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Land and Environment Court of NSW Judicial Newsletter

Announcements

On Wednesday 1 November 2017, the Attorney General launched a video that provided information about the Paperless Trial Pilot Programme which has been conducted by the Court in two Class 3 Resumption Compensation matters. The video can be accessed through this link. A fact sheet has also been prepared to provide information about the Paperless Trial Pilot Programme. The fact sheet can be accessed through this link.

The Court has already scheduled a number of further Class 3 matters to be conducted on a "paperless" basis for the remainder of this year, and in 2018, and the first Class 1 Merit Appeal to be conducted on this basis will also take place in early 2018.

The Land and Environment Court's Annual Review 2016 is available and may be accessed through this link.

Legislation

Statutes

- Planning:

Environmental Planning and Assessment Amendment (Staged Development Applications) Act 2017 - commenced 14 August 2017, amended the *Environmental Planning and Assessment Act 1979* to confirm the manner in which the staged development application provisions of that Act have operated prior to a recent decision of the NSW Court of Appeal that invalidated a State significant development consent for the Walsh Bay Arts Precinct (*Bay Simmer Investments Pty Ltd v State of New South Wales* [2017] NSWCA 135. That decision invalidates a staged development consent where a concept approval is followed by only 1 detailed development application or where the concept approval does not consider construction and other impacts arising from (and required to be assessed in connection with) the subsequent detailed development application. The Act validates previous decisions but does not render valid the development consent that the Court declared invalid in relation to the Walsh Bay Arts Precinct nor any subsequent development application lodged in reliance on that development consent.

Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Act 2017 - commenced 13 October 2017,

amended the *Environmental Planning and Assessment Act* 1979 and State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011:

(a) to clarify the application of the neutral or beneficial effect on water quality test in the case of a development application for the continuation of development under an existing development consent relating to the Sydney drinking water catchment; and

(b) to validate the development consent granted on 21 September 2015 in relation to the Springvale mine extension, and to validate any other development consent that would have been valid under the test as so clarified: *4nature Incorporated v Centennial Springvale Pty Ltd* [2017] NSWCA 191.

Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Act 2017 - assented to 14 August 2017, and partially commenced, inter alia:

(a) amended the *Environmental Planning and Assessment Act 1979* in relation to the establishment and operation of local planning panels, and in particular:

(i) to require a council of an area in the Greater Sydney Region or the City of Wollongong to constitute a local planning panel and to allow other councils to do so;

(ii) to provide that where a local planning panel has been constituted the consent authority functions of the council are not to be exercised by the councillors but are to be exercised on behalf of the council by the panel or by council staff as delegates of the council (and to authorise the Minister to give directions on the development applications that are to be determined on behalf of the council by a panel);

(iii) to confer on a local planning panel (in addition to the consent authority functions of the council) the function of advising on planning proposals relating to planning instruments that are referred to the panel by the council (or at the direction of the Minister);

(iv) to provide that a local planning panel is to be constituted by 4 members, comprising an independent chairperson approved by the Minister, 2 other independent persons with relevant experience approved by the Minister and a community representative for the area (or if the area is divided into wards, a community representative who is most closely associated with the matter before the panel);

(v) to enable the Minister to approve of individual persons to be appointed to a local planning panel or to approve of a panel of persons from whom a member is to be selected, and (vi) to make provision relating to the members and procedure of a local planning panel that is similar to the provision made in relation to regional panels; and

(vii) to provide that existing local panels (called independent hearing and assessment panels) established as at 1 September 2017 are continued until 1 March 2018 an and taken to be local planning panels under the proposed Act;

(b) amended the Environmental Planning and Assessment Regulation 2000 to make ancillary provisions relating to the exercise by a local planning panel of the consent authority functions of the council;

(c) amended the *Environmental Planning and Assessment Act* 1979 and State Environmental Planning Policy (State and Regional Development) 2011:

(i) to change the general threshold for regional panels to exercise the consent authority functions of a council from development exceeding $20 million in capital investment value to development exceeding $30 million in capital investment value, and

(ii) to transfer that threshold and other relevant thresholds relating to the jurisdiction of regional panels from the Act to the State Environmental Planning Policy.

Environmental Planning and Assessment Amendment (Complying Development Codes) Regulation 2017 - published 22 September 2017, requires a complying development certificate for complying development that is carried out under a complying development code under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 to specify the name of the particular code.

Environmental Planning and Assessment Amendment (Complying Development Certificates) Regulation 2017 - published 7 July 2017, updated a cross-reference in a provision relating to complying development

certificates as a consequence of the commencement of the State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Housing Code) 2017.

Environmental Planning and Assessment Amendment (Schools) Regulation 2017 - published 1 September 2017, implemented the following:

(a) to prescribe a proprietor of a registered non-government school as a public authority:

  (i) to enable the proprietor to carry out certain exempt development and development permitted without consent in connection with an existing school under State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (**the Policy**), and

  (ii) to allow the proprietor to be a determining authority for the latter class of development under Pt 5 of the *Environmental Planning and Assessment Act 1979*;

(b) to prescribe specified universities as public authorities to allow them to be determining authorities for certain development that a university may carry out without consent under the Policy;

(c) to prescribe the Regulatory Authority for New South Wales under the Children (Education and Care Services) National Law (NSW) as a public authority to enable the Authority to exercise certain concurrence functions under the Policy;

(d) to enable the Minister for Planning to approve a code (an approved Code) that regulates a proprietor of a registered non-government school in the exercise of its environmental impact assessment functions as a prescribed determining authority under Pt 5 of the Act in respect of development referred to in paragraph (a)(ii);

(e) to make it an offence for a proprietor of a registered non-government school not to comply with certain mandatory obligations in a specified approved Code, in respect of development referred to in paragraph (a)(ii), and to make the offence of not complying with the mandatory obligations in the approved Code relating to record keeping a penalty notice offence;

(f) to require certain complying development in connection with existing schools and school-based child care to apply specified design principles before a complying development certificate may be issued;

(g) to require development that is identified in the Policy as complying development and that requires certain consents or approvals under the *Roads Act 1993* or the *Mine Subsidence Compensation Act 1961*, to have those consents and approvals before a complying development certificate may be issued;

(h) to specify additional documents that must accompany an application for certain complying development in connection with existing schools;

(i) to provide for certain matters in relation to a site compatibility certificate issued under the Policy (a certificate), including to prescribe the maximum fee for an application for a certificate, to include a certificate in the definition of site compatibility certificate for the purposes of the principal Regulation and to require a planning certificate to specify whether a certificate applies to proposed development; and

(j) to insert definitions as a consequence of the amendments referred to above.

For further detail, see the Departments of Planning and Environment's Planning circular "Regulating expansion of schools" [PS 17-004].

Environmental Planning and Assessment Amendment (Albion Park Rail Bypass) Order 2017 - published 29 September 2017, declared development for the purposes of Albion Park Rail Bypass (being a 9.8 kilometre extension of the M1 Princes Motorway bypassing Albion Park Rail town centre between Yallah and Oak Flats including the new motorway extension and any resulting works required to be carried out with respect to the Croom Regional Sporting Complex at Albion Park) to be State significant infrastructure.

Environmental Planning and Assessment Amendment (M4–M5 Link Project) Order 2017 - published 18 August 2017 declared certain development for the purposes of the M4-M5 Link project to be State significant infrastructure and critical State significant infrastructure.

Greater Sydney Commission Amendment (Planning Panels) Order 2017 - published 22 September 2017, amended the Greater Sydney Commission (Planning Panels) Order 2016 as a consequence of certain

districts of the Greater Sydney Region being renamed and merged by the Environmental Planning and Assessment (Greater Sydney Region Districts) Order 2017, as published on the New South Wales planning portal.

Liquor Amendment (Reviews) Act 2017 No 20 - will commence on 1 October 2017.

Liquor Amendment (Outdoor Dining) Regulation 2017 - published 1 September 2017, provides for the provisional approval of applications to change the boundaries of licensed restaurants for outdoor dining purposes.

Liquor Amendment (Miscellaneous) Regulation 2017 - published 29 September 2017, made the following changes:

(a) to consolidate (with some modifications) the special licence conditions that apply, as a consequence of the amendments made to the *Liquor Act 2007* by the *Liquor Amendment (Reviews) Act 2017*, to certain licensed premises in the Sydney CBD Entertainment and Kings Cross precincts;

(b) to modify the basis on which the compliance history risk loading element of the periodic licence for a liquor licence is payable;

(c) to enable the Independent Liquor and Gaming Authority to disregard minor departures from (or non-compliance with) the advertising requirements in relation to liquor licence applications in certain circumstances;

(d) to enable the Secretary of the Department of Industry to revoke an interim restaurant authorisation (which authorises the sale of liquor in a restaurant pending the determination of a licence application) if the requirements and other eligibility criteria for the issuing of the authorisation were not complied with when it was issued;

(e) to prescribe digital driver licences as an "evidence of age document" for the purposes of the *Liquor Act 2007*; and

(f) to make other amendments of a minor or administrative nature.

- Biodiversity

The *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016* commenced on 25 August 2017. The following subordinate legislation has been made to support the Acts:

- Biodiversity Conservation Regulation 2017 - published 25 August 2017
- Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017 - published 25 August 2017
- Biodiversity Conservation (Savings and Transitional) Regulation 2017 - published 25 August 2017
- Biodiversity Assessment Method Order 2017 - published 25 August 2017
- Accreditation Scheme for the Application of the Biodiversity Assessment Method Order 2017 - published 25 August 2017
- Biodiversity Offsets Payment Calculator Order 2017 - published 25 August 2017

Local Land Services Amendment (Land Management-Native Vegetation) Regulation 2017 - published 25 August 2017, amended Schedule 5A to the *Local Land Services Act 2013* (which lists allowable activities clearing of native vegetation):

(a) to allow clearing of mulga for stock fodder on the landholding from which it is cleared;

(b) to provide that allowable clearing on category 2-regulated land does not apply to the proposed sub-category of category 2-sensitive regulated land (and that the allowable clearing for category 2-vulnerable regulated land applies instead);

(c) to require any clearing for allowable activities on category 2-vulnerable regulated land or category2-sensitive regulated land to be carried out in a manner that minimises the risk of erosion; and

(d) to continue the special provisions under the Native Vegetation Regulation 2013 relating to the maximum allowable clearing of native vegetation for the construction, operation or maintenance of certain rural infrastructure on land authorised to be used for private native forestry.

This Regulation also deals with the following matters, inter alia:

(a) the circumstances in which it can be presumed that a species of plant is native to New South Wales, for the purposes of determining whether it is "native vegetation"; and

(b) the preparation and publication of draft native vegetation regulatory maps.

Land Management (Native Vegetation) Code 2017 - commenced 25 August 2017:

(a) authorises clearing of native vegetation on Category 2- regulated land;

(b) provides for establishment and management of set aside areas; and

(c) authorises re-categorisation of land.

Conveyancing (Sale of Land) Amendment (Native Vegetation) Regulation 2017 - published 15 September 2017, amended the Conveyancing (Sale of Land) Regulation 2017 to provide that a set aside relating to the clearing of native vegetation under Pt 5A of the *Local Land Services Act 2013* and a remediation order under Pt 11 of the *Biodiversity Conservation Act 2016* are adverse affectations of land for the purposes of a contract for the sale of land.

Regulations and Orders

Criminal

- Criminal Procedure Regulation 2017 - published 25 August 2017
- Crimes (Sentencing Procedure) Regulation 2017 - published 25 August 2017

Pollution:

Contaminated Land Management (Adjustable Amounts) Notice 2017 - published 25 August 2017, sets out new fees.

Miscellaneous:

The following regulations have been remade, some with minor amendments:

- Civil Procedure Regulation 2017 - published 25 August 2017
- Electronic Transactions Regulation 2017 - published 25 August 2017
- Environmentally Hazardous Chemicals Regulation 2017 - published 25 August 2017
- Pesticides Regulation 2017 - published 25 August 2017
- Place Management NSW Regulation 2017 - published 1 September 2017 (formerly the Sydney Harbour Foreshore Authority Regulation 2011)
- Plumbing and Drainage Regulation 2017 - published 1 September 2017
- Protection of the Environment Operations (Noise Control) Regulation 2017 - published 25 August 2017
- Sydney Water Regulation 2017 - published 25 August 2017

Subordinate Legislation (Postponement of Repeal) Order 2017 - published 4 August 2017, delays the repeal of the following rules, inter alia, until 1 September 2018:

- Coastal Protection Regulation 2011
- Fisheries Management (General) Regulation 2010
- Government Information (Public Access) Regulation 2009
- Heritage Regulation 2012
- Liquor Regulation 2008
- Mine Subsidence Compensation Regulation 2012
- National Parks and Wildlife Regulation 2009
- Protection of the Environment Administration Regulation 2012
- Protection of the Environment Operations (Clean Air) Regulation 2010
- Protection of the Environment Operations (General) Regulation 2009
- Regional Development Regulation 2012
- Residential Tenancies Regulation 2010
- Roads Regulation 2008
- Swimming Pools Regulation 2008
- Threatened Species Conservation Regulation 2010
- Valuation of Land Regulation 2012
- Water Management (General) Regulation 2011
- Western Lands Regulation 2011

Acts assented to but not yet in force:

Local Land Services Amendment Act 2017 - assented to and partially commenced on 13 October 2017.

Justice Legislation Amendment Act (No 2) 2017 - assented to 25 September 2017, and partially commenced, including the following amendment: Sch 1.23 amended the *Strata Schemes Development Act 2015* to enable the Land and Environment Court, under Pt 10 of that Act, to hear, or continue to hear, proceedings, even if agreement has been reached, despite s 34(3)(a) of the *Land and Environment Court Act 1979*.

Coal Mine Subsidence Compensation Act 2017 - assented to 14 August 2017, makes provision for the payment of compensation for damage caused by subsidence arising from coal mining. The Act will repeal and replace the *Mine Subsidence Compensation Act 1961* which contained a statutory scheme of compensation for coal mine subsidence and enacts a new scheme.

Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 – assented 24 October 2017, will:

(a) abolish suspended sentences, good behaviour bonds, community service orders and home detention orders,

(b) enhance intensive correction orders (including permitting home detention conditions to be imposed), and

(c) create community correction orders and conditional release orders (to replace community service orders and good behaviour bonds).

Bills

Environmental Planning and Assessment Amendment Bill 2017 seeks to implement a range of reforms, inter alia:

(a) revise and consolidate the provisions relating to reviews of planning decisions and appeals to the Land and Environment Court;

(b) facilitate the enforcement of complying development requirements (including by enabling councils to stop work under complying development certificates for up to 7 days for compliance investigation purposes and by enabling the Court to invalidate any such certificate);

(c) revise other enforcement arrangements (including by revising provisions relating to development control orders and by providing for enforceable undertakings); and

(d) make a number of other miscellaneous amendments.

Natural Resources Access Regulator Bill 2017 seeks to, inter alia, constitute the Natural Resources Access Regulator (**the Regulator**) as a statutory corporation having functions relating to the enforcement of natural resources management legislation (including determining whether proceedings for offences under that legislation should be instituted).

State Revenue Legislation Amendment (Surcharge) Bill 2017 seeks to make amendments to the *Duties Act 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* to provide for, inter alia, an exemption from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of residential land by a foreign person that is an Australian corporation when the land is used for the construction of new homes or is subdivided and sold for the purposes of the construction of new homes.

State Environmental Planning Policy [SEPP) Amendments

SEPP Amendment (Miscellaneous) 2017 - commenced 22 September 2017, made amendments to some LEPs and SEPPs, in conjunction with SEPP (Exempt and Complying Development Codes) Amendment (Miscellaneous) 2017 - published 22 September 2017.

New and amended polices regarding education at all levels have been updated in:

- Standard Instrument (Local Environmental Plans) Amendment (Child Care) Order 2017 - published 1 September 2017, updates the LEP dictionary by replacing “child care centre” with “centre-based child care facility”
- SEPP (Educational Establishments and Child Care Facilities) 2017 - published 1 September 2017
- SEPP Amendment (Child Care) 2017 - published 1 September 2017

Consequent to the new biodiversity legislation, the following instruments have been made:

- Standard Instrument (Local Environmental Plans) Amendment (Vegetation) Order 2017 - published 25 August 2017
- SEPP (Vegetation in Non-Rural Areas) 2017 - published 25 August 2017

SEPP (Exempt and Complying Development Codes) Amendment (Container Recycling) 2017 - published 14 July 2017, makes changes to terminology.

SEPP (Infrastructure) Amendment (Sydney Harbour Subdivision and Shooting Ranges) 2017 - published 20 October 2017, provides for the subdivision of harbour foreshore land owned by Roads and Maritime Services to be subdivided in certain circumstances.

SEPP (State and Regional Development) Amendment (Inland Rail) 2017 - published 20 October 2017, made inland rail critical state significant infrastructure.

On Exhibition/Consultation

The Department of Planning and Environment has recently commenced a review of the Environmental Planning and Assessment Regulation 2000 (the Regulation). Formal submissions close 24 November 2017.

The Department of Industry is seeking feedback on the draft Community Engagement Strategy for Crown land. Submissions close on 26 November 2017.

Judgments

NSW Court of Appeal

4nature Incorporated v Centennial Springvale Pty Ltd **[2017] NSWCA 191** (Beazley P, Basten, and Leeming JJA)

(related decision: *4nature Incorporated v Centennial Springvale Pty Ltd* [2016] NSWLEC 121 (Pepper J))

Facts: The corporate respondents, Centennial Springvale Pty Ltd and Springvale SK Kores Pty Ltd, carried out underground coal-mining operations at the Springvale Mine, some 120 kilometres west of Sydney. Mining was pursuant to a development consent granted in July 1992 and continued pursuant to that consent (as modified) until 30 September 2015.

In April 2014, the respondents sought approval for an extension of the existing underground mine to the existing workings and extraction of coal up to 31 December 2028.

The project was classified as State significant development under s 89C of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**). Being State significant development, the designated consent authority was the Minister for Planning. The Minister's powers were delegated to the Planning Assessment Commission (**PAC**) and, on 21 September 2015, following a public hearing and two reviews of the proposal, the PAC granted development consent to the application, subject to conditions.

On 18 December 2015, the applicant, 4nature Incorporated, commenced proceedings in the Land and Environment Court (**LEC**) challenging the validity of the consent. The principal ground of challenge was that, in granting the consent, the PAC had not been satisfied of an essential precondition to the grant, that being, "the carrying out of the proposed development would have a neutral or beneficial effect on water quality". The proposal involved the discharge of water within the Sydney drinking water catchment. The requirement to be satisfied was cl 10(1) of the State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011 (NSW) (**SEPP**).

The PAC gave no reasons for its decision to grant the consent, nor did any party seek reasons. As a result, in the LEC proceedings, the approach of the applicant was to establish the factual premise that the PAC did not form the necessary state of satisfaction by reference to the voluminous documentary material which was before the PAC. On 13 September 2016, the primary judge delivered a judgment dismissing the summons.

On appeal, the approach of the appellant focused on the legal requirements of cl 10(1) of the SEPP. As the SEPP required that the proposed development have a neutral or beneficial effect on water quality, the appellant sought to demonstrate a baseline and an assessment of water quality "with and without" the proposed development. The finding of the primary judge was that the PAC adopted the existing discharge limits for salinity and on appeal the issue focused on whether that approach satisfied the requirement of cl 10(1).

Issues:

(1) What is the comparison required by cl 10(1) of the SEPP to determine whether a proposed development would have a neutral or beneficial effect on water quality; and

(2) Whether the approach taken by the Commission was valid.

Held (Basten JA; Beazley P and Leeming JA agreeing): Appeal allowed. LEC should have upheld the challenge and granted consequential relief. Judgment below set aside.

(1) The requirement in cl 10(1) was not to be treated as a question of fact to be assessed by the Court, but was a question of fact to be determined by the PAC. It was the state of satisfaction of the decision-maker which was a "jurisdictional fact". A state of satisfaction is not unreviewable and needed to have been formed on a correct understanding of the law: at [42];

(2) The scope and operation of cl 10(1) required recognition that the language of the provision in the SEPP is precisely that of its statutory source, namely, s 34B(2) of the EP&A Act, and so basic principles of statutory construction applied: at [51];

(3) The meaning of s 34B(2) of the EP&A Act and, therefore, the operation of cl 10(1) was that proposed by the appellant. Clause 10(1) requires the comparison of "water quality" on two hypotheses; namely, where the development is carried out and where it is not. Where the proposed development covers a fixed period, that period will provide the temporal parameter of the comparison. As it will commence in the future, the base case may, but will not necessarily be, an extrapolation of current water quality at the time of the assessment. If current water quality is affected by a use which will terminate before the development commences, current quality will need to be adjusted to take account of that change. Against that base case, the comparison must then address the anticipated effects of carrying out the proposed development: at [63];

(4) The PAC erroneously relied upon the approach of the Department of Planning and Environment (**the Department**). The baseline calculation of water quality should have been undertaken with reference to actual, and not hypothetical, water quality; here, the actual volume and salinity of the water quality was not the reference used by the Department. Further, the Department did not consider what might happen on the ground when the mining operation terminated. Apart from one report the Commission had no material to support a finding that even current discharges would continue absent mining: at [83]; and

(5) The Department's approach did not reflect the exercise required by cl 10(1) with respect to the development proposal. As the decision of the PAC was based on the Department's report, it was infected by the same error. Accordingly, the appeal was upheld: at [84].

Note: The effect of this decision has been negatived by the *Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Act 2017*, which commenced 13 October 2017, amending the *Environmental Planning and Assessment Act 1979* and State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011.

***Bezer v Bassan* [2017] NSWCA 214** (McCallum AJA)

Facts: The applicant sought leave to appeal the decision of a judge of the District Court to continue to hear evidence in proceedings in that Court despite the judge having reserved her decision on an application for her to disqualify herself on the grounds of apprehended bias.

The proceedings in the District Court were for personal injury. The hearing was adjourned, part-heard, after two weeks in July 2017, having exceeded the original estimate for hearing.

During the two weeks of hearing in July, a witness was called to give evidence for the plaintiff. This witness lodged a complaint with the Judicial Commission of New South Wales asserting that the judge had bullied him.

The judge received notice of the complaint, immediately relisted the matter, and informed the parties of the complaint.

In August 2017, the plaintiff filed a notice of motion requesting the judge to recuse herself from hearing the matter.

Following the recusal motion hearing in August 2017, her Honour reserved judgment. Her Honour proposed to continue hearing the substantive proceedings whilst considering the recusal application and proceeded to discuss the fixing of a timetable for the remaining evidence.

The plaintiff submitted that her Honour should first determine the recusal application and indicated that, if unsuccessful, they anticipated receiving instructions to appeal. The plaintiff submitted, in that circumstance, the trial ought stop and, on that basis, submitted that the parties needed a decision on the recusal application before the resumption of evidence.

Her Honour stood down the matter and determined to resume the hearing the following Monday. The following Monday, leave to appeal against the determination of her Honour was sought in the Court of Appeal on an urgent application for a stay.

Issues: Whether a part-heard hearing should be stayed until judgment is delivered on an application for the judge to disqualify herself on the grounds of apprehended bias.

Held: Hearing of the proceedings should be stayed pending determination of the appeal (or else determination of the application on which her Honour is reserved).

(1) Where there existed a basis on which a judicial officer should recuse themselves, that judicial officer lacked authority to hear the case: at [14];

(2) If the applicant was right in asserting the existence of a reasonable apprehension of bias, the whole of the expense and use of Court time expended in hearing the matter would have been wasted: at [13];

(3) Ordinarily, the Court would be reluctant to stay proceedings to allow an application for leave to appeal against an interlocutory order to be heard, where the effect of the stay would be to delay the hearing of the proceedings below. But, in the case of an objection to a judicial officer's authority to hear the proceedings, the position was different: at [15];

(4) The hearing of the proceedings was stayed pending determination of the appeal or determination of the application on which her Honour was reserved: at [17].

Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement) **[2017] NSWCA 263** (McColl JA; Leeming JA; Payne JA agreeing with additional comments)

(related decision: *Pasminco Cockle Creek Smelter Pty Limited (subject to Deed of Company Arrangement) v Lake Macquarie City Council* [2016] NSWLEC 143 (Robson J))

Facts: The respondent's land (**Main site**) was separated from the appellant's land (**Tripad site**) by a road named Main Road. The Tripad site was subject to a development consent allowing subdivision of the site into 90 lots, with condition 16 of this consent requiring construction of stormwater controls. The main issue in the proceedings was whether the appellant or the respondent was responsible for the construction of a pipe running under Main Road. Condition 1 of the consent, expressly incorporated, two strategies, the Tripad Strategy and the Main Road Strategy (collectively **August GCA Strategies**), into the consent, and also provided that the August GCA Strategies could be varied by the conditions of the consent. The August GCA Strategies were also referred to in condition 16. An amended version of the Main Road Strategy, being the September GCA Strategy, was later prepared, which contained amendments to the proposed stormwater structures. The Court, at first instance, held that the September GCA Strategy was incorporated into the consent and that the appellant was therefore required to construct the pipe. The appellant appealed the decision.

Issues:

(1) Whether the appellant was required, pursuant to condition 16 of the consent, to construct the pipe under Main Road;

(2) Whether the September GCA Strategy was incorporated into the consent by necessary implication;

(3) Whether, because of s 80(12) of the *Environmental Planning and Assessment Act 1979 (NSW)*, to the extent there was an inconsistency between the plans in the construction certificate and those in the Development Consent, the former prevailed; and

(4) Whether the primary judge erred in his factual finding that there were "substantial issues with flooding on the Tripad site", and that the consent "did not include Lot 2", which was a drainage reserve owned by Council.

Held: Appeal upheld.

(1) The pipe was not a required part of the stormwater detention structures referred to in condition 16: at [28];

(2) The September GCA Strategy was not incorporated by necessary implication into the consent, and the conclusion that a document created subsequent to a consent was to be incorporated into a consent would create a difficult position: at [39]-[40];

(3) It is one thing to hold a document to be incorporated by necessary implication into a consent, and another to conclude that the legal meaning of the condition in the consent is altered by reference to that document: at [71];

(4) While issue (3) identified above only arose on the basis that condition 16 was construed to require the construction of the pipe, the relevant principle was set out in *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404; 206 LGERA 40 (*Ralan*), which held that where a construction certificate had been issued approving plans that were inconsistent with the development consent plans, the construction certificate and the plans it incorporated would be presumed valid, at least until set aside, and would be deemed to form part of the relevant consent: at [50];

(5) The principle in *Ralan* is not confined to cases involving minor changes in plans, nor is it confined to cases where a construction certificate is generally consistent with a consent: at [78];

(6) The primary judge did not err in the factual finding that there were substantial issues with flooding on the Tripad site, partially as a result of runoff from the Main site: at [227]; and

(7) The consent did, however, include Lot 2, which was owned by Council and used as a drainage reserve: at [234].

***Ku-ring-gai Council v Chan* [2017] NSWCA 226** (McColl and Meagher JJA, Sackville AJA)

(related decision: *Chan v Acres* [2015] NSWSC 1885 (McDougall J))

Facts: Ku-ring-gai Council (**the Council**) appealed the primary judgment in which purchasers of a residential premise claimed the Council did not take reasonable care in issuing an occupation certificate, leading to their suffering economic loss as a result of the previous owner-builder's defective building work. Before selling the property to the purchasers, the owner-builder retained an engineer to prepare structural drawings and to inspect the work from time to time. The purchasers also made claims against the owner-builder and the engineer.

The primary judge held that the Council owed a duty to take reasonable care in the issue of the occupation certificate and that, had it exercised reasonable care when conducting critical stage inspections before the issue of the certificate, the Council would have detected non-compliance and required rectifications by the owner-builder. The primary judge held that the owner-builder was liable for breach of statutory warranties to which the purchasers were entitled (under ss18C and 18D of the *Home Building Act 1989 (NSW)* (**the Home Building Act**)). The claim against the engineer was rejected, with the primary judge finding there was no duty of care owed by the engineer to the purchasers or, alternatively, it was not established that a breach of duty had caused the purchasers' loss.

The owner-builder cross-claimed against the engineer and the Council. The primary judge upheld the claim against the Council on the ground that performance of its certifying task with reasonable care would have resulted in any non-compliant and defective work being detected and remedied by the time the works were completed. The owner-builder was entitled to indemnity from the Council in respect of rectification works. The cross-claim against the engineer was dismissed as no causal link was found.

Issues: Whether the appellant Council, as the principal certifying authority, owed the purchasers of residential premises a duty to take reasonable care in the issue of an occupation certificate to avoid their suffering economic loss as a result of the previous owner-builder's defective building work.

Held (Meagher, McColl JJA; Sackville AJA agreeing): Appeal allowed. The Council had no duty to the incoming purchasers.

(1) The duty of care found by the primary judge was a duty to take care to avoid economic loss: at [72];

(2) The primary judge held that it was reasonably foreseeable that a purchaser "would suffer loss" if the Council carried out its inspections negligently, failed to detect obviously non-compliant work and, as a result, certified that a building with structural defects was fit for use and occupation. However, the conclusion of the primary judge did not identify why it was foreseeable that such purchasers would suffer economic loss. Two possible reasons may have been, one, that the purchasers would rely on the issue of the certificate when deciding whether or not to proceed and, two, that the vendor may not have sold the property in the absence of such a certificate: at [73];

(3) There was no reliance or assumption of responsibility such as would have given rise to a duty owed by the Council to the purchasers to exercise reasonable care in the issue of the occupation certificate. In the absence of any such reliance, the purchasers were not vulnerable in the sense that they were exposed to, but not able to protect themselves from, the Council's want of reasonable care in issuing that certificate: at [98];

(4) It followed that the Council was not subject to the duty of care found by the primary judge and that the Council's liability appeal was allowed: at [99];

(5) In accordance with cl 12 of the service agreement under which the Council was appointed principal certifying authority, where the only inspections undertaken were the critical stage inspections, and they were conducted for the purpose of issuing the final occupation certificate, the owner-builder remained liable as between himself and the Council for ensuring compliance with the relevant legislation, consents and approvals. In the absence of the Council having undertaken to supervise compliance on the owner-builder's behalf, it was not liable for the fact that the works did not comply and contained the defects for which he was liable: at [110]; and

(6) The Council's appeal on the finding that it was liable to indemnify the owner-builder was upheld: at [111].

Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government (No 2) **[2017] NSWCA 255** (Basten, Macfarlan JJA, Sackville AJA)

(related decision: *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government;; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government* [2016] NSWLEC 124 (Moore J))

Facts: On 31 July 2017, the Court handed down judgment in five appeals challenging determinations of several delegates of the Minister with respect to proposals to amalgamate certain local government areas. Three of the appellant councils were successful; two, namely, Mosman Municipal Council and North Sydney Council (together, **the Councils**), were, by majority, unsuccessful.

On 10 August 2017 (North Sydney Council) and 14 August 2017 (Mosman Municipal Council), the unsuccessful appellants filed notices of motion seeking to reopen the judgments and orders given in their appeals on 31 July 2017. The basis for the motions was the alleged failure of the Court to address two grounds of appeal on which they said they were entitled to succeed, accepting that they had been unsuccessful on all other grounds.

The issue was that, in each case, the trial judge had identified error in the determination made by the delegate, but had failed to provide the appropriate relief. The error resulted in the delegate failing to carry out his statutory function, so that both his report and the consequent recommendation of the Boundaries Commission, based on his report, should have been set aside.

The motions sought to have the respective appeals upheld on that basis. However, there was a practical aspect to the applications arising from the fact that the Minister publicly announced that the proposed amalgamations (including those involving these applicants) were to be abandoned. As a result, the 31 July 2017 judgment had limited practical utility for the appellant councils.

The only remaining practical consequence of the Court's orders was to be found in the allocation of the costs of the proceedings. That gave rise to a significant issue, namely, whether, assuming that the Court did overlook a ground upon which the applicants were entitled to succeed, the Court should reopen its decision; not in order to provide substantive relief, but in order to determine the appropriate disposition of costs as between two bodies' politic, each acting in the public interest.

Issues:

(1) Whether the judgment failed to address two appeal grounds;

(2) Whether the alleged failure to address grounds of appeal was sufficient to warrant reopening in the interests of justice; and

(3) Whether the alleged failure to address grounds of appeal justified reopening costs orders made in relation to the trial and appeal proceedings?

Held (Macfarlan JA, Sackville AJA; Basten JA dissenting): Notice of motion filed by Mosman Municipal Council dismissed; to pay costs of the Minister on the motion; North Sydney Council notice of motion dismissed; to pay costs of the Minister on the motion.

(1) The Councils were correct to point out that the majority did not address either the relief ground or the Hardiman ground: at [39];

(2) Notwithstanding that the Councils' arguments would only be relevant to the question of costs, it was appropriate that the Court addressed the issues that were overlooked in the principal judgment: at [41];

(3) As to the relief ground, the Councils had not established that the primary judge erred in not granting additional relief to the Councils on the basis of the Delegate's contravention of s 263(3)(e5) of the *Local Government Act 1993 (NSW)*: at [57]; and

(4) As to the Hardiman ground, in the particular circumstances of this case, the Delegate's contravention of the Hardiman principle did not give rise to a reasonable apprehension that the Delegate, if the matter was to be remitted, would be unable to bring an unprejudiced and impartial mind to the resolution of the one issue which, on the Court's reasoning, remained to be determined: at [63].

Qube Holdings Ltd v Residents Against Intermodal Development Moorebank Inc **[2017] NSWCA 250** (Macfarlan, Meagher and Payne JJA)

(related decision: *Residents Against Intermodal Development Moorebank Incorporated v Minister for Planning, Qube Holdings Ltd* [2017] NSWLEC 115 (Preston CJ))

Facts: An incorporated association, Residents Against Intermodal Development Moorebank Incorporated (**the respondent**), appealed under s 98(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) against the determination of the Minister for Planning to grant consent to the Moorebank Intermodal Precinct East - Stage 1. The proponent of the project, Qube Holdings Ltd (**the appellant**), brought a notice of motion which challenged the standing of the respondent on the ground that the respondent was not an "objector" and, hence, had no right to appeal.

The primary judge dismissed the notice of motion. While the respondent did not itself make a submission under s 79(5) of the EP&A Act, it made submissions as an unincorporated group of persons, Residents Against Intermodal Development Moorebank (**RAID Moorebank**), which became an "objector" with a right of appeal. The primary judge found that RAID Moorebank was an unincorporated body, and, upon incorporation, RAID Moorebank's right of appeal became, by virtue of s 8(2) and Sch 2 of the *Associations Incorporation Act 2009 (NSW)* (**the Associations Inc Act**), the right of the respondent.

In finding that RAID Moorebank was an unincorporated body, the primary judge found that the incorporation of RAID Moorebank, as a consequence of its registration, accepts that it was an

unincorporated body and that its application for registration complied with the statutory requirements. In any case, the appellant failed to establish that RAID Moorebank was not an unincorporated body, RAID Moorebank was not required to follow s 39 of the Associations Inc Act in passing a special resolution authorising the application, and RAID Moorebank passed a special resolution. The appellant appealed the primary judge's decision.

Issues:

(1) Whether the primary judge erred in finding that RAID Moorebank was an unincorporated body for the purposes of the Associations Inc Act; and

(2) Whether the primary judge erred in finding the appellant's argument involved an impermissible collateral challenge to RAID Moorebank's registration as an association.

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

(1) The definition of "special resolution" in s 39 of the Associations Inc Act does not apply to the s 6(2)(b) application for registration: at [31]; courts should be slow to find that any particular formalities are essential to the existence of an unincorporated body: at [40]; the requirement for an unincorporated body is a combination of persons (with a common interest or purpose) with a degree of organisation and continuity: at [41]; on the primary judge's findings, RAID Moorebank met that description: at [42]; the primary judge was correct to find that RAID Moorebank was an "unincorporated body" whose right of appeal passed to the respondent by reason of Sch 2 of the Associations Inc Act: at [43]; the appeal must fail: at [43]; and

(2) The correctness, or otherwise, of the primary judge's finding that the appellant sought an impermissible collateral review of the respondent's registration was not critical to the outcome of the appeal: at [44]; the appellant did not expressly allege that the respondent's registration as an association was invalid: at [45]; non-compliance with the application requirements in s 6 would not invalidate a registration resulting from an application which, although defective, was accepted by the secretary: at [46]; the appellant's submission does not involve a collateral attack on RAID Moorebank's registration: at [50]; the secretary has the power to effect the registration of the organisation, even if RAID Moorebank was not an unincorporated body: at [50]; the primary judge's rejection of the appellant's case on this basis could be sustained: at [50].

***Tanious v Georges River Council* [2017] NSWCA 204** (Leeming and White JJA)

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

Facts: In July of 2015, Hurstville City Council (**the Council**) had adopted a Local Order Policy (**LOP**) on Keeping of Animals. The LOP was presumably made pursuant to Pt 3 of Ch 7 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) under which a council may prepare a policy specifying criteria the Council must take into consideration in determining whether or not to give orders under s 124. This LOP applied to birds and, under a heading of "Poultry", provided maximum numbers of poultry that may be kept.

In January 2016, an order was made by the Council that Mr Tanious (**the applicant**), remove all except 10 poultry (excluding offspring to three months of age) from the premises, remove all roosters, and specified the housing for the poultry and distance from the dwelling in which they must be kept. This order was made pursuant to s 124 of the Local Government Act.

The applicant appealed this first order to the Land and Environment Court (**the LEC**). The appeal achieved partial success, insofar as the commissioner increased the number of birds that could be kept on the property and reduced the distance each poultry house had to be kept from a dwelling. However, all roosters were still required to be removed and Japanese quail were to make up part of the now 15 poultry which could remain on the premises.

A further appeal, confined to questions of law, came before Pepper J of the LEC in November 2016. Her Honour upheld one aspect of the appeal on the basis there was no evidence before the commissioner that the crowing of roosters on the applicant's property amounted to an "offensive noise", as defined. With respect to the characterisation of Japanese quail as poultry, her Honour found that

expert evidence would assist in the resolution of their characterisation. The matter was remitted by her Honour to the commissioner for redetermination.

A further hearing before a commissioner, in January 2017, recorded a submission for the Council that the Japanese quail was poultry and this fact was conceded by the applicant.

Once again, an appeal was brought by the applicant and heard before Pain J of the LEC. The applicant submitted the limit of 15 poultry was unsupported by reliable evidence, yet Pain J found that there was no challenge to the number of birds before the commissioner, so this aspect of appeal was unavailable. The applicant also submitted that he had been denied procedural fairness; however, her Honour concluded there had been no denial of procedural fairness. The appeal was dismissed.

Leave was sought to bring a further appeal on a question of law.

Issues: Whether leave to appeal should be granted.

Held: Summons seeking leave to appeal dismissed with costs.

(1) Whether more than an appropriate number of birds was kept by the applicant so as to justify an order under s 124 was a matter of evaluative judgment dependent upon the facts, and having regard to the criteria in the LOP. It did not raise a question of law: at [24];

(2) As to the proposed second ground of appeal, the applicant did not dispute that he had agreed that Japanese quail were poultry. His argument was that, having regard to the differences between Japanese quail and other poultry, the commissioner ought not to have applied the LOP to Japanese quail. That argument raised questions of fact and evaluative judgment. It did not raise an error of law: at [25]-[26];

(3) The proposed last ground of appeal challenged the procedures for adoption of the LOP insofar as it related to the keeping of birds or poultry, either on the ground of lack of public submission or independent expert evidence supporting the policy. The former ground was not raised as an issue. The applicant had not adduced evidence, nor submitted in his summary of argument, that public notice and public exhibition of a draft of the policy was not given in accordance with s 160 of the Local Government Act. The applicant did not show an arguable case of error in respect of the primary judge's conclusion: at [27]-[29]; and

(4) The applicant's submissions had not elucidated any material error of law in the reasons of the primary judge: at [30].

Turnbull v Chief Executive of the Office of Environment and Heritage **[2017] NSWCA 161** (Basten, Meagher JJA, Sackville AJA)

(related decision: *Chief Executive of the Office of Environment and Heritage v Turnbull (No 4)* [2016] NSWLEC 66 (Craig J))

Facts: The respondent brought the proceedings, claiming that between 5 January 2013 and 31 July 2014, the appellant cleared native vegetation on a property known as "Colorado" in contravention of s 12(1) of the *Native Vegetation Act 2003 (NSW)* (**the Native Vegetation Act Act**).

The respondent's case in the LEC was that the appellant had cleared native vegetation on sections of "Colorado" (**the cleared area**) without implying, thereby, that all clearing carried out by the appellant was of native vegetation in contravention of the Native Vegetation Act.

The relief sought by the respondent in the LEC included orders pursuant to s 41(5) of the Native Vegetation Act restraining the appellant from clearing native vegetation from "Colorado" in contravention of the Native Vegetation Act and requiring the appellant to remedy the unlawful clearing of native vegetation.

The appellant admitted on the pleadings that he had cleared 29.4 hectares of native vegetation on "Colorado" in contravention of the Native Vegetation Act. By that admission he did not mean that he had cleared a discrete area totalling 29.4 hectares. The area of 29.4 hectares was calculated by reference to the crown cover of trees and shrubs that had been removed from the cleared area. Those trees and shrubs had been scattered over all sections of the cleared area, in varying densities.

The appellant's principal contention in the LEC was that he had cleared only a small proportion of the cleared area and that the terms of the remedial order should reflect the limited extent of his contravention of the Native Vegetation Act. The major factual dispute in the LEC was the extent to which the appellant had cleared native vegetation. One aspect of this dispute was whether the respondent had proved that the appellant had cleared "groundcover", as defined in the Native Vegetation Act.

The primary judge found that the appellant had cleared native vegetation, including groundcover, on the cleared area, in contravention of the Native Vegetation Act. There was a contest on the appeal as to whether his Honour intended to find that the appellant had cleared native vegetation from every part of the cleared area or whether his finding was only that the appellant had cleared native vegetation from substantial parts of the cleared area.

Issues:

(1) Whether "groundcover" had been cleared;

(2) Whether clearing must be on each and every part of the land; and

(3) Whether remedial orders appropriate.

Held (Sackville AJA, with Basten and Meagher JJA agreeing): Appeal dismissed, appellant pay the respondent's costs of the appeal.

(1) In an application by the appellant to carry out the broad-scale clearing, as per the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, a description was included stating:

> "All areas examined had a healthy groundcover of native species or leaf litter."

The obvious inference of the statement was found to be that healthy groundcover of native species could be observed on the cleared area shortly before the clearing took place: at [28]-[29] and [61];

(2) Once it was found that the appellant contravened the Native Vegetation Act by removing vegetation from across the cleared area, it mattered not that native vegetation was not present on each and every part of the cleared area. The appellant had been shown to have contravened the Native Vegetation Act. The findings established the extent of the contravention sufficiently to enable a determination to be made as to whether a proposed remedial order was a reasonable and proportionate response to the contravention: at [74];

(3) It is not necessary for a party alleging contravention and seeking a remedial order to identify and prove the precise dimensions of each section or native patch of vegetation that has been removed from an area. Parliament did not enact legislation with the intention that it should be unworkable: at [75]; and

(4) Contrary to the appellant's submissions, the primary judge did not overlook the appellant's contention that the remedial orders would impose undue economic hardship upon him. The primary judge expressly rejected the contention. His Honour took into account the economic consequences of making the remedial order. The primary judge concluded that there was no evidentiary basis for determining that the cost of implementing the remedial orders actually made was disproportionate to the cost of implementing the remedial order proposed by the appellant. There was no error in the primary judge reaching this conclusion or in finding that the appellant had not made out a case that the remedial orders would impose undue hardship: at [85]-[88].

Woolworths Limited v Randwick City Council **[2017] NSWCA 179** (Leeming and Payne JJA, Preston CJ of NSWLEC)

(related decision: *Woolworths Ltd v Randwick City Council* [2016] NSWLEC 82 (Moore J))

Facts: Woolworths Limited (**the appellant**) lodged a development application to convert premises formerly occupied by Randwick Rugby Club into a retail liquor outlet. Randwick City Council (**the Council**) refused consent. The appellant appealed to the Land and Environment Court (**the LEC**) under s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**).

The LEC ordered determination of two separate questions:

(1) Does the development application seek consent for development which does not relate to a building that was designed or constructed for the purpose of commercial premises pursuant to cl 6.13(3)(a) of the Randwick Local Environmental Plan 2012 (**the RLEP**); and

(2) Having regard to the answer to question (1), is it open to the consent authority to grant approval to the development application?

The primary judge decided that development consent could not be granted because the building was not designed or constructed for the purpose of commercial premises and dismissed the appeal. The appellant appealed against the decision of the separate questions and the order dismissing the appeal under s 57(1) of the *Land and Environment Court Act 1979 (NSW)*.

Issues:

(1) Whether the primary judge misapplied cl 6.13(3)(a) of the RLEP by asking the wrong question; and

(2) Whether the primary judge erred in failing to find that the development application was not barred by cl 6.13(3)(a) of RLEP.

Held: (Preston CJ of LEC; Leeming and Payne JJA each agreeing with additional remarks): Appeal upheld; answers given by the LEC to the separate questions were set aside and instead the answers were "no" to the first question and "yes" to the second question; proceedings remitted to the LEC for determination of remaining questions; respondent to pay appellant's costs of the appeal.

(1) The primary judge erroneously asked whether a "registered club" can fit within the definition of "business premises" or "retail premises" and, thus, "commercial premises": at [81]; the relevant question was whether the building "was designed or constructed for the purpose of commercial premises": at [81]; the primary judge asked the wrong questions and misdirected himself about cl 6.13(3)(a): at [93];

(2) To fit within the definition of "business premises", the building must provide services directly to members of the public on a regular basis: at [121]; the societal function of the club is not a service provided at the building: at [121]; the building provided services, principally, to the club members and, secondarily, to members' guests or temporary members but not directly to members of the public: at [122]; there was no error in the finding that the building was not designed or constructed for the purpose of providing services directly to members of the public: at [124]; and

(3) the primary judge erred in adding to the definition of "retail premises" the limitation that retail sale be directly to the public: at [125]; the component parts of the building enable the building to be used as food and drink premises and, hence, retail premises: at [128]; the principal purpose of the kitchen, café/bistro, bars and associated seating areas was preparing and serving, on a retail basis, food and drink to people for consumption in the building: at [130]; whether those people are club members cannot change the principal purpose: at [130]; the primary judge erred in not finding that the building was designed or constructed for the purpose of retail premises and, hence, the purpose of commercial premises: at [131].

Supreme Court of NSW

Mehmet v Carter **[2017] NSWSC 1067** (Darke J)

Facts: The proceedings concerned a contract for the sale of land near Byron Bay. The contract was entered into in July 2016 between the plaintiffs, as purchasers, and the defendants, as vendors. The purchase price was $3 million. The plaintiffs contended that they validly terminated the contract following its repudiation by the defendants, and were entitled to the return of the $300,000 deposit, together with interest. The plaintiffs maintained a claim for damages for loss.

The defendants, by cross-claim, contended that the plaintiffs' termination of contract was itself a repudiation of the contract, and that the defendants accepted the repudiation and validly terminated the contract. The defendants claimed that they were entitled to the deposit together with interest. The defendants also maintained a claim for damages.

Central to the dispute arose issues as to whether there were any "Aboriginal objects", as defined under the National Parks and Wildlife Act 1974 *(NSW)*, located in or on the land the subject of the sale and, if so, whether such objects were capable of constituting a defect in title.

Issues:

(1) Whether "Aboriginal objects" formed part of the subject matter of the sale;

(2) Whether "Aboriginal objects" were included in the subject matter of the contract for the sale of land;

(3) Whether "Aboriginal objects" would give the Crown an interest in the subject matter of the sale; and

(4) Whether such objects were capable of constituting a defect in title.

Held: Separate questions answered favourably to vendor defendants.

(1) The contract was not to be construed in such a way that any "Aboriginal objects" not owned by the defendants were included as part of the subject matter of the sale: at [87];

(2) The property, which the defendants promised to convey to the plaintiffs, did not include any "Aboriginal objects" in or on the land that were not owned by the defendants, such as "Aboriginal objects" that were the property of the Crown. Those objects (if any) did not form part of the subject matter of the contract for sale: at [89];

(3) It may be accepted that an "Aboriginal object" can itself be considered to be (or to have become) real property. However, it does not necessarily follow that a vendor of land that includes "Aboriginal objects" should be taken to have promised to convey the objects as part of a conveyance of the land of which they form part: at [90];

(4) The objects (if any) retained an identity that was separate from the land which surrounded or supported them even if they might be considered more in the nature of fixtures than chattels, and their ownership was divorced from that of the surrounding or supporting land: at [90];

(5) If any such "Aboriginal objects" existed, the Crown (or other owner) would not thereby have had an interest in the property to be conveyed. Even if such objects were in or on the land, the rights of property in the objects themselves would not confer an interest in the surrounding or supporting land. The vesting in the Crown of property in an "Aboriginal object" does not give rise to any restriction upon the lawful use of land, and does not authorise the disturbance or excavation of any land. The Crown is not given rights to enter land merely because the land contains "Aboriginal objects": at [91]; and

(6) The alleged "Aboriginal objects" were not capable of constituting a defect in title for the purposes of the contract for sale entered into by the parties: at [93].

The Owners - Strata Plan No 5225 v Registrar General of New South Wales **[2017] NSWSC 886** (Pembroke J)

Facts: Mrs Heath (**the second defendant**) owned a residential property in Darling Point. The second defendant acquired the property in 1978 and wished to sell it. The property was known as "No 5 Eastbourne Road" but it had no frontage to Eastbourne Road and was landlocked. Her access was from a strip of land adjacent to the property, running alongside its southern boundary. The status and ownership of that land was contentious.

The strip of land, although only a cul-de-sac, was an old unmade road that was originally delineated in an 1837 plan of subdivision. For almost two centuries, the strip of land alongside the second defendant's property had been described and treated as a public road. It was not a thoroughfare, but the evidence suggested that limited numbers of the public had been accustomed to using it freely and continued to do so. Woollahra Council (**the Council**) had been treated as the owner of the strip of land, accepting responsibility for its maintenance and upkeep.

The area of the second defendant's property was almost 300 square metres. The adjoining strip of land had an area of a little over 200 square metres. On the northern side of the strip of land there was a narrow pathway and steps leading from Eastbourne Road to the second defendant's front gate.

The second defendant then claimed ownership of the whole of the strip of land. In the alternative, she claimed those parts consisting of the pathway and steps to her front gate and the lower section at the eastern end. The basis of the claim was the legal doctrine of adverse possession.

Issues:

(1) Whether the second defendant had gained adverse possession of the land;

(2) Whether the plaintiff had standing; and

(3) Whether the Council notification in the *Government Gazette* was valid.

Held: Declaration that the land was a public road vesting in the Council; cross-claim dismissed; second defendant to pay the plaintiff's costs.

(1) Except perhaps in relation to the lower section at the eastern end, the second defendant's degree of exclusive physical control of the strip of land was negligible; her intention to possess as against the whole world was fanciful; and her own prior conduct was inconsistent with the claim. Despite its unlikely appearance, the strip of land was, and always had been, a public road: at [7];

(2) The second defendant's claim to adverse possession failed: at [71];

(3) The challenge to the plaintiff's standing had little merit. The plaintiff's interest was distinct from the public at large; it had a special interest in the subject matter of the proceedings; it was the trustee and agent for the individual lot owners in the neighbouring apartment building, whose units directly adjoined the strip of land; those lot owners had long been accustomed to using the strip of land for access, among other things, to Darling Point Road; no one else, other than the second defendant and the Council, had as direct an interest in the strip of land; and the Registrar-General considered that the plaintiff had such a sufficient interest in the second defendant's primary application that they served it with a notice under s 12A of the *Real Property Act 1900 (NSW)*: at [58];

(4) It was not necessary for the plaintiff to have a proprietary interest, even a caveatable interest, in the strip of land in order to have standing to bring the proceedings: at [59]; and

(5) The exercise of the statutory power by the Council was for the purpose for which it was given. The exercise of the relevant power, concerned with the removal of "doubt" as to the legal status of a road, is concerned with the status of a road and not its opening. Finally, there was not the slightest reason to doubt that the persons directly affected - the Council and the adjoining landowners - knew exactly what land was covered by the notification in the *Government Gazette*. Informality of description is not a ground for invalidation. The Council notification was valid: at [46]-[51], [63], [65], and [70].

Land and Environment Court of NSW

- Judicial Review

Besmaw Pty Ltd v Secretary of the Department of Planning and Environment **[2017] NSWLEC 74** (Robson J)

Facts: The applicant, Besmaw Pty Ltd (**Besmaw**) proposed to construct a major development comprising an integrated leisure, tourism, health, residential and employment precinct on the Kurnell Peninsula, which it claimed constituted State significant development (**SSD**) for the purposes of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) and the State Environmental Planning Policy (State and Regional Development) 2011 (NSW) (**SRD SEPP**). Section 78A(8A) of the EP&A Act requires an application for SSD to be accompanied by an environmental impact statement (**EIS**). To prepare an EIS, an applicant is to apply to the Secretary of the Department of Planning and Environment (**the Department**), who will then issue environmental assessment requirements (EARs). Besmaw applied to the Secretary for EARs; however, the Secretary rejected the EARs application on the basis that only parts of the proposed development are SSD, and the

non-SSD parts are "not sufficiently related" to the proposed development for the purposes of cl 8(2)(a) of the SRD SEPP.

Issues:

(1) Whether the secretary misconstrued the statutory task required under cl 8(2)(a) of the SRD SEPP by:

  (a) ignoring the default position that, where a proposed development is made up of parts that fall within the type of development declared to be SSD, the entire proposed development (including those parts that are not characterised as SSD) should be declared SSD;

  (b) misinterpreting the words "sufficiently related";

  (c) engaging in irrational reasoning; and

  (d) incorrectly applying an ancillary, incidental or complementary test;

(2) Whether the secretary failed to afford Besmaw procedural fairness by failing to disclose to it a letter sent to the Department by the Hon Mark Speakman MP, Member for Cronulla and then Minister for Planning, opposing the proposed development;

(3) Whether the letter sent from Mr Speakman gives rise to an apprehension of bias on the part of the secretary; and

(4) Whether the secretary acted prematurely in determining that the proposed development was not SSD, as a determination under cl 8(2)(a) of the SRD SEPP can only be made once a development application has been submitted.

Held: Appeal dismissed; applicant to pay the respondent's costs.

(1) It was not manifest in the secretary's decision that she ignored the default position; however, notably, the default position operated as a default should the secretary not make a determination under cl 8(2)(a), rather than a presumption in favour of declaring the non-SSD components SSD: at [84];

(2) The SRD SEPP did not prescribe any criteria for the secretary to have regard in determining the meaning of "sufficiently related". It was not for the Court to limit the secretary's discretion, other than in accordance with general principles of administrative decision-making: at [91];

(3) Irrationality does not constitute a separate ground of judicial review, but can be an indication that a decision was unreasonable in a legal sense. This is a high standard, and while it was clear that the secretary placed more weight on certain factors in determining whether the proposed development was SSD, this was not indicative of unreasonableness: at [93]-[94];

(4) While the secretary did use the terms "ancillary", "incidental" or "complementary" in determining whether the non-SSD components were sufficiently related to the development, these were not the sole criteria adopted by the secretary; rather, they illustrate some of the characteristics she had had regard to in making the decision: at [97];

(5) The secretary did owe Besmaw a duty of procedural fairness in making the decision that the proposed development was not SSD; however, the non-disclosure of the letter sent by Mr Speakman did not breach this duty: at [112] and [122];

(6) While the letter sent from Mr Speakman was strongly worded, it did not give rise to a reasonable apprehension of bias on the secretary: at [126]-[127]; and

(7) While there was an element of ambiguity concerning what stage of the consent process a determination under cl 8(2)(a) of the SRD SEPP may be made, the preferable approach, so as to give harmonious effect to the legislative regime, is that the secretary was able to make such a determination before a development application had come into existence: at [135]-[137].

Karimbla Properties v Council of the City of Sydney; Bayside City Council; and North Sydney Council **[2017] NSWLEC 75** (Sheahan J)

Facts: This case involved 12 matters brought by 10 Karimbla Properties' companies seeking to change the categorisation of various Meriton development sites for rating purposes. The various parcels of land

were categorised by the respondent Councils as "business" whilst vacant, and the applicants claimed that they should be categorised "residential". In each case, the applicant applied to the relevant Council for the rating category to be changed, effective on a certain date, and Council either refused, or failed to determine, the application. The applicants sought an adjustment in rates already paid by Karimbala Properties/Meriton for each property by way of refund of any overpayment, plus statutory interest. The applicants argued that the Court should be satisfied that the dominant use of a residential project from the time that preparatory demolition and earthworks are underway is "for residential accommodation". The respondent Councils submitted that, until construction is complete, and an occupation certificate has been granted for a residential building, the use of the land remains for "commercial land development". Counsel for North Sydney Council argued that, since these proceedings are "administrative" in character, the Court cannot exercise judicial power, such as to make orders for any rate refund.

Issue:

(1) The Court was required to determine the proper construction of s 516(1)(a) of the *Local Government Act 1993 (NSW)*, in respect of activities involved in the construction of a residential flat building, and the correctness and/or continued applicability of Pain J's judgment in *Meriton Apartments Pty Ltd v Parramatta City Council* [2003] NSWLEC 309 (*Parramatta*).

(2) The Court was required to consider also the applicability of the *Recovery of Imposts Act 1963 (NSW)* (**the Imposts Act**), and the jurisdiction of the Court to order payment or repayment of money.

Held: The applicants succeeded entirely; that *Parramatta* was to be followed and applied in this instance.

(1) *Conclusion on correctness of Parramatta*: The decision in *Parramatta* was correct and should and would be decided in the same way for these cases: [97]. The same construction of s 516 as was adopted in *Parramatta* applied, along with the case's finding that activities implementing a development consent permitting a residential development of a type not excluded by the section, dictate that the land be categorised for rating purposes as *for* "residential accommodation".

(2) *Application of the Imposts Act*: The Imposts Act, and its 12-month time limit, did not apply to the applicant's claims: [104]. The applicants' submissions that their claims were based on statutory rights, and not made on restitutionary grounds were correct: at [102];

(3) *Jurisdiction to order repayment*: The Court had the necessary power and jurisdiction to order repayment, and concluded that "adjustment" can mean "refund" or "repayment": at [121]-[122];

(4) *Discretion*: No discretionary basis was made out such that the Court would decline the relief sought by the applicants in these cases: [129]. The applicants' failure to notify the Councils earlier of their new claims for reclassification to be "disentitling conduct" was not: [127].

Millers Point Community Assoc. Incorporated v Property NSW **[2017] NSWLEC 92** (Molesworth AJ)

Facts: The Sirius Apartment Building (**Sirius**) - distinctive for its staggered form of box-like components, use of off-form concrete, and use of roof terraces - is located in the upper reaches of The Rocks, opposite the Sydney Opera House. On 2 December 2015, the Heritage Council of New South Wales (**the Heritage Council**) resolved to recommend to the Minister for Heritage (**the Minister**) that, pursuant to the *Heritage Act 1977 (NSW)* (**the Heritage Act**), the Minister direct the listing of Sirius on the State Heritage Register (**the Register**) because of its aesthetic and rarity value. On 30 July 2016, the Minister decided, under s 34 of the Heritage Act, not to direct the listing of Sirius on the Register. Under s 153 of the Heritage Act, Millers Point Community Assoc Inc (**the applicant**) challenged the Minister's decision on the basis that it was infected by two errors of law. The owner and lessee of Sirius, Property NSW (**the first respondent**) and the New South Wales Land and Housing Corporation (**the second respondent**), respectively, denied that the Minister made any error of law in making his decision.

Issues:

(1) Whether the Minister was required to consider the factors in s 32(1) of the Heritage Act;

(2) Whether the Minister made an error of law by misconstruing the meaning of s 32(1)(d) of the Heritage Act and, in particular, the words "… would cause undue financial hardship to the owner …";

(3) Whether the Minister was required to determine whether Sirius was of state heritage significance; and

(4) Whether the Minister made an error of law by failing to determine whether Sirius was of state heritage significance.

Held: Declaring the Minister's decision to be invalid; ordering the Minister to remake the decision; ordering the first and second respondents to pay the applicant's costs.

(1) In order for the Minister to make a decision under s 34 of the Heritage Act in response to a Heritage Council recommendation, the Minister must necessarily consider the matters set out in ss 33(1)(d), 33(3) and 33(4) that the Heritage Council was required to consider: at [102]-[103]. As s 33(2)(d) was enlivened and required the Heritage Council to consider the matter of "undue financial hardship" (as identically expressed in s 32(1)(d)), this matter became a mandatory relevant consideration for the Minister: at [104]-[106]. Similarly, through this pathway, the consideration of whether Sirius was of state heritage significance became a mandatory relevant consideration for the Minister: at [107]-[108];

(2) Section 32(1) (and the matters therein) is not required to be considered by the Minister in all circumstances for the Minister to discharge his duty under s 34(1) to either direct or not to direct that an item be listed on the Register: at [105]. Section 32(1) must only be considered for the Minister to be empowered to direct that an item be listed: at [105]. Therefore, s 32(1) will not require the Minister to consider and determine the heritage significance of an item proposed for listing regardless of the Minister's ultimate decision to list or not to list that item: at [108]-[109];

(3) The Minister erred in law by misdirecting himself as to the meaning of the words "undue financial hardship" in s 32(1)(d) of the Heritage Act. The Minister directed himself to the wrong question of whether the listing of Sirius would have an unacceptable financial impact, rather than considering whether the listing would actually cause financial difficulties for, or impose a harsh financial situation upon, the owner or lessee. The Minister only considered whether the diminution of the sale value of Sirius would have significant and unacceptable financial consequences regardless of the owner. However, a predicted lower financial return from a planned property sale is not "hardship" in and of itself: at [129]-[137];

(4) The matter of "undue financial hardship" cannot properly be considered if the Minister has not arrived at an understanding of the significance of the heritage item that may or may not be listed: at [142]. If the Minister had correctly considered whether the listing would cause financial hardship, he was still required to consider whether that perceived financial hardship was "undue". To do so, the Minister was required to consider the heritage significance of Sirius: at [145]-[146]. The Minister did not properly consider whether Sirius was of state heritage significance and sidestepped the required assessment: at [148]. Consequently, the Minister did not establish a relevant comparator to determine whether the alleged financial hardship caused by listing Sirius would be "undue": at [149]; and

(5) In unnecessarily electing to make his decision pursuant to s 32(1) of the Heritage Act, the Minister fell under an obligation under both s 32(1) and 34(1) to reach a tentative conclusion as to whether Sirius was of state heritage significance. The Minister failed to reach such a conclusion: at [151]-[154].

Platform Project Services Pty Ltd v Minister for Planning **[2017] NSWLEC 102** (Pain J)

Facts: These proceedings concerned a proposed redevelopment of the Nine Network Australian campus located at Artarmon Road, Willoughby. A Concept Plan Approval (**CPA**) for residential development and small-scale non-residential uses incorporating up to 400 dwellings was granted on 23 December 2014 by the Planning Assessment Commission (**PAC**). The CPA included a portion of the adjoining Scott Street which was owned by Willoughby City Council (**the Council**). Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**) applies to the project.

Platform Project Services Pty Ltd (**the applicant**) lodged an application to modify the CPA on 14 July 2016. The Council would not give owner's consent to develop the Council-owned portion of

Scott Street. A second modification application was lodged on 7 April 2017 which did not include this area.

The Department of Planning (**the Department**) had taken the position that it could not determine the second modification application without the consent of the Council. As the existing CPA proposed development on land owned by the Council, its consent was required before a modification application could be assessed per cl 8F(1) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EP&A Regulation**). The applicant sought a declaration that the Council's consent was not required for the determination of its modification application to occur.

The Minister for Planning and the Council filed submitting appearances.

Issue: The proper construction of cl 8F(1) of the EP&A Regulation.

Held: The Council's consent was not required:

(1) The text of cl 8F(1) - "land on which a project is to be carried out" - is prospective and forward-looking. The clause should not be construed as a reference to the land on which the project, as already approved, was to be carried out: at [19];

(2) The Department's construction of cl 8F(1) was inconsistent with the empowering provision in the EP&A Act, specifically s 75Z(b), which identifies the scope and purpose of a regulation such as cl 8F(1) and refers to "projects [which] are proposed to be carried out". The word "proposed" refers to what is planned, not what is already approved, as the lawful extent of a project. Clause 8F(1) should be construed as giving effect to s 75Z(b). A regulation cannot have an effect inconsistent with the empowering Act, per s 32(1) of the *Interpretation Act 1987 (NSW)*: at [20]; and

(3) The Department's construction of cl 8F(1) would lead to the absurd outcome whereby the consent of a landowner whose land was not part of an existing concept plan but is sought to be included in a modification application to add new land would not be required: at [21].

- Compulsory Acquisition

Carlewie Pty Ltd v Roads and Maritime Services **[2017] NSWLEC 78** (Sheahan J)

Facts: This case concerned the compensation to be paid, under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Just Terms Act**), to the applicant company (**Carlewie**), for the compulsory acquisition, on 3 July 2015, of a major consolidated and improved industrial site at St Peters, Sydney. The 20,520-square-metre site was compulsorily acquired by the WestConnex Delivery Authority, later dissolved in favour of the Roads and Maritime Services (**RMS**), on 1 October 2015. The public purpose of the acquisition was for the construction of the St Peters Interchange component of the WestConnex Motorway Project. Compensation was claimed by Carlewie, on 17 July 2015, in the amounts of $47,291,979, for market value, and $3,486,122.67, for disturbance. The Valuer-General determined the compensation on 22 October 2015, in the amounts of $26,750,000, for market value, and $1,945,990, for disturbance. The applicant was dissatisfied with that determination and commenced these proceedings on 24 December 2015. Carlewie sought $36,883,792, for market value (including a land tax claim of $73,735 as a component of market value), and $140,643.96, for agreed disturbance items. The RMS agreed on the amount for disturbance (which had increased since the commencement of the proceedings), but maintained that the market value of the acquired land was $21,914,002. No adjustment was made by the RMS for land tax. The parties relied on expert evidence in the fields of town planning, valuation of land, heritage assessment, heritage architecture, fire measures, contamination, structural engineering, and quantity surveying. Carlewie submitted that, where there are multiple hypothetical purchasers, each of whom would retain only one of the competing experts, the hypothetical purchaser in receipt of advice most favourable to a higher value would "beat" the other hypothetical purchaser by offering the most for the property, thereby establishing the market price. Carlewie argued that, where competing evidence arose, the Court should prefer that which favoured the applicant's case. The RMS submitted that this approach was contrary to authority, and would result in the judicial valuer adopting a legally impermissible approach, if it were followed.

Issue: What were the market value of the property, under s 55 of the Just Terms Act, and the costs associated with disturbance, in accordance with s 59 of the Just Terms Act.

Held: Total compensation for the compulsory acquisition of Carlewie's property in the amount of $23,277,688.96, pursuant to the Just Terms Act.

(1) Market value: Market value was determined in the amount of $23,137,045, pursuant to s 55 of the Just Terms Act: at [237]. The market value was determined through capitalisation of rent, less capital adjustments: at [237]. The capital adjustments included heritage conservation works, compliance with an existing fire order, contamination costs, demolition costs and the loss attributed to one of the lease agreements: at [237];

(2) Approach to differing expert opinion evidence: Carlewie's approach to resolving differences between competing expert advice was clearly wrong: at [83];

(3) Land Tax: The adjustment of land tax in a purchase transaction is something negotiated between an actual vendor and the actual purchaser of a property, and the purchase price indicates the market value of the land, upon which the tax would be levied: at [176]. Had there been any evidence of a consistent practice for adjusting land tax in a particular way in the market, with respect to the sale of industrial property, there might have been some basis for the applicant's claim: at [177]; and

(4) Disturbance claim: At the date of acquisition, Carlewie was not conducting any "actual use" of the acquired land, for the purposes of the Just Terms Act: at [225]. None of the "replacement property costs", namely, stamp duty, conveyancing costs, and other financial costs were to be allowed: at [236]. Disturbance was determined in the amount of $140,643.96, pursuant to s 59 of the Just Terms Act: at [238].

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

Facts: As part of a highway upgrade project, the Ballina to Woolgoolga stage of the Pacific Highway upgrade, Roads and Maritime Services (**the respondent**) compulsorily acquired a parcel of the applicants' land. The framework for determining the compensation to which such dispossessed landholders are entitled is provided by the Land Acquisition (Just Terms) Act 1991 *(NSW)* (**the Just Terms Act**).

Issues:

(1) Whether there was injurious affection and, if so, to what extent, to the eastern element of the landholding for each of the three areas of "lifestyle lands" (grazing lands and woodland areas together), sugarcane fields and wetlands;

(2) Whether the western and eastern elements of the landholding were "adjoining" for the purpose of determining whether the western element suffered injurious affection and, if so, was the western land injuriously affected;

(3) Whether the claim for an improved access road to the new farm shed and proposed new dwelling site was maintainable;

(4) Whether the claim for construction of a new dwelling and its services was maintainable; and

(5) Whether the claim for the cattle yards was maintainable.

Held:

(1) The agreed application of 35% reduction in the value of the "lifestyle lands" by the expert valuers was adopted. This was found to reflect the diminution in amenity that would arise as a consequence of the visual prominence of the new elevated roadway and river crossing, when coupled with what would be the acoustic impact of the significant daily volumes of traffic that would pass along the roadway: at [55];

(2) Aspects of the canefields, such as proximity to the river, and views across the river to a nearby island, contributed positively to the experience of those farming those canefields when they attended and farmed the land. When that broader ambience for those who farm canefields is diminished by some

adverse impact (injurious affection), that would be reflected in an adverse impact on the value of that land. If that conclusion was to be drawn, then that conclusion was equally to be drawn with respect to the canefields' portion on the eastern element of the applicants' landholding being adversely impacted by the Pacific Highway Upgrade Project: at [62]-[65];

(3) The conclusion that when the broader ambience for those who farm the canefields was adversely impacted did not automatically mean that this mandated the adoption of the same percentage diminution value of the canefields as agreed by the expert valuers. The practical restriction on the quiet enjoyment of the canefields in the same fashion, as would be the position for the "lifestyle lands", would occur for, perhaps, a little less than half of each year. A rationally available, alternative percentage reduction in value was adopted at 17.5%, being half of the reduction in value percentage of the "lifestyle lands": at [66] and [71];

(4) The wetlands, from the site inspection, did not appear to provide opportunities for casual strolling to enjoy the ambience of that element of the applicants' landholding (whether before or after the carrying out of the Pacific Highway Upgrade Project). No satisfactory basis upon which to conclude that there was injurious affection of the wetlands areas could be found: at [76];

(5) When seeking to construe the word "adjoins", the provision in s 55(f) is facultative and not strictly restrictive. Such a position to be taken in resumption compensation cases is consistent with the broad approach to construction of the word "adjoins" taken in *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429 and is also consistent with a beneficial to a dispossessed landowner approach for resumption compensation cases derived from *Sydney Water Corporation v Caruso* [2009] NSWCA 391. Broader geography and land settlement patterns would arise to be considered when assessing whether one property "adjoins" another. In these circumstances, where the comparative land settlement pattern was of a smaller scale and the direct linear separation was 280 metres and the functional connection between the eastern and western elements of the applicants' landholding was only 300 metres or so in distance, even on a beneficial and permissive approach, it was not appropriate to conclude that the legislature intended that the word "adjoins" should apply in the circumstances: at [106]-[109];

(6) The pre-acquisition position was that, from the property boundary at the south-eastern corner of the eastern element of the applicant landholding, there was flood-free access to the structures necessary to support the farming activities undertaken on the overall applicant landholding. A necessary structure to provide support for the continuation of those farming activities, post acquisition, was the new farm shed. The compensation regime established by the Just Terms Act is designed to reflect the value of that which is required. The farm shed was for the purposes of enabling him to continue to conduct cattle-grazing and sugarcane-growing activities on the eastern element of the applicants' landholding. For those activities to be carried on in an efficient and effective fashion, access to the shed at times of minor inundation of the low-lying land was required. It therefore followed that, to the extent that cost had been incurred for the partial raising of the roadway, that cost was one which had reasonably been incurred and that, to the extent that provision needed to be made for the further raising of the roadway, that fell within the concept of being a cost which might reasonably be incurred. Such costs were compensable under the Just Terms Act and were to be met by the RMS: at [183], [201]-[202];

(7) Whilst the raised access road was for the purposes of accessing the shed and not the proposed new dwelling, it was a matter of fact that the raised road would provide the same level of access to the future dwelling site. However, that duality of reasons was immaterial: at [201]-[204];

(8) The claim seeking the cost of construction of the proposed new dwelling was rejected. It is now settled that the value paid for land compulsorily acquired pursuant to the Just terms Act includes, in the quantum of compensation, the full compensatory value for all fixtures included in the acquisition: at [153]-[156];

(9) Whilst some aspects of the necessary services for a new dwelling would have been encompassed in the value of the demolished dwelling (water tanks and effluent disposal systems), the same could not be said with respect to the provision of power, telephone services, and access to the proposed new dwelling. Claims for those three aspects connected with the proposed new dwelling were allowable and are to be met by the respondent: at [174]-[175]; and

(10) The equivalent pre-acquisition cattle yards were acquired and demolished. The new cattle yards were replacements. The claim for the cattle yards, falling in the same category as the claim for cost of the new dwelling, was rejected: at [158].

***Scevola v Minister Administering National Parks and Wildlife* [2017] NSWLEC 106; *Scevola v Minister Administering National Parks and Wildlife (No 2)* [2017] NSWLEC 139** (Pain J)

(related decisions: *Esposito v Commonwealth of Australia* [2013] FCA 546 (Griffiths J); *Esposito v Commonwealth of Australia* [2013] FCA 1039 (Foster J); *Esposito v Commonwealth of Australia* [2014] FCA 1440 (Foster J); *Esposito v Commonwealth of Australia* (2015) 235 FCR 1; [2015] FCAFC 160 (Allsop CJ, Flick and Perriam JJ); *Esposito v Commonwealth of Australia* [2016] HCASL 87 (Nettle and Gordon JJ)

Facts: Mr Scevola (**the applicant**) is a landowner within the Heritage Estates, a 180-hectare subdivision of approximately 1,200 lots near Jervis Bay. Many of the lots were sold individually in the 1980s, resulting in approximately 1,100 different ownerships. The lots were zoned rural and were too small for residential development. In 2009, the Federal Minister for the Environment acting under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* refused plans to rezone and construct infrastructure within the Heritage Estates which would facilitate residential development. A subsequent intergovernmental agreement proposed using Commonwealth funds voluntarily to acquire land in the Heritage Estates through offers administered by the not-for-profit Foundation for National Parks and Wildlife (**the Foundation**) to landowners to purchase their lots. The objective was to add the land within the Heritage Estates to the national reserve with the eventual aim of incorporating it into Jervis Bay National Park. The land was also rezoned for environmental conservation. By the time these proceedings were commenced, a number of landowners had accepted the offer but others, including the applicant, had not.

The applicant alleged that the land within the Heritage Estates has been effectively acquired without just compensation. The rezoning to environmental conservation caused its value to drop considerably. Compensation ought to be awarded to give effect to the principles in the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Just Terms Act**).

The respondents (the Minister Administering National Parks and Wildlife, Foundation for National Parks and Wildlife, Shoalhaven City Council and Minister for Planning) sought an order that the applicant's summons be summarily dismissed under r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW). The applicant represented himself at the hearing of the motions for summary dismissal.

Issues:

(1) (In [2017] NSWLEC 106), whether the summons should be summarily dismissed; and

(2) (In [2017] NSWLEC 139), whether this was a public interest matter or whether the applicant should be ordered to pay the costs of the respondents.

Held: Summons summarily dismissed; the applicant ordered to pay costs.

(1) The Court has no jurisdiction to make the orders sought concerning compulsory acquisition as no compulsory acquisition had in fact occurred: at [76], [81], [87]-[88] and [93]. The Foundation's offers to purchase land are entirely voluntary and there is no element of compulsion. The Court has no jurisdiction to make an order sought preventing the rezoning as the relevant amendment to the Shoalhaven Local Environmental Plan 2014 had already come into force: at [94]. An order sought relating to the public roads within the Heritage Estates failed to disclose a reasonable cause of action: at [98]; and

(2) The proceedings were not in the public interest. Whether the compulsory acquisition of land has occurred is strictly a matter of personal interest to any landowner or person with an interest in land such as the applicant. No public policy question of land tenure or the operation of the Just Terms Act arises from the circumstances in this case: at [33]. These proceedings were properly brought in Class 4 of the Court's jurisdiction. They did not involve a Class 3 land tenure matter, as the applicant submitted: at [32].

- Criminal

Chief Executive of the Office of Environment and Heritage v Cory Ian Turnbull **[2017] NSWLEC 140**
(Preston CJ)

Facts: Mr Cory Turnbull (**the defendant**) pleaded guilty to a charge of clearing native vegetation contrary to s 12(1) of the *Native Vegetation Act 2003 (NSW)* (**the Native Vegetation Act**) on his farming property, "Strathdoon", at Croppa Creek, near Moree, between about 18 January and 4 September 2012.

The Chief Executive of the Office of Environment and Heritage (**the prosecutor**) submitted that the total area within which native vegetation was cleared was 316 hectares. The prosecutor contended that the clearing caused substantial environmental harm through a loss of:

(a) significant areas of remnant native vegetation which was not in low condition within an overcleared landscape;

(b) remnant native vegetation of high conservation value; and

(c) important, mature habitat of native fauna, which is likely to impact on several threatened species.

The defendant disputed the number of trees and shrubs cleared and estimated that the aggregate of the areas of trees cleared was 15 hectares. The defendant argued that some of the trees cleared were a non-native species, some were located in areas where clearing for routine agricultural management activities was permissible without approval and some were regrowth and able to be cleared without approval. The defendant disputed whether groundcover was cleared at all.

Issue: What were the appropriate penalties for the defendant's offence against s 12(1) of the Native Vegetation Act.

Held: Defendant convicted of the offence as charged; defendant fined $393,750; defendant to pay the prosecutor's costs of the proceedings.

(1) *Objective circumstances*: The offence thwarted the legislative objective and the objects of the Native Vegetation Act and was objectively serious: at [27], [28]; the maximum penalty was $1,100,000: at [30]; the reductionist approach of the defendant misdirected the necessary inquiry as to the environmental harm caused by the commission of the offence by looking only at the size of the areas beneath the canopies of the trees that were actually cleared: at [51]; the presence of African Boxthorn would not materially affect the estimated number of trees cleared: at [72]; the clearing was not done for any activity within the meaning of "routine agricultural management activities" in s 11(1) of the Native Vegetation Act: at [75]; the defendant did not establish that the native vegetation cleared was regrowth and, hence, permissibly cleared for the purpose of s 12(3) of the Native Vegetation Act: at [117]; native groundcover was removed by the clearing: at [130]; the defendant cleared 316 hectares of native vegetation, numbering at least 3,700 trees, as well as large quantities of shrubs and groundcover plants: at [131]; the offence caused a high level of actual environmental harm involving the loss of significant areas of remnant native vegetation which was of high conservation value, and the loss of important, mature habitat of native fauna which is likely to impact on several threatened species: at [167]; the defendant's conduct was premeditated and intentionally carried out with the knowledge of its illegality: at [186]; the defendant deliberately cleared native vegetation to improve the profits and capital value of the property, and made substantial financial gain: at [188]-[189]; the harm could reasonably have been foreseen, and it is reasonable to infer that the defendant did foresee the risk that the clearing was likely to cause environmental harm: at [190]-[191]; the practical measure to prevent harm was for the defendant to have refrained from clearing: at [192]; the defendant had control over the causes that gave rise to the offence and the harm: at [193]; the offence is in the middle range of objective seriousness: at [194];

(2) *Subjective circumstances*: The defendant did not have any prior convictions: at [196]; the defendant had otherwise been of good character: at [197]; the defendant entered a late plea of guilty and extensively contested the factual basis of the plea, therefore the discount to be afforded for the utilitarian value of the plea should be 12.5%: at [212]; the defendant had not expressed genuine remorse: at [227];

(3) *Purposes of sentencing*: There was a need for specific deterrence, considering the defendant's lack of remorse for, and insight into, his offending conduct, and his failure to make reparation for the environmental harm caused: at [231]; there was a need for general deterrence, which was particularly relevant when imposing sentences for offences of clearing of native vegetation: at [232];

(4) *Consistency in sentencing*: the relevant consistency was in the application of the relevant principles: at [233]; the penalty imposed in one case was not the upper limit of a sentencing court's decision: at [234]; the appropriate yardstick against which the sentence should be compared is the maximum penalty: at [242]; and

(5) *Financial means to pay*: The defendant did not establish that he would be unable to pay the fine or the prosecutor's costs as assessed: at [257]; the fact that the defendant will be ordered to pay the prosecutor's costs of the proceedings was not a reason to impose a lesser fine in the circumstances: at [260]; if a defendant is unable to pay both a fine and a costs order, ordinarily it would be more appropriate to reduce the costs rather than the fine payable: at [261].

Chief Executive of the Office of Environment and Heritage v Grant Wesley Turnbull **[2017] NSWLEC 141** (Preston CJ)

Facts: Mr Grant Turnbull (**the defendant**) pleaded guilty to a charge of clearing native vegetation contrary to s 12(1) of the *Native Vegetation Act 2003 (NSW)* (**the Native Vegetation Act**) on his farming property, "Colorado", at Croppa Creek, near Moree, between about 1 June 2012 and 5 January 2013.

The Chief Executive of the Office of Environment and Heritage (**the prosecutor**) submitted that the total area within which native vegetation was cleared was 103.6 hectares. The prosecutor contended that the clearing caused substantial environmental harm through a loss of:

(a) significant areas of remnant native vegetation which was not in low condition within an overcleared landscape;

(b) remnant native vegetation of high conservation value; and

(c) important, mature habitat of native fauna, which is likely to impact on several threatened species.

The defendant disputed the number of trees and shrubs cleared and estimated that the aggregate of the areas of trees cleared was 17.75 hectares. The defendant argued that some of the trees cleared were a non-native species and some were located in areas where clearing for routine agricultural management activities was permissible without approval. The defendant disputed that the cleared groundcover was native.

Issue: What were the appropriate penalties for the defendant's offence against s 12(1) of the Native Vegetation Act.

Held: Defendant was convicted of the offence as charged; defendant was fined $315,000; defendant was to pay the prosecutor's costs of the proceedings:

(1) *Objective circumstances*: The offence thwarted the legislative objective and the objects of the Native Vegetation Act and was objectively serious: at [22], [23]; the maximum penalty was $1,100,000: at [25]; the reductionist approach of the defendant misdirected the necessary inquiry as to the environmental harm caused by the commission of the offence by looking only at the size of the areas beneath the canopies of the trees that were actually cleared: at [46]; the presence of African Boxthorn would not materially affect the estimated number of trees cleared: at [68]; the clearing was not done for any activity within the meaning of "routine agricultural management activities" in s 11(1) of the Native Vegetation Act: at [71]; native groundcover was removed by the clearing: at [74]; the defendant cleared 103.6 hectares of native vegetation, numbering at least 1,086 trees, as well as large quantities of native understorey plants and groundcover: at [87]; the offence caused a high level of actual environmental harm involving the loss of significant areas of remnant native vegetation which was of high conservation value, and the loss of important, mature habitat of native fauna which is likely to impact on several threatened species: at [125]; the defendant's conduct was premeditated and intentionally carried out with the knowledge of its illegality: at [147]; the defendant deliberately cleared native vegetation to improve the profits and capital value of the property: at [149]; the harm could reasonably have been foreseen, and it is reasonable to infer

that the defendant did foresee the risk that the clearing was likely to cause environmental harm: at [150]-[151]; the practical measure to prevent harm was for the defendant to have refrained from clearing: at [152]; the defendant had control over the causes that gave rise to the offence and the harm: at [153]; the offence is in the middle range of objective seriousness: at [154];

(2) *Subjective circumstances*: The defendant did not have any prior convictions: at [156]; the defendant had otherwise been of good character: at [157]; the defendant entered a late plea of guilty and extensively contested the factual basis of the plea, therefore the discount to be afforded for the utilitarian value of the plea should be 12.5%: at [167]; the defendant had not expressed remorse: at [170];

(3) *Purposes of sentencing*: There is a need for specific deterrence, considering the defendant's lack of remorse for, and insight into, his offending conduct, and his failure to make reparation for the environmental harm caused: at [174]; there is a need for general deterrence, which is particularly relevant when imposing sentences for offences of clearing of native vegetation: at [175];

(4) *Consistency in sentencing*: The relevant consistency was in the application of the relevant principles: at [176]; the penalty imposed in one case was not the upper limit of a sentencing Court's decision: at [177]; the appropriate yardstick against which the sentence should be compared is the maximum penalty: at [185]; and

(5) *Financial means to pay*: The defendant did not establish that he would be unable to pay the fine or the prosecutor's costs as assessed: at [203]; the fact that the defendant would be ordered to pay the prosecutor's costs of the proceedings was not a reason to impose a lesser fine in the circumstances: at [201]; if a defendant is unable to pay both a fine and a costs order, ordinarily it would be more appropriate to reduce the costs rather than the fine payable: at [202].

Chief Environmental Regulator of the Environment Protection Authority v The Forestry Corporation of New South Wales **[2017] NSWLEC 132** (Robson J)

Facts: The defendant, Forestry Corporation of New South Wales, pleaded guilty to an offence under the now repealed s 133(4) of *National Parks and Wildlife Act 1974 (NSW)* (**the NPW Act**) for failing to comply with a condition of its Threatened Species Licence (**TSL**). The defendant was authorised to conduct forestry operations in the Glenbog State Forest, and the relevant condition required the defendant to conduct a thorough search for rocky outcrops and cliffs in compartment 2330, being part of the Glenbog State Forest. Specified forestry activities were undertaken in compartment 2330 during July 2013 and, in October 2013, it came the attention of the prosecutor that the defendant had failed to identify a particular rocky outcrop within the compartment.

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 fined $8,000; ordered to place a publication notice in the specified form in the *Bega District News*; and required to pay the prosecutor's legal costs as agreed or assessed.

(1) The offence falls within the middle range of objective seriousness: at [33];

(2) Although there was no actual direct harm, the defendant's failure to search, record and mark-up areas in accordance with the TSL undermined the protective regulatory scheme established by the NPW Act and the *Forestry Act 2012 (NSW)*;

(3) It was clear the defendant had control over the circumstances giving rise to the offence: at [51];

(4) The defendant did undertake measures to ensure compliance with the TSL; however, in circumstances where the offences related to a failure to conduct a thorough search, it was clear this obligation was not discharged: at [52];

(5) It had not been established that the defendant committed the offence intentionally, recklessly or negligently: at [55];

(6) There was no evidence the defendant committed the offence for commercial gain: at [58];

(7) The defendant's record of prior offence should be taken into account in sentencing. While this was an aggravating factor, in the circumstances it did not necessarily manifest a reckless attitude towards compliance with environmental obligations such as to be a significant aggravating factor: at [67];

(8) The defendant had expressed regret and remorse for the commission of the offence: at [72];

(9) While the defendant entered a guilty plea, it was not done at the first available opportunity, and accordingly the appropriate discount was 20%: at [77]; and

(10) There was a need for both general and specific deterrence: at [83]-[84].

Environment Protection Authority v Clarence Colliery Pty Ltd; Office of Environment and Heritage v Clarence Colliery **[2017] NSWLEC 82** (Robson J)

Facts: The defendant, Clarence Colliery Pty Ltd (**Clarence Colliery**), operated a coal mine in the Blue Mountains, and was charged with and pleaded guilty to an offence under s 116(1)(a) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) and an offence under s 156A(1)(b) of the *National Parks and Wildlife Act 1974 (NSW)* (**the NPW Act**). The charges related to an overtopping incident that occurred at the mine on or around 2 July 2015. Coal fines slurry that was pumped to the REA3 Holding Cell in the mine overflowed the excavated hole and flowed out from the premises, downhill, into an unnamed watercourse. The slurry then migrated down the unnamed watercourse and into the Blue Mountains National Park and the Wollangambe River, affecting approximately 10.3 kilometres of the river.

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 fined $720,000 for the offence under the POEO Act and $330,000 for the offence under the NPW Act. The defendant ordered to pay the EPA's investigation costs in the amount of $103,000 and the Chief Executive, Office of Environment and Heritage's investigation costs in the amount of $3,010, as well as the legal costs of each prosecuting authority as agreed or assessed. The defendant further ordered to publish a notice in the form specified in three separate publications.

(1) Clarence Colliery's conduct significantly undermined the legislative objectives and statutory schemes established under both the POEO Act and the Parks Act, and in doing so thwarted the attainment of the objects of each Act: at [67];

(2) Clarence Colliery's conduct caused both substantial actual harm and likely environmental harm, and the areas that were adversely affected were of high environmental and conservational value: at [93];

(3) The environmental harm resulting from the discharge of coal fines from the premises was reasonably foreseeable: at [98];

(4) There were clearly practical measures available to Clarence Colliery prior to the commission of the offences that would have prevented the offences from occurring: at [102];

(5) The offences were in the upper range of medium objective seriousness: at [105];

(6) A discount of 25% for each offence on the sentence that would otherwise have been imposed was appropriate given Clarence Colliery's early pleas of guilt: at [112];

(7) Clarence Colliery has demonstrated contrition and remorse in relation to the offences, and had taken responsibility for its actions and acknowledged the environmental harm caused. Further, Clarence Colliery's good character is demonstrated by its participation in the Lithgow community: at [116];

(8) Clarence Colliery had made genuine attempts and applied methods and procedures to prevent the recurrence of the offences: at [119];

(9) There was a need for both specific and general deterrence: at [122]-[125]; and

(10) While the offences were not entirely coterminous, there was significant commonality between them, and it was appropriate to apply the totality principle to reduce the sentence otherwise applicable: at [130].

Environment Protection Authority v P&M Quality Smallgoods Pty Ltd; Environment Protection Authority v JBS Australia Pty Limited **[2017] NSWLEC 89** (Robson J)

Facts: The first defendant, P&M Small Goods Pty Ltd (**P&M**), pleaded guilty to an offence under each of s 120(1) and s 64 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**). The second defendant, JBS Australia Pty Ltd (**JBS**), pleaded guilty to an offence against s 120(1) of the POEO Act. The charges related to an incident at an abattoir and agricultural property owned by P&M in Scone, which involved the discharge of waste effluent by-product from the abattoir's operations to a location not permitted under the terms of the relevant Environment Protection Licence (**EPL**). Following a period of heavy rainfall, the effluence entered a creek and flowed downstream towards a common road situated inside the premises. While P&M was at all material times the holder of the EPL, since June 2015 JBS had occupied the premises, carried out the licensed activities and employed the majority of staff.

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: P&M fined $48,000 for the offence under the s 64 of POEO Act and $42,000 for the offence under s 120 of the POEO Act. JBS fined $60,000 for the offence under s 120 of the POEO Act. The defendants were to publish a notice in the form specified in two separate publications.

(1) The defendants' conduct significantly undermined the legislative objectives and statutory schemes established under the POEO Act, and thwarted the attainment of the objects of the POEO Act, particularly s 3(a), d(i) and (ii), and (e): at [35];

(2) The offences caused actual harm to the environment by degrading the aquatic environment in a section of the creek, and caused likely harm to some sensitive taxa of aquatic organisms likely to have been present in the section of the creek impacted by the offences. The extent of actual and likely harm, however, was not substantial for the purposes of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**the Sentencing Act**): at [42]-[43], [46];

(3) There were clearly practical measures that the defendants could have taken to prevent the incident from occurring: at [50];

(4) In relation to the offence under s 64 of the POEO Act, the evidence did not establish that P&M committed the licence contravention offence either negligently or recklessly: at [60];

(5) It was reasonably foreseeable that if there was an effluent discharge of the amount involved in the incident, after a period of rainfall the effluent would enter the creek and cause water pollution. Further, it was reasonably foreseeable that a breach of the EPL would result in environmental harm: at [63];

(6) JBS was clearly aware of the existence of the pipe leading to the discharge area, and had control over its usage, such that it had control over causes which gave rise to the offences. While P&M did not have control of the equipment and operation of the premises, as the holder of the EPL, it remained responsible for ensuring that appropriate procedures were in place: at [68];

(7) The offences were in the top of the low range of objective seriousness: at [70];

(8) The evidence did not indicate that JBS committed the offence for financial or commercial gain: at [74];

(9) A discount of 25% in relation to each penalty was appropriate, given both defendants entered early pleas of guilt: at [75];

(10) The good character of the defendants was demonstrated by their participation in activities in the local community: at [78];

(11) The defendants had demonstrated contrition and remorse in relation to the offences, and had taken responsibility for their actions and acknowledged the harm caused: at [81];

(12) There was a need for both specific and general deterrence: at [86]-[87];

(13) In relation to P&M, the principle of totality applied to reduce the penalty otherwise applicable: at [89]; and

(14) In relation to parity, the criminality of P&M was less than that of JBS in relation to the two s 120 offences: at [93].

- Civil Enforcement

Council of the City of Sydney v The Owners Strata Plan No 18820 **[2017] NSWLEC 81** (Robson J)

Facts: The proceedings related to a property located at 64-64B Darlinghurst Road, Potts Point, with Lots 1 and 2 of the property being ground-floor tenancies used as retail premises, and Lot 3 being a private hotel comprising 18 rooms. On 13 May 2015, the applicant issued the respondent with a fire safety order, with which it failed to comply. The Council commenced Class 4 proceedings seeking orders to compel compliance, which orders were made by Pain J on 5 February 2016. The respondent failed to comply with the orders, and the Council accordingly commenced civil contempt proceedings. The respondent pleaded guilty, and the matter came before the Court for sentence.

Issues:

(1) Whether the respondent's contempt was technical, wilful, and/or contumacious;

(2) Whether the respondent was aware of the consequences of contempt;

(3) Whether the respondent demonstrated contrition; and

(4) Whether the matter requires general and/or specific deterrence.

Held: The respondent fined $15,000; to pay the applicant's costs in the contempt proceedings, agreed at $8,650.

(1) The contempt was wilful, in the sense that while it did not reveal a specific intent to defy the authority of the Court the conduct of the respondent was not casual, accidental or unintentional: at [41];

(2) The contempt was of moderate seriousness: at [51];

(3) The respondent was aware of the Court's orders, and the consequences of not complying with the orders: at [53];

(4) The respondent expressed remorse at Council's need to have approached the Court to achieve compliance with the fire safety order, and deeply regrets that the orders were not complied with: at [55]; and

(5) There is a need for both general and specific deterrence: at [58]-[59].

Georges River Council v Mifsud **[2017] NSWLEC 113** (Pain J)

Facts: Mr Mifsud (**the respondent**) pleaded guilty to contempt of court for failing to comply with orders of 9 January 2015 and amended on 22 December 2016 requiring him to remove articles and restrict the storage or placement of articles to a defined area within his property in Penshurst. The respondent also entered into an undertaking to the Court on 17 December 2016, which he admitted to having breached.

Georges River Council (**the Council**) provided evidence of an increasing accumulation of articles on the respondent's property after the 22 December 2016 amendment to the Court orders. The articles included household appliances, food, cardboard boxes, chemical containers, building materials, mattresses, electronic items and six unregistered cars.

Issue: The appropriate sentence.

Held: The respondent was fined $2,000 and given 12 weeks to comply with the Court orders. He would also incur a weekly penalty of $500 if he failed to comply with the orders after 12 weeks. The respondent was ordered to pay costs of the contempt proceedings on an indemnity basis and costs of the whole of the proceedings on an ordinary basis.

(1) The contempt was held to be of moderate seriousness, having regard to the potential for adverse impacts on health, amenity and safety (at [28]) and the misguided, albeit not deliberate, behaviour of the respondent: at [33]-[37]. The respondent was not under any misapprehension as to the requirements of the Court orders or the possible consequences of non-compliance: at [38]; and

(2) Other relevant sentencing considerations were: the respondent entered an early guilty plea; he did not express contrition or remorse; and there was a need for general and specific deterrence: at [39]-[42]. The respondent was given 12 weeks to purge his contempt by complying with the Court orders before a weekly penalty would be incurred: at [44].

Lake Macquarie City Council v Gordon **[2017] NSWLEC 122** (Moore J)

(related decision: *Lake Macquarie City Council v Gordon and Anor* [2016] NSWLEC 49 (Moore J))

Facts: Mrs Gordon (**the first defendant**) owned a residential property at a beachside suburb south of Newcastle. Extensive earthworks were carried out on the site by her husband, Mr Gordon (**the second defendant**). Those earthworks were carried out in a fashion that was in breach of s 76A(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**).

On 30 September 2015, Lake Macquarie City Council (**the Council**) commenced Class 4 civil enforcement proceedings against the first and second defendants, seeking to restrain the carrying out of any further works in breach of the EP&A Act and seeking orders requiring rectification of the site in a fashion that would prevent recurrence of past impacts of off-site sediment depositing on the neighbouring downhill property and into the Council's street where it would be conveyed by the stormwater drain system into the ocean near Redhead Beach.

In May 2016, orders were made arising from the expert engineering evidence given in those proceedings for the necessary execution of a defined scope of remediation works.

These remediation works were to be carried out by the second defendant and were to be supervised by the consulting civil engineer who had given evidence on behalf of the first and second defendants during the hearing. The orders included a precise timetable for their carrying out, as well as setting out how the scope of works was to be defined by the consulting civil engineer.

Over the following months, until approximately October 2016, the second defendant carried out further earthworks on the site. Until toward the end of September 2016, those earthworks were compliant in scope, but subsequent earthworks were carried out contrary to the advice of the consulting engineer given to the second defendant on 28 September 2016. These were non-compliant with the earthworks ordered to be carried out. Further, the second defendant's activities also were not carried out in accordance with the required timetable set in the orders.

Contempt proceedings were commenced in February 2017. The most pressing matters were addressing the impacts on the neighbouring property and preventing further undermining of structures located on it. The Court arranged for mediation between the Council and the first and second defendants. Following a successful mediation in March 2017, an agreement was reached between the Council and the first and second defendants concerning funding of, and arrangements for, the carrying out of rectification works by the Council. However, the effect of the agreement was also that it would no longer be possible for the second defendant to purge his contempt by carrying out the works that remained to be undertaken to fulfil the plan derived pursuant to the 2 May 2016 orders.

The Council's contempt proceedings resumed in April 2017. The first and second defendants were self-represented at that time and each of them entered a "not guilty" plea to each charge. Directions were made to prepare for a contested hearing.

The contested hearing was set to commence in September 2017; however, at the request of the first and second defendants, the matter was relisted in July 2017. On that occasion, each of the defendants were granted leave to substitute their not guilty pleas for guilty pleas. As a consequence, revised directions were made for preparation for a sentencing hearing.

The first and second defendants were each charged with three charges. With the substitution of "he" for "she" and "his" for "her", where relevant, the charges and particulars for the first and second defendants were in identical terms.

The charges related to, first, failure to, contrary to the 2 May 2016 orders, complete the engineering works within the relevant period of time; second, failure to provide the Council with certification by the consulting civil engineer that all relevant works had been carried out within the relevant time; and, third, the carrying out of works which were not works required to be carried out following the 2 May 2016 orders.

Issues:

(1) What is the appropriate sentence for the first defendant;

(2) What is the appropriate sentence for the second defendant; and

(3) Whether costs should be ordered on an indemnity basis.

Held: The first defendant guilty of the first charge but not convicted of the charge; guilty of the second charge but not convicted of the charge; guilty of the third charge but not convicted of the charge; the second defendant guilty of the first charge, convicted, and fined $3000, guilty of the second charge, convicted, and fined $2000, and guilty of the third charge, convicted, and sentenced to three months' imprisonment.

(1) Consideration of factors relevant to the sentencing process, for the first defendant, included the first defendant electing to give sworn affidavit evidence, largely being a "passenger" and submissive to her husband's enterprise, having no prior convictions, her character references, her remorse and expressions of regret, and other factors: at [74]-[77], [86], and [88]-[92];

(2) The second defendant elected not to give evidence in the sentencing proceedings, as was his right, and no adverse inference was to be drawn from that. However, this left only a small amount of material on the subjective circumstances of the second defendant: at [150]-[151];

(3) Consideration of factors relevant to the sentencing process for the second defendant included his lack of remorse, his carrying out works which he was advised by the consulting civil engineer were in breach of court orders, his rejection of aspects of the statement of agreed facts during submissions and lacking understanding of the reality of his undertakings, and having a prior conviction: at [155], [168], [178] and [179]; and

(4) Both the first and second defendants were ordered to pay the costs of the Council in the contempt proceedings on an indemnity basis (other than the costs relating to notices of motion: at [206].

Penrith City Council v Konemann **[2017] NSWLEC 79** (Molesworth AJ)

Facts: Mr Grahame Konemann (**the first respondent**) occupied a semi-rural block of land within the Mulgoa Valley, being Lot 40 in DP 2120 (**Lot 40**). The first respondent made use of a dwelling house, garage and farm shed on Lot 40, which were each granted development consent. Under the applicable Penrith Local Environmental Plan 2010 (**the PLEP**), Lot 40 was predominately zoned as environmental management land and a small part of the block was zoned as environmental conservation land. Under the Land Use Table for each zone, set out in the PLEP, any development not specified as being permitted without consent or permitted with consent (that is to say, innominate development) was prohibited by dint of a "catch-all" category. Additionally, Lot 40 was identified and regulated under the PLEP as land possessing scenic and landscape values.

For some years, the first respondent collected and stored, on Lot 40, inter alia: a significant number of cars and other vehicles; machinery; various building materials and scrap metals. On 6 May 2014, Penrith City Council (**the Council**) issued an order pursuant to s 124 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) directing the first respondent to remove specified items from Lot 40 and to store other items (**the s 124 Order**). On 25 June 2014, the Council issued an order of a similar nature pursuant to s 121B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) (**the s 121B Order**). The Council commenced these enforcement proceedings when the first respondent failed to comply with the orders.

Issues:

(1) Whether Lot 40 was being used for an innominate prohibited purpose under the PLEP and, therefore, in contravention of s 76B of the EP&A Act;

(2) Whether Lot 40 was being used for the innominate prohibited purpose of "junkyard" - as defined in the repealed Environmental Planning and Assessment Model Provisions 1980 (**the Model Provisions**);

(3) Whether Lot 40 was being used for the innominate prohibited purpose of "storage premises" or "waste or resource management facility" - as defined in the PLEP;

(4) Whether the allegedly prohibited use of Lot 40 was part of, or ancillary to, a lawful use of Lot 40;

(5) Whether the Council had an obligation to prove that the allegedly prohibited use of Lot 40 was not, in fact, permitted by an historical development consent;

(6) Whether the first respondent breached a valid s 124 Order; and

(7) Whether the first respondent breached a valid s 121B Order.

Held: Declaring the use of Lot 40 to be prohibited and unlawful; making consequential orders.

(1) The relevant use of Lot 40 fell within the innominate prohibited category of the applicable Land Use Tables to the PLEP and was, therefore, in breach of s 76B of the EP&A Act. The use was prohibited because it was "[a]ny other development not specified" under the Land Use Tables as being permissible without or with consent: at [140], [142] and [143];

(2) Beyond the determinative holding in (1), the proper characterisation of the purpose of the relevant use of Lot 40 was that of "junkyard", as defined in the Model Provisions: at [141]. The "catch-all" innominate category of uses in the Land Use Tables did not only include development defined in the PLEP. This category of uses extended to "any other development" and, therefore, both defined and undefined purposes of use: at [144]-[148];

(3) The relevant use of Lot 40 was not ancillary to any lawful use of Lot 40. Even in the circumstances of a semi-rural block of land, the quantity and scale of the materials stored on Lot 40 extended beyond any reasonable limits of any lawful ancillary use. In particular, the quantity and nature of the material was so excessive that it was not ancillary to the dwelling house or farm building use: at [158]-[164];

(4) The first respondent was not denied procedural fairness due to the Court finding that the use of Lot 40 was for an innominate prohibited purpose, pure and simple. There was no doubt that the primary case of the Council was that the relevant use of Lot 40 was for an innominate prohibited purpose; that was the case that the Council was required to prove. The further particularisation of the purpose of use by the Council was only of utility to guide the formulation of orders: at [150]-[153];

(5) The Council discharged its onus to prove that Lot 40 was being used for a prohibited purpose. Therefore, in circumstances where the Council had carried out searches of its consent register, the onus shifted to the first respondent to put any evidence of any further relevant development consent. The first respondent did not provide such evidence: at [154]-[157];

(6) Given the Court's decision to uphold the Council's primary claim relating to the prohibited use of Lot 40, it was unnecessary and unwise for the Court to determine the issues concerning the alleged breach by the first respondent of the s 124 Order and the s 121B Order: at [4]-[6]; and

(7) In the exercise of the Court's discretion to make appropriate orders, it was appropriate to consider the public interest in protecting the area around Lot 40, given its established scenic and landscape values: at [166].

Snowy Monaro Regional Council v Cmunt **[2017] NSWLEC 95** (Preston CJ)

Facts: Snowy Monaro Regional Council (**the applicant**) received numerous complaints about dogs barking at the property of Mr and Mrs Cmunt (**the respondents**) and deemed that noise pollution had occurred and was likely to continue. The applicant issued a prevention notice under s 96 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) directing the respondents not to keep more than two dogs, construct various structures and ensure the dogs are kept inside between specified hours (prevention notice).

The applicant observed unauthorised structures, including fencing and chipboard structures and two poles with cameras attached, and an unauthorised advertising sign at the property. The applicant ordered the respondents to remove the structures (**Structures Order**) and the advertising sign (**Advertising Sign Order**) under s 121B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**).

The applicant contended that the respondents failed to comply with the prevention notice and the two orders, and commenced proceedings in the Court to enforce compliance and remedy and restrain breaches of the POEO Act and the EP&A Act.

Issues:

(1) Whether the respondents were served with the prevention notice, Structures Order and Advertising Sign Order;

(2) Whether the respondents failed to comply with the prevention notice in breach of the POEO Act and failed to comply with the two orders in breach of the EP&A Act; and

(3) Whether the respondents erected the structures and advertising sign in breach of s 76A(1) of the EP&A Act.

Held: Respondents failed to comply with prevention notice and were to cease keeping dogs; respondents failed to comply with Structures Order and Advertising Sign Order and were to comply with both orders within 60 days, otherwise the applicant was to carry out the work required; Mrs Cmunt erected the structures and advertising sign in breach of the EP&A Act; respondents were to pay the applicant's costs.

(1) The applicant served the prevention notice in accordance with s 321(1)(c)-(d) of the POEO Act by placing it in the respondents' letterbox and posting it by registered post: at [34], [42]-[45], [52]; the prevention notice was also served when it came into the respondents' possession: at [46], [52]; the applicant served the two orders under s 153(1)(a)(ii) of the EP&A Act when they were sent by prepaid post to the respondents' specified address for notices and their usual place of abode: at [59];

(2) More than two dogs were kept at the property: at [91]; it was not necessary to establish ownership of the dogs or their breed: at [92]-[93]; the respondents did not build the required structures or keep the dogs inside within the specified hours: at [98]; the breach of the prevention notice is a breach of the POEO Act: at [98];

(3) The respondents failed to comply with the Structures Order by not removing the structures and in breach of the EP&A Act: at [106]; erection of two of the structures was allowed with consent under the Snowy River Local Environmental Plan 1997 (**the SRLEP 1997**): at [108]; the structures did not meet exemption criteria and were not exempt development under Snowy River Development Control Plan E3 - Exempt Development (**Exempt Development DCP**): at [118]; erection of another two structures was permitted with consent under Snowy River Local Environmental Plan 2013 (**the SRLEP 2013**): at [122]; the structures did not meet specified development standards and were not exempt development under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**SEPP**): at [131], [142]; erection of the poles required consent under SRLEP 1997 and they were not exempt development under the Exempt Development DCP: at [145]; development consent was not obtained for any of the structures meaning the erection breached s 76A(1) of the EP&A Act: at [146];

(4) The respondents failed to comply with the Advertising Sign Order in breach of the EP&A Act: at [148], [179]; erection and display of the sign needed consent under SRLEP 1997 and SRLEP 2013 and was not obtained: at [174]; the sign was not exempt development under the

Exempt Development DCP or the SEPP: at [174]; erection of the sign and display of advertisements breached s 76A(1) of the EP&A Act: at [174]; and

(5) Declaratory relief is appropriate because the respondents failed to comply with the prevention notice and the orders and the erection of the structures and advertising sign breached the EP&A Act: at [183]; orders that the applicant may carry out the work required to comply with the two orders if the respondent fails to do so is within the Court's power under s 121ZJ(11) of the EP&A Act and is appropriate: at [186]; it is appropriate to order the removal of the structures and the advertising sign because the respondents have had opportunities to apply for development consent or a building certificate: at [195], [196]; it is appropriate to order the respondents not to keep dogs at their property: at [210]; it is not appropriate to order that the Council can enter the property and remove any dogs because there is no power under the POEO Act and it may be difficult to execute and may be unduly intrusive: at [211].

- Section 56A Appeals

Wilson v Farah **[2017] NSWLEC 91** (Preston CJ)

Facts: Ms Wilson (**the appellant**) applied for an order under s 7 of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**the Trees Act**) for the removal of a Fiddlewood tree on the neighbouring property of Mr and Mrs Farah (**the respondents**). She contended that flowers and leaves falling from the tree contaminated the water and caused algal growth in her swimming pool.

Acting Commissioner Fakes found that contaminated water and algal growth did not constitute material damage to the fabric of the pool and therefore was not "damage to property" under s 10(2) of the Trees Act. The acting commissioner was not satisfied that any damage had occurred as a consequence of the tree and accordingly did not have the power to order its removal under s 10(2). Alternatively, as a matter of discretion, the acting commissioner would not have ordered the removal of the tree. The acting commissioner dismissed the application. The appellant appealed under s 56A of the *Land and Environment Court Act 1979 (NSW)* against the order and the decision.

Issues:

(1) Whether the acting commissioner made an error of law by misconstruing the statutory phrase "damage to property";

(2) Whether the acting commissioner denied procedural fairness by prejudging the outcome of the application by determining that only physical damage to the fabric of the pool could constitute damage to property and also that she would not exercise her discretion to order removal of the tree; and

(3) Whether the acting commissioner denied procedural fairness in denying the appellant a fair hearing by not admitting into evidence various documents.

Held: Appeal dismissed; parties to pay their own costs of the appeal.

(1) The acting commissioner erred by too narrowly construing "damage to property" under the Trees Act: at [18]; damage to property is not limited to physical damage to the fabric of the pool or other components and can include excessive algal growth and gross discoloration of the pool water: at [18]; material impairment to usefulness and fitness for purpose can constitute damage to property: at [18]; this error of law did not vitiate the decision: at [29]; the acting commissioner had to be satisfied under s 10(2)(a) that there was, is or is likely in the near future to be damage to property and, also, that the tree concerned caused that damage: at [22]; the acting commissioner held that the actual damage to the pool was a consequence of inadequate maintenance: at [25]; this factual finding was open to the acting commissioner: at [26], [29];

(2) Prejudgement was not established: at [41]; the appellant was given the opportunity to put a case that damage to property involved a wider concept than "cracks or damage to the fabric of the pool": at [42]; the acting commissioner considered the appellant's argument that algal growth and discolouration of pool water constituted damage but did not accept it: at [44], [45]; the appellant had

the opportunity to dissuade the acting commissioner from her preliminary view that she was not going to order the removal of the tree on the basis of the Tree Dispute Principle in *Barker v Kryiakides* [2007] NSWLEC 292: at [47]; the acting commissioner considered the appellant's argument that the required maintenance was "more than ordinary" and "unreasonable" but did not accept it: at [48]; and

(3) A fair hearing was not denied: at [51]; the appellant's written submissions and affidavit were admitted into evidence: at [52]; an e-mail from the officer of the National Herbarium of New South Wales was not admitted into evidence but was part of the application and written submissions: at [53]; the acting commissioner considered the matters in the e-mail: at [56]; the appellant did not adequately describe or formally seek to tender the Development Control Plan (**the DCP**): at [58], [59]; the DCP was not relevant to the question of whether the tree had caused damage or was likely to cause future damage: at [60].

- Separate Question

Moss Capital Pty Limited v Queanbeyan-Palerang Regional Council (No 2) **[2017] NSWLEC 127** (Robson J)

Facts: The substantive proceedings related to the compulsory acquisition of property, known as Curtis Estate, owned by Cannchar Pty Ltd (**Cannchar**). In July 2011, Moss Capital Pty Ltd (**Moss Capital**) entered into a Joint Venture and Development Deed (**the Deed**) with Cannchar and Cannchar Investments Pty Limited (**Cannchar Investments**) for the purpose of developing Curtis Estate. In July 2015, Queanbeyan-Palerang Regional Council (**the Council**) acquired a portion of Curtis Estate. Moss Capital commenced proceedings for compensation arising from the acquisition; however, the Council disputes that Moss Capital had a relevant interest in the acquired land for the purposes of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Just Terms Act**). Accordingly, Moss Capital applied for, and the Court determined, that a separate question, being whether Moss Capital had a relevant interest in the acquired land, should be determined prior to the commencement of the substantive proceedings.

Issues:

(1) Whether Moss Capital had a compensable interest in the acquired land within the meaning of the definition of "interest" in s 4(1) of the Just Terms Act;

(2) Whether Moss Capital had an equitable interest in the acquired land by:

(a) the operation of the Deed;

(b) a partnership relationship between the parties to the Deed; or

(c) a trust; and

(3) Whether Moss Capital had a right, charge, power or privilege over the acquired land by the operation of the Deed and the relationship between itself and Cannchar.

Held: The answer to the separate question was that Moss Capital did not have a compensable interest in the acquired land.

(1) In relation to the equitable interest said to arise by virtue of the operation of the Deed, it is clear that the cl 12.1 of the Deed did no more than establish a contractual right on the part of Moss Capital to a proportion of the sales proceeds: at [40];

(2) Similarly, cll 21 and 24.1(b), while conferring the right to lodge a caveat, did not support an intention to create an equitable charge, nor did any of the other clauses relied upon by Moss Capital: at [50], [57], [59];

(3) Neither the Deed, nor the parties' relationship, indicated the existence of a partnership. Further, even if there was a partnership, the acquired land would not be an asset of the partnership: at [73];

(4) The circumstances surrounding the acquisition did not give rise to a constructive trust and therefore no equitable interest in the land arose from this ground: at [91];

(5) While Moss Capital had expended costs in relation to the development of Curtis Estate, this did not give it a charge over the acquired land in respect of the costs it had expended, nor did it have a relevant power or privilege within the meaning of the Just Terms Act: at [101]-[108]; and

(6) Accordingly, Moss Capital had not established that it was the owner of any "interest" in land as defined in the Just Terms Act that was divested, extinguished or diminished by the acquisition: at [109].

- Practice & procedure

Australian Consulting Architects Pty Ltd v Liverpool City Council **[2017] NSWLEC 129** (Molesworth AJ)

Facts: On 2 October 2015, a development application seeking consent for a major residential subdivision development was lodged with Liverpool City Council (**the Council**). The applicant for consent was specified as Australian Consulting Architects in this development application. After the Council forwarded the development application to the Roads and Maritime Services (**the RMS**) on 4 November 2015, RMS wrote to the Council seeking further traffic modelling information (**the request**), which was provided to RMS by the Council on 4 May 2016. Between February and May 2016, correspondence was exchanged between the Council and agents for the named applicant for consent concerning particular aspects of the development proposed in the development application.

On 14 October 2016, a Class 1 application was filed by Australian Consulting Architects challenging, pursuant to s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), the deemed refusal of this development application. The Council filed two separate notices of motion on 10 July 2017 and 25 August 2017 seeking, on different bases, an order that the proceedings be dismissed as incompetent. On 23 August 2017, Australian Consulting Architects Pty Ltd (**the applicant**) filed a notice of motion seeking orders to amend the development application and Class 1 application so as to specify the applicant as Australian Consulting Architects Pty Ltd.

Issues:

(1) Whether the proceedings were incompetent because they were commenced beyond the prescribed period for appealing a deemed refusal under the EP&A Act and the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**);

(2) Whether RMS had the status of a concurrence authority (or approval body) under the EP&A Act and EP&A Regulation at the time it made the request of 4 November 2015 and, therefore, whether the request had the effect of delaying the date on which the development application was taken to be refused, such that the proceedings were commenced within time;

(3) Whether the development application was amended under cl 55 of the EP&A Regulation on four particular dates between February and May 2016 to delay the date on which the development application was taken to be refused, such that the proceedings were commenced within time;

(4) Whether the proceedings were incompetent because the development application was ineffective; due to it being lodged in circumstances where the named applicant for consent was an unknown entity and without the landowner's consent; and

(5) Whether the development application and Class 1 application should be amended to change the named applicant from 'Australian Consulting Architects' to 'Australian Consulting Architects Pty Ltd'.

Held: Proceedings dismissed as incompetent; no order as to costs.

(1) The RMS was not (under the EP&A Act and the EP&A Regulation) a concurrence authority (or approval body) - by reason of s 138 of the *Roads Act 1993 (NSW)* or cl 104 of the State Environmental Planning Policy (Infrastructure) 2007 - with respect to the development application. Consequently, the request by RMS of 4 November 2016 could not legitimately delay the date on which the development application was taken to be refused for the proceedings to have been commenced within time: at [119]-[129];

(2) The development application was not amended under cl 55 of the EP&A Regulation on any of the four relevant dates between February and May 2016. On each occasion, contrary to the requirements of cl 55, the alleged amendment did not constitute an application to amend, the respondent did not agree to the alleged amendment (as required), and the alleged application to amend did not contain sufficient written particulars (also as required). Consequently, these alleged amendments could not legitimately delay the date on which the development application was taken to be refused for the proceedings to have been commenced within time: at [131]-[152];

(3) The Class 1 application should be amended in order for there to be a legal entity before the Court as the applicant for the proceedings: at [155];

(4) (obiter) The development application could be amended to correct the clear error of the named applicant being "Australian Consulting Architects" rather than "Australian Consulting Architects Pty Ltd": at [160]; and

(5) (obiter) The failure of the applicant to obtain the landowner's consent prior to lodging the development application can be cured by the applicant obtaining the consent of the new landowner: at [158].

Bayside Council v Toplace Pty Ltd **[2017] NSWLEC 120** (Molesworth AJ)

Facts: On 31 October 2016, Bayside Council (**the Council**) commenced civil enforcement proceedings against Toplace Pty Ltd (**the first respondent**) and JKN Australia Pty Ltd (**the second respondent**) seeking, inter alia, a declaration that both respondents contravened s 76A of the *Environmental Planning and Assessment Act 1979 (NSW)* by breaching conditions of development consent requiring the dedication of particular land (**the Land**) as a public road. The second respondent owned the Land and the first respondent was the applicant for the relevant development consents and carried out a considerable amount of the development of the Land and its surrounds. On 8 June 2017, the first respondent filed a notice of motion seeking an order, under the Uniform Civil Procedure Rules 2005 (NSW), that the proceedings against it be summarily dismissed or that, alternatively, material pleadings disclosing allegations against it be struck out.

Issues:

(1) Whether a reasonable cause of action against the first respondent had been disclosed in circumstances where the first respondent did not own the Land and, therefore, could not have allegedly breached the relevant conditions of consent at issue in the proceedings; and

(2) Whether the first respondent's rights, interests, or liabilities could reasonably be affected by the granting of relief in the substantive proceedings such that it should remain a party to the proceedings.

Held: First respondent's motion dismissed with costs.

(1) A reasonable cause of action against the first respondent was disclosed by the Council: at [21]. Given that the first respondent carried out the development on the Land and its surrounds, a reasonably arguable case was disclosed that its conduct or actions could have breached the relevant conditions of consent by precluding the dedication of the Land as a public road: at [22]-[26]; and

(2) Given both the prima facie established relationship between the two respondents - and the role of the first respondent as the applicant for the relevant consents and person who carried out much of the relevant development - there was an "arguable possibility" that the first respondent would be affected by the making of the orders sought in the proceedings: at [20] and [27]-[28].

Bengalla Mining Company Pty Ltd v MACH Energy Australia Pty Ltd **[2017] NSWLEC 121** (Robson J)

Facts: The applicant on the notice of motion, Bengalla Mining Company Pty Limited, sought orders to set aside, partially, a notice to produce and four separate subpoenas issued by MACH Energy Australia Pty Ltd (**the respondent**). The applicant operates an open-cut mine near Muswellbrook, while the

respondent holds a development consent to relating to land situated directly north to that of the applicant. The substantive proceedings were commenced by the applicant seeking declarations that the respondent sought had breached s 76(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* by failing to comply with a condition of development consent. The relevant condition required the respondent to enter into an agreement with the Minister for Mineral Resources, in consultation with the operators of the Bengalla Mine, before commencing development on the site. The applicant contends that the respondent failed to undertake the relevant consultation required under this condition. The notice to produce and subpoenas were directed towards Bengalla's allegations that it was not consulted, and sought four categories of documents. The applicant sought a confidentiality undertaking in respect of category 1, to set aside categories 2 and 4 in full, and to set aside category 3 except to the extent that it sought documents relating to Bengalla's appointment as operator of the Bengalla Mine.

Issues:

(1) Whether there was a legitimate forensic purpose in seeking the documents; and

(2) Whether the documents sought would materially assist on an identified issue, or whether there was a reasonable basis beyond speculation that they were likely to assist.

Held: Notice to produce and subpoenas to be amended, and the notice of motion, otherwise dismissed.

(1) The confidentiality undertaking in the form proffered by the parties was sufficient to satisfy any reasonable concern raised by the applicant in relation to disclosure of what was said to be commercially sensitive information in category 1 of the notice of motion and subpoenas: at [46];

(2) The documents sought in category 2 went to a primary issue in the proceedings, and there was accordingly a legitimate forensic purpose. There was also a reasonable basis, beyond speculation, that the documents sought would materially assist on the identified issue: at [48];

(3) While there was a concern in relation to the breadth of material sought in category 2, there was insufficient evidence that the documents sought were oppressive: at [51]-[53];

(4) The documents sought in category 3 were relevant, and were likely not oppressive as they should not be extensive or difficult to identify: at [55]-[56]; and

(5) Given the respondent's willingness to confine the scope of documents sought in category 4, there was a legitimate forensic purpose, and no evidence why these documents would be difficult to identify or review: at [59]-[60].

City of Ryde Council v Principal Healthcare Finance Pty Ltd (No 2) **[2017] NSWLEC 134** (Molesworth AJ)

(related decision: *Principal Healthcare Finance Pty Ltd v City of Ryde Council* [2017] NSWLEC 1300 (Brown C))

Facts: On 23 May 2017, Brown C upheld, with the consent of the parties, an appeal by Principal Healthcare Finance Pty Ltd (**the respondent**) against the refusal of City of Ryde Council (**the Council**) to grant development consent to an aged care facility development. In so doing, the commissioner imposed conditions of consent (which had been drafted by the Council) that included two conditions restricting the types of people able to occupy the development. On 24 July 2017, the Council commenced proceedings appealing the commissioner's decision under s 56A of the *Land and Environment Court Act 1979 (NSW)*. On 25 August 2017, the respondent filed a notice of motion seeking an order that the appeal proceedings be summarily dismissed pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW).

Issues:

(1) Whether the appeal proceedings failed to disclose a reasonable cause of action due to: the cause of action not disclosing an error of law; the applicant being estopped from agitating the relevant legal issues; or the applicant seeking to raise issues not before the commissioner; and

(2) Whether the appeal proceedings constituted an abuse of process of the Court in circumstances where, inter alia, the applicant consented to the commissioner making his decision.

Held: Motion dismissed; no order as to costs.

(1) On the assumption that the applicant was entitled to run its cause of action, an arguable cause of action was disclosed: there was an arguable case that the commissioner erred in law by imposing a condition of consent that allowed either a wider or narrower range of people to occupy the development than the range of people required to be permitted to occupy the development under the applicable environmental planning instrument: at [57]. Whether the applicant's cause of action had sufficient merit to eventually succeed was to be determined by the trial judge rather than the Court considering the interlocutory application to dismiss: at [64];

(2) As the applicant advanced credible rebuttals or responses to the respondent's allegations that it had not disclosed an error of law; was estopped from agitating the relevant legal issues; and impermissibly sought to raise issues not before the commissioner, it could not be said that no arguable cause of action was disclosed: at [61]-[63]. The respondent was required to show, but failed to show, that the applicant's case was "obviously untenable or groundless" because the applicant had no credible response to each of the respondent's abovementioned allegations: at [52]-[56]; and

(3) The appeal proceedings did not constitute an abuse of process; the applicant had done nothing more than exercise its entitlement to appeal a decision on the basis of an identifiable cause of action: at [67].

Corbett Constructions Pty Ltd v Wollondilly Shire Council **[2017] NSWLEC 135** (Molesworth AJ)

Facts: On 11 July 2016 - 10 days after Corbett Constructions Pty Ltd (**the applicant**) lodged a development application with Wollondilly Shire Council (**the Council**) seeking consent to build townhouses and units on land in Picton - the Council sent a 'stop the clock' letter to the applicant requesting, pursuant to the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**), further information (**the request**). The request directed that the specified further information should be provided within 28 days (by 8 August 2016) unless alternative arrangements were made. On 11 October 2016, the Council sent a further letter to the applicant directing that the requested information be provided within seven days (by 18 October 2016). This letter referred to previous correspondence between the applicant and the Council. On 18 October 2016, the Council granted the applicant, in an e-mail, a further three days to provide the requested information. Despite this, the applicant provided the relevant information to the Council on 18 October 2016.

On 8 June 2017, the applicant commenced proceedings, appealing, pursuant to s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), against the deemed refusal of its development application. The Council filed a notice of motion on 22 August 2017 seeking an order that the proceedings be dismissed as incompetent.

Issues:

(1) Whether the proceedings were incompetent because they were commenced beyond the prescribed period for appealing a deemed refusal under the EP&A Act and the EP&A Regulation;

(2) Whether the request of 11 July 2016 had the effect of delaying the date on which the development application was taken to be refused, such that the proceedings were commenced within time;

(3) Whether the Council allowed the applicant, pursuant to cl 54(6)(b) of the EP&A Regulation, a further period of time to provide the requested further information beyond the 28-day time period specified in the request; and

(4) Whether the period of time of 28 days specified in the request for the applicant to provide the further information was reasonable within the meaning of cl 54(2)(b) of the EP&A Regulation.

Held: Motion dismissed; Council ordered to pay the applicant's costs of the motion.

(1) The Council exercised its discretion under cl 54 of the EP&A Regulation to allow the applicant a further period of time to provide the information listed in the request of 11 July 2016 (which extended to 21 October 2016). A consent authority is not restricted to only allowing a further period of time before the expiry of a specified period for providing that information: at [41]-[47]. The Council's letter of 11 October 2016, and e-mail of 18 October 2016, demonstrated that the Council allowed a further period of time expiring on 21 October 2016: at [48]. Consequently, the proceedings were

commenced within the prescribed period under the EP&A Act and the EP&A Regulation for appealing a deemed refusal: at [39] and [51]-[52]; and

(2) (*obiter*) In order for a specified period of time for providing further information to be reasonable under cl 54(2)(b) of the EP&A Regulation, consent authorities should carefully tailor their requests after making a preliminary assessment of what time would likely be necessary for an applicant for consent to respond appropriately (accepting that a request will trigger the need for preparatory work in order to be able to supply the information): at [56].

***Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2017] NSWLEC 88** (Preston CJ)

Facts: Grafil Pty Ltd and Mr Mackenzie (**the defendants**) were each charged with one offence of using land as a waste facility without lawful authority under s 144 of the *Protection of the Environment Operations Act 1997 (NSW)*. The defendants subpoenaed two persons to produce documents, an expert and the Proper Officer of AECOM Australia, both of whom were engaged by the prosecutor to provide expert advice and evidence.

The documents were produced to the Court, and the prosecutor claimed legal professional privilege over the following eight categories of documents: (A) file note of the expert's phone call with the prosecutor's solicitor concerning the joint report; (B) e-mails from the expert to the prosecutor's solicitor concerning the expert report; (C) e-mails from the expert to the prosecutor's solicitor about the fee agreement; (D) e-mails from the prosecutor's solicitor to an AECOM expert regarding affidavits; (E) e-mails from the prosecutor to an AECOM officer regarding costings, fees and technical reports; (F) e-mails between AECOM officers, including the corporate counsel, referring to legal advice from the prosecutor; (G) draft affidavits by AECOM officers; and (H) draft versions of AECOM's investigation report.

The defendants sought, by notice of motion, access to the privileged documents pursuant to r 33.8 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

Issues:

(1) Whether the *Evidence Act 1995 (NSW)* (**the Evidence Act**) or the common law applies to the privilege claim;

(2) Whether the documents in categories C, E and F are privileged at common law; and

(3) Whether privilege has been waived over the documents in categories G and H.

Held: Motion dismissed.

(1) UCPR, r 1.9 authorises an objection on the ground of a claim for privilege to production of a document (**the first stage**): at [14]; the Evidence Act applies only to the adducing of evidence in the course of a hearing (**the third stage**): at [13]; neither the Evidence Act nor UCPR r 1.9 applies to the inspection of documents already produced (**the second stage**): at [15]; UCPR, r 1.9 does not cause the Evidence Act to apply because the claim for privilege and objection to inspection of the documents produced on subpoena is made by the prosecutor and not the persons who produced the documents: at [15]; the claim for privilege and objection to inspection is governed by the common law: at [15]; the defendants accepted that the documents in categories A, B, D, G and H are privileged at common law: at [18];

(2) The documents in category C were made when the prosecution had commenced proceedings, and with a view to obtaining expert evidence to be used in the prosecution, and are therefore privileged: at [22];

(3) The documents in category E were made for the purpose of the preparation of the prosecutor's case for pending litigation: at [29]; the documents concerned the preparation of evidence to be used as evidence in that case: at [29]; while the EPA officer was not a lawyer, the AECOM officer understood that the communications were confidential and therefore a relationship of confidentiality existed: at [29]; the documents in category E are therefore privileged: at [29];

(4) the documents in category F record communications with and advice provided by the prosecutor's solicitor: at [31]; the documents concern the preparation of draft affidavits to be communicated to the

prosecutor's lawyer for the purposes of the prosecution: at [32]; there is no basis to infer that the documents were not legal advice but merely instructions: at [36]; there is a clear distinction between draft affidavits and the final signed versions prepared for the purpose of putting facts before the Court and which were filed in the Court and served on the defendants: at [35]; it is not the case that draft affidavits might be said to have been prepared for the purpose of disclosure of the matters in the affidavit to the Court and to the defendants: at [37]; the documents in category F are therefore privileged: at [36]; and

(5) The defendants bear the onus of establishing, on the balance of probabilities, that privilege has been waived: at [41]; there is no basis for inferring that advice and comments by the prosecutor or AECOM's corporate counsel influenced the content of the final reports and affidavits: at [47]; the defendants did not establish that the final expert reports were based on the draft reports such that disclosure of the draft reports would be reasonably necessary to enable a proper understanding of the final reports: at [48]; privilege over the documents in categories G and H has not been waived: at [47].

Marshall Rural Pty Ltd v Basscave Pty Ltd **[2017] NSWLEC 84** (Molesworth AJ)

Facts: Marshall Rural Pty Ltd (**the applicant**) commenced civil enforcement proceedings against Basscave Pty Ltd (**the respondent**) to restrain the respondent from allegedly contravening the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) in two respects. First, the applicant claimed that the respondent breached the EP&A Act by carrying out earthworks and filling on its land without the requisite development consent. Second, the applicant claimed that the respondent erected numerous buildings on its land without the requisite development consent. On 3 July 2017, the applicant filed a notice of motion seeking an order that the proceedings be expedited. The respondent opposed this application.

Issues:

(1) Whether there was a clear public interest in expediting the proceedings given the potential environmental impacts of the allegedly unlawful earthworks; and

(2) Whether there were sufficient special factors in these proceedings to warrant the expedition of the proceedings.

Held: Dismissing the application; applicant ordered to pay the respondent's costs of the motion:

(1) The applicant failed to establish that there were sufficient special factors that warranted expediting the proceedings: at [21] and [42]. In particular, the applicant did not demonstrate that: there would be any loss of witnesses if expedition was not granted (at [23]-[25]); the proceedings did not involve any special matter of public importance, including potential environmental impacts (at [26]-[33]); the subject matter of the litigation would not be lost if expedition was not granted (at [34]); the applicant had delayed the proceedings, including the bringing of the application to expedite the proceedings (at [35]-[37]); the applicant would not suffer any hardship if expedition was not granted (at [38]); the applicant did not proceed with due speed in commencing the proceedings (at [39]-[40]); and the parties were not willing to abridge the hearing time (at [41]).

Orico Properties Pty Ltd v Inner West Council **[2017] NSWLEC 90** (Robson J)

Facts: Orico Properties Pty Ltd (**the applicant**) sought development consent for demolition of existing structures and construction of a part three- and part six-storey mixed use development including four ground-floor commercial tenancies, five live/work units, 63 dwellings and basement car-parking in St Peters. The application was refused by the Inner West Council (**the Council**) and Orico accordingly commenced Class 1 proceedings on 23 May 2017. On 14 June 2017, Orico filed a notice of motion seeking leave to rely on amended plans and documents in the Class 1 proceedings. The notice of motion was opposed by the Council, on the basis that the material amounted to a new development application and were not permitted under cl 55 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EPA& Regulation**).

Issues:

(1) Whether the proposed amendments to the development application amounted to a new development application; and

(2) Whether the proposed amendments to the development application could be made pursuant to cl 55 of the EP&A Regulation.

Held: Notice of motion is dismissed.

(1) In applying cl 55 of the EP&A Regulations, the Court was to have regard to three principles:

(a) the power to amend is "beneficial and facultative";

(b) the power to amend is a power to change, not to propose a new or original application; and

(c) a proposal may change in terms of design and layout, however the focus remains on whether the proposal can answer the description and essence of the development as originally proposed: at [10];

(2) The changes to the configuration of the buildings, the nature and arrangement of the uses, the relationship with the neighbouring developments, and the change in density (including changes to provision and location of car-parking, and the nature and extent of accessibility) provided sufficient reason for leave to amend not to be granted: at [27];

(3) While the changes might in some way be responsive to the Council's refusal of the development application, one of the drivers of the changes was also advice given to the applicant relating to the commercial viability of the proposed configuration: at [27]; and

(4) If Orico were given leave to amend, the Council would be required to reconsider, to a significant degree, the whole of the application, including a suite of further expert reports sought to be relied upon: at [27].

Residents Against Intermodal Development Moorebank Incorporated v Minister for Planning, Qube Holdings Ltd **[2017] NSWLEC 115** (Preston CJ)

Facts: An incorporated association, Residents Against Intermodal Development Moorebank Incorporated (**the applicant**), appealed under s 98(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) against the determination of the Minister for Planning to grant consent to the Moorebank Intermodal Precinct East - Stage 1.

The proponent of the project, Qube Holdings Ltd (**the second respondent**), challenged the standing of the applicant on the ground that the applicant was not an "objector" and hence had no right to appeal. The applicant did not make a submission under s 79(5) of the EP&A Act objecting to the intermodal terminal. The applicant submitted that it made submissions as an unincorporated group of persons, Residents Against Intermodal Development Moorebank (**RAID Moorebank**), and upon incorporation, RAID Moorebank's right of appeal became, by virtue of s 8(2) and cl 2(1)(b) of Sch 2 of the *Associations Incorporation Act 2009 (NSW)* (**the Associations Inc Act**), the right of the applicant. The second respondent submitted that RAID Moorebank did not make a submission under s 79(5) and, in any case, any right of appeal did not become the right of the applicant.

Issues:

(1) Whether RAID Moorebank was a "person" who made a submission under s 79(5) of the EP&A Act objecting to the development application for the intermodal terminal; and

(2) Whether, first, the applicant was an unincorporated body under the Associations Inc Act and, second, RAID Moorebank complied with the statutory process for registration as an incorporated association and, hence, cl 2(1)(b) of Sch 2 operated to make any right of RAID Moorebank to appeal the right of the applicant.

Held: Notice of motion dismissed; second respondent to pay applicant's costs of the motion.

(1) The right to appeal under s 98(1) vests in "an objector", which is a "person" who has made a submission under s 79(5): at [94]; the EP&A Act defines "person" to include "an unincorporated group of persons", which has an ordinary meaning of any combination of persons who are not incorporated: at [93]; these provisions expand the categories of who can participate in determining an application for designated development: at [95]; the evidence established that RAID Moorebank was "an unincorporated group of persons" within the meaning of "person": at [96];

(2) RAID Moorebank made four submissions through its Chairman, Mr Anderson: at [97]; the organisation making the submission was stated as "RAID Moorebank": at [97]; the use of Mr Anderson's personal e-mail, residential address and first person singular pronoun did not displace the inference that they were made by RAID Moorebank: at [98]; RAID Moorebank was formed to oppose the development and it is inconceivable they would not make a submission; at [100]; the submissions were consistent with the public statements of RAID Moorebank: at [101]; there is no evidence RAID Moorebank did not authorise them or they exceeded Mr Anderson's authority as chairman: at [103]; RAID Moorebank made submissions under s 79(5) and therefore became an "objector" with a right of appeal under s 98(1); at [104];

(3) RAID Moorebank was an unincorporated body that incorporated upon registration under the Association Inc Act: at [109]; its registration accepts that RAID Moorebank was an unincorporated body and its application for registration complied with the statutory requirements: at [110]; the Court should accept the regularity of the application and its determination: at [110]; if it were appropriate to question the regularity, the Associations Inc Act does not define "unincorporated body" and, under common law, the requirement is a combination of persons, having a common interest or purpose, with a degree of organisation and continuity: at [112]-[113]; the second respondent did not establish RAID Moorebank was not an unincorporated body able to apply for registration: at [116]; an unincorporated body is not required to follow s 39 of the Associations Inc Act in the procedure for passing a special resolution authorising the application: at [117]; the second respondent did not establish that there was not a special resolution: at [118]-[119];

(4) The right of RAID Moorebank to appeal under s 98(1) of the EP&A Act became, by virtue of cl 2(1)(b) of Sch 2 of the Associations Inc Act, the right of the applicant to appeal under s 98(1) of the EP&A Act: at [120]; and

(5) It is fair and reasonable that the second respondent pay the applicant's costs of the motion: at [124]; the motion did not evaluate the merits of the appeal but involved questions of law and fact, the determination of which, in one way, may have been determinative of the proceedings: at [122], [124]; the applicant provided reasons why there was no utility in pursuing the motion and requested that it be withdrawn: at [122]; the rule against costs orders in Class 1 proceedings is inappropriate in the circumstances: at [122], [124].

***Smith v Kaddour* [2017] NSWLEC 117** (Pain J)

(related decision: *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 (Craig J))

Facts: The applicants filed an application under the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**the Trees Act**) which alleged damage to their property caused by a tree located on their neighbours' land. Craig J held in relation to the same tree, in 2011 litigation, that the applicants did not prove, to the requisite level of satisfaction, that the tree had caused damage to their property as required by s 10(2)(a) of the Trees Act.

The respondents became owners of the neighbouring property in 2015. They caused the tree to be reduced to a stump in 2016. The applicants submitted evidence of fresh and continuing damage to their property from 2011 to date which had been prepared by different experts to those engaged in the matter heard by Craig J.

Issue: Whether there had been a material change of circumstance which would allow the applicants to bring fresh proceedings in relation to the same tree at issue in the 2011 litigation.

Held: Application summarily dismissed under r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW):

(1) The change of circumstance relied on by the applicants of more damage to their home since 2011 is not the matter about which a material change of circumstance must arise to overcome the threshold imposed by s 10(2)(a) of the Trees Act. The relevant change in circumstance must relate to the issue of causation of damage to the applicants' property in light of Craig J's decision. The new evidence did not engage with this requirement: at [21]; and

(2) *Additional matters noted*: The respondents cannot be liable for damage caused by the intact tree before they purchased their property, and arguably after that date, given that there is no evidence that they did anything to cause any damage from the tree: at [24]. In any event the respondents reduced the tree to a stump in the interest of good neighbourly relations without any legal requirement that they do so. That is a result the applicants have been seeking for a lengthy period: at [25].

- Interlocutory Injunctions

Strathfield Municipal Council v Michael Raad Architect Pty Ltd (No 1) **[2017] NSWLEC 105** (Robson J)

Facts: On 15 August 2017, Strathfield Municipal Council (**the Council**) filed an application seeking urgent interlocutory relief against three respondents, Michael Raad Architect Pty Ltd, Hallmark Construction Pty Ltd and Telmet Ventures Pty Limited. The first respondent was the recipient of development consent for a large development comprising 303 apartments on a site known as 81-86 Courallie Avenue, Homebush West, which was in the process of being constructed. After attending the site and observing the works, the Council formed a view that works had been carried out, and were about to be carried out in breach of the development consent. Importantly, the Council's concern was that construction involving the pouring of concrete was about to be undertaken in a manner that would be contrary to the development consent. Accordingly, the Council sought an interlocutory injunction that the respondents cease all unauthorised development on the land, and not construct the basement of Building 6 otherwise than in accordance with the development consent.

Issues:

(1) Whether there was a serious question to be tried; and

(2) Whether the balance of convenience has been met.

Held: Interlocutory injunction granted until further order of the Court; the matter made returnable on 17 August 2017.

(1) If concrete was in fact poured in the manner consistent with the reinforcement that was presently on the site, there was little doubt that it would not be in accordance with the development consent, and the construction certificate: at [7];

(2) There was a serious question to be tried, and there was no evidence to indicate that the balance of convenience should be weighed in favour of the respondents: at [10].

Strathfield Municipal Council v Michael Raad Architect Pty Ltd (No 2) **[2017] NSWLEC 119** (Robson J)

Facts: On 15 August 2017, Strathfield Municipal Council (**the Council**) commenced proceedings seeking to remedy a breach of s 76A of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) arising from the respondents allegedly carrying out development in contravention of a development consent. The consent related to development situated at 81-86 Courallie Avenue, Homebush West. On 15 August 2017, the Council had been granted an interlocutory injunction restraining the respondents from carrying out further development on the part of the site known as Building 6, with the Council's primary concern being that construction work was being undertaken for a single-level basement car-park in circumstances where the consent provided for a two-level basement

car-park. Relevantly, a modification application had been lodged to modify the consent to provide for a single-level car-park, but this had not yet been determined.

Issues:

(1) Whether the respondents had carried out construction on the basement at Building 6 otherwise than in accordance with the development consent;

(2) Whether there was a serious question to be tried; and

(3) Whether the balance of convenience favours the grant of an interlocutory application.

Held: The injunction prevented the respondents from constructing the basement of Building 6 of the development otherwise than in accordance with the consent was continued until further order of the Court.

(1) The evidence indicated that the nature of work undertaken on the basement, thusfar, most likely provided for a single-level basement, even though there was evidence that a two-storey basement might still be constructed. In the circumstances, the works presently undertaken were most likely to be unauthorised such that there was clearly a serious question to be tried: at [35];

(2) The complexity and risk involved with complying with the consent were likely to increase as construction of the building proceeded: at [38];

(3) While it might be technically possible from an engineering standpoint to provide for a two-level basement car-park despite the construction proceeding on the basis of a single-level car-park, this might not be compelling in relation to the balance of convenience, given the concern that the works were not in accordance with the consent: at [41];

(4) While there was a modification application on foot, which, if approved, might render the injunction unnecessary, this was not a determining factor in granting relief: at [42];

(5) While a two-level basement might, from a practical and planning matter, be unnecessary in the context of the development, in circumstances where the consent was still on foot and the modification application had not been determined, the injunction had utility: at [43].

- Joinder applications

Avalon Beach Property Pty Limited ACN 609856224 as Trustee for the Avalon Beach Property Trust v Northern Beaches Council **[2017] NSWLEC 130** (Preston CJ)

Facts:

Avalon Beach Property Pty Limited ACN 609856224 as Trustee for the Avalon Beach Property Trust (**the applicant**) appealed against the refusal by Northern Beaches Council (**the Council**) of a development application for a childcare centre.

Following a conciliation conference under s 34 of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**), the application was amended to reduce the built form, reduce the number of children to be catered for and change the nature of the care to be provided. The change to the nature of the care prompted Matthew Durden (**the applicant for joinder**) to apply to be joined under s 39A of the Court Act.

Issues:

(1) Whether the applicant for joinder raised an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if they were not joined as a party (first limb of s 39A); and

(2) Whether it was in the interests of justice or the public interest that the applicant for joinder be joined as a party to the appeal (second limb of s 39A).

Held: Join the applicant for joinder as a party to these proceedings;

(1) The applicant for joinder sought to raise the legal issue of the characterisation and, hence, permissibility of the proposed childcare centre: at [4]; the issue was not raised by the respondent: at [4]; there would be no contradictor so the Court would have inadequate argument about the issue: at [10]; the issue would not be sufficiently raised unless the applicant for joinder was joined to the proceedings: at [9];

(2) The applicant for joinder sought to raise three merit issues concerning alleged non-compliances with controls in the Pittwater Local Environmental Plan 2014 and Pittwater 21 Development Control Plan 2014: at [15]; the non-compliances were not raised in the amended statement of facts and contentions: at [15]; unless the neighbour was joined, there would not be a sufficient contradictor: at [18]; it is necessary to have the neighbour joined in order to raise these issues: at [18];

(3) The applicant for joinder sought to raise the merit issue of alleged unacceptable adverse shadow impacts on their property: at [20]; shadow diagrams included in the development plans are not determinative of the issue and are only part of the evidence needed to address the contention: at [21]; the applicant for joinder should be able to put forward his view as to the acceptability of the overshadowing: at [21];

(4) As the first limb of s 39A was satisfied, it is unnecessary to determine whether the second limb would also be satisfied: at [22];

(5) The basis for the joinder was that the applicant for joinder only raised the five issues that were the basis for his application: at [23]; the applicant for joinder was not precluded from making an application to advance further issues but the Court may have declined to allow them to be raised: at [24]; and

(6) It was inappropriate to impose a condition on the order for joinder that no application be made for costs in the future: at [26]; the question of whether it would be fair and reasonable in the circumstances to make an order for the payment of costs would depend upon what happened in the conduct and outcome of the proceedings: at [26]; it was premature to determine whether there could ever be circumstances in which it would be fair and reasonable to have made an order for costs: at [26].

- Costs

Coffs Harbour City Council v West **[2017] NSWLEC 94** (Molesworth AJ)

Facts: On 6 September 2016, Coffs Harbour City Council (**the Council**) ordered, pursuant to s 124 of the *Local Government Act 1993 (NSW)*, Mr Warren West (**the respondent**) to remove and lawfully dispose of a wide array of waste stored around the respondent's dwelling-house and shed. On 30 November 2016, the applicant commenced civil enforcement proceedings, by way of summons, against the respondent seeking both a declaration that the respondent was in breach of this statutory order and consequential orders requiring the respondent (or, in default, the applicant) to remove and lawfully dispose of the relevant waste. In the course of the substantive hearing on 31 May 2017, the Court made orders, by consent, substantially granting the relief sought in the summons (**the Court Orders**). However, as the respondent opposed the applicant's application for the respondent to pay its costs of the proceedings, the Court reserved its judgment as to costs.

Issues:

(1) Whether the general rule that "costs follow the event", under r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW), applied to the proceedings; and

(2) Whether the discretion of the Court should be exercised to order that the respondent pay the applicant's costs of the proceedings.

Held: Respondent ordered to pay the applicant's costs.

(1) In considering the "costs follow the event" rule, there might not have been an "event" in the form of a judgment. However, the outcome of the Court Orders was that the applicant was entirely successful: at [44];

(2) The Court should order that the respondent pay the applicant's costs of the proceedings because: the applicant acted responsibly in issuing the original statutory order; the applicant also acted responsibly in commencing the proceedings when the respondent failed to comply with the order; the respondent had ample opportunity to withdraw his opposition to the relief sought but, instead, opposed the relief sought until the final hearing (without explanation); and the outcome of the Court Orders represented an entirely successful result for the applicant: at [50]-[51]; and

(3) Given the unfortunate circumstances of the respondent and his family, which the Court accepted, it was noted that it was open to the applicant to take a compassionate approach to the recovery of its costs. In so doing, the Court emphasised that this was entirely a matter for the applicant: at [52].

***Nada v Georges River Council* [2017] NSWLEC 80** (Molesworth AJ)

(related decisions: *Nada v Hurstville City Council* [2015] NSWLEC 1300 (O'Neill C) and *Nada v Georges River Council* [2016] NSWLEC 1302 (O'Neill C))

Facts: Emad and Eva Nada (**the applicants**) appealed - pursuant to s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) - the decision of Hurstville City Council, now Georges River Council (**the Council**), to refuse their development application to demolish existing structures and construct a childcare centre at 46 Ogilvy Street, Peakhurst (**the Premises**). On 4 June 2015, the opening day of the hearing before Commissioner O'Neill, the Court allowed the applicants to file an amended development application "on the basis agreed by the parties pursuant to s 97B of the EP&A Act". However, the commissioner did not make an order requiring the applicants to pay the respondent's costs thrown away.

On 28 July 2015, the commissioner delivered her initial decision in the proceedings (*Nada v Hurstville City Council* [2015] NSWLEC 1300), which provided for the applicants to apply for a Court order, under s 40 of the *Land and Environment Court Act 1979 (NSW)*, imposing an easement over land abutting the Premises. This was done to allow the applicants to address the stormwater management issues of the proposed development to the satisfaction of the commissioner. However, on 3 March 2016, the commissioner ordered, by consent, that the proceedings be reopened to enable the applicants' alternative new stormwater management plan to be considered. In the affidavit in support of the applicants' application to reopen the proceedings, the applicants' solicitor stated that the applicants would "… pay the respondent's reasonable costs associated with the review of this material and attendance at Court for the purpose of reopening the matter". On 21 July 2016, Commissioner O'Neill delivered her final judgment (*Nada v Georges River Council* [2016] NSWLEC 1302) and granted development consent, subject to conditions, for the proposed development.

Issues:

(1) Whether, despite the agreement of the applicants to pay the respondent's costs thrown away by the amendment of the development application and the reopening of the proceedings (**the agreed costs**), the respondent was disentitled from obtaining its costs due to delay; and

(2) Whether the respondent's pursuit of the agreed costs offended the principle of finality.

Held: Ordering the applicants to pay the agreed costs and the costs of the motions for costs.

(1) The respondent did not delay in seeking the agreed costs: it took action in an appropriate period of time: at [29];

(2) The assurance of a legal practitioner to the Court that his or her client agreed to pay particular costs was tantamount to an undertaking that the parties would pay these costs. If this was not so, proceedings before the Court may have been seriously undermined: at [14]. Similarly, as officers of the Court, any legal practitioner should be able to rely upon the commitment of another legal practitioner that his or her client would pay particular costs, unless there were exceptional circumstances: at [32];

(3) Litigation would likely become less efficient and more expensive, contrary to s 56 of the *Civil Procedure Act 2005 (NSW)*, if a party could only rely on an agreement to pay costs (made during a hearing) in a narrowly circumscribed period after the hearing: at [30]; and

(4) (*Obiter*) In circumstances where particular costs had not been agreed and no costs order had been sought at, or shortly after, the time of hearing, an application for costs ought to have been made in a timely fashion: at [33].

Prefabricated Buildings Pty Ltd v Bathurst Regional Council (No 2) **[2017] NSWLEC 111** (Robson J)

Facts: On 24 April 2017, a Class 3 application brought by Prefabricated Buildings Pty Ltd (**the applicant**) against Bathurst Regional Council (**the Council**) was dismissed (*Prefabricated Buildings Pty Ltd v Bathurst Regional Council* [2017] NSWLEC 44). The proceedings related to a rate notice issued by the Council for annual water availability and sewerage access charges. On 10 May 2017, the Council filed a notice of motion seeking an order that the applicant pay its costs in the proceedings and of the motion.

Issues:

(1) Whether it is fair and reasonable to award costs pursuant to r 3.7(3) of the Land and Environment Court Rules 2007 (NSW) (**the Court Rules**);

(2) Whether the proceedings centred on a pure question of law that was determinative or potentially determinative of the proceedings; and

(3) Whether the applicant acted unreasonably in the conduct of the proceedings.

Held: Applicant is to pay the costs of the proceedings from 18 November 2016, including the costs of the motion.

(1) The starting point is the presumptive rule that there be no order for costs in Class 3 proceedings: at [23];

(2) The applicant did not act unreasonably in the conduct of proceedings for the purposes of r 3.7(3)(d) of the Court Rules: at [27];

(3) It was, however, clear that the hearing involved a pure question of law that was determinative of the proceedings, therefore falling within r 3.7(3)(a) of the Court Rules: at [30];

(4) The fact that the proceedings centred on a question of law did not bind the Court in determining whether costs should be awarded. Rather, the Court must engage in an evaluative process and exercise its discretion to determine whether it was fair and reasonable in the circumstances to award costs: at [40];

(5) There is a general public interest in appeals against rating decisions, and the applicant's case was carefully argued and raised a complex question of law that could have had widespread implications for the rate-making abilities of councils across New South Wales: at [43];

(6) The purpose of awarding costs is not to punish the unsuccessful party, but to compensate the successful party: at [44]; and

(7) In the circumstances, while it was fair and reasonable to award Council its costs, it would not have been fair to do so in respect of the entire proceedings. Rather, costs were to be awarded from 18 November 2016, being the date on which it became abundantly clear that the sole issue in the proceedings was a legal question: at [45].

- Review of Registrar's decision

Malek v Woollahra Municipal Council **[2017] NSWLEC 124** (Molesworth AJ)

Facts: On 11 July 2017, Ms Michelle Malek (**the applicant**) commenced proceedings under s 97AA of the *Environmental Planning and Assessment Act 1979 (NSW)* appealing against the deemed refusal of her application to modify a development consent granted by Woollahra Municipal Council (**the Council**). The applicant's modification application sought consent to alter the approved proposed four-storey

dwelling along Coolong Road, Vaucluse to accommodate "architectural changes to address structural and mechanical engineering requirements". On 8 August 2017, the registrar made orders with respect to expert evidence in the proceedings but declined to make an order sought by the applicant to allow the expert architectural evidence of the applicant's architect, Professor Alec Tzannes, to be adduced in the proceedings (**the registrar's ruling**). On 8 September 2017, the applicant filed a notice of motion seeking an order permitting Professor Tzannes to give expert evidence. On 18 September 2017, the registrar referred this motion to the Court pursuant to r 49.16 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) for hearing.

Issues:

(1) Whether the applicant's motion constituted an impermissible collateral attack on the registrar's ruling because the applicant was restricted to reviewing the ruling pursuant to r 49.19 of the UCPR;

(2) Whether the expert architectural evidence of Professor Tzannes was reasonably required in the circumstances of the proceedings; and

(3) Whether the Court should decline to allow the expert architectural evidence of Professor Tzannes to be adduced, given both that the Professor Tzannes was the applicant's project architect and the delay of the applicant in filing its motion of 8 September 2017.

Held: Applicant's motion granted; no order as to costs.

(1) The applicant's motion was not a review of the registrar's ruling in disguise or a collateral attack. Rather, the motion constituted a new application, supported by significant evidence, referred to the Court by the registrar pursuant to r 49.16: at [40], [42] and [45]. Significantly, the registrar's orders concerning expert evidence, and the relevant procedural rules and guidelines, contemplated that a party might demonstrate that the evidence of additional experts was reasonable necessary after the making of initial orders concerning expert evidence: at [39] and [41]; and

(2) The properly curtailed expert architectural evidence of Professor Tzannes was likely to be reasonably necessary in the proceedings because the respondent's statement of facts and contentions gave rise to issues concerning the integrity of the architectural design that ought not be subsumed into town planning evidence: at [44] and [47].

- Merit decisions

- Commissioner decisions

Alexandra Kelly v North Sydney Council **[2017] NSWLEC 1546** (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**) by North Sydney Council (**the Council**) over the property at 24 Cranbrook Avenue, Cremorne. The IHO prevented the applicant from undertaking the demolition and the redevelopment of the site. At the commencement of the hearing, the parties tendered a revised IHO which they sought the Court to make under s 25(2) of the Heritage Act.

Issue: Whether it is lawful and appropriate to issue the IHO in the form sought, having regard to the whole of the relevant circumstances.

Held: Appeal upheld and IHO made.

(1) In determining to exercise the discretion to make an IHO, the Court must be satisfied that:

(a) the item may, on further inquiry or investigation, have been likely to be found to be of local heritage significance; and

(b) the item was being, or is likely to be harmed: at [30];

(2) The expert evidence and the Assessments of Cultural Heritage completed satisfied the requirements of Sch 1(1)(b) of the ministerial order for a preliminary heritage assessment of the item: at [38];

(3) On further investigation the item was likely to be found to be of local heritage significance and that the following constituted further investigations and considerations: [at 39]:

(a) the requirement for public exhibition, which was included in the gateway determination: [at 22]. It was Mr Larkin's view that this exhibition and comment from the public was part of the "further enquiry or investigation" envisaged by s 25(2) of the Heritage Act;

(b) the pending submission from the New South Wales Office of Environment and Heritage, arising from their consultation, required by the gateway determination; and

(c) the additional research of the extant works of Edwin Roy Orchard to determine the rarity of the item, as identified by Mr Stapleton: [at 29]; and

(4) The Court was satisfied by the fact that the applicant sought consent for the demolition of the item that the item was likely to be harmed and the second test was met: [at 39].

Anagnostou & anor v Canterbury Bankstown Council **[2017] NSWLEC 1320** (O'Neill C)

Facts: The applicants appealed under s 30(1) of the *Heritage Act 1977 (NSW)* (**the Heritage Act**) against the making of an Interim Heritage Order (IHO) by Canterbury Bankstown Council which included the properties at 13 and 15 Crinan Street, Hurlstone Park. The two properties contained adjoining shopfronts, with a residence over, and formed part of a retail strip of shops extending down Crinan Street from the railway station. The two shops were located within a draft heritage conservation area (**Crinan Street Shops HCA**) included in a planning proposal to amend the Canterbury Local Environmental Plan 2012 and the gazettal of the amending Canterbury Local Environmental Plan was due later in the year. The Stage 2 Hurlstone Park Heritage Assessment Study had recommended that the two shops not be listed as local heritage items, but had identified the shops as contributory to the draft HCA.

Issue: Whether the part of the IHO applying to the two shops should be revoked.

Held: Upholding the appeal; IHO revoked in part.

(1) The purpose of an IHO is to protect the potential heritage item while it is determined if the potential item's local heritage significance reaches the threshold for heritage listing at a local or state level: at [23];

(2) The identification of the two shops as contributory to the collective significance of the Crinan Street Shops HCA was not equivalent to a finding of local heritage significance for an item and did not meet the threshold of local heritage significance in s 25(2) of the Heritage Act: at [25]; and

(3) The part of the IHO over the two shops had served its statutory purpose of protecting the potential heritage item while further research was undertaken. As it was determined that the two shops did not reach the threshold of local heritage significance for heritage listing, the part of the IHO over the two shops was revoked: at [25].

Arxidia Pty Ltd v Randwick City Council; Arthur Wong Pty Ltd v Randwick City Council **[2017] NSWLEC 1463** (Dickson C)

Facts: These proceedings related to two adjoining properties at 21 and 23 Harbourne Road, Kingsford where the applicant sought to change the use of the current dwellings to boarding houses. Arxidia Pty Ltd and Arthur Wong (**the applicants**) appealed, pursuant to s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), against the refusal of the development applications. Harbourne Road is located within close proximity to the Kingsford Commercial Centre and the University of New South Wales. The applications were lodged, utilising the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPPARH**).

Issues:

(1) Whether the developments were compliant with the mandatory standards in SEPPARH;

(2) Whether the designs of the developments were compatible with the character of the local area (SEPPARH cl 30A);

(3) Whether the developments appropriately mitigated impacts on adjoining neighbours; and

(4) Whether the development provided appropriate facilities and amenity for the boarding house residents.

Held: Dismissed the appeal; refused development consent.

(1) The wording of SEPPARH at cl 29(2)(e)(ii) did not require the provision of a manager's vehicular parking space for the developments due to the use of the phrase "not more than one": at [80];

(2) The intent of the wording "at least 0.2 spaces" at s 29(2)(e)(i) of SEPPARH was to round up the vehicular parking requirements generated by the development, consistent with the observations of Fakes C in *Lam v Ashfield Council* [2015] NSWLEC1195 at [68]: at [81];

(3) The application of cl 30(1)(b) of SEPPARH in relation to the provision of motorcycle spaces was specifically different to the clause relating to car-parking. The wording of cl 30(1)(h) provided a threshold at which the requirement for a space was mandated, and an additional motorcycle space was only required when the relevant threshold was met: at [83];

(4) The likely impacts of the development on the locality (s 79C(1)(b) of the EP&A Act) were not reasonable and warrant the refusal of the applications for the reasons that:

(i) a poor address will contribute negatively to the streetscape of Meeks Lane;

(ii) the overlooking would impact the visual privacy of adjoining residents and that the intensity of this impact was higher in a boarding house over that from the existing residential dwellings, as the frequency of occupation of the bedrooms was greater;

(iii) in the absence of an acoustic report it was not possible to assess the potential impacts of noise generated from the internal communal spaces: at [92]; and

(5) The development provided poor internal amenity for residents for the reasons that:

(i) the development provided poor pedestrian access and in requiring entry through the ground-floor living area rendered that space unsuitable for its use: at [98];

(ii) the reliance on obscure glazing to obviate the privacy impacts had the effect of diminishing the internal amenity of the boarding rooms to an unsatisfactory level: at [99]; and

(iii) due to poor internal site planning, the positioning of waste collection would have a likely detrimental impact on the enjoyment of the communal kitchen and living space due to odour: at [100].

***Fang v Li & anor* [2017] NSWLEC 1503** (Galwey AC)

Facts: Mr Fang (**the applicant**) applied to the Court pursuant to Pt 2 s 7 of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**the Trees Act**) seeking orders regarding two trees on a neighbouring property owned by Ms Li and Mr Xie (**the respondents**). Mr Fang wanted a native Turpentine tree pruned on the basis that limbs were likely to fall and cause damage or injury. He wanted a Tulip tree removed on the grounds that it was likely to drop limbs onto his dwelling and that its roots had damaged his dwelling, a path and some pipes.

Apart from wanting the Tulip tree removed to prevent further damage, the applicant sought compensation for repairs that he would have to carry out to his dwelling, path and pipes.

There were two cracks in the external walls of the applicant's dwelling: one at the join between the original part of the dwelling and a later extension; and another above and below a bathroom window in the extension.

Mr Fang provided two engineering reports and an arborist's report to support his application. The respondents also engaged an arborist and an engineer, both of whom gave evidence at the on-site hearing.

Issues:

(1) Whether the Turpentine was likely to cause damage or injury and, if so, whether it should be pruned or removed;

(2) Whether the evidence demonstrated that the Tulip tree's roots had damaged Mr Fang's dwelling, path or pipes; and

(3) If the Tulip tree had damaged Mr Fang's property, whether he should receive compensation and whether the tree should be removed.

Held: Orders were made for both trees to be removed at the respondents' cost; no orders were made for compensation.

(1) At the hearing, the respondents' arborist recommended that the Turpentine tree should be removed, as it was structurally unsound and its form was unsuited to pruning. The commissioner accepted that the tree's form and structure were unsuited to pruning, and it should be removed: at [19];

(2) The Tulip tree had dropped branches on the applicant's dwelling, causing damage. The respondents had agreed to pay the applicant's insurance excess resulting from that incident, and the applicant sought no further compensation for damage from limbs. Although the respondents had subsequently engaged an arborist to prune the tree, the applicant remained concerned that more limbs would fall onto his dwelling during storms. Although the Court's jurisdiction under the Trees Act was enlivened by past damage, the commissioner found that the risk of further limb failure was low and no orders were made regarding this element of the applications: at [24];

(3) The Tulip Tree was little more than two metres from the applicant's dwelling. The applicant purchased his property in 2013, at which time the extent of damage to the dwelling, path and pipes were likely to be similar to their condition at the time of the application. The applicant had not noticed the damage prior to purchasing the property, and so had suffered no apparent loss himself. The respondents purchased their property in 2014 - their actions, or lack of any actions, had not contributed to the damage: at [72];

(4) One of the engineers engaged by the applicant had removed a section of the concrete path adjacent to the dwelling, exposing damaged pipes and two large roots from the Tulip tree. Both engineers concluded that a root growing beneath the wall's foundation had pushed upwards on the foundation, causing the wall above to crack. Neither engineer took any building level measurements to confirm that this was the case. One of the engineers also referred to numerous documents regarding indirect root damage (resulting from soil drying and shrinkage) despite his conclusion that the damage resulted from direct damage. Despite the engineering reports, the commissioner could not be satisfied that the Tulip tree was responsible for the cracks in the dwelling wall. Other possible causes of the damage had not been excluded, and there was insufficient evidence to demonstrate causation by tree roots. It is not the first time that expert reports obtained by parties in proceedings involving structural damage had provided insufficient evidence of causation to satisfy the commissioner. For this reason, the commissioner published a Tree Dispute Principle in the judgment to provide parties and their experts in future proceedings with a list of matters that might be investigated to demonstrate causation of structural damage: at [59];

(5) The commissioner found that the Tulip tree had damaged the applicant's path and pipes, and the respondents provided no suitable solutions to rectification that would allow the tree to remain, without damage recurring. Therefore, the commissioner ordered removal of the Tulip tree: at [79]; and

(6) Cracks in the building could be easily repaired. Neither party's actions were responsible for causing the damage. As the trees belonged to the respondents, they were responsible for the costs of tree removal. No orders were made for compensation or repair to the applicant's property, as the applicant could carry these out at his own expense as he wished: at [85].

MPG Investments Pty Ltd v Willoughby City Council **[2017] NSWLEC 1442** (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 Willoughby City Council to grant consent to a six-storey residential flat building, with a rooftop terrace and two basement levels, at 155-161 Willoughby Road,

Willoughby. The site was located in an area zoned for medium density residential development and the proposal was permissible with consent. The operative consent for a commercial use on the site was preserved pursuant to s 109B of the EP&A Act and the site benefited from existing use rights within the meaning of s 106 of the EP&A Act.

Issues:

(1) Whether the development standards for height of buildings and floor-space ratio in the Willoughby Local Environmental Plan 2012 (**the WLEP 2012**) were applicable to the determination of the development application;

(2) If the development standards were applicable to the determination of the development application, whether the exceedance of the height of buildings and floor-space ratio development standards in the WLEP 2012 was justified as an incentive for the applicant to abandon the existing use; and

(3) Whether the exceedance of the height of buildings and floor-space ratio development standards was justified by the urban context of the site, which included a nine-storey building on the adjoining property to the north.

Held: Appeal dismissed.:

(1) The development standards in the WLEP 2012 were applicable to the determination of the development application: at [33];

(2) The exceedance of the height and floor-space ratio development standards in the WLEP 2012 was not justified as an incentive for the applicant to abandon the existing use. The provision of an incentive or a reward for an applicant to abandon an existing use is a policy decision that would be appropriately reflected in the planning regime and this argument was unsubstantiated by the provisions of Div 10 of the EP&A Act regarding existing uses: at [34];

(3) The exceedance of the height of buildings development standard was not justified by the presence of a nine-storey residential building to the north of the site because it was an anomaly in the context, in that it deviated from all surrounding development in its vicinity, and the proposal would not read in the context as a transitional building envelope: at [35]; and

(4) The use of design criteria in the Apartment Design Guide to gauge the performance of an existing residential flat building on an adjoining property in relation to the proposal in order to justify the acceptability of the proposal was inappropriate when used to rationalise a non-complying element of a proposal's building envelope. Instead, the actual increase in overshadowing on the winter solstice of an adjoining residential building and its detrimental impact should be assessed in relation to a non-complying building envelope: at [41].

Samowill Pty Ltd v Queanbeyan-Palerang Regional Council; Samowill Pty Ltd v Heritage Council of New South Wales **[2017] NSWLEC 1550** (Dickson 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 Queanbeyan-Palerang Regional Council (**the Council**) to grant consent to a five-lot subdivision to allow future residential development. The application was not provided concurrence from the Heritage Council of NSW (**NSW Heritage**) due to the development's detrimental impact on the heritage item: "Braidwood and its Setting" (SHR 01749). The subject site formed part of land locally known as the "Police Paddock" and sat within the listed area of the item.

Issues: Whether the proposed development would have a detrimental impact on the significance of the SHR listing of "Braidwood and its Setting"; and whether, following merit evaluation, the development warranted approval.

Held: Appeal dismissed and consent refused.

(1) Notwithstanding that the Tallanganda Local Environment Plan 1991 provides for residential subdivision, in and of itself, that was not sufficient to determine the appropriate development on the site. In this matter, the heritage listing and the statement of significance acted as an additional layer of parameters to consider in the merit assessment of the application: at [at 73];

(2) On the basis of the evidence in the current proceedings, it is my view that the heritage listing has the effect of limiting development on the site such that subdivision, whilst a permissible use in the relevant zone, may not able to be achieved in the form proposed by the current application (*Grigorakis v Bayside Council* [2016] NSWLEC 1573 at [35]): [at 74]; and

(3) The impact of the proposed development on the heritage significance of the item sufficiently detrimental to warrant refusal of the application pursuant to s 79C(1)(b) of the EP&A Act for the reasons that:

(a) the visual cohesiveness of the "Police Paddock", as one large expanse, contributed to its importance, and the importance of the item "Braidwood and its Setting" and the proposed development would detrimentally impact on this significance (SHR Criteria A: Historical Significance);

(b) the inclusion of the "Police Paddock" within the historic bounds of the town is recognised in the listing as part of the historic form and fabric of the town (SHR Criteria F& G: Rarity and Representativeness);

(c) the proposed subdivision was contrary to and discordant with the simple grid design of the town and would have a detrimental impact on the significance of the item (SHR Criteria G: Representativeness);

(d) the former police barracks was sited on the localised rise within the sites topography. The Court was not satisfied that the form of subdivision proposed, or the placement of building envelopes, was responsive to this feature of the "Police Paddock" or its role as a surviving historic element (SHR Criteria G: Representativeness); and

(e) the proposal was not an alternative that achieved the objectives of the relevant controls and the variations to Council's controls were not warranted in this instance: [at 76].

- Registrar decisions

***Jomasa Pty Limited v City of Ryde Council* [2017] NSWLEC 1530** (Froh R)

Facts: This notice of motion was not strictly an application for expedition. Rather, the applicant sought hearing dates in October or November 2017, effectively seeking to accelerate the hearing of the matter. In determining whether to accelerate the proceedings and grant a hearing date in the range being sought, the test for expedition was considered.

The site is located at 146 Bowden Street, Meadowbank (**the site**). On 29 April 2009, the respondent granted development consent for a five-storey residential flat building, consisting of 61 residential dwellings with 4,000 square metres of basement car-parking (**the development consent**).

The development consent and subsequent VPA required the construction of a stormwater drain and gross pollutant trap (**the stormwater works**) before issuing the occupation certificate.

On 22 August 2017, the applicant provided the respondent with detailed engineering drawings for the stormwater drainage works pursuant to the VPA and Development Consent (**stormwater works**).

On 31 August 2017, the respondent sent a letter to the applicant rejecting the proposed stormwater works.

The residential dwellings on the site had been completed and were ready for occupation, with all fixtures, fittings and appliances installed. Of the 61 flats that have been built, approximately 30 flats had been sold off-the-plan. However, without an occupation certificate, the applicant could not complete the off-the-plan contracts. The sunset date for the contracts was 31 January 2018.

It was the applicant's uncontested evidence that the applicant was and will continue to suffer commercial hardship and some purchasers who have bought units off-the-plan and sold their homes are affected due to the delay in obtaining the occupation certificate.

Issue: Should the applicant be granted an early hearing date.

Held: Notice of motion dismissed.

(1) The relevant principles for expedition decision were set out in the decision of Young J in *Greetings Oxford Koala Hotel Pty Limited v Oxford Square Investments Pty Limited* (1989) 18 NSWLR 33 as follows:

> "(e) that the applicant is suffering hardship not caused through his own fault; [and]
>
> …
>
> (h) that there are large sums of money involved.": at [17]

(2) In *BGY North Ryde Pty Limited v City of Ryde Council* [2015] NSWLEC 1558, Gray R (as she then was) considered an application to expedite proceedings which involved off-the-plan purchasers. In that case, the applicant had sold 650 residential apartments off-the-plan in reliance that approval would be forthcoming from the City of Ryde Council. Relevant to the present application, Gray R stated at [25]:

> "in moving to sell the apartments [off-the-plan], the applicant has taken a risk that may result in financial consequences. That is a risk that was open to the applicant to take, but it is not a matter that can then be used by the applicant to cause the Court to be compelled to expedite the proceedings": at [19]; and

(3) Similarly in this matter, whilst there was likely to be financial consequences for the applicant and those purchasers as a result of the proceedings not being expedited, those consequences were an inherent risk of a development of this nature and were not grounds which warrant expedition: at [20].

District Court

***Five Star Medical Centre Pty Limited v Kempsey Shire Council* [2017] NSWDC 250** (Russell DCJ)

Facts: By a statement of claim filed on 9 December 2015, the plaintiff sued the defendant for property damage to an aircraft. The plaintiff was the owner of the aircraft, VH-ZVT. The defendant was the local government authority in the Kempsey area. It was the owner and registered operator of the Kempsey Aerodrome.

On 25 February 2014, the aircraft was landing at Kempsey Aerodrome when it collided with a kangaroo that had strayed onto the runway. Fortunately, no person was injured. There was damage to the aircraft and there was no dispute about the quantum of that damage, being $161,195.85.

The facts leading up to the collision were not in dispute; however, complex issues arose as a result of the accident.

Issues: The nature of the duty of care, if any, the defendant owed to the plaintiff, the extent of the duty, breach, and damage.

Held: Judgment for the plaintiff against the defendant for $195,853.51; defendant to pay the plaintiff's costs.

(1) The defendant owed a duty to take reasonable care to avoid the foreseeable risk of a collision between an animal and an aircraft at Kempsey Aerodrome causing damage to the aircraft or harm to its occupants: at [101];

(2) The risk of a collision between an aircraft and a kangaroo at the Kempsey Aerodrome causing damage to an aircraft or harm to its occupants was foreseeable. It was a risk of which the defendant knew or ought to have known. All the evidence pointed to the defendant knowing of the risk and appreciating it. Not only was the risk foreseeable, but that it was actually foreseen by the defendant: at [114];

(3) The risk was not insignificant. While the probability of a collision was not high, it was a definite prospect, and probably just a matter of time if nothing was done. The harm which could have occurred was extremely serious: at [115] and [118]-[119];

(4) The burden of taking precautions to avoid the risk of harm, by giving notice to airmen, was minimal to nil, and by a kangaroo-proof fence, the burden would have required spending about $100,000: at [120]-[121];

(5) There was a failure by the defendant to take reasonable care via various appropriate steps: at [129]-[146].

Court News

Arrivals/Departures

Commissioner Sue Morris retired on 27 June 2017.

Commissioner Sarah Bish commenced on 28 June 2017.

Senior Commissioner Rosemary Martin has resigned. Her last day with the Court is 26 January 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.