Land and Environment Court of New South Wales

Judicial Newsletter

June 2024 / Vol 16 Issue 2

COURT NEWS

APPOINTMENTS

Commissioner Joanne Gray was reappointed as a Commissioner for the period commencing 18 April 2024 and expiring on 17 April 2031. Ms Nicola Targett and Ms Emma Washington were appointed as Commissioners for a term of 7 years commencing on 28 June 2024 and 1 July 2024 respectively.

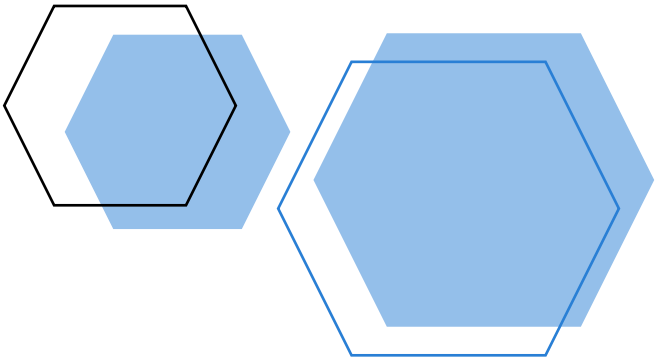
The following Acting Commissioners have been appointed for a period of 2 years from 13 May 2024 to 12 May 2026: Ms Laurenne Coetzee, Mr Niall Macken, Ms Helena Miller, Dr Peter Moore, Dr Peter Nichols, Associate Professor Dr Amelia Thorpe and Mr Michael Young.

ADR GROUP OF THE YEAR AWARD

The Land and Environment Court of NSW has been awarded "Courts and Tribunals – ADR Group of the Year" at the prestigious Australian Disputes Centre ADR Awards 2024.

CLASS 3 PRACTICE NOTES

Class 3 Practice Notes commenced on 2 April 2024.



JUDGMENTS

EUROPEAN COURT OF HUMAN RIGHTS

***Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ECHR 087 (2024)** (Grand Chamber of 17 judges, led by President Síofra O'Leary (Ireland))

Facts: In 2016, an association of older women in Switzerland, *Verein KlimaSeniorinnen Schweiz* (**Association**), and four individual women (all members of the Association), submitted a request to the Swiss Federal Council and other national environmental and energy authorities, alleging various failings in climate protection and seeking that action be taken. The applicants, who were concerned about the effects of climate change on their living conditions and health as vulnerable older women, argued that Switzerland was not taking sufficient action to mitigate the effects of climate change, despite their duties under international climate change treaties, in particular the Paris Agreement.

In 2017, the Federal Department of the Environment, Transport, Energy and Communications declared the request inadmissible, stating the applicants were not directly affected in terms of their rights and as such were not victims, and were pursuing general public interests. In 2018, the Federal Administrative Court dismissed the applicants' appeal, on the basis that older women were not the only population group affected by climate change. In 2020, the Federal Supreme Court also dismissed an appeal by the applicants, holding that the applicants' rights had not been affected with sufficient intensity.

Having exhausted all available domestic legal remedies, the women filed an application with the European Court of Human Rights (**ECtHR**) in 2020, alleging various violations by Switzerland of the European Convention on Human Rights (**Convention**).

Issues:

(1) Whether the group and the four individuals fulfilled the victim-status criterion required to bring the claim (Article 34);

(2) Whether Switzerland had failed to fulfil its duties under the Convention to ensure respect for private and family life, including the home (Article 8);

(3) Whether Switzerland had failed to fulfil its duties under the Convention to protect life (Article 2); and

(4) Whether the applicants were denied access to a court (Article 6 § 1), as the domestic Swiss courts had not properly responded to the applicants' requests and had given arbitrary decisions responding to their concerns about Switzerland's failure to take action to mitigate climate change, affecting their civil rights.

Held: Upheld (per 16 of the 17 judges, with a partly dissenting opinion given by one judge):

(1) The four individual applicants did not meet the status of victims under Article 34 and therefore their complaints were inadmissible, which in relation to future risk is only exceptionally admitted by the ECtHR. However, the association did have the right to bring a complaint, on behalf of those who may claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life, as protected by the Convention: at [521]-[535];

(2) Article 8 encompassed a right for individuals to effective protection by the State, from the serious adverse effects of climate change on their lives, health, well-being and quality of life: at [435]. The ECtHR found that the adverse effects of climate change "impact most heavily on vulnerable groups in society, who need special care and protection from the authorities": at [410]. The State had a positive duty to adopt and apply regulations and measures to mitigate the effects of climate change. Switzerland had failed to quantify national greenhouse gas emissions limitations and not acted in time and in an appropriate way to realise the State's positive obligations under Article 8. Therefore, Switzerland exceeded its discretion, and failed to comply with its duties, thereby violating Article 8 of the Convention: at [572];

(3) The ECtHR did not find it necessary to analyse the issues in relation to Article 2, given their findings in relation to Article 8: at [537]; and

(4) The Swiss authorities had not taken the Association's complaints seriously and had failed to provide convincing reasons as to why they had not examined the merits of the complaints. Therefore, the ECtHR

unanimously held that Switzerland had violated Article 6 § 1: at [640].

HIGH COURT OF AUSTRALIA

Harvey & Ors v Minister for Primary Industry and Resources & Ors **[2024] HCA 1** (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ)

(Related decisions: *Harvey v Minister for Primary Industry and Resources* [2022] FCAFC 66 (Jagot, Charlesworth and O'Bryan JJ); *Friday v Minister for Primary Industry and Resources* [2021] FCA 794 (Reeves J))

Facts: The first and second Appellants, Mr Harvey and Mr Simon, were native title holders in respect of land that was the subject of a proposed mineral lease (ML 29881) to the third Respondent, Mount Isa Mines Limited, for the purpose of the constructing a Dredge Spoil Emplacement Area (**DSEA**) as a part of the McArthur River Project. The Project consisted of the mining of zinc, lead and silver ore, its processing and transportation, and the DSEA was the site to which dredged sediment arising from the navigation channel along which the bulk-carrier vessel that transports such ore, was stored. Before the primary judge, Reeves J of the Federal Court, the Appellants argued that they were entitled to procedural rights under s 24MD(6B)(b) of the *Native Title Act 1993* (Cth) (**NTA**) on the basis that the grant of the mineral lease constituted 'the creation… of a right to mine for the sole purpose of the construction of an infrastructure facility… associated with mining.' Reeves J held that the mineral lease did not satisfy s 24MD(6B)(b), given that the supposed second limb of the provision, being an 'infrastructure facility… associated with mining', did not apply to the DSEA. On appeal, the Full Court of the Federal Court held that the mineral lease would not, assuming it were granted, constitute a right to mine for the reason that the activities undertaken on the DSEA were too remote from 'mining', being otherwise on land separate from the land that was being mined or concerned simply with the transportation of the ore. The Full Court further found that while the DSEA would constitute an 'infrastructure facility' within the ordinary meaning of the expression, that expression was intended by Parliament to refer in a narrow sense, applicable solely to enumerated qualifying facilities, thereby precluding it from falling within s 24MD(6B)(b) of the NTA.

Issue: Whether proposed grant of a mineral lease would constitute 'the creation… of a right to mine for the sole purpose of the construction of an infrastructure facility … associated with mining' for the purposes of s 24MD(6B)(b) of the NTA.

Held: Appeal allowed (per Gageler CJ, Gordon, Steward and Gleeson JJ, Edelman J agreeing):

(1) The Court held that the decision to grant the mineral lease was, pursuant to s 24MD(6B) of the NTA, a future act that involved the creation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining: at [83], [120]. The expression 'right to mine' was held to have a broad and inclusive meaning that embraced all those mining tenements capable of being issued under State and Territory laws, in this case s 40(1)(B) of the *Mineral Titles Act 2010* (NT) (**MTA**): at [66], [71]. The proposed mineral lease, to be granted under s 40(1)(B) of the MTA, was such a tenement, thereby constituting a 'right to mine': at [72];

(2) The Court held that the DSEA would constitute an 'infrastructure facility', properly construed in terms of its ordinary meaning: at [75]. That construction, contrasting with the findings of the Full Court of the Federal Court, was supported by extrinsic materials in the form of the 1997 Explanatory Memorandum accompanying the amendment to the NTA (at [76], [78], [118]-[119]), as well as the definition of an 'infrastructure facility' provided for by s 253 of the NTA, which relevantly employed the word 'includes': at [76]; and

(3) The Court held that the Appellants were entitled to procedural rights, in the nature of notification, objection and consultation with respect to the lease, under s 24MD(6B) of the NTA.

Redland City Council v John Michael Kozik & Ors **[2024] HCA 7** (Gageler CJ, Gordon, Edelman, Steward, Jagot JJ)

(Related decisions: *Redland City Council v Kozik & Ors* [2022] QCA 158 (McMurdo JA, Boddice and Callaghan JJ); *Kozik & Ors v Redland City Council* [2021] QSC 233 (Bradley J))

Facts: Between July 2011 and July 2017, the Appellant, Redland City Council, levied 'special charges' on the Respondents, being owners of rateable land in the Redland City local government area, in order to fund works improving reserves adjacent to the Respondents' properties. By March 2017, the Appellant had became aware that the

resolutions pursuant to which the special charges were levied were invalid with respect to provisions contained in successive regulations – namely, Local Government (Finance, Plans and Reporting) Regulation 2010 (Qld) (**2010 Regulation**) and the Local Government Regulation 2012 (Qld) (**2012 Regulation**) (**the Regulations**, taken together) – made under the *Local Government Act 2009* (Qld) (**LG Act**). The Appellant refused to refund the Respondents the portion of the charges that it had already spent on the works, on the basis that such works occasioned a benefit to the relevant landowners, inclusive of the Respondents. The Appellant refunded the remainder which had yet to be spent. The Respondents, by representative proceedings, sought the repayment of the relevant portion of the 'spent' special charges. In the Supreme Court of Queensland, the primary judge (Bradley J) held that, on a proper construction of s 32 of the 2010 Regulation and s 98 of the 2012 Regulation, which provided for the return of incorrectly levied special rates or charges, the Respondents were entitled to the relevant portion of the special charges as a debt, however dismissed the alternative submission that the relevant portion was recoverable in a common law claim for restitution. The Court of Appeal (McMurdo JA and Boddice J, Callaghan J dissenting) held, conversely, that the portion of charges was recoverable in restitution on the ground of a mistake of law, with the asserted defence of 'good consideration' not being made out, and dismissed the claim of statutory debt. Before the High Court, the Appellant appealed the latter conclusion of the Court of Appeal, re-agitating the defence of good consideration, while the Respondents, under a cross-appeal, challenged the former conclusion concerning statutory debt under the Regulations.

Issues:

(1) Whether, under the cross-appeal, the Regulations entitled the Respondents to recover the 'spent' special charges paid to the Appellant; and

(2) Whether, under the appeal, the Appellant's defence to the Respondents' restitutionary claim of good consideration ought to succeed.

Held: The Appeal was dismissed. Though leave for the cross-appeal was granted, it was dismissed (per Gordon, Edelman and Steward JJ, Gageler CJ and Jagot J in dissent as to (2):

(1) Unanimously, the High Court rejected the Respondents' cross-appeal, which contended that they were entitled to the re-payment of a statutory debt under the relevant provisions of the Regulations: at [11]-[12], [58], [133], [138], [178], [246]. A narrow construction of those provisions, directed to a circumstance of incorrectly levied rates or charges passed by otherwise valid resolutions, as opposed to levies or charges passed by invalid resolutions, as was the case here, was accepted: at [58], [176]-[178]; and

(2) By majority, the High Court dismissed the Appellant's appeal, finding that the Respondents were prima facie entitled under a common law claim for restitution to the spent portion of the special charges, those monies having been mistakenly paid to the Appellant: at [138], [178], [246]. The majority denied, on three principal grounds, that the Appellant could avail itself of the defence of good consideration: firstly, because the restitutionary claim would not cause any failure of the basis upon which the relevant works were performed by the Appellant; second, as the Respondents, among other landowners, did not benefit from the works in the sense in which 'benefit' operated in the context of the unjust restitution, requiring, inter alia, that the benefit be requested and freely accepted; and thirdly, to the extent that recognition of such a defence would have a stultifying effect on the operation of the Regulations: at [203]-[212].

Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks and Anor **[2024] HCA 16** (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, Beech-Jones JJ)

(Related decision: *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1 (Grant CJ, Southwood and Barr JJ)

Facts: The Director of National Parks (**First Respondent**), a body corporate established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**), was charged with an offence against s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (**the Sacred Sites Act**). The offence prohibits a "person" from carrying out work on or using a "sacred site" within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In March 2019, the First Respondent engaged a contractor to perform construction works affecting the walking track at Gunlom Falls, being an area sacred to the Jawoyn people and recognised as such, absent the relevant exempting authorisation provided for by s 34(2) of the Sacred Sites Act. In the Local Court of the Northern Territory, in which the Attorney-General of the Commonwealth (**Second Respondent**) intervened pursuant to s 78A of the *Judiciary Act 1903* (Cth), a special case was

stated requesting the opinion of the Supreme Court of the Northern Territory, which was subsequently referred to the Full Court of the Supreme Court (**Full Court**). Before the Full Court, the First Respondent pleaded not guilty to the offence, relying on the common law interpretative presumption enunciated in *Cain v Doyle* (1946) 72 CLR 409 as a defence to the imposition of criminal liability on the Crown. The Full Court answered the special case in terms that the offence and penalty created by s 34(1) of the Sacred Sites Act did not apply to the First Respondent as a matter of statutory construction. The Appellant was granted leave to appeal.

Issues:

(1) Whether the First Respondent was criminally liable for breach of s 34(1) of the Sacred Sites Act;
(2) Whether the interpretative presumption that a statute does not bind the Crown applied, so as to alleviate criminal responsibility; and
(3) Whether the further and more specific interpretative presumption that a statute does not impose criminal liability upon the Crown, per *Cain v Doyle*, applied.

Held: Appeal allowed (per Gageler CJ and Beech-Jones J, Gordon and Gleeson JJ, Edelman J, Steward J and Jagot J):

(1) Unanimously, the Court held that the First Respondent, being a body corporate under the EPBC Act, was criminally liable for its breach of the prohibition of a person carrying out work on a sacred site created by s 34(1) of the Sacred Sites Act: at [32], [118], [240], [248], [324]. Under the *Interpretation Act 1978* (NT), the definition of "person" relevantly included a "body corporate", thus establishing the relevant criminal liability, subject to any defences in the form of interpretative presumptions;
(2) The Court held that the presumption, albeit 'weak', as made clear in *Bropho v Western Australia* (1990) 171 CLR 1, that a statute did not bind the Crown was expressly displaced by s 4(1) of the Sacred Sites Act: at [13], [62], [244]. That section provided that the Sacred Sites Act 'binds the Territory Crown and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all of its other capacities', evincing the intention necessary to rebut the presumption. Any 'negative implication' to be drawn from s 4, such that it precludes a body corporate such as the First Respondent being exposed to criminal liability, as was contended by the Second Respondent, was also rejected: at [72]-[76]; and
(3) The Court also held that, to the extent that the First Respondent was a body corporate, the presumption for which *Cain v Doyle* stood did not apply to alleviate criminal responsibility: at [30]-[31], [117], [237]-[239], cf. [247]. Agents or servants of the Crown— whether natural persons or, as in this case, bodies corporate— do not enjoy the same immunity afforded to the Crown itself, and any such extension could not be justified: at [26], [106]. The *Cain v Doyle* presumption was otherwise held to apply to the body politic of the Commonwealth: at [30], [117], [233], [322].

FEDERAL COURT OF AUSTRALIA

Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) **[2024] FCAFC 26** (Mortimer CJ, Rangiah and O'Bryan JJ)

(Related decisions: *Santos NSW Pty Ltd v Gomeroi People* [2024] NNTTA 74 (Dowsett, President); *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 (Preston CJ of LEC)).

Facts: On 20 January 2012, the Native Title Tribunal (**the Tribunal**) made a determination that the Applicant, being the traditional owners of land in north-west NSW, had a 'right to negotiate' under s 38 of the *Native Title Act 1993* (Cth) (**NTA**) in respect of certain future acts affecting their native title rights and interests. On 1 May 2014, the Respondent lodged four petroleum production lease applications in respect of land of which the Applicants were registered native title claimants. Development consent was granted by the consent authority for those applications, enabling the Narrabri Gas Project (**the Project**). As was required under s 31 of the NTA, negotiation between the Applicants and Respondents continued until 5 May 2021, after which the matter was referred to the Tribunal. On 19 December 2022, the Tribunal determined the matter in the Respondent's favour, finding that the Project's significant public interest outweighed the Applicant's concerns regarding the protection of its native title rights and interests and relevantly denied that the Respondent had not negotiated in good faith. The Applicants appealed on six grounds pursuant to s 169(1) of the NTA.

Issues:

(1) Whether the Tribunal erred in applying the wrong test for good faith or, in the alternative, incorrectly applied test, correctly identified;

(2) Whether the Tribunal misconstrued "payment" for the purposes of Div 3 of Pt 2 of the NTA, treating it as equivalent to "compensation" for the purposes of Div 5 of Pt 2 of the NTA;
(3) Whether the Tribunal failed to consider, under s 39(1)(e) of the NTA, "environmental matters";
(4) Whether the Tribunal denied the parties procedural fairness;
(5) Whether the Tribunal's findings in respect of the evidence of two witnesses was legally unreasonable; and
(6) Whether the Tribunal erred in its finding that the Respondent was required to negotiate with the Applicant in light of a potential inconsistency with the good faith obligation under s 31(1)(b) of the NTA.

Held: Appeal allowed on Ground 3 (per Mortimer CJ and O'Bryan J, Rangiah J in dissent):

(1) The Applicants having conceded the sub-ground concerning good faith in a legal sense, the Court unanimously held that the Tribunal did not err as a matter of fact in not being persuaded that the Respondent's conduct lacked good faith: at [76]-[97], [244], [317]. In particular, the Applicant's contentions regarding the alleged failure on the part of the Tribunal to fail to consider the Respondent's negotiating position over the relevant period in a 'global' way or make any findings as to the Respondent's conduct as being so inherently unreasonable as to indicate an ulterior motive, were rejected: at [94], [97];
(2) The Court held that the Tribunal did not unduly conflate "compensation" and "payment" in Divs 5 and 3 of Pt 2 of the *Act*, respectively: at [104], [244], [317]. As such, the error alleged by the Applicant, whereby the Tribunal was said to have made a finding that negotiations regarding payments in respect of the relevant right to negotiate were not subject to good faith obligations unless those negotiations related to compensation in respect of a proposed future act affecting native title rights and interests, was dismissed: at [104];
(3) Chief Justice Mortimer, with whom O'Bryan J agreed, held that the Tribunal misconstrued the mandatory consideration of "any public interest in the doing of the act" under s 39(1)(e): at [213], [317], [422]. The Tribunal erred in viewing that section, in light of its 1998 amendment, as not requiring it to engage in an assessment separate from State environmental assessment bodies such as the Independent Planning Commission of the environmental impacts under the "public interest": at [214]. That misconstruction led the Tribunal, by reference to notions of 'particularity' 'practicability', to fail to consider increases in GHG emissions occasioned by the Project in question: at [233]. It further led to the erroneous dismissal of the expert evidence of Professor Steffen: at [224];
(4) The Court rejected the Applicant's contention that the Tribunal failed to accord procedural fairness by denying the parties and opportunity to address issues of futures trading and the definition of 'market' under the *Competition and Consumer Act 2010* (Cth): at [121], [244], [217];
(5) The Court held that the respective weight accorded to the evidence given by Mr Ho and Mr Kreicbergs, the latter alleged by the Applicant to have been given no weight and the former wholly accepted, giving rise to a supposed contradictory and therefore legally unreasonable position, could not be sustained: at [149]. That, by its reasons, the Tribunal made clear that it would have reached the position it did regarding Mr Ho's evidence independently of the view it took of Mr Kreicbergs' evidence was sufficient: at [148]; and
(6) The Court found against the Applicant who contended that the Respondent could not have negotiated in good faith when allegedly doing so with the knowledge of the impugned authority of certain individuals comprising the 'native title applicant' during the relevant period between 2013-2017: [168].

Environment Council of Central Queensland Inc v Minister for the Environment and Water **[2024] FCAFC 56** (Mortimer CJ, Colvin and Horan JJ)

(Related decisions: *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* 2023] FCA 1208 (McElwaine J); *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 3)* [2023] FCA 1532 (McElwaine J))

Facts: The Environment Council of Central Queensland Inc (**Appellant**) brought an appeal against the decision of the Minister for the Environment and Water (**Minister**) by reason of an alleged failure to reconsider the impact of two proposed 'controlled actions' in light of "substantial new information" under Pt 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The relevant actions concerned extensions— both in terms of life-spans and maximum outputs— of two existing mining developments in NSW, in Narrabri and Mt Pleasant respectively. A delegate of the Minister originally made

controlled action decisions in respect of those proposed actions under s 75(1) of the EPBC Act, though excluded the Greenhouse Gas Emissions (**GHG emissions**) associated with such actions as "relevant impacts" bearing upon matters of national environmental significance (**MNES**). In a letter dated 8 July 2022, the Appellants made reconsideration requests under s 78A of the EPBC Act, and presented the Minister with "significant new information" concerning the adverse impact of the actions on the basis of their resulting GHG emissions, in particular Scope 3 emissions. The Minister's refusal to revoke the original controlled action decisions in light of that information—on the basis that the GHG emissions of the actions were not relevant "impacts" within the meaning of the s 527E of the EPBC Act absent the requisite causal link being established either because the information did not demonstrate that the proposed actions would cause any net increase in global GHG emissions and by extension global average temperatures (first limb) or in the alternative that any such contribution would be 'very small' (second limb)—was initially affirmed by the primary judge, McElwaine J, who dismissed each of ten grounds of judicial review. The appellant subsequently appealed that decision.

Issues: The appeal comprised the following five grounds:

(1) Whether the Minister erred in having regard to the net increase in global GHG emissions by reference to 'hypothetical counterfactual scenarios' in which the proposed actions did not occur, rather than conducting a factual inquiry into the consequences, albeit indirect, of the proposed actions, thereby engaging in impermissible 'substitution reasoning';
(2) Whether, assuming the aforementioned counterfactual scenarios could be relied upon, the Minister misdirected herself as to whether the relevant impacts of climate change on MNES were, or would be, a consequence of a net global increase in GHG emissions, as opposed to such impacts being "likely" given that net increase;
(3) Whether the Minister acted legally unreasonably or irrationally in failing to pay due regard to future scenarios involving a lower net rate of GHG emissions as set out in the relevant information provided by the applicant, which it contended were more likely in the absence of the relevant actions;
(4) Whether the evidence of Dr Matthew Gidden was admissible; and
(5) Whether the Minister's finding as to a 'very small contribution' was irrational insofar as the calculation of the proportionate contribution of the proposed actions was based on "fixed" denominators of past years' net global rates of GHG emissions.

Held: Appeal dismissed (per Mortimer CJ and Colvin J, Horan J agreeing):

(1) The Court found that the Minister and by extension the primary judge did not misconstrue the s 78(1)(a) of the EPBC Act by engaging a hypothetical scenario-based reasoning from which the relevant actions were omitted: at [76]-[78], [184]. By her reasons, the Minister disclosed that she was not factually persuaded of there being a sufficient causal link between the proposed actions and global net GHG emissions as required for the making out of a 'substantial cause' under s 527E, the source of those emissions predominately deriving from sources other than the relevant actions;
(2) The Court found no error in the Minister's reasoning that, in the context of s 78(1)(a), "likely" refers in its terms to a real and not remote possibility of an event or circumstance occurring: at [87]-[90], [188]. In fact, the Minster disclosed that climate change, a key anthropogenic factor of which is GHG emissions, is having, or will have, adverse impacts on MNES, though stopped short of attributing such consequences in the relevant causal sense to the proposed actions;
(3) The Court rejected the appellant's submissions as to legal unreasonableness, specifically irrationality, as applied to either limb justifying the absence of a substantial cause within the meaning of s 527E: at [102]-[108], [195]. The Minister was found to have neither engaged in substitution reasoning, as made clear in the resolution to Ground 1, nor did she impermissibly arrive at a conclusion as to the proportional contribution of the proposed actions to global GHG emissions;
(4) The Court held that, in consequence of Ground 3, Ground 4 also failed: at [109], [195];
(5) The Court held that the Minister's 'very small contribution' finding was not irrationally predicated on numerical calculations as to the proportionate contributions of the proposed actions to climate change, even though they were based on 'fixed' denominators of global GHG emissions: at [116]-[138], [193]. The Minister's task in determining what constituted a "substantial cause" did not preclude such an approach, which was necessarily evaluative in nature, requiring a state of satisfaction based, as it was in this case, on information that was non-speculative; and

(6) The Court observed that the failure of the current appeal underscored the 'ill suitedness' of the legislative schemas such as the EPBC Act with respect to the assessment of environment threats like climate change and global warming in particular on MNES: at [140]-[144], [194].

SUPREME COURT OF TASMANIA

Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council **[2022] TASFC 5** (Estcourt, Pearce and Geason JJ)

(Related decisions: *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 13 (Estcourt and Geason JJ); *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council and Coles Bay Holdings Pty Ltd* [2023] TASCAT 90 (Grueber, Deputy President); *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council and Coles Bay Holdings Pty Ltd (No 2)* [2023] TASCAT 143 (Grueber, Deputy President); *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council and Coles Bay Holdings Pty Ltd (No 3)* [2023] TASCAT 191 (Grueber, Deputy President); *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council and Coles Bay Holdings Pty Ltd (No 4)* [2024] TASCAT 6 (Grueber, Deputy President))

Facts: At issue in the appeal was a development application lodged on 12 June 2019 by the Second Respondent, Coles Bay Holdings Pty Ltd, which sought a permit to make alterations and additions to the visitor accommodation at the site. The development included, among other things, twenty-eight additional villas, additional staff accommodation, improvements to the reception centre, waste and storage facilities, and general access and parking. Before the Resource Management and Planning Appeal Tribunal (**RMPAT**), the Appellant, Saltwater Lagoon Pty Ltd, appealed the decision of the First Respondent, the Glamorgan Spring Bay Council, granting approval to the planning permit. The RMPAT varied that decision, rendering approval of the permit subject to certain conditions. The Appellant appealed, pursuant to the s 25 of the *Resource Management and Planning Appeal Tribunal Act 1993* (TAS), to the Supreme Court of Tasmania on four questions of law.

Issues:

(1) Whether the Tribunal acted ultra vires either by imposing upon the permit a new condition, Condition 21C, which required a biodiversity offset plan prior to the commencement of works, that was significantly different from the original development application, or, further and in the alternative, in so doing the Tribunal impermissibly deferred approval of the permit in a manner offensive to the principle of finality;

(2) Whether the Tribunal erred in misapplying the correct definition and understanding of 'site' contained in cl E10.7.1 of the Glamorgan Spring Bay Interim Planning Scheme 2015 (**Planning Scheme**) in light of the evidence before it, rather than the definition provided in cl 4.1.3 of the Planning Scheme;

(3) Whether the Tribunal erred in finding that cl E10.7.1 P1(c)(v) of the Planning Scheme was ultra vires; and

(4) Whether the Tribunal erred in determining that compliance with cl E10.7.1 P1(c)(i) of the Planning Scheme did not require the Second Respondent to demonstrate alternatives in terms of design and location to its development that would have attenuated its biodiversity impacts.

Held: Appeal allowed and remitted before differently constituted Tribunal (per Geason J, Estcourt and Pearce JJ agreeing):

(1) The Court dismissed Ground 1, holding, firstly, that the imposed condition neither transformed the development in question nor created a different development. The requirement for a biodiversity offset plan was as a consequence of the operation of cl E 10 of the Planning Scheme: at [36], [41]. Secondly, the Appellant's submissions regarding finality were rejected inasmuch as the imposed condition was viewed as providing for a degree of flexibility in the decision-making process as undertaken by the delegated authority, as opposed to an outcome so uncertain as to offend said principle: at [41];

(2) The Court upheld the Appellant's submissions that the Tribunal erred by departing from the definition of 'site' as provided for under the Planning Scheme: at [51]. The Court reiterated that the planning instruments, as with legislation, were to be construed in terms of their ordinary meaning as ascertained in light of purpose and context: at [18]-[21]. The Tribunal was found to have erroneously adopted the meaning of 'site' as identified in the evidence as the hazard management area, chiefly to avoid what it perceived to be an unduly onerous task: at [43], [48]. The Court held that the meaning of 'site' under cl. E10 ought to have instead been identified in accordance with the definitions section of the Planning Scheme and the evident purpose in cl E10.7.1 P1: at [50];

(3) As Ground 1 failed, it was unnecessary to consider Ground 3: at [55]; and
(4) The Court dismissed Ground 4, finding that the Tribunal adopted an approach consistent with its statutory obligation under cl E 10.7: at [59]-[60]. That clause was held to provide a method for the amelioration of biodiversity impacts as a part of development approvals with which the Second Respondent did not fail to comply.

NEW SOUTH WALES COURT OF APPEAL

Sader v Elgammal **[2024] NSWCA 20** (Ward P, Meagher JA and Simpson AJA)

(Decision under review: *Sader v Elgammal (No 2)* [2023] NSWLEC 92 (Pain J))

Facts: Mr and Mrs Sader (**appellants**) sought leave to appeal orders dismissing a motion for access by a structural engineer to their neighbour, Mr Elgammal's (**first respondent**) property (**property**). Access was sought for the purpose of inspecting whether two concrete slabs had been demolished in compliance with demolition orders made by the Court. In contempt proceedings the appellants contended that neither slab had been demolished and debris had been placed on one or both slabs inconsistent with the orders that were made. Evidence given by the appellants in the contempt proceedings included photographs of the property. The first respondent served an affidavit with other photographs of the property intended to demonstrate that the slabs had been demolished.

The primary judge did not grant an order for access on the basis the first respondent had privilege against self-exposure to penalty in the context of the contempt proceedings.

Issues:
(1) Whether the primary judge erred in holding that the privilege against self-exposure to a penalty applied to the access motion;
(2) If the privilege against self-exposure to a penalty had been applicable, whether it was waived by the service of the first respondent's affidavit; and
(3) Whether the primary judge erred in the exercise of discretion by treating as irrelevant the fact the orders sought by the appellant might assist the Court in making factual findings, and whether the primary judge erred in considering relevant to the exercise of discretion regarding access that the appellants bore the onus of proof in respect of the contempt allegations.

Held: Appeal allowed with costs. First respondent ordered to provide access to the property to a structural engineer to inspect the slabs (per Ward P, Meagher JA and Simpson AJA agreeing):
(1) Privilege against self-exposure to penalty was not engaged in relation to an order for access to inspect the first respondent's property. Such an order did not require the first respondent to assist in identifying any incriminating material. The order for access simply rendered lawful what would otherwise be a trespass to property by the person carrying out the inspection. Where a charge of criminal contempt is made in civil proceedings, the applicable rules of procedure are those which apply to other civil proceedings: at [80]-[86];
(2) Whether waiver of the privilege had occurred was not obvious. Given the finding that the privilege against self-exposure to a penalty was here inapplicable it was not necessary to reach a conclusion on this issue: at [95]-[103]; and
(3) In view of the conclusions reached it was not necessary to determine ground 3. The primary judge did not misapprehend the purpose of an order for access to the property. The burden of making findings on contested facts was one that was to be borne by the Court. That burden would not be relieved whether or not access was granted. If necessary to decide, the primary judge did take into account an irrelevant consideration in relation to the significance of the burden of proof. The question of onus was not relevant to whether to grant access to the property. It was not true that as it was for the appellants to establish contempt they should not be able to test the evidence served by the first respondent via expert access to the property: at [64]-[68].

Nielson v Secretary, Department of Planning and Environment **[2024] NSWCA 28** (Ward P, Payne and White JJA)

(Decision under review: *Nielson v Secretary, Department of Planning and Environment* [2023] NSWLEC 32 (Pain J))

Facts: Before the primary judge Mr Nielson (**appellant**) sought declarations and orders on the basis that s 81 of the

National Parks and Wildlife Act 1974 (NSW) (**NPW Act**) and the Plan of Management for Mimosa Rocks National Park (**Plan of Management**) entitled him to have the Court compel the Secretary, Department of Planning and Environment (**respondent**) to direct the National Parks and Wildlife Service to carry out roadworks on Lagoon Trail and Cowdroys Road (**roads**) in a national park. This would enable the appellant to access by vehicle towing a boat trailer a commercial oyster lease located in a Lagoon outside the park's boundaries. The appellant sought declarations that, in accordance with the Plan of Management's "policies and actions", the respondent was obliged to maintain an all-weather 4WD standard including for a 4WD vehicle towing a boat trailer for Cowdroy's Road and an all-weather 2WD standard for Lagoon Trail. The appellant sought orders in the nature of mandamus for the Respondent to do such work and take such steps as were necessary to upgrade the roads to those standards.

The primary judge dismissed the application and held the respondent had discretion in how to carry out the Plan of Management. The duty under s 81 of the NPW Act was to implement, carry out and give effect to the Plan of Management overall. The appellant appealed the decision.

Issues:

(1) Whether the Plan of Management imposed a duty on the respondent to maintain and manage the roads to a certain standard;
(2) If the Plan of Management imposed a duty to maintain the roads, to what standard must they be maintained;
(3) Assuming the respondent was obliged to maintain the roads to a certain standard, whether there had been an unreasonable delay in that maintenance; and
(4) Whether the mandamus orders sought by the appellant should be granted.

Held: Appeal dismissed with costs (per Payne JA, Ward P agreeing, White JA agreeing with the outcome but with different reasoning):

(1) There was no requirement imposed by s 81 of the NPW Act to maintain the roads. The duty under s 81 was to carry out and give effect to the Plan of Management as a whole and did not impose an obligation to complete particular policies within a specified time or at all. The respondent had discretion in how to pursue the priorities in the Plan of Management and the exercise of discretion was not intended to be the subject of judicial review. The mandamus orders sought by the appellant were outside the statutory purpose. The Plan of Management policies did not contemplate the use of roads to access commercial operations outside the national park: at [45]-[97];
(2) The Plan of Management did not support the appellant's construction of the phrases "all weather 4WD standard" or "thoroughfare" as implying that the roads could be driven by vehicles towing boat trailers. The Plan of Management did not envisage road improvements so that boat access to the Lagoon should be made available to conduct commercial operations: at [110]-[122];
(3) The delay in maintenance was not unreasonable. Mere length of time is not sufficient to demonstrate unreasonable delay. The Plan of Management was essentially aspirational such that the pace at which policies and actions were completed, if at all, was subject to available funding and staffing: at [153]-[165], [170]; and
(4) The orders sought by the applicant were refused. The making of the orders sought by the appellant would be antithetical to the role of the Court on judicial review. It would require the respondent to spend public money in priority to any other expenditure necessary for the appellant's benefit: at [173].

Kudrynski v Orange City Council **[2024] NSWCA 33** (Meagher and Kirk JJA, Griffith AJA)

(Decision under review: *Kudrynski v Orange City Council* [2023] NSWLEC 9 (Pepper J))

Facts: On 11 September 2020 certain vacant land (**Land**) owned by Mrs Alexandra (Alicia) Kudrynski was compulsorily acquired by the NSW government for the public purpose of a stormwater harvesting project (**Project**). The parties were unable to agree compensation, and the Valuer-General subsequently determined the market value of the Land to be $450,000. Mrs Kudrynski and her husband, Mr Julius Kudrynski (the second applicant and Mrs Kudrynski's agent), challenged this determination in the Land and Environment Court, claiming that the market value of the Land was $160 million.

Before the primary judge Mr Kudrynski claimed that the Land was to be valued having regard to the value of the water for harvesting. Orange City Council (**the respondent**) contended that, by operation of the statutory disregard in s 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), any subsequent value

derived from the carrying out of the Project had to be excluded from the amount of compensation. The primary judge accepted the Council's position and further determined that the $160 million figure relied upon by Mr Kudrynski was not supported by any evidence, and preferring the expert valuer of the Council's figure of $560,000 (with the highest and best use of the land being a four lot rural residential subdivision). This evaluation took into account features including the Land's liability to flooding, its affectation by easements, and its location opposite public housing.

On appeal two procedural issues rose for consideration: whether Mr Kudrynski had notice of the hearing date and the authenticity of the supplementary appeal books. The central substantive issue for determination was whether any of the 24 grounds of appeal disclosed a challenge to a decision or order of the primary judge on a question of law, pursuant to s 57(1) of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**).

Issues:

(1) Whether Mr Kudrynski's procedural complaints were supported by the evidence or Court's internal records;
(2) Whether the ground of appeal identified a question of law which was the subject of any order or decision of the primary judge; and
(3) Whether the substantive issues were without merit.

Held: Appeal dismissed (per Griffith AJA, Meagher and Kirk JJA agreeing):

(1) Mr Kudrynski's procedural complaints were not supported by the evidence or Court's internal records: at [1]-[2], [15];
(2) No ground of appeal identified a question of law which was the subject of any order or decision of the primary judge: at [1]-[2], [37], [99]; and
(3) In any event, the substantive issues were without merit: at [59]-[98].

***Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulbourn Mulwaree Council* [2024] NSWCA 41** (Ward P, Gleeson and White JJA)

(Decisions under review: *Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulburn Mulwaree Council* [2023] NSWLEC 45 (Robson J); *Filetron Pty Ltd v Innovate Partners Pty Ltd atf Banton Family Trust 2 and Goulburn Mulwaree Council (No 2)* [2023] NSWLEC 93 (Robson J))

Facts: On 8 January 2021, Innovate Partners Pty Ltd (**Innovate**) lodged a development application with Goulburn Mulwaree Council (**Council**) for a residential and rural development of land in Marulan, New South Wales (**DA**). The land the subject of the DA was adjacent to land owned by Filetron Pty Ltd (**Filetron**). Between 9 July 2021 and 23 July 2021, the Council exhibited the DA on public exhibition during which time persons could provide submissions. On 30 July 2021, following the close of the public exhibition period, Filetron provided a submission objecting to the DA. On 18 September 2021, the Council, via a delegate appointed under an Instrument of Sub-Delegation, granted development consent in respect of the DA (**Consent**).

After the Consent was issued, Filetron commenced Class 4 judicial review proceedings in the Land and Environment Court contesting the validity of the Consent. Filetron's argument was two-fold: first, the Council's delegate had failed to consider certain matters under s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and/or constructively failed to determine the development application under s 4.16 of the EPA Act; second, the Council's delegate did not have the authority to determine the DA. Specifically, that the delegate's authority was constrained by limitations in the applicable Instrument of Delegation and a specific Council policy that a delegate could not determine a development application if there was an "unresolved submission by way of objection" or a "reasonable and unresolved objection resulting from the neighbour notification / exhibition process".

The primary judge found that Filetron's submission, which was provided outside the public exhibition period, was not treated as a submission as the phrases "submission by way of objection" and "resulting from" referred only to submissions made during the public exhibition period. The delegate's authority was therefore not constrained, notwithstanding that the delegate exercised his discretion to consider the submission under the "public interest" consideration in s 4.15(1)(e) of the EPA Act. Alternatively, if Filetron's letter were considered a submission, the primary judge found that Filetron's submission had been resolved.

However, the primary judge found that the delegate had failed to consider mandatory matters in determining the DA, and thereby breached s 4.15(1) of the EPA Act. The primary judge suspended the Consent and imposed orders under s 25B of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**). On 11 September 2023, the primary judge found that the Council had substantially complied with the terms of the

s 25B orders previously imposed and made orders under s 25C(2) of the LEC Act validating and re-granting the Consent (**Regranted Consent**). Filetron appealed this decision.

Issues:

(1) Whether the primary judge erred in finding that the delegate had authority to determine the DA; and
(2) Whether the primary judge erred in validating the Regranted Consent.

Held: The Court upheld the appeal (per White JA, Gleeson JA agreeing, Ward P dissenting):

(1) A submission was a "submission by way of objection" within the meaning of the Instrument of Delegation even in circumstances where it was provided outside the public exhibition period. In any event, Filetron's submission was an objection "resulting from the neighbour notification / exhibition process": Ward P, White and Gleeson JJA at [110]-[111], [122], [228];
(2) The delegate had no authority to determine the DA due to the construction of the Instrument of Delegation (it was accepted that the delegate could not sub-delegate any functions or powers beyond those which were indicated in the Instrument of Delegation such that the authority under the Instrument of Sub-Delegation was subject to the limitation of the Instrument of Delegation). Filetron's submission would be considered "unresolved" as there was no antecedent resolution of Filetron's objections. Under the Instrument of Delegation, the delegate's power could not extend to any case where there were unresolved submissions: White and Gleeson JJA at [26], [209], [239]-[246]; and
(3) The primary judge was best placed to understand what was contemplated by orders previously made by themselves. In any event, substantial compliance was achieved within the meaning of s 25C of the LEC Act by the insertion of certain conditions that addressed the earlier s 25B: Ward P at [202]-[203].

Cooke v Tweed Shire Council **[2024] NSWCA 50** (Ward P, Gleeson JA, Basten AJA)

(Decision under review: *Tweed Shire Council v Cooke* [2023] NSWLEC 98 (Pain J))

Facts: Mr Cooke (**appellant**) operated a business selling hemp-infused products which involved growing hemp and processing, infusing and packaging hemp on two plots of land in northern New South Wales. Tweed Shire Council (**Council**) commenced proceedings against the appellant on the basis that although the appellant held a licence to cultivate hemp, the processing, infusion, and packaging activities required development consent under the Tweed Local Environment Plan 2014 (**Tweed LEP**) per s 3.18 of the *Environmental Planning and Assessment Act 1979* (NSW).

The primary judge held that the proper characterisation of the use of the land was for a single integrated purpose, the selling of hemp-infused products as "agricultural produce industries" under "rural industry" in the Tweed LEP, not "intensive plant agriculture". This required development consent which had not been obtained.

On appeal the appellant contended that although the use of the land was for a single integrated purpose, this did not require development consent as the growing of hemp was instead a type of "intensive plant agriculture", specifically "horticulture" meaning "the cultivation of … cut flowers and foliage … for commercial purposes". In the alternative growing hemp comprised "extensive agriculture" defined as "the production of crops … for commercial purposes". The appellant argued the hemp processing activities were ancillary to these categories. In the alternative the appellant sought relief permitting the production of a hemp crop while restraining the processing activities. The Council submitted the primary judge's conclusion should not be reviewed unless it could be shown that the primary judge misconstrued the legislative test or made a decision that was not open on the facts.

Issues:

(1) The appropriate standard of review on appeal;
(2) Whether cultivating hemp could be characterised as either "intensive plant agriculture" or "extensive agriculture" and whether the subsequent processing activities were ancillary to those categories; and
(3) Whether the appellant was entitled to alternative relief based on the characterisation of the use of the land as two separate activities.

Held: Appeal dismissed. Costs awarded to the Council (per Basten AJA , Ward P and Gleeson JA agreeing):

(1) The appropriate standard of review involves an evaluative judgment and is not restricted to a question of law as submitted by the Council: at [34]-[36];
(2) The growing of hemp plants was not a type of "intensive plant agriculture". The term "cut flowers and foliage" under the definition of horticulture refers to a flowering plant which is cultivated for market as a bunch of cut flowers. A crop of hemp does not fall under this

definition therefore no issue arises regarding ancillary activities. While the farming of hemp for commercial activities falls under the definition of "extensive agriculture" the activities of processing, infusion and packaging of hemp were not ancillary activities. The Tweed LEP did not expressly encompass ancillary activities under the uses of "intensive plant agriculture" or "extensive agriculture" and such an implication should not be drawn as a matter of proper construction: at [38]-[52]; and

(3) The activities carried out on the land should not be characterised as two separate activities. The primary judge was correct to find the growing of hemp and its subsequent processing as part of a single integrated purpose of selling of the hemp-infused products. There was no scope to consider the appellant's proposed alternative form of relief which was intended to reflect the possibility that there could be separate and independent activities: at [54]-[63].

South East Forest Rescue Incorporated v Forestry Corporation of New South Wales **[2024] NSWCA 64** (Griffiths AJA)

(Decision under review: *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 (Pritchard J))

Facts: In the Court of Appeal South East Forest Rescue (**applicant**) commenced two interrelated appeals from interlocutory orders. In the first motion the applicant sought leave to appeal from orders made in the Land and Environment Court (**LEC**) dismissing a motion seeking to restrain the Forestry Corporation of New South Wales (**respondent**) from conducting certain forestry operations (**primary judgment**). The injunctive relief sought by the applicant was to restrain the respondent from conducting forestry operations in specified compartments in several state forests unless a survey was conducted that was "likely to" identify all trees within the area that have tree-hollows and unless this survey involved examination of "sufficient" hollows in each identified tree to determine if it had been used by three species of gliders. The second motion was an appeal from orders made in the LEC in which the primary judge dismissed the primary proceeding.

The primary judge found the applicant failed to establish it had the requisite special interest in the subject matter of the proceeding or in the alternative failed to establish a serious or arguable case.

Issues:

(1) Whether there was a significant question to be tried;
(2) The significance of delay in seeking interlocutory relief in the LEC;
(3) Whether the scope of relief sought was sufficiently clear; and
(4) How much weight should be placed on expert report evidence of "irreparable harm" to gliders on the balance of convenience.

Held: Both motions were dismissed. Costs of the motions were costs in the cause:

(1) For the purposes of the application, it was assumed there was a serious question to be tried: at [32];
(2) The applicant inexplicably delayed in commencing proceedings in the LEC which formed a sufficient basis for refusing relief. The applicant was aware for four years before commencing proceedings of sightings of gliders in the subject areas. It was reasonable to infer that the applicant knew or had the reasonable opportunity to know about the respondent's plans for its operations in the areas. Some forestry operations in the areas had already commenced and were nearing completion: at [33]-[59];
(3) The terms "likely to" or "sufficient" as expressed in the relief sought by the applicant were too vague and uncertain for the purposes of an injunction in these circumstances. Whether a survey was "likely to" identify hollow-bearing trees or "sufficient" hollows were examined involved questions of fact and degree on which reasonable minds may differ. Such uncertainty was unacceptable where a breach could give rise to contempt proceedings: at [60]-[74]; and
(4) On the balance of convenience evidence of irreparable harm was outweighed by matters relating to delay and the terms of the relief sought. The Court did not accept that the expert report justified the applicant's claim of irreparable damage to the environment. It must also be taken into account that logging operations will inevitably cause harm and the incontrovertible fact that forestry operations had already been commenced by the respondent: at [75]-[80].

Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016 **[2024] NSWCA 107** (White, Adamson and Stern JJA)

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

Facts: The first respondent had approved in part an Aboriginal Land Claim under the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**). The claim covered land in the Paddington Bowling Club, which was subject to a Reservation of Crown Land and a lease granted by the Crown which was later assigned to the appellant. The site had largely fallen into disuse, apart from the northern end of the site used by the Wentworth Tennis Club under an oral sublease. On 19 December 2016, the third respondent, the New South Wales Aboriginal Land Council, lodged the land claim pursuant to s 36 of the ALR Act. When the lease was assigned to the appellant on 1 February 2018, it acknowledged that the land was subject to this claim, which if successful would terminate the lease under the terms of the Minister's consent to the assignment. On 10 December 2021, the first respondent granted the portion of the claim in respect of the Paddington Bowling Club. This determination was made in accordance with a recommendation contained within a briefing paper which considered the land to be "claimable Crown land" based on analysis within "attachment B" to that document. The attachment did not address a submission advanced by the appellant that the land was not "claimable Crown land" because it had been lawfully used by the Crown insofar as the Crown was leasing the site, enlivening an exception under s 36(1)(b) of the ALR Act.

The appellant commenced Class 4 proceedings in the Land and Environment Court (**LEC**) seeking: an order which prevented the transfer of the land; an order in the nature of certiorari to quash the first respondent's determination; and a declaration that the site was lawfully used or occupied at the relevant date. Alternatively, they sought that the matter be remitted to the first respondent to be determined in accordance with law. At first instance, Preston CJ of LEC rejected the argument that s 36(1)(b) was enlivened by the Wentworth Tennis Club's use of the land, finding that such use was not "lawful". His Honour found that there was no evidence to suggest that the first respondent had not considered the submission made by the appellant regarding the Crown's leasing amounting to a use, and therefore procedural fairness was not denied. His Honour also held that there was no evidence that the first respondent rejected that argument as a matter of law as opposed to merely on the facts, meaning there was no jurisdictional error.

Issues: The question on appeal was whether the primary judge had erred in failing to find jurisdictional error in the decision of the first respondent to partially grant the land claim in a situation where the land was subject to a lease granted by the Crown. This raised two issues:

(1) Whether it was open to the first respondent to be satisfied that the land met the criterion in s 36(1)(a) of the ALR Act, requiring it to be able to be lawfully sold or leased or subject to a reservation, in a situation where it was subject to a lawful lease; and
(2) Whether it was open to the first respondent to be satisfied that the land met the criterion in s 36(1)(b) of the ALR Act, requiring that it not be lawfully used or occupied, notwithstanding the Crown's lease of the land.

Held: Appeal allowed (per White JA, with Adamson and Stern JJA agreeing):

Regarding issue (1)

(1) The references to "sold or leased" in ss 36(1)(a) and 36(5) must be read disjunctively: at [128]. Sections 36(1)(a) and 36(5) refer to the ability for land to be sold or leased, making no reference to whether or not they were in fact subject to a contract for sale or lease. As at the date of the claim, the land in question was able to be leased. The question was not whether it could be leased again. In any event, the doctrine of concurrent leases meant that it would be able to be leased again: at [125]-[127];

Regarding issue (2)

(2) The phrase "lawfully used or occupied" was not a composite expression and was better understood by giving the words "used" and "occupied" separate consideration. Consideration of whether land was occupied required consideration of what was physically done on the land, however this was not necessarily the case in determining if land was used. Whilst "occupied" in an ordinary sense had physical connotations, the same was not necessarily true for "use", which was a protean term: at [41]-[43];
(3) The "use" of claimable Crown lands under the ALR Act must be considered with reference to the definition provided in s 4, which included any estate or interest in the land, even if concurrently held by different potential users. Applying this definition to s 36(1)(b) means that land claimed can be "lawfully used" by more than one person in different ways and for different purposes, any of which may enliven the exception: at [46]-[48];
(4) A successful claim under s 36 would result in the transfer of the estate in fee simple to the claimant. This transfer would not by itself extinguish any existing rights which did not derogate from absolute ownership, such as leases: at [63]-[65];

(5) In construing the word "use" in the ALR Act and similar statutory regimes, authority had focused largely, although not exclusively, on whether there was sufficient physical use of the land. No such authority, however, had addressed a claim where the land was being leased by the Crown, nor been required to engage with the definition in s 4. Authority therefore does not preclude non-physical uses from satisfying s 36(1)(b) in appropriate circumstances: at [73], [111]; and

(6) Where "land" is construed not only as physical land, but as any estate or interest therein, then the Crown can be said to be lawfully using land for the purposes of the provision by leasing it. The fact that the tenant did not physically use the land does not mean that the first respondent did not use it by leasing it. The first respondent's determination to the contrary, absent any dispute about the facts, was an error of law and legally unreasonable, falling into jurisdictional error. The appeal should therefore be allowed: at [113], [119], [122]-[123], [130].

South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2) **[2024] NSWCA 113** (Adamson JA, Basten AJA and Griffiths AJA)

(Decision under review: *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 (Pritchard J))

(Related decisions: *South East Forest Rescue Incorporated v Forestry Corporation of New South Wales* [2024] NSWCA 64 (Griffiths AJA); *South East Forest Rescue Incorporated v Forestry Corporation of New South Wales (No 2)* [2024] NSWLEC 36 (Pritchard J))

Facts: South East Forest Rescue Incorporated (**SEFR**) (**appellant**) appealed the decision of the primary judge to dismiss the appellant's notice of motion filed 23 January 2024, which sought interlocutory relief in relation to compartments in three State forests. The substantive proceedings concerned the appellant's Class 4 civil enforcement proceedings seeking that the Forestry Corporation of New South Wales (**respondent**) be restrained from conducting any forestry operation as defined in Protocol 39 to the *Coastal Integrated Forestry Operations Approval* dated 16 November 2018 (**CIFOA**), unless "broad area habitat searches" were conducted in a manner that included particular searches for "nest, roost or den trees" required by condition 57 of the CIFOA.

The primary judge found that it was appropriate to exercise the Court's discretion to decide standing on a *prima facie* basis and that on its proper construction, s 69ZA of the *Forestry Act 2012* (NSW) (**Forestry Act**) did not have the effect of ousting common law standing to bring proceedings seeking to enforce compliance with the requirements of an integrated forestry operations approval to which Pt 5B of the Forestry Act applied.

The primary judge found that the appellant did not have a sufficient special interest to bring the proceedings because it sought relief in relation to compartments outside its usual geographic area of concern; it was formed for the purposes of "ending native logging in NSW", not the protection of gliders; the evidence was unclear as to as to the role and activities of the six members of SEFR, and others, in pursuit of the objects of SEFR; the day-to-day operations of SEFR, its resources and sources of funding were not the subject of evidence; and its concern for gliders recently manifested. Lastly, the primary judge found that if the Court was wrong in relation to the question of sufficient special interest, SEFR had not established a serious question to be tried or an arguable case and that the balance of convenience weighed in favour of granting an injunction.

The appeal principally concerned whether the appellant had a sufficient special interest to bring the proceedings. The Court of Appeal also considered the notice of contention filed by the respondent which challenged the primary judge's rejection of its submission that no person other than one of those identified in s 69ZA(3) of the Forestry Act had power to "institute proceedings in a court to remedy or restrain a breach" of Pt 5B of the Forestry Act.

Issues:

(1) Whether common law standing principles apply to civil enforcement proceedings, notwithstanding the restrictive standing provisions in ss 69SB and 69ZA of the Forestry Act and ss 13.3, 13.14 and 13.14A of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**) (**notice of contention**);

(2) Whether in determining the appellant's application for an interlocutory injunction, the primary judge erred in finding that the court had a discretion to dismiss the proceedings on the ground that the appellant did not have standing (**Ground 1**);

(3) In the event the primary judge had discretion to dismiss the proceedings, whether the primary judge denied the appellant procedural fairness in the exercise of the discretion and ought to have provided the appellant an

opportunity to adduce further evidence as to standing (**Ground 2**); and

(4) In the event the primary judge had discretion to dismiss the proceedings, whether the primary judge erred in finding that the appellant did not have standing to bring the proceedings (**Ground 3**).

Held: Appeal allowed with costs and order 1 of the orders dated 8 February 2024 should be set aside (per Griffiths AJA, Adamson JA and Basten AJA agreeing):

In relation to the notice of contention

(1) The Court rejected the notice of contention and held that much clearer language than appears in ss 69SB and 69ZA of the Forestry Act and ss 13.14 and 13 14A of the Biodiversity Conservation Act was required to oust common law standing, consistent with the presumption that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights, privileges or liberties other than by a law expressed with "irresistible clearness": at [24]-[30], [105]-[119];

In relation to Grounds 1 and 2

(2) The Court held that there was no need to determine grounds 1 and 2 because the appeal succeeded on ground 3: at [50]; and

In relation to Ground 3

(3) The Court held that the appellant had a sufficient special interest in the subject matter of the proceedings because the evidence adequately demonstrated that: (a) its interest was more than a mere intellectual or emotional concern for the preservation of the environment; (b) its interest went beyond that of members of the public generally in upholding the law; (c) its interest involved more than genuinely held convictions; and (d) it had taken sufficient active and concrete steps to give effect to its interest and concerns. The Court observed that the appellant's concern to highlight the inter-relationship between logging of hollow-bearing trees and preservation of glider habitat went back to 2011 and was evident in its publications, submissions and other representations. The Court emphasised that an evaluative judgment had to be formed in relation to the issue of standing and that the exercise should not involve a "tick-the-box" approach: at [45]-[46], [148]-[176].

The substantive proceedings were remitted to the Land and Environment Court.

NSW COURT OF CRIMINAL APPEAL

ACE Demolition & Excavation Pty Ltd v Environment Protection Authority [2024] NSWCCA 4 (Leeming JA, Garling and Cavanagh JJ)

(Decision under review: *Environment Protection Authority v ACE Demolition & Excavation Pty (No 2)* [2023] NSWLEC 3 (Moore J))

Facts: ACE Demolition & Excavation Pty Ltd (**ACE**) pleaded guilty to four charges under s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) in relation to the provision of false or misleading weighbridge dockets and other documents that recorded ACE's dealings with asbestos waste. Three charges were brought for knowingly supplying false or misleading information under s 144AA(2), which attracted a maximum penalty of $500,000 and/or 18 months imprisonment. The remaining charge was brought under s 144AA(1) for supplying information that was false or misleading in a material respect, which attracted a maximum penalty of $250,000.

The primary judge imposed fines of $300,000, $270,000 and $240,000 for the three offences under s 144AA(2), and $133,650 for the fourth offence under s 144AA(1). Mr Al Sarray, ACE's "contract manager", was found to have caused each of the false notices to be sent, which gave rise to the company's offending. He was sentenced for two offences under s 144AA(2) and was fined $135,000 for each offence. ACE appealed the primary judge's decisions on three grounds and the following issues were raised before this Court.

Issues:

(1) Did the primary judge fail to properly account for the unlikelihood of ACE reoffending, under s 21A(3)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**), by requiring proof that future offending would *certainly* not occur?

(2) Did the primary judge err in concluding that 'harm' for the purposes of s 241 of the POEO Act and s 21A(3)(a) extended to "damage to the regulatory system itself", and was not confined to actual harm to the environment?

(3) Whether the sentences were manifestly excessive because of the following "sub-grounds":
(a) firstly, grounds 1 and 2 being made out;

(b) secondly, the sentences being unreasonable or plainly unjust;
(c) thirdly, a defect in the process of intuitive synthesis when reaching starting points of $165,000 and $330,000 for each offence under ss 144AA(1) and 144AA(2) respectively;
(d) fourthly, the primary judge not applying the course of conduct principle to prevent double punishment for the same conduct; and
(e) fifthly, there being unjustifiable disparity between the sentence imposed upon ACE and that imposed upon Mr Al Sarray.

Held: Appeal allowed, existing fines quashed and lesser fines imposed. Existing stay discharged for payment of fines and publication (per Leeming JA, Garling and Cavanagh JJ agreeing):

Ground 1: Assessment of the risk of reoffending

(1) The primary judge erroneously applied an unduly onerous approach to s 21A(3)(g) of the CSP Act by asking whether one could be *certain* that ACE would not reoffend, rather than assessing the likelihood of reoffending: at [52]-[58];

Ground 2: distinction between "the actual or likely harm to the environment" and "damage to regulatory regime"

(2) For the purpose of s 241(1) of the POEO Act, there is a distinction between actual or likely harm to the environment, and damage to the regulatory regime which carries with it the potential of future harm to the environment. Section 241(1) only invites attention to the former. However, damage to the regulatory regime may fall, for example, within s 241(2) of the same Act as part of the "other matters that [the Court] considers relevant: at [60]-[66];
(3) In assessing whether ACE had established, to the civil standard, that "the injury, emotional harm, loss or damage caused by the offence was not substantial" for the purpose of s 21A(3)(a) of the CSP Act, it is inappropriate to have regard to harm to the regulatory system. The statutory language instead picks up familiar terms of compensable loss in private law, and "harm to the regulatory system" does not readily fit within that language. Those considerations fall more readily within s 21A(1) of the same Act: at [67]-[70];

Ground 3: finding of manifest excess in sentences imposed

(4) A finding of manifest excess invites the Court to consider whether the sentence is so excessive that it was plainly unfair or unjust. It was therefore inconsistent for specific errors to be pleaded as though they were "sub-grounds" of manifest excess: at [7]-[14];
(5) As part of the mandated process of instinctive synthesis, it was open for the primary judge to first record the undiscounted starting point for the fines imposed for each offence, to which a discount was later applied: at [73]-[76];
(6) The circumstance that a number of offences arose out of the same course of criminal conduct did not dictate that concurrent sentences must be imposed. However, as an application of the principle of totality, the nature of the criminal conduct involved in the first and third offences overlapped in a way that warranted a discount: at [77]-[83], [108]-[111];
(7) There was no disparity in the sentences imposed upon ACE and Mr Al Sarray in circumstances where ACE was the contracting party entitled to the contract price and Mr Al Sarray was an employee without a direct economic interest in the offending conduct: at [84]-[85]; and
(8) ACE was not entitled to a reduction under section 21A(3)(m) of the CSP Act for "assistance by the offender to law enforcement authorities" where it had merely adhered to an agreed statement of facts without an assessment that that adherence had reduced the issues in contest: at [92]-[103].

SUPREME COURT OF NEW SOUTH WALES

JEA Holdings (Aust) Pty Ltd v Registrar-General of New South Wales **[2024] NSWSC 85** (Richmond J)

(Related decision: *Registrar-General of New South Wales v JED Holdings (Aust) Pty Ltd* [2015] NSWCA 74) (Bathurst CJ, Beazley P, Basten JA))

Facts: The Applicant, JEA Holdings Pty Ltd (**JEA**), sought an order for compensation under the Torrens Assurance Fund (**Fund**) pursuant to s 129 of the *Real Property Act 1900* (NSW) (**Act**), against the Registrar-General (**R-G**). The substance of the claim was that the R-G's omission of an easement from the register affected the property purchased by the Applicant in 2010. Following the subsequent decision of the Court of Appeal in 2015, the R-G ultimately recorded an easement on the folio of the affected lot (**Lot 4**). It was contended that with the registration the easement suffered

loss of a kind compensable under s 129 of the Act. In 2016, Liverpool City Council (**Council**) gave conditional consent to JEA to redevelop the subject site and adverted in its assessment report to cl 1.9A of the Liverpool Local Environmental Plan 2008 (**Liverpool LEP**), evincing an intention to temporarily suspend the easement during the construction phase of the development, there being no carpark on Lot 4 during that period. The compensation pressed by the Applicant in the current proceedings fell into two broad categories: the first being the diminution in the value of the land because its development was affected by the recording of the easement; the second being the costs incurred in the unsuccessful proceedings it brought against the R-G challenging the decision to record the easement and the costs of its claim against the Fund. The R-G, accepting that the failure to record the easement on the title to Lot 4 was an 'omission' for the purposes of s 129(1)(a), nonetheless disputed such relief because s 3.16 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and cl 1.9A of the Liverpool LEP together enabled the Applicant to obtain a development consent effectively overriding the easement.

Issues:

(1) Whether the Council, in the granting of development consent, could suspend the operation of an easement, such that the restrictions applicable to the easement no longer apply to the development;
(2) Whether JEA was entitled to compensation under s 129(1) of the Act for the diminution in the value of Lot 4 caused by the registration of the easement; and
(3) Whether the legal costs incurred by JEA can be compensated under s 129(1) of the Act.

Held: Uphold claim in respect of issue (3) only:

(1) By virtue of s 3.16 of the EPA Act, cl 1.9A of the Liverpool LEP permitted the Council to suspend the easement when granting conditional consent to the Applicant's development and would, permit the Council to grant such consent whilst suspending the easement entirely: at [78]. The three-step approach of Preston CJ in *William Lloyd Carey-Evans and Jennifer Anne Quist as Executors of the Estate of Robert Rufus Carey-Evans v Wenhao Wu* [2022] NSWLEC 144 was applied:
    (a) first, by identifying as the relevant interest occasioned by the original transfer of land in 1963, the easement;
    (b) second, ascertaining that that transfer was properly regarded as an agreement or instrument of an equivalent nature; and
    (c) third determining, as it was said to do, that the transfer restricted the carrying out of development in accordance with the development consent granted by the Council. The Applicant's contrary submissions – regarding the applicability of *Cracknell & Lonergan Pty Ltd v Council of the City of Sydney* (2007) 155 LGERA 291, the distinction between negative and positive easements and the proprietary interest created by easements – were each dismissed;
(2) The Applicant failed to establish an entitlement to compensation for the diminution in the value of Lot 4 as a consequence of the easement: at [100]. Both submissions regarding the highest and best use of the development and that easement restricted the use of the ground level of Lot 4 to a carpark, were rejected: the former because the development could have proceeded regardless of whether the land was burdened by an easement, and the latter because it was contradicted by the terms of the development consent, contemplating as it did that the ground level would be partly a commercial space and partly a carpark; and
(3) The Applicant was entitled to compensation under s 129 (1) for costs incurred in the current, as well as prior, proceedings under s 129(1): at [101], [116]. Contrary to the Applicant's submissions, each set of costs were said to be reasonable in the relevant causative sense required under that section.

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

***Environment Protection Authority v Dial-A-Dump (EC) Pty Ltd* [2024] NSWLEC 21** (Pepper J)

Facts: The defendant, Dial-A-Dump (EC) Pty Ltd (**DADEC**), pleaded guilty to an offence against s 129(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), in that it was the occupier of the premises at which scheduled activities were carried out under the authority conferred by a licence and it caused the emission of offensive odour from the premises to which the licence applied between 26 March and 16 June 2021 (**charge period**). Over the course of the charge period DADEC caused the emission of offensive odour associated with landfill gas (**LFG**) from Bingo Eastern Creek Landfill at Honeycomb Drive,

Eastern Creek New South Wales 2766 (**landfill**). The odour was detected regularly during the charge period by residents in the nearby suburb of Minchinbury, and intermittently during the charge period by residents in the nearby suburbs of Eastern Creek and Horsley Park. On all but one day of the charge period, the EPA received approximately 750 odour complaints from approximately 250 individuals about offensive odour in the vicinity of the landfill, particularly in Minchinbury. The odour was variously described as smelling like "rotten eggs", "a sewer" or "sulphur".

Issue: What was the appropriate sentence to be imposed on DADEC taking into account the objective seriousness of the offence and the subjective circumstances of the offender.

Held: DADEC was fined a total monetary penalty of $280,000. Half which was payable to the prosecutor by way of moiety and the other half of paid to Blacktown City Council as an environmental services order. Publication orders were also made:

Objective seriousness of the offence

(1) The commission of the offence contravened the legislative intent of protecting the quality of the environment under s 3(a) of the POEO Act: at [81];
(2) The maximum penalty for the commission of the offence was $1,000,000 under s 129 of the POEO Act: at [82]-[83];
(3) There were very real symptoms suffered by local residents over several months amounting to "harm" as defined in the POEO Act, despite the fact that the impacts were short term and transitory: at [98];
(4) The harm caused by the commission of the offence was "substantial" for the purposes of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) because the odour had profound physical and emotional consequences, continued for several months, and affected a significant number of people: at [106];
(5) Although DADEC implemented a number of measures to manage odour prior to, and during, the charge period, there were further practical measures that DADEC could, and should, have taken including installing a LFG extraction system: at [115];
(6) The emission of offensive odours from the landfill was reasonably foreseeable: at [120];
(7) As the owner and occupier of the landfill, DADEC had complete control over the commission of the offence. In relation to the extreme rainfall event, it was incumbent upon DADEC to anticipate and plan for the possibility of such events, especially when frequency of such events has increased as a result of climate change: at [125];
(8) To the extent that a considerable number of residents were adversely impacted by the odour the commission of the offence involved multiple victims: at [129];
(9) The offensive odour offence was in the upper mid-range of objective seriousness: at [130];

Subjective circumstances of the offender

(10) A 20% discount for the utilitarian value of the plea of guilty was appropriate due to the delay of approximately one year in DADEC entering its plea: at [135];
(11) DADEC provided assistance to the EPA including by arranging for staff and members of its executive team to meet with EPA officers, respond to information requests, provide the EPA with regular updates, agree voluntarily to a lengthy statement of agreed facts and require only one witness for cross-examination: at [137]-[138];
(12) DADEC accepted responsibility for its actions and acknowledged the injury, loss and damage that it had caused by the commission of the offence: at [142];
(13) DADEC had prior convictions for two offences contrary to cl 80(4) of the Protection of the Environment Operations (Waste) Regulation 2014 (NSW) for failing to cover asbestos waste at the landfill: at [143];
(14) Evidence of DADEC's corporate group engaging in sustainability initiatives was partially accepted as evidence of its good character, but this was given less weight than had the activities been engaged in exclusively by DADEC: at [149];
(15) The likelihood of DADEC reoffending was low: at [153];
(16) There was a need for general deterrence to ensure that other operators in the waste industry prevent offensive odours being emitted resulting from their operations: at [156];
(17) There was also a need for specific deterrence because DADEC was the holder of two EPLs and was an active participant in the waste industry in NSW, including in the operation of landfills: at [157]; and
(18) Various publication orders were made, including requiring DADEC to publish a notice on its social media accounts, in two newspapers, one magazine and by letterbox drop to affected local residents.

Natural Resources Access Regulator v Littore **[2024] NSWLEC 53** (Pepper J)

Facts: The Natural Resources Access Regulator (**prosecutor**) commenced four prosecutions against David Littore

(**defendant**) alleging that he committed four Tier 1 offences against s 60C(1)(b) of the *Water Management Act 2000* (NSW) (**WM Act**) in that he took water otherwise than in accordance with the water allocation for a water access licence either knowing, or with reasonable cause to believe, that the taking of the water was not in accordance with the water allocation. In the alternative, the summonses charged that the defendant committed four Tier 2 offences against s 60C(2) of the WM Act. The four charges particularised events in the four water years from 2011 to 2015. By notice of motion the defendant sought an order that all charges be struck out on the basis that the proceedings were time barred pursuant to s 364(2) of the WM Act. This was because the offending conduct for each offence first came to the attention of any relevant authorised officer before the date nominated in the summonses, being 31 October 2019. The defendant had installed a third main pipe and associated valve (**mainline 3**) at its property without authorisation, which was taking unmetered water from the Darling River in exceedance of his water allocation. Mainline 3 was not discovered by relevant officers until October 2019, however, three officers had developed suspicions of the offending conduct through their investigations of the defendant's property as early as 14 October 2010.

Issues: Whether the defendant could establish that evidence of any act or omission constituting the alleged offences first came to the attention of any relevant authorised officer on a date prior to that nominated in the summonses. Three issues arose for determination:

(1) Who was a relevant authorised officer and when;
(2) Whether there needed to be a direct temporal coincidence between when an individual becomes an authorised officer and when the evidence of the offence comes to their attention; and
(3) When did evidence of any acts or omissions constituting the offences first come to the attention of the authorised officers for the purposes of the WM Act.

Held: Notice of motion dismissed. The defendant had not established that evidence of any act or omission constituting the alleged offences first came to the attention of any relevant authorised officer on a date prior to the nominated date:

(1) One of the three officers was an authorised officer as at 10 February 2009 and the other two officers were authorised as at 8 March 2018: at [89]-[94];
(2) The proper construction of s 364(3) of the WM Act was one that eschews a result whereby on the date upon which an individual is appointed as an authorised officer, everything that they knew prior to that date crystalises and adheres for the purpose of that provision. Rather, only upon an individual being appointed as an "authorised officer" does evidence that comes to their attention become relevant. Time therefore commenced to run from the date upon which any evidence first came to the attention of the three officers in their capacity as authorised officers: at [95]-[114]; and
(3) The evidence of the act or omission which constituted the offence was the discovery of mainline 3 by the relevant officers on 31 October 2019, being the date nominated in the summonses. There was no evidence that any of the three relevant officers were aware of mainline 3 prior to 31 October 2019. Although they had suspicions prior to this date, mere suspicion does not amount to evidence for the purpose of s 364(3) of the WM Act: at [124]-[159].

Secretary, Department of Planning and Environment v Khouzame **[2024] NSWLEC 54** (Preston CJ)

Facts: Ms Khouzame was the owner of a 40.86ha rural property in Canyonleigh, in the Southern Highlands of NSW. Between 13 July to 18 August 2021 Ms Khouzame cleared 4.92ha of native vegetation at the property and cleared 0.12ha between 2 May to 2 August 2022. Ms Khouzame was charged with an offence under s 60N of the *Local Land Services Act 2013* (NSW) (**LLS Act**), for clearing native vegetation in a regulated rural area.

Issue: What is the appropriate sentence for the offence committed by Ms Khouzame?

Held: Ms Khouzame was convicted under s 60N of the LLS Act as charged, fined $135,000, with one half to be paid to the prosecutor, and ordered to pay the prosecutor's costs of the proceedings:

Objective seriousness

(1) *Nature of the offence*: As the clearing was not authorised by the LLS Act, Ms Khouzame would have been required to apply for and obtain approval to authorise the clearing. The clearing had significant and irreversible impacts on biodiversity values and as such, an application for the clearing may have been refused. The consequences of the clearing are contrary to the objects in s 3 and Pt 5A Div 6 the LLS Act, including the object of ensuring proper management of natural

resources, consistent with the principles of ecologically sustainable development: at [10]-[27];

(2) *Maximum penalty for the offence*: The maximum penalty for the offence, committed by an individual when not committed intentionally, was $500,000: at [28]-[29];

(3) *Objective harmfulness of the offence*: Ms Khouzame's offence resulted in 5.04ha of high quality native vegetation being cleared in an area that had significant ecological values. The clearing removed at least 54 species of native trees, plants, shrubs and grasses in an area where no clearing had occurred in over a century, with some trees aged over 200 years. The clearing caused habitat loss, loss of connectivity and fragmentation and had led to significant soil erosion. The objective harmfulness was substantial: at [30]-[42];

(4) *Offender's state of mind*: As the offence is strict liability, mens rea is not an element of the offence. However, the state of mind of the offender can increase the seriousness of the offence. The commission of the offence was premeditated and planned, evident from the nature, scale, extent and duration of the clearing undertaken at Ms Khouzame's direction. The clearing involved earthmovers, excavators and bulldozers and other earthmoving equipment. Further, towards the end of the first tranche of clearing, on 11 August 2021, Ms Khouzame received a Development Control Order (**DCO**) from Wingecarribee Shire Council (**Council**), ordering her to stop all vegetation clearing, landfilling and earthworks. Ms Khouzame also received a Stop Work Order from the Department of Planning and Environment (**DPE**) on 22 April 2022, ordering her to cease clearing of native vegetation. Given this, the first tranche of clearing was committed negligently and the second tranche, when Ms Khouzame had received two notices informing her of the possible illegality of her actions, was committed recklessly: at [43]-[71];

(5) *Foreseeability of the risk of harm*: The evidence did not establish that Ms Khouzame actually foresaw the risk of harm to the environment from the first tranche of clearing, however a reasonable person would have foreseen this risk. The DCO issued in August 2021 alerted Ms Khouzame to the impact of the clearing on the environment and as such she was aware of the risk of environmental harm likely to be caused by the second tranche of clearing: at [72]-[76];

(6) *Practical measures to prevent risk of harm*: The practical measure Ms Khouzame should have taken was to not clear the native vegetation unless and until she had obtained LLS Act approval: at [77];

(7) *Offender's control over the cause of the offence*: Ms Khouzame directed others to carry out the clearing and therefore had full control over the causes of the offence and the harm to the environment: at [78];

(8) *Conclusion*: Having regard to the matters in (1)-(7) above, the offence was of medium objective seriousness, in the lower end of the mid-range of seriousness: at [79];

Subjective circumstances

(9) *Lack of prior criminality*: Ms Khouzame did not have any prior convictions: at [81];

(10) *Prior good character*: Ms Khouzame provided character references testifying to her good character: at [82];

(11) *Likelihood of reoffending*: As Ms Khouzame sold the property in February 2024, she no longer had the capacity to clear further vegetation on the property and so was unlikely to reoffend: at [83];

(12) *Remorse shown by the offender*: Ms Khouzame gave evidence of her regret for her actions. However, she did not undertake any action to rectify the harm caused by the offence, either voluntarily or in response to the Remediation Order by the DPE. She also did not voluntarily report the offence, nor take action to address the causes of the offence. Her remorse was therefore limited and directed more towards being prosecuted for committing the offence and the prospect of paying a sizeable monetary penalty: at [84]-[94]; and

(13) *Plea of guilty*: Ms Khouzame entered a plea of guilty at the earliest occasion and so a 25% discount was awarded: at [95].

Judicial Review

South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales **[2024] NSWLEC 7** (Pritchard J)

(Related decisions: *South East Forest Rescue Incorporated v Forestry Corporation of New South Wales* [2024] NSWCA 64 (Griffiths AJA); *South East Forest Rescue Incorporated v Forestry Corporation of New South Wales (No 2)* [2024] NSWLEC 36 (Pritchard J))

Facts: By summons filed 15 January 2024, the applicant, South East Forest Rescue Incorporated (**SEFR**) commenced Class 4 civil enforcement proceedings seeking that the respondent, Forestry Corporation of New South Wales

(**FCNSW**), be restrained from conducting any forestry operation as defined in Protocol 39 to the Coastal Integrated Forestry Operations Approval dated 16 November 2018 (**CIFOA**) unless "broad area habitat searches" are conducted in a manner that includes particular searches for "nest, roost or den trees" required by condition 57 of the CIFOA.
Condition 57 of the CIFOA specified requirements for the carrying out of broad area habitat searches where forestry operations were to be conducted, and provided in Table 2 that the species that must be searched for include nest, roost or den trees, as listed in Table 4, Ch 4 of Protocol 39 to the CIFOA.

SEFR also sought a declaration "that if a tree has tree-hollows or other holes, crevices or fissures, and at least one of those tree-hollows or other holes, crevices or fissures is or has been used by *Petaurus australis, Petaurus norfolcensis* and *Petauroides volans* for roosting, sleeping, resting, breeding, raising of young and communal congregations, shelter, and/or the rearing of young, that tree is: a "den tree" for purposes of Table 2 of the CIFOA Conditions; and a "Glider (*Petaurus australis, Petaurus norfolcensis* and *Petauroides volans*) den tree" purposes of Table 4 of the CIFOA Conditions".

By amended notice of motion filed 23 January 2024, SEFR sought interlocutory relief in relation to compartments in three State forests.

SEFR submitted that s 69ZA of the *Forestry Act 2012* (NSW) (**Forestry Act**), which departed from the open standing provisions in other NSW environmental legislation, such as ss 252 or 253 of the *Protection of the Environment Operations Act 1997* (NSW), did not oust the common law test for standing. SEFR submitted that *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; [1981] HCA 50 was authority for the proposition that there can exist common law standing to bring civil enforcement proceedings. FCNSW contested the existence of a SEFR having a "special interest".

FCNSW submitted that the compartments the subject of the proceeding were not within the region described as the south-east forests of NSW and that SEFR is "plainly missing" a connection to glider den trees and broad area habitat searches.

Issues:

(1) Whether determination of the question of SEFR's standing to seek the relief sought in its amended notice motion was anterior to and distinct from the questions to be determined on its application for interlocutory relief and whether that question is to be determined as a final matter or on a *prima facie* basis;
(2) Whether there existed, notwithstanding the provisions in ss 69SB and 69ZA of the Forestry Act and ss 13.3, 13.14 and 13.14A of the *Biodiversity Conservation Act 2016* (NSW), standing at common law to bring civil enforcement proceedings to enforce compliance with the requirements of integrated forestry operations approvals;
(3) Whether SEFR had established that it had such standing; that is, that it had a special interest in the subject matter of the proceedings; and
(4) Whether the Court ought exercise its discretion to grant the interlocutory relief sought by SEFR, having regard to whether there was a serious question to be tried and the balance of convenience.

Held: Notice of motion filed 23 January 2024 was dismissed:

(1) It was appropriate to exercise the Court's discretion to decide standing on a *prima facie* basis: at [174], [93]-[106];
(2) On its proper construction, s 69ZA of the Forestry Act does not have the effect of ousting common law standing to bring proceedings seeking to enforce compliance with the requirements of an integrated forestry operations approval to which Pt 5B of the Forestry Act applies. A private person or entity with a special interest in the subject matter of the proceedings seeking to enforce a public right or prevent a public wrong may have standing at common law to bring proceedings to enforce compliance with an integrated forestry operations approval: at [107]-[128], [175];
(3) SEFR did not have a sufficient special interest to bring the proceedings: at [129]-[140], [176]; and
(4) If the Court was wrong in relation to (3), SEFR had not established a serious question to be tried or an arguable case and that the balance of convenience weighed in favour of granting an injunction: at [141]-[167], [177].

Compulsory Acquisition

Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW **[2024] NSWLEC 39** (Duggan J)

(Related decision: *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW (No. 2)* [2024] NSWLEC 40 (Duggan J))

Facts: Goldmate Property Luddenham No 1 Pty Ltd (**Applicant**) objected to the amount of compensation offered by Transport for NSW (**Respondent**) for the compulsory acquisition of its interest in land pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**). On 19 March 2021, the Applicant was issued with a Proposed Acquisition Notice (PAN), evincing the intention to compulsorily acquire the subject land – formerly known as 777-819 Luddenham Road, Luddenham and legally described as Lot 26 in Deposited Plan 604586 (**Acquired Land**) – "for the purposes of the *Roads Act 1993* (NSW) (**Roads Act**) in connection with the construction, operation and maintenance of the M12 Motorway" (**M12**). The Valuer-General originally determined the value of compensation for the Acquired Land as nil and the value of disturbance as $130,112.58 pursuant to s 55(a) and (d) of the Just Terms Act, respectively. On 30 June 2021, the then vacant Acquired Land was acquired (**Acquisition Date**), at which point, given its close proximity to the Western Sydney Airport, it was principally zoned Enterprise under the State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 (**SEPP Aerotropolis**). The Applicant contended that it was entitled to compensation totalling $55,636,727.59 (comprised of $55,437,200 for market value and $199,527.59 for disturbance), whereas the Respondent's estimation as to compensation totalled $4,138,179.78 ($4,000,200 for market value and $137,979.78 for disturbance).

Issues:

(1) What was the public purpose for which the Acquired Land was acquired?
(2) Did the public purpose cause an increase or decrease in the value of the Acquired Land and, assuming in either case it did, ought such alterations be disregarded pursuant to s 56(1)(a) of the Just Terms Act?
(3) On what basis was the Acquired Land to be valued?
(4) What was the determination of the value of the Acquired Land?
(5) Was there any increase or decrease in the value of other land by reason of the public purpose pursuant to s 55(f) of the Just Terms Act?
(6) What was the quantum of the claim for disturbance to which the Applicant is entitled?

Held: Compensation pursuant to Pt 3 Div 4 of the Just Terms Act determined in the sum of $9,761,480, plus statutory interest:

(1) The Court held that the public purpose within s 56(1)(a) of the Just Terms Act, was not limited to the particular powers of the acquiring authority as legislatively conferred, it was ultimately a question of fact and in turn context: at [28]. In this case, the relevant purpose for which the Acquired Land was compulsorily acquired was the facilitation of the Western Sydney Airport, its commercial, industrial and employment uses as well as attendant economic opportunities: at [51], not the narrow purpose attributable to Respondent's powers under s 177 of the Roads Act evidenced by the PAN, as contended by the Applicant: at [21];
(2) The Court held that the change in the zoning of the Acquired Land from RU2 to ENT was relevantly "caused" – causation understood by reference to the statutory regime in question, not simply factually, per *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5 at [32]-[34] (Kirk JA) – by the Public Purpose: at [54]. In consequence, the zoning of the Acquired Land as ENT was to be disregarded due to s 56(1)(a): at [56];
(3) The Court held the Acquired Land was to be valued on the basis for RU2 zoning, with no potential for rezoning otherwise occurring within a foreseeable period of time: at [68];
(4) The Court determined the value of the Acquired Land by reference to comparable sales identified by the valuation experts which, making the necessary adjustments for, among other things, size and topography, amounted in the 'before' scenario to $175 m^2: at [89] and in the 'after' scenario to 260m^2$: at [109];
(5) The Court found in the Applicant's favour regarding a claim of injurious affection under s 55(f) arising from a diminution in value of the Residue Land – being a lot (Lot 2) of DP 1270586 created by the sub-division of the Acquired Land upon acquisition – caused by the Public Purpose restricting access to Residue Land: at [120]. Compensation for injurious affection resulting from the positioning of the "Outer Sydney Orbital (Under Consideration)" (**OSO**) adjacent to the Acquired Land was dismissed: at [127]; and
(6) The Court accepted the quantum for disturbance as agreed between the parties totaling $137,979.78: at [132]. However, Duggan J excluded from that determination the additional $54,947 relating the Applicant's legal costs and disbursement in proceedings it brought in the Supreme Court seeking an order for mandamus, such costs being incurred against parties other than the Respondent: at [138].

SECTION 56A APPEALS

Black v Jeihooni (No 2) **[2024] NSWLEC 13** (Pain J)

(Decision under review: *Black v Jeihooni* [2023] NSWLEC 1193 (Sheridan AC))

Facts: Ms Black (**appellant**) appealed pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**) the acting commissioner's (**AC**) decision to dismiss the appellant's trees dispute application. The application sought orders pursuant to Pt 2A s 14B of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**Trees Act**) for the removal of four palm trees on neighbouring land belonging to Ms Jeihooni (**respondent**). The AC held that she did not have the power to make the orders sought as the trees did not form a hedge.

Issues:

(1) Whether the AC erred on a question of law in determining that the trees were not "planted… so as to form a hedge" within the meaning of s 14A(1)(a) of the Trees Act; and

(2) Whether the AC erred on a question of law in considering the totality of the view when determining that the trees were not" severely obstructing a view from the dwelling situated on the applicant's land" within the meaning of s 14E(2)(a)(ii) of the Trees Act.

Held: Appeal dismissed. The appellant was ordered to pay the respondent's costs as agreed or assessed:

(1) The Trees Act does not have a definition of "planted … so as to form a hedge". Consideration must be had to the plain, ordinary meaning of the words within the statutory context and the particular circumstances of each case. The merits of the AC's decision cannot be reviewed. The appellant's criticism of the AC's finding that the palm trees were not planted close enough together to form a continuous barrier or screen impermissibly applied a fine-toothcomb approach. The AC appropriately considered the distance between the trees and the relationship of the foliage. The appellant's criticism that the AC took into account the subjective intention of the respondent which was inconsistent with the statutory context of "so as to form a hedge" also applied an impermissibly fine-toothcomb approach. The subjective intention of the person who planted trees can permissibly form part of the factual matrix considered by the AC. The AC did not apply subjective intention in her reasoning: at [39]-[56]; and

(2) The AC's judgment read as a whole included multiple references to views which suggests the AC did consider the totality of each separate view within the applicant's dwelling. The AC framed her decision by reference to s 14E(2)(a), suggesting that she was aware of the content of s 14E(2)(a) and was applying it in her judgment: at [69]-[73].

Canterbury-Bankstown Council v Realize Architecture Pty Ltd **[2024] NSWLEC 31** (Preston CJ)

(Decision under review: *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437 (Espinosa C))

Facts: Realize Architecture Pty Ltd (**Realize**) appealed against the refusal of a modification application by Canterbury-Bankstown Council (**Council**). The modification application sought approval to modify a development consent for a high-density residential development in Canterbury. Realize appealed against the refusal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The commissioner found that the precondition in s 4.55(2) of the EPA Act was satisfied and so upheld the appeal and ordered the modification of the development consent. The Council appealed against this decision under s 56A of the *Land and Environment Court Act 1979* (NSW). The Council's summons commencing the appeal included six grounds of appeal, however grounds 1 and 6 were withdrawn or not pressed by the Council at the hearing.

Issues:

(1) Ground 2: whether the commissioner erred in her chain of reasoning, in finding that the original and modified developments were substantially the same (**chain of reasoning ground**);

(2) Ground 3: whether the commissioner erred in concluding that the changes in the critical elements of the development caused the original and modified developments not to be substantially the same (**critical elements ground**); and

(3) Grounds 4 and 5: whether the commissioner erred in adopting the conclusion and approach of Realize's town planner, who concluded the original and modified developments were substantially the same because the consequences of the developments would be substantially the same (**consequences ground**).

Held: Appeal dismissed:

Chain of reasoning ground

(1) The facts found by the commissioner from the evidence admit of different conclusions as to whether the modified development was substantially the same as the originally approved development. It was therefore a question of fact for the commissioner to decide the correct conclusion and as such, the commissioner's conclusion involved no error of law;

(2) The Council's argument that the commissioner made an error in her reasoning process by summing the separate determinations of the precondition in s 4.55(2) of the EPA Act was rejected for four reasons:
   (a) the first assumption of the Council, that the commissioner determined the precondition in s 4.55(2)(a) was not satisfied because of the quantitative differences, was incorrect;
   (b) the second assumption of the Council, that the commissioner made a separate determination of whether the qualitative differences satisfied the precondition in s 4.55(2)(a), was incorrect;
   (c) the alleged process of summing separate determinations of the precondition in s 4.55(2)(a) was not undertaken by the commissioner; and
   (d) the approach contended by the Council was inconsistent with the test in s 4.55(2)(a) and involved misdirection. The requirement of s 4.55(2)(a) is a simple, holistic comparison of the development as modified and the development as originally approved;

Critical elements ground

(3) The commissioner's finding that she was not satisfied that any critical element being deleted or modified significantly would render the two developments not substantially the same was a factual finding and involved no error on a question of law;

(4) The comparison required by s 4.55(2)(a) did not require an identification or comparison of the critical elements of the two developments. Although such an approach had been undertaken in previous cases, this does not make such an inquiry a requirement under this section;

Consequences ground

(5) This argument was rejected for four reasons:
   (a) the foundation of this argument was incorrect as the expert did not only consider the consequences of the proposed modification;
   (b) the commissioner's statement preferring this expert's evidence was not restricted to the statement by that expert regarding the consequences of the development but instead referred to all of the expert's evidence;
   (c) that the commissioner stated she preferred this expert's evidence because the approach taken by that expert was consistent with the test in s 4.55(2)(a) did not reveal the commissioner misinterpreted or misapplied this test, which she had correctly identified and interpreted; and
   (d) misapplication of the test does not give rise to an error on a question of law.

Shoalhaven City Council v Easter Developments Pty Limited [2024] NSWLEC 49 (Preston CJ)

(Decisions under review: *Easter Developments Pty Ltd v Shoalhaven City Council* [2023] NSWLEC 1671; *Easter Developments Pty Ltd v Shoalhaven City Council No 2* [2023] NSWLEC 1732 (Espinosa C))

Facts: Shoalhaven City Council (**Council**) appealed against a Commissioner's decision to grant development consent to a three-lot subdivision in Vincentia (the **land**) to be carried out by Easter Developments Pty Limited (**Easter Developments**). The development site adjoined land owned by the Council. Both the land and the adjoining land were on bushfire prone land, and a bush fire safety authority was required under s 100B of the *Rural Fires Act 1997* (NSW) and the application for this authority, under cl 45(b) of the Rural Fire Regulation 2022 (NSW), was required to include "an assessment of the extent to which the proposed development conforms with or deviates from Planning for Bush Fire Protection" 2019 (**PBP**). Compliance with the PBP was a central issue in determining the development application. The PBP set out Bushfire Protection Measures (**BPMs**), one of which, for rural and residential subdivisions, is the creation of Asset Protection Zones (**APZs**). Easter Developments had proposed an APZ of 21.5m, 15.5m of which was proposed to be on the land and the remaining 6m on the adjoining Council land. The issue for the Commissioner was whether the APZ complied with the APZ requirements in the PBP. The Commissioner determined that this adjoining land was "managed land" and therefore complied with the requirements of the PBP, and so granted development consent. The Council appealed against this decision under s 56A of the *Land and Environment Court Act 1979* (NSW).

Issues:

(1) Whether the Commissioner erred on a question of law by misdirecting herself on a material issue as to the task

required under the PBP being whether the APZ would be provided "in perpetuity"; and

(2) Whether the Commissioner erred on a question of law by misdirecting herself and misapplying s 3.2.5 of the PBP in finding that Easter Development's proposed conditions were sufficient and preferable to the Council's proposed conditions.

Held: The appeal was upheld and the Commissioner's decisions and orders set aside:

Ground 1

(1) For an APZ on adjoining land, the question was not whether that land was "managed land" but rather whether there was an assurance that the APZ on adjoining land would be managed in perpetuity (s 3.2.5 and Table 5.3a of the PBP). This assurance could be achieved by the imposition of an easement under s 88K of the *Conveyancing Act 1919* (NSW) for privately owned land or, for publicly owned land, as in this case, an adopted Plan of Management by the Council which provided the assurance that the APZ would be managed in perpetuity: at [32]-[38], [49].

(2) The Commissioner erred in finding that a Plan of Management, which complied with s 3.2.6 of the PBP, was not required. This was the way in which the requirement that the APZ be provided in perpetuity could be achieved, as 6m of the proposed APZ was on Council land: at [50]; and

Ground 2

(3) The second ground was linked to the first ground: at [59], [61]. The Commissioner declined to impose the Council's proposed conditions, which would have required Easter Developments to obtain an easement over the adjoining Council land to ensure the APZ was managed in perpetuity. This misdirection flowed from the Commissioner's misdirection as to the PBP requirements: at [60].

Separate Question

NCV Enterprises Pty Ltd v Tweed Shire Council **[2024] NSWLEC 14** (Pepper J)

Facts: The applicant, NCV Enterprises Pty Ltd (**NCV**), lodged an application for staged concept development on 27 August 2020 (**concept DA**) pursuant to s 4.22(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The respondent, Tweed Shire Council (**Council**), refused the concept DA on 26 August 2021. NCV appealed against the refusal in Class 1 of the Land and Environment Court's jurisdiction on 16 August 2022. On 22 March 2023, the Court made an order pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) that five questions be decided separately from the proceedings.

Issues:

(1) Whether the Court had the power to grant consent to the concept DA in circumstances where the requirement for satisfaction of cl 4(1)(a) of Sch 5 to State Environmental Planning Policy (Primary Production) 2021 (**Primary Production SEPP**) was not able to be met until the consent authority considered the subsequent development applications (**DAs**) for the relevant stages of the concept proposal the subject of the concept DA;

(2) Whether the Court had the power to grant consent to the concept DA in circumstances where the requirement for satisfaction of cl 4(1)(g) of Sch 5 to the Primary Production SEPP was not able to be met until the consent authority considered the subsequent development applications for the relevant stages of the concept proposal the subject of the concept DA;

(3) Whether the Court had the power to grant consent to the concept DA where the land the subject of the subsequent stages extended beyond a proposed single lot and included roads, infrastructure and rehabilitation areas on other proposed lots;

(4) Whether the Court had the power to grant consent to the concept DA (other than pursuant to cl 4.6 of the Tweed Local Environmental Plan 2014 (**TLEP 2014**)) in circumstances where the requirement of cl 7 of Sch 5 to the Primary Production SEPP was not able to be met until the consent authority considered the subsequent development applications for the relevant stages of the concept proposal the subject of the concept development application; and

(5) If the answer to 1 (d) is "no", whether the Court had the power to grant consent pursuant to cl 4.6 of TLEP 2014.

Held:

(1) The first question was answered in the negative: at [89]. Concept DAs seek consent for development in the same manner as DAs under the EPA Act: at [42], [46]. The consent authority must therefore consider relevant provisions of any environmental planning instrument (**EPI**): at [46], s 4.15(1)(a)(i) of the EPA Act. Clause 4(1)(a) of Sch 5 of the Primary Production SEPP was a relevant EPI in that it contained a precondition

to the granting of consent to the concept DA and was not merely directed to future DAs: at [46], [74]. This precondition was required to be met before the Court could lawfully exercise its power to grant consent: at [72];

(2) For the same reasons, the answer to the second separate question was 'no'. Although markedly different wording, the text and context of cl 4(1)(g) resulted in a finding that the provision acted as a constraint on the exercise of power by a consent authority to the grant of consent: at [91];

(3) The answer to the third question was that the Court did have the power to grant consent to the concept DA provided, as discussed above, that the statutory preconditions to the grant of power in cl 4(1) of Sch 5 of the Primary Production SEPP were met: at [100];

(4) The fourth question was to be answered in the affirmative. The prohibition in cl 7(1) and (2) of Sch 5 of the Primary Production SEPP was directed to the grant of consent to "development under this Schedule" (rather than "to the carrying out of development on the land"). When regard was had to the development the subject of the concept DA it became apparent that the development was the concept proposal and the associated road and earthworks for Stage 1 only: at [104]-[105]; and

(5) The fifth question was not required to be answered in light of the affirmative answer to the fourth question. If however, the answer to the fourth question was 'no', then the answer to the fifth question was 'yes' because cl 7 of Sch 5 constituted "development standards" of a provision "in relation to the carrying out of a development": at [106] and [117]. Consequently, cl 7 of Sch 5 did not expressly exclude the operation of cl 4.6 TLEP 2014 and it remained operative for the purpose of granting dispensation from compliance with the development standard contained in cl 7 of Sch 5: at [127]-[128]

Interlocutory Decisions

The Owners of Strata Plan 78825 v Northern Beaches Council **[2024] NSWLEC 12** (Pain J)

Facts: The Owners of Strata Plan 78825 (**applicant**) owned land adjacent to land owned by the Northern Beaches Council (**Council**). The Council's and applicant's land had a long history of soil instability. The applicant commenced Class 2 proceedings challenging an order issued by the Council requiring a retaining wall to be constructed on the applicant's land to address soil instability. The Council filed a notice of motion seeking to strike out the Class 2 application and statement of facts and contentions (**SOFC**) in part. The applicant filed a notice of motion seeking leave to rely on an amended Class 2 application and amended SOFC. The focus of the argument was the Council's objections to the amended Class 2 application and amended SOFC.

The amended Class 2 application sought a declaration that the Council breached its duty of care in relation to support for land under s 177 of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**). As a result of the purported breach pursuant to s 180(4)(f) of the *Local Government Act 1993* (NSW) (**LG Act**) the applicant sought mandatory injunctive orders against the Council to undertake work on its own land to address soil instability (prayer 2 of the amended Class 2 application). The applicant also sought an order pursuant to s 181 of the LG Act that the Council pay the applicant for any work done and expenses incurred as a consequence of any orders that may be made by the Court (prayer 5 of the amended Class 2 application). The applicant applied for the proceeding to be transferred to the Supreme Court if the Land and Environment Court lacked jurisdiction in respect of these parts of the applicant's claim.

Issues:

(1) Whether the Court had jurisdiction to hear part of the applicant's claim reliant on s 177 of the Conveyancing Act;

(2) Whether the applicant may make a claim pursuant to s 181 of the LG Act in Class 2 proceedings; and

(3) Whether the amended Class 2 application should be transferred to the Supreme Court.

Held: The Class 2 application and SOFC were struck out. The applicant was granted leave to file and serve the amended Class 2 application except for paragraphs 2 and 5 and to file and serve the amended SOFC in part:

(1) The Court had no jurisdiction to entertain the parts of the applicant's claim reliant on the common law of negligence. The Conveyancing Act was not an environment and planning law. The power conferred on the Court to make an order under s 180(4)(f) did not enable jurisdiction where it did not otherwise exist. The matters under the Conveyancing Act were not ancillary to any matter within the Court's jurisdiction: at [26]-[38];

(2) The basis for a claim under s 181 of the LG Act was yet to arise and may not arise depending on the outcome of the Class 2 application. If pursued by the applicant, the appropriate course would be to commence Class 3 proceedings. It was not in the interests of justice nor would it achieve the just, quick and cheap resolution of matters by allowing prayer 5 of the applicant's claim to remain: at [39]-[40]; and

(3) A transfer of the amended Class 2 application to the Supreme Court was not appropriate. The decision to transfer proceedings to the Supreme Court was discretionary. The Land and Environment Court is conferred with express jurisdiction to determine Class 2 proceedings in a merits assessment context where the rules of evidence do not apply and has procedures to enable the prompt consideration of such matters. The commencement of proceedings in the Supreme Court would inevitably require a repleading of the applicant's case, the legal basis for which was unclear. Even allowing for the transfer of jurisdiction it was not apparent how parts of the applicant's claim regarding negligence could proceed alongside legal issues related to orders issued under the LG Act: at [41]-[51].

Xu v Johns **[2024] NSWLEC 33** (Preston CJ)

(Decision under review: *Xu v Seccombe* [2023] NSWLEC 1670 (Galwey AC))

Facts: Ms and Mr Xu (**Applicants**) brought two sets of proceedings in the Land and Environment Court (**LEC**) for orders for the removal of certain trees growing on Ms Johns' neighbouring land (**the Trees**).

The Applicants' first set of proceedings were commenced by an application in the LEC under Part 2 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**Trees Act**), seeking removal of the Trees, compensation for loss and damage, and injunctive orders (**First LEC Proceedings**). The Commissioner dismissed the application on the basis that the Applicants had not established that any of the Trees had caused, or was likely in the near future to cause, damage to their property or injury to a person.

One day after the Commissioner's decision, the Applicants' filed a statement of claim in the Local Court, seeking various forms of relief and compensation. At the pre-trial review before the Registrar, the Applicants' claim was dismissed.

The decision in this case was in relation to a second application made by the Applicants under Part 2 of the Trees Act seeking the removal of the Trees and payment of compensation (**Second LEC Proceedings**). Ms Johns (**Respondent**) sought the summary dismissal of the Second LEC Proceedings pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) on the basis that the proceedings were an abuse of process or were frivolous or vexatious.

The Respondent contended that the Second LEC Proceedings should be dismissed as an abuse of process by reason of:

(1) Cause of action estoppel;
(2) Issue estoppel;
(3) Anshun estoppel; and
(4) Being frivolous or vexatious.

Issues:

(1) Whether the Second LEC Proceedings were an attempt to re-litigate an action or issues that had been decided in the First LEC Proceedings (res judicata)?
(2) Whether the Second LEC Proceedings were an attempt to re-litigate issues that could or should have been litigated in previous proceedings?
(3) Whether the Second LEC Proceedings should be dismissed as they were frivolous or vexatious?

Held: Dismissing the Second LEC Proceedings with costs:

(1) *Cause of action estoppel*: An action under s 7 of the Trees Act as a statutory cause of action replaces the common law cause of action in nuisance. The cause of action for damage to the Applicants' property by the Trees was decided by the Commissioner in the First LEC Proceedings, which precluded the Applicants from later bringing proceedings upon that cause of action. The principle of res judicata applied;
(2) *Issue estoppel*: The cause of action in the Second LEC Proceedings was that the roots of the Trees caused damaged to the Applicants' house. That factual issue was an issue central to the cause of action in the First LEC Proceedings and was determined finally by the Commissioner. The applicants were estopped from raising the issue again in the Second LEC Proceedings;
(3) *Anshun estoppel*: Anshun estoppel is an extension of issue estoppel and applies not to issues that were decided in earlier litigation, but rather to issues that could and should have been raised in that earlier litigation. In the event that the commissioner did not decide the issue of whether roots of the Loquat (Tree 1)

caused damage to the Applicants' house, it was an issue that the Applicants could and should have raised in the First LEC Proceedings. The Applicants were estopped from raising the issue again in the Second LEC Proceedings; and

(4) *Frivolous or vexatious*: The dismissal of the proceedings on grounds of the three forms of estoppel made it unnecessary to decide whether the proceedings should be dismissed as being frivolous or vexatious.

MKB Contracting Pty Ltd v Transport for NSW **[2024] NSWLEC 50** (Pain J)

Facts: MKB Contracting Pty Ltd (**applicant**) operated a childcare centre and sought compensation for the compulsory acquisition of part of its land by Transport for NSW (**respondent**). Orders had been made permitting the filing and service of expert reports on bushfire, traffic, acoustics, quantity surveying, town planning and valuation. The registrar refused leave for the applicant to rely on architectural evidence pursuant to r 31.19 under Pt 31 Div 2 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). The applicant filed a notice of motion seeking to set aside this decision.

Before the registrar the applicant provided evidence that its town planning and valuation experts had advised that architectural evidence was required to determine the precise impact of the public purpose on the applicant's residue land and potential expansion of the childcare centre. Before the Court the applicant read an affidavit (not before the registrar) attaching a letter from the applicant's valuer stating that architectural evidence was required to undertake valuation based on a 'rate per place' basis.

Issues:

(1) Whether the architectural evidence was reasonably necessary; and

(2) Whether the applicant established sufficient reason to set aside the registrar's decision.

Held: The Applicant's notice of motion was dismissed:

(1) The architectural evidence was not reasonably necessary. The extent to which a prudent hypothetical buyer and seller in the relevant market were assumed to be informed, including obtaining expert reports to assist them, must be part of the consideration of whether reports ought be allowed to be adduced. The proceeding was well progressed and the parties already had leave to rely on a large number of expert reports. Class 3 Practice Note – Compensation Claims, the overriding purpose of s 56 of the *Civil Procedure Act 2005* (NSW) and the purpose of Pt 31 Div 2 of the UCPR discourage adducing unnecessary expert evidence. It was not apparent why the applicant's valuer was unable to proceed based on the applicant's town planning evidence which provided estimates that would assist the valuer in undertaking his 'rate per place' valuation and assessment of the impact of the public purpose and potential expansion of the childcare centre: at [12]-[16]; and

(2) The applicant did not establish sufficient reason to set aside the registrar's decision. There was no material change of circumstance between the registrar's decision and the circumstances before the Court. The substance of the valuer's letter attached to the additional affidavit was before the registrar when she made her determination. The applicant did not establish that it is in the interests of justice to set aside the decision, alleged no error of law, *House v The King* error or material fresh evidence to support its application: at [17]-[18].

Merit Decisions (Commissioners)

Investments NQ Pty Ltd v Tweed Shire Council [2024] NSWLEC 1108 (O'Neill C)

Facts: The applicants appealed under ss 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the refusal by Tweed Shire Council (**the Council**) of the development application for a two lot Torrens title subdivision and construction of two dwellings. All the merit issues raised in the Statement of Facts and Contentions had been resolved by amendments made to the application. Two jurisdictional issues were raised by the Council.

The site adjoined a public reserve owned by Crown Lands and managed by the Council. The site had access from Razorback Road reserve via a Right of Carriageway over the public reserve. The Department of Planning, Housing and Infrastructure – Crown Lands had provided a letter granting consent to the lodging of the application subject to certain conditions, including, at (6), that the Council obtain an easement over the water infrastructure on the Crown Land reserve.

A very small portion of the site was mapped as littoral rainforest on the Coastal Wetlands and Littoral Rainforest Area Map. Pursuant to s 4.10(1) of the EPA Act and s 2.7 of State Environmental Planning Policy (Resilience and Hazards) 2021, development on land identified as littoral rainforest and for which consent was required was declared to be designated development. Designated development was to be accompanied by an environmental impact statement (**EIS**), at s 4.12(8) of the EPA Act.

Issues:

(1) Whether owner's consent to lodge the development application, pursuant to s 23(1) of the Environmental Planning and Assessment Regulation 2021 (NSW), had been given in the letter from the Department of Planning, Housing and Infrastructure – Crown Lands, as the condition requiring the Council to obtain an easement over the water infrastructure on the Crown Land reserve had not been fulfilled; and

(2) Whether the development was designated development.

Held: Directing the parties to file a revised set of agreed conditions that omit any reference to the approval of subdivision works:

(1) The letter provided by the Department of Planning, Housing and Infrastructure – Crown Lands gave owner's consent for the lodging of the application. The letter made a clear distinction between what happens under the EPA Act and what happens under its property rights. Crown Lands consented to the making of the application but had not given consent to carry out works under property law. The requirement at (6) for the Council to obtain an easement was not a pre-condition to the granting of consent to make the application, it was instead a requirement after the granting of development consent to the proposal and prior to works commencing: at [27]; and

(2) The subdivision component of the development was designated development because subdivision of the land incorporated the whole of the site. The area mapped as littoral rainforest formed part of one of the subdivided lots and as such, the application required an EIS as a jurisdictional prerequisite to the grant of consent: at [37].

***PC Infrastructure Pty Ltd v Wentworth Shire Council* [2024] NSWLEC 1139** (Espinosa C)

Facts: A development application for the construction and operation of a service station trading as "On the Run" (**OTR**) was refused by Wentworth Shire Council because the service station would rely on vehicular access to the site from a classified road, namely the Sturt Highway.

The site was zoned RU5 Village Zone and had the benefit of a right of way (**ROW**) for vehicular access pursuant to a registered easement. The Applicant did not rely on the ROW for vehicular access for the service station, except in an emergency. The ROW access was gained via Melaleuca Street. The adjoining property, burdened by the ROW, was occupied by an existing Shell service station and the owner was the Second Respondent to the Appeal. The Shell service station had access to the Sturt Highway.

The proposed access to OTR for vehicles travelling in a westerly direction was to be by way of a right turn in (prohibiting right turns into the site from the Sturt Highway for vehicle over 9m long) but not able to turn right out of the site to resume that journey in a westerly direction towards Mildura. The proposal included a deferred commencement condition which, unless the Council was satisfied that left-turn access was demonstrated to be consistent with AS2890.2:2018 following the provision of further information, the diesel bowser and canopy and B-Double parking would be deleted, and access to the Site would be restricted to light vehicles and rigid trucks no longer than 12.5m. This deferred condition was proposed by the Applicant as a result of agreement between the experts that access to the site by articulated heavy vehicles over 12.5m was not practical due to the gradient of the driveway.

Issues:

(1) Whether the Court could be satisfied as to s 2.119 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (**SEPP Transport and Infrastructure**) as to whether an alternate road was practically and safely available for vehicles and secondly, whether there was an adverse impact on the classified road where a right turn in to the Site was provided to westerly travelling vehicles;

(2) Could a jurisdictional prerequisite be satisfied by a condition of consent? (ss 4.16 and 4.17 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**)) and was there power to impose a deferred commencement condition to satisfy a

jurisdictional prerequisite? (s 4.16(3) of the EPA Act); and

(3) Whether the proposed deferred commencement condition created uncertainty.

Held: Dismissing the appeal and refusing development consent:

(1) As to the provisions of SEPP Transport and Infrastructure:
   (a) it was a road, other than the Sturt Highway, by which vehicular access to the Site could be provided: at [58] and [106];
   (b) the ROW and Melaleuca Street provided practicable and safe alternate access to the site: at [76];
(2) The proposed deferred commencement condition would result in works which would have impacts which were unable to be assessed because the design changes were not yet certain: at [146];
(3) Conditions of consent may satisfy deficiencies regarding the merit considerations pursuant to s 4.15 of the EPA Act at the time of granting consent, however, one cannot conflate addressing a merit assessment or evaluation (ss 4.15, 4.16 and 4.17 of the EPA Act) with the satisfaction of a jurisdictional prerequisite: at [133];
(4) A jurisdictional prerequisite was unable to be satisfied by reference to a condition of consent because without the power to grant a consent there was no consent for which conditions can be imposed: at [147]; and
(5) Equally, the power to impose a deferred commencement condition did not extend to the satisfaction of a jurisdictional prerequisite: at [147].

Congarinni North Pty Ltd v Nambucca Valley Council **[2024] NSWLEC 1141** (O'Neill C)

Facts: The applicants appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) against the refusal by Nambucca Valley Council (the Council) of the development application for demolition of existing structures, bulk earthworks, construction of a seniors housing development comprising of 233 independent living units, ancillary recreational facilities, residential and visitor car parking, landscaping works, and civil infrastructure works including construction of roads, stormwater drainage and water supply works.

The site had an area of 57.3 ha and was a rural property occupied by a dwelling house and farm shed. The site had access only from Coronation Road. The waterway, Taylors Arm, a tributary of the Nambucca River, was on the opposite side of Coronation Road and flowed in a north easterly direction into the Nambucca River. Approximately two thirds of the site was flood affected including the access driveway from Coronation Drive.

The site was zoned part C2 Environmental Conservation, part C3 Environmental Management and the bulk of the site was zoned RU1 Primary Production. A Planning Proposal was initiated in 2013 to amend the Nambucca Local Environmental Plan 2010 (**NLEP**) to include development for the purposes of seniors housing on the subject site under Schedule 1 – Additional Permissible Uses. The amendment of the NLEP was subsequently gazetted in 2017 making the proposed development permissible with consent. The Flood Planning clause, cl 7.3 of NLEP, was removed from the NLEP and replaced by a new Flood Planning clause, cl 5.21. Neither of the Flood Planning clauses applied to the proposed development.

The proposed development was located on the higher part of the site above the probable maximum flood line which was accessed via the driveway from Coronation Road. The proposed development included a Flood Emergency Response Plan (**FERP**) which identified an evacuation route via Coronation Road to the local school. For the occupants not wanting to evacuate, the FERP nominated a shelter in place strategy, as the independent living units would be isolated during floods of approximately 10% annual exceedance probability (**AEP**) and may remain isolated for up to 5 days with no suitable overland escape route.

Issue: Whether the site was suitable for the proposed development due to its flood risk.

Held: Dismissing the appeal and refusing development consent:

(1) The site's flood risk constraints were severe for a seniors housing development and the risk to life posed by the site's flood risk could not be overcome through the provision of a FERP: at [47]-[48];
(2) The proposed development would unreasonably increase the burden on the emergency services through evacuation of the site, then rescue and resupply, and the increase in that burden would be significant and excessive due to the number of senior residents who evacuate the site, the number of residents likely to remain on the isolated site and their vulnerability when compared to the rest of the population. A part shelter in place strategy for the likely isolation period during a

greater than 10% AEP event was not appropriate for a vulnerable cohort such as seniors and people with a disability: at [49]-[50]; and

(3) The proposal was not compatible with the flood hazard of the land: at [52].

Harbour Port East Coast Pty Ltd v Sutherland Shire Council **[2023] NSWLEC 1683** (Gray C)

Facts: The applicant appealed against the refusal of three development applications for jetties sought to be constructed at the rear of properties with direct rear access to the foreshore of Woolooware Bay. Each of the three proposed jetties included the construction of a decking platform to provide shared access to the jetty from two properties, a jetty ranging from 22 to 27.3m, and sea stairs to enter the water at the end of the jetty. Each was to be located substantially on the public waterway and foreshore land at the prolongation of a shared boundary between two properties.

Woolooware Bay is largely absent of man-made structures extending into the waterway, except for four historic dilapidated slip rails from old boat sheds. The intertidal area where the access platforms were proposed was comprised of sandy beach area exposed at mid to low tide, and partially exposed at high tide. The sandy beach area extended from an area to the north of where the jetties were proposed, to the southern end of a shorebird reserve known as Taren Point Shorebird Reserve, which provided public access to the beach and foreshore. A person walking along the beach from the reserve to the beach area adjacent to the residential properties to the north would be required to walk over a number of the slip rails.

The beach adjacent to the reserve was an open tidal sandflat, and the area provided habitat for an endangered ecological community known as the Taren Point Shorebird Community. Each of the development applications, when uploaded to the NSW Planning Portal, was accompanied by a letter of owners' consent from Transport for NSW (**TfNSW**) on behalf of Roads and Maritime Services (RMS), except that the consent letter was stated to be valid "for 12 months from the date of this letter". The filing fee was paid after the expiry of the 12 month period. A current owners' consent from TNSW for each of the development applications was then provided on 27 March 2023. The Environmental Planning and Assessment Regulation 2021 (**EPA Regulation 2021**), the Sutherland Shire Local Environmental Plan 2015 (**SLEP**), and s 6.65 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (**SEPP B&C**) each contained savings provisions that were determinative of the provisions that applied to the development applications, which were dependent on when the development applications were "submitted", "lodged" or "made".

Issues:

(1) The date on which the development applications were considered to be "submitted", "lodged" and "made" for the purpose of the savings provision in the EPA Regulation 2021, the savings provision in the SLEP, and the savings provision in s 6.65 of the SEPP B&C;

(2) Whether the proposed developments would adversely impact on safe and convenient access to and along the beach and foreshore;

(3) Whether the proposed developments would have an unacceptable visual impact;

(4) Whether the proposed development would have an acceptable impact on the habitat of the shorebird community; and

(5) Whether the approval of the jetties would set an undesirable precedent for similar future development, which will have a cumulative visual and ecological impact.

Held: Dismissing the appeal and refusing development consent:

(1) The use of the word "submitted" in the savings provision of the EPA Regulation 2021 imparts a different meaning to the word "made", and given that an incomplete development application can be submitted and subsequently rejected pursuant to s 39 of the EPA Regulation 2021, the absence of owners' consent does not mean it cannot be considered to be "submitted": at [52]. Each of the development applications were submitted prior to 1 March 2022. The savings provision of the EPA Regulation 2021 was therefore triggered and the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation 2000**) applied: at [53];

(2) The requirement in cl 49(1) of the EPA Regulation 2000 for a development application to be made "with the consent of the owner of the land" was met when the development applications were lodged on the NSW Planning Portal, as they were accompanied by the consent of the owners of the land: at [58]. The statement that the consent was valid for 12 months raised a question about the adequacy or currency of the consent but did not nullify its existence: at [58]. It is well established that owners' consent cannot be withdrawn or conditional: at [59]. There was also substantial

compliance with cl 50(1)(a) of the EPA Regulation 2000 as each of the development application forms were completed and in the approved form: at [60]. Therefore, the development applications were both "lodged" and "made" on the date that the fee was paid: at [61], *Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2023] NSWCA 264 applied. This was prior to the relevant dates in the savings provisions in cl 1.8A(2A) of the SLEP and s 6.65 of the SEPP B&C, such that the applicable wording of cl 6.9 of the SLEP was that prior to Amendment 23, and the applicable provisions of the SEPP B&C were those contained in the repealed Ch 11;

(3) Public access to the sandy beach areas at the rear of the private properties was achieved by walking along the beach from the public reserve, from the water using a recreational craft and from the private properties of residents who have direct frontage to the bay: at [78]. These beach areas were used by the public for walking, baiting, recreational fishing and accessed for kayakers: at [81];

(4) Each of the decking platforms and jetties presented an unreasonable obstacle and an intrusive impasse to the movement of the public along the beach and to anyone using that area of the beach as a result of their location, length across the beach to connect to the private properties, and resulting height above the sand: at [83]-[84], [86]-[87]. Stairs proposed by the applicant to allow the public to walk over the jetties did not adequately resolve the obstruction, as they would create forced zig-zagging preventing the free range casual traversing of the beach in the relevant areas: at [85] and [88];

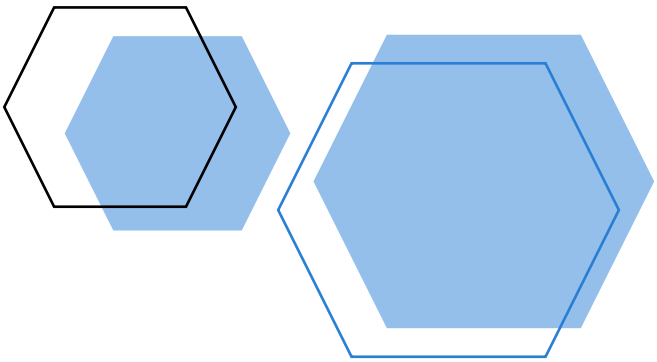
(5) The proposed developments were therefore likely to have an adverse impact on "existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability", one of the matters for consideration pursuant to s 2.10 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (**SEPP RH**): at [89]-[90], and that impact was not avoided, minimised or mitigated to an acceptable degree: at [91]-[96]. The state of satisfaction required by s 2.10(2) of the SEPP RH is therefore not reached in relation to the impact of each of the proposed developments on "existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public", and the development applications should be refused on that basis: at [98];

(6) The interference of the jetties with the publicly accessible areas was also contrary to the provisions of the Sutherland Shire Development Control Plan: at [100]-[102];

(7) With respect to visual impact, the ability to see a permissible form of development anticipated by the zoning is not sufficient, of itself, to constitute an adverse visual impact. There must be something about its location, design or the surrounding locality that creates an impact that is not appropriate or acceptable in the field of view: at [106]. In the circumstances of the proposed developments, the visual impact was not acceptable: Firstly, the scenic quality of the natural landform of Woolooware Bay: at [108]; Secondly, the two northern proposed jetties would protrude into the bay and would be prominent in the visual field: at [109]; Thirdly, the southern-most proposed jetty would protrude further into the bay than the existing sliprails, above the water line: at [110]; Fourthly, the jetties cumulatively would change the scenic quality of the present natural features, exacerbated by their length into the bay: at [111];

(8) The approval of the proposed developments would set an unacceptable precedent for future development of a similar nature at the rear of the properties that have direct access to Woolooware Bay, which would unacceptably continue the erosion of the natural and scenic qualities of the area: at [115]; and

(9) It was unnecessary to consider the acceptability of the impact of the proposed developments on the habitat of the shorebird community in circumstances where they should be refused for other reasons: at [118].



LEGISLATION

STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between March 2024 and June 2024.

HAZARDOUS CHEMICALS

Environmental Legislation Amendment (Hazardous Chemicals) Act 2024 (assented to 3 April 2024)

The object of the Act is to amend the *Protection of the Environment Operations Act 1997* to implement national reforms to the management and control of certain chemicals by—

(a) applying the Commonwealth register under the *Industrial Chemicals Environmental Management (Register) Act 2021* of the Commonwealth to New South Wales (the NSW IChEMS register), and
(b) enabling the Environment Protection Authority (the EPA) to publish chemical use notices to require information to be given to the EPA, and
(c) creating offences relating to compliance with the NSW IChEMS register and chemical use notices, and
(d) dealing with certain licences, applications, orders and offences in the Act as a consequence of the repeal of the Environmentally Hazardous Chemicals Act 1985 and
(e) making other consequential amendments.

STRONGER REGULATION AND PENALTIES

Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024 (assented to 3 April 2024)

The object of the Bill is to increase certain penalties and strengthen protections for the environment by amending the following—

(a) the *Contaminated Land Management Act 1997*,
(b) the *Dangerous Goods (Road and Rail Transport) Act 2008*,
(c) the *Land and Environment Court Act 1979*,
(d) the *Pesticides Act 1999*,
(e) the *Plastic Reduction and Circular Economy Act 2021*,
(f) the *Protection from Harmful Radiation Act 1990*,
(g) the *Protection from Harmful Radiation Regulation 2013*,
(h) the *Protection of the Environment Administration Act 1991*,
(i) the *Protection of the Environment Operations Act 1997*,
(j) the *Protection of the Environment Operations (General) Regulation 2022*,
(k) the *Protection of the Environment Operations (Waste) Regulation 2014*.