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Volume 11 Issue 1

Land and Environment Court of NSW

Judicial Newsletter

Legislation

Statutes and Regulations

- [Planning](#)
- [Environmental Protection](#)
- [Biodiversity](#)
- [Water](#)
- [Transport](#)
- [Miscellaneous](#)

State Environmental Planning Policies [SEPP] Amendments

Judgments

United Kingdom Court of Appeal

NSW Court of Appeal

NSW Court of Criminal Appeal

Supreme Court of NSW

Land and Environment Court of NSW

- [Judicial Review](#)
- [Compulsory Acquisition](#)
- [Criminal](#)
- [Contempt](#)
- [Civil Enforcement](#)
- [Valuation/Rating](#)
- [Separate Question](#)
- [Interlocutory Decisions](#)
- [Joinder Application](#)
- [Costs](#)
- [Review of Registrar's Decision](#)
- [Merit Decisions \(Judges\)](#)
- [Merit Decisions \(Commissioners\)](#)

District Court

NSW Civil and Administrative Tribunal

Court News

Arrivals/Departures

Legislation

Statutes and Regulations:

- **Planning:**

[Environmental Planning and Assessment Amendment \(Contributions Plans\) Regulation 2019](#) - commenced on 25 January 2019. This Regulation prevents a development application being determined in relation to certain land zoned under a Precinct Plan in [State Environmental Planning Policy \(Sydney Region Growth Centres\) 2006](#) until a contributions plan under [s 7. 18](#) of the [Environmental Planning and Assessment Act 1979](#) imposing conditions is in force for the land concerned.

[Environmental Planning and Assessment Amendment \(False or Misleading Information\) Regulation 2018](#) - commenced 21 December 2018. The objects of this Regulation are:

- to extend the offence of providing false or misleading information in connection with a planning matter to the provision of information in or for the purposes of a submission in response to the public exhibition and,
- to update certain references to transferred provisions consequent on the enactment of the [Environmental Planning and Assessment Amendment Act 2017](#).

[Environmental Planning and Assessment Amendment \(Integrated Development and Concurrences\) Regulation 2018](#) - commenced on 21 December 2018 (other than Sch 1[8] and [12]). Schedule 1[8] and [12] commenced on 28 February 2019. The objects of this Regulation are to amend the [Environmental Planning and Assessment Regulation 2000](#) to provide for the following:

- the use of the New South Wales planning portal by consent authorities, concurrence authorities, approval bodies and the Secretary of the Department of Planning and Environment (the Planning Secretary) in connection with development applications for development requiring concurrence or for integrated development,
- the authorisation of the Planning Secretary to act on behalf of an approval body in respect of an application for integrated development,
- procedural and other matters applying when the Planning Secretary acts on behalf of an approval body in respect of an application for integrated development,
- the provision of fees in connection with development applications for development requiring concurrence or for integrated development,
- other amendments of a law revision nature.

[Environmental Planning and Assessment Amendment \(Sydney Eastern City Planning Panel\) Order 2019](#) - commenced on 15 February 2019. This order excludes the City of Sydney local government area from the Sydney Eastern City Planning Panel.

[Environmental Planning and Assessment \(Savings, Transitional and Other Provisions\) Amendment \(Greater Sydney Commission\) Regulation 2018](#) - published 7 December 2018 and commenced on 10 December 2018. This Regulation provides for transitional matters relating to the making of local environmental plans following the removal of plan-making powers for the Greater Sydney Region from the Greater Sydney Commission.

[Environmental Planning and Assessment \(Savings, Transitional and Other Provisions\) Amendment Regulation 2018](#) - commenced on 21 December 2018. This Regulation makes clear the consequences of breaching certain substituted or repealed provisions that have limited continuing operation because of savings provisions.

[Planning Legislation Amendment \(Greater Sydney Commission\) Act 2018](#) - this Act commenced on 10 December 2018. The Act amends the [Environmental Planning and Assessment Act 1979](#), the [Greater Sydney Commission Act 2015](#) and other legislation with respect to the functions and composition of the Greater Sydney Commission and the functions of the Natural Resources Commission.

- **Environmental Protection:**

[Protection of the Environment Operations Amendment \(Asbestos Waste\) Act 2018](#) - commenced 25 January 2019, except Sch 1[11].

The objects of this legislation are:

- (a) to amend the [Protection of the Environment Operations Act 1997](#) (the principal Act) as follows:
 - (i) to transfer certain asbestos waste offences from the [Protection of the Environment Operations \(Waste\) Regulation 2014](#) to the principal Act and increase penalties for those offences,
 - (ii) to increase penalties for other waste offences (such as land pollution) that involve asbestos waste,
 - (iii) to make the presence of asbestos a sentencing consideration, and
- (b) to make related and consequential amendments to the principal Act, and
- (c) to make consequential amendments to the [Protection of the Environment Operations \(General\) Regulation 2009](#) and the [Protection of the Environment Operations \(Waste\) Regulation 2014](#).

All provisions of Sch 1 and Sch 2 are in force with the exception of Sch 1[11].

[Protection of the Environment Operations \(General\) Amendment \(Calculating Amount of Monetary Benefits\) Regulation 2019](#) - commenced 25 January 2019. This Regulation prescribes a protocol to be used in determining the amount that represents the monetary benefit acquired by, or accrued or accruing to, a person as a result of that person committing an offence against the [Protection of the Environment Operations Act 1997](#) or the regulations made under that Act.

[Protection of the Environment Operations Legislation Amendment \(Waste\) Regulation 2018](#) - commenced on 16 November 2018, with the exception of Sch 2[8] and [27], which commence 6 months after 16 November 2018. The primary object of this Regulation is to support the [Protection of the Environment Operations Amendment \(Asbestos Waste\) Act 2018](#), with greater regulation of asbestos waste.

[Protection of the Environment Operations Amendment \(Drug Exhibit Waste and Vapour Recovery\) Regulation 2019](#) - commenced on 22 February 2019. The objects of this Regulation are:

- (a) to provide that, if certain requirements are met, the destruction of drug exhibit waste is not a scheduled activity under the [Protection of the Environment Operations Act 1997](#) and so is not required to be licensed, and
- (b) to empower class 1 enforcement officers (being, principally, members of staff of local councils) to issue penalty notices for offences under the [Protection of the Environment Operations \(Clean Air\) Regulation 2010](#) relating to the testing, commissioning and operation of certain petrol dispensers and petrol storage tanks that are required to be fitted with equipment to control the emission of petrol vapours. (At present, only Class 2

enforcement officers (that is, members of staff of the Environment Protection Authority) may issue penalty notices for offences of this kind.).

- **Biodiversity:**

[Biodiversity Conservation Legislation Amendment \(Miscellaneous\) Regulation 2018](#) - commenced on 23 November 2018. This Regulation amends the [Biodiversity Conservation \(Savings and Transitional\) Regulation 2017](#) to increase the time periods within which an application for development consent (or modification of development consent) under Pt 4 of the [Environmental Planning and Assessment Act 1979](#) in respect of certain local government areas located in Western Sydney (Western Sydney interim designated areas) can be made.

[Biodiversity Conservation \(Savings and Transitional\) Amendment \(Threatened Species Conservation\) Regulation 2019](#) - commenced on 8 February 2019. This Regulation amends the [Biodiversity Conservation \(Savings and Transitional\) Regulation 2017](#) in respect to certain biobanking agreements and biodiversity certifications.

- **Water:**

[Water Management Amendment Act 2018](#) Proclamation - published 30 November 2018, commenced amendments to the [Water Management Act 2000](#) (the Act) in relation to the following:

- on 1 December 2018 - periodic auditing of management plans by the Natural Resources Commission and the metering equipment condition of a water supply work approval, and
- on 1 April 2019 - exceptions to the offence provision of taking water when metering equipment is not working under s 91I of the Act and an offence provision of failure to report metering equipment not working.

[Water Management \(General\) Amendment \(Advertising\) Regulation 2018](#) - commenced on 7 December 2018. This Regulation amends the [Water Management \(General\) Regulation 2018](#) to exempt applications for water supply work approvals from the requirement to be advertised if the water supply work is to be used for the taking of water in relation to a landholder's floodplain water usage that is to be converted into a floodplain harvesting access licence, provided that licence has not yet been granted to the landholder. Once the licence is granted to the landholder, the requirement to advertise applications for certain water supply work approvals will apply to applications for those water supply work approvals under that licence.

[Water Management \(General\) Amendment \(Metering\) Regulation 2018](#) - published 30 November 2018 and commenced on 1 December 2018. This Regulation amends the [Water Management \(General\) Regulation 2018](#) to support the [Water Management Amendment Act 2018](#) with greater regulation around metering equipment.

[Water Management \(General\) Amendment \(Snowy 2.0\) Regulation 2019](#) - commenced on 15 February 2019. This Regulation amends the [Water Management \(General\) Regulation 2018](#) to create an additional specific purpose access licence, namely the Snowy 2.0 project subcategory of the unregulated river access licence.

- **Transport:**

[Transport Administration \(General\) Amendment \(Parramatta Light Rail\) Regulation 2018](#) - commenced 7 December 2018. This Regulation declared the route for the Parramatta Light Rail system.

• Miscellaneous:

[Access Licence Dealing Principles Amendment \(Nomination of Water Supply Works and Extraction Points\) Order 2018](#), published 30 November 2018 and commenced on 1 December 2018. This Order amends the [Access Licence Dealing Principles Order 2004](#) for the following purposes:

- (a) to ensure dealings with respect to the nomination of extraction points are prohibited and regulated in the same way (where relevant) as dealings with respect to the nomination of water supply works.
- (b) to ensure that the nomination of water supply works and extraction points can be made for specific purpose access licences, local water utility access licences and access licences of the subcategory town water supply subject to certain limitations.

The order was made under [s 71Z](#) of the [Water Management Act 2000](#), in particular s 71Z (1) (b).

[Crown lands Management Amendment \(Holdings\) Regulation 2019](#) - commenced on 15 February 2019.

The objects of this Regulation are:

- (a) to provide further for the granting of licences and leases of dedicated or reserved Crown land by a local council in the period before a plan of management for the land is adopted by the local council, and
- (b) to enable the Minister for lands and Forestry to require a security deposit to be paid by a person to whom a licence benefiting other land is transferred (such as a licence allowing access to a waterfront).

[Forestry Amendment Regulation 2018](#) - commenced on 9 November 2018 (except Sch 3.7[1]).

The objects of this Regulation are:

- (a) to make provision for the continued operation of existing integrated forestry operations approvals, to the extent that they apply to bee-keeping and grazing activities, which would otherwise be affected by amendments made by the [Forestry Legislation Amendment Act 2018](#) (the amending Act) that will result in bee-keeping and grazing no longer being treated as on-going forest management operations to which [Pt 5B](#) (Integrated forestry operations approvals) of the [Forestry Act 2012](#) applies, and
- (b) to require the payment of periodic fees in relation to forest permits issued by the Forestry Corporation.

[Justice Legislation Amendment Act \(No 3\) 2018](#) - commenced 28 November 2019 (with some minor exceptions). This Act amends [s 4](#) of the [Land and Environment Court Act 1979](#) to extend the maximum age of Judicial Officers from 72 to 75 years.

State Environmental Planning Policy Amendments:

[State Environmental Planning Policy \(Concurrences\) 2018](#) - published 21 December 2018, commenced 28 February 2019. This Policy enables the Planning Secretary to act as concurrence authority.

[State Environmental Planning Policy \(Coastal Management\) Amendment \(Coastal Wetlands and Littoral Rainforests Area\) 2018](#) - published 14 December 2018, commenced 17 December 2018. The maps adopted by [State Environmental Planning Policy \(Coastal Management\) 2018](#) are amended or replaced, as the case requires, by the maps approved by the Minister on the making of this Policy.

[State Environmental Planning Policy \(Aboriginal Land\) 2019](#) - commenced on 6 February 2019. This Policy aims to provide for development delivery plans for areas of land owned by Local Aboriginal Land Councils to be considered when development applications are considered and to declare specific development carried out on land owned by Local Aboriginal Land Councils to be regionally significant development.

Judgments

United Kingdom Court of Appeal:

DLA Delivery Ltd v Baroness Cumberlege of Newick [\[2018\] EWCA Civ 1305](#) (Lindblom LJ, Moylan LJ, Jackson LJ)

(related decision: *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [\[2017\] EWHC 2057](#))

Facts: The Secretary of State for Communities and Local Government (**Secretary**) allowed an appeal by a developer, DLA Delivery Ltd (**DLA**), against the refusal of Lewes District Council to grant planning permission for a residential development of up to 50 dwellings on a farm in Newick (**the Newick appeal**).

In making his decision, the Secretary determined that saved policy CT1 was out of date for the purposes of the [National Planning Policy Framework \(UK\)](#) (**the NPPF**) and the presumption in favour of sustainable development under paragraph 14 of the NPPF applied. Saved Policy CT1 of the local plan provided that planning permission was not to be granted for development outside of the planning boundaries on the proposals map. The relevant development site was outside of the planning boundary for Newick.

In a decision letter concerning a similar planning proposal 9 weeks earlier, the Secretary had concluded that saved policy CT1 was up to date for the purposes of the earlier appeal (**the Ringmer appeal**). Baroness Cumberlege, a Newick resident and objector to the application for planning permission, challenged the decision of the Secretary in the High Court of Justice of England and Wales.

The decision was challenged on two grounds: first, the Secretary erred by failing to take into account as a material consideration his own decision made in the Ringmer appeal that saved policy CT1 was up to date; and second, the Secretary made a material error of fact in treating the proposal site as outside the “zone of influence” for the Ashdown Forest Special Protection Area (**the AFSPA**). The Secretary submitted to judgment on the first ground, however DLA defended the decision. The High Court allowed the appeal on both grounds and found that the decision to grant planning permission should be quashed.

DLA appealed to the Court of Appeal.

Issues:

- (1) Whether the judge applied the correct test in law in considering whether the Secretary’s decision was unlawful for failing to take into account his own conclusion on Policy CT1 made in the Ringmer appeal;
- (2) Whether the Secretary erred in law in failing to take into account his own conclusion on Policy CT1 made in the Ringmer appeal; and
- (3) Whether the Secretary misapplied the [Conservation of Habitats and Species Regulations 2010 \(UK\)](#) (**the Habitats Regulation**) by treating the proposal site as outside the “zone of influence” for the AFSPA.

Held: Appeal dismissed:

- (1) The correct test was whether the matter was “so obviously material” that no reasonable person could have failed to take it into account: at [24];
- (2) The Secretary was not, as a matter of law, expected to be aware of every decision made by him or his delegate; however, considering the importance of consistency in planning, the court could find in some circumstances that it was unreasonable that a previous decision was not considered: at [36];
- (3) The decision in the Ringmer appeal was a material consideration in the Newick appeal: at [41]. The two proposals were both for planning permission for residential developments on land outside of the planning boundaries defined in policy CT1, in the same local planning authority area, covered by the same policies, recovered for determination by the Secretary and before the Secretary at the same time: at [42]-[45]. No reasonable Secretary would have failed to take reasonable steps to ensure that such similar decisions were consistent or that the inconsistency was clearly explained: at [46]. The Secretary made an error of law in failing to take the previous decision into account: at [58];

- (4) The primary judge did not err in concluding that the Secretary made an error of law by failing to take into account the earlier decision: at [58]; and
- (5) The Secretary made a mistake of fact by treating the proposal site as outside the “zone of influence” of the AFSPA and that error of fact led him to breach the Habitats Regulations: at [70]. This error would have also justified quashing the Secretary’s decision: at [70].

NSW Court of Appeal:

AMT Planning Consultants Pty Ltd t/as Coastplan Consulting v Central Coast Council [2018] NSWCA 289 (Basten and Macfarlan JJA; Sackville AJA)

(decision at first instance: *Coastplan Consulting v Central Coast Council* [2018] NSWLEC 47 (Robson J))

Facts: On 2 September 2015, the appellant lodged a development application seeking consent to use land at Empire Bay for the construction of 48 new caravan sites for “long-term accommodation” (**the 2015 DA**). Pursuant to the City of Gosford Interim Development Order No 122 (**IDO 122**), use of the site for the purpose of a caravan park is prohibited. Central Coast Council (**the council**) refused the application.

Prior to 6 May 1983, use of the site as a caravan park was permissible with consent. On 21 January 1980, a consent was issued for use of the site as a caravan park (**the 1980 consent**), subject to the following relevant condition: “Compliance with Council’s code for Caravan Parks; in particular, no site may be used for permanent accommodation” (**Condition aa**). At the time the 1980 consent was issued, Council’s code for caravan parks included a restriction upon the use of any site for a period greater than six weeks.

On 18 January 1983, a second development consent was granted for an additional 33 caravan sites (**the 1983 consent**). The 1983 consent was subject to the following relevant condition: “No site shall be used continuously for any period great than six weeks” (**Condition i**).

On 12 May 2017, Council refused the 2015 DA on the basis that caravan parks were prohibited in the zone. The appellant appealed to the Land and Environment Court on the basis that it had the benefit of existing use rights pursuant to [s 107\(1\)](#) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). No merit arguments were raised by Council on the appeal.

At first instance, the primary judge dismissed the appeal on the basis that the 1980 consent and 1983 consent limited the permitted use of the site to a short-term caravan park such that the appellant’s existing use rights did not extend to the long-term accommodation sought in the 2015 DA.

Issues:

- (1) Whether the existing use rights for the site were to be determined by having regard to the conditions of consent for the 1980 consent and 1983 consent;
- (2) Was the use to be characterised by reference to town planning purposes in IDO 122 at the time the 1980 consent and 1983 consent were granted;
- (3) Did Condition aa have ambulatory effect such that its effect would change when the council’s code for Caravan Parks was amended; and
- (4) In response to an issue raised by the Court, the following matter became relevant on the appeal:
At which date did the EP&A Act relevantly define “existing use rights”.

Held: Appeal dismissed with costs:

- (1) By virtue of transitional provisions enacted when the EP&A Act was amended, the 2015 DA fell to be determined in accordance with the definition of “existing use” in s 106 of the EP&A Act as amended in 1996. The definition is unchanged since 1996, apart from a renumbering in 2018 (per Sackville AJA at [89], Macfarlan JA agreeing);
- (2) The primary judge was correct to hold that Condition aa and Condition i governed the manner of use such that the appellant’s existing use rights were limited to use as a short-term caravan park (per Sackville AJA at [108], [113], Macfarlan and Basten JJA agreeing);
- (3) The primary judge was clearly aware that IDO 122 permitted the use of the site for the purpose of a caravan park without restrictions as to the length of occupation at the time the 1980 consent and the 1983 consent were granted but this did not require the primary judge to reach any

different conclusion with respect to the characterisation of the existing use (per Sackville AJA at [110], Macfarlan and Basten JJA agreeing);

- (4) Even if Condition aa had an ambulatory operation such that its effect would change when the council's code for Caravan Parks was amended, its wording prevented the site being used for long-term caravan accommodation irrespective of the provisions of the code (per Sackville AJA at [119], Macfarlan and Basten JJA agreeing); and
- (5) The relevant date for assessing an existing use is "immediately before" the date from which the use was prohibited, however the amended definition does not relevantly differ from that in force at 1983 (per Basten JA at [19], [29]).

Attorney General for New South Wales v Gatsby [\[2018\] NSWCA 254](#) (Bathurst CJ, Beazley P, McColl JA, Basten JA, Leeming JA)

(related decision: *Johnson v Dibbin*; *Gatsby v Attorney General for New South Wales* [\[2018\] NSWCATAP 45](#) (Wright J, Boland ADCJ and Senior Member Renwick))

Facts: In 2015, the Appeal Panel of the Civil and Administrative Tribunal of New South Wales heard two proceedings which involved disputes between a landlord and a tenant where the landlord and tenant were residents of different States (*Gatsby v Gatsby* and *Dibbin v Johnson*). After the Tribunal had determined both proceedings, the unsuccessful party in each proceeding appealed to the Appeal Panel of the Tribunal. Before these appeals could be heard, the Appeal Panel raised questions about the jurisdiction of the Tribunal to determine proceedings "between residents of different states". The hearing of both appeals was then stood over to allow the Court of Appeal to resolve the questions about the jurisdiction of the Tribunal in *Burns v Corbett* [\[2017\] NSWCA 3](#). In this matter the Court held that the Tribunal could only determine matters "between residents of different States" if it were a "court of a State" within the meaning of [s 39\(2\)](#) of the *Judiciary Act 1903 (Cth)* (the **Judiciary Act**) and [s 77\(iii\)](#) of the *Constitution*.

Following the decision of the Court of Appeal, the Appeal Panel of the Tribunal directed a separate hearing on two questions relating to the jurisdiction of the Tribunal to determine matters "between residents of different States" which would affect the appeals from the determinations in the *Gatsby v Gatsby* proceeding and the *Dibbin v Johnson* proceedings, with the Attorney General for New South Wales joined as a party to the proceedings and who made submissions on both of the questions before the Appeal Panel. The first question was whether the Tribunal had been exercising judicial power in making the orders sought under the [Residential Tenancies Act 2010 \(NSW\)](#) (the **Residential Tenancies Act**) in the *Gatsby* proceedings. In the *Dibbin v Johnson* proceeding, Attorney General had accepted that the Tribunal was exercising judicial power. The second question was whether, if the Tribunal had been exercising judicial power in making orders under the Residential Tenancies Act it was a "court of a State". The Appeal Panel found in the affirmative for both questions. The Attorney General then sought leave to appeal this determination in the Court of Appeal under [s 83\(1\)](#) of the [Civil and Administrative Tribunal Act 2013 \(NSW\)](#) (the **Tribunal Act**).

Issues:

- (1) Whether the Tribunal was exercising judicial power in making an order under [s 87](#) of the Residential Tenancies Act terminating a residential tenancy agreement in *Gatsby v Gatsby*; and
- (2) If so, whether the Tribunal was a "court of the State" within the meaning of [s 39\(2\)](#) of the Judiciary Act and [s 77\(iii\)](#) of the *Constitution*.

Held: Leave to appeal granted to the Attorney General for New South Wales in both *Gatsby v Gatsby* and *Dibbin v Johnson*. Orders of the Appeal Panel of the Tribunal in these matters set aside, with the proceedings being remitted to the Civil and Administrative Tribunal to be dealt with in accordance with [Pt 3A](#) of the Tribunal Act:

- (1) The Tribunal was exercising judicial power in making an order under [s 87](#) of the Residential Tenancies Act terminating a residential tenancy agreement because the discretion exercised by the Tribunal to make an order under the section was analogous to that exercised by courts under general law. The section required the Tribunal to identify whether the contract existed, if there was a breach of that contract, and if the breach amounted to a justification for termination: at [125]-[137] (Bathurst CJ); at [197] (Beazley P); at [198]-[200] (McColl JA); at [279] (Leeming JA);

- (2) Despite having many features of a “court” and exercising judicial power of the State in some matters, the Tribunal was not a “court of a State” within the meaning of s 39(2) of the Judiciary Act and s 77(iii) of the *Constitution*. The Tribunal was not designated as a “court of record”. Further, most members of the Tribunal did not have the tenure and protection comparable to that held by judges, and lacked the necessary institutional independence and impartiality which were required for a body to be described as a “court of a State”: at [184]-[192] (Bathurst CJ); at [197] (Beazley P); at [198], [201]-[205] (McColl JA); at [223]-[228] (Basten JA); at [279] (Leeming JA); and
- (3) [Part 3A](#) of the Tribunal Act, introduced by the [Justice Legislation Amendment Act \(No 2\) 2017 \(NSW\)](#), was a clear legislative statement that the Tribunal was not a “court of a State” for the purpose of s 39(2) of the Judiciary Act and s 77(iii) of the *Constitution*. The premise of Pt 3A was that the Tribunal lacked jurisdiction to determine matters “between residents of different States” under [s 75\(iv\)](#) of the *Constitution*: at [197] (Beazley P); [205] (McColl JA); at [292]-[304] (Leeming JA).

Bayside Council v Karimbla Properties (No 3) Pty Ltd [\[2018\] NSWCA 257](#) (McColl and White JJA, Emmett AJA)

(related decisions: *Karimbla Properties v Council of the City of Sydney*; *Bayside City Council*; and *North Sydney Council* [\[2017\] NSWLEC 75](#); *Karimbla Properties v Council of the City of Sydney*; *Bayside City Council*; and *North Sydney Council (No 2)* [\[2018\] NSWLEC 3](#) (Sheahan J))

Facts: This appeal, brought by three Sydney councils (the appellants), concerned the correct rating category to be applied to parcels of land owned by the respondents (the various “Karimbla Properties” companies) for the purposes of the [Local Government Act 1993 \(NSW\)](#) (the **Local Government Act**). The subject parcels of land were acquired for the development of residential apartments, and when the respondents lodged the relevant development applications, they were categorised as “business”. In the decision appealed, Sheahan J held that during the construction phase, when the parcels of land were being developed for the construction of residential apartments, they were to be categorised as “residential”. In reaching this conclusion, his Honour held that, in order for the subject lands to fall in the residential rating category pursuant to [s 516\(1\)\(a\)](#) of the Local Government Act, the expression in the Act that “its dominant use is for residential accommodation” did not mean “its dominant use is as residential accommodation”. His Honour also ordered that, where higher rates had been paid in accordance with the business rating, the councils were to pay the respondents an “adjustment”, in the form of a refund, as a result of the declaration that the parcels of lands were to be categorised as residential.

Issues:

- (1) Whether, under s 516(1)(a) of the Local Government Act, the land was correctly categorised as residential, based on the construction that a use “for residential accommodation” does not mean “as residential accommodation”;
- (2) Whether the landowners would be entitled to recover rates levied and paid, on the basis that, during the construction phase, the land was categorised as “business”; and
- (3) the Land and Environment Court had the jurisdiction to order such recovery.

Held: Appeals allowed; orders of the primary judge set aside; respondent in each matter to pay the appellant’s costs in that matter:

- (1) Properly construed, s 516(1)(a) of the Local Government Act signifies a present use even though the purpose may be preparation for an eventual different “use”. A focus on physical acts in relation to the relevant land as opposed to a more general inquiry into purpose reflects the words of s 516(1)(a) and accords with the ordinary meaning of the word use. The exceptions in s 516(1)(a) and 516(1A) demonstrate that it is only the fact of use and the nature of use that is relevant: at [115]-[123] (Emmett AJA, McColl JA agreeing);
- (2) The exclusions and exceptions in s 516(1) and 516(1A) indicate that the reference to land being used “for residential accommodation” is to be understood as land being used as residential accommodation: at [51]-[55] (White JA);
- (3) The issue of an occupation certificate is an indication that a future intended use for residential accommodation has come sufficiently to fruition to become a present use for residential accommodation: at [129]-[131] (Emmett AJA, McColl JA agreeing; White JA contra at [58]);

- (4) There may be cogent reasons for concluding that s 527 of the Local Government Act created no right or cause of action providing an entitlement to a refund of rates paid voluntarily without protest under a lawful rate notice. However, it is undesirable to embark on a consideration as to whether or not Karimbla had a basis to pursue a claim against the council as the question does not arise: at [152] (Emmett AJA, McColl and White JJA agreeing); and
- (5) As to whether the Land and Environment Court had power to repayment of rates levied and paid, it was undesirable to express an opinion about a matter that is entirely hypothetical: at [153] (Emmett AJA, McColl and White JJA agreeing).

Cudgegong Australia Pty Limited v Sydney Metro [\[2018\] NSWCA 298](#) (Meagher and Leeming JJA and Sackville AJA)

(related decision: *Cudgegong Australia Pty Ltd v Transport for New South Wales* [\[2018\] NSWSC 929](#) (Davies J))

Facts: By a notice (**the Acquisition Notice**) published in the *Government Gazette* on 21 September 2012, pursuant to [s 19\(1\)](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**the Just Terms Act**), Transport for New South Wales, the predecessor to Sydney Metro (the respondent), acquired land at Rouse Hill for the construction of the North West Rail Link.

In February 2017, Cudgegong Australia Pty Limited (the applicant) sought declarations in the Common Law Division that the acquisition of the land was invalid. The respondent sought an order pursuant to [r 13.4\(1\)\(b\) Uniform Civil Procedure Rules 2005 \(NSW\)](#) dismissing the proceedings on that ground that no reasonable cause of action was disclosed. The respondent contended that the applicant was estopped from claiming that the Acquisition Notice was invalid because it had claimed compensation under the Just Terms Act for the acquisition of its interest in the land. The primary Judge upheld the respondent's contention and dismissed the proceedings. The applicant sought leave to appeal. The Court of Appeal heard argument on the leave application and the appeal concurrently.

Issues:

- (1) Whether the primary Judge should have granted summary judgment; and
- (2) Whether the defences of conventional estoppel or issue estoppel could be raised on appeal.

Held (Sackville JA, Meagher and Leeming JJA agreeing): Appeal filed on 12 July 2018 dismissed as incompetent; the applicant pay the respondent's costs of the Notice of Motion (**the NOM**) filed on 2 August 2018 insofar as it seeks an order dismissing the notice of appeal as incompetent. The applicant granted leave to appeal; the applicant be directed to file and serve the notice of appeal within seven days; the appeal allowed; the orders made by Davies J on 21 June 2018 set aside and in lieu thereof dismiss the NOM filed 13 October 2017; the respondent to pay the applicant's costs of the NOM filed in the Common Law Division on 13 October 2017; the respondent to pay the applicant's costs of the appeal (including the application for leave to appeal):

- (1) The only estoppel upon which the respondent relied upon before the primary Judge was estoppel by representation: at [30]. The respondent did not adduce evidence to address several critical matters establishing the elements of estoppel by representation: at [33]. The evidence before the primary Judge left open a plausible argument that the respondent incurred expense and otherwise acted to its detriment for reasons unconnected with any belief formed on the basis of any representation by the applicant: at [35];
- (2) An order for summary dismissal should not be made unless there is a high degree of certainty about the ultimate outcome should the proceedings go to trial in the ordinary way: at [31]. It could not have been said with a high degree of certainty that the respondent's defence based on estoppel by representation would be successful at a final hearing: at [36]; and
- (3) The respondent sought to rely on issue estoppel and conventional estoppel: at [37] and [44]. Because the respondent did not raise either argument before the primary Judge (at [39] and [42]), a plea of issue estoppel would require the matter to be adjourned (at [40]) and conventional estoppel would give rise to factual issues (at [44]), the respondent was not permitted to rely on either defence at this stage: at [41] and [44].

Fagin v Australian Leisure and Hospitality Group Pty Limited [\[2018\] NSWCA 273](#) (McColl and Meagher JJA; Sackville AJA)

(decision at first instance: *Sally-Anne Maree Fagin v Australian Leisure and Hospitality Group Pty Limited* [\[2017\] NSWLEC 59](#); (2017) 226 LGERA 226 (Robson J))

Facts: The appellant sought orders remedying what she alleged was the respondent's breach of the conditions of a development consent issued in 2006 (**the 2006 consent**). The 2006 consent prohibited the playing of music in the beer garden of a hotel operated by the respondent. At first instance, primary judge held that the 2006 consent did not restrain the respondent from playing music because it had lapsed in accordance with (what was then) [s 95](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**). Further, the primary judge said that even if the 2006 consent were operative, he would have declined to grant relief on the basis that a subsequent development consent appropriately regulated the noise emitted from the hotel.

Issues:

- (1) The primary judge erred in holding that works undertaken prior to the issue of the 2006 consent did not prevent the 2006 consent from lapsing;
- (2) The primary judge erred in holding that the use of the beer garden as such after 2006 prevented the 2006 consent from lapsing; and
- (3) On the assumption the 2006 consent had not lapsed, the primary judge erred in refusing to grant injunctive relief on the basis that the noise from the hotel was sufficiently regulated.

Held (the Court): Appeal dismissed; appellant to pay respondent's costs:

- (1) In order for work to prevent the lapsing of a development consent under s 95(4) of the EP&A Act, that work must "relate to" the development consent. The work relied upon by the appellant was carried out before the 2006 consent was granted and could not therefore "relate to" the development consent: at [18]-[19];
- (2) The 2006 consent was a consent for the "erection of a building" or the "carrying out of a work" in the terms of s 95(4) of the EP&A Act and accordingly not a consent for use such that s 95(5) of the EP&A Act would prevent the consent from lapsing: at [26];
- (3) In any event, the primary judge was correct to hold that the beer garden was not being used in reliance upon the 2006 consent: at [28]; and
- (4) Although it did not arise for consideration because the 2006 consent had lapsed, the primary judge's exercise would not have miscarried by declining to grant relief on the basis that the noise emitted from the hotel was appropriately regulated: at [32].

Ku-ring-gai Council v Bunnings Properties Pty Ltd [\[2019\] NSWCA 28](#) (Beazley P, Basten JA, Preston CJ of LEC)

(related decision: *Ku-ring-gai Council v Bunnings Properties Pty Ltd (No 2)* [\[2018\] NSWLEC 19](#) (Sheahan J))

Facts: On 8 April 2015, Bunnings Properties Pty Ltd (**Bunnings**) lodged a development application under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) which was refused by Ku-ring-gai Council (**Council**). Bunnings appealed to the Land and Environment Court (**the LEC**) under the then [s 97](#) now [s 8.7](#) of the EP&A Act against the council's refusal.

The appeal was heard in the Class 1 jurisdiction of the LEC by Brown C. In his first judgment of 20 July 2016, the Commissioner found that he was not satisfied that the proposed development was acceptable in the form submitted, but allowed Bunnings to amend the application in response to the issues identified by the Commissioner.

Bunnings was granted leave to rely on amended plans and a second hearing was held before the Commissioner. In his further judgment of 16 May 2017, the Commissioner found that the amended development application was acceptable and granted development consent subject to conditions.

The Council appealed against the Commissioner's decision under [s 56A](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**the Court Act**), on questions of law.

The Council raised two primary issues. First, the commissioner failed to exercise jurisdiction by not disposing of the appeal and instead adopting an "amber light approach" by allowing Bunnings to amend

the development application and determining to grant consent to that amended application. Second, the Commissioner's decision was illogical and legally unreasonable as it permitted the removal of a tree of high significance.

On 28 February 2018 a judge of the LEC dismissed the appeal.

The Council sought leave to appeal from the LEC under [s 57\(4\)](#) of the Court Act against the decision and orders of the primary judge made on the s 56A appeal.

The issues raised on appeal were substantially the same as those in the s 56A appeal. The appellants submitted that the jurisdiction conferred on the LEC to determine the appeal involved the exercise of judicial power which was subject to the principle of finality and the principle against giving advisory opinions. By indicating that although the development application was currently unacceptable it could be approved if changes were made, the Commissioner had infringed those principles and adopted the "amber light approach". The Commissioner's approach was therefore outside of power.

Issues:

- (1) Whether the primary judge had erred in law by not finding that the Commissioner had acted outside of power by not finally disposing of the appeal in the first judgment and instead allowing Bunnings to amend the development application and then granting consent to the amended development application; and
- (2) Whether the primary judge had erred in law by not finding that the Commissioner's decision was legally unreasonable in allowing the removal of a tree of high significance.

Held: Appeal dismissed; Council ordered to pay Bunnings' costs:

Preston CJ of LEC, Beazley P agreeing:

- (1) Contrary to the appellant's submissions concerning the exercise of judicial power, the proper question for the Court was whether the Commissioner's conduct in relation to the two judgments was within or outside of the functions conferred on the LEC by the EP&A Act and the Court Act: at [139], [141];
- (2) The Commissioner did not, in his first judgment, exercise the power under [s 80](#) now [s 4.16](#) of the EP&A Act to determine the development application the subject of the appeal: at [147]. The power to determine the development application was not exercised until the Commissioner granted the consent to the amended application in his further judgment of 16 May 2017: at [148]. The decision to order and grant consent was within the power of s 80 now s 4.16 of the EP&A Act: at [149];
- (3) The appeal under s 97 now s 8.7 of the EP&A Act required the Commissioner to undertake a merits review of the decision, which was to be conducted by way of hearing de novo: at [173]. The Commissioner was not required to conclude the appeal following the first judgment: at [173]. The Commissioner did not exceed the power conferred to hear and dispose of the appeal by not finally determining the development application and disposing of the appeal in the first judgment: at [174];
- (4) The Commissioner's decision to grant consent, thereby approving the removal of the significant tree, was not illogical or legally unreasonable: at [225]. It was within the Commissioner's power to conclude that despite the tree's significance, the development application should be approved: at [223];

Basten JA, dissenting:

- (5) The relevant criteria for determining the bounds of the power conferred on the Commissioner depended on the statutory role of the consent authority and relevant provisions of the EP&A Act: at [71];
- (6) The Commissioner exceeded the scope of his statutory authority: at [74]. The LEC's power to permit amendments to development applications was constrained by the nature of the jurisdiction as defined by the EP&A Act: at [61]. The LEC could not grant an adjournment to amend a development application after the hearing had been completed and a finding made that the application should be refused: at [72], [73]; and
- (7) As the appeal should be allowed on the first ground, it was not necessary to consider the second ground of appeal: at [77].

Mehmet v Carter [\[2018\] NSWCA 305](#) (Bathurst CJ, Beazley P, McColl JA)
(decision under review: *Mehmet v Carter* [\[2017\] NSWSC 1067](#) (Darke J))

Facts: The respondents (**the vendors**) and the appellants, the purchasers, entered into a contract for the sale of land. Before settlement, the appellants were advised of a report which referred to the possible existence of the remains of two Aboriginal elders on the land. Under the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**the NPW Act**), “Aboriginal remains” falls within the [definition](#) of “Aboriginal objects”. The appellants alleged the existence of such objects constituted a defect in title of the land. The appellants requested that the respondents remedy the defect before settlement of the contract. The respondent denied the existence of any Aboriginal objects on the land, and further denied that the existence of such objects on the land would constitute a defect in title. After the stipulated completion date of the contract passed without payment from the appellant, the respondents issued notices to complete and claimed interest on the purchase price. The appellants terminated the contract when the respondents refused to withdraw their claim for interest. The appellants then instigated proceedings against the respondents with the primary issues in dispute being were there Aboriginal objects in or on the land, and if so, whether their existence constituted a defect in title to the land.

Orders were made for the separate determination of four questions: Question 1 - whether the existence of the alleged Aboriginal objects were capable of constituting a defect in title; Question 2 - whether the respondent’s bore the obligation of proving a title free of any Aboriginal objects before completion; Question 3 - whether the existence of any defect in title constituted by the alleged Aboriginal objects which the respondents were unwilling or unable to remove at the completion was a sufficient ground for termination; and Question 4 - whether the appellants effectively terminated the contract on the basis that the respondents refused to withdraw their claim for interest on the purchase price. The primary judge ruled that the existence of the alleged Aboriginal objects was not capable of constituting a defect in title (Question 1) and that the appellants had not effectively terminated their contract with the respondents (Question 4). The primary judge found that Question 2 and Question 3 did not arise.

Issues:

- (1) Whether the primary judge erred in concluding that, on the proper construction of the contract for sale, the subject of the land did not include Aboriginal objects in or on the land; and
- (2) Whether the alleged existence of such Aboriginal objects was capable of constituting a defect in title.

Held (Beazley P, Bathurst CJ agreeing with additional comments, McColl JA agreeing with both): Appeal allowed; the primary judge’s orders set aside:

- (1) It was not appropriate for the primary judge to answer Question 1 as the question was both vague and hypothetical and it was not appropriate to be determined as a separate question to the proceedings: at [2], [10] (Bathurst CJ);
- (2) If it was appropriate for the Court to answer whether the existence of the alleged Aboriginal objects was capable of constituting a defect in title, the primary judge erred in answering the question in the negative: at [102] (Beazley P); and
- (3) If there were Aboriginal objects in or on the land, their presence was capable of constituting a defect in title. The presence of such objects on the land amounted to an interference with the use of land for its owners. This was because under [s 86](#) of the NPW Act any destruction, defacement or damage to Aboriginal objects on the land, intentional or otherwise, would result in the owners committing an offence with attached penalties: at [101] (Beazley P).

Melino v Roads and Maritime Services [\[2018\] NSWCA 251](#) (Beazley P, Basten and Payne JJA)

(related decision: *Michele Melino and three others in their capacity as executors of the Estate of the late Costanzo Melino v Roads and Maritime Services* [\[2017\] NSWLEC 118](#) (Moore J))

Facts: Four members of the Melino family (**the appellants**) were the registered proprietors of farmland in regional NSW used for sugar cane farming. In 2016, the Roads and Maritime Services compulsorily acquired part of the appellants’ land for the purpose of constructing an upgrade of the Pacific Highway. At the time of acquisition, the acquired land was being used for both sugar cane production and cattle grazing. There was a dwelling on the acquired land occupied at the date of acquisition by a tenant as well as various fixtures relating to the farming operations. The appellants made several claims for

compensation pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (the **Just Terms Act**). The primary judge allowed claims for the market value of the acquired land, the decrease in value of the adjoining land and several disturbance claims. However, the primary judge declined to award compensation for disturbance costs involved in relocation of the dwelling, building a replacement dwelling, replacing the farm structures, loan establishment fees and interest and an agreed sum for road works. The appellants challenged each of these findings.

Issues:

- (1) Whether the primary judge erred in declining to award compensation for the costs of building a new dwelling and relocating the existing dwelling;
- (2) Whether the primary judge erred in declining to award compensation for the cost of replacing the farm structures;
- (3) Whether the primary judge erred in declining to award compensation for loan establishment fees and interest; and
- (4) Whether the primary judge erred in failing to award compensation at an agreed amount for the cost of road works.

Held: Appeal allowed; order 1(c) relating to disturbance items made by the primary judge set aside; the matter remitted to the Land and Environment Court to determine whether any allowance to the owners in relation to the cattle yards and farm sheds would exceed the amount already allowed and, if so, to award that additional amount; no order as to costs:

Per Payne JA (Beazley P agreeing):

- (1) It was an error on a question of law for the primary judge to conclude that the Just Terms Act expressly or implicitly provided that the value paid for land compulsorily acquired necessarily includes “the full compensatory value for all fixtures included in the acquisition”: at [82]. The correct approach to s 59(1)(f) was to ask whether the appellants had reasonably incurred financial costs (or might reasonably incur such costs), relating to the actual use of the land, as a direct and natural consequence of the acquisition: at [83] to [84]. On the findings made by the primary judge, the appellants had already received compensation for the market value of the dwelling, which encapsulated the right to potential profits from renting the property after the date of the acquisition: at [85]. The primary judge’s reasoning did not disclose error on a question of law: at [85]. While the primary judge did not consider the appellants’ claim for the cost of a replacement dwelling under s 59(1)(c), this was not a material error: at [95];
- (2) The primary judge erred on a question of law in failing to consider the appellants’ separate claim for disturbance: at [86];
- (3) Neither the loan establishment fees nor loan interest claimed by the appellants as financial costs reasonably incurred in connection with the execution of a new mortgage resulting from the relocation were allowable within the scope of s 59(1)(e): at [110]. Section 59(1)(f) must be read in its context as part of s 59: at [111]. It would not be a coherent application of s 59 for a financial cost which is specifically excluded from compensation by s 59(1)(e) to be allowable under 59(1)(f): at [111];

Per Basten JA:

- (4) Section 59(1)(c) covers financial costs reasonably incurred “in connection with the relocation of those persons” and was therefore not engaged as none of the owners were living on the land at the date of acquisition and consequently did not require relocation: at [9]. The reference in s 59(1)(f) to “any other financial costs” relating to the actual use of the acquired land, and incurred as a “direct and natural consequence of the acquisition”, did not include the cost of replacing the house which had been on the acquired land and for which market value was payable under s 55(a): at [10] to [12];
- (5) Section 59(1)(f) was restricted to ancillary costs and did not extend to purchasing or rebuilding structures: at [19]. The correct approach was to assess the loss of the farm structures as special value of the land to the person entitled to compensation, on the date of acquisition, pursuant to s 55(b): at [20]. Because the valuers did not approach their valuations on that basis, and the primary judge consequently did not allow any amount for the loss of the farm structures beyond their value to the hypothetical purchaser of the acquired land, the issue must be redetermined: at [20];

- (6) If the capital costs of the new farm structures were recoverable under s 59(1)(f), the financing costs would also be a direct and natural consequence of the acquisition: at [26]. However, it would be inconsistent with the legislative scheme to provide a separate amount for borrowing costs where the borrowing was for the purpose of spending the compensation before it was obtained and this ground was rejected: at [26]; and

Per Payne JA (Beazley P and Basten JA agreeing):

- (7) The primary judge's award of compensation for the cost of road works was based on the only evidence before him of the cost of the road: at [123]. The decision to accept this evidence was not "irrational, illogical and not reasonably open on the evidence": at [123]. The appellants, who were given the opportunity to produce further evidence of additional payments made for the road, produced no such evidence: at [123].

[Note: Payne JA (and Beazley P agreeing) remarked that the question of whether s 59(1)(f) was restricted to ancillary costs and did not extend to purchasing or rebuilding structures was appropriate for determination in a case where the point was squarely addressed by the parties: at [77].]

Moloney v Roads and Maritime Services [\[2018\] NSWCA 252](#) (Beazley P, Basten JA, Payne JA)
(related decision: *Moloney v Roads and Maritime Services (No 2)* [\[2017\] NSWLEC 68](#) (Pain J))

Facts: John and Colleen Moloney (**the appellants**) owned a working sugarcane farm in regional NSW. In 2015, the Roads and Maritime Services (the respondent) compulsorily acquired part of the appellants' land for the purpose of constructing an upgrade of the Pacific Highway. The upgrade would move the highway closer to the appellants' current dwelling on the residue land. As a result, the appellants decided to relocate to a new dwelling on the residue land further away from the highway. The appellants made several claims for compensation pursuant to [ss 55\(d\)](#) and [59\(f\)](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**the Just Terms Act**). The appellants made claims for disturbance for the cost of relocating to a new dwelling and for loss of profits from the loss of part of their sugarcane farm. The primary judge declined to award compensation for both claims.

Issues:

- (1) Whether the primary judge erred in declining to award compensation for the costs of building a new home on the residue land; and
- (2) Whether the primary judge erred in declining to award compensation for loss of profits.

Held (Payne JA, Beazley P agreeing and Basten JA agreeing with additional remarks): Appeal dismissed; appellants to pay the respondent's costs as agreed or assessed:

- (1) The primary judge did not err in declining to award compensation for disturbance for relocation: at [90]. Such a claim is only allowable where relocation is the natural and direct consequence of the acquisition: at [78]. On the factual findings of the primary judge the decision to relocate did not meet this requirement: at [81]; and
- (2) Such a claim is not allowable if it has already been fully compensated: at [98]. The primary judge's award of compensation for market value encapsulated the claim for loss of profits: at [99]. The primary judge did not err in declining to award compensation for loss of profits: at [102].

Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [\[2018\] NSWCA 304](#) (Basten and Payne JJA, Emmett AJA)

(related decision: *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd (No 2)* [\[2017\] NSWLEC 186](#) (Pain J))

Facts: Moorebank Recyclers Pty Ltd (**Moorebank**) and Tanlane Pty Ltd (**Tanlane**) owned neighbouring lots of land. Tanlane sought to develop its land for residential subdivision and for the construction of a marina. Tanlane developed a planning proposal for its land which involved two proposed amendments to the [Liverpool Local Environmental Plan 2008 \(LLEP\)](#). One of the proposed amendments sought to enable residential development as an additional permitted use on the site of the proposed marina, zoned RE2 "Private Recreation".

It was common ground that Tanlane's land the subject of the planning proposal was contaminated. Accordingly, at some point the requirements of [cl 6](#) of [State Environmental Planning Policy No 55 - Remediation of Land](#) (the **SEPP 55**) would need to be complied with prior to any actual amendment to the LLEP.

On 31 August 2016, Liverpool City Council (the **council**) passed resolutions supporting the development and authorising an officer of the council to forward the planning proposal in an amended form to the Greater Sydney Commission (the **Commission**) for the purposes of a "gateway determination" pursuant to [Pt 3 Div 4](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (the **EP&A Act**) (the **council resolutions**). On 9 March 2017 a delegate of the Commission made a gateway determination that the planning proposal should proceed subject to certain conditions (the **Gateway decision**).

Moorebank brought proceedings in the Land and Environment Court of New South Wales (the **LEC**) claiming that the council resolutions and the Gateway decision were invalid by reason of a failure to comply with [cl 6](#) of SEPP 55. Pain J dismissed Moorebank's claim on the basis that the obligations imposed by [cl 6](#) of SEPP 55 were not required to be complied with at the point in time of both the council resolutions and the Gateway decision. Her Honour also observed that, in any event, the council resolutions were not necessarily amenable to judicial review and that [cl 6](#) of SEPP 55 would not apply to the part of the planning proposal which sought to enable residential development on part of Tanlane's land.

Issues:

- (1) Whether the council resolutions were amenable to judicial review;
- (2) Whether the council and the Commission were required to comply with [cl 6](#) of SEPP 55;
- (3) Whether [cl 6](#) of SEPP 55 applied to the part of the planning proposal seeking to enable residential development on part of the first respondent's land;
- (4) Whether the council complied with [subcl 6\(1\)](#) and [6\(2\)](#) of SEPP 55; and
- (5) Whether any failure by the council to comply with [cl 6](#) of SEPP 55 invalidated either or both of the council resolutions and the Gateway decision.

Held: Appeal allowed; planning proposal not a valid planning proposal; determination of the delegate of the Commission set aside; Tanlane to pay Moorebank's costs:

- (1) The decisions of the council to approve the planning proposal and to forward it to the Commission were necessary steps in the process of creating legal entitlements in the owner of the land and were therefore reviewable: at [33]-[41] (Basten JA, Payne JA agreeing). The Council resolutions were amenable to judicial review. The Council resolutions were steps taken to prepare the planning proposal within the meaning of [s 55](#) of the *EP&A Act* and the case was advanced as one where a mandatory statutory precondition to the exercise of a power had not been complied with, in respect of which it sought a declaration of invalidity of the two impugned decisions and injunctive relief. That relief was available: at [75]-[85] (Payne JA, Basten JA and Emmett AJA agreeing).
- (2) The Council exercises the function of preparing a planning proposal in accordance with [s 55](#) of the *EP&A Act*. It follows that the council was required to comply with [cl 6](#) of SEPP 55 in preparing the planning proposal: at [19]-[20] (Basten JA, Payne JA agreeing). Clause 6 of SEPP 55 must be complied with at the time that a planning proposal is prepared under [s 55](#) of the *EP&A Act* and submitted to the Minister or Commission under [s 56\(1\)](#). The Council was plainly the public authority responsible for preparing the planning proposal within the meaning of [ss 55](#) and [56](#), and thus a "planning authority" within the meaning of [cl 6](#) of SEPP 55. It was therefore required to comply with [cl 6](#) of SEPP 55 prior to forwarding the planning proposal: at [86]-[107] (Payne JA, Basten JA and Emmett AJA agreeing).
- (3) The effect of the proposed amendment, if made, would be to include in a particular zone contaminated land so as to permit a change of use of the land, being residential development, within the meaning of [cl 6](#) of SEPP 55. For that reason the proposed amendment fell within [subcl 6\(1\)](#) of SEPP 55: at [108]-[119] (Payne JA, Basten JA and Emmett AJA agreeing).
- (4) There was, on the evidence, no attempt by the council to grapple with the requirements of [subcl 6\(1\)](#): at [131]-[135] (Payne JA, Basten JA and Emmett AJA agreeing). The obligations in [subcl 6\(2\)](#) of SEPP 55 were not complied with in circumstances where, at the time of the council resolutions, the only report before the council concerned a different development and did not address any of the matters in [subcl 6\(2\)](#): at [120]-[129] (Payne JA, Basten JA and Emmett AJA agreeing).

- (5) The step required by s 56(2) of the EP&A Act cannot lawfully be undertaken unless the process of preparing the planning proposal has been carried out by the relevant planning authority under s 55(1) in a legally valid manner. In preparing a planning proposal, the language of cl 6 of SEPP 55 is mandatory. There is a clear legislative intention that a planning proposal that did not comply with SEPP 55 at the s 55(1) stage should not be permitted to proceed under s 56: at [138] (Payne JA, Basten JA and Emmett AJA agreeing). As the preparation of the planning proposal under s 55 of the EP&A Act by the council was flawed for failure to comply with cl 5 of SEPP 55, the step taken to forward the planning proposal to the Commission under s 56(1) was not a valid exercise of power: at [141]. In circumstances where the council resolutions are invalid, it follows that the Gateway decision was itself invalid: at [142].

Olefines Pty Ltd v Valuer-General of New South Wales [\[2018\] NSWCA 265](#) (Basten, Macfarlan, Leeming JJA)

(related decision: *Olefines Pty Ltd v Valuer-General of New South Wales* [\[2018\] NSWLEC 18](#) (Molesworth AJ))

Facts: Olefines Pty Ltd (**the appellant**) is the registered proprietor of two lots of land within the Botany Industrial Park (**BIP**) in Banksmeadow, which is situated close to Botany Bay.

Under the [Contaminated Land Management Act 1997 \(NSW\)](#), both lots, Lot 103 and Lot 5, fall within the meaning of “significantly contaminated land”. Both lots are zoned General Industrial (IN1) under the [State Environmental Planning Policy \(Three Ports\) 2013](#). The current use of those lots is categorised as hazardous industry, which is prohibited in Zone IN1, however the continuation of that current use is authorised of the existing use provisions in [Div 4.11](#) of [Pt 4](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#).

The matter at first instance was a challenge by the appellant to land value determinations made by the Valuer-General of New South Wales (**the respondent**) for each lot for the 2014, 2015 and 2016 financial years. The primary judge dismissed the appellant’s challenge on a number of grounds, including that, in determining the value of land pursuant to [s 6A](#) of the [Valuation of Land Act 1916 \(NSW\)](#) (**the Valuation Act**), the contamination of both lots and the costs of their remediation, while relevant, did not affect their value having regard to s 6A(2).

On appeal, the appellant contended that the primary judge had erred in the construction of s 6A.

Issues:

- (1) Did the primary judge err in finding that, in relation to both lots, the costs of remediation were not to be taken into account in assessing land value;
- (2) Did the primary judge err in determining the value of lot 5 without regard to the fact that a large portion of that lot was within an area of acute fire and explosion risk; and
- (3) Did the primary judge err in preferring the evidence of the respondent’s valuer, which included a 10% “uplift” due to the existing heavy industry use in a general industrial zone.

Held: Appeal dismissed with costs (Basten JA, Macfarlan and Leeming JJA agreeing; Leeming JA delivering a short judgment on the construction of s 6A, with which Basten JA agreed):

- (1) A valuation based on the assumptions as to existing use rights contained in subs 6A(2) of the Valuation Act could properly disregard the cost of remediation: at [18] (per Basten JA).
- (2) Lot 5 was not “sterilised” so as to be unavailable for use because it was subject to risks associated with possible fires or explosions in the adjoining petrochemical complex. Indeed, because the present use of lot 5 was to service the surrounding manufacturing operations, with their inherent risks, its continued operation assumed the continued existence of the risks which, as already noted, were even higher with respect to the actual sites of the manufacturing operations: at [19] (per Basten JA).
- (3) On an appeal limited to a question of law, the judge will not err in adopting the approach accepted by a particular valuer unless it can be shown that the valuer failed to undertake the task required by the statute. In this matter, whether the hypothetical purchaser of the particular land would be prepared to pay a small premium in circumstances where the land had existing use rights is a question of judgment for a valuer. Neither the inclusion of such an element, nor its rejection, involves a question of law: at [25]-[26] (per Basten JA).

- (4) The opening words “notwithstanding anything in subs (1)” in subs 6A(2) of the Valuation Act make it plain that in the event of conflict or inconsistency, subs 6A(2) prevails over subs 6A(1): at [39] (per Leeming JA).
- (5) There is nothing in s 6A of the Valuation Act which requires the notional removal of the actual improvements on the land, then remediate the land (and pay for the cost of doing so) so as to be able then lawfully to construct those same improvements on the land. Rather, in this respect 6A(2) overrides 6A(1); the existing land use is assumed to continue, and the existing buildings and structures which are required in order to enable that use are assumed to remain in place: at [51] (per Leeming JA).
- (6) In part, the words “may be continued” in 6A(2)(b) of the Valuation Act assume that actual improvements in the real world remain in place, insofar as they are required in order to enable the land to be used for the purpose in accordance with 6A(2)(a): at [53] (per Leeming JA).

The Owners - Strata Plan No 4983 v Canny [\[2018\] NSWCA 275](#) (McColl and Payne JJA, Emmett AJA) (related decision: *Julian Edward Canny v The Owners-Strata Plan No 4983* [\[2018\] NSWSC 80](#) (Rein J))

Facts: In 1969, the Sydney City Council issued a Development Consent for a 15-storey apartment building, Elizabeth Bay Gardens. The Development Consent contained provision for “free parking of ... cars by the occupants of the proposed building ...”. Car-parking spaces in the building were bought, sold and used by residents and non-residents alike between 1970 and 2014. In 2014, the Owners Corporation passed a resolution creating a new by-law which purportedly had the effect of excluding non-resident owners of parking lots from using their car spaces. The Owners Corporation took steps designed to enforce this new by-law including installing a security access point and issuing new security swipe cards to residential lot owners. A group of non-resident car space owners (the respondents) commenced proceedings seeking a declaration that the new by-law was invalid. The primary judge, amongst other declarations and orders, held that the new by-law was invalid and of no legal force and effect. The Owners Corporation appealed.

Issue: Whether parking by non-residents of Elizabeth Bay Gardens in parking lots owned by them at Elizabeth Bay Gardens was a permitted use.

Held: Appeal allowed in part; orders 2 and 3 made by the primary judge on 1 March 2018 set aside; the notice of appeal otherwise dismissed; the notice of cross-appeal dismissed; the appellant to pay the respondents the costs of the appeal and the cross-appeal and that such costs be paid from a levy raised from the owners of lots in Strata Plan No 4983 other than the respondents or any of them:

Per Payne JA (McColl JA and Emmett AJA agreeing)

- (1) What must be discerned is the true meaning of the Development Consent as the unilateral act of the council, not the result of a bilateral transaction between the applicant and the council: at [60] and [71]. Any lack of clarity or certainty in the Development Consent is the responsibility of the council and it must take the consequences of any failure to specify accurately or in detail what is consented to: at [71]. The Development Consent fails to specify accurately or in detail precisely what the council has consented to: at [73];
- (2) Development Consent permitted use of parking spaces by “occupants” of the building: at [68]. Occupants include persons whose presence has some element of regularity and continuity and permanence: at [78]. The Development Consent refers to “occupants” of the building, rather than occupants of the residential floors: at [77]. The lack of clarity in the Development Consent about the identity of “occupants” permitted to use the car spaces should be resolved in favour of the respondents: at [82]; and

Per Emmett AJA (McColl and Payne JJA agreeing)

- (3) The Development Consent is for the erection of the building, which includes provision for the parking of cars; it is implicit in the instrument that the consent extends to the use of the building: at [105]. There is no express restriction on the use of the provision for parking in the Development Consent and none should be implied: at [105].

NSW Court of Criminal Appeal:

Port Macquarie-Hastings Council v Mansfield [\[2019\] NSWCCA 7](#) (Hoeben CJ at CL, Harrison and Schmidt JJ)

(related decision: *Port Macquarie-Hastings Council v Mansfield* [\[2018\] NSWLEC 107](#) (Sheahan J))

Facts: The defendant, Paul Scott Mansfield, has been charged with two offences, for breaches of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (the EP&A Act). Across three hearing dates in April and May 2018, he appeared before Sheahan J in the Land and Environment Court, moving the Court to set aside two subpoenas, which had been issued to two third party companies. Sheahan J upheld the defendant's Notice of Motion and ordered that the subpoenas be set aside. Prior to commencing criminal proceedings, an officer of the Prosecuting Council issued to the defendant notices under the then [s 119J](#) of the EP&A Act, requiring the defendant to answer questions and produce records. It was said that the answers given by the defendant acted as the "launching pad" from which the council was able to issue the impugned subpoenas. His Honour upheld the defendant's primary argument, which was that the council had issued the s 119J notices for the purpose of deciding whether to commence criminal prosecution, a purpose which is impermissible under the EP&A Act. Accordingly, the subpoenas which were subsequently issued lacked a legitimate forensic purpose. In reaching his decision, Sheahan J relied substantially on the decision of Preston CJ in *Zhang v Woodgate and Lane Cove Council* (2015) LGERA 1; [\[2015\] NSWLEC 10](#) (*Zhang*).

Before the Court of Criminal Appeal (the CCA), the council relied on the sole ground of appeal that Sheahan J erred in finding that the EP&A Act did not permit the council to issue a s 119J notice for the purposes of criminal proceedings, in circumstances where the council had not decided to commence criminal proceedings. The CCA clarified this ground, noting that the council took issue with Sheahan J's finding that the council had already decided to commence criminal proceedings when it issued the notice. The council's key proposition was that it had not decided, wholly or substantially, to commence criminal proceedings at the time it issued the s 119J notices.

Issues:

- (1) Were the s 119J notices issued for the impermissible purpose of commencing a criminal investigation, as opposed to finding that the notices were issued in connection with an investigation purpose, which was permissible under the EP&A Act; and
- (2) What is the correct construction of the EP&A Act in terms of the powers conferred upon a local council to investigate and prosecute breaches of the Act.

Held: Appeal allowed; orders set aside and the matter remitted to Sheahan J:

- (1) In issuing the s 119J notices, the council officer was exercising the powers granted to Council investigation officers, to enable the council to exercise its investigation functions under the EP&A Act: at [45] and [100];
- (2) The relative timing of the issue of the notices on the one hand, and the commencement of criminal proceedings on the other, is a persuasive but not determinative factor in deciding whether the issue of s 119J notices occurred in connection with an investigation purpose: at [33];
- (3) At the time the notices were issued, Council had not commenced criminal proceedings, even though it was contemplated that criminal proceedings were possible or likely: at [53];
- (4) The application of the conclusions reached in *Zhang*, in order to find that the issued subpoenas were invalid, involved an incorrect extension of what was decided in that case: at [44] and [75]. The approach taken by Preston CJ in *Zhang* had been extended to a point in the present factual scenario where the s 119J notices were issued long before a prosecution was commenced, and at an early point of the council's investigation into an alleged breach of the EP&A Act: at [75];
- (5) *Zhang* was concerned with s 118BA, the predecessor of s 119J, and the circumstances were "quite different" from the present case: at [54]. In contrast to the facts in *Zhang*, there were no proceedings on foot in this case at the time the notices were issued to the defendant: at [56];
- (6) Section 119J of the EP&A Act conferred upon councils the power to investigate breaches of the Act: at [81]. That section does not draw a distinction between an investigation of an alleged breach which results in criminal prosecution and one which results in some other outcome: at [88]. It could not have been the parliament's intention that a s 119J notice, issued during a

council investigation, is *ultra vires* because a criminal prosecution was then contemplated: at [52];

- (7) It is only when an investigation has led a council to bring a criminal prosecution that an investigation officer cannot issue a notice under s119J in order to advance that prosecution: at [98]; and
- (8) Accordingly, the notices issued were not *ultra vires*: at [100].

Supreme Court of NSW:

Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority [\[2018\] NSWSC 1931](#) (McDougall J)

Facts: The Barangaroo Delivery Authority (**the Authority**) is the owner of the Barangaroo precinct. A number of years ago, it entered into development agreements with Crown Sydney Property (**Crown**) and two Lendlease parties (**Lendlease**) for those parties to develop part of South Barangaroo. Crown was constructing a hotel resort, which included residential apartments and a casino and Lendlease was developing two towers of residential apartments. At the time the agreements were signed, Barangaroo Central (the region immediately north of South Barangaroo) was undeveloped. The Concept Plan for Barangaroo Central envisaged that development in that region would have significant height restrictions, resulting in the Crown and the Lendlease buildings enjoying sweeping views of the Sydney Harbour Bridge and the Sydney Opera House.

The development agreements between the Authority, Crown and Lendlease included provisions designed to protect those sight lines and views (**the sight lines clauses**). These clauses included an acknowledgment by Crown and Lendlease that optimisation of development of Central Barangaroo was of critical importance to the Authority, and the Authority acknowledged that retention of sight lines to the Harbour Bridge and Opera House was of critical importance to Crown and Lendlease. The Sight Line Clauses further stated that before the Authority considered or approved an “application” which provided for “development different to that provided for in the Concept Plan”, the Authority must “discuss and negotiate [that application] in good faith” with Crown and Lendlease, in order to “agree any changes to that application so as to retain the sight lines...while at the same time optimising the development opportunities for Central Barangaroo”.

After these development agreements were entered into, the Authority considered a number of bids and proposals from various developers to develop Central Barangaroo. Grocon was nominated to be the preferred bidder, and the Authority ended up signing a development agreement with Grocon. The Grocon bids had provided for development different to that provided for in the Concept Plan as the buildings Grocon was proposing significantly exceeded the height limits in the existing Concept Plan. To alter the Concept Plan, either Grocon or the Authority was required to lodge a formal application. Crown and Lendlease commenced proceedings seeking orders that the Authority be restrained from continuing with the Grocon bids until it engaged in good faith discussions and negotiations with Crown and Lendlease, and that it put a proposal to them that allowed for the retention of their sight lines.

Issues:

- (1) Whether the Grocon Bids were “applications” within the meaning of the sight lines clauses, and, thus whether the requirement of the Sight Line Clauses to negotiate changes in good faith was engaged; and
- (2) If the obligation to negotiate in good faith had commenced from that point, what was required to be discussed and negotiated.

Held: Declared that the Grocon Bids were applications for the purpose of a development agreement, between the Crown, Lendlease and the Authority. It was also declared that the Authority breached their agreement with the Crown and Lendlease by considering the Grocon Bids before discussing and negotiating with the Crown and Lendlease, the changes the Grocon Applications envisaged:

- (1) As the parties chose not to define the word “application” in their agreements, they intended it to use its ordinary English meaning, and thus the term should not be narrowly confined in meaning: at [111];
- (2) At least from the time Grocon became the preferred bidder, it was an applicant whose application triggered the operation of the Sight Line Clauses, due to its development altering the Concept

Plan. From this time the Authority was required to undertake the process of good faith discussion and negotiation with Crown and Lendlease, per the Sight Line Clauses: at [123]; and

- (3) To fulfil the requirements of the Sight Line Clauses the parties should have started negotiations with the proposition that the sight lines were to be retained, although also acknowledging that if that parties had started from this position it was possible such negotiations might still fail: at [141].

Sakha & Sons Pty Ltd v Prime Gordon Pty Ltd and Another [\[2018\] NSWSC 1827](#) (Sackar J)

Facts: Sakha & Sons Pty Ltd (**the plaintiff**) sought damages against Prime Gordon Pty Ltd (**the first defendant**) and TQM Design & Construction Pty Ltd (**the second defendant**) for rock anchors and a crane swing imposed over the plaintiff's property at 860 Pacific Highway, Gordon. The first respondent issued a cross-claim seeking easements in respect of its rock anchors and crane swing. The plaintiff subsequently sold its property to Northern Group 3 Pty Ltd (**Northern Group**). At the time of this decision the contract had not yet been completed. Pursuant to [rr 6.26](#) and/or [6.27](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#), Northern Group made an application to be joined as a party to the substantive proceedings and the cross-claim.

Issue: Whether Northern Group ought to be joined as a party to the substantive proceedings and the cross-claim.

Held: Application dismissed:

- (1) A party pursuant to a contract has certain equitable rights: at [7]. Who can be heard in relation to an easement application under [s 88K](#) of the [Conveyancing Act 1919 \(NSW\)](#) is governed by [s 88\(2\)\(b\)](#): at [7]. The section identifies the principal interested party as the owner of the land and makes provision for "each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900*": at [7] to [8]. A caveat is simply a mechanism for devising the protection of rights pending proper determination and does not fall within [s 88K\(2\)\(b\)](#): at [10]. The equitable interest created by the purchase agreement was insufficient for the purposes of [s 88K\(2\)\(b\)](#) and there was no legal basis for joinder: at [9] and [16].

Sanctuary Cammeray No 2 Pty Ltd v North Sydney Council [\[2018\] NSWSC 1699](#) (Emmett AJA)

Facts: In these proceedings, Sanctuary Cammeray Pty Ltd, Sanctuary Cammeray No. 2 Pty Ltd and Pamada 142 Pty Ltd (**the plaintiffs**) applied under [s 88K](#) of the [Conveyancing Act 1919 \(NSW\)](#) for the imposition of two easements for services and a right of carriageway in respect of Lot 12 in deposited plan 599070 and two easements for services and a right of carriageway in respect of Lot 77 in deposited plan 923520. Both Lot 12 and Lot 77 were owned by the North Sydney Council (**the defendant**). The easements were proposed to benefit 2 Vale Street, Cammeray, the site of an approved residential apartment development (**the development**). The proposed easements were required to enable the development to become fully operational and to permit structures for services, driveway and pedestrian access already constructed on Lot 12 and Lot 77 to remain in place. Because Lot 77 was "community land" under the [Local Government Act 1993 \(NSW\)](#), the defendant was unable to grant an easement in respect of Lot 77. However, the defendant supported the imposition of the proposed easements under [s 88K](#). The quantum of compensation to be paid was agreed between the parties.

Issues:

- (1) Whether the grant of easement was "reasonably necessary"; and
- (2) Whether the grant of easement was consistent with the public interest.

Held: Easements imposed; the plaintiffs to pay the defendant compensation in the sum of \$427,950; the plaintiffs to pay the defendant's costs:

- (1) There was no evidence of any reasonably feasible alternative and, in that context, the easement was reasonably necessary as a means of carrying out reasonable development on the dominant tenement: at [13]; and
- (2) The fact that Lot 77 was "community land" did not preclude the imposition of an easement over it: at [14]. None of the proposed easements conferred exclusive use, nor would they detrimentally

affect public interest: at [14]. The facilitation of resident and visitor access to the development may promote public interest: at [14].

Land and Environment Court of NSW:

• Judicial Review:

De Battista v Minister for Planning and Environment [\[2018\] NSWLEC 202](#) (Moore J)

Facts: Mr De Battista (**the applicant**) owns land within the local government area administered by Shoalhaven City Council (**the council** and **second respondent**). In 2014 the [Shoalhaven Local Environmental Plan 2014](#) (**the SLEP 2014**) was introduced and increased the permitted development height for the applicant's land to 13 metres. In 2016 during council elections, the permitted building height on the applicant's land was a matter of some controversy. A number of Councillors, who were then elected at the 2016 election, opposed the height limit on the applicant's land and campaigned that they would support it being lowered. Following the election, the council commenced the process to amend the terms of the SLEP 2014, under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**), so that the maximum permitted height for development on the applicant's land would be reduced from 13 metres to 8.5 metres. The effect of this would be to reduce the maximum development potential of the applicant's land from a four-storey development to a two-storey development. The Minister for Planning and Environment (**the first respondent**) gave authorisation to the council, through the process of a Gateway Determination, pursuant to [s 56](#) of the EP&A Act, to proceed with the process of amending the SLEP 2014. The Council then instigated a community consultation process, pursuant to [s 57](#) of the EP&A Act. The applicant sought to challenge the SLEP 2014 amendment process on the basis that it was incurably infected with bias. At the time of proceedings no report of the outcome of the community consultation process had been provided to councillors.

Issues:

- (1) Whether there was a reasonable apprehension of bias concerning the way the council approached consideration of whether or not to give effect to the planning proposal and whether this should have precluded the council proceeding with the planning proposal (**Ground 2**); and
- (2) Whether the council's community consultation process regarding amending the SLEP 2014 had been undertaken in a fashion which denied the applicant natural justice and that this denial warranted precluding the council from further progression of the planning proposal (**Ground 3**).

Held: Ground 2 failed and Ground 3 was upheld; declaration that the community consultation process pursuant to s 57 of the EP&A Act concerning the SLEP 2014 amendment to reduce the height limit of the applicant's land was void and of no effect; costs reserved:

- (1) The processes that the council undertook in determining whether or not to seek to amend the SLEP 2014 were of a political and policy nature and were not of an administrative nature sufficiently equivalent to curial or quasi-judicial processes as to trigger a finding of apprehended bias: at [127];
- (2) If apprehended bias did apply, the past conduct of the councillors did not provide a sufficient basis to find apprehended bias. Nor was there a basis to conclude the councillors would not give genuine consideration of a report provided after the public consultation process: at [128]-[128];
- (3) The Council's planning proposal displayed for public exhibition during the community consultation process did not acknowledge the delegate's determination at the Gateway Determination stage of the process that the proposal did not comply with a Minister's direction under [s 117](#) of the EP&A Act. This amounted to a material miscarriage of the community consultation process pursuant to s 57 of the EP&A Act: at [151]-[154], [158].

Elite Construction NSW Pty Limited v Coffs Harbour City Council [\[2018\] NSWLEC 201](#) (Pepper J)

Facts: Elite Construction NSW Pty Limited (**Elite**) challenged Coffs Harbour City Council's (**the council**) deemed refusal of a development application to subdivide land.

On 20 December 2010, the Minister for Planning (**the Minister**) granted approval to Elite to complete the works outlined in a concept plan (**the concept approval**). The concept approval was modified on 8 May 2015 (**Modification 3**) and 21 April 2017 (**Modification 4**).

Modification 3 incorporated a lapsing date for the concept approval unless works had physically commenced in accordance with “any related development consent” within the concept plan area (**condition A6**). Modification 4 broadened the definition of “any related development consent” in condition A6 to include a complying development certificate (**CDC**). The lapsing date for the concept approval was 20 December 2017.

On 5 April 2017, two CDCs were issued to Elite to demolish a dwelling house and other ancillary structures (**the works**). Elite carried out the works by 4 May 2017.

Issue: Whether the concept approval under [Pt 3A](#) of the former [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) had lapsed.

Held: The concept approval had not lapsed:

- (1) The Minister had a discretion to impose a lapsing condition under [s 75Y](#) of the EP&A Act: at [36]. The concept approval could only lapse by operation of condition A6: at [44];
- (2) Condition A6 was to be construed having regard to the language of the condition and within the context of the concept approval: at [58]. The text of condition A6 included CDCs as a form of consent that would be sufficient to avoid the lapsing of the concept approval: at [60]. Condition A6 did not stipulate that the works must relate to the concept approval: at [60]. The concept approval envisaged other instruments of approval were required to carry out the development the subject of the concept plan: at [60]. The CDCs related to the concept approval: at [60];
- (3) Condition A6 prevented the lapsing of the concept approval if: first, Elite had physically commenced the works lawfully in accordance with a related approval; and second, the related approval facilitated the carrying out of development consistent with the concept approval: at [61]. The works carried out by Elite were necessary to implement the roadworks contemplated in conditions B5 and A1 of the concept approval: at [62];
- (4) In order to determine whether the CDCs had not complied with the concept approval, the council needed to demonstrate that the performance of the works breached the concept approval’s conditions: at [67];
- (5) Condition A3 required Elite to comply with a Statement of Commitments requiring management plans and preparatory measures undertaken prior to commencing any works: at [69]. While Elite had not wholly complied with the requirements of the Statement of Commitments prior to commencing works, condition A3 was not breached: at [71]-[76]. Given the limited nature of the works and Elite’s overall compliance with the Statement of Commitments, partial non-compliance with certain commitments was not sufficient to preclude Elite’s reliance on the works in satisfaction of condition A6 at a preliminary stage of the project: at [92]-[96];
- (6) Condition C13 required Elite to dedicate six hectares of land as an addition to Coffs Coast Regional Park prior to any construction commencing: at [98]. Although demolition works can fall within the term “construction”, condition C13 formed part of the “further environmental assessment requirements” for the project’s future stages: at [101]. Having regard to context of the concept approval, condition C13 was not a pre-condition to the lawfulness of carrying out the works under the CDCs: at [102]. Non-compliance with condition C13 would not render unlawful the works relied upon by Elite for the purposes of condition A6: at [103]; and
- (7) The inclusion of CDCs in Condition A6 was not unlawful because the power to confer a limitation on the concept approval under s 75Y was discretionary: at [110]. The power to declare Pt 3A developments under [s 75P\(2\)\(d\)](#) was not limited to development consents: at [111]. Condition A6 was validly imposed: at [113]. It formed part of a concept approval which was in force and valid until declared otherwise: at [113].

Mulpha Australia Limited v Central Sydney Planning Committee [\[2018\] NSWLEC 179](#) (Molesworth AJ)

Facts: The building known as the former Health Department Building (**the Health Building**) was listed on the State Heritage Register pursuant to the [Heritage Act 1977 \(NSW\)](#) (**the Heritage Act**) in 2013,

including a specified curtilage. The Health Building was in a cluster of buildings along Macquarie Street owned by the third respondent, Stamford Property Services Pty Ltd (**Stamford**), including the building known as the Sir Stamford Hotel.

On 20 November 2017, a development application (**the Stamford DA**) was lodged by Stamford seeking approval to demolish the Stamford Hotel and in its place construct a 16-storey tower of residential apartments and to make alterations to the Health Building including adapting it for residential use.

Where a listing on the State Heritage Register applied to a building, approval was required from the second respondent (**the Heritage Council**) pursuant to [s 57\(1\)\(e\)](#) of the Heritage Act for “any development in relation to the land on which the building ... is situated, the land that comprises the place, or land within the precinct”. The proposal was therefore integrated development as defined in [s 4.46](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**), requiring the consent authority to obtain general terms of approval from the Heritage Council under [s 4.47](#) of the EP&A Act.

In determining the application for the Stamford DA, the Heritage Council considered that its approval role was limited to the Health Building and it could only make comments on the development proposed on the adjoining area. The Heritage Council granted approval for the conservation work proposed to the Health Building but refused the residential use of the building. The Heritage Council provided comments objecting to the proposed tower, but not refusing or approving it.

Mulpha Australia Limited (**the applicant**), the owner of a neighbouring property, brought judicial review proceedings against the decision of the Heritage Council to provide a partial approval and comments.

Issues:

- (1) Whether the land on which the Health Building was situated under s 57(1)(e) of the Heritage Act included the apartment tower; and
- (2) Whether the Heritage Council, in providing general terms of approval for only a portion of the Stamford DA, acted unlawfully by misconstruing its statutory power.

Held: Central Sydney Planning Committee (**the first respondent**) prohibited from determining the development application pending provision of a lawful decision under s 4.47 of the EP&A Act; Heritage Council ordered to provide consent authority with a lawful decision; Heritage Council and Stamford to pay costs of applicant:

- (1) The meaning of “the land on which the building ... is situated” in s 57(1)(e) depended upon the circumstances of each case and was not taken to mean the lot, tenement, footprint of the building or curtilage defined in the heritage listing: at [108]-[111]. The Heritage Council was to determine a relevant nexus, guided by the words “in relation to”, to determine the scope of approval: at [118]. The assessment of the relevant nexus was a qualitative exercise carried out by the Heritage Council, anchored by the listed building and guided by an assessment of how a proposed development may impact on the land upon which the listed building is situated: at [130];
- (2) For the Stamford DA, “the land on which the building ... is situated” included the broader term of the site, beyond the footprint or curtilage of the building: at [131]. The Heritage Council correctly identified the relevant nexus in the “comments” it provided: at [134]. The apartment tower was included as land on which the building was situated and required approval under s 57(1)(e): at [134]; and
- (3) The Heritage Council was legally obliged, when providing its general terms of approval, to respond to so much of the development as it considered had a relevant nexus to the land on which the building is situated: at [134]. The Heritage Council misdirected itself by believing it was legally constrained to only provide approval to the works to the Health Building itself: at [135].

Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3) [\[2018\] NSWLEC 193](#) (Robson J)

Facts: Muswellbrook Shire Council (**the council**) commenced judicial review and civil enforcement proceedings in relation to a mining rehabilitation strategy (**the strategy**) prepared by Hunter Valley Energy Coal Pty Ltd (**HVEC**) and approved by the Secretary, Department of Planning and Environment

(the Secretary). Council contended that the strategy had not been prepared in accordance with condition 42 (**Condition 42**) of the Modified Project Approval for the Mt Arthur Coal Mine (**the modified Project Approval**). Condition 42 provided:

42. The Proponent shall prepare a revised Rehabilitation Strategy for the Mt Arthur mine complex to the satisfaction of the Secretary. This strategy must:
 - a) be prepared in consultation with the DRE and Council, and be submitted to the Secretary for approval by the end of September 2015, unless otherwise agreed with the Secretary;
 - b) investigate options for:
 - increasing the area to be rehabilitated to woodland on the site;
 - reducing the size of the final voids on site; and
 - beneficial future land use of disturbed areas, including voids;
 - c) describe and justify the proposed rehabilitation plan for the site, including the final landform and land use; and
 - d) include detailed rehabilitation objectives for the site that comply with and building on the objectives in Table 14.

Council submitted that the strategy objectively failed to comply with Condition 42 such that the Secretary was not able to form a valid state of satisfaction. In those circumstances, Council submitted that the rehabilitation works being undertaken in reliance upon the strategy were being conducted unlawfully and that they should be restrained.

Issues:

- (1) Whether the Secretary was exercising a statutory function such that Council's pleaded grounds of judicial review were available;
- (2) The purposes for which the Environment Assessments (**the EAs**) prepared in relation to Mt Arthur Coal Mine could be used to construe the Modified Project Approval;
- (3) Whether any other documents could be referred to when construing the Modified Project Approval;
- (4) Whether, on its proper construction, Condition 42 imposed objective jurisdictional facts required to be met before the Secretary could consider the strategy;
- (5) Whether the strategy was deficient by not meeting objective requirements imposed by Condition 42;
- (6) Whether the Secretary failed to take into account mandatory considerations;
- (7) Whether the Secretary's state of satisfaction with respect to the strategy was legally unreasonable; and
- (8) If Council succeeded in any of its grounds of challenge, whether the Court should exercise its discretion to grant the relief sought.

Held: The Summons dismissed and the applicants pay the respondents' costs unless another costs order was sought within 28 days:

- (1) In formulating the conditions of consent in the Modified Project Approval, the Planning and Assessment Commission delegated part of its statutory discretion under [s 75W\(4\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) to the Secretary such that the Secretary was exercising a statutory function and Council's pleaded grounds of judicial review were available: at [173].
- (2) Because the EAs had been expressly incorporated into the Modified Project Approval, they could be referred to in the task of construction. Where a reading of another condition in the Modified Project Approval which would give a harmonious operation between that condition and the EAs was available, that reading should be preferred: at [189].
- (3) Apart from the EAs, it was not permissible to have regard to any of the further documents sought to be relied upon by the Secretary and HVEC in construing the Modified Project Approval: at [201].
- (4) On its proper construction, Condition 42 did not impose objective requirements capable of determination by the Court, but rather matters about which the Secretary was required to form a state of satisfaction: at [252].

- (5) Although it was unnecessary to decide as Condition 42 did not create objective jurisdictional facts, the strategy was not defective in any relevant sense: at [306].
- (6) Council did not make out that the Secretary constructively failed to consider mandatory considerations because the strategy was not objectively defective: at [316].
- (7) The Secretary's state of satisfaction with respect to the strategy was not legally unreasonable: at [340].
- (8) In the circumstances, it was not necessary to consider whether the Court would have exercised its discretion to order the relief sought by Council: at [341].

Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4) [\[2019\] NSWLEC 5](#)
(Molesworth AJ)

Facts: This case is the result of longstanding issues between the parties, Randren House Property Limited (**the first applicant**), Mr Paul Andrew Andrews (**the second applicant**), Water Administration Ministerial Corporation (**the first respondent**), State of New South Wales (**the second respondent**), and the Minister Administering the Water Management Act 2000 (**the third respondent**) in the regulation of the applicant's water source on their land. In 2012, the first applicant brought proceedings to the Land and Environment Court to challenge the refusal of their 1986 water licence. This resulted in consent orders between the parties requiring the first respondent to renew the 1986 licence (**the 2012 Court Order**). The current proceedings were instigated in 2015, with various procedural disputes occurring between the parties, such as joining parties after proceedings had commenced, with the applicant's seeking judicial review of various administrative decisions made by the respondents which impacted the applicants' water sources and land.

Nineteen days after the primary hearing had concluded, the applicants sought to put further written submissions before the Court. These were rejected. Six weeks after the primary hearing, the applicants sought to reopen proceedings for the Court to receive further supplementary evidence. As the applicant had not established a relevant nexus between the new material and the actual decisions under review, this application was dismissed. The applicants also sought an extension of time to press their claims on decisions 1,2,3,4 and 5 under [r 59.10](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**the UCPR**) which stipulated that proceedings for judicial review of a decision must be commenced within three months of the date of the decision, although the time may be extended by the Court. The applicant sought this because decisions 1-5 were made prior to the limitations set by the UCPR.

Issues:

- (1) Whether continuing environmental harm indicated that an administrative decision was continually being remade by the decision-maker, and whether this extended the time given for an applicant to bring judicial review proceedings to review that decision under r 59.10 of the UCPR,
- (2) Whether administrative decisions made by the respondents were a breach of their duties under the [Water Management Act 2000 \(NSW\)](#) (**the Water Management Act**), particularly [s 372\(1\)](#), in the following ways:

Decision 1: The first respondent failing to classify the applicant's water sources, being a billabong and the linked ecosystem and treating the sources accordingly;

Decision 2: The first respondent refusing to admit that the environment of the Lake Paddock and Somerset Park was being damaged and adversely affected by the first respondent's water management plan setting of water flows in that area;

Decision 3: The first respondent failing to issue the applicants with a water licence for 1000 mega litres in accordance with a 2012 Court Order under the regulated water regime, instead issuing the 1000 mega litres for unregulated flows ;

Decision 4: The first and second respondent placed the applicant's water sources, which were in an existing regulated water sharing plan, in an unregulated water sharing plan. The unregulated water sharing plan caused environmental damage to the applicants' water sources;

Decision 5: The second respondent's making of the 2012 unregulated water sharing plan was saving their own expense resulting in a loss to the applicants;

Decision 6: The second respondent imposed mandatory conditions on the applicant's water access licence and the approval;

Decision 7: The second respondent extending the duration of the 2003 regulated water sharing plan resulting in environmental damage to the applicants' land; and

Decision 8: The respondents replacing the 2003 Regulated Water Sharing Plan with the 2016 Regulated Water Sharing Plan resulted in environmental harm to the applicants' water source and land,

- (3) Whether [s 47](#) of the Water Management Act applied to the decisions being reviewed,
- (4) Whether the respondents impaired the constitutional guarantee of the applicants contained in [s 100](#) of the [Constitution](#), which provides that the Commonwealth shall not abridge the right of a State, or its residents in the reasonable use of waters of rivers for conservation or irrigation.

Held: Appeal dismissed; the applicants to pay the respondents' costs of two applications for leave but costs otherwise reserved:

- (1) Ongoing environmental damage did not mean that impugned decisions are ongoing. A decision must be part of a deliberative process, it is not continually remaking the same decision: at [242];
- (2) It is insufficient in judicial review proceedings to point to impacts and consequences of alleged decision making and assert that there has been a decision that brought about those consequences. The applicant did not provide any particulars of who made the decision, when it was made or what material was considered, therefore the applicant failed to establish a case on this claim: at [287], [297];
- (3) Neither the first respondent, nor indeed the second or third respondents, had the power to make decisions regarding water flow levels, this power belonged to Water NSW, therefore this claim fails: at [320];
- (4) The water licence was only ever issued to access unregulated flows, the 2012 Court Order was given in this context and did not provide orders for regulated flows: at [338], [345];
- (5) It was inconceivable that the legislature intended that every possible repository of water, including the applicant's water source, was required to be classified or regulated. Without evidence provided by the applicant, a decision being made regarding the applicant's water source could not be established: at [372];
- (6) Water management principles under the Water Management Act, such as [s 5](#), and [s 7](#), do not mean that every water source must be classified to the risk it might face, nor must every decision equally protect and restore every dependent ecosystem: at [423];
- (7) The applicant did not establish how the decision maker failed to meet their obligations in imposing mandatory conditions on the applicant's water access licence and the approval or why discretionary conditions should be imposed instead of mandatory conditions: at [437]-[438];
- (8) The applicant did not prove that the Minister made a conscious decision to exclude the applicant's water source from the scope of the 2003 Regulated Water sharing plan: at [448], [463];
- (9) Decisions under the Water Management Act are made at a high level, including water sharing plans, and are not under a duty to consider the potential harm to every small water body within their ambit but seek to benefit the wider area they are controlling: at [560],
- (10) Section 47 of the Water Management Act, which stated that the time limit of 3 months for judicial review of water management plans, applied to decisions 2, 4, 5, 7, 8. This added another ground for their refusal in the appeal: at [319], [377], [419], [457], [521],
- (11) Section 100 of the *Constitution* relates to Commonwealth decisions and actions and does not impose a limitation on the legislative powers of States: at [577].

- **Compulsory Acquisition:**

Barkat v Roads and Maritime Services [\[2018\] NSWLEC 209](#) (Molesworth AJ)

Facts: Mr Mark Barkat and Mrs Rubina Barkat (**the applicants**) owned a property in Homebush comprising three contiguous lots (**the land**). On 18 December 2015, Roads and Maritime Services (**the RMS**) compulsorily acquired the land under the [Roads Act 1993 \(NSW\)](#) for the purpose of the WestConnex M4 East Project.

On 5 April 2016, the applicants commenced proceedings in the Land and Environment Court objecting, under [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (the **Just Terms Act**), to the amount of compensation offered by RMS for the acquisition of the land.

Issues:

- (1) Whether the public purpose for which the land was acquired, and which was therefore to be disregarded pursuant to [s 56\(1\)\(a\)](#) of the Just Terms Act, included strategic documents such as the Draft Parramatta Road Urban Transformation Strategy (**Draft PRUTS**) (that is, ought the signal the Draft PRUTS sent to the marketplace, and the resultant increase in value, that the land would likely be rezoned from R3 to R4 High Density Residential be disregarded);
- (2) To what extent did the flood liability of the land affect the capability of its development and therefore its market value under s 56 of the Just Terms Act;
- (3) To what extent did the easements over the land impact upon its capability of development and therefore its market value under s 56 of the Just Terms Act;
- (4) Was a top-down approach or a direct comparison valuation approach more appropriate in the circumstances;
- (5) What type of development was the highest and best use of the land;
- (6) Ought stamp duty on a replacement property be included in the disturbance pursuant to [s 59\(1\)\(f\)](#) of the Just Terms Act; and
- (7) Ought the applicants' costs of obtaining the, now unusable, development consent with respect to the land be included in disturbance pursuant to s 59(1)(f) of the Just Terms Act.

Held: Compensation ordered; respondent to pay the applicants' costs:

- (1) There was an inextricable nexus between the WestConnex Project and urban development stimulus relevant to the location of the land (including the draft PRUTS): at [165]. There was a direct relationship between the public purpose and the likely upzoning of the land: at [178]. Therefore, WestConnex and all the associated strategic planning initiatives must be disregarded for the purpose of making its assessment of the hypothetical development potential of the land: at [170]. The land would, but for the public purpose, have remained zoned R3 for an indeterminate number of years: at [171];
- (2) The flooding potential of the land would have been a significant factor influencing price. The hypothetical prospective purchaser would have been prepared to purchase the land for its development potential, but would only offer a price significantly discounted due to the flooding consideration: at [213];
- (3) There would be considerable risk and cost burden in resolving the easements issues but that nevertheless an outcome would be reached that would not curtail development options: at [225]; accordingly, a prospective purchaser would not consider the easement issues to be insurmountable, but would seek a discount in the purchase price of the land to account for both the extra costs and the extra delays: at [230];
- (4) Given the Court's finding with respect to the public purpose, the R4 sales were removed from consideration and the "top-down" approach held to be inappropriate: at [235]. The direct comparison method of valuation was therefore preferred, considering only R3 property sales: at [237];
- (5) The highest and best use of the land would be a consolidated development site, rather than individual dwellings: at [238];
- (6) At the relevant date, the land was being held as a domestic land banking property for its development potential, which the applicants lost upon compulsory acquisition: at [286]. The stamp duty that would be paid on a replacement property in order for the applicants to carry on their land bank to development enterprise would constitute financial costs which they might reasonably incur, relating to the actual use of the land, as a direct and natural consequence of the acquisition: at [296]; and
- (7) The costs of securing the development consent were similarly financial costs that the applicants had reasonably incurred, by reason of the costs arising in relation to a proposed holding residence. Market value under [s 55\(a\)](#) of the Just Terms Act would not have included the costs associated with the development consent, costs which were limited to the strategic land bank purpose of the applicants, but otherwise not value-adding to the property: at [297].

Croghan v Blacktown City Council [\[2019\] NSWLEC 2](#) (Molesworth AJ)

(final decision: *Croghan v Blacktown City Council (No 2)* [\[2019\] NSWLEC 9](#) (Molesworth AJ))

Facts: Mr Croghan (**the applicant**) was the owner of land at Vineyard (**the land**). On 23 November 2015, ahead of the acquisition date, Blacktown City Council (**the council**) effected a subdivision of the land, creating three smaller blocks. On 12 August 2016, the council compulsorily acquired two of the applicant's newly divided blocks of land (**the acquired land**) for the stated public purpose of drainage and public recreation. The applicant retained ownership of one block of land (**the retained land**). On 13 October 2016, the Valuer-General determined compensation payable of the acquired land pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**the Just Terms Act**) to be \$4,802,000.00. The applicant objected to the offer of compensation and on 29 November 2016 brought a Class 3 appeal pursuant to [s 66](#) of the Just Terms Act against the council.

Issues:

- (1) The correct approach to be taken with respect to the statutory disregard of the public purpose mandated by [s 56\(1\)\(a\)](#) of the Just Terms Act;
- (2) What information a hypothetical purchaser would consider to determine the development potential of the acquired land regarding the flood affectation on that land;
- (3) Whether the “piecemeal” valuation approach or the “before and after” valuation approach was the more appropriate in the circumstances of the acquisition; and
- (4) Whether the retained land needed to be compensated for value lost.

Held: Final orders for the award of compensation pursuant to [s 55\(a\)](#) or with respects to costs were deferred until the parties provided the Court with their respective final positions on quantum. No order awarding compensation for the retained land. Compensation paid for disturbance pursuant to [s 55\(d\)](#):

- (1) For the purposes of determining market value of the land pursuant to [s 55\(a\)](#) of the Just Terms Act, the [s 56\(1\)\(a\)](#) statutory disregard only applied to the acquired land, and only related to any increase or decrease in the value of that acquired land arising as a consequence of the public purpose. The public purpose did not need to be disregarded in the “after” case in the assessment of compensation of adjoining land (the retained land) pursuant to [s 55\(f\)](#): at [28]-[29];
- (2) Specific flood proposals for the acquired land would impact on value and must be disregarded. district-wide information such as SEPP flood maps would not be disregarded. The hypothetical purchaser would also seek out and obtain property-specific information to explore a range of options to address the identified flooding issues: at [69]-[71];
- (3) As the purpose of the subdivision was the public purpose of the acquired land, it was inappropriate to embrace the “piecemeal” valuation approach by focusing on just the acquired land, and then divide it up further into smaller sections reflecting the different development potential of each parcel of land. Therefore, the “before and after” approach was accepted: at [110]; and
- (4) The severance/injurious affectation claim for the retained land was based on the effect of the acquisition on the access to the retained land. This amounted to a disadvantage no more than 5%. This claim was offset by a 5% adjustment for betterment due to the size reduction of that land, which raised the value of that land per square metre: at [152]-[153].

Croghan v Blacktown City Council (No 2) [\[2019\] NSWLEC 9](#) (Molesworth AJ)

(related decision: *Croghan v Blacktown City Council* [\[2019\] NSWLEC 2](#) (Molesworth AJ))

Facts: On 12 August 2016 Blacktown City Council (**the council**) compulsorily acquired Mr Croghan's (**the applicant**) land for the stated public purpose of drainage and public recreation. On 13 October 2016 the Valuer-General determined compensation payable of the acquired land pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**the Just Terms Act**). The applicant objected to the offer of compensation and on 29 November 2016 brought a Class 3 appeal pursuant to [s 66](#) of the Just Terms Act against the council. The applicant position was compensation should amount

to \$11,157,314.98 with the council's position in their Points of Defence being compensation should amount to \$3,947,314.98. The matter was predominantly dealt with in *Croghan v Blacktown City Council* [2019] NSWLEC 2, where Molesworth AJ largely accept the position of the council's valuer however some issues between the parties remained. The first was an error in the council's submissions on the quantum of compensation. However, both parties were in agreement that the error was inadvertent, and the award ordered by the Court was changed to reflect the updated correct figure, with the total being \$4,227,314.98. However, the question of costs remained outstanding.

The respondent argued that it had provided an Offer of Compromise on 27 September 2017, made pursuant to [r 20.26](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (the UCPR), offering to resolve the dispute by paying the applicant \$5,246,204.98, plus legal costs as agreed or assessed. Keeping with the rule, the offer was open for 28 days. This was rejected by the applicant, who was awarded a total of \$4,227,314.98. This figure was considerably lower than the Offer of Compromise and also the initial determination of the Valuer General, who determined \$4,802,000.00. The council contended that, despite the costs regime in Class 3 compulsory acquisition proceedings excluding certain UCPR cost rules, [rr 42.13](#) to [42.17](#) were not excluded and therefore should apply. Critically, this contains UCPR [r 42.15](#). This rule instructs that where an offer by the defendant to the plaintiff is not accepted and the judgment is no more favourable to plaintiff than the offer, the plaintiff is entitled to costs on the ordinary basis, up to the time from which the defendant made the offer, and from this point in time the defendant is entitled to an order against the plaintiff, assessed on an indemnity basis.

Issue: Whether the council was entitled to costs from the date it had offered the applicant an Offer of Compromise.

Held: The council to pay the applicant's costs, assessed on the ordinary basis, from the time the proceedings were commenced until 27 September 2017 (date of the Offer of Compromise). The applicant to pay the council's costs, on an indemnity basis, from 28 September 2017 until the proceedings were finalised. Excluded from this order was the additional hearing held, for this hearing parties pay their own costs:

- (1) The most relevant focus for the Court to determine whether the respondent can claim costs pursuant to UCPR rule 42.15 should be the Offer of Compromise: at [61];
- (2) The Valuer-General's determination given in October 2016, three months after the Claim for compensation, was highly material as well: at [63];
- (3) The yardstick for determining the reasonableness of the conduct of the applicant in their claim is not the figure in the Points of Defence filed the day before the primary hearing commenced, it was the Offer of Compromise, which contained a figure nearly half a million dollars more than the Valuer-General's Determination and more than a million dollars more than the Court's final determination of compensation payable: at [63];
- (4) It would be unjust for the applicant to pay for the additional hearing, as this was largely held due to an error in the respondent's quantum calculations: at [65].

G Capital Corporation Pty Ltd; Gertos Holdings Pty Ltd; Marsden Developments Ltd v Roads and Maritime Services [\[2019\] NSWLEC 12](#) (Pain J)

Facts: On 9 February 2018, the respondent, the Roads and Maritime Services (the RMS) compulsorily acquired three adjacent parcels of land (the Properties) owned separately by G Capital Corporation Pty Ltd (G Capital), Gertos Holdings Pty Ltd (Gertos Holdings) and Marsden Developments Pty Ltd (Marsden Developments) (the applicants). On 22 June 2018, the Valuer General determined compensation for the applicants to be \$26.5 million in total. The applicants objected to the Valuer General's determination of compensation under [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (the **Just Terms Act**).

The applicants relied on three contracts of sale of the Properties for a total of \$56.5 million which had been exchanged on 28 June 2016 before the Properties were compulsorily acquired by the RMS. The contracts were made between the applicants and three purchasers (Regency Capital Pty Ltd (**Regency Capital**), London Capital Holdings Pty Ltd (**London Capital**) and Portman Securities Pty Ltd (**Portman Securities**)) (the **purchasers**). The applicants stated that three deposits of \$50,000 were paid to them by the purchasers, with settlement due on 28 June 2018. The applicants and the purchasers are related corporate entities.

There was no dispute that the applicants had an interest in the land the subject of compulsory acquisition. As they submitted, a vendor under an uncompleted contract of sale has a legal and equitable estate or interest in the land the subject of the contract. The applicants upon signing the contracts of the sale of the land had a right to the payment of the purchase price less the deposits paid (the balance of the purchase price) and a charge or lien as security for payment of the balance of the purchase price together with the right to retain possession of the land until the price was paid. There was no dispute that the contracts were binding and enforceable.

In dispute was the basis on which any compensation for that interest in land should be compensated. The applicants contended that compensation (being the difference between the balance of the purchase price of the Properties and the amount received from the RMS) was payable as disturbance under s 59(1)(f) of the Just Terms Act. The applicants submitted that they were special purpose vehicles actively managing their respective properties pursuing the maximum return from investment possible and that this was an "actual use of land" for the purposes of s 59(1)(f). Alternatively the applicants submitted that their interest in the Properties arising from their ability to seek specific performance of the contracts of sale constituted an "actual use of land". The RMS submitted that the Land and Environment Court of New South Wales (**the LEC**) has consistently held that where a person is the lessor of a property for the purposes of an investment that is insufficient to constitute an actual use of the property by that person within the meaning of s 59(1)(f).

The applicants submitted that their claims for compensation fell within ss 55(d) and 59(1)(f) of the Just Terms Act. Compensation based on the market value of the land as referred to in s 55(a) was irrelevant. The applicants submitted that s 59(1)(f) is a "catch-all provision" and should not be read down. The RMS submitted that in the context of s 59(1)(f) an exorbitant purchase price under an uncompleted contract of sale that could not be paid for could not be regarded as a financial cost or as a cost that was "reasonably incurred". The RMS contended that the applicants conducted no due diligence whatsoever on the ability of the purchasers to fund the purchase of the Properties and that the contracts of sale were not made at arm's length. The applicants submitted that it was irrelevant whether the transactions were made at arm's length. Further, they did not bear any onus to show that losses were likely to be incurred.

Issues:

- (1) Whether there was any "actual use of land" by any of the applicants that would entitle any of them to any compensation under s 59(1)(f) of the Just Terms Act; and
- (2) Whether, on the basis of the contracts of sale of the Properties, the compensation to be paid to the applicants in respect of their interests in land acquired was to be confined to calculation of compensation having regard only to matters arising under s 55(d) and s 59(1)(f) of the Just Terms Act.

Held: Both questions answered "No"; applicants' disturbance claim under s 59(1)(f) rejected; costs reserved:

- (1) The applicants' submission about use was essentially one of scale, namely that very active and engaged landlords who spend money on maintaining premises fully occupied by tenants from which a substantial income is derived are actually using land: at [39]. The applicants sought to contrast their position to a landowner who rents out residential premises and does not actively manage premises. This submission was rejected and the RMS's submission that the Properties were subject to conventional leases of small commercial premises conferring no special rights to the landlord (the applicants) such as the ability to operate their own business from the premises was accepted. The applicants did not occupy any part of the Properties or conduct their business affairs there. In relation to the applicants' alternative basis for "actual use of land". An interest in land alone such as that held by the applicants does not without more amount to actual use of land for the purposes of s 59(1)(f): at [53]; and
- (2) The applicants were required to establish that they incurred or might reasonably incur a loss: at [65], [84]. No case where compensation for the same interest in land as that of the applicants under the Just Terms Act has been considered was provided by the applicants: at [75]. Since the losses sought to be relied on had not been incurred at the time of acquisition the applicants had the onus to demonstrate that they might be incurred: at [86]. There was no evidence provided by the applicants concerning the ability of the purchasers to complete the contracts of sale: at [87]. To claim successfully \$25 million more than the market value, the applicants had to do more than assert a right of specific performance under the three contracts of sale of land: at [88]. The close connections between the applicants and the purchasers suggested it would have been possible for the applicants to provide some evidence of what was reasonable to

expect in relation to the completion of the contracts of sale. The applicants failed to discharge their onus of proof of establishing the reasonable likelihood of their losses arising as a direct and natural consequence of the acquisition: at [91].

Monti v Roads and Maritime Services (No 4) [2019] NSWLEC 11 (Pepper J)

(related decisions: *Monti v Roads and Maritime Services* [2018] NSWLEC 34; *Monti v Roads and Maritime Services (No 2)* [2018] NSWLEC 178; *Monti v Roads and Maritime Services (No 3)* [2018] NSWLEC 183)

Facts: The Roads and Maritime Services (**the RMS**) compulsorily acquired part of the land at 103 Montis Road, Bagotville (**the acquired land**) for the Ballina upgrade to the Pacific Highway (**the public purpose**). The owners, Mr Phillip Monti, Mr Allan Monti and Mr Christopher Monti (**the Montis**), challenged the Valuer General's determination of compensation pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**the Just Terms Act**). The Montis claimed compensation for:

- (a) the market value of the acquired land pursuant to [ss 55\(a\)](#) and [\(f\)](#) of the Just Terms Act (**the market value claim**). The parties adopted the "before and after" valuation method to calculate the value of the land as a quarry and the injurious affectation of carrying out the public purpose on the acquired land. The valuers adopted a discounted cash flow (**the DCF**) to value the quarry business. The only disputed values in the DCF were the volume and price of hard rock products to be sold in the first year of operation following the acquisition date (**the hard rock inputs**);
- (b) disturbance under [ss 55\(d\)](#) and [59\(1\)\(f\)](#) of the Just Terms Act for the lost profits from the acquisition of the quarry (**lost profits claim**). The parties agreed upon the other disturbance claims for legal costs, valuation fees, stamp duty costs and other financial costs under [ss 59\(1\)\(a\)-\(e\)](#) of the Just Terms Act; and
- (c) the special value of the acquired land in accordance with [s 55\(b\)](#) of the Just Terms Act (**the special value claim**). The Montis claimed that their capability to operate a quarry business without incurring labour costs was a financial advantage which had a monetary value in addition to the market value of the acquired land.

Issues:

- (1) What were the appropriate hard rock inputs (volume and price) necessary to calculate the market value claim;
- (2) Whether the Montis could make a disturbance claim for lost profits; and
- (3) Whether the Montis were entitled to a claim for special value.

Held: The Montis were entitled to \$2,192,080 in compensation under the Just Terms Act:

- (1) The hard rock inputs were calculated at volumes lower than those asserted by the Montis in order to reflect the historical production records; a lack of documented customer requests; the price of the three different hard rock products; the absence of bulk sampling and product testing; and an absence of shortfall in supply to meet expected market demand: at [94]-[101];
- (2) The lost profits claim was not maintainable in light of the recent decisions of the Court of Appeal in *Melino v Roads and Maritime Services* [2018] NSWCA 251 and *Moloney v Roads and Maritime Services* [2018] NSWCA 252: at [120];
- (3) The Montis could not make a special value claim for operating the quarry without incurring any labour costs: at [154]. There was no "free labour" being provided by the Montis because the Montis were being remunerated by additional drawings from the partnership: at [154];
- (4) The business partnership was not an inherent characteristic of the acquired land which could be exploited to increase the land's potential: at [155]. The highest and best use of the acquired land assumed that the hypothetical purchaser would incur external labour costs in operating the quarry: at [155]-[156]. However, the hypothetical purchaser would be unlikely to pay an amount in addition to market value for the Montis' lost or forgone wages in operating the quarry: at [156]. The business partnership was a product of a legal structure, rather than an incident of the Montis' use of the land: at [157].

• **Criminal:**

Chief Executive, Office of Environment and Heritage v Clarence Valley Council
[2018] NSWLEC 205 (Preston CJ)

Facts: Clarence Valley Council (**the council**) pleaded guilty to an offence under [s 86\(1\)](#) of the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**the NPW Act**) for harming an Aboriginal object that it knew was an Aboriginal object. The offence concerned an Aboriginal scar tree of significant cultural importance. The tree was registered as a culturally modified tree on the Aboriginal Site Register in 1995 and later transferred to the Aboriginal Heritage Information Management System maintained by the Office of Environment and Heritage (**OEH**).

In an incident in 2013, the council had lopped the crown of the tree and was issued with, and paid, a penalty notice under s 86(2) of the NPW Act. On 19 May 2016 the council completely removed the scar tree, cutting it into four pieces. The following day, the council realised it had harmed an Aboriginal object in breach of s 86(1) of the NPW Act and self-reported to the OEH.

During the sentencing hearing, the council agreed to participate in a restorative justice conference with representatives of the Aboriginal communities harmed by the removal of the scar tree. The conference provided a forum for discussion between the parties and involved personal apologies being made by senior Council members. In an agreement reached by the participants certain actions were proposed, including: a recommendation that any financial penalty for the offence be paid to Grafton Ngerrie Local Aboriginal Land Council (**the GNLALC**), the council implement cultural skills training for relevant staff, develop effective strategies to engage with, promote and support Aboriginal people in Clarence Valley and consider how to commemorate and preserve the scar tree and removal site. A report outlining the terms of agreement reached at the restorative justice conference was provided to the court.

Issue: What was the appropriate sentence for the offence against s 86(1) of the NPW Act.

Held: The defendant convicted of the offence as charged; ordered to pay \$300,000 to GNLALC; ordered to publicise offences; ordered to notify each of the Local Aboriginal Land Councils in its local government area and the Clarence Valley Aboriginal Advisory Committee of the offence and orders made; ordered that all future references to the council's payment to GNLALC include a statement explaining that the payment was part of a penalty for being convicted of the offence; ordered to establish and conduct cultural skills development workshops for relevant field and senior management staff; ordered to pay the prosecutor's costs of \$48,000:

- (1) The restorative justice conference was not a substitute for the Court's sentence however the facts and results of the conference could be taken into account in the sentencing process: at [23];
- (2) The offence was of medium objective seriousness: at [75]:
 - (a) the council's commission of the offence undermined and hindered the objects of the NPW Act, including the principles of ecologically sustainable development by creating inter-generational inequity: at [34]-[35];
 - (b) the amendments to the NPW Act in 2010 increasing the maximum penalty for a breach of s 86(1) from \$22,000 to \$1,100,000 reflected the increased seriousness with which the offence was viewed: at [38]-[39];
 - (c) the scar tree was highly significant to members of the Aboriginal community and the removal of the tree caused serious emotional harm: at [43], [48]; the substantial harm caused by the offence was an aggravating factor under [s 21A\(2\)\(g\)](#) of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) (**the Sentencing Act**): at [55];
 - (d) the council knew, from previously harming the scar tree in 2013, of the risk and likely consequences of harming the tree: at [59]; the council could have reasonably foreseen the harm and this increased the objective seriousness of the offence: at [56];
 - (e) the council failed to implement available practical measures following the 2013 incident to prevent further harm to Aboriginal objects and in particular the scar tree: at [62]; the council's "substantial and systematic failure" to take practical measures to prevent, control, abate or mitigate the harm increased the objective seriousness of the offence: at [60], [64];
 - (f) the council had complete control over the causes of the offence: at [66];

- (g) the council did not commit the offence for commercial gain: at [67];
 - (h) although the offence was a strict liability offence, the reckless indifference of the council to whether it caused harm to an Aboriginal object increased the objective seriousness of the offence: at [68]; the council committed the offence recklessly: at [70], [74];
- (3) The relevant subjective circumstances of the offender included:
- (a) the council had no prior convictions: at [76]; the lack of a record of prior convictions was a mitigating factor under [s 21A\(3\)\(e\)](#) of the Sentencing Act: at [76];
 - (b) the council pleaded guilty at the earliest opportunity and therefore attracted the maximum discount of 25% for the utilitarian value of the early guilty plea pursuant to [ss 21A\(3\)\(k\)](#) and [22\(1\)](#) of the Sentencing Act: at [78];
 - (c) the council had accepted responsibility for its actions, acknowledged the harm caused, publicly apologised for the commission of the offence and readily participated in the restorative justice conference: at [80]-[85]; the council had shown genuine remorse for the offence which was a mitigating factor under [s 21A\(3\)\(i\)](#) of the Sentencing Act: at [86]; and
- (4) The purposes of sentencing relevant to the offence included the retributive purposes of holding the council accountable, ensuring the council was adequately punished and denouncing its conduct: at [91]; the preventative purposes of individual and general deterrence: at [97]; the reparative and restorative purposes of recognising and repairing the harm caused: at [103].

Chief Executive, Office of Environment and Heritage v Douglas Brian Reitano [\[2018\] NSWLEC 198](#) (Robson J)

Facts: Douglas Brian Reitano (the defendant) pleaded not guilty to two offences under [s 156A\(1\)\(b\)](#) of the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**the NPW Act**) for damaging vegetation in land reserved under the NPW Act. The first charge alleged that he used a chainsaw to cut down River Red Gum trees in the Murrumbidgee Valley National Park. The second charge alleged that he removed River Red Gum from the Park. Both offences were allegedly committed on or about 7 September 2016. Section 156A of the NPW Act relevantly provided, “(1) A person must not, on or in land reserved under this Act or acquired under Pt 11: ...; (b) damage or remove any vegetation, rock, soil, sand, stone or similar substance.”

On 6 September 2016, the NSW National Parks and Wildlife Service (**the NPWS**) installed cameras in the McCaugheys Lagoon precinct (**the precinct**) in the Park. On 7 September 2016, three officers employed by the prosecutor carried out a surveillance operation to monitor the defendant.

In the morning, two officers saw the defendant’s vehicle and trailer enter the park. Approximately one hour later, a camera captured images of the vehicle and trailer carrying River Red Gum timber. The officers saw the fully loaded vehicle and trailer leave the park. In the afternoon, officers saw the vehicle and trailer, now empty, drive within the park again. Camera footage also captured this scene. Two officers claimed they heard the sounds of a chainsaw coming from where they saw the vehicle and trailer parked in the precinct, but no photographs were taken of the defendant at this time.

The officers said that they then saw the vehicle and trailer leave the park fully loaded with freshly cut River Red Gum timber. Upon sighting the NPWS vehicle, the defendant’s vehicle reversed and changed direction, leaving the park via a different route to the one it used to enter.

When interviewed, the defendant admitted to being in the park that morning in the vehicle, to travelling through and exiting the park with the vehicle and trailer loaded with timber, and to having sold timber for firewood in the past. The defendant alleged that he cut the timber on the grounds of Yanco Agricultural High School (**the high school**), which he travelled to through the park rather than via a public road.

On 7 September 2016, the park grounds were flooded due to rainfall in recent days. The prosecutor alleged that the boundary between the high school and the park was flooded to a depth of approximately 45 centimetres.

As no witness gave evidence that they saw the defendant cut down trees in the park, the Court was asked to draw inferences from the evidence and the prosecution case was therefore a circumstantial one.

Issues:

- (1) Whether the defendant's timber-cutting activities occurred on the grounds of the high school or at the precinct in the park; and
- (2) Whether the defendant cut down River Red Gum or only cut up River Red Gum which were already lying on the ground.

Held: Defendant found guilty of both charges:

- (1) The evidence was of a kind described in *Shepherd v The Queen* [1990] HCA 56 as "strands in a cable" rather than "links in a chain" from which the Court was asked to infer further facts: at [75], [78];
- (2) The Court considered, for example:
 - (a) that on or about 7 September 2016, someone cut down and cut up River Red Gums in the precinct. Video and photographic evidence taken on 8 September 2016 of the trees that were cut indicate that they could not have been cut more than a few days prior: at [82];
 - (b) that the defendant was in the park on 7 September 2016: at [82];
 - (c) that the defendant cut up and took timber without permission either from the park or the high school on 7 September 2016: at [82];
 - (d) that a chainsaw was heard by the officers (the distance from them being in dispute): at [83];
 - (e) that the defendant's vehicle left the park using a different route: at [83]; and
 - (f) that there was no evidence of freshly cut timber in the high school: at [83];
- (3) Aside from the NPWS vehicle and the defendant's vehicle, no other vehicles were captured by the cameras in the precinct. Although the camera technology was not fool proof, it was unlikely that another vehicle gained access to the Precinct without being captured by any of the cameras: at [87]-[88];
- (4) Due to the flooding, it would have been impractical for the defendant to go westward from the area of the stumps, in the direction of the high school, to cut timber: at [93];
- (5) The fact that the officers did not photograph the defendant's vehicle in the afternoon was not considered to be determinative that the vehicle was not present in the precinct. Rather, it was accepted as a credible alternative explanation that the relevant officer wished to remain hidden, to possibly observe a larger commercial enterprise: at [95]; and
- (6) The defendant did not present a rational hypothesis consistent with his innocence; namely, that he obtained timber from the high school rather than from the park. Accordingly, whilst the prosecution case was circumstantial, the evidence against the defendant was overwhelming: at [105]-[106].

***Ku-ring-gai Council v John David Chia (No 15)* [2019] NSWLEC 1** (Robson J)

(related decisions: *Ku-ring-gai Council v Chia* [2018] NSWLEC 40 (Molesworth AJ); *Ku-ring-gai Council v John David Chia (No 2)* [2018] NSWLEC 44 (Robson J); *Ku-ring-gai Council v John David Chia (No 3)* [2018] NSWLEC 61 (Robson J); *Ku-ring-gai Council v John David Chia (No 4)* [2018] NSWLEC 75 (Robson J); *Ku-ring-gai Council v John David Chia (No 5)* [2018] NSWLEC 167 (Robson J); *Ku-ring-gai Council v John David Chia (No 6)* [2018] NSWLEC 168 (Robson J); *Ku-ring-gai Council v John David Chia (No 7)* [2018] NSWLEC 169 (Robson J); *Ku-ring-gai Council v John David Chia (No 8)* [2018] NSWLEC 170 (Robson J); *Ku-ring-gai Council v John David Chia (No 9)* [2018] NSWLEC 171 (Robson J); *Ku-ring-gai Council v John David Chia (No 10)* [2018] NSWLEC 176 (Robson J); *Ku-ring-gai Council v John David Chia (No 11)* [2018] NSWLEC 177 (Robson J); *Ku-ring-gai Council v John David Chia (No 12)* [2018] NSWLEC 184 (Robson J); *Ku-ring-gai Council v John David Chia (No 13)* [2018] NSWLEC 185 (Robson J); *Ku-ring-gai Council v John David Chia (No 14)* [2018] NSWLEC 186 (Robson J))

Facts: John David Chia (**the defendant**) was charged with an offence against [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) for the alleged unlawful cutting down and removal of 74 trees protected by the Ku-ring-gai Council Tree Preservation Order (**the TPO**).

Ku-ring-gai Council (**the prosecutor**) alleged that the defendant, between 6 October and 21 October 2014, directed contractors, including Mr Edgar and Mr McKenzie, to cut down 74 trees on land which included the defendant's property, a Crown reserve adjacent to his property, and Roseville Golf Club (collectively, the site) in breach of the TPO.

On 16 October 2014, Ms Miller, an officer of the prosecutor, hand delivered a "stop work" letter to the defendant's Killara property.

On 21 October 2014, Ms Miller and other officers from the prosecutor attended the site. Ms Miller interviewed Mr Edgar and took Mr McKenzie's licence details. On the same day, the defendant called Mr Robertson, general manager of Roseville Golf Club, seeking the golf club's permission to carry out clearing on land owned by Roseville Golf Club and to the rear of the defendant's property.

Mr Myles was a private investigator who was retained by the prosecutor to investigate the offence in question. In July 2016, during the course of his investigations, Mr Myles put the same aerial photograph of the site, with markings in relation to the extent of clearing undertaken made earlier by Mr Edgar to two further witnesses.

The defendant pleaded not guilty to the charge.

A charge was also brought against Mr Edgar for his involvement in the same incident. Mr Edgar pleaded guilty to the charge and was sentenced on 1 May 2017: *Ku-ring-gai Council v Edgar* [\[2017\] NSWLEC 49](#).

Issues:

- (1) Whether the defendant gave directions to the contractors to cut down the trees and was, therefore, vicariously liable for the commission of the offence;
- (2) Whether the tree clearing works with which the defendant was charged fell within the 10/50 Vegetation Clearing Code of Practice for New South Wales (**the 10/50 Code**); and
- (3) Whether the TPO provided for the offence with which the defendant was charged.

Held: Defendant found guilty of the charge. Matter stood over to a date to be fixed for submissions on penalty:

- (1) The 10/50 Code did not apply to any of the 74 trees as none of them were within 10m of an external wall of a building containing habitable rooms and the majority were on land not owned by the defendant and were felled in the absence of owners' consent: at [31];
- (2) It was not accepted that the only relevant criminal conduct in relation to the TPO was the physical carrying out of prohibited tree works. That conclusion would be contrary to established law in relation to vicarious liability and the common law position in relation to accessorial liability: at [51];
- (3) The Court gave itself certain warnings and directions including:
 - (a) a direction in respect of the defendant's good character: at [254];
 - (b) a warning that the evidence of Mr Edgar was of the kind that may be unreliable because he was a witness who might reasonably be supposed to have been (and indeed was) criminally concerned in the events which gave rise to the proceedings: at [281]; and
 - (c) a direction regarding the defendant not giving evidence: at [298];
- (4) While the Court accepted that the use of the same copy of the aerial photograph by Mr Myles was less than ideal, it was understandable given that Mr Myles did not have a clean copy of the photograph with him at the time and he did not expect to interview Mr Edgar, Mr Draeger and Mr McKenzie that day: at [362];
- (5) If the Court was satisfied beyond reasonable doubt that the defendant instructed the contractors to carry out the work which constituted the offence such that he was vicariously liable, the defendant could not rely upon the expertise of the contractors: at [448];
- (6) The defendant had a motive to carry out the clearing the subject of the charge. He was, on his own account, concerned about the risk of fire at his property and there was also evidence that he was considering carrying out building work: at [453];
- (7) In contradistinction to the motive of the defendant, it was difficult to see what motive the contractors could have had for clearing the site independently: at [454];
- (8) The Court had regard to the apparent logic of events that transpired at the site and found that it was not plausible that the contractors would have cleared such a large area without instructions and with no apparent motive to do so: at [519];

- (9) The phone records which indicated communication between Mr McKenzie and the defendant not only supported Mr McKenzie's account of events but were indicative of the defendant taking a continuing interest in the work that was being carried out at the site, consistent with him having directed the clearing work to be carried out: at [523];
- (10) The Court found that the prosecutor had discharged its onus. The defendant directed Mr Edgar, Mr McKenzie and the other contractors to carry out the work which comprised the offence such that he was vicariously liable for the commission of the offence: at [528]; and
- (11) The Court was also satisfied beyond reasonable doubt that the trees the subject of the charge were protected by the TPO, that the TPO was validly made, that no exception applied in relation to the trees that were felled, and that no consent was issued in relation to the trees' removal: at [528].

Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 2) [\[2018\] NSWLEC 125](#) (Pepper J)

(related decision: *Department of Planning and Environment v Leda Manorstead Pty Ltd* [\[2018\] NSWLEC 114](#) (Pain J))

Facts: Leda Manorstead Pty Ltd (**the defendant**) objected to a paragraph of an affidavit which attached documents containing admissions made by the defendant, because the defendant had earlier sought to withdraw the admissions. On 19 April 2017 the defendant's solicitors sent a letter to the Department of Planning and Environment (**the prosecutor**), which included admissions made pursuant to legal advice regarding condition 21A(b) of the defendant's project approval. On 22 June 2017, the prosecutor commenced Class 5 proceeding against the defendant for breaching condition 21A(b) of the project approval. On 15 November 2018, the defendant's solicitors sent a further letter to the prosecutor seeking to withdraw the admissions. The prosecutor declined the request.

Issues: Whether the Court should exercise its discretion under [ss 90](#), [135](#) and [137](#) of the [Evidence Act 1995 \(NSW\)](#) to exclude the evidence containing the admissions.

Held: The evidence was admissible and ought not be excluded:

- (1) The defendant had made the statements voluntarily upon receiving legal advice: at [14]. It was immaterial that the defendant had made the admissions prior to being charged: at [16]. The defendant provided no evidence to establish that the letter containing the admissions was sent on a "without prejudice basis": at [17]. The admissions were not improperly obtained or unreliable: at [17]-[18]; and
- (2) The parties did not dispute the probative value of the evidence: at [20]. The evidence was not unfairly prejudicial because the admissions were made voluntarily and without any promise from the Department that charges would not be brought: at [22]. The defendant's admissions related to a breach of condition 21A which was the subject of two of the three contested charges: at [22]. The admissions did not diminish the prosecutor's burden of proof to establish the elements of the offences beyond reasonable doubt: at [22]. If admitted, the admissions did not result in any procedural unfairness or restriction on the defendant's ability to cross-examine any witness: at [23]. The probative value of the evidence was therefore not outweighed by any danger of prejudice to the defendant if the admissions were allowed into evidence: at [24].

• **Contempt:**

Blacktown City Council v Everson [\[2019\] NSWLEC 4](#) (Molesworth AJ)

Facts: Blacktown City Council (**the council**) brought civil enforcement proceedings against Mr Everson (**the respondent**) for using his land in Lethbridge Park (**the premises**) as a site for an accumulation of scrap material and waste, a prohibited use under the [Blacktown Local Environment Plan 2015](#) (**the BLEP 2015**).

The parties agreed to consent orders on 9 December 2016 (**the consent orders**). The respondent agreed to remove all scrap material and goods collected, stored and abandoned on the premises. The respondent was self-represented during those proceedings.

Due to the respondent's lack of compliance with the consent orders, the council commenced contempt proceedings against him on 26 July 2017.

When the matter was before the Court on 10 October 2017, Molesworth AJ formed the view that the respondent should not proceed self-represented and pro bono representation was obtained for the respondent.

Further consent orders were made on 17 October 2017 for clean-up of the premises.

By 5 December 2017, when the matter came before the Court again, the agreed clean-up had not been completed to the council's satisfaction. The respondent entered a plea of guilty to the contempt charge at that time.

Issues:

- (1) Whether the respondent's contempt was wilful or contumacious;
- (2) Whether a custodial sentence or fine should be imposed; and
- (3) Whether costs should be paid on the ordinary basis or an indemnity basis.

Held: Respondent guilty of contempt by failing to comply with consent orders; respondent fined \$5,000; time for compliance with orders extended until 14 March 2019; respondent to give the council access to the premises on 15 and 18 March 2019 to carry out inspection to check compliance; if respondent did not comply with extended consent orders, fined \$2,000 per calendar month until compliance was achieved:

- (1) The respondent's contempt was contumacious. His ongoing offending was intentional and was of a commercial nature. It included four years of non-compliance with council's efforts to clean up the premises. His conduct demonstrated an arrogant disregard of the council and was uncooperative, offensive and, in one instance, threatening. The offending gave rise to serious and unacceptable amenity impacts and a health hazard in the neighbourhood of the premises: at [52];
- (2) In all the circumstances of the matter, the Court could have considered a custodial sentence was warranted. However, due to the defendant being 75, evidence the respondent had suffered a minor stroke, amongst other illnesses, and was a disability pensioner before now being an aged pensioner, a custodial sentence inappropriate: at [53];
- (3) In the context of the status of the respondent, \$5,000 was a substantial fine, even though this was not objectively true and an appropriate amount for the charge. Imposition of additional fines of \$2,000 per month appropriate to secure compliance: at [71], [73]; and
- (4) It was appropriate for the council to be compensated for bringing proceedings by being awarded its costs on an indemnity basis. This was because the respondent had pursued a deceitful course in his defence, misleading the Court as well as misleading his pro bono counsel: at [82].

Snowy Monaro Regional Council v Cmunt (No 3) [\[2018\] NSWLEC 175](#) (Pepper J)

(related decisions: *Snowy Monaro Regional Council v Cmunt* [\[2017\] NSWLEC 95](#) (Preston J); *Snowy Monaro Regional Council v Cmunt (No 2)* [\[2018\] NSWLEC 136](#) (Sheahan J); *Cmunt v Vescio*; *Broder* [\[2018\] NSWCA 21](#) (Beazley P); *Cmunt v Snowy Monaro Regional Council* [\[2018\] NSWCA 237](#) (Basten, Leeming JJA, Emmett AJA))

Facts: The respondents, Mrs Marie Cmunt and Mr Jiri Cmunt (**the Cmunts**), sought by Notice of Motion to stay all lower court proceedings and orders made by Sheahan J in contempt proceedings, where his Honour had found that the Cmunts had failed to comply with an order made by Preston CJ to cease keeping dogs at certain premises.

The Cmunts filed Notices of Intention to Appeal against the decision of Sheahan J in the contempt proceedings.

Issue: Whether the orders in the contempt proceedings and all lower court proceedings should be stayed pending an appeal against the decision of Sheahan J.

Held: The application for a stay was refused with costs:

- (1) In all previous decisions, the courts had rejected the Cmunts' claim that they did not own dogs: at [24];

- (2) The Cmunts had not demonstrated any prejudice if the stay was not granted: at [25] and [34]. The Cmunts would not incur any ongoing penalties if they complied with the orders: at [25]. If the appeal was successful, the council would refund any fines paid: at [25];
- (3) The Court weighed the lack of prejudice to the Cmunts against the ongoing disturbance and the loss of amenity being suffered by nearby residents as a result of the dogs located on the premises: at [27]. The Council had demonstrated that the disturbance was continuing: at [27];
- (4) The Cmunts had not provided any recent medical evidence to support their claim of poor health: at [28] and [34];
- (5) The Cmunts had not adduced any evidence in support of their claim of impecuniosity: at [29] and [34]; and
- (6) There was no basis for the Court to waive the costs of the motion: at [35].

• **Civil Enforcement:**

Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd (No 2) [\[2018\] NSWLEC 153](#) (Molesworth AJ)

(related decision: ***Dungog Shire Council v Hunter Industrial Rental Equipment Pty Ltd*** [\[2016\] NSWLEC 164](#) (Sheahan J))

Facts: These proceedings brought by Dungog Shire Council (**Council**) concern the Martins Creek Quarry (**Quarry**), in Martins Creek, near the town of Paterson. The Quarry comprises four lots, being: Lot 5 and Lot 6 in DP 242210 (together, the **western lands**); and Lot 1 in DP 1006375; and Lot 1 in DP 204377 (together, the **eastern lands**). The first respondent, Hunter Industrial Rental Equipment Pty Ltd (**HIRE**) is the lessee of both the western and eastern lands, and the second respondent, Buttai Gravel Pty Ltd (**Buttai**) subleases those lands from the first respondent and manages the day-to-day operation of the Quarry.

Quarrying activities on the eastern lands commenced in around 1914, and expanded between 1952 and 1975. By the end of 1993, extraction activities on most of the eastern lands ceased but it is contested whether all allegedly extraction-related activities ceased (such as rehabilitation, stockpiling and various ancillary uses).

On 17 September 1999, the then operator of the Quarry, Rail Services Australia, was notified that the council had granted development consent for the “erection and operation of fixed tertiary crushing equipment” on part of the eastern lands.

With respect to the western lands, on 8 August 1990 the then operator of the Quarry, the State Rail Authority of New South Wales, lodged a development application with the council (**the 1990 DA**) - which described the proposed development as “quarry for railway balast [sic]” and the location of the proposed development as “Lot No. 5 + 6” of “D.P. 232210 [sic]” (with an area of 10 hectares.) - and copies of an accompanying environmental impact statement dated July 1990 (**the 1990 EIS**).

Consent was given by the council in relation to the 1990 DA in 1991 (**1991 Consent**). The precise date on which the 1991 Consent was granted was at issue in the proceedings.

Quarrying has been carried out on the western lands since the granting of the 1991 Consent, to the present day. Processing of quarry product extracted from the western lands has been conducted on the eastern lands since the commencement of the quarrying on the western lands.

The Council alleged that HIRE and Buttai are operating “a very large scale designated development at the [Quarry] without that development having been the subject of any proper environmental assessment and that the development is being carried out unlawfully, in the absence of the requisite approvals under the [Environmental Planning and Assessment Act 1979](#)” (**the EP&A Act**).

In addition, Buttai holds an environment protection licence under the [Protection of the Environment Operations Act 1991 \(NSW\)](#) (**the POEO Act**), EPL 1378, for the scheduled activities of “crushing, grinding or separating works” and “extractive industries” at the Quarry. The Council argued that a purported variation of EPL 1378 dated 2 April 2007, to significantly increase the scale of the fee-based activity of “hard-rock gravel quarrying”, was invalid.

Issues:

- (1) Whether or not the 1990 DA and 1990 EIS should be taken to be incorporated into the 1991 Consent.
- (2) Whether or not HIRE and Buttai are carrying out extractive operations on Lot 6 (and part of Lot 5) without the requisite development consent and, therefore, unlawfully.
- (3) Whether or not HIRE and Buttai are unlawfully carrying out the unapproved extractive industry development on Lots 5 and 6 of a quarry winning material primarily for the manufacture of concrete, asphalt and spray seal aggregates and road and pavement construction materials (rather than a quarry winning material primarily for railway ballast).
- (4) Whether or not conditions of the 1991 Consent were validly imposed and, if so, what are those conditions and, if not, what are the consequences.
- (5) Whether or not HIRE and Buttai are contravening conditions 1 (relating to neighbourhood amenity) and 6 (relating to product transportation) of the 1991 Consent.
- (6) Whether or not HIRE and Buttai are contravening condition 7 of the 1991 Consent (relating to environmental monitoring/environmental safeguards).
- (7) Whether or not HIRE and Buttai - in using a manufactured sand processing plant and associated facilities and two mobile processing plants - are carrying out unlawful processing on the western lands.
- (8) Whether or not the current use of the eastern lands is a lawful continuing use under [s 109](#) (now [s 4.68](#)) of the EP&A Act and, hence, whether or not HIRE and Buttai are unlawfully processing materials and manufacturing products on the eastern lands.
- (9) Whether or not HIRE can be liable for the carrying out of development on the eastern lands and western lands unlawfully in circumstances where it has allegedly not carried out any of the relevant development on the eastern lands and western lands.
- (10) Whether or not the variation of EPL 1378 was invalid and of no effect.
- (11) Whether or not, if the council was to be successful, the Court should exercise its discretion under [s 124](#) (now [s 9.46](#)) of the EP&A Act to decline to grant the council the relief that it seeks.

Held: Twelve declarations were made having the effect of defining the various activities being undertaken by the respondents that did not have either development consent or a valid environment protection licence for those activities; orders restraining the various activities with respect to which the declarations were made; orders stayed for three months to permit further progression of State Significant Development application to regularise the respondents' activities; respondents to pay the council's costs:

- (1) There was uncertainty or ambiguity on the face of the 1991 Consent and therefore the 1990 DA and 1990 EIS were taken to be incorporated, by necessary implication, to the extent of the uncertainty or ambiguity: at [108]-[137];
- (2) The stone extraction component of the quarry proposal as approved by the 1991 Consent was limited to a designated area within Lot 5 and was never to expand into Lot 6. Therefore, the extraction of stone beyond the specified area on Lot 5 and from Lot 6 constituted a breach of the 1991 Consent and [s 4.2\(1\)\(a\)](#) of the EP&A Act: at [155]-[170]
- (3) The 1991 Consent was granted for a "quarry for railway ballast" and not for the broader category of "extractive industry". The Court held that it was appropriate to characterise the approved use at this level of particularity because, amongst other things, of the differing "external" impacts between a railway ballast quarry (having a lower off-site impact due to the method of transporting product to its end destination - by rail rather than road) and a general "extractive industry". The elements of a railway ballast quarry as distinct from a generic quarry are:
 - (i) production of crushed rock of a particular range of grades for railway usage;
 - (ii) utilisation of railway rolling stock for transporting the rock;
 - (iii) loading from a railway siding purpose-built within or adjoining the ballast quarry;
 - (iv) a railway freight car carries the ballast to its end location; and
 - (v) contained amenity and environmental impact.

With respect to the Quarry, the Court found that its operations have transformed and are no longer a railway ballast quarry and that this transformation from railway ballast quarry to general

quarry did not have planning approval and therefore contravene s 4.2(1)(a) of the EP&A Act: at [189]-[208];

- (4) The Council did not issue a condition-less approval, rather, the 1991 Consent was subject to validly imposed conditions. These conditions were imposed following the approval of those conditions by the development applicant, a government authority (as required by the then [s 91A](#) of the EP&A Act): at [254]-[271];
- (5) Condition 1 of the 1991 Consent prohibited the approved development from being conducted in a manner interfering with the “amenity of the neighbourhood”. The concept of “neighbourhood” will vary from case to case, on the facts relating to any given development, and that in these circumstances, “neighbourhood” included the town of Paterson (through which the product of the Quarry was being transported by trucks). The amenity of a neighbourhood is its pleasantness or agreeableness, and impact thereon must be taken from a relevant baseline. The Quarry had an impact on the amenity of the neighbourhood (through truck movements and associated noise, dust and vibration), and that condition 1 of the 1991 Consent had therefore been breached: at [313]-[351];
- (6) Condition 6 of the 1991 Consent prohibited the transportation of product from the Quarry of “greatly more than 30%” by road. The product from land dealt with by an approval does not cease to be the product of that land by being transported via, or processed on, another parcel of land close by and part of the operation. Significantly more than 30% (on the Court’s assessment, 97.5%) of quarry product was being transported by road and that therefore, Condition 6 of the 1991 Consent had been breached: at [352]-[378];
- (7) Condition 7 required the development to be carried out in accordance with all environmental safeguards proposed for the development. Due to ambiguity and therefore uncertainty as to these “environmental safeguards” in the 1991 Consent, an explanation of the environmental safeguards proposed for the development was found in the 1990 DA and 1990 EIS, which parts were therefore incorporated by necessarily implication into the 1991 Consent. Many such safeguards had not been complied with, and that therefore condition 7 to the 1991 Consent had been breached: at [422]-[448];
- (8) Whether the processing occurring on Lot 5 was unlawful was held to turn on whether it was an ancillary use to a lawful dominant purpose. The processing was an ancillary (rather than stand-alone) use, but that as the dominant use (being the development at the Quarry) was no longer being conducted lawfully, the ancillary processing was similarly being conducted unlawfully: at [452]-[474];
- (9) The lawfulness of the use of the eastern lands for processing of materials and manufacturing of products was held to turn on whether there were continuing use rights. The characterisation of any continuing use rights ought to be at the “species” level of railway ballast quarry, rather than “genus” level of extractive industry due to the differing impacts on the neighbourhood (see (3) above). In a railway ballast quarry, the current use on the eastern lands, processing of stone, would have been ancillary to the dominant use being the extraction of stone, however given that the extraction of stone on the eastern lands ceased in 1993 (and the current extraction of stone on the western lands being held to be unlawful), the ancillary processing use could no longer be considered part of the protected “existing use”. The use of the eastern lands has transformed from a railway ballast quarry into a stand-alone industrial operation, for which there is no development consent: at [602]-[681];
- (10) The residual rehabilitation obligations on the eastern lands do not support the recommencement of a use now requiring development consent: at [682]-[687];
- (11) HIRE and Buttai share a close operational nexus in the operation of the impugned development and therefore HIRE is a proper party to the proceedings: at [701]-[712];
- (12) The elements of [s 58\(6\)](#) of the POEO Act were held to be jurisdictional facts, and the EPA was therefore obliged, prior to the variation of EPL 1378, to invite and consider public submissions. The EPA’s failure to do so meant that it had no jurisdiction and the variation was invalid: at [768]-[804];
- (13) Further, the variation of EPL 1378 was granted in relation to an activity that did not have the requisite development consent, and therefore that the variation was granted in contravention of [s 50\(2\)](#) of the POEO Act: at [805]-[812];

- (14) Given the State Significant Development application currently being assessed, there was utility in making the declarations sought, to assist in the assessment of that application: at [852]-[855]; and
- (15) The orders sought, restraining HIRE and Buttai from conducting the operations held to be unlawful, were stayed for three months: at [879]-[891].

Raphael Glaser v Silvana Slaveva Smithwick [\[2018\] NSWLEC 206](#) (Robson J)

Facts: Raphael Glaser (**the applicant**) brought Class 4 proceedings against Silvana Slaveva Smithwick (**the respondent**) in relation to a timber fence constructed on or near a boundary between the properties owned by the parties. Both lots and fence were on the beachfront of Pearl Beach.

The applicant alleged that the fence was built without development consent, in contravention of a restrictive covenant which applied to both lots, and that the fence had significant effects on the views enjoyed from his property.

[Clause 2.33\(d\)](#) in [Pt 2 subdiv 17](#) of [the State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) (**the Codes SEPP**) provided that the installation of a fence is development specified for the code, and therefore does not require development consent, if it is not constructed or installed on land identified as being in a foreshore area.

[Clause 1.5](#) of the Codes SEPP defined the following terms:

foreshore area means the land between a foreshore building line and the mean high water mark of an adjacent waterbody (natural).

foreshore building line means the foreshore building line identified by:

- (a) a development control plan adopted before 12 December 2008, or
- (b) an environmental planning instrument.

The applicant submitted that the fence was not exempt development as it was in a foreshore area, relying upon a foreshore building line identified in the Gosford Development Control Plan No. 125 - Coastal Frontage (**the DCP 125**), which it alleged was a “development control plan adopted before 12 December 2008” that had since been repealed.

The applicant also submitted that the foreshore building line was adopted pursuant to the Gosford Planning Scheme Ordinance and was thereby made under an environmental planning instrument (**EPI**), albeit one that had since been repealed.

Issue: Whether the fence was exempt development pursuant to the Codes SEPP.

Held: Summons dismissed and applicant to pay the respondent’s costs unless an alternative costs order sought within 28 days:

- (1) [Clause 1.20](#) of the Codes SEPP removed any impediment on development which the restrictive covenant may otherwise have provided. The restrictive covenant was therefore not relevant in this case: at [14], [17];
- (2) The fact that the Gosford Planning Scheme Ordinance had been repealed was determinative and it could not assist the applicant in these proceedings: at [47];
 - (a) The definition of EPI contained in [s 1.4](#) of the [Environmental Planning & Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) which provided that an EPI must be “in force” applied to the definition in the Codes SEPP absent any contrary intention: at [48];
 - (b) Adopting the applicant’s submission would mean that the creation of a foreshore building line would continue to be picked up by cl 2.33 of the Codes SEPP even once the EPI in which it was identified was repealed and replaced by another EPI which introduced a new foreshore building line: at [49];
 - (c) The aim of providing a State-wide code would be hindered by allowing all EPIs, including repealed ones, to apply to the application of the Codes SEPP: at [50]; and
 - (d) While the reference to an EPI in the definition of “foreshore building line” referred to EPIs in the plural sense, it did not follow that the definition extended to repealed EPIs: at [51];
- (3) The definition of “development control plan” provided in the EP&A Act did not apply to limb (a) of the definition of “foreshore building line” in cl 1.5 of the Codes SEPP because limb (a) did not refer to a development control plan simpliciter: at [54];

- (4) DCP 125 did not identify a foreshore building line within the meaning of the Codes SEPP. References in DCP 125 to the Broken Bay Beaches Coastal Management Plan 1999 (**the BBBCMP**) were insufficient to incorporate the BBBCMP into DCP 125. Even if the BBBCMP had been incorporated into DCP 125, it was unclear that the BBBCMP referred to a “foreshore building line”: at [58]-[59];
- (5) While the applicant did not rely on cl 9 of DCP 125 which referred to a “building/hazard line” in its submissions, having regard to the number of EPIs which used the expression “foreshore building line” as a composite phrase, a foreshore building line needed to be so identified rather than by a like description: at [64], [66]; and
- (6) The fence was exempt development. It was for Council to provide a foreshore building line and the Gosford Local Environmental Plan 2014 did not contain one: at [70].

• **Valuation/Rating:**

Wild Oaks Properties Pty Ltd v Valuer General [\[2018\] NSWLEC 192](#) (Sheahan J)

Facts: In this valuation appeal, Wild Oaks Properties Pty Ltd (**the company**) sought an order that the subject rural lands, comprised of three lots of land (Lots 101 and 102 of DP1122102 and Lot 2 of DP1171468) should be valued separately as two distinct “parcels”. It was argued that Lots 101 and 102 should form one parcel of land, while Lot 2 should form a separate parcel. The lands were used for the breeding and training of racehorses: two “streams” of distinct uses. Lot 2 was used for spelling and conditioning racehorses, whereas Lots 101-102 were used for breeding thoroughbreds. The company argued that these distinct uses provided a basis for separate valuation as two parcels. The Valuer-General (the respondent) argued that the lands did not meet the criteria in [s 27\(2\)](#) of the [Valuation of Land Act 1916 \(NSW\)](#) (**the Valuation Act**) to enable them to be separately valued. The company relied instead upon s 28A of the Valuation Act, which provides for separate valuation of land of which part only is rateable or taxable.

Issue: Should the subject lands be valued separately as two parcels of land.

Held: Appeal dismissed:

- (1) The company bore the onus of bringing itself within either arm of s 27 of the Valuation Act, but failed to satisfy it: at [51];
- (2) The respondent’s arguments, and explanations regarding the intent and application of the statutory provisions, were to be preferred: at [52]; and
- (3) The lands are worked together as one farm, or a “one-stop shop”: at [53].

• **Separate Question:**

Bella Ikea Ryde Pty Ltd v City of Ryde Council (No 2) [\[2018\] NSWLEC 204](#) (Sheahan J)

(related decision: *Bella Ikea Ryde Pty Ltd v City of Ryde Council* [\[2018\] NSWLEC 142](#) (Robson J))

Facts: In this class 1 appeal, two preliminary questions were set down for separate determination. The substantive proceedings involve an appeal from Bella Ikea Pty Ltd (the applicant) against the City of Ryde Council’s deemed refusal of a development application. The development application proposed the demolition of six existing dwellings on a site located at Ryde, and the subsequent erection of 33 new multi-dwelling buildings on the same site. The two separate questions concerned the construction and interpretation of provisions of the [State Environmental Planning Policy \(Affordable Rental Housing\) 2009 \(NSW\)](#) (**the ARH SEPP**).

The first separate question was to determine whether, pursuant to [cl 4\(c\)](#) of the ARH SEPP, the proposed development was within an “accessible area”, a necessary precondition for the applicability of [Pt 2, Div 1](#) of the ARH SEPP. In this matter, the key issue in satisfying this definition was whether the proposed site was within 400m of a bus stop, used by a regular bus service, which had at least one bus per hour servicing the stop between 08.00 and 18.00 on a Sunday. The evidence revealed that there were two time periods on a Sunday, which exceeded one hour by two and six minutes, in which a city-bound bus

did not service a bus stop identified as being within 400m of the site. The applicant submitted that by applying [s 8](#) of the [Interpretation Act 1987 \(NSW\)](#), regard could be had to the bus stop across the road, where a bus did service that stop during those two time periods on a Sunday. The question was therefore whether this was enough to satisfy the criteria for an “accessible area”.

The second question was whether there was an inconsistency between the ARH SEPP and the [Ryde Local Environmental Plan 2014 \(the RLEP 2014\)](#). The respondent contended that [cl 4.5A\(a\)](#) of the RLEP should prohibit the grant of development consent. The applicant contended that this provision was inconsistent with [cl 14\(1\)\(b\)](#) of the ARH SEPP, submitting that both were site area controls and were therefore “incapable of concurrent operation”. In the event of any inconsistency, the ARH SEPP prevails to the extent of the inconsistency: [cl 8](#).

Issues:

- (1) Whether the proposed development was on land located within an accessible area for the purposes of cl 10 of the ARH SEPP; and
- (2) Whether an inconsistency between cl 4.5A(a) of the RLEP 2014 and cl 14(1)(b) of the ARH SEPP existed.

Held: The answer to both separate questions was “yes”:

- (1) It was appropriate to have regards to bus stops located on both sides of the road in order to satisfy the criteria of one bus per hour servicing a stop within 400m of the site. The Court must find a practical construction which meets the goals of the ARH SEPP: at [54]. There was merit in the applicant’s alternative submissions, relying on the concept of “chronological hour” and the application of the *de minimis* principle: at [55] - [56]; and
- (2) The submissions of the applicant were preferred: at [89]. The inconsistency between the provisions of the two instruments dealing with site area is “very clear” and accordingly, cl 14 of the ARH SEPP prevails: at [90].

• **Interlocutory Decisions:**

Gaudioso v Roads and Maritime Services [\[2019\] NSWLEC 10](#) (Sheahan J)

Facts: The respondent, Roads and Maritime Services (**the RMS**), filed a Notice of Motion (**the NOM**) asking the Court to set aside two subpoenas and a Notice to Produce (**the NTP**), issued by the applicants in the course of class 3 proceedings. The substantive proceedings concern the amount of compensation to be paid for the compulsory acquisition of a site at Camperdown, acquired as part of the “WestConnex” project. The NTP was directed to the RMS, while the challenged subpoenas were issued to two other government entities, being the Department of Planning and Landcom. The applicants alleged that the zoning of the subject site was “held back” in order to carry out the public purpose, and RMS acknowledged that the underlying zoning was likely to be in dispute in the substantive hearing. Documents had already been subpoenaed, and produced, by two other entities.

In the course of the hearing on this NOM, the applicants argued that they were now seeking these additional documents to confirm the “correctness” of their case, and affirmed that the categories of documents now requested to be produced had been “narrowed” from those originally sought. RMS contended that the issuing of the disclosure documents was “premature”, because the contested issues were yet to be identified with certainty, rendering the legitimate forensic purpose of the documents unclear. RMS relied particularly on the judgment of Craig J in *Azar Building and Construction Services Pty Ltd v Transport Infrastructure Development Corporation* [\[2010\] NSWLEC 110 \(Azar\)](#) in support of this position. RMS also argued that the production of documents would be “oppressive”, citing the cost of production, and the wide scope of the documents requested.

Issues:

- (1) Should the disclosure documents issued by RMS, consisting of two subpoenas and the NTP, be set aside;
- (2) Was there any “oppressiveness” in the request for the production of the documents sought; and
- (3) Was the disclosure of documents sought by the applicants “premature”.

Held: The respondent’s NOM was dismissed:

- (1) The circumstances of this case were “very different” from those in *Azar*: at [49];

- (2) Given that the scope of the documents required to be produced had been “narrowed” by the applicant, the subpoenas and the notice to produce should be complied with: at [57]; and
- (3) The respondent’s submissions that the request for documents was “premature” or “oppressive” were rejected: at [56].

Monti v Roads and Maritime Services (No 2) [\[2018\] NSWLEC 178](#) (Pepper J)

(related decision: *Monti v Roads and Maritime Services* [\[2018\] NSWLEC 34](#) (Molesworth AJ))

Facts: The applicants, Messrs Allan Monti, Phillip Monti and Christopher Monti (**the Montis**), sought leave to file an amended points of claim after evidence had closed, but before closing submissions. The amendments added a further claim for compensation for special value. The amendments were purportedly as a result of the recently handed down Court of Appeal authority.

The respondent, the Roads and Maritime Services (**the RMS**), opposed the application. The RMS argued further expert evidence would be required which would cause delay. Neither party adduced any affidavit evidence in support of the application.

Issue: Whether the Court ought to grant leave to the Montis to amend their claim to include compensation for special value.

Held: Leave to amend granted:

- (1) If leave was not granted, the Montis would suffer prejudice by being unable to make a claim for compensation worth \$510,473: at [35]. The special value claim was arguable: at [40]. While the claim might be ultimately unsuccessful, the Court was not required to assess the final success of the Montis’ claim on the application: at [40]. The Montis should have the opportunity to plead their special value claim: at [35];
- (2) Any delay in making a special value claim was reasonable in all the circumstances: at [37]. Upon realising the “devastating” effect of the Court of Appeal decisions, the Montis made the application to amend immediately: at [36];
- (3) If leave were granted, the RMS would suffer prejudice because the proceedings would require further expert valuation evidence, an extension to the allocated hearing dates and an increase in the litigation costs of all parties: at [41]. However, an appropriate costs order could remedy most of the prejudice suffered by the RMS: at [42]; and
- (4) The Court could accommodate the delay in finalising the proceedings, by allocating further hearing dates to ensure that the case concluded prior to the end of 2018: at [43].

Verde Terra Pty Ltd v Environment Protection Authority (No 2) [\[2018\] NSWLEC 160](#) (Moore J)

Facts: Verde Terra Pty Ltd (**the Company**) applied to the Environment Protection Authority (**EPA**) to vary the Company’s Environment Protection Licence for the Company’s landfill/waste disposal facility. The EPA considered and refused the Company’s application. The Company exercised its rights pursuant to s 287(1) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**the POEO Act**) to appeal to the Court against the decision of the EPA not to vary the licence as requested. By way of Notice of Motion (**the NOM**), the Company requested the Court order the EPA go through the consultation process for their licence application. The initial substantive orders sought by the NOM were too vague and imprecise to be able to be contemplated as an outcome, and therefore an Amended NOM was filed providing clear orders and steps the EPA would need to take for the public consultation process including the Company paying for the costs of the consultations.

Issues:

- (1) Whether the Court had appropriate power to require such consultation;
- (2) If the Court did have such power, whether it was premature to consider doing so when there were still outstanding merit issues in the case that may result in variations to the application.

Held: The Court proposed orders for the public consultation process, giving the parties an opportunity to provide submissions about the proposed orders. The parties subsequently provided agreed orders for a public consultation process. No costs ordered:

- (1) The Court did not have the power pursuant to [s 58\(6\)](#) of the POEO Act as the Court is not the regulatory authority for the purposes of that Act and also, in this instance, the EPA was functus officio, meaning it cannot be required to carry out the consultation process that might otherwise arise if the matter was still with the EPA and was not refused: at [12], [14]-[16];
- (2) The Court did have power under [s 38\(4\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) as the proposed orders were “in connection with the hearing”: at [20];
- (3) Despite any potential for error in the above reasoning, the Court also had power under [s 61\(1\)](#) of the [Civil Procedure Act 2005 \(NSW\)](#) to direct any party to proceedings to take specified steps in relation to the proceedings: at [21]-[22]; and
- (4) Regardless of the outcome of the appeal, the public submissions would not be futile, as it was likely the Company would seek future variances to its activities on the site, and this would be useful to both the Company and relevant regulators to understand the public’s positions on such matters: at [27].

• **Joinder Applications:**

Huajun Investments Pty Ltd v City of Canada Bay Council (No 2) [\[2018\] NSWLEC 194](#) (Robson J)
(related decisions: *Huajun Investments Pty Ltd v City of Canada Bay Council* [\[2018\] NSWLEC 1087](#) (Smithson C); *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [\[2018\] NSWCA 245](#) (Basten and Leeming JJA, Preston CJ of LEC))

Facts: Al Maha Pty Ltd (**Al Maha**) sought to be joined as a respondent to Class 1 proceedings pursuant to [s 8.15\(2\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) and, if successful, sought a consequential order that the hearing date of the appeal be vacated. Huajun Investments Pty Ltd and City of Canada Bay Council had previously reached agreement in a conciliation conference but the orders entered by the Court were set aside by the Court of Appeal after judicial review proceedings brought by Al Maha.

In support of its joinder motion, Al Maha submitted that it sought to raise issues in relation to the development including various non-compliances with the [State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development](#) and the [Strathfield Triangle Development Control Plan](#).

Issues: The issues arising for determination in the motion were:

- (1) Whether it was appropriate to join Al Maha to the proceedings; and
- (2) Whether the hearing date should be vacated.

Held: Al Maha joined as second respondent:

- (1) It was appropriate for Al Maha to be joined as a party having regard to the fact that it was seeking to raise issues which would not otherwise be sufficiently addressed: at [48].
- (2) Although Al Maha’s joinder to the proceedings necessitated the vacation of the hearing date, the matter continued to be deserving of expedition: at [51].

• **Costs:**

Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie (No 2) [\[2018\] NSWLEC 210](#) (Pain J)

(related decision: *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [\[2018\] NSWLEC 99](#) (Pain J))

Facts: In *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [\[2018\] NSWLEC 99](#) (**Grafil No 1**), Pain J found both Grafil Pty Ltd (**Grafil**) and its director Mr Mackenzie (**the defendants**) not guilty of waste charges under [ss 144\(1\)](#) and [169\(1\)](#) of the [Protection of Environment Operations Act 1997 \(NSW\)](#) respectively. Upon delivery of this judgment, the Environment Protection Agency (**the prosecutor**), agreed to use its best endeavours to provide any draft

stated case to the Court of Criminal Appeal as provided by [s 5AE](#) of the [Criminal Appeal Act 1912 \(NSW\)](#) in relation to *Grafil No 1 on or before 23 July 2018*.

At a mention on 26 July 2018, the prosecutor provided the Court with the first draft stated case which contained at least 70 questions of law. In response, the defendants submitted that that they should be acquitted and the stated case rejected as it was impermissibly drafted as if it was an appeal and impermissibly sought to challenge every finding of fact and amounted to an abuse of process. At the request of the Court, the prosecutor filed a second draft stated case. On 24 August 2018, the matter again came before the Court. The judge indicated that the draft would require extensive revision before it would be acceptable. The prosecutor filed a third draft stated case on 3 September 2018 and a fourth draft on 21 November 2018. On 4 December 2018, the matter came before the Court for a further mention directed to finalising the stated case. The fourth draft identified 17 questions of law, some of which were disputed by the defendants.

The defendants sought an order for costs under [s 257F](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) (**the Criminal Procedure Act**) in relation to the three appearances on 26 July 2018, 24 August 2018 and 4 December 2018. They submitted that there was unreasonable conduct and unreasonable delay by the EPA in progressing the stated case. The defendants submitted that the court appearances were “additional” within the meaning of s 257F(2) of the Criminal Procedure Act as the inappropriate nature of the first three draft stated cases meant the aim of achieving a final stated case was not achieved. The prosecutor should have been prepared to state a final case on 26 July 2018.

The prosecutor submitted that the matter on 26 July 2018 would have been adjourned in any event and was not a result of the prosecutor breaching a court order. As the defendants were likely to appear in court on that occasion in any event, the costs incurred could not be characterised as “additional”. The two-day lapse in “best endeavours” to produce a stated case was not sufficient to be unreasonable conduct or delay. Further, it is common for the preparation of a stated case to require several mentions in order for it to be finalised.

Issue: Whether the legal costs incurred by the defendants due to the three adjournments were payable to the defendants under s 257F of the Criminal Procedure Act, that is:

- (i) whether these costs were “additional costs”; and
- (ii) whether these costs arose from the unreasonable conduct or delay of the EPA.

Held: Legal costs incurred by the defendants constituted additional costs and these were incurred due to the unreasonable conduct or delay of the prosecutor. The prosecutor to pay the defendants’ costs of the mentions on 26 July 2018, 24 August 2018 and 4 December 2018 pursuant to s 257F of the Criminal Procedure Act:

- (1) While a prosecutor generally drafts a stated case for consideration by the trial judge, input from a defendant’s legal team is generally very useful in finalising a stated case. That input is likely to require legal costs to be incurred given that a stated case must identify questions of law: at [20]. A number of court mentions to draft appropriate questions of law can be essential to finalising an appropriate set of questions, as has occurred in this case. That this occurs as a practical matter does not overcome the disadvantage to a defendant in such a process in incurring further legal costs. There were three adjournments necessitated by the state of the first three drafts. All drafts have required lengthy discussions in court and generated a substantial amount of correspondence and submissions by the parties. That the defendants did not choose to make detailed submissions on the first two drafts, an appropriate course of action in terms of not incurring unnecessary costs, did not undermine their costs application. The defendants incurred additional costs as a result of the adjournments: at [21]. The prosecutor’s submission concerning additional costs not arising from the mention on 26 July 2018 on the basis that the defendants would have had to appear and the matter would have to be adjourned anyway was rejected. This is because a stated case in close to final form was not provided on 26 July 2018: at [24]; and
- (2) Evidence from the trial should not generally be included in a stated case but was extensively included in the second draft. The first two drafts were quite different from each other, unreasonably lengthy and not in an appropriate form. The third draft of the stated case continued to be roundly criticised by the defendants as not identifying appropriate questions of law: at [22]. The adjournments occasioned by the inappropriate first three draft stated cases arose from unreasonable behaviour and/or unreasonable delay by the prosecutor: at [23]. That the prosecutor provided its first draft stated case two days later than promised contributed to this finding and it was irrelevant that this did not constitute a breach of court order: at [24].

Monti v Roads and Maritime Services (No 3) [\[2018\] NSWLEC 183](#) (Pepper J)

(related decision: *Monti v Roads and Maritime Services* [\[2018\] NSWLEC 34](#) (Molesworth AJ); *Monti v Roads and Maritime Services (No 2)* [\[2018\] NSWLEC 178](#) (Pepper J))

Facts: the respondent, the Roads and Maritime Services (**the RMS**), sought its costs thrown away occasioned by two amendments to the claim for compensation by the applicants, Messrs Allan Monti, Phillip Monti and Christopher Monti (**the Montis**).

First, the Montis were granted leave to require the land valuation experts to produce a further joint report to confirm the net present value for determining market value (**the terminal value claim**). However, the terminal value claim was abandoned upon the experts confirming that a net present value could not be derived.

Second, the Montis were granted leave to rely upon an alternative disturbance claim for lost profits during the course of the hearing and produced an accompanying joint supplementary report date 22 October 2018. After the business valuation experts were cross-examined, the Montis notified the RMS that it would not press the alternative disturbance claim.

Issue: Whether the Court should order that the Montis pay the RMS's costs thrown away by the abandoned terminal value claim and alternative disturbance claim.

Held: The Montis to pay the RMS's costs thrown away:

- (1) Parties must not conduct litigation in an unreasonable manner which accrues unnecessary expense or delay: at [9]. The Court can take into account the time and expense incurred by parties to meet specific claims which are abandoned during the proceedings: at [9];
- (2) The Montis had made material changes to their claim for compensation which were subsequently abandoned during the course of the hearing: at [29]-[30];
- (3) The RMS incurred additional costs for the further joint conferencing of the valuation experts, the production of further joint reports and the provision of associated legal advice: at [30]. Although the terminal value claim accrued modest costs, the RMS nonetheless incurred these costs: at [31]; and
- (4) The alternative disturbance claim resulted in additional legal advice and extensive cross-examination of both business valuation experts: at [32]. While the Montis never formally amended their claim, in this regard all parties, and the Court, assumed that the Montis would make a formal amendment to their claim: at [33]. The Montis actively pursued this claim resulting in the RMS accruing costs thrown away: at [34]. The Court neither invited nor directed the Montis to either expressly or impliedly alter their disturbance claim: at [35].

Moss Vale Projects Pty Limited v Wingecarribee Shire Council [\[2018\] NSWLEC 180](#) (Sheahan J)

Facts: The respondent, Wingecarribee Shire Council (the council) applied to the Court to have its costs paid by Moss Vale Projects Pty Limited (**the company**) in this discontinued Class 1 appeal (the company). The company had appealed from the council's deemed refusal of a development application, which had sought approval for a supermarket and car-park development in Moss Vale. The company had already been ordered to pay some of the council's costs, in respect of costs thrown away as a result of vacating the first hearing dates, and costs under [s 97B](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) consequential upon the company's amendment of their application. In the lead up to the final hearing dates, a number of events occurred between the parties (summarised in the chronology at [43]-[75]), relating primarily to the exchange of correspondence and documents, culminating in the company's eventual discontinuance.

Issue: Whether, under [rule 3.7](#) of the [Land and Environment Court Rules 2007 \(NSW\)](#), it was fair and reasonable in all the circumstances to award costs to the council.

Held: The Council's Notice of Motion was dismissed:

- (1) The company's submissions and explanations, set out at [80]-[90], were preferred;

- (2) The relevant events during the preparation for the hearing were not unusual or unreasonable in Class 1 proceedings, and could be considered part of the usual “argy bargy” between an applicant and Council; and
- (3) Accordingly, there was no basis to award costs to Council beyond those already ordered: at [93]-[95].

• **Review of Registrar’s Decision:**

Sydney Tools Pty Ltd v Canterbury-Bankstown Council (No 2) [\[2019\] NSWLEC 6](#) (Sheahan J)

(related decision: *Sydney Tools Pty Ltd v Canterbury- Bankstown Council* [\[2018\] NSWLEC 1625](#) (Froh R))

Facts: In this matter, the Court was asked to review a decision made by the Registrar in the management of Class 1 proceedings. The substantive proceedings involve an appeal against Canterbury-Bankstown Council’s (**the respondent**) refusal of a development application (**DA**), which proposed the use of premises at Riverwood as a “tools hardware and building supplies store and a warehouse and distribution centre”. Presently on foot in the Court are Class 4 proceedings involving the same parties. On 22 November 2018, the Registrar, after hearing a contested Notice of Motion (**the NOM**), granted the applicant leave to rely on amended plans in the Class 1 proceedings. The respondent sought a review of the Registrar’s decision to grant leave, contending primarily that the Registrar gave inadequate reasons. Before the Registrar, the respondent had contended that the applicant’s proposed amendment, which sought to add an additional “Unit B” to the existing proposed development, was so significant that it took the DA beyond the ambit of [cl 55](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#). The applicant argued, both before the Registrar, and in the review proceedings, that the proposed amendment was “within power”.

Issues:

- (1) Should the Registrar’s decision of 22 November 2018 be overturned, taking into account the reasonableness of the decision and how best to serve the interests of justice in the circumstances of this case; and
- (2) Were the reasons of the registrar so inadequate as to warrant the decision being overturned.

Held: Notice of motion dismissed:

- (1) The decision of the Registrar was “reasonable” and, in consideration of the “interests of justice”, her decision and orders were to stand: at [45]; and
- (2) While the Registrar’s decision was “albeit quite brief”, the Registrar “actively engaged” with the applicant’s detailed submissions and the substance of the application during the hearing of the NOM: at [10].

• **Merit Decisions (Judges):**

Gloucester Resources Limited v Minister for Planning [\[2019\] NSWLEC 7](#) (Preston CJ)

(related decision: for joinder decision, see *Gloucester Resources Limited v Minister for Planning and Environment (No 2)* [\[2018\] NSWLEC 1200](#) (Dixon SC))

Facts: Gloucester Resources Limited (**the applicant**) sought consent to develop, operate and rehabilitate an open-cut coal mine in close proximity to the country town of Gloucester (**the Rocky Hill coal project**).

The development was classified as State significant development under [s 89C](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**) with the Minister for Planning as the relevant consent authority. The applicant submitted an application for the Rocky Hill coal project to the Department of Planning and Environment (**the department**) on 18 December 2012 and submitted an amended application on 11 August 2016.

The project would produce 21 million tonnes of coal over 16 years. The project involved constructing three contiguous open-cut pits which would be surrounded by a long-term amenity barrier to mitigate

noise and visual impacts. The open-cut pits would be approximately 1km from the closest rural residential properties.

The amended development application was placed on exhibition from 17 August to 14 October 2016, attracting 2,570 submissions, with 2,308 in objection and 261 in support. The application was referred to the Planning and Assessment Commission (**the PAC**), as delegate of the Minister, who determined on 14 December 2017 to refuse the consent. The PAC referred in its reasons to the significant visual impacts of the project, the incompatibility of the project with the relevant zoning objectives of the [Gloucester Local Environmental Plan 2010](#) and concluded that the project was not in the public interest.

The applicant filed an appeal to the Minister's refusal of consent on 19 December 2017 pursuant to [s 97](#) of the EP&A Act. Gloucester Groundswell Inc (**Groundswell Gloucester**), a local community group opposed to the mine, was later joined as a party to the proceedings, pursuant to [s 8.15\(2\)](#) of the EP&A Act.

There were five key areas of contention between the parties: compatibility with existing, approved and likely preferred uses of the land in the vicinity of the mine, visual impacts, social impacts, economic and public benefits and climate change impacts. The Minister's principal contention was that the mine was incompatible with the existing, approved and likely preferred uses of the land in the vicinity of the mine under [cl 12](#) of the [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) 2009 \(NSW\)](#) (**the Mining SEPP**). The Minister and Groundswell Gloucester also argued that the amenity impacts from dust and noise, social impacts, and visual impacts justified refusal of the project.

The impacts of the mine on climate change were raised by Groundswell Gloucester, arguing that the mine should be refused as it would have a cumulative effect on anthropogenic climate change and be inconsistent with existing policies to reduce greenhouse gas (**GHG**) emissions. They submitted that, to reach the goal of limiting climate change to well below 2°C under the [Paris Agreement 2015](#), no new coal mines could be approved. The applicant did not challenge the science of climate change or need for immediate GHG emissions reductions but contested that the Rocky Hill coal project needed to be refused to meet those objectives.

The applicant contended that the public and economic benefits of the mine outweighed any social or environmental impacts and justified the consent.

Issue: Whether State significant development application No SSD5156 for the amended Rocky Hill coal project should be approved or refused, having regard to the merits of the project and balancing the relevant impacts, particularly:

- (a) the compatibility of the mine with the existing, approved and likely preferred uses of land in the vicinity of the proposed mine;
- (b) the visual impacts of the mine;
- (c) the social impacts of the mine, including social impacts caused by noise, dust and visual impacts;
- (d) the impacts of the mine on climate change; and
- (e) the economic and public benefits of the mine.

Held: Appeal dismissed. State significant development application determined by refusal of consent:

- (1) *Existing, approved and likely preferred uses of land in the vicinity of the proposed mine:* cl 12(a) of the Mining SEPP required the consent authority to consider the existing, approved and likely preferred uses of land in the vicinity of the proposal, consider whether the project would have significant impacts on those uses, and consider whether the mine would be incompatible with those uses: at [57]. The decision maker would then need to evaluate and compare the respective public benefits of those uses with the benefits of the mine, considering any proposed measures to avoid or minimise the incompatibility (cl 12(b) and 12(c)): at [87]. The mine would cause significant social, amenity and visual impacts on the existing, approved and likely preferred uses of land, which included residential, tourism, agribusiness, commercial, recreational and social infrastructure uses: at [82]. That the mine was permissible with consent in the vicinity was insufficient for it to be considered a "likely preferred use": at [81]. Mining would be incompatible with those uses: at [86]. The mitigation measures proposed would not avoid or minimise the incompatibility of uses: at [86]. The public benefits of the mine were not proven to outweigh the public costs of the mine or the public benefits associated with the existing, approved and likely preferred uses if left unaffected by the mine: at [87], [89];

- (2) *Visual impacts*: the Rocky Hill coal project would have high visual impact, experienced from various viewpoints on both public and private land that would significantly affect the amenity, use and enjoyment of residential, rural residential properties and rural properties involved in tourism: at [218]. The proposed amenity barrier would itself have high visual impact and not mitigate the negative visual impact of the project: at [220]-[222]. The visual impacts of the project, both by themselves and by consequential impacts associated with the visual impacts, justified refusal of the project; at [222];
- (3) *Social impacts*: assessing the social impacts required identifying, evaluating and weighing the negative and positive social impacts of the project: at [419]. The positive social impacts, including to the local economy and employment, would not outweigh the negative social impacts to people's way of life, community, access to and use of infrastructure, services and facilities, culture, health and wellbeing, surroundings and fears and aspirations: at [419]. The project would also cause distributive inequity both within the current generation and between current and future generations: at [419], [696], and further social impacts would result from the amenity impacts associated with noise and dust: at [252], [269]. The social impacts justified refusing consent to the project: at [419];
- (4) *Impacts of the mine on climate change*: the Rocky Hill coal project would result in GHG emissions including directly (scope 1 and 2 emissions) and indirectly (scope 3 emissions): at [486]. Scope 1, 2 and 3 emissions were relevant to be considered in the environmental impact assessment stage and in assessing whether the project should be granted approval: at [486], [513]. Consideration of the principles of ecologically sustainable development (**ESD**) could include consideration of climate change: at [488]. All GHG emissions would contribute to climate change: at [514]. There was a causal link between the project's GHG emissions and climate change that made it likely to have indirect impacts on the climate system: at [525]. The possibilities of GHG emissions reductions unrelated to the project, where no specific offsetting proposal existed, were not relevant to assessing the project: at [530], [532]. The possibility of another mine being approved with the same GHG emissions to meet global demand if the Rocky Hill coal project was not approved did not provide a reason to approve the project: at [545]. Fossil fuel developments must be evaluated on their individual merits taking into account the GHG emissions and likely impacts on climate change in absolute or relative terms: at [553]. The unacceptable planning, visual and social impacts justified refusal of consent while the GHG emissions of the Rocky Hill coal project and its likely impacts on climate change provided a further reason: at [556];
- (5) *Economic and public benefits of the mine and other land uses*: the public economic and local benefits of royalties, tax, worker benefits and supplier benefits were overstated and likely to be lower than suggested by the applicant: at [580], [605]-[606], [636]. The indirect environmental costs, social and transport costs, public infrastructure costs and indirect costs to other industries were likely to be much greater than stated by the project: at [663]. The positive impacts would not balance out the negative impacts and would adversely affect the public benefits from the existing, approved and likely preferred land uses: at [685]; and
- (6) Balancing the public interest in approving or disapproving the project, a qualitative and not quantitative exercise, the benefits of the project were outweighed by the costs: at [686]-[688]. The project was not in the public interest: at [688].

Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel; Stewartville Pty Ltd v New South Wales Transitional Coastal Panel; Robert Watson v New South Wales Transitional Coastal Panel [\[2018\] NSWLEC 207](#) (Preston CJ)

Facts: The applicants owned private properties along the coast of Belongil Beach at Byron Bay. They sought consent to rebuild and repair failing sea walls to protect their properties from coastal hazards. The existing sea walls were among a series of ad hoc rock and rubble walls along the coastline that were built without development consent and therefore unlawful.

The works proposed to the sea walls would occur either largely or entirely on the public land of Belongil Beach. The public land was zoned under the [Byron Local Environmental Plan 1988 \(the BLEP 1988\)](#) as 7(f1) Coastal lands, while the private property in question was zoned 7(f2) Urban Coastal Land. Development consent was required for the proposed works in both zones.

On 19 January 2017, the landowners applied for development consent from the consent authority, New South Wales Coastal Panel. After the applications were lodged, changes to the planning and legislative provisions occurred, renaming the consent authority as New South Wales Transitional Coastal Panel (**the Panel**). The former legislative and planning provisions continued to apply due to savings and transitional provisions. In September 2017, the landowners appealed the deemed refusal of consent under [s 97](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**the EP&A Act**), as the Panel failed to determine the applications within the prescribed time.

The development applications were assessable under the EP&A Act, subject to the consent authority first being satisfied of the preconditions in [s 55M\(1\)](#) of the [Coastal Protection Act 1979 \(NSW\)](#) (**the Coastal Protection Act**). Development consent could not be granted unless the consent authority was satisfied that the works would not unreasonably limit public access to or use of Belongil Beach and would not pose or be likely to pose a threat to public safety, as required by s 55M(1)(a). The consent authority would then need to be satisfied that appropriate arrangements had been made for restoration of the beach and maintenance of the works (s 55M(1)(b)).

[Clause 88\(3\)](#) of the BLEP 1988 contained similar preconditions, including that the consent authority be satisfied that the works would not impede or diminish the physical land-based right of access of the public to Belongil Beach (cl 88(3)(a)).

Issues:

- (1) Whether the preconditions to granting development consent for coastal protection works contained in s 55M(1) of the Coastal Protection Act were satisfied;
- (2) Whether the preconditions to granting development on land wholly or partly within the coastal zone in cl 88(3) of the BLEP 1988 were satisfied; and
- (3) Whether the appropriate reference point for assessing the impacts of the application included the existing unlawful sea walls.

Held: Appeals dismissed; development applications determined by refusal of consent:

- (1) The preconditions in s 55M(1)(a)(i) and cl 88(3)(a) were not satisfied, thereby precluding the grant of consent: at [132], [133]. The proposed works would limit public access and use of the parts of the beach where the sea walls would be physically located, which was either largely or wholly on public land: at [117]. The sea walls would result in the alienation of significant parts of the public land accessed and used by the public: at [122], [123]. The limitation on public access would last for a significant period of time: at [124]. Greater limitations on public access would occur whilst the works were being carried out: at [125]. Public access would be limited outside of the parts of the beach where the sea walls were physically located by preventing pedestrian passage from either side: at [126]. There were no practical reasons preventing the landowners from designing, locating and constructing coastal protection works that satisfy the requirements of cl 88(3)(a): at [131]. The extent to which and ways in which the proposed works would limit access were unreasonable for the purposes of s 55M(1)(a): at [130]; and
- (2) The appropriate reference point for assessing the application excluded the existing unlawful works: at [128]. No advantage could be gained either directly or indirectly from the established unlawful use of land: at [128]. The extent that the existing sea walls limited, impeded or diminished public access to or use of the beach could not be considered in assessing the application: at [127].

• **Merit Decisions (Commissioners):**

AS Investment Company Pty Ltd v Liverpool City Council [\[2019\] NSWLEC 1054](#) (Gray C)

Facts: AS Investment Company Pty Ltd (**AS Investment**) appealed against the refusal of a development application for a two-lot subdivision of Lot 74 in DP 1134477, located at 76 Pleasure Point Road, Pleasure Point. Liverpool City Council (**the council**) contended that the subdivision was prohibited by the operation of [cl 7.12](#) of the [Liverpool Local Environmental Plan 2008](#) (**the LLEP 2008**). That clause provided:

7.12 Maximum number of lots

The total number of lots created by the subdivision of land in an area of land identified as “Restricted Lot Yield” on the Dwelling Density Map must not exceed the number shown on that map for that area.

The map, to which cl 7.12 refers, shows the site (Lot 74) falling within a parcel of land the subject of a restricted lot yield of four lots. The site (Lot 74) and Lots 71, 72 and 73, comprise four lots within that parcel of land. As a result, the council’s position was that the subdivision of the site into two lots would result in a fifth lot within the parcel, in breach of the maximum lot yield, and that the proposed subdivision is therefore prohibited.

AS Investment’s position, instead, was that cl 7.12 does not prohibit the development, but is a development standard within the definition contained in the [Environmental Planning and Assessment Act 1979 \(NSW\) \(the EP&A Act\)](#) which makes it amenable to grant of consent following a written request pursuant to [cl 4.6](#) of the LLEP 2008.

Issue: Whether cl 7.12 is a prohibition or a development standard.

Held: Appeal dismissed; development consent refused:

- (1) The task of determining whether cl 7.12 is a prohibition or a development standard is principally one of statutory construction, where the clause must be considered in the context of the instrument as a whole: at [53-55];
- (2) Clause 7.12 imposes a condition precedent to permissible development in the areas identified in the Dwelling Density map, and is therefore a prohibition if the condition precedent is not met:
 - (a) First, the language of cl 7.12 suggests that permissibility depends on a precondition being met: at [56];
 - (b) Second, cl 7.12 applies indiscriminately to any proposed subdivision within the areas defined in the Dwelling Density Map: at [57];
 - (c) Third, cl 7.12 adopts language that provides a precondition to development that would otherwise be permissible, and the mere fact that subdivision is permissible by cl 2.6 of LLEP 2008 does not mean that cl 7.12 cannot operate to prohibit subdivision if the precondition is not met: at [58];
 - (d) Fourth, the structure of the LLEP 2008 and the context of cl 7.12 support this interpretation, particularly given that cl 2.6 is a mandatory clause of the standard instrument and cl 7.12 does not fall within “Pt 4 Principal Development Standards”: at [59];
 - (e) Fifth, in applying the first of the two steps in *Strathfield Municipal Council v Poynting (2001) 116 LGERA 319*, the development is the two lot subdivision of Lot 74 and it is prohibited in any circumstances. As the land the subject of the development application is one of four lots that comprise an area the subject of a restricted lot yield of 4, cl 7.12 prohibits further subdivision in any circumstances: at [60];
 - (f) Sixth, cl 7.12 does not meet the definition of a development standard as it does not specify a requirement or fix a standard in relation to an aspect of the development. Clause 7.12 does not operate by reference to the subdivision of the lot the subject of the development application, but instead requires the existence of an attribute of the entire area the subject of the maximum lot yield. Clause 7.12 therefore does not pass the second step in *Strathfield Municipal Council v Poynting*, and does not meet the definition of “development standards” in the EP&A Act: at [61];
 - (g) Finally, cl 7.12 does not fit within the description as something that regulates “the intensity or density of the use of any land, building or work...”, consistent with category (e) of the definition of “development standards”. Category (e) is concerned with the use of land, which is a distinct from the subdivision of land: at [62]; and
- (3) The proposed subdivision of Lot 74 is prohibited, as Lot 74 is one of four lots that comprise an area the subject of a restricted lot yield of 4, and therefore any subdivision would result in exceeding the maximum lot yield for the specified area and as such the condition precedent is not met.

Blairgrove Pty Ltd v Burwood Council [\[2019\] NSWLEC 1027](#) (Walsh C)

Facts: This was an appeal under [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) against Burwood Council's deemed refusal of development consent for the change of use of an existing three-level building to a pub incorporating bars, gaming and dining areas. The pub would trade until 2am the following day from Monday to Wednesday, until 3am the following day Thursday to Saturday, and until midnight Sunday. Occupancy would be a maximum of 250 persons.

The site is zoned B4 Mixed use under [Burwood LEP 2012](#), with pubs a permissible use. The Burwood Development Control Plan defines the site as falling outside the "Commercial Core Area" or Burwood Town Centre and within the "Middle Ring Area". Medium and higher density residential development exists across the road and otherwise near the site. The site is some 200m from Burwood railway station.

Issues:

- (1) Adverse social impacts - alcohol-related harm. Whether the site is unsuitable as pub patronage likely to be at particular risk of alcohol related harm on the evidence of local demographics; and risks associated with site's location in street crime and domestic violence "hotspots". Whether late trading exacerbated risks.
- (2) Adverse local amenity impacts. Whether unreasonable noise and antisocial activity risks.

Held: Appeal upheld with reduced trading hours:

- (1) If it were to be found that the location was unsuitable for a pub, the evidence would need to be such as to rebut any assumption to the contrary based on the site zoning and the permissibility of the use within the zone (*BGP Properties Pty Limited v Lake Macquarie City Council* [\[2004\] NSWLEC 399](#) at [118]). The respondent argued an unreasonably narrow interpretation of the pub's predominant patronage or catchment (500m and walking distance). The pub's catchment cannot be reasonably considered as a socially disadvantaged one. The crime hotspot argument was unpersuasive given the relatively low rates of alcohol-related crime and (reported) domestic violence in Burwood over recent years: at [57], [52], [53];
- (2) In considering trading hours it is important to consider the land use context. The pub's setting has a strong residential component and little foot traffic or passing cars during late hours, especially during mid-week. For amenity and patron safety reasons trading should cease at midnight Friday-Saturday and 10pm Sunday-Thursday. A trial period was allowed for extended midweek trading in recognition of evidenced good record of intended licensee: at [89], [95]-[96].

Boral Resources (NSW) Pty Ltd v Camden Council [\[2018\] NSWLEC 1623](#) (Maston AC)

(related decision: *Boral Resources (NSW) Pty Ltd v Camden Council (No 2)* [\[2019\] NSWLEC 1070](#) (Maston AC))

Facts: This was an appeal pursuant to [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (the **EP&A Act**) from the decision of Camden Council (the **council**) to refuse development consent for a mobile concrete batching plant (the **DA**) on part of Lot 100 DP 1203966 (**Lot 100**), known as 60 Greendale Road, Bringelly.

The development was prohibited under [Camden Local Environmental Plan 2010](#), but the applicant relied on [cl 7\(4\)\(d\)](#) of [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) 2007 \(NSW\)](#) (the **Mining SEPP**).

Clause 7 of the Mining SEPP is headed "Development permissible with consent". Subclause 7(4) is headed "Co-location of industry" and relevantly provides:

If extractive industry is being carried out with development consent on any land, development for ... (d) concrete works that produce only pre-mixed concrete ... [may also be carried out with development consent on that land].

Development consent for extractive industry had been granted by Camden Council in 1991 on extensive conditions. The applicant was continuing to carry out extractive industry on Lot 100 as at the date of the hearing.

Boral argued that the proposed concrete batching plant fulfilled the requirements for permissible development under [cl 7\(4\)](#) of the Mining SEPP.

The 1991 Consent for extractive industry on Lot 100 expressly applied to the whole of Lot 100.

However, the council argued that whilst the proposed “development area” of the proposed concrete batching plant was within the same lot as the extractive industry under the 1991 Consent. It was “not located on the same land or within the curtilage of the extractive industry”.

Thus, the 1991 Consent including the conditions of the Consent to which it was subject was impressed on the whole of Lot 100 including the area designated for the site of the batching plant.

There was no dispute but that Boral’s current use of the land fell within the definition of extractive industry under the Mining SEPP.

The Council submitted that the meaning of the word “land” in cl 7(4) of the Mining SEPP can be understood by considering cases decided under the provisions of the EP&A Act with respect to enlargement, expansion or intensification of existing uses such as [cl 42](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) and earlier equivalent provisions. Reference was made to the decision of the Court of Appeal in [Lemworth Pty Ltd v Liverpool City Council \(2001\) 53 NSWLR 371 \(CA\)](#) and the decision of the High Court of Australia in [Eaton & Sons Pty Ltd v Warringah Shire Council \(1972\) 129 CLR 270 \(Eaton\)](#) at 278, whilst acknowledging the different context of cl 7(4) of the Mining SEPP and the statutory provisions relating to existing uses.

Boral contended that cl 7(4) of the Mining SEPP does not stipulate that permissible development for a concrete works must be in a particular location on land; rather, it merely stipulates that there should be extractive industry being carried out on “any land”.

Issue: Whether the proposed concrete works were permissible with development consent.

Held: Appeal upheld; variation to height of building development standard granted; development consent granted subject to conditions:

- (1) There is no reference to a “development area” or “curtilage of extractive industry” in the Mining SEPP: at [21];
- (2) The definition of “extractive industry” in the Mining SEPP is broad: at [9], [21];
- (3) The conditions of the 1991 Consent deal with a wide range of activities on site which fall within the definition of extractive industry, such as management of stormwater, pollution, water storage dams, contamination, stormwater natural drainage lines on Lot 100, landscaping, revegetation and rehabilitation of land amongst other matters. Several of these conditions impact on the site of the proposed concrete works: at [21];
- (4) It was accepted that extractive industry was being carried out by Boral on Lot 100 pursuant to the 1991 Consent. There was no basis for dissecting the various activities taking place on Lot 100 and the area of Lot 100 on which the concrete works are to be established applying *People for Plains Inc v Santos NSW (Eastern) Pty Ltd* [\[2017\] NSWCA 46](#) in which it was held that issues of development categorisation and permissibility with respect to petroleum prospecting should be regarded “as a whole” and that “land” in [cl 18](#) of the Mining SEPP should be read as referring to the land on which the overall development is taking place: at [23], [26];
- (5) The “existing use” decision of the High Court of Australia in *Parramatta City Council v Brickworks Limited* [\(1972\) 128 CLR 1; \[1972\] HCA 21](#) (*Brickworks*) concerned a similar extractive industry to that in the present case. In *Eaton*, Barwick CJ applied the decision in *Brickworks* and held that the whole of the land occupied and acquired for the purposes of the business of timber selling (existing use) should be regarded and the land should not be divided into doubtfully definable parts related to current physical use: at [29];
- (6) In *Brickworks*, Gibbs J held that when a provision speaks of an existing use of land it refers to land which from a practical point of view should be regarded as one piece of land. The fact that all the land forms one parcel, one unit in a subdivision, tends to support the view that all the land should be regarded as one piece or as the “land” to which the ordinance applies. See also *Kismet Engineering Pty Ltd v Brisbane City Council* [\(1959\) 102 CLR 574; \[1959\] HCA 49](#) where Gibbs J held where a relatively small area is held by one owner and none of it has been used in fact for any purpose different from that for which part of it has been used, it should generally be regarded as being all one parcel for the purpose of determining what land has been put to that use: at [29]-[30];
- (7) Accordingly, in the present case, there could be no dispute but that extractive industry as defined was being carried out on Lot 100 in accordance with the 1991 Consent as a single business on the single lot and the “land” referred to in cl 7(4) of the Mining SEPP used for extractive industry was the whole of Lot 100 which included the proposed site of the mobile concrete batching works which was therefore permissible development under the Mining SEPP: at [33];

- (8) Moreover, that site physically forms part of the embankment which is alongside and supports the northern quarry cells used for the purpose of extractive industry: at [33];
- (9) In the result, the proposed development was permissible with consent under the Mining SEPP: at [33];
- (10) There was no issue but that the applicant was entitled to development consent and that by dint of [cl 5\(3\)](#) of the Mining SEPP which provides that if the Mining SEPP is inconsistent with any other environmental planning instrument, whether made before or after the Mining SEPP, the latter prevails to the extent of the inconsistency. For this reason, the prohibition in the Local Environmental Plan is inconsistent with the Mining SEPP and the Mining SEPP prevails: at [6].

Chan v McDonald [\[2018\] NSWLEC 1692](#) (Galwey AC)

Facts: A tall native eucalypt growing on or close to the boundary between two Pymble properties dropped a branch that broke roofing tiles on the property belonging to the Chans (**the applicants**). The Chans applied to the Court pursuant to [s 7](#) of the [Trees \(Disputes Between Neighbours\) Act 2006 \(NSW\)](#) (**the Trees Act**) seeking orders for their neighbour Mr McDonald (**the respondent**) to pay for the tree to be inspected and pruned, and to compensate them \$300 for costs of repairing their roof.

There was no doubt that a branch from the tree had damaged the Chans' property, but Mr McDonald was of the view that the tree was partly on the Chans' land, that the Chans had chosen to locate their granny flat beneath this tree's broad crown, and that the Chans should be responsible for any resulting damage.

At the onsite hearing, it was evident that, although the tree appeared to be on Mr McDonald's land relative to the location of the boundary fence, the fence was not aligned along the boundary but was angled each side of the tree to go around its stem. The Commissioner directed the Chans to obtain a survey of the common boundary and the tree's stem at ground level (as per [Awad v Hardie \(No 2\)](#) [\[2010\] NSWLEC 1258](#)).

Issues:

- (1) Whether the tree was situated *principally* on land adjoining the applicants', as required by [s 7](#) of the Trees Act, supported by [s 4\(3\)](#);
- (2) Who owns the tree;
- (3) Whether works are required to prevent further damage or injury.
- (4) Who should pay for any works required; and
- (5) Whether the Chans should be compensated for past damage.

Held: The applicants ordered to engage an arborist to prune the tree to remove hazardous branches, with the cost to be shared equally by the parties; no orders for compensation:

- (1) The survey obtained by the applicants indicated that, at or near ground level, 38.5% of the stem's area is on the applicants' land and 61.5% of its area is on the respondent's. This allows the Chans to make this application, as the tree is located principally on Mr McDonald's land: at [13];
- (2) Considering the location of the tree and the damage caused by a fallen branch, the Court can make orders to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of the tree: at [10];
- (3) Further damage or injury is likely to result from failures of deadwood and some hazardous branches, but the risk could be minimised by pruning carried out by a professional arborist: at [23];
- (4) Despite the majority of the stem at ground level being on the respondent's land, it was not apparent on which property the tree began its life when it first grew from a seed or was planted as a seedling. It may have grown on the boundary, with growth of the root buttress accounting for a greater portion now residing on Mr McDonald's land. According to common law principles, ownership of the tree is therefore shared by the owners of both properties: at [15]-[16]; and
- (5) The principle established in *Black v Johnson (No 2)* [\[2007\] NSWLEC 513](#) applies here. The tree was there first; the applicants had some discretion over how they developed their property; they chose to locate their granny flat beneath the tree's crown. No orders for compensation for damage to their property caused by a tree they partly own: at [27].

Ferrier Hodgson v Lake Macquarie City Council [2018] NSWLEC 1585 (Gray C)

Facts: At 2A Main Road and 1A First Street, Boolaroo, is the site of the former Pasmenco Cockle Creek Smelter, which operated predominantly as a lead and zinc smelter from 1897 to 2003. By a development application lodged with Lake Macquarie City Council (**the council**) on 5 May 2016 and subsequently amended, Ferrier Hodgson sought consent for a four stage development to consolidate the lots and subdivide the consolidated lot. Following the expiry of the period after which a development application is deemed to be refused, Ferrier Hodgson appealed to the Court pursuant to [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#).

[State Environmental Planning Policy No 55 - Remediation of Land \(SEPP 55\)](#) applied to the site. On 31 August 2018, the [State Environmental Planning Policy Amendment \(Remediation of Land\) 2018](#) inserted [cl 22](#) into SEPP 55. Clause 22 is a site specific clause that affected the entirety of the site the subject of the appeal. Pursuant to [cl 22\(10\)](#), the clause applied to a development application that had been made, but not finally determined, before the commencement of the clause on 31 August 2018.

Pursuant to [cl 22\(3\)](#) of SEPP 55, a consent authority must not consent to a development application to carry out development on the former Cockle Creek Smelter and Incitec site unless certification is given by the Planning Secretary that adequate arrangements are in place for the perpetual care of the containment cell at the site, the land on which the cell and infrastructure is located, the land that has not been remediated, and the land within the E2 Environmental Conservation zone.

The certification required by [cl 22\(3\)](#) had not been provided and Ferrier Hodgson considered that the certification would not be forthcoming within any known period. As such, Ferrier Hodgson and the council agreed that, as a result of insertion and application of [cl 22](#), there was no power for development consent to be granted.

The appeal was listed for a conciliation conference. The parties did not enter into an agreement at the conciliation, but they agreed to the Commissioner terminating the conciliation and disposing of the proceedings on the basis of what occurred at the conciliation conference, pursuant to [s 34\(4\)\(b\)\(ii\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#).

Issue: Whether the application of [cl 22](#) of SEPP 55 precludes the Court from granting consent to the development application.

Held: By consent, dismissing the appeal and refusing development consent:

- (1) Clause 22 prevents a consent authority, and the Court in exercising the functions of the consent authority, from granting consent to the development application (DA/716/2016) unless the Planning Secretary has certified that adequate arrangements are in place for the perpetual care and maintenance of specific aspects of the site to which the application related: at [7];
- (2) The certification required by [cl 22\(3\)](#) of SEPP 55 had not been provided and there was no indication to Ferrier Hodgson or to the council that the certification would be provided at any time prior to the hearing of the appeal. As a result, there was no power for the Court to grant the development consent: at [9].

Touma v Liverpool City Council [2018] NSWLEC 1635 (Dixon SC)

Facts: Mr Touma (the applicant) appealed against the refusal of Liverpool City Council (**the council**) of a development application that proposed a six-storey residential flat building containing 26 units on land at 24-26 McKay Street, Moorebank (**the site**). Ten of these units were proposed to be allocated as affordable housing pursuant to the provisions of [State Environmental Planning Policy \(Affordable Rental Housing\) 2009 \(NSW\)](#) (**the ARH SEPP**).

The Council contended that the ARH SEPP did not apply because the site was not within an “accessible area” as defined in [cl 4\(1\)\(c\)](#) of the ARH SEPP.

Although the parties agreed that the site was not within 400m walking distance of a bus stop used by a “regular bus service” within the meaning of the [Passenger Transport Act 1990 \(NSW\)](#), the applicant still relied on the fact that there were two bus stops relatively close to each other to engage jurisdiction under the ARH SEPP.

The Council argued that the provision should be construed and interpreted with the specific aims of the ARH SEPP in mind and that the two bus stops could not justify the qualification of the site as being one within an “accessible area”.

Issue: Whether the site is within an “accessible area” as defined in cl 4(1)(c) of the ARH SEPP.

Held: Appeal dismissed:

- (1) The purposive approach dictates the outcome as outlined because a different outcome was not available on the current draft of the clause: at [11];
- (2) The words were not ambiguous and therefore the provision must be given its ordinary meaning; and this interpretation assisted the Court to provide a consistent planning regime for the provision of affordable rental housing: at [11];
- (3) The site was not within an “accessible area” as defined in cl 4(1)(c) and therefore the Court had no jurisdiction and was precluded from entertaining the application under [cl 10\(2\)](#) of the ARH SEPP: at [12].

UMA Centre Limited v Canterbury-Bankstown Council [\[2018\] NSWLEC 1591](#) (Gray C)

Facts: UMA Centre Limited (**UMA**) operated a multi-purpose community facility at Padstow. Within the facility were various different rooms and spaces, one of which was a prayer room. UMA appealed against the deemed refusal of an application for development consent for use of that prayer room as a place of public worship, as well as for an increase in the patronage of the community facility. UMA also sought development consent for use of the premises for child minding and playgroups, for use of structures within the building for the purpose of the community facility, and for partial demolition of warehouse structures and the construction of a car-park with 155 car-parking spaces.

The existing facility had the benefit of development consent granted by the Court in January 2016, in *Ali v Bankstown City Council* [\[2016\] NSWLEC 1044](#). The consent included the prayer room, the use of which was limited to those who were already in attendance at the facility. It was therefore considered to be ancillary to the use for the purpose of the community facility. UMA conceded that there had been breaches of the existing development consent, including in 2017 during the Ramadan period. Local residents attended the hearing and gave evidence on a range of issues that they said warranted refusal of the application, including traffic and parking concerns that arose due to prior breaches.

Following the receipt of an amended plan for the car-park layout and an updated Operational Plan of Management, the council agreed that development consent should be granted subject to the imposition of appropriate conditions of development consent. One such condition was for the consent to be subject to a trial period of 12 months. The trial period would allow the use of the prayer room as a place of public worship to commence only on the issue of an occupation certificate following the construction of the car-park.

The proposed Operational Plan of Management set out the hours of the facility, the schedule of prayer services provided in the prayer room as a Place of Public Worship, and the maximum occupancy of the facility. It included how the maximum occupancy for peak prayer services will be managed, including using a register of attendance for each service, using an SMS alert system, conducting head counts and preventing entry to the car-park after maximum occupancy is reached.

Issues:

- (1) Whether the evidence of the traffic and parking impacts of the past use was relevant to the decision on whether to grant development consent.
- (2) Whether it was appropriate for development consent to be granted for the use of the prayer room as a place of worship and for the increase in patronage for the community facility.
- (3) Whether the management procedures proposed Operational Plan of Management were adequate and suitable to manage the facility and the place of public worship.

Held: By consent, allowing the appeal and granting development consent:

- (1) The traffic and parking impacts of the past use had limited relevance to the assessment of the merits of the development application that was now before the Court: First, the past use did not have a car-park of the capacity of that now proposed; second, the past use did not appear to have any traffic and parking management system in place such as that in the proposed Operational Plan of Management, discussed above, which involved an SMS alert system and turning vehicles away once capacity is reached; third, there was insufficient evidence of the numbers in attendance at the community facility during the periods of alleged breaches of the development consent to verify that it was commensurate with the numbers that are now proposed: at [56];

- (2) It is appropriate for development consent to be granted for the proposed use: First, the proposed use of the prayer room as a place of public worship is a permissible use in the IN2 Light Industrial zone, and is not inconsistent with the zone objectives. It would not impede or restrict the operation of existing surrounding land uses: at [61]; second, the playgroup and the child minding uses are ancillary to the community facility use: at [62]; third, sufficient car-parking is provided by the 155 car-parking spaces, which will ensure that all of the car-parking demand is accommodated on site, and Enterprise Avenue and the surrounding intersections have the capacity to accommodate the additional traffic generated by the proposed use of the prayer room and the proposed increase in capacity of the entire facility: at [63]; fourth, the traffic movements for larger congregations (for the occasions of Friday prayer and Ramadan) will be effectively managed through the procedures outlined in the Operational Plan of Management: at [64]; fifth, the proposed conditions concerning noise emission are appropriate to manage the acoustic impact on neighbouring land uses, and should be imposed on the grant of development consent together with the 12 month trial period to enable the acoustic impact of the proposal to be measured: at [65]; and
- (3) The Operational Plan of Management is an effective way of achieving compliance with the proposed maximum occupancy of the facility, and the trial period is appropriate in order to measure the effectiveness of the procedures outlined therein: at [64].

Vision Land Glebe Pty Ltd v The Council of the City of Sydney [\[2018\] NSWLEC 1593](#) (Dixon SC)

Facts: The appeal concerns the redevelopment of a site at 357 Glebe Point Road, Glebe (**the site**). The site comprises the former Children's Court and Metropolitan Remand Centre (**the MRC**) and the State heritage listed buildings known as the Bidura House Group. Vision Land Glebe Pty Ltd (**the applicant**) is the landowner having purchased the site from the State government, after a public tender process in December 2014.

On 20 June 2017, the applicant commenced proceedings to appeal The Council of the City of Sydney's deemed refusal of a Concept Development Application for the demolition of the MRC and an approval for the envelope for a replacement residential flat building.

Issues:

- (1) Whether the MRC should be demolished.
- (2) If the Commissioner determines to approve the demolition of the MRC, then whether the form of the building relative to the Bidura House Group and the surrounding heritage conservation areas should be approved as proposed.

Held: Appeal upheld:

- (1) The MRC is not an item of local heritage, but is a building within the Glebe Point Road Heritage Conservation Area, and therefore, its demolition is covered by [cl 5.10 Heritage Conservation](#) of the [Sydney Local Environmental Plan 2012](#): at [37];
- (2) The MRC should be demolished to provide for a replacement building that will enable the orderly and economic redevelopment of the site consistent with the planning controls and compatible with the local area: at [6];
- (3) The proposed modifications will better integrate the new building into the Glebe Point Road Heritage Conservation Area: at [70]; and
- (4) The proposed modifications which affect a distribution of height, bulk and floor space ratio allowed for appropriate separation of the new development from the Bidura House Group whilst achieving a satisfactory level of residential amenity for the residents proximate to the site. Accordingly, the appeal was upheld: at [106], [110(1)].

District Court:

R v Simpson (District Court of New South Wales, 31 August 2018, unreported) (Zahra DCJ)

Facts: Mr Neil Simpson pleaded guilty to four counts of exporting and importing live endangered species in breach of the [Environmental Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (the **EPBC Act**), between May 2015 and February 2016. Mr Simpson had attempted to:

- (a) export 12 Pygmy Spiny-Tailed Skinks to South Korea inside three travel mugs (**Count 1**);
- (b) export four Shingleback Lizards to Indonesia inside sealed plastic containers and calico bags (**Count 2**); and
- (c) import 11 Green Tree Pythons, three Emerald Tree Monitors, six Spotted Tree Monitors and 10 Mangrove Monitors from Indonesia (**Counts 3 and 4**).

Mr Simpson admitted to arranging to purchase and sell the animals, which were listed as endangered species in the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1975.

Issue: The appropriate sentence to be imposed for the commissions of the offences under Pt 1B of the [Crimes Act 1914 \(Cth\)](#).

Held: Mr Simpson convicted and a suspended sentence of 23 months was imposed on the condition that he enter into a recognisance of \$2,000 and be of good behaviour:

- (1) Actual environmental harm was occasioned by the importation and exportation of live endangered species: at [13]. Mr Simpson's conduct caused substantial and permanent harm to endangered ecosystems both in Australia and overseas: at [13];
- (2) The offences were of high objective gravity considering the seriousness of illicit wildlife trafficking offences under the **EPBC Act**, the rarity of the endangered species traded and the extent to which Mr Simpson would attain a significant financial profit from his trafficking operations: at [11]-[12]. Although Mr Simpson's trafficking operations were not sophisticated, he had extensive knowledge of the endangered species which he was exporting: at [11];
- (3) The subjective circumstances, including his current health condition and his substantial assistance with the authorities' investigations, mitigated the penalty that the Court would otherwise have imposed: at [15]-[16]. Mr Simpson was entitled to a total discount of 45% for each offence: at [8]. But apart from his early guilty plea, Mr Simpson had demonstrated no contrition or remorse: at [7];
- (4) Mr Simpson's prior criminal record was not relevant and could not be considered in assessing the objective gravity of the offence, however, it could be taken into consideration when assessing his prospects of rehabilitation: at [16]. Although Mr Simpson's antecedents were substantial, he had assisted the authorities and had day-to-day care of his children and elderly parents: at [15]; and
- (5) Imprisonment was appropriate in all the circumstances, having considered all other available sentences: at [16]. Mr Simpson was given concurrent sentences for counts 3 and 4 because both offences were related to same incident: at [16].

NSW Civil and Administrative Tribunal:

Aldi Foods Pty Ltd v Independent Liquor and Gaming Authority [\[2019\] NSWCATAD 26](#) (Senior Member Molony)

Facts: Aldi Foods Pty Ltd (Aldi) applied to the Civil and Administrative Tribunal of NSW (the Tribunal) under [s 13A](#) of the [Gaming and Liquor Administration Act 2007 \(NSW\)](#) (the **Administration Act**) for administrative review of a decision of the Independent Liquor and Gaming Authority (the **ILGA**) to refuse its application for a packaged liquor licence at Aldi's Gunnedah store. The Tribunal had jurisdiction to hear and determine an administrative review decision to refuse an application for a packaged liquor licence under the [Liquor Act 2007 \(NSW\)](#) (the **Liquor Act**), per [s 30](#) of the [Civil and Administrative Tribunal Act 2012 \(NSW\)](#).

The decision of ILGA to reject the licence was based on ILGA's dissatisfaction that overall social impact of the licence would not be detrimental to the well-being of the local or broader community. [Section 48\(5\)](#)

of the Liquor Act contained factors an Authority must consider when granting a liquor licence, also known as the social impact test. The Tribunal used the social impact test in their determination of this case.

Issue: Whether the benefits associated with a packaged liquor licence outweighed the potential social harm impacts to the community.

Held: The Tribunal affirmed the decision of ILGA to refuse Aldi a packaged liquor licence at its Gunnedah store:

- (1) The community area of Gunnedah had a higher population of disadvantage than average in the State, and a high indigenous population, with both populations prone to higher levels of harm from alcohol related incidents. Therefore, the harm flowing from Aldi selling packaged liquor had the potential to be very real to the local community, and in this case, a local community which already had higher than average alcohol related violence and alcohol related crashes in the State: at [68]; and
- (2) On the balance of probabilities this harm outweighed the benefits put forth by the experts in this case including reduction in traffic, increase in economy and customer convenience: at [67], [70].

Elf Farm Supplies Pty Ltd v Department of Planning and Environment [\[2018\] NSWCATAD 277](#) (Senior Member Montgomery)

Facts: In September 2014, Elf Farm Supplies Pty Ltd (the applicant) lodged a modification application with the Department of Planning and Environment (the respondent) to modify existing project approval in respect of a substrate plant in Mulgrave. Approval of the application was subject, inter alia, to a review of the design of the proposed odour management system. Elf engaged The Odour Unit Pty Ltd to conduct the required review, which resulted in a document titled *Elf Farm Supplies Pty Ltd: Mushroom Substrate Plant - Modifications to Approved Expansion, Odour Emissions Plant Design and Construction Review, Mulgrave, NSW, Final Report (the Report)*. The respondent received an access application under the [Government Information \(Public Access\) Act 2009 \(NSW\) \(the GIPA Act\)](#) for access relating to the substrate plant. The Department identified the Report as falling within the scope of that request and, notwithstanding the applicant's objection to release of the Report, decided to provide access to the Report in a redacted form. These proceedings concerned an application by the applicant under [s 100](#) of the GIPA Act seeking an external review of the respondent's decision to provide access.

Issue: Whether there is an overriding public interest against disclosure of that information because of the commercial value of the information and the disadvantage that would follow if it is released.

Held: The Report be released to the access applicant in a redacted form:

- (1) Pursuant to [s 5](#) of the GIPA Act there is a presumption in favour of disclosure of the information unless there is an overriding public interest against disclosure (at [20]) and the onus of establishing such an overriding public interest lies with the applicant: at [31]. The Tribunal needed to consider whether, on balance, the public interest considerations against disclosure outweigh those in favour of disclosure: at [20]; and
- (2) Relevant considerations in favour of release included that disclosure of the unredacted material would provide a greater context on the issue of odour emissions, enhance government accountability and release information about systems that could impact on air quality: at [54]. However, the information related to the applicant's business, commercial or financial interests ([cl 4\(1\)\(c\)](#) and [4\(d\)](#) of the Table at [s 14](#) of the GIPA Act) and, if released, would have a prejudicial effect on the applicant's interests and diminish the competitive commercial value of the information: at [63]. Therefore, the correct and preferable decision was to refuse access to the information that was of commercial value to the applicant and to release the Report in a redacted form: at [66] and [69].

Webb v Port Stephens Council (No 3) [\[2018\] NSWCATAP 286](#) (Senior Member Higgins, Senior Member Ransome)

(decision under review: *Webb v Port Stephens Council* [\[2017\] NSWCATAD 348](#) (Senior Member McAteer))

Facts: Ms Telina Webb (**the appellant**) made access requests to Port Stephens Council (**the council**) for access to information held by the council. The information that was the subject of access requests related to a development application the appellant and her partner made, concerning a back yard privacy

screen on the property that they owned at that time. The Council denied these requests under the [Government Information \(Public Access\) Act 2009 \(NSW\)](#) (the **GIPA Act**) because it found there was an overriding public interest against disclosure of the information.

The appellant appealed to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal under [s 100](#) of the GIPA Act. The external review applications made by the appellant sought review of the decision of the council in rejecting access to specified information, with six external review applications made by the appellant in total. The Council cited legal professional privilege, disclosure of personal information and disclosure of information that could expose a person to harm as the reasons for not releasing the information, all public interest considerations against disclosure under [s 14](#) of the GIPA Act. Two of the external review application decisions of the council were affirmed by the Tribunal. The remaining four application decisions of the council were set aside in respect of specified information but were otherwise affirmed.

The appellant appealed the Tribunal's decision under [ss 32, 80\(1\)](#) and [80\(2\)\(b\)](#) of the [Civil and Administrative Tribunal Act 2013 \(NSW\)](#) (the **Tribunal Act**). Although the appellant's appeal was lodged out of time, under [s 41](#) of the Tribunal Act, the Tribunal granted the appellant leave to file her application.

Issues:

- (1) Whether the Tribunal failed to deal adequately with the issue as to whether the respondent had carried out reasonable searches in regard to the information for which the appellant sought access;
- (2) Whether there was a reasonable apprehension of bias against the Tribunal in the conduct of the matter; and
- (3) Whether the Tribunal applied the wrong test to the issue of:
 - (a) open access information
 - (b) legal professional privilege

Held: Appeal allowed in part; decision in regard to specific information was remitted for reconsideration by the Tribunal:

- (1) The appellant did not provide any evidence to support the contention that more documents should have been provided. The appellant's assumption that there would be more documents did not mean that the council did hold further documents: at [68];
- (2) Under [s 107\(2\)-\(3\)](#) of the GIPA Act, where there is information for which there is a claim of overriding public interest against disclosure, the Tribunal was required to receive that information into evidence and hear argument in confidence, absent the public or appellant. There was no error in how the Tribunal proceeded to deal with that material: at [57];
- (3) The Tribunal's failure to make any reference to the open access nature of the information contended between the appellant and the council raised a question in law. This is because it indicated that the Tribunal failed to carry out the balancing exercise it was required to undertake by reference to the open access nature of the information: at [at 81];
- (4) Legal professional privilege is a long-standing rule of law. There was no error by the Tribunal on this ground: at [85], [92].

Court News

Arrivals/Departures:

Mr Timothy Horton has been appointed a commissioner from 5 November 2018.

Ms Julie Binden has been appointed an acting commissioner from 21 December 2018.

Acting Commissioner Bob Smith retired and was not reappointed.

Acting Commissioner Jeff Kildea retired and was not reappointed.