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Land and Environment Court of NSW Judicial Newsletter

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Legislation

Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Amendment (Primary Production and Rural Development) Regulation 2019 - commenced 28 February 2019. The object of this Regulation is to amend the Environmental Planning and Assessment Regulation 2000 as follows:

(a) to restate, and incorporate as designated development, certain development for the purpose of artificial water bodies that was designated development under a superseded State environmental planning policy,

(b) to update references to certain land use terms so that they are consistent with those in the Standard Instrument and to clarify the meaning of a term,

(c) to separate out a provision for designated development in relation to horses so that it is not expressed in the context of a threshold relating to feedlots,

(d) to clarify that a reference to layers in a description of designated development relating to poultry farms is to layers for egg production,

(e) to update references to environmental planning instruments and omit redundant provisions.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Amendment (Building Code of Australia) Regulation 2019 - commenced 10 May 2018. The object of this Regulation is to ensure that until the current version of Planning for Bush Fire Protection is updated certain references in the BCA continue to work by construing those references as being to existing documents.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Amendment (State Significant Infrastructure) Regulation 2019 - commenced 28 February 2019. The object of this Regulation is to provide that an approval for certain development that is State significant infrastructure (and that was a transitional Pt 3A project) that is due to lapse on a specified day (the original lapsing day) does not lapse on that day if:

(a) an application is made to the Minister to modify the approval to specify a later day on which the approval lapses, and

(b) that application has not been determined on or before the original lapsing day.

- **Biodiversity:**

Biodiversity Conservation Act 2016 - final determination regarding Ericaceae commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final determination regarding *Grevillea raybrownii* Olde & Marriott commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final determination regarding *Helichrysum calvertianum (F.Muell.) F.Muell.* commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final determination regarding *Persoonia mollis* subsp. *revoluta* S.Krauss & L.A.S.Johnson commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final determination to list an ecological community (Lower Hunter Spotted Gum Ironbark Forest) as an endangered ecological community commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final to list an ecological community (Sydney Turpentine-Ironbark Forest) as a critically endangered ecological community commenced on 31 May 2019.

Biodiversity Conservation Act 2016 - final determination to make minor amendments to Schs 1 and 2 to the Act commenced on 31 May 2019.

- **Miscellaneous:**

Administrative Arrangement (Administrative Changes - Ministers) Order 2019 - commenced 2 April 2019. Notes construction of references to Ministers to reflect public service agency changes.

Administrative Arrangement (Administrative Changes - Public Service Agencies) Order 2019 - commences on 1 July 2019. Establishes Department of Customer Service, Department of Planning and Industry, Department of Family and Community Services and Justice. Abolishes Department of Finance, Services and Innovation, Department of Planning and Environment, Department of Industry, Department of Justice, Department of Family and Community Services, Office of Environment and Heritage, Office of Local Government, Barangaroo Delivery Authority Staff Agency, UrbanGrowth New South Wales Development Corporation Staff Agency.

Administrative Arrangement (Administration of Acts - General) Order 2019 - commenced on 2 April 2019. Allocates the administration of Acts to Ministers indicated in Sch 1 of the Order.

Crown Land Management Amendment Regulation 2019 - commenced 28 February 2019. This Regulation amends the savings and transitional provisions in Sch 7 to the *Crown Land Management Act 2016* to extend until 1 July 2020 the transitional period for certain reserve trusts managed by corporations under the repealed *Crown Lands Act 1989*.

Liquor Amendment (Special Events Extended Trading) Regulation (No 2) 2019 - commenced 17 May 2019. This Regulation enables certain hotels and clubs to trade during extended hours for certain special events that will be held from May to November 2019.

State Environmental Planning Policy Amendments:

State Environmental Planning Policy (Affordable Rental Housing) Amendment (Boarding House Development) 2019 - commenced 28 February 2019. Amends Sch 1 "Development standards for secondary dwellings" of the State Environmental Planning Policy (Affordable Rental Housing) 2009.

State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment (Heritage Conservation Areas) 2019 - commenced 28 February 2019. Inserts cl 4A "Land to which Policy applies - heritage conservation areas in Greater Sydney Region" after cl 4 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

State Environmental Planning Policy (Infrastructure) Amendment (Water and Emergency Services Facilities) 2019 - commenced 31 May 2019. Amends cl 47 Development permitted with consent and cl 124 Definitions.

State Environmental Planning Policy (Primary Production and Rural Development 2019 - commenced 28 February 2019. The aims of this Policy are as follows:

(a) to facilitate the orderly economic use and development of lands for primary production,

(b) to reduce land use conflict and sterilisation of rural land by balancing primary production, residential development and the protection of native vegetation, biodiversity and water resources,

(c) to identify State significant agricultural land for the purpose of ensuring the ongoing viability of agriculture on that land, having regard to social, economic and environmental considerations,

(d) to simplify the regulatory process for smaller-scale low risk artificial water bodies, and routine maintenance of artificial water supply or drainage, in irrigation areas and districts, and for routine and emergency work in irrigation areas and districts,

(e) to encourage sustainable agriculture, including sustainable aquaculture,

(f) to require consideration of the effects of all proposed development in the State on oyster aquaculture,

(g) to identify aquaculture that is to be treated as designated development using a well-defined and concise development assessment regime based on environment risks associated with site and operational factors.

State Environmental Planning Policy (State and Regional Development) Amendment (Inland Rail-Narrabri to North Star Project) 2019 - commenced 31 May 2019. Amends Sch 5 Critical State significant infrastructure.

Standard Instrument (Local Environmental Plans) Amendment (Primary Production and Rural Development) Order 2019 - commenced 28 February 2019. This order amends Sch 1 "Additional permitted uses" and inserts Sch 6 "Pond-based and tank-based aquaculture" of the Standard Instrument prescribed by Standard Instrument (Local Environmental Plans) Order 2006.

Bills:

Local Government Amendment Bill 2019 - introduced to the Lower Assembly on 4 June 2019. The objects of this Bill are to amend the Local Government Act 1993 and other legislation as follows:

(a) to increase to $250,000 the value of a contract at or above which a council is required to invite tenders and to provide for other exceptions from the tendering requirement,

(b) to extend by a further 12 months the period for which the Minister for Local Government may maintain the existing rate path for amalgamated councils,

(c) to extend the cut-off dates for councils to decide to enter into arrangements with the Electoral Commissioner to administer the 2020 ordinary council elections, and to enter into the arrangements, to 1 October 2019 and 1 January 2020, respectively,

(d) to enable the delegation of regulatory functions of councils to other councils, their committees and employees, and to committees of boards of joint organisations,

(e) to enable regulations to be made to exempt councils from requirements relating to public notice of fees or determination of fees according to pricing methodologies where the fees relate to specified commercial activities,

(f) to enable regulations to be made to establish a scheme for mutual recognition by councils of approvals and for appeals from decisions about the approvals.

Judgments

United Kingdom Supreme Court:

Cameron v Liverpool Victoria Insurance Co Ltd **[2019] UKSC 6** (Lords Reed, Carnwath, Hodge and Sumpton, Lady Black)

(decision under review: *Hussain v Cameron* [2019] EWCA Civ 366 (Gloster and Lloyd Jones LJJ, Sir Ross Cranston)

Facts: The claimant was involved in a motor vehicle accident causing personal injuries and damage to her vehicle. The incident was a hit-and-run and the other driver fled the scene before being identified. However, the registration number of the other vehicle was recorded.

The complainant commenced proceedings seeking damages from the registered owner of the other vehicle and a declaration that the insurer of the other vehicle had a duty to satisfy any judgment pursuant to s 151 of the *Road Traffic Act 1988* (UK) (**Road Traffic Act**).

The owner of the vehicle had not been driving at the time of the incident and refused to identify the true driver. The insurance over the vehicle had been granted to a fictitious person such that neither the registered owner nor the unidentified driver was insured under the policy.

Section 151 of the Road Traffic Act required the insurer to satisfy the judgment even where the driver of the vehicle was not insured by the policy. However, in order for the insurer to be liable to satisfy the judgment, a judgment was required to be obtained against the driver at the time of the incident.

The claimant applied to amend her claim, substituting the name of the registered owner of the vehicle for the unidentified driver of the vehicle at the time of the crash.

The district court refused the application and granted summary judgment for the insurer. The Court of Appeal allowed the claimant's appeal on 23 May 2017. The insurer appealed further to the Supreme Court of the United Kingdom.

Issues: Whether the claimant could bring a claim for damages against an unnamed and unidentifiable defendant.

Held: (Lord Sumpton, Lords Reed, Carnwath, Hodge and Lady Black agreeing) Appeal allowed; orders of the Court of Appeal set aside; orders of the District Court reinstated:

(1) It is a basic principle of natural justice that a person is not subject to the jurisdiction of the court without receiving notice of proceedings that would enable them to be heard in the proceedings: at [17];

(2) It is an essential requirement for alternative service that the mode of service is reasonably expected to bring the proceedings to the attention of the defendant: at [21]; it is not possible to sue an unnamed person where it is conceptually impossible to bring the proceedings to the attention of the defendant: at [16], [21];

(3) It may be appropriate to dispense with service where a defendant deliberately evades service, however a person cannot be said to evade service unless they have actual knowledge that proceedings have been or are likely to be commenced against them: at [25]; and

(4) A claim cannot be issued or amended to sue an unnamed and unidentifiable defendant unless the circumstances are such that the service of the claim form could be effected or properly dispensed with: at [26].

High Court of Australia:

Northern Territory of Australia v Griffiths (deceased) and Jones on behalf of the Ngaliwurru and Nungali Peoples **[2019] HCA 7** (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

(decision under review: *Northern Territory v Griffiths* (2017) 256 FCR 478; [2017] FCAFC 106 (North ACJ, Barker and Mortimer JJ)

Note: Only the portion of this decision that may have interest to the readers of this newsletter is addressed below.

Facts: Timber Creek is a tributary of the Victoria River situated in the north-western corner of the Northern Territory. The town, which was proclaimed as such in 1975, is located on the Victoria Highway. It is bounded on the north by the Victoria River and on the east, south and west by Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). It has a population of approximately 230 people, some two thirds of whom identify as Aboriginal; principally native title holders. Between 1980 and 17 December 1996, the Northern Territory was responsible for 53 acts on 39 lots and four roads within the town, comprising various grants of tenure and the construction of public works, which were later held to have impaired or extinguished native title rights and interests (**compensable acts**) and which gave rise to the applicant's (**Claim Group**) entitlement to compensation under Pt 2 of the *Native Title Act 1993* (Cth) (**Native Title Act**).

In 1999 and 2000, the Claim Group instituted three proceedings under the Native Title Act for determination of native title to land within the boundaries of the town (*Griffiths v Northern Territory* (2006) 165 FCR 300 (Weinberg J)). The trial judge held that the Claim Group had native title rights and interests comprised of non-exclusive rights to use and enjoy the land and waters to which s 47B of the Native Title Act applied. On appeal, the Full Court of the Federal Court (*Griffiths v Northern Territory* (2007) 243 ALR 72; [2007] FCAFC 178 (French, Branson and Sundberg JJ)) varied the trial judge's determination, holding in relation to those parts of the determination area to which s 47B applied that the Claim Group's native title rights and interests comprised a right to exclusive possession, use and occupation, but otherwise affirmed Weinberg J's determination.

On 2 August 2011, the Claim Group instituted a claim for compensation under s 61(1) of the Native Title Act in respect of the compensable acts (*Griffiths v Northern Territory (No 3)* (2016) 337 ALR 362; [2016] FCA 900 (Mansfield J)). The compensation was framed, pursuant to s 51(4) of the Native Title Act, in terms that compensation for loss, diminution, impairment or other effect on native title of the compensable acts should consist of the following elements: compensation for economic loss of the native title rights; whether and upon what basis interest was payable on or as part of the compensation for economic loss; compensation for loss or diminution of connection or traditional attachment to land and intangible disadvantages of loss of rights to live on and gain spiritual and material sustenance from the land. The trial judge assessed compensation in the amount of $3,300,661. The Full Court varied the trial judge's total compensation award to $2,899,446. By grant of special leave, the Claim Group, the Northern Territory and the Commonwealth each appealed to the High Court.

Issues: How should the Claim Group's sense of loss of traditional attachment to the land or connection to country be reflected in the award of compensation.

Held: Appeal allowed in part; set aside Order 2 of the Federal Court; instead, order that compensation for economic loss in the sum of $320,250, interest on the economic sum in the amount of $910,100, compensation for cultural loss in the sum of $1,300,000, the total compensation award being $2,530,350:

Per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, with Gageler and Edelman JJ agreeing:

(1) The notion of diminution in connection to land is spiritual. It is not to be equated with loss of enjoyment of life or other notions relating to compensation for personal injury as those expressions do not go near to capturing the breadth and depth of what is spiritual connection with the land: at [187], [240], [326];

(2) The reasoning of the trial judge did not reveal legal error, it was the task required by s 51(1) of the Native Title Act: identification of the compensable acts; identification of the native title holders' connection with the land or waters by their laws and customs; and then consideration of the particular and inter-related effects of the compensable acts on that connection, those steps are separate but inter-related: at [224], [240], [326];

(3) The trial judge correctly recognised that consistent with s 223(1) of the Native Title Act, the entitlement to compensation was a communal or group entitlement, and the loss was permanent and intergenerational: at [238]-[230], [240], [326];

(4) The amount awarded was not so large that it suggested a failure to apply proper principles referencing relevant considerations. That aspect of the award was compensation to the Claim Group, on just terms, for the effect of the compensable acts on their native title rights and interests - their cultural loss: at [237], [240], [326]; and

Per Edelman J:

(5) The special use of the land in native title cases is reflected in its cultural value, not in its exchange value. The value to the Claim Group of the native title rights was immense. The total award was not excessive. With all the latitude, afforded to the primary judge it was a reasonable, even conservative, award: at [304], [328].

New South Wales Court of Appeal:

Chief Commissioner of State Revenue v Adams Bidco Pty Ltd **[2019] NSWCA 34** (Leeming JA, White JA, Emmett AJA)

(decision under review: *Adams Bidco Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 735 (Pembroke J))

Facts: In 2013, Adams Bidco Pty Ltd (**Bidco**) entered into an agreement with Ingham Enterprises Pty Ltd (**Ingham**), a poultry business, to buy all its issued shares. In September 2016, the Chief Commissioner of State Revenue (**Commissioner**) assessed Bidco as not being a primary producer for the purpose of the shares it bought from Ingham, meaning it had to pay a higher duty sum under Ch 4 of the *Duties Act 1997* (NSW) (**Duties Act**). Section 163D(2) of the Duties Act states that a ***primary producer*** is a landholder whose land holdings in all places…wholly or predominantly comprise land used for primary production…

In July 2017, Bidco applied to the Supreme Court for a review of the assessment, pursuant to s 97 of the *Taxation Administration Act 1996* (NSW). In May 2018, the primary judge ordered that the duty assessment be revoked, determined that Bidco was not liable to pay duty in respect of the acquisition, and ordered the Commissioner to pay Bidco's costs in the proceedings. The primary judge took a quantitative approach to how s 163D of the Duties Act should be applied. Although it was not a ground of appeal, the Court of Appeal provided approaches on how a primary producer, under s 163D, should be interpreted.

Issue: Which approach to the interpretation of s 163D should be favoured, a quantitative or qualitative approach.

Held: Appeal allowed with orders made by the primary judge set aside; proceedings remitted to the Equity Division for determination of questions of penalty, interests and costs; respondent to pay appellant's costs of the appeal:

(1) A quantitative assessment based on either (or both) of land value and area rather than a "qualitative" or "evaluative" assessment should be undertaken to define the expression "primary producer": at [37] (White JA);

(2) The "wholly or predominantly" test is an evaluative one, informed by both the value and the area of the land which is exempt from land tax and also the purpose for which the land is used is not

irrelevant. There is no express limit in the statute with regard to what may be considered for this purpose: at [28] (Leeming JA); and

(3) The construction of s 163D will depend upon what might generally be characterised as the evaluative approach, which may entail aspects of area and value as well as other aspects. An assessment of the activities carried on by the landholder, and the relative importance of such activities on the various uses of the land holdings of the landholder must take place: at [194] (Emmett AJA).

Community Association DP270447 v ATB Morton Pty Ltd **[2019] NSWCA 83** (Bell P, Leeming JA, Payne JA)

(related decision: *A.T.B. Morton Pty Ltd v Community Association DP270447 (No 2)* [2018] NSWLEC 87 (Robson J))

Facts: ATB Morton Pty Ltd (**ATB Morton**) and Community Association DP270447 (**CA**) were neighbouring landowners of industrially zoned land in Hexham. ATB Morton's land was accessible from the north but a bridge overpass meant that the road could not be used by trucks over three metres in height. There was no existing access to the public road system from the south of ATB Morton's land, although there was an existing private road built on CA's land running generally along the bank of the river. ATB Morton wanted to develop its land and proposed obtaining access over the existing private road on CA's land. CA opposed ATB Morton's application for development consent, and the local council refused it, citing the lack of access for heavy vehicles.

ATB Morton brought Class 1 proceedings whereby the Court approved the development application subject to a deferred commencement condition requiring it to obtain an easement over neighbouring land owned by CA so as to enable access by heavy trucks (**consent**). While the Class 1 proceedings were pending, ATB Morton sought, by separate proceedings in Class 3 of the Land and Environment Court's (**LEC**) jurisdiction pursuant to s 40(2) of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), an easement over CA's land. The primary judge made orders granting the easement. However, by then, the consent had lapsed.

CA appealed from the decision granting an easement over its land and by way of Summons for judicial review filed belatedly on 20 February 2019, sought relief in the nature of certiorari and a declaration to the effect that the consent which the Court issued was void because it had not been joined as a party to the Class 1 proceedings.

Issues:

(1) Whether the consent was void ab initio because CA had not given owner's consent with the result that the LEC lacked jurisdiction to make an order under s 40 of the Court Act;

(2) In the alternative to issue (1), whether the LEC lacked jurisdiction to make orders under s 40 because the consent had lapsed;

(3) Whether there should be an extension of time for CA to bring the judicial review proceedings in relation to the consent in the Court of Appeal's supervisory jurisdiction;

(4) Whether Ausgrid and/or Reliance Hexham (both of which enjoyed registered easements over part of the land over which the compulsory easement was sought), and the Lot owners of lots 2-6 under the Community Scheme were necessary parties to the Class 3 proceedings;

(5) Whether the primary judge applied an incorrect test in determining whether the proposed easement was reasonably necessary for the effective use of ATB Morton's land; and

(6) Whether the easement should be set aside on the basis that there was no evidence supporting the condition that truck movements should be limited to 50 per day, or that the condition could be enforced.

Held: Appeal dismissed with costs; application for judicial review dismissed with costs:

(1) CA's submission that consent should never have been granted because ATB Morton failed to obtain owner's consent of all of the land to which its application related was not sound. Even if it were, it would not avail CA because: at [35]:

(a) obtaining owner's consent was not a matter which need be done at the time at which the application was made; rather, it was necessary that there be consent of the owners of all land to which the consent related at the time development consent was granted; and

(b) the power under s 40(1)(b) was available even if proceedings on an appeal were merely pending;

(2) It was not to the point that the consent had lapsed by the time the primary judge ordered the easement. The relevant jurisdictional prerequisite was whether an appeal was pending at the time the s 40 application was made. That prerequisite was satisfied: at [45];

(3) In circumstances where there was significant unexplained delay in bringing the application for judicial review, and no real prospect of obtaining any useful declaratory relief, it would be inappropriate to grant leave to extend the time by some three years to challenge the consent. That was sufficient to warrant the conclusion that the Summons filed on 20 February 2019 be dismissed: at [67];

(4) The primary judge correctly proceeded on the basis that the Lot owners did not have an estate or interest evidenced in the register for the purposes of s 40(3) of the Court Act: at [93]. There was an overwhelming case for the primary judge proceeding as he did, where Ausgrid and Reliance Hexham were informed of the proceedings and their entitlement to be joined and chose in an informed way not to participate: at [119];

(5) The primary judge addressed the appropriate legal test, by reference to familiar first instance authorities regularly invoked in this area and a series of more recent Court of Appeal decisions: at [125]. The primary judge recognised that the test of reasonable necessity also required consideration of the impact upon the servient tenement and then turned to address various potential impacts which substantially accorded with matters raised by CA: at [127]; and

(6) It was unavoidably necessary to translate the crudeness of an estimate derived from an RMS publication into the precision of an upper limit, if there were to be a cap on heavy vehicle movements in the easement. There was no error of law in imposing an upper limit which exceeded the estimation, particularly in circumstances where the estimate was an average and there could be days which were twice as busy as the average: at [165]-[166]. In relation to enforceability, there was no difficulty in CA, either by a natural person or equipment, counting such vehicles at the entrance: at [167].

Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (Subject to Deed of Company Arrangement) **[2019] NSWCA 53** (Leeming JA with Sackville AJA concurring and Emmett AJA also concurring with additional comments)

(decision under review: *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (Subject to Deed of Company Arrangement) (No 3)* [2019] NSWLEC 1956 (Stevenson J))

Facts: On 23 December 2015, Greencapital Aust Pty Ltd (**Greencapital**) entered into a contract with Pasminco Cockle Creek Smelter Pty Ltd (**Pasminco**) for the sale of land. On 21 December 2016, Greencapital and Pasminco entered into a Deed of Contract Amendment, which amended the initial contract. Relevant changes included the definition of "Sunset Date" changing from 30 June 2017 to 30 June 2018 and the addition of a new subcl 37.8, which conferred a further right upon Greencapital in the event that conditions precedent remained unsatisfied by that date. This new right entitled Greencapital, by giving written notice, to 'step-in" and assume responsibility for causing the conditions precedent to be satisfied by 30 June 2019.

It was common ground between the parties that the conditions precedent were not satisfied. On Sunday, 1 July 2018, Pasminco served a notice purporting to exercise its right of rescission while, on Monday, 2 July 2018, Greencapital served a notice purporting to exercise its right to step in. The primary judge held the parties had agreed to a "first past the post" regime, and that Pasminco "got in first", such that its notice was effective to rescind the contract. Greencapital appealed to the Court of Appeal. Pasminco revived its contention, which had been rejected by the primary judge, that irrespective of whether Greencapital's step-in right qualified its right to rescind, the contract was frustrated by an amendment to State Environmental Planning Policy No 55 - Remediation of Land (**SEPP 55**). The amendment was to cl 22 of SEPP 55 and imposed a new fetter upon the power to grant consent to a subdivision of the land.

Issues:

(1) Whether Greencapital's step-in right, gained in the Deed of Contract Amendment, qualified Pasminco's right to rescind; and

(2) Whether the making of an amendment to SEPP 55 frustrated the contract between the parties.

Held: Appeal allowed; Orders 2, 3 and 4 made on 18 December 2018 set aside and, in lieu thereof, it was declared that (a) the purported notices of rescission dated 1 and 2 July served by Pasminco were invalid, and (b) the notice of election dated 2 July 2018 served by Greencapital was valid and effective. Proceedings were remitted to the Commercial List for such further orders as might be appropriate; Pasminco to pay the costs of Greencapital of the appeal:

(1) Pasminco's right to rescind was qualified by Greencapital's right under cl 37.8 because (a) the improbability and impracticality of the "race" to which the competing construction involves, (b) the need to give efficacy to the separately negotiated new valuable right enjoyed by Greencapital and (c) the orthodox approach that inconsistent provisions are construed as one qualifying the other. Irrespective of any purported exercise by Pasminco of its right to rescind, Greencapital had a reasonable time to exercise its right to step in: at [54]-[55], [75], and [85]; and

(2) The amendment to SEPP 55 and the draft condition of consent proposed by the Council did not cause Pasminco's performance of its obligations under contract to be radically different from what it had undertaken in 2015. It was entirely foreseeable that when a polluter fails to remediate its land, further steps will be put in place to oblige it to perform its obligations. On no view was it a fundamental aspect of the parties' contract that Pasminco would be permitted to obtain a subdivision before satisfying the conditions of project approval: at [66]-[68], [75], and [86].

Local Democracy Matters Incorporated v Infrastructure New South Wales **[2019] NSWCA 65** (Leeming JA, Sackville AJA, Emmett AJA)

(decision under review: *Local Democracy Matters Incorporated v Infrastructure New South Wales* [2019] NSWLEC 20 (Pain J))

Facts: On 6 December 2018, the Minister for Planning (**Minster**) granted consent to a concept proposal and Stage 1 demolition of buildings to slab for the redevelopment of the Sydney Football Stadium (**Concept DA**). Local Democracy Matters (**LDM**) brought Class 4 proceedings in the Land and Environment Court (**LEC**) seeking a declaration that the Minister's determination to grant consent to the concept proposal and demolition of the Stadium was invalid and of no effect. LDM challenged the Minister's determination on three grounds which were dismissed by Pain J of the LEC. LDM appealed to the Court of Appeal relying on essentially the same three grounds rejected by the LEC.

Issues:

(1) Whether the Concept DA was placed on public exhibition for only 28 days when the minimum exhibition period was 30 days as required by cl 83 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EP&A Regulation**);

(2) Whether the Minister failed to form the opinion regarding design excellence required by cl 6.21(3) of the Sydney Local Environmental Plan 2012 and failed to have regard to the mandatory design considerations specified in cl 6.21(4); and

(3) Whether the Minister failed to comply with the requirements of cl 7 of the State Environmental Planning Policy No 55 - Remediation of Land (**SEPP 55**), which prohibits a consent authority consenting to the carrying out of any development on contaminated land unless satisfied of certain matters.

Held: Appeal dismissed at the conclusion of the hearing with reasons delivered later:

(1) The minimum exhibition period was 28 days. Section 89F of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) was repealed and replaced by s 2.22 and Sch 1[9] of the EP&A Act, which stipulate the minimum public exhibition period as 28 days. Schedule 1 [9] cannot be construed as being a re-enactment of s 89F. Thus s 89F is not a "relocated" provision within the meaning of cl 4A(2) of the Environmental Planning and Assessment (Savings, Transitional and Other

Provisions) Regulation 2017 (NSW): at [49]-[53]. Section 2.22 and Sch 1[9] of the EP&A Act demonstrate clear legislative intention to reduce the minimum public exhibition period from 30 days to 28 days. Clause 4A(2) and cl 83 cannot be construed inconsistently with that legislative intention: at [54]-[57];

(2) LDM failed to discharge its onus of establishing that the Minister did not form the requisite opinion as to design excellence of the concept proposal. The Minister was only required to form an opinion as to design excellence by reference to matters relevant to the Concept DA. Section 4.22(1) of the EP&A Act contemplates that further development of the site will be the subject of one or more development applications. The Minister was not required to form an opinion about matters relevant only to a later stage of the development for which a separate consent would be required: at [73], [86]; and

(3) LDM failed to establish that the Minister did not comply with the requirements of cl 7 of the SEPP 55. The prohibition in the chapeau to cl 7(1) is directed to the grant of consent "to the carrying out of development on the land". The "development on the land" to be carried out was restricted to the demolition of buildings to slab as part of Stage 1. Read consistently with s 4.22(4) of the EP&A Act, the requirements contained in cl 7(1)(b) and (c) applied to the next stage of the project for which a separate development application and the grant of consent by the Minister are required. This construction is also consistent with the concept development applications scheme established by s 4.22 of the EP&A Act and the object of SEPP 55 stated in cl 2: at [98]-[104], [110].

Roads and Maritime Services v United Petroleum Pty Ltd **[2019] NSWCA 41** (Basten, Macfarlan, Payne JJA, Sackville AJA, Preston CJ of LEC)

(decisions under review: *United Petroleum Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 35 (Robson J) and *United Petroleum Pty Ltd v Roads and Maritime Services (No 2)* [2018] NSWLEC 64 (Robson J))

Facts: United Petroleum Pty Ltd (**United**) operated a service station and restaurant business on a parcel of land on the Pacific Highway between Woolgoolga and Ballina. United had an oral lease with the owners of the land, terminable on one month's notice. Roads and Maritime Services (**RMS**) compulsorily acquired the land in August 2015. United was unable to relocate its business. United rejected the offer of compensation made by RMS and commenced proceedings in the Land and Environment Court (**LEC**) for loss attributable to disturbance under s 59(f) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

On 27 April 2018, United was awarded $1.9 million as the capitalised sum for the loss of its business and an additional $83,000 for the increase in rent paid to RMS in the period between compulsory acquisition and vacant possession. The appellant challenged both elements of the award of compensation. The appellant's primary contention was that existing authority did not permit recovery of an amount equal to the capitalisation of projected future profits of the business as "loss attributable to disturbance" caused by the acquisition. Alternatively, if earlier case law permitted such a claim, it should not be followed.

Issues:

(1) Whether United was entitled under s 59(f) to compensation for its loss of ongoing business profits;

(2) Whether United was entitled under s 59(f) to compensation for the increased rental paid to the appellant; and

(2) The appropriate cost orders for the primary hearing and the appeal.

Held: Appeal allowed; judgment and orders by primary judge set aside; application brought by United in the LEC be dismissed; respondent to pay the appellant's costs of the appeal:

(1) The scope of loss attributable to disturbance, compensable under s 59(f), is limited to a direct and natural consequence of the acquisition and does not cover loss of the kind addressed under other paragraphs of s 59, but not otherwise claimable: at [13]-[14], [72], [73], [96], [160] (unanimous);

(2) Loss of future income from a business carried on under a lease terminable on one month's notice is not a loss attributable to disturbance because it is not reasonably incurred as a direct and natural

consequence of the acquisition, but of the tenure held by the respondent: at [22], [26], [72], [73], [116]-[118], [161] (Basten, Macfarlan, Payne JJA, Sackville AJA, Preston CJ of LEC);

(3) Whether the term "any other financial costs" in s 59(f) extends to the loss of future income or profits from a business may be doubted: at [17], [37], [72], [76], [96] (Basten, Macfarlan, Payne JJA and Sackville AJA);

(4) The term "any other financial costs" in s 59(f) is capable of extending to financial losses, such as loss of income or profits: [138], [142], [163] (Preston CJ of LEC);

(5) The claim for loss of business in circumstances where the respondent's interest in the land was of no value was an attempt to recharacterise loss that was previously recognised in the assessment of the market value of the land. *Health Administration Corporation v George D Angus Pty Ltd* (2014) 88 NSWLR 752; [2014] NSWCA 352 not followed: at [21]-[27], [49] (Basten, Macfarlan and Payne JJA);

(6) Compensation for an increase in rental during the period between compulsory acquisition and vacant possession under s 59(f) should not be awarded, as the loss is not a direct and natural consequence of the acquisition and such recovery would be inconsistent with s 34 of the Act: at [63], [72], [73], [79], 167] (unanimous); and

(7) United acted reasonably during the primary hearing and was entitled to those costs. However, no sufficient reason why the usual principle of costs to the follow event in the Court of Appeal should not apply: at [67]-[70], [72], [73], [122]-[123], [166] (unanimous).

***Weber v Greater Hume Shire Council* [2019] NSWCA 74** (Basten JA, Gleeson JA agreeing with Basten JA, and Sackville AJA concurring with additional comments)

(decision under review: *Weber v Greater Hume Shire Council* [2018] NSWSC 667 (Walton J))

Facts: On 17 December 2009, a fire ignited in the waste disposal tip of the Greater Hume Shire Council (**Council**). The fire became large and uncontrollable, spreading approximately 11 kilometres to the nearby town of Gerogery. The fire destroyed the property of the appellant and other residents in the surrounding area. On 15 December 2015, Ms Weber commenced representative proceedings against the Council. The class represented were all persons who suffered loss, damage to property or injury as a result of the fire.

The primary judge found that a duty of care was owed, and that it was breached by the respondent's failure to take precautions such as maintaining a fire management plan, maintaining a firebreak, consolidating deposited waste appropriately and removing dangerous fuel build-ups. However, the proceedings were dismissed as the judge did not find factual causation, as he did not accept that a cause of the fire had been identified, or that the failure to take precautions had caused the appellant's loss. Ms Weber appealed to the Court of Appeal. The Council challenged numerous findings by Notice of Contention.

Issues:

(1) Whether the Council owed a duty of care to Ms Weber;

(2) If so, whether that duty was breached, considering the principles regarding public authorities' resources set by s 42 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**);

(3) Whether causation was established where a sole probable cause of the fire could not be identified, but the likely causes were all due to the Council's negligence;

(4) If so, whether a causal link was established between the Council's failure to take precautions against the risk of fire and the damage suffered by the appellant; and

(5) Whether the Council could use s 43A of the Civil Liability Act as a defence.

Held: Appellant granted leave to appeal from the judgment and orders in the Common Law Division; appeal allowed and previous orders set aside; the following orders made:

(a) judgment for the representative plaintiff, against the defendant in the amount of $104,400 plus interest;

(b) the defendant pay the plaintiff's costs of the trial of the common issues;

(c) remit the proceedings to the Common Law Division to deal with outstanding issues in the representative proceedings; and

(d) the respondent pay the appellant's costs in the Court of Appeal:

(1) The imposition of a duty of care that extended to those affected by the fire was not inconsistent with the Council's statutory functions: at [42], [200], [210];

(2) The existence of a duty of care to prevent the escape of fire is not a novel proposition; nor was the class of persons potentially affected indeterminate; the Council owed a duty of care to the appellant as a person directly affected by the fire: at [23]-[27], [200], [207]-[208];

(3) The Council's financial statements indicated that there was sufficient unallocated funds available at the relevant time for it to undertake the precautions necessary to reduce the risk of the ignition or spread of fire at the tip: at [180], [200], [243];

(4) It was unnecessary for the Court to be satisfied as to the precise cause of the fire if it was more probable than not that the fire was caused by one of the methods of ignition caused by the Council's negligence: at [141], [200] (Basten and Gleeson JJA);

(5) The relevant question was whether the fire would have escaped from the tip if the precautions had been taken: at [216] (Sackville AJA);

(6) Specific precautions which should have been taken by the Council, including compacting and covering the general waste, levelling the ground between waste to allow for slashers and similar machinery, removing long grass, and maintenance of a cleared firebreak would have slowed the spread of the fire: at [160], [200], [237];

(7) The precautions which should have been taken would probably have allowed the fire to be controlled before it escaped from the tip; the breaches of duty therefore caused the appellant's loss: at [198], [200], [236]; and

(8) The Council's management of the tip was not undertaken pursuant to a special statutory power; general law principles applied and s 43A was not engaged: at [50], [200], [243].

New South Wales Court of Criminal Appeal:

Moseley v Queanbeyan-Palerang Regional Council **[2019] NSWCCA 42** (Button J, with Hoeben CJ at CL and R A Hulme J agreeing)

(decision under review: *Moseley v Queanbeyan-Palerang Regional Council* [2016] NSWLEC 165 (Pain J))

Facts: On 21 June 2016, Mr Moseley (**appellant**) was convicted in the Local Court at Queanbeyan with carrying out development without consent under the Palerang Local Environmental Plan 2014 (**PLEP 2014**) contrary to the provisions of ss 76A and 125 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). He was fined $15,000 and was ordered to pay the prosecutor's costs.

The appellant appealed both conviction and sentence to the Land and Environment Court (**LEC**), pursuant to s 31 of the *Crimes (Appeal and Review) Act 2001* (NSW). The appellant argued that the development in issue had been undertaken in various exculpatory circumstances relating to agricultural use and consent was not required. Works were ancillary to development for the purposes of "extensive agriculture", a "farm dam" and/or a "farm building" (development permissible without consent under the PLEP 2014 and the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (NSW)). Pain J dismissed the appellant's conviction appeal and reduced his fine to $4,000 due to considerations such as a financial hardship under s 6 of the *Fines Act 1996* (NSW). On 1 December 2017, Pain J submitted a stated case for determination by the Court of Criminal Appeal pursuant to s 5BA of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**).

Issues:

(1) Whether leave to extend time to submit the stated case should be granted pursuant to s 5BA(2) of the Criminal Appeal Act;

(2) Whether the primary judge had taken too restrictive an approach to the concept of purpose and consequently to the exculpatory circumstances based on agricultural use; and

(3) Whether the primary judge had reversed the onus of proof regarding the exculpatory circumstances (as reflected by the wording of questions in the stated case).

Held: Leave to extend time to submit the stated case granted; no error of law established:

(1) The Court granted the time extension despite the delay in commencement because the matter was fully argued before the Court; featured extensive written and oral submissions; and raised important questions about environmental law and stated cases: at [7]-[8];

(2) Summarising the relevant case law, the Court distilled the following principles. First, "purpose" is the "end to which land is seen to serve" or "to be put". Second, the purpose for which land is used is determined with reference to how that purpose is achieved practically (for example, the physical acts necessary to achieve that purpose). Third, the purpose of the use of land should be characterised at a "level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on". Fourth, the purpose must also be characterised in a common sense and practical way. Finally, the use of land is simply the "physical acts by which land is made to serve some purpose". The primary judge had found that an agricultural use of land was only speculative as there was no livestock on the land during the charge period and the appellant did not intend to use the land for agricultural purposes. Applying the above principles to the primary judge's findings of fact, the Court held that the primary judge had not committed an error of law in finding that, with regard to all particulars, it had not been the purpose of the appellant to engage in agriculture: at [110]-[123], [128], [138]; and

(3) The Court focused on the primary judge's judgment not the stated case. The judgment, read fairly and as an integrated whole, unquestionably expressed the proposition that it was incumbent upon the prosecution to prove beyond reasonable doubt every element of the offence, and to disprove to the same standard at least one element of every exculpatory circumstance with regard to which the appellant had discharged the evidential burden: at [104], [127], [137].

Supreme Court of New South Wales:

Cappello v Roads and Maritime Services **[2019] NSWSC 439** (Campbell J)

Facts: On 18 January 2019, Roads and Maritime Services (**RMS**) issued proposed acquisition notices (**notices**) on the plaintiffs (**landowners**), for a parcel of land they jointly owned, and one that the second plaintiff owned (**land**). This was done under s 11 of the *Land Acquisition (Just Terms) Act 1991* (**Land Acquisition Act**). The notices were for a proportion of the substratum of the land for the purpose of having road tunnels and ancillary works in the construction, operation and maintenance of the WestConnex M4-M5 link.

The landowners argued that the notices were of no legal effect because the RMS did not possess the statutory authority (power) to acquire their land. The RMS argued it did have power under s 177 of the *Roads Act 1993* (NSW) (**Roads Act**). Due to the impending expiration of the minimum statutory period of notice under s 14 the Land Acquisition Act, the matter was expedited, so, if successful in these proceedings, RMS would be able to compulsorily acquire the land.

Issues: Whether RMS had power (or authority) to acquire the land.

Held: Relief sought in the Amended Summons refused; proceedings dismissed; plaintiff to pay the first defendant's costs; no order as to the Registrar-General's costs:

(1) The power given by s 177 of the Roads Act extends to acquiring land "for the purpose of opening, widening or constructing a road or road work". Moreover, the power extends beyond the acquisition of the land that is necessary for that purpose: at [39];

(2) The objects of the Roads Act (s 3) are in very general terms and are not an exhaustive statement of the purpose of the legislation. It is not a fair reading of the expression "for the purposes of the Act" within s 177(1) to equate those purposes with the objects expressed in the objects provision. The purposes of the Act are to be found in all the provisions of the statute: at [41];

(3) When used in s 177 of the Roads Act, "the purpose of this Act" is a reference to the general statutory purposes to be gleaned from all of the provisions of the Roads Act including the objects provision, the nature of the functions imposed upon the Minister, RMS or a Council by the Roads Act, and the powers conferred by the operative provisions: at [49]; and

(3) Taking this approach, RMS was empowered to acquire private land either by agreement or otherwise in accordance with the Land Acquisition Act for the construction of a proposed road declared by the Minister under s 52 of the Roads Act to be a tollway, on land to be owned by RMS: at [50].

Khadivzad v The Owners - Strata Plan 53457 **[2019] NSWSC 157** (Darke J)

Facts: In October 1996, Strata Plan No 53457 (**strata plan)** was established. The strata scheme consisted of 32 lots in a residential development. The development involved a building of eight storeys, with two basement levels. The plaintiff was the sole registered proprietor of Lot 9 in the strata plan. The plaintiff and his wife acquired an interest in Lot 9 in late 1999 or early 2000, completing the purchase of the property in April 2000. In January 2008, the plaintiff acquired the whole interest of the property.

The proceedings concerned a special by-law noted on the title of the common property at the time the plaintiff acquired interest that included a term giving a number of proprietors of lots (including the plaintiff) strata scheme rights exclusively to use car spaces located on basement level 1 of the common property. On 14 December 1999, a special resolution at the Annual General Meeting of the Owners Corporation was passed to the effect that certain by-laws and additional by-laws "be confirmed", and that "the Bylaws in existence up to this time be repealed" (including the strata scheme right of use of car spaces).

The plaintiff alleged that the special resolution was not effective to repeal the special by-law validly as it was not repealed in accordance with s 52(1) of the *Strata Schemes Management Act 1996* (NSW) (**Strata Schemes Management Act**). This section states that, for a special resolution repealing a by-law to be valid, written consent of the owners concerned was needed, with the plaintiff alleging at least one of the owners of the lots concerned did not provide written consent.

However, during the course of proceedings s 52(3) of the Strata Schemes Management Act was raised. This provides that, after two years from the making, or purported making, of a by-law, it was presumed that all conditions and steps necessary to the making of the by-law were complied with and performed.

Issue: Whether the special by-law remained in full force and effect.

Held: Summons dismissed; no order as to costs:

(1) On the plain meaning of the statute, viewing the Strata Schemes Management Act as a whole, obtaining consent of the owners was a condition precedent to the making of a by-law: at [32]; and

(2) Section 52(3) of the Strata Schemes Management Act operated so that two years from the passing of the special resolution on 14 December 1999, it was conclusively presumed that the consent requirement under s 52(1) had been complied with: at [33].

Loulach Developments Pty Ltd v Roads and Maritime Services **[2019] NSWSC 438** (Leeming JA)

Note: Only the portion of this decision that may have interest to the readers of this newsletter is addressed below.

Facts: In July 2012, construction for a development on the northern edge of the Parramatta CBD was completed. The developer was the plaintiff, Loulach Developments Pty Ltd (**Loulach**). The site comprised two lots, 11 and 12. However, the building had only been erected on Lot 11, Lot 12 now forms an extra-wide footpath.

In August 2008 and January 2009, when Loulach was pursuing development consent to build on Lot 11, the defendant's predecessor the Roads and Traffic Authority (**RTA**) confirmed in writing that Lot 12 was required for a road. Those statements constituted the first and second representation made by the RTA.

The first representation was to an agent of Loulach in response to a Property Information Inquiry Form, and stated that the whole of Lot 12 was required for the widening of Pennant Hills Road. The second representation was to Parramatta City Council, and stated that a road widening Order from 1967 applied to Loulach's land. Both representations turned out to be inaccurate. Loulach took proceedings against the Roads and Maritime Services (**RMS**), as the relevant current statutory authority for negligent misstatement.

Issues:

(1) Whether the RTA owe a duty of care to Loulach when it made the first and second representations, and

(2) Whether Loulach's cause of action was statute barred by reason of s 14(1)(b) the *Limitation Act 1969* (NSW) (**Limitation Act**).

Held: Judgment for defendant; parties given leave to apply for special cost orders but, if not sought, plaintiff to pay defendant's costs:

(1) Regarding the first representation, the RMS accepted it had a duty to take reasonable care in responding to Loulach's agent. Even if it had not, the conclusion would have remained. The negligent provision of information by a statutory authority to a private person who evidently intended to rely upon it gives rise to a duty: at [46]-[48];

(2) Where a plaintiff has suffered pure economic loss flowing from a negligent representation to the consent authority for a pending development application, the four most significant features in the evaluative inquiry are (a) assumption of responsibility, (b) reliance, (c) vulnerability and (d) inconsistency with the statutory regime: at [61];

(3) Regarding the second representation, it was not made to Loulach (or its agent), nor made in response to a request from Loulach, and therefore the assumption of responsibility is reduced: at [62];

(4) Secondly, in cases of negligent misstatement, reliance is important. However, in this matter, it was difficult to see reliance sufficient to generate a duty of care on the part of a person who did not seek and might at least in theory never learn of the RTA's submission to council: at [63];

(5) Thirdly, Loulach was not particularly vulnerable. The outcome of the application was in the hands of the local council. However, it was acknowledged that the information regarding the road widening was peculiarly within the knowledge of the RTA: at [64];

(6) Fourthly, it was difficult to see how the common law would impose a duty upon the RTA to take reasonable care lest its suggestions expose Loulach to expense, where the statutory regime invited the RTA to employ its expertise to provide advice as to the safety and efficiency of the built structure, and its impact on traffic during the construction phase: at [70];

(7) A plaintiff suing on a cause of action for which damage is the gist cannot escape the operation of the statute merely by declining to sue for heads of damage which have been suffered more than six years before commencement of proceedings, and confining its claim to those heads of damage that were suffered within time: at [212];

(8) Damages in actions for negligence will not uncommonly include more than one category of loss. The analysis required by s 14(1)(b) turns upon when a cause of action is first accrued. There is no dispute that wasted expenditure incurred in reliance on a negligent misrepresentation is a head of recoverable damages: at [217]; and

(9) RMS failed to discharge its onus of proving that the plaintiff suffered measurable, non-negligible loss after the second representation on 30 January and prior to the commencement of the limitation period on 5 June 2009. Thus, Loulach's first cause of action was statute-barred, but the second was not: at [228].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Australian Coal Alliance Incorporated v Wyong Coal Pty Ltd **[2019] NSWLEC 31** (Moore J)

Facts: Australian Coal Alliance Incorporated commenced proceedings on 16 April 2018 seeking judicial review of the Planning and Assessment Commission's (**PAC**) determination of the Wallarah 2 Coal Project. The First respondent, Wyong Coal Pty Ltd (**Wyong Coal**), the project manager of the site, was the only respondent economically involved with the proposed mine to take an active role in the proceedings. The Second respondent, Minister for Planning (**Minister**) also took an active role. The Third to Seventh respondents, whom were also economically involved in the mine, filed submitting appearances.

The judge noted the difference between the recent decision of Preston CJ in *Gloucester Resources Ltd v The Minister for Planning* [2019] NSWLEC 7, which were merit review proceedings, and the current judicial review proceedings. In the current matter, the judge was not considering the merits of the decision by the respondent, but the processes it used to come to that decision. His decision was not to be taken as an endorsement of the PAC's merit conclusions.

Issues:

(1) Whether the PAC considered downstream greenhouse gas emissions in its assessment of the project as required by cl 14(1) and cl 14(2) of State Environmental Planning Policy (Mining Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**);

(2) Whether the PAC considered the impacts of the Central Coast Water Supply System Pipeline;

(3) Whether the PAC considered the flood impacts in their assessment of the application;

(4) Whether there was an erroneous finding of fact made by the PAC in relation to flooding impacts;

(5) Whether the PAC failed to consider the risk to private water supplies; and

(6) Whether the Water Supply Condition of the consent was invalid.

Held: Summons dismissed; hearing vacated; costs reserved:

(1) What the PAC set out in its Determination Report, although brief, was sufficient to establish that the PAC had regard, as it was obliged to by cl 14(1) and (2) of the Mining SEPP, to the question of downstream emissions: at [84];

(2) The PAC did have regard, appropriately, to ecological sustainable development when considering greenhouse gas emissions, through the adoption of advice given on this subject: at [98];

(3) The process concerning a future water supply pipeline was distinguishable from *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242, as there was no inevitability that a pipeline to provide a compensatory water supply would be required unless the mine was extended. The requirement of a separate, subsequent application for approval of a pipeline was an entirely permissible approach in the circumstances: at [123]-[125];

(4) The applicant's complaint regarding flood risk lacked proper legal foundation, as it sought to have the Court substitute its own views for the consideration approach which was adopted by the PAC at a broader level of generality. The broader level of generality approach was not inconsistent with the matters mandated for consideration in s 79C of the EP&A Act: at [140];

(5) As to flood risks, there was a sufficient level of particularity for the satisfaction of matters in s 79C of the EP&A Act: at [148];

(6) Although the PAC made an erroneous finding of fact in relation to flood impacts, it did not colour or taint the actual exercise of power with which the PAC was invested as the PAC did not purport to impose any condition based on that erroneous finding of fact: at [172];

(7) As the PAC had considered, and responded to, water supply matters, it was facile to suggest that compensatory measures for any individual private landowner or the method of implementation for such measures should be prescribed to a specific level of particularity: at [194];

(8) The Water Supply Condition responded to matters in the PAC's Determination Report and materials considered by the PAC regarding that condition and therefore was not invalid: at [225].

Bailey v Ku-Ring-Gai Council **[2019] NSWLEC 35** (Preston CJ)

Facts: The applicants, Mr and Mrs Bailey, owned a Georgian revival architecture style house at 7 Grosvenor Street, Wahroonga. In 2015, the house was listed as a local heritage item in Sch 5 of the Ku-ring-gai Local Environmental Plan 2015 (**KLEP 2015**). The applicants wanted to have the property delisted as a heritage item. Mrs Bailey conducted her own research into the property's heritage significance in correspondence with two heritage consultants from Ku-ring-gai Council (**Council**). She was unable to find any reason why the property had been listed and wrote to the Council querying whether the listing was a mistake. A heritage specialist planner advised that the Council was considering a proposal to remove three other erroneous heritage listings and the Baileys' property could be considered with that proposal.

On 22 November 2016, the Council resolved to submit a planning proposal to remove four items from the list of local heritage items in Sch 5 of the KLEP 2015, including the Baileys' property. At that time, the council officers' report stated that the listing was "considered an erroneous listing potentially being confused with the listed 7 Grosvenor Road, Lindfield".

The Council prepared and submitted a planning proposal to the Department of Planning and Environment to amend the KLEP 2015 by delisting the four properties. The Council was required to prepare a detailed heritage assessment for each property.

The heritage assessment prepared for the Baileys' property found that it had been designed and built by a local public architect and had some local heritage significance. The heritage assessment nevertheless recommended that the property be delisted.

The Council placed the planning proposal on public exhibition from 1-16 February 2018. The heritage assessment was included in the public exhibition material. The applicants made a submission supporting the delisting but did not bring any expert heritage advice to refute the conclusion that the property had some local heritage significance.

A further report was prepared on 6 April 2018 for the purpose of considering the public submissions. This report recommended that the Council amend the planning proposal to retain the listing on the Baileys' property and proceed with the delisting of the other 3 properties.

Mr and Mrs Bailey did not become aware that the recommendation had changed until 21 May 2018, although they had received an e-mail with a link to the further report on 16 May 2018. Mr Bailey e-mailed the councillors directly on the morning of 22 May 2018 explaining the background to the planning proposal, the property and the change of recommendation. Mr and Mrs Bailey's solicitor addressed the council meeting, advocating for the delisting and asking the Council to adjourn its consideration of the planning proposal to allow Mr and Mrs Bailey an opportunity to consider, investigate and oppose the further report.

At the meeting the councillors considered the likelihood that the listing for 7 Grosvenor Street, Wahroonga was originally made in error, but resolved to nevertheless vary the planning proposal to retain the heritage listing for the property.

Mr and Mrs Bailey brought judicial review proceedings challenging the decision of the Council to vary the planning proposal by removing their property from the list of local heritage items proposed for removal and to make a local environmental plan in accordance with the revised planning proposal.

Issues:

(1) Whether Mr and Mrs Bailey were denied procedural fairness by being denied the opportunity to consider, investigate and comment on the planning proposal with the knowledge of the change in the recommendation of the Council officers;

(2) Whether the Council had failed to consider relevant matters; and

(3) Whether the Council's decision was manifestly unreasonable.

Held: Proceedings dismissed; applicants to pay the respondent's costs:

(1) The applicants were not denied procedural fairness: at [76]; the Council was not shown to have not complied with the legislative requirements for notification and consultation contained in the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**): at [77]; even if these requirements did not exhaustively state the content of the obligation to afford procedural fairness, the applicants were afforded opportunities, which they utilised, to make submissions on the planning proposal when it was publicly exhibited, to contact the Council members prior to the Council meeting on 22 May 2018 and to address the Council at that meeting: at [79]-[84]; the opportunity that Mr and Mrs Bailey sought, to consider, investigate and oppose the information and assessment of the heritage significance of the property, had already been provided to them when the planning proposal was exhibited: at [88]; the recommendation in the further report to retain the listing was a re-evaluation of the existing information and did not require a further opportunity be provided for the applicants to make submissions: at [88]; there was no additional information provided to the Council that the applicants did not have a sufficient opportunity to comment on: at [88]; there can be no legitimate expectation that a decision maker will exercise a discretionary power in a particular way: at [89];

(2) The Council did not fail to consider any relevant matter: at [125]; Mr and Mrs Bailey's allegation that the Council relied on inaccurate and misleading statements in making its decision calls for an assessment of the adequacy of the Council's consideration and the merits of the decision which is impermissible under the ground of failure to consider relevant matters: at [114]; in any event, the Council did not rely on inaccurate or misleading information in coming to their decision: at [115]; and

(3) The Council's decision was not manifestly unreasonable: at [136]; the decision to not proceed with the heritage delisting of Mr and Mrs Bailey's property was reasonably open to the Council on the information available to it when it made the decision: at [133]; whether the decision was sound or not is not a question for determination on judicial review: at [133].

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

Facts: Mr Barrak (**applicant**) was elected as a councillor for the Dundas Ward in the Council of the City of Parramatta Council (**Council**) on 25 September 2017. In a council meeting of 20 February 2019, the applicant and the Lord Mayor of the Council engaged in a discussion about previous controversy within the Council during 2018. At this meeting the applicant was expelled by the Lord Mayor for disorder, as he referred to the Lord Mayor as a "clown". At the next council meeting of 25 February 2019, a resolution was carried calling on the applicant to apologise for various events at the meeting of 20 February 2019. The applicant declined to apologise on 25 February 2019 as required by the resolution and was then expelled. The applicant was then expelled from a further four council meetings as he declined to apologise at each meeting in accordance with the resolution of 25 February 2019. The expulsion from each further meeting was by way of resolution at each meeting. The applicant commenced proceedings on 27 March 2019 seeking various declarations that the resolutions passed were unlawful and that an

order permanently restraining the Council from requiring the applicant to unreservedly apologise for his conduct at the 20 February 2019 meeting.

Issues:

(1) Whether the Lord Mayor's conclusion that the applicant's use of "clown" directed at the Lord Mayor was an act of disorder pursuant to cl 182 of the Local Government (General) Regulation;

(2) Whether the Lord Mayor had the power to expel the applicant from the 20 February 2019 meeting;

(3) Whether the applicant was required to return his notes taken at the 20 February 2019 meeting;

(4) Whether the Lord Mayor had the power to expel the applicant from the 25 February 2019 meeting;

(5) Whether the resolution to remove the applicant from Council committees was valid, and

(6) Whether the Lord Mayor had the power to expel the applicant from the subsequent meetings.

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

(1) It was consistent with cl 31(1) of the City of Parramatta Council's Code of Meeting Practice to accept that the Lord Mayor reached the conclusion the use of "clown" was an act of disorder, as it is the opinion of the chairperson to determine whether an act of disorder had occurred. From the material provided there was nothing unreasonable about that determination: at [129], [134];

(2) The applicant's expulsion from the 20 February 2019 meeting was made without power, and was invalidly effected as there was no evidence that the necessary condition precedent (an authorising resolution as required by s 10(2)(b) of the *Local Government Act 1993* (NSW) (**Local Government Act**)) had been carried by the Council to give the Lord Mayor the power to expel councillors for acts of disorder without the carriage of a resolution of the Council to effect this: at [163]-[164];

(3) There was no proper basis to conclude that the Council was acting outside its power when requiring notes be returned as the process in place to ensure that the collection and securing of confidential papers and notes would not prevent any councillors from access to their own notes, and the notes would remain confidential to the authoring councillor: at [177]-[179];

(4) The 25 February was effected by resolution as required by s 23 of the Local Government Act and was therefore within power: at [216];

(5) The resolution to remove the applicant from Council committees was within power and there was no basis for the Court to set it aside. This was because the ancillary power given to local councils under s 23 of the Local Government Act to carry out their functions is extraordinarily broad. Although the Local Government (General) Regulation had made specific provision for council meetings, those provisions had been removed in December 2018 which left s 23 as the power permitting the establishment of committees: at [236]-[237]; and

(6) The subsequent meetings were consistent with the reasoning of the expulsion from the 25 February 2019 meeting and were within power: at [249].

City of Ryde Council v State of New South Wales **[2019] NSWLEC 47** (Preston CJ)

Facts: City of Ryde Council (**Council**) challenged the validity of amendments made to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Codes SEPP**) and consequential amendments of local environmental plans for the purpose of making certain types of medium density housing complying development.

The relevant instruments challenged were the State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017 (**Amending SEPP**), subsequent amendments to the Amending SEPP by the State Environment Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) Amendment 2018 (**Amending SEPP Amendment**) and the State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) Further Amendment 2018 (**Amending SEPP Further Amendment**).

Under s 34A(2) (now s 3.25) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), before an environmental planning instrument is made the relevant authority, being the Secretary of the Department of Planning and Environment (**Secretary**), must consult with the Chief Executive of the Office of Environment and Heritage (**OEH**) if, in the opinion of the Secretary, critical habitat or threatened species, populations or ecological communities, or their habitats, will or may be adversely affected by the proposed instrument.

The Secretary determined not to consult with OEH about the Amending SEPP on 29 September 2016. On 8 December 2017 the Secretary made a second decision not to consult with OEH. The second decision concerned consequential amendments to the Standard Instrument and to 20 local environmental plans.

In forming the two opinions that consultation was not required, the Secretary relied on two separate briefing notes prepared by senior officers of the Department of Planning and Environment (**DPE**) and a number of attachments to those briefing notes. The briefing notes and attachments provided information on the background of the proposal and its intended effects. The briefing notes also addressed the issue of consultation under s 34A(2), stating in each note the Department's view that consultation was not required as the amendments did not propose any changes to the current provisions within the Codes SEPP "which ensure that critical habitat or threatened species, populations or ecological communities or their habitats are not adversely affected by development carried out under the [Codes SEPP]."

The relevant provisions of the Codes SEPP were cll 1.17A and 1.19. Clause 1.17A provided that in order to be complying development the development must not be on land that is "critical habitat" or within an "environmentally sensitive area". Clause 1.19 further prohibited complying development from being carried out on, inter alia, land that is "within an ecologically sensitive area" and "environmentally sensitive land".

The Council contended that the statement in the briefing notes was erroneous. The statement suggested that the existing provisions "ensure", in the sense of "guarantee", that critical habitat or threatened species, populations or ecological communities or their habitats are not adversely affected when in fact, these provisions provided only some level of environmental protection and did not fully cover "threatened species, populations or ecological communities, or their habitats". The Council submitted that this erroneous statement infected the formation of the opinion under s 34(2) of the EP&A Act.

Issues: Whether the Secretary erred in forming the opinion, first on 29 September 2016 and again on 8 December 2017, that consultation under s 34(2) of the EP&A Act was not required by:

(a) misconstruing cll 1.17A and 1.19 of the Codes SEPP by proceeding on the basis that they "ensured" threatened species, populations or ecological communities, or their habitats, were not adversely affected by complying development;

(b) failing to take into account a mandatory relevant consideration, being the matters in s 34(2) of the EP&A Act;

(c) making a legally unreasonable decision as there was no basis for concluding that the provisions of the Codes SEPP avoided adverse effects on threatened species, populations or ecological communities, or their habitats.

Held: Proceedings dismissed; applicant to pay respondent's costs:

(1) The decisions of the Secretary were not legally invalid due to the small number of statements contained in the briefing notes and attachments claimed to be legally inaccurate: at [96]; the departmental officers writing the briefing notes and the Secretary considering them are taken to have read and understood the impugned statements in light of their knowledge and familiarity with the current provisions of the EP&A Act and Codes SEPP, prior knowledge of the proposal and the information provided in the briefing notes and attachments: at [97]-[99], [110]; consistent with the purpose and practice of briefing notes, it is appropriate to infer that the Secretary read and considered the briefing notes and the attachments to the briefing notes: at [107];

(2) The statements in the briefing notes must be read fairly and in the context of the discussion in the whole of the briefing notes: at [105]; read in the context of the briefing notes and attachments, the impugned statements were not legally inaccurate, did not lead the Secretary to misconstrue the

existing provisions of the Codes SEPP, and did not lead the Secretary to err in law in forming her opinion not to consult under s 34A(2): at [110]-[112]; and

(3) As the statements in the briefing notes and attachments were not legally inaccurate, the Secretary did not misdirect herself, fail to consider any relevant matter, or make a manifestly unreasonable decision by considering these statements: at [121].

Local Democracy Matters Incorporated v Infrastructure New South Wales; Waverley Council v Infrastructure New South Wales **[2019] NSWLEC 20** (Pain J)

(related decision: *Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 18 (Pain J); *Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 22 (Pain J))

Facts: Local Democracy Matters Incorporated (**LDM**) and Waverley Council (**Council**) challenged, in separate judicial review proceedings, the decision of the Minister for Planning (**Minister**) to grant development consent to the first respondent, Infrastructure New South Wales (**INSW**) for a concept proposal and Stage 1 demolition of the Sydney Football Stadium (**SFS**) in Driver Avenue Moore Park on 6 December 2018. Both matters were considered in one judgment. Work on the project had commenced when the case was heard. The hearing was expedited.

LDM and the Council relied on three grounds of review. First, the Minister publicly exhibited the development application (**DA**) for 28 days between 14 June and 11 July 2018. LDM submitted that the time for the exhibition period that applied in June 2018 was fixed by cl 83 of the Environmental Planning and Assessment Regulation 2000 (**EP&A Regulation**) which has since been repealed. It specified 30 days as the minimum submission period "for the purposes of s 89F(1)(a) of the Act". This must be read as a reference to Sch 1.9 to the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) per cl 4A(2) and (3) of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (**Transitional Regulation**) as s 89F(1)(a) was repealed on 1 March 2018. In 2018, the EP&A Act was renumbered and the community participation provisions were reallocated to s 2.22 and Sch 1 to the EP&A Act. While Sch 1.9 provides for a period of 28 days for exhibiting a state significant development (**SSD**) application, that period can be varied by regulation (Sch 1.21), as it was by cl 83 of the EP&A Regulation. Clauses 9 and 21 of Sch 1 are a re-enactment of the former s 89F within the meaning of cl 5 of the Transitional Regulation. Clause 4A(3) of the Transitional Regulation critically provides that a reference in a document (defined by cl 4A(1) and (2)) to any renumbered or relocated provision, issued or made before or after the commencement of this clause) is taken to include a reference to the provision before it was renumbered or relocated. The Minister submitted that the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (**Amendment Act**) amended the minimum exhibition period requirements with respect to SSD and repealed s 89F. From the commencement of the Amendment Act on 1 March 2018, by reason of s 2.22 read together with Sch 1.9 of the EP&A Act, the applicable minimum exhibition period with respect to SSD was fixed at 28 days. Clause 83 of the EP&A Regulation did not operate to "vary" the 28 day period fixed in Sch 1.9 pursuant to Sch 1.22.

Second, LDM and the Council submitted the Minister failed to form the opinion required by cl 6.21(3) of the Sydney Local Environmental Plan 2012 (**SLEP 2012**) that the proposed development exhibited design excellence and failed to have regard to the mandatory relevant considerations specified by cl 6.21(4). The assessment of impacts of the concept proposal was insufficient to satisfy cl 6.21 because it called for a consideration of design excellence not just an assessment of impact and how they would be minimised. In addition, the opinion in subcl (3) had to be formed as a matter separate to consideration of those matters in subcl (4).

The Minister submitted that requirement to form an opinion that a proposed design exhibits design excellence in cl 6.21(3) must be informed by the matters of relevance in subcl (4). Consequently if a consent authority has undertaken the required consideration of each of the relevant matters in cl 6.21(4) then that consideration can support a conclusion that the proposed development exhibits design excellence. Several of the matters identified in subcl (4) are framed in terms of their impact.

Third, LDM submitted that the Minister failed to comply with the requirements in cl 7 of the State Environmental Planning Policy No 55-Remediation of Land (**SEPP 55**). While it may be true that

the demolition component of the DA engaged cl 7(1) of SEPP 55 (because it involved "the carrying out of any development on the land"), it would be a misconstruction of cl 7(1) to interpret the suitability requirements in cl 7(1)(b) and (c) as being confined to the Stage 1 (demolition) works. The demolition is not in the context of a concept DA an end in itself. The demolition works were part of the concept DA which was for the redevelopment of the existing SFS comprising the concept proposal and Stage 1 works. Although "land" as defined by s 1.4(1) of the EP&A Act includes "a building erected on the land" the "land" is not limited to the building. The Minister did not form the requisite state of satisfaction referred to in cl 7(1)(b) because the contamination material before him equivocated as to whether remediation was required. Further, cl 7(2) applied because the DA was an application for consent to carry out development that would involve a change of use on any of the land as specified in subcl (4). Various commercial and other buildings were to be demolished to make way for the new larger stadium and a large car park was to be temporarily replaced with a construction compound and waste recycling area. Therefore there would be a "change of use" from commercial buildings to a major recreational facility (the stadium). In addition, in light of the findings of the preliminary site investigation report (**PSI report**) contained in the relevant environmental impact statement (**EIS**) that a detailed investigation was required, the Minister had a duty under cl 7(3) to require INSW to carry out a detailed site investigation prior to determining the application and not to defer it until a subsequent stage of the project.

The respondents submitted that properly construed in light of s 4.22(4) of the EP&A Act, neither cl 7(1)(b) or (c) nor (2) and therefore (3) of SEPP 55 applied to the extent the development consent approved the concept proposal as distinct from the proposal for concurrent Stage 1 works. Further cl 7(1) of SEPP 55 has limited application and cl 7(2) of SEPP 55 is not engaged, in circumstances where the Stage 1 works described in the DA relevantly involved the demolition of buildings to the ground (or existing slab) level and no excavation could occur under the conditions of consent.

Issues:

(1) Whether the Minister was required to exhibit the DA for 30 days;

(2) Whether the Minister failed to consider and be satisfied of the mandatory requirements in relation to design excellence of cl 6.21 of the SLEP 2012; and

(3) Whether the Minister failed to comply with the requirements in cl 7 of SEPP 55.

Held: Applicants unsuccessful on all grounds; both judicial review proceedings dismissed; costs reserved:

(1) Section 89F(1)(a) of the EP&A Act only did one thing, namely, it enabled the regulations to prescribe the period of public exhibition of a DA which must not be less than 30 days: at [79]. That is clear from the plain and ordinary meaning of the text, particularly the inclusion of the words "not less than 30 days" in parentheses after the word "period" as a qualifying factor for the period of public notification to be specified in a regulation. Concerning statutory context, if the two operative provisions (cll 9 and 21 of Sch 1 to the EP&A Act) LDM contended for applied there would have been no need for cl 83 at all: at [80]. Given that s 89F(1)(a) expressly stated a minimum period of 30 days cl 9 of Sch 1 cannot be regarded as a re-enactment of s 89F(1) as it refers to 28 days: at [83]. Further, in the historical notes to the EP&A Act a number of other provisions were repealed, and a number of different provisions are identified as being amended: at [86]. A clear difference in the treatment of different sections is apparent. The combination of findings such as those above led to the conclusion that s 89F(1) was not repealed and re-enacted as referred to in cl 4A(3) of the Transitional Regulation but was simply repealed: at [87]. Ultimately LDM's approach imputes to the legislature an intention that despite the express amendment to the 28 day exhibition period provided for in s 2.22 and Sch 1.9 the legislature immediately intended to revert back to the 30 day period in cl 83 of the EP&A Regulation: at [91]. Such an intention is not supported by the legislative scheme analysed above;

(2) The Minister's reasons adopted the findings of the Department Assessment Report which attached inter alia the EIS: at [126]. The Minister did not in his reasons make an express statement concerning the formation of an opinion of satisfaction about design excellence required by cl 6.21(3), nor did the Department Assessment Report: at [126], [139]. The EIS and Department Assessment Report both squarely addressed the requirement in cl 6.21 for satisfaction in relation to design excellence for the concept proposal and less directly referred to the substance of this requirement: [130]-[135]. Further there was extensive material in the EIS addressing all the criteria in subcl (4): [136]-[137]. The relevant factors referred to in cl 6.21(4) as they apply to the building envelope for

which development consent was sought in the concept plan were the subject of consideration in the EIS, the public consultation process to the extent they were identified and in the Department Assessment Report. The evidence showed that the Minister was told about the requirement in cl 6.21(3) in relation to the concept proposal including expressly in relation to the building envelope for Stage 1 in the EIS. The Minister had before him ample consideration of relevant matters identified in subcl (4) relevant to the formation of an opinion about the design excellence of the stadium building envelope. All this material gave rise to the inference that he was able to and did form the opinion required by cl 6.21(3) in relation to the concept proposal. This material did more than draw the Minister's attention to relevant matters; and

(3) Land in the context of the approved DA is the stadium building and other related buildings which are to be demolished to slab and is the land to which cl 7(1)(a) and (b) are directed in this case: at [185]. In circumstances where the Stage 1 PSI report had recognised the potential for contamination, the Minister was advised of this in the EIS and by the Department Assessment Report. He did consider whether the land was suitable in its contaminated state for the purpose for which the development was proposed to be carried out: at [186]. Further, cl 7(2) was not engaged because the Minister did not determine an application for development consent that would involve a change of use on any land specified in subcl (4): at [192]. The Stage 1 works are for demolition of the existing stadium and other buildings to slab level and ancillary works on a car park area. The new stadium footprint will subsume all the demolished buildings. The definition of development in s 1.5(1)(a) and (e) of the EP&A Act distinguishes between "use of land" and "demolition of a building or work" as distinct forms of development. Demolition alone does not involve a change of use of land. Moreover the consent did not involve a change of use from car parking, open space and commercial buildings to a stadium by approving an envelope which consumed much of the land on which non-stadium activities are presently taking place: at [195]. The existing ancillary buildings and indoor wickets and associated facilities are an aspect of the existing stadium (or recreation facility) use. Neither the Stage 1 works nor the concept proposal have sought consent for a change of use on the land specified in cl 7(4) and the terms of the development consent do not approve a change in use. Since cl 7(2) was not engaged neither was cl 7(3): at [197].

- **Criminal:**

Burwood Council v Pan Pac Investments Pty Ltd (No 2) **[2019] NSWLEC 29** (Pain J)

(related decision: *Burwood Council v Pan Pac Investments Pty Ltd* [2018] NSWLEC 110 (Pain J))

Facts: In *Burwood Council v Pan Pac Investments Pty Ltd* [2018] NSWLEC 110, Pain J found Pan Pac Investments Pty Ltd (**defendant**) guilty of two charges of failing to comply with an order issued under the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**) and a charge of failing to provide information to officers of Burwood Council (**Council**) as required by the EP&A Act. It remained for the defendant to be sentenced in all three matters. At the outset of the sentencing hearing, the prosecutor identified that the defendant was in liquidation.

Issue: Whether the sentencing hearings could proceed in the absence of an application to the Supreme Court or Federal Court for leave to proceed pursuant to s 471B of the *Corporations Act 2001* (Cth) (**Corporations Act**).

Held: Section 471B applied to both criminal and civil proceedings; leave of the Supreme Court or Federal Court required for the sentencing of defendant for the three offences:

(1) There was no clear authority on whether s 471B applied to both criminal and civil proceedings. Further, various legal commentaries are divided as to the application of s 471B: at [16];

(2) The decisions of *RA Ringwood Pty Ltd v Lower* [1968] SASR 454 (***Ringwood***) and *Re Timberland Ltd and Equitable Forestry Services Pty Ltd* [1976] VR 790 concerned provisions which were not identical in terms to s 471B: at [12];

(3) The opinion of Perry J in *SA Police v Temday Pty Ltd* (1996) 184 LSJS 488 regarding s 471B is obiter (at [11]). No reasoning was provided by the Queensland Court of Appeal in *Tate v Aarjets Pty Ltd*

ATF The Jurgholme Trust [2010] QCA 243 (***Tate***) for adopting the approach that s 471B of the Corporations Act has no application to criminal proceedings (applying *Ringwood*): at [20]; and

(4) Schmidt J's reasoning in *Workcover Authority of NSW v Josef & Sons Contracting Pty Ltd (in liquidation)* [2002] NSWIRComm 226 that s 471B applied to both civil and criminal proceedings was preferred and *Tate* should not be followed on that occasion: at [20].

***Chief Executive, Office of Environment and Heritage v Douglas Brian Reitano (No 2)* [2019] NSWLEC 39** (Robson J)

(related decision: *Chief Executive, Office of Environment and Heritage v Douglas Brian Reitano* [2018] NSWLEC 198(Robson J))

Facts: In December 2018, Mr Reitano (**defendant**) was found guilty of two charges under s 156A(1)(b) of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) for damaging and removing vegetation in land reserved under the NPW Act. One charge was that the defendant used a chainsaw to cut down River Red Gum trees in the Murrumbidgee Valley National Park (**park**). The other charge was that the defendant removed River Red Gum trees from the park. These proceedings concerned the sentencing of the defendant for these offences.

Issue: What was the appropriate sentence for the offences against s 156A(1)(b) of the NPW Act.

Held: Defendant convicted of the offences; fined $15,000 for each offence (50% of which was to be paid to the prosecutor); ordered to pay prosecutor's costs:

(1) The defendant's conduct resulted in adverse impacts from removing habitat for multiple native species. It was incompatible with the legislative objectives of the NPW Act and the purpose of reserving land as a national park: at [47];

(2) Given the quantity of River Red Gum trees that were felled and removed, actual environmental harm resulted from the defendant's conduct and that the harm was substantial: at [58];

(3) The defendant's conduct was premeditated and intentional, increasing the objective seriousness of the offences: at [64];

(4) It was not established that the wood was intended for distribution without payment to the defendant's family and/or friends. The fact that a significant quantity of River Red Gum wood was already in storage at the time of the offences made it clear that the defendant committed the offences for financial gain: at [68];

(5) While the offences were undertaken for commercial gain, they were not part of a large "commercial scale" operation: at [70];

(6) Each of the offences was found to be at the low end of medium objective seriousness for offences of that kind: at [74];

(7) There was a need for general deterrence so that there would be a real disincentive for others to engage in similar conduct: at [95];

(8) The defendant's criminal record and, to a lesser extent, the evidence of his other activities in the park pointed to a strong need for specific deterrence, particularly in light of the lack of effectiveness of previous efforts of the Local Court: at [96];

(9) There was overlap between the offences and the defendant should not be punished twice in relation to characteristics of the offences that were in common. It was found to be appropriate to apply the totality principle to reduce the sentences otherwise applicable: at [101];

(10) While a sentence of imprisonment may have been appropriate to achieve the retributive purposes of punishment, having regard to the objective seriousness of the offences, and accepting that the defendant had not been deterred in the past by prior custodial sentences, such a course was not necessary: at [117];

(11) The imposition of a fine was both sufficient and appropriate to achieve the proper purposes of sentencing: at [119];

(12) While the means of an offender to pay was found to be a matter for consideration in fixing the amount of a fine, there were other sentencing considerations such as achieving appropriate deterrence that could justify imposing a fine for an amount the offender was unlikely to be able to pay: at [122];

(13) The appropriate starting points were $20,000 for each offence. The aggregate amount of the fines was found to exceed what was just and appropriate in the circumstances, so each penalty was reduced by 25%. Accordingly, two fines of $15,000 each were imposed: at [125];

(14) Orders pursuant to s 122(2) of the *Fines Act 1996* (NSW) directing that one half of the fines be paid to the prosecutor: at [126]; and

(15) Orders under s 257B of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) that the defendant pay the prosecutor's costs of the proceedings as determined under s 257G of the Criminal Procedure Act: at [129].

Environment Protection Authority v Crown in the Right of New South Wales (Office of Environment and Heritage) **[2019] NSWLEC 66** (Pepper J)

Facts: The Crown in the Right of New South Wales (Office of Environment and Heritage) (**OEH**) (the defendant) pleaded guilty to an offence against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The OEH was charged with polluting waters from about 14 June to 4 September 2017 inclusive, at or near the Perisher Sewage Treatment Plant, North Perisher Road, Perisher Valley (**STP**) within Kosciuszko National Park. The pollution was the result of complications in the treatment of the sewage which resulted in effluent entering Perisher Creek with elevated levels of nitrogen (total) and nitrogen (ammonia). The complications in the treatment process arose due to the OEH's decision to use a different chemical in the treatment process; an unforeseen resignation at the STP resulting in reduced staff levels; insufficient training of staff (staff were in the process of completing the required training at the time of the offence); and an unforeseen resignation at the company who provided certain necessary equipment to the STP.

Issue: The determination of an appropriate sentence to be imposed for the commission of the offence.

Held: OEH fined $84,000; ordered to pay the prosecutor's costs:

(1) The offence caused "extremely limited actual environmental harm of limited duration": at [135]. The offence had the potential to cause harm to the environment as ammonia is toxic to aquatic biota at high concentrations and the toxicity of ammonia increases with decreasing dissolved oxygen concentrations: at [131];

(2) The offence was in the low range of seriousness based on the objective circumstances of its commission: at [157]. This was because: the offence clearly undermined the objectives of the POEO Act: at [113]; OEH took immediate action to rectify the pollution; the commission of the offence was not intentional; and there was minimal ephemeral actual and likely harm to the environment: at [157];

(3) The OEH's early guilty plea, evident contrition and remorse, assistance to the Environment Protection Authority during its investigation of the offence, and good character entitled it to a discount of 30%: at [189]. The OEH had two prior convictions for similar offences, and the Land and Environment Court therefore could not take into account a lack of prior convictions or a low likelihood of reoffending as a mitigating factor: at [171]; and

(4) Both general and specific deterrence were relevant to determining the appropriate sentence due to the importance of ensuring sewage treatment plants are operated in a competent manner that does not harm the environment, particularly in sensitive ecological areas such as a national park: at [177], and the OEH's prior offending and continuing operation of the STP: at [178].

***Environment Protection Authority v Rands* [2019] NSWLEC 23** (Pepper J)

(related decision: *Environment Protection Authority v Gilder* [2018] NSWLEC 119 (Robson J))

Facts: Mr Geoffrey Rands (**defendant**) pleaded guilty to an offence against s 144(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). As the director of Newcastle Waste Recycling (**NWR**), the defendant was liable, pursuant to s 169 of the POEO Act, for causing a place to be used as a waste facility without lawful authority. From 5 December 2013, NWR used 509 Tomago Road, Tomago (**premises**) to receive, store and sort waste from off-site, including mixed construction and demolition waste; brick and concrete; rubble; soil; rubbish; timber; woodchips or green waste; and asbestos waste (**waste materials**). Between 12 August and 24 October 2014, NWR stored 20,000 cubic metres of waste materials at the premises without obtaining an environment protection licence (**EPL**). The day-to-day operations at the premises were managed by NWR's site manager, Mr Edward Gilder. The defendant did not play an active role in the day-to-day operations and attended the premises approximately 10 times, usually to deliver or remove machinery, or to attend to other business in the area. The Environment Protection Authority (**EPA**) commenced separate proceedings against Mr Gilder, the site manager at NWR, in relation to the same activities at the premises. Mr Gilder was fined $37,500.

Issue: Determination of the appropriate sentence to be imposed for the commission of the offence.

Held: Defendant was fined $33,750; ordered to pay the EPA's costs:

(1) Actual environmental harm was occasioned by the storage of wastes and asbestos waste at the premises: at [67]. The defendant's conduct caused contamination at the premises and the emission of impurities into the air resulting from a stockpile of timber catching fire: at [64] and [67]-[68];

(2) The defendant's conduct was negligent because he was plainly indifferent to the obvious risk of an excess of waste materials accumulating at the premises, having regard to his considerable experience in the waste industry and his obligations as the director of NWR: at [56];

(3) The defendant's conduct undermined the legislative objectives of the POEO Act insofar as the storage of waste materials without obtaining an EPL compromised the beneficial protection of the legislation to the environment and human health: at [105];

(4) The offence was at the upper end of the lower range of seriousness for offences against s 144(1) of the POEO Act: at [153];

(5) The defendant's early guilty plea, his cooperation with the authorities, his otherwise good character and his lack of prior convictions mitigated the penalty that would otherwise have been imposed: at [154] and [158]. The defendant was entitled to a discount of 25% on account of his early guilty plea: at [154]. The defendant had not demonstrated contrition or remorse: at [155];

(6) The parity principle did not apply because there was no commonality between the involvement of Mr Gilder and the defendant in the commission of the offence: at [172]. The defendant was not involved in the daily operations of the business, which were left to Mr Gilder, upon whom he was heavily reliant: at [173]; and

(7) The offence could have been brought in the Local Court: at [159]. However, the EPA commenced proceedings in the Land and Environment Court because of the volume of waste materials involved and the necessity to set a precedent for the commission of this type of offence: at [160].

***Environment Protection Authority v Whitehaven Coal Mining Ltd* [2019] NSWLEC 27** (Pepper J)

Facts: Whitehaven Coal Mining Ltd (**defendant**) pleaded guilty to an offence against s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), arising from a blast fume event at the Rocglen Coal Mine near Wean Road, Gunnedah (**licensed premises**). On 10 August 2016, the defendant conducted a mine blast at the licensed premises (**blast incident**). The blast incident generated nitrous oxide gases (**NOx gases**) which migrated outside the boundaries of the licensed premises. The defendant contravened condition 01.1 of environment protection licence (**EPL**) 12870 by failing to carry out its licensed activity in a competent manner. In carrying out the mine blast at the

licensed premises, the defendant had not used suitable explosive products to reduce the risk of blast fume generation to the greatest possible extent; had failed to undertake a written risk assessment prior to the blast; had departed from provisions contained in its internal blast management plans; had not notified the neighbouring properties about the mine blast; and had overloaded some blast holes with explosives.

Issue: Determination of an appropriate sentence to be imposed for the commission of the offence.

Held: Defendant ordered to pay $38,500 to the Environmental Trust; ordered to pay prosecutor's costs; ordered to publish a notice in various national, State and regional publications, and ordered to place a notice on Whitehaven Coal Limited's (the parent company of the defendant) (**WCL**) website:

(1) No actual environmental harm was occasioned by the blast incident: at [207]. The blast incident did have the potential to cause environmental harm because NOx gases can cause harm to biological organisms, animals and humans: at [140] and [210]-[212]. In light of the levels of NOx fumes released and the proximity of the fumes to neighbouring properties, the potential environmental harm was serious: at [211]. The defendant's non-compliance with condition 01.1 of the EPL also caused potential environmental harm insofar as strict compliance with the conditions of any EPL was necessary to ensure that the objectives of the POEO Act were met: at [213];

(2) The offence was at the upper end of the lower range of seriousness, based on the objective circumstances of its commission: at [224]. The defendant had control of the design and execution of the blast at all times: at [223]. The defendant's breach of a condition of EPL 12870 was not intentional, reckless or negligent: at [202]. The fact that the defendant failed to notify adjoining landholders, overloaded blast holes, and used an explosive that did not reduce to the greatest extent the risk of blast fume generation, indicated that the harm was reasonably foreseeable: at [214]-[216]. Practical measures had been taken by the defendant to prevent the release of NOx gases prior to the incident but further measures could have been taken, none of which were costly or difficult to implement: at [217]-[222];

(3) The defendant's early guilty plea, its cooperation with authorities, its agreement to pay the prosecutor's costs, its expression of contrition and remorse, its otherwise good character and its lack of prior convictions mitigated the penalty that the Land and Environment Court would otherwise have imposed: at [227], [229], [230], [235] and [249]. The defendant was entitled to a total discount of 30%: at [275]; and

(4) A publication order on WCL's website was appropriate, given that the defendant was a wholly owned subsidiary of WCL and the defendant did not have a company website: at [273]. The publication of notices in various national, State and regional publications was also appropriate because WCL owned and operated other coal mines statewide and the defendant's employees were likely to be employed elsewhere in mines owned by WCL after the defendant ceased mining at the licensed premises: at [273].

Hornsby Shire Council v Henlong Property Group Pty Ltd (No 2) **[2019] NSWLEC 17** (Robson J)

(related decision: *Hornsby Shire Council v Henlong Property Group Pty Ltd* [2019] NSWLEC 16 (Robson J))

Facts: Henlong Property Group Pty Ltd (**defendant**) pleaded guilty to an offence under s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for carrying out development that the Hornsby Local Environmental Plan 2013 provided may not be carried out except with development consent in circumstances where no such consent was in force.

The offence related to the felling of seven large native trees and vegetation clearing on 17 February 2017. Development consent had been granted by the Land and Environment Court prior to the offending conduct taking place which would have otherwise permitted the removal of the trees that were felled. The consent was granted on condition that it would not operate unless or until the Hornsby Shire Council (**Council**) was satisfied as to the preparation and provision of certain management plans to minimise environmental harm pursuant to a detailed deferred commencement condition.

As at 17 February 2017, the consent was not operative, as the deferred commencement condition had not been complied with. Despite this, the defendant retained the services of an arborist company to carry out the clearing work.

Issue: What was the appropriate penalty for the offence.

Held: Defendant convicted; fined $28,000; ordered to pay prosecutor's costs:

(1) The defendant's conduct undermined the principles that underpin the planning regime which added to the seriousness of the offence: at [62];

(2) The defendant's conduct was contrary to a specifically designed deferred commencement condition and it was directly involved in promulgating that condition. That fact, combined with the fact that there was environmental harm, placed the matter below the mid-range of seriousness for the type of offence, but above the very low category: at [63];

(3) While the offence resulted in environmental harm, there was no major ecological damage beyond that which would have been permitted under the consent: at [64];

(4) The defendant provided assistance to the authorities, demonstrated contrition and remorse, and entered a relatively early guilty plea: at [69];

(5) Apart from this particular project, the defendant will not be inclined to engage in further property development projects. This, combined with the fact that the defendant has a lack of prior convictions, gave specific deterrence a lesser role to play: at [76];

(6) Although general deterrence is an important consideration in the imposition of penalties for planning and environmental offences, this was particularly the case in this matter, given that the defendant engaged in property development, and compliance with planning laws is fundamental to that business: at [77];

(7) The appropriate monetary penalty was $35,000. This amount was reduced by 20% to account for the utilitarian value of the early guilty plea, resulting in a penalty of $28,000: at [83]; and

(8) The defendant was ordered to pay the prosecutor's costs pursuant to s 257B of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) in an amount to be determined under s 257G of the Criminal Procedure Act: at [84]-[85].

***Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58** (Pepper J)

(related decisions: *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd* [2018] NSWLEC 114 (Pain J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 2)* [2018] NSWLEC 195 (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 3)* [2018] NSWLEC 197 (Pepper J))

Facts: The defendant, Leda Manorstead Pty Ltd (**Leda**), was charged with carrying out bulk earthworks contrary to project approval conditions at the Cobaki Estate near Piggabean Road, Cobaki Lakes (**site**) in breach of ss 75D and 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Pursuant to s 75J of the EP&A Act, the project approval was granted on 28 February 2011 (**project approval**). Leda had carried out bulk earthworks exceeding a 5.59-hectare limit between 21 April 2014 and 30 July 2015, and 31 July 2015 and 7 March 2017. Leda had also carried out bulk earthworks outside of approved areas and had removed an earthen mound between 1 September and 2 November 2015. The Project Approval permitted Leda to subdivide the site and to carry out staged bulk earthworks. Leda was also granted several historic consents by Tweed Shire Council (**Council**), together with associated construction certificates to carry out bulk earthworks on the site (**historic consents**). On 6 December 2010 Leda was granted a concept approval for the site under s 75O of EP&A Act for the site (**concept approval**). The concept approval included a notation that it did not affect the historic consents granted for the site. The project approval was the subject of three modifications on the site permitting further bulk earthworks in various locations across the site.

Issues:

(1) Whether the conditions of the project approval affected the operation of historic consents purporting to authorise the carrying out of bulk earthworks on the site;

(2) Whether Leda contravened the project approval by carrying out bulk earthworks exceeding the 5.59-hectare limit; and

(3) Whether Leda contravened conditions of the project approval by carrying out bulk earthworks outside of the approved areas and by removing the earthen mound.

Held: Leda was found guilty of all three offences as charged:

(1) Because the bulk earthworks the subject of the changes were carried out pursuant to the project approval, Leda was required to comply with the conditions of that approval: at [76]-[77]. Leda's obligation to comply with the project approval's conditions was not displaced by the existence of the historic consents granted by the Council for the same parcel of land to carry out earthworks: at [77]. The historic consents did not overcome the obligations imposed on Leda under the EP&A Act: at [78]. Notwithstanding that the historic consents were not surrendered or modified, the concept approval did not excuse Leda from complying with the project approval's conditions: at [83];

(2) The extent of Leda's contravention of the conditions of the project approval was dependent upon the proper construction of the conditions: at [90]-[91];

(3) Leda had breached the geographical limit of the conditions because the term "exposed disturbed area" included areas of exposed fill resulting from bulk earthworks and areas of exposed cuts: at [100] and [103]. The geographical ambit of the conditions did not, however, extend to the entire site but only to areas referred to in the project approval: at [99]. Only areas of bulk earthworks carried out under the project approval were included in calculation of the maximum exposed disturbed area: at [100]-[103];

(4) The natural and ordinary meaning of the term "bulk earthworks" included cutting and filling works: at [139]-[141]. The term "maximum exposed disturbed area (that has not been permanently vegetated)" was also given its natural and ordinary meaning: at [150]-[152] and [155];

(5) Site inspections and aerial photographs confirmed that the bulk earthworks were carried out in furtherance of the project approval and not some other historic consent: at [157]-[187], [189]-[210] and [280]; and

(6) Leda had failed to comply with the conditions insofar as bulk earthworks, including the removal of the earthen mound and associated works, were undertaken outside the approved areas under the project approval: at [291]. Notwithstanding that the creation of the earthen mound was an activity approved under a historic consent, its removal constituted "bulk earthworks" under project approval and was therefore subject to it: at [318].

Secretary, Department of Planning and Environment v SingTel Optus Pty Ltd **[2019] NSWLEC 44** (Sheahan J)

Facts: In these four Class 5 sentencing proceedings, SingTel Optus Pty Ltd (**defendant**), pleaded guilty to four charges of failing to disclose reportable political donations in the course of submitting development applications and/or applications to modify development consents. The defendant is the sole shareholder of the mobile network "Optus Mobile", and the planning applications related to the installation of telecommunications infrastructure in the Snowy Mountains region. The offences occurred between April 2015 and September 2016. Each charge concerned the same set of six undisclosed donations, which were made for tickets to attend various dinner type functions with members of political parties. They had a total monetary value of $5,400. The charges arose under s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), from failures to comply with the obligations contained within s 147(3) of the same Act. The maximum penalty for each offence is $44,000. The prosecutor contended that, given the number of donations that were not disclosed, the offences should be categorised as falling within the upper range of objective seriousness. The prosecutor also pressed for the making of a publication order in addition to the imposition of fines, despite not including a publication order in the relief

sought in the Summonses. Counsel for the defendant contended that the offences should fall within a lower range of objective seriousness, and contested the making of a publication order.

Issues:

(1) Did the offences constitute "strict liability" offences;

(2) What was the level of objective seriousness of the offences;

(3) What was the state of mind of the defendant;

(4) What were the subjective factors relevant to the defendant's conduct;

(5) What were the appropriate discounts to be applied for the defendant's guilty pleas;

(6) What were the appropriate monetary penalties to be applied; and

(7) Was it appropriate in these circumstances to order a publication order.

Held: In all four proceedings, defendant convicted of the offences charged and ordered to pay fines totalling $25,000; in three of the four proceedings, the defendant was ordered to place a publication order in three different newspapers:

(1) The offences in question are not 'strict liability" offences. Section 125 of the EP&A Act must be read in conjunction with s 147(11), which states a requirement for proof of knowledge or proof that the defendant ought reasonably have known that the donation was made and was required to be disclosed. Accordingly, the offence should not be read as one of strict liability: at [90]- [92];

(2) The defendant's submissions on the issue of objective seriousness were accepted, and the offences were held to be at the "lower end" of any scale of objective seriousness: at [102];

(3) While the defendant's conduct displayed a degree of carelessness or inadvertence, its failings were not so serious as to be regarded as intentional, reckless or negligent: at [112];

(4) In assessing the defendant's subjective factors, the defendant had expressed "genuine" remorse: at [132]; the defendant cooperated with the prosecutor: at [133]; the defendant was unlikely to reoffend and had taken comprehensive steps to address its offending: at [137]-[139]; and the defendant was of prior good character: at [144];

(5) In two of the proceedings, it was accepted that the defendant pleaded guilty at the first available opportunity, thus entitling it to the maximum discount of 25%: at [116]-[118]. In respect of the remaining two offences, it was accepted that these pleas were entered later, but that a "real utilitarian benefit" flowed from the entry of those pleas, and thus they should attract a discount of 20%: at [127]; and

(6) The making of a publication order is "no less appropriate" where the offending is at a low level of seriousness, and the defendant was ordered to publish a notice in three Australian newspapers, but only in respect of the three offences committed in 2016: at [164].

Water New South Wales v Barlow **[2019] NSWLEC 30** (Preston CJ)

Facts: Mr Barlow (**defendant**) was the occupier and manager of an agricultural property. A Water Access Licence authorised water to be taken from the Barwon River and stored in a dam on the property to be used for irrigation. A Measuring and Control (**MACE**) AgriFlo Series 3 meter (**meter**) recorded the flow of water taken through two mixed use pumps.

By direction of the Minister, a Temporary Water Restrictions Order was published in the gazette on 6 February 2015 prohibiting the take of water from certain water sources, including the Barwon River. The embargo on taking water was not lifted until 29 May 2015.

During the embargo, on 16 May 2015 the defendant instructed his employee to commence taking water from the Barwon River through the mixed flow pumps. Both pumps were operating and taking water from the Barwon River until 18 May 2015. During this period the metering equipment recorded a zero velocity and flow rate, until it began recording a negative velocity and flow rate on 18 May 2015 (**first offence against s 91I(2)**).

On the morning of 18 May 2015, an employee, believing that the meter had stopped working, changed the battery, took the plugs out of their sockets and cleaned them. When placing the plugs back into their sockets, the employee swapped the plugs. The meter was configured for different orientations of the sensors connected to the pumps and it was accepted that swapping the plugs resulted in negative flow rates being recorded.

On 29 May 2015, the defendant again instructed his employee to commence pumping, continuing until 2 June 2015. During this period the metering equipment recorded velocities and flow rates as zero or negative, although both pumps were operating and taking water from the Barwon River (**second offence against s 91I(2)**).

The defendant pleaded guilty to one offence of contravening a direction of the Minister under s 336C(1) of the *Water Management Act 2000* (NSW) (**Water Management Act**) and two offences of taking water while metering equipment was not working, under s 91I(2) of the Water Management Act.

Issues: What was the appropriate sentence for the offence against s 336C(1) and the two offences against s 91I(2) of the Water Management Act.

Held: Defendant convicted of the offence against s 336C(1), the first offence against s 91I(2) and the second offence against s 91I(2); defendant fined $86,625 for the offence against s 336C(1); defendant fined $48,726 for the first offence against s 91I(2); defendant fined $54,140 for the second offence against s 91I(2); defendant to pay prosecutor's costs:

(1) The offence against s 336C(1) was of medium objective seriousness: at [83]; the offences against s 91I(2) were of low objective seriousness: at [83]:

  (a) the Water Management Act emphasised the role that Ministerial directions play in the statutory scheme: at [31]; use of metering equipment to measure the flow of water taken from the water source was an important means of enforcing compliance with the statutory scheme and essential for fairness and equity of water sharing between users: at [25], [27]; the offences against s 91I(2) and s 336C(1) avoided the regulatory scheme relating to the distribution, sharing and taking of water and undermined the statutory object to provide for sustainable and integrated management of water sources: at [27], [32];

  (b) the maximum penalty for each offence at the relevant time was $247,500 and a further penalty of $66,000 for each day the offence continued, reflecting the seriousness with which Parliament viewed the offences: at [34]-[36];

  (c) the offence against s 336C(1) had the potential to impact on people's rights and on the environment, however the prosecutor did not prove the likelihood or actuality of any impacts: at [43]; the offences against s 91I(2) could not have caused any harm to the environment as the water would have been taken anyway: at [42];

  (d) the defendant should have implemented measures to prevent, control, abate or mitigate the commission of the offences, however no harm or likely harm was established: at [49];

  (e) the defendant had complete control over the causes of each offence: at [51];

  (f) it was appropriate to take into account that the first offence against s 91I(2) was committed during a water shortage: at [56]; as this was an element of the offence against s 336C(1), it was not taken into account in imposing the penalty for that offence: at [56];

  (g) the offence against s 336C(1) was committed recklessly: at [72]; it was not proven beyond reasonable doubt that the defendant committed the offences against s 91I(2) intentionally, negligently or recklessly: at [73];

  (i) it was not proven beyond reasonable doubt that the defendant committed the offences for financial gain: at [82];

(2) The subjective circumstances of the offender included:

  (a) the defendant had no prior convictions for any environmental offences, which was a mitigating factor under s 21A(3)(e) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**): at [76];

(b) the defendant was generally held to be a person of good character, which was a mitigating factor under s 21A(3)(f) of the Sentencing Act: at [87]; this factor was given less significance as environmental offences are typically committed by persons of prior good character: at [86];

(c) the defendant pleaded guilty which was a mitigating factor under s 21A(3)(k) of the Sentencing Act and to be taken into account under s 22 of the Sentencing Act: at [88]; the delay in pleading guilty reduced the utilitarian value of the plea, attracting a 12.5% discount: at [96];

(d) the defendant displayed genuine remorse, accepted responsibility and endeavoured to make reparation for the offences: at [101]; this was a mitigating factor under s 21A(3)(i) of the Sentencing Act;

(e) the defendant assisted the authorities by providing information at the time of committing the offences, during their investigation and agreeing a Statement of Agreed Facts with the prosecutor: at [103];

(3) The purposes of punishment, retribution and denunciation were relevant to determining the appropriate sentences for the offences: at [105]; general deterrence was relevant to ensure compliance with the statutory scheme: at [106]; individual deterrence was not necessary in the circumstances of the defendant's remorse, prior good character, actions taken to address the causes of the offences and prevent reoccurrence and unlikelihood of reoffending: at [107];

(4) The appropriate monetary penalties were $99,000 for the offence against s 336C(1) and $61,875 for each of the offences against s 91I(2), discounted by 12.5% for the utilitarian value of the pleas of guilty: at [108]-[109]; it was appropriate to take into account that the offence against s 336C(1) continued for two days rather than imposing a further penalty for the continuing offence: at [110]; and

(5) It was necessary to apply the totality principle as the first offence against s 91I(2) and the offence against s 336C(1) arose out of the same conduct: at [111]; the appropriate adjustment to avoid punishing the defendant twice for the commission of the aspect of the offences that overlap was to reduce the penalty for the first offence against s 91I(2) by 10%: at [114].

- **Appeals from Local Court:**

Carroll v Byron Shire Council **[2019] NSWLEC 52** (Sheahan J)

Facts: Mr Carroll filed an appeal against the severity of a sentence imposed in Byron Local Court in February 2017. The sentence comprised fines totalling $30,000, with a costs order of $1,500. That sentence was imposed upon Mr Carroll following his challenge to two penalty infringement notices which had been issued to him in November 2015, for displaying signs in the Byron area without approval. Mr Carroll was absent when Byron Local Court imposed those sentences upon him in February 2017. He then sought an annulment of those fines. That application was dismissed after Mr Carroll failed to appear in Court for its listing date in March 2017. In the present proceedings, Mr Carroll sought leave to appeal out of time against the sentence.

Mr Carroll's present application was filed nearly two years after judgment was entered against him in March 2017. The application for leave to appeal is governed by s 33 of the *Crimes (Appeal and Review) Act 2001* (NSW). Mr Carroll argued that it was in the "interests of justice" that his appeal be granted. Mr Carroll relied on the decision of Pepper J in *Fletcher v Byron Shire Council (No 2)* [2010] NSWLEC 226 (***Fletcher (No 2)***). Mr Baird, solicitor for the respondent, relied on several other decisions, two of which post-dated *Fletcher (No 2)*. Those two decisions were *Hussain v Liverpool City Council* [2014] NSWLEC 45 (***Hussain***) and *Thaler v Cooma Monaro Shire Council* [2015] NSWLEC 119 (***Thaler***), which were contrary to the submissions put by Mr Carroll.

Prior to the hearing of his application, Council's solicitor wrote to Mr Carroll, inviting him to withdraw his application with no costs penalty. That invitation was rejected.

Issues:

(1) Should Mr Carroll be granted leave to file an appeal against the Local Court out of time, and

(2) What, if any, orders should be made as to costs in these proceedings.

Held: Appellant's Summons seeking leave to appeal out of time was dismissed; appellant to pay respondent's costs:

(1) The decisions in *Hussain* and *Thaler* are not "clearly wrong" and it was appropriate that the Court should follow them in these proceedings. The Court was "powerless" to entertain Mr Carroll's application, the legislation being designed to bring finality to proceedings: at [24]; and

(2) Given that the Council had written to Mr Carroll, explaining its legal arguments and inviting him to withdraw his application without a costs penalty, it was appropriate that the Court make the costs order sought by the Council: at [28].

***Cmunt v Commissioner of Police New South Wales* [2019] NSWLEC 33** (Pepper J)

(related decisions: *Snowy Monaro Regional Council v Cmunt* [2017] NSWLEC 95 (Preston J); *Snowy Monaro Regional Council v Cmunt (No 2)* [2018] NSWLEC 136 (Sheahan J); *Cmunt v Vescio; Broder* [2018] NSWCA 21 (Beazley P); *Cmunt v Snowy Monaro Regional Council* [2018] NSWCA 237 (Basten, Leeming JJA and Emmett AJA); *Snowy Monaro Regional Council v Cmunt (No 3)* [2018] NSWLEC 175 (Pepper J); *Jiri Thomas Cmunt v Commissioner for Police, New South Wales Police Force; Marie Cmunt v Commissioner for Police, New South Wales Police Force* [2018] NSWLEC 156 (Moore J))

Facts: Mrs Marie Cmunt appealed her conviction and sentence in the Local Court under s 277(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The Local Court held that Mrs Cmunt had permitted offensive noise to be emitted from her premises at 12 Kiparra Drive, Berridale (**premises**) without reasonable excuse within 28 days of a noise abatement direction being issued under s 276 of the POEO Act. Mrs Cmunt was fined $1,500. On 18 March 2019 the Commissioner of Police New South Wales (**Commissioner**) informed the Court that the charge was no longer pressed. The Commissioner indicated during the course of preparing for the hearing it had become apparent that Mrs Cmunt's conviction could not be maintained on the evidence and that her appeal therefore ought to be upheld.

Issues:

(1) Whether the Commissioner had proven beyond reasonable doubt all the elements of the offence; and

(2) Whether the Commissioner should pay Mrs Cmunt's costs of the appeal pursuant to s 70 of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**).

Held: Appeal upheld; conviction and fine set aside; the Commissioner to pay Mrs Cmunt's translation and witness costs:

(1) The Commissioner was required to prove beyond reasonable doubt that Mrs Cmunt was given a noise abatement direction under s 276 of the POEO Act; that Mrs Cmunt caused or permitted offensive noise to be emitted from the premises without reasonable excuse; and that Mrs Cmunt committed the offence within 28 days of a noise abatement direction being issued: at [26];

(2) The Commissioner failed to prove at all that the offensive noise occurred within 28 days of the date upon which the noise abatement direction was given; that the barking dogs were located at the premises; or that Mrs Cmunt had caused or permitted the alleged breach of the noise abatement direction: at [42]-[44]; and

(3) The evidence relied upon by the Commissioner to secure the conviction was, on any reasonable view, so inadequate that it constituted exceptional circumstances to make an order for Mrs Cmunt's costs pursuant to s 70(1)(d) of the Appeal and Review Act: at [51]. Mrs Cmunt was not entitled to claim her travel costs to and from the Local Court, however, she was entitled to a witness fee: at [58]. In respect of the Mrs Cmunt's costs of hiring an interpreter to translate documents, these costs could be claimed as out-of-pocket expenses or disbursements incurred for the purpose of the appeal: at [62].

Pesic v Sutherland Shire Council **[2019] NSWLEC 38** (Preston CJ)

Facts: Mr Pesic operated a vehicle servicing and repairs business from about November 2014 until 15 May 2017 at premises zoned General Industrial Zone 1 under the Sutherland Shire Local Environmental Plan 2015. In the relevant period, the use of the premises as a "vehicle repair station" was permissible with consent. Mr Pesic did not have development consent for this use.

In December 2014, Council officers inspected the premises and later informed Mr Pesic that he did not have consent for his current use. However, he continued operating the business unlawfully until a Court Attendance Notice was issued on 15 May 2017.

Mr Pesic pleaded guilty in the Local Court to the offence of carrying out development without development consent in breach of s 76A(1)(a) and s 125 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). On 25 July 2018, Mr Pesic was convicted of the offence and fined $7,600 and ordered to pay the costs of the prosecutor, Sutherland Shire Council (**Council**), in the amount of $9,550.

Mr Pesic appealed against the severity of the sentence of the Local Court, pursuant to s 31(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**). The appeal was commenced one day out of time, requiring leave to appeal pursuant to s 33(1) of the Appeal and Review Act.

Mr Pesic submitted that the only appropriate sentence would be a dismissal pursuant to s 10(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), due to his age, good character, lack of prior convictions, the financial loss already suffered by him for ceasing operating his business, and the lack of harm to the environment or his neighbours caused by the offence. Mr Pesic also contended that the conviction placed his motor vehicle repairer's licence and future employment prospects at risk.

Issues:

(1) Whether the appellant should be granted leave to appeal;

(2) Whether the sentence imposed by the Local Court was too severe and should be varied.

Held: Appeal dismissed; appellant to pay prosecutor's costs:

(1) As the delay in commencing the appeal was only slight, it was in the interests of justice to grant leave to appeal: at [56];

(2) In an appeal from the severity of the sentence of the Local Court, the Court is to redetermine the appropriate sentence for the offence and is not restricted to determining whether the sentence imposed by the Local Court was infected with error: at [19];

(3) The offence was of low objective seriousness: at [33]; the objective circumstances of the offence included the maximum penalty for the offence, the objective harmfulness of the offence, Mr Pesic's state of mind and his reasons for committing the offence: at [20];

(4) The subjective circumstances of the offender included: Mr Pesic's lack of prior convictions: at [35]; Mr Pesic's general good character, other than committing the offence for which he was charged: at [35]; Mr Pesic's late guilty plea, although he had applied during the hearing for it to be withdrawn: at [37]; and his lack of remorse shown for the offence: at [39];

(5) The relevant purposes of sentencing included: the purposes of punishment, retribution, denunciation and individual and general deterrence: at [41]-[42];

(6) Synthesising the objective circumstances of the offence, subjective circumstances of the offender and the relevant purposes of sentencing, the appropriate sentence would be an amount considerably higher than the sentence imposed by the Local Court, in the order of $25,000: at [43];

(7) It would be unfair to vary the sentence by increasing the amount of the fine in circumstances where the prosecutor did not appeal against the leniency of the sentence and the appellant was not warned that the court might impose a more severe sentence: at [44]-[45];

(8) It would not be appropriate to make an order under s 10(1): at [48], [54]; the factors referred to by Mr Pesic, including his good character, age and lack of prior convictions, did not warrant doing so: at [48]; there were no extenuating circumstances proven: at [49]-[52]; a conviction for a breach of

planning law was not considered to put at risk Mr Pesic's motor vehicle repairer's licence or future employment and was not a reason that an order under s 10(1) should be made: at [53]; and

(9) Mr Pesic did not establish that the Court should vary the sentence of the Local Court: at [55].

- **Contempt:**

Georges River Council v Stojanovski (No 2) **[2019] NSWLEC 53** (Sheahan J)

(related decision: *Georges River Council v Stojanovski* [2018] NSWLEC 125 (Pepper J))

Facts: These proceedings concern the alleged breach of orders made by Pepper J in Class 4 proceedings, heard in August 2018. In those proceedings, Pepper J was satisfied that the respondents, in carrying out development work without consent, had breached the *Environmental Planning and Assessment Act 1979* (NSW). Orders were made for the demolition and removal of the illegal works, which consisted of two sheds and a concrete slab. Georges River Council (**Council**) brought the present Notice of Motion (**NOM**) on 30 October 2018, alleging that Mr Steven Stojanovski (**first respondent**) was in contempt of orders of Pepper J. The first respondent was not present for the hearing of that NOM, and Sheahan J granted leave to proceed in his absence. In order to give the first respondent the opportunity to purge the contempt, the Council sought orders for the purpose of remediation, including an order for 'substituted performance" under r 40.8 of the Uniform Civil Procedure Rules 2005 (NSW). The Council had received correspondence from a solicitor who had previously appeared for the first respondent, which advised that the first respondent had made arrangements to have a friend attend to the demolition works, and sought final Consent Orders to dispose of the proceedings.

Issues:

(1) Should the Land and Environment Court make a finding that the first respondent is guilty of contempt;

(2) What were the appropriate orders to be made; and

(3) What were the appropriate orders to be made in respect of costs.

Held: First respondent was guilty of contempt, contravening Pepper J's orders by continuing to use the two sheds without development consent and failing to demolish all unlawfully erected structures on the property; first respondent ordered to demolish all unlawfully erected structures on the property; if the first respondent did not do so, the Council was given the power to enter the property and carry out the demolition of all unlawfully erected structures; first respondent to pay Council's costs incurred for such demolition works; first respondent to pay Council's costs of the NOM on the indemnity basis:

(1) The Council's NOM should not be deferred in light of the late suggestion that a friend of the first respondent was going to attend to the demolition works: at [18];

(2) In light of the first respondent's continued use of the unlawfully erected sheds for a habitable dwelling, and his failure to demolish these sheds, both in contravention of the orders of Pepper J, the first respondent was found guilty of contempt: at [20];

(3) Further ordered that the unlawfully erected structures, including the sheds and the concrete slab, were to be removed within 28 days of the making of this order: at [20];

(4) If the first respondent failed to remove those structures within the 28 days, Council was directed, within 21 days of the end of that period, to enter the property and carry out the demolition of the unlawful structures; the first respondent was to bear the costs of such demolition: at [20]; and

(5) The first respondent was ordered to pay the Council's costs of the NOM on the indemnity basis: at [20].

Hawkesbury City Council v Kara-Ali (No 3) **[2019] NSWLEC 55** (Sheahan J)

(related decisions: *Hawkesbury City Council v Mustapha Kara-Ali* [2018] NSWLEC 105 (Robson J); *Hawkesbury City Council v Kara-Ali (No 2)* [2018] NSWLEC 129 (Sheahan J))

Facts: These contempt proceedings arose from the three defendants' non-compliance with orders made by Sheahan J in the substantive Class 4 Civil Enforcement proceedings in August 2018: see *Hawkesbury City Council v Kara-Ali (No 2)* [2018] NSWLEC 129. Those orders were made in the absence of the three defendants (two individuals, and one a company), and they concerned illegal development and works carried out on land owned by the third defendant, the Company, at Colo. Following an alleged failure to comply with any of those orders, the Council proceeded to charge each of the three defendants with four charges of contempt. When the defendants failed to appear in Court, on multiple dates, to face the 12 contempt charges, Sheahan J issued an arrest warrant on 10 October 2018, and the first and second defendants were arrested on 11 November 2018. Those defendants were granted bail the following day at a mention conducted via video link, and they remained on bail throughout the hearing of this matter.

All three defendants pleaded guilty to all four charges on 23 November 2018, following the engagement of legal representation. The defendants also then took steps to comply with the original orders, and the Court accepted that, by the time the sentencing hearing occurred on 28 February 2019, the defendants had gone a long way towards purging their contempt: at [90].

However, at the time of the sentencing hearing, some issues remained outstanding. In particular, the defendants were yet to submit a landscape plan as required by original order 9(a). In the early stages of the contempt proceedings, the Council had been seeking the imprisonment of the first and second defendants, and the Court referred them for pre-sentence assessment. Imprisonment was not strongly pressed by the Council at the final sentencing hearing.

Issues:

(1) What was the appropriate form of sentence to be imposed;

(2) What was the level of seriousness of the contempt;

(3) What were the relevant subjective factors to be considered in sentencing;

(4) What were the appropriate discounts to be applied for the defendants' guilty pleas; and

(5) What were the appropriate costs orders to be made.

Held: Three defendants convicted of contempt; defendants fined $101,250 in total and ordered to pay Council's cost on the indemnity basis:

(1) Imprisonment must not be imposed until all possible alternatives have been considered, and the Court concludes that no penalty other than imprisonment is appropriate. The most appropriate punishments to be imposed in these proceedings at the time of sentencing were fines: at [100];

(2) The appropriate total fine to be imposed on the three defendants as a group was $125,000, discounted by 10% having regard to the principle of totality, and a further 10% for the defendants' guilty pleas: at [213];

(3) The seriousness of the contempt (of at least the two individual defendants) was found to be "contumacious": at [149];

(4) In considering the discount to be applied for the defendants' guilty pleas, it was noted that the contempt charges came before the Court five times before the defendants had to be compelled to attend Court. Nevertheless, there was some utilitarian benefit in the defendants' guilty pleas and a discount of 10% was applied: at [170];

(5) In considering the applicable subjective factors, no evidence of good character was found. It was not held that the defendants were unlikely to reoffend: at [173]; and

(6) The three defendants were ordered to pay, jointly and severally, the costs incurred by the Council since 27 August 2018, on an indemnity basis: at [213].

- **Civil Enforcement:**

Inner West Council v Balmain Rentals Pty Ltd **[2019] NSWLEC 24** (Robson J)

Facts: Inner West Council (**Council**) sought declaratory and consequential injunctive relief against Balmain Rentals Pty Ltd (**Balmain Rentals**) and Dewkelp Pty Ltd (**Dewkelp**) in relation to the use of the premises known as 89 Fitzroy Street, Marrickville (**premises**) for the purpose of a "vehicle sales or hire premises", contrary to the Marrickville Local Environmental Plan 2011 (**MLEP 2011**). Balmain Rentals is the occupier of the premises and Dewkelp is the registered proprietor of the premises.

The MLEP 2011 Dictionary lists "vehicle sales or hire premises" as a type of "retail premises". "Commercial premises" which are defined to include "retail premises" are prohibited in the IN1 Zone, where the premises are situated.

Section 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) relevantly provides:

> **4.3 Development that is prohibited**
>
> If an environmental planning instrument provides that:
>
> (a) specified development is prohibited on land to which the provision applies, or
>
> …
>
> a person must not carry out the development on the land.
>
> Maximum penalty: Tier 1 monetary penalty.

In 2017, an Order was issued to Dewkelp to cease using the premises for a prohibited purpose within 28 days. The Order was not complied with. In 2018, the Council issued two letters of demand to Balmain Rentals demanding that the unlawful use of the premises cease by a certain date. Neither the first nor the second letter of demand was complied with.

Each respondent filed an appearance submitting to the relief sought against it and an order for costs in favour of the Council in the agreed sum of $15,000.

Issue: Whether it was appropriate in the circumstances to grant the relief sought by the Council.

Held: Council was entitled to the relief sought; order for costs in the agreed sum of $15,000:

(1) The premises were being used for the prohibited purpose of vehicle sales or hire premises and had been so used since about May 2017, in breach of s 4.3(a) of the EP&A Act: at [32]-[33];

(2) The breach of the EP&A Act was continuing despite the conduct of the Council in issuing orders under the EP&A Act and numerous warnings to the respondents. Given that there was agreement between the parties that the declaration should be made, no objection or contradictory evidence was called by the respondents, and the respondents did not offer any material explaining or excusing their conduct, the relief sought was appropriate: at [42];

(3) A number of attempts had been made by the Council to cause the respondents to cease using the premises for a prohibited purpose. Unless restrained, the prohibited use would continue: at [48];

(4) The extensive evidence from surrounding residents as to the amenity impacts being caused by the respondents' conduct made it clear that there was benefit in both making a declaration and granting injunctive relief: at [49]; and

(5) The respondents were ordered to pay the costs of the Council as agreed in the sum of $15,000: at [50].

Tweed Shire Council v Murray Taylor **[2019] NSWLEC 45** (Preston CJ)

Facts: Mr Taylor constructed a treehouse at the edge of his property, partially on land owned by Mr Taylor and his daughter and partially on a Crown road reserve. The building comprised an open-plan living area and bedroom, separate kitchen area, balcony and pathway to a separate building containing a bathroom overlooking the trees. The building was built in and around trees in the forest and attached to three living trees, using chains and bolts.

Mr Taylor used the property as a serviced apartment from October 2016, renting it for short-term visitor and tourist accommodation through Airbnb. The land was zoned RU2 Rural Landscape under the Tweed Local Environmental Plan 2014. Mr Taylor did not have development consent for the construction of the building. The use of the building as a serviced apartment was prohibited in the zone.

On 20 April 2018, Tweed Shire Council (**Council**) gave Mr Taylor a development control order under Pt 9, Div 3 of the *Environmental Planning and Assessment Act 1979* (NSW) directing him to stop using the building as a serviced apartment and to demolish and remove the building. Mr Taylor did not contest that he had been unlawfully using the building as a serviced apartment. He agreed to stop this use by removing the listing from Airbnb and no longer taking any further bookings. However, he wished to honour his remaining advance bookings and so continued to use the building as a serviced apartment until about August 2018. Mr Taylor eventually stopped the unlawful use of the building and removed certain services and facilities. He refused to demolish and remove the building altogether and continued to use it for household storage.

The Council brought civil enforcement proceedings pursuant to s 9.45(1) of the EP&A Act, seeking to remedy or restrain a breach of the EP&A Act. The Council contended that Mr Taylor had breached the EP&A Act by failing to comply with a development control order in breach of s 9.44(b)(v) of the EP&A Act and by carrying out prohibited development in breach of s 4.3 of the EP&A Act.

Mr Taylor contested the demolition of the building. He contended that the building was now used as a "farm shed" and would not require development consent. He submitted that removing the building would cause him undue financial hardship and the Land and Environment Court should exercise its discretion to not order its demolition.

Issues:

(1) Whether Mr Taylor and Ms Taylor had breached the EP&A Act by failing to comply with a development control order or carrying out prohibited development; and

(2) If Mr Taylor and Ms Taylor had breached the EP&A Act, what orders were appropriate to remedy the breach.

Held: Respondents ordered not to use the building for the purpose of a serviced apartment; respondents ordered to demolish and remove the building within three months; respondents to pay applicant's costs of the proceedings:

(1) Mr Taylor's and Ms Taylor's failure to comply with the development control order was a breach of the EP&A Act: at [15]; Mr Taylor and Ms Taylor's erection and use of the building for the purpose of a serviced apartment involved carrying out prohibited developed, which was a breach of the EP&A Act: at [18];

(2) An order for the demolition and removal of the building was appropriate to remedy the breaches of the EP&A Act: at [68]; Mr Taylor was unlikely to remedy the breaches by regularising the unlawful erection and use of the building: at [69]; the Crown did not consent to the erection of the building on the Crown road reserve and had not indicated that it would consent to any future applications that would regularise the use of the building: at [70]; the building was not shown to be structurally sound or comply with any building regulations and a building information certificate would be unlikely to be issued: at [71]-[73]; the building could not lawfully be used for the purpose it was constructed, as serviced apartments were prohibited in the zone: at [74]; it was not shown that the building could be used for any permissible purposes as development consent would depend on the appropriateness of the design and construction of the building and the Council's evidence demonstrated that the building could not meet bushfire regulatory requirements: at [75]; there was no evidence that the building was complying or exempt development: at [77]; the potential to lawfully use the building at some point in the future was slight and highly uncertain: at [78]; and

(3) The inconvenience and cost in demolishing and removing the building would not be excessive or disproportionate to the benefit of remedying the breach of the EP&A Act: at [79].

- **Section 56A Appeals:**

Baron Corporation Pty Limited v Council of the City of Sydney **[2019] NSWLEC 61** (Preston CJ)

(decision under review: *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 1552 (Gray C); related decision: *Bettar v Council of the City of Sydney* [2016] NSWLEC 1456 (O'Neill C))

Facts: On 4 October 2016, the Land and Environment Court granted development consent to Baron Corporation Pty Limited (**Baron**) to erect a seven-storey residential flat building. Baron sought to make alterations to the internal layout of the building, within the approved building envelope. Instead of submitting a modification application to modify the 2016 consent, Baron submitted a new development application seeking consent for "alterations and additions to approved residential flat building".

The alterations included the filling in of internal voids and increasing the number of units in the building. These alterations would cause the building to contravene the floor space ratio (**FSR**) development standard in cl 4.4(2) of the Sydney Local Environmental Plan 2012 (**SLEP 2012**).

Development consent may be granted for development even though it contravenes a development standard, subject to cl 4.6 of SLEP 2012. Clause 4.6(3) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention by demonstrating (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and (b) that there are sufficient environmental planning grounds to justify contravening the development standard. Clause 4.6(4)(a)(i) provides that consent cannot be granted unless the consent authority is satisfied that the written request "adequately addresses" the matters required to be demonstrated by cl 4.6(3).

The Council of the City of Sydney (**Council**) did not determine the development application within the prescribed period and Baron appealed the deemed refusal of consent under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The appeal was heard in the Land and Environment Court by Gray C. At the hearing, the commissioner accepted into evidence an amended written request under cl 4.6 (**request**). The request sought to justify the contravention by demonstrating, inter alia, that it was unnecessary to comply with the development standard as the objectives of the development standard in cl 4.4(1) were achieved notwithstanding the noncompliance.

The commissioner dismissed the appeal as she was not satisfied under cl 4.6(4)(a)(i) that the written request had adequately addressed the matters in cl 4.6(3)(a) or (b). The commissioner was not satisfied that the request demonstrated that objective (b) of the development standard was satisfied. The commissioner also found that the request merely raised the benefits of the project and did not demonstrate that there were sufficient environmental planning grounds justifying the contravention.

Baron appealed the decision pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), on questions of law. In the Summons commencing the appeal, Baron raised a number of errors purported to have occurred in the commissioner's consideration of whether the request adequately addressed the matter in cl 4.6(3)(a). In its written and oral submissions Baron purported to challenge the commissioner's findings relating to cl 4.6(3)(b) but did not amend its Summons to reflect these additional challenges.

Issues:

(1) Whether the commissioner erred in law by:

(a) misconstruing objective (b) of the FSR development standard;

(b) failing to apply the correct test under cl 4.6(4)(a)(ii);

(c) applying the wrong test under cl 4.6(4)(a)(i) by considering whether she was personally satisfied that compliance with the development standard was unreasonable or unnecessary rather than whether the written request adequately addressed that matter;

(d) focusing on the non-compliant element of the development, being the additional floor space added by the development application, when it was not possible to identify any particular element of the development that did not comply with the development standard;

(e) misdirecting herself by proceeding on the basis that a lack of adverse impacts was not a sufficient ground justifying the contravention of the development standard; and

(2) Whether the Court may consider the additional challenge raised in oral and written submissions but not contained within the Summons, being whether the commissioner misdirected herself as to the meaning of environmental planning grounds under cl 4.6(3)(b).

Held: Appeal dismissed; applicant to pay respondent's costs:

(1) The commissioner erred on a question of law in misconstruing objective (b) of the development standard by asking whether the written request demonstrated that the regulation or strategic management of the density of development, built form and land use intensity was maintained, notwithstanding the noncompliance: at [57]-[58]; an individual development could never demonstrate that strategic management was maintained notwithstanding noncompliance with a development standard: at [57]; this error did not vitiate the decision as there was no error demonstrated in the commissioner's findings pursuant to cl 4.6(3)(b): at [59];

(2) The commissioner could not have misdirected herself in applying cl 4.6(4)(a)(ii) as she did not in fact consider, and having regard to her conclusions on cl 4.6(4)(a)(i) did not need to consider, whether she was satisfied as to the matter in cl 4.6(4)(a)(ii): at [66];

(3) It was not shown that the commissioner had in fact applied the wrong test by personally considering whether compliance with the development standard was unreasonable or unnecessary: at [74]; it would not have been an error to form a personal opinion about whether compliance with the development standard was unreasonable or unnecessary provided that this was done to consider the applicant's request and determine whether the request adequately addressed the matters required to be demonstrated by cl 4.6(3): at [75];

(4) The commissioner did not in fact focus on a non-compliant element of the development in considering cl 4.6: at [86];

(5) The commissioner did not in fact find that a lack of adverse impacts was not a sufficient ground justifying the contravention of the development standard: at [95]-[96]; and

(6) The Court's jurisdiction to hear an appeal against a commissioner's decision pursuant to s 56A of the Court Act is limited to addressing the grounds raised in the Summons commencing the appeal: at [100]; in any event, Baron did not establish that the commissioner misdirected herself as to the meaning of environmental planning grounds under cl 4.6(3)(b): at [115].

Council of the City of Sydney v Vision Land Glebe Pty Ltd **[2019] NSWLEC 60** (Preston CJ)

(decision under review: *Vision Land Glebe Pty Ltd v The Council of the City of Sydney* [2019] NSWLEC 1593 (Dixon SC))

Facts: Vision Land Glebe Pty Ltd (**Vision Land**) submitted a concept development application for the approval of an envelope for a residential flat building and the demolition of a purpose-built children's court and remand centre, the Metropolitan Remand Centre (**MRC**). The MRC is a Brutalist architecture style building. It has not received any statutory heritage listing at the state or local level but has been listed as a building of significance by the Australian Institute of Architects (New South Wales Chapter) and the National Trust.

The Council of the City of Sydney (**Council**) did not determine the development application within the prescribed period and Vision Land appealed the deemed refusal of consent under s 97 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) to the Land and Environment Court. The appeal was heard by Dixon SC and concluded on 12 April 2018.

The primary issue in the proceedings was whether the MRC should be demolished. The parties brought competing expert evidence on the heritage significance of the MRC. The Council's heritage expert, Mr Harper, was undertaking research in Brutalist architecture for the purpose of his PhD, was a media advocate for the retention of Brutalist architecture, and had authored the Australian Institute of Architects listing of the MRC. Vision Land's expert, Mr Davies, had no particular connection to Brutalist architecture.

A land economist, Mr Hill, gave expert evidence for Vision Land that there were no economically viable adaptive reuse options available for the MRC. The Council did not cross examine Mr Hill, however submitted that this evidence was irrelevant to the question of whether the MRC should be retained.

On 7 November 2018, the Senior Commissioner (Dixon SC) gave judgment indicating that she proposed to approve the development application provided that Vision Land submitted amended plans responding to her reasons for judgment and the Council provided final conditions of consent. Dixon SC determined that the MRC should be demolished to make way for the proposed residential flat building. In so deciding, Dixon SC accepted the expert assessment of Mr Davies over the evidence of Mr Harper, as in her view it was "more balanced and objective".

On 7 December 2018, Dixon SC granted consent to the concept development application subject to conditions. The Council of the City of Sydney appealed the decision pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), on questions of law.

Issues:

(1) Whether the Senior Commissioner failed to give adequate reasons for determining that the MRC should be demolished, for preferring the expert evidence of Mr Davies over Mr Harper, or for accepting the evidence of Mr Hill that adaptive reuse of the MRC was not economically viable;

(2) Whether the Senior Commissioner's finding that the evidence of Mr Harper was not balanced or objective was irrational, illogical or manifestly unreasonable;

(3) Whether the Senior Commissioner denied the Council procedural fairness by finding that Mr Harper lacked objectivity without that assertion being put to him;

(4) Whether the Senior Commissioner denied the Council procedural fairness by failing to address the Council's submissions as to why the evidence of Mr Hill was not relevant; and

(5) Whether the delay in giving judgment of seven months after the hearing of submissions and nine months after the completion of the evidence denied the Council procedural fairness by diminishing the Senior Commissioner's ability to recall the evidence of the experts and impaired her finding that Mr Harper's evidence lacked objectivity.

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

(1) Where the adequacy of reasons are questioned, the correct inquiry is whether these reasons have reached a minimal acceptable level to constitute a proper exercise of judicial power: at [58]; the minimal acceptable level for the extent and content of the reasons depends on the particular case and matters in issue: at [58]; the duty to give reasons did not require Dixon SC to express findings in respect of every fact leading to, or relevant to, her final conclusions of fact or that she reason from one fact to the next fact along a chain of reasoning to that conclusion: at [62]; it was not an error of law to resolve the competing evidence of the experts by preferring the whole of one expert's evidence to the other: at [62]; Dixon SC's reasons must be viewed in the context of the contentions, evidence and submissions made by the parties: at [69]; it was open to her to prefer the evidence of Mr Davies, and in doing so find that the MRC should be demolished, for the reasons she gave: at [65];

(2) In circumstances where the Council did not call evidence to contest Mr Hill's evidence, cross-examine Mr Hill, and expressly stated in their submissions that the matter of his evidence did not need to "detain the Court", there was no obligation on Dixon SC to give reasons analysing the unchallenged evidence or to expressly address the Council's submissions in her judgment: at [72], [75], [98]-[100];

(3) A primary finding of fact is not reviewable on an appeal under s 56A of the Court Act, which is limited to questions of law, on the ground that it is "irrational, illogical and manifestly unreasonable": at [84]; it is a question of fact and not law whether evidence of a fact ought to be accepted or ought to be sufficient to establish that fact: at [84]; in any event, there was no irrationality, illogicality or manifest unreasonableness in Dixon SC preferring the evidence of Mr Davies over that of Mr Hill: at [89];

(4) Vision Land challenged the objectivity of Mr Harper during cross examination and submissions, putting the Council on notice that the objectivity of Mr Harper was called into question: at [97]; Dixon SC was under no additional obligation to inform the Council that she may accept the submissions of Vision Land: at [97]; and

(5) The Council did not establish that the delay in giving judgment caused Dixon SC to err on a question of law: [118]; no inference can be drawn that the delay in judgment caused her fact-finding and decision-making to be unconsciously affected: [123]; the delay in giving judgment did not diminish her capacity to assess the evidence or the parties' submissions on their evidence: at [131].

***Saffioti v Kiama Municipal Council* [2019] NSWLEC 57** (Preston CJ)

(related decisions: *Saffioti v Kiama Municipal Council* (2017) 225 LGERA 136; [2017] NSWLEC 65 (Molesworth AJ); *Saffioti v Kiama Municipal Council* [2018] NSWLEC 1426 (Chilcott C))

Facts: The applicant, Ms Saffioti, applied for development consent to erect a new dwelling on a different part of land to where an existing dwelling stood. The existing dwelling would be decommissioned and used as an artist's studio.

The land was zoned E2 under the Kiama Local Environmental Plan 2011 (**KLEP 2011**). The erection and use of a building for a dwelling was prohibited in the zone. However, Kiama Municipal Council (**Council**) and the applicant agreed that the use of the existing building on the land as a dwelling was an existing use under s 4.65 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

On 5 June 2017, the Land and Environment Court (**LEC**) determined that the proposed new dwelling was permissible with development consent as an enlargement, expansion or intensification of an existing use under cl 42 of the Environmental Planning and Assessment Regulation 2000 (**EP&A Regulation**).

Ms Saffioti lodged a development application with the Council seeking consent for the erection and use of the new dwelling. The Council failed to determine the application within the prescribed period and Ms Saffioti appealed the deemed refusal of consent to the LEC.

The appeal was heard in the class one jurisdiction of the LEC by Chilcott C. In determining whether to grant consent under s 4.15(1) of the EP&A Act, the commissioner was required to consider KLEP 2011 and the Kiama Development Control Plan 2012 (**KDCP 2012**). The applicant submitted that certain provisions of KLEP 2011, including cl 6.4(4), which concerned impacts on biodiversity, "derogated" from the incorporated provisions in Pt 5 of the EP&A Regulation. The applicant submitted that cl 6.4(4) would therefore have no force or effect due to s 4.67(3) of the EP&A Act.

At the hearing, the applicant requested that the commissioner provide an "amber light approach", by offering her an opportunity to amend her application if the commissioner was not satisfied that it could be approved in its current form.

The commissioner dismissed the appeal. He found that cl 6.4(4) of KLEP 2011 did not derogate from the incorporated provisions and he was not satisfied that the proposed development was designed, sited and managed to avoid, minimise or mitigate any significant adverse environmental impacts on terrestrial biodiversity, as required by cl 6.4(4) of KLEP 2011. He was also not satisfied that the proposed development complied with five controls in KDCP 2012, and found that reasonable alternative solutions were not available that would achieve the objects of the controls under s 4.15(3A)(b) of the EP&A Act.

Ms Saffioti appealed under s 56A of the *Land and Environment Court Act 1979* (NSW) against the decision of the commissioner on questions of law.

Issues:

(1) Whether the commissioner denied the applicant procedural fairness by not providing an "amber light approach" or giving the applicant an opportunity to put forward reasonable alternative solutions;

(2) Whether the commissioner misconstrued and misapplied the word "derogate" in s 4.67(3) of the EP&A Act and wrongly found that cl 6.4(4) of the KLEP 2011 did not derogate or have the effect of derogating from the incorporated provisions in Pt 5 of the EP&A Regulation; and

(3) Whether the commissioner conflated the controls in KLEP 2011 with those in KDCP 2012.

Held: Appeal dismissed; applicants to pay respondent's costs:

(1) The commissioner did not deny the applicant procedural fairness by not offering an "amber light approach": at [25]; there can be no legitimate expectation that an approach with no statutory basis and of questionable legality will be adopted: at [25]; the commissioner was not obliged, by considerations of procedural fairness, to give notice to the applicant that the evidence she had adduced was insufficient to establish the matters required to be established or provide an opportunity to adduce further evidence to overcome these deficiencies: at [26];

(2) The commissioner did not deny the applicant procedural fairness by not offering her an opportunity to put forward reasonable alternative solutions that would achieve the objects of the controls in the KDCP 2012 pursuant to s 4.15(3A) of the EP&A Act: at [27]; The "reasonable alternative solutions" referred to in s 4.15(3A)(b) of the EP&A Act are the alternative solutions embodied in the development that is the subject of the development application: at [27]; the applicant's request at the hearing that the commissioner adopt an "amber light" approach did not give rise to any obligation to invite the applicant to provide further alternative solutions: at [31];

(3) The commissioner did not misconstrue or misapply the word derogate in s 4.67(3) of the EP&A Act: at [63]; the commissioner applied the correct inquiry by asking whether the provisions of cl 6.4(4) served to prohibit the proposed development of enlarging, expanding or intensifying the use of the land: at [62]; there is no entitlement to change an existing use in one or more of the ways permitted by the incorporated provisions: at [69]; the entitlement in the incorporated provisions is to make a development application seeking consent to change an existing use in one or more of the ways permitted and to have a consent authority consider and determine that development application: at [69]; the test is whether a provision derogates from the entitlement to make, and have the consent authority consider and determine, a development application seeking consent to enlarge, expand or intensify the existing use: at [69];

(4) The commissioner was correct to conclude that cl 6.4(4) did not derogate from the incorporated provisions: at [64]; a provision requiring a consent authority to be satisfied, before being able to grant consent to a development, that the development is designed, sited or managed to avoid, minimise or mitigate any significant adverse environmental impact does not derogate from the incorporated provisions: at [64]; the requirements of 6.4(4) could be met in the individual circumstances of a development: at [64]; and

(5) The commissioner did not conflate the controls in KLEP 2011 with those in the KDCP 2012: at [82]; the references of the commissioner to his earlier findings were to the factual findings concerning the impact of the proposed development on the natural environment and not to any earlier legal analysis: at [82].

- **Interlocutory Decisions:**

Environment Protection Authority v Wollondilly Abattoirs Pty Ltd; Environment Protection Authority v Davis **[2019] NSWLEC 26** (Pain J)

Facts: Wollondilly Abattoirs Pty Ltd (**Wollondilly Abattoirs**) pleaded guilty to five charges under s 66(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) of providing false information to the Environment Protection Authority (**EPA**) in relation to its quarterly reports and annual return. The EPA charged Mr Davis with five offences relying on s 169(1) of the POEO Act, a special executive liability provision. Mr Davis had pleaded guilty to all charges. The basis on which Mr Davis was charged under s 169(1) arose from the five charges laid against Wollondilly Abattoirs. Mr Davis was the general manager during the charge periods and was charged under s 169(1) as a person concerned in the management of a company. The EPA wished to adduce evidence in the affidavit of Ms Ward dated 7 August 2018 to the effect that the false records she provided to the EPA were a result of Mr Davis' direction and done with his knowledge. The EPA wished to argue that Mr Davis was knowingly involved in the falsification of the records giving rise to the five charges under s 66(2) against Wollondilly Abattoirs and hence the five charges against him under s 169(1).

Mr Davis submitted that the evidence the EPA sought to have admitted in Ms Ward's affidavit could not be relied on in his sentencing hearing under the principle in *R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31 (***De Simoni***). If the EPA wanted to bring forward this kind of evidence it should have charged Mr Davis under s 169B alleging that he was knowingly concerned in or party to the commission of the corporate offence inter alia, an element of that offence under subs (2)(c). The EPA argued that as part of sentencing Mr Davis under s 169(1) it can adduce evidence proving that his behaviour was fraudulent to establish the objective seriousness of the offence. The maximum penalty for both ss 169 and 169B is the same, $250,000, so that the *De Simoni* principle does not apply.

Issue: Whether the parts of Ms Ward's affidavit that the EPA wished to rely on were admissible in the proceedings against Mr Davis.

Held: EPA could not rely on the disputed parts of Ms Ward's affidavit:

(1) The offence in s 169B is more serious than that in s 169 so that the *De Simoni* principle applied. Although the same maximum penalty of $250,000 applied for both charges, the elements of s 169B are more objectively serious in terms of personal moral culpability given the factors in subs (2)(c). Evidence seeking to prove Mr Davis acted fraudulently which would fall within s 169B(2)(c) is clearly more serious than the elements of s 169(1) of failing to exercise due diligence. Consideration of objective seriousness of the offence is limited to the elements of s 169(1): at [13]; and

(2) Reliance on the contested parts of Ms Ward's affidavit if read would give rise to unfair prejudice to Mr Davis. Absent some statutory provision reversing the onus of proof, a prosecutor must establish matters in contest beyond reasonable doubt. In order to challenge that evidence if read, Mr Davis may have to give evidence concerning matters with which he was not charged. Mr Davis would suffer practical prejudice. If Mr Davis gave evidence on matters relevant to sentencing he runs the risk of being cross-examined about a more serious offence he had not been charged with: at [16].

Goode v Gwydir Shire Council **[2019] NSWLEC 70** (Pepper J)

Facts: Gwydir Shire Council (**Council**) sought to dismiss Mr Goode's Class 1 appeal from the Council's determination of a development application (**DA**) approving a truck wash facility in Warialda. The truck wash facility was not designated development. However, a notification letter sent from the Council to residents erroneously stated that "any person who makes a submission by way of objection, and who is dissatisfied with the determination of the consent authority to grant development may appeal to the Land and Environment Court".

Mr Goode lodged an objection to the DA during the public notification period. The Council approved the DA, and in its Notice of Determination it again erroneously referred to a merits review appeal right for objectors under s 8.8 of *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Mr Goode accordingly lodged a Class 1 appeal in this Court.

Issues:

(1) Whether the proceedings should be dismissed pursuant to r 13.4(1) of the Uniform Civil Procedures Rules 2005 (NSW) or s 31 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**); and

(2) Whether the proceedings should be transformed to the correct class (Class 4) pursuant to s 31 of the Court Act.

Held: Proceedings dismissed; no order for costs:

(1) As Mr Goode was not the applicant to the DA, he did not have a right of appeal in Class 1 of the Court's jurisdiction under s 8.8 of the EP&A Act, and therefore the proceedings should be dismissed: at [17], [24]-[25]; and

(2) The proceedings were not transferred to Class 4 as this was not sought by Mr Goode and to do so would expose him to a potential costs liability: at [31].

Lawrence v Inner West Council **[2019] NSWLEC 46** (Pain J)

Facts: Mr and Mrs Lawrence (**the applicants**) had a complying development certificate to renovate a house including its partial demolition. During the demolition of the house, a retaining wall on land controlled by the respondent the Inner West Council (**Council**) adjoining the applicants' land collapsed onto the substructure of the house. Council officers inspected the property and prepared an inspection report (**Inspection Report**). The Council issued an order (**Order**) under s 124 of the *Local Government Act 1993* (NSW) (**Local Government Act**) requiring the applicants to repair the retaining wall. The applicants appealed against the terms of the Order as provided by s 180 of the Local Government Act in Class 2 proceedings filed on 4 September 2018. The applicants' Notice of Motion (**NOM**) dated 15 February 2019 sought to amend the appeal in the Class 2 proceedings to permit a claim for compensation based on s 181 of the Local Government Act and the transfer of the proceedings from Class 2 to Class 3 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**). Amendments to the Statement of Facts and Contentions (**SOFAC**) to include the Inspection Report were also sought to support the applicants' claim under s 181 of the Local Government Act that the Order was unsubstantiated or the terms of the Order were unreasonable. The applicants argued that there was delay in the Council providing the Inspection Report to them.

Issues:

(1) Whether the applicants' amended application was permitted under s 64 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**) and if so, whether the amendments raised a new claim, requiring leave under s 65 of the Civil Procedure Act; and

(2) Whether at the stage of the proceedings before a substantive hearing of the merits the proposed amendments to the SOFAC (which would limit the matters in issue by relying solely on the Inspection Report) were futile and should be refused.

Held: Applicants' NOM dated 15 February 2019 upheld to the extent that the amended application in Class 3 proceedings could be relied on; applicants may file an amended SOFAC; costs reserved; proceedings stood over to Class 3 List.

(1) The relief sought in the original application included, first (prayer 1), the modification of the Order pursuant to s 180 so that the costs of complying with it would be paid by the Council and, secondly (prayer 2), a claim for compensation for the costs of complying with the Order under s 181 of the Local Government Act. The applicants' NOM sought to amend the original application by deleting prayer 1. The sole claim for relief in the amended application was a claim for compensation under s 181 which is a matter to be determined in Class 3 proceedings as nominated in s 19(d) of the Court Act. That the proceedings were commenced as Class 2 proceedings and would now be transferred to Class 3 was simply a consequence of the operation of the Court Act. A claim under s 181 can be made in the Court in the absence of a challenge to an order under s 180 given the reference in s 181 to "… or otherwise …". The substance of the claim in the proposed amended application remained the same so that the timeframe of three months for commencing an action relying on s 181 was satisfied. There was no substantive difference between the original and the proposed amended application in relation to a claim under s 181. As no new claim, s 64 of the Civil Procedure Act applied and it was unnecessary to engage s 65 as the claim was not out of time: at [49]-[50];

(2) The original SOFAC criticised the reasons for the Order because the collapse of the retaining wall was not caused by the demolition of the house on the applicants' land, rather the collapse of the retaining wall onto the applicants' land caused the remaining house to be substantially damaged so that it required demolition; the poor condition of the retaining wall; and the responsibility for the retaining wall rested with the Council. While not stated explicitly, these matters support arguments about whether the Order was reasonable or unsubstantiated. The proposed amended SOFAC criticised the Inspection Report as being insufficient to issue the Order. The two council officers whose visual observations were relied on were not engineers and lacked relevant qualifications to determine the cause of the retaining wall failing, they did not speak to anyone on the site and the report did not provide any evidence about what caused the retaining wall to fail. There was no basis for the applicants' assertion that the Council had no evidence on which to base the Order and that the Inspection Report lacked relevant content. The applicants could not limit the matters in issue by relying solely on the Inspection Report and avoid relying on expert reports as the proposed amended

SOFAC sought to do. The proposed amendments were futile on their own and the case articulated in the original SOFAC supported the relief sought in the amended application focussing solely on s 181 of the Local Government Act. The Inspection Report could be referred to as part of the background of the matter: at [54]-[58].

Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales **[2019] NSWLEC 18** (Pain J)

(related decision: *Local Democracy Matters Incorporated v Infrastructure New South Wales; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 20 (Pain J))

Facts: The three day hearing of the two judicial review challenges to the Third respondent the Minister for Planning's decision to grant development consent to a concept plan and demolition stage 1 for the Sydney Football Stadium (**SFS**) was completed on Friday, 22 February 2019. Judgment was reserved. At the conclusion of the hearing at 5.00 pm on the third day, both applicants, Local Democracy Matters Incorporated (**LDM**) and Waverley Council (**Council**), were given leave to file in court and briefly argue a Notice of Motion seeking interlocutory orders restraining the fourth respondent, Lendlease Building Pty Ltd (**Lendlease**), from hard demolition work until 8 March 2018. At approximately 6.00 pm on Friday, 22 February 2019, an order was made restraining Lendlease from undertaking hard demolition at the SFS until 4.00 pm on Monday, 22 February 2019 and stood the Notices of Motion over for further hearing. The injunctive order was extended until 10.15 am on Tuesday 23 February 2019. Lendlease filed a submitting appearance. It indicated that it did not oppose the order sought by the applicants. Infrastructure New South Wales (**INSW**), the first respondent, opposed the injunction continuing.

Issue: Whether the applicants' interlocutory injunction should be extended to restrain Lendlease from carrying out demolition pursuant to the development consent other than demolition soft strip until 5.00 pm on Friday, 8 March 2019.

Held: Interlocutory injunction extended; Lendlease restrained from carrying out demolition pursuant to the development consent other than demolition soft strip until 5.00 pm on Friday 8 March 2019:

(1) It was uncontested that there was a serious question to be tried: at [29];

(2) The following factors were relevant to the finding that the balance of convenience favoured the extension of the injunction:

   (a) the period of the injunction sought is short - being until 8 March 2019 a period the parties effectively presumed was the time in which a judgment could be delivered in the substantive proceedings: at [30];

   (b) hard demolition including the loosening of the roof joints and lowering of the roof was imminent: at [31];

   (c) it was unclear that a claim for costs by Lendlease on INSW caused by delay in the project was inevitable and payable: at [32];

   (d) LDM is a community group established to promote democracy in specified local government areas and the Council is an elected local council: at [33]. They gain no benefit directly from the proceedings if successful. The grounds raised by the applicants in the substantive proceedings allege important matters concerning the assessment of the SFS. One ground concerned the adequacy of consideration of design excellence in the concept plan the subject of the consent which is a matter of considerable public importance given the location of the SFS: at [33];

   (e) neither applicant offered to give an undertaking to pay damages: at [4]. In public interest matters the Court does not necessarily require an undertaking as to damages per r 4.2(3) of the Land and Environment Court Rules 2007: at [4]; and

(3) There was no disqualifying delay on the part of the applicants: at [32]. The steps taken before proceedings were commenced appear reasonable given that they are an incorporated community group and an elected council which has to conduct its affairs in an orderly fashion: at [32].

Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales **[2019] NSWLEC 22** (Pain J)

(related decisions: *Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 18 (Pain J); *Local Democracy Matters Incorporated v Infrastructure New South Wales; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 20 (Pain J))

Facts: Final judgment in *Local Democracy Matters Incorporated v Infrastructure New South Wales; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 20 (***Local Democracy Matters Incorporated v Infrastructure New South Wales***) was delivered on 6 March 2019 dismissing the Summons commencing judicial review proceedings filed by Local Democracy Matters Incorporated (**LDM**). At issue in the proceedings was the legal validity of the grant of development consent by the Minister for Planning (**third respondent**) to the Sydney Football Stadium (**SFS**) concept proposal and Stage 1 works on 6 December 2018. LDM was given leave to file in court a Notice of Motion (**NOM**) dated 7 March 2019 which sought, first, a suspension under s 59 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) of final Order 1 made in *Local Democracy Matters Incorporated v Infrastructure New South Wales* dismissing the Summons and, second, an order restraining further hard demolition work until 5.00 pm on Monday 11 March 2019. A Notice of Appeal was filed by LDM's solicitor in the afternoon on 7 March 2019.

The contract between the first respondent, Infrastructure New South Wales (**INSW**), and the fourth respondent, Lendlease Building Pty Ltd (**Lendlease**), was entered into on 7 December 2018 and some demolition work of soft stripping had taken place. The Summons commencing proceedings was filed on 6 February 2019. The expedited hearing was heard on 20-22 February 2019. An interlocutory injunction preventing hard demolition works was made late on 22 February 2019 until 4.00 pm on Monday, 25 February 2019 when more complete argument was heard. A second interlocutory injunction preventing hard demolition by Lendlease until 8 March 2019 or further court order was made on 26 February 2019, see *Local Democracy Matters Incorporated; Waverley Council v Infrastructure New South Wales* [2019] NSWLEC 18 (**injunction judgment**).

Issue: Whether, pursuant to s 59 of the Court Act, final Order 1 made in *Local Democracy Matters Incorporated v Infrastructure New South Wales* should be suspended and an order restraining further hard demolition work until 5.00 pm on Monday, 11 March 2019 should be made.

Held: LDM's NOM dated 7 March 2019 dismissed; Order 1 made in *Local Democracy Matters Incorporated v Infrastructure New South Wales* not suspended; no order restraining further hard demolition work until 5.00 pm on Monday, 11 March 2019 made; costs of NOM dated 7 March 2019 reserved:

(1) LDM submitted that the circumstances in which it sought a stay of a final order and an injunction restraining work for a very short period were little changed from when the second interlocutory injunction with effect until 8 March 2019 or further court order was issued on 26 February 2019: at [14]. These submissions did not recognise that Pain J delivered a final judgment. Importantly, her Honour's decision to grant the interlocutory injunction was based on finding that there was a serious question to be tried. That was no longer the case and that represented an important change of circumstance. That a beneficiary of a judgment should be able to rely on it was an important consideration: at [14];

(2) The identification of reasonably arguable grounds of appeal was relevant. Although a Notice of Appeal was provided, this largely but for one possible matter repeated the judicial review case heard and final judgment had been given. Whether the grounds of appeal were arguable was hard to judge in the absence of any submissions identifying argument. This matter could be more satisfactorily considered by the Court of Appeal: at [15]; and

(3) The interests of the parties and the hardship and inconvenience caused to the successful parties must be fairly adjusted per *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685. A claim under the contract between INSW and Lendlease of $46,000 per day (although that evidence was disputed) was possible. While significant financial burden would not be incurred by INSW in the context of the overall cost of the SFS redevelopment project if a claim was ultimately made by Lendlease, the amount of any potential claim would accumulate the longer hard demolition work was

restrained. As final judgment had been delivered, the absence of an undertaking to pay damages was relevant in considering the parties' respective interests: at [16]-[17].

Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council **[2019] NSWLEC 28** (Sheahan J)

Facts: This judgment concerns various Notices of Motion (**NsOM**) which sought to have set aside Notices to Produce (**Notice to Produce**) and subpoenas (together, **disclosure documents**) which had been issued by both parties.

The substantive proceedings are Class 3 "categorisation" appeals, and the applicant is challenging the Council's deemed refusal of an application to change the categorisation of two parcels of land, for rating purposes, from "mining" to "farmland". The applicant contends that the Council is seeking to characterise parcels of land, which are owned by a mining company, although not actually used for mining, as falling within the "mining" category. The applicant contends its actual use is for "farmland". Accordingly, the only factual issue to be tried in the substantive proceedings is whether the dominant use was for a coal mine, or did it include being held for any mining purpose.

Argument was heard on 7 December 2018, on a Notice of Motion (**NOM**) filed by the Council on 2 October 2018, which sought to have set aside disclosure documents issued by the applicant and directed to the respondent Council and two neighbouring councils. Another NOM, filed by the applicant on 19 November 2018, sought leave to amend those disclosure documents so as to narrow their scope. Subsequently, argument was heard on 5 February 2019, on a NOM filed by the applicant on 4 December 2018, which sought to challenge a Notice to Produce issued to the applicant by the Council, as well as a subpoena issued by the Council to a third party company.

In moving the Court to have set aside the respective disclosure documents, both parties made similar submissions on whether the disclosure documents were too broad, and that the parties had "cast their nets too widely".

This judgment addresses all three NsOM.

Issues:

(1) Whether the applicant's NOM seeking leave to narrow the scope of documents requested should be upheld; and

(2) Whether each party's NOM, seeking to have set aside the disclosure documents, should be upheld.

Held: Applicant's NOM dated 19 November 2018, which sought to narrow the scope of their disclosure documents, was upheld. Council's NOM dated 2 October 2018 and the applicant's NOM dated 4 December 2018, which sought to have the respective disclosure documents set aside, were dismissed:

(1) Sheahan J's lengthy analysis of the relevant principles, in *Young v King (No 3)* [2012] NSWLEC 42 had been applied by His Honour in cases such as *Alexandria Landfill Pty Ltd v Roads and Maritime Services; Boiling Pty Limited v Roads and Maritime Services (No 3)* [2017] NSWLEC 183, and most recently in *Gaudioso v Roads and Maritime Services* [2019] NSWLEC 10 (***Gaudioso***), and had never been challenged, so His Honour applied it again in this case: at [33]- [36]. The Court accepted that these principles were satisfied in the present case: at [45].

(2) Each party's justifications as to why they sought the nominated documents were accepted: at [43].

(3) The applicant's narrowing of their disclosure documents rendered them in an acceptable form, in circumstances similar to *Gaudioso*: at [44].

Michael Ryan v Joint Regional Planning Panel **[2019] NSWLEC 21** (Robson J)

Facts: In January 2019, Michael Ryan (**applicant**) commenced proceedings against the Joint Regional Planning Panel (**first respondent**), Lismore City Council (**second respondent**), and Winten (No 12) Pty Ltd (**third respondent**) seeking declaratory and injunctive relief in relation to development consent granted by the Northern Regional Planning Panel (**consent**).

The consent relates to development comprising the subdivision of land at North Lismore to create 390 residential allotments, a local centre allotment, open space, and areas for environmental management.

In an Amended Summons filed in February 2019, W A Sexton (**fourth respondent**) and Glorbill Pty Ltd (**fifth respondent**) were added to the proceedings. The applicant sought, inter alia, an urgent interlocutory injunction restraining the second, third, fourth and fifth respondents from undertaking activity which relied upon the authority of the consent.

The only matter the subject of evidence and submissions, and the only basis upon which interlocutory injunctive relief was sought, related to Aboriginal cultural heritage. The applicant contended that the first respondent, in reaching its decision to grant the consent, relied upon the North Lismore Plateau Aboriginal Cultural Heritage Assessment Report 2018 in circumstances where the preparation of that report either failed to comply with the Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales 2010 or failed to regard to the accepted methodology for undertaking such assessments contained in the Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010.

Issue: Whether interlocutory relief should be granted.

Held: Notice of Motion for interlocutory relief dismissed; costs reserved:

(1) There was a serious question to be tried; however, there were concerns as to the relative strength of the applicant's case on the material before the Court: at [19], [34];

(2) The following matters could be determined at final hearing:

(a) the applicant's concerns that the registered Aboriginal parties who were consulted and involved in various consultations were either not present at relevant times and/or had no proper knowledge of the plateau: at [32], [41];

(b) the applicant's concerns in relation to irreparable damage caused by the commencement of the work, a lack of ongoing monitoring, and concerns relating to an inferred grave and stone walls: at [34]-[35], [37];

(c) the appropriateness or otherwise of the recommendations contained in the cultural assessment reports which acknowledged that the proposed development could damage matters of significant cultural heritage: at [38]-[39]; and

(d) the applicant's concern that the consideration given to his concerns and the manner in which they had been ventilated were not to his satisfaction: at [41].

(3) It was not appropriate to grant the interlocutory relief sought given the background material, the nature of the works to be conducted in the first 10 to 12 weeks, and the works program for the relevant precinct: at [43]; and

(4) Not granting the interlocutory relief and providing directions for a relatively expeditious hearing was held to balance the legitimate interests of all parties: at [43].

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

Facts: Sell & Parker Pty Ltd (**Sell & Parker**), the operator of a metal recycling facility, was granted development consent to expand the size and capacity of the facility subject to conditions. The conditions included:

A7. The applicant shall not receive or process on the site more than 350,000 tonnes per calendar year of waste, subject to Condition A8.

A8. Despite Condition A7, the applicant shall not receive or process on the site more than 90,000 tonnes per calendar year of waste (on a weekly pro rata basis) until:

a) The Emissions Collection System for the hammer mill has been commissioned in accordance with Condition B20 and approved by the Secretary for operation; and

b) A Final Occupation Certificate has been issued for the Development.

The Secretary, Department of Planning and Environment (**prosecutor**) filed two Amended Summonses alleging that Sell & Parker committed offences against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) by carrying out development between 26 May and 31 December 2016 (**first charge period**) and 1 January and 22 October 2017 (**second charge period**) otherwise than in accordance with a development consent, contrary to s 76A(1)(b) of the EP&A Act.

Each Summons relevantly contained particulars in the following terms (specifying different time periods):

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

Each Summons annexed Schedule A, a three-column table, containing Sell & Parker's waste data. For each week stipulated in the first column, the amount of waste alleged to have been received was stated in the second column, and the corresponding alleged "exceedance of 90,000 limit on weekly pro-rata basis (tonnes)" was stated in the third column. Schedule A also contained data on the number of weeks the weekly pro rata amount was exceeded, being 31 weeks during the first charge period and 42 weeks during the second charge period.

Sell & Parker filed a Notice of Motion in each matter seeking orders that the Amended Summons be struck out and the proceedings be dismissed, and an order for costs.

Issue: Whether the present formulation of the Amended Summonses was duplicitous.

Held: In each proceeding, the Summons was duplicitous and directions were given to allow the prosecutor to make an application to amend the Summons further; costs were reserved:

(1) While the prosecutor submitted that the weekly exceedances showed that the single offence was part of Sell & Parker's continuing course of conduct to receive waste in excess of the prescribed annual limit in 2016 and 2017, the material in each of the schedules, being explicitly and necessarily incorporated into the particulars of the offences charged, did not, on its face, accord with this contention: at [48];

(2) Properly construed, the charges as pleaded related to discrete breaches on each week condition A8 was contravened: at [53];

(3) The present formulation of each of the Summonses was duplicitous and Sell & Parker was entitled to know the particular offences it was called upon to answer: at [54];

(4) No opinion was expressed as to whether an appropriate amendment could be made without injustice to Sell & Parker and/or whether leave should be granted to the prosecutor to amend the charges, until an application for leave to amend was made and each of the parties were heard in relation to any such amendments: at [60]; and

(5) The prosecutor was granted the opportunity to seek leave to amend the Summonses: at [61].

Tamworth Regional Council v Johnson **[2019] NSWLEC 32** (Pepper J)

(related case: *Tamworth Regional Council v Johnson (No 2)* [2019] NSWLEC 34 (Pepper J))

Facts: Tamworth Regional Council (**Council**) sought an ex parte interlocutory injunction to restrain Ms Jennifer Johnson (**Ms Johnson**) and her agents from demolishing, disturbing, or removing, in whole or in part, a structure on land owned by her at 24 Northbrook Lane, Manilla (**property**). The property was located on a residential lot within close proximity to a school. The Council alleged that the property was contaminated with friable asbestos. On 20 July 2018, the Council issued a Notice of Clean Up Action under s 91 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) to Ms Johnson (**s 91 Notice**). The s 91 Notice required Ms Johnson to clean up the property urgently because the property had been damaged in 2011 by a fire and much of the bonded asbestos had been reduced to

friable asbestos. Because Ms Johnson had not complied with the s 91 Notice, the Council erected a fence around the property in order to carry out the remediation works itself at some point. On 21 March 2019, a council officer, Mr Ross Briggs, attended the site and observed that Ms Johnson and others had entered the property and were removing material, including material potentially contaminated by asbestos. On 22 March 2019, a council ranger attempted to notify Ms Johnson about the likely application for an interlocutory injunction but was not successful in doing so.

Issues: Whether the Court should grant an ex parte interlocutory injunction.

Held: Injunction granted:

(1) **T**here was a serious question to be tried because of Ms Johnson's failure to comply with the s 91 Notice, which constituted a potential breach of s 91 of the POEO Act: at [27];

(2) The balance of convenience favoured the granting of the injunction for a short period of time so that Ms Johnson could, if she chose, have the opportunity to be heard: at [30]; and

(3) The evidence indicated that immediate action was required to minimise or prevent any further harm occurring because of the location of the property in a residential area and its proximity to a school: at [28]. The Council had given the usual undertaking as to damages: at [29].

Tamworth Regional Council v Johnson (No 2) [2019] NSWLEC 34 (Justice Pepper)

(related decision: *Tamworth Regional Council v Johnson* [2019] NSWLEC 32 (Justice Pepper))

Facts: Tamworth Regional Council (**Council**) sought an extension of the injunction granted in *Tamworth Regional Council v Johnson* [2019] NSWLEC 32 (***Tamworth***) for an additional two days. The purpose of the extension was to permit demolition and remediation works (**works**) to be completed at 24 Northbrook Lane, Manilla (**property**) by the Council as required by the s 91 Notice (see *Tamworth* case summary above). It was necessary to consider whether the s 91 Notice had been properly served on the owner of the property, Ms Jennifer Johnson (who disputed having received it), and whether the Council had the power to enter onto the property to carry out the works.

The Council had served Ms Johnson by e-mail. Ms Johnson gave oral evidence that she did not recall receiving the s 91 Notice and that she had difficulty opening attachments to e-mails. The Council tendered evidence of a number of e-mails between itself and Ms Johnson (and her advisers), which demonstrated that the e-mail address in use by Ms Johnson at the time the s 91 Notice and letter serving the s 91 Notice were sent, was the e-mail address to which those documents were sent. There was also evidence that a Council officer had spoken with Ms Johnson by telephone about the "clean-up order".

Issues:

(1) Whether service of the s 91 Notice was effected,

(2) Whether the Council had the power to enter the property to carry out demolition and remediation works; and

(3) Whether the Court should grant an extension of the injunction granted in *Tamworth*.

Held: Extension to injunction granted:

(1) In accordance with s 321(1)(e) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), the s 91 Notice had been e-mailed to Ms Johnson in accordance with arrangements indicated by her as appropriate for transmitting documents: at [14]; Ms Johnson received the s 91 Notice and was aware of its contents: at [15];

(2) As the Council is a "public authority" and the s 91 Notice was not complied with by Ms Johnson, Council was therefore authorised by s 92 of the POEO Act to enter the property and carry out the works: at [18];

(3) There was a serious question to be tried, for the same reasons as those given in *Tamworth*: at [21]; and

(4) The balance of convenience also favoured the granting of a further extension, for the same reasons as those given in *Tamworth*: at [22].

***UTSG Pty Ltd v Sydney Metro (No 3)* [2019] NSWLEC 49** (Pepper J)

(related decisions: *UTSG Pty Ltd v Sydney Metro*[2018] NSWLEC 128 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 2)* [2018] NSWLEC 199 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 4)* [2019] NSWLEC 51 (Pepper J))

Facts: The respondent, Sydney Metro, objected to the tender by the applicant, UTSG Pty Ltd (**UTSG**), of an expert business valuation report by Mr David Mullins dated 29 March 2018 (**Mullins report**), in Class 3 compulsory acquisition proceedings. Sydney Metro objected to the Mullins report on two bases. First, because Mr Mullins had breached rr 31.23, 31.27 and Sch 7 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) by not providing a supplementary report explaining his reasons for continuing to rely upon the Mullins report. He had earlier withdrawn the Mullins report in August 2018. Second, because Mr Mullins had failed to disclose fully the relevant financial materials used by him to calculate the financial loss of UTSG in the Mullins report. On 19 October 2018, Mr Mullins wrote to the director of UTSG, Ms Simran Singh, indicating that he had not received a response to his letter withdrawing the Mullins report. Between 19 October 2018 and 10 April 2019, Mr Mullins and Ms Singh had exchanged correspondence concerning the non-payment of his fees. Mr Mullins and Sydney Metro's business valuation expert, Dr Rodney Ferrier, nonetheless participated in joint conferencing and produced two joint reports dated 29 January and 7 March 2019.

Issue: Whether the Mullins report should be rejected.

Held: The Mullins report was admitted:

(1) The rules of evidence did not apply to Class 3 of the Court's jurisdiction: at [10];

(2) Contrary to r 31.27 and Sch 7 of the UCPR, Mr Mullins had failed to produce a supplementary expert report: at [20]. Unlike r 31.23 of the UCPR, there was no discretion to waive compliance with r 31.27 of the UCPR: at [29]. Notwithstanding the failure to remedy this breach, Ms Singh became legally unrepresented shortly after the Mullins report was withdrawn: at [39]. It was doubtful whether Ms Singh or Mr Mullins were aware of the requirement to obtain or provide a supplementary expert report: at [39];

(3) Notwithstanding deficiencies in the Mullins report regarding the disclosure of documents used to calculate UTSG's financial loss, Mr Mullins could still be cross-examined on the content of his report: at [42]. Further, Dr Ferrier had participated in two joint conferences and had been able to express opinions as to the reliability of UTSG's financial information and on the content of the Mullins report: at [43]; and

(4) It was not appropriate to reject the Mullins report given the fatal consequences to UTSG of doing so and the nature of the breaches of the UCPR (which were not very serious), and because the objections raised by Sydney Metro went to weight and could be addressed in cross-examination: at [45]-[46].

***UTSG Pty Ltd v Sydney Metro (No 4)* [2019] NSWLEC 51** (Pepper J)

(related decisions: *UTSG Pty Ltd v Sydney Metro* [2018] NSWLEC 128 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 2)* [2018] NSWLEC 199 (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 4)* [2019] NSWLEC 49 (Pepper J))

Facts: The respondent, Sydney Metro, objected to the tender by the applicants, UTSG Pty Ltd (**UTSG**), of a forensic accounting report by Mr Gambhir Watts dated 28 November 2018 (**Watts report**) in Class 3 compulsory acquisition proceedings. Sydney Metro argued that the Watts report did not comply with rr 31.23, 31.27 and Sch 7 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). The Watts report was prepared in response to an expert report of Mr Luke Howman-Giles of KPMG dated 16 August 2018, prepared for Sydney Metro (**KPMG report**). Mr Watts had previously been engaged by UTSG to provide accounting services to it.

Issue: Whether the Watts report should be rejected.

Held: The Watts report was rejected:

(1) The rules of evidence did not apply to Class 3 of the Court's jurisdiction: at [14];

(2) Mr Watts was obliged to comply with the relevant provisions of the UCPR: at [15];

(3) Contrary to Sch 7 of the UCPR, Mr Watts failed to disclose his investigations and the information that he used to prepare his report: at [25]. The Watts report failed to identify documentary material in a manner which would allow Sydney Metro to test or verify Mr Watts's conclusions: at [27]. The bases for many of Mr Watts's opinions were not explained in the report: at [29], [30], [31] and [36]. These matters could not be cured by cross-examining Mr Watts because they were incapable of being tested: at [32];

(4) If the Watts report was admitted, no weight could be placed upon it because the report contained serious deficiencies and its probative value was so low: at [33] and [38];

(5) While the rejection of the Watts report was prejudicial to UTSG, it was not fatal to its claim: at [40]. Further, UTSG would have the opportunity to cross-examine Mr Howman-Giles if the KPMG report was successfully tendered: at [40];

(6) Having regard to the contents of the Watts report, and the intemperate and scandalous nature of language used in it together with the unsubstantiated allegations made against Mr Luke Howman-Giles and KPMG, Mr Watts was a biased and partial witness for UTSG: at [46]; and

(7) While Mr Watts's previous dealings with UTSG would not necessarily preclude the admission of his report, the nature and contents of the Watts report strongly suggested that he was incapable of providing impartial expert advice in the proceedings: at [46].

Zhiva Living Dural Pty Ltd v Hornsby Shire Council (No 2) **[2019] NSWLEC 68** (Robson J)

(related decision: *Zhiva Living Dural Pty Ltd v Hornsby Shire Council* [2019] NSWLEC 1222 (Chilcott C))

Facts: The proceedings related to a Notice of Motion for expedition of an appeal under s 56A of the *Land and Environment Court Act 1979* (NSW) from a decision handed down the previous day by Commissioner Chilcott. The commissioner found that the power of the Court to grant consent to the applicant's development application for the demolition of existing structures, earthworks, tree and vegetation removal, and the construction of a seniors housing development had not been enlivened as the jurisdictional pre-conditions within cl 55 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, a clause relating to the provision of a fire sprinkler system at the site, had not been satisfied. While the absence of provision for a fire sprinkler system was not raised in the contentions filed by either party, it was a matter which the commissioner raised during the hearing. The commissioner made this finding notwithstanding the fact that he was furnished with a draft proposed condition and the respondent agreed with the applicant that the inclusion of the condition would be sufficient to ensure the proposed development complied with cl 55.

The Summons commencing the s 56A appeal and the motion for expedition were filed on the same day the commissioner handed down his decision. The applicant sought an order that the s 56A appeal be heard the following day before a judge and, in the event that the appeal was upheld, the applicant sought an order that the matter be remitted to the commissioner for further hearing and determination before 4:00pm the following day. The matter was brought before the Court urgently on the basis that the relevant department issued the applicant with a Site Compatibility Certificate (**certificate**) which was due to expire the day after the motion for expedition was heard.

Issue: Whether expedition of the s 56A appeal should be granted in the circumstances.

Held: Motion for expedition dismissed; matter adjourned:

(1) There were genuine issues raised by the applicant. The prospects of the s 56A appeal were not speculative; and the hearing involved a discrete issue. However, the urgent relief sought in the application was partly, if not wholly, impractical: at [22];

(2) Even if there were available resources to enable the s 56A hearing to progress before a judge that afternoon, and even if that judge was able to provide an appropriately considered judgment, there

was little likelihood that if the appeal was upheld and the matter remitted to the commissioner, that he would be available or in a position to deliver judgment in relation to issues which had clearly not been the subject of consideration in the judgment (and were presumably the subject of various expert reports and some 350 pages of transcript), before the expiration of the Certificate: at [23]-[24];

(3) There was no evidence that another Certificate could not be obtained, particularly in circumstances where an application for another Certificate had been made and was awaiting consideration. The expiration of the Certificate on its own was not a matter that was otherwise determinative: at [26]; and

(4) The motion was dismissed and the s 56A proceedings listed for directions: at [27].

- **Joinder Applications:**

Vella v Penrith City Council **[2019] NSWLEC 62** (Moore J)

Facts: In a development appeal being taken by Mr Vella (**applicant**) against Penrith City Council (**Council**), the New South Wales Department of Education (**Department**) sought by way of a Motion to be joined to the proceedings pursuant to s 8.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). At the time the motion was brought by the Department in the proceedings, the contentions between the applicant and the Council were limited.

The primary matter the Department pressed was that they had not given concurrence for the development with respect to the provisions of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 and the related Child Care Planning Guideline. Specifically, that instead of limiting the number of children that would be permitted outside at any one time, (which was the Council's position) that the Department proposed to contend the full amount of space should be made available.

At the same time, the applicant brought a motion to be given leave to rely on amended plans, which was granted without objection.

Issues: Whether New South Wales Department of Education should be joined as a party in the proceedings.

Held: Applicant given leave to rely on amended plans; applicant to pay costs of first respondent as a result of costs thrown away on amended plans and New South Wales Department of Education joined as a party in the proceedings:

(1) Although s 64(1) of the *Land and Environment Court Act 1979* (NSW) gave the Crown the right to appear and be heard, this meant that those matters upon which the Crown would propose to rely will be able to be ventilated in a full sense before the commissioner to whom the matter has been assigned: at [14]. In the current circumstances, where there is a broad public interest policy issue proposed to be addressed by the Department of Education, pursuant to s 8.15 of the EP&A Act, it was appropriate to join the Department as a party to the proceedings: at [19]-[20].

- **Costs:**

Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd (No 2) **[2019] NSWLEC 67** (Robson J)

(related decision: *Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd* [2018] NSWLEC 145 (Robson J))

Facts: The defendants were charged with offences pursuant to s 125 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Each charge arose from the same incident and related to the

erection of a mosque in 2014 with development consent, but without a construction certificate. Two Class 5 Summonses were brought in respect of each defendant, one relying on s 125(1) of the EP&A Act (**s 125(1) Summonses**) and the other relying on s 125(3A) of the EP&A Act (**s 125(3A) Summonses**).

The date at which s 125(3A) of the EP&A Act came into force was 31 July 2015, after the date on which it was alleged the offences were committed. For this reason, the charges relying on s 125(3A) could not be maintained, but the s 125(3A) Summonses remained on foot at the outset of the hearing with the possibility that they might be repleaded. A contention with respect to duplicity was not pressed and the s 125(3A) Summonses were dismissed by consent on the first day of hearing. The s 125(1) Summonses were subsequently dismissed as they were commenced out of time. The question of costs was reserved in both proceedings.

Each of the successful defendants sought costs orders against the prosecutor pursuant to s 257C of the *Criminal Procedure Act 1986* (NSW) (**Civil Procedure Act**) on an indemnity basis, or in the alternative on the ordinary basis.

Issues:

(1) Whether the Court was satisfied in relation to each or any of subpars (a)-(d) in s 257D(1) of the Civil Procedure Act so as to justify an order for costs against the prosecutor; and

(2) Whether the Court had power to award costs on an indemnity basis in Class 5 proceedings and if so, whether such an order was justified in the circumstances.

Held: Defendants' application for costs in relation to the s 125(1) Summonses was dismissed with no order for costs; prosecutor ordered to pay the defendants' costs in respect of the s 125(3A) Summonses on the ordinary basis, including 50% of the costs incurred in the costs application:

(1) On a purely objective basis and noting that the Court was not required to find that the investigation fell "grossly below optimum standards", and accepting that there could have been matters which may have resulted in an earlier determination, the Court was not satisfied that Council's investigation into the alleged offences contained in the s 125(1) Summonses (and relevantly the s 125(3A) Summonses) was conducted in an unreasonable or improper manner: at [44];

(2) The s 125(3A) Summonses were maintained by the prosecutor as it was contended by the defendants that the s 125(1) Summonses were duplicitous (because each Summons charged the respective defendant with the offence as principal and, in the alternate, as an accessory). This was not reasonable either on the basis of the investigation of the offences or any relevant matter: at [58];

(3) In considering whether the s 125(3A) proceedings were instituted "without reasonable cause", held that there was no substantial prospect of success in proceedings based upon a section that was inoperative at the relevant time: at [58];

(4) In seeking the advice of senior counsel when it became aware of a likely concern as to the expiration of time for the commencement of the proceedings, the Council could not be said to have initiated the s 125(1) proceedings without reasonable cause: at [63];

(5) The Court did not find that the s 125(1) proceedings were conducted in an improper manner: at [65];

(6) The Court was not satisfied that had the enquiries suggested by the defendants been undertaken and greater detail elicited from Council officers at an earlier stage, it would have indicated to the prosecutor that proceedings should not have been brought given the prosecutor's reliance on senior counsel's advice which indicated that time to commence proceedings did not run until the identity of the defendants became known: at [79];

(7) The prosecutor's conduct in maintaining the s 125(3A) Summonses which included offences not known to law would also amount to an "exceptional circumstance", thereby making it just and reasonable to award professional costs in those proceedings: at [87];

(8) The Court retained a residual discretion not to order costs even if satisfied in relation to one or more of the matters referred to in s 257D(1). However, in light of the aforementioned findings, it found no reason not to award costs in the s 125(3A) proceedings: at [89];

(9) The Court did not have power to award indemnity costs. Even if it did, an award for costs in respect of the s 125(3A) Summonses on an indemnity basis would not have been appropriate in the circumstances: at [91], [103]; and

(10)In circumstances where the s 125(1) proceedings and the s 125(3A) proceedings proceeded concurrently with evidence in one being evidence in the other, and, in the interests of justice, that it was reasonable to award the defendants 50% of the costs of the costs application: at [112].

Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 4) **[2019] NSWLEC 56** (Robson J)

(related decisions: *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2017] NSWLEC 184 (Preston CJ); *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 2)* [2018] NSWLEC 53 (Robson J); *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3)* [2018] NSWLEC 193 (Robson J))

Facts: On 30 November 2018, a Class 4 Summons filed by Muswellbrook Shire Council (**Council**) in relation to the Mt Arthur Coal Rehabilitation Strategy prepared by Hunter Valley Energy Coal Pty Ltd (**first respondent**) and approved by the Secretary, Department of Planning and Environment (**second respondent**) was dismissed and Council was ordered to pay the costs of the first and second respondents unless an alternative order was sought within 28 days.

On 20 December 2018, Council filed submissions seeking an order that each party bear its or her own costs. Council submitted that the Court should exercise its discretion under r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) to decline to make an order for costs against it as the proceedings were brought in the public interest. Each respondent filed separate submissions seeking an order that Council pay their costs as there was no reason to depart from the ordinary rule that costs follow the event.

Issue: Whether the proceedings were brought in the public interest and warranted the exercise of the Court's discretion to relieve Council of its obligation to pay costs.

Held: Applicant to pay the costs of first and second respondents, including the costs incurred in addressing the application for costs:

(1) The Court considered and adopted the three-step approach of Preston CJ of LEC in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59 to determine whether or not the proceedings were brought in the public interest: at [56];

(2) In characterising the proceedings:

   (a) while the proceedings concerned a condition of a project approval that related to the rehabilitation of a sizeable area of land disturbed by coal mining, this matter was not determinative of the public interest. The gravamen of the proceedings was whether the first respondent had jurisdiction to be satisfied that the rehabilitation strategy complied with the relevant condition: at [58];

   (b) while there could be little doubt that Council was motivated to commence proceedings as it harboured a genuine concern that the rehabilitation of the mine was not being conducted appropriately, this was not sufficient, either on its own or in combination with the other considerations, given the Court's findings regarding the essential nature of the proceedings (ie the construction of a condition of approval in relation to a rehabilitation strategy): at [60];

   (c) in light of the above, it was doubtful that the proceedings could properly be characterised as public interest proceedings: at [62];

(3) Even if Council established that the proceedings were public interest proceedings, the Council had not established that there was 'something more" justifying a departure from the general rule: at [65];

(4) Council was not seeking to vindicate rights of a commercial character, it did not have a financial interest in the outcome of the litigation, it did not unreasonably pursue or persist with points that lacked merit, and it did not otherwise conduct itself in a manner that could be considered disentitling in the "countervailing sense": at [67]-[68];

(5) The second respondent's participation was consistent with the *Hardiman* principle and she did not conduct herself in a manner which warranted a departure from the usual rule: at [72]; and

(6) The public interest in the determination of a "relatively discrete point of interpretation" was not of "such moment or magnitude" as to warrant the exercise of the Court's discretion to relieve Council of its obligation to pay costs: at [73].

Randren House Pty Ltd v Water Administration Ministerial Corporation (No 5) **[2019] NSWLEC 63** (Molesworth AJ)

(related decision: *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)* [2019] NSWLEC 5 (Molesworth AJ))

Facts: The primary judgment for this matter was *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)* (**primary proceedings**), a Class 4 judicial review brought by Randren House Pty Ltd (**applicant**) against the Water Administration Ministerial Corporation (**respondent**) regarding a water licence the applicant held under s 50 of the *Water Management Act 2000* (NSW). Order 8 in the primary proceedings reserved the costs of the overall proceedings, which is the subject of these proceedings, other costs orders regarding interlocutory matters were issued in Orders 2 and 4 in the primary proceedings. The applicant submitted that the primary proceedings were brought in the public interest. The respondent argued that the ordinary rule that costs following the event should apply as they were entirely successful in the primary proceedings. The respondent further submitted that the applicant should pay the respondents' costs on an indemnity basis under s 98 of the *Civil Procedure Act 2005* (NSW), either from the commencement of the proceedings; or, alternatively, on an ordinary basis up to and including 21 August 2017, which was the date than the respondent made an Offer of Compromise to the applicant in accordance with r 20.26 of the Uniform Civil Procedure Rules 2005 (NSW), and on an indemnity basis after that.

Issues: What costs order should be made and on what basis.

Held: Applicant to pay the costs of respondents up to and including 21 August 2017, on an ordinary basis; save for Orders 2 and 4, applicants to pay the costs of respondents incurred after 21 August 2017 on the indemnity basis; applicant to pay the costs of respondents incurred in addressing the applications for costs on an ordinary basis:

(1) The proceedings were not ones that could be characterised as being public interest ones. They were clearly brought for the private benefit of the applicant. Further, no novel point of construction was addressed in the proceedings. The applicant failed to satisfy the onus resting with them to convince the Court that there was justification to disturb the usual practice of ordering that the costs of the successful party be awarded: at [37];

(2) The applicant could not argue the Offer of Compromise by the respondent was unreasonable as it responded to the Offer by serving their own Offer of Compromise in return: at [49]; and

(3) The applicant engaged in unacceptable conduct, this conduct overlapped with the period that the respondent made the Offer of Compromise. As a consequence, it was apt for the award of indemnity costs to be ordered in the proceedings: at [70].

Waverley Council v Bobolas (No 4) **[2019] NSWLEC 25** (Pain J)

(related decision: *Waverley Council v Bobolas (No 3)* [2018] NSWLEC 208 (Pain J))

Facts: By Notice of Motion (**NOM**) dated 2 January 2019, the second and third respondents (**respondents**) sought orders varying a costs order made by Pain J on 19 December 2018 that the respondents pay Waverley Council's (**Council**) costs of the NOM dated 11 December 2018. This order was made because the respondents were unsuccessful in obtaining an extension of time of earlier orders concerning the removal of waste material from premises in Waverley within a specified timeframe.

Issues: Whether the following variations to the costs order made on 19 December 2018 should be made:

(1) That the costs be "as agreed or assessed" per r 36.17 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) (**slip rule**); and

(2) Applying r 36.16(2)(b) of the UCPR (power to set aside or vary a judgment or order if given or made in the absence of a party), that:

(a) costs be limited to the payment of a junior barrister only. The NOM was not complex and therefore the presence of a senior counsel, junior counsel and solicitor was not necessary;

(b) the costs for the preparation of an affidavit of Mr Schilt, a council officer, on 19 December 2019 in the amount of two hours should not be paid under the costs order; and

(c) in the alternative to the above, a different costs order be made altogether that each party pay its own costs.

Held: Order made on 19 December 2019 varied by the insertion of "as agreed or assessed" to read, "The Second and Third Respondents are to pay the Council's costs of the NOM dated 11 December 2018 as agreed or assessed"; Council's costs incurred from the commencement of the hearing of the respondents' NOM dated 2 January 2019 at 12.15 pm on 8 March 2019, as agreed or assessed, are to be paid by respondents:

(1) *Rule 36.17 (slip rule) applied* - the first variation sought "as agreed or assessed" is unnecessary, the original order has the same effect as if the words were included: at [7]. The order as it stands permits the payment of costs on the ordinary basis if assessed and parties can always negotiate. An order does not need to explicitly state that. Notwithstanding this, the amendment can be made under r 36.17 of the UCPR: at [7]; and

(2) *No basis established for applying r 36.16 to vary order* - the respondents were not in court when judgment was delivered and orders were made on 19 December 2019: at [9]. Rule 36.16(2)(b) could apply as the NOM was filed on 2 January 2019 which was within 14 days of the order being entered as required by r 36.16(3A). All variations to the costs order sought by the respondents were rejected: at [9]:

(a) the hearing of the NOM on 14 December 2019 cannot be described as sufficiently straightforward to warrant limiting costs to payment of a junior barrister only: at [10];

(b) the preparation of Mr Schilt's affidavit was necessary to respond to additional material the respondents sought to rely on about which there was no notice given to the Council: at [11]. Further the respondents were given the choice to have the matter proceed that day with Mr Schilt either giving oral evidence or preparing a short affidavit that day to give the respondents notice of what he said or adjourning their motion to the following week to enable Mr Schilt to swear an affidavit and give them further time to consider it. The respondents chose to have Mr Schilt provide an affidavit which was dealt with on the day: at [11]; and

(c) no basis to set aside the costs order was otherwise demonstrated: at [15].

- **Merit Decisions (Judges):**

***Whitehall Property Services Pty Limited v Randwick City Council* [2019] NSWLEC 19** (Pain J)

Facts: The applicant Whitehall Property Services Pty Limited appealed pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the deemed refusal by Randwick City Council (**Council**) of development consent for a digital static advertising sign on the side wall of a nine-storey building fronting Anzac Parade at Kingsford. The proposed sign would have a dwell time of 24 hours with an 18 month trial period for a dwell time of 60 seconds. The Roads and Maritime Services (**RMS**) provided concurrence as required by cl 18 of State Environmental Planning Policy No 64 - Advertising and Signage (**SEPP 64**) since the proposed sign was within 250 metres of a classified road and would be visible from the classified road. Under cl 13(2) of SEPP 64 a consent authority must not grant consent to an application for an advertisement unless it is consistent with the objectives of SEPP 64, has been assessed in accordance with the assessment criteria in Sch 1 and the consent authority is satisfied that the proposal is acceptable in terms of its impacts and satisfies any other relevant requirements of SEPP 64.

Issues:

(1) Was cl 13(2) of SEPP 64 complied with:

(a) whether the proposed sign was inconsistent with cl 3(1)(a)(i) of SEPP 64 (an aim of SEPP 64 is to ensure that signage is compatible with the desired amenity and visual character of an area) and failed to satisfy the required Sch 1 assessment as it failed inter alia to comply with the existing and desired future character of the locality;

(b) whether the proposed sign was inconsistent with cl 3(1)(e) of SEPP 64 because it was not in the public interest as it would set an undesirable precedent for future development in the locality; and

(2) Whether various controls in Pt F2 of the Randwick Comprehensive Development Control Plan 2013 (**RDCP 2013**) prohibited the proposed sign.

Held: Appeal dismissed:

(1) The proposal was unacceptable in terms of its impact per cl 13(2)(b) of SEPP 64 due to the following Sch 1 assessment:

(a) *Existing and desired future character of area* - the Council's expert planner's assessment of the character of the Kingsford Centre (**Centre**) reflected its dual nature as both a commercial and retail centre up to two storeys in height with shop top development fronting Anzac Parade and a residential area. The proposal represented a significant intrusion into the higher residential zone as it would sit well above the existing large amount of signage. Further, the Draft Planning Strategy Kensington and Kingsford Town Centres envisaged a continuation of the Centre as a mixed commercial and retail zone with residential uses. The proposed sign was not compatible with the current and desired future character of the Centre: at [55]-[56];

(b) *Views and vistas* - the proposed sign would be very noticeable to pedestrians from several locations at street level on the eastern and western sides of Anzac Parade. It would be the only advertisement at that high level in a dominant position. It would be substantial in size (albeit complying with the dimensions specified in SEPP 64): at [58];

(c) *Streetscape and setting* - the sign would add to visual clutter as it would introduce a large wall sign in a dominant location where presently there is no advertising signage. It would not result in the rationalisation and simplification of existing advertising: at [59];

(d) *Site and building* - this factor was neutral given the blank and unattractive wall that was proposed for the wall advertisement: at [60];

(2) As apparent during the view there were two other side facing blank walls on the same side of Anzac Parade in the Centre which could potentially be the subject of a similar application. It was difficult to assess the likelihood of concurrence to these by the RMS. One side wall near the five way Anzac Parade/Bunnerong Road intersection has a view line to a possible advertisement through traffic lights. In any event, the potential for future applications for similar types of wall advertisements existed and this application represented an undesirable precedent if approved: at [69]; and

(3) SEPP 64 prevails to the extent of any inconsistency with an environmental planning instrument (**EPI**) by virtue of cl 7 of SEPP 64 and s 3.28(1)(a) of the EP&A Act. A development control plan is not an EPI as defined in s 1.4 of the EP&A Act. While the RDCP 2013 applies to the extent it is not inconsistent with SEPP 64 in light of s 4.15 of the EP&A Act, SEPP 64 is the primary planning document controlling the proposed sign. The RDCP 2013 controls cannot prohibit what is otherwise permitted by SEPP 64: at [68].

- **Merit Decisions (Commissioners):**

Australian Nursing Home Foundation Limited v Ku-ring-gai Council **[2019] NSWLEC 1205** (Dixon SC)

Facts: This was an appeal by Australian Nursing Home Foundation Limited (**applicant**) against Ku-ring-gai Council's (**respondent**) refusal to grant consent to a development application (**DA 0418/15**) for the

construction of a residential aged care facility for 84 "high care" residents on land at 25, 25A and 27 Bushlands Avenue, Gordon (**site**).

The respondent refused the application on three grounds. First, the respondent submitted that the proposed development was prohibited because part of the site is mapped "biodiversity" which is a "like description" for the expression "conservation" or "environment protection" and therefore does not apply under Sch 1 of the State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (**Housing for Seniors SEPP**), rendering the portion of the site identified as "biodiversity" prohibited under the Housing for Seniors SEPP.

Second, the respondent contended that the proposed development was prohibited under cl 26 of the Housing for Seniors SEPP because the development did not satisfy the requirements of the clause which is a prohibition and therefore not amenable to variation under cl 4.6 of the Ku-ring-gai Council Local Environmental Plan 2015 (**KLEP 2015**).

Pursuant to cl 26 of the Housing for Seniors SEPP, a consent authority must not consent to a development application made pursuant to Ch 3 unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access to facilities and services referred to in subcl (1) that are located at a distance of not more than 400 meters from the site.

The respondent submitted that the applicant cannot rely on cl 4.6 in this case to vary cl 26 of the Housing for Seniors SEPP because the provision operates as a location criteria and, in effect, is a prohibition. However, the applicant contended that irrespective of whether cl 26 operates as a prohibition or as a development standard, the facilities and services referred to in subcl (1) are located at a distance of not more than 400 metres from the site of the proposed development because they would be on site.

Third, the respondent contended that the proposed development would have unacceptable adverse impacts on the local heritage item, "Birralee", and therefore the application was prohibited by its contravention of cll 32 and 33 of the Housing for Seniors SEPP.

Issues:

(1) Whether the proposed development is prohibited on the basis that the portion of the site marked "biodiversity" in the KLEP 2015 fails to satisfy the relevant categories in cl 4(6) and Sch 1 of the Housing for Seniors SEPP;

(2) Whether the development is prohibited by cl 26 of the Housing for Seniors SEPP because the clause operates as a prohibition and is thereby not amenable to variation under cl 4.6 of the KLEP 2015; and

(3) Whether the development will have unacceptable adverse impacts on the local heritage item, "Birralee", and is therefore in breach of cll 32 and 33 of the Housing for Seniors SEPP.

Held: Appeal upheld:

(1) The description of the land as "biodiversity" on the Terrestrial Biodiversity Map under cl 6.3(2) of the KLEP 2015 does not satisfy the categories of the Housing for Seniors SEPP because this term is not a "like description" in the sense of a similar description as "environment protection" or "conservation". The result of this is that cl 4(6)(a) is not engaged and the Housing for Seniors SEPP therefore applies to the land: at [86];

(2) Clause 26 of the Housing for Seniors SEPP is a development standard amenable to variation under cl 4.6 of the KLEP 2015 because the clause, when analysed in context of the whole instrument, clearly specifies a requirement or fixes a standard in relation to an aspect of the development in respect of the matters contained within s 1.4(1)(a), (c) and (m) of the EP&A Act: at [162];

(3) The cl 4.6 written request to permit the contravention of the development standard contained within cl 26 of the Housing for Seniors SEPP should be approved because the proposed development adequately addressed the matters required to be demonstrated by subcl (3) by providing the facilities on site. The proposed development will be in the public interest because it is consistent with the underlying objective of cl 26 of the Housing for Seniors SEPP and the zone within which the development is proposed to be carried out: at [190]; and

(4) The presence of the local heritage item, "Birralee", is not a basis on which to refuse consent as the proposed development demonstrates that adequate regard has been had to the design principles in Div 2 (cl 33), referred to in cl 32, and cl 5.10 of the KLEP 2015: at [228].

***Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097** (O'Neill C)

(related decision: *Initial Action Pty Ltd v Woollahra Municipal Council (No 2)* [2019] NSWLEC 1151 (O'Neill C))

Facts: Initial Action Pty Ltd (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the deemed refusal by Woollahra Municipal Council (**Council**) to grant consent to a three- and four-storey residential flat building at 12-16 William Street, Double Bay.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ upheld an appeal on a question of law and set aside the decision and orders of Smithson C in *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734 and made an exclusionary remitter order that the proceedings be heard by a different commissioner or commissioners in accordance with his Honour's judgment.

The applicant's written request, pursuant to cl 4.6 of the Woollahra Local Environmental Plan 2014 (**WLEP 2014**) justifying the contravention of the Height of Buildings Development Standard defended the exceedance of the numerical standard as a justified response to the scale of the existing Inter-War flats in the immediate context of the site and on the basis that maintaining a consistent scale was appropriate because the Inter-War flat buildings were identified as contributing to the precinct character.

Issues:

(1) Whether the contravention of the Height of Buildings Development Standard was justified;

(2) Whether the quantity of excavation was excessive; and

(3) Whether the height of the front fence should be reduced to 1.5 metres high.

Held: Appeal upheld following directions for amended drawings:

(1) Justifying the aspect of the development that contravened the development standard as creating a consistent scale with neighbouring development could properly be described as an environmental planning ground because the quality and form of the built environment of the development site creates unique opportunities and constraints to achieving a good design outcome: at [42];

(2) The contravention of the Height of Buildings Development Standard was in the public interest because the objectives of the contravened development standard and zone were achieved notwithstanding numerical non-compliance with the development standard: at [46]-[62];

(3) The quantity of excavation on the site was acceptable because the volume to be excavated was limited to that which might reasonably have been required for car parking and storage requirements: at [67]; and

(4) The applicant was directed to amend the fence to 1.5 metres high to comply with the control in the Woollahra Development Control Plan because it permitted views from the public domain into the semi-private front setback of the site, allowing the landscaped front setback to contribute to the landscaped character of the street: at [70].

***Malcolm Smith v the Hills Shire Council* [2019] NSWLEC 1096** (Dixon SC)

Facts: Mr Malcolm Smith (**applicant**) appealed against The Hills Shire Council's (**respondent**) refusal of a modification application to modify the s 7.11 contribution conditions imposed at the time of the grant of consent.

On November 2017, the Section 7.11 Contributions Plan No 2 - West Pennant Hills Valley, North West Sub-Precinct (**existing plan**) was repealed and replaced with The Hills Section 7.12 Contributions Plan (**current plan**). Clause 5 of the current plan provides that the existing plan continues to govern where it applies to land and the development proposed.

The applicant's primary position for justifying this modification is that the consent should reflect the amount that would be required under the current plan in order to avoid imposing conditions that are unreasonable. The applicant contends that these conditions are unreasonable on the basis that such contribution conditions are no longer imposed by Council. The Court has the power to amend the contribution conditions imposed on the consent under s 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

Issue: Whether the type of development that was approved is now restricted by the current plan.

Held: Appeal dismissed:

(1) There is clear intention by Parliament, by the operation of s 7.20(4) of the EP&A Act and cl 5 of the current plan, that the existing plan continues to operate. It would be incoherent for the law to hold simultaneously that by reason of that fact alone, the condition is unreasonable: at [42];

(2) The fact that the existing plan is valid in this case but is no longer being imposed by Council did not make the conditions unreasonable: at [42]; and

(3) It could not be reasonable for the applicant to be permitted to take up the consent and seek contributions under the current plan in circumstances where The Hills Local Environmental Plan 2012 and biodiversity laws have changed, as they have in this case: at [43].

Registrar Decisions:

Elanor Investors Limited v Sydney Zoo Pty Limited **[2019] NSWLEC 1173** (Froh R)

Facts: On 22 November 2018, Elanor Investors Limited (**applicant**) commenced Class 4 civil enforcement proceedings against Sydney Zoo Pty Limited (**respondent**). The Summons commencing the proceedings alleges breaches of the respondent's development consent obligations.

The applicant operates the Featherdale Wildlife Park (**Featherdale**) in Doonside where it exhibits Australian fauna. The respondent was granted development consent by the Planning Assessment Commission (**PAC**) for a new zoo (**Sydney Zoo**) which the respondent proposes to operate approximately 3km away from Featherdale. The development consent granted by the PAC imposes a number of obligations on Sydney Zoo to differentiate it from Featherdale.

These are referred to as Differentiation Obligations and are contained in Sydney Zoo's development consent. It is the applicant's contention that the Differentiation Obligations require the respondent to differentiate itself from the applicant in respect of: the type of facility it provides; its pricing; the type of Australian animal encounters it offers; the amount of Australian species at its facility; having two thirds exotic specifies upon its opening and not offering a koala interaction experience.

The applicant claims that the respondent is engaging in advertising and marketing activities that demonstrates it will not comply with the Differentiation Obligations. The Points of Claim contains specific examples of the respondent's marketing and advertising material which the applicant claims evidences an actual, threatened and/or apprehended breach of the *Environmental Planning and Assessment Act 1979* (NSW).

On 21 January 2019, the respondent applied to set aside the applicant's Notice to Produce dated 21 December 2018 (**Notice to Produce**) and subpoena to Australian Attractions Pty Limited (**Australian Attractions**) dated 21 December 2018 (**Subpoena**).

Issues: Whether the Notice to Produce and Subpoena should be set aside.

Held: Application to set aside Notice to Produce and Subpoena dismissed; costs reserved:

(1) The Differentiation Obligations are expressly pleaded as individual grounds in the Summons and the Points of Claim. The production of material under paragraphs 1 and 2 of both the Subpoena and the Notice to Produce "will materially assist on an identified issue" in the proceedings and that it is "on the cards" that such material will be relevant": at [21];

(2) Production of the Aboriginal Heritage Experience Strategy (including all drafts) would "throw light on the issues in the main case" and materially assist on this identified issue, namely the allegation of breach at paragraph 12(c) of the Points of Claim: at [22];

(3) The production of material in response to paragraphs 4, 5 and 6 of the Notice to Produce will materially assisting on an identified issue - namely the allegations made by the applicant in cl 12 of the Points of Claim: at [23];

(4) The production of material in response to paragraphs 7, 8, 9 and 10 of the Notice to Produce (and 5, 6, 7 and 8 of the Subpoena) will be relevant to paragraph 12(b) of the Points of Claim and "will materially assist on an identified issue" in the substantive proceedings: at [24];

(5) Paragraph 12(d) of the Points of Claim alleges that the respondent will exceed the maximum number of native animals permitted at Sydney Zoo. Paragraph 12(e) of the Points of Claim alleges that the respondent will not achieve the mandatory two-thirds exotic species requirement at opening. A list of those species is relevant to these two pleadings and will "materially assist on an identified issue": at [25];

(6) The *"Table contained at pages 37 to 39 of Section 3.6 of the "Response to the Planning Assessment Commission's Request for Further Information" prepared by the respondent dated April 2017"* is relevant to the issue pleaded at Paragraph 12(e) of the Points of Claim: at [27];

(7) The date on which Sydney Zoo intends to commence operations will assist the Court in its determination of the allegation that there is a threatened or apprehended breach of the Differentiation Obligations in the development consent and, as such, "could possibly throw light on the issues in the main case": at [28]; and

(8) The justifications advanced by the applicant for seeking the documents set out in the Notice to Produce and Subpoena satisfy the applicable legal principles: at [29].

Mod Urban Pty Ltd v Mid-Western Regional Council (No 2) **[2019] NSWLEC 1140** (Froh R)

Facts: On 4 September 2018, Mod Urban Pty Ltd (**applicant**) commenced Class 1 proceedings concerning the refusal by Midwestern Regional Council (**Council**) of the applicant's development application seeking consent for a new hotel development at 5-7 Church Street and 33 Short Street, Mudgee.

On 18 March 2019, Mr Witherby filed a Notice of Motion (**first NOM**) in these proceedings. Mr Witherby filed the first NOM as agent for the Mudgee Motelliers Association (**first applicant for joinder**) and Gulgong, Mudgee & Rylstone Branch of the National Trust of New South Wales (**second applicant for joinder**).

The first NOM was quickly followed by a second Notice of Motion sent to the Court by e-mail on 18 March 2019, amending the orders sought by the first and second applicants (**second NOM**).

Two further Notices of Motion were sent to the Court by e-mail on 26 March 2019, one seeking the joinder of what is now being called the Mudgee Motelliers Group (**third NOM**) and a separate motion seeking the joinder of the Second applicant (**fourth NOM**).

At the hearing of the Motions on 27 March 2019, only the third and fourth NsOM were moved on, and the first NOM and the second NOM were not pressed. The motions sought orders for: (1) Mr Witherby to be granted leave to act as agent for the first and second applicants for joinder and access to tendered expert witness statements; similarly, (2) the first and second applicants for joinder to be granted leave to appear as party to the matter, pursuant to s 38(2) of the *Land and Environment Court Act 1979* (NSW) (**Court Act**); or (3) in the alternative, be joined pursuant to s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). Both the applicant and Council opposed the motions and the grant of any of the orders sought.

Issues:

(1) Whether either applicant for Joinder should be joined as a party to the proceedings under s 8.15(2) of the EP&A Act; and

(2) If either applicant for Joinder ought be joined as a party under s 8.15(2), is a Double Bay Marina order appropriate in the circumstances.

Held: Both motions dismissed; no orders as to costs:

(1) The first and second applicants for joinder did not satisfy the first test for joinder under s 8.15(2) of the EP&A Act, nor did they put forward any other basis for joinder. Hence, the joinder application fails: at [26]-[27], [31]-[32];

(2) There are no issues in the proceedings that are not likely to be sufficiently addressed in the absence of some special order being made for the involvement the first and second applicants for joinder in the proceedings: at [35]; and

(3) Although there were flaws identified in each motion, there was no conduct that makes it fair and reasonable for the two applicants for joinder to bear the costs of the parties in defending the application: at [43].

Local Court:

Environment Protection Authority v Australian Aged Dental Care Pty Ltd **[2018] NSWLC 15** (Magistrate Donnelly)

Facts: On 16 July 2018, Australian Aged Dental Care Pty Ltd (**defendant**) was charged and stood trial in the Local Court for nine offences under s 6(6) of the *Radiation Control Act 1990* (NSW) (**Radiation Control Act**).

Issues:

(1) Whether opinion evidence was needed to prove that the actions of the defendant resulted in harm;

(2) Whether an increase to the Local Court's jurisdictional maximum after the date of the offence could apply; and

(3) Whether the Local Court should sentence according to its jurisdictional maximum or the maximum penalty for an offence.

Held: Defendant was convicted of all nine offences and fined $22,000 for each of the offences; defendant to pay prosecutor's costs of $125,000 pursuant to s 213 of the *Criminal Procedure Act 1986* (NSW); pursuant to s 23B(1)(a) of the Radiation Control Act, the Directors of the defendant, at the Company's expense, ordered to publish notices in the *Daily Telegraph* and *Sydney Morning Herald* of the conviction:

(1) It was not established beyond reasonable doubt that actual harm occurred with opinion evidence or any other evidence of harm. However, it was also not established to the requisite standard that no harm occurred. The Court accepted that the conduct of the defendant caused a potential of harm to occur, which in itself was a serious matter: at [23], [25];

(2) Generally laws that govern practice and procedure do not fall within the presumption against the retrospective operation of a statute. A jurisdictional maximum sentence penalty clause is a procedural provision and the higher jurisdictional maximum applied: at [27]; and

(3) The Court must assess each offence against the maximum penalty of that offence and not by reference to the Court's jurisdictional maximum: at [28].

New South Wales Civil and Administrative Tribunal:

Fisher v Goulburn Mulwaree Council **[2019] NSWCATAD 34** (D Dinnen, Senior Member)

Facts: On 10 February 2017, John Fisher (**applicant**) sought access to information from Goulburn Mulwaree Council (**Council**) regarding Taradale Road, on which his family property is located, under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). Under s 58(1)(a) of the GIPA Act the Council released two records relating to the applicant's request, which the applicant did not accept as constituting the full amount of documents the Council had within its possession.

The applicant requested an internal review of the decision which the Council completed. The applicant then requested an external review of the Council's decision by the Information and Privacy Commissioner (IPC). The IPC found that the Council's decision was not justified, and recommended it make a new decision by way of internal review. The Council complied with this recommendation and made a new internal review decision. After this, the applicant applied again to the IPC for external review of the Council's decision. This time the IPC found the Council's decision was justified and made no further recommendations. The applicant then lodged an application with Service New South Wales seeking review by the New South Wales Civil and Administrative Tribunal.

Issue: Whether the Council failed to comply with its obligations under s 53 of the GIPA Act to undertake reasonable searches to answer the applicant's access application.

Held: Tribunal set aside the administratively reviewable decision and remitted the matter for reconsideration by the Council within 28 days; matter listed for further directions:

(1) As a general rule, requests involving more than 40 hours of work by an agency are like to involve an unreasonable and substantial diversion of resources. The Council's evidence indicates less than six hours were spent conducting searches pursuant to the applicant's request: at [54];

(2) On consideration of the evidence, it was not accepted that the Council's conclusion that it did not hold any further information requested under the access application was sound. The Council may not ultimately hold any further information, but there are other reasonable searches and inquiries should be undertaken before that conclusion could be reached: at [55]; and

(3) Consultation with the Council's Information and Technology Department and Operations Department should be undertaken prior to the Council concluding that it did not hold any further information requested under the access application: at [56].

Kallin Pty Ltd v Independent Liquor and Gaming Authority **[2019] NSWCATAD 36** (C Ludlow, Senior Member)

Facts: On 28 February 2018 the Independent Liquor and Gaming Authority (**ILGA**) refused the application of Kallin Pty Ltd (**Kallin**) for a new packaged liquor licence in Bondi, pursuant to s 45 of the *Liquor Act 2007* (NSW) *(***Liquor Act**). The decision of ILGA to reject the licence was based on ILGA's dissatisfaction that overall social impact of the licence would not be detrimental to the well-being of the local or broader community. Section 48(5) of the Liquor Act contained factors an Authority must consider when granting a liquor licence, also known as the social impact test. Kallin applied to the Civil and Administrative Tribunal of New South Wales (**Tribunal**) under s 13A of the *Gaming and Liquor Administration Act 2007* (NSW) and s 7 of the *Administrative Decisions Review Act 1997* (NSW) (**ADR Act**) for administrative review of the ILGA's decision.

Issues:

(1) Whether the ILGA's Guideline 6, Consideration of social impact under Section 48(5) of the Liquor Act, published under s 57 of the Liquor Act, had the status of being a Government policy under s 64 of the ADR Act; and

(2) Whether the benefits associated with a packaged liquor licence outweighed the potential social harm impacts to the community.

Held: Decision under review was affirmed:

(1) Guideline 6 was a policy within the meaning of s 64(4) of the ADR Act, as it was a policy applied by an administrator in relation the matter concerned and was relevant to the issues before the Tribunal: at [14]; and

(2) The objective facts, including increased crime and health detriments, demonstrated that on the balance of probabilities granting the licence would increase the rate of domestic assault, other assault and chronic illness in the Bondi and Waverley community. Therefore, it could not be satisfied that that the overall social impact of granting the licence would not be detrimental to the well-being of the local or broader community: at [138] - [140]; and

(3) On the available evidence, the identified detriments could not be remedied by imposing licence conditions: at [141].