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Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes and Regulations:

- **Commonwealth:**

The *Native Title Legislation Amendment Act 2021* (Cth) amends the *Native Title Act 1993* (Cth), including a range of adjustments to native title claims resolution, agreement making, Indigenous decision-making and dispute resolution processes. This Act received Royal Assent on 16 February 2021, with ss 1-3 commencing. Section 2 tabulates the commencement dates for the associated schedules: Sch 1 (Role of the applicant); Sch 2 (Indigenous land use agreements); Sch 3 (Historical extinguishment); Sch 4 (Allowing a registered native title body corporate to bring a compensation application); Sch 5 (Intervention and consent determinations); Sch 6 (Other procedural changes); Sch 7 (National Native Title Tribunal); and Sch 8 (Registered native title bodies corporate) proclaimed to commence on 25 March 2021. Schedule 9 (Just terms compensation and validation) commenced on 17 February 2021.

The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) identified a need for legally enforceable standards to underpin the effective operation of the EPBC Act. The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (Cth) would establish a framework for the making, varying, revoking and application of National Environmental Standards; and establish an Environment Assurance Commissioner to undertake monitoring and auditing of the operation of bilateral agreements under the EPBC Act. The Bill is currently before the House of Representatives (second reading moved 25 February 2021).

- **Strata:**

The *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021 No 1* (NSW) includes amendments to facilitate the installation of sustainability infrastructure in strata schemes. The amendments define 'sustainability infrastructure' and 'sustainability infrastructure resolution'. An Owners' corporation must consider certain matters before approving a sustainability infrastructure resolution. A special resolution of an Owners' corporation that is a sustainability infrastructure resolution requires a simple majority of the value of the votes cast to be successful rather than 75% as is required in other special resolutions.

- **Planning:**

Environmental Planning and Assessment Amendment Regulation 2020 (NSW) - this amendment removes the requirement for a consent authority 'that receives a development application for designated development to provide a copy of the

development application and the environmental impact statement to the Secretary of the Department of Planning, Industry and Environment (Department);' and replaces references to *Medium Density Design Guide* with *Low Rise Housing Diversity Design Guide for Development Applications* for development applications (published by the Department in July 2020) and for compliant development - *Low Rise Housing Diversity Design Guide* (1 July 2020).

Environmental Planning and Assessment Amendment (Build-to-rent Housing) Regulation 2021 (NSW). The amendment prescribes conditions for a development consent for the use of a building as 'build-to-rent housing.' Clause 98F is inserted identifying the conditions to be imposed.

Environmental Planning and Assessment Amendment (Central-West Orana Renewable Energy Zone Transmission) Order 2020 (NSW) designates the Central-West Orana Renewable Energy Zone Transmission as State significant infrastructure and critical State significant infrastructure.

Environmental Planning and Assessment Amendment (Construction Certificate Applications) Regulation 2020 (NSW) amends cl 144(1) with the addition of two subclauses (f)-(g). Subclause (f) requires plans relating to Class 2 or 3 buildings of greater than four storeys to be referred to the NSW Fire Brigades (**NSWFB**). Subclause (g) requires Class 9b plans for an early childhood centre to be referred to the NSWFB. The insertion of cl 144(8C) allows those construction certificates that have been initiated but not finalised to proceed as if the amendments to cl 144(1) have not been made. Finally, the definition of an 'early childhood centre' has been tied to that in the *Building Code of Australia*.

Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2021 (NSW) - this amendment requires councils to make information available regarding contributions and how those contributions have been expended or used. Development agreements will also be subject to the requirement to disclose information regarding contributions received and how those contributions are spent. Amendments relating to planning agreements omit the provisions that require the preparation of explanatory notes and, instead, planning authorities are to rely upon practice notes from the Planning Secretary 'when preparing aa explanatory note for a planning agreement.

Environmental Planning and Assessment Amendment (Kurri Kurri Gas-fired Power Station Project) Order 2020 (NSW) - the Order designates 'certain development for the purposes of the Kurri-Kurri Gas-fired Power Station Project' as State significant infrastructure and critical State significant infrastructure.

Environmental Planning and Assessment Amendment (Sydney Metro West) Order 2020 (NSW) - this Order identifies what development is and is not to be regarded as being for Sydney Metro West construction. Lists relevant LGAs:

(a) Burwood, City of Canada Bay, Cumberland, Inner West, City of Parramatta, Strathfield, City of Sydney, and

(b) lists the parts of Sydney Harbour and the Parramatta River that adjoin the local government areas described in par (a).

Environmental Planning and Assessment Amendment (Sydney Metro—Western Sydney Airport) Order 2020 (NSW) designates certain development activities associated with the development of the Western Sydney Airport as State significant, or critical State significant infrastructure, especially in relation to the Cities of Penrith and Liverpool LGAs.

Environmental Planning and Assessment Amendment (Western Harbour Tunnel and Warringah Freeway Upgrade Project) Order 2020 (NSW) amends Sch 5 - critical State significant infrastructure in relation to the Western Harbour Tunnel and the Warringah Freeway Upgrade Project. This Order amends the definition of development within the clause relating to this project -

> ***development*** does not include surveys, test drilling, test excavations, geotechnical or contamination investigations or other tests or surveys, sampling or investigation for the purposes of the design or assessment of the project.

The Heritage Amendment (Applications) Regulation 2021 (NSW) amends the Heritage Regulation 2012 (NSW) to enable additional information about an application for approval under Pt 4, Div 3 of the *Heritage Act 1977* (NSW) to be requested to help the approval body to make a determination; and to prescribe the period of time that is not to be taken into account in the period of assessing a determination, as referred to in s 65(1) of the Act.

- **Biodiversity:**

Biodiversity Conservation Amendment (*Cetacea*) Regulation 2021 (NSW) prohibits the breeding and importation of certain marine mammals and lists acts that are to be considered as a 'harm' to the animals. Licenses are not to be issued to allow a person to obtain or exhibit a marine mammal unless the licensor is satisfied that there is a genuine scientific need or educational purposes that are sufficient to override the general prohibition.

Biodiversity Conservation Amendment (Exemptions) Regulation 2020 (NSW) amends the Biodiversity Conservation Regulation 2017 (NSW) to permit development in bush fire affected areas, so that such development that involves native vegetation clearing will not be considered to 'exceed biodiversity offsets scheme threshold' (Pt 7 of the *Biodiversity Conservation Act 2016* (NSW)). Development application consent for areas affected by the 2019-20 bush fires does not require a biodiversity development assessment report. These exemptions are only permitted for the 2 years post the 2019/2020 bush fires.

- **Water:**

Water Management (General) Amendment (Emergency Works Exemption) Regulation 2021 (NSW) - the Amendment streamlines the procedure for allowing emergency (urgent) work to be carried out through the removal of groundwater and overland flow 'in response to emergency events' by providing exceptions from requirements under the *Water Management Act 2000* (NSW).

The Water Management (General) Amendment (Miscellaneous) Regulation 2021 (NSW) amends the mandatory conditions imposed on access licences and approvals in relation to the reporting requirements of holders of access licences or approvals as to water taken.

- **Pollution:**

The Protection of the Environment Operations (General) Amendment (PFAS Firefighting Foam) Regulation 2021 (NSW) introduces new protections to prevent PFAS pollution. The objects of the Regulation amendments are to:

(a) prevent pollution caused by certain types of PFAS firefighting foam by

(i) making it an offence to discharge the PFAS firefighting foam for the purposes of firefighting training or demonstration, and

(ii) from 26 September 2022, making it an offence to discharge the PFAS firefighting foam unless the foam is discharged by—

particular persons to prevent, extinguish, or attempt to extinguish a fire that, in the opinion of the person, is a catastrophic fire or has the potential to be a catastrophic fire, or

a person to prevent, extinguish, or attempt to extinguish a fire on a watercraft in State waters or prescribed waters, and

(iii) (from 26 September 2022, making it an offence to sell a portable fire extinguisher containing the precursor to the PFAS firefighting foam, except if the extinguisher is sold to particular persons, the owner or master of a watercraft or a person granted an exemption by the Environment Protection Authority to discharge the firefighting foam from a portable fire extinguisher, and

(b) enable the Environment Protection Authority to exempt a person or class of persons from offences in relation to the prevention of pollution caused by certain types of PFAS firefighting foam, and

(c) declare the Environment Protection Authority is the appropriate regulatory authority for a matter relating to the prevention of pollution caused by certain types of PFAS firefighting foam.

- **Miscellaneous:**

Building and Development Certifiers Amendment (Miscellaneous) Regulation 2020 (NSW) makes it conditional for registration of a certifier that 'the certifier must carry out certification work in accordance with the whole or part of a certain practice standard,' being the standards contained in *Practice Standard for Registered Certifiers - 1 - New Residential Apartment Buildings*. The whole practice standard applies for those certifiers who hold restricted or unrestricted certificates for building surveyors (all classes of buildings); for those who do not hold the certificates described, then only chapters 1 and 2 apply. The amendments allow the Secretary to suspend the registration of certifier as part of disciplinary action, provides for methods to contend with conflicts of interest, and makes it a requirement for swimming pool inspector registrants to take an exam (discretionary).

Bushfires Legislation Amendment Act 2020 No 37 (NSW) - this legislation further amends the *Rural Fires Act 1997* (NSW). Schedule 1 of the amendment lists the amendments to the Act in pars 1 to 27. This legislation commenced on 25 November 2020, except for Sch 1 par 26. Of interest is Sch 1 par 26 which will insert ss 100RA and 100RB into the legislation.

Section 100RA - Rural Boundary Clearing Code - will set out the procedures for the creation of clearing codes regarding native vegetation clearing in rural areas to reduce bushfire hazards. Section 100RA gives the Minister the power to create, amend, or repeal clearing codes. Any clearing code must be published in the Gazette, will take effect from the date of publication, and must be made publicly available after it has been published in the Gazette.

Section 100RB - This will permit the carrying out of vegetation clearing work in accordance with Rural Boundary Clearing Code - lists the conditions under which vegetation clearing may be carried out on one or more parcels of land under this section. Subsection 2 makes it clear that licences are not required pursuant to the *Biodiversity Conservation Act 2016* (NSW) or the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) assuming compliance with an extant clearing code. If a person complies with a clearing code, then s 100RB states that a person cannot be found guilty of any breach under the following Acts for carrying out vegetation clearing:

(a) EPA Act;

(b) *Fisheries Management Act 1994* (NSW);

(c) *Heritage Act 1977* (NSW);

(d) Part 5A of the *Local Land Services Act 2013* (NSW);

(e) *Protection of the Environment Operations Act 1997* (NSW); and

(f) *Soil Conservation Act 1938* (NSW).

Of interest is Sch 2 which sets out the amendments to other legislation - particularly amendments to the *Biodiversity Conservation Act 2016* (NSW) (Sch 2.1) and the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) (Sch 2.4).

The amendment to the BCA removes the requirement that development in a bush fire affected area will 'likely or significantly affect threatened species or ecological communities or their habitats,' but conditions are placed upon this - the building/structure will be the same or substantially the same as the building that was destroyed, and the exemption application must be made within 2 years of the commencement of the relevant subsections.

The amendment to the NPW Act inserts s 188H - assets of intergenerational significance - into the legislation. This provision is in the following terms:

(1) If the Minister is satisfied that land reserved or acquired for reservation under this Act is an environmental or cultural asset of intergenerational significance, the Minister may, by order published in the Gazette, declare the land to be land to which this section applies (declared land);

(2) The regulations may make provision for or with respect to action that may be taken for the management of declared land, including protection of the land from bush fire risks;

(3) Action authorised by regulations under this section may be taken despite any plan of management that applies to declared land;

(4) Regulations under this section do not affect the *Rural Fires Act 1997* (NSW) or the regulations under that Act.

National Parks and Wildlife Legislation Amendment (Reservations) Act 2020 No 38 (NSW) - commenced 25 November 2020.

Amendments allow the Minister to:

(a) to revoke the reservation of nominated land and to vest the land in the Minister for the purposes of Pt 11 of the principal Act, which enables the Minister to sell, grant leases of, dispose of or otherwise deal with the land;

(b) to revoke the reservation of the nominated land and to vest the land in Transport for NSW;

(c) to provide that the Minister must not transfer the parts of the land currently forming part of the various nominated reservations, unless the Minister is satisfied that appropriate compensation has been provided.

Protection of the Environment Operations (Waste) Amendment Regulation 2020 (NSW) - changes are made to waste volumes that are to be included in calculations. Includes an amendment that deals with waste that is comprised 'predominately' of whale carcases. The amendments also list exemptions to 'certain occupiers from licensing requirement[s] for the disposal of mixed organic waste.'

Bills:

Local Land Services Amendment (Miscellaneous) Bill 2020 (NSW) - the Bill proposes amendments to the *Local Land Services Act 2013* (NSW) (especially Pts 5A and 5B) relating to allowable activities concerning private forestry, koala habitat, and native vegetation. This amendment encompasses the LGAs of Ballina, Coffs Harbour, Kempsey, Lismore and Port Stephens. It will remove development consent required under other legislation for private forestry and allow private, native forestry plans to extend to a maximum of 30 years and mandates consultation with the Minister who administers Pt 7A of the *Fisheries Management Act 1994* (NSW), the Minister administering the *Forestry Act 2012* (NSW), the Minister for Agriculture, and the Minister for Western NSW before granting a private, native forestry code. The amendment will also remove the need to seek authorisation for native vegetation clearing for land that is under agricultural use.

Marine Pollution Amendment (Review) Bill 2020 (NSW) - the Bill was introduced to adopt the recommendations from the 2019 review of the Act to promote consistency between the *Marine Pollution Act 2012* (NSW), the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983 (Cth), and International Convention for the Prevention of Pollution from Ships (**MARPOL**). The Bill also proposes enforcement powers regarding the maintenance of equipment used for sewage pollution prevention. The amendment allows actions to be taken to prevent pollution from emanating from 'abandoned, derelict, or out-of-commission vessels,' as well as other minor amendments.

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy Amendment (Build-to-rent Housing) 2021 amends State Environmental Planning Policy (Affordable Rental Housing) 2009 by inserting a new Division 6A - Built-to-Rent (BtR) Housing. The changes insert:

- Clause 41A: definitions for *Apartment Design Guide, Greater Sydney Region*, and *tenanted component*;
- Clause 41B: development for the purpose of built-to-rent housing is permitted with consent;
- Clause 41C: conditions for built-to-rent housing will apply for a minimum of 15 years;
- Clause 41D outlines the non-discretionary development standards;
- Clause 41E covers the design requirements; and
- Clauses 41F-H relate to 'active uses' for the ground floor in BtR complexes in business zones (cl 41F), conditions requiring land or affordable housing contributions (cl 41G), and the necessary considerations of the Apartment Design Guide when conducting further subdivision of dwellings (cl 41H), respectively.

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Outdoor Events) 2020 (NSW) - this amendment is concerned with outdoor community events hosted on council land. Clause 2.132A deals with specified development, cl 2.132B with development standards. Clause 2.132C is repealed.

State Environmental Planning Policy (Koala Habitat Protection) 2020 (NSW) - this policy was developed to 'encourage the proper conservation and management areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range and reverse the current trend of koala population decline':

(1) Prior to development consent, management plans must be prepared in relation to core areas of koala habitat; and

(2) Identify core areas of koala habitat; and

(3) Include core koala habitat in environment protection zones.

Definitions amended for the Policy included amendments to exempt land sections. These amendments would allow the clearing of 'feed tree species' to create a buffer zone for asset protection that forms part of a lawfully erected dwelling house that is a replacement for one lost by bush fires.

State Environmental Planning Policy (Koala Habitat Protection) 2021 - this proposed policy is aimed at halting and reversing the present decline in the Koala populations of NSW. In order to achieve this policy goal, the conservation and management of areas of native vegetation that will provide forage and shelter for Koalas is 'encouraged' for maintaining the Koala population in its current range. The policy identifies 'equivalent land use zones' within the designations of RU1 (primary production), RU2 (rural landscapes), and RU3 (forestry) for permitted uses within those zone types. The Policy also lists the land to which the instrument applies, the land that is exempt, and how this Policy interacts with other environmental planning instruments. Part 2 of the Policy applies to development control of Koala habitats, Pt 3 describes Koala plans of management, and Pt 4 relates to savings and transitional purposes.

Judgments

United Kingdom Supreme Court:

Dill v Secretary of State for Housing, Communities and Local Government **[2020] 4 All E.R. 631; [2020] UKSC 20** (Lady Arden, Lords Carnwath, Wilson, Kitchin, Sales)

(decision under review: *Dill v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2619 (McCombe, Hickinbottom and Coulson LJJ))

Facts: The case considered whether two early 18th century lead urns resting on limestone pedestals were 'buildings' for the purposes of the *Planning (Listed Buildings and Conservation Areas) Act 1990* (UK) (**Listed Buildings Act**). The urns were originally commissioned for a historic garden. They had been moved several times since then and were eventually moved to a property where they were entered onto the register of listed buildings along with the property itself. Mr Dill (**applicant**) was the owner of both the urns and the property. The applicant was not aware that the urns were listed and sold the urns. The urns have since been removed from the United Kingdom.

When the local planning authority became aware that the urns had been removed, it notified the applicant. The applicant made a retrospective application for listed building consent. The retrospective application was refused by the local planning authority, which subsequently issued a listed building enforcement notice s 38 of the Listed Buildings Act. The applicant appealed against the refusal of listed building consent and the enforcement notice on several grounds, including that the items were not 'buildings'.

Issues:

(1) Whether listing is conclusive of the items being 'buildings' for the purposes of the Listed Buildings Act; and

(2) Whether the urns were 'buildings'.

Held:

(1) The Listed Buildings Act did not make the designation as a listed building conclusive. Individuals affected by a legal measure should have a fair opportunity to challenge the measure and to vindicate their rights in court proceedings, within the context of the relevant statutory regime. In the context of a listed building enforcement notice, the statutory grounds of appeal include every aspect of the merits of the decision. This includes the question raised at issue (2), as to whether an item is a 'building' for the purpose of the legislation: at [20]-[27];

(2) The urns were outside the 'extended definition' of building within s 1(5) of the Listed Buildings Act. This definition extends the meaning of 'building' so that certain objects or structures are to be treated as part of the building, if they are either fixed to the building or 'within the curtilage of the building' and form part of the land. A statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building: at [38]-[44]; and

(3) The urns were not buildings in their own right. The court applied the three-fold test of size, permanence and degree of physical attachment in *Skerritts of Nottingham v Secretary of State for the Environment Transport and Regions* [2000] JPL 1025 (***Skerritts***). The same definition of 'building' as was in issue in *Skerritts* was adopted in the Listed Buildings Act. The application of this test to the urns was remitted to Secretary of State: at [45]-[58].

United Kingdom High Court:

R (Finch) v Surrey CC & Other **[2020] EWHC 3566 (Admin)** (Holgate J)

Facts: Surrey County Council (**SCC**) granted planning permission to Horse Hill Developments Limited (**HHDL**) to retain and expand a well site and to drill four new wells at Horse Hill, Surrey, to produce hydrocarbons over a period of 25 years (**development**). The environmental statement (**ES**) for the development assessed the greenhouse gas (**GHG**) emissions that would be produced from the operation of the development itself. However, it did not assess the GHG that would be emitted when the crude oil produced from the site is used by consumers, typically as a fuel for motor vehicles, after having been refined elsewhere.

Issues:

(1) Whether SCC failed to comply with the obligations of EU Directive 2011/92/EU (**EIA Directive**) and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) (UK) (**2017 Regulations**) by failing to assess the indirect GHG impacts of the development arising from the combustion of the oil it produces; and/or failing to take into account the UK environmental protection objectives relevant to the project, including the need to reduce GHG emissions by at least 100% below the 1990 baseline;

(2) Whether SCC failed to comply with the obligations of the EIA Directive and the 2017 Regulations and/or erred in law by interpreting par 183 of the National Planning Policy Framework (**NPPF**) and paragraphs 12 and 112 of the Minerals Planning Practice Guidance (**Minerals PPG**) so as to permit the downstream GHG emissions from the oil produced by the proposed development to be excluded from assessment; and

(3) Alternatively, whether par 183 of the NPPF and paragraphs 12 and 112 of the Minerals PPG are unlawful because they are not in conformity with the obligations of the EIA Directive and their application in this instance vitiated SCC's decision.

Held:

(1) EIAs must address the environmental effects, both direct and indirect, of the development for which planning permission is sought (and also any larger project of which that development forms a part), but there is no requirement to assess matters which are not environmental effects of the development or project. The scope of this obligation does not include the environmental effects of consumers using an end product which will be made in a separate facility from materials to be supplied from the development being assessed. The

assessment of GHG emissions from the future combustion of refined oil products was incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application: at [90]-[126];

(2) The SCC did not err in focusing on the land use and development proposed because that was the project which was the subject of the planning application and EIA. The SCC's decision that GHG emissions from the combustion of refined fuels were not an environmental effect of the proposed development was not irrational. SCC's decision was not beyond the range of conclusions which rational decision-makers could lawfully reach: at [126]-[133];

(3) Because there was no legal requirement for the amount of GHG emissions from the combustion of refined oil products to be estimated in the EIA, it follows that there was no requirement that these GHG emissions be considered with regard to climate objectives, including the requirement to reduce GHG emissions by at least 100% below the 1990 baseline: at [134]-[140];

(4) The ES and SCC adequately dealt with the NPPF and Minerals PPG. The reasoning in the ES, which was accepted by SCC, applied the policies to processing facilities used in the production of end products, notably refineries, and not to the combustion of those end products in, for example, vehicles being driven by consumers. Indirect emissions were not required to be considered: at [142]; and

(5) The national policies in question do not purport to limit the scope of ES or EIA under the 2017 Regulations and so there is no question of those policies being unlawful on the grounds of conflict with the EIA Directive or those Regulations. The policies, like the case law which they reflect, do not allow a planning authority to disregard a relevant environment effect of a particular development proposal, but do allow an authority to exercise judgment as to the extent to which such an effect should be assessed in the development control process, taking into account the existence of other dedicated regulatory regimes: at [143].

High Court of Australia:

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd **[2021] HCA 2** (Kiefel CJ, Bell, Gageler, Keane, Edelman JJ)

(related decisions: *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors* (2019) 2 QR 312; [2019] QCA 238 (Sofronoff P, Philippides JA,Burns J); *New Acland Coal Pty Ltd v Ashman & Ors (No 2)* [2018] QLC 41 (Kingham P): *New Acland Coal Pty Ltd v Smith* [2018] QSC 88 and *New Acland Coal Pty Ltd v Smith (No 2)* [2018] QSC 119 (Bowskill J); *New Acland Coal Pty Ltd v Ashman & Ors (No 4)* [2017] QLC 24 (Member Smith))

Facts: The New Acland Coal Mine is an open-cut mine located close to Oakey, Queensland, in the Darling Downs region. New Acland Coal Pty Ltd (**New Acland**) sought to expand its operations and applied for additional mining leases pursuant to Ch 6 of the *Mineral Resources Act 1986* (Qld) and sought amendment of its environmental authority under Ch 5 of the *Environmental Protection Act 1994* (Qld).

Oakey Coal Action Alliance Inc (**Oakey**), among others, lodged objections to the mine's expansion that triggered the requirement of the Land Court to deliver an objections ruling and to produce recommendations. Issues related to air quality, noise, climate change, biodiversity, and intergenerational equity, among others, were argued. After assessing the objections, the Land Court (Member Smith) recommended that the additional mining leases and the amendment to the environmental authority be refused.

The recommendation by the Land Court to deny the leases was adopted by the decision-makers (Minister for Natural Resources, Mines, and Energy and the Chief Executive of the Department of Environment and Science - the **Chief Executive**) in refusing the additional mining leases and the proposed amended environmental authority.

New Acland applied to the Supreme Court (Bowskill J) for judicial review under ss 20-21 of the *Judicial Review Act 1991* (Qld) (**Judicial Review Act**) and for non-statutory review under s 58 of the *Constitution of Queensland 2001* (Qld) of the Land Court's recommendations, alleging apprehended bias by Member Smith. Bowskill J found that apprehended bias was not a factor but the recommendations by the Land Court contained errors of law. The case was sent back to the Land Court for rehearing (before Kingham P). Kingham P recommended that the mining leases and the environmental authority be approved subject to conditions.

Both Oakey and New Acland sought leave to appeal to the Queensland Court of Appeal. Sofronoff P, Philippides JA and Burns J dismissed Oakey's appeal but allowed New Acland's cross-appeal. The Court of Appeal found that both apprehended bias and errors of law were present in the original decision of the Land Court.

Oakey sought and was granted special leave to appeal to the High Court to have the orders of the Court of Appeal set aside.

Issues:

(1) Were the decisions made by the Minister and the Chief Executive nullified upon the determination of apprehended bias in the Land Court's recommendations to these decision-makers;

(2) Were administrative decisions concluded by the Land Court just an administrative step, or must those conclusions have been legally valid and effective; and

(3) Does a conclusion of apprehended bias extant in a preliminary outcome affect subsequent decisions made relying upon the initial finding.

Held: Appeal allowed; decision of the Court of Appeal (Qld) set aside; Qld Supreme Court's 'qualified order for referral back' set aside; New Acland's application referred to the Land Court for re-evaluation 'according to law'; the Chief Executive's delegated decision was set aside; parties to bear their own costs for the appeal and cross-appeal; and New Acland to pay Oakey's costs in the High Court:

(1) The powers granted by subs 30(1) of the Judicial Review Act should not be 'unnecessarily' constrained as they were created to avoid re-litigating a matter by allowing flexibility but do not allow a decision-maker to progress a matter in ways contrary to the legislation: at [40]-[41];

(2) Kingham P's recommendations in the rehearing of the matter in the Land Court, 'gain no additional force or effect by reason of having been made in consequence of Bowskill J's order for referral back under s 30(1)(b) of the Judicial Review Act or the directions added under s 30(1)(b) and (d) of the JRA': at [44], [86]-[89];

(3) The orders under appeal from Bowskill J should have been set aside by the Court of Appeal as those findings were demonstrated to be erroneous: at [45];

(4) Because Kingham P's recommendations were constrained by Bowskill J's orders in the Supreme Court, the recommendations of Kingham P, in the rehearing of the matter, prima facie could not satisfy the statutory requirements of the Land Court under the *Mineral Resources Act* (Qld) (Mineral Resources Act) or the *Environmental Protection Act (1994)* (Qld) (Environment Protection Act): at [46], [98];

(5) An order of the Land Court has no legal force if it is against a required condition of exercising that court's jurisdiction, therefore, if Member Smith's decision was a nullity due to failure to provide procedural fairness, then Kingham P's recommendations were also tainted through the Supreme Court's requirement to retain all of the decisions by Member Smith except those in contention - intergenerational equity, noise, and groundwater issues: at [47]-[50], [98];

(6) The mere existence of a recommendation by the Land Court does not allow the Minister to make a decision to grant or refuse the mining leases if the recommendation was not valid and thus, the decision by the Minister was invalid under the Mineral Resources Act and the Environmental Protection Act: at [66];

(7) While the Judicial Review Act allows a court some discretion in the making of orders, '[p]ractical inconvenience of giving effect to the rights, duties and powers that have been judicially determined is not amongst them' and, therefore, New Acland's argument that the High Court could allow the orders of the Supreme Court to stand, even though the orders did not allow the Land Court to fulfil statutory requirements in the rehearing of the matter, was dismissed: at [67]-[68], [99]-[101]; and

(8) The orders of Kingham P and the delegate of the Chief Executive 'could and should also have been set aside by the Court of Appeal', as were the 'qualified orders' from the Supreme Court constraining the rehearing by the Land Court: at [69]-[70].

Federal Court of Australia:

Onus v Minister for the Environment **[2020] FCA 1807** (Griffiths J)

(related decision: *Clark v Minister for the Environment* [2019] FCA 2027 (Robertson J))

Facts: This case concerned proposals to upgrade and realign the Western Highway between Ararat and Buangor on Djab Wurrung Country in Victoria. Six large trees were located near the maximum construction footprint for the highway upgrade (**Specified Area**). The Minister accepted that five of the six trees were significant Aboriginal objects for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**Islander Heritage Protection Act**). Two Traditional Owners of Djab Wurrung Country (**applicants**) sought judicial review of the Minister's decision to decline to make declarations under either s 10 or s 12 of the Islander Heritage Protection Act.

This was the third proceeding challenging Ministerial decisions refusing to grant declarations under either ss 10 or 12. Two previous decisions were set aside, either by consent, or after a hearing (*Clark v Minister for the Environment* [2019] FCA 2027 per Robertson J). The Minister reconsidered the decision and determined again not to make a declaration under either s 10 or s 12 and provided a statement of reasons which purported to address the errors found in the previous decisions. The Minister decided that the trees were not at risk of injury or desecration because of the State agency's commitment, and the Minister was not satisfied that the five trees were likely to be used or treated in a manner inconsistent with Aboriginal tradition more broadly.

As to the application for a declaration under s 10, the Minister accepted that the Specified Area was a significant Aboriginal area and that it was under threat of injury or desecration but declined to exercise her discretion to make the declaration because she considered that these matters were outweighed by other relevant considerations. The statement of reasons stated that even, if the Minister had found the five trees to be under threat of injury or desecration for the purposes of s 12, other considerations would have also outweighed that finding.

Issues:

(1) Whether failure to commission and receive a report under s 10(1)(c) of the Islander Heritage Protection Act relating to the application;

(2) Whether unreasonable failure to exercise the power to obtain an up-to-date report;

(3) Whether error in the treatment of the Major Road Projects Victoria (**MRPV**) draft Framework;

(4) Whether failure to take into account relevant considerations, namely submissions;

(5) Whether erroneous finding that an alternative route would have similar Aboriginal heritage protection issues; and

(6) Whether error in the treatment of cost estimates.

Held: Minister's decision set aside; matter remitted to a Minister other than the Minister; Minister to pay the applicants' costs:

(1) The report provided was a valid report for the purposes of s 10(1)(c) of the Islander Heritage Protection Act. A change to MRPV's commitment to avoid five of the six trees did not affect the validity of the report: at [78]-[83];

(2) The Minister's failure not to obtain an up-to-date s 10(4) report was not unreasonable. There is nothing in the statutory scheme which indicates that the Minister is required to obtain a further s 10(4) report whenever there is a significant change in the conduct which is being assessed against the relevant statutory provisions: at [84]-[85];

(3) The Minister had again fallen into jurisdictional error and had substantially repeated the error identified by Robertson J regarding the misunderstanding and misapplication by the Minister of the statutory definitions and concepts of 'Aboriginal tradition' and 'injury or desecration'. The Minister's state of satisfaction under s 12(1)(b)(ii) of the Islander Heritage Protection Act was attained unreasonably and/or without a correct understanding of the law in concluding that the five trees were not at risk of injury or desecration:

(a) contrary to the Minister's view, there was material before her which clearly described how the five trees were under threat of injury or desecration with reference to 'Aboriginal tradition' as defined in the Islander Heritage Protection Act: at [109]- [124];

(b) in attaining the state of satisfaction required under s 12(1)(b)(ii), the Minister did not have before her any material or map which precisely identified the physical proximity of the highway alignment to the five trees; at [125]-[132];

(c) the Minister failed to appreciate that the cultural significance of the five trees was not confined to their connection with the Specified Area, but extended to the area beyond the Specified Area: at [133]-[135];

(d) these errors were material errors: at [136]-[138]; and

(e) the Minister's findings and reasoning regarding s 10 are severable from those relating to s 12. Relief should only be granted in respect of the Minister's decision concerning the s 12 application: at [139]-[142];

(4) The reporter is not obliged to consider representations which do not relate to any of those matters, nor is the Minister required to consider them if she reasonably concludes that the representations are not relevant to the Minister's statutory task: at [144]-[147];

(5) The Minister's finding that an alternative route would have similar Aboriginal heritage protection issues was not erroneous, as it was a peripheral comment and did not involve a finding of fact: at [148]-[151]

(6) There was no error in the treatment of cost estimates. The Minister did not make any findings about the costs of construction of an alternative route in the event that she made a declaration which required MRPV to pursue an alternative alignment: at [152]-156]; and

(7) The s 12 application was remitted to the Minister but with a direction that she refer it for reconsideration by one of four other Ministers or Assistant Ministers with responsibility for administering the Islander Heritage Protection Act. An informed lay observer might apprehend that the Minister may not conduct a reconsideration with an open mind. This was because in her second attempt to determine the application the Minister substantially repeated the error identified by Robertson J; and in her latest statement of reasons the Minister indicated that even if she had found that the five trees were under threat of injury or desecration, she would not have granted a s 12 declaration because of the other considerations identified by her in declining to make a s 10 declaration. A hypothetical observer might apprehend that the Minister may have prejudged the matter if she was to redetermine the application for a third time, hence it was necessary that another Minister perform that task in order to do justice between the parties: at [157]-[163].

New South Wales Court of Appeal:

Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council **[2020] NSWCA 292** (Basten and Gleeson JJA, Preston CJ of LEC)

(decision under review: *Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council* [2020] NSWLEC 22 (Duggan J))

Facts: Isas Pty Ltd (**second appellant**) is the owner of land bordering a drainage channel. Aussie Skips Recycling Pty Ltd (**first appellant**) is the lessee of this land on which it operates a waste transfer and recycling business. There is a narrow strip of land between the appellants' land and the drainage channel owned by Strathfield Municipal Council (**Council**). The appellants built an acoustic wall along the boundary of the appellants' land and the Council land, which incorporated 341 square metres of Council land within their operations. The Council commenced enforcement proceedings to restrain the appellants' continued occupation of its land. Soon after, the appellants commenced proceedings seeking the imposition of four easements over that part of the Council land which they were using for their business. At first instance, the Land and Environment Court (**LEC**) refused the application for the easements. This determination was appealed to the Court of Appeal.

Issues:

(1) Whether the easements were capable of being easements at law;

(2) if so, whether the test of 'reasonable necessity' for imposing an easement was satisfied; and

(3) whether the Council or the LEC had the power to grant an easement over community land.

Held: Appeal dismissed; appellants to pay the Council's costs (Basten JA, Gleeson JA and Preston CJ of LEC agreeing):

(1) The proposed easements were incapable of comprising easements at law: at [27]. The appellants enclosed 68% of the Council's lot, in a manner which practically excluded the Council from any use of the enclosed land: at [25]. The Council's rights of access to the land were in truth illusory: at [22] and the enclosure diminished the Council's enjoyment of the residue land: at [26];

(2) The fact that the cost of removing the wall and reconstructing it on the appellants' own land was considered to be a relevant factor supports the view that the illegality was not taken to preclude the grant of an easement. On the other hand, use of the land over a period of years without objection did not give rise by prescription to an entitlement to an easement: at [40];

(3) The Council had no power to grant the easement over land designated as community land. Additionally, the appellants were not running a public utility but, rather, a private business for profit: at [41]-[45];

(4) The Court may not have a power to grant an easement over community land. For the Court to do what the Council cannot do may undermine the purpose and operation of the *Local Government Act 1993* (NSW). Section 88K may assume that the owner has the legal power to grant and modify the easement, which operates as if it were a deed: at [48]-[52].

Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd **[2020] NSWCA 303** (Leeming and White JJA, Emmett AJA)

(decision under review: *Sydney Capitol Hotels Ptd Ltd v Bandelle Pty Ltd* [2019] NSWSC 1825 (Hammerschlag J))

Facts: Sydney Capitol Hotels Pty Ltd (**Sydney Capitol**) brought an action against Fletcher Construction Australia Pty Ltd (**Fletcher**) for damage to the Capitol Square Building on 2 January 2017 as a result of Fletcher allegedly failing to take reasonable care during the course of construction works at the Capitol Square Shopping Centre. The construction that was undertaken by Fletcher was the building of a shaft to house a ducted exhaust system (that was to service restaurants and shops). The activity occurred as part of the renovation of the building. The shaft passed through the Capitol Square Hotel. The construction of the shaft was completed in around 1997.

The damage was alleged to have occurred when Fletcher failed to follow the certified building plans and drawings and the Building Code of Australia. This failure resulted in a gap between the roof sheeting and the shaft.

Sydney Capitol alleged that Fletcher should have foreseen the consequences flowing from leaving the gap and did not take reasonable care in the shaft construction. This was also evidenced by Fletcher's failure to ensure the shaft's fire safety. Capital Square Hotel was damaged by fire and smoke, emanating from a kitchen on the ground floor of the Capitol Square Building, which crossed through the gap to the hotel.

In about 2014, Bandelle Pty Ltd (**Bandelle**) assumed the liabilities of Fletcher, including those that potentially arose from Sydney Capitol's claim. While Bandelle rejected all claims that it had allegedly assumed from Fletcher, Bandelle conceded that Sydney Capitol's claim was a civil action for loss and damage but submitted that the claim was statute barred pursuant to s 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The claim was barred from about 2007, Bandelle argued, at the 10-year anniversary of the completion of the construction works.

Sydney Capitol filed a Notice of Motion seeking an order under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), prior to other matters being heard, seeking a ruling that the claim was statute barred. After the primary judge held that the claim was not statute barred, Bandelle sought leave to appeal that decision.

Issues:

(1) Did s 6.20 of the EPA Act statute bar Sydney Capitol from bringing a claim for defective building works after 10 years; and

(2) Was s 6.20 of the EPA Act limited to only building works that were required to have development consent.

Held: Leave granted to appeal; appeal upheld; orders made by the primary judge set aside including the answer to the question on 18 December 2019, and in lieu thereof, answer that question 'Yes, s 6.20 afforded a defence to Capitol's claim', and dismiss the proceedings with costs; Capitol to pay Bandelle's costs of the appeal (Leeming JA,White JA agreeing with additional reasons and Emmett AJA dissenting):

Leeming and White JJA and Emmett AJA

(1) In order to construe s 6.20 of the EPA Act, it is necessary to consider its predecessor, s 109ZK: at [9], [11]; [75]; [110], [114];

(2) Section 6.20 and former s 109ZK apply to all claims for economic loss caused by defective building work: at [38]; [71]-[74]; [123]-[127].

(3) The purpose of s 6.20 and former s 109ZK is to provide a long-stop limitation period, independently of when damage was first manifested: at [8]; [116]-[117], [123].

(4) Section 6.20 replaced s 109ZK. There was no gap when neither provision applied: at [39]-[41], [65]-[68], [109]-[110].

By Leeming JA, allowing the appeal

(5) Section 109ZK as originally enacted was confined to defective building work pursuant to development consents granted after July 1998, but extended to all defective building work in 2012, after the repeal of cl 34 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 (NSW): at [12]-[19], [24]-[37].

(6) No differently from s 109ZK in 2012 after the repeal of cl 34, s 6.20 is not confined to building work done pursuant to development consents granted after 1998: at [41].

By White JA, allowing the appeal

(7) While the repeal of cl 34 did not revive the limitation period in s 109ZK, the scope of s 6.20 is not limited in the same way as the former s 109ZK: at [48], [78]-[82].

(8) Section 6.20 is not confined to defective building work pursuant to development consents granted after July 1998 but extends to all defective building work: at [75]-[77].

By Emmett AJA, dissenting

(9) Both s 109ZK and s 6.20 were confined to building work pursuant to development consents granted after July 1998, and thus did not apply to the work on which Capitol's complaint was based: at [101]-[103], [110], [128].

Cooper v The Owners - Strata Plan No 58068 **[2020] NSWCA 250** (Basten and McFarlan JJA, Fagan J)

(related decision/decision under review: *The Owners - Strata Plan No 58068 v Cooper* [2020] NSWCATAP 96 (Armstrong J, President and M Harrowell, Deputy President))

Facts: Johanna Cooper and Leo Cooper (**applicants**) owned an apartment in a freehold strata scheme in Darlinghurst known as 'The Horizon'. By-law 14 of that strata scheme stated that an owner or occupier must not keep or permit any animal to be on a lot or the common property. The applicants kept a small dog in their lot. Following successive complaints, the applicants sought a declaration from the NSW Civil and Administrative Tribunal (**NCAT**) that the by-law was invalid, arguing that it contravened s 139(1) of the *Strata Schemes Management Act 2015* (NSW) in that the by-law was harsh, unconscionable or oppressive. The applicants were successful at first instance in the Consumer and Commercial Division of NCAT but were overturned on appeal by the Appeal Panel of NCAT. The applicants then sought leave to appeal to the Court of Appeal on a question of law, which formed the basis for this decision.

Issues: Whether the Appeal Panel erred in law by holding that By-law 14 was not harsh, unconscionable or oppressive.

Held: Leave granted to appeal and appeal allowed; orders of the Appeal Panel set aside; respondent to pay applicants' costs (Basten JA with Macfarlan JA and Fagan J agreeing with further reasons):

Basten JA

(1) Two propositions follow from the statutory structure of the Strata Schemes Management Act (Act). First, because the owner holds a freehold estate in a stratum, the rights and obligations were drawn from real property. Second, the fundamental principle of indefeasibility of title to real property under the Torrens system had significance in identifying the attributes of the title, and constraints that could have been imposed by by-laws: at [9];

(2) Section 139 focused on the character of by-laws, rather than the state of knowledge, whether actual or constructive, of any particular lot owner: at [45];

(3) By-laws are not formulated by an owners corporation, but were registered prior to the existence of an owners corporation, and were not variable by a simple majority vote. Restraints were contained under ss 136 and 139 which were designed to protect minorities from oppression: at [48];

(4) Purposes of provisions could not be pursued without qualification, but a limiting purpose must have been obeyed: at [56];

(5) A by-law which restricted the rights of all owners as to the use and enjoyment of their lots in circumstances where the prohibited use would not interfere with the use and enjoyment of any other lot, was not a by-law which has regard to the interests of all lot holders; nor is it 'for the benefit of the lot owners', within the terms of s 9(2) of the Act: at [63];

(6) There was no sound reason to construe a by-law making power broadly so as to permit a by-law which limits the choice of all lot owners in the use and enjoyment of their lots, without conferring any material benefit on those who would not have exercised the right if available: at [64];

(7) The orders of the Appeal Panel were set aside, with the consequence that the orders at first instance stood, and did not need to be reinstated: at [71];

(8) Costs followed the event and awarded to the applicants: at [72];

By Macfarlan JA

(9) A by-law would have been 'harsh, unconscionable or oppressive' where the restriction could not have had, on any rational view, any necessity for the preservation of other lot owners' enjoyment of their lots and the scheme common property: at [78];

By Fagan J

(10) The by-law was oppressive because it prohibited the keeping of animals across the board, without qualification or exception for animals that would create no hazard, nuisance or material annoyance to others. The by-law thus interfered with the lot holders' use of their real property in a respect and to an extent that was unjustified by any legitimate concern of others in the building: at [88];

(11) The words 'harsh, unconscionable or oppressive' are grouped disjunctively in s 139(1) and that subsection is breached if any one of them was applicable to the impugned by-law. The impugned by-law fell within the description 'oppressive': at [90];

(12) Ease of administration was not able to be used to preserve the by-law against invalidation: at [96];

(13) By-laws adopted unanimously or by majority were not inviolate; they were amenable to declaration of invalidity if they infringed a statutorily prescribed standard: at [100]; and

(14) The circumstances surrounding any owner's acquisition of his or her lot could not have had any bearing upon the assessment of the by-law according to the standard. The Appeal Panel erred in law: at [102].

Lawson v Minister for Environment & Water (SA) **[2021] NSWCA 6** (Bathurst CJ, Basten and McCallum JJA

(related decisions: *Lawson v Minister for Environment and Water* [2020] NSWSC 186 (Ward CJ in Eq); *Lawson v Minister Assisting the Minister for Natural Resources (Lands)* (2004) 139 FCA 548; [2004] FCAFC 308; *Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 165))

Facts: This case concerned land acquisitions to give effect to agreements regarding the flow of water within the Murray-Darling Basin among the Commonwealth, New South Wales, South Australia, and Victoria. On

9 September 1914, an agreement was reached among the parties as to the economic use of the Murray River and its tributaries. The agreement also sought to resolve issues among the parties as to their individual interests. Part of this agreement, cl 55, provided for Lake Victoria, in New South Wales, to be used as water storage for South Australia. To achieve this, New South Wales was to vest South Australia with the estate for fee simple for the Lake Victoria area. The following year, the agreement was codified into the *River Murray Waters Act 1915* (NSW) (**River Murray Waters Act**), s 18 was the 'operative' section that 'vested' the estate in fee simple of the Lake Victoria area to South Australia. In 1922, the *Public Works Act 1912* (NSW) (**Public Works Act**) was used to resume the land in the Lake Victoria area.

Dorothy Lawson (**applicant**) was a descendant of the Native Title holders of the land prior to the resumption of the land by the Public Works Act. The applicant sought compensation for land resumption under the Public Works Act and a declaration of Native Title under the *Native Title Act 1993* (Cth) (**Native Title Act**). The Minister for Environment & Water (**respondent**) asserted that this title was extinguished prior to the Public Works Act through the action of s 18 of the River Murray Waters Act.

Issues:

(1) Was the estate in fee simple for the land under appeal vested in South Australia by the Murray Waters Act;

(2) Was compensation allowable for deprivation of possessory title and native title rights under the Public Works Act;

(3) If the land was vested in South Australia, was the effect of s 18 of the Murray Waters Act to extinguish any and all interests, both Native Title and otherwise, by the commencement of the Act; and

(4) Were s 23B of the Native Title Act and s 20 of the *Native Title (New South Wales) Act 1994* (NSW) triggered as 'previous exclusive possession' when the Murray Waters Act commenced.

Held: Appeal allowed; order of the primary judge set aside; case remitted to the Chief Judge in Equity or her nominated judge; respondents to pay the cost of appeal for the appellants; and costs for proceedings in the lower Court to be ordered by the Judge who determined those proceedings (Bathurst CJ, with Basten JA agreeing with further reasons and McCallum JA agreeing with both):

(1) Section 18 of the River Murray Waters Act did not vest an estate in fee simple with South Australia: at [24]. [29], [48], [58];

(2) Section 18 of the River Murray Waters Act did not 'express intention' to deprive people of their interests in property rights without compensation: at [25], [54], [58];

(3) Upon the resumption of land under the Public Works Act which extinguished people's rights to land, this Act converted the claim into one of compensation: at [25], [54], [58];

(4) Because s 18 of the River Murray Water Act did not vest the estate in fee simple with South Australia, the interests in the land at the time of the Act the question of the extinguishment of other interests in the land does not arise: at [29], [57]-[58]; and

(5) Issues of 'previous exclusive possession' do not arise because s 18 of the Act did not vest the estate in fee simple with South Australia: at [29]; [57]-[58].

Omaya Investments Pty Ltd v Dean Street Holdings Pty Ltd **[2021] NSWCA 2** (Basten, Payne, Brereton JJA)

(decision under review: *Omaya Investments Pty Limited v Dean Street Holdings Pty Limited (No 5)* [2020] NSWLEC 9 (Duggan J))

Facts: This was an appeal from a decision dismissing an application brought by the owners of a site adjoining a development site in Burwood for declarations and restraining orders concerning a residential apartment development.

Development consent was granted in March 2013 and a construction certificate was issued in March 2018 with accompanying plans. Amended engineering plans were approved by the principal certifying authority in March 2019 which proposed an excavation that was deeper and more extensive than had originally been approved. The amended plans were incorrectly stamped and were not accompanied by a formal application to amend the construction certificate or the plans which accompanied it.

Issues:

(1) Whether the modified construction certificate was valid to support the excavation works undertaken at the site; and

(2) If there was a valid certificate issued, did it authorise the works undertaken as the certificate could not have retrospective effect.

Held: Appeal dismissed; appellants to pay respondents' costs (Basten JA, Payne and Brereton JJA agreeing):

(1) As found by the trial judge, neither the *Environmental Planning and Assessment Act 1979* (NSW) or the Environmental Planning and Assessment Regulation 2000 (NSW) required an application to modify the plans accompanying the certificate to be in any particular form: at [63];

(2) Whether the plans were properly stamped, and whether there was any non-compliance with the Regulations, did not displace the evidence to support the finding that the certifier did approve the new plans at the relevant time: at [71]; and

(3) The evidence tendered by the appellant to the trial judge to determine what excavation and piling work was done prior to the variation was not sufficient. The appellant should have called on expert evidence to draw conclusions from the images it had provided: at [78].

Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 **[2020] NSWCA 281** (Bell P, Gleeson AND Payne JJA)

(decision under review: *Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* [2019] NSWLEC 203 (Pain J))

Facts: Reysson Pty Ltd (**appellant**) sought judicial review of the State Environmental Planning Policy (Coastal Management) 2018 (**Coastal Management SEPP**) made by the Governor pursuant to s 3.29 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The appellant owned land at Tweed Heads which had been identified as part of a 'coastal wetlands and littoral rainforests area' (**coastal wetlands area**) on the Coastal Wetlands and Littoral Rainforests Area Map under the Coastal Management SEPP. The appellant sought a declaration that the Coastal Management SEPP was invalid, or alternatively, was invalid to the extent that it applied to the appellant's land. Pain J dismissed the appellant's claims.

Issues:

(1) Section 6(1) of the *Coastal Management Act 2016* (NSW) (**Coastal Management Act**) describes the type of land which is to be identified by a SEPP as coastal wetlands area. Whether s 6(1) of the Coastal Management Act contained an objective jurisdictional fact which must exist as a precondition to the exercise of the power to identify land as being within the coastal wetlands area;

(2) The definition in s 6(1) of the Coastal Management Act includes 'land adjoining' coastal wetlands. Whether the inclusion of land adjoining coastal wetlands was reasonably appropriate and adapted to serving the objects of the EPA Act and the Coastal Management Act; and

(3) Whether the Governor must have had regard to or approved the Coastal Wetlands and Littoral Rainforests Area Map before making the Coastal Management SEPP.

Held: Appeal dismissed; appellant to pay Minister's costs (Payne JA; Bell P and Gleeson JA agreeing):

(1) The structure of the Coastal Management Act (at [57]-[67]), the nature of the task to be performed (at [68]-[73]) and inconvenience (at [74]-[75]) tended against a conclusion that the fact relied upon by the appellant was a jurisdictional fact. Determining which area of land should be identified as a coastal wetlands area may involve complex, contestable evaluative judgments. It is improbable that the legislature intended for these provisions to turn on objective jurisdictional facts. The power to make the Coastal Management SEPP did not depend on an objective jurisdictional fact: at [81];

(2) The inclusion of land adjoining coastal wetlands is both rational and proportionate to serve the objects of the EPA Act and the Coastal Management Act: at [104]-[105];

(3) There was nothing in the EPA Act or the Coastal Management Act that required the Governor to have regard to, approve or do anything at all in relation to making the Coastal Wetlands and Littoral Rainforests Area Map: at [113].

Settlers Estate Pty Ltd v Penrith City Council **[2021] NSWCA 13** (Gleeson and Payne JJA, Preston CJ of LEC)

(decisions under review: *Penrith City Council v Settlers Estate Pty Ltd* [2020] NSWLEC 99 (Pepper J); *Penrith City Council v Settlers Estate Pty Ltd (No 2)* [2020] NSWLEC 128 (Pepper J))

Facts: Development consents had been granted for the subdivision of land and associated works in three stages. The Stage 3 development consent approved construction of a drainage line ("Drainage Line A") to convey stormwater flows from the future development into a riparian corridor. A construction certificate for the drainage works was later issued. The relevant approved plans issued with respect to the construction certificate specified the height (or depth below surface), length, grade and direction of Drainage Line A. These differed in some respects from those specified in the approved development consent plans. The main point of difference, however, was that the construction certificate plan identified the location of the discharge point of Drainage Line A as abutting to the east the existing channel (watercourse), while the development consent plan showed Drainage Line A in an area marked as "Riparian Corridor".

Penrith City Council brought proceedings in the Land and Environment Court contending that the applicants had constructed Drainage Line A not in accordance with the development consent and in breach of s 4.2 of the *Environmental Planning and Assessment Act 1979* (EPA Act) because the drainage line did not discharge at a location abutting to the east the existing channel but instead crossed the existing channel and discharged into a newly formed drainage line to the west of the existing channel that flowed into the existing channel a little downstream of the discharge point.

The primary judge ordered and determined a separate question of whether the drainage line had been constructed in accordance with the development consent. The primary judge found that the location of the discharge point abutting to the east the existing channel, shown on the construction certificate plan, was a legal requirement of the development consent, which the applicants had breached by constructing the drainage line in a different location.

The applicants sought leave to appeal against the primary judge's finding that the drainage line was constructed not in accordance with the development consent, and in breach of s 4.2 of the EPA Act. The applicants also challenged an interlocutory decision of the primary judge refusing the applicants leave to reopen their case in order to tender additional evidence from a surveyor to establish that the drainage line was constructed in the same direction as the direction shown on the construction certificate plan.

Issues:

(1) Whether the primary judge erred in finding that the drainage line was not constructed in the location depicted in the construction certificate;

(2) Whether the primary judge erred in finding that Drainage Line A could be lawfully constructed in accordance with the construction certificate plan and yet still end on the eastern side of the watercourse;

(3) Whether the primary judge erred in refusing to determine for herself, by either a comparison of different plans or by use of a protractor, that Drainage Line A had been constructed in the same direction as that shown on the construction certificate plan;

(4) Whether the primary judge had misunderstood the relevance of certain construction plans and the applicants' argument concerning these plans; and

(5) Whether the primary judge's interlocutory decision refusing the applicants leave to reopen their case to tender evidence from a surveyor denied the applicants procedural fairness or was based on incorrect factual and legal assumptions.

Held: Appeal dismissed (Preston CJ of LEC, Gleeson and Payne JJA agreeing):

(1) The primary judge did not err in finding that Drainage Line A was not constructed in accordance with the construction certificate plans:

   (a) the construction certificate and its approved plans and specifications are taken to form part of the development consent. The construction certificate did more than merely authorise the proposed development; the construction certificate also described and defined the development authorised to be carried out. The specification in the construction certificate plan that Drainage Line A should discharge

into the existing channel from the east described and defined an aspect of the development the subject of the development consent: at [42]-[43];

(b) the fixing of the location of the discharge point at the existing channel served the functional purpose of discharging stormwater directly into the existing channel. This functional utility supported the conclusion that the location of the discharge point, shown on the construction certificate plan, is a fundamental aspect of the development the subject of the development consent and one in accordance with which the development had to be carried out: at [44];

(c) it was irrelevant to the issue of breach of s 4.2 of the EPA Act that it might be impossible to comply with all of the parameters for construction of Drainage Line A shown on the construction certificate plans: at [45];

(2) The primary judge's statement that "there was no evidence to suggest that the pipe structure could not be constructed in accordance with the plans as approved" meant only that there was "no evidence" of this fact. The statement, read in context, was made in the course of explaining why the primary judge rejected the first of four arguments: at [47]-[51];

(3) The primary judge did not err in refusing to determine for herself, by either a comparison of different plans or by use of a protractor, that Drainage Line A had been constructed in the same direction as that shown on the construction certificate plan. The angle of the drainage line shown on the plans was not a fact of which the primary judge could take judicial notice under s 144 of the *Evidence Act 1995*. Evidence was needed to establish the foundational facts upon which the angle was to be measured and to otherwise compare the two plans: [52]-[63]. In addition, the issue of direction was not a principal contested issue. The primary judge did not therefore need to deal with the applicants' submissions about the direction of the drainage line. But insofar as she did, even if she were to have been in error, that error would not be material or vitiating: at [64];

(4) Irrespective of whether the primary judge misunderstood the applicants' argument about certain construction plans, the primary judge did not err in rejecting the applicants' argument. The Council's review of plans submitted by the applicants prior to the issue of the construction certificate pursuant to condition 67 of the development consent did not constitute any "acceptance" or "approval" of the submitted detailed construction plans or effect any modification of the development consent: [71]. The construction certificate that was subsequently issued, and the approved plans and specifications issued with respect to that construction certificate, described and defined the location of the discharge point as abutting to the east the existing channel: at [72]; and

(5) There was no denial of natural justice. None of the primary judge's reasoning to refuse leave to reopen involved any material error of fact or law of the kind required for an appeal against a matter of practice and procedure: [79]. Even if the primary judge's decision were found to be erroneous, no substantial injustice would result if leave to appeal against the decision were to be refused. The applicants did not have to meet any changed case of the Council concerning the direction in which the drainage line was constructed: at [81]-[88].

New South Wales Court of Criminal Appeal:

Kiangatha Holdings Pty Ltd v Water NSW **[2020] NSWCCA 298** (Hoeben CJ at CL, Rothman and Fagan JJ)

(related decision/decision under review: *Water NSW v Kiangatha Holdings Pty Ltd; Water NSW v Laurence Natale* [2019] NSWLEC 185 (Robson J))

Facts: Kiangatha Holdings Pty Ltd (**appellant**) sought leave to appeal from a decision of Robson J in the Land and Environment Court. The decision regarded a motion to strike out charges laid against them on the basis that they were duplicitous. The alleged offences were of polluting waters contrary to s 120 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The manner of breach was said to arise as a result of the unlawful construction of unsealed roads on the appellant's property, some of which traversed ephemeral watercourses, which were referred to as 'gullies'. This was alleged to have occurred in multiple places within the property. The appellant sought to characterise each individual act of placing material for the purpose of road construction as giving rise to an independent charge. The prosecutor claimed that the act of building the road formed a single criminal enterprise.

There were four proceedings on foot, two of which were attributed to the appellant, and the other two to Mr Natale, the director for the appellant (who was said to attract liability by virtue of special executive liability pursuant to s 169 of the POEO Act). The two charges levied against the appellant and Mr Natale were the 'actual pollution' charges and the 'likely pollution' charges. The former required actual evidence of material entering the gully, and the latter did not.

Issues:

(1) Whether the summonses were bad for duplicity; and

(2) Whether the act of constructing the unsealed road, over a considerable distance and time period, formed a single criminal enterprise.

Held: Leave granted to appeal; appeal upheld; each summons stayed until respondent elected and particularised in each summons a single offence (Fagan J with Hoeben CJ at CL and Rothman J agreeing):

(1) A number of individual acts, each one complete at the moment of its performance, did not become something that is 'continuing' just by being drawn together under the one charge: at [50];

(2) There was no element of continuance in what the prosecutor had alleged. The alleged offending conduct could be characterised as one criminal enterprise in breach of s 120, so as to come within the single transaction exception to the rule against duplicity: at [51];

(3) It did not follow from recognising the road construction as a single engineering project that one may regard numerous individual acts, committed in the course of that project and being of a kind that s 120 forbade, as an 'overall transaction' from the point of view of criminal pleading: at [57];

(4) The geographic differentiation of specific sites, where the activities were alleged to have occurred, was sufficiently distinct as to constitute separate events. It could not have formed a single criminal enterprise: at [61]-[62]; and

(5) The rule against duplicity was essential to the administration of criminal justice and must be applied to prosecutions of offences of all kinds: at [70].

Namoi Valley Farms Pty Ltd v Office of Environment and Heritage New South Wales; Department of Premier and Cabinet **[2020] NSWCCA 298** (Brereton JA, Johnson and Davies JJ)

(decision under review: *Chief Executive Office of Environment and Heritage and Namoi Valley Farms Pty Limited* [2020] NSWLEC 69 (Pain J))

Facts: Namoi Valley Farms Pty Ltd (**defendant**) was charged with an offence under s 12 of the *Native Vegetation Act 2003* (NSW) for the alleged clearing of native vegetation. The Office of Environment and Heritage (**OEH**) claimed legal professional privilege over a document called a breach report. An OEH employee provided an affidavit deposing that the breach report had been created in accordance with OEH practice and that it had been prepared for the purpose of obtaining legal advice. Annexed to the affidavit was a copy of a contemporaneous email where the document was called a 'draft breach report for legal for your review'. Pain J upheld the prosecutor's claim for legal professional privilege. The applicant applied to the Criminal Court of Appeal for leave to appeal that decision under s 5F of the *Criminal Appeal Act 1912* (NSW).

Issues:

(1) Whether the dominant purpose of the breach report was to obtain professional legal advice;

(2) Whether the affidavit supporting the claim of legal professional privilege was admissible;

(3) During the hearing there was an issue as to whether there was one or more than one breach report. Pain J inspected two subpoena packets provided by the OEH and confirmed there was only one. Whether the primary judge erred in inspecting documents subject to the privilege claim.

Held: The defendant did not establish an arguable case and leave to appeal was refused (per Brereton JA, Johnson and Davies JJ agreeing):

(1) The dominant purpose of the breach report was to obtain legal advice. It may be that the report was created not only for the purposes of obtaining legal advice, but the rule is the dominant and not the sole purpose test: at [16];

(2) Affidavit evidence was admissible as relevant but not decisive: at [6]-[10]; and

(3) There was no error in inspecting documents to confirm the number of relevant documents subject to the privilege claim: at [11]-[12];

Supreme Court of New South Wales:

Council of the City of Sydney v Baboon Pty Limited **[2020] NSWSC 1480** (Rees J)

Facts: Mr Zaven Margarian owned a unit in Strata Plan 46528 within the Council of the City of Sydney (**plaintiff**); subsequently Mr Margarian disappeared. Rates were owed to the plaintiff of around $9,500 and to the Owners' Corporation of Strata Plan 46528, levies of $26,000 (second interested party - **OC**). To recoup these levies, the plaintiff sold the unit, which was purchased by Baboon Pty Limited (third interested party - **BPL**) for $136,000 in November of 2018.

Because Mr Margarian was missing, the normal course of events, where the vendor pays any outstanding rates to the date of settlement, could not be followed.

Upon completion, the 'net proceeds of sale' were paid into the Court and another, unsuccessful, attempt was made to locate Mr Margarian.

In May 2020, the plaintiff applied to the Court to recover costs in arrears and in July 2020, Ward CJ in Eq, ordered by consent that the sum of $15,266.67 be paid to the plaintiff, leaving a balance of $92,733.66.

The plaintiff wrote to interested parties regarding the remainder of the balance; Baboon Pty Limited made a claim on the net proceeds of sale for the amount it paid to cover Mr Margarian's unpaid levies to the plaintiff, while OC made a claim in the amount of $118,899.20 for the legal costs of recovery and the unpaid levies.

A commercial compromise was reached between BPL and OC that would rateably proportion the remaining proceeds - $17,888.26 and $74,845.07 respectively. Both OC and BPL sought orders from the Court under r 41.3(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

Issues:

(1) What was the correct apportionment of the proceeds of sale: at [4]-[5]; and

(2) Was r 41.3(1) the correct rule under which the Court could make the order: at [5].

Held: Pursuant to r 55.11 of the UCPR, the remaining funds from those paid into Court by Council of the City of Sydney in the proceedings were to be paid as follows:

(i) to Baboon Pty Ltd, the amount of $26,729.60; and

(ii) to the Owners - Strata Plan No 46528 of 155 King Street, Sydney, the balance:

(1) Rule 41.3(1) was not the correct rule, r 55.11 of the UCPR was the appropriate rule for the Court to make orders on this matter: at [6]-[8];

(2) The Court must determine the validity of competing claims, citing *Re C & L Cameron Pty Limited* [2012] NSWSC 676, [128]: at [10];

(3) As to the legal costs incurred by OC, there was wide discretion to ensure that legal costs are proportionate: at [11]; and

(4) The Court rejected the commercial compromise was rejected because the costs that OC sought to recover were disproportionate: at [12].

Double Bay Bowling Club v Council of the Municipality of Woollahra trading as Woollahra Municipal Council **[2020] NSWSC 1861** (Rein J)

Facts: Double Bay Bowling Club (**Club**) runs its operations on lots 9, 100, and 101 at 18 Kiaora Rd (lots 100 and 101) and 42 Glendon Rd (lot 9), Double Bay. Lot 101 is the current location of the Club's three bowling greens and the clubhouse. Lot 9 had a cottage that had been previously rented to the greenkeeper until 2018 when the cottage was demolished.

Woollahra Municipal Council (**Council**) sold the land to the Club. The three lots were sold to the Club in 1948 and the sale of land included a restricted covenant. The covenant limited the uses of the land to recreational uses and any building erected had to be connected to that pursuit, unless varied or terminated by written consent of the Council. At the time the covenant was drafted, it was required to be in benefit to specific land.

Between 2015 and 2016, the Club and the Council had discussions relating to the termination of the covenant, as the Club was concerned with declining membership and wanted to examine development of townhouses on lot 9 to provide an alternative stream of income. The Council exhibited a willingness to consider the extinguishment of the covenant provided the Council received compensation should either of the two proposed townhouses be sold, but these discussions ended with disagreement regarding the outcome.

The Club sought an order under s 89(1) of the *Conveyancing Act 1919* (NSW) that would terminate the covenant because it was 'obsolete', the covenant would 'impede the reasonable user of the land', the Council would not be injured by the cancelation of the covenant, and the Council 'had by its acts or omissions waived the benefit of the covenant'. According to the Council's cross-claim, a binding agreement was created through the correspondence between the parties that would result in the Council 'removing the existing covenant'; require the payment of compensation by the Club to the Council for the sale of any of the townhouses or of lot 9; and the method for determining compensation was to be the 'before and after method'.

Issues:

Section 89 claim

(1) Was the Court's discretion under s 89(1) of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**) enlivened? This requires consideration of the following:

   (a) was the covenant now obsolete;

   (b) did the covenant impede the reasonable user of the land without securing any practical benefit to the Council;

   (c) had the Council waived the benefit of the covenant;

   (d) would the modification or extinguishment of the covenant cause no substantial injury to the Council;

(2) If the answer to (1) was 'yes', should the Court exercise its discretion to modify or extinguish the covenant over Lot 9;

(3) If so, should the modification or extinguishment be conditional or unconditional;

Successors in title

(4) Was the question of whether the covenant binds successors in title to the Club a justiciable controversy, in circumstances where there was no such successor in existence;

(5) If the answer to (4) was 'yes', was the Club entitled to a declaration that the covenant would not bind successors in title to Lot 9;

Consent under the covenant

(6) Had the Council, pursuant to the covenant, given its written consent to the use of Lot 9 for any purpose other than recreational purposes in connection with a bowling club;

Clause 1.9A

(7) Did the Supreme Court have jurisdiction to determine whether cl 1.9A(1) of the Woollahra Local Environment Plan 2014 (**WLEP 2014**) applied to the covenant;

(8) If the answer to (7) was 'yes', did cl 1.9(1) of the WLEP 2014 apply to the covenant;

Council's cross-claim

(9) Did the Council and the Club, by correspondence between October 2015 and May 2016, enter into a binding agreement; and

(10) If the answer to (9) was 'yes', should the Council be granted specific performance of the Agreement.

Held: There was no binding agreement between the Club and the Council; however, if there was a binding agreement contrary to that finding, the agreement was abandoned by the parties; and the covenant should be extinguished pursuant to s 89(1)(a) and (c) of the Conveyancing Act:

(1) The use of Lot 9 as a residential dwelling was not use for a recreational purpose in connection with a bowling club, whether leased as a matter of convenience to a greenkeeper or not: at [66];

(2) The covenant had in effect become obsolete when Lot 9 ceased being used as a temporary club house and that the continued operation of the covenant stultified the appropriate use of Lot 9: at [82];

(3) Even if 'recreational purpose of a bowling club' included an ancillary or incidental use, rental to a greenkeeper of a residence on Lot 9 as a matter of convenience (as opposed to an 'essential matter') would not be sufficient: at [67; .

(4) Even if use of Lot 9 as a residence for the Club's greenkeeper was permitted by the covenant, forcing the Club to house the greenkeeper in one of the townhouses and effectively precluding use of the other townhouse would similarly involve a stultification of the use of Lot 9 permitted under the relevant planning law and the approval, by the Council's development consent, of use of Lot 9 for a dual occupancy residential dwelling: at [82];

(5) No benefit or advantage to the Council or the local area had been identified arising out of the covenant insofar as it concerned Lot 9 and the Court was not persuaded that any practical benefit would be lost, or that any likelihood of any injury to the Council, by reason of extinguishment of the covenant, had been established, a conclusion supporting extinguishment pursuant to s 89(1)(c) : at [94-5];

(6) Discretionary considerations did not lead to refusal of the relief otherwise available under s 89: at [90-5].

(7) The development consent granted by the Council to the Club for demolition of the cottage and the development of townhouses on Lot 9 did constitute consent to a use other than use as a recreational purpose in connection with a bowling club but because of the conclusions otherwise reached in respect of s 89, there was no need to express a view as to whether this consent constituted waiver of the covenant by the Council within the meaning of s 89(1)(b) : at [110]; and

(8) The Council not only resisted the Club's case based on s 89 but also asserted (by way of cross-claim) that it and the Club had entered into a binding agreement in May 2016 pursuant to which the Council agreed to removal of the covenant and in return the Club agreed to a new restriction. The new restriction required that, in order to sell one or both of the townhouses, the Club would need to pay the Council an amount based on what was described as the 'Before and After Method' of valuation - i.e. the Club was to pay the Council the difference between what Lot 9 is worth with the covenant in place and what it is worth without the covenant (an amount of at least $3M). If there had been such an agreement, it had been abandoned: at [91]-[92], [103], [111]-[112].

Downes v Maitland City Council **[2020] NSWSC 1555** (Adamson J)

Facts: Maureen and Louis Downes (**plaintiffs**) brought a statement of claim against Maitland City Council (**Council**). The plaintiffs alleged that the Council negligently exposed them to the risk of harm caused by disruption of drainage to their property upon approving the development of a two-storied office and carpark next to their property. They furthermore alleged that this act created a nuisance which adversely affected the use, enjoyment and value of the property. The Council denied negligence and nuisance and submitted that it had a complete defence to the claim pursuant to s 733 of the *Local Government Act 1993* (NSW) (**Local Government Act**).

The Council sought, by Notice of Motion pursuant to r 13.4(1)(b) of the Uniform Civil Procedure Rules 2005 (**UCPR**), that the proceedings be dismissed on the basis that no reasonable cause of action was disclosed.

Issues: Whether the statement of claim disclosed a reasonable cause of action.

Held: Notice of Motion dismissed; no order for costs:

(1) Mere negligence did not amount to a lack of good faith. More is involved to establish good faith than mere proof of absence of corruption or compliance with procedures and applicable legislation: at [54];

(2) It was plain from the plaintiff's evidence that the development conditions imposed by the Council were either not enforced or were manifestly insufficient to protect the plaintiffs' property from the run-off occasioned by the building and carpark development: at [56];

(3) The evidence was sufficient to indicate that there was a triable issue as to whether the Council acted in good faith: at [57];

(4) The Council had not established that the question whether it was entitled to defeat the plaintiffs' claim on the basis of s 733 ought to have been dealt with summarily because the meaning of 'good faith' is 'protean' and coloured by context: at [58]; and

(5) The plaintiffs confirmed that they had acted as self-represented litigants and had therefore not incurred legal fees. Accordingly, there was no order for costs, which would have otherwise followed the event pursuant to UCPR 42.1: at [59].

GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 2) **[2020] NSWSC 1360** (Stephenson J)

(related decision: *GC Group Company Pty Ltd v Bingo Holdings Pty Ltd* [2020] NSWSC 598 (Stephenson J))

Facts: GC Group Company Pty Ltd (**plaintiff**) purchased 'recycled aggregate' from Bingo Holdings Pty Ltd (**defendant**) for a large residential development project at Albion Park. The plaintiff alleged that the aggregate supplied was contaminated and, as a consequence, the plaintiff had to effect substantial reconstruction works at its own cost and had thus incurred loss and damage.

The plaintiff submitted that the defendant was liable for damages for breach of contract and other breaches under the *Competition and Consumer Act 2010* (Cth), Sch 2 (Australian Consumer Law). The defendant's assertion that the plaintiff's claim against them was an 'apportionate claim' was struck out in the related proceedings earlier in the year.

The defendant then sought, by Notice of Motion, to re-plead an apportionate liability defence insofar that any contamination of the aggregate came from materials supplied to it by one or more of its 710 customers.

Issues: Whether a concurrent wrongdoer, within the meaning of s 34(2) of the *Civil Liability Act 2002* (NSW), could be identified as being the registered owner of a vehicle.

Held: Leave to replead refused; defendant to pay applicant's costs of the Motion:

(1) The defendant could not know that any one of the 710 customers, let alone each of them, was a person whose acts and omissions caused the loss the subject of the claim and therefore constituted a concurrent wrongdoer: at [25]-[26]; and

(2) To permit such an amendment would have been unjustifiably oppressive to the plaintiff and would have brought the administration of justice into disrepute such that the defendant would have had to articulate a defence that it could not make out and which would, therefore, have been amenable to summary disposal: at [29]

Lorenzato v Burwood Council **[2020] NSWSC 1659** (Fagan J)

Facts: The plaintiff brought action against Burwood Council (**Council**) for negligent misstatement concerning the s 149 certificate of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The misstatement related to the failure to disclose a 400 mm drainage pipe that ran through the property at 13 Appian Way, Burwood that had been installed around 1911. This drainage pipe services an area of 5.2 hectares on which there were approximately 10 houses. A pool was installed over the area of the pipe in 1969. Both the pool and the pipe remained extant during the course of the proceedings.

Another defect of the s 149 certificate was that it failed to disclose the creation of a drainage easement along the western property boundary. The property was purchased by the plaintiff in 2011 for $3,000,000. It was sold to the second defendant (**vendor**).

The plaintiff inspected the property prior to purchase but was not made aware of the drainage pipe of the easement by the second defendant or his agents, and nor was the existence of the pipe 'readily ascertainable' from the inspections. The second defendant was joined to the proceedings for negligent misstatement for failure to appropriately answer requisitions and identifying the existence of the drainage pipe and of the drainage easement.

The plaintiff suffered a total of nine flooding events between 7 November 2011 and 11 October 2012. Each was caused by a blockage in the drainage pipe under her property. The plaintiff sued the Council for nuisance resulting from the flooding that occurred because of the blockage in the drainage pipe resulting in overland storm water flow. The plaintiff remained unaware of either the drainage pipe or the associated easement until three months post completion when the first of the flooding events occurred and the Council claimed right of entry to conduct work on the drainage pipe.

Issues:

(1) Was a right to rescission created per the rule in *Flight v Booth* (1834) 1 Bing (NC) 370; (1834) 131 ER 1160, where the purchaser may not have contracted with knowledge of the issue;

(2) Did the Council breach its duty of care, resulting in negligent misstatement, when the Council issued a certificate under s 149 of the EPA Act;

(3) Did the vendor breach their duty, resulting in negligent misstatement, when they answered requisitions about the presence of the storm water pipe under the property and would the purchaser have the right to rescind if correct information had been given;

(4) Did the vendor's solicitor exercise reasonable care and skill in obtaining the instructions for answering the requisitions (cross-claim);

(5) Did the Council's actions in supplying the certificate without the information regarding the storm water pipe amount to nuisance by a public authority; and

(6) Was the land value of the property affected by the presence of the storm water pipe and easement; and

(7) What was the correct and proportionate distribution of damages, if they arose.

Held: Judgment for the plaintiff against the Council for $1,274,000 together with statutory interest up to judgment; Council to pay the plaintiff's costs of the proceedings against it; judgment for the plaintiff against the second defendant for $1,219,000 together with interest up to judgment; the second defendant is to pay the plaintiff's costs of the proceedings against him; cross-claim by the second defendant against his solicitor dismissed; the second defendant is to pay the cross-defendant's costs of the cross-claim:

(1) The Council did not appropriately answer question 7 of the s 149 certificate when it answered 'No' because it was contrary to its 2002 resolution that restricts development in areas prone to flooding; the Council should have indicated 'Yes' and supplied a 'statement of substance of the 2002 resolution:' at [277];

(2) The storm water drain only had an 'indirect connection' to the flooding and, as such, was outside the purview of the issues with which question 7A was connected: at [286];

(3) A person who receives a certificate cannot 'reasonably rely upon' that certificate as to meaningful disclosure of all information had occurred in connexion with the disclosure of specific information about Council infrastructure: at [290];

(4) The Council negligently breached its duty of care owed to the plaintiff by indicating an answer to question 7 that was incorrect: at [307];

(5) The Council's defence through s 733(1)(a) of the *Local Government Act 1993* (NSW) is not engaged when the answer to question 7 on the certificate was incorrect: at [319];

(6) All elements required for negligent misstatement have been established by the plaintiff: at [325];

(7) The second defendant would have been negligent for the 'incorrect and misleading answers if he had given [his solicitor] full instructions and if the latter had made an error of professional judgment in the answers he provide:' at [347];

(8) Had the questions in the requisition been answered correctly, the plaintiff would have had the right to rescind: at [358];

(9) *Flight v Booth* applied - the plaintiff would have had the right to rescind and, as she stated, she would have rescinded, the plaintiff would have recovered her deposit and suffered no loss: at [360];

(10) Reliance and causation were proven thereby realising the requirements for negligent misstatement. Clause 6.1 of the contract did not exclude tortious liability for failure to uphold 'the implied obligation to exercise care in answering the requisitions:' at [360];

(11) Total damages was assessed at $1,219,000 based on the difference of the purchase price ($3,000,000) and the discounted price that accounted for the 'reason of its impaired state:' at [413];

(12) No failure to mitigate by the plaintiff against the first defendant was shown in relation to the transfer of the Grant of Easement and the Deed did not specify in sufficient clarity, the works; neither of these issues could have been definitively accepted by the plaintiff, due to their inherent uncertainty: at [414];

(13) The argument for a proportionate liability defence for the Council was dismissed due to the second defendant's concurrent liability; as the Council 'has not pleaded or even attempted to adopt that ground for apportionment' the full amount was awarded against each defendant: at [423];

(14) It was not possible 'to determine a suitable apportionment between Council and the second defendant because there was no basis to allocate what percentage of the plaintiff's loss was due to the actions of the Council compared to the vendor. However, the Council had not pressed an argument pursuant to s 35 of the *Civil Liability Act 2002* (NSW): at [429];

(15) The cross-claim against the second respondent's solicitor was dismissed, because the erroneous answers were provided to the solicitor by the second respondent: at [438];

(16) The Council had not discharged its onus of proving the defence provided for in s 733 and it was liable to the plaintiff for the flooding damage to her property:' at [463]; and

(17) The Council's nuisance to the plaintiff's property impinged on the plaintiff's enjoyment and was liable for damages to the property and chattels: at [467].

Land and Environment Court of New South Wales:

- **Judicial Review:**

KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2) **[2020] NSWLEC 179** (Pain J)

(related decision: *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission* [2020] NSWLEC 38 (Moore J))

Facts: KEPCO Bylong Australia Pty Ltd (**KEPCO**) lodged a development application for state significant development in 2015 for a new coal mine in the Bylong Valley (**DA**). Applying the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**), the Independent Planning Commission (**IPC**) refused approval for the project. The IPC provided extensive reasons for its decision. KEPCO sought a declaration that the IPC's refusal was invalid and of no effect on eight grounds (Grounds 5 and 10 were not pressed at the hearing). The IPC filed a submitting appearance (**first respondent**). The Bylong Valley Protection Alliance Incorporated was joined as a contradictor (**second respondent**).

Issues:

(1) Whether the IPC made an error in law in construing cl 14(1)(c) of the Mining SEPP as imposing a requirement on KEPCO to minimise scope 1, 2 and 3 greenhouse gas (**GHG**) emissions from the project to the greatest extent practicable (**Ground 1**);

(2) Whether the IPC failed to perform its duty imposed by cl 14(1)(c) of the Mining SEPP to consider whether or not approval should be issued subject to conditions aimed at ensuring that the project was undertaken

in an environmentally responsible manner, including conditions to ensure that GHG are minimised to the greatest extent practicable (**Ground 2**);

(3) Clause 14(2) of the Mining SEPP refers to 'policies, programs or guidelines' relevant to the assessment of GHG emissions, including downstream emissions. Whether the IPC made an error in law by applying the NSW Climate Change Policy Framework **(NSW CCPF**) and Paris Agreement (**Ground 3**);

(4) Whether the IPC failed to refer the DA to the Minister for Regional Water for advice as required by cl 17B of the Mining SEPP (**Ground 4**);

(5) Whether the IPC failed to apply requirements from cl 14(1)(a) of the Mining SEPP in considering impacts of the development on water resources (**Ground 6**);

(6) Whether the IPC failed to have regard to 'land use trends' as required by cl 12(a)(ii) of the Mining SEPP (**Ground 7**); and

(7) Whether the IPC failed to accord procedural fairness to KEPCO in relation to Aboriginal heritage protection, alternative sources of coal, ground water or GHG mitigation, by identifying that there was insufficient evidence in relation to these matters (**Grounds 8 and 9**).

Held: Application for judicial review dismissed; costs reserved:

(1) The IPC did not correctly identify the obligation in cl 14(1)(c) of the Mining SEPP to consider whether consent should be issued subject to conditions: at [41]. However, any error in law was not material. The proposal would nonetheless have been refused consent because it was not in the public interest: at [61]-[63];

(2) There was no statutory basis for finding that cl 14(1)(c) required the IPC to itself propose conditions to mitigate GHG emissions: at [76]-[85];

(3) The plain and ordinary meaning of 'policies, programs or guidelines' in cl 14(2) of the Mining SEPP potentially applies to a broad range of documents: at [108]. The IPC noted, but did not apply, the Paris Agreement. Reference to the NSW CCPF was within the IPC's discretion: at [111]-[115]. Even if the IPC applied the NSW CCPF in error, it was not material: at [118]-[119];

(4) There was no temporal requirement for referring the DA to the Minister for Regional Water. The IPC could rely on a response received two years earlier: at [132]-[135];

(5) The same conclusions about the construction of cl 14(1)(c) of the Mining SEPP applied to cl 14(1)(a): at [147]-[149];

(6) A fair reading of the reasons showed that the IPC did have regard to land use trends. KEPCO cannot use judicial proceedings to challenge the merits of the IPC's conclusions: at [157]-[162]; and

(7) Arguments about procedural fairness were an attempt to canvas merits issues in the guise of judicial review grounds. KEPCO did not establish a denial of procedural fairness. The development assessment and approval processes were exhaustive: at [226]-[231].

Palm Beach Protection Group Incorporated v Northern Beaches Council **[2020] NSWLEC 156** (Preston CJ)

Facts: The Northern Beaches Council (**Council**) twice resolved to allow dogs on Station Beach at Palm Beach. The first resolution (**resolution 1**) resolved to conduct an off-leash area trial for 12 months; delegate authority to enter into a licence agreement for the trial; declare an off-leash area under s 13(6) of the *Companion Animals Act 1998* (NSW) subject to the granting of a licence; and investigate other beach locations prior to appointing a permanent dog off-leash area.

A Review of Environmental Factors (**REF**) was required to be included with the licence application and had been conducted. The REF had recommended measures to mitigate the impacts of dog use on marine biodiversity including seagrasses and a threatened species of seahorse, White's seahorse.

Palm Beach Protection Group (**Group**) commenced judicial review proceedings challenging resolution 1. Partly for this reason and partly because the Council had been unable to obtain the licence to use submerged Crown land, the Council passed a second resolution (**resolution 2**). Resolution 2 resolved to allow dogs on-leash at

Station Beach; amend the former Pittwater Council Dog Control Policy along with Council Resolution 267/19; and give authorisation to the Chief Executive Officer to do all things necessary to give effect to the resolution. The Group sought judicial review of resolution 2.

Issues:

(1) Whether the Council's two resolutions authorising the carrying out of development was in breach of s 4.2 or s 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**); and

(2) Alternatively, if the use authorised by the resolutions was not either prohibited or permitted only with consent, but instead is permitted without consent, whether the environmental impact of the use needed to be assessed under Pt 5 of the EPA Act.

Held: Declarations of invalidity made; Council decisions quashed; questions of possible injunctive relief set down for further hearing; and Council to pay the Group's costs:

(1) Resolution 1 may be legally ineffective to declare Station Beach to be an off-leash area. This is because it did not expressly revoke or vary the order in the Dog Control Policy that dogs are prohibited on all beaches before purporting to declare Station Beach to be an off-leash area. Additionally, resolution 1 was a resolution and not an order declaring a public place to be an off-leash area. It was also conditional upon the granting of a licence which had not been granted: at [37]-[41];

(2) Assuming that resolution 1 was effective to allow dogs on Station Beach, the use enabled was to conduct a dog off-leash area trial without implementation of the mitigation measures recommended by the REF. Assuming that resolution 2 was effective to allow dogs on Station Beach, the result was that the resolution enabled a use of Station Beach by people with their leashed dogs without implementation of these mitigation measures: at [46]-[62];

(3) Resolution 1 and resolution 2 were not in breach of both ss 4.2 and 4.3 of the EPA Act. Consent was not required for the use of the land enabled by the resolutions, because:

   (a) each resolution enabled a use of the land above and below the mean high water mark (**MHWM**) at Station Beach by the public: at [130];

   (b) the use of the land enabled by each resolution was characterised as being for the purpose of recreation area, which is permitted in the RE1 zone and the E2 zone with consent: at [131]-[136];

   (c) clause 65(3) of the State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP) did not apply to the use of the land above or below MHWM at Station Beach for the purpose of recreation area, so as to enable that use to be carried out without consent. This was because the use of the land for the purpose of recreation area would be carried out by the public and the use of the land below MHWM in the E2 zone would not be on a 'public reserve': at [137]-[155];

   (d) the use of the land enabled by the resolutions was a continuance of the use of the land for the purpose of recreation area for which the land was being used immediately before the coming into force of the Pittwater Local Environmental Plan 2014 (**PLEP 2014**) so consent is not required to continue that use under s 4.68(1) of the EPA Act. It was not established to be an enlargement, expansion or intensification of this use, so consent was not required under s 4.68(2): at [156]-[192]; and

   (e) the use of the land for the purpose of recreation area for which the land was used immediately before the coming into force of PLEP 2014 was not established to be abandoned under s 4.68(3), and not established to have been unlawfully commenced under s 4.69(1): at [193]-[203].

(4) Part 5 of the EPA Act imposes two duties on determining authorities to consider the environmental impact of each and every activity before carrying out the activity or granting an approval to the activity. The overarching duty in s 5.5(1), to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of' the activity, applies to every consideration by the determining authority of the activity. The duty in s 5.7(1) is twofold: It is an implied duty to determine whether an activity is likely to significantly affect the environment; and an express duty, triggered by an affirmative answer to the threshold question required to be asked by the implied duty. If an activity is likely to significantly affect the environment, the determining authority is under an express duty not to carry out the activity or grant an approval to the activity unless it has obtained or been furnished with, and has examined and considered, an EIS in respect of the activity: at [257];

(5) A number of points can be made about the duty in s 5.5(1) of the EPA Act: at [260];

(a) the duty in s 5.5(1) is imposed for the purpose of obtaining the objects of the EPA Act relating to the protection of the environment and has effect notwithstanding any other provision of the EPA Act or any other Act. Compliance with the duty is mandatory, and its importance is difficult to overstate;

(b) the 'activity' whose environmental impacts are to be considered by the determining authority is the particular activity proposed by the proponent;

(c) the duty is to examine and take into account the impact of an activity and both verbs require positive action by the determining authority. Examination requires inspection, inquiry or investigation of the environmental impact. Taking into account requires some responsiveness and reflectiveness to the impacts in the determining authority's decision-making;

(d) the phrase 'to the fullest extent possible' sets a high standard, but one that is tempered by reasonableness, so that the phrase is to be read as if the word 'reasonably' was inserted before 'possible';

(e) the duty imposed by s 5.5(1) is not restricted to any time frame. Any matter affecting or likely to affect the environment that first came to Council's attention after the activity commenced could not be ignored;

(f) the environment affected by the carrying out of the activity is the site on which the activity is carried out in addition to the area of which it is physically a part. It is permissible to go beyond the area in which the activity is proposed to be carried out and look at the whole undertaking of which the activity forms a part to understand the cumulative and continuing effect of the activity on the environment.

(6) A number of points can also be made about the duty under s 5.7(1) of the EPA Act: at [261];

(a) the duty under s 5.7(1) serves to ensure that the determining authority is equipped with the necessary information on the environmental impact of the activity in order to make a fully informed and well-considered decision of whether it should carry out the activity or grant approval to carry out the activity. It also ensures that the relevant information will be made available so that the public may participate in the decision-making process;

(b) the duty on the determining authority under s 5.7(1) is mandatory and gives rise to a jurisdictional fact that the Court must determine for itself on the evidence before the Court of whether or not the activity is likely to significantly affect the environment;

(c) section 5.7(1) imposes an implied duty on the determining authority to determine the threshold question of whether an activity is likely to significantly affect the environment;

(d) the activity to be assessed is the activity described by the proponent, including any ameliorative measures, but does not include any conditions that might be imposed by the authority on any approval granted;

(e) the activity cannot be a sham or a cover for a quite different type of activity or segment a large or cumulative activity into smaller components;

(f) the determining authority can also select the activity it proposes to assess for the purposes of s 5.7(1). However, the determining authority is not permitted to misdescribe the activity for the purposes of avoiding the duty imposed on it;

(g) the word 'likely' means only a 'real chance or possibility' and not 'more probably than not'. The word 'significantly' means 'important', 'notable', 'weighty' or 'more than ordinary';

(h) determining whether the activity is likely to 'significantly' affect the environment requires consideration of both the potentially affected environment and the degree of the effects of the activity;

(i) determining whether an activity is likely to 'significantly' affect the environment includes examining at least two relevant factors: '(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area';

(j) the word 'affect' refers to 'having an effect on'. Effects involve changes to the environment caused by the activity; and

(k) the 'environment' includes not only those areas that are likely to be directly affected by the activity but also those areas that are likely to be indirectly affected;

(7) Resolution 2 breached s 5.5(1) of the EPA Act by failing, in its consideration and approval of the activity of allowing dogs on-leash at Station Beach, to examine and take account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity. First, as a matter of fact, the Council did not even address the duty under s 5.5(1) before granting approval to the activity of allowing dogs on-leash at Station Beach. Secondly, if the Council could be seen to have brought to mind the assessment of the likely environmental impact of the activity of the dog off-leash area trial when it considered the activity of allowing dogs on-leash at Station Beach, any such consideration did not discharge the Council's duty under s 5.5(1) to consider the environmental impact of the activity. Such consideration was of a different activity, was neither an examination nor a taking into account, was not to the fullest extent possible, and was not a consideration of all matters affecting or likely to affect the environment by reason of the activity: at [262]-[279];

(8) Resolution 1 breached s 5.7(1) of the EPA Act. The activity of the dog off-leash area trial was likely to significantly affect the environment. The Council breached s 5.7(1) of the EPA Act by granting approval to the activity without having obtained or been furnished with, and having examined and considered, an EIS in respect of the activity. First, the actual finding in the REF of no likely significant effect on the environment was not adopted by the Council, so that the Council did not in fact find that the activity of conducting the dog off-leash area trial that the Council approved was not likely to significantly affect the environment. Second, as a matter of jurisdictional fact, the activity of conducting the dog off-leash area trial that the Council approved was likely to significantly affect the environment: at [280]-[322];

(9) The Council breached the implied duty in s 5.7(1) by not considering whether the activity of allowing dogs on-leash at Station Beach was likely to significantly affect the environment. As a matter of jurisdictional fact, the activity of allowing dogs on-leash at Station Beach, that was approved by the Council, was likely to significantly affect the environment: at [345].

Palm Beach Protection Group Incorporated v Northern Beaches Council (No 2) **[2020] NSWLEC 181** (Preston CJ)

(related decision: *Palm Beach Protection Group Incorporated v Northern Beaches Council* [2020] NSWLEC 156 (Preston CJ))

Facts: On 20 November 2020, the Court gave judgment in *Palm Beach Protection Group Incorporated v Northern Beaches Council* [2020] NSWLEC 156 and declared the Northern Beaches Council (**Council**) had breached s 5.5(1) and s 5.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) in making two decisions to allow dogs off-leash and on leash at Station Beach, and declared invalid and quashed the decisions. The Court deferred granting injunctive relief to give the parties an opportunity to make submissions on whether the Court should grant injunctive relief, and, if so, on what terms and to request a further hearing on the issue of injunctive relief.

Issues:

(1) Whether the Court should grant injunctive relief; and

(2) Whether the costs order should be varied.

Held: No injunctive relief ordered; no variation to costs order in principal decision; no order for costs of this secondary hearing:

(1) Injunctive orders were not necessary. The Council had already taken steps to install appropriate signage and notify the public that dogs are prohibited on Station Beach. Insofar as the signage and notification could beneficially be improved, the Council had indicated it would do so without the need for the Court to order it to do so. Additional signage and notification as sought by the Group was not necessary if the signage and the notifications and information on the Council's website were amended as the Court indicated and may be beyond what the Court could order to remedy and restrain the breaches of the EPA Act found by the Court: at [39]-[43]; and

(2) The Council's application to vary the costs order so as to award the Group only 60% of its costs was rejected. The Council had not made out a case for departing from the general principle that a successful party should be awarded its whole costs of the proceedings, including the costs of an issue on which it has failed at [44]-54].

The Owners Strata Plan 83556 trading as Aspect Apartments v Dehsabszi **[2020] NSWLEC 175** (Preston CJ)

Facts: Mr and Ms Dehsabszi (**respondents**) owned a ground floor shop (**Lot 12**) in a strata-titled, mixed-use building. They wanted to use the shop as a pizza shop. To do this, they needed to change the use from the currently approved use of an office for a real estate agent to a use for a food and drink premises and carry out building alterations. The building alterations involved carrying out work in the common property in addition to Lot 12. The Owners Corporation refused to give consent to the carrying out of any building work on the common property. There has been litigation between the Owners Corporation and the respondents in the New South Wales Civil and Administrative Appeals Tribunal (**NCAT**) and the Supreme Court.

The respondents obtained a complying development certificate (**CDC**) from a private certifier. The CDC authorised internal building alterations to Lot 12 in order to fit it out as a pizza shop. The respondents carried out these works in reliance on the CDC. The respondents also undertook building works in basement B1, which is part of the common property.

The Owners Corporation brought proceedings challenging the validity of the CDC and claiming the building works carried out in the common property were in breach of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

Issues:

(1) Whether the application for the CDC required the consent of the Owners Corporation as the owner of the common property because the development involved undertaking building works in the common property;

(2) Alternatively, if the application for the CDC did not include the building works in the common property, whether the application for the CDC is a sham, in that it does not include all work necessary to facilitate the use of Lot 12 as a pizza shop, or a contrivance in that it purports to divide into parts building works of an intrinsically indivisible nature, such as gas pipes, water pipes and sewer connections, along the title boundary between Lot 12 and the common property;

(3) Whether the development that the CDC purports to certify is not complying development under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Exempt and Complying Development Codes SEPP**);

(4) Whether the CDC was invalid because the certifier issued the CDC without himself carrying out an inspection of the development and instead relied on an inspection by another certifier, working in the same organisation, but the record of site inspection did not comply with the requirements of cl 129C of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**); and

(5) Alternatively, whether, by reason of the decision of NCAT in proceedings the respondents are estopped from seeking consent under the EPA Act.

Held: CDC declared invalid; works on common property declared to be in breach of the EPA Act; order prohibiting use of works unless and until development consent and building information certificate (as relevant) obtained; demolition order made and suspended for 12 months; respondents to pay Owners Corporation's costs:

(1) The application for the CDC did not propose carrying out of development on the common property. 'The land on which the development is proposed to be carried out' for the purposes of s 4.26(2)(b) of the EPA Act is limited to Lot 12 and did not extend to the common property. The consent of the owner of the common property, the Owners Corporation, was therefore not required to be obtained for the application: at [68]-[77];

(2) The application for the CDC was not a sham or contrivance. As a matter of fact, the application for a complying development certificate for the development described in the application was not a sham or a contrivance. As a matter of law, it is the application that defines and confines the complying development certificate or development consent that can be granted. There was no requirement under the EPA Act to apply in the application for a CDC for the tenancy fitout of Lot 12 as a pizza shop, for a CDC for the building works in the common property, irrespective of whether those works could be described as related development to the fitout of Lot 12 as a pizza shop because they were necessary in order to make the pizza shop functional: at [78]-[102];

(3) The development of a change of use of the premises, being one of the developments for which the CDC was sought, was not in fact complying development because of the failure of the applicant to obtain the required notice or other form of written advice from Sydney Water under cl 5.3(2) of the Exempt and Complying Development Codes SEPP. The certifier therefore had no power to issue the CDC for the proposed development and the CDC is invalid: at [103]-[133];

(4) The proposed development will not comply with the development standard in cl 5.4(1)(f) of the Exempt and Complying Development Codes SEPP. This is because the carrying out of the proposed development of the change of use of Lot 12 to food and drink premises authorised by the CDC will not, by themselves, cause the premises to comply with the Australian Standard: at [134]-[156];

(5) The Owners Corporation did not establish that the proposed development of Lot 12 as a pizza shop is not the specified complying development in cl 5.1 because the CDC granted by the certifier authorised the use of the building for the purpose of food and drink premises simultaneously with authorising the internal alteration to the building. Accordingly, the proposed development of the fitout of Lot 12 as a pizza shop, by the time it comes to be carried out, would be an internal alteration to a building that is the subject of a development consent (which includes a complying development certificate) for use for the purpose of food and drink premises, which is the specified complying development in clause 5.1: at [157]-[176];

(6) The inspection and record of inspection did not comply with the requirements of cl 129B and cl 129C of the EPA Regulation, so that there was not an inspection for the purposes of cl 129B. The prohibition in cl 129B(1) therefore remained and the certifying authority had no power to issue the CDC: at [177]-[234];

(7) As three of the Owners Corporation's challenges to the validity of the CDC should be upheld it was unnecessary to determine whether the respondents are estopped from being able to rely on the CDC: at [253]-[236];

(8) The carrying out of the building works in the common property was development, was not exempt development, and needed development consent. The carrying out of the building works in the common property without first obtaining development consent was in breach of s 4.2 of the EPA Act: at [237]-[254]; and

(9) It is appropriate to make declarations that the CDC is invalid and that the building works carried out in the common property were carried out in breach of s 4.2 of the EPA Act: at [255]-[292].

- **Criminal:**

Environment Protection Authority v Central Coast Council **[2020] NSWLEC 157** (Moore J)

Facts: In 2017, Mr Damien Terry, a developmentally disabled young man, drank pesticide from a Coca-Cola bottle that had been stored in the disabled bathroom at Bloodtree Oval Mangrove Mountain. Mr McInnes, the groundskeeper, was successfully prosecuted by the Environment Protection Authority (**prosecutor**) pursuant to s 10(1) of the *Pesticides Act 1999* (NSW) (**Pesticides Act**). In these proceedings, the prosecutor attempted to attribute criminal liability to Central Coast Council (**defendant**) pursuant to s 10(1) by virtue of operation of s 111(1) of the Pesticides Act by alleging that the defendant allowed that to occur.

Following opening submissions, the prosecutor proposal to adduce evidence became subject to a voir dire hearing. The evidence in question was a specific paragraph (par 11) from an affidavit of Inspector Bradley Folitarik, an officer of the New South Wales Ambulance Service, in which he deposed a conversation that he had had with a council officer (later confirmed by the prosecutor to be Mr McDermott, an employee of the defendant). This conversation contained statements to the effect that the defendant's officer knew that substances were being stored in a Coca-Cola bottle. The defendant objected to this paragraph of Inspector Folitarik's affidavit on the basis of at least second-hand hearsay. The defendant acknowledged that an exception to the hearsay rule related to evidence of an admission, but submitted that that exception did not apply.

Issues:

(1) Did the statements made in par 11 of Inspector Folitarik's affidavit amount to an admission made by the defendant for the purpose of establishing an exception to the hearsay rule.

Held: Paragraph 11 of Inspector Folitarik's affidavit did not constitute evidence of an admission:

(1) Accepting the prosecutor's case at its highest as being valid, the conversation could not pass through either of the two gates available for it pursuant to s 87(1)(b) of the *Evidence Act 1995* (NSW) (**Evidence Act**). This was fatal to the prosecutor's case and the evidence could not be admitted: at [31];

(2) There was no evidence that would demonstrate that Mr McDermott had authority to speak on behalf of the defendant concerning matters in the contested conversation: at [32];

(3) Whether Mr McDermott had authority to speak on behalf of the defendant did not need to be proved beyond a reasonable doubt on the *voir dire*. Section 87(1) of the Evidence Act only required that it was reasonably open to be found: at [35];

(4) The uncontested necessity of Mr McDermott making a further enquiry of another council officer who in turn needed to make another further enquiry of a third (unknown) person supported the inference that Mr McDermott did not have authority to speak on behalf of the defendant: at [38];

(5) Equally, there was no evidence that Mr McDermott had authority to make admissions on behalf of the defendant: at [39]; and

(6) The impugned paragraph was not to be admitted: at [46].

***Environment Protection Authority v Eveston* [2020] NSWLEC 178** (Preston CJ)

Facts: Mr Eveston (**defendant**) had been charged with committing two offences against s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). He applied for the proceedings to be adjourned for around three-and-a-half months to allow him the opportunity to seek access to funds to mitigate the environmental harm caused by his commission of the offences.

Issue: Whether the proceedings should be adjourned for a limited time to allow the defendant the opportunity to see seek access to funds to undertake the removal, transportation and disposal of waste from the premises.

Held: Proceedings adjourned:

(1) It was appropriate to adjourn the criminal proceedings for a limited time to allow the defendant the opportunity to see if he can succeed in his application to further amend the amended notice of revocation so as to be able to access funds to undertake the removal, transportation and disposal of waste from the premises: at [53];

(2) Removing and disposing of waste from the premises would be relevant to sentencing factors. It would also be relevant to making a start at compliance with the conditions for removal and disposal of waste from the premises: at [54]-[57];

(3) The adjournment of the criminal proceedings sought was to be for a definite and limited period of time, after which the parties and the Court would know if there was any real prospect that the defendant would be able to access funds to pay for the removal, transportation and disposal of waste from the premises. The criminal proceedings had not yet been fixed for a sentencing hearing and would not be fixed for a sentencing hearing before the date to which the criminal proceedings would be adjourned. The period of the adjournment would be over the Court's fixed law vacation. The adjournment would not, therefore, affect the orderly and efficient management and disposal of the criminal proceedings: at [58]-[60]; and

(4) There were no countervailing interests of justice or public interest that would justify refusing the adjournment: at [61].

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

(related decisions: *Environment Protection Authority v Mouawad* [2020] NSWLEC 1 (Robson J); *Environment Protection Authority v Aussie Earthmovers Pty Ltd (No 2)* [2020] NSWLEC 98 (Pain J); *Environment Protection Authority v Aussie Earthmovers Pty Ltd* [2018] NSWLEC 91 (Robson J)

Facts: Mr Paul Mouawad pleaded guilty to two offences of knowingly supplying false and misleading information about waste contrary to s 144AA(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Aussie Earthmovers Pty Ltd (**Aussie Earthmovers**) was found guilty of the same charges based on the actions of its employee, Mr Mouawad. Aussie Earthmovers did not participate in any stage of the proceedings. In 2016, Peter O'Brien Constructions Pty Ltd (**Peter O'Brien Constructions**) engaged Aussie Earthmovers to dispose of 84 truckloads of asbestos-contaminated waste from a building site in Darlington. The waste was to be disposed of at a landfill operated by Suez Recycling and Recovery Ltd (**Suez**). Aussie Earthmovers, through Mr Mouawad, supplied Peter O'Brien Constructions with a false Ticket List Report (**Ticket List Report offence**) and Waste Disposal Dockets (**Waste Disposal Dockets offence**), purportedly created by Suez. Apart from one truckload that was correctly disposed of, the location of the asbestos waste is unknown.

Issues: The appropriate sentences for Mr Mouawad and Aussie Earthmovers.

Held:

Mr Mouawad

A finding that Mr Mouawad should be sentenced to 12-months imprisonment to be served by an intensive correction order (**ICO**) (s 7(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) if an assessment found that he was suitable so to be sentenced; publication order appropriate to be made after the outcome of sentencing was finalised:

(1) The offences were of high objective seriousness: at [45]. The maximum penalty for an offence under s 144AA(2) of the POEO Act is $240,000 or imprisonment for 18 months, or both. The disposal of asbestos waste at an unknown location gives rise to the potential for harm. Mr Mouawad could have prevented or mitigated the likely environmental harm by not supplying Peter O'Brien Constructions with the false Ticket List Report and Waste Disposal Dockets. It was reasonably foreseeable that these actions would likely cause harm to the environment since the Ticket List Report and Waste Disposal Dockets misrepresented the location of the asbestos waste: at [21]-[27];

(2) There were several aggravating factors. The offences were committed without regard for public safety: at [29]. The offences involved reasonably elaborate planning since Mr Mouawad involved other people; made several demands of Peter O'Brien Constructions for payment; manipulated a Suez document; bought a thermal printer and created false records: at [31]-[32]. The offences were committed for financial gain: at [44];

(3) There were limited subjective matters to mitigate any sentence: at [72]. Mr Mouawad's guilty pleas almost eight months after proceedings commenced had minimum utility since he later sought leave to withdraw them: at [48]. Mr Mouawad's only statement of contrition was an untested statement in a psychologist's report: at [49]. Limited weight was given to the fact that Mr Mouawad resolved all factual disputes with the prosecutor; agreed to pay $60,000 of the prosecutor's legal costs; and did not dispute the making of a publication order: at [53]-[54]. Mr Mouawad's previous conviction for unlawfully transporting waste contrary to s 143(1) of the POEO Act was given limited weight as a relevant prior conviction since it did not involve dishonesty: at [59]. Mr Mouawad no longer performs asbestos removal work and the likelihood of him committing another similar offence is significantly diminished: at [60];

(4) The totality principle applied to the two s 144AA(2) offences given that they arose from essentially the same facts: at [65]. It was also noted that Mr Mouawad had already been sentenced for criminal fraud offences for providing false invoices to Peter O'Brien Constructions: at [68]-[70]; and

(5) Final orders on sentencing, costs and publication of the offences to be made after Mr Mouawad's suitability for an ICO had been assessed;

Aussie Earthmovers

Fined $450,000; ordered to pay the prosecutor's legal costs; appropriate to include Aussie Earthmovers in a future publication order:

(6) The same findings of a high level of objective seriousness for Mr Mouawad apply to Aussie Earthmovers. The only relevant difference is that the maximum penalty for a company for an offence under s 144AA(2) of the POEO Act is $500,000: at [84];

(7) No subjective matters mitigated Aussie Earthmover's sentence: at [85]; and

(8) The totality principle was engaged given that the two offences arose from essentially the same circumstances: at [87].

Environment Protection Authority v Sydney Water Corporation **[2020] NSWLEC 153** (Pain J)

Facts: The defendant, Sydney Water Corporation (**Sydney Water**), pleaded guilty to two separate offences under s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for a failure to comply with a licence condition (**Licence Offence**) and s 120(1) of the POEO Act for the pollution of waters (**Pollution Offence**). The charges were laid by the Environment Protection Authority (**EPA**). The offences arose following the discharge of approximately 64,000 litres of sewage from a maintenance hole into an unnamed creek in the Lane Cove National Park (National Park) not the subject of a charge. Efforts to clean up included limited manual clean-up followed by flushing the sewage with mains water. Pollution of water, the Lane Cove River, resulted from the activity.

Issue: What sentence should be imposed for each of the offences.

Held: Sydney Water fined $145,000; pay the EPA's costs and investigation costs and expenses; ordered to pay $127,000 to the NSW National Parks and Wildlife Service for the purposes of a bush regeneration project in the National Park; publication order made:

(1) *Objective seriousness* Taking into account the nature of the offences (at [32]-[35]), the conditions of Sydney Water's EPL (at [36]-[41]), sentencing factors under s 241 of the POEO Act (extent of harm at [43]-[61]), practical measures to prevent, control or mitigate harm (at [62]-[63]), foreseeability of harm (at [64]), and Sydney Water's control over the offences (at [65]), state of mind (at [66]-[78]), and Sydney Water's reasons for committing the offence (at [79]), both offences were at the high end of the low range of objective seriousness: at [81];

(2) *Environmental harm* The prosecutor could not rely on the fact that the receiving waters were degraded by the overflow as that would punish by reference to an event not the subject of a charge. The prosecutor's approach of seeking to compare the environment before the overflow with the impact of the overflow and flushing was not correct: at [56]. The prosecutor did not establish beyond reasonable doubt the likelihood of increased harm to the environment and greater risk to human health for either offence was substantial: at [61];

(3) *State of mind/De Simoni* Accepting Sydney Water's submissions, the prosecutor's allegations that a breach of the licence leading to polluted waters was negligent or reckless offended the *De Simoni* principle (*R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31) as it picked up elements of an offence under s 116 of the POEO Act. It was irrelevant that s 116 was differently worded to the condition breached in the Licence Offence as the focus should be upon the circumstances of the offence to ensure punishment is only for the offence charged and that matters of aggravation that would have warranted a different offence are not taken into account: at [74]-[75];

(4) *Other sentencing factors* The offences were committed in reasonable temporal proximity to the offences the subject of *Environment Protection Authority v Sydney Water* [2019] NSWLEC 100. It was appropriate to view the prior convictions as an aggravating factor: at [89], [91];

(5) *Mitigating factors* Under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the Court took into account Sydney Water's good character (at [95]), unlikelihood of reoffending (at [96]), remorse (at [97]), guilty pleas (at [98]-[100]) and assistance to law enforcement authorities (at [101]) as relevant mitigating factors;

(6) *Penalties/ orders* The appropriate penalty for the Pollution Offence was $120,000, reduced by 30% in light of the early guilty plea and other mitigating circumstances to $84,000: at [119];

(7) The Licence Offence was of similar seriousness and the same penalty of $120,000 was imposed, reduced by 25 percent reflecting the slightly later guilty plea and other mitigating circumstances to $90,000: at [120]; and

(8) Totality principle applied to reduce both penalties, as the two offences arose from essentially the same circumstances. The penalties were reduced to $70,000 and $75,000 respectively, a total of $145,000: at [121].

***Environment Protection Authority v Sydney Water Corporation* [2021] NSWLEC 4** (Pepper J)

(related decision: *Environment Protection Authority v Sydney Water Corporation* [2019] NSWLEC 100 (Pepper J))

Facts: On 7 February 2020, Sydney Water Corporation (**Sydney Water**) pleaded guilty to an offence against s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for failing to comply with a condition of its environment protection licence (**EPL**) (**licence offence**) and an offence against s 91(5) of that Act for failing to comply with a clean-up notice issued by the Environment Protection Authority (**EPA**) without reasonable excuse (**clean-up notice offence**). The offences occurred following an overflow of sewage from a maintenance hole in a Sydney Water sewer main into an unnamed creek (**creek**) and surrounding bushland at Bangor.

Sydney Water was first made aware of the overflow event on 14 September 2018 and notified the EPA of the event on this date. Sydney Water arranged for its Field Sampling Team (**FST Team**) to attend the overflow site to perform an environmental assessment and to install watergates to prevent the spread of sewage. However, Sydney Water had provided the FST Team with the incorrect coordinates to the overflow site and these measures were taken at an incorrect location. On 19 September 2018, the EPA inspected the site and identified Sydney Water's error. The following day, the EPA provided clean-up instructions to Sydney Water. These were not complied with and on 21 September 2018 the EPA issued Sydney Water with a clean-up notice pursuant to s 91 of the POEO Act. The clean-up notice was not adequately complied with and action taken by Sydney Water resulted in the further spread of the sewage. On 3 October 2018, the EPA issued a written direction which required the manual clean-up of sewage solids at the overflow site. On 17 October 2018, the EPA conducted a further investigation at the overflow site and observed that sewage material remained at the site. The EPA then provided further clean-up instructions to Sydney Water. On 19 October 2018 Sydney Water complied with these instructions and completed clean-up.

Issues:

(1) What was the appropriate sentence to be imposed on Sydney Water; and

(2) Whether the *De Simoni* principle (*R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31) applied to preclude the Court from considering Sydney Water's state of mind in the commission of the offences.

Held: The appropriate total financial penalty was $185,000 ($100,000 to be paid to Sutherland Shire Council for the purposes of the Watercourse rehabilitation and Bush Regeneration Project at Sabugal Gully, Engadine; $85,000 fine with a moiety to be paid to the EPA); Sydney Water to pay the EPA's costs of the proceedings; publication order made:

(1) In relation to the licence offence, EPLs are a primary means of regulation under the POEO Act. The commission of the licence offence undermined the statutory scheme set out in that Act: at [122];

(2) Sydney Water failed to carry out reasonable and feasible clean-up action as soon as practicable, having failed to carry out a manual clean-up of sewage around the maintenance hole; failed to contain solids and contaminated water at installed watergates; carried out flushing without pumping which served to further spread the sewage; and failed to communicate clear instructions to its staff. On this basis, Sydney Water contravened condition O3.1 of its EPL: at [125];

(3) In relation to the clean-up offence, the offence created by s 91 of the POEO Act also plays a critical role in giving effect to the objectives of that Act: at [126];

(4) The fact that the clean-up notice offence charged in the Summons was not stated to be a continuing offence meant that the clean-up notice offence as charged was not a continuing offence: at [135]. In any event, properly construed, the offence enacted by s 91(5) was not a continuing offence: at [136];

(5) The objective culpability of Sydney Water's offences was not mitigated because the receiving waters were in a degraded state: at [147];

(6) Absent specific evidence adduced by the EPA of the extent of the actual and likely harm caused by the offending conduct, the EPA's submissions that the actual and likely harm to the environment was substantial were not established to the criminal standard: at [157];

(7) If the Court had regard to whether or not Sydney Water had acted negligently or recklessly in the commission of the licence offence, it would have contravened the *De Simoni* principle because to do so would have amounted to sentencing Sydney Water for a more serious crime than that to which it had pleaded guilty, namely, an offence against s 116 of the POEO Act: at [165]-[166]. However, the Court was not precluded from taking into account Sydney Water's mental state in assessing the overall objective seriousness of the commission of that offence or in determining whether there was a need for specific deterrence: at [167];

(8) The clean-up notice offence did not enliven the *De Simoni* principle because there was no overlap between s 91(5) of the POEO Act (directed to the minimisation of harm once a substance has escaped) and s 116 of that Act (directed to avoiding the escape of that substance in the first place): at [168];

(9) An offender's conduct will be reckless if they believe or suspect that an act or omission may be unlawful but nevertheless proceed to engage in it without making further enquiries: at [171];

(10) The preferable recitation of the test for criminal negligence in the context of environmental crime is to ask whether there has been such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that harm would follow that the doing of the act or the omission merits criminal punishment: at [175]-[176];

(11) The facts and circumstances relied upon by the EPA did not meet the very high threshold demanded by the test for criminal negligence for either offence: at [179]. However, Sydney Water acted recklessly with respect to both offences. Sydney Water was put on notice that it ought to have manually removed the pulp before flushing the contaminated water downstream but failed to do so. Sydney Water was also repeatedly put on notice by officers of both parties that it had failed to comply with the clean-up notice, but nonetheless it continued to perform inadequate clean-up efforts: at [179]-[182];

(12) There was no evidence before the Court that Sydney Water committed the offences for any reason (such as financial gain) that would increase their objective seriousness: at [184];

(13) The risk of harm to the environment was reasonably foreseeable with respect to both offences. Condition 03.1 of the EPL and the issued clean-up notice were premised on the fact that sewage overflows may be harmful to the environment and that urgent remedial action was necessary to minimise such risks: at [186];

(14) With respect to both offences, Sydney Water had complete control over the causes of the harm. It had control over the FST recommendations; staff and resource allocation; and clean-up monitoring: at [189];

(15) Having regard to the extent of the harm occasioned by the commission of the offences and Sydney Water's state of mind at the relevant time, the objective seriousness of the offences was at the very high end of the low range (or conversely at the very lower end of the mid range): at [196];

(16) Sydney Water benefited from mitigating factors including that the harm was not substantial; that it showed contrition and remorse; that it assisted the EPA; that it had entered early pleas of guilty; and that it was of good corporate character. Sydney Water was precluded from relying on other mitigating factors because of the likelihood of it reoffending and its six prior convictions: at [197]-[213];

(17) General deterrence must be considered to ensure that large scale sewerage utilities operate in a manner that do not harm the environment: at [217]. Given Sydney Water's history of prior offending, there was also a very real need to take into account specific deterrence: at [219];

(18) Given that the two offences arose out of the same incident and factual matrix it was appropriate to apply the totality principle: at [231];

(19) The appropriate sentences to be imposed for the EPL offence and clean-up notice offence were monetary penalties of $150,000 for each offence: at [233]-[234]. These amounts were discounted by 30% for the utilitarian value of Sydney Water's early plea of guilty and other mitigating factors. After the application of the totality principle, the clean-up notice offence was further reduced to $80,000. The total monetary penalty imposed for the commission of both offences was therefore $185,000: at [235]-[237];

(20) A portion of the monetary penalty imposed was ordered to be paid to Sutherland Shire Council for the Watercourse Rehabilitation and Bush Regeneration Project at Sabugal Gully, Engadine: at [238]-[241];

(21) Half of the remaining monetary penalty was ordered to be paid to the EPA because the award of investigation costs under s 248 of the POEO Act would not fully compensate the EPA for the costs of its investigation regarding the offences: at [242]-[246]); and

(22) A publication order was made, including an order that the commission of the offences and the penalty imposed be publicised on social media: at [247]-[248].

Environment Protection Authority v Warwick Ronald McInnes (No 2) **[2020] NSWLEC 147** (Duggan J)

(related decision: *Environment Protection Authority v Warwick Ronald McInnes* [2020] NSWLEC 37 (Duggan J))

Facts: Mr McInnes (**defendant**) was a volunteer groundsman with the Mountain District Sporting Association at Bloodtree Oval (**Oval**), Mangrove Mountain. The defendant decanted the pesticides Paraquat and Diquat into a Coca-Cola bottle and placed it in the disabled toilet at the Oval. Mr Damien Terry, a 22-year-old autistic man, ingested the contents of the bottle and suffered numerous near-fatal injuries. During the primary proceedings, the defendant was convicted of using a pesticide in a manner that injured another person, pursuant to s 10(1)(a) of the *Pesticides Act 1999* (NSW) (**Pesticides Act**).

Issue: The sentence to be imposed on Mr McInnes.

Held: Defendant was fined $48,000; ordered to pay a Victim's Support levy; and to pay the Environment Protection Authority's legal costs:

(1) The injury and harm occasioned to Mr Terry were significant. The inherent qualities of the particular pesticide made the risk of harm of the type suffered by Mr Terry virtually inevitable if ingested. The manner of storage in a drink bottle was a significant breach of the purpose and objects of the Pesticides Act. Objectively, the conduct that gave rise to this offence was very serious: at [39];

(2) As the defendant believed he had the only key to the disabled toilet and it was secure, the reasonable foreseeability of damage, harm or injury is not a factor considered in the determination of objective seriousness: at [46];

(3) Overall, the objective seriousness of the conduct was at the higher end of the range of objective seriousness: at [51];

(4) The defendant did not fully take responsibility for the offence. Whilst he demonstrated real and genuine regret, but he has not shown contrition and remorse of the type to which this consideration is directed: at [59-60];

(5) Given the defendant's previous offending was so dissimilar to the particular offence, it could not be said he had a history of past offending. His criminal history was regarded as a neutral factor: at [64-65];

(6) The defendant was unlikely to offend in a similar way in the future. As such, it was not necessary to specifically deter the defendant: at [68];

(7) The fact that the conduct in this case was the type of conduct for which the legislative scheme was developed goes to general deterrence. However, this factor was taken into account in the consideration of the objective seriousness of the conduct. Consideration of this general issue again would be tantamount to a double punishment of the defendant: at [70];

(8) The fact that the defendant, at the time of the commission of the offence, was acting in a voluntary position is not considered to be a matter that would affect the determination of the appropriate sentence: at [75].

Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v O'Haire **[2020] NSWLEC 158** (Pepper J)

Facts: On 19 July 2019, Brian O'Haire (**defendant**), pleaded guilty to eight offences against s 60C(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**). Between about 12 April 2016 and 4 March 2019 (inclusive), at Tapaulin Farm, Euston, the defendant took over 1,378 megalitres of water from the Murray River in breach of the Water Management Act and his water access licence (**WAL**).

Section 56(1) of the Water Management Act provides that a WAL entitles its holder to specified shares in the available water within a specified water management area. The WAL provides that water must not be taken unless in accordance with a water supply order lodged with, and approved by, State Water or WaterNSW.

WaterNSW and the then NSW Office of Water (**Office of Water**) monitored the defendant's water usage and interviewed the defendant regarding his breaches on a number of occasions. On 18 February 2015, an officer of the Office of Water issued the defendant with a stop work order (**SWO**) under s 327(2) of the Water Management Act. On 31 March 2015, the defendant was issued with two penalty infringement notices (**PINs**) for offences contrary to ss 60C(2) and 91B(2) of the Water Management Act. Those PINs were paid. However, the defendant continued to take water in breach of the Water Management Act and his environment protection licence (**EPL**).

Issues:

(1) What was the appropriate sentence to be imposed on the defendant;

(2) Whether the *De Simoni* principle (*R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31) applied to preclude the Court from considering the defendant's state of mind in the commission of the offences; and

(3) Whether the defendant had suffered extra-curial punishment.

Held: Defendant fined $131,250; moiety to be paid to Grant Barnes, Chief Reglatory Officer, Natural Resources Access Regulator (**prosecutor**); publication order made; defendant to pay the prosecutor's costs:

(1) The offences against s 60C(2) of the Water Management Act frustrated the attainment of the objects of the Water Management Act (at [102]) and subverted the objectives of the statutory water management regime: at [104];

(2) While the offences resulted in harm to the regulatory regime established by the Water Management Act, that harm was not substantial: at [120];

(3) The gross market value of the water taken was a relevant consideration: at [121]-[122];

(4) The expert evidence relied upon by the prosecutor in support of its submission that the offences impacted other persons rights (s 364A(1)(a) of the Water Management Act) did not meet the criminal standard of proof: at [125];

(5) The defendant's state of mind in the commission of the offences was relevant to the question of penalty, subject to the application of the principle in *De Simoni* (noting that s 60C(1) of the Water Management Act prescribes a more serious Tier 1 offence for which the defendant was not charged): at [126];

(6) The *De Simoni* principle will not be engaged if a Court takes into account the offender's state of mind in order to assess their objective culpability or the need for specific deterrence: at [129];

(7) The defendant committed the offences intentionally (s 364A(1)(h) of the Water Management Act): at [144];

(8) That the defendant committed the offences to save or defer expenses, increased the seriousness of those offences: at [145];

(9) The offences were in the moderate range of objective seriousness for offences of this kind: at [151];

(10) The defendant submitted that he had suffered extra-curial punishment as a result of publicity coverage and having regard to the likelihood that he would lose his Victorian solicitor's practising certificate as a solicitor or suffer some form of professional disadvantage by reason of his conviction. While it was appropriate to take into account the adverse publicity suffered, it was unlikely that his practising certificate would be revoked: at [156]-[165];

(11) As a result of the various applications the defendant had made during the proceedings, the utilitarian value of his guilty pleas was eroded and he received a discount of 15%: at [166]-[175], [210]-[214];

(12) The defendant remained at moderate risk of reoffending: at [176]-[178];

(13) The defendant displayed no regret or remorse for his offending. In fact, the defendant sought to implicate the prosecutor in his culpability in various submissions to the effect that the regulator was to blame for the defendant's offending, including by a failure to take earlier enforcement action against the defendant: at [179]-[184], [135];

(14) For the purposes of general deterrence, a sentence had to be imposed that made it economically irrational for persons to disobey the law in the taking of water under a WAL. It was also appropriate to have regard to the need for an element of specific deterrence in the present case, having regard to the defendant's understanding of his legal obligations; his status as a solicitor; and the myriad communications from regulatory bodies to the effect that he was acting in breach of his WAL: at [186]-[191];

(15) The sentence to be imposed for each of charges 1 to 7 was a monetary penalty of $25,000 per offence and, for charge 8, a monetary penalty of $35,000. These figures were discounted by 15% for the utilitarian value of the defendant's early plea of guilty. After the application of the totality principle, charges 2 to 7 were further reduced to $15,000 per offence and charge 8 was further reduced to $20,000. The total monetary penalty imposed was $131,250: at [210]-[214];

(16) Under s 122(2) of the *Fines Act 1996*, half of each fine payable by the defendant was to be paid to the prosecutor`: at [220]; and

(17) The circumstances of the case warranted the making of a publication order notwithstanding the prior publicity the proceedings had garnered: at [216]-[219].

Transport for NSW v East Coast Wharf Constructions Pty Ltd; Transport for NSW v King **[2020] NSWLEC 112** (Moore J)

Facts: East Coast Wharf Constructions (**ECWC**) was contracted to demolish and remove part of the Berowra Waters Marina and dispose of it lawfully. Mr King was the guiding mind of ECWC (together, the **defendants**). The defendants allegedly then took the waste materials and transported them to a commercial mooring located near Scotland Island in Pittwater, a mooring that was not lawfully able to be used as a waste facility.

Portion of these pontoons were located on the floor of Pittwater, some 280 metres from the commercial mooring. The defendants denied that these pontoon elements were from the Berowra Waters Marina.

On 9 November 2018, the Roads and Maritime Services (now Transport for NSW) (**prosecutor**) commenced three separate prosecutions against both ECWC and Mr King - six charges in total. There was a single Tier 1 charge laid against each of ECWC and Mr King, with the remaining charges being Tier 2. These two charges arose from an alleged contravention of s 143(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) (**waste transport offence**) and s 144(1) of the POEO Act (**waste storage offence**).

The defendants pleaded not guilty. On the first day of the contested liability hearing, the prosecutor stated that it no longer pressed the Tier 1 charges, with the expectation that the defendants would change their plea to guilty as a consequence. The solicitor for the defendants then entered pleas of guilty for the remaining Tier 2 charges. The proceedings then continued for the purpose of determining the appropriate penalties for the defendants.

Issues:

(1) Contrary to the defendants' denial:

  (a) did the submerged pontoon elements originate from Berowra Waters Marina;

  (b) did the defendants unlawfully transport waste to a place that could not be lawfully used as a waste facility; and

  (c) did the defendants unlawfully store waste at a place that could not be lawfully used as a waste storage facility; and

(2) What was the appropriate sentence to be issued to the defendants.

Held: ECWC convicted of an offence under s 143(1) of the POEO Act and fined $30,000; ECWC convicted of an offence under s 144(1) of the POEO Act and fined $75,000; Mr King convicted of an offence under s 143(1) of the POEO Act and fined $8,000; Mr King convicted of an offence under s 144(1) of the POEO Act and fined $20,000; defendants to pay prosecutor's costs as agreed or assessed; publication orders made for the *Afloat Magazine* and the *Manly Daily*:

(1) There was no basis upon which to conclude that ECWC's history constituted an aggravating factor: at [76];

(2) The presence of 21 historical maritime compliance breaches for King establish an aggravating factor beyond reasonable doubt: at [80];

(3) The environmental harm was serious but not sufficient to constitute a factor of aggravation: at [89];

(4) The question of how the pontoons came to be on the bottom of Pittwater was irrelevant: at [111];

(5) The evidence of Mr Conradi and Mr MacDiarmid of the idiosyncratic nature of the pontoon established beyond a reasonable doubt that the pontoons came from Berowra Waters: at [129];

(6) There was significant actual environmental harm as a result of the pontoons being sunk, as well as the likelihood of further significant environmental harm had the pontoons not been retrieved. The risk of further environmental harm was established: at [146];

(7) However, environmental harm as an aggravating factor had not been established: at [148];

(8) King's endeavours to retrieve elements of waste were to be taken into account: at [163];

(9) Visual harm was not established by the prosecutor beyond a reasonable doubt. The fact that the pontoons were stored at a commercial mooring, which has different aesthetic considerations, was to be taken into account: at [171]-[172];

(10) The storage activities at the barge for the purpose of demolition, stripping and disposal of the demolished material from the Marina, are essential links in the relevant actual or potential chain of causation: at [180];

(11) There was the potential for harm until King had retrieved all of the floating material and had resecured it, which was required to be taken into account as part of the sentencing considerations: at [181];

(12) The fact that harm was not substantial did not act as a positive factor of mitigation for the Company and King: at [185], [195];

(13) The fact that ECWC did not have prior convictions was a matter to be taken into account: at [187];

(14) Contrition and remorse, as well as cooperation with the prosecutor were mitigating factors of limited weight to be taken into account: at [189], [194];

(15) King's record of prior convictions gave rise to a factor of aggravation: at [196];

(16) King's contest of the provenance of the pontoons undermined any notion of genuine contrition or remorse: at [200];

(17) The entering of a plea of guilty by ECWC and King was to be taken into account: at [190], [201];

(18) King's history of non-compliance was to be taken as representing a need for specific deterrence, but to him alone and not to ECWC: at [207]-[209];

(19) General deterrence was appropriate as part of the sentencing process: at [213];

(20) Due to the lack of any demonstrated impact from carrying out the transportation of waste, the transport offence was to be characterised at the bottom end of the low range of seriousness: at [222];

(21) The appropriate characterisation of the waste facility operational charges was toward, but not at, the upper end of the low range of offending conduct: at [229];

(22) This case was distinguished from other cases involving the same charges because it involves waste in an aquatic environment, rather than a terrestrial one: at [232];

(23) The appropriate discount for the sentence due to the plea of guilty was determined to be 10% for each of the charges: at [254];

(24) It was appropriate to adjust the penalty for totality and accumulation: at [262]-[266];

(25) The making of a publication order in addition to, and not in substitution for, the appropriate punishment of the offending conduct formed an important element of general deterrence: at [276];

(26) It would not have been in accordance with the principle of proportionality to order a publication notice in the *Daily Telegraph*, given the localised nature of the offence. It was therefore appropriate to order the notices appear in the *Afloat Magazine* and the *Manly Daily*: at [282]-[283];

(27) For an electronic facsimile newspaper, such as the *Manly Daily Digital Edition*, conventional specification of page numbers and presentational position could be ordered in the same terms as would have been required in a print newspaper. However, the specification of dimensions was inappropriate. The appropriate specification was to nominate the proportion of the facsimile print page which is to be occupied by the notice: at [288]-[289];

(28) The conventional order that a copy of the page with the publication notice be delivered to the prosecutor was likewise inappropriate. The appropriate replacement order was to require the defendants to provide a screenshot in PDF, JPEG, or PNG format to the prosecutor on a USB thumb drive within 28 days of the publication in which the notice appears: at [291]; and

(29) The making of a publication order did not mitigate the financial penalty: at [295].

- **Appeals from Local Court:**

Chahoud v Penrith City Council **[2020] NSWLEC 167** (Pepper J)

Facts: Sirine Chahoud (**appellant**) appealed under s 31(1) of the *Crimes (Appeal and Review) Act 2011* (NSW) against the severity of sentences imposed on her by the Local Court in proceedings brought by Penrith City Council (**Council**) for four offences of carrying out prohibited development on land contrary to s 4.3(a) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

The proceedings related to the appellant's use of property to which she was the registered proprietor as a truck depot and her construction of a large shed to service the vehicles. The appellant also allowed third parties to park their vehicles on her property for a fee. Relevantly, a truck depot is not a land use that is permitted under the Penrith Local Environmental Plan 2010 (**PLEP 2010**) and it was agreed that the appellant did not have development consent for any of these uses.

On 15 April 2019, the Council issued the appellant with a penalty infringement notice (**PIN**) for the construction of the concrete slab for the shed. The appellant paid the PIN but continued to construct the shed.

On 26 November 2019, the Council filed five court attendance notices (**CANs**) against the appellant. On 18 June 2020, the appellant was fined $10,000 for each of CANs A, B and E, and $40,000 in respect of CAN C.

Issues:

(1) Whether the monetary penalties imposed by the Local Court were excessive; and

(2) Whether the appellant had acted negligently or recklessly in the commission of the offences, prior to and after 15 April 2019.

Held: Appeals upheld; appellant resentenced; Council to pay appellant's costs of the appeal:

(1) The monetary penalties imposed by the Local Court were excessive and the appeal against the severity of the sentence imposed at first instance should be allowed: at [5];

(2) The sentence imposed must reflect and be proportionate to the objective circumstances of the commission of the offences and the personal or subjective circumstances of the offender: at [43];

(3) The instinctive synthesis method is the correct method of sentencing: at [44];

(4) The Council bore the onus of proving beyond reasonable doubt any aggravating factor for the purpose of sentencing, but it was for the appellant to demonstrate any factor in mitigation on the balance of probabilities: at [47];

(5) The appellant's unlawful use of the property offended both the objects of the EPA Act and the PLEP 2010: at [54];

(6) The Council failed to adduce evidence of any actual environmental harm caused by the commission of the offences by the appellant, including by way of expert evidence, and failed to make out any such argument to the criminal standard: at [60] and [61];

(7) A strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally: at [68];

(8) An offender's conduct will be found to be reckless if they are put on notice, in the sense that they believe or suspect that an act or omission may be unlawful but nevertheless proceed to engage in it without making further enquiries: at [72];

(9) By proceeding with the construction of the shed after having received the PIN, the appellant committed the offences the subject of CANs B and E recklessly after 15 April 2019. The PIN should have put the appellant on notice that the development may have been unlawful. On this basis, the commission of the offences the subject of CANs B and E after 15 April 2019, were objectively more serious: at [80];

(10) An offender commits a crime negligently when there has been such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that harm would follow that the doing of the act or the omission merits criminal punishment: at [75];

(11) The Court did not accept that either before or after the PIN was issued that the appellant acted negligently in respect of the commission of any of the offences to which she had pleaded guilty: at [81];

(12) With respect to the prohibited use of the property as a depot in the period after the PIN was issued, given that the PIN did not refer to the use of the property as a depot and in light of the appellant's submissions that she believed she could park and repair trucks on the property, the Court found that the appellant did not commit the offences giving rise to CANs A and C either recklessly or negligently: at [84];

(13) Offences committed for financial gain have an increased objective gravity (*Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(o)). It was clear that the appellant's motivation for the offending conduct was that of financial gain: at [85]-[87];

(14) Because the appellant was not aware that she required approval to construct the shed prior to 15 April 2019, or aware at any time that its construction was prohibited, the foreseeability of risk of harm was not made out with respect to CANSs A and C.The foreseeability of risk of harm was, however, reasonable in respect of the offences the subject of CANs B and E for the period following her receipt of the PIN: at [89];

(15) The four offences were of low to moderate objective gravity. The commission of the offences the subject of CANs B and E were objectively more serious given the appellant's state of mind: at [93];

(16) Within the limits set by the objective seriousness of the offence, account was had of the subjective factors relevant to the appellant, having regard to ss 21A(2) and (3) of the CSPA: at [95]-[116];

(17) Specific and general deterrence were also to be taken into account. Although the appellant demonstrated genuine contrition for, and insight into, her offending conduct, nevertheless an element of specific deterrence was warranted in the imposition of an appropriate sentence because she continued to construct and use the shed after the PIN was issued: at [120];

(18) The appellant's submission that she did not have the necessary financial means to satisfy any monetary penalty to be imposed, pursuant to s 6 of the *Fines Act 1996* (NSW) was rejected: at [131]-[136];

(19) The appellant's submission that in respect to CANs A and B an order under s 10A(1) of the CSPA should be made in the alternative was rejected. This was not appropriate given the seriousness of those offences and that any overlap between the factual circumstances of the offences would be adequately dealt with by reason of application of the totality principle: at [140]-[144];

(20) Upon the application of the totality principle, the fines were to be adjusted as follows: $5,000 for CAN A; $32,000 for CAN B; $8,000 for CAN C; and $6,000 for CAN E, totalling $51,000: at [152(3)]; and

(21) The Council was ordered to pay the appellant's costs of appeal: at [152(4)].

***De Battista v Shoalhaven City Council* [2020] NSWLEC 164** (Pain J)

Facts: Mr De Battista (**appellant**) appealed against his conviction and sentence in the Local Court for an offence in 2016 against s 76A(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) as then in force. The offence particularised in the Court Attendance Notice (CAN) was that the clearing of 24 trees on the Appellant's property in St Georges Basin was contrary to a subdivision consent (seven-lot subdivision consent). The Appellant contended on appeal that as another consent for a manufactured housing estate (**MHE consent**) was in force in the charge period, it was possible the Appellant was acting in accordance with that consent, meaning Shoalhaven City Council (**Council**) had not established beyond reasonable doubt that the CAN offence was carried out in accordance with the seven-lot subdivision consent. It was accepted that if the Council could prove beyond reasonable doubt that the tree clearing was carried out in furtherance of the seven-lot subdivision consent, the offence was proven.

Issues:

(1) Had the MHE consent commenced before the charge period; and

(2) Did the Council establish beyond reasonable doubt that the CAN offence was carried out in furtherance of the seven-lot subdivision consent.

Held: Appeal dismissed; appellant to pay the Council's costs:

(1) Preparatory works carried out in 2001 and 2006 satisfied physical commencement of the MHE consent before the charge period, per *Hunter Development Brokerage Pty Ltd v Cessnock City Council; Tovedale Pty Ltd v Shoalhaven City Council* (2005) 63 NSWLR 124; [2005] NSWCA 169: at [63]-[68]; and

(2) On the Council's evidence, the inference was able to be drawn that the Appellant was undertaking work pursuant to the seven-lot subdivision consent at the time he cleared the trees the subject of the CAN charge. That inference was established beyond reasonable doubt by the Counci: at [77]. The Appellant's contention that he was relying on the MHE consent raised a fanciful doubt only, per *The Queen v Dookheea* (2017) 262 CLR 402; [2017] HCA 36: at [36]-[37]: at [79].

***Waverley Council v Whitehouse Properties Pty Limited* [2020] NSWLEC 171** (Robson J)

Facts: Pursuant to s 42(2B) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**Appeal and Review Act**), Waverley Council (**prosecutor**) appealed against the decision of Waverley Local Court to dismiss charges against Whitehouse Properties Pty Limited in relation to an environmental offence. The charges concerned the use of a courtyard area at a hotel in Bondi Beach contrary to Condition 16 of a development consent.

The prosecutor appealed on the basis that the magistrate had wrongly construed the relevant terms of Condition 16.

Issues:

(1) Whether the appeal concerned a 'question of law alone' pursuant to s 42(2B) of the Appeal and Review Act;

(2) Whether the magistrate wrongly construed the relevant terms of Condition 16; and

(3) If the magistrate so erred, whether such an error would be vitiating.

Held: Appeal dismissed:

(1) The Court's jurisdiction to hear appeals brought by prosecutors pursuant to s 42(2B) of the Appeal and Review Act will not be enlivened unless the grounds of appeal are limited to ' a question of law alone': at [23];

(2) The prosecutor's sole ground of appeal, articulated as a question of statutory construction, was indicative that the appeal was on a question of law alone: at [27];

(3) However, to the extent that the prosecutor argued that the magistrate wrongly applied the correct legal principles to the facts, this would be a question of mixed fact of law and therefore not a 'question of law alone': at [30];

(4) Even if the appeal was limited to a question of law alone, the magistrate did not err in his construction of Condition 16 or in considering 'use' in a purposive sense: at [32]; and

(5) Further, even if the magistrate had erred in his construction of Condition 16, such an error would not be vitiating given that the magistrate's decision to dismiss the charges was based upon the magistrate's view that the available evidence and facts was unable to prove the charges to the criminal standard: at [36]-[39].

- **Civil Enforcement:**

Georges River Council v Tyre Nation Pty Ltd **[2020] NSWLEC 172** (Moore J)

Facts: Georges River Council (**Council**) commenced Class 4 proceedings against Tyre Nation Pty Ltd (**first respondent**) on 9 July 2020. The Council held fire safety concerns arising from the storage of tyres as a result of the first respondent's activities at 36-38 Waterview St, Carlton. The Council's concerns resulted from onsite inspections by the Council officers and a fire safety expert retained by the Council. The Council issued a fire safety order to Fardous Saab Pty Ltd (**second respondent**) requiring cessation of the use pending approval and undertaking of remedial fire safety works.

The first respondent and the second respondent were of the opinion that the change in use of the land in Carlton from the use permitted by a 1994 development consent amounted to exempt development pursuant to State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Exempt and Complying Development Codes SEPP**) and did not require a development application to the Council.

The Council alleged that the tyre storage activities did not comply with the 1994 development application and were also in breach of fire safety standards. The Council said that the change of use could not, therefore, be exempt development pursuant to the Exempt and Complying Development Codes SEPP. The Council also engaged a fire safety expert to report on the fire safety status of the Waterview St building. These formed the bases for the allegations against the first respondent and the second respondent in the Class 4 proceedings.

Issues:

(1) Was the change in use of the land by the first respondent, on or about 1 February 2018, exempt development under the Exempt and Complying Development Codes SEPP;
(2) If the land use change was not exempt development, should discretion be exercised to allow the first respondent to prepare and lodge a development application to regularise its activities;
(3) If discretion was to be exercised, what should the appropriate fire safety orders (interim and permanent) to be made; and
(4) Was a bare declaration appropriate that the second respondent had breached the *Environmental Planning and Assessment Act 1979* (NSW) when it failed to comply with the Fire Safety Order of 12 February 2020, appropriate.

Held: The first respondent's change of use not exempt development and to be restrained; restraining order suspended to permit lodgment of a development application for the unauthorised use; interim and permanent fire protection measures ordered; second respondent declared to have breached fire safety order issued by the Council; first respondent and second respondent jointly ordered to pay council's costs (with first respondent to pay council's and second respondent's costs of several interlocutory hearings):

(1) Safety expert report were present at the time the land use changed; these fire safety issues prevented the change of use being exempt development pursuant to the Exempt and Complying Development Codes SEPP: at [90]-[95];

(2) There was "educative utility" in making a bare declaration of failure by the second respondent to comply with the fire safety order, even though specific utility was absent: at [116];

(3) Upon the demolition of the mezzanine, the lack of some fire safety infrastructure was no longer a factor for concluding the first respondent's tyre storage was "not exempt development"; this was due to the reduction in the functional floor space of the building: at [144]-[146];

(4) It was appropriate for the Court to exercise discretion and allow the first respondent time to prepare and lodge a development application: at [154];

(5) The change in internal use of the building was not a barrier to a finding of exempt status, however, this was not the only consideration: at [170]-[171];

(6) Clause 1.16(2)(a) of the Exempt and Complying Development Codes SEPP had not been satisfied because, at no time from February 2018 had there been a fire safety certificate or statement, this led to the conclusion that this development was not exempt: at [172]-[173], [184];

(7) A wide interpretation of the word "required" found in cl 1.16(2)(a) was appropriate in the circumstances where a change in use was contemplated by the first respondent and fire safety issues would necessarily arise from that change: at [190]-[191];

(8) Fire safety measures were currently required as the result of the Council's Fire Safety Order of 12 February 2020 and, therefore, cl 1.16(2)(b) of the Exempt and Complying Development Codes SEPP was breached: at [242]-[243];

(9) Clause 2.20B(i) of the Exempt and Complying Development Codes SEPP had been breached regarding the hours of operation by the first respondent, as these differed from those in the currently operative 1994 development consent, rendering the change in land use non-exempt development: at [296], [302]-[303];

(10) The Council should discharge the Fire Safety Order because the orders of the Court would result in different fire safety precautions being implemented: at [315]; and

(11) It was appropriate to exercise the Court's discretion, subject to interim and permanent fire protection measures being ordered, to allow the first respondent time to apply for development approval from the Council and allow the Council time to assess the application from the first respondent, but strict deadlines should be applied to such a process: at [362], [366].

- **Valuation/Rating:**

Alexandrou v Valuer General of New South Wales **[2020] NSWLEC 139** (Pain J)

Facts: The applicants Mr and Mrs Alexandrou (**applicants**) appealed against a land valuation assessment of their unit in Kogarah by the Valuer General of New South Wales (Valuer General) undertaken pursuant to s 6A(1) of the *Valuation of Land Act 1916* (NSW) (**Valuation of Land Act**). The applicants sought to rely on the *Strata Scheme Development Act 2015* (NSW) (**Strata Scheme Development Act**) which, in their view, limited the amount of development that should be considered in the valuation task under of s 6A(1) of the Valuation of Land Act. The applicants, relying on the Strata Scheme Development Act, said that up-zoning of the land in 2017 to high density residential resulted in the market value being less than the land value, yet the latter was taken to be the value of their property. They considered the land value should be lower.

Issue: Whether the provisions of the Strata Scheme Development Act should be applied to the valuation of land under the Valuation of Land Act, limiting what is considered in the hypothetical valuation task under s 6A(1) of the Valuation of Land Act.

Held: Appeal dismissed:

(1) Nothing in the Valuation of Land Act states explicitly that the Strata Scheme Development Act must be considered when valuing in accordance with s 6A(1). Any such obligation can therefore arise implicitly only: at [103]. No basis was identified by the applicants for implying such a construction anywhere in the Valuation of Land Act: at [104];

(2) Section 6A(1) of the Valuation of Land Act required an artificial hypothetical scenario be adopted whereby a sale between willing but not anxious vendors and purchasers are assumed, considered in relation to land stripped of improvements. The applicants' approach which sought to interpose a real-world scenario into the hypothetical exercise was not consistent with well-established principles of valuation and was not accepted: at [108];

(3) The evidence of the Valuer General's valuer relying on comparable sales was orthodox and in accordance with the well-established principles of valuation. This evidence was accepted: at [111]; and

(4) There is no statutory guarantee that land value calculated as required by s 6A(1) of the Valuation of Land Act will be less than market value. This case was an example where a valuable up-zoning of an area created a substantial increase in land value from previous years. The applicants' submission that market value should be higher than land value was not accepted: at [116].

- **Section 56A Appeals:**

278 Palmer St Pty Ltd v The Council of the City of Sydney **[2019] NSWLEC 165** (Robson J)

(related decision: *278 Palmer St Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 1012 (Dickson C))

Facts: 278 Palmer St Pty Ltd (**278 Palmer**) appealed pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) against the decision of Dickson C to refuse development consent for significant alterations and additions to an existing warehouse building located in Darlinghurst. The warehouse building is over 50 years old and within the East Sydney Heritage Conservation Area.

The commissioner determined that refusal of 278 Palmer's development application was warranted on the basis that: the impacts upon the structural adequacy and heritage fabric of the building were uncertain; the structural means of stabilising and retaining the existing building during and after the proposed development were not detailed in the development application; it would be inappropriate to defer this assessment through a deferred commencement condition; and because the proposed development represented a risk to the structural soundness of surrounding buildings that had not been adequately addressed by the development application.

Issues: 278 Palmer raised five grounds of appeal:

(1) Whether the commissioner denied 278 Palmer procedural fairness by refusing the application on the basis of an issue that was not principally contested between the parties and without giving an opportunity to address the issue;

(2) Whether the commissioner erred contrary to s 4.15(3A(a)) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), in requiring a 'more detailed structural methodology';

(3) Whether the commissioner erred by not giving 278 Palmer the opportunity to address the issue of potential impacts to surrounding buildings, which was not an issue joined between the parties;

(4) Whether the commissioner erred by failing to consider all relevant matters and not making findings in relation to most of the principal contested issues joined between the parties; and

(5) Whether the commissioner erred by determining a principal contested issue by reference to only one aspect of the evidence before the Court.

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

(1) The issue regarding the structural integrity of the building was raised both in the pleadings and through the evidence marshalled by the parties at the hearing. The commissioner did not reformulate this contention or ask the wrong question in this regard: at [51]-[58];

(2) 278 Palmer bore the burden of adducing evidence and establishing the facts necessary to satisfy the requirements to be granted development consent: at [62];

(3) The commissioner was entitled to find that she did not have sufficient information regarding the potential impacts upon structural adequacy of the building, being an issue raised in the proceedings: at [65];

(4) It was open to the commissioner to find that the structural adequacy certificate tendered by 278 Palmer was insufficient to meet the standard set by the Sydney Development Control Plan 2012. The commissioner's view that further structural analysis was required for her to be satisfied of the relevant impacts does not indicate an error contrary to s 4.15(3A)(a)) of the EPA Act: at [74];

(5) The issue concerning the structural soundness of adjoining buildings had been raised by objectors to the development application, in a geotechnical report filed in the proceedings, and in Council's contentions. The onus lay with 278 Palmer to furnish the Court with all material required to establish its case in this respect: at [97];

(6) The commissioner did not deny 278 Palmer procedural fairness in relation to the issue of structural soundness of adjoining buildings and, in any event, this was only one matter which the commissioner took into account and was not a matter of determinative weight: at [98];

(7) It was clear that the commissioner was aware of the expert evidence and the commissioner was entitled to consider that any issues raised in that evidence, however decided, would not alleviate her concerns in relation to the structural adequacy concerns which she had found determinative: at [112]; and

(8) The commissioner was not required to address, or give reasons for, issues which would not have impacted upon her ultimate conclusion. As such, the commissioner did not err in considering evidence that was extraneous to the issue which she found to be of determinative weight: at [116].

Grant William Clarke v Shoalhaven City Council (No 2) **[2021] NSWLEC 8** (Duggan J)

Facts: Mr Clarke (**appellant**) appealed against the decision of a commissioner of the Court to refuse to grant his development application (**DA**) for the subdivision of a lot of land into two lots for the purposes of animal (equine) breeding and training facilities.

Issues:

(1) Whether the commissioner erred in the proper construction of the provisions of the Shoalhaven Local Environment Plan 2014 (**SLEP 2014**) by holding that the DA was required to satisfy cl 4.2B of SLEP 2014, when the application relied on cl 4.2E of SLEP 2014; and

(2) In considering cl 4.2E of SLEP 2014, whether the commissioner failed to consider a mandatory relevant consideration and took into account a matter for which there was no evidence.

Held: Appeal dismissed; appellant to pay the Council's costs:

(1) The commissioner did not err in determining the appeal as the provisions of cl 4.2B operated concurrently with the provisions of cl 4.2E. The DA could not be granted unless both clauses were satisfied. As it was an agreed fact the proposed subdivision could not satisfy cl 4.2B, the Commissioner had no alternative but to refuse the DA: at [40]; and

(2) The appellant accepted he could only succeed if all the particularised errors were established, therefore it was unnecessary to determine the remaining grounds of appeal: at [14], [41].

- **Separate Question:**

R.I.G Consulting Pty Ltd v Queanbeyan-Palerang Regional Council (No 2) **[2020] NSWLEC 184** (Pain J)

(related decision: *R.I.G Consulting Pty Ltd v Queanbeyan-Palerang Regional Council* [2020] NSWLEC 155 (Robson J)

Facts: A subdivision proposal made by R.I.G Consulting Pty Ltd (**applicant**) was refused development consent because the application did not comply with provisions of the Palerang Local Environmental Plan 2014 (**PLEP 2014**). The subject site was zoned E4 - Environmental Living (**E4 zone**) under the PLEP. The average lot size limit in cl 4.1B of the PLEP 2014 of six hectares applied to land in the E4 zone. The subdivision proposal resulted in average lot sizes of 3.286 hectares. The Council also considered that the site was a resulting lot within the meaning of cl 4.1B(6) of the PLEP 2014. The applicant proposed to subdivide the lot for residential accommodation. Clause 4.1B(5) of the PLEP 2014 precluded subdivision of resulting lots for residential accommodation. The applicant appealed the Council's refusal. A hearing on four separate questions was ordered.

Issues:

(1) Whether the average lot size requirement in cl 4.1B(4)(a) of the PLEP 2014 applied to the proposed subdivision (**Question 1**);

(2) If so, whether development consent was precluded by the average lot size requirements in cl 4.1B(4)(a) of the PLEP 2014 (**Question 2**);

(3) Whether the subject site met the definition of 'resulting lot' in cl 4.1B(6) of the PLEP 2014 (**Question 3**);

(4) If so, whether development consent was precluded under cl 4.1B(5) of the PLEP 2014 (**Question 4**).

Held: Development prohibited:

Questions 1 and 2

(1) The applicant argued that the Court should consider earlier versions of the PLEP 2014 to assist in constructing cl 4.1B. This argument was rejected: at [30]-[31];

(2) The provisions of the PLEP 2014 were clear on their face. Council could legally apply average lot limits to the subdivision of land in the E4 zone rather than the minimum lot sizes applied to other zones. Average lot size requirements in cl 4.1B(4)(a) applied to the proposed subdivision: at [26]-[29];

(3) Development consent was precluded since the proposed subdivision resulted in average lot sizes smaller than the minimum required in cl 4.1B(4)(a): at [45];

Questions 3 and 4

(4) The existing site was a resulting lot since it was created by a subdivision under cl 20 of the Yarrowlumla Local Environmental Plan 2002 per cl 4.1B(6) of the PLEP 2014: at [63]-[69];

(5) Development consent could not be granted in accordance with cl 4.1B(5) of the PLEP 2014 which precluded subdivision of resulting lots for residential accommodation: at [72]-[74].

- **Interlocutory Decisions:**

Bushfire Survivors for Climate Action Inc v Environment Protection Authority **[2020] NSWLEC 152** (Moore J)

Facts: The Bushfire Survivors for Climate Action Inc (**Bushfire Survivors**) commenced Class 4 proceedings against the EPA on 8 April 2020. The Summons alleged that the EPA had not created policies that were sufficient to address issues arising from climate change. On 8 May 2020, Bushfire Survivors was granted leave to amend the original Summons, but the relief sought was the same, seeking an order of mandamus under ss 65(1) and 69(1) of the *Supreme Court Act 1970* (NSW) requiring the EPA to:

(a) develop environmental quality objectives, guidelines and policies to ensure environment protection; and

(b) develop draft policies in accordance with Ch 2 of the *Protection of the Environment Operations Act 1997* (NSW) to ensure environment protection.

The EPA filed its Points of Defence and relied upon a policy document which listed over 300 document titles, which it said was one piece of evidence that had discharged its duty under s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW). On 11 June 2020, Bushfire Survivors served the EPA with a Notice to Admit Facts and served with a list of '73 facts, with which the EPA was asked to agree.' Some of the 'facts' were statements of opinion sought as a result of this 'admission-seeking process.' The EPA produced a Notice Disputing Facts on 25 June 2020 in response to the Notice to Admit from Bushfire Survivors. On 28 September 2020, Bushfire Survivors filed a Notice of Motion requesting leave to adduce expert evidence into the proceedings.

Issues: Was it appropriate to grant leave to file and serve expert evidence.

Held: Bushfire Survivors for Climate Action Inc permitted to rely upon a Further Amended Notice of Motion and granted leave to file and serve expert evidence:

(1) The leave was confined to the expert nominated by Bushfire Survivors and was confined to a limited range of matters (other proposed matters being excluded): at [18]-[19], [31];

(2) The EPA was allowed to seek an expert of their own and rely upon the evidence from that expert if it chose to do so. The EPA still retained its ability to cross-examine the Bushfire Survivors' expert and question admissibility of the evidence to be provided: at [31];

(3) There was the likely prospect that further pre-trial, interlocutory applications would be arise without the expert evidence: at [21]; and

(4) Leave granted to adduce expert evidence had the potential to focus the arguments in the trial, limiting the scope of the initial, broad arguments proposed by Bushfire Survivors: at [24].

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

Facts: Eastern Creek Operations Pty Limited (**defendant**) was a processor of mixed waste organic outputs (**MWOO**). The defendant was permitted to process and supply this waste to consumers under *the organic outputs derived from mixed waste order 2014* (21 November 2014) (**Order**) and *the organic outputs derived from mixed waste exemption 2014* (21 November 2014) (**Exemption**). In September 2018, the Environment Protection Authority (**EPA)** issued a Notice to Provide Information and/or Records pursuant to s 191(1) of the *Protection of the Environment Operations Act 1977* (NSW) (**POEO Act**) requiring the defendant to provide records and information for an investigation into the potential risk to the environment and human health of land application of MWOO (**Notice**). The defendant was charged with two offences under s 211 of the POEO Act for failing to comply with, and for providing false or misleading information in answer to, the Notice. The defendant filed two identical Notices of Motion (**NOMs**), seeking orders that the proceedings brought by the EPA be dismissed because the Notice underpinning both charges was invalid.

Issue: Whether the Notice was valid.

Held: The Notice was invalid:

(1) The defendant's NOMs raised a collateral attack on an administrative act - being the issuing of the Notice. The Court was able to determine such an attack as a preliminary matter in these proceedings per ss 247G(2) and (3)(f)(g) of the *Criminal Procedure Act 1986* (NSW): at [4]-[5];

(2) The onus was on the EPA to prove the Notice was valid: at [67];

(3) Failure to comply with a notice issued under s 191 is a criminal offence under s 211 of the POEO Act. It is important that a notice identify the information or documents sought relating to one or more matters of a kind described in the legislation about which the giver was entitled to serve the notice: at [73];

(4) Notices should generally be considered on the terms appearing on their face: at [83];

(5) The Notice was very broad. It set out the EPA's wide responsibilities under the POEO Act; identified the Order and Exemption; and stated that the EPA was investigating the potential human health and environmental risks of that application of MWOO to land. The Notice did not specify, in any useful way, the nature of the matter to be investigated: at [80]-[89];

(6) The Notice did not make it clear why records and information were sought. The fact that certain items of information and/or records were sought or that the defendant was required to keep some of these records under cl 4.9 of the Order, did not make it obvious why these were sought: at [90]-[91].

(7) The EPA's NOMs and the question of costs stood over for further hearing.

Friends of Gardiner Park Inc v Bayside Council [2020] NSWLEC 176 (Pepper J)

Facts: By Notice of Motion, Friends of Gardiner Park Inc (**Friends**) sought various interlocutory orders to restrain upgrade works being carried out by the first respondent, Bayside Council (**Council**), through the second respondent, Polytan Asia Pacific Pty Ltd (**Polytan**), on sporting fields at Gardiner Park, Banksia. At all relevant times, the Park was zoned under the Rockdale Local Environmental Plan 2011 (**RLEP 2010**), was identified as a 'heritage item' under the RLEP 2010, and was identified as 'community land' under the Council's Plan of Management for Public Open Space 2015 (**2015 POM**).

No environmental impact statement (**EIS**) was prepared by the Council notwithstanding that it was not in dispute that the works were an 'activity' for the purpose of Div 5.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Nor had any development consent had been obtained by the Council for the upgrade works. On the basis of the Council's Review of Environmental Factors (**REF**) and Environmental Assessment (**EA**), it found that the environmental impacts associated with the proposal had been adequately assessed and that no EIS was required.

The upgrade works had commenced prior to the hearing but had ceased when the Council provided an undertaking that it would not resume works until the interlocutory injunction application had been determined.

Issues:

(1) Whether Friends had raised issues to be tried which were sufficiently serious such that there was a sufficient likelihood of success to justify the granting of the interlocutory injunction; and

(2) Whether the balance of convenience favoured the granting of the injunction.

Held: Interim injunctive relief refused:

(1) The application was dismissed because no issues to be tried were sufficiently serious to warrant the granting of interim interlocutory relief especially given that the balance of convenience strongly favoured the Council and in light of the paucity of evidence relied upon by Friends: at [7].

(2) The costs of the additional two days of hearing as a result of Friends's ill preparedness ought not be visited upon the Council should it be unsuccessful at final hearing and consideration should be given as to whether any such order should be made personally against its legal representatives: at [5].

(3) Little to no weight could be placed on most of the opinions expressed in the lay affidavit evidence relied upon by Friends because the witnesses were not experts: at [28]. Similarly, many of the opinions expressed by Friends's expert arborist were based on supposition and assumption: at [30].

(4) Friends were required to demonstrate that there was a serious question to be tried such that there was a sufficient likelihood of success to justify the granting of the interlocutory injunction, and that the balance of convenience favoured granting the injunction: at [37].

(5) Friends raised questions to be tried with respect to the Council's obligations under ss 5.5(1) and 5.7 of the EPA Act, but a serious question to be tried regarding the Council's obligation to obtain an EIS was not established: at [49].

(6) The Council's consideration of environmental impacts of the works well exceeded the mere 'lip service' characterisation ascribed to it by Friends: at [41].

(7) While there was some force to the argument that the failure of the EA and REF to take into account the Bayside Council Plan of Management for Community Land and Public Open Space 2016 (**2016 POM**) constituted a breach of s 5.5(1) of the EPA Act, it did not amount to a serious question to be tried, particularly given the high level of similarity between the 2015 POM and the 2016 POM: at [44]-[45].

(8) The REF and the EA were replete with references to the impacts of the works on the existing and future use of the Park and Friends's submission to the contrary was factually misconceived: at [47].

(9) With respect to Friends's submission that the Council required development consent pursuant to cl 65(3)(c) of the State Environmental Planning Policy (Infrastructure) 2007 (**Infrastructure SEPP**) in respect of the carrying out of the works on certain heritage items, there was a question as to whether the heritage items in the Park engaged cl 65(3)(c) of the Infrastructure SEPP as a matter of construction and whether the works in respect of the heritage items were permissible with consent under that clause because the whole of Gardiner Park was a heritage item under the RLEP 2011 and various heritage items were located within the Park itself. However, these questions were rendered otiose in light of the undertaking given by the Council not to demolish or remove specific heritage items pending final determination of the matter: at [52], [56].

(10) It was not for the Court to determine whether the Council's undertaking was in breach of its contract with Polytan and Friends's submissions to this effect were inconsistent with its reliance on the Council's undertaking and the very nature of the grant of interim relief sought: at [55].

(11) There was a question to be tried as to whether the works were category 1 remediation works pursuant to cl 9 of the State Environmental Planning Policy No 55 - Remediation of Land (**SEPP 55**), in which case they required consent by reason of contamination present in the Park, or whether they were category 2 remediation works not requiring consent pursuant to cll 14(2)(ii) and 19(4) of SEPP 55. However, the question as to the application of cl 65(3)(b) of the Infrastructure SEPP did not exhibit a sufficient likelihood of success to justify the preservation of the status quo pending trial. Therefore, it did not amount to a serious question to be tried: at [57]-[60].

(12) Friends's submissions that the works had resulted in non-compliance with the 2015 POM and (or in the alternative), the 2016 POM, and the Council's Conservation Management Plan for Arncliffe, Gardiner, and

Bexley Parks, New South Wales for the City of Rockdale, Final Report (**CMP**) (referenced in both POMs) were rejected. This was because the use of the Park identified in both the 2015 POM and the 2016 POM for active recreation embodied the very purpose of the works; both POMs expressly referred to the CMP; even if the CMP was not complied with, there was no evidence that compliance with it was mandatory; the Council was not obligated to follow a single recommendation that the works should not proceed; and the construction of a fence around a synthetic playing field at the Park could not be characterised as exclusionary where there was pedestrian access to the field and the REF and EA envisaged the continued use of the Park for community events: at [61]-[69].

(13) The balance of convenience weighed heavily in favour of the Council because the strength of Friends' case was weak; Friends's evidence did not establish that there were any special features of the environment which would be harmed or lost if the Court did not grant the interlocutory relief sought; if Friends was ultimately successful, the Park could be reinstated to its current form by the removal of all imported materials; dust and sediment impacts, stormwater impacts, and contamination impacts were likely to occur if the upgrades were not completed; any delay would result in increased costs of the works; any delay would adversely impact the community; any delay would defer the improved stormwater management; and the usual undertaking as to damages was not offered by Friends: at [73].

Malass v Strathfield Municipal Council **[2020] NSWLEC 168** (Preston CJ)

Facts: Strathfield Council (**Council**) granted a development consent to Ms Malass (**applicant**) for the demolition of existing structures and construction of a new two-storey dwelling with basement car parking, in-ground swimming pool and front fence. The applicant constructed the building not in accordance with the development consent. The Council issued a stop work order under s 9.34(1)(a) and Sch 5 Pt 1 Item 2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The Council then issued a notice of intention to issue a demolish works order pursuant to s 9.34 and Sch 5 Pt 6 of the EPA Act. Directions were made separately in the substantive appeal, including arranging a conciliation conference.

The applicant sought an interlocutory stay on the stop work order. During the hearing, the applicant's Notice of Motion was amended to confine the works that would be allowed to be carried out by the stay to only works internal to the building for the purposes of making the building waterproof and physically secure. No other works would be permitted to be carried out; however, contractors and subcontractors could access the site for the purposes of removing the equipment.

Issues: Whether a stay against the stop work order should be granted.

Held: Partial stay granted; no order as to costs:

(1) A partial stay of the stop work order should be granted so that the building can be waterproofed and secured. There was no good purpose in the waterproofing and security being undertaken using temporary materials: at [51]-[57]; and

(2) The applicant was successful in obtaining a stay to allow some of the works to be carried out, and it would not be fair and reasonable to order her to pay costs in these circumstances: at [58]-[60].

Raymond Boutros Azizi v Council of the City of Ryde **[2020] NSWLEC 180** (Duggan J)

Facts: The City of Ryde Council (**Council**) sought a determination as to whether the Valuer General of New South Wales (**VG**) was to be required to produce documents sought by a subpoena issued by the Council. The documents sought related to:

(i) the engagement of consultants;

(ii) documents prepared by consultants; and

(iii) all other documents relating to the determination of compensation payable by the Council for the acquisition of land previously owned by Mr Azizi and others pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**).

Issues:

(1) Whether the VG was entitled to claim privilege at all, given its task under s 41 of the Land Acquisition Act;

(2) Whether the documents were subject to privilege, either by ss 118(a) or 118(c) and ss 119(a) or 119(b) of the *Evidence Act 1995* (NSW) (**Evidence Act**); and

(3) If the VG could claim privilege, whether it had impliedly waived that privilege by relying on the contents of the reports of the third-party advisors for the purpose of making the determination of compensation.

Held: Claim for privilege upheld; Council's motion dismissed; Council to pay VG's costs of the motion:

(1) As a general proposition, the VG is entitled to the protection afforded by the common law claim for legal professional privilege: at [26];

(2) The documents, divided into 4 categories, were found to be protected by either ss 118 or 119 of the Evidence Act: at [32], [35], [37], [39]; and

(3) The VG did not impliedly waive privilege; the production of the report was required by operation of s 41(3) of the Land Acquisition Act and did not impliedly waive the privilege as a matter of course. However, privilege may be waived in some circumstances where the report is unclear or the conduct of the provision of the report is inconsistent with the retention of confidentiality: at [44].

- **Joinder Applications:**

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

Facts: AQC Darbrook Management Pty Ltd (**applicant**) appealed against the determination of a s 75W of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**) modification request lodged by it to the Minister for Planning and Public Spaces (**respondent**) in relation to an underground coal mine. The modification request sought approval for the bord-and-pillar-mining method, the use of a new shaft facility, and an extension of time for the project. Both parties agreed terms in respect of the appeal and submitted to the Court an agreement under s 34 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) proposing the terms on which the proceedings be resolved by the grant of approval. The Hunter Thoroughbred Breeders Association Inc (Intervenor) sought to be joined as a party to these proceedings under s 8.15 of the EPA Act.

Issues:

(1) Whether entering into a s 34 agreement denies the Court of a contradictor in the proceedings;

(2) Whether bord-and-pillar mining of the Kayuga Seam as a mining method was an additional alternative or a replacement system to longwall mining;

(3) Whether the s 34 agreement has the effect of converting the Varied Modification Request to a new application for the purposes of s 75W; and

(4) Whether the Intervenor should be joined as a party.

Held: Joinder allowed:

(1) Section 34 of the Court Act is part of the Court's alternative dispute resolution process. The mere fact that the parties have been able to resolve their dispute does not automatically entitle other persons, no matter how interested they are in the proceedings, to be joined. The only factor to be considered in determining a joinder application where such agreement has been reached is whether the terms of the agreement are 'a decision that the Court could have made in the proper exercise of its functions'. While this factor is not specifically applicable under a s 8.15 EPA Act joinder application, the overriding purpose of considerations of s 56 of the *Civil Procedure Act 2005* (NSW) recognise further discretionary considerations even if the section is not directly applicable: at [33-35]. Further, there is no automatic right for a person to be joined if there is no contradictor - the s 8.15 EPA Act considerations must still be satisfied. Such factors do not include matters going to the mere merits of the application but are limited to matters where the Court must

form an opinion as to statutory preconditions prior to the granting of a consent in the form proposed by the agreement: at [36];

(2) Contention 1, regarding the bord-and-pillar mining issue, has to disclose an arguable cause of action, a test similar to that applied on a strike out application. Applying the ordinary meaning of 'alternative' and examining it within the context of the request and the subsequent assessment by the Independent Planning Commission, bord-and-pillar-mining method was an 'alternative' to longwall mining rather than a replacement. As such, no reasonable cause of action was disclosed, ie the s 34 agreement did not have the effect of converting the Varied Modification Request to a new application for the purposes of s 75W: at [46-48]. However, as for contentions 1(ii) and (iii), a reduction in the scope of the Modification Request leading to the Varied Modification Request being a new application could arguably change the character of a Modification Request such that it could comprise a new request rather than a variation to such request. Answering this will turn on mixed questions of fact and law and has the potential to affect the Commissioner's capacity to make the s 34 agreement as proposed by the parties. This matter would not be likely to be sufficiently addressed if the person were not joined as a party: at [at 50];

(3) Whilst merit matters do not arise for consideration in an appeal that has resulted in a s 34 agreement, as it is appropriate that the Intervenor be joined for the purposes of raising Contention 1, and as such the matter likely will not proceed to a s 34 disposal, it is likely that the Commissioner will have to determine the merits of the appeal raised in Contentions 2-4. As such the Intervenor was also joined to address Contentions 2-4: at [52-53, 55].

Yarranabbe Property Pty Ltd v Woollahra Municipal Council (No 2) **[2020] NSWLEC 151** (Duggan J)

(related decision: *Yarranabbe Property Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 122 (Duggan J))

Facts: The owners of land at 83 and 83A Yarranabbe Road, Darling Point (**Intervenors**) had on a previous occasion brought a motion to be joined as a party to these proceedings. The primary proceedings were an appeal brought by the applicants for the refusal of a development application for the partial demolition of and alterations to an existing residential flat building. Since the first joinder application, three material events occurred, being that the applicant lodged further cl 4.6 variations; the Intervenors commissioned a new survey plan; and the Intervenors provided further photographs of the public views.

Issues:

(1) Whether the application is estopped or an abuse of power,

(2) whether the Intervenors should be joined as a party to the proceedings,

Held: application for joinder dismissed:

(1) The principles relating to why a party should not be able to bring multiple sufficiently identical applications without a material change in circumstances or evidence reasonably available at the first hearing are so fundamental that there would have to be some real and compelling reason to depart from this rule of practice. Whilst the Court retains a discretion to permit an identical application to be made, the Intervenors have not identified any factor warranting departure from this rule: at [15];

(2) The three factors identified by the Intervenors were insufficient to establish that there has been a material change in circumstances or evidence that could reasonably been available to the Intervenors at the time of the previous joinder hearing: at [16]. If there is failure to identify a sufficient change in circumstances or evidence, the bringing of a second application for joinder constitutes an abuse of process: at [17];

(3) In the alternative, if the application was not an abuse of process, the application would not satisfy s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW). The substance of the issues that the Intervenors wished to raise had been raised, both in written and oral evidence, formed the focus of the visual evidence taken at the view where the Commissioner was assisted by further submissions by the Intervenors; and the making of further submissions at each variation to the application. As such, the identified issues have been raised sufficiently and addressed in the evidence available to the Commissioner: at [21].

- **Costs:**

Twynam Investments Pty Ltd v Goulburn Mulwaree Council **[2021] NSWLEC 7** (Moore J)

Facts: Twynam Investments Pty Ltd (**applicant**) owns property in the Goulburn Mulwaree Council's (**respondent**) local government area, outside the town of Marulan. The property has upon it the Wingello Park Dwelling, Barn Complex, and adjoining curtilage (**Wingello Park structures**). The applicant had filed for subdivision consent in 2008, which was granted to allow subdivision of the property and the creation of roads and other necessary services.

The Wingello Park structures were made the subject of an Interim Heritage Order (**IHO**) by the respondent pursuant to s 25 of the *Heritage Act 1977* (NSW) (**Heritage Act**). This provision states that the Minister may authorise a council to make an IHO if the authorisation is published in the local gazette and may be have conditions imposed upon the Council's authority of which the Council may not contravene.

A Ministerial Order was published in the Gazette on 12 July 2013 that described the circumstances under which a council could make an IHO. Schedule 2 of the Ministerial Order provides the 'operative provisions' and includes cl (2)(d) that states that if development consent has been granted which permits the item to be 'harmed', then an IHO must not be made. The respondent acknowledged that the development consent had commenced when the IHO was imposed and that the development consent permitted the item to be 'harmed'.

The applicant exercised its right of appeal pursuant to s 30 of the Heritage Act. The applicant sought a discontinuance of the proceedings (agreed between the parties) and a costs order in its favour pursuant to r 3.7 of the Land and Environment Court Rules 2007 (NSW) (**Court Rules**).

Issues:

(1) Did the respondent have the authority to make the IHO;

(2) Was it appropriate to discontinue the Class 1 appeal;

(3) Was it 'fair and reasonable' under r 3.7 of the Court Rules to award the applicant its costs; and

(4) Whether costs of excessive photocopying in an affidavit read for the applicant should be disallowed.

Held: Proceedings discontinued; respondent to pay the applicant's costs of the proceedings as agreed or assessed; respondent to pay the applicant's costs of the costs proceedings as agreed or assessed (other than the costs associated with unnecessary photocopying of the annexures to a nominated affidavit read for the applicant); and the respondent to pay the applicant's costs as ordered within 28 days of agreement or assessment of those costs:

(1) It was appropriate to grant leave to discontinue the proceedings as the parties were in agreement: at [36];

(2) The applicant had established that costs should follow in its favour pursuant to r 3.7(3)(f)(i) of the Court Rules: at [51];

(3) The Council lacked authority in this case to make an IHO (Sch 2(2)(d)), which led to it being 'fair and reasonable' to make a costs order in favour of the applicant: at [60]: and

(4) The amount of photocopying that was supplied to tender the Ministerial Order was excessive when the applicant supplied a large majority of the Gazette rather than only supplying the pages necessary to cover the range of pages that listed the Ministerial Order and related material - this is to be discouraged and would be excluded from costs.

Waverley Council v Ash Samadi and Ors (No 2) **[2020] NSWLEC 162** (Duggan J)

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

Facts: Mr Samadi (**respondent**) had carried out a series of alterations to an existing dwelling in the Waverley Council (**Council**) local government area, authorised by a series of complying development certificates amended over time. In *Waverley Council v Ash Samadi and Ors* [2020] NSWLEC 67, Duggan J held that the

applicant had breached a Stop Work Order issued relating to the works, and that the relevant complying development certificate was invalid.

Issues: Whether the costs of the proceedings should be paid on an indemnity basis.

Held: Indemnity costs awarded in part:

(1) The respondent relied upon a defence that the Council had been notified of a change of address. As this assertion went directly to the Council's case and was found to be false, the defence was not open to be sustained. Such conduct was sufficiently delinquent to warrant an order that costs be awarded to the Council on an indemnity basis: at [15];

(2) The respondent's conduct in preventing the Council from inspecting the premises was not normal conduct in the course of litigation. Costs incurred relating to this interlocutory conduct were also to be paid on an indemnity basis: at [16];

(3) The remaining matters were incidental to the usual conduct of the proceedings and were to be paid on the ordinary basis: at [17].

- **Merit Decisions (Judges):**

***Landcorp Australia Pty Ltd v The Council of the City of Sydney* [2020] NSWLEC 174** (Duggan J)

Facts: Landcorp Australia Pty Ltd (**applicant**) appealed the Council of the City of Sydney's (**Council**) two deemed refusals of a development application (**DA**)and a modification application two internally illuminated top of building signs. The Council contended that the development was prohibited as it did not meet the requirements of State Environmental Planning Policy No 64 - Advertising and Signage (**SEPP 64**); and breached the sun access plane and height controls of the Sydney Local Environment Plan 2012 (**SLEP 2012**). The Council also contended the proposed sign should be refused on merit considerations of heritage impact and town planning impacts.

Issues:

(1) Whether the development proposed by the DA was prohibited development;

(2) Whether the development be approved having regard to the relevant considerations in s 4.15 of the *Environmental Planning and Assessment Act* 1979 (NSW); and

(3) Whether the development consent should be granted at all and what conditions should be imposed, considering the merits of the matter.

Held:

(1) The development was not prohibited. The signs were properly characterised as a business development sign for SEPP 64 and Pt 3 does not apply to the signs. The development would not result in a projection into the Sun Access Plane so cl 6.17 of SLEP 2012 did not apply, and the DA was not for a building that exceeds the maximum height shown for the land and, therefore, the development standard in cl 4.3 of SLEP 2012 did not apply to a determination of the DA: at [60];

(2) The development should not be refused on merit. The development satisfied the criteria specified in Sch 1 of SEPP 64, is compatible with the character of the area, heritage significance is not diminished to a significantly adverse extent, the development improves the quality and amenity of the public domain, and displays sign excellence: at [113], [114], [123]; and

(3) Only one of the signs be approved so that the total is limited to two signs, condition 1 proposed by the parties as an agreed condition amended: at [126].

Salama v Northern Beaches Council **[2020] NSWLEC 143** (Pain J)

Facts: Mr Salama (**applicant**) appealed the refusal by Northern Beaches Council (**Council**) of his modification application of a development consent for coastal protection works on the seaward side of his property at Collaroy fronting Collaroy-Narrabeen Beach (**Property**). Improvements on the Property included a house, landscaping and an existing seawall which was to be replaced under the development consent. A condition limiting the life of the development consent to 60 years was the only matter remaining in contention (**Condition 41**). A key issue underpinning the dispute was planning for vulnerable coastal locations into the future in light of uncertain risks, particularly sea level rise resulting from climate change.

Issue: Whether Condition 41 ought to be deleted because it was:

(a) unjustified;

(b) unnecessary; or

(c) unreasonable.

Held: Appeal in relation to Condition 41 dismissed:

(1) The Council understood that it needed to be satisfied of the matters in s 27(1)(a)(i) and (ii) of the *Coastal Management Act 2016* (NSW) as a precondition to the grant of consent, as identified in *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345; [2018] NSWLEC 207 at [152]: at [135]. The Council assessed substantively what the applicant sought development consent for, which identified the design life of the seawall as 60 years based on modelling of projected sea level rise: at [131], [136]. Condition 41 responded directly to the requirements of s 27(1)(a)(ii) in focusing on the specified 60-year design life of the works: at [137]. Condition 41 was not unjustified: at [142].

(2) The applicant's contention that the sea wall would be maintained after each storm event and would be in good repair in 60 years confused ongoing maintenance of the approved structure with adaptation to sea level rise. The works required assessment for the purposes of adaptation after 60 years given evidence relating to sea level rise and projected changes in the environment. Condition 41 was not unnecessary: at [143].

(3) Condition 41 was not convoluted or onerous and its operation did not result in the owner of the Property having to remove coastal protection works after 60 years: at [144]. Condition 41 was not unreasonable: at [146].

- **Merit Decisions (Commissioners):**

Chhabra v Ku-ring-gai Council **[2021] NSWLEC 1009** (Gray C)

Facts: In around May 2018, an elevated 88-square-metre, rectangular deck was constructed without a planning approval at the rear of a residential property at 218 Bobbin Head Road, North Turramurra. Ms Chhabra (**applicant**), who owns the property, applied for a building information certificate for the deck. On 28 February 2019, Ku-ring-gai Municipal Council (**Council**) refused the application. On the same date, the Council issued a development control order requiring that the deck be brought into compliance with the development standards for exempt development in the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Exempt and Complying Developments Codes SEPP**). The applicant appealed against both the refusal of the building information certificate (**certificate appeal**) and the development control order (**order appeal**).

It was agreed that the deck was constructed without a planning approval and did not comply with the Exempt and Complying Developments Codes SEPP, and that the statutory basis for the issue of the development control order was established.

The applicant sought orders to carry out works to the deck and for a building information certificate to issue subsequently, and for the stay of the order pending the issue of the building information certificate.

The approved stormwater management for the site included an absorption trench system, and the deck was built in an area where the absorption trench was located and where the stormwater was to be dispersed across the length of the absorption trench. A positive covenant and restriction on the use of the land were registered on title, and prevented anything from being erected or placed on the stormwater system or so as to inhibit the flow of water to and from the system.

The facts in issue included whether the trench system was in place, and whether there had been an interference of the deck with the operation of the stormwater absorption trench system. One of the ways of possible interference was that the piers of the deck could have pierced the absorption trench.

On the day of the site inspection, which occurred after some rainfall, a significant sub-surface flow was observed coming from one of the gaps between the rocks in a retaining wall at the rear of the site, flowing from the site to the neighbouring property at the rear. The owner of that property gave evidence on site that the construction of the deck had increased the degree of flooding on his property. The engineers gave agreed evidence that the flow observed on the site inspection would not occur if the absorption trench system was working properly. In their joint report, they also agreed that the deck was in an area that was required for the dispersal of water from the absorption trench. In oral evidence, the engineer for the applicant gave evidence that, to ensure that there is no interference by the piers with the trench, a CCTV camera should be inserted along the full length of the trench.

After three days of hearing, judgment was reserved. The applicant then filed Notices of Motion in each appeal, seeking to reopen the hearing of the appeals so that an affidavit of a plumber could be read on the appeals, which was procured following the hearing and contained evidence of a dye test being carried out and a CCTV camera being inserted in a pit near the absorption trench.

Issues:

On the Notice of Motion

(1) Whether the interests of justice were better served by allowing or rejecting the applications to reopen the hearing.

On the appeals

(1) Whether the issues on a building information certificate appeal were confined to the question of structural adequacy;

(2) The relevance of the 'notional or hypothetical development application' in relation to the certificate appeal, and whether the controls in the development control plan were relevant;

(3) Whether the construction of the deck, in particular the piers and footings, had caused an adverse impact on the management of stormwater within the site;

(4) Whether the evidence of the neighbour should be given less weight because it was not given under oath;

(5) Whether the stormwater run-off from the deck itself (including as proposed to be modified by the proposed directions) would cause an unacceptable impact;

(6) Whether the proposed directions, sought by the applicant, would resolve the adverse impacts identified concerning stormwater management and stormwater run-off; and

(7) Whether the positive covenant and the restriction on use applied to the absorption trench, and whether they were relevant in an appeal under the *Environmental Planning and Assessment Act 1979* (NSW).

Held:

Dismissing the Notice of Motion in each appeal

(1) The interests of justice were better served by rejecting the applications to reopen as reopening the hearing would cause undue delay and result in unnecessary costs: at [29]-[32]; and the plumbing affidavit was of little probative value and was not sufficiently material to the stormwater issues raised: at [33]-[37].

Dismissing the certificate appeal and allowing the order appeal to extend the time for compliance

(1) The power of the Court on a building information certificate appeal conferred a broad discretion, which was not limited to or bound by an inquiry on structural adequacy. The consideration of a 'notional or hypothetical development application' was a useful framework in which to consider matters that are relevant to the

exercise of that discretion, including the impacts of the structure, but it was not a mandatory approach: at [75]-[77];

(2) The planning controls and any development standards were relevant to an assessment of the impacts of the structure, but are not a mandatory consideration: at [78]-[79];

(3) Upon the raising of any issues of impact by the Council, the applicant then had the burden of establishing that any identified impacts are not unacceptable: at [136];

(4) There was a presumption that the absorption trench system had been installed as certified: at [138]; and the applicant has failed to establish that the construction of the deck had not caused an adverse impact on the management of stormwater through the absorption trench system: at [137];

(5) The evidence of the engineers and the neighbour was sufficient to establish that there was an interference by the deck with the absorption trench system: at [139]-[142] and [146];

(6) The neighbour's evidence ought not be given any less weight because it was given onsite: at [143]; and it was not fabricated: at [145];

(7) The applicant had failed to establish that the stormwater run-off from the deck itself (including as proposed to be modified by her proposed directions) did not cause an unacceptable impact: at [147];

(8) It was not possible to be satisfied that there was no adverse impact of the deck on the downstream property, or that there was no issue with the long term stability of the deck due to the concentration of water in the soil around the piers: at [148]-[150];

(9) The directions proposed by the applicant do not achieve finality in the consideration of the merits of the appeals and they lacked sufficient certainty that the impacts of the deck would be avoided: at [152]-[159]; and

(10) The positive covenant and the restriction on the use of land did apply to the absorption trench: at [57]; their existence and terms were relevant to the exercise of discretion on each appeal: at [163]; and the potential breach of both the covenant and the restriction on use of land by the construction of the deck was another reason why the Court's discretion ought not be exercised to direct the issue of a building information certificate or modify the order: at [163]-[164].

Gebran & Raad Developments Pty Ltd v Wollongong City Council **[2020] NSWLEC 1610** (Gray C)

Facts: On 16 October 2019, Wollongong City Council refused a development application for a 15-room boarding house at 124 Avondale Road, Avondale. Gebran & Raad Developments Pty Ltd (**Gebran**) appealed against that decision. Although the proposal included stormwater concept plans, the plans did not include the disposal of the stormwater. The plan noted that the pit to which the stormwater was directed would connect to a future stormwater easement. Gebran acknowledged that the stormwater collected onsite would require disposal off-site through inter-allotment drainage to a watercourse on an adjacent property known as 118 Avondale Road, and proposed to deal with the future drainage works through a deferred commencement condition. A superseded stormwater plan was in evidence as a possible route for that off-site disposal, but did not form part of the proposed development. The Council opposed the grant of consent on the basis that it was uncertain and incomplete as it failed to make provision for stormwater disposal, and this meant that an assessment of the impacts of the proposed development cannot be properly assessed. It also raised issues concerning the number of boarding rooms, the design and location of the principal communal room, and the adequacy of the social impact statement.

Issues:

(1) Whether, without the design for the offsite disposal of stormwater, there is sufficient information to consider the likely impacts of the development, as required by s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

(2) Whether the future drainage works for the offsite disposal of the stormwater could be dealt with by way of a deferred commencement condition.

Held: Appeal dismissed; development consent refused:

(1) The assessment of impacts required by s 4.15(1)(b) of the EPA Act extended to an assessment of impacts from works that are required off-site that are inextricably involved in the carrying out of the proposed development, even if those off-site works were not proposed in the development application the subject of the s 4.15 assessment, applying *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41: at [53], [54] and [59];

(2) The assessment of impacts of the proposed boarding house extended to the impacts of the stormwater drainage works that are required on 118 Avondale Road to drain the stormwater from the site to the watercourse, as those off-site works were inextricably involved in the carrying out of the proposed development: at [54];

(3) Gebran bears the persuasive burden to provide information to persuade the Court that any impacts resulting from those off-site works on 118 Avondale Road could be satisfactorily addressed: at [58]-[59];

(4) Without a design for the drainage across 118 Avondale Road or an arborist assessment concerning the impact on trees proximate to the potential route in the superseded stormwater plan, there is insufficient information to assess the impacts of the proposed development: at [55]-[59]'

(5) The lacuna in information cannot be satisfied by the imposition of deferred commencement conditions: First, to do so impermissibly defers a mandatory relevant matter for later consideration; second, to do so would result in a lack of finality in the development consent, as the off-site design could result in changes to the built form of the development and leave open the possibility that the development would be altered to an extent that is not known: at [60]; and

(6) There is no utility in considering the remaining matters raised by the Council: at [62]-[66].

Intrapak Skennars Head Pty Ltd v Ballina Shire Council **[2021] NSWLEC 1006** (Clay AC)

Facts: Ballina Shire Council (**Council**) granted a development consent to Intrapak Skennars Head Pty Ltd (**applicant**) for the residential subdivision of land and imposed conditions requiring the construction of a roundabout and the carrying out of works on land which is to be dedicated to the Council. It was common ground that the conditions were lawfully imposed, and also that the works will provide a public benefit in addition to serving the proposed subdivision. The Council also imposed conditions requiring monetary contributions to roadworks and parks in accordance with its Contributions Plans (**Contributions Condition**).

The applicant made a modification application seeking that the monetary contributions be reduced to take account of the value of the material public benefit of the carrying out of the works the subject of the lawful conditions.

The applicant contended specifically that the Contributions Condition was unreasonable because the quantum of contributions imposed for road and other works was not reduced through the mechanism available in certain clauses of the relevant contributions plans to account for an offset for the material public benefit provided by the road and other works to be undertaken by the applicant pursuant to conditions of consent.

Issues:

(1) Whether the meaning of 'unreasonable' in s 7.11(3) of the *Environmental Planning and Assessment Act 1979* (NSW) embraced the required works the subject of the application by the applicant; and

(2) Whether the decision in *Colonial Credits Pty Ltd v Pittwater Council* [2015] NSWLEC 188 (***Colonial***) by Moore AJ (as his Honour then was) determined in Class 1 proceedings that the power to set aside a contributions condition must find a basis for unreasonableness in the contributions plan's application to the site rather than in some other burden imposed on the beneficiary of the consent should be applied, followed or ignored; and

(3) The role of comity amongst decision makers in Class 1 appeals.

Held: Appeal dismissed:

(1) There is truly no tension between the cases of *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310 (***Segal***) and *Challenger Listed Investments Limited v Valuer General (No 2)* [2015] NSWLEC 60 (***Challenger***) when it is understood that the two decisions related to different aspects of the exercise of the Court's Class 1 jurisdiction. There is no obligation to follow, or even refer to and take

into account, a decision which is a purely merit based decision by another commissioner (or judge). As is recognised in *Segal*, decisions will be based on the evidence before the Court in each case, and a different conclusion may be reached, even on similar evidence in two cases: at [105];

(2) The position is different in relation to questions of law. They are questions which, in the particular case in the Court's Class 1 jurisdiction, are necessary to determine in order to make the ultimate administrative decision. It is that type of determination that *Mac Services Group v Mid-Western Regional Council* [2014] NSWLEC 1072 and *Challenger* refer to as being apt to apply the principle of comity in decision making: at [106];

(3) Where a judge at first instance (or commissioner) has made a determination on a question of law, then it should be followed as a matter of comity unless the commissioner considers it is 'plainly wrong' (*Challenger*) or convinced that the judgment was wrong (*Michael Realty Pty Ltd v Carr* [1975] NSWLR 812): at [106].

(4) A contributions condition is not unreasonable because in imposing it the Council failed to take into consideration a circumstance which has not yet arisen. That is, the power which the applicant asserts should have been exercised is not a power which could have been exercised in imposing the contributions condition. The power to allow a credit for the provision of a material public benefit which has not yet been provided only arises after the grant of development consent and the imposition of the condition: at [142];

(5) A condition is not invalid because it also confers a public benefit in addition to serving the development the subject of the condition: at [81];

(6) The material public benefit arising from work carried out pursuant to a lawful condition of development consent has no role to play in determining the reasonableness of a contributions condition in the very same development consent. It would not be consistent with the scheme of the Act to take into account a material public benefit arising from the imposition of a condition of development consent in the very same instrument: at [145];

(7) The asserted unreasonableness does not arise from the application of the Contributions Plans. It arises from the burden imposed on the beneficiary of the consent by the conditions of consent requiring the carrying out of road and other works in respect of which the applicant seeks a 'credit'. That is a matter extraneous to the operation of the contributions plan to determine the reasonable contribution to public amenities and services having regard to the terms of the plan itself. Applying the dicta *of Colonial*, there is no unreasonableness: at [151], [165];

(8) The decision of Moore AJ in *Colonial* is correct and should be applied: at [161]-[163]; and

(9) An analysis of the 'offset' provisions of the contributions plans relied on by the applicant did not lead to a finding of unreasonableness on the merits: at [166];

***IPM Holdings Pty Limited v The Council of the City of Sydney* [2020] NSWLEC 1593** (Dixon SC)

Facts: IPM Holdings Pty Ltd (**IPM**) appealed pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) from the deemed refusal of development application D/2019/952 (**DA**). The DA sought approval for the 'occupation and use of 5 residential apartments (Units 305 to 309) within the existing residential flat building' at 161 Brougham Street, Woolloomooloo known as the 'Calidad Building'.

The Council of the City of Sydney (**Council**) contended that there was no need, and in fact no power under the EPA Act for the Court to grant consent to this application. It maintained that the 'occupation' of the units was not a form of development capable of being the subject of an application for development under the EPA Act, and the residential use had already been approved under development consent (D/2014/1890) (as amended). The Council said that the occupation certificates would be issued for the units once full compliance with the relevant conditions (Conditions 8, 9 and 11) of D/2014/1890 had been satisfied.

In the alternative, assuming there was power to grant approval for the use, the Council contended that the exercise of that power in the present circumstances was contrary to the public interest as it would allow occupation and use of the units without first satisfying the outstanding conditions of D/2014/1890. In short, it submitted that an approval of this application (D/2019/952) would allow IPM to take the benefit of the earlier consent without the burden imposed by the conditions of consent.

The adjoining landowners who were the second and third respondents (for 'Telford Lodge' and two Victorian terraces respectively) and the strata plan for the Calidad Building - the fourth respondent, also opposed the application for the same reasons as the Council together with additional grounds.

Issues:

(1) Is a development application for 'occupation' a proper application under the EPA Act;

(2) Is a development application for 'use' a proper application under the EPA Act;

(3) Did the Court have power to impose a condition of consent requiring IPM to enter into a voluntary planning agreement (**VPA**) with the Council, when the Council opposes the VPA; and

(4) Did the proposed development promote the orderly and economic development of land and was it in the public interest.

Held: Appeal dismissed:

(1) The process of obtaining occupation certificates is distinct from that of obtaining development consent. Compliance with the conditions of an applicable development consent is a necessary precondition to obtaining occupation certificates. 'Occupation' is not a form of 'use' as the word is used in the EPA Act and therefore did not fall within the meaning of 'development' under the EPA Act: at [67];

(2) An application for 'the use of land' was clearly a form of development for the purposes of the EPA Act being 'the use of land' pursuant to ss 1.4(1) and 1.5(1): at [82];

(3) It was irrelevant whether there was an existing consent for the residential use, expressly or by operation of s 4.19 of the EPA Act, because the EPA Act provided opportunity for multiple and inconsistent consents for the same land: at [83];

(4) There was no relevant prohibition, express or implied, which impinges upon the application making process. The EPA Act provides an opportunity to make an application for development irrespective of the fact that there was no opportunity after assessment to grant consent or an earlier consent has been granted: at [84], [87]; *Currey v Sutherland Shire Council and Russell* (2003) 129 LGERA 223; [2003] NSWCA 300 at [35] (per Spigelman CJ);

(5) Clause 4.6 of the Sydney Local Environmental Plan 2012 (**SLEP 2012**) was not engaged by this application for use of part of an existing building: at [91]; It is the 'development' that must contravene the standard in order to engage cl 4.6 of the SLEP 2012 and this application for use of part of the development (five units) could not engage the section: at [92];

(6) A planning agreement or other arrangement under s 7.4 of the EPA Act entered into with a planning authority must be voluntary and for a public purpose. As the Council was not willing to enter into the proposed VPA, there was no power for the Court to impose a condition of consent requiring the Council to enter into the VPA under s 7.7(3) of the EPA Act: at [120]; Nor did the Court have power under s 39(2) of the *Land and Environment Court Act 1979* (NSW) or otherwise to impose the proposed VPA as a condition of consent: at [126]; *Australian International Academy of Education Inc v The Hills Shire Council* (2013) 196 LGERA 1; [2013] NSWLEC 1: at [52] and [73];

(7) The meaning of 'public purpose' within s 7.4(1) is one of statutory construction. Although 'public purpose' is defined inclusively in s 7.4(2), the purposes enumerated in s 7.4(2) all share two key characteristics. The first is that they have a dimension of public utility through the provision of a service or infrastructure which can be used by the public or a portion of the public. The second is that they pertain to matters over which the Council can exercise control: at [122];

(8) The VPA would not be used or applied for a 'public purpose' within the meaning of subss 7.4(1) and (2). The work funded by the VPA did not have the two key features of public purpose. While it was accepted that some privately-owned residences that are local heritage items under the SLEP 2012 have historical and cultural value, their maintenance does not fall within the ambit of 'public purpose' within s 7.4. The Council does not exercise control over the Telford Lodge land without the agreement of the owner or by application to the Court for an order for such access: at [124];

(9) The orderly and economic development of the land (s 1.3(c) of the EPA Act) and the public interest are best served by the conditions of consent being satisfied prior to the issue of the occupation certificates and a restrictive covenant being registered on the title. In the absence of satisfaction with the conditions, there

was no assurance that the conservation works would be funded and completed and there was no satisfactory mechanism in place to avoid 'double dipping' (cl 4.5 of the SLEP 2012): at [146]; and

(10) It was not appropriate that IPM, having benefited from utilising the gross floor area of the adjoining landowners' land, could avoid the responsibility of fulfilling the conditions of the consent for the residential flat building and shift those obligations to the body corporate and adjoining landowners. The application was not consistent with the orderly and economic development of the land and was not in the public interest. It is appropriate that the occupation certificates be issued for the units upon compliance with the relevant conditions of the consent for the residential flat building. Those conditions were imposed to promote the objects of the EPA Act and IPM having taken the benefit of the earlier consent cannot now seek to avoid the burden imposed by the outstanding conditions. An approval of this application would reduce certainty for both the site owners and members of the public as to whether the outstanding conditions would ever be satisfied: at [154].

Jeffrey v Canterbury-Bankstown Council **[2020] NSWLEC 1581** (Clay AC)

Facts: Ms Jeffrey (**applicant**) sought development consent from Canterbury-Bankstown Council (**Council**) to establish a funeral home in a former motor cycle retail establishment on land zoned R4 High Density Residential. The activities to be conducted were proposed to be:

(a) meeting family members (customers) by appointment only;

(b) receiving the body of a deceased, preparing and storing the body;

(c) making all necessary arrangements for a funeral usually at other premises;

(d) conducting a viewing of the body and/or a service at the premises from time to time; and

(3) carrying out embalming when required.

The proposed development intended to arrange about 130 funerals per year. There would be in the order of a total of 20 services/viewings at the premises. Embalming (a process which involves the removal of bodily fluids and their replacement with certain chemical fluids) of a body would occur 15-20 times per year. The site would provide parking for staff and customers and mourners. That part of the site and premises proposed to be used for the purpose of business premises (as defined) has a gross floor area of 365.5m sqm.

The use for the purpose of 'Business premises' is a permissible use within zone R4 but cl 6.5(3) of the Canterbury Local Environmental Plan 2012 (**CLEP 2012**) states that development consent must not be granted to development for the purposes of business premises unless the gross floor area of the development will not exceed 100 sqm.

The objectives of the zone included '*to enable other land uses that provide facilities or services to meet the day to day needs of residents*'.

Issues:

(1) Whether the embalming was:

  (a) permissible as an ancillary use; or

  (b) was a separate or independent use prohibited because of its control by public health legislation;

(2) Whether the provision limiting the business premises in the R4 zone to a maximum of 100 sqm was a development standard;

(3) If the 100 sqm maximum was a development standard, whether the proposal met the objectives of the standard and so compliance was unreasonable or unnecessary;

(4) If the 100 sqm maximum was a development standard, whether the proposal was in the public interest, specifically whether it achieved the objective of the zone 'to enable other land uses that provide facilities or services to meet the day to day needs of residents'.

Held: Appeal dismissed:

(1) The Council submission that, because the activity of embalming is the subject of public health legislation (and is therein described as being a mortuary), it is to be characterised as a mortuary for the purposes of the planning regime was rejected: at [73];

(2) Whilst an activity can be the subject of regulation by another legislative regime as well as the planning regime, it can only be the planning regime which determines the characterisation of the purpose of the activities for application of the provisions of that very planning regime: at [73];

(3) Whilst the act of embalming is one of the elements of the activities of a mortuary, it is a service being provided directly to members of the public on a regular basis. Therefore, it is an occupation, profession, or trade carried on for the provision of services directly to members of the public on a regular basis. That is, to the extent that the activities proposed to be carried out fall within the characterisation of 'mortuary', mortuary is an innominate prohibited purpose but a species of the genus of a nominated permissible purpose, 'business premises': at [72];

(4) Alternatively, the activity of embalming is ancillary to the dominant use of premises as a 'funeral home' (*Foodbarn Pty Ltd v The Solicitor-General* (1975) 32 LGRA 157). Any embalming would be part of the process of preparation of a body for viewing and/or a service. That is, the embalming is not an end in itself, but is serving the broader purpose of the funeral home. Second, embalming forms a very small part of the overall services provided by the applicant and is a very minor part of the facilities: at [75]-[76];

(5) The embalming activity is not prohibited: at [77];

(6) The two step approach to determine whether a provision is a development standard or prohibition is the correct approach (*Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319; [2001] NSWCA 270 and *Laurence Browning Pty Ltd v Blue Mountains City Council* [2006] NSWLEC 74): at [84];

(7) The CLEP 2012's provisions do not prohibit the development under any circumstances. The development for the purpose of business premises is permissible in the zoning table but subject to the constraint of a maximum 100sqm. If the gross floor area for business premises is less than 100 sqm then the use is not prohibited by that provision. That is the first step: at [85];

(8) The second step is whether the maximum area for gross floor space specifies a requirement or fixes a standard in respect of an aspect of the development. The standard is that the development can only be carried out within the amount of area identified. The aspect of the development concerned is the land or building occupied by it: at [86];

(9) The provision is a development standard: at [87];

(10) The cl 4.6 objection fails to properly address the underlying objective of the standard to limit the scale of commercial premises in certain residential zones (including zone R4) to promote higher density, mainly, residential land uses: at [97]-[100];

(11) The word 'consistent' is a word which attracts its ordinary meaning, a synonym of which is 'compatible', rather than 'not antipathetic'. To utilise a phrase such as 'not antipathetic' has a tendency to divert from the requirement of the language to find a positive outcome - consistency - rather than not find a negative outcome - not antipathetic: at [108];

(12) The fact of permissibility of business premises does not mean that any development which is properly characterised as use for the purpose of business premises thereby meets the objective of the zone: at [117];

(13) 'Day to day needs' are those needs which arise for the majority of persons on a regular basis: at [121]; and

(14) The proposed funeral home is not a service which meets the day to day needs of the residents of the zone, because it is not a service that the majority of the population will need on a regular basis: at [124].

Madss Properties No 2 Pty Ltd ATF Newtown Property Trust v Blacktown City Council **[2021] NSWLEC 1053** (Dixon SC)

(related decisions : *Madss Properties No 2 Pty Ltd ATF Newtown Property Trust (No 2) v Blacktown City Council* [2019] NSWLEC 126 (Moore J); *Madss Properties No 2 Pty Ltd ATF Newtown Property Trust v Blacktown City Council* [2019] NSWLEC 1108 (Horton C))

Facts: Consequent upon Blacktown City Council's refusal of a development application (**DA**) for a boarding house, Madss Properties No 2 Pty Ltd ATF Newtown Property Trust (**NPT**) appealed to the Land and Environment Court. A commissioner refused the appeal.

On 15 April 2019, NPT filed an appeal against the commissioner's decision to dismiss the appeal pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) on grounds relating to the misconstruction of cl 29 of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**Affordable Rental Housing SEPP**) and cl 7.7 of the Blacktown Local Environmental Plan 2015 (**BLEP 2015**), failure to provide reasons for dismissal and lack of procedural fairness. Moore J upheld the s 56A appeal on four grounds (all conceded by the Council). The first was the commissioner's incorrect application of the Affordable Rental Housing SEPP to the facts as to whether 'manager's private open space' complied with the Affordable Rental Housing SEPP; two further grounds related to the commissioner's failure to give reasons for his conclusions concerning design excellence (design excellence being required by the BLEP 2015); and, fourth, the commissioner's denial of procedural fairness to NPT concerning both manager's private open space and design excellence.

Moore J ordered an exclusionary remitter for determination in accordance with the correct application of cl 7.7(3) of the BLEP 2015 and cl 29(2)(d)(ii) of the Affordable Rental Housing SEPP.

The DA, as amended since the first hearing, sought development consent for the demolition of existing dwellings and construction of a two-storey boarding house containing 14 boarding rooms and an onsite manager's room with car parking and landscaping. With certain amendments made to the DA, at the second hearing, the remaining contentions related to character, design excellence and public interest.

Issues:

(1) Whether the design of the proposed development was compatible with the character of the local area in light of cl 30A of the Affordable Rental Housing SEPP; and

(2) Whether the design exhibited design excellence.

Held: Appeal upheld; development consent granted subject to conditions:

(1) The consideration mandated by cl 30A of the Affordable Rental Housing SEPP required more than a simple comparison of the proposed development with the existing streetscape standing opposite the site and comparing the development in that streetscape view. The focus of cl 30A was on the character of the local area, not the residential character of the street: at [36];

(2) Compatibility is multifactored and not simply 'sameness'. Buildings can exist together in harmony without having the same density, scale or appearance. In this case, the design of the proposed development in terms of its density, scale and appearance will be compatible or harmonious with the character of the identified local area: at [37];

(3) Clause 30A of the Affordable Rental Housing SEPP does not require a finding that the design of the development was compatible with the local area in order to grant consent, but rather consideration of whether the design of the proposed development is compatible with the local area: at [38].

(4) In relation to design excellence, cl 7.7(3) of the BLEP 2015 requires the consent authority to have regard to discrete matters in cl 7.7(4) in order to determine whether the proposed development exhibits design excellence. This list is not exhaustive. However, in this case, no further criteria had been identified and therefore, the Court's consideration was limited to the listed criteria in cl 7.7(4) (*Madss Properties No 2 Pty Ltd ATF Newtown Property Trust (No 2) v Blacktown City Council* [2019] NSWLEC 126 at [58]-[59] per Moore J): at [55];

(5) Clause 7.7 of the BLEP 2015 does not define or command 'design excellence'. The objective of the clause is to 'ensure that development exhibits design excellence that contributes to the natural, cultural, visual and built character values of Blacktown': at [56]; and

(6) Clause 7.7(4) of the BLEP 2015 does not require a finding or tick against each criterion in order to decide that the development exhibits design excellence for the purpose of cl 7.7(3). It is open to the Court to accept that one or more of the criteria is not met and still conclude that the proposed development exhibits design excellence and grant development consent. In this case, based on all the evidence, the proposed development does exhibit design excellence: at [39]-[72].

Warnervale Employment Zone Pty Ltd v Central Coast Council **[2020] NSWLEC 1571** (Clay AC)

(related decision: *Central Coast Council v 422 Pacific Highway Wyong Pty Ltd* [2018] NSWLEC 38 (Moore J))

Facts: A development application (**DA**) was lodged Warnervale Employment Zone Pty Ltd (**Warnervale**) on about 13 July 2018 by with the consent of the owners of 450 Pacific Highway, Wyong (**site**). A Class 1 appeal was lodged on 8 November 2018 against the deemed refusal of the DA by Central Coast Council (**Council**). The appeal named three applicants: 40 Gindurra Road Somersby Pty Ltd, Warnervale Employment Zone Pty Ltd and 422 Pacific Highway Pty Ltd (**422 Pacific Highway**).

On 3 December 2018, an Amended Application Class 1 was filed naming the applicants only as Warnervale and 422 Pacific Highway, removing 40 Gindurra Road Somersby Pty Ltd as an applicant. The amendment was made in response to observations made by Moore J in related Class 4 proceedings.

Shortly prior to the hearing of the Class 1 appeal, the Council had filed and served an affidavit which annexed an ASIC Current Organisation Extract which recorded that Warnervale was deregistered on 10 May 2020 pursuant to s 601AB of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The DA was made by Warnervale. 422 Pacific Highway was not a named applicant for development consent nor was it the owner of the land.

The director of the applicants who appeared at the hearing, after the commissioner explained the need to demonstrate that 422 Pacific Highway was a company entitled to appeal, claimed that Warnervale and 422 Pacific Highway had a commercial relationship and that Warnervale was the agent of 422 Pacific Highway when Warnervale made the development application.

It was submitted that 422 Pacific Highway was a person dissatisfied with the decision of the Council. When called upon to produce a document to that effect, the director produced a 'Principal Agency Agreement' which in fact appointed 422 Pacific Highway the agent of Warnervale.

Issue: Whether the appeal was competent.

Held: Appeal dismissed:

(1) The consequence of deregistration is that the corporation ceases to exist: s 601AD of the Corporations Act: at [10];

(2) A agency agreement between Warnervale and 422 Pacific Highway was tendered. The document records the appointment of 422 Pacific Highway as agent of Warnervale. It did not demonstrate that Warnervale was acting as the agent for 422 Pacific Highway when it lodged the DA or at all: at [14];

(3) Although the Council took no active part in any debate about the entitlement of 422 Pacific Highway to prosecute the appeal, it was important to the integrity of the Court process that only entities who are entitled so to do engage the Court in the exercise of its powers: at [17];

(4) An applicant for development consent who is dissatisfied with the determination of the application by the consent authority may appeal to the Court against the determination: s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**): at [22];

(5) The right of appeal is a statutory right vested in the applicant for development consent, if it is dissatisfied with the determination of the application. It is well settled that an applicant for development consent may have been performing that function as agent for a principal, and accordingly the principal has a right of appeal although the development application was not in its name: *Betohuwisa Investments Pty Ltd v Kiama Municipal Council* (2010) 177 LGERA 312; [2010] NSWLEC 223 (***Betohuwisa***) at [54] per Craig J: at [22];

(6) The argument that an appellant may include 'those persons so closely related to [the applicant for development consent] as to be regarded as the privies of the applicant such as agents, mortgagees,

persons to whom the applicant has divested all conceivable rights in the property including the right to develop it' was rejected (*Betohuwisa*): at [23];

(7) Warnervale does not exist. It cannot prosecute the appeal. Even if the director and/or 422 Pacific Highway is Warnervale's agent, an agent has no greater right or power than its principal. If the principal does not exist, then the agent for that now non-existent principal cannot take any steps purporting to be on its behalf: at [24];

(8) 422 Pacific Highway was not the principal of Warnervale and had no right to prosecute the appeal; at [25];

(9) The proceedings are incompetent because one of the named applicants no longer exists and the other is not a person who was an applicant for development consent as that term is properly understood in s 8.7 of the EPA Act: at [28]; and

(10) That was sufficient to dispose of the appeal, but the commissioner proceeded in any event to deal with the matters of merit raised by the Council in its contentions which also were sufficient to dismiss the appeal: at [29]-[112]

XLJ Investment Group Pty Ltd v Ku-ring-gai Council **[2020] NSWLEC 1607** (Walsh C)

Facts: XLJ Investment Group Pty Ltd (**applicant**) lodged a development application (**DA**) for a residential flat building (**RFB**) in Turramurra. While the accommodation element of the proposal would be located, essentially, on a parcel of land 930.8 square metres in area (**core land**), the proposal would integrate this new RFB with adjacent lands to the east, south and west (**supplementary land**) which could, subject to inclusion particulars, total in excess of a further 10,000 square metres in area. The physical aspects of this integration would include construction of a driveway, elevated walking paths as well as certain landscape and conservation related works on the supplementary land, as well as some shared land use. Property rights had already been secured by way of easements for all of the proposed development and shared use on the supplementary land. Notably, RFB development has already occurred on the supplementary land, and there are encumbrances in relation to certain parts of these lands relating to the conservation and management of Blue Gum High Forest (**BGHF**), listed as a Critically Endangered Ecological Community under the *Biodiversity Conservation Act 2016* (NSW). The applicant lodged an appeal against the deemed refusal of the DA by Ku-ring-gai Council.

The proposal was permissible under the land use tables of Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (**KLEP 2012**). Within KLEP 2012, building height, floor space ratio (**FSR**) and minimum site area controls each embody incentive provisions directly concerned with encouraging larger rather than smaller site area for the purposes of development such as RFBs; larger sites generally seen to encourage superior design opportunities. This encouragement is by way an uplift in development yield opportunities. That is, the development standards listed are more permissive for large sites than sites of the size of the core land.

A factor in the determination of whether KLEP 2012 incentives should apply is 'site area'. Clause 4.5 of KLEP 2012 is specifically concerned with the '(calculation) of floor space ratio and site area'. The objectives of cl 4.5 include: '(i) (to) prevent the inclusion in the site area of an area that has no significant development being carried out on it', and '(ii) (to) prevent the inclusion in the site area of an area that has already been included as part of a site area to maximise floor space area in another building' (termed as 'double dipping' in the proceedings and referenced directly as such at cl 4.5(9)). The KLEP 2012 Dictionary definition of 'site area' applies for the purposes of calculation of building height. The parties disagreed on the correct definition of site area for each of these development standards but, no matter which of the parties' arguments was to be adopted, it was agreed that the proposal did not comply. Issues also arose in regard to overshadowing and biodiversity impact.

Issues:

(1) Whether the incentives within KLEP 2012 to encourage consolidation of land, to effect larger development sites for RFB development, should also apply when property-related rights were to be secured by way of easements over adjoining land instead;

(2) The proper interpretation of 'site area' for the purposes of calculation of development standards for:

(i) FSR; and

(ii) building height, when the 'significance' of proposed development (on the supplementary land) is under question;

(3) Whether KLEP 2012's jurisdictional test relating to biodiversity protection (cl 6.3(4)) was satisfied in relation to BGHF areas. In particular, whether the development was designed, sited and managed 'to avoid any potentially adverse environmental impact' or, if impact cannot be avoided then were various preconditions of cl 6.3(4)(b) satisfied;

(4) Overshadowing of certain apartments within one of the RFBs built on the supplementary land. Relevant here was the interpretation of the difference between 'design criteria' and 'design guidance' when considering compliance with the Apartment Design Guideline (**ADG**); and

(5) Contravention of FSR development standard.

Held: Appeal dismissed; development consent refused:

(1) Whether KLEP 2012's RFB incentives should apply, in instances where property rights are secured other than by land consolidation, would depend on the facts and circumstances of the case. Within the limits of legal construction, the core question is whether the intentions of the incentives are achieved. At a prima facie level, there can be a capacity for this to occur with property rights secured by easements instead of consolidation. Doubts in regard to bona fides, including in regard to double dipping, and the proposal's merits against development controls, warrant their own attention, as relevant: at [32]-[34];

(2) KLEP 2012's definitions of site area, in relation to FSR and building height standards were correctly followed by the applicant. While the large areas of communal open space proposed for shared use on the supplementary land was not 'significant development', other development on supplementary land, such as the driveway, was significant (*Oshlack v Richmond River Council* (1993) 82 LGERA 222; [1993] NSWLEC 210 at 233). Because of the construction of cl 4.5(3)(b), the whole of the claimed supplementary land comes into the calculation of site area for FSR purposes. Notably, the statutory provisions aimed at preventing double dipping (cl 4.5(9) of KLEP 2012) are limited to instances where a relevant covenant is already in place on the adjoining lands. Here, no such covenant applied to the supplementary land. In regard to building height, under the KLEP 2012 Dictionary there is no cause to question the 'significance' of any proposed development in determining whether it should be included in the site area calculation. The applicable statutory construction permitted the supplementary land to be included as site area for the purposes of determination of applicable FSR and building height controls, in accordance with the particulars of the applicant's submissions in respect of each: at [43]-[47];

(3) The proposal would bring about an adverse environmental impact on an identified high value BGHF management area, established under a prior development consent and located within the supplementary land in circumstances where the impact could be avoided. This was, in part, due to proposed works within that BGHF management area and, in part, due to the siting of the proposed RFB proposed to be built to the immediate boundary of that area, when the Ku-ring-gai Local Centres Development Control Plan would require a building setback: at [80]-[82];

(4) Achievement of a design guidance-level provision under the ADG does not indicate achievement of an ADG objective. This is the function of a design criterion. Despite accordance with certain related ADG design guidance provisions, the proposal would cause significant adverse effect on the amenity on a neighbouring building when design alternatives were available to reduce the impact: at [112]; and

(5) The proposal contravenes KLEP 2012's FSR development standard. The applicant's written cl 4.6 request did not demonstrate that compliance with the FSR standard was unreasonable or unnecessary in the circumstances of the case. The written request inappropriately suggested that maximising FSR towards a local environmental plan's maxima provided a community benefit. This was not an appropriate approach interpretation (see *Wenli Wang v North Sydney Council* [2018] NSWLEC 122 at [64]). The cl 4.6 request was to be rejected: at [115]-[129].

Zobon Australia Pty Ltd v Mosman Council **[2020] NSWLEC 1627** (O'Neill C)

Facts: Zobon Australia Pty Ltd (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) (**EPA Act**) against the refusal by Mosman Council (**Council**) to grant development consent for the substantial demolition of the existing dwelling, retention of some external walls,

construction of a new four storey dwelling including a swimming pool, a separate double garage structure, a new front fence, tree removal and landscaping, at 5 Morella Road, Mosman.

The existing dwelling known as 'Morella' was designed by the architect Eric Nicholls; built in 1938; and is in ruins. The site is identified as a local heritage item. The height of buildings development standard for the site is 8.5 metres and the floor space ratio (**FSR**) for the site is 0.478:1.

Issues:

(1) Whether the proposal was consistent with the heritage objectives of cl 5.10(1) of the Mosman Local Environmental Plan 2012 (**MLEP 2012**) to conserve the heritage significance of heritage items and conservation areas including associated fabric, settings and views;

(2) Whether the proposal was justified by the difference in costing for the reconstruction of the dwelling compared to the proposal, when considered in light of the Court's planning principle in *Helou v Strathfield Municipal Council* (2006) 144 LGERA 322; [2006] NSWLEC 66 (***Helou* planning principle'**);

(3) Whether the metal roof constructed in 2010, at the Council's request, over the parapet and flat roof of the existing dwelling to protect the dwelling from further deterioration formed part of the building pursuant to the definition of 'building' under the EPA Act, because the definition of building at s 1.4 includes a 'temporary structure'; and

(4) Whether the exceedance of the development standards for height and FSR was justified.

Held: Appeal dismissed; development consent refused:

(1) The proposal was for the demolition of the existing dwelling and the construction of a new dwelling: at [33]; the proposal was not for the adaptation of the existing dwelling: at [35]; the proposal did not achieve the objective of the heritage clause, cl 5.10(1)(b) of MLEP 2012, to conserve the heritage significance of heritage items: at [74];

(2) The Court's Helou planning principle was not relevant to the appeal because the applicant presented the case as the conservation of a heritage item and not as the demolition of a heritage item justified by the prohibitive cost of reconstruction: at [42];

(3) The metal roof constructed as a temporary emergency measure to arrest the deterioration of the load bearing structure caused by the ingress of water was not a temporary structure within the meaning of 'building' under s 1.4 of the EPA Act: at [50]; and

(4) The retention of the heritage significance of a heritage item was a sufficient environmental planning ground to justify contravening a development standard, within the meaning of cl 4.6(3)(b) of MLEP 2012: at [72]; however, the applicant's argument that the existing dwelling was sufficiently retained and interpreted by the proposal to justify the exceedance of the development standards was not made out by the evidence: at [76].

- **New South Wales Civil and Administrative Tribunal:**

North Coast Environment Council v Environment Protection Authority **[2021] NSWCATAD 29** (Senior Member Montgomery)

Facts: This was an application for judicial review under s 100 of the *Government Information (Public Access) Act 2009* (NSW) (**GIP Act**) of a decision by the Environment Protection Authority ('*EPA*') to refuse access information to the North Coast Environment Council Inc (**applicant**). It was a requirement for records to be kept of this information. The application for access to information was initially made to the Office of Environment and Heritage and the application was then forwarded to the EPA. The information requested was:

> The records of sources and volumes of biomass (native forest biomass) inputs to Cape Byron Power. We seek data on volumes or each biomass source for each year, and for each of Broadwater and Condong, for the last 10 years;
>
> Information to cover the period from 01/01/2009 to 27/10/2019.

Later, the applicant limited the request to biomass fuel sources and volumes - excluding the other information.

The information requested in the access application related to two power stations in the Byron Area; one at Broadwater and the other at Condong and both owned by Cape Byron Management Pty Ltd (**company**), which was subsequently joined to the proceedings.

The EPA released 10 documents that had information redacted concerning fuel percentages; fuel volumes (tonnage) unless no fuel was consumed; and the amount of power generated including power generation in general.

Part of this decision was because the company had economic interests that could be impacted by the release of information.

Issue: Was the decision to withhold information the correct and/or preferable decision.

Held: Decision under review upheld:

(1) The public interest considerations identified should have significant weight in the decision-making process: at [43]-[44];

(2) However, confidentiality of information could be inferred for the information held by the EPA even if there is no express reference to confidential information: at [51]-[52];

(3) The evidence against disclosure relating to the diminishment of commercial competitiveness was an important factor for the company because the fuel costs are highly related to commercial competitiveness and must be given significant weight: at [57], [61]-[62];

(4) The commercial detriment that could arise from disclosure was significant and should be given the greater weight in the proceedings: at [69]; and

(5) The potential commercial prejudice outweighed the considerations in favour of release of the redacted/withheld information: at [79].

Court News

Appointments/Retirements:

The following Acting Commissioners were reappointed, with terms commencing on 25 February 2021 to 23 February 2022:

- Associate Professor Paul Adam AM,
- Ms Julie Marie Bindon,
- Professor Megan Jane Davis,
- Mr David Neil Galwey,
- Mr Peter Kempthorne,
- Mr Paul Alistair Knight,
- Mr Norman Charles William Laing,
- Mr Matthew Benjamin Pullinger and
- Mr Ross William Speers

The following Acting Commissioners did not seek reappointment:

- Ms Jenny Smithson
- Mr John Maston

As for COVID:

- Revised COVID-19 Pandemic Arrangements Policy issued on 10 December 2020.
- Mask mandate issued on 8 January 2021 was removed on 8 March 2021.

Other:

- Updated Class 5 Practice Note issued on 10 December 2020.
- Updated template for Court-granted development consent issued on 25 February 2021.