NSWLEC 29 (Pepper J))

Facts: The predecessor of Central Coast Council (**Council**), Gosford City Council, granted development consent to the predecessor of Verde Terra Pty Ltd (**Verde Terra**) to remodel and expand a nine-hole golf course at Mangrove Mountain on 6 October 1998 (**1998 consent**). At the time that the approval was granted, the project was classified as "designated development" under s 77A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The grant of the development consent was predicated on the provision of an environmental impact statement, amongst other things. In 2012, the Council commenced proceedings in the Court against Verde Terra alleging that it had breached the terms of the development consent. In 2014, the Court made orders by consent (**2014 consent orders**) settling the proceedings. The works the subject of the consent orders differed from the works authorised by the 1998 consent. It was common ground on appeal that although such works were not authorised by the 1998 consent, the 2014 consent orders were lawfully made, and both authorised and mandated the carrying out of the works.

On 21 December 2018, Verde Terra submitted a new development application to the Council seeking to alter aspects of its prior development. On 1 April 2019, Verde Terra commenced Class 1 and Class 4 proceedings against the Council for its refusal of the application. In the Class 4 proceedings, Verde Terra sought, first, a declaration that no further development consent was required beyond the 2014 consent orders for it to carry out the development of the landfill and golf course, which was granted, and second, a declaration that the landfill and golf course constituted an "existing or approved" development within the meaning of cl 35 of Pt 2 of Sch 3 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**), which was refused. The utility of the second declaration was to excuse the development from the need to comply with requirements of "designated development".

The Court refused to make the second declaration on the basis that the development had not been approved by a consent authority. Her Honour held that the 2014 consent orders operated as a judgment *in rem* in relation to the development that may be carried out pursuant to the 1998 consent.

Verde Terra appealed against the refusal to make the second declaration.

Issues: Whether the primary judge erred in:

(1) Not holding that a development the subject of consent orders amounted to an "approved" development for the purposes of cl 35 of Pt 2 of Sch 3 to the EPA Regulation; and
(2) Not finding that the 2014 consent orders merged with the original development consent, so as to amount to an "approved" development.

Held: The appeal was dismissed with costs (per White JA, Ward P and Kirk JA agreeing):

(1) While consent orders and judgments by consent might give rise to a *res judicata* estoppel enforceable as between the participants in litigation, they did not give rise to a judgment *in rem* binding third parties: at [37]-[43];
(2) An "approved development" within the meaning of cl 35 of Pt 2 of Sch 3 of the EPA Regulation did not necessarily require approval from a consent authority but could include development authorised by court orders: at [46];
(3) As cl 35 affected third parties' rights, the "approved development" against which the environmental impact of the total development was to be assessed, was a development the approval of which was binding on third parties: at [47]; and
(4) The 2014 consent orders were obtained by consent and thus not binding on third parties, the development sought to be altered by Verde Terra did not answer the description of an "approved development": at [44]-[46].

The Next Generation (NSW) Pty Ltd v State of New South Wales [2023] NSWCA 159 (Meagher JA, Gleeson JA, Beech-Jones JA)

(Decision under review: *The Next Generation (NSW) Pty Ltd v State of New South Wales* [2022] NSWLEC 138 (Preston CJ))

Facts: The Independent Planning Commission (**IPC**) refused a development application made by The Next Generation (NSW) Pty Ltd (**Next Generation**) in respect of State significant development seeking consent for the construction and operation of an energy from waste facility on land at Eastern Creek (**SSD Application**). The Protection of the Environment Operations (General) Regulation 2022 (NSW) (**Thermal Energy from Waste Regulation**) prohibited the carrying out of the proposed thermal treatment of waste activity at the premises. Next Generation appealed against the IPC's refusal of the SSD Application, seeking in judicial review proceedings, a declaration that Pt 4 of Ch 9 of the Thermal Energy from Waste Regulation was invalid and of no effect. In November 2022, the primary judge dismissed the proceedings, finding that the Thermal Energy from Waste Regulation was a proper exercise of the regulation-making power under the POEO Act and not inconsistent with the POEO Act. In December 2022, the State Environment Planning Policy (Transport and Infrastructure) Amendment (Thermal Energy from Waste) 2022 (NSW) (**2022 Amendment**) was made under s 3.29 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), also prohibiting development involving or enabling the thermal treatment of waste.

Next Generation appealed to the Court of Appeal against the primary judge's decision, maintaining its claim that the Thermal Energy from Waste Regulation was invalid and sought a declaration to this effect. Next Generation claimed that by prohibiting the thermal treatment of waste other than in specific geographical locations, the Regulation was inconsistent with Ch 3 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and was therefore not authorised by the regulation-making power conferred by s 323 of the POEO Act.

Issues:

(1) Whether the Thermal Energy from Waste Regulation, especially reg 143, was inconsistent with the POEO Act and therefore invalid (**POEO Act inconsistency issue**);
(2) Whether reg 45 of the Thermal Energy from Waste Regulation was inconsistent with the EPA Act and therefore invalid (**EPA Act inconsistency issue**); and
(3) Whether declaratory relief should be granted concerning the scope of operation of reg 145 and s 4.42(1) of the EPA Act, in light of the 2022 Amendment (**declaratory relief issue**).

Held: Appeal dismissed with costs (per Beech-Jones JA at [90]-[92], Meagher JA agreeing at [1], Gleeson JA agreeing at [2]):

The POEO Act invalidity issue

(1) The scope of the regulation-making power must be considered in light of the approach taken by the relevant statute in regulating the subject matter with which it deals. The definitions of "thermal treatment" and "waste" mean that the "thermal treatment of waste" (in reg 143(1)) is a form of "processing… of… waste" (as in cl 5(6) of Sch 2 to the POEO Act). It followed that reg 143 was a regulation "with respect to" the prohibition of "processing… of… waste" as referred to in cl 5(6) of Sch 1 and thus was a regulation "with respect to any matter", which the POEO Act permitted to be prescribed pursuant to s 323(1) and (2): at [46], [51]–[55]; and
(2) The provisions of the POEO Act, including the scope of the regulation-making power, confirmed that reg 143 was not inconsistent with the licensing scheme under Ch 3 of the POEO Act. The "authority" conferred by a licence under s 43(b) of the POEO Act was only a lawful excuse, in a sense, to do what s 48 otherwise prohibits. The POEO Act expressly contemplated that the regulations may prohibit what a licence under Ch 3 of the POEO Act "authorises": at [62]–[65].

EPA Act inconsistency issue

(3) Sections 323(1)–(2) of the POEO Act should be construed so that the regulation-making power does not extend to making regulations which are inconsistent with "any [other] Act of the Parliament in force at the time when the regulations are made". By operation of s 32(2) of the *Interpretation Act 1987* (NSW), reg 145 can be read down so that its operation is not inconsistent with the provisions of legislation other than the POEO Act, such as s 4.42(1) of the EPA Act: at [83]–[84]; and

The declaratory relief issue

(4) The grant of declaratory relief as to the operation of reg 145 was not appropriate in circumstances where the proper construction and effect of Div 28 of the State Environment Planning Policy (Transport and Infrastructure) 2021 (NSW), following the 2022 Amendment, which came into force after the primary judgment, could reasonably be expected to be an issue in the Class 1 proceedings on foot between Next Generation and other parties. The grant of declaratory

relief concerning the scope of reg 145 and its interaction with s 4.42(1) of the EPA Act was also not appropriate where Next Generation expressly declined to pursue a challenge to the validity of reg 145 independently of its challenge to reg 143: at [88]−[90].

McMillan v Taylor **[2023] NSWCA 157** (Payne JA)

(Related decision: *Taylor v Council of the Municipality of Woollahra* [2022] NSWLEC 1658 (Espinosa C))

Facts: The applicants, neighbouring homeowners of the first and second respondents (**respondents**), sought access to certain documents contained in a Land and Environment Court file. The applicants served a notice to produce seeking access to the entire Land and Environment Court file and the matter was heard in the Court of Appeal referrals list. The applicants had earlier commenced judicial review proceedings challenging the decision of a commissioner of the Land and Environment Court where an agreement was reached between the Council and the respondents under s 34 of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**).

As was usual practice, the file was obtained by the registrar of the Court of Appeal (**registrar**) who granted first access to the respondents. The respondents provided a schedule of documents to the applicants which they claimed should not be produced by reason of s 34(11) of the LEC Act. In reliance upon r 33.13 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) rather than the notice to produce, the applicants sought production of certain documents in the file from the registrar. In particular, the applicants claimed that documents 2 and 25 (being expert reports), and 4, 28, 30 and 35 (being bundles of documents) were obtained or created for the purpose of a future contested hearing and were not subject to s 34(11) of the LEC Act.

Issues:

(1) Whether to grant access to the file under r 33.13(3) of the UCPR;
(2) Whether "purpose" within the meaning of s 34(11) of the LEC Act means "dominant purpose" in the sense of ruling or prevailing;
(3) Whether the documents sought by the applicants were prepared for the dominant purpose of a conciliation conference within the meaning of s 34(11) of the LEC Act; and
(4) Whether the documents sought were "privileged information" within the meaning of (h)(iii) of the UCPR's Dictionary.

Held: Application refused:

(1) In accordance with r 33.13(3), the Court of Appeal "otherwise order[ed]" and did not allow access to the file as it was inconsistent with Pt 6 of the *Civil Procedure Act 2005* (NSW) (**CP Act**): at [10]-[11];
(2) Purpose within the meaning of s 34(11) means dominant purpose. The applicants' characterisation of the documents as prepared for the dominant purpose of a future hearing was rejected. The documents were likely prepared for the purpose of, in the course of, or as a result of, a conciliation conference within the meaning of s 34(11) of the LEC Act: at [13]-[15];
(3) The documents were not admissible in judicial review proceedings without consent of the respondents. The respondents clearly stated that they did not consent to granting access to the documents. Therefore, it would not accord with Pt 6 of the CP Act to provide access to the documents so that the respondent could later refuse consent to their tender: at [16]-[17], [22]; and
(4) The documents sought were privileged under (h)(iii) of the UCPR's Dictionary because their admission would be contrary to "any Act", namely s 34(11) of the LEC Act: at [20].

McMillan v Taylor **[2023] NSWCA 183** (Payne and Kirk JJA, and Basten AJA)

(Related decision/decision under review: *Taylor v Council of the Municipality of Woollahra* [2022] NSWLEC 1658 (Espinosa C); *McMillan v Taylor* [2023] NSWCA 157 (Payne JA))

Facts: By way of judicial review, the applicants, neighbouring homeowners of the first and second respondents (**respondents**), sought to challenge a decision of a commissioner of the Land and Environment Court made under s 34 of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**). The applicants alleged that each ground of review involved jurisdictional error, including procedural unfairness and the scope of the commissioner's function under the LEC Act. Much of the dispute turned on the proper interpretation of s 34(3) of the LEC Act. Relevantly, the applicants were not parties to the proceedings before the commissioner.

The history of the proceedings was as follows. In an application to the Woollahra Municipal Council (**Council**) the respondents sought development consent to, amongst other things, demolish an existing dwelling and erect a new dwelling. The Council refused development consent and the respondents appealed against the Council's decision. The proceedings in the Land and Environment Court commenced on-site and were attended by the applicants, their experts, and their lawyers. At the on-site hearing, the commissioner heard the applicants' objections to the proposed development. The respondents and the Council reached agreement at a conciliation conference the following day, at which the applicants were not present. The commissioner gave effect to the agreement by granting consent to the proposal.

Issues: Whether the commissioner:

(1) Failed to consider terminating the conciliation conference under s 34AA(3) of the LEC Act;
(2) Denied the applicants procedural fairness by failing to take the applicants' objections into account in determining the appeal under s 34(3) of the LEC Act;
(3) Failed to take into account an amendment to cl 6.2 of the Woollahra Local Environmental Plan 2014 (**Woollahra LEP**); and
(4) Granted a consent which was legally uncertain.

Held: Summons dismissed (per Basten AJA, Payne and Kirk JJA agreeing):

In relation to ground 1

(1) Section 34AA(3) of the LEC Act conferred power on the commissioner to terminate the conciliation conference but did not impose a duty to do so. It would be unusual to encounter circumstances which would require a commissioner to terminate without a request from a party to the proceedings: at [29]-[31];
(2) The commissioner knew the applicants had written to the Council seeking the conciliation conference be terminated. Therefore, the applicants did not establish that the commissioner had not considered the possibility of termination: at [32];

In relation to ground 2

(3) Reference to "legitimate expectations" as an element of procedural fairness should be eschewed. The applicants' subjective beliefs about the scope of the inquiry to be conducted by the commissioner in order to be satisfied under s 34(3) were irrelevant: at [35], [42], [48];
(4) The content of the obligation for procedural fairness depends upon the statutory context. The statutory context under s 1.3(j) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) was given effect by providing the applicants notice of the development proposal, an opportunity to make submissions to the council, and an opportunity to explain their objections at the on-site hearing: at [37]-[39];
(5) The constraint under s 34(3) of the LEC Act that the agreed decision must be "one that the Court could have made in the proper exercise of its functions" engaged a consideration of any jurisdictional constraints on the power of the Court to make the order. A commissioner presiding over a conciliation process was not required to make an independent determination on the merits. Nor does reference to the "proper exercise of its functions" have that consequence: [4]-[6] (Kirk JA); [62]-[65]; [67]-[80];
(6) The commissioner was not required to address the evaluative criteria in s 4.15 of the EPA Act: at [89];

In relation to ground 3

(7) Although the commissioner did not refer to an amendment made to cl 6.2 of the Woollahra LEP, which had application, it merely introduced matters for evaluative consideration by a consent authority, and was not a jurisdictional constraint: at [85]; and

In relation to ground 4

(8) The factual premise for this ground was not made good. In any event, while a consent to a significantly different set of works from those the subject of the development application might be invalid, the claim of inconsistency between a condition of the consent and the plans, as to the location of a stormwater absorption trench failed to engage that criterion: at [88].

Sydney Metro v Expandamesh Pty Ltd **[2023] NSWCA 200**
(Leeming JA, Griffiths, and Simpson AJJA)

(Related decision: *Expandamesh Pty Ltd v Sydney Metro* [2022] NSWLEC 43 (Moore J))

Facts: Sydney Metro (**the applicant**) appealed against a decision of the Land and Environment Court in which Expandamesh Pty Ltd (**the respondent**) was found to be

entitled to $20,000 of compensation following the applicant's compulsory acquisition of substratum beneath the respondent's land (**the site**). The substratum was acquired to construct two tunnels in preparation for the new Waterloo railway station.

The respondent (the applicant in the primary proceedings) claimed that the condition in cl 2(1)(a) of Sch 6B of the *Transport Administration Act 1988* (NSW) (**disturbance condition**) had been satisfied because the surface of the overlying soil on the site had been disturbed. During the course of the hearing before the primary judge, both parties adduced expert evidence regarding the extent of soil subsidence caused by the construction of the tunnels, which relied on data from soil monitoring pins. Without resolving the disagreement between the experts, the primary judge held that the subsidence of 1.5mm caused by the construction of the tunnels satisfied the disturbance condition and triggered the ability of the respondent to make a claim for compensation pursuant to the *Land Acquisition (Just Terms) Act 1991* (NSW) (**Just Terms Act**). The primary judge ultimately ordered that that the respondent was entitled to $20,000 pursuant to s 55(a) of the Just Terms Act.

The applicant appealed the order of compensation under s 57 of the *Land and Environment Court Act 1979* (NSW) and raised three grounds of appeal. The first ground (the first being dispositive) was that the primary judge erred in the construction of the disturbance condition, the effect of which would disentitle the respondent from receiving compensation for the acquisition of the substratum.

Issue: Whether the respondent was entitled to compensation for the compulsory acquisition of the substratum.

Held: Appeal allowed; issue of costs of the primary proceedings remitted to the Land and Environment Court (per Leeming JA and Griffiths AJA at [1]; Simpson AJA agreeing with additional remarks at [91]):

(1) The task of the proper construction of a legislative provision should be conducted by reference to considerations of text, context and purpose having regard to the mischief with which it was directed: at [47] (citing *Australian Securities and Investments Commission v King* [2020] HCA 4 at [23] per Kiefel CJ (as her Honour then was), Gageler and Keane JJ);

(2) The primary judge correctly eschewed any reliance on dictionary definitions of the word "disturbed". That word should be given its ordinary or common meaning unless it is clear that the legislation indicates otherwise: at [50];

(3) The ordinary meaning of "disturbed" does not extend to an impact or effect which is objectively trivial and of no practical significance: at [63]. It is unnecessary to read such qualifying words to that effect into the disturbance condition: at [63];

(4) Whether a particular effect is non-trivial for the purposes of the disturbance condition will depend upon the particular factual context: at [64]. The present or future use of land may be relevant to an assessment of the triviality of disturbance to the surface of overlying soil: at [64]; and

(5) The intention of the disturbance condition was to provide protection to State entities involved in the construction and operation of underground rail facilities: at [80]. The intention was not to broaden the circumstances in which compensation was payable: at [80].

NSW COURT OF CRIMINAL APPEAL

Aerotropolis Pty Ltd v Secretary, Department of Planning and Environment **[2023] NSWCCA 195** (Adamson JA, Price J and Dhanji J)

(Related decision: *Secretary, Department of Planning and Environment v Aerotropolis Pty Ltd* [2023] NSWLEC 4 (Moore J))

Facts: Aerotropolis Pty Ltd (**the applicant**) was the subject of 20 criminal proceedings (**the prosecutions**) brought by the Secretary, Department of Planning and Environment (**the respondent**) in the Land and Environment Court in relation to offences against the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) and the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**). The summonses alleged eight breaches of the NPW Act and 12 breaches of the BC Act arising from the picking of plants that belonged to an endangered ecological community in Bringelly, New South Wales.

The applicant filed a notice of motion seeking orders that the prosecutions were commenced out of time. Both the NPW

Act and the BC Act prescribed a 2-year limitation period for the commencement of proceedings from the date on which evidence of the alleged offence first came to the attention of any relevant investigation officer. This date was agreed to be 11 June 2020. The company contended that the limitation period expired on Friday, 10 June 2022. The company also contended that even if this was not the case, and the 2-year period expired on 11 June 2022, s 36 of the *Interpretation Act 1987* (NSW) (**Interpretation Act**) did not apply to extend the limitation period from Saturday, 11 June 2022 to Tuesday, 14 June 2022 (noting that Monday, 13 June 2022 was a public holiday).

The notice of motion was dismissed by the primary judge. The company sought leave to appeal the interlocutory order pursuant to s 5F of the *Criminal Appeals Act 1912* (NSW). The appeal was subsequently heard by the Court of Criminal Appeal on 19 June 2023.

Issue: Whether the prosecutions were commenced in time.

Held: Leave granted to appeal; appeal dismissed (per Price J at [2], Adamson JA agreeing at [1], Dhanji J agreeing with additional reasons at [143]):

(1) Seriously considered dicta of the Court of Appeal should be followed unless there are compelling reasons for departing from that seriously considered dicta: at [61]. The primary judge did not err by failing to regard the dicta in *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204 as "persuasive": at [66];

(2) Although the rule in *Lester v Garland* (1808) 15 Ves Jun 248 that the date on which an event occurred was to be disregarded in the calculation of time (**corresponding date rule**) is a general rule and subject to exceptions, the text of s 13.4(2) of the BC Act did not evince an intention to displace the corresponding date rule: at [78];

(3) A court construing a statutory provision must strive to give meaning to every word of the provision: at [68] (citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] per McHugh, Gummow, Kirby and Hayne JJ);

(4) The word "within" in the context of s 13.4(2) of the BC Act is tethered to the word "after": at [79]. Accordingly, the calculation of the two-year period excluded the day the alleged offences were brought to the attention of the relevant officer: at [79];

(5) The words "within" and "after" in s 13.4(2) of the BC Act both have work to do and the section is not ambiguous: at [80]. As there was no ambiguity arising from either s 13.4(2) of the BC Act or s 190(1) of the NPW Act after the ordinary rules of construction were applied, it was not necessary to consider whether the provisions in issue were penal in nature (and, therefore, whether such provisions should have been given a narrow construction): at [82];

(6) The primary judge was correct in referring to the second principle identified in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (and later confirmed by the High Court in *Hill v Zuda Pty Ltd* [2022] HCA 21) that neither an intermediate appellate court nor a trial judge should depart from a decision of another intermediate appellate court on the interpretation of Commonwealth legislation, uniform national legislation or the common law of Australia unless convinced that the interpretation is plainly wrong, or that there exists a compelling reason to do so: at [110];

(7) Section 13.4(4) of the BC Act and s 190(3) of the NPW Act are in the same terms. These provisions apply "despite anything in the *Criminal Procedure Act 1986* (NSW) (**CPA**) or any other Act": at [133]. The word "despite" in this context was facultative, not restrictive: at [136]. The plain intention of this expression was to authorise the commencement of proceedings that might otherwise have been barred by the 6-month time limitation in the CPA or by a time limit in any other legislation: at [138]; and

(8) There was neither an express nor implicit intention to exclude the operation of s 36 of the Interpretation Act: at [139]. The primary judge correctly concluded that s 13.4(4) of the BC Act and s 190(3) of the NPW Act did not oust s 36(2) of the Interpretation Act: at [140].

SUPREME COURT OF NSW

***Mourched v Chief Commissioner of State Revenue* [2023] NSWSC 668** (Davies J)

(Related decision/decision under review: *Mourched v Chief Commissioner of State Revenue* [2022] NSWCATAP 362 (Dr R Dubler SC, Senior Member and S Higgins, Senior Member); *Mourched v Chief Commissioner of State Revenue* [2022] NSWCATAD 180 (N Isenberg, Senior Member))

Facts: The plaintiffs sought leave to appeal to the Supreme Court of NSW from a decision of the NSW Civil and

Administrative Tribunal Appeal Panel (**Appeal Panel**). The Appeal Panel decision was the outcome of an internal appeal from an earlier decision of the Administrative and Equal Opportunity Division of NCAT. The proceedings concerned the land tax assessment of the plaintiffs' land at 297 Bringelly Road, Leppington (**land**). Relevantly, the land was entered into the Register of Land Values under s 14CC of the *Valuation of Land Act 1916* (NSW) (**Valuation of Land Act**) as two separate parcels (**Parcel A** and **Parcel B**). Parcel A, where a childcare centre was situated, was determined to be exempt as it fell within s 10(1)(u) of the *Land Tax Management Act 1956* (NSW) (**Land Tax Management Act**). The plaintiffs claimed a land tax exemption in relation to Parcel B under s 10(1)(u) of the Land Tax Management Act on the basis that Parcel B was used solely for the provision of an approved education and care service. Parcel B contained a septic system, which the plaintiffs claimed was indispensable to the operation of the childcare centre. Parcel B was determined by the Appeal Panel not to fall within the definition of the exemption under s 10(1)(u) because it was not the actual place where children were educated or cared for.

Issues:

(1) Whether land tax could be assessed separately on the parcels of land as valued by the Valuer General in accordance with s 14A(4) of the Valuation of Land Act;
(2) Whether Parcel B was a place where children were educated or cared for, and was therefore entitled to the land tax exemption under s 10(1)(u) of the Land Tax Management Act; and
(3) Whether the sole use of Parcel B was for the septic system.

Held: Appeal dismissed:

(1) The result of the interplay between s 9 of the Land Tax Management Act and ss 14A and 14CC of the Valuation of Land Act is that the Chief Commissioner of State Revenue can assess land tax payable on any parcel of land entered into the Register by the Valuer General for valuation purposes under s 14A(4) of the Valuation of Land Act. There was no error in the determination that Parcel B could be separately assessed under the Land Tax Management Act: at [36], [41];
(2) There was no basis for the suggestion that where "land" was referred to in s 10 of the Land Tax Management Act, it should be treated differently from where it appeared in s 9. It is a general rule of statutory construction that where a word is used consistently in a single piece of legislation, it should be given a consistent meaning unless there is a reason to do otherwise: at [36];
(3) Where the terms "land" and "place" were used in s 10(1)(u) of the Land Tax Management Act, the meaning of the terms included land containing ancillary services to the land in respect of which there was an unchallenged exemption. If Parcel B was used only for the septic system, it would have been entitled to an exemption under s 10(1)(u) because of its connection with the building on Parcel A: at [60]-[61];
(4) The question of current use of Parcel B at the relevant time was a question of fact, not law. There was no right of appeal to the Supreme Court from a question of fact: at [74], [76], [81]; and
(5) On the evidence, it was open to the Appeal Panel to conclude that the plaintiffs failed to discharge their onus to establish that the land was used solely for the provision of an approved education and care service, even accepting that the septic system should be regarded as part of the "land" for the purposes of the exemption: at [77].

Hunt Leather Pty Ltd v Transport for NSW **[2023] NSWSC 840** (Cavanagh J)

Facts: The proceedings were representative proceedings under Pt 10 of the *Civil Procedure Act 2005* (NSW) pursued on behalf of persons said to be affected by the construction of the Sydney Light Rail (**SLR**) between Circular Quay and Randwick/Kingsford in Sydney. The SLR was due to be completed by March 2019, but it was not complete until March 2020. The lead plaintiffs made claims in both private and public nuisance. There were four lead plaintiffs including two businesses, Hunt Leather Pty Ltd (**Hunt Leather**) and Ancio Investments Pty Ltd (**Ancio**). Hunt Leather operated two luxury goods stores – one in the Queen Victoria Building (**QVB**) and one on George Street. Ancio operated a restaurant in Kensington, which permanently closed in April 2019. The defendant was Transport for NSW which had management of the processes leading to the construction of the SLR.

The complaint related to the conduct of the defendant prior to construction – during the design, planning and contract negotiation phases of the SLR. The defendant did not undertake the construction work itself but determined that the SLR would be built and operated through a public and private partnership with an entity appointed by the

defendant (**contractor**). The defendant and the contractor entered into a project deed in which the contractor agreed to finance, design, construct, commission, operate and maintain the SLR for a 15-year term. The project deed commenced on 17 December 2014 after the defendant completed significant investigation and planning in relation to the SLR.

The SLR was to be constructed in 31 separate "fee zones" to ensure minimal disruption to businesses. Each fee zone had a specified occupation period for construction. A fee was payable by the contractor if the occupation period was exceeded unless there was an event that gave rise to an extension. Additionally, the contractor could claim compensation for losses arising out of delays during the period for which an extension of time was granted, for example, a utilities work event. One of the biggest risks to the construction of the SLR was the discovery of previously unknown utilities along the SLR route, which required treatment works with approval from utility providers such as Ausgrid. The utilities risk featured prominently in the planning stage of the SLR project, for which the defendant was responsible. The defendant had not entered into any agreements with utility providers for utilities treatment.

Issues:

(1) Whether, for a finding of nuisance to be made, the plaintiffs were required to establish that the defendant failed to take reasonable care or acted negligently;
(2) Whether a description of the defendant's use of land as not common or ordinary changed or reduced the requirements for an actionable nuisance;
(3) Whether the defendant could be at fault if it was not negligent;
(4) Whether the interference with the plaintiffs' land was an inevitable consequence of the defendant's function as a statutory authority and in circumstances where it was authorised to undertake those functions;
(5) Whether the interference with the plaintiffs' business was substantial and unreasonable; and
(6) Whether the defendant was liable for the nuisance; and
(7) Whether the plaintiffs could succeed in a claim for public nuisance.

Held: Private nuisance was established. Two of the four lead plaintiffs, Hunt Leather and Ancio, were entitled to succeed:

(1) Failure to take care was not an element of the tort of nuisance. The interference may have been unreasonable even though the defendant took reasonable care. However, the fact that the defendant took reasonable care may be a relevant factor but in of itself does not provide a defence against a finding of nuisance: at [644], [646];
(2) Whether the use of land is common or ordinary was a matter of impression and evaluation on the relevant facts and circumstances. The use of roads for the construction of the SLR was not a common and ordinary use, it was exceptional: at [654], [656];
(3) Foreseeability was an essential element of the tort of nuisance. Fault may be established without a finding of negligence where the defendant created circumstances which led to substantial and unreasonable interference where such interference was foreseeable: at [659], [663];
(4) The onus was not on the plaintiffs to prove that the nuisance was not inevitable. The existence of the fee zone strategy and occupation schedule meant that the defendant did not establish the defence. The nuisance was not an inevitable consequence of the exercise of statutory authority: at [833]-[834];
(5) Hunt Leather and Ancio suffered interference with the use of their properties which was both substantial and unreasonable: at [917], [923];
(6) Establishing that the use of the road for the SLR was for the public benefit and represented reasonable use of the land for a period did not preclude an action in nuisance where the interference became unreasonable. If the opposite was true, a landowner who obtained permission to undertake construction works would be said to have extinguished the rights of the neighbouring land owner. That could not be so: at [920];
(7) The defendant was liable in nuisance for the following reasons: at [940]-[946], [1125]-[1127]:
    (a) the prolongation of construction activities was plainly foreseeable by the defendant due to its knowledge of the utilities risk and warnings given by Ausgrid about the timeframe for treatment of the utilities;
    (b) the defendant entered into the project deed on terms that it accepted all of the risk for discovery of unknown utilities. It did so without having concluded agreements with utility providers, which was identified as a significant risk of delay in pre-project deed documents;
    (c) the defendant contracted on terms that provided no real deterrence for any departure from the

occupation schedule in the fee zones. This meant that if the foreseeable risk of delay eventuated, the occupation of fee zones would be prolonged; and

(d) the defendant created the state of affairs which led to the extended period of interference in circumstances where harm was foreseeable and predictable; and

(8) This case was not an appropriate vehicle for a claim in public nuisance. The mere closure of George Street to vehicular traffic, the presence of hoardings and construction work near footpaths in fee zones did not give rise to public nuisance: at [954], [961].

The Owners – Strata Plan No. 91016 v Upright Builders Pty Ltd **[2023] NSWSC 867** (Ball J)

Facts: The plaintiff commenced proceedings in the Supreme Court of New South Wales (**Supreme Court**) in relation to, amongst other things, alleged defects and deficiencies in the common property of a high-rise residential home unit development, including an error that resulted in the walkway and stairs forming part of the development being constructed on a public road. The plaintiff was the owners corporation for the development, the first defendant was the builder, and the second defendant was the developer. Under s 7 of the *Roads Act 1993* (NSW) (**Roads Act**), the third defendant, the City of Ryde Council, was the roads authority for all public roads in the relevant area. The plaintiff sought orders under s 3 of the *Encroachment of Buildings Act 1922* (NSW) (**EB Act**) requiring the third defendant to transfer to it the part of the land upon which the encroaching works were constructed. The respondent contended that there was inconsistency between the definition of "land" in the EB Act and Roads Act which meant that the Supreme Court did not have power to grant the relief sought by the plaintiff. This issue was determined as a separate question as to whether the EB Act applied to the encroachment.

Issues:

(1) Whether the word "land" in the definition of "adjacent owner" under the EB Act excluded particular types of land from the operation of the EB Act;

(2) Whether *Pesic v South Sydney Municipal Council* [1978] 1 NSWLR 135 (***Pesic***) was wrongly decided;

(3) Whether the EB Act, insofar as it applied to public roads, was impliedly repealed by the Roads Act; and

(4) Whether the EB Act applied to the encroachment of the development onto the public road so as to give the plaintiff and third defendant the rights and obligations provided for in s 3 of the EB Act.

Held: The EB Act applied to the encroachment:

(1) The word "land" in the EB Act appeared to be used in its ordinary sense to describe both the real property from which the encroachment extended, as well as the real property affected by the encroachment: at [35];

(2) The conclusion reached by the court in *Pesic* on the correct interpretation of the EB Act was wrong and was not followed. However, the ultimate decision was correct – the court had no power under s 3(2) of the EB Act to make the orders sought by the plaintiff in that case: at [39]-[41];

(3) There was no inconsistency between the EB Act and the Roads Act that would circumvent the limitations imposed on councils by the Roads Act. The court may have power to order a council to follow the procedures set out in the Roads Act in relation to a road closure, but it could not order a council to close the road: at [45]; and

(4) The application of the EB Act to the encroachment of the development was qualified by an implied limitation preventing a court from making orders that exceed the restrictions placed on a council, rather than read the word "land" in the definition of "adjacent owner" to exclude a public road: at [36], [38], [46].

The relevant principles of statutory construction were set out by the court as follows:

(1) The legal meaning of a statutory provision was to be derived from a full consideration of the language of the statute viewed as a whole and the context, general purpose and policy of the statute or a provision within it, to the extent that that is separately discernible;

(2) Later statutory provisions should be read to operate harmoniously with earlier ones. Only where, after careful examination, the later provisions appear inconsistent with the earlier ones should the later act impliedly repeal the earlier one; and

(3) The provisions of a statute have one legal meaning that could not change as a result of subsequent changes to the law. However, the denotation of the words, or the things a statute describes may change.

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

Environment Protection Authority v Sydney Water Corporation **[2023] NSWLEC 68** (Pritchard J)

Facts: The defendant, Sydney Water Corporation (**Sydney Water**) pleaded guilty to three offences of polluting waters contrary to s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Each of the three offences arose from the same incident whereby a sewer and adjoining maintenance hole in Naremburn collapsed, causing a blockage in the reticulation system and approximately 16 million litres of untreated sewage to be discharged from three parts of the Northern Suburbs Sewage Treatment System, entering Flat Rock Creek and the foreshore of Long Bay, Middle Harbour. It was agreed between the parties that the commission of the offences caused actual environmental harm, and that the overflows of sewage directly altered the chemical and biological characteristics of the waters for approximately 6 to 7 days. It was also agreed that the offences were inadvertent and not deliberate, and that the sewer subject of the incident was part of a system initially constructed between 1916 and 1930. Iain Fairbairn, Head of Wastewater and Environment at Sydney Water, expressed remorse and contrition for the offences. Mr Fairbairn gave evidence that Sydney Water took all reasonable and feasible actions to minimise harm to the environment and protect public health in response to the incident, and had undertaken initiatives to reduce the risk of overflows from its wastewater networks in the future.

Issue: The appropriate sentence to be imposed on Sydney Water.

Held: Sydney Water was convicted of the three offences against s 120(1) of the POEO Act, and ordered to pay a total monetary penalty in the sum of $365,625. Sydney Water was also required to pay the prosecutor's professional costs of the proceedings in an amount as agreed or assessed, and comply with a number of publication orders made pursuant to s 250(1) of the POEO Act:

(1) The first offence against s 120(1) of the POEO Act was in the mid-range of objective seriousness, having regard to the large volume of sewage discharged, the environmental impact of the offence, the period of harm taking place over 6 to 7 days, the preventative practical measures that could have been undertaken, and the fact that Sydney Water had control over the cause of the incident: at [121]-[122];
(2) The second and third offences against s 120(1) of the POEO Act were in the low-range of objective seriousness, having regard to the lower volume of sewage discharged, shorter time period over which the sewage was discharged, and the lesser environmental impact of the offences: at [123];
(3) The Court accepted as mitigating factors Sydney Water's demonstration of good character, remorse, and assistance provided to authorities. The Court applied discounts of 10 percent for the first offence and 25 percent for the second and third offences for Sydney Water's early guilty pleas: at [151], [155]; and
(4) Having regard to Sydney Water's aging system and prior convictions, the Court could not find that Sydney Water would not reoffend in the future, despite there being a lower likelihood of reoffending. Accordingly, there was a need for specific deterrence in circumstances where Sydney Water had an ongoing responsibility to ensure its activities are carried out in a manner that did not result in the pollution of waters: at [156], [165].

Environment Protection Authority v Mouawad (also known as Isaac) (No 4) **[2023] NSWLEC 76** (Pritchard J)

(Related decisions: *Environment Protection Authority v Mouawad (also known as Isaac)* [2023] NSWLEC 30 (Pain J); *Environment Protection Authority v Mouawad (also known as Boulos Isaac) (No 2)* [2023] NSWLEC 38 (Pritchard J); *Environment Protection Authority v Mouawad (No 3)* [2023] NSWLEC 44 (Duggan J))

Facts: Mr Mouawad (**defendant**) entered a plea of guilty on the first day of a 21-day trial to one offence of polluting land against s 142A(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), and one offence of causing waste to be transported to a place that could not lawfully be used as a waste facility for that waste against s 143(1) of the POEO Act. The offences, as charged by the Environment Protection Authority (**prosecutor**), related to the defendant having caused fill to be brought to and placed in a stockpile on a property at 22 Geelans Road, Arcadia (**property**). During the charge period, approximately 1,399 truckloads of fill material (**fill material**) were transported to the property, each truck having a capacity of approximately 30 tonnes. Some 20,000 tonnes of the fill material were considered by the prosecutor's expert to be asbestos waste.

The defendant was self-represented. He agreed to the prosecutor's proposed Statement of Agreed Facts (**SOAF**). At the hearing on sentence, the prosecutor sought to establish that the defendant's state of mind in committing the offences was one of recklessness. The defendant gave evidence in relation to his state of mind, and was subsequently cross-examined in relation to that evidence. In his evidence, the defendant sought to resile from the SOAF in various respects, in particular, his role under a construction deed entered into with the owner and developer of the property to ensure that all fill material imported to the property was "virgin excavated natural material" or "other approved material".

Issues:

(1) The weight to be attributed to the defendant's evidence to the extent that it resiled from the SOAF;
(2) Whether the defendant's state of mind was one of recklessness, and whether such reckless ought be taken into account in relation to strict liability offences against ss 142A(1) and 143(1) of the POEO Act; and
(3) The appropriate sentence to be imposed on the defendant.

Held: The defendant was convicted of the two offences against ss 142A(1) and 143(1) of the POEO Act, and ordered to pay a total monetary penalty in the sum of $189,000. The defendant was required to pay the prosecutor's investigation costs of the proceedings in the amount of $33,647, and professional costs in an amount as agreed or assessed:

(1) The defendant's evidence seeking to cut across statements in the SOAF was not credible. The facts in the SOAF, negotiated and agreed were to be preferred: at [45]-[48];
(2) The defendant's state of mind was one of recklessness. Such a finding was available to the Court as an aggravating factor in relation to the s 142A(1) offence. In relation to the s 143(1) offence, the principle in *The Queen v De Simoni* (1981) 147 CLR 383; [1981] HCA 31 prevented the defendant's state of mind from being taken into account as an aggravating factor. However, the same evidence in relation to the defendant's state of mind was relevant to the objective seriousness of the offence and the need for specific deterrence: at [156], [160];
(3) Each of the offences against ss 142A(1) and 143(1) of the POEO Act were in the medium to high range of objective seriousness, having regard to the volume of fill material transported to the property, the conduct occurring over a period of 7 months, the nature of the waste being asbestos waste, the significant planning and organisation in committing the offences, the foreseeable harm caused to the local environment, and the offences having been committed for financial gain: at [206], [208];
(4) The defendant's prior criminal offending was an aggravating factor, and there was a need for specific deterrence. The defendant did not demonstrate remorse, and the Court found that he had a propensity to reoffend: at [214], [220], [231], [242]; and
(5) A discount of 10 percent was applied for the pleas of guilty entered by the defendant on the first day of the trial set for 21 days, and a further discount of 30 percent was applied having regard to the totality principle: at [229], [252].

CONTEMPT

Georges River Council v Hamade [2023] NSWLEC 71 (Pepper J)

Facts: On 9 March 2022, Georges River Council (**the Council**) brought proceedings against Habib Hamade (**Hamade**) under r 6.3 of the Land and Environment Court Rules 2007 (NSW) for two charges of contempt for failing to comply with orders made by the Court on 19 October 2020 (**the orders**) and for him to pay the Council's costs of the proceedings on an indemnity basis. The orders were made by consent after Hamade unlawfully caused excavation works to be carried out on his land, which led to the partial collapse of a rock wall between his land and the neighbouring land. Order 2 required Hamade to construct a retaining wall to rectify the geotechnical instability caused by the unlawful works in accordance with specific plans (**the remedial works**) within 180 days of the making of the orders, namely, by 17 April 2021, while order 3 required Hamade to retain appropriately qualified geotechnical and structural engineers to supervise the remedial works and to provide their details to the Council within 7 days of the making of the orders, namely, by 26 October 2020.

In relation to order 2, despite Hamade's assertion that the remedial works had been completed on 30 March 2023, an inspection by the engineers revealed that they were not carried out in accordance with the plans the subject of order

2. At the time of the sentence hearing, the completion of the remedial works was still outstanding and required an amendment to the orders to cure the instability of the retaining wall as advised by the engineers. In relation to order 3, the Council received confirmation of the engineers' appointment on 17 December 2020.

Issues: The appropriate sentence to be imposed on Hamade.

Held: Hamade was convicted and fined $17,000 and ordered to pay the Council's costs fixed in the sum of $65,000:

(1) Hamade's non-compliance with order 2 was found to be wilful and serious notwithstanding his continual attempts at purging the contempt: at [66]-[67];
(2) There was no penalty imposed in relation to Hamade's non-compliance with order 3 having regard to its trivial nature and the totality principle: at [77], [114];
(3) Reasons for the contempt included delays and difficulties in arranging finance to pay for the cost of the remediation works, Hamade's declining mental health and delays associated with the grout injection, inclement weather and the impact of Covid-19 affecting the construction industry: at [68];
(4) Hamade was aware of the consequences of failing to comply with the orders: at [70];
(5) Hamade's early guilty plea was taken into account: at [79];
(6) The full weight of Hamade's remorse and contrition was tempered by his failure to directly apologise to his neighbours for the detrimental impact of the remedial works on their amenity: at [83];
(7) Hamade's good character, low likelihood of re-offending and mental state were taken into account: at [86]-[88], [90];
(8) The substantial expenses incurred by Hamade during the proceedings and in undertaking the remedial works were considered by the Court: at [96]-[100]; and
(9) The Court proceeded with the option of determining an appropriate penalty for Hamade based on the orders, rather than the option of imposing an ongoing monthly penalty until the contempt was purged, or the option of adjourning the proceedings to allow for Hamade to apply for an amendment of the orders. This decision was made on the basis that the contempt could never be fully purged until a variation of the orders is made to complete the remediation works in accordance with the engineers' advice, and that the purpose of the contempt proceedings was to sentence Hamade for contempt of the orders made on 19 October 2020: at [107]-[112].

Sader v Elgammal (No 2) **[2023] NSWLEC 92** (Pain J)

(Related decision: *Sader v Elgammal* [2022] NSWLEC 107 (Duggan J))

Facts: In *Sader v Elgammal* [2022] NSWLEC 107 the Court found Mr Elgammal (**first respondent**) had unlawfully constructed two concrete slabs on his property at Connells Point. On 30 September 2022 the Court ordered inter alia the demolition of the slabs and restrained the first respondent from placing any materials, plant or machinery on the slabs while they remained in situ. Mr and Mrs Sader (**applicants**) commenced contempt proceedings against the first respondent alleging failure to comply with the orders made by the Court on 30 September 2022. The first respondent pleaded not guilty to the charges. The applicants and first respondent filed lay evidence in accordance with the timetable. The applicants submitted that a factual dispute had arisen from the evidence. The first respondent refused the applicant's written request for an expert engineer to inspect his property. The applicants sought an order for access to the first respondent's property by an expert engineer under r 23.8 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

Issue: Whether the Court ought to exercise its discretion to make the access orders sought by the applicants and grant the applicants leave to rely on an expert pursuant to r 31.19 of the UCPR.

Held: Notice of motion dismissed and no leave granted for reliance on expert evidence at [69] as:

(1) The existence of a factual dispute was not decisive in exercise of discretion given factual disputes occur in many cases. Relieving the Court of the burden of making factual findings was irrelevant. Expert evidence was not necessarily needed to determine what 'demolish' requires. That the first respondent's defence was not known until his affidavit was filed was not persuasive: at [55]-[56];
(2) Given the common law presumptions of privacy and quiet enjoyment of property applies, the first respondent's refusal to grant access was immaterial to the exercise of discretion. The first respondent was under no obligation to cooperate with the applicants in

adversarial contempt proceedings that could result in a penalty or imprisonment in worst cases: at [58]-[60];

(3) High Court authorities emphasise the importance of the privilege against self-exposure to penalty that applies in civil proceedings for contempt in applications seeking discovery of documents or information 'from the mouth of the' defendant. No case addresses circumstance where application is for expert to attend private property. Privilege applied as first respondent must make his property available to an expert who may be called by the applicants to prove the contempt case and thereby expose the first respondent to penalty: at [64], [66]; and

(4) Application to rely on expert evidence was made late. Making the order for access sought was not in the interest of justice, nor provided for the just, quick or cheap resolution of proceedings: at [57], [67].

JUDICIAL REVIEW

Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016 **[2023] NSWLEC 62** (Preston CJ)

Facts: The New South Wales Aboriginal Land Council (**Land Council**) lodged in 2016 claims for Crown land in the La Perouse Local Aboriginal Land Council under the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**). The land was subject to a Special Lease to Paddington Bowling Club, renewed in 2010 for a term of 50 years (**the Lease**). In 2011, the Lease was assigned to CSKS Holdings Pty Ltd (**CSKS**), and in 2018, re-assigned to Quarry Street Pty Ltd (**Quarry Street**), pursuant to a Deed to Consent to the Assignment of Lease (**the Deed**). In 2021, the Minister administering the Crown Land Management Act (**the Minister**) approved the land claim in part, in relation to land known as the Paddington Bowling Club (**the land**). The Minister determined that he was satisfied that the land was "claimable Crown lands" under s 36(1)(b) of the ALR Act, being Crown lands that, at the date of the claim, "are not lawfully used or occupied." In making his determination, the Minister approved the recommendations in a Brief from the Aboriginal Land Claim Investigation Unit of the Department of Planning, Industry and Environment (**the Brief**).

Quarry Street brought proceedings for judicial review of the Minister's decision, advancing three grounds of review. The first ground concerned the part of the land where there were tennis courts, which had been used and occupied by Wentworth Tennis Club (**WTC**) since 2015. The second and third grounds of review concerned the balance of the land, which Quarry Street had submitted during the investigation of the land claim, that the Crown itself was lawfully using for the purpose of leasing the land to CSKS.

Issues:

(1) Whether the finding that the WTC's use and occupation of the tennis courts were not lawful, because of a failure to obtain consent in writing from the Crown contrary to cl 39(a) of the Lease, was inconsistent with a term in the Deed that the Lessee was compliant with all its leaseholder obligations as at the date of the land claim, and whether the Minister misconstrued cl 39(a) of the Lease in finding that possession had passed from CSKS to WTC (**the misconstruction ground**);

(2) Whether the Minister erred in law by not accepting Quarry Street's argument that the Crown itself was using the land for the purpose of leasing it (**the use for leasing ground**); and

(3) Whether, in the alternative, the Minister failed to consider Quarry Street's argument that the Crown itself was lawfully using the land and, in doing so, denied Quarry Street procedural fairness (**the procedural fairness ground**).

Held: Quarry Street did not establish any of its three grounds of review. The proceedings dismissed, with costs:

The misconstruction ground

(1) The time for determining whether claimed land was lawfully used or occupied was at the date when the claim was made, being 19 December 2016. At this time, CSKS had given WTC exclusive use and management of the tennis courts, without having obtained the consent of the Crown, contrary to cl 39(a) of the Lease. The Crown's later opinion in a Deed in 2018, that CSKS was in compliance with its obligations under the Lease around the date of the land claim, did not affect the factual circumstances as at the date of the claim: at [22]-[23];

(2) The question of whether there was a parting of possession by CSKS was a question of fact. There was no evidence that CSKS retained any possession of the tennis courts as at the date of the claim: at [25]-[30]. There was also no evidence that the Minister construed, let alone misconstrued, the term "to part with possession" in cl 39(a) of the Lease: at [34];

The use for leasing ground

(3) Where the Minister signed and dated the Brief, as well as initialled the page containing the list of attachments, it could not be reasonably inferred that the Minister did not consider the Brief and its attachments. Quarry Street did not establish any evidence of the Minister's assessment of the use for leasing argument, or that the Minister must have rejected that argument: at [45]-[48]; and

The procedural fairness ground

(4) Even if the Minister owed Quarry Street procedural fairness to consider its submissions, it did not establish that the Minister failed to consider Quarry Street's use for leasing submission. There was no statutory, or common law, requirement for the Minister to provide reasons for his decision. The Brief, and its attachments, could not be considered to record the Minister's reasons: at [56]-[59].

Bushfire Survivors for Climate Action Incorporated (INC 1901160) v Narrabri Coal Operations Pty Ltd (ACN 129850139) **[2023] NSWLEC 69** (Duggan J)

Facts: By way of judicial review, the applicant challenged the decision of the Independent Planning Commission (**IPC**) by which it granted development consent to the first respondent for an extension to an underground mine (**Extension Project**). The applicant sought a declaration that the decision to approve the Extension Project was legally unreasonable and therefore invalid. The applicant's claim focussed on issues relating to the impacts of the Extension Project on climate change and the unchallenged evidence before the IPC which the applicant contended supported its argument. The applicant referred to this evidence as Interim Findings, which findings it said should have been made by the IPC in arriving at its decision.

The IPC acknowledged that the Extension Project would contribute to anthropogenic climate change. Notwithstanding that fact, the IPC determined the Extension Project was in the public interest after undertaking the balancing exercise required by s 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The IPC approved the Extension Project subject to conditions and published a Statement of Reasons for its decision.

Issues:

(1) Whether the statutory context required the Interim Findings to be expressly made by the IPC in order for it to have acted reasonably and within the scope of its power;
(2) Whether it was legally unreasonable for the IPC to determine that the Extension Project was in the public interest; and
(3) Whether the ultimate decision to approve the Extension Project was legally unreasonable in light of the available evidence of harm caused by climate change.

Held: Summons dismissed:

(1) The standard of reasonableness must be ascertained from the scope and purpose of the legislation that conferred the decision-making power in question: at [119];
(2) An exercise of power under s 4.38 of the EPA Act will be within the bounds of power if:
    (a) the power was exercised by a body authorised by the EPA Act to make such a determination;
    (b) it related to an application for development consent that was within power;
    (c) it was evaluated by taking into account all mandatory matters and any other relevant matters for consideration, constraining the scope to that which the EPA Act was directed; and
    (d) it was one of the outcomes of determination provided for in the EPA Act: at [126];
(3) The decision was not legally unreasonable on the basis of a failure to make the Interim Findings in the manner contended by the applicant: at [156];
(4) It was not legally unreasonable for the IPC to find that the approval of the Extension Project was in the public interest: at [161], [178];
(5) The IPC's ultimate decision to approve the Extension Project was one within the bounds of its decision-making power: at [181];

In relation to ground 1

(6) There was no statutory basis on which it could be found that the IPC had an express statutory requirement to give detailed reasons for approving the Extension Project. Instead, the content and purpose of the IPC's Statement of Reasons was determined by reference to the Statement of Reasons: at [136];
(7) Considering the totality of the Statement of Reasons, an inference could not be drawn from the failure to make

express findings in the terms of the Interim Findings. The overwhelming inference drawn was that the substance of the Interim Findings was before the IPC and considered by it: at [144], [150];

In relation to ground 2

(8) To find that the only available legally reasonable finding within the scope of the IPC's discretion was that the approval was not in the public interest would require as a matter of law that climate change evidence was given weight that would overwhelm any other legally available consideration. In the context of s 4.38 of the EPA Act, that requirement was not available: at [171];

In relation to ground 3

(9) A decision that was consistent with State and national policies was not legally unreasonable. The power requiring those policies to be considered anticipated that at least one of the potential outcomes of the lawful exercise of that power was to approve the extraction of coal and contribute to climate change: at [183]; and

(10) In light of the IPC's Statement of Reasons, the decision to approve the Extension Project did not demonstrate that the weight given in the balancing exercise required by s 4.15 of the EPA Act was on its face disproportionate to warrant a finding of legal unreasonableness: at [184].

Inglis v Buckley **[2023] NSWLEC 77** (Pain J)

Facts: Mr Inglis (**applicant**) sought judicial review of the grant of development consent DA 2022/0023 by the second respondent Snowy Valleys Council (**council**) to the first respondent Mr Buckley (who filed a submitting appearance). The development consent was for a boundary adjustment and consolidation of lots, including transfer of a dwelling entitlement in a rural area. One lot created did not meet the minimum lot size in RU1 primary production zone for subdivision triggering cl 4.2C(3) of the Tumut Local Environmental Plan 2012 (NSW) (**TLEP**). Clause 4.2C(3)(c) required the council to be satisfied that the potential for land use conflict would not be increased as a result of the subdivision. Clause 4.2C(3) also required the council be satisfied that the subdivision would not create additional lots or the opportunity for additional dwellings (cl 4.2C(3)(a)) and that the number of dwellings or opportunities for dwellings on each lot after the subdivision would be the same as before the subdivision (cl 4.2C(3)(b)). Material before the council included: the development application, the statement of environment effects that stated that there would no increase in land use conflict, two management reports prepared by council officers that recommended against approval of the subdivision and a submission by the applicant identifying difficulties with use of any access road to the proposed smaller lot. Discussion at the council meeting largely focussed on subcll (a) and (b) of cl 4.2C(3) on whether there would be an expansion of dwelling entitlements. The council resolved to approve the development application and delegate to the chief executive officer (**CEO**) the application of standard conditions of development consent and two non-standard conditions. A suite of 50 conditions was available for the CEO to select standard conditions from. The councillors were made aware of the existence of standard conditions of development consent at a council induction program for new councillors a few months before the decision to approve development. A council officer applied 8 conditions to the notice of determination including one condition that was not a standard condition of development consent nor a non-standard condition expressly identified in the council's resolution.

Issues:

(1) Whether the council formed the positive state of satisfaction required by cl 4.2C(3)(c) of TLEP that the potential for land use conflict would not be increased as a result of the subdivision (**ground 1**); and

(2) Whether the principle of indivisibility of function was breached by delegation to CEO in circumstances where no proposed conditions before the council when it resolved to delegate to the CEO the application of standard conditions of subdivision to the consent (**ground 2**).

Held: Development consent invalid and of no effect:

(1) Ground 1 upheld. The inference arose on the balance of probabilities that the council had not formed the state of satisfaction required by 4.2C(3)(c). The absence of a council management report recommending that development consent be granted or specifically addressing cl 4.2C(3), the absence of express terms of cl 4.2C(3)(c) before the councillors and the councillors' consideration of subcll (a) and (b) in Council meetings not subcl (c) particularly gave rise to that inference: at [58]; and

(2) It was unnecessary to resolve ground 2. This ground raised a complex matter not fully argued before Court. If the correct question to be asked was what the

councillors' understanding of the application of standard conditions to the development consent was, the evidence did not enable an inference to be drawn that councillors were aware of the particular standard conditions that would be imposed on the development consent: at [82].

Separate Question

Fabemu (No 2) Pty Ltd v Kiama Municipal Council **[2023] NSWLEC 79** (Moore J)

(Related decision: *Robby Ingham Pty Ltd v Kiama Municipal Council* [2016] NSWLEC 149 (Brown C))

Facts: On 29 March 2023, the applicant commenced these proceedings to obtain relief in the form of a declaration that a development consent granted by the Land and Environment Court in October 2016 (**2016 consent**) had not lapsed. The 2016 consent was granted as a consequence of consent orders arising from a s 34 conciliation conference pursuant to the *Land and Environment Court Act 1979* (NSW). The 2016 consent approved, subject to conditions, the construction of a ring-shaped residential dwelling in Fern Street, Gerringong (**the site**).

Condition 4 of the 2016 consent required the preparation of a traffic management plan which was to be provided to Kiama Municipal Council (**the council**), and to obtain approval from the council for such a plan, prior to any works being commenced on the site.

The operative date for the commencement of the 2016 consent was 25 October 2016, with the consent to lapse after the expiry of five years from that date. However, it was not in dispute between the parties that legislative and regulatory responses to the COVID-19 pandemic had extended the five-year life of the consent by a further two years, such that the new lapsing date for the consent was 25 October 2023. The consent would lapse after this date unless necessary prerequisite physical works (engineering works) had been commenced on the site: s 95(4) (now s 4.53(4)) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

In 2021, prior to the lapsing of the consent, the report of a geotechnical investigation of the site revealed that seven bore holes had been excavated on the site. The location of each bore hole was determined and staked on site by a surveyor. On 4 May 2023, the council filed a submitting appearance, save as to costs.

Issue: Whether the geotechnical bore hole drilling was relevant to the commencement of engineering works for the purposes of preventing the lapsing of the consent.

Held: Amended summons dismissed; declaration that the 2016 consent had commenced refused:

(1) The drilling of boreholes were engineering works in the fashion discussed by Tobias JA in *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* (2005) 63 NSWLR 124; [2005] NSWCA 169 and could thus be characterised as engineering works for the purposes of s 4.53(4) of the EPA Act: at [49];
(2) Works that fail to comply with a condition that must be satisfied prior to the carrying out of any works cannot be relied upon as commencement of work approved by the development consent: at [79];
(3) Condition 4 of the consent was required to be satisfied and was not: at [85]-[86]. Therefore, the engineering works were not capable of preventing the consent from lapsing: at [86];
(4) Condition 4 occurs in the part of the conditions of consent headed "General": at [84]. A proper understanding of the framework of the conditions of the consent, and of Condition 4 specifically, gave rise to the outcome that it was intended to be a condition of general application requiring satisfaction prior to the carrying out of any works on the site: at [84]; and
(5) The failure to satisfy the terms of Condition 4 prior to the carrying out of the engineering works was an insurmountable barrier to those works being regarded as causing the consent to have commenced: at [78].

Costs

National Parks Association of NSW v Minister for Environment and Heritage **[2023] NSWLEC 80** (Robson J)

Facts: By notice of motion, the National Parks Association of NSW Inc (**NPA**) sought a protective costs order pursuant to r 42.2 of the Uniform Civil Procedure Rules 2005 (NSW) limiting the costs recoverable by the Minister for Environment and Heritage (**Minister**) in judicial review

proceedings brought against it in the Land and Environment Court to the sum of $20,000. The substantive proceedings related to the Minister's decision to adopt an amendment in relation to the application of s 12.6 of the Kosciuszko National Park Plan of Management 2006 to a project known as 'Snowy 2.0'. The amendment would have the effect of allowing the construction of a nine-kilometre-long double circuit overhead transmission line which would otherwise have been required to be located underground.

Issue: Whether a protective costs order should be made.

Held: Motion granted; protective costs order in the amount of $20,000 made:

(1) The underlying judicial review proceedings brought by the NPA seek to raise matters that were of some general public importance: at [17];

(2) The NPA seeks to clarify the operation of s 72AA of the *National Parks and Wildlife Act 1974* (NSW) as it relates to the management of plans generally: at [18];

(3) Neither the NPA, nor any of its members, stood to derive any benefit (financial or otherwise) from the judicial review proceedings: at [19];

(4) The NPA has limited financial resources and has been actively involved in the protection of national parks located in NSW: at [20]; and

(5) Overall, the public interest weighed in favour of the protective costs order sought in the notice of motion: at [21].

Merit Decisions (Commissioners)

Crush and Haul Pty Limited v Environment Protection Authority **[2023] NSWLEC 1367** (Targett AC)

Facts: The applicant operated a quarry known as Corindi Quarry in Dirty Creek, NSW, which had the benefit of development consent for "extractive industry (quarry extension)". In September 2022, the applicant submitted an application for an environment protection licence (**EPL**) to authorise the scheduled activities of "crushing, grinding and separating" and "extractive activities" under cll 16 and 19, respectively, of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) in order to be able to expand their operations in accordance with the consent granted. The respondent did not determine the applicant's EPL application and the applicant appealed the deemed refusal to the Land and Environment Court. The sole issue in dispute between the parties was whether the applicant was a "fit and proper person" to hold an EPL having regard to the considerations listed under s 45(f) of the POEO Act. The respondent contended that the applicant was not a fit and proper person on the basis of the environmental non-compliance history of the applicant, its current and former directors and companies of which a former director of the applicant was or is currently a director. In particular, the applicant and its sole director had each been convicted of an environmental offence by this Court in 2022.

Issue: Whether the applicant was a fit and proper person to hold an EPL under s 45(f) of the POEO Act.

Held: Allowing the appeal and granting the environment protection licence:

(1) The applicant's one prior conviction where no environmental harm was caused and was held to be of low to medium objective seriousness was not determinative, on its own, that the applicant was not a fit and proper person to hold an EPL: at [70];
(2) The sole director's one prior conviction where no environmental harm was caused and was held to be of low objective seriousness was similarly not determinative, on its own, that the applicant was not a fit and proper person to hold an EPL. This was particularly in circumstances where the sole director had expressed shame and embarrassment for the offence, was continuing to educate himself on his responsibilities as director and had committed to environmental compliance in future: at [76]-[77];
(3) The weight to be applied to a former director's history of contraventions with environment protection legislation should be considered in the context of their present and future influence or control over the conduct of the applicant company seeking to obtain an EPL: at [94]; and
(4) There was no cogent evidence that the former director was controlling or would control the conduct and environmental compliance of the applicant company and the environmental non-compliances of that director were not considered to be of material weight on this basis: at [120].

Eastern High Pty Ltd v Ku-ring-gai Council **[2023] NSWLEC 1383** (Dickson C)

Facts: The applicant sought development consent for the demolition, tree removal, construction of four dwellings over four storeys with basement carparking, and landscaping and site works at 15 Boyd Street, Turramurra (the development). The applicant appealed the deemed refusal of their development application, pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (NSW). When the conciliation conference was terminated, the matter was listed for hearing. The Applicant was granted leave to amend the development application twice, resulting in changes pertaining to: the Boyd Street setback, gross floor area, floor height, shading, landscaping and engineering plans, and the written request to vary the minimum lot size and dimension provisions in the Ku-ring-gai Local Environmental Plan 2015 (NSW) (**KLEP 2015**). The amended development was notified for 30 days and a number of issues were raised by public submissions. Despite the amendments, Council also raised a number of issues.

Issues:

(1) Whether the development is properly characterised as a residential flat building, a use which is prohibited in the R3 Medium Density Residential zone pursuant KLEP 2015;
(2) Whether the applicant's cl 4.6 written request to vary the site's minimum lot size and minimum dimensions development standard pursuant to cl 6.6 of KLEP 2015 should be upheld;
(3) Whether the development provided inadequate setbacks from Boyd and Jersey Streets and the if setbacks proposed did not comply with the requirements in Part 6 of the Ku-ring-gai Development Control Plan 2015; and
(4) Whether the building design appeared as a residential flat building and was inconsistent with the controls for multi dwelling housing in Part 6 of DCP 2015.

Held: Appeal dismissed and development consent refused:

(1) That the proposed development was properly characterised as "multi dwelling housing", a permissible use in the R3 Medium Density Residential zone in KLEP 2015. This view was formed as the development sought consent for four dwellings, the dwellings are attached, were on one lot, each with access at ground level, and did not include a residential flat building pursuant to the definition of multi dwelling housing in KLEP 2015; as opposed to a residential flat building, an innominate prohibited use in the R3 zone. The proposed entry door and stairs at ground level were held to provide access to each dwelling at ground level, despite the fact that the stairs travel up the building to higher levels, relying on the Court's reasoning in *Mount Annan 88 Pty Ltd v Camden Council* [2016] NSWLEC 1072: at [31];
(2) The cl 4.6 written request seeking a variation to the minimum lot size and minimum width and depth dimension standard at cl 6.6 of KLEP 2015 should not be upheld. The written request failed to demonstrate sufficient environmental planning grounds pursuant to cl 4.6(3) of KLEP 2015. The eight grounds advanced in the applicant's written request related to the neutral question of permissibility of multi dwelling housing on the land, the impossibility of amalgamation with neighbouring allotments, the greater multi dwelling housing built form anticipated by KLEP 2015 in the locality, the orderly and economic development of the land, the satisfaction of the zone objectives and positive contribution to the character of the area, and compliance with council's controls in relation to height, floor space ratio, site coverage and deep soil landscaping. These grounds were found to not be environmental planning grounds, be statements of fact, be lacking evidence and reasoning, or be non-specific to the variation, rendering them inadequate: at [55]; and
(3) Therefore, the appeal should be dismissed, and development application DA0101/22 be determined by the refusal of consent: at [56].

SSTG Property Pty Ltd v Inner West Council **[2022] NSWLEC 1557** (Walsh C)

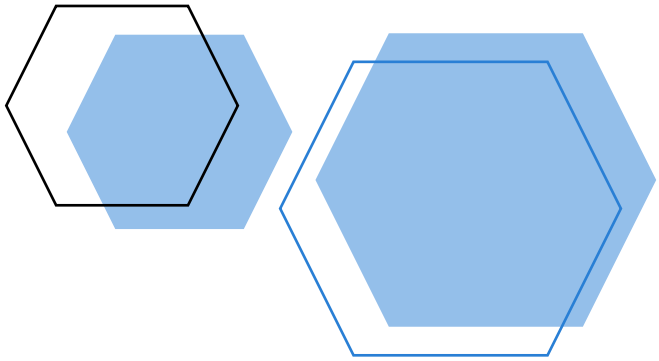
Facts: The applicant appealed against the respondent's deemed refusal of a development application seeking consent for demolition of existing structures and construction of multi dwelling housing (four dwellings) with four basement car spaces, and site remediation, at 180 Darling Street Balmain. As a consequence of agreed amending plans, the proposal, as amended, had addressed each of the reasons raised by the respondent for refusal of the application. However, there remained some uncertainty in regard to certain geotechnical, stormwater and contamination issues. There were also numerous objecting submissions raised by lay persons.

Issues:

(1) At the time of the hearing an existing building occupied almost the entirety of the site. This prevented the required additional geotechnical, stormwater and contamination investigations and ascertaining of responses to these issues.
(2) Noting the appeal was a hearing de novo, the numerous lay objections warranted consideration.

Held: Appeal allowed and development consent granted:

(1) The circumstances are available for the application of a "tailored" decision process in regard to the grant of consent (*CEAL Ltd v Minister for Planning* (2007) 159 LGERA 232; [2007] NSWLEC 302 (**CEAL**) at [24]-[26]). It was determined that a two-step decision process was appropriate in this instance, noting s 4.16(4)(c) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) provided for the granting of "partial" consents: at [49], [52], [57];
    (a) the first step granted consent for demolition of existing structures. This would allow the undertaking of the required further investigations, at present prevented by the existence of the on-site structures: at [49]-[50], [57];
    (b) the second step used the provisions of s 4.16(3) of the EPA Act to grant deferred commencement consent for the remainder of the development: at [51];
    (c) consideration was required to be given to the "tensions" inherent with the use of this approach (as per CEAL (at [25]). Of note here were established limits on the use of deferred commencement approaches (*GPT RE Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647; [2008] NSWCA 256 at [55]-[56]): at [55]-[56]; and
    (d) a three-fold test was applied to the use of deferred commencement conditions: (i) the substance of the matters involved in the deferred commencement conditions, (ii) the question of certainty, and (iii) whether the approach results in the deferral of assessment of essential evaluative matters under s 4.15(1) of the EPA Act. Use of deferred commencement conditions were held to be open to the Court in the circumstances: at [60]-[62]; and
(2) In consideration of sworn expert evidence, lay objections were held to be adequately addressed by various amendments to the proposal: at [30]-[47].



LEGISLATION

STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between 6 March 2023 and 10 September 2023.

PLANNING

Environmental Planning and Assessment Amendment (NSW Planning Portal) Regulation 2023

The objects of this regulation are as follows—

(a) to enable the Secretary of the Department of Planning and Environment to provide advice about the design of proposed State significant development before an environmental impact statement is prepared in relation to the development,
(b) to update a reference to the Parramatta City Centre Local Infrastructure Contributions Plan adopted by the City of Parramatta Council on 22 May 2023,
(c) to require submissions about certain development to be made through the NSW planning portal,
(d) to make consequential amendments to clarify the use of the NSW planning portal for certain notices and applications.

The regulation is made under the *Environmental Planning and Assessment Act 1979* (NSW), including ss 4.39, 7.12(5)(b) and 10.13, the general regulation-making power and Sch 1, cl 22 and Sch 3, cl 3.

WATER

Water Management (General) Amendment (Access Licence Exemption) Regulation 2023

The object of this regulation is to amend the Water Management (General) Regulation 2018 to extend the temporary exemption from the requirement to hold a water access licence for the taking of more than 3ML of groundwater in a water year from specified groundwater sources to 30 June 2025.

Natural Resources Access Regulator Regulation 2023

The object of this regulation is to repeal and remake, with minor amendments, the Natural Resources Access Regulator Regulation 2018, which would otherwise be repealed on 1 September 2023 by the *Subordinate Legislation Act 1989* (NSW), s 10(2).

This regulation provides for the following—

(a) to specify as additional functions of the Natural Resources Access Regulator certain enforcement functions of the Minister under the *Water Management Act 2000* (NSW),
(b) to prescribe information that may be included in the register of information about enforcement actions taken by the Natural Resources Access Regulator,
(c) to prescribe various persons and bodies as relevant agencies for the purposes of the *Natural Resources Access Regulator Act 2017* (NSW) (the Act), s 16.

This regulation is made under the Act, including ss 11, 12A, 16 and 18, the general regulation-making power.

This regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Sch 3, namely, matters of a savings or transitional nature.

Access Licence Dealing Principles (Interstate Assignments) Order 2023 (No 2)

The object of this order is to prohibit the interstate assignments of water allocations from Victoria and South Australia to access licences in the NSW Murray, Lower Darling and Murrumbidgee Regulated River water sources. This is to mitigate the risk that water traded from Victoria or South Australia to NSW access licence holders is not available to be delivered in the future because of the inability to capture inflows while Hume Dam is spilling.