# Land and Environment Court of New South Wales

# Judicial Newsletter

July 2026 / Vol 18 Issue 2



# JUDGMENTS

## NSW COURT OF CRIMINAL APPEAL

***Maules Creek Coal Pty Ltd v Environment Protection Authority; Environment Protection Authority v Maules Creek Coal Pty Ltd* [2026] NSWCCA 80** (Ward P, Leeming JA and Fagan J)

(Decisions under review: *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 3)* [2024] NSWLEC 97; *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 4)* [2025] NSWLEC 92 (Pritchard J))

Facts: On 4 October 2024, following a prosecution in the Land and Environment Court, Maules Creek Coal (**MCC**) was found guilty of 4 offences under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The offences related to an overburden blast carried out on 20 August 2020 at the Maules Creek open cut coal mine.

The process of blasting, using explosives to extract coal, is a regulated activity and MCC held an Environmental Protection Licence (**EPL**) issued under POEO Act. At first instance, MCC was found guilty of 3 offences against s 64(1) POEO Act for contravening Condition O1.1 of its EPL by carrying out the blast otherwise than in a competent manner (in respect of timing, stemming length and overloading), and an offence against s 140(1) POEO Act for dealing with materials in such a manner as to cause the emission of noise by failing to deal with those materials in a proper or efficient manner.

The blast complied with the airblast overpressure and ground vibration limits required under Conditions L4.1-L4.4 of the EPL. However, operators at the nearby Boggabri mine were impacted by the airblast overpressure.

MCC was ordered to pay a monetary penalty of $50,000 for each offence (a total penalty of $200,000). MCC appealed against this, raising 16 grounds of appeal grouped into 3 categories: (1) construction of the EPL (grounds 1-6); (2) competence findings (grounds 7-14); and (3) the noise charge (grounds 17-18). Grounds 15 and 16 were withdrawn.

The EPA appealed against sentence on the basis that the penalties imposed were manifestly inadequate.

Issues:

(1) Whether the primary judge erred in construing Condition O1.1 of the EPL, including whether compliance with the specific blasting limit conditions L4.1-L4.4 operated to preclude an allegation that MCC failed to carry out licensed activities in a competent manner (**construction of the EPL**);

(2) whether the primary judge erred in finding beyond reasonable doubt that MCC failed to carry out the blast in a competent manner, in relation to the timing, stemming length and overloading (**competence findings**); and

(3) whether the primary judge erred in finding beyond reasonable doubt that MCC dealt with materials otherwise than in a proper and efficient manner so as to cause emission of noise, contrary to s 140 of the POEO Act (**noise charge**).

Held: Conviction appeal allowed; convictions quashed and verdicts of acquittal were entered on each charge. Application for leave to appeal against sentence dismissed. The orders of the Land and Environment Court imposing monetary penalties and order for costs are set aside. The matter is remitted to the Land and Environment Court on the question of costs of the proceedings in that court. There was no order as to costs of the proceedings in the Court of Criminal Appeal: at [325].

(1) **Construction of the EPL:** The Court agreed with the primary judge and held that Condition O1.1 imposed an obligation of competence separate from and independent of the specific blasting obligations in Conditions L4.1-L4.4. Condition O1.1 was about the *manner* in which licensed activities were carried out, whereas the Conditions L4.1-L4.4 were specific conditions focused on the outcome of blasting. Therefore, compliance with the limitations did not provide a defence to, or establish compliance with, Condition O1.1. However, it was accepted that non-compliance with limit conditions may be a strong

indicator of a lack of competence: at [151]-[155], [161]-[164].

(2) **Competence findings**: The Court held that the primary judge erred in concluding that the EPA had established beyond reasonable doubt that MCC failed to carry out the blast in a competent manner. While departures were made from standard blasting practices, such as the use of fast timing, reduced stemming lengths and overloading, those departures were adopted following extensive modelling by Dr McKenzie in response to fragmentation and safety concerns. Further, compliance with the EPL limits, the considered modelling undertaken and the competing expert evidence raised a reasonable doubt. A preference of one expert over the other is insufficient for a finding of guilt. The convictions for the s 64(1) offences under the POEO Act were quashed: at [187]-[208], [273]-[274], [285], [317].

(3) **Noise charge:** The primary judge did not err in finding that compliance with the noise condition in the EPL did not provide a defence (or implied defence) to an alleged breach of s 140 of the POEO, for similar reasons to the contention that the limit conditions did not provide a defence to the s 64 charges. Yet, such compliance is an indication that materials were dealt with in a proper and efficient manner. The Court held that the fact that the blast met the objective fragmentation and did so within the limit conditions as modelled was a strong indication that the blast was carried out in a proper and efficient manner. The primary judge erred in concluding that this was established beyond reasonable doubt. The competing expert evidence and modelling raised a reasonable doubt that the materials were not handled in a proper and efficient manner: at [313]-[320].

(4) **Sentence appeal:** It was unnecessary to determine the EPA's application for leave to appeal against sentence given the convictions were quashed and acquittals entered: at [322].

## NSW COURT OF APPEAL

***Lee v Huo* [2026] NSWCA 15** (Bell CJ, Mitchelmore JA and Stern JA)

(Related decision: *Huo v Super Shepherd Pty Ltd & Ors* [2025] NSWDC 345 (Gibson DCJ))

Facts: Ms Huo, the respondent, entered into a contractual arrangement with Super Shepherd Pty Ltd, following a conversation with Mr Lee, the appellant, who was an employee of Super Shepherd. Under the contractual arrangement, Super Shepherd agreed to perform building works at the respondent's property. The works were partially completed before the respondent discovered that Super Shepherd did not hold a building licence or Home Building Compensation Fund insurance.

The respondent successfully brought proceedings in the District Court alleging misleading or deceptive conduct, in contravention of s 18 of the *Competition and Consumer Act 2010* (Cth), schedule 2 Australia Consumer Law. During the trial, the primary judge refused to permit the appellant, who was self-represented, to cross examine the respondent, who was present in court.

This appeal challenged the primary judgment on a number of grounds including a lack of procedural fairness in circumstances where the primary judge did not permit the appellant (self-represented) to cross-examine the respondent even though she was present and available to be cross-examined.

Issues:

(1) whether the primary judge erred in finding that the appellant made the building licence and insurance representations (**ground 1**);

(2) whether the primary judge erred in finding that the appellant, not Super Shepherd, was responsible for the misleading or deceptive conduct (**ground 2**);

(3) whether the primary judge failed to take appropriate steps to ensure that the Appellant had sufficient information about the practice and procedure of the District Court for the purpose of ensuring a fair trial (**ground 3**);

(4) whether the primary judge constructively failed to exercise jurisdiction in failing to consider the expert evidence (**ground 4**);

(5) whether the primary judge denied the appellant procedural fairness by refusing to permit him the right to cross-examine the respondent's lay and expert witnesses (**grounds 5 and 6**);

(6) whether the conduct of the judge would have led a fair-minded observer to conclude that there was a reasonable apprehension of bias (**ground 1A**); and

(7) whether the primary judge erred in the assessment of damages (**grounds 7 and 8**).

Held: The appeal was allowed. The decision of the primary judge was set aside and the matter remitted to the District

Court for a new trial. The costs of the appeal be costs in the cause.

(1) **Ground 1 was rejected**: The appellant had not in his affidavit denied making the representations or contested the evidence of the respondent: at [55]-[62].
(2) **Ground 2 was rejected:** No error; the appellant was not a mere conduit or intermediary and made misleading representations in a "positive and unqualified" way: at [63]-[69].
(3) **Ground 3 was dismissed:** at [70]-[78].
(4) **Ground 4 was upheld:** The evidence as to the value of the works completed was relevant and should have been taken into account in the assessment of damages. This was also relevant to ground 7 relating to damages: at [79]-[83].
(5) **Grounds 5 and 6 was upheld:** Fairness dictated that Mr Lee be given the opportunity to cross-examine Ms Huo given that she was present in Court, there was no logistical impediment to this occurring within the timeframe set aside for the trial and no other prejudice was pointed to. Rule 35.2 of the Uniform Civil Procedure Rules 2005 (NSW) does not prevent cross-examination of a witness who has not been required for cross-examination. Adopting the High Court in *Lee v The Queen* (1998) 195 CLR 594, "the opportunity for cross-examination is of central significance to the common law adversarial system of trial". The cross-examination could have changed the course of the proceedings. There must be a new trial: at [84]-[107].
(6) **Ground 1A was rejected:** There was no reasonable apprehension of bias.
(7) **Grounds 7 and 8:** The appellant's partial success in relation to ground 4 means that the primary judge's decision in relation to damages should also be set aside.

***Valuer General of New South Wales v Esperia Court Pty Ltd* [2026] NSWCA 30** (Payne JA, McHugh JA, Preston CJ of LEC)

(Decision under review: *Valuer General of New South Wales v Esperia Court Pty Ltd* [2025] NSWLEC 104 (Robson J))

Facts: Esperia Court Pty Ltd (**Esperia**) brought eight appeals under s 37(1) of the *Valuation of Land Act 1916* (NSW) (**Valuation of Land Act**) against land value determinations made by the Valuer General of New South Wales (**Valuer General**) for four parcels of land in Strathfield. The primary judge determined that each of the appeals against the determinations of the Valuer General should be upheld.
The Valuer General appealed to the New South Wales Court of Appeal under s 57(1) of the *Land and Environment Court Act 1979* (NSW) (**Court Act**) arguing that the primary judge made an error of law.

Issues: Whether the primary judge erred by:
(1) placing equal weight on the comparable sales used to determine the land value (**weight ground**);
(2) averaging the values of the comparable sales in determining the land value (**averaging ground**); or
(3) failing to give adequate reasons for the determination of the land value (**reasons ground**).

Held: The Valuer General did not establish that the primary judge erred on a question of law. The appeal was dismissed with costs:

**Weight ground**

(1) The Valuer General did not establish that the primary judge inappropriately placed equal weight on the comparable sales used to determine the land value. The primary judge accepted that all of the sales selected by the parties' valuers were comparable. Each comparable sale was then adjusted according to the comparability of the sales. This analysis and adjustment of each of the comparable sales yielded a range of adjusted rates that the primary judge set out in tables. The primary judge then calculated the median and mean of the adjusted rate range derived from the comparable sales. The primary judge's statement of "placing equal weight on all the sales evidence" did not refer to placing equal weight on each of the comparable sales, but instead was construed as referring to the fact that each of the adjusted rates in the data set was used equally in the calculation of the median and mean. The Court noted that even if equal weight had been placed on each of the comparable sales, this would not be in contravention of the Valuation of Land Act. The Valuation of Land Act does not prescribe the use of any valuation method, nor does it set out a particular methodology for conducting a comparable sales valuation: at [29], [36]-[37], [47]-[50], [52], [63].

**Averaging ground**

(2) The primary judge did not average the comparable sales to determine the land value. The median and mean of the adjusted rates calculated by the primary judge were derived from individually analysed and adjusted rates for each comparable sale. The calculation and consideration of the median and mean did not involve performing the task of valuing the land not in accordance with the terms of the Valuation of Land Act. The Court, in finding that the primary judge had not erred in valuation principle, noted that while *The*

*Commonwealth v Milledge* (1953) 90 CLR 157; [1953] HCA 6 provided a caution on how to consider an average of values, it did not proscribe the consideration of an average in determining the value of the land. Further, the primary judge did not rely solely on the average of the adjusted rates but merely had reference to it as a statistic in determining the rate to be used: at [69], [73]-[75].

**Reasons ground**

(3) The Valuer General argued that the primary judge did not give sufficient reasons for his determination of the value of the parcels of land, including the reasoning for determining the rate to be applied to determine the value of the parcels of land. The Court held that the primary judge gave adequate reasons explaining each step in his decision-making process, including in the body of the judgment and summarised in the tables annexed to the judgment which indicated the adjustments the primary judge found should be made to derive the adjusted rate from the comparable sales of each of the parcels of land: at [80]-[82].

***Joseph v Spencer* [2026] NSWCA 46** (Stern JA, McHugh JA and Griffiths AJA)

(Related decisions: *Spencer v Kiama Municipal Council (No 2)* [2024] NSWLEC 1526 (Dickson C))

Facts: The applicant, Mr Joseph, and the first and second respondents, Mr and Mrs Spencer, own adjoining properties within the area administered by the third respondent, Kiama Municipal Council. The Spencers lodged a development application (**DA**) seeking alterations and additions to their dwelling, to which Mr Joseph objected.

The Council refused development consent, including on the basis that the proposal did not comply with cl 6.7(2) of the Kiama Local Environmental Plan 2011 (**KLEP**). The Spencers appealed against that refusal to the Land and Environment Court under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Mr Joseph was not a party to those proceedings, having unsuccessfully sought to be joined.

After a conciliation conference before the commissioner under ss 34 and 34AA(2)(a) of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**), the Spencers and the Council reached an agreement, including that the proposed development fell within an exception to cl 6.7(2) of the KLEP. The commissioner disposed of the proceedings, in accordance with s 34(3) of the LEC Act, and was satisfied that the agreement had been reached as to the terms, and that the decision was one "that the Court could have made in the proper exercise of its functions". The commissioner upheld the appeal and granted development consent.

Mr Joseph sought judicial review and declaratory relief in respect of the decision of the commissioner made under s 34(3) of the LEC Act. As he had no right of appeal against that decision, Mr Joseph sought an order under s 69 of the *Supreme Court Act 1970* (NSW) (**SC Act**) to set aside the commissioner's decision, together with declaratory relief under s 75 of the SC Act. Mr Joseph's application was advanced on 11 grounds.

Issues:

(1) Whether the commissioner and Council had power to approve and give effect to an amended DA following refusal (**Ground 1**);

(2) whether the commissioner erred in concluding that the development satisfied cl 6.7 of the KLEP, by legal unreasonableness, inadequate reasoning, or failure to form the requisite state of satisfaction (**Grounds 2, 3, 4, 13(a)**); and

(3) whether there were errors in the commissioner's approach, by reliance on the Jurisdictional Note, failure to consider relevant material, denial of procedural fairness, constructive failure to exercise jurisdiction, or failure to consider cl 6.6 (**Grounds 9-11, 14-16**).

Held: The amended summons was dismissed. The applicant was ordered to pay the first and second respondents' costs: at [143].

(1) On the proper construction of ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021, the Council could approve an amendment to the DA notwithstanding its prior refusal, and the applicant had an entitlement to seek amendment while the matter was subject to determination. The Council was not functus officio. Further, the commissioner gave the necessary approval to the amended DA: at [52]-[75].

(2) The commissioner did not err in concluding that the development satisfied cl 6.7(2)(b) of the KLEP. It was not legally unreasonable for the commissioner to rely on a Statement of Environmental Effects and Addendum Statement of Environmental Effects (**Addendum SEE**), which on their face coherently analysed the planning controls and supported satisfaction of the exception. The development fell under the ambit of cl 6.7(2)(b) as an "erection of a

building", with "building" inclusively defined in s 1.4 of the EPA Act. Words used in the KLEP that are defined in the EPA Act should be given that defined meaning. "Exceptional features" were not limited to topographical features. The commissioner turned her mind to cl 6.7(3) when accepting that the development fell within the ambit of cl 6.7(2)(b) of the KLEP: at [76]-[104], [119]-[123].

(3) None of the remaining grounds disclosed error. There was no basis to infer that the commissioner reached a state of satisfaction merely by deferring to the submissions made in the Jurisdictional Note. Regarding the contention that the commissioner failed to consider material findings in the Joint Expert Report and Court's Joint Expert Report Policy, there was no requirement to reach an evaluative conclusion having regard to all the available material. The commissioner's role was limited to satisfying herself of the matters in s 34(3) of the LEC Act. The commissioner was not required to evaluate the matters set out in the Addendum SEE against other aspects of the planning history.

There was no procedural unfairness or abuse of process and the LEC Act provides no entitlement to an objector, who is not a party to the proceedings, to be heard at a conciliation conference. There was no obligation upon the Council to notify its changed position to Mr Joseph before reaching agreement in the conciliation conference or before the commissioner made orders for the purpose of s 34(3) of the Act. The commissioner did not leave it to the parties to identify jurisdictional constraints and there was no constructive failure to exercise jurisdiction. The commissioner was not bound to consider cl 6.6, however, it was considered in the Addendum SEE: at [105]-[118], [124]-[141].

## LAND AND ENVIRONMENT COURT OF NSW

### CRIMINAL

***Environment Protection Authority v Clarence Colliery Pty Ltd* [2026] NSWLEC 13** (Pain J)

Facts: Clarence Colliery Pty Ltd (**defendant**) operated an underground coal mine, the Clarence Colliery. At the time of the offending the defendant held an Environment Protection Licence which authorised coal mining and coal work. The defendant pleaded guilty to five offences:

(1) one offence against s 120(1) *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for polluting an unnamed tributary of the Wollangambe River (**First Water Pollution Offence**);

(2) one offence against s 120(1) POEO Act for polluting the cement drain leading to the main dam of the Wollangambe River (**Second Water Pollution Offence**);

(3) one offence against s 64(1) POEO Act for breaching their Environment Protection Licence by failing to maintain the Polishing Lagoon that enabled surface and/or wastewater to be stored without discharging into the environment (**Licence Breach Offence**);

(4) one offence against s 153E POEO Act for not ensuring that the defendant's pollution incident response management plan was tested within one month of the pollution incident the subject of offence three above (**PIRMP Offence**); and

(5) one offence against s 97 POEO Act for failing to comply with a prevention notice which required the defendant to stop wastewater discharges from the Polishing Lagoon (**Prevention Notice Offence**).

Issues: The appropriate sentence to be applied to the defendant in respect of the offences, considering the objective seriousness of the offences and the subjective circumstances of the defendant.

Held: The defendant was convicted of the offences and fined a total of $630,000 which included a 25% discount for a guilty plea and further 30% reduction by applying the totality principle. A publication order under s 250(1)(a) POEO Act was made. An environmental services order under s 250(1)(e) was made meaning a portion of the monetary penalty was to be paid to Local Land Services. The defendant was ordered to pay the prosecutor's professional and investigation costs. A 50% moiety was ordered.

**Objective circumstances**:

(1) The Water Pollution Offences directly undermined the objects of the POEO Act as s 120(1) is central to the statutory regime for the prohibition of water pollution: at [14]. The Licence Breach Offence was serious as it involved a breach of public trust and offended the objects of the POEO Act: at [15]. The Prevention Notice Offence undermined the regulatory scheme: at [23]. The maximum penalties for each offence were considered: at [24]-[31].

(2) Regarding the Water Pollution Offences and the Licence Breach Offence, far more could have been done proactively by the defendant to ensure that the Polishing Lagoon was fit for the purpose of stormwater storage and avoid the offences: at [39]. The

defendant's submission that its culpability for the PIRMP Offence was the least serious of the offences was rejected: at [46]. Regarding the Prevention Notice Offence efforts to remove sediment had commenced but were inadequate to restore sufficient storage before further rainfall events occurred: at [43].

(3) The factors identified in s 241(1) POEO Act were considered. No harm to the environment was alleged to have been caused by the PIRMP Offence and the parties agreed that potential, rather than actual or likely harm was caused by the other four offences: at [50]. There were practical measures available to the defendant to prevent, control, abate or mitigate the potential environmental harm arising from the offences: at [70]. The defendant could reasonably have foreseen the risk of potential harm to the environment arising from the offending conduct: at [73]. At all material times the defendant had control over the causes of the offence: at [74].

(4) In light of these considerations, the objective seriousness of the offences was found to range from the upper end of lower objective seriousness to medium objective seriousness: at [75].

**Subjective factors**:

(5) The defendant's previous convictions for two serious environmental offences meant it could not benefit from mitigation in sentencing under s 21A(3)(e) *Crimes Sentencing Procedure Act* 1999 (NSW). A discount of 25% for an early guilty plea was applied: at [81]. Little weight was given to the defendant's submissions on good character as the activities which were said to demonstrate good character were regulatory obligations and licence requirements: at [84]-[85]. The defendant was not unlikely to re-offend due to its history of prior convictions, continued operation of the premises and not implementing all measures that may have prevented the offending: at [90]. The defendant demonstrated remorse for the offences and substantial actions had been taken to address the causes and consequences of the offences: at [98].

**Other considerations:**

(6) Specific deterrence was warranted due to the defendant's prior conviction for a Tier 1 environmental offence at the same business location: at [110]. The totality principle was considered as the offences arose from the same events: at [122].

***Environment Protection Authority v Tumut Waste Pty Ltd*** **[2026] NSWLEC 18** (Pepper J)

Facts: The defendant, Tumut Waste Pty Ltd (**Tumut Waste**), pleaded guilty to two offences against the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Both charges brought by the Environment Protection Authority (**EPA**) concerned the management of waste at Bellettes Landfill Gilmore (**the landfill**), a premises located near the town of Tumut. The first was an offence contrary to s 129(3) of the POEO Act. This provision was breached when, in carrying out the licenced activity of waste disposal, Tumut Waste caused the emission of offensive odour from the landfill (**offensive odour offence**). The basis of the second offence was a failure to manage leachate generated within a particular 'cell' at the landfill. In so doing, Tumut Waste breached a condition of its Environment Protection Licence and, in turn, s 64(1) of the POEO Act (**leachate management offence**).

Issues:

(1) What was the appropriate sentence to be imposed.

Held: Tumut Waste was ordered to pay a total monetary penalty of $270,000, as well as the EPA's professional costs, the latter being agreed upon and amounted to $250,000: at [190].

**Consideration of Objective and Subjective Factors**

(1) The offensive odour offence was determined to be "moderately objectively serious". The leachate management offence, on the other hand, was considered to sit at the "low range of objective seriousness". In coming to these conclusions, the Court noted the substantial harm caused by the odour emitted from the landfill. The indicia of harm that the Court had regard to included the sustained nature of the odour, its manifest physical effects on multiple residents within the vicinity of the landfill as well as its prolonged interference with people's comfort and repose. It was also pertinent that the causes of the offences were within the control of Tumut Waste. Whilst a period of significant rainfall had increased water entry into the waste, which generated odour-causing leachate, it was incumbent on Tumut Waste to implement measures to mitigate the risks posed by an adverse weather event. Those practical measures were not put in place at the earliest possible opportunity, with landfill gas monitoring and leachate pumping from the problem area only beginning approximately a month after the odour started permeating the

surrounding area: at [93]-[107], [110]-[116], [121]-[125], [126].

(2) There was no evidence supporting a finding that Tumut Waste's state of mind at the time it committed the offences was intentional, negligent or reckless: at [83].

(3) The Court also considered various subjective circumstances personal to Tumut Waste in coming to its sentencing decision. Relevant considerations included that Tumut Waste: had no prior convictions; did not commit the offences for commercial gain; could present evidence, in the form of sponsorships and local community involvement, of its good character; clearly expressed remorse through statements to that effect made by its director, with its contrition amplified by subsequent odour prevention works; and entered guilty pleas at an early stage: at [128], [130], [131]-[132], [134]-[137], [145]-[147].

(4) The mitigating factors, synthesised with the objective seriousness of the offences, led the Court to order that Tumut Waste pay a sum of $240,000 in respect of the offensive odour offence. Half of this amount was to be paid to the Environmental Trust. The leachate management offence attracted a penalty of $30,000, half of which, again, was to be paid to the Environmental Trust. Separate publication and notification orders were made too: at [174]-[177], [183], [184]-[189].

***Environment Protection Authority v Forestry Corporation of New South Wales (No 3)* [[2026] NSWLEC 25]** (Pain J)

*(Related decision: Environment Protection Authority v Forestry Corporation of NSW* [2024] NSWLEC 84 (Pain J))

Facts: The Forestry Corporation of New South Wales (**FCNSW**), the defendant, pleaded guilty to four offences under s 69SA(1) of the *Forestry Act 2012 (NSW)* (**Forestry Act**). The offences related to failures to carry out a harvesting operation in the Wild Cattle Creek State Forest (**WCCSF**) in accordance with the Integrated Forestry Operations Approval for the Coastal Region (**CIFOA**). One offence related to the cutting down of six giant trees. The remaining three offences related to cutting down three hollow-bearing trees.

Issues: The appropriate sentence to be applied to the defendant in respect of the offences, considering the objective seriousness of the offences and the subjective circumstances of the defendant.

Held: The defendant was convicted of all offences. A publication order was made. The defendant was ordered to undergo an audit of searches for giant trees and hollow-bearing trees. An order to pay $450,000 to the Yurruungga Aboriginal Corporation to undertake restorative justice activities in lieu of a monetary penalty was made.

**Objective seriousness:**

(1) The offences caused actual environmental harm and potential for environmental harm: at [173]. The offences occurred in a location of high conservation significance for the endangered koala: at [174]. The number of trees removed was relatively small compared to the number of retained trees, yet the structural significance of the giant trees was significant: at [174]. That the giant trees offence was "rolled up", being six individual contraventions of the CIFOA was relevant to assessing its seriousness: at [175]. The giant trees offence was a low level of medium objective seriousness: at [175]. The hollow-bearing trees offences were of low objective seriousness: at [176].

**Subjective factors:**

(2) The defendant had a record of prior convictions: at [177]. A 25% discount for a prompt guilty plea to the giant trees offences was ordered: at [181]. A discount of 5% was warranted for the hollow-bearing tree offences due to the substantial delay in entering guilty pleas: at [183]. The defendant had good prospects of rehabilitation and low likelihood of re-offending for the giant trees offence: at [192]. The defendant had taken necessary measures minimising a re-occurrence of the hollow-bearing trees offences: at [192]. The defendant's actions and its CEO's expression of contrition and remorse, including voluntary participation in a restorative justice process, were considered mitigating factors: at [196]-[201].

**Other considerations:**

(3) In *Environment Protection Authority v Forestry Corporation of NSW* [2024] NSWLEC 84, Bellingen Environment Centre Incorporated (**BEC**) was granted their application to participate in these sentencing proceedings as an amicus curiae. The BEC presented information to the Court regarding the high conservation significance of the WCCSF: at [153]. The BEC submitted that the area where the offences occurred were of key conservation value due to forming part of a chain connecting koala habitats, such that the harm caused by the offences included harm to the functionality of that chain: at [154]. The concerns submitted by the BEC were relevant to the extent of environmental harm caused by the offences as they

emphasised the importance of the WCCSF as a koala habitat and the significance of the offences to the local community: at [158].

(4) The cultural harm to the Gumbaynggirr Nation caused by the offences was considered as a relevant factor in sentencing under s 13.12(2) *Biodiversity Conservation Act 2016* (NSW) (**BC Act**): at [165]. Several Gumbaynggirr people provided evidence of the specific impacts of the offences on the Gumbaynggirr Nation including the loss of habitat for totem species and harm to culture, emotional and spiritual wellbeing: at [165]. The offences severed ancestral ties, disrupted symbiotic relationships and caused irreparable cultural loss: at [168].

(5) The prosecutor and defendant voluntarily committed to a restorative justice process, which included a restorative justice conference, prior to the sentencing hearing: at [201]. This process led to agreements to undertake activities involving the Gumbayngigir community including a healing ceremony, biocultural repair plan, engagement in future harvesting plans, cultural mapping and establishing a Gumbaynggir Guardian ranger program. An order for these activities was made under s 13.25(2) of the BC Act.

(6) Specific deterrence was relevant due to the ongoing nature of the offences in the context of the CIFOA and the defendant's prior convictions: at [212]. The defendant's prior convictions were considered when applying the even-handedness principle: at [214]-[220].

(7) Applying the totality principle, a fine of $450,000 was considered appropriate if a monetary penalty had to be imposed. A payment of $450,000 to the Yurruungga Aboriginal Corporation was ordered instead of a fine to facilitate the carrying out of the restorative justice activities order: at [225]-[226].

***Secretary, Department of Climate Change, Energy, the Environment and Water v Vassallo* [2026] NSWLEC 30** (Duggan J)

Facts: On 23 May 2025, Mr and Mrs Vassallo (**defendants**) pleaded guilty to five offences each of clearing native vegetation in a regulated rural area contrary to s 60N(1) of the *Local Land Services Act 2013* (NSW) (**LLS Act**). These proceedings concerned the sentencing of the defendants with respect of those offences.

At all times between 22 October 2021 and 1 April 2024 (**relevant period**), the defendants were the landholders and occupiers of a hobby farm in Coolabah (**subject land**). Clearing of native vegetation was permitted on the subject land in accordance with a mandatory code compliance certificate, Land Management Certificate No LMC001135 (**LMC**), which was issued to the previous owners of the subject land pursuant to Pt 5A Div 5 of the LLS Act. However, during the relevant period the defendants caused or authorised the clearing of 2,398.34 hectares of native vegetation from the subject land, which was not in accordance with the LMC. This clearing, particularly the removal of large numbers of mature trees and tree hollows, caused significant environmental harm to the Cobar Peneplain's threatened and protected species of fauna and flora.

Issue: What was the appropriate sentence to be imposed on the defendants, taking into account the objective seriousness of the offences and the subjective circumstances of the defendants?

Held: Mr Vassallo was fined a total of $315,000.00 and Mrs Vassallo was fined a total of $116,250.00. Half of each fine was required to be paid to the prosecutor by way of moiety. Both defendants were required to publicise their offending and the orders made against them:

**Objective seriousness of the offences**

(1) The extent of the harm and the foreseeability of the harm elevated the objective seriousness of the defendants' offending: at [84], [94].

(2) Mr Vassallo exercised significant control over the clearing, which elevated the objective seriousness of his offending, while Mrs Vassallo exercised more of an administrative role, which did not elevate the objective seriousness of her offending: at [97]-[98].

(3) Although there was some degree of planning by the defendants, this was an inherent characteristic of the offences and did not increase the objective seriousness of the defendants' offending: at [107].

(4) The defendants acted negligently, which increased the objective seriousness of their offending: at [128]-[129], [131]-[132].

**Subjective circumstances of the defendants**

(5) By way of mitigating factors, the defendants were remorseful, committed to repairing the damage caused and unlikely to reoffend. Additionally, they had good character, good prospects of rehabilitation and no prior convictions for environmental offences: at [137]-[139], [143], [146].

**Other considerations**

(6) To the extent that general deterrence was warranted, this was satisfied by the making of the publication order: at [150].

(7) The principle of totality was applicable in these proceedings as each offence was interconnected and the defendants, being a married couple, bore the financial burden of each other's offending. On that basis, it was appropriate to reduce the fine in each matter by 50%: at [162]-[164].

***Secretary, Department of Planning and Environment v Keelendi Farms Pty Ltd; Timothy Justin O'Brien; T J O'Brien Investments Pty Ltd; Edenmore Farms Pty Ltd (No 3)* [2026] NSWLEC 47** (Pepper J)

(Related decisions: *Secretary, Department of Planning and Environment v Keelendi Farms Pty Ltd; Timothy Justin O'Brien; T J O'Brien Investments Pty Ltd; Edenmore Farms Pty Ltd* [2025] NSWLEC 8 (Pepper J) and *Secretary, Department of Planning and Environment v Keelendi Farms Pty Ltd; Timothy Justin O'Brien; T J O'Brien Investments Pty Ltd; Edenmore Farms Pty Ltd (No 2)* [2025] NSWLEC 18 (Pepper J))

Facts: The Secretary, Department of Planning and Environment (**Secretary**) brought related criminal proceedings against four defendants in Class 5 of the Court's jurisdiction for alleged unlawful clearing of native vegetation by the application of herbicide. This clearing was said to have occurred on two farming properties known as 'Keelendi' and 'Edenmore', both of which are located in the area surrounding the village of Pilliga. The charges against Keelendi Farms Pty Ltd (**Keelendi Farms**), T J O'Brien Investments Pty Ltd (**T J O'Brien**) and Edenmore Farms Pty Ltd (**Edenmore Farms**) were brought under s 60N of the *Local Land Services Act 2013* (NSW) (**LLSA**). Timothy O'Brien was alleged to be liable for the alleged unlawful clearing as a director of T J O'Brien, with the executive liability charge brought pursuant to s 13.6 of the *Biodiversity Conservation Act 2016* (NSW).

Issues: In determining whether the Secretary had proven beyond reasonable doubt that Keelendi Farms, T J O'Brien and Edenmore Farms breached s 60N of the LLSA, the issues to be resolved were:

(1) whether 'clearing', as defined by s 60C of the LLSA, had occurred on Keelendi and Edenmore;

(2) if clearing did in fact occur, whether the clearing, first, was of 'native vegetation' within the meaning of the term as defined in s 60B of the LLSA, and second, whether it occurred during the charge periods;

(3) provided that clearing of native vegetation took place, whether it occurred in a 'regulated rural area', with this phrase given meaning by s 60D of the LLSA; and

(4) in the event the preceding elements could be established to the criminal standard, whether it was the defendants who were responsible for the clearing.

Held: The Court found that the Secretary had failed to prove beyond reasonable doubt that the defendants cleared native vegetation by the application of herbicide in the areas during the periods nominated by the summonses: at [267].

(1) The evidence before the Court indicated that vegetation was 'cleared' on both Keelendi and Edenmore during the charge periods. Contrary to the position advanced by the defendants, it was not incumbent on the Secretary to prove that vegetation was killed in order for such a finding to be made: at [187]-[197], [214].

(2) It could not be found beyond reasonable doubt that the application of herbicide caused native vegetation to be cleared. Herbicide was the nominated method of clearing as particularised in the summonses. Each summons specified the "method of clearing" as "by means of poisoning", specifically herbicidal poisoning, and not some other form of clearing. It was the basis upon which the defendants prepared their defence. In such circumstances, and having regards to the dictates of fairness, the Secretary could not be permitted to rely upon other methods of clearing, namely, mechanical clearing, in order to prove the charges. A lack of timely vegetation testing and sampling in the charge areas by the Secretary therefore became an issue. It meant that other causes of the poor health of vegetation on the properties, such as drought, could not be eliminated. In other words, it could not be proven beyond reasonable doubt that herbicide spraying caused the damage to vegetation that the Secretary's witnesses deposed to: at [180]-[186], [232], [235].

(3) The evidence did not adequately establish that native vegetation in particular was cleared, and that the clearing took place during the charge periods. It was possible that clearing occurred as part of broadacre clearing or herbicide spraying that fell outside the charge periods. Further, a reasonable inference could be drawn that, given the history of cropping and other farming activity on the properties, that weeds, and not native vegetation, had been cleared. This proposition found support in the reasons for spraying the properties

contained in documentation produced by the company that actually conducted said spraying: at [236]-[247].

(4) Given that there was no unlawful clearing of native vegetation attributable to the three corporate defendants, the Court was not required to determine whether they had caused or permitted the commission of the offences as charged. The failure to make out a breach of s 60N of the LLSA meant that executive liability could not be attributed to O'Brien: at [252], [255].

***Environment Protection Authority v Matthew Alexander Brain* [2026] NSWLEC 56** (Preston CJ of LEC)

Facts: Mr Matthew Brain pleaded guilty to an offence under s 251 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), of failing to comply with an order of the Local Court that he organise the removal and disposal of 170 tonnes of asbestos waste within 6 weeks of the date of the order. Mr Brain had been engaged to remove one load of building waste (10 tonnes) from a residential development site and dispose of it on vacant land at Denham Court where other contractors were disposing of other building waste. Despite only contributing 10 of the 170 tonnes of waste disposed of at the site, the EPA issued a clean-up notice to Mr Brain requiring him to engage a licensed asbestos removalist to remove the 170 tonnes of waste and dispose of it at a landfill lawfully permitted to receive asbestos waste. Mr Brain failed to comply with the clean-up notice and was found guilty of an offence against s 91B of the POEO Act in the Local Court. Mr Brain was fined $22,500, ordered to pay the EPA's costs of around $28,561.50, and ordered again to arrange the removal and disposal of the asbestos waste. It is this Local Court's order with which Mr Brain failed to comply.

Issues:

(1) What was the appropriate sentence to be imposed.

Held: The Court imposed a fine of $8000 with 50% of the fine to be paid to the prosecutor and made no orders as to costs.

**Objective circumstances**

(1) Although the maximum penalty for the offence is $60,000 for each day the offence continues, the Court proceeded on the basis that the maximum penalty should be $60,000, being the amount that would arise on the first day the offence was committed, which in this case was the day immediately after the 6-week compliance period had elapsed. The Court noted that a contrary assumption would have resulted in an accumulated penalty of nearly $18 million, which would be out of all proportion to the criminality involved in Mr Brain not complying with the Local Court's order: at [14]-[15].

(2) The offence was not committed intentionally. Mr Brain's failure to comply with the Local Court's order was a result of his financial position, rather than a deliberate defiance of the Local Court's order. The Local Court's order required Mr Brain to engage a licenced asbestos removalist to remove and dispose of the 170 tonnes of waste at an authorised landfill. The estimated cost of this was accepted as being around or in excess of $250,000. The Court accepted evidence led by Mr Brain that he has limited financial resources: his company is in liquidation; he does not personally own any trucks, machinery equipment or real property; he is living rent free with his father; he has only around $1000 in a bank account; he is working on a temporary and unstable basis; and he is paying off in instalments the fine and costs (totalling over $50,000) from the Local Court order: at [16]-[26].

(3) The EPA did not prove that there was additional harm from the ongoing non-compliance with the Local Court's order or that the reasonable foreseeability of that harm aggravated the offence: [31]-[33].

(4) Mr Brain had limited control over the cause giving rise to the offence, or any practical measures to prevent harm caused by the commission of the offence, as he did not have sufficient financial resources to comply with the Local Court's order in the terms in which it was made: at [31], [35].

**Subjective circumstances**

(5) The sentence should be discounted by 20% to reflect Mr Brain's plea of guilty. This reduction reflected Mr Brain's delay in waiting until the fourth directions hearing before entering a guilty plea: at [40]-[41].

(6) Mr Brain had no relevant prior convictions, other than the conviction in the Local Court for failing to comply with the clean-up notice, the material conduct of which was the same as the offence before the Court: at [43].

(7) Whilst Mr Brain did not expressly apologise for committing the offence, he said he would have complied in removing the waste if the order had allowed him to remove and dispose of the waste himself, but it did not: at [42].

(8) Mr Brain had significant financial constraints on his ability to pay a fine, including that he is currently not permanently employed and is still paying off by

instalments the fine and costs orders imposed by the Local Court: at [44]-[46].

## Appeals from the Local Court

***Geetha Rajagopalan v Penrith City Council*** **[2026] NSWLEC 44** (Pritchard J)

Facts: Ms Rajagopalan appealed a decision of the Local Court at Mount Druitt in which she was found guilty of an offence against s 9.37(1) of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**) for failing to comply with the terms of a development control order (**DCO**) given to Ms Rajagopalan on 14 February 2024 by Penrith City Council (**Council**) ordering Ms Rajagopalan to remove a timber retaining wall built without development consent (**retaining wall**) by 15 March 2024. Council first became aware of the retaining wall during an inspection on 9 December 2021. After receiving an extension of time until 31 May 2024 to comply with the DCO, on 27 June 2024 Council observed that the retaining wall had not been removed. On 27 November 2024, Council sent a letter to Ms Rajagopalan saying that it was considering issuing a penalty notice in relation to the failure to comply with the DCO, and on 29 January 2025 Council issued a penalty infringement notice. On 13 February 2025, Council filed a court attendance notice commencing proceedings in the Local Court after Ms Rajagopalan elected to have the penalty notice determined by the Local Court.

Issues:

(1) Whether the proceedings against Ms Rajagopalan were statute barred by reason of s 9.57(5A) of the EPA Act, which provides “proceedings for any such offence may also be commenced within, but not later than, 2 years after the date on which evidence of the alleged offence first came to the attention of … (c) any investigation officer”;

(2) whether an offence against s 9.37 of the EPA Act was proven beyond reasonable doubt;

(3) whether the Court should make an order pursuant to s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**);

(4) the appropriate sentence having regard to the objective seriousness of the offence, subjective circumstances and other sentencing principles; and

(5) whether Ms Rajagopalan should pay the Council’s professional costs of the Local Court hearing pursuant to s 215 of the *Criminal Procedure Act 1986* (NSW), and Council’s costs of the appeal.

Held: Appeal dismissed; Ms Rajagopalan to pay Council’s costs of the appeal:

(1) The offence with which Ms Rajagopalan was charged was her failure to comply with the DCO by failing to remove the retaining wall by 31 May 2024, and the first occasion that Council became aware of the offence was during an inspection on 27 June 2024. Council commenced proceedings in the Local Court on 13 February 2025, about ten months after the date that evidence of the alleged offence first came to the attention of Council, and so the proceedings were not statute barred: at [47]-[48].

(2) As Ms Rajagopalan was given a valid DCO, and Ms Rajagopalan failed to comply with that DCO by the date for compliance, the elements of an offence against s 9.37 of the EPA Act were proven beyond reasonable doubt: at [60], [64]-[65].

(3) In relation to an order pursuant to s 10(1)(b) of the CSP Act, Ms Rajagopalan’s character, antecedents, age, health and mental condition were neutral; the nature of the offence was not trivial although it was at the low end of the spectrum of objective seriousness; and Ms Rajagopalan had not established on the balance of probabilities any extenuating circumstances in which the offence was committed. Accordingly, the Court did not make an order pursuant to s 10(1)(b): at [102]-[103].

(4) Having regard to the objective seriousness of the offence which was at the low end of the spectrum of objective seriousness, that there was not actual harm to the environment, that Ms Rajagopalan had control over the causes that gave rise to the offence, and some need for specific deterrence, an appropriate penalty for the offence was that imposed by the Local Court, namely $1,600: at [106]-[107].

(5) There was nothing unreasonable about the way in which the investigation was conducted or the proceedings were brought, such that Ms Rajagopalan should pay Council’s professional costs of $1,400 for the Local Court hearing and Council’s costs of the appeal: at [110], [117].

## Contempt

***Susan Ann Holz v Catherine Marie McMahon* [2026] NSWLEC 57** (Pain J)

(Related decision: *Holz v McMahon* [2024] NSWLEC 1245 (Gray C))

Facts: The parties, who are neighbours, reached agreement about building a new brick boundary fence in the substantive Class 3 proceedings commenced pursuant to the Encroachment of Buildings Act 1922 (NSW). Following a s 34 conciliation conference, consent orders were made on 14 May 2024 (**Orders**) in *Holz v McMahon* [2024] NSWLEC 1245 (***Holz No 1***). Construction of a new fence by contractors engaged by the applicants was carried out. The respondents brought two contempt charges containing nine particulars against the applicants for failing to comply with the Orders in building the new fence.

Issues: Whether the applicants were in contempt of the Orders.

Held: Technical contempt was established in relation to three particulars of the charges. The remaining particulars of the charges were not established.

(1) Technical contempt was established due to the applicants' failure to have built a brick return, engaged piers at 1.8m and a new fence placed on new concrete footing: at [205]. The extent to which lay parties who agree consent orders requiring building work can be expected to supervise employed contractors to ensure compliance with such orders was considered: at [82].
(2) Non-compliance with the Orders was established as the new fence was not built "like for like" in comparison to the original fence and the site was not left clean and tidy. No contempt was established for these non-compliances as supervision of the applicants' contractor to undertake such work could not reasonably be expected of them: at [209].
(3) No non-compliance was established in relation to the location of the brickwork of the new fence, the height of the new fence and the existence of a weephole in the new fence: at [210].
(4) Punishment was not warranted in the circumstances: at [211].
(5) Orders under r 40.8 Uniform Civil Procedure Rules 2005 (NSW) were considered necessary to address the non-compliances and ensure the Orders can be complied with as far as practicable: at [212]. Further discussion with the parties is required to establish a timetable and agreement for making these r 40.8 orders: at [216].

## Judicial Review

***Hika Tarawa Te-Kowhai v Minister for Aboriginal Affairs and Treaty* [2026] NSWLEC 20** (Pritchard J)

Facts: The Applicant commenced Class 4 proceedings on behalf of the Cobowra Local Aboriginal Land Council (**CLALC**) seeking judicial review of the Minister for Aboriginal Affairs and Treaty's (**Minister**) decision to appoint an administrator for the CLALC (**Appointment Decision**). This appointment was approved by the CEO of the New South Wales Aboriginal Land Council (**NSWALC**) pursuant to s 222(3) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) on the basis of serious governance, financial and compliance failures.

Issues:

(1) Whether the Applicant, as former CEO of the CLALC, had authority to commence and carry out legal proceedings on behalf of the CLALC;
(2) whether the CLALC should have been removed as a party to the proceedings;
(3) whether the Minister complied with the statutory preconditions imposed by ss 222 and 223A of the ALR Act;
(4) whether the Minister complied with the requirements of procedural fairness;
(5) whether the Appointment Decision was made for an improper purpose;
(6) whether the Appointment Decision was unreasonable or disproportionate; and
(7) whether the Applicant was required to seek leave to advance an additional ground of review in relation to s 10 of the *Racial Discrimination Act 1975* (Cth).

Held: Summons dismissed with costs.

(1) The functions of a CEO of a Local Aboriginal Land Council did not include the authority to commence and carry out legal proceedings on behalf of the Local Aboriginal Land Council: at [48].

(2) Accordingly, the CLALC was removed as a party, and the Applicant was joined as the sole applicant in the proceedings: at [51].
(3) The statutory preconditions imposed by ss 222 and 223A of the ALR Act were satisfied: the NSWALC's power to approve the Appointment Decision was validly delegated to its CEO; the statutory notice and publishing requirements were complied with; the Minister took into account the submission of the CLALC board members; and there was sufficient probative evidence before the Minister to support the Appointment Decision: at [72]–[75].
(4) The Minister satisfied the requirements of procedural fairness because adverse material was disclosed to the board members of the CLALC and they were given a reasonable opportunity to respond to that adverse material: at [90].
(5) Without evidence of the Minister's subjective intention, there was no proper basis to infer that the Appointment Decision had been made for an improper purpose: at [105]–[107].
(6) The Appointment Decision fell within a range of possible acceptable outcomes and, therefore, was not vitiated on the grounds of unreasonableness or disproportionality: at [120]–[121].
(7) The Applicant could not challenge the Appointment Decision on the basis of a breach of s 10 of the *Racial Discrimination Act* because this challenge was not the subject of an application to further amend the summons and was not articulated as falling within the Court's jurisdiction: at [125].

## Civil Enforcement

***Wollondilly Shire Council v Godfrey*** [[2026] NSWLEC 21]() (Robson J)

Facts: By summons filed 29 January 2024 (and amended on 26 July 2024), Wollondilly Shire Council (**Council**) sought declaratory and consequential injunctive relief against three respondents in relation to use and development of land at 28 Wonga Road, Picton (**Land**). The first respondent, James Godfrey, is the owner of the Land and the sole director, secretary and shareholder of each of the second respondent, Picton Sand and Soil Pty Ltd (**PSS**), and the third respondent, ECC Earth Civil Contracting Pty Ltd (**ECC**), two companies that have long operated business on the Land involving soils sales and earthmoving activities. As at August 1994, the Land comprised an undeveloped rural allotment then zoned 1(a3) under the Wollondilly Local Environmental Plan 1991 (**WLEP 1991**) which applied to the Land from 1991 to 22 February 2011. Since 23 February 2011, the Wollondilly Local Environmental Plan 2011 (**WLEP 2011**) has applied to the Land under which the Land is zoned RU2 – Rural Landscape.

Between 1994 and 2007, four development consents were granted in relation to the Land:

(1) D179/94 for a dwelling and shed for storage and servicing of earthmoving equipment;
(2) D70/97 for a wholesale sand and soil yard;
(3) D144/00 for a retail plant nursery; and
(4) D884-05 granted by Jagot J in the NSW Land and Environment Court in 2007 to authorise a wider suite of activities (earthmoving, wholesale sand and soil supply, fuel infrastructure, sediment basins and noise barriers) subject to deferred commencement conditions, which included surrender of the earlier consents.

D884-05 was never acted upon, and shortly before trial it was conceded to have lapsed. Over many years, Mr Godfrey and his companies engaged in various activities on the Land, including stockpiling materials, operating a screening machine, vehicle servicing and washing, fuel storage and construction of numerous structures which caused impacts from noise, dust and vibration on two neighbouring rural residential properties.

Issues:
(1) Whether development consents D70/97 and D144/00 had lapsed;
(2) the proper construction and scope of D179/94, D70/97 and D144/00;
(3) whether the respondents' current activities and structures were authorised by an operative consent or were otherwise lawful under the applicable planning regime; and
(4) what declaratory and injunctive relief, if any, should be granted.

Held: The respondents were using and developing the Land unlawfully (including in breach of development consents and without consent) and granted declaratory and injunctive relief requiring cessation of those activities and removal of unlawful work.
(1) D70/97 and D144/00 had not lapsed, as both were consents for use of land and the approved uses had commenced. However, the ongoing activities did not

comply with the terms of the consents or approved plans: at [61]-[70], [77]-[92].

(2) D179/97 was narrowly construed to authorise only the storage and servicing of earthmoving equipment within the approved shed. This did not include broader earthmoving or industrial activities which were found to be being carried out on the Land: at [75]-[76].

(3) The respondents' present operations, including industrial-scale sand and soil handling, vehicle servicing and washing, fuel storage, screening machinery, extensive stockpiling, landfill and multiple unauthorised structures, exceeded and breached all operative consents and included development requiring consent or prohibited development under WLEP 1991 or WLEP 2011: at [90].

(4) Numerous works were constructed by the respondents without development consent, including a wash bay and service areas, a garage, a screening machine, hardstand and material bins, sedimentation basins and a fuel tank and bowser. The respondents also used the Land for prohibited or unapproved purposes, including uses characterised as a truck depot, commercial premises, a waste disposal facility and landscaping material supplies: at [90]-[91].

(5) Evidence established long-standing impacts on neighbouring properties, including noise, dust and vibration: at [89].

(6) Council was entitled to declaratory relief and discrete injunctive orders. While the Court ordered cessation of unlawful uses, removal of various structures and materials, and restrained further unlawful development, compliance with these orders was suspended for three months to allow orderly removal and/or staged removal (or winding down) of the operations which the Court found were being unlawfully conducted, and cost orders were made in favour of Council: at [108]-[113].

## Aboriginal Land Claims

***New South Wales Aboriginal Land Council v Ministering Administering the Crown Land Management Act ("Narooma Claim")* [2026] NSWLEC 39** (Pritchard J)

Facts: The applicants appealed the Minister's refusal of four Aboriginal land claims insofar as the claims concerned the eastern portion of the claimed land (**eastern portion**). The eastern portion had been occupied by the Narooma Golf Club (**Club**) as part of the Narooma golf course (**course**) since about 1980. The Minister contended that the eastern portion was lawfully used within the meaning of s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW).

Issues:

(1) Whether the eastern portion was included in a Reserve No 91374 for public recreation (**R91374)**;

(2) whether the eastern portion was included in a lease granted to the Club on 23 May 2000 (**2000 lease**);

(3) whether the eastern portion was lawfully used or occupied by the Club pursuant to the 2000 lease having regard to the reserve purpose of public recreation; and

(4) whether the eastern portion was lawfully used by members of the public for public recreation.

Held: The eastern portion was not lawfully used or occupied; appeal upheld and land to be transferred:

**Whether eastern portion included in R91374**

(1) The R91374 gazettal notice clearly identified the eastern potion as included in R91374; it was the marking of a road intersection outside of the stippled area, and not the location of the eastern portion within the stippled area, that amounted to a minor discrepancy that could be regarded as *falsa demonstratio*: at [75].

(2) There is no principle that it is impermissible to have regard to extrinsic material such as historical maps and internal memoranda used by Crown Lands NSW in construing reserve notifications: *Slough Estates v Slough Borough Council (No 2)* [1971] AC 958 (***Slough Estates***) distinguished: at [78].

(3) The strict approach to the interpretation of development consents in *Slough Estates* appeared to have been rejected in *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* (2019) 101 NSWLR 1; [2019] NSWCA 147, and if not, the Minister established an exception to the strict approach: *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528; [2007] HCA 45 and *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* (2013) 195 LGERA 182; [2013] NSWCA 103 applied: at [80]-[81].

(4) The extrinsic material relied on by the Minister demonstrated an intent for R91374 to include the eastern portion as part of a new reserve for public recreation for an expanded golf course, and otherwise resolved any ambiguity or misdescription by demonstrating that R91374 included the eastern portion: at [82]-[85].

**Whether eastern portion included in 2000 lease**

(5) The genesis of the lease evinced an intention for it to cover the whole of the course and thus R91374, including the eastern portion, such that the description of the property leased as "Reserve No. R91374" should be preferred over a plan attached to the lease which showed R91374 as excluding part of the golf course and which erroneously included land that was never part of R91374. Given that the eastern portion was included in R91374, the eastern portion was included in the 2000 lease: at [121], [126].

**Whether eastern portion lawfully used or occupied by Club**

(6) The exclusion of the public from the course during regular competitions was not justified in order to provide for public recreation on R91374, such that R91374 was "not open to the public generally as of right". The Club's financial statements demonstrated that the course was profitable, and the Minister did not discharge their onus of proving that profits from the course were devoted towards providing public recreation on R91374 such that R91374 was not being used by the Club as a "source of private profit": *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54; [1959] HCA 63 applied: at [194], [199]-[201], [216]-[217].

(7) Accordingly, the Minister did not prove that the 2000 lease was "in furtherance of, or incidental to" the reserve purpose of public recreation. The Club's use and occupation of R91374 was unlawful: *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2012) 84 NSWLR 219; [2012] NSWCA 358 applied: at [221].

**Whether eastern portion lawfully used by members of the public**

(8) As the Club could not lawfully occupy R91374, the Club could not have conferred a valid licence on members of the public to use the eastern portion. R91374 did not itself create any right in members of the public to use the land. Accordingly, any use of R91374 by members of the public was not lawful: at [245].

## Compulsory Acquisition

***Goldmate Property Luddenham No 1 Pty Ltd v Transport for NSW* [2026] NSWLEC 22** (Duggan J)

(Related decisions: *Goldmate Property Luddenham No. 1 Pty Ltd v Transport for NSW* [2024] NSWLEC 39 (Duggan J); *Goldmate Property Luddenham No 1 Pty Ltd v Transport for New South Wales* [2024] NSWCA 292 (Gleeson and Adamson JJA, Preston CJ of LEC))

Facts: On 19 April 2024, Duggan J delivered a judgment (**Goldmate LEC**) in relation to Goldmate Property Luddenham No 1 Pty Ltd's (**applicant**) objection to the amount of compensation offered by Transport for NSW (**respondent**) for the compulsory acquisition of the applicant's land at Luddenham. Duggan J held that the public purpose for which the applicant's land was acquired was to carry out the broad intention of the Western Sydney Infrastructure Plan (**WSIP**), including transport infrastructure and rezoning as part of a coordinated response to the announcement of the Western Sydney Airport (**Airport**). On that basis, the applicant was entitled to $9,761,480.00 in compensation. The applicant successfully appealed this decision in the Court of Appeal. On 9 December 2024, Gleeson and Adamson JJA and Preston CJ of LEC delivered a judgment (**Goldmate CoA**) setting aside the determination by Duggan J in Goldmate LEC with respect to: the identification of the public purpose and the consequent determination of market value pursuant to s 55(a) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**); the determination of compensation payable to the applicant under Pt 3 Div 4 of the Just Terms Act; and the order for the costs of the proceedings in Goldmate LEC. The matter was remitted to Duggan J to redetermine these matters.

Issues:

(1) What was the public purpose for which the applicant's land was compulsorily acquired?

(2) Did the public purpose (or the proposal to carry out the public purpose) cause the rezoning of the acquired land?

(3) Was there a decrease in the value of the applicant's residue land caused by the public purpose and the location of the Outer Sydney Orbital (**OSO**)?

(4) How was compensation for the acquisition of the applicant's land to be determined?

(5) How were costs of the proceedings to be determined?

Held:

(1) The M12 road project (**M12**) was treated separately from the other roads identified in the WSIP and there was no degree of continuity or consistency between the M12 and other roads to which the WSIP related. Therefore, the public purpose for which the applicant's

land was acquired was limited to the construction, operation and maintenance of the M12: at [29].

(2) The event that changed the development potential of the acquired land was the creation of the Airport. Whilst the M12 facilitated the movement of traffic from the rezoned land, it did not cause the decision to rezone the land. Therefore, the rezoning was not caused by the public purpose and was not required to be disregarded for the purposes of determining market value: at [57], [64], [66].

(3) The location of the OSO was not caused by the public purpose and had no connection to the achievement of the public purpose. Consequently, the impact of the OSO was not compensable under [s 55](f) of the Just Terms Act: at [73]-[74].

(4) The before and after valuation method was adopted at an agreed rate of $234/m$^2$ for the OSO land and $260/m$^2$ for the non-OSO land. Compensation was assessed in the amount of $38,353,979.78, including $38,116,00.00 for market value, $100,000.00 for the impact on access to the residue land and $137,979.78 for disturbance: at [77]-[78].

(5) The determination of compensation exceeded that identified by the respondent in Goldmate LEC and therefore, the respondent was ordered to pay the applicant's costs of the Goldmate LEC proceedings. Regarding the remitter proceedings, the applicant was ordered to pay the respondent's costs of the notices of motion as they were unreasonable in the circumstances and the respondent was ordered to pay the applicant's costs of the proceedings because the applicant was largely successful with respect to the questions identified in Goldmate CoA: at [87]-[90].

***Beningna Pty Ltd v Liverpool City Council*** **[[2026] NSWLEC 36]**
(Pain J)

Facts: Liverpool City Council (**Council**) compulsorily acquired land in Edmondson Park (**Land**) in 2022 for the purpose of public recreation. The Land was owned by Abu.Tony Pty Limited (**Abu.Tony**), which had been wound up at the date of acquisition. The applicant, Beningna Pty Ltd, held a mortgage over the Land at the date of acquisition and appealed the determination of market value by the Valuer-General under [s 66] of the [*Land Acquisition (Just Terms Compensation) Act 1991* (NSW)] (**Just Terms Act**).

Issues:

(1) Was the applicant's compensation for market value 'capped' by the Valuer-General's assessed amount due to Abu.Tony's deemed acceptance of the statutory offer?

(2) Was the existing drainage basin part of the public purpose of the acquisition and to be disregarded in accordance with [s 56](1)(a)?

(3) Absent the public purpose, which areas of land in the northeast and southeast, would be considered by a hypothetical purchaser to have had an underlying R1-Residential zoning?

(4) What valuation should be applied to the areas of residential and constrained land?

(5) Was the Council entitled to set off any amount owed by Abu.Tony by reason of its remaining in occupation of the Land after the date of acquisition, against compensation payable to the applicant?

Held:

(1) [Section 65] of the Just Terms Act in the context of a mortgagee's interest exceeding a landowner's interest as represented by the statutory offer was construed for the first time. No construction basis existed for finding that an individual response by a person with an interest in the acquired land binds another person with a statutorily defined interest. The applicant was able to commence the appeal and was not bound by the financial ceiling of the Valuer-General's initial assessment: at [27]-[34].

(2) At the date of acquisition, a basin existed on the Land which the owner Abu.Tony built when a residential apartment building was developed. The basin could not be disregarded under s 56(1)(a) as Abu.Tony chose to build it for a private purpose. The key inquiry was not whether the approved development served or aligned with a public purpose but whether the public purpose caused the change in value: at [80].

(3) A hypothetical purchaser would have been aware of flood liability in the north-east corner of the Land however could not be certain how the Council would have rezoned the corner for residential purposes as the evidence was not clear as to the extent of such flood risk: at [125]-[127]. The planning expert witnesses agreed the south-east corner would have been considered likely to have some R1 Residential zoning but disagreed as to the extent of the area to be assumed by the hypothetical parties: at [159].

(4) The comparable sales identified by the valuers were adjusted to render them applicable to the Land and derive a rate for the residential and constrained sections of the Land: at [226]-[258].

(5) Under s 34(2) Abu.Tony was entitled to remain in occupation of any building which was its principal place of business for a further three months after it was compulsorily acquired. The Council sought to claim rent for a further six months after Abu.Tony had left the Land. As Abu.Tony was not the applicant, it held no compensation from which rent could be deducted. Therefore, set off for this amount could not be claimed by the Council from the applicant's claim: at [289]-[294].

## Valuation

***Riveredge Investments Pty Limited v Valuer General of new South Wales* [2026] NSWLEC 45** (Preston CJ of LEC)

Facts: Riveredge Investments Pty Ltd (**Riveredge**) lodged a written objection to the Valuer General's valuation of the land of $17.4 million for the valuing years of 2022, 2023, and 2024 pursuant to s 29(3A) of the *Valuation of Land Act 1916* (NSW) (**Valuation of Land Act**). Riveredge contended in their objection that the valuation was too high and the land was to be properly valued at $4 million. The Valuer General, pursuant to s 35B(1) of the Valuation of Land Act, disallowed the objection. Riveredge appealed under s 37(1) of the Valuation of Land Act against the Valuer General's determination to disallow the objection to the valuation. It is this appeal in respect of the determination of the objection that the Court has jurisdiction to determine. The Registrar of the Land and Environment Court made a number of case management directions, including relating to expert evidence. Riveredge, under r 49.19 of the Uniform Civil Procedure Rules 2005 (NSW), sought review of some of these decisions of the Registrar.

Issues:

(1) Whether the decision of the Registrar should be set aside to allow Riveredge to call evidence from experts relating to acid sulfate soils; and

(2) Whether the Valuer General required leave of the Court to respond to Riveredge's case by arguing that the land value should be an amount different to that of the initial Valuer General's valuation and Riveredge's valuation in its objection to that valuation.

Held:

(1) Riveredge was required to replead its contentions of valuation objection to accord with the case it articulated in the hearing of the review of the Registrar's decisions. This was that the land should be valued, in accordance with s 6A(1) and (2) of the Valuation of Land Act, on the basis that its highest and best use is the existing use for industrial purposes, with no added value for any potential to redevelop the land for residential purposes. Riveredge argued that carrying out development in accordance with the existing consent was economically unviable as a result of the total costs of construction of development and treatment and management of contaminated and acid sulfate soils: at [5], [14].

(2) As a consequence of Riveredge being required to replead its case, the directions of the Registrar which related to the case as initially pleaded, were set aside and fresh directions made, including allowing Riveredge to adduce evidence relating to acid sulfate soils which it argued was relevant to the economic viability of any redevelopment of the land, and consequentially the value of the land: at [14]-[15].

(3) In responding to Riveredge's repleaded case, the Valuer General is required to seek leave of the Court to advance on the appeal a positive case that the land value should be determined to be different to either the valuation determined by the Valuer General or the land value advanced by Riveredge in the objection to that valuation. If the Valuer General wanted to advance a positive case to this effect, it would need to demonstrate how the nature, scope and purpose of the appeal under s 37(1) of the Valuation of Land Act authorises the Valuer General to advance on the appeal a positive case that the land value should be determined to be different to either the valuation determined by the Valuer General or the land value advanced by Riveredge in the objection to that valuation. The Valuer General would also be required to demonstrate why it would be reasonable to require Riveredge to expend time, effort and cost to advance two objections, one objection to the Valuer General's initial valuation that is the subject of the appeal, and a second objection to the Valuer General's new valuation raised for the first time on appeal. The Court noted that the Valuer General would not need to seek the leave of the Court if it confined its case to being defensive – defending both its original valuation and its disallowance of Riveredge's objection to that valuation: at [16]-[18].

(4) The Court made timetabling and case management orders to allow the parties to replead any amended contentions on valuation objection, prepare an agreed statement of facts, prepare a court bundle, and prepare

expert evidence, including in relation to acid sulfate soils: at [20].

***Karimbla Properties (No. 35) Pty Limited v Valuer General of New South Wales* [2025] NSWLEC 1810** (Dixon SC)

Facts:

The appellant appealed against the Valuer-General's determination of the land value of land on the ground that it was too high, pursuant to s 37(1) *Valuation of Land Act 1916* (NSW) (**VLA**). The land value of the subject land, located at 150 Epping Road, Lane Cove West, was determined by the Valuer-General to be $63,843,435. The appellant contended the correct land value to be $52,000,000 plus "land improvements". The appellant's objection to the assessed land value was disallowed by the Valuer-General with the result that the present Class 3 proceedings were commenced in the Court.

The land that is the subject of consideration is one of two lots that were jointly considered by the Valuer-General when determining land value. One lot was owned by the appellant, and the other lot was owned by Lane Cove Council. It was common ground between the parties that the site comprising those two lots had been improved before development by excavation, filling, levelling and grading works, thereby engaging the definition of "land improvements" within the meaning of s 4(1) of the VLA. Given that the two lots comprised a single parcel of land for the purpose of determining land value, it was acknowledged that apportionment of the land value of the two-lot parcel of land was required to be undertaken in accordance with s 26A of the VLA to determine the land value of the lot owned by the appellant. Applying that section, it was agreed that 96.4% of the land value determined for the two-lot parcel should be applied to the lot owned by the appellant and 3.6% applied to the Council owned lot. The Council had not objected to the land value assigned to its lot.

At the valuation date of 1 July 2023, five residential unit buildings had been erected on the two-lot site with car parking, a retail use and a childcare centre. The buildings had a gross floor area of 35,351.2m². Development of the site in that manner was the subject of development consent granted in 2012. The land use zoning of the site had since changed to E4 – General Industrial under the current LEP. It was agreed by the parties that development of the land in accordance with the 2012 consent founded a higher land value for the site than would be the case under the current E4 zone. As a consequence, the provisions of s 6A(2) of the VLA Act were engaged when determining the land value of the site.

The parties further agreed that the cost of construction of the "land improvements" was $8,789,484 as determined by a report provided by a quantity surveyor.

Issues:

(1) What is the value of the land in question conformably with s 6A of the VLA; and

(2) What is the value of the 'land improvements' to be added when determining the 'land value'.

Held: The appeal was dismissed upon the following reasons:

(1) When determining the 'land value' in accordance with s 6A, the section requires that the land in question be valued as if it was devoid of all improvements, other than those works that engage the definition of 'land improvements'. The correct approach is to determine that value on the basis of a hypothetical purchaser acquiring the land for its highest and best use, given its capacity, in the present case, for a use that is more beneficial than the present zoning would allow (*Trust Company of Australia Ltd v Valuer-General* [2007] NSWCA 181; *Peter Sleiman Property Investments Pty Ltd v Valuer-General of NSW (No 2)* [2021] NSWLEC 47).

(2) Each of the valuation experts approached the valuation task by the direct comparison method with the conventional steps of utilising comparable sales by accumulation, analysis, adjustment and application (*Square Holdings Pty Ltd v Valuer-General of NSW* [2018] NSWLEC 140; *Warwick Farm Central Pty Ltd v Valuer-General* [2024] NSWLEC 25). Not unusually, application of that approach by each valuer resulted in a significant difference in the resulting value for which each valuer contended.

(3) The evidence of the Valuer-General's expert was preferred to that of the appellant's expert because the quantum and rationale for adjustments to comparable sales made by the former valuer were more transparent and accorded with the methodology to which the expert had agreed prior to embarking on the exercise of adjustment. The integrity of the process and comparative task required adherence to the agreed methodology.

(4) It was contended by the Valuer-General's expert that in addressing the 'land improvements' component of the land value of the subject land, there should be added to the cost of works engaging that definition, the value of

other advantages gained by the hypothetical purchaser, assuming that those works had, at the time of the hypothetical sale already been undertaken. Those advantages included savings in holding costs and interest costs that would otherwise be incurred if the 'land improvements' were yet to be undertaken. According to that evidence, the 'land improvements' factor would result in the agreed construction cost of $8,789,484 being increased to $16,050,000.

(5) That approach was rejected because the quantification of the added cost would depend upon the circumstances of the particular purchaser. The identity and circumstances of a particular purchaser in the notional sale postulated by s 6A(1) of the VLA is an entity with full knowledge of the market and so its identity is irrelevant to the determination of land value (*Storage Equities Pty Ltd v Valuer-General* [2013] NSWLEC 137). However, as the value of the land in question, before considering land improvements, had not been reduced to the value for which the appellant contended, even accepting the agreed construction cost of land improvements for which the appellant contended, it had not been established that the land value for which the Valuer-General contended was too high, with the result that the appeal was dismissed.

## EVIDENCE

***Environment Protection Authority v Maules Creek Coal Pty Ltd (No 3)* [2026] NSWLEC 58** (Beasley J)

Facts: The defendant filed a notice of motion seeking advance rulings under s 192A of the *Evidence Act 1995 (NSW)* (**Evidence Act**) that certain evidence be inadmissible.

The underlying proceedings to the motion involve eight separate prosecutions brought against the defendant for an alleged breach of s 64(1) of the *Protection of the Environment Operations Act 1997 (NSW)* (**POEO Act**), relating to explosive blasts at the Maules Creek Coal Mine allegedly carried out in a less than competent manner. Seven charges concern Blasts A to G, and one charge concerns the March 2022 Blast.

The basis upon which the defendant sought Orders 2 and 4 in the motion was that the proposed evidence was not relevant to the proceedings, in the sense that it was of no relevance to the particulars of alleged contravention in the various summonses, within the meaning of s 56(2) of the Evidence Act. The manner of particularisation of the offences has been a live issue in these proceedings for some time.

Issues: Whether evidence was inadmissible under ss 56(2), 135(a) and 137 of the Evidence Act for:

(1) the allegation that the defendant did not have a complete understanding of the capabilities and parameters of Enaex's explosives (**Prayer 2(a)**);

(2) the allegation that the trial blast carried out at the Maules Creek Coal Mine on 24 February 2021 was "inadequate" (**Prayer 2(b)**);

(3) the allegation that it was not until after Blast G that the defendant introduced changes to the drill and blast processes (**Prayer 2(c)**);

(4) the allegation that the defendant did not use hole liners in Blasts A to G (**Prayer 2(d)**);

(5) the allegation that the defendant was, or should have been, aware of the allegedly inferior quality of Enaex's emulsion product compared to Hanwha products previously used at the mine (**Prayer 2(e)**);

(6) the allegation that Enaex's Heat 200D emulsion was inappropriate for use with holes deeper than 20 metres (**Prayer 2(g)**);

(7) evidence concerning the "control particulars" (**Prayer 4**); and

(8) whether certain records of interview (**ROIs**) were inadmissible as a whole under s 59 and s 135(c) of the Evidence Act. Further, if there are relevant admissions in the ROIs that are exceptions to the hearsay rule, whether the entirety of the ROI is admissible (**Prayer 5**).

Held: Order 2(d) was granted and Order 5 was made in accordance with the short minutes. Orders 2(a) to (c), 2(e) to (g) and 4 were declined. Costs of the motion were reserved.

(1) **Prayer 2(a)**: The advance ruling was declined. There was no particular of contravention in any summons that expressly reflected what is asserted. The evidence cannot directly be used as evidence to establish a breach of s 64(1) of the POEO Act. However, it might be evidence that is relevant to the central and particularised alleged contraventions relating to (a) a failure to test the explosives; (b) the failure to make changes to drill and blast design; and (c) the loading of the explosives in "deep and weak strata": at [9]-[17].

(2) **Prayer 2(b)**: The advance ruling was declined. There was no particular of contravention in the summonses that alleged incompetence because of an "inadequate trial blast". The inadequacy or otherwise of any trial blast cannot of itself be evidence upon which the offences can be established beyond reasonable doubt. However, the circumstances of the trial blast might be relevant to at least some of the particulars of contravention, for instance, to the particular (a) in summonses for Blasts A to G concerning an alleged failure to test the Enaex explosive products: at [18]-[23].

(3) **Prayer 2(c)**: The advance ruling was declined. It may be that blast design (the contravention alleged) and blast processes (not expressly alleged) are entirely distinct things. However, it might be established on the evidence that there is some relevant relationship between the two. "Processes" might follow "design" and might be relevant to the alleged particular of contravention, if not a reason itself for establishing breach of s 64(1) of the POEO Act: at [24]-[27].

(4) **Prayer 2(d)**: The advance ruling was given. Any evidence that the defendant should have used hole liners for Blasts A to G, or that its failure to do so establishes that it conducted Blasts A to G in a less than competent manner, is not relevant to the proceedings for each blast A to G. The prosecutor needed to particularise that alleged contravention and had not done so. None of the prosecutor's Further Amended Statement of Facts (**FASF**) for Blasts A to G mention the failure to use hole liners. The defendant has not come to defend the charges relating to Blasts A to G on the basis of this allegation and the defendant's expert has not been asked to assist in relation to it (save as to the March 2022 Blast): at [28]-[35].

(5) **Prayer 2(e)**: The advance ruling was declined. There was no express particular of contravention in the summonses that alleged that the Enaex's emulsion product were "inferior". Evidence that the defendant should have been aware of the alleged "inferior quality" is not admissible to establish a breach of s 64 of the POEO Act. However, evidence concerning the nature and characteristics of the Enaex products could be rationally probative to establish the "liability particulars" of contravention that are set out in the summonses for Blast A to G: at [36]-[39].

(6) **Prayer 2(g)**: The advance ruling was declined. An allegation in precisely these terms was not found in the particulars of contravention in the summonses and the issue in relation to "20 metres" was not expressly raised in the FASF. However, some particulars do raise the issue of depth, and the FASF includes facts concerning depth of the blast holes. In these circumstances, an advance ruling that evidence concerning Enaex's emulsion performance in holes deeper than 20 metres is inadmissible was not made: at [40]-[43].

(7) **Prayer 4**: The advance ruling was declined. It was not accepted that evidence concerning the control particulars is irrelevant or that at the moment specific evidence relating to these particulars can be ruled out. The control particulars, individually or cumulatively, cannot establish guilt.

(8) **Prayer 5**: Orders were made in accordance with the short minutes of order. The ROIs may be capable of being admitted as admissions which are exceptions to the hearsay rule pursuant to s 87(1)(b) of the Evidence Act if the prosecutor can make good that provision. The prosecutor suggested that if there are relevant admissions in the ROIs that are exceptions to the hearsay rule, the entirety of the record of interview is admissible. The defendant contended otherwise. It was held that the High Court's decisions in *Nguyen v The Queen* (2020) 269 CLR 299 and *R v Soma* (2003) 212 CLR 299 do not provide support for the proposition that the entirety of the ROIs are admissible merely because some parts may be. Parts that contain neither admissions, nor relevant context, and that are otherwise not relevant to the proceedings, would not be admissible: at [52]-[56].

(9) The defendant is entitled to know, based on the particulars of the charge, what alleged "acts or omissions" of it are said to constitute the offence it is charged with. Put another way, it is entitled to know the essential factual ingredients of its alleged offending: at [5].

## Practice and Procedure

***Lachlan Haskins v Yass Valley Council* [2026] NSWLEC 14** (Pritchard J)

Facts: On 25 July 2024, Yass Valley Council (**Council**) refused a development application lodged by Mr Haskins (**initial determination**). On 14 August 2024, Mr Haskins submitted a request for review pursuant to Div 8.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). On 23 June 2025, Council determined to uphold the initial determination (**review determination**), and on 27 June 2025 the review determination was registered on the

NSW Planning Portal. On 6 November 2025, Mr Haskins commenced a Class 1 appeal from Council's review determination.

By notice of motion filed 8 December 2025, Council sought to strike out the Class 1 appeal on the basis that it was brought out of time, where s 8.10(1)(a) of the EPA Act provides that an appeal against a decision of a consent authority may only be made within 6 months after the date the decision appealed against is registered on the NSW Planning Portal. Mr Haskins argued that in requesting a review of the initial determination he amended the proposed development pursuant to s 8.3(3), such that the review determination, although upholding the initial determination, was a determination "changed on review" within the meaning of s 8.5(4), and so replaced the initial determination on the date the review determination was registered on the NSW Planning Portal pursuant to that section. The Class 1 appeal was thus brought within time. Council argued as a threshold issue that it did not have power to determine the review as the time period in s 8.3(2)(a), which provides that a review of a determination or decision must not be made after the period within which any appeal may be made to the Court has expired if not appeal was made, had expired. Hence, there was no determination that could have changed the initial determination. In the alternative, Council argued that the review determination in upholding the initial determination was not a determination "changed on review" within the meaning of s 8.5(4).

Issues:

(1) As a matter of law, whether the period in s 8.3(2)(a) had expired, and if so, whether Council had power to review the refusal after the period in s 8.3(2)(a) had expired; and

(2) as a matter of fact, whether the review determination was a determination "changed on review" within the meaning of s 8.5(4).

Held: The Class 1 appeal was brought out of time and dismissed.

**Issue (1)**

(1) The lodging of a request for review under s 8.3 was not sufficient to preserve a right of appeal to the Court under s 8.10(1)(a) and hence bring the review of the determination within the power of the consent authority to conduct a review under s 8.3(2)(a). *Hainbury Pty Ltd v Campbelltown City Council* [2007] NSWLEC 713; *Lakeman v Ku-ring-gai Council* [2013] NSWLEC 14; and *Congregational Christian Church Samoa Parish of Sydney v Georges River Council* [2017] NSWLEC 71 applied: at [59].

(2) Notwithstanding that an amended development may have come forward through the review process, Council had no power to conduct the review, the period within which an appeal from Council's initial determination could be made to the court having expired: at [67].

**Issue (2)**

(3) In addition to the deletion of a small area of hardstand, there was also the addition of a fence and nature buffer. The reasons for the initial determination and the review determination, although upholding the refusal, were different, there being a new reason that the proposed development was "not in the public interest". That reason was based on substantial community opposition received in new submissions as a result of the notification of the request for review. For these reasons, the review determination resulted in the refusal being changed on review within the meaning of s 8.5(4): at [75].

## Merit Decisions (Judges)

***Manchee v Secretary, Department of Climate Change, Energy, the Environment and Water* [2026] NSWLEC 15** (Beasley J)

(Related decision: *Manchee v Secretary, Department of Climate Change, Energy, the Environment and Water (No 2)* [2026] NSWLEC 33 (Beasley J))

Facts: The applicant, Mr Manchee, brought a Class 1 appeal under s 60M of the *Local Land Services Act 2013 (NSW)* (**LLS Act**) against a determination made following a map review requested on 31 August 2024 pursuant to s 60L of the LLS Act.

The determination, made by the respondent, classified the entirety of "Sandy's Paddock" at the property known as "Luellan", near Moree, as Category 2 – Regulated Land under s 60I of the LLS Act. The respondent maintained that Sandy's Paddock was Category 2 land because it was subject to a Direction to Carry out Remedial Work dated 17 September 2002 (**Remediation Order**), made by the Director-General of the then Department of Land and Water Conservation, under s 47 of the (repealed) *Native Vegetation Conservation Act 1997 (NSW)* (**NVC Act**) (see s 60I(2)(f) of the LLS Act), and because parts of the paddock had been unlawfully cleared of native vegetation after 1 January 1990 (see s 60I(1)(b) of the LLS Act).

The Remediation Order was issued to Leverton Pastoral Company Pty Ltd following its guilty plea on 18 September 2002 to unlawfully clearing native vegetation, contrary to s 21(2) of the (repealed) NVC Act. Leverton conducts farming on the property "Luellan" and the Applicant is its sole director. The applicant contended that, on its proper construction, the Remediation Order was limited to the areas identified in cl 7.1, and not the whole paddock. Alternatively, the applicant contended that only those parts of Sandy's Paddock that had been unlawfully cleared after 1 January 1990 could be classified as Category 2 – Regulated Land under s 60I(1)(b) of the LLS Act. The case turned on the proper construction of the Remediation Order made under the NVC Act, in particular the construction of cll 3.8 and 7.1.

Clause 3 of the Remediation Order was headed "General Conditions", and provides:

> *"3.8 Native vegetation in the Remediation Areas must not be cleared or burnt, except as provided in sections 6.2 and 9.1 of this Schedule or after such time as the restriction periods agreed to in this Schedule expire for the various areas."*

Clause 7 of the Remediation Order was headed "Management of Remediation Area 2", and provides:

> *"7.1 No clearing, cultivation, or pasture improvement using NVC Act exemptions is to occur in the following areas within Remediation Area 2 for five years from 18 September 2002 without the written permission of the Resource Compliance Manager:*
> *The Tree Clump*
> *The Eastern Shelterbelt*
> *The non-cultivated strip on the northern boundary of Remediation Area 2"*

Issues:

(1) Whether, on its proper construction, the Remediation Order applied to the whole of Sandy's Paddock or only to the specific areas identified in cl 7.1, namely the Tree Clump, Eastern Shelterbelt and non-cultivated strip;

(2) Whether land could be designated as Category 2 – Regulated Land under s 60I(2)(f) of the LLS Act by reason of the Remediation Order; and

(3) If the Remediation Order did not apply to the whole paddock, whether only the areas unlawfully cleared after 1 January 1990 could be classified as Category 2 – Regulated Land under s 60I(1)(b).

Held:

(1) The Remediation Order applied to the whole of Sandy's Paddock, not merely the areas identified in cl 7.1, having regard to its text, context and purpose. The Remediation Order applied to the whole of Sandy's Paddock. Clause 3.8 contained a general prohibition on clearing or burning native vegetation in all Remediation Areas. This included Remediation Area 2, which the map and definition indicates includes the whole of Sandy's Paddock. Clause 3.8 is not read to be limited by cl 7.1, which contains additional restrictions beyond cl 3.8: at [55]-[61].

(2) In consequence, the whole of Sandy's Paddock was subject to a requirement to take remedial action within the meaning of s 60I(2)(f) of the LLS Act and was therefore properly designated as Category 2 – Regulated Land: at [64].

(3) Due to (2) and (3), it was unnecessary to determine which parts of Sandy's Paddock, were not unlawfully cleared for the purposes of s 60I(1)(b): at [65].

## Merit Decisions (Commissioners)

***Leppington Main 88 Pty Limited v Camden Council* [2026] NSWLEC 1104** (Dixon SC)

Facts: The applicant appealed against the Council's refusal of a development application comprising a commercial mixed-use development on rural land at 173 and 183 Rickard Road, Leppington (**Site**). The development is fully compliant with the current Precinct Plan (Camden Growth Centres Precinct Plan 2013) under the State Environmental Planning Policy (Precincts—Western Parkland City) 2021 (**SEPP WPC**). For the development to be serviced, there needs to be an extension of the reticulation sewer and water main to the Site. Clause 6.1 of Appendix 5 of SEPP WPC requires the Court to be satisfied that "adequate arrangements have been made" to make the sewer and water infrastructure available when required.

Issues:

(1) Whether adequate arrangements have been made for public utilities infrastructure for the purpose of cl 6.1(1) of Appendix 5 of SEPP WPC; and

(2) whether determining weight should be given to the Leppington Town Centre Planning Proposal 2023 (**LTCPP**) under s 4.15(1)(a)(ii) of the Environmental Planning and Assessment Act 1979 (NSW) (**EPA Act**), resulting in the refusal of consent.

Held:

(1) Both parties rely on the decision in *Georges River Council v Eskander* [2024] NSWLEC 98 (*Eskander*) to determine whether there is "objective and tangible proof that an arrangement has been made" for sewer infrastructure to be available for the development when required by cl 6.1 (*Eskander* [23]): at [28]. The applicant submits that there is "objective and tangible proof" of an arrangement in the form of an application made under s 73 of the Sydney Water Act 1994 (NSW) to obtain a compliance certificate, the issue of a Notice of Requirements following that application and a Developer Works Deed entered with Sydney Water: at [29]. The Council contends that the applicant's arrangements do not reach the necessary threshold ("adequate") to satisfy cl 6.1 because none of the provisions indicate that Sydney Water is inclined to authorise the applicant to enter the adjoining land to carry out water infrastructure: at [37], [44]. It was held that the satisfaction of an "adequate arrangement" is not expressly limited to arrangements made with Sydney Water, rather, the standard invites a consideration of the position of the adjoining landowner where the sewer infrastructure is to be constructed: at [50]. There is no evidence of communication with, or permission sought from the adjoining owner to satisfy the terms of arrangements submitted by the applicant: at [54], [56]. In the absence of satisfactory evidence, the Court could not form the requisite state of satisfaction under cl 6.1, requiring the refusal of the application: at [59].

(2) The applicant submits that the Planning Proposal should be afforded minimal weight because the Council had failed to establish that the proposal is both certain and imminent. The applicant argues the Planning Proposal has undergone significant changes and that the changes to the draft Development Control Plan mean that it is uncertain and it needs to be redrafted and renotified: at [77], [81]. The Court found that there cannot be an expectation that requires re-exhibition of a draft planning instrument following every alteration made to the draft: at [98]. On the issue of certainty, the Court accepted that the proposed amendments to the draft instrument to be matters of detail as opposed to substance following *Architects Haywood and Bakker Pty Ltd v North Sydney Council* [2000] NSWLEC 138: at [100]. The Court accepted that the changes incorporated into the planning instruments will not change its purpose; the four critical features affected the Site have remained consistent through amendment: at [101], [104]. Upon these facts, the Court did not accept the changes proposed to be anything other than matters of detail: at [115]. In respect of imminence, s 4.15(1)(a)(ii) of the EPA Act requires the consideration of draft instruments that have been exhibited: at [97]. The Court accepted the evidence from the Department and various other sources that the proposed instrument will be finalised by end of March 2026 or thereabout and was certain: at [112].

***Hampton Heights Pty Ltd v Central Coast Council* [2026] NSWLEC 1077** (Espinosa C)

Facts: A residential Torrens title subdivision in the Wadalba South Urban Release Area (**WSURA**) required removal of native vegetation for the residential development and for the new collector road designed in accordance with the strategic indicative road layout plan for the WSURA prepared by the Council. The Site had a land area of approximately 7.574 ha and would accommodate 68 new residential lots and a dedicated public reserve Lot 150 for environmental purposes. The Site itself was mostly located within the R2 Low Density Residential zone and along the northern boundary was an area of C2 Environmental Conservation zone sometime called a "corridor". The Lot 150 public reserve was approximately 1.76 ha and expanded out from the C2 Environmental Conservation corridor to include R2 Low Density Residential land. The whole of Lot 150 would be managed in accordance with a Biodiversity Management Plan (**BMP**). The native vegetation clearing of approximately 5.49 ha would be in an area declared under cl 7.2 of the Biodiversity Conservation Regulation 2017 (**BC Regulation**) and required a Biodiversity Development Assessment Report (**BDAR**).

The Proposed Development would impact the Swift Parrot (a threatened species) and the Squirrel Glider. The BDAR responded to and relied on the Swift Parrot Expert Advice by Dr Ross Crates dated 19 May 2025. The applicant provided a Letter of Offer to enter into a Voluntary Planning Agreement "to ensure the proper management of important Swift Parrot and Squirrel Glider habitat to allow for the persistence of these species in the Wadalba area" and provided for the dedication of Lot 150 at no cost to Council and completion of specified works for a period of no less than 5 years or longer if regeneration targets were not reached.

The subdivision design generally follows the curved geometry of Jensen Road and provided 4 new roads including the collector road (or Road 01) which followed the indicative road layout in the Central Coast Development Control Plan 2022 (**CCDCP**). As a result, a small number of lots had a narrow frontage of less than 15 m and their orientation was at a greater angle than would result if the roads were "generally east-west and north-south". The proposed roads provided for generally a 4.5 m or 3.5 m verge. The vegetated buffer was required by the CCDCP to be 5-10 m, being a bush regeneration zone to mitigate abiotic and biotic edge effects, the Water Sensitive Urban Design (**WSUD**) was also required to be a minimum of 5 m, and these widths were not part of the road design. The expert ecologists, when addressing edge effects, agreed that the BMP should be updated to include the provision of three rows of Lilly Pilly trees (or other suitable species such as *Elaeocarpus reticulatus*) to be planted within the first 5 m of the road reserve to provide a dense planting screen between the development and the retained lands. The planting screen would reduce the suitability of the retained lands for Noisy Miner as well as reduce the light spill from the development and vehicles.

Issues:

The main issues were ecology and planning which were dealt with as follows:

(1) satisfaction of the jurisdictional prerequisite terms of s 7.16 of the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) by undertaking an evaluation of whether serious and irreversible impacts on two species being the threatened Swift Parrot and the Squirrel Glider;

(2) the exercise of discretion in the application of the precautionary principle;

(3) consideration of the management of edge effects in an urban interface; and

(4) whether the proposed residential lots were capable of accommodating an appropriate building envelope suitable for acceptable future residential amenity as a result of urban design of the lot layout and orientation.

The location of the Collector Road was a key issue in these proceedings and the implications of its location traversed planning and ecology.

Held:

(1) The Court should give weight to the history of strategic planning regarding the WSURA as set out and depicted in Chapter 5.9 of the CCDCP including Fig 2 and Fig 3. The location of the Collector Road was a strategic location determined by the respondent after consultation with various disciplines including ecologists such as Dr McLean. There was not sufficient evidence to assist the Court to form any conclusion that the location of that road should be changed: at [56].

(2) The evidence supported a conclusion that the consideration of Principle 4 (cl 6.7(2)(d) BC Regulation) for the Swift Parrot resulted in an answer in the negative to the proposition that the Swift Parrot was "unlikely to respond to measures to improve its habitat and vegetation integrity and therefore its members are not replaceable".

The Proposed Development, by increasing the size of Lot 150 and expanding into the R2 zone, would provide land which would avoid impacts, the sensitive road design attempted to minimise impacts and the BMP also minimised and mitigated the impacts of the Proposed Development on the Site. Although the Proposed Development would reduce the foraging area of the Swift Parrot, such impacts may not exacerbate the current threats to the species. By reference to three of the principles in cl 6.7(2) of the BC Regulation, the impacts of the Proposed Development on the Swift Parrot's foraging habitat on the Site were not to be regarded as serious and irreversible: at [107]-[108].

(3) The impact of the Proposed Development on the Squirrel Glider could be mitigated by ensuring that the connectivity remains on Site for the Squirrel Glider by enhancing the C2 corridor, together with the installation of the nest boxes and artificial hollows, in conjunction with management and revegetation, under the supervision of suitably trained people. The impacts of the Proposed Development would not exacerbate the current threats to the Squirrel Glider. By reference to three of the principles in cl 6.7(2) of the BC Regulation, the impacts of the Proposed Development on the Squirrel Glider and their habitat on the Site were not to be regarded as serious and irreversible. In accordance with s 6.5 of the BC Act and cl 6.7 of the BC Regulation, that the Proposed Development was not likely to have serious and irreversible impacts on the two threatened species (Swift Parrot) and (Squirrel Glider) that occur on the development site: at [124]-[125].

(4) The precautionary principle is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. In relation to the Squirrel Glider, the evidence did not support a finding that there was scientific uncertainty. It seemed that Dr McLean's concerns regarding uncertainty and his reliance on the precautionary principle was limited to the Swift Parrot. Dr Crates gave his expert advice consisting of six comments which have

been considered and implemented where possible and appropriate in the BDAR. By virtue of seeking and incorporating the expert advice of Dr Crates, the BDAR did in fact pay regard to cumulative impacts. On the basis of the incorporation of the Swift Parrot Expert Advice in the BDAR and the various concessions made by Dr McLean including Principle 4 regarding the measures to improve its foraging habitat and vegetation integrity, it was not appropriate in this instance to refuse the Proposed Development on the basis of applying the precautionary principle: at [131], [133] and [137]-[139].

(5) The management of edge effects was sufficiently resolved so as to not warrant the refusal of the Proposed Development because the BDAR addressed light spill mitigation and the BMP provided that “edge effects will be managed through a designated 10m landscape buffer within the BMP from the development edge … to reduce impacts associated with the proposed development including light spill, weed incursion, noise, dust, and altered hydrology” and specified the details of the 5 m native planning screen within the UIA consisting of 3 rows of Lilly Pilli, or suitable alternative, and as shown in Figure 3 of the BMP: at [41] and [149]-[151].

(6) The non-compliance with the CCDCP lot layout and orientation control was not sufficient to warrant the refusal of granting consent because no particular Lot of the Proposed Development was identified to have sub-optimal outcomes for solar performance for external open space: at [173]-[174].

***Garrard Building Pty Ltd v Clarence Valley Council* [2026] NSWLEC 1150** (Walsh C)

Facts: The applicant appealed the Northern Regional Planning Panel’s refusal of a development application for community title subdivision (277 low density lots) at Yamba on the Clarence River. The site is flood prone. It is also zoned R1 General Residential under Clarence Valley Local Environmental Plan 2011 (**CVLEP**) and located within the West Yamba Urban Release Area (**WYURA**), with related housing targets. Under the proposal, the site would be filled to achieve required building pad levels above flooding. A large number of residents objected to the proposal, concerned about its potential of land filling to worsen flood affectation, pointing to 2022 flooding events, which brought significant impacts and damage to property. Heightening risks having regard to climate change were also raised.

Issues:

(1) Potential detrimental increases in flood affectation of other properties associated with proposed land fill (cl 5.21(3)(b) of CVLEP);

(2) adequacy of consideration of projected changes to flood behaviour as a result of climate change (cl 5.21(3)(a) of CVLEP); and

(3) safe occupation and efficient evacuation for future occupants (cl 5.21(3)(c) of CVLEP).

Held: appeal upheld:

(1) The Court accepted the opinion of the experts that reasonable assumptions were adopted in regard to current conditions in final work on: (a) flood modelling (e.g. river entrance conditions, storm surges, and Lake Wooloweyah implications); (b) terrain modelling (including in relation to pre-existing landfill); and (c) localised overland flow modelling. Based on the evidence, the Court held that the proposed development would not cause increased flood affectation of other relevant property: at [68].

(2) The climate change related shared socio-economic pathway (**SSP**) indicators adopted in the Council’s flood policy, and for modelling purposes in this case were not unreasonable. These included the less conservative SSP2 for rainfall intensity and the figure of 0.76 metres for sea level rise which was considered by experts to be reasonable (equivalent to SSP5) given a “surrogate” factor adopted in modelling. The Court found that unless there are strong and coherent arguments to the contrary, it is reasonable that a local council should be able to adopt its own positions in regard to SSPs: at [53].

(3) The Court held that in these particular circumstances: (a) it was reasonable to assume that State Emergency Services and other agencies would respond adequately to flooding in accordance with statutory responsibilities, given this site is zoned for residential use: at [87]; (b) the proposed flood emergency management plan (**FEMP**) is well founded: at [104]; and (c) acknowledging the flood setting (adequate warning and evacuation systems), the nature and type of development (residential zone) and proposed flood emergency systems (community title based FEMP), the proposal was satisfactory: at [123]-[125].

***McDonald v Wingecarribee Shire Council* [2026] NSWLEC 1178** (Dickson C)

Facts: Mr McDonald (**applicant**) appealed against Wingecarribee Shire Council's (**Council**) refusal of a development application comprising the demolition of existing single-storey dwelling and outbuildings, and the construction of a new dwelling within the Berrima Heritage Conservation Area (**HCA**).

The adjoining property to the site is also a listed heritage item (I250) at Sch 5 of the Wingecarribee Local Environmental Plan 2010 (NSW) (**WLEP 2010**): "Oaklea Cottage" at 24 Oxley Street, Berrima NSW 2577. At the hearing no issue was raised as to the acceptability of the proposed replacement dwelling. The remaining contention was whether the demolition of the existing dwelling had an unacceptable impact on the HCA.

The proceedings were brought to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

Issues:

(1) Whether the demolition of the existing dwelling would have a detrimental impact on the heritage significance of the HCA and therefore warrants refusal of the development application pursuant to s 4.15 of the EPA Act; and

(2) the extent to which the existing dwelling contributed to the significance of the HCA.

Held: Appeal upheld and development consent granted:

(1) To the extent that the existing dwelling possesses heritage value contributing to the significance of the HCA, that contribution must be considered within the hierarchy established by the relevant planning instruments i.e. WLEP 2010, the Berrima Village Development Control Plan (**BV DCP**), and expert evidence: at [38].

(2) The intactness, state of repair of the existing building, and extent of proposed works are relevant in considering the impact of the proposed demolition on the significance of the HCA: at [42].

(3) To the extent that the Council's heritage experts evidence details a preference for, or the appeal of, a development application which sought to retain the existing original portion of the dwelling in a remediated and restored state, the focus for the Court is determining the impact of the proposed demolition on the significance of the HCA and then considering that impact in the framework of s 4.15(1) of the EPA Act. It is not a question of determining the preferred development outcome for the site: at [43].

(4) Any value in retaining the remaining components of the existing building and site that constitute the original and early fabric are outweighed by: the extent of agreed works required to address structural defects that will diminish the extant fabric; the extensive and less sympathetic later alterations and additions to the building both externally and internally; and the location of the site in precinct that is of a lower order of importance in the HCA: at [46].

(5) The demolition of the existing dwelling will have a minor adverse impact on the significance of the HCA because of the development application. However, considering the development application as a whole, the development's compliance with the provisions of WLEP 2010 and the BV DCP, and the other relevant matters for consideration under s 4.15(1) of the EPA Act, the impact does not warrant refusal of the application: at [47].

(6) The Court accepts the agreement of the experts that the proposed replacement building is acceptable in heritage terms as it is compliant with the development controls in the BV DCP and retains the aesthetic significance of the HCA through its design and siting: at [41].

***Patchy Properties Pty Ltd v Randwick City Council* [2026] NSWLEC 1190** (Porter C)

Facts: Patchy Properties Pty Ltd (**applicant**), appealed against the Randwick City Council's (**respondent**) refusal of a development application for construction of a five-storey residential flat building (**DA**). The DA proposed affordable housing pursuant to Ch 2, Div 1 'In-fill affordable housing' of the State Environmental Planning Policy (Housing) 2021 (**Housing SEPP**).

Issues:

(1) What the relevant setback control is for the corner site and whether the area is in transition;

(2) whether the applicant demonstrated that the proposed variation to the floor space ratio (**FSR**) development standard was acceptable pursuant to cl 4.6 of the Randwick Local Environmental Plan 2012 (**RLEP 2012**); and

(3) whether a cl 4.6 variation is required for a contravention of s 19(2)(a), a non-discretionary development standard, of the Housing SEPP.

Held: Appeal dismissed:

**Setbacks**

(1) The subject site is a corner site in Coogee. The proposed setbacks along both of the site's frontages along Brook Street and Ormond Gardens were in dispute. The front setback controls at 3.4 of the Randwick Development Control Plan 2013 (**RDCP**) provide for different front setback controls. The primary and secondary property frontages must be consistent with the prevailing setback line along the street, or in areas of transition, the front setback is to be determined on a merit basis.

It was found that the area was not in transition with regard to the mixed character, established development, development consents issued and suite of applicable planning controls, including the Housing SEPP. Accordingly, the primary and secondary setbacks should be consistent with the prevailing setback line. The Ormond Gardens setback was inconsistent with the prevailing setbacks: at [28]-[38].

It was not accepted that the Ormond Gardens frontage was a side setback and there was no inconsistency between the setback controls and the site planning guidelines of the RDCP, as these are examples only: at [39].

**FSR**

(2) The applicant sought flexibility for additional FSR. The respondent also contended that the additional car parking spaces above the Housing SEPP should either be redistributed as visitor car parking in accordance with the RDCP or included as FSR. It was found that the proposed car parking was not FSR as the Housing SEPP prevails over the RDCP requirements and the standard is a minimum: at [59].

The adverse visual bulk presented to 7 Ormond Gardens and the public domain was contrary to objective (d) of cl 4.4 FSR of the RLEP 2012: at [61]-[65]. The environmental planning grounds relied on were not accepted as, most of the variation was not attributed to affordable housing, the variation had visual bulk impacts, the design grounds were not related to the variation, and caution should be exercised if relying on a maximum theoretical capacity of the site as is not the role of cl 4.6 to effect general planning change (*Wehbe v Pittwater Council* [2007] NSWLEC 827 at [51]): at [66]-[72].

**Variation of a non-discretionary development standard**

(3) The subject site was below the minimum site area required by s 19(2)(a) of the Housing SEPP. Section 4.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and s 19 of the Housing SEPP turns off the discretion of a consent authority for non-discretionary development standards. It was accepted that s 4.15(3)(a) of the EPA Act turns off s 4.15(2) subject to s 4.15(3)(b), which provides that a provision of an EPI that allows flexibility to a development standard, such as cl 4.6 of RLEP 2012, may be applied to the non-discretionary development standard. It was found that a variation pursuant to cl 4.6 of RLEP 2012 was required: at [97]-[106].

It was not accepted that compliance was unnecessary or unreasonable in the circumstances as the applicant primarily relied on the principles of the Housing SEPP, which were too broad to relate to the contravention, that the underlying purpose had not been identified, and that the other reasons were not supported: at [109]-[119].

# LEGISLATION

## STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between February and June 2026.

### BILLS

Building (Approvals and Practitioners) Bill 2026

The objects of this Bill are as follows—

(a) to establish a framework for the approval and oversight of building work, including work involving prefabricated buildings,

(b) to provide that certain work may be carried out only under a registration (registered work) and to establish a registration process for registered work,

(c) to enable the Secretary of the Department of Customer Service (the Secretary) to take disciplinary action against persons who are registered,

(d) to enable the appointment of authorised officers, who are responsible for investigating, monitoring and enforcing the requirements of the proposed Act and the regulations,
(e) to set out additional powers of the Secretary under the proposed Act,
(f) to establish a duty of care owed by persons who carry out construction work requiring the persons to take reasonable care to avoid defects arising from the construction work,
(g) to set out additional miscellaneous matters relating to the administration of the proposed Act,
(h) to make consequential amendments to other Acts.

Electricity Supply Amendment (Renewable Fuel Scheme) Bill 2026

The object of this Bill is to amend the *Electricity Supply Act 1995* (the Act) and the *Electricity Supply (General) Regulation 2014* to—
(a) provide for scheme targets for different renewable fuel groups and compliance requirements under the renewable fuel scheme (the RFS), and
(b) make other minor and consequential amendments relating to the administration of, and compliance with, the RFS.

Energy Legislation Amendment (Prioritising Renewable Energy) Bill 2026

The object of this Bill is to amend the *Electricity Supply Act 1995* and the *Environmental Planning and Assessment Act 1979* to prioritise and streamline certain energy infrastructure projects.

Amendment of *Environmental Planning and Assessment Act 1979 No 203*

Schedule 2[1] authorises the Independent Planning Commission, on the request of the Minister administering the Environmental Planning and Assessment Act 1979 (the Planning Minister), to hold a public hearing about development that includes a PEP.

Schedule 2[2] provides that the Development Coordination Authority is subject to the control and direction of the Planning Minister except in relation to the contents of an advice, recommendation or report provided to the Planning Minister by the Development Coordination Authority.

Schedule 2[3] and [4] provide that, where a development is declared a PEP, the Planning Minister may declare the development to be State significant development without obtaining and making publicly available advice from the Independent Planning Commission.

Schedule 2[5] provides that the Energy Minister may recommend to the Planning Minister that a particular development be declared State significant infrastructure.

Schedule 2[6] provides that, if a voluntary planning agreement has been made in relation to a renewable energy project, a developer is required to dedicate land free of cost, pay a monetary contribution or provide any other material public benefit, or any combination of them, to be used for a public purpose or another purpose prescribed by the regulations, or both. Schedule 2[7] makes a consequential amendment.

Schedule 2[8] provides that the Planning Minister may determine or direct another planning authority as to—
(a) the amount of land to be dedicated free of cost, monetary contribution to be made or other material public benefit to be provided by the developer under a planning agreement, or
(b) the method of determining the extent of the provision of the land to be dedicated free of cost, monetary contribution to be made or other material public benefit to be provided by the developer under a planning agreement.

Schedule 2[9] provides that the Planning Minister may set minimum or maximum amounts, or both, when exercising the Planning Minister's power to make determinations or directions under proposed section 7.9(1)(b2).

Schedule 2[10] allows the Planning Minister to direct the Independent Planning Commission to exercise its functions in relation to development that is State significant development, State significant infrastructure or critical State significant infrastructure, including in relation to development that is a PEP.

Energy and Other Legislation Amendment (Renewable Energy Infrastructure) Bill 2026 (No 2)

The objects of this Bill are as follows—
(a) to amend the *Electricity Infrastructure Investment Act 2020* to—
(i) make the efficient decommissioning of solar and wind energy infrastructure and the remediation of land on which the infrastructure was located objects of the Act, and

(ii) require the NSW renewable energy sector board (the board) to plan for how to achieve the objectives,

(b) to amend the *Protection of the Environment Operations Act 1997* to require—

(i) environment protection licences for solar electricity generating works, and

(ii) Ministerial consent for the transfer of a licence relating to solar or wind electricity generating works,

(c) to amend the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2021* to impose conditions on development consents relating to solar and wind electricity generating works requiring—

(i) the decommissioning of the works and the remediation of the land on which the development is located, and

(ii) the giving of security to ensure compliance with decommissioning and remediation requirements.

Environmental Legislation Amendment (Plastic Reduction and Container Recycling) Bill 2026

The object of this Bill is to amend the following Acts—

(a) the *Contaminated Land Management Act 1997,*

(b) the *Environmental Legislation Amendment Act 2025,*

(c) the *Pesticides Act 1999,*

(d) the *Plastic Reduction and Circular Economy Act 2021*,

(e) the *Product Lifecycle Responsibility Act 2025,*

(f) the *Protection of the Environment Operations Act 1997*,

(g) the *Waste Avoidance and Resource Recovery Act 2001.*

Amendment of *Environmental Legislation Amendment Act 2025 No 58*

Schedule 2[1] substitutes references to the relevant authority with references to the EPA or appropriate regulatory authority in relation to the issue of preliminary investigation notices.

Schedule 2[3] and [4] substitute references to a local council with references to an appropriate regulatory authority in relation to preliminary investigation notices. Schedule 2[2] and [5] make consequential amendments.

Amendment of *Pesticides Act 1999 No 80*

Schedule 3[1] amends the time at which a clean-up direction given orally expires, substituting 72 hours from the time the direction is given with 3 business days from the time the direction is given. Schedule 3[2] makes an amendment to provide for additional circumstances in which information obtained in connection with the administration or execution of the Act or the regulations may be disclosed and to provide consistency with the disclosure provisions of other environmental protection legislation.

Amendment of *Protection of the Environment Operations Act 1997 No 156*

Schedule 6[1] permits the EPA to give ancillary directions in relation to clean-up notices if the EPA is not the appropriate regulatory authority.

Schedule 6[2], [6] and [11]–[13] make minor amendments for the purpose of effecting statute law revision.

Schedule 6[3]–[5] entitle the EPA to recover costs and expenses after giving a clean-up notice if the EPA is not the appropriate regulatory authority.

Schedule 6[7] and [8] make consequential amendments to provide that it is an offence for a person to cause, ask, require or induce, or attempt to cause, ask require or induce, a person to do anything that contravenes or would contravene proposed section 146E(1) or (2).

Schedule 6[9] substitutes section 146E to make it an offence to release one or more balloons, as opposed to 20 or more balloons.

Schedule 6[10] provides that an offence under the Waste Avoidance and Resource Recovery Act 2001, section 44 or 47 is a prescribed offence for the purposes of commencing summary proceedings under the Act, section 216.

Schedule 6[14] substitutes section 286 to make further provision for exemptions from the Act or the regulations, including the granting of an exemption, or about an exemption granted, by the EPA and for the imposition or waiver or refund of fees concerning exemptions. This is a Henry VIII provision.

Schedule 6[15]–[18] make amendments to provide for additional circumstances in which information obtained in connection with the administration or execution of the Act or the regulations may be disclosed and provide consistency with the disclosure provisions of other environmental protection legislation.

Schedule 6[19] enables regulations to be made permitting the EPA to deal with matters, including making decisions and carrying out other actions, from time to time for the Act and the regulations.

Schedule 6[20] inserts a definition of dealt with.

Schedule 6[21] enables regulations to be made in relation to the immobilisation of waste.

Schedule 6[22] enables regulations to be made in relation to the EPA exercising functions relating to waste, including the granting of approvals and the determination or estimation of the quantity of waste in any circumstances.

Schedule 6[23] enables regulations to be made for the imposition of fees in relation to national environment protection measures under the National Environment Protection Council Act 1994 of the Commonwealth.

Schedule 6[24] makes a consequential amendment with retrospective effect to ensure that ancillary directions may apply to clean-up notices that have been issued and that costs and expenses incurred to date may be recovered.

Water NSW Amendment (Warragamba Dam) Bill 2026

The object of this Bill is to amend the *Water NSW Act 2014*—

(a) to repeal the provisions for reduced requirements under the *National Parks and Wildlife Act 1974* for the temporary inundation of national park land from the Warragamba Dam project, and

(b) to authorise Water NSW to operate Warragamba Dam for the purposes of facilitating flood mitigation downstream of the dam.

## ACTS ASSENTED TO BUT NOT YET IN FORCE

Statute Law (Miscellaneous Provisions) Act 2026

Amends the *Land and Environment Court Act 1979* (among other miscellaneous acts).

Section 12 Commissioners

Omit section 12(2)(g).

Insert instead—

> (g) suitable knowledge of matters concerning land rights for Aboriginal persons and qualifications and experience suitable for the determination of disputes involving Aboriginal persons, or

Explanatory note: The proposed amendment updates outdated references to Aboriginal persons.

A number of amendments to other Acts to update references to the *Environmental Planning and Assessment Act 1979*.

Water Management Amendment (Easements for Inundation) Act 2026

Amends the *Water Management Act 2000* to make provision for the creation and transfer of easements in gross relating to inundation for environmental purposes; to amend the Water NSW Act 2014 to address Water NSW's liability in relation to the inundation of land; and for related purposes.

## STATUTES AND REGULATIONS

Uniform Civil Procedure (Amendment No 107) Rule 2026 (2026-86)

This rule makes amendments to clarify that— (a) the summons commencing an appeal must contain a statement setting out in precise terms the question or questions of law sought to be raised, and (b) a notice of appeal must state the question or questions of law sought to be raised.

Rule 50.4(2A)

Insert after rule 50.4(2)—

> (2A) The summons must also contain a statement setting out in precise terms the question or questions of law sought to be raised.

Rule 51.18 Contents of notice of appeal

Insert after rule 51.18(1)(e)—

(e1) the question or questions of law sought to be raised, and

Environmental Planning and Assessment Amendment (Planning System Reforms) Regulation 2026 (2026-72)

The objects of this regulation are to— (a) make a number of minor amendments to clarify the operation of existing provisions in the regulation, and (b) insert savings and transitional provisions relating to the modification of development consents, appeals and reviews.

Amendment of *Environmental Planning and Assessment Regulation 2021*

[1] Section 192 Content of environmental impact statement

> Omit section 192(1)(c).

[2] Section 192(1)(d)(iii)

> Omit "likely impact" from section 192(1)(d)(iii).
>
> Insert instead "significant likely impacts".

[3] Section 192(1)(d)(iv) and (e)

Insert "proposed" before "measures" wherever occurring.

[4] Schedule 6 Savings, transitional and other provisions

> Insert after section 34—
>
> 34A Pending modification applications If an application to modify a development consent was lodged, but not finally determined, before the commencement of the following items of the amending Act, the application must be determined as if the items had not commenced—
>
> (a) Schedule 1[96]–[98], [102] and [105]–[107],
>
> (b) Schedule 2[9], [10], [15]–[17], [36] and [37].
>
> 34B Reviews and appeals—general If a review or appeal has been lodged under the Act, Part 8, but not finally determined, before the commencement of the following items of the amending Act, the review or appeal must be determined as if the items had not commenced—
>
> (a) Schedule 1[119], [123]–[125] and [129]–[133],

(b) Schedule 2[20].

Environmental Planning and Assessment Amendment (State and Regionally Significant Development) Regulation 2026 (2026-59)

The object of this regulation is to amend the *Environmental Planning and Assessment Regulation 2021* to provide that the environmental assessment requirements for a development application for development that is declared by Ministerial planning order to be State significant development and includes residential accommodation expire 9 months after the responsible person receives notice of the requirements.

Protection of the Environment Operations Legislation Amendment (Miscellaneous) Regulation 2026 (2026-227)

The objects of this regulation are to amend—

(a) the *Protection of the Environment Operations Act 1997* (the Act) to clarify the scheduled activities relating to aquaculture and brewing or distilling, and

(b) the *Protection of the Environment Operations (General) Regulation 2022* to make miscellaneous and consequential amendments, and

(c) the *Protection of the Environment Operations (Waste) Regulation 2014* to—

(i) extend certain reductions of and exemptions to waste contributions payable by occupiers of scheduled waste disposal facilities until 31 August 2027, and

(ii) provide that an occupier of a scheduled waste facility may apply to use certain excavated natural materials for daily cover for waste at landfill sites.

Access Licence Dealing Principles Amendment Order 2026 (2026-200)

The object of this Order is to make consequential amendments to the Access Licence Dealing Principles Order 2004 because of amendments to the regulations under the *Water Management Act 2000* relating to metering and to extend the sunset date to permit certain assignment of water allocations dealings under section 71T of the *Water Management Act 2000* between access licences in water sources to which the Water Sharing Plan for the Gwydir Regulated River Water Source 2016 applies.

Access Licence Dealing Principles Amendment Order (No. 2) 2026 (2026-237) LW 2 June 2026

The object of this Order is to make amendments to the Access Licence Dealing Principles Order 2004 to permit certain assignments of water allocations dealings under section 71T of the *Water Management Act 2000* to access licences in the Lower Namoi Regulated River Water Source to which the Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2016 applies.

Water Management (General) Amendment (Billabong Creek Floodplain and NSW Murray Valley Floodplain) Regulation 2026 (2026-229) LW 29 May 2026

The object of this regulation is to amend the *Water Management (General) Regulation 2025* to—

(a) declare certain land as the following floodplains under the Water Management Act 2000—

(i) Billabong Creek Floodplain,

(ii) NSW Murray Valley Floodplain, and

(b) repeal the current declarations of floodplains for the land that corresponds to the land described in paragraph (a).

Water Management (General) Amendment (Irrigation Corporations) Regulation 2026 (2026-244)

The objects of this regulation are to—

(a) prescribe the Energy and Water Ombudsman NSW as the dispute resolution organisation an irrigation corporation must be a member of as a condition of the irrigation corporation's operating licence, and

(b) provide that an irrigation corporation contravening the irrigation corporation's operating licence is a penalty notice offence with a penalty of $6,000.

Water Management (General) Amendment (Miscellaneous) Regulation 2026 (2026-152)

The object of this regulation is to amend the Water Management (General) Regulation 2025—

(a) to create an exemption from the requirement to obtain a water supply approval for the construction or use of a permeable structure on the bed of a river for the purpose of enhancing geomorphic processes to control the flow of the river, and

(b) to make minor amendments to correct cross-references and other matters.

## Notice

Notice under the Land Acquisition (Just Terms Compensation) Act 1991 (2026-257)

Pursuant to Schedule 1A of the Land Acquisition (Just Terms Compensation) Act 1991, the following amount is the maximum amount of compensation in respect to disadvantage resulting from relocation: • $101,150.81 for acquisitions of land on or after 1 July 2026.

## Water

Floodplain Management Plan for the Billabong Creek Floodplain Order 2026 (2026-255)
The objects of this Order are to repeal the Billabong Creek Floodplain Management Plan 2006 pursuant to section 45(5) of the *Water Management Act 2000* and to make the Floodplain Management Plan for the Billabong Creek Floodplain 2026 pursuant to section 50 of the *Water Management Act 2000*. The concurrence of the Minister for the Environment was obtained prior to the making of the Floodplain Management Plan for the Billabong Creek Floodplain 2026 pursuant to section 50(3) of the *Water Management Act 2000.*

Floodplain Management Plan for the NSW Murray Valley Floodplain Order 2026 (2026-256)
The objects of this Order are to repeal certain floodplain management plans relating to the Tuppal and Bullatale Creeks and the Edward, Niemur and Wakool Rivers pursuant to section 45(5) of the *Water Management Act 2000* and to make the Floodplain Management Plan for the NSW Murray Valley Floodplain 2026 pursuant to section 50 of the *Water Management Act 2000.*

Water Management Amendment (Private Water Corporations) Order 2026 (2026-230)
The object of this order is to insert in the *Water Management Act 2000* (the Act), Schedule 13 two private water corporations constituted under the Act, section 142(2) – Pomona Water and Wallon Bore Corporation.

Water Sharing Plan for the Barwon-Darling Unregulated River Water Source 2026 (2026-64)
Sets out a water management and sharing plan for the Barwon-Darling.

Water Sharing Plan for the Deua River Unregulated and Alluvial Water Sources 2016 and the Water Sharing Plan for the Clyde River Unregulated and Alluvial Water Sources 2016 Consolidation Order 2026 (2026-231)
This Order is made under section 45A(1)(a) of the *Water Management Act 2000*. The object of this Order is to consolidate the Water Sharing Plan for the Deua River Unregulated and Alluvial Water Sources 2016 and the Water Sharing Plan for the Clyde River Unregulated and Alluvial Water Sources 2016.

Water Sharing Plan for the Gwydir Unregulated River Water Sources 2026 (2026-138)
Sets out Water Sharing Plan for Gwydir unregulated water sources.

Water Sharing Plan for the Hunter Regulated River Water Source 2016 and Water Sharing Plan for the Paterson Regulated River Water Source 2019 Consolidation Order 2026 (2026-232)
This Order is made under section 45A(1)(a) of the *Water Management Act 2000*. The object of this Order is to consolidate the Water Sharing Plan for the Hunter Regulated River Water Source 2016 and the Water Sharing Plan for the Paterson Regulated River Water Source 2019.

Water Sharing Plan for the Lachlan Unregulated River Water Sources 2026 (2026-65)
Sets out Water Sharing Plan for the Lachlan Unregulated River Water Sources.

Water Sharing Plan for the Macquarie/Wambuul Bogan Unregulated Rivers Water Sources 2026 (2026-139)
Sets out Water Sharing Plan for the Macquarie/Wambuul Bogan Unregulated Rivers Water Sources.

Water Sharing Plan for the Namoi and Peel Unregulated River Water Sources 2026 (2026-140)
Sets out Water Sharing Plan for the Namoi and Peel Unregulated River Water Sources.

## State Environmental Planning Policies (SEPP) Amendments

State Environmental Planning Policy Amendment (Bradfield City Centre) 2026 (2026-168)
Identifies development that costs $30 million or more on land identified as “Bradfield City Centre” as State significant development.

State Environmental Planning Policy Amendment (Fitzwilliam Street) 2026 (2026-248)
Amends the *Parramatta Local Environmental Plan 2023* to include Parramatta Affordable Housing Principles and other local provisions relating to Fitzwilliam Street.

State Environmental Planning Policy Amendment (Housing Delivery Authority Rezoning) 2026 (2026-249)
Amends the *Parramatta Local Environmental Plan 2023* to add local provisions relating to development at Thomas Street, Parramatta.

State Environmental Planning Policy Amendment (Housing Delivery Authority Rezoning) (No 2) 2026 (2026-187)
Amends the *North Sydney Local Environment Plan 2013* to add local provisions relating to development in Neutral Bay.

State Environmental Planning Policy Amendment (Pacific Highway Crows Nest) 2026 (2026-250)
Amends the *North Sydney Local Environment Plan 2013* to add local provisions relating to development in Crows Nest.

State Environmental Planning Policy Amendment (Punchbowl and Wiley Park Transport Oriented Development Precinct) 2026 (2026-177)
Amends the *Canterbury-Bankstown Local Environment Plan 2023* to add provisions relating to development and affordable housing contributions.

State Environmental Planning Policy Amendment (Riverstone Town Centre) 2026 (2026-165)
Amends the *Blacktown Local Environment Plan 2015* to add and amend local provisions relating to affordable housing and development controls.

State Environmental Planning Policy (Biodiversity and Conservation) Amendment (Miscellaneous) 2026 (2026-79)
Amends the *State Environmental Planning Policy (Biodiversity and Conservation) 2021.*

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Crown Land) 2026 (2026-212)
Amends the *State Environment Planning Policy (Exempt and Complying Development Codes 2008* to update definition of specified development.

State Environmental Planning Policy (Planning Systems) Amendment (Lord Howe Island Critical Infrastructure Project) 2026 (2026-234)
Amends the *State Environment Planning Policy (Planning Systems) 2021* to include the Lord Howe Island Critical Infrastructure Project.

State Environmental Planning Policy (Planning Systems) Amendment (Places of Public Worship) 2026 (2026-128)
Amends the *State Environment Planning Policy (Planning Systems) 2021* to add provisions relating to consultation for granting consent to development of places of public worship. For example, a consent authority must not grant consent to development for the purposes of places of public worship unless the consent authority has— (a) provided a copy of the development application to the Commissioner of Police, and (b) consulted with the Commissioner of Police in relation to community safety and prevention of crime.

State Environmental Planning Policy (Precincts—Central River City) Amendment (Sydney Olympic Park Master Plan 2050) 2026 (2026-133)
Amends the *State Environment Planning Policy (Precincts – Central River City) 2021* to update provisions related to the Sydney Olympic Park site, including zoning.

State Environmental Planning Policy (Precincts—Western Parkland City) Amendment (Secondary Dwellings) 2026 (2026-213)
Amends the *State Environment Planning Policy (Precincts – Western Parkland City) Amendment (Secondary Dwellings) 2026* provisions relating to development consents for dwellings which would be affected by aircraft noise within a specified region.