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Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes

- Planning:

Environmental Planning and Assessment Amendment (The Northern Road Upgrade) Order 2017 - published 31 March 2017, declared development for the purposes of The Northern Road Upgrade project to be State-significant infrastructure and critical State-significant infrastructure.

Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017 - published 30 June 2017, implements some of the recommendations made as a result of the independent statutory review of the *Building Professionals Act* 2005. This was achieved by amending the provisions of the Environmental Planning and Assessment Regulation 2000 dealing with fire safety and building certification so as to:

(a) require plans and specifications to be submitted in relation to work on certain fire safety systems in class 2-9 buildings;

(b) introduce critical stage inspections for class 2-9 buildings;

(c) introduce a new alternative solution report for fire safety alternative solutions for class 1b-9 buildings;

(d) require fire safety statements and fire safety certificates to be in a form approved by the Secretary of the Department of Planning and Environment; and

(e) provide for the Secretary of the Department of Finance, Services and Innovation to recognise persons as competent fire safety practitioners (who are qualified, under the amended provisions, to prepare alternative solution reports and endorse plans and specifications).

- Local Government:

Local Government (General) Amendment (Minimum Rates) Regulation 2017 - published 10 March 2017, increased the statutory limit on the minimum amount that may be specified by a council when levying an ordinary rate from $506 to $514.

Local Government Amendment (Rates-Merged Council Areas) Act 2017, amended the *Local Government Act* 1993:

(a) to enable the Minister for Local Government, by determination published in the Gazette, to require a newly merged council to maintain pre-merger rate paths in levying rates for land in the new local government area; and

(b) to provide that a determination is to apply to the levying of rates for 3 rating years (in addition to the rating year for which the new council is required to maintain pre-merger rate paths by the proclamation constituting the new council).

- Water:

Floodplain Management Plan for the Barwon-Darling Valley Floodplain 2017 - published 30 June 2017, made the Floodplain Management Plan for the Barwon-Darling Valley Floodplain.

Water Management (General) Amendment (Floodplain) Regulation 2017 - published 30 June 2017 declared certain land to be the Barwon-Darling Valley Floodplain for the purposes of the *Water Management Act* 2000.

Access Licence Dealing Principles Amendment Order 2017 - published 23 June 2017, set a conversion factor to be applied for dealings involving interstate transfer or assignment of water allocations in specified water sources.

- Miscellaneous:

The Western Sydney Parklands Amendment Order 2017 - published 19 May 2017, lists land that has been transferred to Trust.

Local Land Services Amendment (Voting) Regulation 2017 - published 31 March 2017, amended the Local Land Services Regulation 2014 to make further provision in relation to elections for members of local boards, particularly electronic elections. The Regulation:

(a) deals with instructions provided to voters relating to the formality of ballot papers with fewer votes cast than the number of persons to be elected in the election;

(b) modifies the declaration that an electronic voter must make on the voting website before casting an electronic vote; and

(c) removes the requirement that the voting website must provide a warning message to a voter when the voter is about to cast votes for a number of candidates less than the number of persons to be elected in the election.

Acts assented to and in force:

Universities Legislation Amendment (Planning Agreements) Act 2017 - assented to on 1 June 2017 and commenced 1 July 2017. It amends the various governing statutes for the universities regulated by State legislation to permit those universities to be able to eenter into voluntary planning agreements.

Acts assented to and only partially in force:

Protection of the Environment Legislation Miscellaneous Amendments Act 2017 - assented to and partially commenced 1 June 2017.

The following amendments commenced on assent:

(a) *Contaminated Land Management Act* 1997 to extend the application of Ch 7 (Investigation) of the *Protection of the Environment Operations Act* 1997 to the exercise of powers by authorised officers under the *Contaminated Land Management* Act 1997. Chapter 7 deals with such matters as the appointment of authorised officers, powers to require information and records, powers of entry and search, powers to question and to identify persons, and powers with respect to certain things such as vehicles;

(b) *Protection of the Environment Administration Act* 1991 to abolish Environment Protection Community Consultation Forums and the New South Wales Council on Environmental Education, and to make consequential amendments;

(c) *Radiation Control Act* 1990:

(i) to give the Land and Environment Court, instead of the District Court, jurisdiction to hear appeals against decisions of the Environment Protection Authority (**the EPA**) and, instead of the Supreme Court, jurisdiction to hear proceedings for offences under the Act or the regulations and proceedings for orders to remedy or restrain breaches of the Act or regulations;

(ii) to provide that offences may be prosecuted by the EPA or persons acting on behalf of the EPA, without the need for the Minister's consent;

(iii) to increase the maximum penalties that may be imposed by the Local Court for offences; and

(iv) to increase the time within which proceedings for offences may be commenced,

(d) *Land and Environment Court Act* 1979 to allow the Land and Environment Court:

(i) to hear appeals against the serving of a notice under s 18 of the *Radiation Control Act* 1990 to remedy or avoid a contravention of that Act or appeals against certain decisions of the EPA under s 36A of that Act; and

(ii) to hear proceedings for offences against the *Radiation Control Act* 1990.

Only some of the amendments to the *Protection of the Environment Operations Act* 1997 came into effect on assent. The commenced amendments related to:

- The provisions in s 78(2) concerning the review of licences have been amended so that the notice of the review is published on the EPA's website rather than in a newspaper circulating throughout the State. The time for notification of the proposed licence review (not less than one month, and not more than six months, before the review is undertaken) remains the same but the new regime is consolidated into s 78(2)(a), rather than being in s 78(2)(a) and (b) as in the past (Sch 3[3]).
- The section dealing with licensing arrangements for putrescible waste landfill sites (s 87) has been repealed (Sch 3[5]) but savings, transitional and other provisions concerning not only putrescible waste landfill sites, but also licences to transport trackable waste, came into effect (Sch 3[16]) pending the coming into effect of the new Pt 3.6A noted above as not having yet commenced.
- The provision in s 144AC "Use of approved GPS tracking device required by EPA for waste transportation vehicles" has been expanded to permit the EPA to require such a device to be attached not only to a motor vehicle, but also to any trailer (Sch 3[6]). For these purposes, the Dictionary has been amended to include a definition of "trailer", stating that it has the same meaning as in the *Road Transport Act* 2013 (Sch 3[18]).
- The provisions in Ch 7 (Investigation) have been extended to have the provisions now apply to the Contaminated Land Management Act 1997 and regulations made under that Act (Sch 3[7]).
- The powers of authorised officers to enter premises, contained in s 196, have been amended by adding the words "or vessel" to the means by which such entry may be effected (Sch 3[8]).
- The provisions concerning the time within which summary proceedings may be commenced (s 216) have been amended to add to the prescribed offences in s 216(6) two new offences. These offences are:
  - An offence under s 120 (Prohibition of pollution of waters), but only in relation to underground or artesian water; and
  - An offence under s 144AB (Repeat waste offenders).

These additional offences were inserted by Sch 3[10].

The uncommenced amendments to the *Protection of the Environment Operations Act* 1997 will commence on proclamation at a later date. These uncommenced amendments relate to:

- Insertion of provisions to clarify the existing legislation as it relates to renewal of licenses (Sch 3[1]). Other uncommenced provisions clarifying elements of the existing legislation concerning renewal of licenses are contained in Sch 3[11], [12] and [15].
- The insertion of a new Pt 3.6A (Duration and renewal of licenses to transport trackable waste) (Sch 3[4]) and two amendments consequential on the insertion of the new Pt 3.6A (Sch 3[2] and [13]).
- Section 196 (Powers of authorised officers to enter premises) will include a new s 196(2A) permitting entry to be effected by an unmanned vehicle, vessel or aircraft, but only when that equipment is operated by or under the authority of an authorised officer.

Crown Land Legislation Amendment Act 2017 - assented to and partially commenced 17 May 2017. This Act amends the as yet not operative *Crown Land Management Act* 2016 (and other legislation consequent on the enactment of these amendments to the *Crown Land Management Act* 2016). These, relevantly to this Court, deal with closure of public or Crown roads and rights of appeal to this Court concerning such closures. None of these provisions will become operative until the *Crown Lands Act* 1989 is repealed and replaced by the *Crown Land Management Act* 2016.

Bills

Local Government Amendment (Amalgamation Referendums) Bill 2017 seeks to amend the *Local Government Act* 1993 to provide that:

(a) plebiscites are to be conducted to ascertain whether the electors of the local government areas amalgamated during 2016 wish the amalgamations to be reversed; and

(b) certain proposed amalgamations of local government areas are not to proceed unless approval to the amalgamation has been given by the electors of each of the areas concerned at a referendum.

State Environmental Planning Policy [SEPP) Amendments

The SEPP (Exempt and Complying Development Codes) 2008 was amended by:

- SEPP (Exempt and Complying Development Codes) Amendment (Housing Code) 2017; and
- SEPP (Exempt and Complying Development Codes) Amendment (Miscellaneous and Affordable Housing) 2017 - these amendments came into effect when published on the legislation website on 16 June 2017 and are now incorporated in the SEPP.

State Environmental Planning Policy (State and Regional Development) Amendment (Ivanhoe Estate) 2017 - commenced 31 March 2017, and amended or replaced maps adopted by SEPP (State and Regional Development) 2011.

Miscellaneous

The Growth Centres (Development Corporations) Amendment (Hunter Development Corporation) Order 2017 - published 9 June 2017, changed the nature of governance of the Hunter Development Corporation from being a board-governed entity to one governed by a chief executive.

Mining Legislation Amendments

The Mine Subsidence Compensation (Mine Subsidence Districts) Proclamation 2017 - published 9 June 2017 and commencing 1 July 2017:

(a) altered the boundaries of certain mine subsidence districts (including by amalgamating the Swansea-North Entrance Mine Subsidence District and Swansea-North Entrance Mine Subsidence District (No 1)); and

(b) proclaimed the new mine subsidence districts of Bellbird-Millfield, Black Hill, Curlewis, Greta, Lithgow South, Louth Park, Maitland West, Mudgee and Swansea Heads.

The *Mining and Petroleum Legislation Amendment Act* 2017 commenced 27 June 2017. It amended the *Mining Act* 1992 (**the Mining Act**), the Mining Regulation 2016 (**the Mining Regulation**) and the *Petroleum (Onshore) Act* 1991 (**the Petroleum Act**) as follows:

(a) to clarify how ancillary mining activities (currently known as “mining purposes”) that are carried out in connection with mining leases and mineral claims are to be regulated under the Mining Act;

(b) to make further provision in relation to the giving of enforceable undertakings under the Mining Act and the Petroleum Act and the enforcement of those instruments;

(c) to make further provision in relation to offences under the Mining Act and the Petroleum Act regarding the furnishing of false or misleading information; and

(d) to make other miscellaneous amendments regarding the administration and enforcement of the Mining Act and the Petroleum Act.

Civil Procedure Amendments

Uniform Civil Procedure (Amendment No 84) Rule 2017 - published 7 April 2017, amended the Uniform Civil Procedure Rules 2005 to ensure the expert witness code of conduct reflects the harmonised rules approved by the Council of Chief Justices.

Judgments

United Kingdom

R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire BC **[2016] EWCA Civ 1260** (Briggs and Sales JJ)

(related decision: *R. (on the application of Skelmersdale Ltd Partnership) v West Lancashire* BC [2016] EWHC 109 (Admin) (Jay J))

Facts: This was an appeal from a dismissed judicial review claim of a condition of a planning permission. The planning permission was for a new retail-led development on a site in the town centre of Skelmersdale, known as the St Modwen site.

The developer of the site was the Second respondent, St Modwen Developments (Skelmersdale) (**SMD**). The appellant, Skelmersdale Limited Partnership (**SLP**), was the owner of an already existing shopping mall the town centre, the Concourse Centre. The object of the judicial review proceedings brought by SLP was to show that the relevant condition (condition 5) of the planning permission could not stand, with the result that the grant of planning permission should be quashed.

Condition 5 sought to impose restrictions on existing retailers in the Concourse Centre that might wish to relocate to the new centre.

The SMD development application was assessed by independent retail consultants of the Council producing "the report". The report highlighted the commercial fragility of the existing shopping mall, the Concourse Centre, which had experienced closures of retail outlets and an increase its vacancy rate. The report noted that it was concerned that if retailers with significant retail units in the Concourse Centre gave up those units in order to lease new units on the St Modwen site, that would damage the viability of the Concourse Centre. Two retail outlets were identified as key retailers to the mall for their large size and location at either end of the mall.

The report of the Council's planning officer for members of the Council's planning committee on the application for planning permission recommended that approval be granted, subject to a condition to protect the vitality and viability of the Concourse Centre. Thus, condition 5 was imposed by the Council restricting retailers of a certain size in the Concourse Centre from opening a retail outlet at the St Modwen site unless they submitted a scheme in which they would commit to retaining their presence as a retailer within the Concourse Centre for a minimum of 5 years following occupation of a retail outlet at the St Modwen site.

Issues:

(1) Whether condition 5 required a retailer to enter into a legally binding commitment to retain their presence as a retailer in the Concourse Centre;

(2) Whether condition 5 was so vague as to be unlawful and unenforceable; and

(3) Whether condition 5 would fail to achieve its intended purpose.

Held: Dismissing the appeal.

(1) Interpretation of the word "commits" in condition 5 involved asking, as per Lord Hodge JSC in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [34], "what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole"; "This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense": at [16];

(2) In this case, the purpose of condition 5 was clear, it was to maintain the viability and vitality of the Concourse Centre by ensuring that retailers with significant units in the Concourse Centre should not be able to decamp from there to go to the St Modwen site, but should be required to maintain their units at the Concourse Centre even if they decided that they wanted a unit at the St Modwen site as well. That objective could only be fulfilled if the retailers in question were made subject to a legally binding commitment holding them to that position: at [17];

(3) In this context, the phrase in condition 5 retained its natural and ordinary meaning, including the word "commits". This view accorded with a common sense view of what the Council was seeking to achieve. The word "commits" connotes a legally binding commitment: at [17]-[18];

(4) In order to ensure condition 5 could be enforced in practice, the relevant contract with a retailer could include a negative covenant not to occupy retail floor-space at the St Modwen site unless that retailer continued to retain its presence as a retailer at the Concourse Centre and all that would be required to enforce the contract in a manner effective to protect the Concourse Centre against the risk of a retailer decamping would be negative injunctive relief to enforce that negative covenant; [21]; and

(5) The phrase "retaining their presence" rather than "retaining a presence" was the natural and ordinary meaning of the words in condition 5 This ordinary meaning accorded with the scheme as a whole and the purpose of condition 5, which was to provide effective (not ineffective) protection for the Concourse Centre. Any approvals under a condition 5 scheme less stringent than that articulated in the condition would themselves be vulnerable to being quashed for error of law on statutory review: at [24]-[26].

Queensland

- Land Court of Queensland

New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) **[2017] QLC 24** (Member PA Smith)

Facts: Mining began at the New Acland Coal mine, located approximately 50km north-west of Toowoomba, in 2001 (**Stage 1**). The project was expanded in 2006 (**Stage 2**). New Acland Coal Pty Ltd (**the applicant**) lodged Mining Lease Application (**MLA**) 50232 in 2007, which sought to further expand mining operations (**Stage 3**). The Stage 3 expansion was declared a state significant project pursuant to s 26 of the *State Development and Public Works Organisation Act 1971* (Qld).

The Queensland Government rejected the Stage 3 expansion in 2012 because it "was 'inappropriate' to expand the mine in the State's southern food bowl". The applicant revised the Stage 3 application, reducing the area and mine capacity of MLA 50232 and also lodged MLA 700002 to facilitate the construction of a rail spur (removing the need for road hauling the coal). The Queensland Department of Environment and Heritage Protection issued a draft Environment Authority (**EA**), EPML 00335713, for the revised project.

Objections to the grant of MLAs 50232 and 700002 under the *Mineral Resources Act 1989* (Qld), and objections to the grant of Environment Authority 00335713 under the *Environmental Protection Act 1994* (Qld) (**the EPA Act**), were referred to the Land Court of Queensland for an objections hearing.

Issues:

(1) Whether the impacts of the revised Stage 3 expansion could be appropriately managed, with regard to:

(a) air quality and dust; (b) noise; (c) lighting; (d) visual amenity; (e) traffic, transport and roads; (f) economics; (g) agricultural economics; (h) climate change; (i) biodiversity/flora and fauna; (j) health (including mental and physical health); (l) land values; (m) livestock and rehabilitation; (n) land use and soils, intergenerational equity; (o) community and social environment; (p) heritage values/cultural heritage; (q) groundwater; (r) surface water; and (s) other objections.

Held: Recommended that the Minister responsible for the *Mineral Resources Act 1989* (Qld) reject MLA 50231 and MLA 700002; recommended that the administering authority responsible for the EPA Act refuse draft Environmental Authority EPML 00335713.

(1) *Groundwater:* the potential impacts of the expansion on groundwater supplies were uncertain due to difficulties with the faulting models and other aspects of groundwater studies: at [1626]-[1627]; the 2016 advice from the Independent Expert Scientific Community (**IESC**) did not allay these concerns because the IESC did not have access to the material before the Court, and accordingly the revised Stage 3 project should not proceed given the risks to landholders and the poor state of the model: at [16];

(2) *Intergenerational equity*:

(a) intergenerational equity includes the principles of conservation of options, conservation of quality and conservation of access (as discussed in *Gray v The Minister for Planning* (Pain J), *Taralga Landscape Guardians Inc v Minister for Planning RES Southern Cross Pty Ltd* (Preston CJ)): at [1306]-[1311], and sets out that future generations have the same opportunities to undertake various activities on the land as the current generation: at [1332];

(b) pure agricultural economics demonstrates that the expansion will produce economic benefits, however economic analysis is just one factor that needs to be taken into account when considering intergenerational equity: at [1331]-[1332];

(c) there is a real risk that the conservation of quality principle will be breached by the expansion because of the real possibility that landholders will suffer a depletion of groundwater supplies, and the potential for that loss will continue for hundreds of years, if not indefinitely: at [1337]-[1338];

(d) there is a real risk that the principle of conservation of options will be breached by the expansion, not only because of the real possibility of depletion of groundwater, but also because the coal will remain available for future generations who may find ways to mine the coal in the future in ways that remove or reduce the extent of risk: at [1341]-[1342];

(e) the revised Stage 3 expansion therefore breaches the principle of intergenerational equity, warranting the rejection of the MLAs and draft EA: at [14];

(3) *Noise*: noise levels should be set at 35 dB for the evening and night, and as this is inconsistent with the conditions in the EA, the EA should be refused: at [3];

(4) *Climate change*: the burning of thermal coal (Scope 3 emissions) from the revised Stage 3 expansion will occur predominantly overseas: at [1091]; the science of climate change is not of itself an issue in this matter: at [1091]; however the impact of the revised Stage 3 expansion on climate change is not of concern, because if it does not proceed, the coal will be obtained from elsewhere and will likely be of a lower quality thereby increasing global emissions: at [9]; and

(5) *Other impacts*: the impacts of the revised Stage 3 expansion were either found to be minor, appropriately managed or adequately dealt with by conditions in the draft EA (or the additional conditions recommended by the Court) with regard to air quality and dust: at [2]; light: at [4]; visual amenity: at [5]; traffic, transport and roads: at [6]; biodiversity/flora and fauna: at [10]; mental and physical health: at [11]; land values: at [12]; livestock and rehabilitation issues and land use and soils: at [13]; and surface water: at [17]; the expansion is likely to provide significant economic benefit to the local region, the state and the nation: at [7]; the expansion is of greater economic value than agricultural pursuits: at [8]; the community and social environment of Acland has been fractured by those for and against the expansion and this will continue in the short term irrespective of whether the expansion is approved or not: at [15].

Western Australia

- Court of Appeal of Western Australia

Reid v Western Australian Planning Commission **[2016] WASCA 181** (Martin CJ, Newnes and Murphy JJA)

Facts: Lance and Wayne Reid (**the appellants**) were the registered owners of approximately 40 hectares of land situated five kilometres north of Albany. They applied to the Western Australian Planning Commission (**the respondent**) for approval to subdivide the land into two lots. There were two dwelling houses on the land, and aside from some cleared land adjacent to the dwellings, the land was densely vegetated and was of high biodiversity and conservation value.

The respondent granted approval to the subdivision subject to five conditions, including, relevantly, that the appellants must:

(1) switch to underground power supply on each of the new lots;

(2) grant a restrictive covenant in perpetuity for the benefit of the Department of Parks and Wildlife requiring the conservation of 23 hectares of the land; and

(3) obtain approval for a fire management plan.

The appellants applied to the State Administrative Tribunal (**the Tribunal**) for a review of the respondent's decision to impose the conditions. The Tribunal dismissed the application. The appellants applied to the Supreme Court, where leave to appeal the Tribunal's decision was refused. The appellants then appealed the Supreme Court's decision to the Western Australian Court of Appeal.

Issues:

(1) Whether the Tribunal and the judge at first instance erred in their application of the test for determining the validity of a condition imposed on a subdivision by:

  (a) failing to consider properly whether the conditions reasonably and fairly related to the development permitted; and

  (b) asserting that a condition will reasonably and fairly relate to a development if the relevant policy framework leads to the conclusion that the development should only be permitted if the condition is imposed.

Held: Leave to appeal granted; appeal allowed; decision of primary judge set aside; decision of State Administrative Tribunal set aside; matter remitted to State Administrative Tribunal for determination.

(1) For a condition to reasonably and fairly relate to the development permitted, a relevant connection or relationship must be established between the planning purpose to be served by the condition and the likely or possible consequences of the proposed subdivision: at [37]; a relevant connection or relationship is not established merely because the application for subdivision approval provides an opportunity or occasion to impose a condition in the furtherance of a proper planning purpose: at [37];

(2) The Tribunal failed to appreciate the need for a factual connection to be established between the likely or possible consequences of the subdivision proposed and the planning purpose to be served by the conditions imposed: at [41]; the Tribunal failed to express any findings of fact with respect to the likely or possible consequences of the subdivision which would have any impact on the need to protect the environmental values of the land or to supply electricity to the land below the ground rather than above it: at [41]; and

(3) The primary judge made the same error as the Tribunal in asserting that a condition will reasonably and fairly relate to a development if the relevant policy framework leads to the conclusion that the development should only be permitted if the condition is imposed: at [43]; this erroneously conflates the first part of the test for determining the validity of a condition imposed on a subdivision

(the condition must be for a planning purpose and not for any ulterior purpose) with the second part (the condition reasonably and fairly relates to the development permitted): at [44].

NSW Court of Appeal

Bay Simmer Investments Pty Ltd v State of New South Wales **[2017] NSWCA 135** (Basten JA; with Leeming JA concurring with additional comments; Sackville AJA concurring)

(related decision: *Bay Simmer Investments Pty Ltd v The State of New South Wales* [2016] NSWLEC 123 (Pain J))

Facts: Bay Simmer Investments Pty Ltd (**the appellant**) runs a restaurant business at Walsh Bay, Sydney. The State of New South Wales, through its entity, Arts NSW, obtained development consent for a concept plan for the Walsh Bay Arts Precinct (**WBAP**), via a staged development application. The WBAP is state significant development. The appellant commenced judicial review proceedings challenging the validity of development consent on the basis that the delegate of the Minister for Planning had failed to consider "construction related impacts", a mandatory relevant consideration under s 79C(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

The Land and Environment Court dismissed the proceedings. The primary judge held that it was permissible to defer consideration of construction related impacts because the development application was for staged development.

Issues:

(1) Whether the proposal was a staged development application within the meaning of s 83B of the EP&A Act; and

(2) Whether the Minister's delegate was required to consider any construction related impacts of the proposed development.

Held: Appeal allowed, development consent declared invalid.

(1) The structure, purpose and language of s 83B is not consistent with the formulation of a concept proposal which may be followed by only a single further detailed development application for the whole of the site: at [27], [77]-[81]. There must be at least two proposals detailing proposed stages of the development relating to separate parts of the site: at [37], [41]. There was no indication that the proponent, Arts New South Wales, intended to proceed in such a way: at [38], [41]. The proposal did not comply with the statutory requirements, therefore the consent was invalid: at [42]; and

(2) There is no basis in the language of the EP&A Act, the purposes of the provisions relating to staged development applications or the provisions relating to state significant development to exclude construction related impacts from the assessment of a staged development application. As the delegate did not consider any construction related impacts, the consent was invalid: at [66]-[67], [83].

Bayside Council v V Corp Constructions Pty Ltd **[2017] NSWCA 120** (Basten JA, Macfarlan JA concurring and Ward JA concurring with additional comments)

(related decision: *Bayside Council v V Corp Constructions Pty Ltd*, District Court of New South Wales, 31 May 2016, Olsson SC DCJ, unreported)

Facts: In October 2004 the Bayside Council – as it now is – (**the Council**) granted consent to V Corp Construction Pty Ltd (**the respondent**) for the demolition of existing buildings and the construction of a four-storey mixed use development at 1-3 Elizabeth Avenue, Mascot. As part of the consent a condition required the developer to enter an agreement with the Council for the respondent to provide for the existing aboveground power cables in the street adjoining the site to be replaced, at the developer's expense, by underground cables to the standards of the relevant network operator (**Energy Australia**). This agreement was entered into in May 2006. In July 2006, following communication

between Energy Australia and the respondent, the respondent was informed that Energy Australia did not approve the activity as "undergrounding" was unsuitable in that instance for a number of reasons.

In May 2007 a council engineer wrote to the respondent requiring that the developer, in lieu of the impermissible cable undergrounding, pay the Council $10,000. In June 2007 this arrangement was confirmed by letter from the Council and noted that the developer had paid the amount of $10,000.

On appeal, the Council alleged that it incurred a loss as a result of the failure of the developer to procure the repositioning of the cabling as per the agreement. The Council claimed that despite the correspondence and agreement to pay $10,000 they were entitled to require compliance.

In the District Court, where the proceedings commenced, Olsson DCJ rejected the claim; the appeal was brought from that decision.

In addition to the proceedings against the developer, the Council sued the second respondent, an accredited certifier under the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), who issued an occupation certificate with respect to the development, despite the fact that the electric cables were still above ground and so, the Council submitted, the relevant condition had not been complied with. The Council alleged that the certifier owed it a duty of care and had been negligent in issuing the occupation certificate in circumstances were there was non-compliance with the development consent. The trial judge rejected that claim also.

Issues:

(1) Whether the developer's resultant failure to procure the undergrounding work constituted a breach of the agreement;

(2) Whether Energy Australia's approval was a necessary condition of fulfilment; and

(3) Whether the loss was demonstrated in circumstances where the works were unable to proceed without Energy Australia's approval.

Held: Appeal dismissed with costs.

(1) It was consistent with the language of the deed that if Energy Australia required that the work not be done, it could not be done and the failure to procure the work to be done would not constitute a breach of the respondent's agreement. On one view, that was the effect of the express reference to the need to comply with the "requirements" of Energy Australia: at [39];

(2) It needed to be assumed that the parties knew that no such work could be done without the approval of Energy Australia. **I**f the contract did not expressly so provide, the implication of a term to that effect would have been both necessary and obvious. Thus, it could be accommodated by implying the words "with the approval of and" before the words "in accordance with the standards and requirements of Energy Australia"; that would exclude from the scope of the obligation work which would be unlawful and would render the obligation legally effective: at [41]-[42]'

(3) The trial judge concluded that the Council suffered no loss in any event. If Energy Australia were not willing to countenance that work, it could not be said that Council had suffered any loss, because the expenditure would not take place. The Council had in fact obtained a public benefit in the form of the varied improvements made by the developer, which involved paving instead of footpaths and improvements to the kerbing and guttering: at [53]-[54]; and

(4) The trial judge found that, at the very least, in order to prove loss the Council needed to establish that it had not received any such additional benefits, or, if it had, they were required to be valued and set off against the amount claimed. That would have been consistent with the position of the Council in agreeing that the $10,000 should be repaid, acknowledging that it was a benefit which had been obtained in lieu of compliance with the agreement. That step was not undertaken. The Court found there was no obvious error in the approach of the trial judge in this respect: at [54]-[55].

Bligh Consulting Pty Ltd v Ausgrid **[2017] NSWCA 95** (Sackville AJA; McColl JA concurring and Basten JA concurring with additional comments)

(related decision: *Bligh Consulting Pty Ltd v Ausgrid* [2016] NSWLEC 75 (Pain J))

Facts: Ausgrid compulsorily acquired three interests in land at 31 Bligh Street Sydney owned by Bligh Consulting Pty Ltd (**Bligh**). These interests were an easement for crane swing, an easement for scaffolding and an easement for rock anchors. The easements were acquired to facilitate demolition and excavation works and construction of an electrical substation on neighbouring land. On Bligh's land stands a heritage-listed building that was leased to the Lowy Institute for International Policy (**the Institute**) pursuant to a sub-sublease. The date of acquisition of the easements was 8 August 2014. On 30 September 2014, the Institute's lease ended and a new lease was not entered into. The Institute remained in the building on a month-to-month basis until 11 December 2015.

Bligh claimed compensation pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**) under ss 55(a) market value, (d) disturbance (which was agreed) and (f) injurious affection. Bligh argued that the Institute vacated the building at 31 Bligh Street by reason of the carrying out of or the proposal to carry out the public purpose and therefore the value of the land decreased. The primary judge rejected Bligh's $4.25 million claim for injurious affection.

Issues:

(1) Whether the primary judge erred in rejecting Bligh's claim for injurious affection;

(2) Whether the primary judge failed to apply *Besmaw Pty Ltd v Sydney Water Corporation* (2001) 113 LGERA 246 when assessing compensation for the crane swing easement; and

(3) Whether the primary judge erred in finding that s 62(1) (compensation for subterranean easement only payable when actual damage in construction or caused by the work) applies to rock anchor easements.

Held: Appeal dismissed with costs.

(1) The primary judge correctly addressed the threshold question of whether a hypothetical purchaser in the "after" scenario would value 31 Bligh Street on the assumption that the Institute would vacate the premises due to the proposed construction and that the premises would remain vacant for an extended period: at [101]. As the primary judge found that a hypothetical purchaser would not have valued the premises on these assumptions, the basis for Bligh's injurious affection claim dissolved: at [102]. A distinction was drawn between what the Institute would do and what a reasonable person in the position of the Institute would do: at [106] and [107];

(2) The primary judge did not overlook the principle in *Besmaw* but distinguished the decision on the ground that an informed hypothetical seller of the crane swing easement would assess its value taking into account that, in reality, the easement would not interfere with the use of the building on 31 Bligh Street: at [132]; and

(3) Section 62(1) applied to rock anchor easements, as held in *Pennant Hills Golf Club Ltd v Roads and Traffic Authority (NSW)* [1999] NSWCA 110: at [122]. Further, nothing in the language of s 62(1) justifies reading into the provision a requirement that the relevant works must be "ends in themselves" rather than works that form part of or support other works: at [124].

Cheetham v Goulburn Motorcycle Club Inc **[2017] NSWCA 83** (McColl JA and Sackville AJA; Basten JA dissenting)

(related decision: *Cheetham and Anor v Goulburn Motorcycle Club Incorporated and Ors* [2016] NSWLEC 80 (Moore J))

Facts: The Council granted the original development consent on 18 August 2015 in a Notice of Determination pursuant to s 81(1)(a) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). The original development consent granted consent to the proposed development of a motorcycle facility subject to conditions stated in the schedule attached to the Notice of Determination.

Issues:

(1) Whether the proposed development was prohibited under the Goulburn Mulwaree Local Environmental Plan (**the GMLEP**);

(2) Whether the characterisation of the proposal was a jurisdictional fact to be determined by the Court;

(3) Whether consent was for a "recreation facility (major)";

(4) The extent to which reference could be made to documents referred to in conditions of consent in construing the consent; and

(5) How to construe "means" and "includes";

Held: Appeal dismissed.

McColl JA and Sackville AJA:

(1) Use of the land for the purpose of "motor racing tracks" was not a prohibited use under the GMLEP: at [14]-[17];

(2) The question of whether the development application, as approved, was a permitted use was an issue to be determined by the court undertaking judicial review. In administrative law terms, that question was identified as involving a "jurisdictional fact". Although the question of whether the development was a permitted use included questions of fact, it also included the construction of the GMLEP and the application of the relevant terms to the proposed development. The issue better understood was whether there was an essential precondition to the exercise of a power which was not satisfied: at [37];

(3) The consent did not permit the land to be developed for the prohibited use as "recreation facility (major)". The definition of "recreation facility (major)" in the local environmental plan, properly construed, would not be satisfied simply because particular numbers of people were likely to attend motorcycle events conducted on the land in conformity with the consent. To satisfy the definition of "recreation facility (major)" the motor cycle activities would have needed to be conducted on a "large scale" and attended by large numbers of people. The definition required the attendees to include large numbers of members of the public (as distinct, for example from the limited membership of a club) who were required, at least on some occasions, to pay for admission to the events: at [30]-[31]; and

(4) To the extent that the language of the consent left uncertain the scale and nature of the activities permitted on the land, it was necessary for the Court to consider how far the contents of the documents referred to in conditions of the consent could be taken into account. The Court found that it would have been impossible to understand the nature and scope of the development approved without reference to the site plan and other plans specifically identified in Condition 1 of the consent. However, a tendered letter and Statement of Environmental Effects were found to contain some information that would be impermissible for the purpose of construing the consent: at [26]-[27].

Basten JA dissenting:

(5) With regards to the definition of "recreation facility (major)" two words, "means" and "includes", were critical to statutory interpretation of the definition. The first limb of the definition identified what the defined term "means" by reference to a descriptive (composite) criterion; the second limb identified specific uses which were said to be included. The fact that the examples follow the conjunctive "and" was inconsistent with them constituting a separate, or alternative, basis for satisfying the definition. Further, the verb "includes" was apt to serve an illustrative or an expansionary function. If the items specified would not ordinarily be understood to fall within the descriptive criterion, the effect may be expansionary. If, on the other hand, they naturally fall within the descriptive criterion, they may be understood as illustrations: at [47].

Coshott v Spencer **[2017] NSWCA 118** (Beazley ACJ; McColl JA agreeing with both; and Simpson JA concurring with additional comments)

(related decision: *Coshott v Spencer* [2016] NSWDC 43 (Gibson DCJ))

Facts: Mr Coshott (**the applicant**) sought judicial review of two decisions, each of which related to the statutorily regulated costs assessment processes in New South Wales.

The first decision subject of the application for judicial review was the appeal to Gibson DCJ in the District Court under s 384 of the *Legal Profession Act 2004* (NSW) (repealed) (**the 2004 Act**). In that appeal, the applicant sought an order that a determination of Ms Dulhunty (**the costs assessor**) be set

aside on the basis that, in carrying out a costs assessment under s 367 of the 2004 Act, the costs assessor had no jurisdiction to determine whether the applicant, the other party to the costs assessment, was a "third party payer" within the meaning of s 302A of the 2004 Act.

Gibson DCJ determined the appeal in favour of Mr Spencer (**the respondent**). As the applicant was unsuccessful in his appeal under s 384, her Honour made a costs order in the respondent's favour.

The respondent was a solicitor who was the principal of the incorporated legal practice, Kejus Pty Ltd, trading as Spencer & Co Legal, which provided legal services. The respondent, having a costs order made in his favour by Gibson DCJ, made an application for costs assessment of his costs and disbursements in respect of the appeal proceedings before her Honour. The costs assessor, Mr Wall, in his costs assessment determination, allowed the respondent his professional costs. The applicant contended in respect of that second determination that Mr Wall erred in law in allowing the respondent his professional costs in circumstances where he was a self-represented litigant.

Issues:

(1) Whether Gibson DCJ erred in law in holding that the costs assessor had jurisdiction to determine whether the applicant was a "third party payer" within the meaning of s 302A of the 2004 Act; and

(2) Whether, upon the proper construction of s 98 of the *Civil Procedure Act 2005* (NSW) and the definition of "costs" in s 3 of that Act, the "*Chorley* exception" to the rule, that a self-represented litigant is not entitled to professional costs, applies in New South Wales.

Held: Summons dismissed, with costs.

(1) The powers of a costs assessor were not limited in the manner argued by the applicant. This was so because in the usual course an administrative officer has the power to determine whether it is acting within authority: at [48];

(2) An applicant for costs assessment must be either a "client" or a "third party payer" within the meaning of the 2004 Act to be entitled to seek a costs assessment. Under s 358, a costs assessor may require the production of documents and information for the purposes of determining the costs application. The determination of a costs application could, and would in an appropriate case, properly include a rejection of the application if a party was not entitled to bring it;

(3) Her Honour was correct in finding that a costs assessor in undertaking an assessment has jurisdiction to determine whether a party to the assessment was a "third party payer". Section 350 provides that "a third party payer" may apply to a costs assessor for a costs assessment. This is to be contrasted with the position of a "client" who may apply to the Manager, Costs Assessment. There was found no apparent reason for the differentiation as between the two classes of applicants. Nor did the Court find there to be a mechanism for a third party payer to apply to a costs assessor for a costs assessment. It was found that it is a difference which has escaped the notice of those statutorily engaged in the costs assessment process. However, as the legislation provided that a "third party payer" may apply to a costs assessor, then, a fortiori, the costs assessor had the power to determine whether the applicant was a "third party payer" within the meaning of the Act: at [53];

(4) It is well established that a self-represented litigant is not entitled to professional costs for acting for themselves in proceedings: *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14. There is a recognised exception to this rule where a solicitor is self-represented in proceedings brought by or against her or him as per *London Scottish Benefit Society v Chorley* (1884) 13 QBD 87 (the *Chorley* exception). The *Chorley* exception was applied in Australia in *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47; [1976] HCA 57: at [64]; and

(5) The Court found that s 98, by reference to the definition of "costs" in s 3 does not, by its express terms, render the *Chorley* exception inapplicable. Rather, the Court was bound by the decision in *Guss v Veenhuizen (No 2)*. That view was taken in *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10 and *Khera v Jones* [2006] NSWCA 85, albeit that the terms of the relevant costs rules were not discussed in those cases. For that reason, it was not necessary to consider other jurisdictions in which the *Chorley* exception has been discussed, other than to observe that, with limited exceptions, it has been accepted that *Guss v Veenhuizen (No 2)* is binding precedent on the question: at [107].

Dial A Dump Industries Pty Ltd v Roads and Maritime Services [2017] NSWCA 73 (Beazley P; McColl and Leeming JJA each concurring with additional comments)

(related decision: *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2016] NSWLEC 39 (Preston CJ))

Facts: On 19 December 2014, land at St Peters, described as Lot 2 in DP168612, having a street address of 10-16 Albert Street, St Peters and known as the Alexandria Landfill (**Lot 2**) was compulsorily acquired for the purposes of the WestConnex Motorway pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**), ss 19 and 20.

Immediately prior to its compulsory acquisition, Alexandria Landfill Pty Ltd (**ALF**) was the registered owner of the estate in fee simple of Lot 2. Boiling Point Pty Limited (**BP**) was the lessee of Lot 2 pursuant to an unregistered lease dated 7 February 2014. Each was, therefore, an owner of an interest in the land and thereby entitled to be paid compensation consequent upon the compulsory acquisition.

Dial A Dump Industries Pty Ltd (**Dial A Dump**) also claimed an entitlement to compensation on the basis that it had an interest in the land, being permission to use and occupy Lot 2 to operate a waste landfill and to carry out crushing, grinding and separating works on the land. Its claim for compensation was rejected by the WestConnex Delivery Authority.

Dial A Dump appealed to the Land and Environment Court and, on 29 October 2015, the Court ordered that the following separate question be heard and determined:

> "... whether Dial A Dump Industries Pty Ltd had 'an interest in land' as at the acquisition date for the purposes of s 5 of the *Land Acquisition (Just Terms Compensation) Act 1999* (NSW), as defined in s 4 of that Act, in, over or in connection with Lot 2 DP 1168612."

On 8 April 2016, Preston CJ of LEC answered that question "*no*" and ordered that the proceedings be dismissed. Dial A Dump appealed against his Honour's decision.

Issues:

(1) Whether Dial A Dump had a legal interest in the land;

(2) Whether Dial A Dump had an equitable interest in the land; and

(3) Whether Dial A Dump had any rights, power, or privilege in connection with the land;

Held: Appeal dismissed.

(1) In order to determine whether Dial A Dump had a legal interest in the land, the Court considered several issues: at [48]:

   (a) it is established law in New South Wales that a party can have a legal interest in Torrens title land other than a documented title, the right to exclusive possession being sufficient as against all but the lawful owner: at [49];

   (b) the primary judge did not confine his consideration of Dial A Dump's claim to a legal interest in land by reference only to a documented interest: at [53];

   (c) Dial A Dump was unable to rely upon the principles of *Perry v Clissold* (1906) 4 CLR 374 to establish a legal interest in land as this was not a case where the true owner, or any other party with a right to the land, was unknown, nor was it a case where there was evidence of Dial A Dump having been granted exclusive possession: at [68]-[69];

   (d) Dial A Dump had no independent right to carry on the businesses itself. Thus the Court found it was apparent that Dial A Dump's reliance upon the fact that it occupied the premises and received revenue for doing so and paid certain expenses did not establish that it had any legal interest in the land: at [59]-[60];

   (e) In answer to Dial A Dump's contention that it had a legal interest derived from either ALF or BP, the Court found that given the circumstances and, in particular, ALF's legal title and BP's leasehold interest and their continued holding of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) licences, Dial A Dump's occupation did not constitute legal possession such as to constitute an interest in land: at [61]-[62];

(f) The primary judge did not make a finding of agency. Further, the Court could not make a positive finding of agency: at [56]-[62];

(g) If Dial A Dump's submission were correct, it would, as occupier of the premises, have been committing an offence contrary to s 48 of the POEO Act. The Court found that there was no evidence to suggest that Dial A Dump was acting illegally. All the evidence pointed to ALF and Boiling not only being aware of their obligations under their POEO Act licences, but structuring all of their dealings on that basis: at [70]-[72];

(2) There was no error of law by the primary judge in finding that Dial A Dump had not established that it had a legal interest in the land: at [73];

(3) In order to determine whether Dial A Dump had an equitable interest in the land, the Court considered several issues: at [89]-[91]:

(a) Dial A Dump did not have a beneficial interest in the trust fund including any individual assets in it, including the lease of Lot 2: [92]-[97];

(b) The Court rejected Dial A Dump's submission that its equitable interest arose from a declaration of trust. Dial A Dump did not discharge its onus of demonstrating that the case would not have been conducted differently had the point been raised at first instance. Thus the Court found that Dial A Dump should not be permitted to raise the point on appeal: [98]-[110];

(c) A lease that is held on trust for a beneficiary does not entitle that beneficiary to occupation of the land: at [111];

(4) There was no error of law by the primary judge in finding that Dial A Dump had not established that it had an equitable interest in the land: at [111];

(5) Dial A Dump had no power to control or direct the grant of leases or licences over the land. It could determine how the businesses were carried on, but it could not otherwise control or direct what went on on the land: at [157];

(6) It is arguable that a permission to use land could constitute a privilege. Whether that could be so would depend on the terms of the permission. Dial A Dump's permission to be on the land was for the purposes of the businesses that it was carrying on for ALF and Boiling. That did not give rise to an interest in land as defined: at [158]; and

(7) Dial A Dump's rights were no greater than its obligation to conduct the two businesses on behalf of ALF and BP for so long as those entities permitted it to do so: at [159].

Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government **[2017] NSWCA 54** (Basten JA; Macfarlan JA agreeing with additional comments; and Sackville AJA dissenting in part)

(related decision: *Ku-ring-gai Council v Mr Garry West as delegate of the Acting Director-General, Office of Local Government* [2016] NSWLEC 118 (Moore J))

Facts: On 6 January 2016, the Minister for Local Government referred to the Acting Chief Executive, Office of Local Government (**the Acting Chief Executive**) a series of proposals for council amalgamations and changes in council boundaries. One such proposal was described as a proposal by the Minister "for the merger of Hornsby Shire and Ku-ring-gai local government areas north of the M2 [Motorway]." The purpose of the referral, made under s 218F(1) of the *Local Government Act 1993* (NSW) (**the Local Government Act**), was "for examination and report" by the Chief Executive. On the same day the Acting Chief Executive delegated, under s 745(1) of the Local Government Act, their functions in relation to the examination of and reporting on the proposal to Mr Garry West (**the Delegate**).

On 22 March 2016, the Delegate forwarded his report to the Minister as well as the Boundaries Commission as required when proposing an amalgamation. This report relied upon modelling and analysis by KPMG contained in a long form document. However, the document prepared by KPMG had not been made available publicly or to the Delegate. The reason for the failure to release the document was the claim for public interest immunity.

The Boundaries Commission reviewed the Delegate's report and sent comments to the Minister on 22 April 2016 recommending that the proposal proceed to implementation.

On 22 March 2016, Ku-ring-gai Council (**Ku-ring-gai**) commenced proceedings in the Supreme Court seeking judicial review of the Delegate's report and an order setting aside the report under s 673 of the Local Government Act. Those proceedings were transferred to the Land and Environment Court. On 20 September 2016, Moore J dismissed the proceedings. The appeal sought to reagitate a number of grounds raised before the primary judge which, Ku-ring-gai contended, had been wrongly rejected.

Issues:

(1) Whether the Delegate was required to consider the advantages and disadvantages of the Merger Proposal insofar as it contemplated the excision of part of one local government area;

(2) Whether the Delegate misapprehended his functions under ss 263(1) and (3) of the LGA;

(3) Whether relief would be futile;

(4) Whether the Delegate carried out the statutory task of examination and report in relation to the Merger Proposal;

(5) Whether constructive failure to fulfil the statutory function because the Delegate lacked access to documents over which the Department claimed public interest immunity;

(6) Whether public interest in the production of the documents outweighed the public interest in preserving secrecy and confidentiality;

(7) Whether Ku-ring-gai denied procedural fairness because it was refused access to documents relevant to the Delegate's task; and

(8) Whether reasonable public notice of an inquiry was given as required by s 263(2B) of the Local Government Act.

Held: Appeal allowed.

(1) An analysis of the Delegate's reasons demonstrates that the primary judge was correct in concluding that the Delegate had eschewed any assessment of the merits of the excision of the area south of the M2 Motorway. It is understandable that he did so: the merger proposal, as described, neither required nor permitted such an examination: at [59];

(2) The Delegate misapprehended his function under ss 263(1) and (3) of the Local Government Act in relation to the area proposed to be excised from Hornsby Council's area. The Delegate's report indicated that he did not form his own judgment about the financial advantages or disadvantages of the proposed merger but instead adopted, uncritically, the results of the undisclosed KPMG analysis. Accordingly, he did not "examine" the merger proposal as s 263(1) (when read in conjunction with s 218F) required him to do. Further, the Delegate did not consider the Merger Proposal, insofar as it related to the alteration of Hornsby's boundaries by the excision of Hornsby South, having regard to the mandatory factors specified in s 263(3) of the Local Government Act: at [115], [125] and [239];

(3) No issue was raised about Ku-ring-gai's standing to claim relief by reason of the Delegate's failure to consider the Merger Proposal insofar as it excised Hornsby South from the remainder of Hornsby. Accordingly, if the flawed examination could be redone properly, relief should be granted which would allow that to happen: at [66] and [242];

(4) The fact that the delegate did not have access to the KMPG documents, in the absence of any legal justification for that situation, and objection to its absence having been squarely and repeatedly raised by Ku-ring-gai, lead to the conclusion that the delegate constructively failed to fulfil the statutory function of examining the Minister's proposal. Ku-ring-gai was right to assert that the delegate could not properly carry out his function of examination without having access to that material: at [100] and [102];

(5) The public interest in the KPMG analysis being produced to Ku-ring-gai and other opponents of the merger was not outweighed by any public interest in preserving secrecy or confidentiality: at [128];

(6) Ku-ring-gai was denied procedural fairness as the Delegate chose to rely on the results of the KPMG analysis, rather than conducting his own assessment of the advantages or disadvantages of the merger, when Ku-ring-gai was not in possession of the document in which the analysis was

contained. Ku-ring-gai thus did not have a proper opportunity to deal with "the critical issue or factor on which the administrative decision [was] likely to turn" (*Kioa v West* [1985] HCA 81 per Mason J) because a document whose examination was fundamental to that decision was not made available to it: at [126]-[127]; and

(7) While Ku-ring-gai focused on aspects of the reasoning of the primary judge which may have been partly inapt, there was no reason to doubt that the statutory requirement of reasonable public notice was in fact satisfied: at [111] and [298].

Per Sackville AJA dissenting:

(1) The Delegate misapprehended the function he was to perform under ss 263(1) and (3) of the Local Government Act. This error was sufficient to vitiate his report. However, whatever view might be taken of the merits of the Delegate's investigation, his actions and his report did not otherwise exceed the bounds of legality: at [295];

(2) The issues could have been resolved without any occasion for Ku-ring-gai to have access to the KPMG Documents: at [299]-[300]; and

(3) The Delegate's decision to reject Ku-ring-gai's submission as to how to proceed and to proceed to make his recommendation without having access to the KPMG documents did not involve a denial of procedural fairness. Regardless of the outcome to that challenge, Ku-ring-gai had the opportunity to put its case to the Delegate and was not denied procedural fairness: at [274]-[275].

LDF Enterprise Pty Ltd v State of New South Wales **[2017] NSWCA 89** (Leeming JA; Basten JA agreeing and Macfarlan JA agreeing with a qualification)

(related decision: *LDF Enterprise Pty Ltd v State of New South Wales* [2017] NSWSC 350 (Adamson J))

Facts: This was an application for leave to appeal from the refusal of interlocutory injunctive relief sought by the owner of land, LDF Enterprise Pty Ltd (**LDF**), to prevent officers within the Office of Environment and Heritage (**OEH**) from entering upon that land.

The OEH had previously visited the site as part of an investigation. Site visits had been made in June, August, and September of 2016 as well as March of 2017. There was correspondence between OEH and LDF's solicitor throughout this time culminating in a letter dated 3 April 2017 in which OEH communicated, via a letter to LDF's solicitor, that they would conduct another inspection on 4 April 2017. The letter invited the owner of land to grant consent, however, noted that if consent was not given the OEH officers would exercise the power of entry under s 196 of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) (imported into the *National Parks and Wildlife Act 1974* (NSW) (**the NPW Act**) by s 156B of the NPW Act).

Shortly before receiving that letter, and notwithstanding the extensive communications between the parties, LDF Enterprise filed a statement of claim and moved ex parte before the Supreme Court duty judge on 3 April 2017 seeking injunctive relief. That application was refused, and instead short service was ordered and the matter stood over to 2pm on 4 April 2017. There was a short hearing that afternoon, following which the primary judge refused to grant the injunction sought. Her Honour gave reasons at 10am the following day. LDF appealed the refusal by the primary judge

In the meantime, by orders made on 6 April 2017, a concurrent hearing of the application for leave to appeal and the appeal was directed with an interim injunction being granted up to and including 3 May 2017 (being the date of this judgment).

Issues:

(1) Whether the exercise of a power of entry in the course of investigations attracted any obligation to accord procedural fairness to the landowner;

(2) Whether the statute clearly displaced any such obligation if it existed; and

(3) Whether any claim for declaratory and injunctive relief concerning threatened entry on land in purported exercise of powers under the POEO Act was within the exclusive jurisdiction of Land and Environment Court.

Held: Leave to appeal granted; appeal dismissed with costs.

(1) In respect of matters involving what may broadly be described as judicial review of the enforcement of rights, obligations or duties, or the exercise of functions, conferred or imposed by a wide range of planning or environmental laws, including the NPW Act and the POEO Act not only is jurisdiction invested in the Land and Environment Court, but that jurisdiction is exclusive of that of the Supreme Court. Proceedings answering that description may neither be commenced nor maintained in the Supreme Court: at [13];

(2) Section 72 of the *Land and Environment Court Act 1979* (NSW) authorises the Supreme Court to transfer "proceedings commenced or purporting to have been commenced in the Supreme Court" which "could or should have been commenced" in the Land and Environment Court to that Court. That section does not apply to proceedings in, inter alia, Class 4 of the jurisdiction of the Land and Environment Court. However, s 149B of the *Civil Procedure Act 2005* (NSW) confers power to do so, including on the Court's own motion: at [14];

(3) The statutory scheme clearly displaced the presumption that the power conferred by s 196 was conditioned by an obligation to accord procedural fairness: at [30];

(4) The Court gave six grounds as to why power of entry in the course of investigation did not attract an obligation to accord procedural fairness: at [31]-[45]:

(a) First, s 196(1) was to be read as a whole. It was difficult to construe words of generality (at any time) as meaning "at any time, subject first to the landowner having been notified and given an opportunity to be heard": at [33];

(b) Secondly, s 196(3) in terms authorises the use of "reasonable force". That is to say, it authorises entry where the occupier has not consented. The most likely circumstance for the need for reasonable force is that the occupier has not been notified in advance of the entry being effected: at [34];

(c) Thirdly, s 211(3), which is also in Ch 7, provides, "a person who wilfully delays or obstructs an authorised officer in the exercise of the authorised officer's powers under this Chapter is guilty of an offence". A likely occasion for wilful delay or obstruction is when a landowner has not received notice of entry: at [35]-[36];

(d) Fourthly, Ch 7 is entitled "Investigation". With regards to the s 184 commencing the chapter the purpose of investigating compliance and contravention in legislation to protect the environment would not be furthered by qualifying the generally worded power of authorised officers to enter premises, so that it may only be exercised after notice has been given. It is easy to see how many investigations could be frustrated if notice were given (consider pollutants being discharged on occasion into waterways rather than in a more expensive lawful fashion): at [37]-[38];

(e) Fifthly, s 197 provides that the Part does not empower entry into residential premises without the permission of an occupier or the authority of a search warrant under s 199: at [39];

(f) Sixthly, s 189(2) qualifies the rights conferred upon authorised officers, including the right of entry, with respect to producing identification, that is the officer's statutorily issued identification or police identification if a police officer, upon request. The terms of that provision tend to sit ill with the right only being exercisable after notice has first been given to the landowner. Further, this obligation, together with those in s 196(3) and s 211(3) referred to above, is suggestive of an analogy with the powers conferred on police officers: at [41]-[42]; and

(5) In accordance with s 71 of the NPW Act, the proceeding should not have been commenced, and could not be maintained in the Supreme Court. However, the proceeding was not a nullity, and the Court had jurisdiction to determine whether its jurisdiction had been properly invoked: at [48].

Nash v Silver City Drilling (NSW) Pty Ltd **[2017] NSWCA 100** (Basten JA; Hoeben CJ at CL and Walton J agreeing)

Facts: On 12 August 2016, Silver City Drilling (NSW) Pty Ltd (**the respondent**) was sentenced under s 32 of the *Work Health and Safety Act 2011* (NSW) (**the Work Safety Act**) for a breach of the duty imposed by s 19(1) of that Act and fined in an amount of $112 000. The prosecutor sought an order for costs, however, after providing short reasons, the sentencing judge concluded:

"I decline to order that the defendant pay the prosecutor's costs."

On 8 March 2017, Ms Nash (**the prosecutor**) sought relief in the supervisory jurisdiction of the Court of Appeal with respect to the refusal by the District Court to order costs in her favour. This course was taken as a precaution in the light of submissions put on behalf of the respondent that there was no appeal to the Court of Criminal Appeal from the refusal to make a costs order.

The respondent challenged the jurisdiction of the Court under s 5AA of the *Criminal Appeal Act 1912* (NSW) (**the Appeal Act**) on two grounds. First, it submitted that the language of the judge ("decline to order ... costs") was not the dismissal of an application for an order for costs, within the second limb in s 5AA(1)(b). Nor was it an "order" from which an appeal might be brought within the concluding words of s 5AA(1). The second ground on which jurisdiction was resisted was that the prosecutor was not a "person", as the term does not include "the Crown" or "an aggrieved government authority" for the purposes of s 5AA(1).

Issues:

(1) Whether the prosecutor had the right of appeal under the Appeal Act;

(2) Whether refusal to award costs was an "order"; and

(3) Whether prosecutor was a "person".

Held: Dismissed the summons by the applicant, no order as to costs.

(1) The conventional way in which a court dismisses an application for an order is to make an order dismissing the application. Such an order may take one of several forms, including "application dismissed", "dismiss the application" or "refuse the application". The terminology is unimportant; the effect is the same in each case, namely an order dismissing the application. It followed that the first ground relied upon by the respondent was rejected: at [11]-[12];

(2) It was necessary to ask why an officer with authority to prosecute for an offence would not be a "person" for the purposes of s 5AA(1). A person charged with an offence may have a right to costs if the matter is dismissed or withdrawn, pursuant to s 257C of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**), and would have a right of appeal, subject to the limitations imposed by s 257D. Although the positions of the accused and the prosecutor with respect to costs were not identical, each had some form of entitlement under the relevant provisions of the Criminal Procedure Act and it was not self-evident that the language of the statute allowed for a limitation to be imposed on the right of appeal which excluded one, but not the other: at [21];

(3) In *Sasterawan v Morris* (2007) 69 NSWLR 547,the Court of Criminal Appeal considered the scope of the reference to "any person" in s 14 of the Criminal Procedure Act, conferring a right to institute a prosecution. Although the means of commencement varied as between "a person other than a police officer or public officer", and "a police officer or public officer", the Court concluded that the reference to "any person" in s 14, headed "Common informer", covered both classes. There was no reason why a similar construction should not be given to the term "person" where it appeared in s 5AA of the Appeal Act: at [22]; and

(4) It followed that there was an appeal available to the prosecutor in the District Court, pursuant to s 5AA of the Appeal Act, from the order refusing to award costs in her favour. An appeal having been lodged pursuant to that provision, the proceedings in the supervisory jurisdiction of the Court of Appeal were otiose: at [23].

People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (No 2) **[2017] NSWCA 157** (Meagher, Ward, and Payne JJA)

(related decisions: *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd* [2017] NSWCA 46 (Meagher, Ward, and Payne JJA); first instance decision: *People for the Plains Incorporated v Santos NSW (Eastern) Pty Limited and Ors* [2016] NSWLEC 93) (Moore J)

Facts:

In March 2017, the Court had dismissed an appeal by People for the Plains Incorporated (**the appellant**) from a decision of the New South Wales Land and Environment Court relating to the validity of approvals that had been granted under the *Petroleum (Onshore) Act 1991* (NSW) by delegates of the Secretary of the New South Wales Department of Industry in respect of the second stage of a project (**the Leewood Project**) relating to the management of water produced as a necessary or inevitable consequence of petroleum exploration operations carried out by the first, second and fourth respondents (the Santos parties) in the Narrabri area.

The appellant was ordered to pay the costs of the Santos' parties, on the basis of the general rule that costs ordinarily follow the event. There was no order in respect of the costs of the Secretary of the NSW Department of Industry (**the third respondent**), the Secretary not having sought any such order.

By Notice of Motion filed following dismissal of the appeal, the appellant sought, pursuant to rr 36.16(3A) and 51.58 of *the* Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) that there be no order as to costs.

It was accepted by the appellant and the Santos' parties that costs were in the discretion of the Court and that the general rule is that ordinarily costs follow the event (see *Civil Procedure Act 2005* (NSW), s 98; UCPR, r 42.1). Furthermore, they accepted that the characterisation of litigation as "public interest litigation" may be taken into account in considering whether there should be a departure from the general rule, though of itself this is not necessarily determinative. Where the parties departed was as to whether the litigation was properly to be characterised as "public interest litigation"; whether, if it was, there was "something more" than such a characterisation to warrant departure from the general rule; and whether there were (as the Santos parties contend) any relevant countervailing circumstances.

Issues:

(1) Whether the proceedings should be characterised as public interest litigation and, if so, whether there is something more that warrants a departure from the general rule; and

(2) Whether the Court should depart from the general rule that costs follow the event.

Held: Motion dismissed with costs.

(1) The respondents were correct to emphasise that the proceedings related to the validity of approvals given in relation to the treatment and beneficial reuse of water produced from the Santos parties' petroleum exploration activities; not to the merits or environmental ramifications of the coal seam mining operations. Nevertheless, the fact that proceedings relate to the validity of statutory approvals and do not directly raise an issue relating to the environmental impacts of those approvals being granted and exercised do not necessarily preclude proceedings from being characterised as "public interest litigation". The process of characterisation should favour substance over form: at [35];

(2) The fact that there may be a high level of interest shown by members of the public in the environmental impacts of coal seam mining did not of itself warrant the conclusion that this was "public interest litigation", nor did the fact that the appellant was incorporated as an association with objects that include the protection of the environment: at [38];

(3) Whether or not the appellant's members had a pecuniary interest in the outcome of the litigation or were motivated by such an interest in bringing the proceedings was a relevant factor but not determinative of the issue whether the litigation should be characterised as public interest litigation. Similarly, whether or not it might be inferred that members of the appellant in the vicinity of the Leewood Project had a personal interest in preserving the amenity of their land or otherwise in preserving any commercial rights or interests in their own land, was a relevant factor but not determinative of the issue: at [41];

(4) Even assuming the proceedings were properly to be characterised as amounting to "public interest litigation" (and there was scope for debate about that), the appellant did not demonstrate that the appeal involved "something more" than the mere fact of the litigation having the character of "public interest litigation": at [40]; and

(5) Accepting that there was a reasonable basis for the appellant to bring the appeal from the first instance decision (and noting that the appellant did establish error on one ground), the Court was nevertheless not persuaded that there should be a departure from the usual costs order. The appellant was unsuccessful in its appeal and was ordered to pay the Santos parties' costs as ordered: at [42].

NSW Court of Criminal Appeal

Heatscape Pty Ltd v Mahoney **[2017] NSWCCA 135** (Gleeson JA, Rothman and Button JJ)

(stated case from Land and Environment Court decision: *Heatscape Pty Ltd v Mahoney (No 2)* [2016] NSWLEC 45 (Pepper J))

Facts: On 30 October 2014, the Local Court found Heatscape Pty Ltd (**Heatscape**) guilty of the offence of carrying out building works on premises at 76 Church Street, Gloucester (**the premises**) on 20 June 2012 without development consent, contrary to s 76A(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). Heatscape was fined $12,000 and ordered to pay the costs of the prosecutor (Mr Maxwell Mahoney prosecuted the charge on behalf of Gloucester Shire Council (**the Council**)). The relevant building work carried out by Heatscape was the replacement of an external sash window with a new window of different and larger dimensions. As the premises were located within the Gloucester Main Street Precinct Heritage Conservation Area (**the Main Street heritage area**), cl 5.10(2)(a)(iii) of the Gloucester Local Environmental Plan 2010 (**the GLEP**) required prior development consent to be obtained for this work to be lawful. On appeal to the Land and Environment Court, Pepper J dismissed Heatscape's appeal against both the conviction and sentence, confirmed the Local Court costs order and ordered Heatscape to pay the Council's costs of the appeal. At the request of Heatscape, pursuant to s 5BA of the *Criminal Appeal Act 1912* (NSW), Pepper J submitted two questions to the Court of Criminal Appeal as questions of law arising in relation to the Land and Environment Court's environmental offences appeals jurisdiction.

Issues:

(1) Whether cl 5.10(2)(a)(iii) of the GLEP required that the heritage significance of the Main Street heritage area be proved (the first question); and

(2) Whether the location and nature of the Main Street heritage area was sufficiently described in Sch 5 of the GLEP, as required by the definition of heritage conservation area (the second question).

Held: Dismissing the stated case with costs.

(1) Clause 5.10(2)(a)(iii) of the GLEP did not require that the heritage significance of the Main Street heritage area be proved and it was sufficient to demonstrate that the subject area was described as a heritage conservation area in Sch 5 of the GLEP (the answer to the first question): at [61]. The proper construction of the definition of "heritage conservation area" when read into cl 5.10(2)(iii) was that an area of "land of heritage significance" is one that was shown on the "Heritage Map" and the location and nature of which was described in Sch 5: at [43]. In the evaluative exercise of determining the heritage significance of local areas, the inconvenience of requiring an objective satisfaction of a judicial officer that the area is "of heritage significance" is so great, that it should be avoided: at [50];

(2) Part 2 of Sch 5 of the GLEP sufficiently described the location and nature of the Main Street heritage area as "a heritage conservation area" (the answer to the second question): at [61]. The location of the Main Street heritage area was expressly described in Sch 5 and the nature of the area, as a heritage conservation area, was adequately described by reference to its identification on the Heritage Map and by reference to the map: at [58]; and

(3) (*obiter*) With respect to the protection afforded by s 35 of the EP&A Act, concerning the validity of environmental planning instruments, there might have been issues arising from *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 and, additionally, the capacity in a prosecution to engage in a collateral attack on an instrument (citing *R v Commonwealth Industrial Court Judges* (1968) 121 CLR 313; [1968] HCA 86). However, it was unnecessary to deal with these issues: at [60].

***Nash v Silver City Drilling (NSW) Pty Ltd; Attorney General for New South Wales v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96** (Basten JA; Hoeben CJ at CL and Walton J agreeing)

(related decision: *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCA 100 (Basten JA; Hoeben CJ at CL and Walton J agreeing), earlier reported in this newsletter)

Facts: On 12 August 2012, Silver City Drilling (NSW) Pty Ltd (**the respondent**) was operating a drilling rig at the Ashton Coal Mine, near Singleton. There was an incident which caused an employee, Benjamin Kuypers, to suffer life-threatening injuries, resulting in quadriplegia. The incident led Ms Nash, an inspector with the New South Wales Department of Industry, Skills and Regional Development (**the appellant)** to lay a charge against the respondent under s 32 of the *Work Health and Safety Act 2011* (NSW) (**the Work Safety Act**) for a breach of the duty imposed by s 19(1) of that Act.

The respondent having entered a plea of guilty to the charge was sentenced in the District Court on 12 August 2016 to a fine of $112,000. The sentencing judge, Curtis DCJ, awarded the prosecutor a moiety of the fine but declined an application for an order that the respondent pay the prosecutor's costs.

The present proceedings involved an appeal against the inadequacy of the fine and a separate appeal against the failure to award costs. The appeal with respect to the sentence was brought by the Attorney General under s 5D of the *Criminal Appeal Act 1912* (NSW). There was no challenge to the jurisdiction of this Court under that provision. There was, however, a challenge by the respondent to the jurisdiction of the Court to hear an appeal against the refusal to award costs. That challenge led the prosecutor to commence proceedings in the supervisory jurisdiction of the Supreme Court, seeking to set aside the judge's decision with respect to costs. That challenge was rejected, for the reasons given in the contemporaneous judgment delivered in the Court of Appeal.

Issues:

(1) Whether the sentencing judge erred in determining the objective seriousness of the offence, the weight to be placed on deterrence, and the appropriate discount for a guilty plea;

(2) Whether the fine imposed was inadequate;

(3) Whether the Court should exercise the power to resentence; and

(4) Whether the award of moiety of fine to the prosecutor under s 122(2) of the *Fines Act 1996* (NSW) displaced an order for costs.

Held: Appeal against sentence was upheld and the Court should resentence the respondent; respondent fined $212,500. The appeal against the refusal to award costs was also upheld and ordered that the respondent pay the prosecutor's costs in the District Court.

(1) The sentencing judge did not err simply in evaluating the seriousness of the identified circumstances of the offending; rather, he mistook material facts and engaged in a process of reasoning which was erroneous. In these circumstances, his characterisation of the objective seriousness of the offending as minor, because the "risk" was "barely foreseeable", cannot be accepted: at [40];

(2) Reassessing the objective seriousness, the conduct of the respondent fell in the middle of the range for a category 2 offence: at [45];

(3) The evidence supported the proposition that limited emphasis needed to be given to personal deterrence with respect to the respondent. On the other hand, the prosecutor was right to emphasise the importance of general deterrence as a means of promoting compliance with health and safety requirements at work. However, the trial judge did not accept that the financial circumstances of the company should lead to the appropriate fine being reduced, and there was no reason to revisit that conclusion: at [46]-[48];

(4) There was no doubt that the full discount of 25% for the plea of guilty was not sustainable. The plea was entered on the first day of what had been fixed for a three week trial. The utilitarian value of the plea must have been severely reduced in those circumstances. Further, no exceptional circumstances were found to exist nor were any identified by the sentencing judge beyond the fact that the plea was entered to an amended charge contained in a further amended summons. It would have been open to the respondent to plead at an early stage, without admitting all the particulars, thus, an appropriate discount in the circumstances was 15%: at [49]-[51];

(5) The legitimate purposes of resentencing intervention were twofold. The first purpose was to identify the proper approach to considering the objective seriousness of offences under the Work Safety Act. Secondly, it was important to emphasise that the proportionality of the sentence should depend upon an assessment of the particular offence in the context of the penalties imposed by the Act: at [53]-[54];

(6) Upon resentencing, it was found that an appropriate fine prior to discount, would have been $250,000. Applying a discount of 15% for the late plea, gave a figure of $212,500: at [62];

(7) The brief reasons given by the sentencing judge for not awarding costs revealed that a number of factors had been taken into account which, with one possible exception, were not material to the exercise of the discretion to order costs. The possible exception was the reference to the award of a moiety (that is payment of half of the fine) to the prosecutor: at [71];

(8) There was no statutory requirement that the payment of the moiety be applied to the costs of the proceedings brought, as opposed to the costs of running the regulatory agency responsible for bringing the proceedings. Further, it would be anomalous if the prosecutor were to be paid his or her costs in circumstances where no moiety was payable, but not in circumstances where one was. Indeed, the very idea of a moiety payable to a public officer is something of an anomaly in circumstances where the fine will be paid to the same body politic as that responsible for maintaining the law enforcement agency in question, in this case, the State of New South Wales. How the moneys are accounted for within the government should be of no concern to the offender or the court: at [74]; and

(9) In the absence of reasons justifying the refusal to award any costs to the prosecutor, the decision was set aside. In addition to the award of moiety to be paid to the prosecutor standing, the Court ordered that the respondent pay the appellant's costs of the proceedings in the District Court, not including any costs incurred in preparation for a trial in which the particulars withdrawn in the further amended summons were to be relied upon, as agreed or assessed: at [75]-[79].

Supreme Court of NSW

Capilano Honey Ltd v Mulvany **[2017] NSWSC 833** (McCallum J)

Facts: These were proceedings commenced by Capilano Honey Ltd (**the first plaintiff**), a public, listed company, against Mr Mulvany (**the defendant**), with, Mr McKee, the Chief Executive Officer of Capilano, the second plaintiff in the proceedings. Mr McKee sought to sue the defendant for defamation. The company sought to sue the defendant for injurious falsehood and misleading or deceptive conduct.

The proceedings arose out of a series of statements written by the defendant broadly concerning the topic of the integrity of Australian honey. The defendant had a fervent interest in the safety of bees in Australia and holds the view that the importation of honey posed a threat to Australian bees.

The day before the hearing, the defendant terminated the services of legal representatives who had agreed to appear for him on a pro bono basis, leaving him unrepresented for the hearing. As a result, the judge, before whom the matter was to be heard, vacated the hearing date on the basis that the defendant then consented to interlocutory orders restraining him from publishing specified representations and imputations.

The defendant then filed a Notice of Motion seeking to vary the orders. The variation sought to vacate the order restraining him from making such publications and permit him to publish a press release (which

was attached to the Notice of Motion). By the press release, the defendant sought to discuss the proceedings for the purposes of raising funds to defend his claim, characterising the proceedings as a SLAPP. SLAPP is a well-known acronym standing for Strategic Lawsuit Against Public Participation. The burden of the allegation was that the proceedings were calculated to shut down the defendant's discussion, in the public interest, of the integrity of bees in Australia. At the Notice of Motion hearing, the defendant appeared self-represented.

Capilano submitted, at the hearing on the motion, that the motion be dismissed without proceeding to hear evidence or argument.

Issues:

(1) Whether the application should be dismissed in limine.

Held: Defendant referred to the registrar for referral to a barrister or solicitor on the pro bono panel for legal assistance.

(1) The Court found that a number of considerations suggested it should properly entertain the application: at [7];

(2) The first was that the orders made by Rothman J, although by consent, were interlocutory. It is always open to a party to move the Court to vary an interlocutory order: at [7];

(3) The second was that the orders were made at a time when the defendant was unrepresented, as he remained at the motion hearing: at [7];

(4) The third consideration was that, upon a review of the terms of the orders, the Court was persuaded that it was reasonably arguable that, depending on what the evidence showed, they may have unduly constrained the defendant's entitlement to discuss a matter of public interest. Whether or not that was so was something as to which the Court expressed no opinion, emphasising that there was no evidence at that stage: at [7];

(5) It was enough to observe that the Court thought it was reasonably possible that the orders might have overreached in some limited extent: at [7]; and

(6) The Court referred the defendant to the registrar for referral to a barrister or solicitor on the Pro Bono Panel for legal assistance. The kind of assistance for which the referral was made was confined to advice in relation to Mr Mulvany's notice of motion to vary the injunction by which he was restrained and for representation at the hearing of that motion: at [11].

Dee Why Auto Clinic and anor v Roads and Maritime Services **[2017] NSWSC 377** (Bellew J)

Facts:

By an amended summons dated 18 August 2016 the plaintiffs (Dee Why Auto Clinic and Mr Rostamians) sought to appeal against a decision of Bradd LCM delivered in the Local Court on 7 July 2016, in which his Honour dismissed an appeal brought by the plaintiffs against the decision of the defendant to cancel the second plaintiff's authority to operate an Authorised Inspection Station (the business of such Inspection Station having been carried on by the second plaintiff under the name of the first plaintiff). That decision followed a hearing which proceeded before his Honour on 7 March 2016 and 22 April 2016.

The magistrate identified the issue before him as whether Mr Rostamians was a fit and proper person to continue to hold the authority of an examiner or a proprietor.

Issues:

(1) Whether magistrate properly applied the onus and standard of proof;

(2) Whether magistrate failed to give adequate reasons for factual findings as to breaches of relevant rules;

Held: Appeal allowed, decision of the magistrate set aside, proceedings remitted to the magistrate to be dealt with according to law.

(1) An appellate court should make due allowance for the often pressured circumstances in which extempore judgments are delivered in busy lists, be it in the Local Court or in the District Court: see for example *Maviglia v Maviglia* [1999] NSWCA 188 at [1] per Mason P; *Rose v R* [2013] NSWCCA 71 at [41] per Bellew J and the authorities cited therein. However, those authorities had no application in the present case, given that the magistrate reserved his decision for more than three months. Bellew J found that the magistrate had a considerable period of time in which to consider the matter with, it was inferred, the benefit of a transcript of the evidence and submissions: at [49];

(2) Bellew J was not satisfied that the complaint made by the plaintiffs regarding the magistrate's asserted failure to properly apply the *Briginshaw* test was made out. The magistrate's reasons were replete with references to that test. He was clearly aware of it and it is to be inferred that he applied it. There is nothing in his reasons to suggest that he did not do so: at [50];

(3) The complaint concerning the inadequacy of the magistrate's reasons was made out on a number of bases: at [51];

(4) The magistrate's judgment reflected his having taken what might be described as two steps in reaching his ultimate conclusion that the second plaintiff was not a fit and proper person to hold the relevant authorisation. The first step involved his finding that a number of the rules had been breached. Whilst some breaches were conceded by the plaintiffs, some of the alleged breaches were in dispute. The basis on which, and the reasoning process by which, the magistrate found that those disputed breaches were established were simply not apparent from the judgment. Having found that various provisions of the Rules were breached, the magistrate then proceeded to the second step and concluded, on the basis of those breaches, that Mr Rostamians was not a fit and proper person to hold the relevant authorisation. The magistrate failed to explain why this was so. In other words, the magistrate failed to provide reasons for his determination of what he had identified as the issue between the parties: at [52]-[54]; and

(5) Bellew J was left to speculate, in the absence of any reasons, that the magistrate found that the mere fact of the established breaches of the rules was sufficient, without more, to support the conclusion that the second plaintiff was not a fit and proper person. The fact that the Court was left to engage in such speculation was, of itself, reflective of a failure to give adequate reasons: *Pollard v RRR Corporation* [2009] NSWCA 110 at [56]: at [54].

The Baptist Union of New South Wales v Georges River Council **[2017] NSWSC 347** (Lonergan J)

Facts: Georges River Council (**the defendant**) issued a Proposed Acquisition Notice (**PAN**) dated 6 December 2016 concerning church property known as 4-6 Dora Street, Hurstville (**the land**). The PAN was issued pursuant to the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**) and the *Local Government Act 1993* (NSW).

The first plaintiff, the Baptist Church Union (**the Union**) was the registered proprietor of the land. The second plaintiff, the Baptist Churches Property Trust (**the Trust**) claimed that it was the owner of the land by virtue of s 16 of the *Baptist Churches of NSW Property Trust Act 1984* (NSW) (**the Property Trust Act**) and complained that it did not receive a PAN.

The Union and the Trust alleged that the PAN was void for jurisdictional error because, first, it purported to notify an intention to acquire interest in the Land which was not "held" by the recipient of the PAN; and, second, it failed to comply with the requirements of ss 11 and 12 of the Just Terms Act, by failing to notify any "owners" with an interest in the Land.

The defendant submitted that due to the operation of r 59.10 of the Uniform Civil Procedure Rules (**the UCPR**), the Union and the Trust were out of time to seek relief in relation to the PAN, and that leave to bring the claim out of time should not be given because, first, the case did not enjoy reasonable prospects of success and, second, there was no satisfactory explanation for the delay in commencing the proceedings.

The defendant also disputed the Union's and the Trust's contention that the PAN was not valid and contended that the plaintiffs' claim was misconceived because it elevated procedural requirements of the Just Terms Act into mandatory preconditions to be satisfied before acquisition could occur, and that was not consistent with the legislative scheme or terms of the Act. The defendant argued that the objects and

structure of the legislation was focused upon procedures to simplify and expedite the compulsory acquisition processes and to ensure avenues of compensation were available for those able to receive compensation (including after acquisition has taken place).

Issues:

(1) Whether to grant leave to bring the claim out of time;

(2) Whether the requirements of ss 11 and 12 of the Just Terms Act were jurisdictional preconditions;

(3) Whether the proposed acquisition notice served on the Union was valid; and

(4) Whether the proposed acquisition notice was invalid in form.

Held: Granting leave to the Union and the Trust to commence proceedings out of time, dismissing the proceedings and ordering the plaintiffs to pay the defendant's costs.

(1) It was appropriate to extend time for commencing proceedings in the circumstances. It was preferable, in the interests of justice, to determine issues on their merits: at [26];

(2) The objects, provisions and structure of the Just Terms Act supported a conclusion that it was not the purpose of the legislation that an act done in breach of s 12 amounted to jurisdictional error. When regard was had to the language of the relevant provisions and the scope and objects of the statute, it was directed to just compensation and prompt action after gazettal for land acquisition, and to ensuring the maintenance of rights of persons to claim compensation after land acquisition had occurred. This specifically included circumstances where a person had not been notified of the land acquisition and/or the authority was not aware of the owner or interest holder's position in relation to the land. The Court rejected the Union's and the Trust's submission that service of a PAN on every owner as defined was a jurisdictional requirement that had to be met before the acquisition could proceed: at [66]-[67];

(3) At the very least, the Union, being the registered proprietor of the land had a "right, power or privilege over or in connection with the land", and therefore fitted within the defined circumstances. The PAN served upon the Union was a validly directed PAN: at [69]; and

(4) The provisions of s 15 did propose mandatory contents for the notice, by using the term 'must'. However, there was no issue that the other requirements for s 15 were met. There was power in s 16(3) to allow an amended PAN to be served for the purpose of correcting a "clerical error" or an "obvious mistake" in a notice. The defendant exercised that amendment power and issued an amended PAN with a signature on 22 March 2017. Additionally, the initial PAN was served with a covering letter authored by the defendant's solicitor, and in that letter was the name of a council representative, together with a direct phone number for that person identified as the contact person for queries. Given those circumstances, the failure to include a signature on the PAN did not invalidate the PAN and, if that was an incorrect conclusion, it was in the nature of a clerical error or an obvious mistake that had been remedied by the service of the amended PAN and the amended PAN was a valid PAN: at [74]-[77].

The Hills Shire Council v Stankovic **[2017] NSWSC 464** (Schmidt J)

(related decisions: some 41 judgments published since 2005 by the Land and Environment Court, the Federal Magistrates Court, the Federal Court, the District Court, the Court of Appeal and the Supreme Court, in proceedings to which Mr Stankovic was a party)

Facts: The Hills Shire Council sought orders under s 8 of the *Vexatious Proceedings Act 2008* (NSW) (**the Vexatious Proceedings Act**), prohibiting Mr Milovan (also known as Michael) Stankovic from instituting proceedings in New South Wales, without leave of the Court. Orders staying proceedings he currently had on foot in the New South Wales Land and Environment Court, to which the Council was a party, were also sought.

Issues:

(1) Whether the Council met the onus of establish that Mr Stankovic has frequently instituted or conducted vexatious proceedings; and

(2) Whether the Court's discretion to make orders should be exercised.

Held: Orders made pursuant to s 8(7) of the Vexatious Proceedings Act; costs to the Council.

(1) The Council established that Mr Stankovic's ongoing pursuit of his views as to the judgment given by Pain J in 2005, his later bankruptcy and the sale of his Kellyville property, in both proceedings he brought and interlocutory applications he made in other proceedings, had involved the institution and conduct of "vexatious proceedings" as defined; that he had done so frequently; and that the circumstances were such that the Court was satisfied it must exercise its discretion, albeit not in the form of the orders pressed: at [16];

(2) It was in the face of relentless pursuit, since 2005, of claims about the 2005 Land and Environment Court proceedings, his bankruptcy, the Kellyville property and his extravagant damages claim, which have been repeatedly rejected, that despite the case advanced for Mr Stankovic, the Court was satisfied that the Court's discretion to make orders under s 8 of the Vexatious Proceedings Act against him, should be exercised: at [55]; and

(3) The orders made were to stay the further proceedings Mr Stankovic brought in the Land and Environment Court, but did not precisely reflect those otherwise finally pressed by the Council as appropriate. That was because the Court was not satisfied that the Court should preclude Mr Stankovic pursuing claims of any kind against the Council in the future. Like all litigants, Mr Stankovic was bound by established principles such as *res judicata* and issue estoppel. Thus the orders precluded his pursuit of claims inconsistent with the decisions by which he is bound. The Council was not entitled, however, to protection under the Vexatious Proceedings Act against any other legitimate claims which might arise to be pursued against it in the future: at [68].

Land and Environment Court of NSW

- Judicial Review

North Sydney Council v Harris Farm Markets Pty Limited **[2017] NSWLEC 67** (Sheahan J)

Facts: North Sydney Council challenged two complying development certificates (**CDCs**) which purported to amalgamate two tenancies, operated by Harris Farm Markets Pty Limited (**HFM**), within a development complex known as "Cammeray Square". The amalgamation sought to change the use of tenancy number CG-01 from a fruit and vegetable market, to a comprehensive supermarket within CG-01 and CG-02. Further, CDC2 sought to authorise changes to the Cammeray Village's basement area, which is shared among the numerous retail and residential users in the development. The complex has been the subject of three decisions by the Land and Environment Court, two decisions by accredited certifiers, and one decision by an Independent Planning Panel. Relevantly, the third decision of the Court, made by Hoffman C, approved the use of tenancy CG-01 as a "fruit and vegetable market". The decision took account of Council's concern that the two adjacent tenancies would be amalgamated to form a larger supermarket, inconsistent with the "neighbourhood business" zoning objectives, and having adverse impacts on traffic and car-parking. In doing so, Hoffman C inserted a condition of consent (condition I5) to prevent the amalgamation of (any two or more of) tenancies CG-01, CG-02 and CG-03. The proper construction of condition I5 was central to the case, in that a determination had to be made as to whether the condition prevented only the amalgamation of any two of the tenancies, or the amalgamation of all three, thereby allowing the amalgamation of two tenancies. Two further issues between the parties included whether the CDCs authorised the amalgamation of tenancies CG-01 and CG-02, despite condition I5, and whether the CDCs were valid.

Issue:

(1) The Court was required to determine whether condition I5 of the existing development consent for tenancy CG-01 prevented amalgamation of tenancies CG-01 and CG-02; and whether the CDCs were valid pursuant to ss 76A, 85, 85A, 86A and 87 of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) and the relevant development standards contained in the

Commercial and Industrial Alterations Code within the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Codes SEPP**), as well as the relevant zoning provisions in the North Sydney Local Environmental Plans of 2001 and 2013.

Held: Declarations that condition I5 prohibited amalgamation of tenancies CG-01 and CG-02; and that any amalgamation of those two tenancies would infringe s 76A(1) of the EP&A Act, irrespective of either of the two CDCs; and that the two CDCs were invalid and of no effect.

(1) *Construction of consent condition*: It was not necessary to find ambiguity in the text of condition I5 in order to construe it in its context: at [198]. That context was set by the reasoning of Hoffman C, and there was no need to resort to any "extrinsic evidence" when the commissioner's reasons were clear: at [198]; and

(2) *Reasonableness*: Applying the development standards in the Codes SEPP requires judgment or some form of reasonable assessment: at [192]. The CDCs were tainted by unreasonableness and/or error: at [193]-[194]. Had the certifier inspected the impacts of the alterations proposed, it would be unreasonable to conclude that they ought to be approved: at [197].

- Compulsory Acquisition

Moloney v Roads and Maritime Services (No 2) **[2017] NSWLEC 68** (Pain J)

(related decision: *Moloney v Roads and Maritime Services* [2016] NSWLEC 148 **(**Moore J))

Facts: The applicants owned two sugarcane farms (Home Farm and Watts Farm), parts of which were compulsorily acquired for the Pacific Highway Upgrade between Woolgoolga and Ballina. The applicants lived in a house on Home Farm. The new highway will bisect the property and will be 115 metres from the house, at its closest point. Prior to the acquisition, the applicants enjoyed a quiet, rural environment, some 950 metres from the existing Pacific Highway.

The "before-and-after" method of land valuation was adopted to determine the applicants' claim for compensation for the market value of the land and loss of value of the residue land under ss 55(a) and (f) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**). The expert valuers relied upon comparable sales to derive land values.

The applicants also claimed loss attributable to disturbance under s 55(d) for the cost of constructing a replacement dwelling on the residue of Home Farm and for loss of future profits from the acquired land as financial costs reasonably incurred as a result of the acquisition (s 59(1)(f)).

Issues:

(1) Market value/loss of value of residue land (ss 55(a), (f)): whether the residue sugarcane land suffered injurious affection as a result of the acquisition;

(2) Disturbance (s 59(1)(f)):

(a) whether the claim for construction costs of a replacement dwelling on the residue land was "double-dipping", given the "before-and-after" method of valuation; and

(b) whether the costs of relocating to a replacement dwelling (excluding construction costs) on the residue land might be reasonably incurred as a direct and natural consequence of the acquisition; and

(3) Disturbance (s 59(1)(f)): whether the claim for business disturbance by way of loss of future profits from farming in perpetuity on the acquired land was maintainable.

Held: Findings made that parties to advise the Court further on outstanding issues before final orders made.

(1) No loss of value of the residue sugarcane land was demonstrated. The comparable sales did not show injurious affection for cane farming land: at [148]. The main dwelling on Home Farm and its curtilage decreased in value by 50% to reflect the change in amenity after acquisition: at [199(viii)].

A small allowance was made for injurious affection in respect of a portion of Watts Farm to reflect potential for a dwelling to be constructed on that land: at [244];

(2) (a) The cost of building a replacement dwelling cannot be separately claimed as a disbursement as its value was taken into account in the "before-and-after" method adopted by the valuation experts: at [272]; and

(b) the Applicants may reasonably incur the costs of relocating to a replacement dwelling (excluding construction costs) as a potential direct and natural consequence of the acquisition (subject to more evidence being provided by the Applicants addressing these findings): at [306]-[308]; and

(3) The right to assumed future profits from farming the acquired land is encapsulated in the market value assessment using the "before-and-after" method of valuation: at [317]. After acquisition no relevant "actual use of the land" acquired (s 59(1)(f)) is possible: at [321]. The acquisition extinguished all rights in the acquired land as provided by s 20: at [316]. Accordingly, the claim for loss of profits in perpetuity was not maintainable: at [322].

Rocco Fraietta v Roads and Maritime Services **[2017] NSWLEC 11** (Robson J)

Facts: Rocco Fraietta (**the applicant**) appealed the resumption compensation determination of the Valuer-General of $1,313,60.29 for land owned by him and compulsorily acquired by the Roads and Maritime Services (**RMS**). The property was unimproved at the date of acquisition, although the applicant had an intention to construct a stone house on the property. Relevantly, the property contained an urban watercourse known as Cockle Creek that effectively divided the property into three regions – only one of which could be developed. The applicant sought compensation in the sum of $3,426,458.68, comprising $3,170,000.00 for the market value of the property, $198,890.00 for disturbance and $57,568.68 for miscellaneous costs. The claim for disturbance included stamp duty on the purchase of a replacement property on which to build the stone house.

Issues:

(1) Whether the property should be valued on the basis that the Creek could be relocated to the west, which would increase the developable area of the property;

(2) Whether the value of the property should be determined on a piecemeal per square metre basis, or a block value basis (known as a 'per lot basis');

(3) Whether the Court should take into account an offer of $2.5 million made for the property in 2014 in determining the value of property;

(4) In relation to the claim for disturbance, whether the respondent is required to compensate the applicant for future survey costs, future conveyancing costs, future costs relating to the relocation of plant and equipment, mortgage costs and stamp duty relating to the purchase of a replacement property (relocation costs); and

(5) In relation to the claim for disturbance, whether the respondent is required to compensate the applicant for past costs relating to the relocation of plant and equipment (past relocation costs).

Held: The RMS is to pay the applicant compensation in the amount of $1,930,443.34, and to pay the applicant's costs as agreed or assessed.

(1) The property should be valued on a piecemeal per square metre basis: at [77];

(2) The correct approach is to value the property as it existed as at the date of acquisition, ie without the realignment of the Creek: at [87];

(3) In considering comparable properties, to the extent their purchase prices were depressed because they were being acquired by a public authority, this is not in any way prejudicial to the RMS: at [99];

(4) The Court should not make an adjustment as a result of the offer of $2.5 million made in 2014: at [151];

(5) The property has a market value of $1,759,500, comprised of $1,519,000 for Area A, $32,100 for Area B, and $208,400 for Area C: at [156];

(6) In relation to the claim for disturbance, there has been no relocation pursuant to subss 59(1)(c), (d) and (e) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**) as relocation requires something to be relocated. An intention to purchase a replacement property alone is insufficient, unless something is also relocated, whether it be a person, a business or physical objects: at [167];

(7) In relation to the claim for disturbance, the relocation costs are, however, compensable under s 59(1)(f) of the Just Terms Act: at [188];

(8) The applicant was involved in the actual use of the land, both because he deposited a large pile of stones on the property which were to be used in the construction of a dwelling and because he held the land with that specific development purpose in mind: at [183]-[184];

(9) The applicant is entitled to be compensated for the past relocation costs in the amount claimed by the applicant, as the RMS's quote obtained for the same work expired on the day the plant and equipment was moved, and required Mr Fraietta's assistance in any event: at [191]; and

(10) The applicant was entitled to compensation in the amount of $170,943.34 for disturbance: at [192].

- Criminal

Blue Legend Australia Pty Ltd v Liverpool City Council **[2017] NSWLEC 30** (Pain J)

Facts: Blue Legend Australia Pty Ltd (**the appellant**) appealed against the severity of sentence imposed on it at Liverpool Local Court on 16 September 2016. The appellant owned a shop in Liverpool Plaza from which fresh and cooked seafood was sold. The Council had alleged that the appellant stored and displayed buckets containing seafood and ice in a manner that was not in accordance with approved plans for the fitout of the shop contrary to development consent and was an offence under s 76A(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). Moreover, the handling and storage of uncooked seafood was potentially hazardous for customers and led to the emission of offensive odours. The appellant pleaded not guilty in the Local Court. The appellant was found guilty of using the shop contrary to the consent. It was ordered to pay a penalty of $36,000 and the prosecutor's costs of $2,000.

The appellant was represented by Mr Huang, sole director, at the Local Court hearing. The appellant was legally represented on appeal. The principal basis for the appeal was to place financial information before the Court as to the appellant's state of financial affairs. This suggested that the appellant was trading at a large deficit.

Issue:

(1) Whether the penalty imposed by the Local Court was too severe.

Held: Appeal dismissed.

(1) It was to be accepted that the appellant has a limited capacity to pay a fine although this is but one of the matters relevant to the exercise of sentencing discretion: at [37], [40]. No other basis for reducing the penalty imposed in the Local Court was identified: at [40]; and

(2) No evidence of actual environmental harm was identified. There was the potential for such harm: at [18]. The objective seriousness of the offence is in the low- to mid-range: at [40].

Burwood Council v Erector Group Pty Ltd; Burwood Council v Liverpool Developing Pty Ltd **[2017] NSWLEC 20** (Preston CJ)

Facts: Burwood Council granted development consent to Liverpool Developing Pty Ltd (**Liverpool Developing**) to demolish existing buildings and construct a mixed use development with

basement car-parking on land owned by the Liverpool Developing. A related company, Erector Group Pty Ltd (**Erector Group**), was appointed as the builder and head contractor.

Liverpool Developing failed to appoint a principal certifying authority (**PCA**), which breached s 81A(2)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). It also failed to ensure detailed plans and specifications of the building were endorsed with a construction certificate prior to commencing building work, which breached condition 26(b) of the development consent (and thereby s 76A(1) of the EP&A Act). Erector Group commenced building work prior to the issuance of a construction certificate and prior to notifying the council of the intention to commence and the appointment of a PCA, which breached of s 81A(2)(a) of the EP&A Act and condition 26(a) (and thereby s 76A(1) of the EP&A Act) respectively.

Liverpool Developing and Erector Group both pleaded guilty to two offences against s 125(1) of the EP&A Act, in that they each carried out one offence against s 76A(1) and one offence against s 81A(2) of the EP&A Act.

Issues:

(1) What were the appropriate penalties for Liverpool Developing's offences against s 81A(2)(b) and s 76A(1) of the Act, and for Erector Group's offences against s 81A(2)(a) and s 76A(1) of the EP&A Act.

Held:

(1) *Penalties*: Liverpool Developing and Erector Group were each fined $40,000 for breaching s 81A(2) of the EP&A Act and $40,000 for breaching s 76A(1) of the EP&A Act: at [84];

(2) *Objective circumstances*: All offences were at the low end of the range of objective seriousness: at [42]; maximum penalty for corporations for each offence is the Tier 2 maximum penalty under s 125B(2) of the EP&A Act, which is $2 million: at [13]; this increased from the previous maximum penalty of $1.1 million from 31 July 2015, which reflects the increased seriousness with which the Parliament views the offences and should be reflected in the sentence imposed: at [14]; the offences caused substantial damage to buildings on adjoining land: at [26]; it was reasonably foreseeable that the offences were likely to cause damage to the buildings: at [31]; practical measures could have been taken to avoid the harm: at [32]; Liverpool Developing and Erector Group had control over the causes giving rise to the offences: at [33]; the offences were not committed with the intention of avoiding legal obligations or saving time or money: at [38]; the offences were not part of a planned or organised criminal activity: at [41];

(3) *Subjective circumstances*: no prior convictions for environmental offences: at [44]; delayed pleas of guilty justified discount of 22%: at [51]-[53]; Liverpool Developing and Erector Group were remorseful, have taken responsibility for their actions and have acknowledged the damage caused to buildings on the adjoining property; at [55]; Liverpool Developing and Erector Group were unlikely to reoffend, given their genuine remorse, the financial costs incurred and the good character of the director of both Liverpool Developing and Erector Group: at [61]; provision of some assistance to the Council: at [62];

(4) *Purposes of sentencing*: there is a need for specific deterrence, which is particularly important for offenders which are in the business of carrying out development: at [66]; there is a need for general deterrence, which is of central importance for environmental offences and where the offender is in a business or industry that undertakes development: at [66]-[67], [69];

(5) *Totality principle*: both Liverpool Developing and Erector Group were charged with offences relating to commencing building work without a construction certificate and offences relating to the failure to appoint a principal certifying authority: at [76]-[77]; the common director, Mr Wang, is the effective mind of both companies: at [78]; the aggregate of the fines for the two offences committed by each defendant should be reduced from $93,600 to $80,000: at [80]; and

(6) *Costs*: Liverpool Developing and Erector Group should pay the full amount of the Council's costs; they are each to pay $14,000 for the Council's legal costs of all of the proceedings: at [83].

Chief Executive, Office of Environment and Heritage v Essential Energy **[2017] NSWLEC 27** (Pain J)

Facts: Essential Energy (**the defendant**) pleaded guilty to an offence under s 156A(1)(d) of the *National Parks and Wildlife Act 1974* (NSW) (**the NPW Act**), in that it caused damage to vegetation, soil and/or sand on reserved land. The damage involved clearing and mulching between 0.63-0.84 hectares of vegetation along 1.4 kilometres of a disused regenerating trail in the Yuraygir National Park. The work, carried out by a subcontractor on 29 October 2013 was designed to provide alternate access to a power-line corridor which the defendant was responsible for maintaining after a previous access route was found to be impassable. Relevant consents had not been sought, nor granted, to permit the clearing.

Issues:

(1) The objective circumstances of the offences;

(2) The subjective circumstances of the defendant; and

(3) The appropriate penalties.

Held: The defendant was convicted, ordered to undertake specified works in accordance with a restoration and prevention order, and ordered to pay the prosecutor's costs of $95,000.

(1) The clearing of vegetation had a relatively modest, short-term impact on the environment: at [39]. There is no evidence that any threated species were harmed: at [45]. Notwithstanding the involvement of a contractor and subcontractor who carried out the clearing, the defendant had control over the causes of the offence: at [55]. The clearing was undertaken to provide access to essential infrastructure that required maintenance in accordance with the defendant's statutory duties and functions under the *Electricity Supply Act 1995* (NSW) and State Environmental Planning Policy (Infrastructure) 2007 (NSW): at [56]. The objective seriousness of the offence was held to be at the high end of the low range: at [57];

(2) The defendant did not have any prior convictions, which was considered impressive considering it operates approximately 95% of the New South Wales' electricity network: at [58]. It was found to be of good corporate character, showed remorse, cooperated with authorities and the likelihood of reoffending was very low, given extensive measures taken by the defendant since the incident occurred: at [58]-[61]; and

(3) A restoration and prevention order made pursuant to s 200(1) of the NPW Act was deemed to satisfy the purposes of sentencing for the offence. The order required the defendant to make good the damage resulting from the offence and prevent a reoccurrence of the incident: at [81]. An approximate costing of the measures proposed under the order was $73,200. The defendant was also ordered to pay the prosecutor's costs of $95,000.

Chief Executive of the Office of Environment and Heritage v Kurstjens; Chief Executive of the Office of Environment and Heritage v Topview Brisbane Pty Ltd **[2017] NSWLEC 54** (Sheahan J)

Facts: Mr Kurstjens was the guiding mind of a group of family companies and a family trust (**the Kurstjens' interests**). The Kurstjens' interests owned the property "Beefwood", in the Moree area. Mr Kurstjens was also the guiding mind of Topview Brisbane Pty Ltd (**Topview**). Topview operated on land owned by the Kurstjens' interests.

Mr Kurstjens and Topview were charged with the clearing of native vegetation at or near "Beefwood". Eight species of native vegetation were identified as cleared, by persons, employees, or agents acting under the direction of Topview, by means of machinery (including a bulldozer) between about 7 March 2011 and 5 September 2012. The offence was in contravention of s 12 of the *Native Vegetation Act 2003* (NSW) (**the Native Vegetation Act**), which prohibits the clearing of native vegetation otherwise than in accordance with a development consent or a property vegetation plan. Mr Kurstjens was charged as the director of Topview (s 45 of the Native Vegetation Act).

Both Mr Kurstjens and Topview entered guilty pleas (although not at the earliest opportunity) and agreed to pay the prosecutor's costs.

Issue:

(1) The Court was required to determine and impose the appropriate penalty for the offence pursuant to ss 3A and 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Held: Convicting Mr Kurstjens and fining him $118,125, and convicting and fining Topview $39,375, with the defendants jointly and severally liable to pay the prosecutor's costs in the agreed sum of $185,000.

(1) *Objective seriousness*: The maximum fine at the time of commission of the offences was $1,100,000: at [10]. The affected land was not "pristine" at the time of the offence, but prior disturbance does not exculpate an offender in a vegetation clearing case: at [54]. Mr Kurstjens' and Topview's behaviour was "reckless": at [61]. Mr Kurstjens and Topview had total control of the offending behaviour, and had available to them the full range of practical measures to avoid harm: at [62]. By clearing native vegetation without approval, Mr Kurstjens and Topview directly undermined the legislative native vegetation regime: at [63]. The harm done was clearly foreseeable: at [66]. Clearing is normally done to improve the commercial prospects of agricultural land, even if motivated by improving the land for other reasons: at [65]. Mr Kurstjens' and Topview's offences were near the upper end of "moderate" seriousness and indicated a fine towards 20%-25% of the maximum: at [93]; and

(2) *Subjective circumstances*: Mr Kurstjens and Topview apologised for their offences and agreed to participate/cooperate in remediation works: at [73]. Their guilty pleas entitled both of them to some "discount", despite lateness: at [77]. There was no evidence of Mr Kurstjens' character, good or bad, or of his reputation in the local area: at [83]. Neither of Mr Kurstjens nor Topview had any record of environmental offending and the prosecutor did not submit that there was a likelihood of reoffending: at [84]. Mr Kurstjens was responsible for funding any penalty imposed on him and/or his company, and he had already committed to pay a substantial costs order in favour of the prosecutor, as well as cooperating in the remediation of the site: at [85]. No submission was made on the basis of limited means: at [86]. The Court allowed a discount of 12.5% for subjective factors, including the guilty pleas: at [87]. With regard to relative culpability, Mr Kurstjens was personally responsible for the offending behaviour: at [88]. The appropriate relativity was considered to be 3:1, Kurstjens when compared to Topview: at [91]. The penalties included elements of both specific and general deterrence: at [92].

Council of the City of Sydney v Blue Chips Franchise Pty Ltd **[2017] NSWLEC 24** (Preston CJ)

(related decision: *Council of the City of Sydney v Blue Chips Franchise Pty Ltd* (Local Court (NSW), Atkinson LCM, 9 August 2016, unreported))

Facts: Blue Chips Franchise Pty Ltd (**the defendant**) was charged with committing an offence under s 119M(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) by failing, without reasonable excuse, to comply with an oral requirement made by an officer of the Council of the City of Sydney (**the appellant**) to produce all documents relating to 33 apartments which they manage.

The Local Court dismissed the charge on 9 August 2016, finding that there was a reasonable excuse for the defendant's failure to comply with the requirement to produce the documents. The Council appealed, under s 42(2B)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW), against the order dismissing the matter.

Issues:

(1) Whether the magistrate made an error of law in finding that the Council was required to disprove any reasonable excuse raised by Blue Chips beyond a reasonable doubt (Ground 1); and

(2) Whether there was evidence supporting the magistrate's factual finding that Blue Chips had a reasonable excuse to not comply with the requirement to produce the documents (Ground 2).

Held: Appeal dismissed; with costs.

(1) On a fair reading of the magistrate's reasons as a whole, the magistrate found that the defendant, and not the Council, bore the legal onus of proving, on the balance of probabilities, that there was a reasonable excuse for failing to comply with the oral requirement: at [22]-[23]; accordingly, the magistrate did not make an error of law: at [22], [29];

(2) There was some evidence for both the conclusion that there was a reasonable excuse for Blue Chips not to comply and the reason given for that conclusion that there was insufficient time to complete the searches for the information and provide it to the Council investigation officer: at [39]; and

(3) The unsuccessful Council should pay the costs of the appeal. Ground 1 did not necessitate authoritative determination of the question of the incidence of the legal onus to prove the existence or absence of reasonable excuse under s 119M(1) of the EP&A Act. There was no broader issue of public interest involved in the resolution of this question on the appeal: at [46].

Cumberland Council v Badaoui Habib **[2017] NSWLEC 18** (Robson J)

Facts: Mr Habib (**the defendant**) pleaded guilty to the commission of two offences under s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), that, contrary to s 76A of the EP&A Act, he carried out unauthorised building works on Lots 23 and 24 in DP 3088. The works entailed the construction of two detached two-storey dwellings, and two detached granny flats. The land upon which the works were built belonged to the defendant's brother. The defendant admitted that he knew he did not have approval to carry out the works, but did so as the approval process was taking too long and he was becoming frustrated. The defendant attested that he did not know that he needed to have consent before commencing the works, and that he believed that other parties were arranging to obtain the necessary development approvals.

Issues:

(1) What are the objective circumstances of the offence;

(2) What are the subjective circumstances of the defendant; and

(3) What is the appropriate sentence.

Held: The defendant was fined $105,000, in total, for the two offences, and ordered to pay the prosecutor's costs in the sum of $24,000.

(1) The defendant's conduct objectively amounts to a serious infringement which undermines the integrity of the planning regime [19];

(2) There was no environmental harm in the sense of actual or physical harm, rather the harm caused goes to the integrity of the planning system, which lies at the lowest end of the spectrum of environmental harm [21];

(3) The defendant was aware of the need to obtain development consent, and even if he believed he could commence work without consent, he continued to complete the significant developments knowing he did not have the requisite approvals [22];

(4) The offences were committed intentionally, and the defendant's frustration with the delay in obtaining consent and reliance on others to obtain consent do not mitigate the seriousness of the offences [24];

(5) Remorse must be directed at the offences committed, rather than the fact that a defendant was caught [34]; and

(6) There is a particular need for general deterrence, as the Court plays an important role in ensuring the integrity of the planning system and punishing those who transgress the stipulated procedures for development works [40], [42].

Dai (Martin) Shi v North Sydney Council; Mary's Crows Nest EPS Pty Ltd v North Sydney Council **[2017] NSWLEC 12** (Robson J)

Facts: The two appellants, Mary's Crows Nest EPS Pty Ltd (**the company**) and Dai Shi, were each convicted and sentenced in the Local Court in relation to two offences. The offences related to first, use of premises as a brothel or for adult sexual services in circumstances where the development consent allowed only for use as a massage parlour, and second, use of premises for sexual services in exchange for payment without first obtaining a development consent. The magistrate convicted and fined each

appellant $18,000 cumulatively for the two offences, and ordered each defendant to pay $8,421.50 in costs. The defendants sought leave to appeal the magistrate's decision on the basis that the magistrate did not give sufficient weight to Mr Shi's evidence regarding his belief that the premises had appropriate approval for use as a brothel or for the provision of sexual services. The evidence regarded a 2006 decision by Hussey C in Class 1 appeal proceedings relating to development approval for a brothel, which contained a typographical error describing the premises the subject of that appeal as the premises the subject of the present proceedings. The typographical error was quickly amended. The application seeking leave to appeal the magistrate's decision was filed outside of the 28 day time period.

Issues:

(1) Whether it is in the interests of justice to grant leave to appeal; and

(2) Whether the prospective appeal is meritorious.

Held: Application dismissed, appellants to pay the respondent's costs.

(1) Taking into account the evidence before the Local Court, the submissions, and further evidence proposed to be filed on appeal, if leave were granted the prospects for reversal of the findings made by the Local Court in relation to each of the four offences was extremely poor and perhaps non-existent [32]; and

(2) It is therefore not, as required under s 36(2) of the *Crimes (Appeal and Review) Act 2001* (NSW), in the interests of justice to grant leave to appeal out of time [33].

***Environment Protection Authority v Elf Farm Supplies Pty Ltd* [2017] NSWLEC 60** (Sheahan J)

Facts: Elf Farm Supplies Pty Ltd (**the defendant**) pleaded guilty to two charges involving the discharge of mushroom substrate into receiving waters including South Creek/Wianamatta Creek near Mulgrave. The Environment Protection Authority (**the EPA**) prosecuted the defendant for breaching s 64(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) by being the holder of Environmental Protection Licence (**EPL**) 6229, a condition of which was contravened. The relevant licence condition, O1.1 required activities to be carried out in a competent manner, and the EPA submitted that the defendant failed to do so by causing the irrigation of "process water" onto a paddock in a manner that allowed 200,000 litres of the liquid to flow ultimately into receiving waters, including South Creek/Wianamatta Creek, between 19 May 2015 and 21 May 2015. The second charge was brought under s 120(1) of the POEO Act, which prohibits the pollution of waters.

In addition to the imposition of a fine, and an order against the defendant for costs, the prosecutor sought orders pursuant to Pt 8.3 of the POEO Act, requiring:

(1) Publication of a notice concerning the incident in the media pursuant to s 250(1)(a); and

(2) The payment of the amount of any fine imposed to Hawkesbury City Council to fund revegetation works on the creek, pursuant to s 250(1)(e).

Issue:

(1) What was the appropriate penalty for the offence, pursuant to ss 3A and 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), and s 241 of the POEO Act.

Held: Convicting the defendant; ordering it to pay a total of $100,000 ($55,000 for the s 64 offence, and $45,000 for the s 120 offence) to the "South Creek Riparian Restoration Project" and to pay the prosecutor's costs, as agreed or assessed, and to place a notice in the *Hawkesbury Gazette* and the *Hawkesbury Courier* publicising the incident.

(1) *Objective seriousness*: Although state of mind is not a relevant consideration for the s 120 offence, the defendant was clearly on notice, for a significant period of time, of the potential for water pollution, and breaching of EPL conditions: at [71]. Although there was no available evidence that the incident caused any actual harm, there was the potential of harm to aquatic organisms within no more than 20m from the point where the discharge entered the creek: at [73]. The actual or likely harm in the present case was moderately foreseeable: at [77]. The s 120 offence was considered to sit at the

top of the lower end of the scale of seriousness, and the s 64 offence at the bottom end of the medium/moderate section of any such scale: at [104];

(2) *Subjective circumstances*: The defendant had no record of relevant prior convictions, but had received four penalty notices for odour matters: at [90]. The prosecutor accepted that the defendant should receive a 25% discount for its guilty pleas: at [91]. The defendant displayed a high level of cooperation with the prosecutor and evidenced its contrition and remorse: [91]. The penalty imposed on the defendant should serve the function of both general and specific deterrence: at [97]. Adjustments were made for the defendant's demonstration of remorse, and its implementation of procedural and training reforms, as well as for the principle of totality: at [106].

Environment Protection Authority v Hawkesbury City Council **[2017] NSWLEC 39** (Pain J)

Facts: The Council pleaded guilty to three offences under the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) committed across two separate incidents at the South Windsor Sewage Treatment Plant.

The first incident (16-20 July 2015) involved a spill of approximately 543,840 litres of partially treated sewage (2% solids). The majority of the sewage flowed into the adjoining Windsor Downs Nature Reserve including an ephemeral creek. The offences that arose from this incident were pollution of waters contrary to s 120(1) of the POEO Act and failure to comply with a licence condition pursuant to s 64(1) of the POEO Act.

The second incident (6-9 August 2015) involved a spill of approximately 100,000 litres of partially treated sewage (0.34% solids). Different causes contributed to this incident and the sewage emanated from a different section of the Plant compared to the July incident and flowed onto neighbouring private property. The offence that arose from this incident was failure to comply with a licence condition pursuant to s 64(1) of the POEO Act.

Issues:

(1) The objective circumstances of the offences;

(2) The subjective circumstances of the Council; and

(3) The appropriate penalties.

Held: The Council was convicted of the three offences and fined $175,000 in total; ordered to contribute to a specified environmental project; and ordered to pay the prosecutor's professional and investigation costs totalling $94,556.30.

(1) The July incident caused likely environmental harm of a significant albeit short-term nature, potential harm to public health and potential impact on human amenity: at [31]. The harm caused by the August incident was low: at [34]. The July incident resulted from failing to check maintenance work, train staff regarding the stormwater system at the Plant, undertake thorough weekend inspections and maintain an adequate overflow alarm system: at [35]-[39]. The August incident resulted from an inadequate maintenance schedule and faulty alarm switches: at [43]-[45];

(2) The Council did not have any prior convictions, was found to be of good corporate character, pleaded guilty at the earliest opportunity, cooperated with the investigation at all times and showed remorse for its actions: at [56]-[62]. It also took steps such as auditing its procedures and instituting better regimes for testing equipment to ensure that the offences are unlikely to reoccur. These measures were adequate to satisfy the Court that the risk of reoccurrence was minimal: at [67]; and

(3) A fine of $130,000 was imposed for the water pollution offence and $40,000 for the July incident licence contravention offence after applying the totality principle: at [69]. A fine of $80,000 was imposed for the August incident licence contravention offence. The total penalty was discounted by 30% taking into account mitigating factors was $175,000. This was ordered to be paid to the National Parks and Wildlife Service for an environmental project in the Windsor Downs Nature Reserve which was affected by the July incident. The specifics of the project were provided to the Court: at [79]-[80].

Environment Protection Authority v Hill; Environment Protection Authority v Stockwell International Pty Ltd **[2017] NSWLEC 72** (Pain J)

Facts: On 17 October 2014 Mr Hill, a truck driver, collected a large quantity of expandable polymeric beads, a classified dangerous good, from the premises of Stockwell International Pty Ltd (**Stockwell**) in Botany for delivery in Smithfield, New South Wales. The purchaser of the goods had engaged Toll Global Forwarding Pty Ltd (**Toll**) to arrange their importation and transportation. Toll engaged Stockwell to transport the goods by road upon their arrival in Sydney who, in turn, contacted Mr Hill to drive the goods. Mr Hill was employed by another transport company that was not charged.

Mr Hill's vehicle was stopped during a random inspection at a heavy vehicle checking station on the M5 Motorway at Kingsgrove. Neither Mr Hill nor the vehicle he was driving were licensed to transport dangerous goods. The vehicle did not display placards or emergency information indicating that it was carrying dangerous goods and was not fitted with fire extinguishers. Mr Hill had not been given transport documentation or emergency information that complied with requirements under the legislative regime and drove through tunnels in which dangerous goods were prohibited. The goods were clearly labelled "Class 9 dangerous goods" on their packaging, such that Mr Hill, and the Stockwell employees who assisted the loading of the materials onto the truck, would have seen this.

Mr Hill and Stockwell each pleaded guilty to an offence under s 9(1) of the *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW) (**the Dangerous Goods Act**) in that they failed to ensure that dangerous goods transported by road were transported in a safe manner. Toll was charged with a similar offence and had yet to enter a plea at the time of these sentencing hearings.

Issues:

(1) The objective circumstances of the offences; and

(2) The subjective circumstances of the defendants; and

(3) The appropriate penalties.

Held: Stockwell was convicted and fined $120,000, reduced to $84,000, and ordered to pay the prosecutor's costs of $27,000. Mr Hill was convicted and fined $4,000, reduced to $2,800, and ordered to pay costs as agreed or assessed.

Stockwell

(1) The legislative regime imposes requirements on all parties involved in the transport of dangerous goods to ensure that those goods are transported in a safe manner. The public and the environment were exposed to potential serious harm: at [37]. Stockwell's procedures for handling dangerous goods at the time of the offence were inadequate: at [36]. This was concerning given dangerous goods constitute 20% of Stockwell's business: at [42]. Stockwell did not provide correct documentation, placards and safety equipment to the driver Mr Hill: at [38]. The offence was held to be at the high end of the moderate range of objective seriousness: at [42]; and

(2) Stockwell did not have any record of prior convictions: at [49]. It showed remorse, cooperated with investigating authorities and pleaded guilty at the earliest opportunity: at [51]-[55]. Stockwell was deemed to have little prospect of reoffending given the extensive measures it has taken to improve its practices and policies concerning dangerous goods since the offence: at [50].

Mr Hill

(3) Mr Hill was placed in a difficult position having not been informed, prior to arriving at Stockwell's premises, that the job required transportation of dangerous goods. His responsibility was to refuse to drive the truck once he realised it was to be loaded with dangerous goods: at [84]. Mr Hill's culpability was at the low end of objective seriousness: at [87];

(4) Mr Hill did not have any record of prior convictions: at [92]. He showed remorse, cooperated with investigating authorities and pleaded guilty at the earliest opportunity: at [95]-[97]. Mr Hill has obtained a dangerous goods' licence since the offence and had little prospect of reoffending: at [94]; and

(5) The exercise of prosecutorial discretion to charge Mr Hill with a breach of the Dangerous Goods Act rather than the Dangerous Goods (Road and Rail Transport) Regulation 2014 (**the Dangerous**

Goods Regulation) for which maximum penalties are far lower was onerous in the circumstances of this case: at [88]. The offence as charged carries a maximum penalty of $55,000 and/or two years imprisonment. A breach of cl 83(1) of the Dangerous Goods Regulation (failure to drive without placards, for example) carries a maximum penalty of $2,200: at [99]. This appeared to be the first case in which an individual driver was charged with this type of offence in this Court: at [86]. Mr Hill's capacity to pay a fine was taken into account: at [101].

Environment Protection Authority v Imad Osman-Kerim **[2017] NSWLEC 63** (Robson J)

(related decision: *Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4)* [2016] NSWLEC 59 (Craig J))

Facts: Mr Imad Osman-Kerim (**the defendant**) was charged with, and found guilty of, contravening a condition of an environmental protection licence (**EPL**), and two offences relating to a failure to comply with Clean-Up Notices issued to a company of which he was a director (see related decision). The offences related to the defendant's drum cleaning and repair business, Sydney Drum Machinery. The condition of the EPL which was breached related to the maximum number of containers permitted to be stored on the premises at any one time. The two offences of failing to comply with Clean-Up Notices related to liquid waste flowing from the stormwater retention tank (**the SRT**) as a result of two consecutive fires on the premises. The waste water flowed from the premises into a nearby watercourse, and the defendant's failure to isolate the SRT resulted in the Environment Protection Agency (**EPA**) having to do so. The defendant and his company were before the Court to be sentenced for those offences.

Issues:

(1) What are the objective circumstances of each offence;

(2) What are the subjective circumstances of the defendant; and

(3) What is the appropriate sentence for the defendant.

Held: The defendant was fined in the cumulative sum of $151,000 for the three offences, was ordered to pay the EPA's investigation costs amounting to $120,795, and legal costs as agreed or assessed. The defendant was also ordered to place a notice in a specified form in three separate publications.

(1) The defendant's failure to comply with the Clean-Up Notices represented a significant transgression of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) and the objects underpinning that Act, and demonstrated a serious disregard for the legislative regime: at [70(1)];

(2) The offence relating to the contravention of a licence condition did not cause direct harm to the environment; however, the offences relating to failure to comply with Clean-Up Notices caused a significant degree of actual and likely harm to the environment: at [70(2)];

(3) All three offences were committed deliberately, and the financial issues faced by the defendant in complying with the Clean-Up Notices did not detract from the deliberateness of his conduct: at [70(3)];

(4) The defendant was well placed to take practical measures to avoid the environmental harm caused: at [70(4)];

(5) The defendant could have reasonably foreseen that his inaction could cause environmental harm: at (70[5]);

(6) The fact that the defendant had not had any prior convictions should be considered a mitigating factor: at [81];

(7) The defendant's guilty plea in respect of the offence relating to non-compliance with a licence condition attracted a discount of 15%: at [82];

(8) The defendant's expression of remorse and contrition should be given limited weight as it was directed more at the effects of the offences and subsequent events on him and his business, rather than at the harm caused by his actions: at [83];

(9) The fact that the defendant provided assistance to authorities should be considered a mitigating factor: at [84];

(10) There is a need for both general and specific deterrence: at [87]; and

(11) There was a significant degree of overlap between the two offences relating to the Clean-Up Notices and, while the offences arise from distinct conduct, it was appropriate to impose a penalty which took into account this overlap: at [94].

Environment Protection Authority v Rixa Quarries (No. 2) Pty Ltd **[2017] NSWLEC 48** (Pain J)

Facts: Rixa Quarries (No 2) Pty Ltd (**the defendant**) was charged with an offence against s 48(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**) in that it authorised a scheduled activity (processing more than 30,000 tonnes of sand per year for sale or reuse) to be carried out on its premises without an environmental protection licence (**EPL**). The defendant did not appear at any stage of these proceedings.

Issues:

(1) Whether the hearing should proceed in the absence of the defendant per s 250 of the *Criminal Procedure Act 1986* (NSW); and

(2) Whether each element of the offence was proven beyond reasonable doubt.

Held: The defendant was convicted of the offence.

(1) The Environment Protection Authority (**the EPA**) demonstrated adequate service of the originating process and evidence and attempted to draw the defendant's directors' attention to the date of the conviction hearing. The Court was satisfied that the hearing could proceed in the absence of the defendant on the assumed basis that the defendant pleaded not guilty: at [2]; and

(2) Each element of the offence was proven to the requisite criminal standard of proof. Firstly, the defendant was the occupier of the premises, having been granted a *profit-à-prendre* over the land: at [11], [15]. Secondly, witness testimony, video evidence and various loader docket information showed that the defendant processed and sold approximately 53,000 tonnes of sand between 25 March 2013 and 10 October 2013: at [16]-[32]. Thirdly, the premises were not the subject of an EPL: at [33].

(Note: This matter was listed for a sentencing hearing on 22 June 2017.)

Kovacevic v Queanbeyan City Council **[2017] NSWLEC 40** (Pain J)

(related decisions: *Queanbeyan City Council v Kovacevic* [2015] NSWLEC 152 (Craig J); *Queanbeyan City Council v Kovacevic (No 2)* [2015] NSWLEC 196 (Craig J); *Kovacevic v Queanbeyan City Council* [2016] NSWCA 346 (Beazley ACJ, Leeming and Payne JJA))

Facts: Ms Kovacevic (**the applicant**) sought leave to appeal against the severity of a sentence imposed on her by a magistrate in the Queanbeyan Local Court. Leave is required and could be sought because the appeal summons was filed between 28 days and three months after the sentence was imposed: ss 31(2)(a) and 33(2) of the *Crimes (Appeal and Review) Act 2001* (NSW) (**the Appeal and Review Act**).

In the Local Court, the applicant pleaded not guilty to an offence under s 125 of the *Environmental Planning and Assessment Act 1979* (NSW) of using her property as a transport depot without development consent. She was convicted, fined $8,800 and ordered to pay the Council's costs of $11,000.

Issue:

(1) Whether leave should be granted to allow the appeal out of time.

Held: Application for leave to appeal dismissed.

(1) The delay in filing the appeal was not satisfactorily explained or justified: at [6].

(2) No evidence was provided as to the applicant's capacity to pay a fine or the impact a conviction would have on her livelihood. It is therefore impossible to weigh up the significance of any such evidence in balancing the interests of justice, a relevant consideration in applications for leave to appeal per s 36(2) of the Appeal and Review Act: at [9]; and

(3) There is no obvious error in the magistrate's exercise of sentencing discretion. Although it is not necessary to find error, this is a relevant consideration in the application for leave as it informs the Court's assessment of the merit of any appeal against severity of sentence: at [7].

Moseley v Queanbeyan-Palerang Regional Council (No 2) **[2017] NSWLEC 52** (Pain J)

(related decision: *Moseley v Queanbeyan-Palerang Regional Council* [2016] NSWLEC 165 (Pain J))

Facts: The appellant appealed against the severity of sentence imposed on him (a $15,000 fine and $12,000 professional costs) by a magistrate at Queanbeyan Local Court.

The appellant had been issued with a Penalty Infringement Notice for works including excavation associated with the intended construction of a house and dam on his rural property. These works were carried out without development consent contrary to s 76A of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). The conviction was upheld in this Court. The appellant's submission that the works were exempt development was not accepted.

The appellant was not present when sentenced at the Local Court and did not otherwise put forward any material relevant to sentencing. In this appeal the appellant adduced evidence in relation to his capacity to pay a fine which was not available to the sentencing magistrate.

Issues:

(1) The objective circumstances of the offence;

(2) The subjective circumstances of the appellant; and

(3) The appropriate penalty.

Held: Appeal upheld, penalty of $4,000 imposed.

(1) The works caused a risk of environmental harm and the appellant had control over the causes of the offence: at [20], [22]. The offence was a strict liability offence. The defendant's reasons for committing an offence are relevant in determining the appropriate penalty: at [23]. The Council did not prove beyond reasonable doubt that the appellant intentionally breached the EP&A Act prior to the first on-site visit of a council officer: at [31]. The appellant acted intentionally after this visit in ignoring the Council's request to cease excavations until it was established whether the works were exempt development: at [34]. The appellant did not prove on the balance of probabilities that the Council approved his actions: at [39]. The offence was held to be at the low to mid-range of low objective seriousness: at [41];

(2) The appellant was of good character and had no prior record: at [43]. His likelihood of reoffending was considered low: at [44]. The appellant did not provide any express statement of remorse and contrition but took necessary steps to implement sediment and erosion controls on the land: at [45]. The appellant cooperated with authorities: at [46]; and

(3) The appellant's fine was reduced to $4,000, having regard to his limited means to pay: at [55]. The substantial costs order made in the Local Court was considered in assessing penalty: at [57]. No basis was provided for varying this order: at [58]. An order dismissing the charges and placing the appellant on a good behaviour bond under s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was held not to be appropriate in the circumstances: at [54].

The Council of the City of Sydney v Imaeda **[2017] NSWLEC 19** (Sheahan J)

Facts: Mr Masaaki Imaeda (**the defendant**) owned premises in Alexandria on which he operated a tourist coach depot in line with development consent granted by the Council in 1997. In January 2014, the defendant commenced using the premises as rental accommodation. He rented an abandoned bus as accommodation, installing a kitchen with the sink draining to stormwater. The defendant also installed a caravan and annexe above a shipping container, in addition to three other caravans which were all rented. The use of the premises for storage is prohibited under the Sydney Local Environmental Plan 2012 (**the SLEP**) without development consent, and the use of the premises as a caravan park, tourist and visitor accommodation or a boarding house is prohibited under the SLEP. A fire broke out at the premises on 2 July 2014 and extensively damaged both the premises and a neighbouring government building. NSW Police and NSW Fire and Rescue attended the premises at the time of the fire and evacuated 13 people. The defendant pleaded guilty to the two charges brought under s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) for breaches of ss 76A(1)(a) and 76B, namely:

(a) the defendant carried out development which required development consent under the provisions of the SLEP and did not obtain a development consent with respect to the development; and

(b) the defendant carried out development on the land which was prohibited under the SLEP.

Issue:

(1) The appropriate penalty for the offences pursuant to ss 3A and 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Held: The defendant was convicted of the offences as charged; ordered to pay a fine in the sum of $60,000 for offence (a) above; ordered to pay a fine in the sum of $150,000 for offence (b) above; and ordered to pay the prosecutor's costs in the agreed sum of $71,000.

(1) *Objective circumstances*: The offence was of moderate seriousness: at [100]. The developments and use of the land, the subject of the charges, were conceived and carried out deliberately, adding to their objective seriousness: at [81]. Prohibited development and uses of land cause harm by undermining the effectiveness and integrity of the statutory system for planning and development controls: at [79]. The illegal development and use of the land were undertaken for financial gain, adding to the objective seriousness: at [84];

(2) *Subjective circumstances*: The defendant pleaded guilty to both charges at an early stage and was entitled to a discount on penalty of 25%: at [90]. There was no evidence that the defendant was of poor character: at [89]. The plea alone was not sufficient to establish remorse or contrition and no evidence was led to support any submissions that the defendant demonstrated any remorse or contrition: at [91]. The defendant had no record of environmental offending: at [92]. His level of cooperation with authorities was exceptionally high: at [93]. The defendant agreed to pay the prosecutor's costs: at [94]; and

(3) *Sentencing considerations*: The defendant was unlikely to reoffend in environmental planning matters, therefore specific deterrence was not necessary: at [101]. General deterrence was an important sentencing consideration due to the prevalence of such offences: at [102]. The defendant's cerebral condition did not contribute in any significant way to the commission of the offences: at [125]; so there was no basis for reducing any finding of moral culpability: at [127]. The defendant showed no contrition and his conduct, the subject of this matter, was planned and prosecuted over a long period of time, and involved some complexity: at [128].

Wollongong City Council v Eldridge **[2017] NSWLEC 35** (Moore J)

Facts: Mr Eldridge (**the defendant**) acted as the Project Manager for approved remediation of a site in anticipation of seeking approval of a later residential subdivision development application on behalf of a consortium of investors. The defendant was the applicant for the approval on behalf of the consortium. The remediation project was approved in a development consent by Wollongong City Council (**the Council**) in April 2014, subject to a range of conditions. During the period of May to July 2014, the defendant performed his role as Project Manager until a "stop work" notice was served by the Council.

Prior to the "stop work" notice, works included extensive vegetation removal over virtually all of the site, and contamination remediation activities over a significant portion of the site. Conditions within the development consent protected part of the vegetation Mr Eldridge had cleared, because it was an endangered ecological community. There was also present, on the site, vegetation protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the Conservation Act**). The defendant had no particular regard to any ecological value of the vegetation (with the exception of a small number of mature trees, in several stands, that were protected during the clearing operation). The defendant's repeated reference during his oral evidence-in-chief to the vegetation as "green waste" made it clear, by necessary inference, that he had no regard to the ecological values of the vegetation cleared whilst he was project managing the removal process

The defendant faced two charges under the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). The first charge related to the clearing of the protected vegetation on the site, and the second charge arose from the activities undertaken on the site whilst under the project management control of the defendant, in the watercourse that runs through the site and on the land immediately on either side of the watercourse.

At the commencement of the trial, the defendant sought leave to withdraw his not guilty plea and to substitute, in lieu, a plea of guilty to both charges. Leave was granted to enter the guilty pleas without objection from the Council.

Issues:

(1) What was the seriousness of the offending conduct;

(2) What was the defendant's financial capacity to pay a fine (vide s 6 of the *Fines Act 1996* (NSW)); and

(3) If so, what was the appropriate sentence.

Held: Convicting the defendant and fining him $62,500 and ordering him to pay the prosecutor's costs, as agreed or assessed.

(1) In his affidavit of 2 December 2016, the defendant set out details concerning two matters, the first of which were matters that related to his personal health circumstances; whilst the second purported to deal with his capacity to pay any fine which might have been imposed. Mr Eldridge had deposed, in his affidavit, that, in addition to his very modest bank balance, the only asset which he owned was a motor vehicle with a value of less than $10,000: at [180];

(2) The defendant was cross-examined on the nature and extent of his involvement in a residential property development at Castle Hill and whether or not he should be regarded as having some form of financial interest in the development (although the development was being carried out, ostensibly, as a joint venture between his wife and another person): [at 183]. The defendant's involvement with the Castle Hill subdivision project was significant and it was not possible to be satisfied that he did not have a financial interest in the outcome of the joint venture: at [197];

(3) The defendant was also cross-examined on his ownership of 185,000 fully paid shares in a company named Matalym Pty Ltd, as evidenced by ASIC records: at [183]. Although he said that the fully paid shares were of no worth, in the course of cross-examination he made the admission that he had made a conscious decision not to mention ownership of those shares: at [201]. It was not possible to be satisfied that the defendant lacked capacity to pay such financial penalty as would have been appropriate to impose: at [204]; and

(4) The offending was to be described as of moderate seriousness: at [208]. The starting penalty for each of the offences was a fine of $50,000. Each of the fines was discounted by 30% for the entry of guilty pleas and after having regard to the objective and subjective factors to be taken into account. This resulted in fines for each offence of $35,000. Finally, after considering aggregation and totality, the fine for Charge 2 was further reduced to $27,500. This resulted in a total fine of $62,500: at [209]-[213]. The defendant was ordered to pay the prosecutor's costs as agreed or assessed: at [214]-215].

- Civil Enforcement

Blacktown City Council v Saker **[2017] NSWLEC 46** (Preston CJ)

Facts: Mr Jason Saker (**the first respondent**) occupied land owned by Mr Sam Saker (**the second respondent**) and Mr Bruce Gleeson (**the third respondent**) as tenants in common. The land is zoned RU4 - Primary Production Small Lots under the Blacktown Local Environmental Plan 2015 (**the BLEP**). Blacktown City Council (**the applicant**) alleged that, from late 2016 to date, the first respondent received fill consisting of building waste, soil, rocks and other material on the property and undertook earthworks involving the spreading of the fill material, which is a prohibited development under the BLEP and therefore forbidden under s 76B of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**).

The applicant made an order, and subsequently an emergency order, under s 121B of the EP&A Act ordering the first respondent to cease receiving fill material and the unapproved earthworks, lawfully dispose of the fill material, and restore the property to its natural level. The applicant alleged that the first respondent failed to comply with these orders and sought interlocutory injunctive relief. Moore J granted an interlocutory injunction restraining the first respondent from receiving fill material and undertaking the unapproved earthworks until further order.

Issues:

(1) Whether or not the interlocutory order restraining the first respondent, and his servants, agents and invitees, from receiving fill material and undertaking unapproved earthworks should continue until further order.

Held: Interlocutory injunction maintained.

(1) There were serious questions to be tried, including the failure to comply with the order and the emergency order under s 121B of the EP&A Act and the carrying out of a prohibited development in breach of s 76B of the EP&A Act: at [14];

(2) There was some evidence establishing that the first respondent had failed to comply with the order, and the emergency order, and carried out a prohibited development: at [15]-[16];

(3) The balance of convenience clearly favoured the granting of the interlocutory injunction: at [17]. There was a need to enforce the law and the orderly development and use of the environment and continued receipt of fill material was likely to cause harm to the environment: at [17]. The environmental harm caused by continuing to receive fill material and undertaking earthworks would be difficult and costly to remedy: at [17]. Significant prejudice would be suffered if the interlocutory injunction were not continued: at [18]; and

(4) There is no evidence that the first respondent would suffer prejudice if the interlocutory injunction was maintained because he was prevented from receiving fill and undertaking earthworks by an injunction granted by the Federal Circuit Court: at [19].

Kempsey Shire Council v Slade (No 2) **[2017] NSWLEC 10** (Sheahan J)

(related decision: *Kempsey Shire Council v Slade* [2015] NSWLEC 135 (Biscoe J))

Facts: Kempsey Shire Council (**the applicant**) sought to recover a statutory debt under s 105(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**the POEO Act**). The respondents were Michael Slade and his father, Barry Slade. A claim was made for reasonable costs and expenses of taking clean-up action in respect of pollution incidents resulting from the deposit of asbestos at a waste facility (**the premises**) during the currency of the lease of the premises to Michael Slade or the currency of a later lease to a company of which the respondents were the only directors and shareholders. The clean-up was required to be undertaken in response to a notice issued by the Environmental Protection Authority (**the EPA**) under s 92(1) of the POEO Act. As a result of judgment handed down by Biscoe J on 21 August 2015, the respondents were liable to pay the reasonable cost of the clean-up, and the issue

of quantum came before Sheahan J. The amount claimed by Council was $1,286,452.62, plus interest on the amount claimed, pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).

Issue:

(1) Was the cost of clean-up claimed reasonable.

Held: The respondents were ordered to pay the applicant $1,286,452.62, and the applicant's costs of the proceedings; liberty to apply on the question of interest payable by the respondents.

(1) *Evidence*: The respondents produced no evidence that the costs would have been lower, had the work been done earlier: at [86]. The amounts claimed were supported by Council's evidence, which was mostly unchallenged: at [88]. Council was entitled to engage and rely upon the experts involved in the clean-up to "assess, project manage, and safely remove and dispose of" the asbestos waste: at [89]. A loss was incurred by Council in using up 6,000 tonnes of landfill space, shortening the life of the landfill: at [91]. There was no evidence that Council acted "otherwise than reasonably" in complying with the clean-up notice: at [92].

(2) *Interest*: The respondents did not join issue on the question of interest, but strenuously opposed any payment to the Council: at [94]. The Court has a discretion whether to order interest and to determine the rate: at [95]. The respondents are entitled to be heard on the exercise of discretion, and the rate: at [96].

Sally-Anne Maree Fagin v Australian Leisure and Hospitality Group Pty Limited **[2017] NSWLEC 59**
(Robson J)

Facts: Sally-Anne Maree Fagin (**the applicant**) commenced civil enforcement proceedings seeking that the defendant (**ALH**) cease playing live and recorded music in the outdoor beer garden of the Charles Hotel, and remove the large video screen and audio speakers in the beer garden. The primary issue in the proceedings was whether a development consent granted to ALH in 2006 (**the 2006 consent**), which contained a prohibition as to live or recorded music or amplified sounds, was operative. The applicant contended that works undertaken, both prior to and after the consent was granted, constituted physical commencement pursuant to s 95(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). ALH's position was that there was no physical commencement, and the 2006 consent had lapsed. A further consent was granted in 2016 (**the 2016 consent**) which set out a number of conditions for noise control. Those conditions had not been breached.

Issues:

(1) Whether works undertaken prior to the grant of the 2006 consent "relate to" the consent so as to constitute physical commencement under s 95(4) of the EP&A Act;

(2) Whether the works undertaken after the granting of consent constitute physical commencement;

(3) Whether the use of the beer garden triggered the 2006 consent; and

(4) Whether ALH has engaged in unconscionable conduct by building the substantive part of the beer garden before consent was granted.

Held: Proceedings dismissed, costs are reserved.

(1) Works undertaken prior to the grant of consent could be seen as "relating to" the consent, such that they constitute physical commencement under s 95(4) of the EP&A Act: at [29];

(2) Works undertaken after the grant of the 2006 consent could not be relied upon to render the consent operational as:

   (a) the specific works authorised by the consent were not undertaken;

   (b) to the extent some planter boxes were constructed after the grant of the 2006 consent, they were not wholly reflective of the approved plans;

   (c) it was questionable whether planter boxes were works requiring consent; and

(d) in any case if they were constructed as part of the 2006 consent they would have required a construction certificate which was not obtained: at [30];

(3) The evidence demonstrated that the beer garden formed part of the lawful use of the hotel and was a beer garden well prior to November 2006. Accordingly, the use of the beer garden could not be relied upon as having physically commenced the 2006 consent: at [31]-[33];

(4) ALH did not act unconscionably as it only commenced operation of the premises in July 2012, and was not responsible for works undertaken before the 2006 consent or, indeed, before it commenced operation of the premises: at [36]; and

(5) The video screen and audio speakers were removed prior to the commencement of proceedings, and the premises are now subject to conditions for noise control as a result of the 2016 consent. Accordingly, if discretion was required to be exercised under s 124 of the EP&A Act, it would likely be exercised in ALH's favour: at [38]-[40].

- Resumption Compensation

Qasabian Family Investments Pty Ltd v Roads and Maritime Services; Fishing Station Pty Ltd v Roads and Maritime Services [2017] NSWLEC 73 (Moore J)

Facts: Roads and Maritime Services (**the respondent**) was the authority responsible for construction of roadwork upgrades requiring the acquisition of land at Frenchs Forest for the construction of a 12-lane-wide road. Included in the acquisitions was a service station site at 461 Warringah Road (**the site**), to the west of the Bantry Bay Road shopping complex on the western side of the intersection of Warringah Road and Bantry Bay Road.

These proceedings were simply confined to the Qasabian family interests involved with the site. The first interest was the ownership by Qasabian Family Investments Pty Ltd (**Qasabian Investments**) of the site itself. The second comprised a business operated by Fishing Station Pty Ltd (**Fishing Station**), which operated a retail fishing tackle and related fishing supplies (including bait supply) shop on the site.

Qasabian Investments made two claims arising out of the acquisition. The first was whether or not the market value of the freehold of the site should be increased above the $4.7 million that had been agreed to by the land valuers in their Joint Expert Report. The second was whether Qasabian Investments was entitled to claim future stamp duty costs for acquiring a replacement investment property.

Fishing Station also made two claims arising out of the acquisition. The first was a claim for compensation for the market value of the interest in the site held by Fishing Station by virtue of its unregistered sublease. The second claim arose from what was said to be the fact that the Fishing Station business at Frenchs Forest had not yet been relocated despite the opening of a new business at Mona Vale - a business also trading under the name Fishing Station.

Issues:

(1) When the land valuers set out a range of values, should the highest point be adopted despite agreement by valuers that a nominated point within the range was the appropriate value of the land;

(2) Was Qasabian Investments a passive investor and thus not entitled to compensation for stamp duty costs for future acquisition of a replacement property;

(3) Whether business valuation rather than land valuation was the appropriate methodology to determine the value of acquisition of Fishing Station's unregistered sublease in light of restrictions in the sublease; and

(4) Whether Fishing Station's business is to relocate in the future or has it already actually relocated.

Held:

Qasabian Investments issues

(1) For the *Caruso* approach – favouring an outcome beneficial to a dispossessed owner – (*Sydney Water Corporation v Caruso* [2009] NSWCA 391) to be engaged, there must be some uncertainty; some range or ambiguity to be addressed by the decision-maker. In these circumstances, the evidence from the Joint Expert Valuers Report disclosed no uncertainty, nor any ambiguity: at [31];

(2) The reasoning by which the expert land valuers reached their initial positions was exposed in their individual expert reports. The joint report disclosed that, as a result of the joint conferencing process, there was agreement between the experts that led to the derivation of the $4.7 million market value agreed as appropriate for the site. Because they had reached agreement, it was not necessary for them to set out, in any structured and detailed analysis, why they reached that agreement. The agreement, itself, was sufficient and self-contained. There was no evidentiary basis in the proceedings that would provide any foundation for the Court to seek to disturb it. As a consequence, to the extent that the Qasabian Investments' claim sought to have the market value increased for the site above the agreed $4.7 million, that claim was rejected: at [34]-[35]; and

(3) As Qasabian Investments was a passive investor it was not entitled to compensation for stamp duty costs for future acquisition of a replacement property: at [38].

Fishing Station issues

(4) The restriction on use in Fishing Station's sublease was one which meant that the value of the sublease could only be determined by having regard to the profitability of, and risks associated with, that permitted use. Any attempt to change the specified permitted use (as a fishing tackle shop) would have required the consent of 7-Eleven (the head lessee and grantor of the sublease) and would have led to some (unquantified) upward rental adjustment. As a consequence, business valuation was the appropriate methodology to adopt to value the interest in the land acquired from Fishing Station: at [67]; and

(5) After having regard to all of the indicators, had Fishing Station at Frenchs Forest been put into hibernation, as was proposed by Fishing Station, was the appropriate conclusion that there had been a relocation that had effected the transmuting of Frenchs Forest Fishing Station into Mona Vale Fishing Station: at [128]. On the balance of probabilities, relocation had taken place and that transmutation of Frenchs Forest Fishing Station into Mona Vale Fishing Station had been the functional outcome of what had occurred. Whilst it may well be that the Qasabian family interests will establish further Fishing Station outlets, the indicia were that any such future outlets would be the expansion of Fishing Station Frenchs Forest/Mona Vale rather than a relocation of Fishing Station Frenchs Forest (even if such an expansion were to be in the Frenchs Forest area). No evidence had been given of any activity to seek alternative premises for a relocated Frenchs Forest Fishing Station since Fishing Station Mona Vale opened for trading in April 2016. Powerful support for the relocation conclusion came from Fishing Station itself via its Facebook banner postings regarding its "Relocation Sale": at [130]-[132].

- Valuation/Rating

***Williams v Valuer-General of NSW* [2017] NSWLEC 17** (Pain J)

Facts: The applicant owned vacant land in Braemar which was assessed by the Valuer-General on 1 July 2015 to have a land value of $430,000. The applicant contended that the actual value of the land is $215,000 because of a positive covenant.

The land had a total area of 6,974 square metres, including a 1,000-square-metre building envelope. The majority of the land (86%) was subject to a public positive covenant intended to protect Southern Highlands Shale Woodlands, an endangered ecological community under the *Threatened Species Conservation Act 1995* (NSW) (**the Threatened Species Act**). The covenant imposed limitations on access and use of the land preventing residential subdivision.

Part 4 Div 9 of the *Rural Fires Act 1997* (NSW) (**the Rural Fires Act**) introduced the "10/50 rule" for bushfire protection in 2014. This permitted landowners in specified areas to clear all vegetation within 10 metres of an external wall of a habitable dwelling and vegetation, except trees within 50 metres of an external wall. The proximity of houses on adjacent lots meant that under this regime almost the entirety of the subject land could be cleared at the date of valuation. The applicant caused such clearing to be carried out in accordance with the "10/50 rule".

Issues:

(1) Whether the clearing permitted by the Rural Fires Act undermined the positive covenant such that it became redundant; and

(2) Whether the Valuer-General correctly valued the subject land on the basis that it could be used for residential subdivision.

Held: Appeal dismissed.

(1) The "10/50 rule" permitted substantial clearing of the subject land which overrode previous protections imposed by the positive covenant: at [16]. The land could therefore be valued on the basis that residential subdivision development was not likely to be constrained by the covenant: at [17]. In any event, the land had been substantially cleared such that vegetation which remained at the date of valuation was insignificant: at [22]. Although the legal regime had since been amended to preclude clearing contrary to a positive covenant, this was not so at the date of valuation and was therefore irrelevant per s 14K(1) of the *Valuation of Land Act 1916* (**the Valuation of Land Act**): at [16]; and

(2) The Valuer-General was entitled to conclude that the highest and best use of the subject land was for a seven-lot residential subdivision. This opinion was prescient, given that the applicant obtained development consent for an eight-lot subdivision of the subject land and an adjacent lot in July 2016: at [31]. The applicant did not rely on any expert valuation evidence and failed to discharge the onus of proof borne under s 40(2) of the Valuation of Land Act: at [33].

- Section 56A Appeals

Council of the City of Ryde v Sally Haddad executor of the estate of the late Jim Haddad **[2017] NSWLEC 70** (Sheahan J)

(related decision: *Haddad v Council of the City of Ryde* [2016] NSWLEC 1386 (O'Neill C))

Facts: This was an appeal under s 56A of the *Land and Environment Court Act 1979* (NSW) (**the Court Act**) brought by the Council of the City of Ryde (**the Council**) against the decision of a commissioner. The commissioner upheld an appeal against Council's refusal of a development application (**the DA**) made by the late Dr Jim Haddad. The DA was for use of Dr Haddad's "surgery" in West Ryde as "business premises". The site is zoned R4 - High Density Residential, under the Ryde Local Environmental Plan 2014 (**the RLEP**), and "business premises" is a prohibited use in the zone. Before the commissioner, Dr Haddad relied upon a claim for existing use rights and was successful in doing so. Dr Haddad passed away following the Class 1 appeal and the executor of his estate, Sally Haddad (**the respondent**), resisted the Council's s 56A appeal. Council appealed on the ground that the commissioner had failed to deal with a substantive element of the case, in that the existing use could not be characterised as a "commercial use". Council submitted that the commissioner did not look adequately at whether or not the existing use was better characterised as a "medical centre" or a "business premises". As a consequence of these failures, the Council submitted that the commissioner erred on the question of permissibility. In contesting the Council's arguments, the respondent rebutted the presumption of abandonment in s 107(3) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) by stating that Dr Haddad had not ceased to use the surgery over the period in which it was said to be abandoned. Further, the respondent argued that use of the premises as a medical surgery can extend to use as business premises and that any purported change of use of the premises was to one which could also be considered an existing use. The respondent argued that, pursuant to s 108(1)(b) of the EP&A Act, cl 41 of the Environmental Planning

and Assessment Regulation 2000 (**the EP&A Regulation**) makes provision for the change of an existing use to another use.

Issue:

(1) Did the commissioner incorrectly construe subcll 41(1) and (2) of the EP&A Regulation.

Held: The appeal was dismissed with costs (except for the costs of the adjournment on 15 March 2017, which was caused due to illness of counsel for the respondent).

(1) The key principles governing the determination of s 56A appeals as stated in *Botany Bay City Council v Botany Development Pty Ltd (No 2)* [2015] NSWLEC 55, and *Tanious v Georges River Council* [2016] NSWLEC 142: at [30]-[31];

(2) The Council's approach offended the injunctions in those authorities to avoid "fine tooth comb", "pernickety", "legalistic", or "overly critical" analysis of the commissioner's reasons: at [61]; and

(3) The commissioner gave adequate, comprehensive and articulate reasons for her conclusion: at [62].

***Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2017] NSWLEC 16** (Pain J)

(related decisions: *Bunnings Properties Pty Ltd v Ku-ring-gai Council* [2016] NSWLEC 1658 (Brown C); *Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 2)* [2016] NSWLEC 1659 (Brown C); *Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 4)* [2017] NSWLEC 1238 (Brown C))

Facts: By Notice of Motion, Bunnings Properties Pty Ltd (**Bunnings**) sought an order summarily dismissing the Council's appeal under s 56A of the *Land and Environment Court Act 1979* (NSW) (**the Court Act**).

The s 56A appeal related to a Class 1 challenge to the refusal of development consent for the proposed demolition of existing structures and construction of a four-storey Bunnings in Pymble. Findings were made by a commissioner in *Bunnings Properties Pty Ltd v Ku-ring-gai Council* [2016] NSWLEC 1658 (**the interim findings judgment**) resolving not to approve the development application, as it was then drafted, and giving Bunnings the opportunity to file amended plans. Leave was granted to reopen the proceedings in *Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 2)* [2016] NSWLEC 1659. After a contested hearing on 5 December 2016, the commissioner made orders (not published as at the s 56A appeal hearing) granting leave for Bunnings to rely on amended plans (**the amended plans order**).

Ku-ring-gai Council (**the Council**) challenged the three decisions of the commissioner, in particular the interim findings judgment and amended plans order. Bunnings submitted that the s 56A appeal should be dismissed for failure to disclose a reasonable cause of action.

Issue:

(1) Whether the commissioner had made a "decision" within the meaning of s 56A.

Held: Section 56A appeal summarily dismissed with costs.

(1) The commissioner had not made a decision that would affect his final determination of the Class 1 appeal. The interim findings judgment provided an option for Bunnings to file additional plans, which does not constitute a decision within the meaning of s 56A. The findings were not final, operative or determinative: at [19]; and

(2) The amended plans order was not operative. The lodging of amended plans did not give rise to any particular outcome in the proceedings: at [21].

***Tanious v Georges River Council* [2017] NSWLEC 58** (Pain J)

(related decision: *Tanious v Georges River Council* [2017] NSWLEC 1023 (Morris C))

Facts: This s 56A appeal concerned a commissioner's determination of an appeal against an order issued by the Council that limited the number of poultry that could be kept on the appellant's residential

premises. Section 124 of the *Local Government Act 1919* (NSW) (**the Local Government Act**) permits a local council to require an occupier of premises not to keep birds or animals "other than of such kinds, in such numbers or in such manner as specified in the order". The order cited, as its rationale, contraventions of the Council's Local Orders Policy – Keeping of Animals 2014 (**the LOP**). It required the appellant remove all but 10 poultry. The commissioner's decision limited the number of poultry to 15.

The appellant contested this decision in the s 56A appeal on the grounds that there was no evidentiary basis to restrict poultry to 15, his birds caused no health impacts, the Local Government (General) Regulation 2005 (**the Local Government Regulation**) did not specify the number of poultry that could be kept in residential areas and other councils in New South Wales did not set a limit on poultry numbers. The appellant did not accept (as the Council claimed) that he had agreed to a direction made during a callover before the registrar that the hearing before the commissioner should proceed without expert evidence.

Issue:

(1) Whether the commissioner had made an error of law or denied the appellant procedural fairness.

Held: Appeal dismissed.

(1) The appellant failed to establish any error of law. A merit challenge is not permissible in a s 56A appeal: at [17]. The appellant could not challenge the validity of the LOP in the s 56A appeal where no such challenge was raised at first instance. Parties in a s 56A appeal are bound by their conduct in the hearing before the commissioner: at [17];

(2) Section 161 of the Local Government Act provides for the adoption by a council of a local policy. The commissioner was entitled to consider the LOP which restricted the number of poultry permissible in residential areas in making her decision. The validity of the LOP does not depend on providing expert opinion to support it. No error of law in the commissioner's application of the LOP was identified: at [23];

(3) The appellant was not denied procedural fairness in relation to the calling of expert evidence. The Court did not accept his submission that the Registrar had denied him the opportunity to adduce expert evidence: at [20]. He did not make an application to rely on any evidence at the hearing so no basis for denial of procedural fairness during the hearing could be established: at [21]; and

(4) The absence of a specified limit on bird numbers in the Local Government Regulation is irrelevant: at [25]. That other local councils may not limit the numbers of birds on residential premises was similarly irrelevant: at [25].

- Separate Question

***Lawson v South Australian Minister for Water and the River Murray* [2017] NSWLEC 62** (Moore J)

(related decision: *Lawson v South Australian Minister for Water and the River Murray (No 2)* [2014] NSWLEC 189) (Biscoe J))

Facts: In 1922, the New South Wales Government resumed all such land at Lake Victoria in far south-western New South Wales, as may have been in private possession, necessary for the purposes of the transfer of those lands to the relevant representative of the South Australian Government for future water storage uses. The acquisition was made pursuant to the provisions of the *Public Works Act 1912* (NSW) (**the Public Works Act**).

On 8 December 2014, Biscoe J granted an extension of time to Mrs Lawson to lodge a claim for compensation for the resumption of that land. His Honour's ability to grant such an extension arose from the discretion vested in him for this purpose by s 102 of the Public Works Act. Mrs Lawson lodged her claim, the validity of which was contested by both the New South Wales and South Australian Governments.

Mrs Lawson's claimed legal interest was said to arise from possessory title to the land being held by her great-grandfather from some time after the mid-nineteenth century; the transmission of that possessory

title to Mrs Lawson's grandmother who, it was claimed, held that possessory title as at the date of acquisition in 1922; and transmission to Mrs Lawson of the right to claim compensation arising from the 1922 resumption having been transmitted to Mrs Lawson in 1956 on the death of her grandmother.

The decision of Biscoe J granting the necessary extension of time cleared but the first of many legal hurdles that must be overcome by Mrs Lawson before any compensation for the resumption would actually fall to be paid to her.

These proceedings addressed two preliminary separate questions, drafted by the legal representatives of the State of New South Wales and accepted by Mrs Lawson and the legal representatives of the South Australian Minister for Water and the River Murray as being appropriate for consideration as the next step in the process.

The first of those questions formed the primary issue as to whether on the assumed, but not agreed, fact that a person (now being deceased) held an entitlement to claim compensation under the Public Works Act by reason of the resumption of land in 1922, was such an entitlement, as a matter of law, amenable to transfer or transmission to, or otherwise passing to, another person?

Issues:

(1) Whether the ability to claim survived the death of the person said to have held possessory title in 1922.

Held:

(1) The first and primary question, as to whether the ability to claim survived the death of the person said to have held possessory title, was answered in the affirmative: at [41];

(2) Section 102 of the Public Works Act was found to contain two separate rights. The first right is the absolute one to make a claim for compensation within 90 days. The second right is a right to seek the exercise of a discretion in favour of a potential claimant who has not made a claim within the 90-day period of automatic entitlement. Further, no distinction arose between their status as rights: at [33]-[34];

(3) Given that there are these two rights, the Court found it would be absurd to suggest that the second right, the right to seek an extension of time to make a claim, would be extinguished by the death of a potential claimant. This would be demonstrated by what would be the necessary consequence if a potential claimant died shortly after midnight upon the expiry of the 90 days permitted by s 102. The second right would be extinguished on this construction: at [36]; and

(4) To counterbalance this, the rights of a constructing authority to be protected from claims that are made unreasonably late (whether by a living potential claimant or on behalf of the estate of such a now deceased potential claimant) is given by the fact that granting such an extension is discretionary: at [38].

Luxcon Developments No 6 Pty Ltd v Woollahra Municipal Council **[2017] NSWLEC 43** (Robson J)

Facts: Woollahra Municipal Council (**the respondent**) in the substantive Class 1 proceedings filed a Notice of Motion seeking an order for a separate question pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (**the UCPR**). The substantive proceedings concerned a development application for a mixed use development in Rose Bay, which included car-parking, residential dwellings and retail premises. Under the Woollahra Local Environment Plan 2014 (**the WLEP**), the site was zoned B4 - Mixed Use, which permits "shop top housing". Luxcon Developments No 6 Pty Ltd (**the applicant**) contended that the residential dwellings were properly characterised as "shop top housing" and are, therefore, permitted under the WLEP. The respondent disputed this characterisation and, accordingly, sought that the issue of whether the proposed residential accommodation was "shop-top housing" be determined as a separate question.

Issues:

(1) Whether the separate question would be dispositive of the proceedings;

(2) Whether there would be a time and cost saving arising from determination of the separate question; and

(3) Whether a hearing on all issues would be beneficial in informing future development applications, and whether the Court should take this into account in deciding whether to order a separate question.

Held: Notice of Motion dismissed, costs reserved.

(1) The time and costs saving predicted by the parties did not warrant a departure from the "ordinarily applicable" position that all issues in a proceedings should be heard and determined together: at [24];

(2) The fact that a Court make may make findings in relation to the merits of a particular development that may inform a new development application was not a matter that assists the Court in determining whether or not to order a separate question: at [25]; and

(3) While a positive answer to the separate question might be determinative of the proceedings, this should not be given significant weight in light of the insignificant savings of cost and time: at [26].

Moss Capital Pty Limited v Queanbeyan-Palerang Regional Council **[2017] NSWLEC 42** (Robson J)

Facts: Queanbeyan-Palerang Regional Council (**the respondent**) in the substantive proceedings filed a Notice of Motion seeking an order for a separate question pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (**the UCPR**). The substantive proceedings involved a claim for compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**), and the separate question proposed by the respondent concerned whether Moss Capital Pty Limited (**the applicant**) had a compensable interest in parts of the acquired land. Relevantly, the respondent's purported interest in the land arose from a joint venture agreement between it, Cannchar Pty Limited (**the owner of the land**) and another corporation (Cannchar Investments Pty Limited) to develop the land owned by the owner of the land. The owner of the land had also filed separate Class 3 proceedings for compensation.

Issues:

(1) Whether the separate question would be dispositive of the proceedings;

(2) Whether there would be a time and cost saving arising from determination of the separate question;

(3) Whether the evidence required for determination of the separate question was confined to construction of the joint venture agreement and otherwise unrelated to the determination of the quantum of compensation; and

(4) Whether, even if the separate question was negatively determined, the Court would nevertheless be required to consider the nature of the relationship between the owner of the land the applicant in the proceedings instigated by the owner of the land, resulting in the Court being required to resolve the same issue twice.

Held: Motion granted and separate question to be determined. Costs reserved.

(1) Determination of the proposed separate question would result in a real time and cost saving: at [22];

(2) A negative answer to the separate question would be dispositive of the proceedings: at [23];

(3) The submission that the Court may be required to consider the same issue twice should not be taken into account in determining this Motion, as the two proceedings had not been joined: at [24];

(4) The evidence required to determine the separate question would relate to the construction of the joint venture agreement, and would likely not require expert evidence of the market value of the land acquired. Accordingly, there would not be an overlap between the evidence required for the separate question and the balance of the proceedings, should they proceed: at [25]-[26]; and

(5) The proposed separate question involved a separate point of law which falls to be determined in the balance of the proceedings, should they proceed. Further, the facts relating to the separate question would likely not be contentious : at [27].

Saffioti v Kiama Municipal Council **[2017] NSWLEC 65** (Molesworth AJ)

Facts: Connie Saffioti (**the applicant**) appealed, pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), against a deemed refusal of her development application, which sought development consent for a proposed new dwelling on a 9.3-hectare bush block in Kiama. A dwelling erected in the 1980s was situated on a small cleared area within the bush block. Save for some small cleared areas, the bush block was predominantly forested by remnant Illawarra subtropical rainforest. Under the Kiama Local Environmental Plan 2011 (**the KLEP**), the vast majority of the bush block was zoned as environmental conservation land. The applicant sought, in her development application, to erect the proposed new dwelling on that part of the bush block zoned as environmental conservation land. Under the KLEP, development for the purpose of a dwelling or dwelling house was prohibited on land so zoned. It was agreed that the necessary statutory approvals for the erection and use of the extant dwelling had been granted in 1984 and that this was the foundation for the ongoing statutory privilege, under s 107 of the EP&A Act, to continue the existing dwelling use.

Issues:

(1) Whether the proposed development would "be carried out only on the land on which the existing use was carried out before the relevant date" pursuant to cl 42 of the Environmental Planning and Assessment Regulation 2000 (**the EP&A Regulation**); and

(2) Whether the proposed development, as an enlargement, expansion or intensification of an existing dwelling use, was permissible with development consent pursuant to cl 42 of the EP&A Regulation (**the separate legal question**).

Held: The development was permissible; proceedings stood over for further directions; no order as to costs.

(1) The ongoing dwelling use of the bush block was an existing use as defined under s 106(b) of the EP&A Act and, therefore, the "relevant date" for the purposes of Pt 5 of the EP&A Regulation was a date proximate to 18 May 1984, the date of the relevant building approval under the *Local Government Act 1919* (NSW): at [19], [25] and [75]-[76]. The building approval was the best available evidence of the parameters of the development consent and the nature and extent of the lawful existing use: at [77] and [80];

(2) For the purposes of cl 41(2)(b) of the EP&A Regulation, the land on which the existing dwelling use was carried out before the relevant date was the entirety of the bush block and not some smaller, undefined area bounded by a fair or generous curtilage to the existing dwelling: at [71]. In the absence of any division of the land, or evidence of the land being put to some other use, the determination of the extent of an existing use requires an examination of the characterisation of the relevant use: at [85]. The dwelling usage of a bush block embraces the normal and expected domiciliary activity, both within and outside the physical structure of the dwelling: at [89]. For the relatively simple dwelling use of a single lot constituting a single planning unit, detailed evidence is not necessary to define the parameters of that use: at [92];

(3) Under cl 41(2)(b) of the EP&A Regulation, it was possible for development consent to be granted for the proposed development as an enlargement, expansion or intensification of the existing dwelling use: at [71] (the answer to the separate question); and

(4) (*obiter*) In determining the extent of an existing dwelling use, a detailed factual inquiry would likely be necessary and useful if there were to be any issue that the dwelling use had become another use or that the land in question was being used for a range of different uses: at [96].

Sharkey v Minister administering the Water Management Act 2000 **[2017] NSWLEC 47** (Preston CJ)

Facts: Mr Sharkey (**the applicant**) owned a property on the Murray River, upstream of the wall of the Hume Dam. A water access licence (**WAL**) under s 12 of the *Water Act 1912* (NSW) (**the Water Act**) was attached to one of the lots within the property. Licences under the Water Act were converted to new

licences under the *Water Management Act 2000* (NSW) (**the Water Management Act**). The date of conversion and the category of the new licence depended on whether the old licence was with respect to a "regulated river" or an "unregulated river". By orders published in the *Gazette*, on 26 February 2003 and again on 1 July 2004, the Minister declared "the Murray River, from the upper limit of the storage of Hume Dam, downstream to the South Australian border" to be a regulated river.

The applicant's old licence was converted into an unregulated river WAL in 2012 because the Minister administering the Water Management Act (**the respondent**) deemed that it was with respect to a part of the Murray River that was upstream of the upper limit of the storage of Hume Dam. The applicant contended that the old licence was with respect to a part of the Murray River that was downstream of the upper limit of the storage of the Hume Dam and, accordingly, the old licence should have been converted into a "regulated river (general security)" WAL in 2004. The applicant claimed that the unregulated river licence is null and void and sought an order that the respondent issue a "regulated river (general security)" WAL.

Sheahan J ordered that the proper construction of the expression, "the upper limit of the storage of Hume Dam", be determined separately.

Issues:

(1) What is the proper construction of the expression, "the upper limit of the storage of Hume Dam".

Held: The separate question was determined in favour of the applicant.

(1) The ordinary and natural meaning of the expression supports the applicant's construction: at [31]. The areas of land that will be inundated by water stored by the Hume Dam to the upper limit of 192 metres AHD will be all areas of land upstream of the dam wall with an elevation equal to or lower than 192 metres AHD: at [32]. The water stored over these areas of land equal to or lower than 192 metres AHD will constitute part of the regulated river: at [32]. The upper limit of the storage of Hume Dam will be the point up the Murray River where the bed of the river first reaches 192 metres AHD, which is the furthermost point that water stored can extend up the Murray River: at [42];

(2) The purpose and criteria for distinguishing between regulated rivers and unregulated rivers is not clear: at [35]. Even if it were possible to identify the purpose, the description of regulated rivers in the Second Reading Speech is "rivers in respect of which the Department assures water supply by a storage dam and by operating other works in the rivers …": at [36]. All water stored up to the furthermost point up the Murray River that water stored by Hume Dam can extend is part of the water supply assured by the storage dam; it matters not that the water stored in the uppermost "finger" of the Murray River might be small in volume: at [36]; and

(3) Considerations of practicality do not demand preferring the respondent's construction because any practical difficulties which flow from this construction are a necessary and intended result of the words used in the respondent's order: at [40]-[41].

- Costs

Lane Cove Council v Ross (No 16); Lane Cove Council v Chami (No 6) **[2017] NSWLEC 26** (Pain J)

(related decisions: There are 27 decisions related to these matters, see the chronology in the judgment at [13])

Facts: Lane Cove Council (**the Council**) sought, by Notice of Motion, to discontinue its two Class 4 civil enforcement proceedings against the owners (at different times, Mr Ross and Ms Chami) (**the respondents**) of a property in Northwood, and an order that the respondents pay its costs for the entirety of these proceedings. In *Lane Cove Council v Ross (No 4)* [2012] NSWLEC 191 (*Ross (No 14)*), Mr Ross was declared to be in breach of development consent for a residential dwelling. Demolition and restoration orders were made in *Lane Cove Council v Ross (No 14)* [2013] NSWLEC 87. On appeal (*Ross v Lane Cove Council* [2014] NSWCA 50), the matter was remitted in order formally to join Ms Chami as the registered proprietor of the property from May 2013. By this time, the Council had

commenced separate civil enforcement proceedings against Ms Chami. Before the hearing on costs, there were 20 judgments across both Class 4 matters.

The property was also the subject of three separate Class 1 appeals, which sought to regularise the unlawful building works. The third appeal resulted in the grant of a conditional building certificate: *Chami v Lane Cove Council (No 4)* [2015] NSWLEC 176. Consequently, the civil enforcement proceedings seeking orders for demolition and restoration of unlawful works were rendered otiose.

Issue:

(1) Whether a costs order should be made in favour of the Council when proceedings discontinued.

Held: Leave granted to discontinue proceedings, the respondents ordered to pay the Council's costs in both matters.

(1) The Class 4 proceedings were properly commenced and were not vindictive: at [80], [131]. The Court had evidence of unlawful building works to which Mr Ross admitted. The Class 4 proceedings were virtually finalised in *Ross (No 14)*, but for a procedural failure to join Ms Chami: at [84]. The Council, having been successful in these proceedings, would reasonably expect a costs order in its favour, given it did not engage in any disentitling conduct and there was not a relevant supervening event: at [96], [107], [130]. The Court of Appeal decision did not disturb the substantive conclusions reached by the Court in earlier decisions: at [82]. The Class 1 proceedings did not replace or cancel the civil enforcement proceedings: at [86]. They are properly characterised as a surrender by the respondents: at [89], [133]; and

(2) The respondents delayed, substantially, their attempts to seek regularisation of the unlawful building works through various Class 1 appeals: at [102]. The dilatory (or absence of) compliance with Court orders by Mr Ross during the civil enforcement proceedings was noted by this Court and the Court of Appeal: at [112]. Mr Ross engaged in conduct, during the hearing of these proceedings, which caused them to be longer and more complicated than they needed to be: at [116]. There is no reason to ameliorate any costs order because Mr Ross was not legally represented and acted as Ms Chami's agent, given his familiarity with court processes: at [116].

Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd (No 2) **[2017] NSWLEC 29** (Robson J)

(related decision: *Millers Point Fund Incorporated v Lendlease (Millers Point) Pty Ltd* [2016] NSWLEC 166 (Robson J))

Facts: The applicant filed a Notice of Motion relating to a costs order from the related, earlier proceedings requiring the applicant to pay the first, third, fourth and fifth respondents' costs unless a Notice of Motion was filed seeking an alternative costs order. The Notice of Motion sought an order pursuant to r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) (the Court Rules) that each party to the earlier proceedings pay its own costs.

Issues:

(1) Where the earlier proceedings were brought in the public interest so that the Court should not make an order for the payment of costs against the unsuccessful applicant;

(2) Whether there was "something more" than a mere characterisation of the litigation as having been brought in the public interest; and

(3) Whether there were "countervailing circumstances" that spoke against departure from the usual rule on costs.

Held: Each party to pay its own costs of the earlier proceedings.

(1) There is a clear public interest in preserving park area for recreation and enjoyment; the earlier proceedings concerned a broad sector of the community beyond the local residents, and involved public law obligations: at [26]-[27];

(2) The claim made in the earlier proceedings was established and arguable, and involved novel legal issues which contributed to the proper understanding of the law: at [32];

(3) The earlier proceedings concerned a component of the environment that is of significant value and importance, and the development, the subject of the application, generated significant controversy and public interest: at [33]; and

(4) There was no indication that the applicant sought to vindicate rights of a commercial character or that it would benefit legally or financially from the earlier proceedings. More broadly, there was no evidence of any countervailing circumstances which spoke against departing from the usual rule on costs: at [35].

Young v King (No.11) **[2017] NSWLEC 34** (Sheahan J)

(related decisions: See the list of 16 decisions – both first instance and on appeal – related to these matters as set out in the case list at the commencement of the judgment)

Facts: The proceedings arose from a dispute in about 2001, between Ms Young (**the applicant**) and her immediate neighbours, Brendan King and Kristina King (**the respondents**). The applicant alleged that the respondents had carried out unlawful works on their property, including on its boundary with her property. In 2004, Consent Orders (**the 2004 Consent Orders**) were made in the substantive matter by McClellan CJ, largely in favour of the applicant, and in reliance on an undertaking by the respondents to carry out certain works. The respondents were ordered to pay the applicant's costs. The applicant became dissatisfied with the 2004 Consent Orders and alleged that she was the victim of some conspiracy, involving the respondents, the Council and the parties' respective advisers. Accordingly, the applicant has, since 2004, sought to have the 2004 Consent Orders set aside in the Land and Environment Court (**the Court**), and in the Supreme Court. The applicant has also commenced many related proceedings – against her advisers and representatives from those days, and others. The applicant's attempts in all courts have failed, and her appeal to the New South Wales Court of Appeal was also dismissed with costs (*Young v King* [2016] NSWCA 282).

In these most recent proceedings, the respondents sought an order that their costs on the applicant's dismissed 20 August 2015 Notice of Motion be paid by her solicitor, Leonardo Muriniti. Eleven of the 16 non-party respondents (**the non-party respondents**), who successfully resisted the applicant's costs Notice of Motion in August 2015, and obtained costs orders against the applicant, also moved the Court for various orders, including orders for indemnity costs on that Notice of Motion and for personal costs orders against Mr Muriniti and Mr Robert Duane Newell (originally the applicant's counsel, briefed by Mr Muriniti, and lately, including in these proceedings, a solicitor employed by Mr Muriniti and/or his firm, LC Muriniti & Associates).

Judgment No 11 dealt with all those motions for indemnity and/or personal costs orders against the applicant's lawyers. The respondents are pursuing similar orders against the lawyers in respect of their costs of her unsuccessful substantive proceedings.

Issue:

(1) Whether to award the non-party respondents costs on an indemnity basis pursuant to ss 98 and 99 of the *Civil Procedure Act 2005* (**the Civil Procedure Act**) and/or ss 61 and 62 of the *Legal Profession Uniform Law Application Act 2014* (NSW); and

(2) Whether to award interest on the costs payable to the non-party respondents pursuant to s 101 of the Civil Procedure Act.

Held: Costs were ordered against Mr Muriniti and Mr Newell, as well as the law firm, LC Muriniti & Associates, jointly and severally, on an indemnity basis. Interest was also ordered to be paid by these parties, jointly and severally, at the prescribed rate, on the costs ordered to be paid to the non-party respondents.

(1) *Costs orders*: A rule which gives the Court the power, or a discretion, regarding the burden of costs, such as s 98 of the Civil Procedure Act, is wide enough to allow an order to be made against a non-party: at [155]. There is a tension between the importance of lawyers feeling no threat of a personal liability flowing from their representation of clients, and the freedom of litigants from financial prejudice caused by the unjustifiable conduct of litigation by lawyers on either side: at [163]. Courts must be extremely cautious and circumspect in considering the making of personal costs orders against legal

practitioners: at [169]. The lawyer against whom the claim is made must have a full opportunity to rebut the complaint: at [164]. The current legal profession legislation requires a more demanding standard of lawyers than cases where a costs order is sought against a party's lawyer on general law principles, including under s 99 of the Civil Procedure Act: at [186]. More must be established than unconscionable conduct or breach of fiduciary for a special order as to costs: at [190]; and

(2) *Legal professional misconduct*: The impetus for the institution of the proceedings came from the applicant's lawyers: at [213]. The applicant's lawyers behaved incompetently, unprofessionally, inappropriately and against the true interests of their client, who was entitled to expect competent and reasonable representation: at [210]. The lawyers brought a costs application on the applicant's behalf with no arguable basis, and were the real authors of the folly which it became, compounding the mounting of a conspiracy case with no factual basis in the substantive proceedings: at [211]. Throughout the history of the proceedings, the lawyers continued to incur, on the applicant's behalf, unnecessary liability for her own costs and the costs of those she unreasonably pursued, and they must be held responsible: at [212]. The Court was satisfied that the test for "something more" than incompetence was met: [213].

- Miscellaneous

Aubrey Robert Mills v Local Land Services **[2017] NSWLEC 25** (Robson J)

Facts: Mr Mills (**the applicant**) submitted an expression of interest (**EOI**) for a Long Term Grazing Permit (**LTGP**) to the Local Land Services (**LLS**) over an area of land approximately 220 hectares (**the relevant land**). The applicant was initially notified that he had "won" the areas the subject of the EOI, including the relevant land. The LLS, however, then notified the applicant that the relevant land was unfenced from the neighbouring property, the Arula holding (owned by Arula Farming), and that, pursuant to subcl 2.10.4, the land therefore was to be awarded to Arula Faming. Relevantly, cl 2.6 of the LTGP policy, adopted by the local branch of the LLS, provided that an LTGP was to be provided to the highest tender, which in this case was the applicant. The applicant appealed to the Civil and Administrative Tribunal against the LLS' decision and, after the Tribunal confirmed the LLS' decision, the applicant appealed to this Court seeking an order revoking the LLS' decision to refuse to issue the LTGP and requiring the LLS to issue the LTGP to him.

Issues:

(1) Whether the decision to issue an LTGP was required to be made in accordance with the LTGP policy;

(2) Whether cl 2.6 of the LTGP policy was the sole criterion by which the determination was required to be made;

(3) Whether subcl 2.10.4 of the LTGP policy applied to the decision to issue a LTGP;

(4) Whether the relevant land was ever fenced; and

(5) Whether the issue that the relevant land was presently unfenced could be (or should be) dealt with by issuing an LTGP subject to conditions.

Held: Appeal dismissed, costs are reserved.

(1) In determining whether to grant an LTGP, the Court is entitled to give consideration to the LTGP policy; however, strict adherence to the LTGP policy was not required: at [51];

(2) Given that strict adherence to the LTGP policy was not required, the criteria set out under cl 2.6 were not determinative and did not need to be applied strictly: at [63];

(3) Subclause 2.10.4 of the LTGP policy was a consideration that could be taken into account and, in any case, reflected an enduring consideration that the relevant authorities had, for some time, taken into account when deciding whether to grant an LTGP: at [73];

(4) The evidence relied upon was satisfactory to demonstrate that the relevant land was historically "unfenced from a holding": at [90]; and

(5) The conditions presently proposed by the applicant were insufficient to address the concerns raised by the LLS which would arise were the LTGP granted to the applicant: at [104].

- Jurisdiction

Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel **[2017] NSWLEC 51** (Robson J)

Facts: Butler Street Community Network Incorporated (**Butler Street**) filed a Notice of Motion seeking orders, primarily, that the proceedings be dismissed, as the Court had no jurisdiction to determine the development application before it. The proceedings brought were an objector appeal against the Northern Region Joint Regional Planning Panel's (**the Panel**) grant of consent for the construction of a road and associated works. The primary basis upon which Butler Street sought dismissal of the proceedings was that the parties had mistakenly believed that the Byron Local Environmental Plan 2014 (**the BLEP**) applied to the site, whereas, in fact, the relevant environmental planning instrument was the State Environmental Planning Policy (Infrastructure) 2007 (NSW) (**the SEPP Infrastructure**). Pursuant to the SEPP Infrastructure, development for the purposes of a road is permissible without consent where the development was being carried out by a public authority. Accordingly, the parties agreed that consent was only required for the parts of the development passing through certain wetlands (**SEPP 14 Wetlands**).

Issues:

(1) Whether there was a valid development application before the Court for determination;

(2) Whether the Court had the power to determine the development application;

(3) Whether there was a valid development consent on foot; and

(4) Whether Council was required to amend the development application, and whether they were permitted to do so under cl 55 of the Environmental Planning and Assessment Regulation 2000 (NSW).

Held: Notice of Motion dismissed, costs are reserved.

(1) There was a valid development application before the Court. Even if the application exceeded that for which consent could be granted, it fell to the consent authority to determine the extent to which the development was permissible under various planning instruments and to grant consent accordingly: at [33];

(2) The Court had jurisdiction as there was a development application before the Court for determination, with the Court in Class 1 proceedings taking the place of the consent authority. Further, pursuant to s 80(4) of the *Environmental Planning and Assessment Act 1979* (NSW), the Court was entitled to grant or refuse consent solely in respect of the SEPP 14 Wetlands: at [39];

(3) To the extent the Panel did grant consent to parts of the development application that did not require consent, that consent was merely superfluous and therefore ineffectual: at [41];

(4) Absent any judicial findings as to the validity of the consent given in respect the SEPP 14 Wetlands area, that consent must necessarily endure: at [43]; and

(5) Council was not required to amend the scope of the development application as applicants were entitled to submit a development application as they saw fit, and it fell to the consent authority to determine whether consent should be granted, and for what parts: at [46].

- Practice and Procedure

Cumberland Council v Cando Management and Maintenance Pty Limited **[2017] NSWLEC 50** (Sheahan J)

Facts: In July 2004, the Court granted consent for the development of a multi-unit residential development at 527 Woodville Road, Guildford, comprising nine townhouses and basement car-parking. That development was completed by Cando Management and Maintenance Pty Limited (**the respondent**), but, on 2 July 2015, the then Parramatta City Council (now Cumberland Council) (**the Council**) commenced proceedings claiming that the consent had lapsed, and seeking, inter alia, an order for demolition.

The Council rejected building certificate and modification applications made by the respondent, but acknowledged in its Points of Claim, the respondent's efforts to rectify its position. At a mediation conducted by Dixon C, on 8 February 2016, the parties reached an agreement, in accordance with which the respondent lodged a Development Application (**DA**) with the Council seeking approval to use the development as a boarding house, but it was refused. The respondent did not appeal that refusal.

The respondent sought leave to file a Cross-Summons out of time in these Class 4 proceedings. The proposed Cross-Summons sought a declaration that the consent had not lapsed; that the development might be occupied without an occupation certificate; that the Council was authorised to issue a subdivision certificate; and an order that the Council issue that certificate.

Issue:

(1) Whether to grant leave to the respondent to file a Cross-Summons in accordance with s 22 of the *Civil Procedure Act 2005* (NSW) (**the Civil Procedure Act**).

Held: Leave granted to file the Cross-Summons and hearing dates were vacated.

(1) The interests of justice were best served by granting the respondent leave: at [35]. The respondent's change of course was to be regretted and could hardly be said to be just, quick and cheap: at [34]-[35]. A tight timetable must be set and supervised due to the residual concern for timetable slippage on the respondent's part: at [36]-[37]. Directions were made and a timetable set: at [41]; and

(2) The Council had requested an order for costs thrown away, on an indemnity basis: at [39]. The Court reserved that question: at [40]. The respondent was, however, ordered to pay the Council's costs on the Notice of Motion on a party-party basis, as agreed or assessed, before any further hearing, or any mediation, dates were set by the Court: at [41].

Hunter's Hill Council v Cavasinni **[2017] NSWLEC 28** (Pain J)

Facts: The respondents filed a Notice of Motion seeking an order that the judge allocated to hear this case recuse herself on grounds of apprehension of bias and/or actual bias. The basis for the application was exchanges between the judge and senior counsel for the respondents at a pre-trial mention.

This Class 4 civil enforcement matter related to alleged unlawful development on the respondents' land which the Hunter's Hill Council (**the Council**) sought to have demolished. During the pre-trial mention, the judge raised questions about the course adopted by the respondents outlined in their pleadings which included their proposed reliance on alternative landscape plans. The judge suggested to counsel that a separate Class 1 merit appeal could have been a more appropriate approach to resolving the issue of landscaping.

The second respondent, who was not present during the pre-trial mention, subsequently filed an affidavit stating that, having reviewed the transcript of the mention, he was concerned that the respondents would not receive a fair hearing of the matter. The respondents submitted the judge's questioning of senior counsel was overly interrogative, personally critical and showed prejudgement of the respondents' case.

Issue:

(1) Whether there was a reasonable apprehension of bias and/or actual bias, per the test in *Livesey v NSW Bar Association* (1983) 151 CLR 288; [1983] HCA 17 at 300.

Held: Motion dismissed.

(1) A pre-trial mention could be necessary for the judge hearing the matter to gain an appreciation of the substantive matters in issue, as well as for the procedural steps required to bring the matter to final hearing. It is not unusual for a detailed consideration of the parties' respective cases to be undertaken by a judge at a pre-trial mention, as occurred in this case: at [10];

(2) To the extent that the judge expressed concerns with the respondents' case, these were intended to test the nature of that case to gain an understanding of the issues in dispute and enable appropriate preparation for hearing: at [11]; and

(3) A hypothetical observer aware of the judicial decision-making role would not have perceived any actual or apprehended bias: at [12].

Neale v NSW Department of Planning and Infrastructure *[2017] NSWLEC 61* (Pain J)

Facts: In 2012, Mr Neale (**the applicant**) commenced proceedings in the Supreme Court and these were transferred to this Court pursuant to s 149B of the *Civil Procedure Act 2005* (NSW) (**the Civil Procedure Act**) on 24 May 2012 challenging the NSW Department of Planning and Infrastructure's (**the respondent**) assessment of a concept plan to develop land owned by the applicant. The proceedings were stood over for several years pending challenges to the validity of the appointment of managers and receivers to the applicant's land and his company. Approval of the concept plan was ultimately granted in December 2014, rendering the applicant's original claim otiose.

In December 2016, the respondent filed a Notice of Motion seeking an order that the proceedings be dismissed for failure to disclose a reasonable cause of action and/or abuse of process. In response, the applicant sought leave to file amended pleadings and transfer the matter to the Supreme Court. The causes of action in the amended pleadings included fraud, injurious falsehood and misfeasance in relation to various dealings concerning the applicant's land and assessment and approval of the concept plan. The parties agreed the Court did not have jurisdiction to determine the causes of action in the amended pleadings.

Issues:

(1) Whether the applicant should be granted leave to file amended pleadings pursuant to s 65(2)(c) of the Civil Procedure Act introducing causes of action over which the Court had no jurisdiction and have the proceedings transferred to the Supreme Court; and

(2) Whether the proceedings should be dismissed for failure to disclose a reasonable cause of action under r 13.4(1)(b) of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**); and

(3) Whether a costs order should be made against the applicant.

Held: Leave refused: proceedings dismissed; costs ordered.

(1) The proposed amendments contained entirely new causes of action and claims for relief beyond the jurisdiction of this Court: at [32]. The new causes of action arose from the same facts as the original pleadings as provided by s 65(2)(c) in only the broadest sense: at [28];

(2) The original pleadings had been overtaken by subsequent events. The proceedings disclosed no reasonable cause of action and were dismissed accordingly: at [25]; and

(3) A supervening event, the approval of the concept plan on 19 December 2014, removed the subject matter of the proceedings and rendered them otiose: at [36]. The applicant should have amended his pleadings or discontinued the proceedings at that time. The applicant was ordered to pay the respondent's costs from that date: at [37].

Piper v Minister administering the Water Management Act 2000 **[2017] NSWLEC 15** (Sheahan J)

Facts: The Applicants have owned the property "Auburn", in Wee Waa, since 2000 and, on it, they operate an irrigation farm. In 1995, the previous owner applied for approval to carry out proposed levee bank works. Approval was granted in 2005 (**the controlled work approval**). The conditions listed on the controlled work approval were repeated on the 2015 renewal. In 2012, Mr Piper signed a Memorandum of Agreement (**MOA**) proposed by the NSW Office of Water, but never received a signed copy of the document. The MOA was relied upon by Mr Piper when he undertook flood management works at "Auburn" in contravention of the conditions of the controlled work approval. Clause 6 of the MOA contained a requirement that Mr Piper make applications for any licences, or renewals thereof, that might be required in respect of the works. The works carried out included removal of the earlier-approved levee bank works, replaced with a "blocking" levee to the south. No applications were made as required by cl 6 of the MOA. In 2015, the *Water Management Act 2000* (NSW) (**the Water Management Act**) superseded relevant sections of the *Water Act 1912* (NSW), and a new "flood work approval" was issued to the applicants to replace the controlled work approval. The NSW Department of Primary Industries Water was required to update the conditions in order to bring the existing approval under the new legislation, and to notify the approval holder.

The applicants appealed against conditions imposed on the flood work approval under s 368(1)(i) of the Water Management Act, and pursuant to s 17(c) of the *Land and Environment Court Act 1979* (NSW) (**the Court Act**). The Minister administering the Water Management Act (**the Minister**) filed a Notice of Motion seeking an order for a "separate question" as to "whether the applicants' appeal is competent". The applicants then filed a Notice of Motion seeking to amend their Class 1 application. The applicants' Notice of Motion formed the subject of these proceedings.

Issue:

(1) Whether to grant leave to the applicants to amend the Class 1 appeal in accordance with ss 56, 57, 58 and 64 of the *Civil Procedure Act 2005* (NSW) (**the Civil Procedure Act**).

Held: Leave to amend the Class 1 appeal was refused. Costs were reserved.

(1) The Court preferred the construction advanced by the Minister: at [78]. It was highly unlikely that the legislature intended that such a substantive amendment could be made to an approval simply by a unilateral, non-participatory decision to impose or amend a condition: at [79];

(2) Conditions that leave open the possibility that the works would be significantly different from the approvals which were sought may not be in accordance with a statutory scheme for conditions to be imposed on approvals: at [74]. The "condition" specifying the location of the levee was the actual substance of the 2005 approval, and the amendments sought by the applicants would "fundamentally" alter the work contemplated by the approval, making it "significantly" different: at [75]. and

(3) Since the Minister would not have power to impose the conditions sought by the applicants, s39(2) of the Court Act would not authorise the Court to do so on appeal: at [76].

Opera Properties Pty Ltd v Northern Beaches Council **[2017] NSWLEC 1086** (Registrar Gray)

Facts: The Uniting Church owns property burdened by a right of carriageway and easement to access land at the rear. Opera Properties seeks development consent for the first stage of a proposal to subdivide that land into 62 lots as well as concept approval for the staged development. The access to the new lots is proposed to be by way of the existing right of carriageway. Opera Properties appealed against the deemed refusal of the development application. The Uniting Church, who objected to the development application, sought to be joined as a party pursuant to s 39A of the *Land and Environment Court Act 1979* (NSW).

Issues:

(1) Whether the contention proposed by the Uniting Church regarding the failure to provide the final design and construction of the required road access raises an issue that would *not be likely to be sufficiently addressed if they were not joined as a* party (s 39A(a)*).*

(2) Whether the contention proposed by the Uniting Church regarding the requirement for owner's consent for intensification of the use of the right of carriageway raises an issue that would not be likely to be sufficiently addressed if they were not joined as a party (s 39A(a)).

(3) Whether it is otherwise in the interests of justice that the Uniting Church be joined as a party to the proceedings (s 39A(b)(i)).

(4) Whether the Court should exercise its discretion in favour of ordering joinder.

Held: Allowing the application and ordering joinder.

(1) There are two steps in the exercise of the Court's power under s 39A. The first is that the Court must be satisfied that one of the limbs within s 39A have been satisfied. The second is that the Court must consider whether, in all of the circumstances of the application, it ought to exercise its discretion to allow a joinder: at [17];

(2) The adequacy of access through the right of carriageway is already raised in the Statement of Facts and Contentions and any further details offered by the Uniting Church are provided in support of existing issues, and may be included in the evidence of the parties' experts or raised through objector evidence: at [21];

(3) The contention that owner's consent is required for intensification of the right of carriageway is arguable and is not otherwise raised in the proceedings, and is therefore sufficient to satisfy s 39A(a): at [22].

(4) It is in the interests of justice that joinder be ordered as the Uniting Church's use and enjoyment of its land may be affected by the proposed development: at [23].

(5) The Court's discretion should be exercised in favour of ordering joinder so that the Uniting Church has the opportunity to participate in the proceedings to respond and lead evidence on matters possibly adversely affecting its property rights: at [25].

- Merit Decisions

Judges

Liverpool City Council v Moorebank Recyclers Pty Limited; Benedict Industries Pty Ltd v Minister for Planning (No 2) **[2017] NSWLEC 53** (Robson J)

Facts: The proceedings concerned an appeal against the decision of the Planning Assessment Commission (**the PAC**) to approve, subject to conditions, a project application by Moorebank Recyclers Pty Ltd (**Moorebank**) for the construction and operation of a materials recycling facility. Two objector appeals were instigated, the first by Liverpool City Council (**the Council**) and the second by Tanlane Pty Ltd and Benedict Industries Pty Ltd (**together Benedict**), which respectively owned and occupied the land to the north of the site and are related companies. Relevantly, Benedict has development consent to build a roadbridge passing approximately six metres above the Council land and the adjoining panhandle of Moorebank's battle-axe property. The only road access for future developments on the Moorebank and Benedict lands will be via the future roadbridge. The site is zoned E2 - Environmental Conservation. However, Sch 1 cl 11 of the Liverpool Local Environmental Plan 2008 (NSW) (**the LLEP**) provides for development for the purposes of a resource recovery facility to be permitted with consent.

Issues:

(1) Whether Benedict was estopped from raising certain contentions because of an undertaking given in earlier proceedings: *Moorebank Recyclers Pty Ltd v Liverpool City Council (No 2)* [2013] NSWLEC 93;

(2) Whether the proposed development was inconsistent with the planning and community context;

(3) Whether the traffic impacts, namely, the introduction of truck traffic onto residential streets and introduction of trucks exiting the proposed development, were grounds on which to refuse the proposed development;

(4) Whether there would be significant acoustic impacts arising from the proposed development on the future residential use of the Benedict land to the north of the site, so as to warrant refusal of the proposed development;

(5) Whether the visual and urban design impacts of the proposed development warranted refusal of the proposed development; and

(6) Whether the air quality, geotechnical, contamination and waste management, aquatic ecology, water (sewage, stormwater and flooding) impacts of the proposed development were sufficient grounds to warrant a refusal.

Held: Approval granted to the proposed development subject to conditions. The parties were directed to confer and present finalised conditions of consent to the registrar, with liberty granted for a further short hearing in respect of any contested conditions.

(1) Benedict was not estopped from raising any contentions due to earlier proceedings or the undertaking, as the matters sought to be raised in these proceedings differed from those adjudicated in the earlier proceedings: at [64];

(2) There was not sufficient non-compliance with the objectives of the E2 - Environmental Conservation zoning of the site or LLEP to warrant refusal of the proposed development: at [122];

(3) The significant agreement between the traffic experts and the provision of additional information modelling, as part of proceedings and joint conferring, meant that all traffic-related impacts were acceptable and appropriate, given the detailed conditions to which the proposed development was likely to be subject: at [152]-[155];

(4) While there would be some deleterious acoustic effect on the Benedict land, the acoustic mitigation measures proposed by Moorebank are sufficient: at [177];

(5) The proposed development was acceptable in relation to visual amenity concerns for a number of reasons, particularly given that a material recycling facility was specifically permissible on the site, and there would be vegetative screening: at [184]; and

(6) The air quality, geotechnical, contamination and waste management, aquatic ecology, water (sewage, stormwater and flooding) impacts of the proposed development could all be adequately addressed by the imposition of conditions of consent: at [212].

Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council **[2017] NSWLEC 56** (Preston CJ)

Facts: The Broken Bay Branch of the Royal Motor Yacht Club (**the RMYC**) lodged a development application with Pittwater Council (now the Northern Beaches Council) (**the Council**) for consent to expand their floating berthing structure further west into the waterway beyond the area leased by the RMYC, where swing-moorings are currently located. This would result in an additional 39 fixed berths and the relinquishment of 11 swing moorings.

The RMYC appealed against the Council's deemed refusal of their application under s 97(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). The Council's reason for the deemed refusal were that the development was prohibited under the Pittwater Local Environmental Plan 2014 (**the PLEP**). The RMYC contended that their use of the proposed expansion zone immediately before PLEP came into force was an existing use under s 106(a) of the EP&A Act so as to enable a

development application to be made to enlarge, expand and intensify the existing use. The Council contended that the swing moorings were installed unlawfully and therefore the use of the swing moorings was not for a lawful purpose.

Local residents and club members raised a number of merit issues, including the impact of the proposed development on traffic and parking, the safe navigation of the waterway, the environmental degradation of the waterway, the impact on the visual amenity of neighbouring properties, fire safety, public interest and cumulative impact.

Issues:

(1) Whether the appropriate characterisation of the purpose of the RMYC's use of the land and the waterway was "recreational boating club" or "marina";

(2) Whether PLEP prohibited the RMYC's use of the land and the waterway;

(3) Whether, in general planning terms, the commencement and continuance of the RMYC's use of the land and the waterway was for a lawful purpose;

(4) Whether the installation and use of the swing moorings was unlawful, causing the use of the waterway not to be for a lawful purpose;

(5) Whether, therefore, the RMYC's use of the waterway immediately west of the leased area was an existing use under s 106(a) of the EP&A Act so as to authorise the RMYC's development application to enlarge, expand and intensify the existing use and alter and extend any building or work used for the existing use under s 108 of the EP&A Act and cll 41-44 of the Environmental Planning and Assessment Regulation 2000 (NSW); and

(6) Whether, considering the relevant environmental planning instruments, the likely impacts, the suitability of the site, the submissions made and the public interest, the proposed development is an appropriate use of the land and the waterway.

Held: Appeal upheld; development consent granted to development application No 379/15 on the conditions in Annexure A to the orders.

(1) *Purpose of the use:* the purpose of the RMYC's use of the land and the waterway from when the use commenced to immediately before the PLEP came into force was "recreational boating club", which inspired and described the end served by the land- and water-based facilities and activities of the RMYC: at [27];

(2) *Effect of the PLEP*: The PLEP zoned the waterway west of the leased area W1 - Natural Waterways, in which development for the purpose of "recreational boating club" was an innominate prohibited development: at [34]; the PLEP zoned the land RE2 - Private Recreation and the waterway in the leased area W2 - Recreational Waterways, in which the proposed development was permissible with consent: at [31]-[32];

(3) *Use of the land and waterway for a lawful purpose*: The RMYC's use of the land and waterway commenced in 1926, and the subsequent construction in the period 1926-1945 of the clubhouse, jetty and other structures was lawful because no law required development consent to be obtained to erect a building, carry out a work or use land for any purpose: at [38]-[45]; successive planning instruments made the use of the land and the waterway within the leased area for the purpose of "recreational boating club" permitted with consent, however consent was obtained for new buildings and uses: at [46]-[102]; and the existing buildings and uses continued to be lawful, including under s 109 of the EP&A Act: at [103]. The waterway west of the leased area was first zoned 6(a1) (Waterways Recreation) by the Pittwater Local Environmental Plan 1993 (**Amendment No 1**), and subsequently zoned W1 - Natural Waterways under the PLEP, in which zone development for the purpose of "recreational boating club" was an innominate prohibited development: at [89], [92], [93], [102]; however, by s 107 of the EP&A Act, nothing in Amendment No 1 or the PLEP prevented the continuance of an existing use under s 106(a) of the EP&A Act, meaning the use continued to be lawful: at [93], [103];

(4) *Lawfulness of the installation and use of the swing moorings*: The RMYC installed the swing moorings in the expansion area before there was any restriction on erecting a building below the highwater mark: at [133]; the installation of the swing moorings in the waterway did not involve the erection of a building on land below the highwater mark (as permitted only with consent under

cl 59 of the Warringah Planning Scheme Ordinance 1963): at [152]; even if the swing moorings had been erected unlawfully, the RMYC's use of its existing swing moorings would have been rendered lawful under s 109A(1)(a) of the EP&A Act by Amendment No 1 permitting use of the existing swing moorings without consent: at [181]; however, if the swing moorings had been erected unlawfully, then their use could not have been for a lawful purpose under s 106(a) of the EP&A Act, and would not have been made lawful by the development consent granted to the RMYC in 2003 because the consent did not cover the use of existing swing moorings: at [173], [206]; and

(5) The proposed development was an appropriate use of the land and the waterway and the impacts of the development will be acceptable and could be managed satisfactorily by appropriate conditions of consent: at [253].

Seraglio v Shoalhaven City Council **[2017] NSWLEC 45** (Preston CJ)

Facts: Mr Seraglio (**the applicant**) applied for development consent for a Torrens Title subdivision of one lot (**the land**) into two new lots. The land contained two dwelling houses that were separated by a paling fence; each house had its own site, curtilage and street address. The proposed subdivision was along the line of the existing fence.

The land is zoned R3 - Medium Density Residential in the Shoalhaven Local Environmental Plan 2014 (**the SLEP**), under which land may be subdivided with development consent but development for the purpose of dwelling houses is prohibited. The subdivision would result in the use of each new lot for the purpose of a dwelling house.

Shoalhaven City Council (**the respondent**) refused the development because it was prohibited by the SLEP and must be refused under s 80(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**). The applicant appealed under s 97(1) of the EP&A Act, contending that the proposed subdivision was not prohibited because there were existing uses of the land for the purpose of dwelling houses.

Issues:

(1) Whether the proposed subdivision was lawful because there were existing uses for the purpose of a dwelling house on the land that were permitted to continue under s 107(1) of the Act.

Held: Development consent should be granted, pending submission of an amended plan of subdivision and draft conditions of consent.

(1) The proposed subdivision was not prohibited and would not result in a contravention of the SLEP or the EP&A Act because there were existing uses of the land for the purpose of a dwelling house: at [7];

(2) The unit of land on which each use for the purpose of a dwelling house was carried out were not the whole of the land but rather each site on which the use was carried out (being the site of each dwelling house, separated by a paling fence, on the land): at [23]. These sites were capable of separate identification and there were no problems of detailed investigation or complicated disputes of fact: at [23];

(3) The erection of two dwelling houses on the land in the 1930s and subsequent use of each site for the purpose of dwelling houses was lawful, because no planning law required development consent to be obtained: at [26]. Use for the purpose of dwelling houses was permitted with consent under Interim Development Order No 1 – Shire of Shoalhaven in 1964 and, therefore, the use of each site became a continuing use for a lawful purpose: at [27]-[28]. Use for the purpose of dwelling houses was prohibited under the Shoalhaven Local Environmental Plan 1985 (and remained prohibited following Amendment No 73) and, therefore, the use of each site became an existing use within the definition in s 106 of the EP&A Act: at [29]-[32]; and

(4) Use of the land for the purpose of dwelling houses remained prohibited under the SLEP: at [43]. Use of the land for the purpose of dual occupancies was permissible with consent, however, the proper characterisation of the purpose of each use of the sites and the dwelling houses erected on each of them was not dual occupancy: at [38], [51]. There were two separate uses of two parts of the land for the purpose of a dwelling house (which is antithetical to a use for the purpose of dual

occupancies), and there was not one use of the whole of the land for the purpose of dual occupancies: at [43], [52]. The SLEP did not change the actual or physical use of each site, and did not change the purpose of each use of each site: at [46].

Commissioners

Lane v Inner West Council **[2017] NSWLEC 1257** (O'Neill C)

Facts: The applicants appealed, under s 97(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), against the refusal by Inner West Council (**the Council**) to grant consent to alterations and additions to an existing modest cottage at 6 Ann Street, Balmain, including a first-floor addition. The site was located in an area zoned R1 - General Residential and within the Balmain Heritage Conservation Area (**the BHCA**).

Issues:

(1) Whether the proposal was an overdevelopment of the site, as the proposed site coverage exceeded one of the two components of the development standard for landscaped areas for residential accommodation in the R1 zone, requiring a maximum 60% site coverage. The planning experts did not agree on the calculation of the proposal's site coverage;

(2) Whether the proposal had an unacceptable impact on the heritage significance of the BHCA; and

(3) Whether the proposal had an unacceptable impact on its northern neighbour's courtyard, as the first-floor addition was at the rear of the site and adjacent to the neighbour's courtyard.

Held: Appeal upheld and development consent granted subject to conditions.

(1) The calculation of site coverage, according to the definition and subcl 4.3A(4)(c) of Leichhardt Local Environment Plan 2013, excluded the area of the first-floor deck, despite the deck being covered by a roof, as the deck was outside the outer walls of the building and was more than 2.4 metres above the existing ground level, satisfying the first limb of subcl 4.3A(c)(i). The proposal satisfied one of the alternatives of the second limb of subcl 4.3A(c)(i), because the parking space below the deck could be used for recreation purposes when it suited the occupier. The surface finish of the area below the deck was irrelevant to whether it could be used for recreation purposes: at [28];

(2) The form and scale of the proposed changes to the modest cottage were acceptable in terms of their impact on the heritage significance of the BHCA as they were not unsympathetic to the original cottage and they were clearly a contemporary addition: at [36]; and

(3) The changes made to the proposal in response to the experts' discussions during joint conferencing successfully ameliorated the amenity impacts of the first-floor addition on the northern neighbour: at [38].

Liang v Marsh & anor **[2017] NSWLEC 1208** (Fakes AC)

Facts: Mr Liang applied under Pt 2 s 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**the Trees Act**) for orders seeking the removal of a dead Sydney Blue Gum located in the respondents' backyard. Mr Liang also sought compensation of up to $1,000 for damage to his roof and aerial, allegedly caused by dead branches falling from the tree. The orders were sought on the basis of damage to property and potential injury.

The tree was the subject of an earlier application made by Mr Liang under Pt 2 of the Trees Act (see *Liang & anor v Marsh & anor* [2011] NSWLEC 1026). In that matter, heard on 9 February 2011, Mr Liang sought the removal of the tree on the applicants' contention that the tree had caused damage to a retaining wall and roof and that it could continue to do so. In that matter, Mr Liang was also concerned about possible injury arising from failure of the whole tree, or of branches. Amongst other things, orders were made refusing tree removal but requiring the biennial removal of dead wood.

According to the respondents, the tree died in May 2012 (over the course of one week). An inspection of the trunk revealed seven, closely spaced pieces of bark stuck with blue adhesive to the northern side of the trunk (Mr Liang's side) just above the fence. The pieces of bark covered holes in the tree. An arborist's report describes the filled holes as drill holes and states that the sudden death of an otherwise apparently healthy tree was most probably the result of herbicide poisoning.

At the time of the on-site hearing, the drilled area appeared to have been refilled with a material of a colour selected to blend in with the rest of the tree.

Issues:

(1) Whether any of the jurisdictional tests in s 10(2) of the Trees Act were satisfied; and

(2) If so, what orders should be made, including who should pay for their implementation.

Held: Ordering removal of the tree with Mr Liang to pay the costs of the removal of the tree.

(1) Given the advanced state of decline of the tree and its proximity to Mr Liang's dwelling, branches falling from the tree could reasonably have damaged the roof and the aerial and could potentially cause injury or further damage, thus satisfying the jurisdictional tests in s 10(2): at [14];

(2) The tree must be removed: at [15];

(3) In agreeing with the arborists, and considering the location of the holes, the most feasible explanation was that Mr Liang, or someone on his behalf, poisoned the tree: at [16];

(4) The damage to Mr Liang's property was likely an inevitable consequence of the poisoning and any rectification should be at his expense: at [18]; and

(5) Mr Liang was ordered to pay the cost of removing the tree and to provide all reasonable access to enable its safe and efficient removal: at [20].

Newland Developers Pty Ltd v Tweed Shire Council **[2017] NSWLEC 1021** (Morris C)

Facts: The first stages (Stages 1 to 14) of the Seabreeze Estate at Pottsville were completed under Development Consent No K99/1837 and comprised around 500 lots. On 2 June 2013, Tweed Shire Council (**the Council**) issued Development Consent No DA13/0577 for an 88-lot subdivision of Stages 15 to 18.

Under that approval, Stage 18 comprised a Master Lot (**the site**). Stages 15 to 17 were being developed for housing. The Master Lot had been identified under the Council's planning controls as a potential school site.

Newland Developers Pty Ltd (**the applicant**) lodged a development application with the Council on 3 June 2015 seeking consent to subdivide land in Stage 18 into 65 lots over two stages. The application was subsequently amended. The plans considered by the Court proposed the subdivision of the land into a total of 66 allotments over two stages, Stages 18A and 18B. Two lots would be dedicated to the Council as public reserves, and one as a drainage reserve, leaving a total of 63 residential allotments.

The Council had refused consent and the applicant appealed that determination pursuant to the provisions of s 97(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**).

Issues:

(1) Whether the proposal was inconsistent with the identification of the Master Lot as a potential school site in the Council's Development Control Plan (**the DCP**); and

(2) Whether approval of the application would be in the public interest.

Held: Dismissing the appeal and refusing development consent.

(1) On the evidence provided, there will be a need for another school to service the needs of the locality: at [70];

(2) The strategic planning for the Tweed Coast had been well documented. This had long-identified a need for a school site in Pottsville and the Council had incorporated such provision within its DCP since 2000: at [72];

(3) Section 74BA of the EP&A Act sets out the purpose and status of development control plans and the Council uses its DCP to achieve the aims of its Local Environment Plan (**the LEP**). The DCP had nominated the site as a potential school site since 1999. The designation has been considered on a number of occasions since, with the Council's latest resolution to retain that designation with a review no earlier than 2018: at [73]-[74];

(4) Section 79C(3A)(b) of the EP&A Act requires a consent authority to flexibly apply standards with respect to an aspect of the development and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development. Whilst the DCP does not set standards, it does, in Pt B21 s 3.5, contemplate that the site may not be required for a school and sets criteria to be satisfied if an alternate use is to be made of the land: at [77];

(5) The commissioner was not satisfied that the criteria set out in the DCP were met, in particular, that ,at this stage, subdivision of the site as proposed represented a better outcome than the provision of a school or would be in the public interest: at [82];

(6) Having regard to the Council's strategic planning and the consistent application of its controls, approval of the application would not achieve the objectives of the LEP or the R2 zone objective of providing other land use facilities or services to meet the day-to-day needs of residents, nor would it be in the public interest: at [87]; and

(7) No evidence of whether final interest in the property for the purpose of the school had been exhausted was available, or whether only part of the site could be developed for the purpose of a school: at [88].

Norman McDonald & Anor v Central Coast Council **[2017] NSWLEC 1207** (O'Neill C)

Facts: The applicants appealed, under s 97(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), against the refusal by Central Coast Council (**the Council**) to grant consent to alterations and additions to the existing Avoca Beach Theatre for a mixed use development. The site is located within a coastal township, adjoining low and medium density residential development, open space and commercial development to the north and adjacent to the beach. The site was zoned 2(f) - Residential (Beach Frontage) pursuant to the Gosford Planning Scheme Ordinance (**the GPSO**) and the proposal was not permissible in the zone. The proposal was permissible pursuant to an enabling clause in the GPSO at cl 49DN, inserted by the making of Gosford Local Plan No 456.

Issue:

(1) Whether the proposal would have an adverse impact on the heritage character and qualities of the Avoca Beach Theatre; and

(2) Whether the requirement for the applicants to pay the respondent for 29 car-spaces to be sealed and marked in the South End Car-Park, as stipulated in the terms of the Voluntary Planning Agreement (**the VPA**) between the parties, should be given weight in determining whether the proposal provides inadequate car-parking.

Held: Upholding the appeal and granting conditional development consent subject to the inclusion of a condition of consent pertaining to trading hours.

(1) The existing building does not demonstrate aesthetic characteristics worthy of the threshold for a local heritage listing: at [48];

(2) The agreed evidence of the experts that the social value that the community placed on the Avoca Beach Theatre is embodied in the physical fabric of the existing building was accepted, noting the following:

- social value is a collective attachment to a place, embodying meanings important to that community;

- social value for a place focuses on the experiential qualities of that place and not primarily on the physical fabric; and
- the key conservation issue with a place of social value is to ensure its continuing ability to evoke the associations, qualities and memories of that place, where the intactness of the original fabric is less important than it would be if the building was assessed as having architectural merit and demonstrated aesthetic characteristics worthy of meeting the threshold for local heritage listing.

Therefore, seeing the existing building in the round was not a priority, as the substantial additions to the northern and western sides of the existing building would not necessarily diminish the esteem felt by the community for the Avoca Beach Theatre, because the existing important elements of the fabric of the building associated with its value were being retained: at [49];

(3) The proposal had a shortfall of 33 car-spaces and the experts' agreement that the shortfall could be accommodated within the public domain in the vicinity of the site was accepted, with an agreed condition imposed on the consent that limited the patronage of the proposal to a maximum 75% capacity on Sundays during summer school holidays for a trial period: at [58]; and

(4) The Council's submission that, in considering the shortfall in parking provided by the proposal, the terms of the VPA be given no weight was accepted: at [65].

Padraig Pty Ltd v Council of the City of Sydney **[2017] NSWLEC 1158** (Dickson C)

Facts: Padraig Pty Ltd (**the applicant**) appealed the Council of the City of Sydney's (**the Council**) order made under s 121B of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) regarding fire upgrade works. The applicant also appealed against the Council's refusal of a building certificate under s 149F(1)(a) of the EP&A Act, which sought to regularise unauthorised works. The Council's refusal of a development application proposing works to the layout and number of hotel accommodation rooms on levels 1 and 2 of the Criterion Hotel was also appealed pursuant to s 97 of the EP&A Act.

Issues:

(1) Whether the proposed works had an adverse impact on the significance of the heritage item under cl 5.10 of the Sydney Local Environmental Plan 2012 (**SLEP 2012**);

(2) Whether the proposed work failed to achieve design excellence as required by cl 6.21 of SLEP 2012, inclusive of an acceptable active street frontage;

(3) Whether the premises were non-compliant with the Building Code of Australia (**the BCA**); and

(4) Were the Court to grant consent, what conditions may be appropriate for the development.

Held: Dismissing the building certificate appeal; staying the s 121B order and upholding the development appeal and granting development consent subject to conditions.

(1) The building certificate appeal:

(a) the premises was not compliant with the relevant instruments and codes: at [99]; and

(b) consistent with the parties agreed orders, Council was not permitted to make an order requiring the unauthorised works to be demolished, altered, added or rebuilt, provided that the works required by the fire safety order were carried out; works were compliant with the *Smoke Free Environment Act 2000* (NSW) and Smoke Free Environment Regulation 2000 (NSW); and that the remainder of works were carried out and an occupation certificate issued prior to the dates ordered by the Court: at [101];

(2) The s121B order appeal:

(a) the Court found that staying the existing orders assisted in providing the Council and the Court certainty of the completion of the works prior to the repeal of the order: at [100]; and

(b) the parties agreed orders were satisfactory (see point (2) reasoning above): at [101].

(3) The development application appeal:

(a) it was appropriate to require the fire upgrade works as part of the consent despite the fire order being on foot: at [79];

(b) the development was consistent with the relevant planning instruments, DCP and other documents. The likely impacts were acceptable and the site was suitable for the proposed development: at [96];

(c) the proposal in conjunction with the proposed conditions complied with cl 5.10 and cl 6.12 of LEP 2012: at [97]; and

(d) the applicant was granted leave to amend its development application to rely upon plans set out in the proposed conditions: at [101].

Strebora Pty Ltd v Randwick City Council **[2017] NSWLEC 1204** (Dickson C)

Facts: Appeal against the making of an Interim Heritage Order (**IHO**) under s 30(1) of the *Heritage Act 1977* (NSW) (**the Heritage Act**). The building, subject to the IHO, was a two-storey residence with a detached garage to the rear. Strebora Pty Ltd (**the applicant**) had obtained a complying development certificate for its demolition. The IHO prevented the applicant from undertaking the demolition. At the time of determining to make the IHO, Randwick City Council (**the Council**) relied exclusively on a verbal briefing by Council's Senior Environmental Planning Officer – Heritage. This briefing was later recorded in a file note.

Issues:

(1) Whether the IHO was validly made;

(2) Whether the verbal briefing and subsequent file note amounted to a valid "preliminary heritage assessment";

(3) Whether the heritage significance of the property was sufficient to warrant local heritage listing; and

(4) Whether the IHO should be revoked or retained.

Held: Appeal upheld and the IHO revoked.

(1) Depending on the circumstances, a new or specific report is not required to be prepared to support a finding that an IHO is necessary: at [37];

(2) It is, however, mandatory that the preliminary heritage assessment meet the requirements of the "guidelines" provided under the document, "Assessing Heritage Significance", prepared by the NSW Heritage Office, 2001; and make a conclusion or identify why the officer is satisfied the IHO is necessary and that the building or site may have heritage significance: at [37];

(3) The file note prepared did not satisfy the requirements for a preliminary heritage assessment. No previous heritage studies of the precinct or the local government area had identified the property as having heritage significance or warranting listing at a local level and could not be relied on to inform the making of the IHO. The file note did not identify (using the relevant guidelines) the basis for, or criterion upon, which the property would likely be found (on further enquiry and investigation) to be of local heritage significance: at [37]-[38];

(4) The property was not found to be of local heritage significance. This was mainly due to the resubdivision of the original allotment and subsequent construction of adjoining residential flat buildings, unsatisfactory association with the previous owner or architect and recent removal of internal fabric: at [63]-[64]; and

(5) The reasoning and criterion that underpin an IHO determination by council should be made clear to the applicant as a matter of procedural fairness. In most cases, such reasoning should be captured in writing at the time of the making of the IHO: at [39].

Yao v Liverpool City Council **[2017] NSWLEC 1167** (Brown C)

Facts: The Court granted development consent "to use the first floor of No 24 Railway Street, Liverpool as a brothel" in April 1998. The applicant sought to modify a condition of the development consent to enable extension of the brothel's permitted trading hours and to add a further condition imposing a plan of management prepared by Mr Yao's (**the applicant**) town planner. The applicant appealed against the refusal by Liverpool City Council (**the Council**) of the modification application.

Issues:

(1) Were the extended hours compatible with surrounding land uses;

(2) Would the extended hours give rise to unacceptable social impacts in the immediate locality, and

(3) Whether the applicant had demonstrated a satisfactory justification for the proposed extended hours.

Held: Dismissing the appeal and refusing to modify the development consent.

(1) The planning principle in *Martyn v Hornsby Shire Council* [2004] NSWLEC 614 (***Martyn***) concerning the location of brothels had been in operation for some 13 years and, in many instances, had been overtaken by specific controls and requirements in development control plans for individual councils. The more prescriptive form of the planning principle in *Martyn* required revision given the more recent approach of creating planning principles that simply raise relevant considerations: at [24];

(2) The commissioners had concluded that a planning principle that addressed sex services' premises was still necessary: at [25];

(3) The revised planning principle reads:

> *When considering whether to grant consent for a development application for a "sex services premises" a consent authority should to take into consideration such of the following matters as are relevant to the development application:*
>
> 1. *The proximity to any sensitive land uses, such as, but not exclusively educational establishments, places of public worship, child care centres etc*
> 2. *Tthe proximity to any premises used for residential accommodation,*
> 3. *Paths of travel for different members of the community near the premises,*
> 4. *The hours of operation,*
> 5. *Signage,*
> 6. *Means of access to the premises,*
> 7. *Safety of patrons and employees,*
> 8. *Streetscape appearance,*
> 9. *The existing or anticipated character of the area,*
> 10. *Car parking and public transport access,*
> 11. *Social impact, and*
> 12. *Impacts of clustering multiple sex services premises: at [25];*

(4) The extension of the operating hours and the intensification of the use was not appropriate: at [31]; and

(5) While the intensification of an existing use is permitted, it was not appropriate in the circumstances of this case. In 2008, the Council made the conscious strategic decision to prohibit sex services' premises in the B3 zone. It would be inappropriate to intensify the existing use, given the clear strategic direction taken by the Council to prohibit this land use in their most recent planning documents: at [37]

NSW Civil and Administrative Tribunal

Meriton Property Services Pty Limited & Ors v UrbanGrowth NSW **[2017] NSWCATAD 71**
(S Montgomery, Senior Member)

Facts: Landcom, created by the *Landcom Corporation Act 2001* (NSW) (**the Landcom Act**), is a state-owned corporation trading through UrbanGrowth. UrbanGrowth is the New South Wales Government's main agency responsible for urban transformation and development projects, including urban development projects.

In November 2014, UrbanGrowth sought expressions of interest to purchase the Lachlan's Line. The two-stage tendering process involved submission of expressions of interest (**Stage 1**), with UrbanGrowth to then select a short-list of preferred parties to submit a tender (**Stage 2**).

Meriton Property Services Pty Limited (**Meriton**) is a wholly owned subsidiary of the holding company of the Meriton Group. Karimbla Properties (No 50) Pty Limited (**Karimbla**) is also a wholly owned subsidiary. Accordingly, Meriton and Karimbla were associated companies.

Karimbla was short-listed for the Stage 2 Invitation to Tender. However, Karimbla was subsequently excluded from the Stage 2 tender process. Karimbla challenged the exclusion in the Supreme Court but ultimately abandoned those proceedings. Meriton's involvement in the tender process was set out in the affidavit of Mr Joseph Callaghan.

The successful tender bid by Greenland was for $190,000,000 plus GST.

Meriton applied under the *Government Information (Public Access) Act 2009* (NSW) for documents concerning the tender process. Meriton explained that its access application sought documents that pertained to the transparency of the tender process. It contended that the requested information was significant to the transparency of the tender process and that its release would serve to publicly demonstrate whether or not the exclusion of Karimbla from the tender process was in the best interests of the community.

Meriton contended that the reasons relied upon by UrbanGrowth to refuse disclosure did not demonstrate an overriding public interest against disclosure and that, to the contrary, the factors favouring disclosure overwhelmingly outweighed the factors against disclosure. It asserted that the information ceased to be commercially, professionally or financially sensitive at the conclusion of the tender process and disclosure was necessary to ensure the deliberations, consultations, processes and procedures adopted by UrbanGrowth were consistent with its legislative functions and in accordance with the tender campaign for Lachlan's Line. It submitted that there was a significant public interest in ensuring that the functions and activities of UrbanGrowth under the Landcom Act, dealing with public land in a quasi-commercial way, were undertaken with transparency and accountability.

Issues:

(1) Whether the public interest considerations in favour of disclosure outweighed the considerations in favour of release.

Held: Decision affirmed.

(1) The Tribunal found that the public interest considerations against disclosure of information outweighed the considerations in favour of release. Thus, having examined all of both the open and confidential material filed with the Tribunal by UrbanGrowth, and having noted all of the evidence and submissions in the proceedings, the Tribunal found that the correct and preferable decision was to affirm UrbanGrowth's decision that some of the information was already available to Meriton; and to refuse to provide access to some of the information on the basis that there was an overriding public interest against disclosure: at [169]-[170].

Court News

Arrivals/Departures

Commissioner Sue Morris retired on 27 June 2017.

Commissioner Sarah Bish commenced on 28 June 2017.

Fees

Court fees increased on July 1 2017, as set out in the:

- Civil Procedure Amendment (Fees) Regulation 2017 - published 30 June 2017;
- Criminal Procedure Amendment (Fees) Regulation 2017 - published 30 June 2017; and
- Victims Rights and Support (Victims Support Levy) Amendment Notice 2017 - published 23 June 2017.