July 2022

Volume 14 Issue 2

Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Regulation 2021 - this Regulation commenced on 1 March 2022, with the Environmental Planning and Assessment Regulation 2000 (**2000 Regulation**) repealed on the same day. The new Regulation dealt with the following matters:

(1) Planning instruments, including local environmental plans and development control plans;
(2) Development applications, including for State significant development;
(3) Modification of development applications;
(4) Complying development;
(5) Existing uses;
(6) State signficant infrastructure;
(7) Environmental impact assessment;
(8) Infrastructure contributions and finance;
(9) Paper subdivisions;
(10) Registers of development consents and other certificates kept by councils;
(11) Reviews and appeals; and
(12) Fees payable by applicants and other persons.

Some key changes introduced by this Regulation include:

(1) Development applications and complying development certificate applications must be in an approved form to ensure that consent authorities have all required information;

(2) Changes to how modification applications can be amended before determination, and when modification applications can be rejected or withdrawn;

(3) Assessment periods have changed and consent authorities are now obligated to be transparent on the days elapsed and when the clock will cease running;

(4) Updates to the environmental assessment process under Pt 5, Div 5.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), including the introduction of criteria-based publication of environmental assessments (**review of environmental factors**) for certain infrastructure proposals. The Planning Secretary can now prescribe guidelines for the format of a review of environmental factors and the factors to be taken into account when considering the likely impact of an activity;

(5) Removal of requirements for hard copies of documents, with documents required to be made available online or electronically;

(6) From 1 October 2022, local councils are required to include more information on planning certificates; and

(7) Categories of development which are and are not considered designated development have been updated, including the inclusion of certain emerging technologies as designated development.

Greater Cities Commission Act 2022 (NSW) - this Act provides that from 13 April 2022, the Greater Sydney Region became known as the Six Cities Region. It repealed the *Greater Sydney Commission Act 2015* (NSW) (**GSC Act**), reconstituted the Greater Sydney Commission (**GSC**) as the Greater Cities Commission (**GCC**), and amended the EPA Act to require district plans for the Six Cities Region to include targets for net additional dwellings.

This Act created six cities, comprising the Eastern Harbour City, Central River City, Central Coast City, Lower Hunter and Greater Newcastle City, Western Parkland City, and Illawarra-Shoalhaven City. This increased the area previously known as the Greater Sydney Region. The aim of creating the Six Cities Region was to create "a polycentric region where each city builds on its existing strengths and local character while leveraging the benefits of scale to attract new talent and investment as well as enhanced infrastructure and amenities". The term "Greater Sydney Region" continues to be used in various statutes. To accommodate this, the meaning of "Greater Sydney Region" as it existed under the GSC Act has been preserved as a commonly used expression under s 21 and Sch 1 of the *Interpretation Act 1987* (NSW).

Under this Act, the GCC generally has the same functions as the GSC which it replaced. However, the key difference is that the GCC has jurisdiction over the Illawarra-Shoalhaven City as well as the Lower Hunter and Greater Newcastle City. The GCC also has new objectives in relation to climate-resilient development, First Nations peoples' involvement and participation in environmental planning and assessment, and coordination of the delivery of key economic precincts.

Changes were also made to the EPA Act. Amendments were made to s 3.4 of the EPA Act, which is concerned with the preparation and content of district strategic plans, the drafts of which which must include or identify, amongst other things, the planning priorities for the district that are consistent with the objectives, strategies, and actions specified in the regional strategic plan for the region in respect of which the district is part. Previously, "planning priorities" were undefined. This Act amended s 3.4(6) of the EPA Act to define "planning priorities" to mean:

> "(a) for a district within the Six Cities Region—must include targets, for the periods of 5, 10 and 20 years after the making of the plan, for each local government area in the district, for development consents to be granted by consent authorities for net additional dwellings in the district, and
>
> (b) for other districts—may include net additional dwelling targets."

This inclusion of a statutory target also affects local strategic planning statements prepared by local councils, as per s 3.9(2)(b) of the EPA Act.

The Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 was also amended to save the Greater Sydney Regional Plan, Sydney district plans, Illawarra Shoalhaven Regional Plan 2041, existing and draft Central Coast Regional Plans, and existing and draft Hunter Regional Plans, until new plans are made.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Amendment (Modifications) Regulation 2022 - this Regulation provided that a request to modify a project or concept plan that was originally dealt with under the repealed Pt 3A of the EPA Act, and that may continue to be dealt with as a transitional Pt 3A project, may itself be amended prior to being approved or refused by the Minister.

Environmental Planning and Assessment Amendment (Miscellaneous) Regulation 2022 - this Regulation made permanent the current temporary arrangements for adjournments of public hearings of the Independent Planning Commission, extended the savings and transitional arrangements applying to development applications and applications for complying development certificates submitted but not finally determined before 1 March 2022 to applications to modify development consents and complying development, and made a number of other minor law revision amendments.

Environmental Planning and Assessment Amendment (Emergency Accommodation) Regulation 2022 - this Regulation provided that development for the purposes of camping grounds or caravan parks that are permitted without development consent under Ch 3, Pt 10 of the State Environmental Planning Policy (Housing) 2021 (**Housing SEPP**), is not an activity for which an environmental impact assessment may otherwise be required under the EPA Act.

Environmental Planning and Assessment Amendment (Temporary Emergency Facilities) Regulation 2022 - this Regulation provided that development for the purposes of temporary emergency early education and care facilities, schools and health services facilities, other than patient transport facilities or hospitals, that is permitted without development consent under State Environmental Planning Policy (Transport and Infrastructure) 2021 is not an activity for which an environmental impact assessment may be required under the EPA Act.

- **Local Government:**

Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment Regulation 2022 - this Regulation provided that the installation of a moveable dwelling or associated structure on land used for the purposes of a caravan park or camping ground that is permitted without development consent under Ch 3, Pt 10 of the Housing SEPP, and the operation of the caravan park or camping ground, are activities that may be carried out without council approval.

Local Government (General) Amendment Regulation 2022 - this Regulation exempted contracts valued at less than $500,000 that are entered into for the purpose of natural disaster response or recovery from the tendering requirements that councils must comply with under the *Local Government Act 1993* (NSW).

- **Biodiversity:**

Biodiversity Conservation Amendment Regulation 2022 - this Regulation added cl 6.8A to the *Biodiversity Conservation Regulation 2017*. This new clause provides that, despite the content requirements for biodiversity assessment reports under cl 6.8, a biodiversity development assessment report is not required to include content relating to continued development if the report is prepared in relation to State Significant Development that includes continued development, and the existing development consent for the continued development is proposed to be surrendered under s 4.63 of the EPA Act.

- **Miscellaneous:**

Legal Profession Uniform Law Australian Solicitors' Conduct Amendment (No 2) Rules 2022 - this Amendment amends r 38 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 to provide that a solicitor who is a former judicial officer must not appear in any court that the solicitor has been a member of or presided in, or any court from which appeals to any court of which the solicitor was formerly a member may be made or brought, for a period of two years after ceasing to hold that office unless permitted by the relevant court.

Residential Apartment Buildings (Compliance and Enforcement Powers) Amendment (Building Work Levy) Regulation 2022 - this Regulation provided that a building work levy will apply to building work where an expected completion notice (**ECN**) is submitted (or amended) after 3 July 2022. The levy applies to building work for class 2 buildings (ie, residential apartment buildings) or buildings that have a class 2 part in them (eg, mixed-use buildings). The levy applies to building work that is for new buildings, or the addition of storeys to existing buildings. The levy also applies to the repair, renovation or protective treatment of a building where the value of the building work is over $150,000 including GST. There is some building work that will not attract a levy (eg, work on fewer than five residential premises, or work carried out by or for the New South Wales Land and Housing Corporation, or work repairing, rectifying, or replacing external cladding). The rate of the levy is charged on a sliding scale with larger projects, determined by the number of storeys being constructed at each stage, paying a greater amount. The trigger for the levy starts when an ECN is submitted as part of the Intention to Seek an Occupation Certificate (**ITSOC**) application. The person who submits the ITSOC is liable to pay the levy. An occupation certificate will not be issued if the levy has not been paid. Payment of the levy will made on the New South Wales Planning Portal.

Protection of the Environment Operations (Waste) Amendment Regulation 2022 - this Regulation amended the Protection of the Environment Operations (Waste) Regulation 2014 to continue the effect of the exemption of mixed waste organic outputs from the calculation of waste contributions payable by licensees of scheduled waste disposal facilities under the *Protection of the Environment Operations Act 1997* (NSW). The exemption

is limited to waste processed at facilities approved by the Environment Protection Authority by notice published in the *New South Wales Government Gazette* and not exceeding the amount of waste specified in the notice.

Community Land Management Amendment (COVID-19) Regulation 2022 - this Regulation amended the Community Land Management Regulation 2021 for the purpose of responding to the public health emergency caused by the COVID-19 pandemic. It provided for altered arrangements for voting at meetings of an association or association committee and allowed instruments and documents, instead of being affixed with the seal of an association in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

Strata Schemes Management Amendment (COVID-19) Regulation 2022 - this Regulation amended the Strata Scheme Management Regulation 2016 for the purpose of responding to the public health emergency caused by the COVID-19 pandemic. It provided for altered arrangements for voting at meetings of an owners corporation or a strata committee and allowed instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

Greater Sydney Parklands Trust Act 2022 (NSW) - this Act establishes the Greater Sydney Parklands Trust and provides for the management of the Greater Sydney Parklands Trust estate, amongst other purposes.

Acts Assented to but not yet in Force:

Mining and Petroleum Legislation Amendment Act 2022 (NSW) - this Act was assented to on 6 June 2022 and amended the *Mining Act 1992* (NSW) and the *Petroleum (Onshore) Act 1991* (NSW). It introduced a suite of changes to harmonise and update existing legislation, as well to provide the legislative basis for a new "Royalties for Rejuvenation Fund" aimed at alleviating economic impacts in affected coal-mining regions caused by a move away from coal mining by supporting other economic diversification in those regions.

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy (Housing) Amendment (Miscellaneous) 2022 - this Amendment clarified, amongst other things, the drafting of the seniors housing provisions of the Housing SEPP. This included clarifications that the 11.5-metre building height restriction only applies to seniors housing in residential zones where residential flat buildings are prohibited, that only independent living units on land in the R2 Low Density Residential Zone must be provided by an "operator" and that subdivision is also permitted in this zone, that the list of zones to which the seniors housing part of the Housing SEPP applies are "prescribed zones". The capital investment value trigger for State Significant Development seniors housing has been clarified to read "more than" $30 million (in Sydney) and "more than" $20 million (regionally).

State Environmental Planning Policy Amendment (Disaster Recovery) 2022 - this Amendment inserts a new Ch 3, Pt 10 of the Housing SEPP aiming to facilitate temporary emergency accommodation in suitable locations for persons who have been displaced as a result of a natural disaster, and to ensure that temporary emergency accommodation has access to essential facilities and services. It inserts a new s 135 which provides criteria for a scenario where development for the purposes of caravan parks or camping grounds may be carried out without development consent. This Amendment also makes miscellaneous natural disaster-related changes to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

State Environmental Planning Policy (Planning Systems) Amendment (State Significant Development—Cemeteries) 2022 - this SEPP added a provision to the end of Sch 1 of the State Environmental Planning Policy (Planning Systems) 2021 to provide that development for the purposes of cemeteries that will create at least 5,000 sites for the interment of human remains other than cremated remains is State Signficant Development.

State Environmental Planning Policy Amendment (Temporary Emergency Facilities) 2022 - this SEPP amended s 135(1)(a) of the Housing SEPP with a provision that development consent is not required for development for the purposes of caravan parks and camping grounds, if the caravan park or camping ground will only be used to provide temporary emergency accommodation to persons who have been displaced as a result of a natural disaster, or persons carrying out construction work on behalf of the public authority, or persons providing services to displaced persons with the consent of the public authority. This change was part of a broader suite

of reforms that were made by the New South Wales Department of Planning and Environment to ensure that New South Wales residents who had been impacted by large-scale events, such as the COVID-19 pandemic and natural disasters, have access to emergency accommodation.

Civil Procedure Amendments:

Civil Procedure Amendment (Fees) Regulation 2022 - this Regulation increased certain fees payable to a court in relation to the conduct of civil proceedings. Of note, the fees payable in relation to filing a notice of motion in the Supreme Court increased from $427 to $647 (standard fee) and from $979 to $1,295 (corporation fee). There have been no changes to the fees payable in relation to proceedings before the Land and Environment Court.

Miscellaneous :

Private Native Forestry Code of Practice for Cypress and Western Hardwood Forests; Private Native Forestry Code of Practice for Northern NSW; Private Native Forestry Code of Practice for Southern NSW; Private Native Forestry Code of Practice for the River Red Gum Forests - these Codes of Practice were made under s 60ZT of the *Local Land Services Act 2013* (NSW) (**LLS Act**) and commenced on 2 May 2022. and seek to support the long-term sustainable management of certain native forests on private land and Crown land (other than land excluded by s 60ZS of the LLS Act for timber production and ecologically sustainable forest management).

On 24 June 2022, the Secretary of the Department of Planning, Industry and Environment published a notice pursuant to Sch 1A of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) that the adjusted maximum amount of compensation in respect to disadvantage resulting from relocation was to be $85,350 for acquisitions of land on or after 1 July 2022.

Judgments

Fiji:

State v Freesoul Real Estate Development (Fiji) Pte Limited **[2022] FJHC 282** (Gounder J)

Facts: Between 2017 and 2018, Freesoul Real Estate Development (Fiji) Pte Limited (**Freesoul**) was involved in a tourism development project at Malolo Island, Fiji. Freesoul had been granted approval for land-based development, but did not have approval for any development to the foreshore or the sea, which was subject to separate environmental impact assessment (**EIA**) approval from the Fiji Department of Environment (**Department**) in accordance with the *Environment Management Act 2005* (**Environment Management Act**). In order to access land which it had leased for the purpose of development, Freesoul dug a sea channel and cleared mangroves from the shore without first carrying out an EIA. Following a trial in the Magistrates Court of Fiji, Freesoul was convicted on two counts of undertaking unauthorised development contrary to s 43(1) of the Environment Management Act. The case was subsequently transferred to the High Court of Fiji for sentence.

Issue: The appropriate sentence to be imposed upon Freesoul.

Held: Freesoul fined an aggregate sum of FJ$1,000,000 for two counts of carrying out unauthorised developments; Freesoul ordered to post a refundable environmental bond of FJ$1,400,000 with the Department and rehabilitate the affected areas to the satisfaction of the Department at its own expense:

(1) There were no comparable cases decided in Fiji for the purpose of sentencing. Overseas guidelines for sentencing of environmental crimes were distinguished as they were based on different sentencing regimes.

Section 4 of the *Sentencing and Penalties Act 2009* prescribed a number of purposes for sentencing, including deterrence, rehabilitation, and denunciation of the crime. The substantial potential fine and imprisonment term under the Environment Management Act for undertaking unauthorised developments indicated that such offences were to be treated seriously. In this case, the main aim of the sentence was deterrence, with general deterrence being more relevant than special deterrence as these were Freesoul's first offences: at [19]-[22];

(2) Freesoul could not claim any credit for remorse as it had pleaded not guilty to the charges: at [15];

(3) The benefits to the community which may have arisen out of the tourism development project had it been completed were diminished by the environmental harm caused by Freesoul: at [16];

(4) Freesoul had no regard for the marine life and corals that had existed in the area where the sea channel was dug. The structural damage done to the area was irreversible, but could be mitigated by channel revetment stabilisation works costing approximately FJ$830,000: at [17];

(5) Similarly, Freesoul had no regard to the marine life affected by the removal of the mangroves. The damage done to the mangroves was irreversible, but could be mitigated by restoration works costing approximately FJ$479,600: at [18];

(6) Freesoul's clean record was a mitigating factor for the offence, however, the substantial harm caused to the environment was an aggravating factor: at [24]; and

(7) Although the offending was not of the most serious type, Freesoul's culpability was high. It had been involved in a large scale tourism development for economic gain, causing damage to the environment. The sentence had to reflect the community's disapproval of Freesoul's lack of respect for the environment: at [25].

Queensland:

Desbois v Chief Executive, Department of Transport and Main Roads; Chief Executive, Department of Transport and Main Roads v Desbois **[2022] QLAC 1** (North J, Member Stilgoe and Acting Member Preston J)

(related decision: *Desbois v Chief Executive, Department of Transport and Main Roads* [2021] QLC 43 (Kingham P))

Facts: The Department of Transport and Main Roads (**DTMR**) resumed 1.934 hectares of a total area of 59.556 hectares owned by Mr Desbois for the Mackay Ring Road Project. The land adjoined the Bruce Highway west of Mackay. Mr Desbois applied to the Land Court of Queensland (**Land Court**) to decide his compensation entitlement under the *Acquisition of Land Act 1967* (Qld) (**Acquisition of Land Act**). The President of the Land Court (the primary judge) determined compensation under s 20 of the Acquisition of Land Act in the sum of $948,961. This sum comprised the loss in land value of $781,355, interest of $83,576.08 and disturbance of $84,000 (*Desbois v Chief Executive, Department of Transport and Main Roads* [2021] QLC 43). Both DTMR and Mr Desbois were dissatisfied with the amount determined for the loss in land value and appealed the primary judge's decision under s 58 of the *Land Court Act 2000* (Qld).

Issues:

(1) Whether planning approval was likely to have been granted to use part of the site for the commercial use of a service station/truckstop (**town planning grounds**);

(2) Whether the primary judge erred in using an area of 2.25 hectares rather than 1.8 hectares in determining the commercial value of this part of the site (**area of commercial use ground**);

(3) Whether there was a risk that a condition of approval would be imposed requiring an acceleration lane of such a length that would necessitate the widening of a nearby railway bridge (**length of the acceleration lane ground**);

(4) Whether the primary judge erred in applying a discount of 15% to the value of the part of the site to be used as a service station/truckstop to reflect the risk that the condition of approval might require an acceleration lane which would necessitate widening the railway bridge (**risk discount grounds**); and

(5) Whether the primary judge erred in applying an analysed rate of $400,000 per hectare to derive the value of the part of the site to be used as a service station/truckstop (**land value grounds**).

Held: Acting Member Preston J (North J and Member Stilgoe agreeing); upholding Mr Desbois' appeal and dismissing DTMR's appeal; matter remitted to be dealt with in accordance with the decision:

(1) In regard to the town planning grounds, the Court rejected DTMR's contention that the primary judge erred in finding that there were good prospects of obtaining planning approval for a service station/truckstop. This was because the primary judge's reliance on a superseded version of the Mackay City Planning Scheme 2006 did not materially affect her decision, the primary judge did not misconstrue or misapply the relevant provisions of the planning scheme and it was not necessary for the primary judge to apply the test under s 326 of the *Sustainable Planning Act 2009* (Qld): [29]-[107].

(2) In regard to the area of commercial use ground, the Court held that DTMR had not established that the primary judge erred in finding that the area to be used as a service station/truckstop would have been 2.25 hectares as there was an evidentiary basis for the primary judge's finding: [108]-[113].

(3) In regard to the length of the acceleration lane ground, the Court rejected DTMR's contention that the primary judge erred in finding that there were reasonable prospects that the condition of approval would require an acceleration lane of no longer than 315 metres. This was because DTMR's contention that the primary judge did not give any real weight to the Austroads Guide to Road Design (**Austroads Guide**) was wrong, the primary judge was not in error in finding that the volume of traffic in the through lane was low as there was evidence to support this finding and it was open to the primary judge to draw the inference that DTMR considered the volume of traffic in the through lane to be low, otherwise DTMR would have required an acceleration lane in accordance with the Austroads Guide: [114]-[143].

(4) In regard to the risk discount grounds, the Court held that the primary judge erred in conflating the two tasks of determining the appropriate rate per hectare and the appropriate discount to apply to that rate per hectare to account for the risk that the condition of approval might require a longer acceleration lane and consequently the widening of the railway bridge. The primary judge's downward adjustment of the discount from 30% to 15% was adopted to counterbalance her assessment that the value of $400,000 per hectare was too low. This was to adjust the discount for a purpose other than the purpose for which the discount was applied, being to reflect the relevant risk. As a result, the primary judge erred on a principle of assessment in determining the loss of land value: [144]-[156]; and

(5) In regard to the land value grounds, the Court held that the primary judge erred in applying a rate of $400,000 per hectare to derive the value of the part of the site to be used as a service station/truckstop. The primary judge applied this rate, even though she held it was too low, as she found that she had no information to allow her to adjust that rate. The primary judge sought to counterbalance her using too low a rate by reducing the discount that she applied to that rate. The Court held that the primary judge's failure to determine separately both the appropriate rate per hectare and the appropriate discount to be applied to that rate per hectare was an error of principle of assessment and accordingly a constructive failure to exercise jurisdiction: [157]-[162].

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 4) **[2022] QLC 3** (Kingham P)

Facts: Youth Verdict (**YV**) and The Bimblebox Alliance (**TBA**) brought a challenge to the jurisdiction of the Land Court of Queensland (**Land Court**) "to hear applications for permits and objections to their grant based on a revised mine-plan" submitted by Waratah Coal Pty Ltd (**Waratah**) for its Galilee Basin mining project. Waratah had revised its mine-plan to abandon open-cut mining in the Bimblebox Nature Refuge (**BNR**) following objections made by YV and TBA. The challenge was brought on the basis that the Land Court lacked jurisdiction to make recommendations on the revised mine-plan as the plan amounted to a substantially and materially different project to the one initially applied for by Waratah. The parties also disputed whether the Land Court should determine the jurisdictional question at a later date.

Issue: Whether, in light of the fact that Waratah had revised its mine-plan during proceedings and thus after the normal statutory assessment process, the Land Court:

(a) should defer deciding the challenge to its jurisdiction; and

(b) had jurisdiction to make recommendations on the revised mine-plan.

Held: The Land Court refused to defer deciding the challenge to its jurisdiction and found that it could hear the applications and objections based on the revised mine-plan:

(1) While a court's "first duty" is to consider whether it has jurisdiction to hear a matter, this does not necessarily mean that a court has to consider this first chronologically. The unusual feature of this case, which led to the jurisdictional question being deferred for some months, was that the jurisdiction of the Land Court had been properly invoked by the initial referral of the applications and objections to the Land Court for hearing. YV and TBA did not challenge the Land Court's jurisdiction to continue to hear the application as referred. Instead, the challenge only arose as Waratah had revised its mine-plan during proceedings. The

Land Court concluded that the jurisdictional challenge was a threshold question and the circumstances of the case did not justify deferring it until a later date: at [11]-[33]; and

(2) The power of the Land Court to recommend the grant of a mining lease and environmental authority is an administrative function which is only enlivened after a detailed statutory assessment process. Accordingly, the issue that arose was whether Waratah's revised mine-plan was so fundamentally different to the one assessed that it could not have been said to comply with those statutory pre-conditions for referral to the Land Court. The Land Court found that the revised mine-plan was not a fundamentally different application as there would be no fundamental change to the activities or the impacts of the mining project. The revised mine-plan made no change to the purpose of the mining lease, being the mining of coal, and the abandonment of the open-cut pits would not result in materially different impacts as it would not expand any activities identified in the original plan. Therefore, the Land Court held that it can and should hear the applications and objections based on the revised mine-plan as the project was still within the scope of the original application: at [47]-[66], [73].

New South Wales Court of Appeal:

Coffs Harbour City Council v Noubia Pty Limited [2022] NSWCA 32 (Leeming JA and Simpson AJA, Preston CJ of LEC)

(decision under review: *Noubia Pty Limited v Coffs Harbour City Council (No 2)* [2021] NSWLEC 142 (Pain J))

Facts: Noubia Pty Ltd (**Respondent**) transferred land to Coffs Harbour City Council (**Council**), the Appellant, pursuant to a condition of development consent. At issue was the valuation of that land. During the hearing expert hydrological evidence was given concerning whether a proposed scheme for dealing with stormwater and floodwater would have been approved by the Council. In the course of the hearing it became clear the parties' engineering experts were using different modelling and the state of the evidence was not adequate to enable evaluation of that evidence. The proceedings were adjourned in part to prepare a joint report pursuant to the orders of the primary judge. The Council opposed the admission of the joint report into evidence. The primary judge admitted the joint report. That interlocutory decision was appealed.

Issues:

(1) Whether leave should be given to appeal the interlocutory decision of Pain J because the appeal:
   (a) involved an issue of principle;
   (b) a question of importance; or
   (c) a reasonably clear injustice beyond something that is merely arguable.

Held: Summons for leave to appeal dismissed; Appellant to pay Respondent's costs of the application for leave to appeal:

(1) No error of legal principle warranting the grant of leave to appeal against a discretionary decision on a matter of practice and procedure arises: at [88] (Preston CJ of LEC). There is nothing in the complaint that the experts went beyond the Court's directions. Nothing in the terms of the orders given by Pain J limited the content of the joint report, and in any event, Pain J found that the joint report was responsive to her order: at [9] (Leeming JA and Simpson AJA); [86] (Preston CJ of LEC). The Council's analogy to reopening a case after judgment is inapt, as this case is more akin to reopening a case prior to the delivery of judgment: at [73]-[75]. The Council did not make out its case that the primary judge erred by not applying the principles governing applications to reopen a case before judgment has been delivered, failing to consider the principle of finality or the need for the just quick and cheap resolution of the proceedings: at [79]-[82]. It was not even fairly arguable that the primary judge failed to give adequate reasons or constructively failed to exercise jurisdiction: at [83]-[84]. Neither the ground that the primary judge's discretion miscarried, nor that the decision was unreasonable or plainly unjust, was demonstrated: [85]-[87];

(2) No question of principle or public importance arises: at [10] (Leeming JA and Simpson AJA); [89] (Preston CJ of LEC). No point arises about the admission of fresh evidence on remitter because the Council was bound by the unchallenged direction that there be a further joint report: at [10]; and

(3) The Council did not demonstrate that it would suffer a reasonably clear injustice going beyond something which is merely arguable: at [11] (Leeming JA and Simpson AJA); [90] (Preston CJ of LEC). There was no injustice, let alone injustice going beyond what is merely arguable: at [11]. There is no injustice in conducting a hearing based on the actual opinions of both experts in 2022, which were different from their

original opinions in 2019: at [11]. Parties' cases can and often do change on remitter and in any case there can be no relevant injustice to the Council having to pay just compensation for the land transferred to it: at [92]-[93].

Tahmoor Coal Pty Ltd v Visser **[2022] NSWCA 35** (Basten, Gleeson and Payne JJA)

(decisions under review: *Visser v Department of Customer Service* [2021] NSWLEC 88 (Pain J); *Visser v Department of Customer Service (No 2)* [2021] NSWLEC 114 (Pain J))

Facts: The Vissers owned a property which suffered subsidence as a result of coal-mining operations undertaken by Tahmoor Coal Pty Ltd (**Appellant**) and the Vissers made a claim under s 11 of the *Coal Mine Subsidence Compensation Act 2017* (NSW) (**CMSC Act**). Dissatisfied with the determination of the payment by the Department of Customer Service (**Department**), the Vissers commenced merits review proceedings in the Land and Environment Court. The Appellant was not named as a Respondent to the proceedings. The Respondent sought joinder, which was refused by the primary judge. This was the first time a joinder application by a coal mine in an appeal under the CMSC Act had been determined.

Issues:

(1) Whether leave to appeal should be granted; and

(2) Whether the primary judge erred in not joining the Appellant as a party.

Held: Leave to appeal granted; appeal allowed and orders made by the Court in both decisions set aside; Appellant to be joined as Respondent to proceedings; the Vissers to pay the costs of the Appellant and those incidental to its joinder application and those incurred in the Court of Appeal; no order as to costs of the Secretary of the Department in the Court; the Vissers granted a certificate under the *Suitors' Fund Act 1951* (NSW):

(1) Leave to appeal should be granted as there was sufficient doubt about the judgment below to warrant its reconsideration and it was arguable that the primary judge was wrong; substantial injustice would be occasioned to all parties if the judgment was unenforceable by the Vissers; there was clearly an issue of general importance in identifying proper parties to proceedings in the Court; and the amount in dispute was not small: at [7]-[12]; and

(2) The principles applicable to the joinder of parties are well-settled and stated by Leeming JA in *Ross v Lane Cove Council* (2014) 86 NSWLR 34; [2014] NSWCA 50 (***Ross***): at [51]-[58]. *Ross* could not be distinguished and the principles were binding on the primary judge: at [19]. The Appellant's interest in the proceedings was not equivocal or uncertain as it bore liability for the compensation to be paid to the Vissers: at [20]. The failure to make payment is an offence under s 15(6) of the CMSC Act. The Appellant was a necessary party and ought to have been joined: at [20].

New South Wales Court of Criminal Appeal:

Bartter Enterprises Pty Ltd v Environment Protection Authority **[2022] NSWCCA 43** (Basten JA, Davies and Dhanji JJ)

(decision under review: *Environment Protection Authority v Bartter Enterprises Pty Ltd (No 3)* [2020] NSWLEC 114 (Duggan J))

Facts: Bartter Enterprises Pty Ltd (**Appellant**) operated a poultry-processing facility at Beresfield, north-west of Newcastle (**premises**). The premises contained a two-storey freezer/cold store building for storage of processed meat. The top blast freezer contained two identical ammonia refrigeration systems known as the southern circuit and northern circuit. The Appellant engaged a contractor to upgrade the refrigeration facilities including replacing the fan coil units during which the base plate at each of the northern and southern circuits was removed for ventilation. Pressure tests and the appropriate notifications were required to be undertaken prior to the reintroduction of ammonia to the circuit, and a notification for an intention to reintroduce ammonia. This process was followed for the northern circuit, however not for the southern circuit, and ammonia was reintroduced without a base plate attached, causing an ammonia leak for some 10 seconds at the premises on or about 29 June 2018. The Appellant held an environmental protection licence (**EPL**) in relation to the premises, issued under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) which condition O2.1 required that "all plant and equipment … (a) must be maintained in a proper and efficient

condition; and (b) must be operated in a proper and efficient manner". The primary proceedings were brought by the Environment Protection Authority (**EPA**) against the Appellant alleging a contravention of that condition of the licence, being an offence against s 64(1) of the POEO Act where it is an offence for the holder of a licence if any condition of a licence is contravened by any person. The Appellant was found guilty and, in these proceedings, appealed the finding of guilt on three grounds, each raising a narrow point concerning the proper construction of the licence condition and the scope of the charge.

Issues:

(1) Whether the trial judge erred in finding that there was a failure to maintain the plant installed at the premises in a proper and efficient condition within the meaning of condition O2.1(a) of the EPL;

(2) Whether the trial judge erred in finding that the southern circuit, properly and efficiently maintained, must perform a design function of containing ammonia when it is off-line; and

(3) Whether the trial judge erred in attaching any weight to the circumstance that the base plate had been removed from the suction valve in finding that condition O2.1(a) had been contravened, when the removal of the base plate did not form part of the charge and was carried out by a different person from the person identified in the particulars of the charge as having contravened the condition.

Held: Appeal dismissed:

Per Basten JA, Davies and Dhanji JJ agreeing:

(1) The Appellant's fundamental proposition was that the conduct alleged to have given rise to the release of ammonia was the opening of the stop valve, and whether or not it could be said that this involved the operation of the plant otherwise than in a proper and efficient manner. The Appellant submitted that the act of opening the stop valve had nothing to do with the condition of the plant and equipment, or maintaining its proper and efficient condition: at [19];

(2) On its proper construction, the phrase "proper and efficient" in condition O2.1 must be understood as referring to the maintaining of plant and equipment and the use of plant and equipment having regard to possible environmental consequences arising from failure to maintain or use the plant and equipment in such a way as to minimise or avoid those risks: at [24];

(3) The Appellant's criticism of the trial judge's use of the language of "design function" in reference to the piping system "containing ammonia" and the fact that this phrase was not primarily directed to environmental protection was unfounded as it originated from the Appellant's submissions. The question was whether the plant was maintained in a condition which would minimise possible environmental consequences. The trial judge correctly reasoned that the plant was not in a condition to prevent the release of gas (the relevant environmental consequence) at the relevant time: at [27];

(4) The Appellant's submission that the plant could not be maintained in operating condition at all times was accepted. However, this did not mean the plant had to be capable of containing ammonia at all times. If the plant were to be taken offline and the ammonia removed from the circuit pipes, the plant would nevertheless be maintained in a proper and efficient condition. The character of the condition of the plant depended upon the function it was serving at a particular time. The Appellant's plant may have been in a proper and efficient condition when no ammonia was present in the southern circuit but, immediately a step was taken to release ammonia into the southern circuit, the condition of the plant no longer satisfied the requirement of licence condition O2.1(a): at [30]-[31]; and

Per Davies J, Dhanji J agreeing:

(5) The Appellant's submission that the trial judge was in error in treating the design function of refrigeration system as an "integrated whole" was unfounded. The relevant plant and equipment referred to in the EPL was the blast freezer and the ammonia refrigeration system. That system had to be viewed as a whole, both because of what it was designed to achieve and for the possible environmental consequences arising from it, either from a failure to maintain it or to operate it in a proper and efficient manner. As the trial judge correctly said, the southern circuit was an integrated system relying upon a series of valves and pipes to allow the function of refrigeration of the building whilst containing the refrigerant (ammonia) within that circuit: at [36].

Environment Protection Authority v Eastern Creek Operations Pty Limited **[2022] NSWCCA 97** (Macfarlan JA, Fullerton and Lonergan JJ)

(decisions under review: *Environment Protection Authority v Eastern Creek Operations Pty Limited* [2020] NSWLEC 182 (Pain J) and *Environment Protection Authority v Eastern Creek Operations Pty Limited (No 2)* [2021] NSWLEC 39 (Pain J))

Facts: The Environment Protection Authority (**EPA**) charged Eastern Creek Operations Pty Ltd (**Defendant**) with two offences in connection with a notice issued to the Defendant pursuant to s 191 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) requiring that it provide specified information and/or records pertaining to mixed waste organics outputs (**MWOO**). The charges were that the Defendant failed to produce required material and knowingly produced misleading material in response to the notice. Pain J held that the notice was invalid. In a subsequent judgment, Pain J acknowledged that her previous judgment meant that the charges must fail and that if she had the power to do so, she would summarily dismiss both charges. Prompted by the Prosecutor, rather than make orders for summary dismissal of the charges, her Honour stated a separate question to the Court of Criminal Appeal (**CCA**) on the question of whether the Land and Environment Court has power to make orders for summary dismissal in these circumstances. The EPA also sought leave to appeal under s 5F of the *Criminal Appeal Act 1912* (NSW) (**Criminal Appeal Act**) in respect of the ruling on the validity of the notice.

Issues:

(1) Whether leave should be given to appeal under s 5F(3)(a) of the Criminal Appeal Act, which provides that a party may appeal to the CCA against "an interlocutory judgment or order given or made in the proceedings" if the CCA gives leave.

(2) What is the answer the question stated in the following terms by Pain J: "Do I have the power to summarily dismiss a Summons prior to the commencement of any trial/hearing under Ch 4 Pt 5 Division 3 of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**), in circumstances where, following a preliminary hearing conducted pursuant to s 247Gv of the Criminal Procedure, I have determined that a Notice to Provide Information and/or Records (**Notice**) is invalid and the validity of the Notice is critical to an element of the charge pleaded in the Summons."

Held: Application for leave to appeal dismissed (Fullerton and Lonergan JJ agreeing, Macfarlan JA dissenting); answer the stated question in the affirmative (Fullerton and Lonergan JJ agreeing, Macfarlan JA not deciding):

(1) The imperative that the CCA should have regard to the substance and not the form of the ruling under consideration in determining whether it is amenable to an application for leave to appeal under s 5F(3) does not derogate from the need to also critically examine the effect of the decision under consideration and to determine whether it is interlocutory: at [131]. Significance attaches to the fact that if the ruling on the validity of the Notice was made in the course of the summary hearing of the Summonses, an appeal under s 5F(3) could not have been brought, and the EPA would have been obliged to seek a review of that ruling and its consequences by other appeal routes. The fact that the question of validity was raised in a preliminary hearing does not alter that fact: at [132];

(2) The proper characterisation of the finding that Pain J's ruling did not determine "an identifiable or separate part of the proceedings" is that it, in effect, operated as a final order and that, save for the EPA inviting a stated case concerning the power to dismiss the Summonses, the finding of invalidity would have had that effect: at [133]. Although, on one view, the decision was made at a preliminary stage and not in a final hearing, in this case that is not a relevant consideration and even less a determining factor: at [133];

(3) The decision was not such as to refuse to permit the Crown to make a case (which would make it interlocutory per *R v Bozatsis* (1997) 97 A Crim R 296) because the EPA had every opportunity to make its case on a matter fundamental to the prosecution: at [134]. It was wholly immaterial in these circumstances that the EPA did not have an opportunity to make its case in proof of other elements of the offences: at [134]. The detailed reasons of the primary judge were not capable of being formally entered into the court's records: at [135]. It was only after the reasons were delivered following the preliminary hearing in which the EPA actively participated that the EPA sought to categorise the reasons as interlocutory, which it sought to achieve by seeking an order in its Notice of Motion designed solely for that purpose: at [135]. Even if the application for leave to appeal was competent, the appeal would be refused: at [136];

(4) The stated case should be answered in the affirmative: at [218]-[219]:

   (a) it is unsurprising that the legislature has drawn a distinction between the summary jurisdiction exercised by superior and by inferior courts in the context of the structure of the Criminal Procedure Act, where s 202 provides that a lower court "must determine summary proceedings after hearing …": at [205].

Cases relied on by the EPA were distinguishable because they did not address the operation of Ch 4, Pt 5, Div 3 of the Criminal Procedure Act: at [207];

(b) the submission that, if Pain J were to dismiss the Summonses at a preliminary hearing, her Honour would be denying procedural fairness could not sensibly be sustained in light of the comprehensive hearing on the validity of the notice: at [208]-[209]; and

(c) three Land and Environment Court (LEC) decisions had featured orders for summary dismissal following a preliminary hearing. Fullerton J was unable to conclude that the Court's decisions were wrongly decided: at [210]. There is nothing in the construction of s 247G to deprive a superior court, in an appropriate case (as this case plainly was), of the power to determine whether a case should be dismissed after a preliminary hearing into the question of whether an essential condition of criminal liability can be established or proceed to a final hearing: at [216]. The construction of s 247G(2) advanced by the Respondent provides a source of power available to a superior court to be exercised in those circumstances. That purposive construction is an endorsement of the legislature's commitment to a form of criminal justice in which the real issues in dispute between the parties are determined without undue delay and expense: at [217].

Supreme Court of New South Wales:

McWilliam v Hunter **[2022] NSWSC 342** (Darke J)

Facts: Phillip and Susan McWilliam (**Plaintiffs**) were joint owners of a property in Scotts Head (**Plaintiffs' lot**). Howard and Wendy Hunter (**Defendants**) were joint owners of an adjoining property (**Defendants' lot**). A right of carriageway, 3.05 metres wide, ran along the south-eastern boundary of the Defendants' lot and served as the only means of vehicular access to the Plaintiffs' lot. By virtue s 181A(1) of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**), the right of carriageway was taken to have the same effect as if the instrument included the relevant words contained in Sch 8, Pt 1 of the Conveyancing Act. The dispute between the parties arose when the Defendants proposed to erect a cantilever structure that was to sit above the driveway and thus restrict the height beneath which the right of carriageway could be used. The Plaintiffs sought a declaration that the proposed cantilever structure would constitute an unlawful obstruction of their reasonable use of the easement and sought an injunction to restrain the Defendants from constructing the cantilever structure. The Defendants resisted the claims and, by an amended cross-claim, sought an order pursuant to s 89(1) of the Conveyancing Act modifying the right of carriageway such that it would be limited in height to 2.8 metres.

Issues:

(1) Whether reasonable use of the right of carriageway in connection with the use of the Plaintiffs' lot included traversal by vehicles requiring a vertical clearance of more than 2.8 metres;

(2) Whether the Defendants' proposed construction would have constituted a substantial and unreasonable interference with the reasonable use of the easement; and

(3) Whether it was appropriate for the Court to order modification of the easement under s 89(1) of the Conveyancing Act.

Held: Defendants restrained from proceeding with the proposed development; additional declaratory relief not required; Defendants' amended cross-claim dismissed:

(1) Under the terms of the easement, the Plaintiffs (and persons authorised by them) were given full and free right to go, pass and repass along the easement to and from the Plaintiffs' lot, at all times and for all purposes, including with vehicles. The references to "all purposes" and "vehicles" suggested that the range of vehicles that might have been employed in the use of the easement was extensive. The language indicated that the range of vehicles was effectively limited only by the range of purposes for which the easement might have been reasonably used so as to benefit the Plaintiff's lot: at [38];

(2) The Court expressed considerable doubt as to whether evidence of a single garage which existed on the Plaintiffs' lot at the end of the easement area at the time when the easement was created could have been taken into account as evidence of the physical characteristics of the land concerned. This was because the garage no longer existed as a physical feature on the land for all to see. Even if it was assumed that the garage could have been taken into account and that it could only have housed vehicles of a modest size or type, it did not follow that the easement should have been construed so as to be limited to use of vehicles of that size or type. Generally speaking, limitations should not be read into the language of an easement

by reference to the state of improvements on the land where it can be expected that the improvements will change over time as the land is further developed: at [40];

(3) The imposition of a height limit of 2.8 metres above the driveway, as would have occurred if the Defendants' proposed development proceeded, would have amounted to a substantial interference with the reasonable use and enjoyment of the right of carriageway. Even if it was assumed that the lawful use of the Plaintiffs' lot was limited to residential use, the introduction of a 2.8-metre-height limit would have permanently reduced to an appreciable extent the range of vehicles able to traverse the right of carriageway, including the movement of tall vehicles such as certain motorhomes, boat trailers, and delivery trucks. Although the Plaintiffs did not presently use their land in a manner that would have involved tall vehicles, it would have been reasonable for the Plaintiffs, or future owners of the Plaintiffs' lot, to choose to make use of the land in that way: at [41]-[44]; and

(4) For similar reasons, the Court was not satisfied that the modification of the right of carriageway sought by the Defendants would not have substantially injured the Plaintiffs within the meaning of s 89(1)(c) of the Conveyancing Act. The Defendants also failed to satisfy the Court that the continued existence of the easement would have impeded the reasonable use of their lot within the meaning of s 89(1)(a) of the Conveyancing Act: at [45]-[46].

Land and Environment Court of New South Wales:

- **Criminal:**

Environment Protection Authority v Afram **[2022] NSWLEC 38** (Pain J)

Facts: Mr Fayed Afram (**Defendant**) pleaded guilty to four offences under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) which took place from on or about 26 October 2016 to on or about 28 August 2017. Three offences were against s 144AA(1) of the POEO Act of supplying false or misleading information in a material respect about waste in the course of removal of building and demolition material by SSADCO Contractors Pty Ltd (**SSADCO**), of which he was a director, at a project in Green Square, Sydney for Ertech Pty Ltd (**Ertech**) (**Misleading Information Offences**). One offence was against s 142A(1) of the POEO Act which criminalises pollution of land (**Land Pollution Offence**), occurring on residential land at Kulnura (**Kulnura site**). The pollutants, the subject of that charge, were sourced from the Green Square project and numerous other locations. Under the common law principle referred to in *Hanna v Environment Protection Authority* (2019) 280 A Crim R 575; [2019] NSWCCA 299, the parties asked the Land and Environment Court (**Court**) to take into account in the sentencing process an additional offence, although it was withdrawn by the Prosecutor. This offence was against s 142A(1) of the POEO Act and occurred at Horsley Park (**Horsley Park site**). The Defendant was convicted of a fraud offence under s 192E of the *Crimes Act 1900* (NSW) by the District Court for substantially the same underlying conduct the subject of the Misleading Information Offences. The maximum penalty for the s 144AA(1) offence was $120,000 and the maximum penalty for the s 142A(1) offence was $250,000.

Issue: The appropriate sentence to be imposed for the offences.

Held: Defendant convicted; fined $67,500, $30,000 and $15,000 for the Misleading Information Offences and $127,500 for the Land Pollution Offence; publication order imposed; Defendant to pay the Prosecutor's costs in agreed sum of $95,000; 50% moiety ordered; Defendant to pay investigation expenses of $125,001:

Objective circumstances and matters to be considered under s 241 of the POEO Act

(1) The Defendant substantially undermined the objects of the POEO Act by providing multiple false documents to Ertech and polluting the Kulnura site with a substantial amount of asbestos and other waste: at [49]. The Misleading Information Offences substantially undermine the waste management system established by the POEO Act and regulations: at [49]-[50]. The offences undermined the regulatory system for waste management including the waste levy: at [51]. They were objectively serious on that basis alone: at [51]-[52].

(2) The offences were committed deliberately and egregiously by the Defendant, were pre-planned and concealed: at [53]-[55];

(3) The circumstances of the Misleading Information Offences clearly gave rise to the risk of substantial harm to the environment: at [72]. There was actual degradation of the Kulnura site including altered air and water with consequential impact for living organisms and potential non-trivial harm such as physical injury, lung

disease, cancer, skin irritation and neurotoxicity to humans, including from the presence of asbestos: at [75]-[77]. The offences gave rise to actual harm to the environment and there was substantial further potential harm to human health and the environment: at [78];

(4) There were practical measures that could have been taken in relation to each offence: [79]-[80]. The harm was foreseeable: at [81]-[82]. There was control over the causes of the offences: at [83];

Aggravating factors under the Crimes (Sentencing Procedure) Act 1999 (NSW) (**Sentencing Procedure Act**)

(5) The Defendant's previous fraud conviction in the District Court was an adverse matter under s 21A(2)(d) of the Sentencing Procedure Act: at [86]. The offences were committed without regard to public safety within s 21A(2)(i) of the Sentencing Procedure Act: at [87]. The conduct occurred as part of planned or organised criminal activity within s 21A(2)(n) of the Sentencing Procedure Act: at [89]. The Land Pollution Offence was committed for financial gain within s 21A(2)(o) of the Sentencing Procedure Act. The motive for committing the Misleading Information Offences was not taken into account because it overlapped with the Defendant's conviction for fraud: at [90]-[95];

(6) The Misleading Information Offences were at the low end of the high range of objective seriousness and the Land Pollution Offence was in the middle range of the high range of objective seriousness: at [96], [101];

Subjective circumstances

(7) The Defendant received a 25% discount for early guilty plea: at [104]. There was no indication of remorse: at [107]. The Defendant's evidence of good character were given little weight in the circumstances of the offending: [108]; The Defendant was not given a discount for cooperation with police in relation to the s 192E offence authorities and provided no assistance to the EPA: at [111]. The Defendant was not unlikely to reoffend: at [112]. The Defendant's mental and physical illnesses did not operate in mitigation: at [115]-[118]. That the Defendant had caring responsibilities for his disabled daughter did not operate in mitigation in the context of a fine-only offence: at [120];

Sentencing principles

(8) General deterrence is an important consideration in environmental offences: at [122]. Specific deterrence had some role to play as this was not the first time the Defendant had committed the Land Pollution Offence: at [124], [126];

(9) Consideration of a number of relevant cases in the application of the even-handedness principle. Assistance was derived from *Bankstown City Council v Hanna* (2014) 205 LGERA 39; [2014] NSWLEC 152: at [127]-[132];

(10) Double punishment and totality should not be confused. In relation to double punishment, the elements of the fraud and Misleading Information Offences were not common so that double punishment did not arise on that basis. The facts and circumstances giving rise to the offences were common and there was likely to be complete overlap. The double punishment principle was applied to reduce the penalty partially for the Misleading Information Offences, however, the nature of the offences and harm caused does not fully overlap and separate punishment was warranted: at [139]. The double punishment principle did not warrant reduction of the penalty for the Land Pollution Offence: at [140];

(11) The principle of totality was relevant to the Misleading Information Offences, however, not the Land Pollution Offence: at [143]-[144]; and

(12) The evidence was inadequate to show that the Defendant lacked the means to pay substantial fines: at [149].

***Environment Protection Authority v Cleanaway Equipment Services Pty Ltd* [2022] NSWLEC 40** (Pain J)

Facts: Cleanaway Equipment Services Pty Ltd (**Defendant**) operates a waste storage facility in Queanbeyan (**premises**). On 14 May 2022, a solvent leaked from a pipe located on the premises into the council stormwater system linked to an outlet flowing into the Molonglo River (**Charge 1**). By no later than 12.44 pm on 14 May 2020, the site supervisor at the premises became aware that the solvent had spilled into the stormwater system. Between 12.44 and 16.57 pm there were a number of telephone calls and text messages sent between employees of the Defendant. At 16.58 pm, the environmental business partner contacted the Environment Protection Authority (**EPA**) to notify it of the spill of what was thought to be 2,000 litres of solvent into the stormwater drain (**Charge 2**). On 15 May 2021, the solvent was pumped from the Molonglo River into a truck and the polluted water was brought back to the premises for disposal. Between 9,000 and 10,000 litres of water brought back to the premises from the Molonglo River, which contained Vivasol, was poured into a containment

pit on the premises. Some of the contaminated water escaped to the Molonglo River (**Charge 3**). The Defendant pleaded guilty to Charge 1, being one offence against s 120 of the *Protection of the Environment Operations Act 1997 (NSW)* (**POEO Act**) for pollution of waters; Charge 2 against s 152 of the POEO Act for failing to notify each relevant authority immediately after it became aware a pollution incident occurred on 14 May 2020 that threatened, and caused, material harm to the environment; and Charge 3 against s 120 of the POEO Act for pollution of waters on 15 May 2020. The maximum penalty for the s 120 offences was $1,000,000 and the maximum penalty for the s 152 offence was $2,000,000.

Issue: The appropriate sentence to be imposed for the offences.

Held: Defendant convicted; fined $187,500 for Charge 1, $280,000 for Charge 2 and $150,000 for Charge 3; publication order imposed; Defendant to pay the Prosecutor's costs in agreed sum of $195,000; 50% moiety ordered; Defendant to pay investigation expenses of $110,778:

Objective circumstances and matters to be considered under s 241 of the POEO Act

(1) The Defendant undermined the objects of the POEO Act by polluting water otherwise than in accordance with its Environment Protection Licence enabling it to undertake certain polluting activities: at [38]. The failure to notify the EPA immediately undermines the statutory scheme for addressing polluting activities which if followed enables government entities to make decisions about the appropriate response to polluting activities: at [39];

(2) The offences were not deliberate: at [41];

(3) Given the proximity in time between the offences it was not possible to distinguish the harm caused by the offences. Actual harm to the environment occurred. The evidence was that there was significant impact on invertebrates in the river up to 500 metres from the discharge point for at least one month: at [66]-[67]. In relation to the stormwater system, the discharge caused substantial temporary contamination and greatly changed the chemical composition of the waters. A significant adverse effect on the stormwater system was highly likely: at [68]. No evidence of actual harm to humans was evident. There was potential for adverse impacts on human health: at [69]. The potential for greater harm arises if the EPA is not notified immediately, albeit there was no evidence any harm was exacerbated: at [70];

(4) Practical measures could have been taken in relation to each offence (at [72]-[74]), harm was foreseeable for each offence: at [75]-[81]; and the Defendant had control over the causes of each offence: at [82];

(5) Charges 1 and 3 were in the middle of the medium range of objective seriousness: at [84]. Charge 2 was in the low range of objective seriousness as the Defendant's employees were alive to the potential harmful effects of the solvent and the obligation to report; took steps to assess whether the incident was reportable; notification was made a little over four hours since the Defendant became aware of the incident; and there was no evidence harm was amplified: at [85]-[89];

Subjective circumstances

(6) The Defendant received a 25% discount for early guilty pleas: at [92]; showed remorse: at [93]; was of good character: at [94]; cooperated with authorities: at [95]; and was unlikely to reoffend: at [98];

Sentencing principles

(7) General deterrence was an important factor given the prohibition on water pollution is a critical aspect of the regulatory framework: at [101]. Specific deterrence had less relevance given the evidence of the Defendant's steps to prevent a recurrence: at [104]; and

(8) The principle of totality was relevant to Charges 1 and 3. It was not relevant to Charge 2: at [114]-[115].

***Environment Protection Authority v Maules Creek Coal Pty Ltd* [2022] NSWLEC 33** (Pepper J)

Facts: Maules Creek Coal Pty Ltd (**MCC**) pleaded guilty to three offences against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for polluting waters with sediment (**first offence** and **second offence**) and expanded polystyrene beads (**EPBs**) (**third offence**) in early 2020 at the Maules Creek mine in Boggabri (**mine**). MCC, at the time of the commission of the offences, had not yet completed construction of the northern overburden emplacement area (**NOEA**) at the mine which was meant to manage sediment and erosion. MCC had also failed to implement proper erosion controls at the mine. Explosives, which included EPBs, were used at the mine to access coal seams and were managed by a contactor at the direction of MCC. The EPBs were not properly secured at the time of the commission of the offences and EPB-contaminated water was able to discharge from the NOEA. In combination, these factors caused sediment-laden water and EPBs to discharge from the mine's water management system into nearby Back Creek during two extreme rainfall events in January and February 2020.

Issue: Appropriate sentence to be imposed on MCC.

Held: MCC fined $158,750 to be paid to the Environmental Trust; ordered to place a notice outlining the conviction and penalty in four newspapers; ordered to pay the Prosecutor's costs:

(1) The pollution of waters by MCC offended the objects of the POEO Act by undermining the quality of the environment and preventing pollution of it: at [149]-[150];

(2) The commission of the offences caused actual harm by introducing sediment and EPBs into Back Creek downstream of the mine: at [168]. The offending conduct caused likely minor harm to the water quality, aquatic ecology and ecotoxicology of Back Creek, and the environmental amenity of the area surrounding the mine: at [169]-[188];

(3) There was no evidence that MCC committed the offences for any reason, such as financial gain: at [194];

(4) The harm caused or likely to be caused by the commission of the offences was reasonably foreseeable because MCC had actual knowledge of the erosion risks associated with the mine and that its erosion controls were not fully operational. However, the rainfall events that precipitated the offending conduct were especially severe: at [199]-[200];

(5) MCC had complete control over the commission of the first two offences but the contractor tasked with managing explosives on the site was partially responsible for the management of the EPBs, and therefore, MCC did not have complete control over the discharge of EPBs during the commission of the third offence: at [206];

(6) MCC could have taken additional practical measures to reduce erosion at the NOEA and the volume of sediment released into Back Creek during the commission of the offences. However, given the high volume of rainfall during the offending period, it was unlikely that additional practical measures would have prevented all discharges: at [209];

(7) The objective seriousness of the three offences was low to moderate: at [210];

(8) Mitigating factors that weighed in MCC's favour included that it expressed contrition and remorse; had entered pleas of guilty at the earliest opportunity, entitling it to the full discount of 25% for the utilitarian value of that plea; had good character and was unlikely to reoffend, despite a prior conviction: [211]-[219];

(9) General and specific deterrence was warranted so as to ensure that large-scale mining projects operate in a manner that does not pollute the environment and because MCC has a prior criminal conviction, a history of non-compliance with environmental operations and continues to operate the mine: at [220]-[224];

(10) The totality principle was applied because the commission of the offences arose from the same or related conduct: at [226]-[228];

(11) After the application of a 25% discount for MCC's early guilty plea and the application of the totality principle, MCC was ordered to pay $93,750 for the first offence, $56,250 for the second offence and $56,250 for the third offence: at [237]; and

(12) MCC was ordered to cause a notice to be published in four newspapers and on Whitehaven Coal Limited's website (as the parent company of MCC): at [241]-[242].

Environment Protection Authority v University of Sydney **[2022] NSWLEC 41** (Pain J)

Facts: The University of Sydney (**Defendant**) possessed a Positron Emission Tomography (**PET**) scanner on its Camperdown campus within which was contained the radioactive isotope caesium chloride (**source**), in a sealed capsule. The source was regulated material under the *Radiation Control Act 1990* (NSW) (**Radiation Control Act**). The Defendant proposed to dispose of the PET scanner in the process of refurbishment works and contracted a head contractor to undertake those works without disclosing the existence of the source. A subcontractor transported the PET scanner to a scrap-metal yard. Neither the subcontractor nor the operator of the scrap-metal yard held a licence under the Radiation Control Act to handle the source. They were prohibited from possessing, storing or using the source within the meaning of s 4 of the Radiation Control Act. The PET scanner was cut up at the scrap-metal yard before being transported to another scrap-metal yard whereupon employees detected the presence of the source.

The Defendant pleaded guilty to one charge under s 6(6) of the Radiation Control Act of failing to ensure that regulated material was not possessed by a person who was not the holder of an appropriate licence under Pt 2 of the Radiation Control Act and one charge of disposing of regulated material without the consent of the Chairperson of the EPA under cl 34 of the Radiation Control Regulation 2013 (NSW) (**Radiation Control Regulation**). The parties agreed that the offences were accidental. The maximum penalty for the

s 6(6) offence was $165,000 and the maximum penalty for the cl 34 offence was $44,000. Expert evidence, as to the risk of harm to persons and the environment from the offences, was given by a health physicist and manager at the Australian Nuclear Science and Technology Organisation.

Issue: The appropriate sentence to be imposed for the offences.

Held: Defendant convicted; fined $51,000 for the s 6(6) offence and $10,000 for the cl 34 offence; publication order imposed; Defendant to pay the Prosecutor's costs as agreed or assessed; 50% moiety ordered:

Objective circumstances

(1) These offences were environmental offences and the legislative context indicates a particular emphasis on safety: at [30]-[32]. The Defendant's submission that the strict nature of the legislative requirements and extensive protections in the Radiation Control Act and Radiation Control Regulation do not inform an assessment of the relative seriousness of the offence was not accepted: at [33];

(2) In the context of the Radiation Control Act and Radiation Control Regulation, unlike in the context of other environmental offences, the Land and Environment Court can take into account harm which is remote, as opposed to harm that might arise as a real possibility: at [44]. The potential for harm to persons or detriment to the environment from the sealed source was very unlikely. There was a public health risk and a risk to the environment and weight should be given to these in the sentencing exercise: at [50];

(3) The Defendant had complete control over the causes of the offence and harm was only fortuitously avoided. The objective seriousness is at the high end of the low range: at [51]-[52];

Subjective circumstances

(4) The Defendant's late plea of guilty at the pre-trial mention attracted a 10% utilitarian discount: at [55]. The Defendant's remorse was accepted: at [56]. The Defendant cooperated with regulatory authorities: at [57];

Sentencing principles

(5) General deterrence was an important factor given the stringent requirements of the Radiation Control Act and Radiation Control Regulation: at [60]. Specific deterrence remained relevant despite the evidence that the Defendant had learned from its mistakes: at [62]; and

(6) The principle of totality operated in relation to the two offences as the same facts and circumstances gave rise to the offences: at [66].

Hawkesbury City Council v Saed **[2022] NSWLEC 34** (Pepper J)

Facts: Hadi Saed (**Saed**) pleaded guilty to an offence under ss 4.2 and 9.51 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for the removal of 20 trees on 20 May 2019 at a property in Ebenezer (**land**) without a development consent and in contravention of the State Environmental Planning Policy 2017 (Vegetation in Non-Rural Areas) (**Vegetation SEPP**). Saed had removed the trees in the course of running a gardening and maintenance business, although Saed held no formal qualifications in landscaping or horticulture. The 20 trees formed part of the critically endangered Shale Sandstone Transition Forest in the Sydney Basin Bioregion Ecological Community and were considered habitat for Koalas, Yellow-Bellied Gliders and micro bat species.

Issue: Appropriate sentence to be imposed on Saed.

Held: Saed was fined $18,750; ordered to undertake remediation works on the land; ordered to pay the Prosecutor's costs:

(1) The unlawful development undertaken by Saed offended the objects of the EPA Act and the Vegetation SEPP and subverted the integrity of the planning regime established by those statutory instruments: at [41];

(2) There was no evidence to the requisite criminal standard that Saed committed the offence negligently: at [51]-[52]. Saed adduced evidence of his mental health conditions but did not establish a nexus between his impaired mental health and his state of mind at the commission of the offence. Therefore, no account was taken of that evidence: at [53]-[54];

(3) The commission of the offence caused substantial actual harm, namely, the removal of trees that formed part of a critically endangered ecological community and that were habitat for threatened species: at [57]-[59];

(4) The objective seriousness of the offence was moderate to low: at [69];

(5) Mitigating factors that weighed in Saed's favour included that he had expressed contrition and remorse; he had entered a plea of guilty at the earliest opportunity, entitling him to the full discount of 25% for the utilitarian value of that plea; he had good character and was unlikely to reoffend: [71]-[83];

(6) The consideration of general deterrence was warranted so as to ensure that persons engaged as gardeners obtain all requisite consents to carry out development: at [88];

(7) However, the Court was not satisfied beyond reasonable doubt that an element of specific deterrence was warranted because there was no evidence put to demonstrate that Saed continued to run a gardening business: at [89];

(8) Although Saed claimed that he had limited means, he did not provide evidence to ground any finding that he would be unable to pay any monetary penalty likely to be imposed upon him: at [97]-[99]; and

(9) After the application of a 25% discount for Saed's early plea of guilty, he was fined $18,750 and ordered to undertake remediation works on the land to remove weeds, install fauna habitat boxes and plant new trees: at [111].

Natural Resources Access Regulator v Bao Lin Pty Ltd **[2022] NSWLEC 42** (Robson J)

Facts: On 23 October 2020, Bao Lin Pty Ltd (**Bao Lin**) pleaded guilty to four offences against the *Water Management Act 2000* (NSW) (**Water Management Act**) on land at Tea Gardens on the mid-north coast of New South Wales: First, between 10 January 2016 and 29 June 2016, Bao Lin carried out a controlled activity on waterfront land (removing vegetation along three watercourses) without approval in contravention of s 91E(1) of the Water Management Act (**Offence 1**); second, between 16 December 2015 and 12 February 2019, Bao Lin carried out a controlled activity on waterfront land (removing vegetation and depositing material near a watercourse) without approval in contravention of s 91E(1) of the Water Management Act (**Offence 2**); third, between 10 January 2016 and 3 November 2017, Bao Lin harmed waterfront land by constructing a dam and removing vegetation from a watercourse in contravention of s 345(2) of the Water Management Act (**Offence 3**); and fourth, between 10 January 2016 and 10 January 2020, Bao Lin harmed waterfront land by constructing a dam and removing vegetation at Station Creek (**Offence 4**).

Issue: The appropriate sentence to be imposed.

Held: Convicted and fined $64,600 for Offence 1, $57,000 for Offence 2, $64,600 for Offence 3, $64,600 for Offence 4; ordered to undertake steps to prevent, control, abate or mitigate harm caused by the offences; to pay the Prosecutor's costs; and to publicise the sentences:

(1) Each of the offences was in the moderate range of seriousness, with Offence 2 being slightly less objectively serious: at [205]:

  (a) the offences were objectively serious because Offences 1 and 2 sought to avoid the regulatory scheme and its protection of water sources and waterfront land; and Offences 3 and 4 undermined the objects of the Water Management Act: at [59]-[60];

  (b) Each of the offences caused, or were likely to have caused, harm to the environment, including to aquatic species, fauna and vegetation. Offence 1 increased light penetration (thereby increasing water temperature), caused physical changes to the stream beds and habitats, increased sedimentation, caused damage to the waterway (by operation of heavy machinery), and changed the flow of three creeks; Offence 2 increased light penetration, and caused the delivery of sediment to the creek which likely clogged the gills of biota; Offence 3 changed the natural flow of the creek system, caused damage to the waterway (by operation of heavy machinery), caused vegetation loss by water inundation, and increased sedimentation, although the dam had since been removed and rehabilitated to some extent; and Offence 4 caused vegetation loss by water inundation, changed the natural flow regime, and caused damage to the waterway (by operation of heavy machinery): at [169]-[190];

  (c) Bao Lin could reasonably have foreseen the harm actually caused, or likely to be caused, by the offences, even taking into account various "flood events" which Bao Lin relied upon as justification for the offences: at [191];

  (d) there were practical measures Bao Lin could have taken to prevent environmental harm caused by the offences, including not carrying out the offences and seeking approval for the works associated with Offences 1 and 2: at [193];

  (e) Bao Lin had control over the causes that gave rise to the offences: at [196]; and

  (f) Offences 1, 3 and 4 were performed by workers who were unaware of legal requirements and without the knowledge of Bao Lin's director; and Offence 2 was authorised by Bao Lin's director on the mistaken

understanding that Bao Lin had an existing approval. There was no evidence that the offences were committed wilfully, negligently or in reckless disregard of the law (where the offences were self-reported to the regulator), or that they were committed for any reason, such as financial gain: at [200]-[203];

(2) Bao Lin's lack of prior convictions for environmental offences, pleas of guilty, and assistance to the authorities were mitigating factors. Bao Lin demonstrated some remorse and responsibility for the offences (including by undertaking, and being willing to undertaken more, remedial works), although Bao Lin had not fully acknowledged the environmental harm caused by its conduct: at [207], [210], [217], [218];

(3) An element of general deterrence was appropriate to ensure conduct on and around waterways and waterfront land does not harm the environment; and specific deterrence was appropriate where Bao Lin continues to participate in farming activities associated with the offending conduct: at [220]-[221];

(4) It was appropriate to make restoration and prevention orders pursuant to s 353B of the Water Management Act, including a remediation strategy for retaining the dam the subject of Offence 4 where removing it would pose various risks, remediation could ensure a continuous channel of water, and where it had not been established beyond reasonable doubt that the dam had obstructed tidal flow: at [233]-[235];

(5) It was appropriate to make a publication order because of its significant educative and deterrent function: at [238]; and

(6) The principle of totality was relevant to sentencing and resulted in a 5% reduction in penalty, because the boundaries of the four offences had some overlapping characteristics: at [248], [249], [252].

Secretary, Department of Planning and Environment v Sell & Parker Pty Ltd **[2022] NSWLEC 60** (Pepper J)

Facts: Sell & Parker Pty Ltd (**S&P**) pleaded guilty to two offences against ss 76A(1)(b) and 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for carrying out development on land otherwise than in accordance with a development consent that was in force. The contraventions related to S&P's receipt of waste in excess of tonnage limits imposed by its development consent in 2016 (**2016 Offence**) and 2017 (**2017 Offence**). S&P was granted a development consent for the expansion of its metal waste recycling facility at Blacktown (**facility**) in November 2015 (**development consent**). That development consent relevantly contained condition A8, which restricted S&P from receiving more than 90,000 tonnes of waste per annum until an emissions collection system (**ECS**) for the facility's hammer mill was installed and approved by the Secretary of the New South Wales Department of Planning and Environment (**Department**). In 2016, S&P had an ECS installed, but that system was not approved by the Secretary of the Department until 2018. Nevertheless S&P processed 195,386.751 tonnes of waste in 2016, the subject of the 2016 Offence, and 268,645.476 tonnes of waste in 2017, the subject of the 2017 Offence, exceeding the limit imposed by condition A8 of its development consent in both years.

The central factual dispute in the proceedings concerned statements made at a meeting that occurred during a site inspection of the facility conducted by the Department and the Environment Protection Authority (**EPA**) on 20 September 2016. Particularly, whether a Department official had said words to the effect of "No. We don't want you to do that" (**Department response**) in reply to S&P stating that it would have to lay off 50 staff members in order to comply with condition A8 of the development consent and that reducing S&P's waste processing would have a negative impact on New South Wales' steel industry. It was disputed between the parties whether those statements were made and the effect of those statements, notably whether the Department response was an exercise of discretion not to prosecute the 2016 and 2017 Offences.

Issues:

(1) What was the appropriate sentence to be imposed on S&P;

(2) Whether S&P formed a genuine and reasonable belief that the Department response at the 20 September 2016 site inspection meeting was an election by the Department to not prosecute the 2016 and 2017 Offences, and further, whether such a belief impacted upon the Land and Environment Court's (**Court**) assessment of S&P's state of mind during the commission of the offences; and

(3) Whether S&P had accepted full responsibility for the commission of the offences and demonstrated genuine remorse.

Held: S&P fined $250,000, half of which was to be paid to the Prosecutor as moiety; ordered to pay the Prosecutor's costs; a publication order was made:

(1) S&P's characterisation of the offending conduct as administrative in nature was not accepted: at [311]. Rather, the Court held that S&P's conduct offended against the objects of the EPA Act: at [295]-[299] and [312];

(2) Any belief S&P formed after the 20 September 2016 site inspection meeting that the Department would not prosecute its offending conduct was neither genuinely held nor reasonable. This was because such an understanding was inconsistent with events leading up to the site inspection, including the Department's approach to the imposition of condition A8 and its concern that the environmental impacts of the facility expansion were not fully accounted for, and events after that inspection, such as subsequent audits that found S&P was not complying with its development consent: at [346]-367]. It was not the case that S&P was under the mistaken belief that its unlawful conduct was sanctioned by the Department and, therefore, the Court held that S&P committed the offences intentionally and contumeliously: at [368];

(3) The commission of the offences caused serious and material harm to the integrity of the planning system of New South Wales and that harm was reasonably foreseeable: at [369]-[374] and [377];

(4) S&P had complete control over the commission of the two offences and it could have taken practical measures to prevent or mitigate the environmental harm, including taking steps to ascertain whether its belief that the Department would not prosecute the 2016 and 2017 Offences was correct and by not exceeding the tonnage limit imposed by the development consent: at [362] and [378]-[379];

(5) S&P committed the offences for financial gain: at [380]-[387];

(6) The objective seriousness of the two offences was therefore at the upper end of moderate objective seriousness. The 2017 Offence was of slightly higher objective seriousness because, during 2017, it had become clear to S&P that it was being investigated for the contravention of its development consent and yet it continued to process excess waste: at [392]-[393];

(7) Mitigating factors that weighed in S&P's favour included that it had provided some assistance to the authorities, had reasonable prospects of rehabilitation and that, but for the commission of the offences, it was generally of good corporate character: at [397]-[400] and [419]-[424];

(8) The Court took into account S&P's two prior convictions for environmental offences: at [395]-[396];

(9) The utilitarian value of S&P's early guilty pleas was eroded by S&P's conduct throughout the proceedings because it put the Prosecutor to proof on several factual issues and was unsuccessful with respect to a significant part of its case in mitigation. In these circumstances, the Court determined a 20% discount should apply: at [401]-[409];

(10) S&P did not accept full responsibility for the commission of the offences nor did it demonstrate genuine remorse because S&P continued to deflect culpability onto the Department, notably because S&P maintained the position that the Department response amounted to permission from the Department for S&P to continue to breach its development consent: at [410]-[418];

(11) General and specific deterrence was warranted so as to ensure that participants in the metal recycling industry abide by the conditions of their development consent and because, with respect to S&P specifically, it remained a principal player in that industry, had committed the offences intentionally, and its conduct was motivated by financial gain: at [426]-[447]; and

(12) The totality principle was applied because the commission of the offences arose from the same or related conduct: at [456]-[461].

Transport for New South Wales v Estuary Constructions Pty Ltd; Transport for New South Wales v Sampson **[2022] NSWLEC 23** (Duggan J)

Facts: These sentencing proceedings related to the sinking, on 22 January 2019, of a pile-driving and construction barge in Pittwater New South Wales. In relation to the sinking, Estuary Constructions Pty Ltd (**Estuary**) pleaded guilty to four offences pursuant to the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) as follows: s 97 (**Prevention Notice Offence**), s 120(1) (**Pollute Waters Offence**), s 91(5) (**Clean-Up Notice Offence**) and s 211(1) (**Notice to Produce Offence**). Estuary's sole director and shareholder, Mr Grant Darcy Sampson (**Mr Sampson**), entered guilty pleas to three offences relating to the Prevention Notice Offence, Clean-Up Notice Offence and Pollute Waters Offence pursuant to ss 169A and 169(1) of the POEO Act. Following an inspection by Transport for New South Wales (**Prosecutor**), a Prohibition Notice was issued on 25 October 2016 to the Defendants citing concerns regarding the condition of the barge's hull and its watertight integrity. A Prevention Notice, the subject of that offence, was issued on 13 June 2018 stating that no preventative action or extensive repairs had taken place since the

Prohibition Notice. When the barge sank on 22 January 2019, the barge was fully submerged, allowing various plant and equipment to enter the waterways. The Clean-Up Notice, the subject of that offence, was issued to Estuary on 23 January 2019. Following the Defendants' denial of responsibility for the sinking, the Prosecutor organised oil-absorbent booms until the barge was salvaged in March 2019 by contractors hired and paid for by the Prosecutor. A notice in writing (the subject of the Notice to Produce Offence) was issued pursuant to Pt 7.3 of the POEO Act dated 1 March 2019 requiring Estuary to provide information and records.

Issue: Appropriate sentence for the Defendants pursuant to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 241 of the POEO Act.

Held: Fines imposed totalling $370,000 for Estuary and $204,000 for Mr Sampson; Defendants jointly and severally liable to pay $146,346.60 in abatement costs; Defendants to pay Prosecutor's legal and investigative costs; publication order made:

(1) The Pollute Waters Offence was at the lower end range of the mid-range of objective seriousness as whilst the actual and likely harm was short-lived, the causes that gave rise to the commission of the foreseeable offence were in the control of the Defendants: at [112];

(2) For the same reasons, the objective seriousness of the Prevention Notice and Clean-Up Notice Offences were also at the lower end of the mid-range of objective seriousness: at [113];

(3) In relation to the Notice to Produce Offence, as the harm was caused to the facilitation under the POEO Act of the regulation, prevention and abatement of pollution events and the investigation process (rather than actual harm to the environment), the offence was at the low end of objective seriousness: at [114];

(4) The Defendants expressed no real remorse or contrition. By failing to take some real measure of responsibility for the commission of the offences, they demonstrated no appreciation of the risks arising from their conduct and the consequential harm caused by their failure to properly manage the barge or respond to the remedial requests issued by the Prosecutor: at [115];

(5) The Defendants' early pleas of guilty was a relevant mitigating factor warranting a discount of 10% of the fine, as well as the Defendants having no record of prior convictions: at [119]-[120];

(6) An element of specific deterrence was appropriate as the Defendants failed to appreciate the significance of their responsibilities in operating a barge in waters and the obligations that flow from the provisions of the POEO Act: at [124];

(7) There were no reasonably comparable cases to which a sentencing pattern could be derived: at [126];

(8) Whilst the offences were conceptually and temporally distinct, as the failure to comply with the Prevention Notice was causally connected to the Pollute Waters Offence, and the circumstances relating to the Clean-Up Notice Offence impacted upon the environmental harm occasioned by the Pollute Waters Offence, it would have been inappropriate to further punish the Defendants for these causal factors and so a significant discount in the penalty for the Prevention Notice and Clean-Up Notice Offences was appropriate for totality: at [128];

(9) The Prosecutor would not have had to carry out the abatement works and investigation but for the failure of the Defendants to comply with the terms of the Clean-Up Notice or to otherwise seek to mitigate the harm caused by the sinking of the barge. For those reasons, it was appropriate in the circumstances that the Defendants each jointly and severally be ordered to pay such sum: at [132], [139];

(10) Based on the evidence, Estuary did not provide sufficient information as to its financial position and Mr Sampson's position was unclear as he was unable to adequately explain his position and relied on the knowledge of others. A reduction of the fine, based of the Defendants' means to pay, was not appropriate: at [142]-[143];

(11) Having regard to the need for waterborne vessels to be maintained and for the actions of the appropriate regulatory authority to be observed, as well as general deterrence and a reminder to other users of the waterways, a publication order was appropriate to reinforce the risk to the environment of failing to comply with the statutory provisions: at [149].

- **Contempt:**

Inner West Council v Balmain Rentals Pty Ltd **[2022] NSWLEC 20** (Robson J)
(related decision: *Inner West Council v Balmain Rentals Pty Ltd* [2019] NSWLEC 24 (Robson J))

Facts: On 28 February 2019, the Land and Environment Court (**Court**) made orders, first, declaring that Balmain Rentals Pty Ltd (**Defendant**) had breached s 4.3(a) of the *Environmental Planning and Assessment Act 1979* (NSW) by carrying out development on premises in Marrickville for the prohibited purpose of a vehicle sales or hire premises as defined by the Marrickville Local Environmental Plan 2011 (NSW) (**Order 1**); and, second, restraining the Defendant from carrying out the prohibited purpose (**Order 2**). By Notice of Motion filed 9 July 2021, Inner West Council (**Council**) sought an order that the Defendant be found guilty of, and punished for, eight counts of contempt of court for carrying out the prohibited purposes between 14 June 2019 and 18 June 2021 contrary to Order 2. On 4 February 2022, the Defendant pleaded guilty.

Issue: The determination of an appropriate penalty for civil contempt.

Held: Defendant convicted of all eight counts; fined a total of $60,000; ordered to pay Council's costs of $55,000:

(1) Considering the conduct took place over a period of two years, the service of a penalty notice and the clear and unequivocal nature of the Court's orders, the Defendant's contempt constituted wilful contempt: at [48];

(2) The contempt was objectively more than moderately serious given that the Defendant was aware of the circumstances leading to, and the meaning and consequences of, the Court's order; and the counts involved serial breaches of the Court's order. Furthermore, the Defendant was aware of what it was doing where it was not inexperienced with planning regulation; received and considered but did not implement town planning advice; and engaged in the conduct for commercial purposes: at [51], [53]-[56];

(3) While the Defendant had no prior convictions and had ceased the operation of the prohibited use at the premises, it did not obtain any relevant approval over an extended timeframe to comply with the Court's order and its apology to the Court was "qualified": at [57]-[59];

(4) Where the Defendant actively participated in the entry of the Court's orders, was aware of Council's concerns and the counts occurred over an extended period of time, general and personal deterrence were appropriate because the planning law system depends on a high level of compliance and the prospect of reoffending could not be disregarded: at [60]-[62];

(5) There was a significant role for denunciation of the contempt where the public may question the utility of injunctive relief and statutory enforcement, and the conduct was objectively serious for commercial purposes: at [63]-[65];

(6) A significant discount was not appropriate where the Defendant's pleas of guilty were entered after the matter had appeared before the Court on at least one occasion; however, the Court did take into account the Defendant's assistance to authorities, the circumstance of the Defendant's directing mind, and the fact that the conduct at the premises had ceased by early January 2022: at [66]; and

(7) Although each count varied slightly, they all comprised an overall unlawful activity and therefore a fine of $7,500 in relation to each count was appropriate, with a total penalty of $60,000 in accordance with considerations of sentencing consistency, the principle of totality and the parties' agreed payment of costs: at [67]-[70].

- **Civil Enforcement:**

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

(related decisions: *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 2)* [2020] NSWLEC 10 (Pepper J); *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 3)* [2020] NSWLEC 40 (Pepper J); *Verde Terra Pty Ltd v Environment Protection Authority* [2018] NSWLEC 159 (Moore J); *Verde Terra Pty Ltd v Environment Protection Authority (No 3)* [2018] NSWLEC 161 (Moore J))

Facts: These Class 4 civil enforcement proceedings concerned a property at Central Mangrove that, at all material times, was used as a golf course (**land**). In 1998, a development application in respect of the land was lodged with Gosford City Council (**Council**) and approved with conditions in October 1998. As part of that approval, conditions were imposed to authorise the making of substantial changes to the contours of the land through the operation of a waste facility, in order to create a landscape for the golf course. The land was, at all material times, also subject to conditions under an environment protection licence (**EPL**). From 2007, Verde Terra Pty Ltd and related entities (**Verde Terra**) operated a waste facility on the land.

In 2012, Council commenced proceedings against Verde Terra alleging it had carried out waste works in excess of the 1998 consent, in breach of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Council sought injunctive relief against the carrying out of further works on the land that fell outside that consent. The Court made Consent Orders in 2014 to resolve those proceedings (**2014 Consent Orders**). The 2014 Consent Orders authorised development works to remediate the breaches of the EPA Act.

In 2019, Verde Terra brought proceedings seeking declaratory relief that the existing golf course and waste facility on the land constituted a "development (whether existing or approved)" within the meaning of cl 35 of Sch 3 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**) and that no further development consent was required to carry out the development envisaged by the 2014 Consent Orders. The Central Coast Council (**Council**), successor to Council, brought cross-claim seeking to set aside the 2014 Consent Orders (**VT proceedings**). Verde Terra brought a cross-claim seeking declaratory relief that the existing golf course and waste facility constituted a "development (whether existing or approved)" within the meaning of cl 35 of Sch 3 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**) and that no further development consent was required to carry out the development envisaged by the 2014 Consent Orders. In separate, but related, proceedings against the Environment Protection Authority (**EPA**), Council sought orders that specific variations to the EPL granted between 2009 and 2011 for the land were invalid and should be set aside (**Council proceedings**).

Issues:

VT proceedings

(1) The proper construction of the 1998 consent and, therefore, whether the scope of the 2014 Consent Orders impermissibly authorised works beyond the scale of the 1998 consent and should be set aside;

(2) Whether the development contemplated under the 2014 Consent Orders comprised "existing or approved" or "other" development under cl 35 of Sch 3 of the EPA Regulation;

(3) Whether the principles of estoppel and related doctrines precluded the Council from seeking to set aside the 2014 Consent Orders; and

(4) Whether any development consent is in force or, alternatively, was required under the EPA Act to permit the developments described in the 2014 Consent Orders or that which was proposed by Verde Terra to be carried out on the land;

Council proceedings

(5) Whether r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) precluded the Council from commencing the proceedings;

(6) Whether specific variations to the EPL granted between 2009 and 2011 for the land were invalid because they permitted a controlled development for the purposes of s 50(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) where there was no development consent in force permitting that development; and

(7) If any of the variations to the EPL were invalid, whether they could be severed.

Held:

VT proceedings:

(1) The central purpose of the 1998 consent was to remodel the golf course on the land and that the operation of a waste facility and limited excavation was permitted in order to import waste material in furtherance of that purpose. The 1998 consent did not permit a large and independent waste disposal facility: at [270]-[271];

(2) The 2014 Consent Orders authorised works that went beyond that which was authorised by the 1998 consent, in order to remedy the alleged breaches of the EPA Act: at [297]. Such orders were made within the broad powers of the Court under s 124 of the EPA Act remediate breaches of that Act: at [298]-[299];

(3) Furthermore, the Court rejected the Council's submission that the 2014 Consent Orders ought to be set aside on the grounds of illegality, irregularity or for being contrary to public policy because they exceeded the Court's jurisdiction. The making of the 2014 Consent Orders demonstrated that it had reached a state of satisfaction that those orders remedied the alleged 2014 breaches of the EPA Act so as to enliven s 124 of that Act: at [332]. Additionally, there was no basis for finding illegality and there were discretionary factors weighing against setting aside the 2014 Consent Orders, including prejudice to Verde Terra: at [334]-[359];

(4) The doctrines of issue and *Anshun* estoppel and *res judicata* were applicable to the 2014 Consent Orders because those orders operated *in personam* and *in rem*, and the Council was not acting as a statutory authority in seeking to set aside the 2014 Consent Orders: at [366]-[401]. The Council was therefore estopped from seeking to set aside the 2014 Consent Orders because Verde Terra acted in detrimental reliance to fulfil those orders: at [440]-[441];

(5) For the purposes of cl 35 of Sch 3 of the EPA Regulation, the phrase "existing or approved" development referred to the development approved by the 1998 consent and did not extend to actual works carried out on the land subsequent to the making of the 2014 Consent Orders: at [450]-[463]; and

(6) No further development consent beyond that embodied by the 2014 Consent Orders was required for Verde Terra to lawfully carry out the works contemplated by those orders: at [551];

Council proceedings:

(7) The impugned decisions to vary the EPL made by the EPA occurred prior to the commencement of r 59.10 of the UCPR. The Court held that r 59.10 did not have retrospective effect, and therefore, that the Council commenced proceedings within time: at [465]-[475];

(8) The Court noted that, given its findings in the VT proceedings, it was not strictly necessary to determine the substantive issues raised in the Council proceedings but addressed the issues raised in those proceedings in the alternative: at [493]-[495];

(9) The EPA submitted that to validly exercise the power contained in s 50(2) of the POEO Act to vary the EPL, the EPA had to elect to vary a licence on its own initiative, not by the initiative of the licenceholder: at [496]-[505]. Verde Terra had submitted variation applications for the impugned EPL variations and, therefore, the variations were invalid because the power in s 50(2) had not been properly enlivened: at [506]-[515];

(9) The invalid conditions of the EPL can be severed because of the application of s 32 of the *Interpretation Act 1987* (NSW) which allowed an instrument to be read down if parts of it are invalid so as to enable the instrument to continue to operate: at [516]-[523]; and

(10) The Council proceedings were therefore dismissed: at [551].

- **Aboriginal Land Claims:**

Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act - 'Gosford 1 & 2' **[2022] NSWLEC 68** (Pain J, Smith AC)

Facts: Darkinjung Local Aboriginal Land Council (**Applicant**) filed two appeals under s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) appealing the refusals by the Minister Administering the Crown Lands Management Act 2016 (NSW) (**Minister**) of two land claims lodged on 2 June 2009. The claimed land comprised Lots 7 and 8 of Section 96 in DP758466. Lots 7 and 8 are located at 143 Henry Parry Drive, Gosford. In 1970, the land was subject to a reserve for the purpose of charitable organisations for which the

reserve manager was Aid Retarded Persons NSW (**ARP**). A workshop was built by ARP for supported employment for disabled persons in about 1970. The use continued until the date of claims. Part of Lot 8 was used, and had always been used, as a driveway to access the workshop on Lot 7. Other entrances to Lot 7 were not used for access at the date of claims because they were impractical, given the arrangement of the workshop, or were unsafe. In 1987, Terama Industries Inc (**Terama**) was registered with NSW Fair Trading and entered into an agreement with ARP, which was in liquidation, to transfer the assets of ARP to Terama. ARP was dissolved in 1995. Terama's occupation of Lot 7 was unlawful because it was not appointed as a reserve manager of Lots 7 and 8 when it took over activities from ARP. At the date of the claims, ARP was still listed as the reserve manager. Terama was registered as a charitable organisation with the Australian Taxation Office at the date of claims.

Issues:

(1) Whether the Minister could establish that, as at the date of claims, any part of Lot 7 was needed, or likely to be needed, for an essential public purpose of "supported employment of disabled persons" and was therefore not "claimable Crown lands" within the meaning of s 36(1)(c) of the ALR Act. This involved the questions:

   (a) whether supported employment for disabled persons is a public purpose;

   (b) if so, whether that public purpose was essential; and

   (c) whether, if so, the land was needed, or likely to be needed, for the essential public purpose relied on; and

(2) Whether the Minister could establish that, as at the date of claims, any part of Lot 8 was needed, or likely to be needed, for an essential public purpose of "supported employment of disabled persons" and was therefore not "claimable Crown lands" within the meaning of s 36(1)(c) of the ALR Act.

Held: Lot 7 and Lot 8 were not claimable Crown land at the date of claims:

(1) There is no statutory basis or authority to limit public purpose to the provision of services for people otherwise directly controlled by the New South Wales Government or provided directly by the New South Wales Government: at [194]. Supported employment for disabled persons contributes to the welfare of the whole society of New South Wales: at [195]. The New South Wales and Commonwealth Governments took responsibility for the provision of supported employment at the date of claims and that it was provided, in this case, by a non-government entity does not mean the purpose was not a public one: at [195]. Terama was a charitable organisation at the date of claims and, while not determinative of whether the purpose was a public one, that answer provided important context by which to assess the matter: at [199]-[213];

(2) The Minister established, through the governmental and intergovernmental policy documents and reports in evidence, that the public purpose was an essential one: at [216];

(3) That the activity on Lot 7 was for a lengthy period before the date of claims was, on one view, a strong indicator that it is needed (required or wanted) at the date of claims: at [222]. The governmental view, formed in 1969-1971, that that land was needed for the claimed essential public purpose, together with the continuous use of Lot 7 for that purpose up to the date of claims, was sufficient to discharge the Minister's onus of proof: at [239];

(4) No statutory obligation to review the use of Crown land existed in the *Crown Lands Act 1989* (NSW) or *Crown Lands Consolidation Act 1913* (NSW): at [225]. Authorities relied on by the Applicant all considered factual circumstances which differed in a fundamental respect, in that the land use relied on by the Minister as needed, or likely to be needed, was not occurring on the land at the date of claims: at [233]. The use of the land was consistent with the reservation of Lot 7 for charitable organisations in 1970. In these circumstances the application of cases which considered whether a proposed use was sufficiently seriously considered within the New South Wales Government at or near the date of claims was limited: at [233]. The text and context are plain in s 36(1)(c) of the ALR Act that lawfulness is not relevant to the inquiry under that subsection: at [248];

(5) The Minister established that Lot 7 was not claimable Crown land at the date of claims as it was needed for the essential public purpose of provision of supported employment for disabled persons: at [250]; and

(6) The Minister established that the part of Lot 8 used as the driveway access into the workshop on Lot 7 was not claimable Crown land at the date of claims as it was needed for the essential public purpose of provision of supported employment for disabled persons: at [288]. One potential access could not be used by trucks as to do so would be unsafe and not permitted by the relevant road regulations: at [285]. The use of another access was untenable on the evidence given the operation of the workshop: at [286]. The use of Lot 8

where the driveway was located meant that at the date of claims it was needed for safe access and as a matter of utility and therefore for the essential public purpose claimed: at [287].

- **Section 56A Appeals:**

Cai v Fairfield City Council **[2022] NSWLEC 58** (Preston CJ)

Facts: Mr Wei Cai and Mrs Xi Ma (**Appellants**) erected an unlawful building in the rear yard of their property without obtaining development consent. Fairfield City Council (**Council**) gave a development control order under s 9.34(1)(a) and Pt 1 of Sch 5 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to the Appellants. The order was a Demolish Works Order (**DWO**) under Item 3 of the table in Pt 1 of Sch 5 and required the Appellants to demolish the building. The Appellants appealed to the Land and Environment Court (**Court**) under s 8.18(1) of the EPA Act against the DWO. The appeal was heard and determined by Acting Commissioner Bradbury in *Cai v Fairfield City Council* [2021] NSWLEC 1657. The Acting Commissioner modified the DWO to replace the words "granny flat" wherever appearing with the words "secondary dwelling" and to, in effect, make the operation of the order for demolition of the building conditional on the Appellants not obtaining development consent for the use of the secondary dwelling and a building information certificate in relation to the secondary dwelling. The Appellants appealed under s 56A(1) of the *Land and Environment Court Act 1979* (NSW) against the decision and orders of the Commissioner on a question of law. The Appellants were represented by their son, acting as their agent.

Issues:

(1) Whether the Acting Commissioner erred in not finding that the DWO was given in breach of the required process for giving a development control order (**Process Ground**);

(2) Whether the Acting Commissioner erred in finding on the evidence before the Court that the building was being used as a secondary dwelling (**Evidence Ground**); and

(3) Whether the Acting Commissioner erred in modifying the DWO to refer to "secondary dwelling" rather than "granny flat" and to require the Appellants to obtain development consent to use the building as a secondary dwelling and a building information certificate in relation to the secondary dwelling in order to avoid demolishing the building (**Secondary Dwelling Ground**).

Held: Appellants did not establish any ground of appeal; appeal dismissed with costs:

(1) In regard to the Process Ground, the Court held that the Appellants did not establish that the Acting Commissioner erred on a question of law in not finding that the Council had given the DWO in breach of the required statutory process or the rules of procedural fairness. The Acting Commissioner's findings that the Council did comply with the statutory requirements in Sch 5 of the EPA Act and the rules of procedural fairness were findings of fact that were open to the Acting Commissioner on the evidence. Accordingly, no error of law was demonstrated: [8]-[29];

(2) In regard to the Evidence Ground, the Court found that the Appellants did not establish that the Acting Commissioner erred on a question of law in finding that the building was a "dwelling" within the meaning of the definition in the Fairfield Local Environmental Plan 2013 (**FLEP 2013**). The Court gave two reasons for its finding. First, the Acting Commissioner's finding was one of fact and had a foundation in the evidence. Even if it were to be incorrect, no error of law arises. Second, the Acting Commissioner did not find that the building was actually occupied or used as a separate domicile, only that it was capable of being occupied or used in this way. This meant that the building still fell within the second limb of the definition of "dwelling" in the FLEP 2013. The Acting Commissioner did not err on a question of law in making this finding as, again, this was a finding of fact open to the Acting Commissioner on the evidence: [30]-[40]; and

(3) In regard to the Secondary Dwelling Ground, the Court did not consider that the Acting Commissioner's modification of the DWO to refer to "secondary dwelling" raised an error of law. This was for three reasons. First, the Acting Commissioner framed the modification of the DWO to give effect to his factual finding that the building was a secondary dwelling. Even if that finding was incorrect, that would be an error of fact, not law. Second, the replacement of the words "granny flat" with the words "secondary dwelling" did not make compliance with the DWO impossible. The operation of the DWO did not depend on the description of the structure. The structure still had to be demolished, irrespective of whether it was a secondary dwelling or something else. In this respect, the Acting Commissioner did not err in law in framing the DWO in this way. Third, merely because the result of the Acting Commissioner's modification was unwanted and costly for the Appellants, if complied with, did not cause the DWO to be erroneous in law. The Acting Commissioner

decided that the only circumstance in which the building should not be demolished was if the Appellants obtained development consent to use the building as a secondary dwelling and a building information certificate in relation to the secondary dwelling. Again, that was a finding of fact and, even if it were to be incorrect, it would not raise an error of law: [41]-[62].

- **Interlocutory Decisions:**

Secretary, Department of Planning, Industry and Environment v Edenmore Farms Pty Ltd; Keelendi Farms Pty Ltd; T J O'Brien Investments Pty Ltd; O'Brien **[2022] NSWLEC 63** (Robson J)

Facts: Edenmore Farms Pty Ltd and Keelendi Farms Pty Ltd (as registered owners of the property), T J O'Brien Investments Pty Ltd (operator of farming on the land) and Mr O'Brien (the director of all three corporate entities) (jointly, **Defendants**) were charged with the alleged unauthorised clearing of native vegetation on property near Pilliga, New South Wales in 2017 and 2018. By Notice of Motion, filed 25 March 2022, the Defendants sought to vacate the 12 discrete proceedings set down for hearing for 10 days from 11 July 2022 on the primary basis that the Prosecutor's evidence, to which the Defendants required time to respond, was "voluminous"; that flooding events in South Wales, between November 2021 and February 2022, had made it difficult for the Defendants' expert to attend the property, which is spread across some 4,000 hectares; and that the Defendants' expert would require until August 2022 to prepare a report.

Issue: Whether the Land and Environment Court should exercise its discretion to vacate the hearing dates.

Held: Notice of Motion dismissed:

(1) The existence of rain and flooding from November 2021 to February 2022 provided little explanation as to why the Defendants had not undertaken any preparation of their evidence prior to November 2021: at [43];

(2) There was no reasonable explanation for the Defendants' delay in retaining experts eight months after proceedings had been commenced where the Prosecutor's evidence had been available for over 12 months: at [44]-[45];

(3) If the hearing dates were vacated, the next available hearing dates would be 12 months away and court time had been allocated already to these proceedings to the detriment of other parties seeking hearing dates: at [46];

(4) The Defendants' delay was significantly due to its expert's other professional consulting commitments and not solely due to the weather, and those commitments could not be a compelling reason to vacate the 12 proceedings; and, moreover, there was no evidence as to the availability or otherwise of alternative experts: at [47]-[49]; and

(5) Although not determinative, is was not persuasive that it took some time for the Prosecutor to marshal its evidence where it had been provided to the Defendants 12 months ago; and the Defendants had made a forensic decision to delay their preparation of evidence to pursue an argument regarding the two-year limitation period: at [50]-[51].

The Next Generation Pty Ltd v Independent Planning Commission **[2022] NSWLEC 16** (Robson J)

(related decisions: *The Next Generation Pty Ltd v Independent Planning Commission* [2020] NSWLEC 70 (Pain J); *The Next Generation Pty Limited v Independent Planning Commission* [2020] NSWLEC 13 (Moore J); *The Next Generation Pty Limited v Independent Planning Commission (No 2)* [2020] NSWLEC 16 (Moore J))

Facts: On 28 April 2015, The Next Generation Pty Ltd (**Applicant**) lodged State Significant Development Application SSD 6236 (**SSDA**) and an Environmental Impact Statement (later amended) (**EIS**) for the construction and operation of an energy from waste facility (**EfW facility**) at Honeycomb Drive, Eastern Creek. The SSDA was refused by the Independent Planning Commission (**IPC**) and, on 14 January 2019, the Applicant commenced Class 1 proceedings pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) appealing against the IPC's refusal. In earlier decisions by the Land and Environment Court (**Court**), Blacktown City Council (**Council**) and Jacfin Pty Ltd (**Jacfin**) were joined as parties to the proceedings. By Notice of Motion filed 16 July 2021, the Applicant sought leave to rely on material amending the SSDA (**amended material**) which it contended responded to issues raised by the Respondents and specifically removed "floc" waste as a feedstock for the EfW facility. At the hearing of the motion, the IPC did not oppose the order sought by the Applicant and maintained that it was appropriate for the Court to grant the relief sought.

Issues:

(1) Whether the role of the IPC as consent authority for the purposes of (then applicable) cl 55 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**) endures where it had refused the SSDA; and

(2) Whether the amended material included sufficient particulars to indicate the nature of the changed development as required by (then applicable) cl 55 of the EPA Regulation.

Held: Leave granted to Applicant to amend the SSDA:

(1) The IPC, having refused the SSDA, maintained its function as consent authority to provide agreement to the amendment pursuant to cl 55 of the EPA Regulation because the SSDA had not been (finally) "determined" in circumstances where an appeal is pending; however, where the IPC (and Council and Jacfin) fully participated in the hearing and maintained that it was not offering its agreement as consent authority to the amended material, it was appropriate for the Court to determine the motion through s 39(2) of the *Land and Environment Court Act 1979* (NSW): at [96]-[97]; and

(2) The proposal had not been changed in any material sense, in that the only material change was the deletion of "floc" waste as a feedstock for the EfW facility; the particulars were sufficient to indicate the nature of any change to the proposed development, in that the authors of the amended material provided discrete and direct comments addressing the earlier reports within the EIS regarding the proposed deletion of "floc" waste; and it was appropriate to make the orders sought, noting that the Respondents raised other concerns (including the impact of delay on the proposal's compliance with the present statutory and policy framework) which, although they may be relevant to the merits hearing, were insufficient as independent discretionary grounds to refuse the relief sought in the motion: at [113], [121], [123], [128]-[136], [138].

- **Procedural Matters:**

Evidence:

***Environment Protection Authority v ACE Demolition & Excavation Pty Ltd* [2022] NSWLEC 44** (Moore J)

(related decision: *Environment Protection Authority v Allam* [2021] NSWLEC 103 (Moore J); *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd; Allam* [2022] NSWLEC 45 (Moore J))

Facts: ACE Demolition & Excavation Pty Ltd (**ACE**) was contracted by developers to carry out certain excavation works and to remove waste generated by those excavation works. The Environment Protection Authority (**Prosecutor**) laid four charges against **ACE** under s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) arising from the alleged provision of false or misleading information to other persons in the course of dealing with waste. The Prosecutor sought to rely on three e-mails sent to waste disposal facilities by Mr Bachar Allam (**Bachar**), an ACE employee, each of which attached a waste classification certificate (**certificate**) originally issued by Environmental Investigations Australia Pty Ltd (**EIA**). This certificate classified the waste materials likely or actually found at a Wolli Creek construction site at which ACE provided its services (**Wolli Creek Premises**). The front page of the EIA-issued certificate recorded "virgin excavated natural material (VENM) containing potential acid sulphate soils". The certificate attached to Bachar's e-mails had been modified to omit reference to the potential acid sulphate soils. The Prosecutor sought to rely on this evidence to show that ACE had a tendency "to supply information about waste to another person in the course of dealing with the waste, which information was false or misleading in a material respect" (**"asserted tendency"**). The Prosecutor sought an advance evidentiary ruling pursuant to s 192A of the *Evidence Act 1995* (NSW) (**Evidence Act**) that the three e-mails attaching the certificate were admissible as tendency evidence.

Issues:

(1) Whether the information conveyed about waste was false or misleading in a material respect, as required by ss 144AA(1)-(2) of the POEO Act;

(2) Whether the evidence at issue had significant probative value (s 97(1)(b) of the Evidence Act);

(3) Whether the probative value of the evidence at issue outweighed the danger of unfair prejudice to ACE (ss 101(2) and 137 of the Evidence Act), or was substantially outweighed by the danger of unfair prejudice to ACE (s 135(a) of the Evidence Act); and

(4) Whether the probative value of the evidence at issue might have caused or resulted in undue waste of time (s 135(c) of the Evidence Act).

Held: Prosecutor permitted to rely upon evidence of three e-mails sent by Bachar attaching the certificate as demonstrating that ACE had the "asserted tendency"; limitation imposed pursuant to s 136(a) of the Evidence Act to preclude the evidence from being used to prove knowledge of the falsity of information conveyed for the purposes of any charges laid pursuant to s 144AA(2) of the POEO Act:

(1) The alteration to the certificate rendered it "false" as a matter of fact. Furthermore, it was appropriate to take the Prosecutor's case at its highest and assume that the information conveyed about waste was false "in a material respect", this being a mandatory precondition of proving offences under s 144AA of the POEO Act. The removal of the words "potential acid sulphate soils" could be assumed to have rendered the certificate misleading or deceptive in a material respect when transmitted to a third party, the presence of acid sulphate soils being a matter of considerable relevance and importance for the disposal of waste. The requirement in s 97(1)(b) of the Evidence Act was satisfied: at [117]-[124];

(2) Taking the Prosecutor's case at its highest, the evidence sought to be relied on by the Prosecutor could be viewed as demonstrating that:

(a) for the single charge against ACE of a breach of s 144AA(1) of the POEO Act, each of the elements necessary to be proved against ACE concerning the behaviour of an employee said to found that charge was present in the behaviour of Bachar in the three instances relied upon to establish the "asserted tendency"; and

(b) for the three charges against ACE pursuant to s 144AA(2) of the POEO Act, the behaviour of Bachar relied upon by the Prosecutor as demonstrating the "asserted tendency" lacked the mental element required to prove the offence, namely, that the employee must have had actual knowledge that the information that had been conveyed to a third party was false. The "asserted tendency" could rationally affect the assessment of the probability of the evidence demonstrating the existence of facts in issue in the trial of the charges against ACE. However, the "asserted tendency" could not be relied upon to support the *mens rea* element of the offences charged pursuant to s 144AA(2) of the POEO Act: at [125]-[137];

(3) With respect to the application of s 101(2) of the Evidence Act, the three e-mails attaching the certificate had significant probative value that was not outweighed by any prejudice to ACE of admitting that evidence. Because the trial of ACE would have been heard by a judge alone, the risk of the trial judge not having proper regard to necessary issues of reliability and credibility in assessing the probative value to be accorded to the "asserted tendency" was minimal and not one which would have given rise to any potential unfair prejudice to ACE. For a similar reason, there was no risk of misuse of the "asserted tendency" in a fashion which would have caused prejudice to ACE in the fashion postulated by ss 135(a) and 137 of the Evidence Act: at [138]-[142]; and

(4) The limitation imposed pursuant to s 136(a) of the Evidence Act would likely have removed any necessity of ACE engaging in collateral enquiries resulting in undue waste of time. Foundational forensic work already conducted for ACE did not provide a basis for excluding the "asserted tendency" evidence under s 135(c) of the Evidence Act: at [143]-[145].

***Environment Protection Authority v ACE Demolition & Excavation Pty Ltd; Allam* [2022] NSWLEC 45** (Moore J)

(related decision: *Environment Protection Authority v Allam* [2021] NSWLEC 103 (Moore J); *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd* [2022] NSWLEC 44 (Moore J))

Facts: ACE Demolition & Excavation Pty Ltd (**ACE**) had been contracted by developers to carry out certain excavation works and to remove waste generated by those excavation works. The Environment Protection Authority (**Prosecutor**) laid four charges against ACE under s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) arising from the alleged provision of false or misleading information to other persons in the course of dealing with waste. On 6 September 2021, pursuant to orders made by the Land and Environment Court on 25 August 2021, the Prosecutor served two spreadsheets on ACE's legal representatives containing 1,692 messages proposed to be relied on for non-tendency evidentiary purposes (**additional messages**). One spreadsheet contained text messages and the other contained WhatsApp conversations, all of which had been retrieved from the mobile phone of Mr Sami Allam (**Allam**), ACE's sole director, shareholder and CEO. For this judgment, the disputed text messages and WhatsApp

conversations requiring consideration were those grouped, by the Prosecutor, in Categories N, O, P, and Q, being messages with respect to:

- (N) Allam's interest in reducing costs;
- (O) Mr Munaf Al Sarray's (**Al Sarray's**) role and responsibilities in ACE and Allam's knowledge of Al Sarray's role and responsibilities;
- (P) Mr Ameer Sidawi's (**Sidawi's**) role and responsibilities in ACE and Allam's knowledge of Sidawi's role and responsibilities; and
- (Q) Sidawi's role in altering weighbridge disposal dockets and Allam's constructive knowledge in relation to the supply of false or misleading information about waste.

ACE and Allam (**Defendants**) filed a Notice of Motion seeking advance evidentiary rulings pursuant to s 192A of the *Evidence Act 1995* (NSW) (**Evidence Act**) that the additional messages:

- were inadmissible or liable to exclusion on discretionary grounds; and
- alternatively were inadmissible against Allam, pursuant to s 212(3) of the POEO Act.

In relation to the first point above, the Defendants advanced four bases for inadmissibility or exclusion, namely, that the evidence was irrelevant, that the evidence was hearsay, that no tendency notice had been issued by the Prosecutor for certain messages that could only be relevant for tendency purposes, and that the evidence could be excluded under ss 135 or 137 of the Evidence Act.

Issue: Whether the evidence in contention was inadmissible or otherwise liable to exclusion.

Held: Determinations made in relation to the admissibility of evidence in contention; parties directed to settle orders reflecting determinations made by the Court; in light of this decision and that of *Environment Protection Authority v Allam (No 2)* [2022] NSWLEC 7; parties directed to settle orders with respect to the admissibility of messages in two further Categories J and K, or otherwise attend a short supplementary hearing concerning the orders needed to give effect to the two judgments:

(1) At the broad level of generality appropriate to be considered at the pre-trial stage, the four matters said to be demonstrated by the text messages or WhatsApp conversations assigned to Categories N, O, P, and Q were matters sufficiently potentially relevant to the charges which had been laid against ACE and/or Allam. The extent to which the messages would contribute to establishing the truth of a fact in issue with respect to the charges was a matter for consideration at trial: at [74]-[76];

(2) All messages and conversations in Category N were capable of demonstrating Allam's interest in reducing costs, with the exception of one WhatsApp message identified in "item 45" ("items" being groups of messages within categories), which was confined to an issue of debt recovery: at [82]-[87];

(3) All Category O WhatsApp conversations from 1 September 2016 onwards, together with five specific messages in "item 196", were appropriate to demonstrate what was proposed by the Prosecutor for Category O: at [88]-[102];

(4) All text message conversations, and the five WhatsApp conversations from Category O, could also be regarded as demonstrating what was proposed by the Prosecutor for Category P: at [103]-[110];

(5) The text message exchange in Category Q was rejected for the purpose of demonstrating what was proposed by the Prosecutor for Category Q. There were other potential interpretations of the text message exchange other than that proposed by the Prosecutor: at [111]-[121]; and

(6) Because the trial of the Defendants was to be heard by a judge alone, there was no risk of misuse of the categories of text messages and WhatsApp conversations and what they were said to demonstrate in a fashion which would have caused unfair prejudice to the Defendants as required to be considered by ss 135(a) and 137 of the Evidence Act. Furthermore, the consideration and addressing of the various text messages and WhatsApp conversations would not be so time-demanding as to require discretionary exclusion pursuant to s 135(c) of the Evidence Act: at [122]-[135].

***Environment Protection Authority v Allam (No 2)* [2022] NSWLEC 7** (Moore J)

(related decision: *Environment Protection Authority v Allam* [2021] NSWLEC 103 (Moore J); *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd* [2022] NSWLEC 44 (Moore J); *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd; Allam* [2022] NSWLEC 45 (Moore J))

Facts: ACE Demolition & Excavation Pty Ltd (**ACE**) was contracted by developers to carry out certain excavation works and to remove waste generated by those excavation works. ACE was contractually obliged to account to the developers for the removal of the waste, which was typically done by providing copies of

weighbridge disposal tickets, spreadsheets, or summaries of waste disposal. The Environment Protection Authority (**Prosecutor**) had laid four charges against ACE under s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) arising from the alleged provision of false or misleading information to other persons in the course of dealing with waste. Mr Sami Allam (**Allam**) was the sole director, sole shareholder, and CEO of ACE. The Prosecutor had also laid three executive liability charges against Allam for offences under s 169A the POEO Act. The Prosecutor served a notice upon Allam pursuant to s 97(1)(a) of the *Evidence Act 1995* (NSW) (**Evidence Act**) of its intention to rely on 16 groups of text messages to or from Allam which were said to establish a tendency to promote a culture, practice, and/or system of work in ACE which involved dishonesty and deception when supplying information to other people in the course of dealing with waste (**"asserted tendency"**). Nine of the groups of messages were said to have demonstrated that Allam directly instructed or encouraged employees to convey false information concerning waste (**"dishonesty" groups**). The remaining seven groups of messages were said to have demonstrated instances in which Allam gave instructions to employees to tell the truth as to how waste should be described, thus giving rise to the inference that there had been an established practice of dishonesty (**"dishonesty inferred" groups**). Both the Prosecutor and Allam sought advance evidentiary rulings pursuant to s 192A of the Evidence Act. The Prosecutor filed a Notice of Motion seeking a ruling that the text messages were admissible as tendency evidence. Allam filed a Notice of Motion seeking to have the material upon which the Prosecutor proposed to rely for the "asserted tendency" rejected on the basis that it did not have significant probative value, and thus failed to satisfy the test in s 97(1)(b) of the Evidence Act or, alternatively, if certain text messages satisfied that test, the evidence nonetheless warranted exclusion under:

- s 101(2) as its probative value did not outweigh the danger of unfair prejudice to Allam; and/or
- s 135 as its probative value was substantially outweighed by the danger that it might have been unfairly prejudicial to Allam, or might have caused or resulted in undue waste of time; and/or
- s 137 as its probative value was outweighed by the danger of unfair prejudice to Allam.

Issues:

(1) Whether each of the 16 groups of text messages were admissible as tendency evidence;

(2) If the text messages were admissible as tendency evidence, whether the text messages could have been excluded pursuant to ss 101(2), 135, or 137 of the Evidence Act; and

(3) If the text messages were inadmissible as tendency evidence, whether the Prosecutor could have sought to rely on the text messages for the non-tendency purpose of proving Allam's constructive knowledge of the relevant offences pursuant to s 169A(2)(c)(1) of the POEO Act.

Held: Determinations made in relation to the admissibility of evidence; parties directed to settle orders reflecting determinations made by the Land and Environment Court (**Court**) or, if they failed to do so, have the matter brought back to the Court for determination of any dispute concerning the necessary orders:

(1) The text messages relied on by the Prosecutor as supporting the "asserted tendency" were not incapable of doing so merely by reason of the fact that they formed only a small proportion of the thousands of text messages retrieved from Allam's mobile telephone, nor were they incapable of providing a basis for founding the "asserted tendency" when viewed solely as a proportion of the number of messages exchanged between Allam and his employees: at [190]-[203];

(2) Six of the nine "dishonesty" groups of text messages were capable of demonstrating that Allam had the "asserted tendency", and three groups were not: at [221]-[271];

(3) When considered in a context confined to, and framed by, only those six groups of text messages mentioned above, the Court was satisfied that the "asserted tendency" was not cast in such a wide fashion as to have been incapable of having significant probative value, nor did the "asserted tendency" lack precision: at [187]-[188];

(4) None of the seven "dishonesty inferred" groups of text messages were capable of establishing that Allam had the "asserted tendency": at [272]-[323];

(5) With respect to the application of s 101(2) of the Evidence Act to the six groups of messages noted in (2) above, the tendency they demonstrated had significant probative value that was not outweighed by any prejudice to Allam of admitting those messages as evidence for the "asserted tendency". Because the trial of Allam would have been heard by a judge alone, the risk of the trial judge not having proper regard to necessary issues of reliability and credibility in assessing the probative value to be accorded to the "asserted tendency" was minimal and not one which would have given rise to any potential unfair prejudice to Allam. For a similar reason, there was no risk of misuse of the "asserted tendency" in a fashion which would have caused prejudice to Allam in the fashion postulated by ss 135 and 137 of the Evidence Act: at [329]-[336]; and

(6) With respect to the Prosecutor's proposal that certain groups of messages should have been admitted for a non-tendency purpose, the Prosecutor was permitted to seek to rely on only those groups of messages that were also found to have supported the "asserted tendency". Those six groups of text messages were potentially capable of demonstrating the Allam ought to have known that offences which ACE has been charged might be committed. All other text messages could not have been regarded as going to the proof of any fact in issue in the proceedings against ACE or Allam: at [370]-[382].

Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd (No 4) **[2022] NSWLEC 57** (Pain J)

Facts: The Secretary, Department of Planning and Environment (**Prosecutor**) was prosecuting Namoi Valley Farms Pty Ltd (**Defendant**) for an offence against s 12 of the now repealed *Native Vegetation Act 2003* (NSW). The Prosecutor had sought to adduce evidence of representations made by a witness, who had recently deceased, under s 65 of the *Evidence Act 1995* (NSW) (**Evidence Act**), which provides an exception to the hearsay rule in criminal proceedings if the maker of a representation is not available. The Prosecutor sought to rely on a notice issued under s 67(1) of the Evidence Act (**s 67 notice**), issuance of which enlivens the power in s 65. In *Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd (No 3)* [2022] NSWLEC 54, Pain J held that the application to rely on the s 67(1) notice was not defeated by the fact that it was made during the hearing given the recent death of the witness. Pain J also held that s 65(2)(a) applied to the witness because his responses to the authorised officer during an oral interview which was recorded and his written responses to questions in a statutory notice were made under a duty to make a representation of that kind. An invoice from the witness to the Defendant for farming work performed was allowed. Representations arising from maps put to the witness during his Record of Interview (**ROI**) were not allowed to be adduced. The judgment ruled further on the admissibility of representations referred to in the s 67 notice.

Issue: Whether admission of the evidence of the representations referred to in the s 67 notice would give rise to the danger of unfair prejudice to the Defendant which outweighed their probative value such that the trial judge must refuse to admit the evidence under s 137 of the Evidence Act.

Held: Motion dismissed:

(1) Where a judge-alone trial is held, admission of evidence may be considered less likely to be prejudicial than if a jury trial is being held. That cross-examination is not available alone does not render the evidence unfairly prejudicial, given the exceptions to the hearsay rule under the Evidence Act. Factors to consider include the nature and importance of the evidence and the issue it relates to, and the probative value of the evidence upon which there cannot be cross-examination, in light of the ability of the judge to take into account the absence of cross-examination: at [30];

The representations based on the statutory notice dated 22 July 2019

(2) The representations in part of the s 67 notice fairly reflected what the statutory notice and response contained. No unfair prejudice arose from the admission of these paragraphs: at [32];

The representations based on the ROI on 6 August 2022

(3) A number of paragraphs containing representations by the witness were admitted as they fairly reflected the transcript of the ROI and did not contain any references to maps, which evidence was not admitted: at [39];

(4) The Prosecutor did establish that the witness did work on the Defendant's property by reference to numerous lots, not in relation to areas of interest and representations to that effect were admitted: at [42]; and

(5) Other paragraphs did fairly reflect the evidence relied on and could be admitted in light of their potential probative value and the absence of danger of unfair prejudice: at [45]. The Defendant could make submissions as to the weight to be given to the representations based on the criticisms made: at [45].

Application to Vary Orders:

J.K. Williams Staff Pty Limited v Sydney Water Corporation (No 3) **[2022] NSWLEC 17** (Preston CJ)
(related decision: *J.K. Williams Staff Pty Limited v Sydney Water Corporation (No 2)* [2021] NSWLEC 72 (Preston CJ))

Facts: On 8 July 2021, in *J.K. Williams Staff Pty Limited v Sydney Water Corporation (No 2)* [2021] NSWLEC 72, the Land and Environment Court (**Court**) made an order that Sydney Water Corporation (**Sydney Water**) pay J.K. Williams Staff Pty Limited's (**Williams**) "costs of and incidental to these proceedings on the ordinary basis as agreed or as assessed, including the costs of and incidental to the Notice of Motion filed and served by Sydney Water on 29 April 2021". On 19 November 2021, Williams applied, by Notice of Motion, to the Court for an order under s 101(5) of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**) varying the date from which interest was to be calculated on the amount payable under the costs order to be the date of payment of each amount of costs rather than the date of the costs order.

Issue: Whether the Court had power to vary the date from which interest on costs was to be calculated.

Held: Dismissing the motion:

(1) The Court's order that Sydney Water pay Williams' costs determined Williams' claim for interest on costs, as the making of the order triggered the operation of ss 101(4) and (5) of the Civil Procedure Act. Sections 101(4) and (5) operated to determine the claim for interest on costs as s 101(4) set a default position that interest on costs was payable, and s 101(5) operated to determine that interest was to be calculated at the prescribed rate pursuant to r 36.7 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) and from the date of the costs order. Accordingly, no aspect of the claim for interest on costs was left undetermined: at [24], [26], [27];

(2) The default operation of ss 101(4) and (5) in this way could only be varied by an affirmative step of the Court to order otherwise. The Court no longer needs to make a positive order that interest on costs be payable. This reversed the position prior to the amendment of the Civil Procedure Act in 2015: at [22], [23], [25];

(3) Williams' application to vary the date from which interest on costs was to be calculated was an application for the Court to set aside or vary the costs order in two ways. First, it sought to vary the date from which interest on the amount payable under the costs order was to be calculated from the default date of the date of the costs order to another date. Second, by varying the date from which interest was to be calculated, Williams' application changed the operation of the costs order by varying how interest on the amount payable under the costs order was to be calculated and hence the amount of interest payable. If the amount of interest is varied, the amount payable under the costs order is also varied. Williams' application was accordingly out of time as it was made after the 14-day period for setting aside or varying a judgment or order allowed for by r 36.16(3) of the UCPR: at [32]-[35]; and

(4) Even if the Court had power to vary the date from which interest on costs was to be calculated, the Court would not have made that order in the exercise of its discretion as Williams' application was delayed, Williams did not advance any explanation for this delay and Williams did not establish that it would suffer prejudice if the Court were not to make the order [37]-[54].

Karmel Property Trust trading as Karmel & Co Pty Ltd v Inner West Council **[2022] NSWLEC 30** (Preston CJ)

Facts: On 25 March 2019, Karmel Property Trust (**Applicant**) filed an appeal against a development control order issued by Inner West Council (**Council**) in relation to its building works (**2019 DCO**). The 2019 DCO required the Applicant to audit the building's compliance with the Building Code of Australia and undertake specified fire safety works. On 5 August 2020, the Land and Environment Court (**Court**) was informed by the Applicant and the Council that the 2019 DCO had been complied with. The Applicant filed a Notice of Discontinuance on 12 August 2020, as there was no utility in continuing to a hearing of the proceedings. The Council purported to consent to the proceedings being discontinued on terms that the Applicant undertake to comply with "Development Control Order dated 5 August 2020" (**2020 DCO**). The 2020 DCO was a different and later development control order to the 2019 DCO and required the Applicant to carry out other building rectification works, fire safety upgrade works and access works. By Notice of Motion filed on 17 March 2022, the Applicant sought to vary the terms and operation of the 2020 DCO as if the 2019 DCO proceedings had not been discontinued. However, before the Court could make any such orders,

the Applicant would have to apply by Notice of Motion to the Court to set aside the discontinuance of the 2019 DCO proceedings.

Issue: Whether the Court should set aside the discontinuance of the 2019 DCO proceedings if such an application were to be made by the Applicant.

Held: There is no utility in the Court setting aside the discontinuance of the 2019 DCO proceedings:

(1) The Applicant's Notice of Motion sought to vary the terms and operation of the 2020 DCO. Even if the Court were to set aside the discontinuance, the subject matter of the appeal would remain the 2019 DCO. As the Applicant never appealed against the 2020 DCO, any determination by the Court of the revived appeal could only concern the 2019 DCO. The Court would accordingly have no power to make the orders sought as the 2020 DCO is not the subject of the proceedings: [13], [15], [19];

(2) Even if the discontinuance were to be set aside, the reason for the discontinuance would still remain. That is, the Applicant had already complied with the 2019 DCO so there would be no utility in the Court determining the Applicant's appeal against the 2019 DCO. The Court would have no power in the revived proceedings to make any order in relation to the 2020 DCO. The Court would only have such power in fresh proceedings brought by the Applicant to appeal against the 2020 DCO: [16]-[19]; and

In making its decision, the Court noted:

(3) The Council's purported term of consent to the 2019 DCO proceedings being discontinued, that the Applicant undertake to comply with the 2020 DCO, was irregular and not able to be imposed as a term of the Council consenting to the discontinuance as it did not relate to the proceedings. Further, the 2020 DCO already had the force of law as the Applicant was required by the *Environmental Planning and Assessment Act 1979* (NSW) to comply with the 2020 DCO: [9]-[10], [13].

- **Costs:**

***Friends of Gardiner Park Inc v Bayside Council (No 2)* [2022] NSWLEC 61** (Preston CJ)

(related decisions: *Friends of Gardiner Park Inc v Bayside Council* [2020] NSWLEC 176 (Pepper J); *Friends of Gardiner Park Inc v Bayside Council* [2022] NSWLEC 22 (Preston CJ))

Facts: Friends of Gardiner Park Inc (**Friends**), a community action group, was unsuccessful in proceedings to judicially review the decision of Bayside Council (**Council**) to upgrade the sports fields in Gardiner Park (*Friends of Gardiner Park Inc v Bayside Council* [2022] NSWLEC 22). The Council sought an order that the Friends pay its costs of the proceedings. Alternatively, the Council sought a limited costs order that the Friends pay the Council's costs of the unsuccessful application for an interlocutory injunction to restrain the carrying out of the upgrade works (*Friends of Gardiner Park Inc v Bayside Council* [2020] NSWLEC 176). The Friends submitted that the Land and Environment Court (**Court**) should exercise its discretion under r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) not to make an order for the payment of costs in relation to the proceedings or the application for interlocutory injunctive relief.

Issues:

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

(2) If so, whether the Court should make an order for the payment of costs against the Friends in relation to the proceedings generally or the unsuccessful application for interlocutory injunctive relief.

Held: The proceedings were brought in the public interest; an order for the payment of costs against the Friends should not be made in relation to the proceedings generally, but should be made in relation to two of the three days of the hearing of the unsuccessful application for interlocutory injunctive relief:

(1) In deciding whether the proceedings have been brought in the public interest, the Court ordinarily will look for something more than the unsuccessful applicant's bare assertion that the proceedings were brought in the public interest. Courts have identified various considerations or factors that indicate that proceedings have been brought in the public interest. They include the five considerations identified by Lloyd J in *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365; [2004] NSWLEC 434 and the five factors identified by Preston CJ in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280; [2010] NSWLEC 59. In the circumstances of this case, the Court was satisfied that the proceedings were brought in the public interest as, among other reasons, the proceedings sought to enforce public law obligations to ensure the protection of the environment, the litigation involved a significant section of the public, the Friends did not have a pecuniary

interest in a positive outcome of the proceedings, and the Friends brought the litigation to protect the heritage, recreational and amenity values of Gardiner Park: at [8], [41]-[53];

(2) Even though the Friends were unsuccessful in the litigation, the Court did not agree with the Council that the Friends had unreasonably pursued grounds of challenge that had no merit. The Court accordingly did not consider this to be a countervailing consideration that would justify it not exercising the power in r 4.2(1) to decline to make the usual order for costs against the Friends: at [55];

(3) Based on the findings of Pepper J in the application for interlocutory injunctive relief, the Court found that the Friends conducted that application in an unreasonable manner which caused the hearing of the application to be extended from one day to three days. Accordingly, in order to compensate the Council for the increased length and cost of the hearing, the Court ordered the Friends to pay the costs of the second and third days of the hearing of the application for interlocutory injunctive relief: [56]-[58]; and

(4) The Court was satisfied that the proceedings were brought in the public interest and that, except for the Friends' conduct in extending the length of the hearing of the application for interlocutory injunctive relief, there were no countervailing considerations for not departing from the usual costs order. The Court therefore considered it appropriate not to make an order that the Friends pay the Council's costs of the proceedings, with the exception that the Friends pay the Council's costs of the second and third days of the hearing of the application for interlocutory injunctive relief: [59].

Janssen v Qureshi **[2022] NSWLEC 39** (Pain J)

Facts: The Qureshis (**Respondents**) lodged a development application (**DA**) for a two-storey extension which was approved. A modification (**First Modification Application**) was lodged seeking further consent for a single-storey extension. It was approved, subject to a condition which provided for a setback of 900 millimetres from the side boundary. In correspondence, the Applicants made clear that they believed that the condition mandated a 900-millimetre setback for the original two-storey extension, as well as the further one-storey extension. A second modification application (**Second Modification Application**) was lodged on 21 June 2021 seeking clarification of the condition. On 15 July 2021, the construction certificate was issued with plans showing a 900-millimetre setback for the extension approved by the First Modification Application. The Summons, filed by Mr Janssen and Ms Lynch (**Applicants**) without notice on 15 September 2021, sought injunctive and declaratory relief flowing from an alleged inconsistency between the construction certificate and the condition. Under s 6.32 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), proceedings must be brought within three months of the issue of the construction certificate. The Inner West Planning Panel determined the Second Modification Application on 12 November 2021 and amended the condition to clarify that it applied only to the further one-storey extension. The Applicants discontinued proceedings on 25 November 2021. The Respondents sought orders that the Applicants pay their costs on an indemnity or, in the alternative, an ordinary basis and the Applicants submitted that each party should pay their own costs.

Issues:

(1) Where proceedings have been discontinued by the Applicants without a hearing on the merits, whether the Applicants should pay the Respondents' costs of the proceedings or whether costs should be borne by each party, which required deciding:

  (a) whether the Applicants' conduct in commencing proceedings without notice was reasonable in the circumstances;

  (b) whether there was a supervening event; and

  (c) whether the time bar under s 6.32 of the EPA Act made commencing proceedings reasonable; and

(2) If the Applicants were to bear the Respondents' costs, should those costs be paid on an ordinary or indemnity basis.

Held: Applicants ordered to pay the Respondents' costs of the proceedings:

(1) The commencement of the proceedings by the Applicants without notice to the Respondents was unreasonable in the circumstances, as it deprived them of an opportunity to respond with the possibility of avoiding litigation. That no pre-litigation demand was made is relevant when considering costs. The Respondents set out their entire case in a letter dated 6 October 2021 and provided numerous undertakings to delay work immediately after the commencement of proceedings, suggesting that they should have had the opportunity to negotiate before proceedings were commenced: at [64]-[66]. The circumstance that the

Applicants were not provided with the modified condition wording sought in the Second Modification Application was neutral: at [72];

(2) No finding was made on the construction of the condition to determine the prospects of the Applicants succeeding for the purpose of the costs application. Given the construction was not immediately self-evident, the determination of the Second Modification Application can be regarded as a supervening event: at [71];

(3) The Applicants had to commence proceedings by 15 October 2021 in order to preserve their right to challenge the construction certificate, at which date the Second Modification Application was not determined. Far fewer costs would likely have been incurred if the Applicants had delayed commencement until the last day before the time bar expired on 15 October 2021: at [74]; and

(4) The Applicants were ordered to pay costs on an ordinary or party-party basis: at [75]. The circumstances did not give rise to a special or unusual feature warranting a departure from the usual rule that cost orders are payable on the ordinary basis: at [76].

***Lismore City Council v Dajoco Investments Pty Ltd* [2022] NSWLEC 28** (Duggan J)

(related decision: *Lismore City Council v Dajoco Investments Pty Ltd* [2021] NSWLEC 59 (Duggan J))

Facts: In the primary proceedings, Lismore City Council (**Council**) sought declaratory relief and remedial orders against Dajoco Investments Pty Ltd and Darren Coyne (**Respondents**) in relation to three alleged breaches of ss 4.2 and 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) at 71 Union Street, South Lismore (**premises**): (1) the prohibited residential use of the premises; (2) the construction of a deck without development consent; and (3) the installation of a stove at the premises without development consent. Two further claims relating to the construction of a carport and installation of a spa without development consent were withdrawn by Council prior to the commencement of the hearing. Council was partly successful in that the Land and Environment Court (**Court**) ordered the Respondents to cease permitting and using the premises for residential purposes. No orders were made in relation to the other two issues. In these costs proceedings, Council sought, by Notice of Motion, that the Respondents pay Council's costs for the whole of the proceedings, and the Respondents sought that each party pay its own costs, except for a list of particularised items that the Council should be liable to pay.

Issue: Whether it was appropriate to exercise the Court's discretion in relation to costs pursuant to s 98 of the *Civil Procedure Act 2005* (NSW) and apportion costs based on each party's respective success.

Held: Notice of Motion dismissed; Respondents to pay 40% of total costs of proceedings:

(1) Each of the three grounds involved clearly discrete and separable issues and so it was appropriate to review Council's respective success on each issue and apportion costs accordingly: at [50];

(2) As the carport and spa claims were withdrawn prior to commencement and no evidence was heard, it was inappropriate to undertake a merit assessment of the success of those claims: at [51];

(3) In relation to the deck, whilst Council was largely successful in that it was held not to be exempt development, as the part of the issue on which Council was successful - the roof height - took up little time and was admitted by the Respondents, and neither the declaration nor rectification order sought was granted, it was not appropriate for the Respondents to be liable for costs on this issue: at [55]-[56];

(4) Council was unsuccessful on the issue relating to the stove. The issue was discrete and to the extent that it did overlap with the residential use ground, this was as a result of the way Council put its case rather than the nature of the issue as pleaded. It was never disputed that the Second Respondent was residing at the premises and so any evidence relating to the stove's existence facilitating a residential use did not form the basis for the findings. The pursuit of this issue lacked a reasonable basis and the Respondents should not be liable for costs: at [65]-[66]; and

(5) Whilst Council was successful on the residential use ground, the issue was specifically limited to whether the Respondents' caretaker use was ancillary to the commercial use and this aspect of the issue did not take up the bulk of the hearing time. Combined with the fact that Council did not succeed in obtaining its relief as sought, it was not entitled to all its costs on that issue: at [72]-[73].

Lu v Walding (No 3) **[2022] NSWLEC 15** (Pain J)

Facts: This claim concerned costs arising from the Lus (**Applicants**) commencing judicial review proceedings challenging the grant of development consent to their neighbours, the Waldings (**Respondents**), for a garage. Unbeknownst to all parties, including the Third Respondent, Northern Beaches Council (**Council**), the land the subject of the development consent was owned by Council under a road reservation. The grounds of judicial review raised were: That the absence of landowner's consent was an absence of jurisdictional fact (**Ground 1**); that the Council failed to consider a mandatory matter under s 79C of the *Environment Planning and Assessment Act 1979* (NSW) (**Ground 2**); and that the Council's decision was manifestly unreasonable and illogical (**Ground 4**). An additional issue in the proceedings was whether the proceedings should be allowed to continue, despite being commenced well outside the time limit set by r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). In *Lu v Walding (No 2)* (2021) 249 LGERA 1; [2021] NSWLEC 21, Pain J found in favour of the Applicants on Ground 1. No order for demolition of the partly built garage was made. The Applicants sought that all their costs of the proceedings be paid by the Respondents and the Council in equal share. The Respondents sought costs orders against the Applicants and indemnity costs from the date that the Applicants refused their first offer of compromise or *Calderbank* letter (*Calderbank v Calderbank* [1975] 3 All ER 333). The Respondents contended that it might also be appropriate that the Council pay some of their costs. The Council, which filed a submitting appearance save as to costs in the substantive proceedings, submitted that it should not be subject to any costs order and its costs of defending the costs application should be paid by the other parties.

Issue: How the Land and Environment Court (**Court**) should award costs.

Held: Respondents to pay two-thirds of the Applicants' costs of the proceedings as agreed or assessed; Respondents to pay the costs of the costs applications:

(1) In proceedings raising multiple issues in which the Applicants did not succeed on all of them, and where issues are discrete, the Court can consider the apportionment of costs, albeit a strict mathematical approach is not called for: at [137];

(2) The Applicants were successful on the principal legal ground of Ground 1. That the Applicants were unsuccessful on Grounds 2 and 4 did not preclude the Applicants receiving a complete costs order in their favour: at [138];

(3) The Applicants were also successful in asking the Court to exercise its discretion to allow the proceedings to continue despite the time bar: at [139];

(4) The Applicants did not obtain the primary relief sought, being demolition of the development: at [140]-[142]. The Applicants were successful to a significant extent, albeit not achieving the primary relief sought, and there was no relevant disentitling conduct to prevent a partial costs award in their favour: at [148];

(5) The offers of compromise/*Calderbank* offers were not sufficiently clear or failed to provide adequate reimbursement of the Applicants' legal costs and therefore the Applicants' failure to accept them was reasonable: at [154]; AND

(6) The Council should not be liable for any costs as they did not cause costs to be incurred in the course or proceedings: at [158]. The Council was entitled to rely on the plans submitted with the DA and the Statement of Environmental Effects; error in material lodged with a DA is attributable to an applicant and the Council's erroneous records were a secondary explanation for how the unusual circumstances of the case arose: at [159].

- **Merit Decisions (Judges):**

Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council **[2022] NSWLEC 64** (Duggan J)

(related decision: *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143 (Pearlman CJ))

Facts: Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design (**Applicant**) appealed the deemed refusal by Singleton Council (**Council**) of its modification application pursuant to s 4.56 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) (**Modification Application**). The Applicant sought to modify the 1994 development consent and associated conditions (**1994 DC**) granted by the Land and Environment Court (**Court**) in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and*

Singleton Council (1994) 86 LGERA 143 (Pearlman CJ) for the construction of Redbank power plant utilising coal tailings sourced from the adjacent Warkworth and Lemington mines as the source of fuel. Prior to the construction of the power plant, the 1994 DC was modified in March 1997 to limit the source of coal tailings to the Warkworth mine, remove the slurry pipeline, and allow for the use of beneficiated, dewatered tailings over tailings in slurry form as the fuel source. The Redbank power plant ceased operation in October 2014 when an alternate market for coal tailings became viable, rendering the price for coal tailings uncommercial for use. The primary modification proposed in the Modification Application was the introduction of biomass as a supplementary source of fuel for the operation of the power plant, including for up to 100%. The consideration of the merits and determination of the Modification Application only arose if the Modification Application was held to be substantially the same.

Issues:

(1) Whether the development proposed to be modified was substantially the same as the development for which the consent was originally granted (before the 1997 modifications); and

(2) If yes, whether, based on a consideration of the matters referred to in s 4.15(1) of the EPA Act and the reasons given by the Court for the grant of the original consent, the Modification Application should be granted.

Held: No power to grant approval; appeal dismissed:

(1) Whilst the legislative power to modify pursuant to s 4.56 of the EPA Act is beneficial and facultative, the development must remain substantially the same, once amended, as that which was originally approved (in 1994): at [79];

(2) Judicial interpretation of the statutory language of substantially the same favours the formula of it being essentially or materially or having the same essence: at [80];

(3) The 1994 DC did not have the single material or essential purpose of generating power, but rather two interrelated purposes: the disposal of coal tailings; and the consequential generation of electricity from the process of the disposal of the coal tailings: at [88];

(4) The relationship between the mines and the disposal of coal tailings was a fundamental element of the 1994 DC. The maintenance of the ability to burn coal tailings in the Modification Application was an illusory maintenance of the essence of the 1994 DC as it would be at the absolute discretion of the operator whether or not to burn coal tailings, if at all: at [100]; and

(5) The Modification Application would therefore alter the development in such a manner that would lose the essential and material relationship to the disposal of coal tailings and associated mine operations and it could not be characterised as substantially the same: at [100].

- **Merit Decisions (Commissioners):**

***2 Phillip Rise Pty Ltd v Kempsey Shire Council* [2022] NSWLEC 1107 (Bradbury AC)**

Facts: 2 Phillip Rise Pty Ltd (**Applicant**) appealed to the Land and Environment Court (**Court**) pursuant to ss 8.16 and 8.17 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the Council's deemed refusal of its application for a construction certificate to undertake site clearing works on the land known as 1 Phillip Drive, South West Rocks.

The site clearing works involved:

- the clearing of existing trees and vegetation;
- the stripping of topsoil;
- the erection of temporary tree protection barriers;
- the carrying out of erosion control works.

The site clearing works relate to development the subject of a development consent for a resort complex granted by the Council on 24 February 1993 (**Consent**). That development comprised 180 residential units, together with a commercial and administration complex comprising shops, bar areas, conference auditoriums, restaurant/dining areas and administrative areas, together with car-parking, recreation facilities and associated landscaping (**Approved Development**).

A condition of consent required the Applicant to conduct acid sulphate soil testing on the site "prior to release of the building application".

After the grant of the Consent, and before the date on which the Consent would otherwise have lapsed, acid sulphate soil testing was carried out on the site by engineering consultants engaged by Caltex Oil (Australia) Pty Ltd (**Caltex**). At that time, Caltex was carrying out remediation activities at the former Caltex Trial Bay Terminal site (**Caltex site**). These activities included the drilling of boreholes and the installation of monitoring wells on the Caltex `site, within Phillips Drive, on the Applicant's site and on adjacent land vested in the then Department of Conservation and Land Management.

The Applicant entered into an agreement with Caltex which enabled (but did not require) Caltex to enter the Applicant's land "to carry out groundwater testing on the Land, as part of its contamination investigations in relation to its former fuel terminal on adjacent land".

Issues:

(1) Whether the work proposed in the construction certificate application relevantly constituted "building work" which required, or could be made the subject of, a construction certificate;

(2) Whether, in Class 1 proceedings, the Court can determine whether a development consent has lapsed;

(3) Whether engineering work relating to the approved development was physically commenced on the land before the date on which the Consent would otherwise have lapsed.

Held: Appeal dismissed; application for construction certificate refused:

(1) It was unusual for the issue of whether a development consent had lapsed to arise in Class 1 proceedings concerning an application for a construction certificate. Nevertheless, the question of whether a development consent had lapsed had been raised in several previous decisions of the Court in Class 1 appeals: see *Savellis v Sutherland Shire Council* [2018] NSWLEC 100 and *Dennes v Port Macquarie-Hastings Council* [2018] NSWLEC 95. In the circumstances, however, it was open to the Court to determine whether the Consent was in force (and had not lapsed) as a jurisdictional prerequisite to the determination of the construction certificate application; at [6];

(2) A construction certificate is required both for "the erection of a building" (s 6.7(1)) and for the carrying out of "building work" (s 6.3(1)): at [9] and [10];

(3) The activities described in the application, involving the removal of vegetation, stormwater drainage works and soil erosion control works are not things that, in ordinary language, would be described either as "buildings" or as being "erected". It follows that they do not involve "the erection of a building" and do not require a construction certificate under s 6.7(1) of the EPA Act: *Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* (2018) 98 NSWLR 439; [2018] NSWCA 240 applied: [15] and [16];

(4) However, the definition of "building work" in s 6.1 of the EPA Act extends beyond the erection of a building and includes "any physical activity involved in the erection of a building". The removal of vegetation, the stormwater drainage works and the soil erosion control works proposed in the Application are all physical activities involved in the erection of the buildings that are the subject of the Consent. As submitted by the Applicant, the Approved Development could not be carried out unless the site is cleared of vegetation and the necessary drainage and soil erosion controls are put in place. Accordingly, those works constitute "building work" for the purposes of s 6.3(1) of the EPA Act and cannot be carried out without a construction certificate: at [17];

(5) The legal principles relevant to whether the Consent has lapsed are to be found in the decision of the Court of Appeal in *Hunter Development Brokerage Pty Ltd v Cessnock City Council* (2005) 63 NSWLR 124; [2005] NSWCA 169 (***Hunter***). From that decision the following principles emerged:

- site investigation work such as the carrying out of survey work is capable of constituting "engineering work" if it relates to the development approved by the development consent;
- the requirement that the work relate to the approved development requires a "real nexus between them");
- the work must be more than merely notional or equivocal, in that it must truly be work relating, in a real sense, to the approved development;
- the expression "relating to" requires some real relationship or connection between the work and the approved development;
- the necessary connection is satisfied if the relevant work is a necessary step in, or part of, the process required for or involved in the carrying out of the development authorised by the development consent; and
- the work may serve more than one purpose. Provided one of those purposes relates to the approved development, it does not matter that the work may also serve another purpose: at [43] and [44];

(6) The acid sulphate soil testing carried out by Caltex was for the purpose of determining the presence of acid sulphate soils on its own land and on land in the adjacent area, as this would impact on the proposed method of remediating hydrocarbon contamination in the affected land: at [51];

(7) While the work carried out by Caltex was capable of also serving the purpose of satisfying the condition of Consent, the Court was not satisfied that the acid sulphate soil testing was also carried out for that purpose: at [52];

(8) Applying the principles established in *Hunter*, the Applicant had not demonstrated:

- a "real nexus" between the acid sulphate soils testing carried out by Caltex and the additional testing required by the Consent;
- that there was more than a merely notional or equivocal connection between the testing carried out by Caltex and the testing required by the Consent;
- a real relationship or connection between the testing carried out by Caltex and the testing required by the Consent; and
- that the testing carried out by Caltex was of the type required to satisfy the requirements of the condition of the Consent: at [53]; and

(9) The acid sulphate soil testing carried out on the site was capable of constituting "engineering work" for the purposes of determining whether the Consent had lapsed but that the testing carried out did not relevantly "relate to" the Approved Development. The acid sulphate soils testing did not "relate to" the Consent. Accordingly, the Consent had lapsed and the construction certificate application must be refused: at [54].

Court News

Land and Environment Court Anniversary Conference and Dinner:

Land and Environment Court Anniversary Conference

A conference to celebrate the Land and Environment Court and its contributions to environmental law and the legal system over the last four decades. The conference will explore the Court's contribution in three fields: function, doctrine and process. A book, *An Environmental Court in Action: Function, Doctrine and Process* (Hart Publishing, 2022) edited by Professor Elizabeth Fisher and Justice Brian Preston, exploring these fields of contribution by the speakers, will be launched at the conclusion of the conference.

Date: Monday 29 August 2022
Time: 8.45 am-4.30 pm
Location: Theatrette, NSW Parliament House, Macquarie Street, Sydney
Cost: $165
Booking link: https://www.trybooking.com/BZVQD

Land and Environment Court Anniversary Dinner

A dinner held in conjunction with the Land and Environment Court Anniversary Conference to celebrate the Court and its contributions to environmental law and the legal system. The dinner address will be given by the Hon Mark Speakman SC MP, Attorney General of New South Wales. Tickets are available individually or as a table of 10.

Date: Monday 29 August 2022
Time: 5.30-9.30 pm
Location: Strangers' Dining Room, NSW Parliament House, Macquarie Street, Sydney
Cost: $240
Booking link: https://www.trybooking.com/BZWCP- external site

Please note you will need to book separately for the Conference and Dinner using the links provided.