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Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Amendment (Housing Supply) Regulation 2022 (NSW) - this Regulation amended the Environmental Planning and Assessment Regulation 2021 (NSW) (**EPA Regulation**) to:

- require the name of the registered community housing provider who will manage dwellings used for affordable housing to be specified in a development application for certain residential flat building development carried out by, or on behalf of, a public authority or social housing provider, or by certain joint ventures (**relevant development**); and
- extend the period during which a development consent for relevant development is subject to certain conditions in s 84(3) to 15 years, in line with affordable housing requirements for the development under s 40 of the State Environmental Planning Policy (Housing) 2021.

Environmental Planning and Assessment Amendment (Avoided Land) Regulation 2022 (NSW) - this Regulation requires a development application relating to certain infrastructure development on avoided land to be accompanied by a statement setting out whether the development is consistent with the Cumberland Plain Conservation Plan Guidelines. "Avoided land" is land in Western Sydney with important biodiversity values identified in the State Environmental Planning Policy (Biodiversity and Conservation) 2021 Strategic Conservation Planning Avoided Land Map for which certain additional planning controls apply under Pt 13.3 in Ch 13 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021. This Regulation also requires that a determining authority notify the Secretary of the Department of Planning and Environment of a decision to carry out or modify such development.

Environmental Planning and Assessment Amendment (Notice Requirements) Regulation 2022 (NSW) - this Regulation amended the EPA Regulation to require certain consent authorities to notify particular determinations of development applications and reviews in the form approved by the Secretary of the Department of Planning and Environment unless the notice is in relation to State significant development or Crown development.

- **Local Government:**

Local Government Amendment Regulation 2022 (NSW) - this Regulation postponed the repeal of the Local Government (General) Regulation 2021 (NSW) and the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 (NSW) to 1 September 2025.

- **Water:**

Water Management (General) Amendment Regulation 2022 (NSW) - this Regulation inserted a new cl 248A into the Water Management (General) Regulation 2018 (NSW) to provide that a person who constructs or uses a water supply work smaller in capacity than the water supply work the person is approved to construct or use must notify the Minister for Lands and Water of the smaller capacity. The notified smaller capacity of the water supply work was also made relevant to the s 231(1) exemptions from s 229 mandatory metering equipment conditions.

- **Criminal:**

Crimes (Sentencing Procedure) Amendment Act 2022 (NSW) - this Act amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) by inserting a new provision that requires a court, except in certain circumstances, to sentence an offender in accordance with the sentencing patterns and practices at the time of sentencing.

- **Pollution:**

Protection of the Environment Operations (General) Regulation 2022 (NSW) - This Regulation remade, with amendments, the provisions of the Protection of the Environment Operations (General) Regulation 2021 (NSW) (**2021 Regulation**), which was repealed on 1 September 2022. Key changes introduced in the 2021 Regulation include:

- introduction of a new application fee, and updated and indexed existing fees;
- amendments to the definition of some scheduled activities in the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) such as extractive activities and aquaculture;
- changes to National Pollutant Inventory (**NPI**) reporting requirements to capture the amount of NPI substances used each year;
- clarified pollution incident and response management plan testing requirements for licensees; and
- aligning of thresholds for waste generation activities with the POEO Act.

Protection of the Environment Operations (Clean Air) Amendment Regulation 2022 (NSW) - this Regulation postponed the repeal of the Protection of the Environment Operations (Clean Air) Regulation 2021 (NSW) from 1 September 2022 to 16 December 2022.

- **Miscellaneous:**

Contaminated Land Management Regulation 2022 (NSW) - this Regulation repealed and remade, with minor amendments, the Contaminated Land Management Regulation 2013 (NSW), which was subject to repeal on 1 September 2022 by virtue of s 10(2) of the *Subordinate Legislation Act 1989* (NSW) (**Subordinate Legislation Act**). This Regulation provided for:

- the observance of certain guidelines about financial assurances;
- the waiver or refund of the accreditation fee payable by a site auditor under certain circumstances;
- a requirement for the following particulars of each site audit to be included in the annual return: whether the audit is a statutory site audit, the termination date of a terminated audit and the reason for the termination, and the date of issue of a revised or amended statutory site audit statement and the reason for the revision or amendment; and
- increases to the amounts payable for certain penalty notice offences under the *Contaminated Land Management Act 1997* (NSW).

Forestry Regulation 2022 (NSW) - this Regulation remade, with amendments, the Forestry Regulation 2012 (NSW) (**2012 Regulation**), which was subject to repeal on 1 September 2022 by virtue of s 10(2) of the Subordinate Legislation Act. This Regulation is mostly in line with the 2012 Regulation. However, new requirements have been inserted for bee-keeping and grazing activities in certain forestry areas.

Place Management NSW Regulation 2022 (NSW) - this Regulation repealed and remade, with some amendments, the Place Management NSW Regulation 2017 (NSW) (**2017 Regulation**), which was subject to

repeal on 1 September 2022 by virtue of s 10(2) of the Subordinate Legislation Act. This Regulation is generally consistent with the 2017 Regulation in that it oversees the management of land and asset use, as well as conduct, in public areas, and also outlines penalty notice offences in public areas, allowing on-the-spot fines for certain offences.

Judicial Officers Regulation 2022 (NSW) - this Regulation remade, without substantial changes, the Judicial Officers Regulation 2017 (NSW), which was repealed on 1 September 2022. It sets out the process for lodging complaints with the Judicial Commission of New South Wales and requires those complaints to be verified by statutory declaration.

Protection of the Environment Operations (General) Amendment (Thermal Energy from Waste) Regulation 2022 (NSW) - this Regulation amended the Protection of the Environment Operations (General) Regulation 2021 (NSW) to impose a prohibition on the thermal treatment of waste that involves or results in energy recovery, as well as works to enable this activity to be carried out. It also provided for certain exceptions to the prohibition, including if the activity or work is carried out at certain precincts or premises, is a pre-existing established and operating activity at the premises, or is carried out to replace a less environmentally sound fuel in certain circumstances.

Conveyancing (General) Amendment (Transport Asset Holding Entity of New South Wales and Landcom) Regulation 2022 (NSW) - this Regulation prescribed the Transport Asset Holding Entity of New South Wales and Landcom as corporations that may impose restrictions on the use of land, or impose public positive covenants on land, whether or not the land is vested in the corporation. It also prescribed the Transport Asset Holding Entity of New South Wales as a corporation in favour of which an easement without a dominant tenement may be created.

Government Information (Public Access) Amendment (Greater Sydney Commission) Regulation 2022 (NSW) - this Regulation amended the Government Information (Public Access) Regulation 2018 (NSW) to provide that, for the purposes of the *Government Information (Public Access) Act 2009* (NSW), the Greater Sydney Commission is no longer declared to be a part of, and included in, the Department of Planning and Environment.

Acts Assented to but not yet in Force:

Environmental Planning and Assessment Amendment (Sustainable Buildings) Regulation 2022 (NSW) - this Regulation amended the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) (**DCFS Regulation**) and the EPA Regulation in response to the newly-announced State Environmental Planning Policy (Sustainable Buildings) 2022 (**Sustainable Buildings SEPP**; also summarised in this newsletter at p 5). This Regulation will come into effect on 1 October 2023, at the same time as the Sustainable Buildings SEPP. The following amendments were introduced to the DCFS Regulation:

- requirement for a construction certificate application for non-residential development under the Sustainable Buildings SEPP to disclose the amount of embodied emissions attributable to the development;
- requirement for a construction certificate application for large commercial development under the Sustainable Buildings SEPP to be accompanied by reports about the energy and water use standards achieved by the development, taking into account Sustainable Buildings SEPP standards;
- insertion of a new subs (c) into ss 15(3) and 43(3) of the DCFS Regulation to provide that "[i]f the development application was also required to be accompanied by a Building Sustainability Index (**BASIX**) certificate for a building, the design quality principles do not need to be addressed to the extent to which they aim … (c) to quantify and report on the embodied emissions attributable to the development"; and
- replacement of "meet the Government's requirements for sustainability" in s 71(3)(c) of the DCFS Regulation with "achieve the standards that apply to the development under [Sustainable Buildings SEPP]".

The following amendments were also introduced to the EPA Regulation:

- insertion of a new subs (c) into ss 29(3) and 102(3) of the EPA Regulation to provide that "[i]f the development application is accompanied by a BASIX certificate for a building, the design quality principles do not need to be addressed to the extent to which they aim … (c) to quantify and report on the embodied emissions attributable to the development";
- requirement for a development application for non-residential development under the Sustainable Buildings SEPP to disclose the amount of embodied emissions attributable to the development and describe the use of low emissions construction technologies in the development;

- requirement for a development application for large commercial development and State significant non-residential development under the Sustainable Buildings SEPP to include evidence that the development will not use on-site fossil fuels after occupation and use commences. The development application must also include details of any renewable energy generation and storage infrastructure forming part of the development and passive and technical design features that minimise energy consumption by users of the development. If available, information about the estimated annual energy consumption for the building and the estimated amount of emissions relating to energy use in the building, including direct and indirect emissions, must be included in the development application;
- requirement for a development application for large commercial development under the Sustainable Buildings SEPP to be accompanied by a copy of a National Australian Built Environment Rating System (**NABERS**) agreement that demonstrates the development is capable of achieving the energy and water use standards specified in the Sustainable Buildings SEPP; and
- making it a condition of development consent for large commercial development under the Sustainable Buildings SEPP that the following are given to the consent authority: a NABERS water and energy assessment, and evidence that the offsets required for the development have been purchased and surrendered (Australian carbon credit units or large-scale generation certificates) or obtained (Climate Active certification).

Environmental Planning and Assessment Amendment (Conflict of Interest) Regulation 2022 (NSW) - this Regulation, which will commence on 3 April 2023, imposes requirements on councils to manage conflicts of interest that may arise in connection with council-related development applications because the council is the consent authority. "Council-related development applications" are defined in a new cl 9B in Sch 1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to include development applications for which council is the consent authority, and that are made by or on behalf of council, or is for development on land of which the council is an owner, lessee, or licensee, or for land that is otherwise vested in or under the control of the council. The EPA Regulation will be amended to require council-related development applications to be accompanied by a management strategy regarding conflicts of interest or a statement that the council has no management strategy for the application. The amendments also require that a council-related development application must not be determined under s 4.16 of the EPA Act unless the council has adopted a conflict of interest policy and considers the policy in determining the applicaton. Furthermore, the amendments will introduce requirements regarding the keeping of information about conflicts of interest and their management in a council's register of development applications and consents under s 240 of the EPA Regulation.

Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Act 2022 (NSW) - this Act, which will commence on 1 February 2023, amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (**LEPR Act**) and the *Criminal Procedure Act 1986* (NSW) to:

- provide for digital evidence access orders;
- require a specified person to provide reasonable and necessary information or assistance to enable access to data held in a relevant computer;
- prevent an application for review of a crime scene warrant causing a stay on the operation of a digital evidence access order in connection with the warrant;
- require the Minister to conduct a review of the proposed provisions set out in the proposed LEPR Act; and
- provide that the offence of giving false or misleading information in applications for a digital evidence access order is a summary offence.

State Environmental Planning Policy (SEPP) Amendments:

State Environmental Planning Policy (Transport and Infrastructure) Amendment (Miscellaneous) (No 2) 2022 - this policy amended the State Environmental Planning Policy (Transport and Infrastructure) 2021 to create the following exempt and complying development:

- the use of a railway station room for the purposes of commercial premises, community facilities or public administration buildings is exempt development if certain requirements are met;
- development for the purposes of automatic teller machines, coffee carts or vending machines is exempt development if certain requirements are met; and
- the use of a railway station room for the purposes of commercial premises, community facilities or public administration buildings is complying development if certain requirements are met.

State Environmental Planning Policy Amendment (Housing Supply) 2022 - this policy introduced minor miscellaneous amendments to the State Environmental Planning Policy (Housing) 2021, State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, and the State Environmental Planning Policy (Transport and Infrastructure) 2021.

State Environmental Planning Policy (Biodiversity and Conservation) Amendment (Strategic Conservation Planning) 2022 - among other amendments, this policy inserted a new Ch 13 (Strategic conservation planning) into the State Environmental Planning Policy (Biodiversity and Conservation) 2021, with the aims to:

- ensure development in nominated areas is consistent with biodiversity certification under the *Biodiversity Conservation Act 2016* (NSW) and strategic assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- facilitate appropriate development on biodiversity certified areas;
- identify and protect areas with high biodiversity value or regionally significant biodiversity that can support ecological functions, including threatened ecological communities, species and areas with important connectivity or ecological restoration potential;
- avoid or minimise impacts from future development on biodiversity values in areas with high biodiversity value; and
- support the acquisition of priority areas with high biodiversity value as conservation lands in perpetuity.

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Change of Use) 2022 - among other amendments, this policy inserted a new subcl (4) into cl 2.20B of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. This new subclause sets out various additional development standards applicable to a change of use referred to in Category 5 of the table in cl 2.20A (being changes from a current use of "food and drink premises" or "shop" to a new use of "entertainment facility" or "information and education facility").

State Environmental Planning Policy Amendment (Coastal Mapping and Native Vegetation) 2022 - this policy, which commenced on 3 October 2022, made changes to certain definitions in s 2.2 of the State Environmental Planning Policy (Resilience and Hazards) 2021 and expanded the application of Pt 2.3 in Ch 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (in relation to council permits for clearing of vegetation in non-rural areas) to include certain additional vegetation.

State Environmental Planning Policy (Sustainable Buildings) 2022 - this policy will commence on 1 October 2023 and was made with aims to:

- encourage the design and delivery of sustainable buildings;
- ensure consistent assessment of the sustainability of buildings;
- record accurate data about the sustainability of buildings, to enable improvements to be monitored;
- monitor the embodied emissions of materials used in construction of buildings;
- minimise the consumption of energy;
- reduce greenhouse gas emissions;
- minimise the consumption of mains-supplied potable water; and
- ensure good thermal performance of buildings.

The policy updates Building Sustainability Index (**BASIX**) standards for new residential buildings, including higher standards for energy use, water use, and thermal performance. Sustainability provisions will also be introduced for non-residential development, including a requirement for consent authorities to consider factors relating to waste, peak energy demand, artificial lighting, heating and cooling, renewable energy, energy consumption, and potable water consumption when deciding whether to grant development consent. For large commercial development and State significant development, the consent authority will also be required to consider whether the development minimises use of on-site fossil fuels, as part of the goal of achieving net zero emissions in NSW by 2050. Large commercial development must also be capable of achieving specified energy and water use standards. Certain non-residential properties, including industrial sites and shopping centres, will be excluded from the operation of these provisions. For both residential and non-residential development, provisions are included such that the consent authority must not grant development consent unless it has satisfied itself that the embodied emissions attributed to the development have been quantified. Savings and transitional provisions were included so that the policy will not apply to development applications or modification applications that had already been submitted, but not yet determined by the commencement date. The State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 will be repealed when this policy commences.

Miscellaneous :

The Minister for Planning has made the following Local Environmental Plans:

- Central Coast Local Environmental Plan 2022 (commenced on 1 August 2022); and
- Inner West Local Environmental Plan 2022 (commenced on 12 August 2022).

The Minister for Lands and Water has made the following Orders amending water sharing plans pusuant to s 45(1) of the *Water Management Act 2000* (NSW) (**Water Management Act**):

- Water Sharing Plan for the Gwydir Regulated River Water Source Amendment Order 2022;
- Water Sharing Plan for the Gwydir Unregulated River Water Sources Amendment Order 2022;
- Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source Amendment Order 2022;
- Water Sharing Plan for the NSW Border Rivers Regulated River Water Source Amendment Order 2022;
- Water Sharing Plan for the Darling Alluvial Groundwater Sources Amendment Order 2022;
- Water Sharing Plan for the Murray Alluvial Groundwater Sources Amendment Order 2022; and
- Water Sharing Plan for the Macquarie-Bogan Unregulated Rivers Water Sources Amendment Order 2022.

Access Licence Dealing Principles (Interstate Assignments) Order 2022 - this Order pursuant to s 71Z of the Water Management Act prohibited the interstate assignments of water allocations from Victoria and South Australia to access licences in the New South Wales Murray, Lower Darling, and Murrumbidgee Regulated River water sources. This is to mitigate the risk that water traded from Victoria or South Australia to New South Wales access licenceholders is not available to be delivered in the future because of the inability to capture inflows while Hume Dam is spilling. This Order commenced on 5 August 2022 and ceases to have effect on 31 December 2022, unless repealed earlier.

Judgments

South Africa:

Sustaining the Wild Coast NPC and Ors v Minister of Mineral Resources and Energy and Ors **[2022] ZAECMKHC 55** (Mbenenge JP)

Facts: A number of non-profit organisations, traditional communities and local fishers (**Applicants**) brought proceedings in the High Court of South Africa (Eastern Cape Division, Makhanda) (**Court**) seeking to judicially review decisions by the Minister of Mineral Resources and Energy of South Africa (**Minister**) to grant an exploration right to Shell Exploration & Production South Africa BV (**Shell**) and Impact Africa Limited (**Impact**), allowing them to conduct seismic surveys off the south-east coast of South Africa (**Wild Coast**) to seek oil and gas reserves. The Wild Coast is a haven for marine and bird life, including endangered, threatened and protected species, and is home to traditional communities steeped in customary practices. The seismic surveys would have involved a vessel towing a six-kilometre-long array of airguns discharging pressurised air at regular intervals to generate low-frequency soundwaves directed at the seabed in order to map for oil and gas reserves. The Applicants sought to set aside the Minister's decisions on the grounds of, among others, procedural unfairness and failure to take into account relevant considerations, being the anticipated harm of the seismic surveys to marine and birdlife and the applicant communities' spiritual and cultural rights and rights to livelihood, and climate change considerations.

Issue: Whether the Minister's decisions to grant an exploration right to oil and gas companies, which would have allowed them to conduct seismic surveys off the Wild Coast, were lawful.

Held: Setting aside the exploration right as the Minister's decisions were unlawful; the Court found in favour of the Applicants on all grounds of review:

(1) The consultation process carried out with the applicant communities was procedurally unfair. The proposed exploration activities were first publicised in newspapers that were outside the local area of some of the applicant communities and were in a language not understood by those communities. The Court noted that

if the "consultants and those who mandated them were serious about reaching out to the applicant communities, they would have seen their way clear to utilising a newspaper that is in a language spoken by the majority of the people in the area concerned": at [99], [103];

(2) It was incorrect for consultations to have only been conducted with traditional leaders. The Court noted that "[t]here is no law, and none was pointed to, authorising traditional authorities to represent their communities in consultations". Further, "meaningful consultations consist not in the mere ticking of a checklist, but in engaging in a genuine, *bona fide* substantive two-way process aimed at achieving, as far as possible, consensus". The applicant communities were not given proper notice of the nature and purpose of the proposed seismic survey, the information required to make meaningful representation, or the opportunity to make representations. The corollary of this was that factors that the Applicants would have placed before the Minister to inform the decision-making process were not considered: at [92], [93], [95], [102], [103];

(3) Due to the apparent dispute between the parties' experts as to the adequacy of the mitigation measures minimising the known effects of seismic surveys to marine and bird life, the Minister should have adopted a precautionary approach. The onus rested on the party refuting the applicability of the precautionary principle to establish that the principle was of no application. The failure of the Minister to take this principle into account was fatal to the grant of the exploration right: at [109], [110], [123];

(4) The decisions were unlawful as there was no evidence that the Minister considered the potential harm of the seismic surveys to the Applicants, including their religious and ancestral beliefs and practices, and ability to sustain themselves from the sea, when making the decisions: at [114], [116], [119]; and

(5) The Court rejected the argument that climate change considerations are irrelevant when considering an application for an exploration right as such considerations are premature and fall to be considered at a later stage. The Court recognised that the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis. The Court concluded that had the Minister had the benefit of considering a comprehensive assessment of the need and desirability of exploring new oil and gas reserves for climate change, the decision-maker may very well have concluded that the proposed exploration is neither needed nor desirable: at [122], [123], [125].

United States of America:

West Virginia et al v Environmental Protection Agency et al 597 US (2022) (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ)

Facts: In 2015, the United States Environmental Protection Agency (**EPA**) promulgated the Clean Power Plan (**CPP**) rule, which sought to reduce carbon dioxide emissions from existing coal-fired and natural gas-fired power plants in three ways. First, existing power plants undertaking to burn coal more cleanly. Second, effecting a shift in generation from existing coal-fired power plants, which would produce less power, to gas-fired power plants, which would produce more power. Third, effecting a shift in generation from both coal and gas power plants to renewable energy sources. The EPA cited s 111(d) of the *Clean Air Act 1963* (US) (**CAA**) as providing authorisation to make the CPP. Under that section, the EPA can determine the "best system of emission reduction… that has been adequately demonstrated" for the kind of existing source.

Issue: Whether s 111(d) of the CAA authorised the generation shifting approach in the CPP to reduce emissions from existing coal-fired power plants.

Held: The United States Supreme Court (**Court**) (Roberts CJ, Thomas, Alito, Gorsuch, Kavanaugh and Barrett JJ), with a concurring opinion of Gorsuch J in which Alito J joined, held that it did not; Kagan J, with whom Breyer and Sotomayor JJ (**minority**) agreed, dissenting, held that it did:

(1) The Court applied the "major questions doctrine", which holds that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there": at [19];

(2) The Court described "extraordinary cases" as ones "in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority": at [17];

(3) The Court noted that in such extraordinary cases, courts "'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism'". To convince the court otherwise, the agency "must point to 'clear congressional authorization' for the power it claims": at [19];

(4) The Court identified the following circumstances which made this case a major questions case: the EPA's claim that s 111(d) "empowers it to substantially restructure the American energy market" based on "an unheralded power" discovered "in a long-extant statute"; the location of that power in the "vague" language of an "ancillary" provision of the CAA; and that the EPA's discovery "allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself": at [20];

(5) Given these circumstances, the Court held that "there is every reason to 'hesitate before concluding that Congress' meant to confer on [the] EPA the authority it claimed under [s] 111(d)": at [20];

(6) The Court found that the generation shifting approach in the CPP was "unprecedented" and "effected a 'fundamental revision'" of the CAA as, prior to the CPP, the EPA had always set s 111 emission limits based on measures that would cause the regulated source to operate more cleanly: at [20], [21], [24];

(7) The Court held that the "vague statutory grant" of authority by s 111(d) to the EPA to establish emission limits at a level reflecting "the application of the best system of emission reduction… adequately demonstrated" was "not close to the sort of clear authorization required by our precedents": at [28];

(8) The Court concluded that "Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.'… But it is not plausible that Congress gave [the] EPA the authority to adopt on its own such a regulatory scheme in [s] 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body": at [31];

(9) The minority disputed the legitimacy and application of the "major questions doctrine" as a rule of statutory interpretation. The question of whether the CPP was authorised by the CAA was to be determined by the "normal text-in-context statutory interpretation": at [15];

(10) Applying this normal rule of statutory interpretation, the minority held that the CPP was authorised by s 111(d) of the CAA: [5]-[9], [19], [20]-[22], [32].

(11) According to the minority, the generation shifting enabled by the CPP was the "best system of emission reduction", being the most effective and efficient way to reduce power plants' emissions: at [4]-[5];

(12) The minority observed that the history of regulation shows that "Congress makes broad delegations in part so that agencies can 'adapt their rules and policies to the demands of changing circumstances.'… To keep faith with that congressional choice, courts must give agencies 'ample latitude' to revisit, rethink, and revise their regulatory approaches": at [26]-[27];

(13) The minority found that this was what Congress had done with the CAA. The enacting Congress had told the EPA, in s 111(d) of the CAA, to pick the "best system of emissions reduction", recognising that the "best system" would change over time. Congress wanted and instructed the EPA "to keep up". The EPA followed those statutory directions when it issued the CPP: at [27]; and

(14) The minority concluded that the generation shifting approach was the best system of emissions reduction and accorded with the enacting Congress's choice: at [27], [30]-[31].

Federal Court of Australia:

Bob Brown Foundation Inc v Minister for the Environment (No 2) **[2022] FCA 873** (Moshinsky J)

(related decision: *Bob Brown Foundation Inc v Minister for the Environment* [2022] FCA 498 (Moshinsky J))

Facts: The Bob Brown Foundation Inc (**Applicant**) sought judicial review of a decision of a delegate of the Minister for the Environment made on 6 January 2022 that certain design and assessment works proposed to be undertaken by the MMG Australia Limited (**Second Respondent**) did not constitute a "controlled action" for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The proposed action involved geotechnical works and investigations, activities to inform the design and assessment of a proposed tailings storage facility for the Second Respondent Rosebery mine operations on the west coast of Tasmania. The decision did not require any specific measures to be taken to protect the Tasmanian Masked Owl, which is a listed threatened species under the EPBC Act. North Barker Ecosystem Services (**NBES**), the consultants engaged by the Second Respondent to undertake a flora and fauna habitat assessment, had recommended that measures be adopted in relation to the Tasmanian Masked Owl. The delegate provided a statement of reasons for the decision on 7 February 2022 (**Statement of Reasons**). The Applicant applied to the Federal Court of Australia (**Court**) under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for review of the decision.

Issues: Whether, in making the decision, the delegate:

(i) made a decision that was not authorised by the EPBC Act;

(ii) failed to take a relevant consideration into account in the exercise of the power; and/or

(iii) erred in law,

in that she failed to comply with her obligation under s 391(1) of the EPBC Act to take account of the precautionary principle in making her decision under s 75 of the EPBC Act (**primary ground**). Two alternative grounds were pleaded but did not need to be decided.

Held: Primary ground established; submissions to be made on appropriate orders:

(1) The Court applied Preston CJ's discussion of the precautionary principle in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 (***Telstra***) to the EPBC Act: at [19];

(2) It was apparent from the Statement of Reasons that the delegate did not comply with the obligation in s 391(1) to take account of the precautionary principle. To comply with this obligation, it was necessary for the delegate to consider whether the first condition precedent of the precautionary principle as stated in *Telstra* (that is, if there are threats of serious or irreversible environmental damage) was satisfied. This required the decision-maker to bring an active intellectual process to the matter. The Court was satisfied that the delegate failed to do this. While a number of "threats" to the Tasmanian Masked Owl were identified, the delegate did not discuss whether those threats were serious or irreversible. In the absence of this discussion, the Court inferred that the delegate failed to consider it: at [48];

(3) The delegate jumped straight into the question of whether the proposed action would have a significant impact on the Tasmanian Masked Owl. However, it was necessary for the delegate to first consider whether there were "threats of serious or irreversible environmental damage", being the first condition precedent to the application of the precautionary principle. The delegate did not do this: at [49];

(4) While the Statement of Reasons at the end stated that the delegate had taken into account of the precautionary principle, the Court did not accept that the precautionary principle had been applied in the case of the Tasmanian Masked Owl. The section of the Statement of Reasons dealing with the Tasmanian Masked Owl did not refer to the precautionary principle. Further, it was difficult for the Court to accept that the delegate applied the precautionary principle in circumstances where NBES recommended that certain measures be taken to protect the Tasmanian Masked Owl, but the delegate did not require the proposed action to be undertaken in accordance with those measures: at [52];

(5) The obligation to take account of the precautionary principle in making a decision listed in the table in s 391(3) is an important obligation that requires active intellectual engagement with, at least, the first condition precedent to the application of the principle. The Court was satisfied that that did not take place in relation to the Tasmanian Masked Owl: at [53].

New South Wales Court of Appeal:

Foundas v Arambatzis (No 5) **[2022] NSWCA 113** (Bell CJ, White JA and Basten AJA)

(related decisions: *Foundas v Arambatzis* [2020] NSWCA 47 (Bell P, Basten and White JJA); *Foundas v Arambatzis (No 4)* [2020] NSWCA 100 (Bell P, Basten and White JJA))

Facts: Ms Cassiani Foundas (**Applicant**), and Mr Peter Arambatzis (**Respondent**), were registered proprietors of two properties as tenants in common in equal shares. One property was in Stanwell Crescent, Ashcroft (**Stanwell Crescent property**) and the other was in Magee Street, Ashcroft (**Magee Street property**).

On 15 October 2018, Darke J made orders on the application of the Respondent appointing trustees for sale of the Magee Street property. His Honour ordered that the net proceeds of sale be divided between the parties equally after payment of the trustees' commission, costs and other expenses. His Honour also gave judgment for the Respondent against the Applicant in the sum of $108,983.93 in respect of the surplus of proceeds of sale of the Stanwell Crescent property. Those orders were made in the Applicant's absence. On 6 September 2019, Darke J dismissed a Notice of Motion filed by the Applicant seeking to set aside the orders of 15 October 2018.

The Applicant appealed as of right from those orders and her appeal was determined by the New South Wales Court of Appeal (**Court**) on 24 March 2020. The appeal was allowed, in part, but the Applicant was substantially unsuccessful. The orders of the Court of 24 March 2020, as varied on 28 May 2020, varied the orders made on 15 October 2018, discharged a stay of the orders of 15 October 2018 and 6 September 2019, required the

Applicant to deliver vacant possession of the Magee Street property to the trustees for sale, and ordered that they be at liberty to obtain a writ for possession. The orders were duly entered.

On 26 February 2021, the Applicant filed a Notice of Motion seeking a stay of a writ of possession that had by then been issued. In support of that Notice of Motion, the Applicant made an affidavit in which she deposed that, on 3 December 2013, she and the Respondent had made a deed in which the Respondent disclaimed any beneficial interest in either the Magee Street or the Stanwell Crescent properties. The Applicant had not previously produced this document, nor referred to its existence. By an Amended Summons seeking leave to appeal and Notice of Motion, the Applicant applied to reopen her appeal that had been determined by the orders of 24 March and 28 May 2020.

Issue: Whether, having already made final orders partly allowing the Applicant's earlier appeal from the orders of 15 October 2018 but substantially dismissing the appeal from those orders, the Court had the authority to reopen the appeal, set aside its earlier orders, and set aside the orders of the primary judge of 15 October 2018, on the ground of the discovery of new evidence.

Held: Amended Summons seeking leave to appeal and Notice of Motion dated 28 May 2021 both dismissed (White JA; Bell CJ and Basten AJA agreeing):

(1) The Court did not have power to reopen the earlier appeal and set aside the orders; no application to set aside the orders had been made before the orders were entered or within 14 days of entry in accordance with rr 36.16(1) and (3A) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**): at [18]-[19]. Furthermore, the former power of a Chancery judge to set aside an enrolled decree on the ground of the discovery of new evidence did not survive the appeal provisions introduced by the *Equity Act 1880* (NSW), and could not be relied upon as an alternative power to set aside an order under r 36.16(4) of the UCPR: at [21], [27], [30].

Olde English Tiles Australia Pty Ltd v Transport for New South Wales **[2022] NSWCA 108** (Ward P, Gleeson, Mitchelmore JJA, Basten AJA, Preston CJ of LEC)

(related decision: *Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2021] NSWLEC 90 (Duggan J))

Facts: Roads and Maritime Services compulsorily acquired a parcel of land on Parramatta Road, Camperdown. The registered owners of the land were Mr Antonino and Mrs Carmel Gaudioso. Mr and Mrs Gaudioso were also the sole directors and shareholders of Olde English Tiles Australia Pty Ltd (**Olde English Tiles**). Olde English Tiles occupied premises on the land in accordance with a bare licence terminable at will by the registered owners.

Offers of compensation were made to both Mr and Mrs Gaudioso and to Olde English Tiles pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**). Both challenged the adequacy of the compensation offered in separate proceedings, heard together, in the Land and Environment Court. The primary judge awarded over $10 million to Mr and Mrs Gaudioso for the market value of the acquired land, legal costs and valuation fees. The primary judge dismissed Olde English Tiles' claim for loss attributable to disturbance, finding that it did not have a compensable interest in the acquired land because its bare licence was terminable at will (*Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2021] NSWLEC 90). Olde English Tiles challenged that conclusion and appealed the decision of the primary judge to the New South Wales Court of Appeal (**Court**).

Issue: Whether Olde English Tiles had a compensable interest under the Land Acquisition Act because it had a "privilege over, or in connection with, the land" within the meaning of "interest" in land under s 4 of the Land Acquisition Act.

Held: Appeal dismissed; Appellant to pay Respondent's costs (per Basten AJA; Ward P, Gleeson and Mitchelmore JJA, and Preston CJ of LEC agreeing):

(1) The definition of "interest" in land in s 4 must be construed in its statutory context. First, a primary object of the Land Acquisition Act is to guarantee compensation at "not less than the market value of the land". This assumes that a compensable interest has some market value. Secondly, the Land Acquisition Act uses the language of 'ownership' in relation to acquired land. Thirdly, the source of a "privilege over, or in connection with, land" must be in a legally enforceable instrument or arrangement for it to be divested, extinguished or diminished by the acquisition. If the privilege is not legally enforceable and is not extinguished by acquisition, it is not a compensable interest. Finally, the right to obtain compensation for loss attributable to other losses and expenses (such as disturbance) is contingent upon the holder having a right to receive compensation for the market value of the interest. Read together, the holder of a bare licence or permission

to occupy land, terminable at will by the owner, has no foundation or interest on which to build a claim for compensation for losses attributable to disturbance under the Land Acquisition Act: at [38]-[46];

(2) The finding that a bare licence terminable at will is not an interest in land under the Land Acquisition Act is consistent with existing authorities. The reasoning in those cases was not clearly wrong and should not be overturned: at [48]-[70]; and

(3) In any event, the earlier authorities should not be overturned because the Land Acquisition Act has been the subject of substantial subsequent amendment, without any change to the effect of the authorities: at [71]-[74].

Supreme Court of New South Wales:

Bathurst Regional Council v Natural Resources Access Regulator **[2022] NSWSC 846** (Basten AJ)

Facts: Bathurst Regional Council (**Council**) was the holder of an approval under the *Water Management Act 2000* (NSW) (**Water Management Act**) to "construct and use" Winburndale Dam (**approval**). The conditions of the approval included obligations to release water into the Winburndale Rivulet. On 5 June 2020, an officer of the Natural Resources Access Regulator (**Regulator**) issued a caution and show cause notice to the Council stating that investigations found that releases from the dam into the rivulet were not compliant with condition DK3944 of the approval. This was said to contravene s 91B(2) of the Water Management Act. The Council asserted a different understanding of conditions DK3752 and DK3944 of the approval and sought a declaration from the Supreme Court of New South Wakes (**Court**) in relation to the operation of the conditions. In particular, the Council sought a declaration that condition DK3752 regulated the volume of the flow of water to be released from the dam, while the condition DK3944 regulated the rate of flow of the release. The relevant conditions provided:

DK3752	A When the water level in the dam, authorised by this approval, is below its crest level, flows entering the storage must be released through the 300mm valve to ensure the release of: (i) 20% of the increment of the storage conserved in the preceding flow event, or (ii) 50% of the increment of the storage conserved in the preceding flow event when a drought declaration has been made by the New South Wales Government, or (iii) 80% of the increment of the storage conserved in the preceding flow event when exceptional circumstances have been announced by the Commonwealth Government in response to prolonged drought. B Water must be released from the dam only: (i) on request from the relevant licensor, and (ii) when inflows have been recorded for not more than 28 days before the request…
DK3944	The 300mm valve must be operated to maintain a flow in the watercourse downstream of the dam. The flow must be equal to the flow entering the storage of the dam or the capacity of the 300mm pipe, whichever is the lesser discharge.

Issue: The proper construction of the conditions of the approval.

Held: Declaration that the primary obligation of the Council with respect to the discharge of water from the Winburndale Dam, pursuant to the condition DK3944 of Approval No 80CA723483, was to release from the dam a volume of water equal to the daily inflow, but not exceeding the daily capacity of the 300-millimetre discharge pipe, given the water level of the dam:

(1) Having regard to earlier versions of the conditions, it would be a large step to read condition DK3944 as other than what was formerly clearly a general requirement because it now occurs at the end, rather than the beginning, of the list of conditions. Something more would be required to read condition DK3944 as limited to circumstances where condition DK3752 was not engaged: at [15], [25]-[27];

(2) Little weight should be given to the Council's contention that it was necessary to invoke DK3752 to impose a volumetric limit on the discharge required by condition DK3944. Condition DK3944 already had a volumetric limitation in place as it required the release of water at a flow "equal to the flow entering the

storage of the dam". The volume to be released was dependent on the volume entering the dam: at [28]-[29];

(3) The Council's submission that condition DK3944 only operated in circumstances where condition DK3752 was not engaged gave rise to an incoherent result. The alternative conclusion was that condition DK3944 also applied when the water level was below the crest: at [30]-[31];

(4) The Court roughly calculated how much water would have been stored in the dam if inflows had been discharged to the full capacity of the discharge pipe on certain days when total inflows to the dam exceeded the capacity of the pipe. While these calculations supported the Council's contention that release in accordance with condition DK3944 would undermine the storage function of the dam, it was not clear that there was an alternative reading of condition DK3944 which would avoid this result: at [32]-[38];

(5) It was appropriate to identify in a declaration the operation of condition DK3944, but not condition DK3752 as that condition was not the basis of the alleged breach which led to the caution: at [54];

(6) The primary obligation of the Council pursuant to condition DK3944 was to release from the dam a volume of water equal to the daily inflow, but not exceeding the daily capacity of the 300mm discharge pipe, given the water level of the dam: at [56];

(7) The declaration could not address the validity of the caution and that the practical operation of the dam may require an agreement between the Council and the Regulator: at [52], [54].

Land and Environment Court of New South Wales:

- **Judicial Review:**

Council of the City of Ryde v Network Developments NSW Pty Ltd **[2022] NSWLEC 101** (Pepper J)

Facts: On 26 March 2021 Waratah Certifiers Pty Ltd (**Waratah**) issued complying development certificate 2020/101 (**CDC**) to Network Developments NSW Pty Ltd (**Respondent**) for the demolition of an existing house and the construction of a four-unit manor house, also known as multi dwelling housing, in Ryde (**development**), pursuant to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 and Ryde Local Environmental Plan 2014 (**RLEP 2014**). The development was on land zoned R2 Low Density Residential (**R2 zone**). The Respondent lodged the application for the CDC on 20 October 2020. At that time, RLEP 2014 permitted multi dwelling housing within the R2 zone. However, on 5 March 2021, RLEP 2014 was amended by the Ryde Local Environmental Plan 2014 (Amendment No 28) 2021 (**Amendment 28**) such that multi dwelling housing became prohibited development within the R2 zone. A savings provision, cl 1.8A(3), was also inserted into RLEP 2014. Clause 1.8A(3) stated that Amendment 28 did not apply to "development applications" already made but not finally determined before the commencement of those amendments. Amendment 28 came into effect on 26 March 2021, the same day the CDC was granted.

The Council of the City of Ryde brought judicial review proceedings against the Respondent, contending that by the operation of Amendment 28 Waratah did not have the power to issue the CDC because multi dwelling housing was prohibited in the relevant zone as at the date of issue. The savings provision contained in cl 1.8A(3) of RLEP 2014 did not assist the Respondent because it only saved development applications not CDCs. The Respondent contended that cl 1.8A(3) of RLEP 2014 did save the CDC having regard to the context of RLEP 2014. The Respondent further argued that the CDC could be saved on a separate basis by the operation of either s 30(1)(b) or (c) of the *Interpretation Act 1987* (NSW) (**Interpretation Act**) because this section preserved accrued rights despite amendment or appeal of any Act or statutory rule.

Issue: Whether the CDC was invalid by the operation of amended RLEP 2014:

(i) whether the savings provision contained in cl 1.8A(3) of RLEP 2014 could be construed to preserve CDC applications such that Amendment 28 did not apply to the CDC;

(ii) whether the context of Amendment 28, which was enacted as a result of a planning proposal that stated that amendments to RLEP 2014 should include a broad savings provision to preserve "any development applications or appeal processes", meant that a broader construction of cl 1.8A(3) preserving the CDC should be preferred by the Court; and

(iii) whether s 30(1)(b) or (c) of the Interpretation Act operated to prevent Amendment 28 from applying to the CDC because that Act preserved accrued rights despite the amendment to RLEP 2014.

Held: The CDC was invalid; Respondent was restrained from undertaking the development in reliance upon it; Respondent ordered to pay Council's costs:

(1) Clause 1.8A(3) of RLEP 2014 only saved "development applications". That term was defined to expressly exclude CDCs in s 1.4 of *the Environmental Planning and Assessment Act 1979* (NSW): at [39]-[40;

(2) Despite the planning proposal, the clear text of cl 1.8A(3) could not be displaced by its context, and therefore, RLEP 2014 did not apply to save the CDC: at [25] and [39]-[64]; and

(3) The CDC was not saved by s 30(1)(b) or (c) of the Interpretation Act because the operation of that Act was subject to a contrary intention. The language of cl 1.8A(3) of RLEP 2014 plainly and unambiguously excluded CDCs from the savings provision: at [67]-[74].

Hitchcock v Reed **[2022] NSWLEC 81** (Robson J)

Facts: By summons, Paula Hitchcock (**Applicant**) sought a declaration that a development consent granted by Woollahra Municipal Council (**Council**) on 27 June 2011 and later modified on 31 March 2014 and 23 September 2015 (**consent**) for substantial alterations and additions and associated landscaping works to a dwelling house in Watsons Bay (**site**) had lapsed; and an order restraining Genevieve Reed, who was the and registered proprietor of the site (**Respondent**), from taking any action in reliance on the consent. The Respondent maintained that the demolition of two existing dormer windows and construction of a new dormer and stair (**dormer works**) undertaken in late 2015 and early 2016 at the dwelling house comprised physical commencement of the development such that the consent did not lapse on 27 June 2016 for the purpose of (now) s 4.53 of the *Environmental Planning and Assessment Act 1979* (NSW). The Respondent admitted that she had not complied with eight conditions of consent prior to carrying out the dormer works.

Issues:

(1) Whether, on the proper construction of the consent, the Respondent was required to comply with the eight subject conditions before carrying out the dormer works; and

(2) Whether the consent had lapsed.

Held: Declaration that the consent had lapsed; order restraining the Respondent from relying on the consent; Respondent to pay Applicant's costs:

(1) Seven of the conditions of consent required compliance before undertaking the dormer works:

  (a) the consent contained a "Condition B.1" which required all conditions with "Part C and Part D" of the consent to be complied with; and

  (b) the conditions of consent must be read to reflect that the dormer works formed part of the "works" (as referred to in various forms) generally the subject of the consent: at [67], [72]-[75]; and

  (c) the Respondent was required: to establish tree protection zones because the dormer works involved activities from which identified trees required protection (at [76]); to submit to Council for assessment a demolition and construction management plan because the dormer works involved works and activities which were relevant to such an assessment (at [77]-[78]); to prepare and submit to Council a soil and water management plan, a landscape plan and stormwater drainage plan prior to being issued the construction certificate for the dormer works, taking into account the heading to Part C and the "prescription" of Condition B.1 (at [80]-[83]); to complete and submit dilapidation surveys and reports prior to the commencement of "any development work" (at [84]-[85]); and to establish a "work zone" prior to the commencement of "any work": at [86];

(2) The Respondent was not required to comply with one condition of consent which required an application to Council for approval of "infrastructure works" related to crossways and driveways prior to undertaking the dormer works, because the condition was drafted in express terms as only applying to the issuing of a discrete construction certificate in relation to defined "infrastructure works" of which the dormer works did not comprise: at [79]-[80]; and

(3) As the Respondent had not complied with conditions of the consent which required compliance, the dormer works were not carried out in accordance with the consent, could not be said to "relate to" the development works the subject of the consent, and could not be described as having "commenced" the development the subject of the consent, such that the consent had lapsed: at [92].

***IOF Custodian Pty Limited atf 105 Miller Street North Sydney Trust v Special Minister for State* [2022] NSWLEC 86** (Duggan J)

Facts: IOF Custodian Pty Limited atf 105 Miller Street North Sydney Trust (**Applicant**) challenged the decision of the First Respondent, the Special Minister for State (**Minister**), to direct the Heritage Council (**Second Respondent**) to list the building known as the MLC Building in the North Sydney CBD on the State Heritage Register. Following recommendations by the Second Respondent and the Independent Planning Commission, the Minister directed the listing of the MLC Building on the State Heritage Register pursuant to s 34(2) of the *Heritage Act 1977* (NSW) (**Heritage Act**) on 31 May 2021 and published the reasons for the decision to list on its website. Of the nine grounds raised by the Applicant, the determinative ground upon which the Applicant challenged the Minister's decision was whether the Minister had failed to consider a mandatory consideration, namely, those contained in ss 32(1)(c) and 32(1)(d), being "whether the listing would render the item incapable of reasonable or economic use; and whether the listing would cause undue financial hardship to the owner … of the item or the land on which the item is situation". It was accepted between the parties that the reasons published by the Minister did not explicitly refer to those mandatory considerations.

Issue: Whether an inference could be drawn from the documentary material that the Minister considered the mandatory considerations set out in s 32(1) of the Heritage Act.

Held: Declaration made that decision invalid; Respondents ordered to set aside and remove heritage listing:

(1) Whilst the material suggested the Minister may have possessed general knowledge of the subject matter relating to the listing, this was not enough to demonstrate sufficient intellectual engagement with the relevant mandatory considerations to resolve the conflicting considerations of heritage protection and the economic impacts on the landowner: at [103]; and

(2) Whilst in some cases an inference could be drawn that the Minister's reasons were not an expression of the totality of his reasons, this could only occur where there was evidence to the contrary. In this case, such evidence was not adequate to overcome that hurdle and so the reasons provided must be understood as an expression of the totality of the matters considered: at [104].

- **Criminal:**

***Environment Protection Authority v Crush and Haul Pty Ltd; Environment Protection Authority v Cauchi* [2022] NSWLEC 113** (Preston CJ)

Facts: Crush and Haul Pty Ltd (**Crush and Haul**) was prosecuted by the Environment Protection Authority (**EPA**) for, and pleaded guilty to, the offence of carrying out extractive activities without an environment protection licence (**EPL**) at Corindi Quarry, near Coffs Harbour, contrary to s 48(2) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). An EPL was required to extract more than 30,000 tonnes. During 2018, Crush and Haul sold 92,966.28 tonnes of extractive materials from Corindi Quarry, exceeding the lawful limit of 30,000 tonnes per year by over 60,000 tonnes. Mr Luke Cauchi was the sole director of Crush and Haul in 2018. Mr Cauchi was also charged with, and pleaded guilty to, an offence against s 169A(2) of the POEO Act.

Issue: What is the appropriate sentence to impose on Crush and Haul and Mr Cauchi.

Held: Crush and Haul convicted; fined $225,000; publication order made; moiety of 50% of the fine to the EPA; ordered to pay the EPA's costs as agreed or assessed:

Objective seriousness of the offence

(1) While Crush and Haul's carrying on of the scheduled activity of land-based extractive activity without holding an EPL did not cause actual harm to the environment, Crush and Haul's conduct undermined the regulatory scheme of the POEO Act: at [13]-[17];

(2) Crush and Haul committed the offence recklessly. Crush and Haul had knowledge or foresight of the likelihood of the consequence or circumstance, that the 30,000 tonnes threshold would be exceeded triggering the need for an EPL, occurring: at [18]-[82];

(3) Even though Crush and Haul did gain financially from selling more than it was permitted to without an EPL, the EPA did not prove beyond reasonable doubt that Crush and Haul committed the offence for financial gain: at [83]-[86];

(4) Crush and Haul had control over the causes of the offence as it operated Corindi Quarry: at [89];

(5) By reason of the factors above, the Court found that the offence committed by Crush and Haul was of low to medium objective seriousness: at [90];

Objective circumstances of the offender

(6) The two penalty notices received by Crush and Haul did not establish that Crush and Haul had a significant record of prior convictions as these notices related to different activities at different premises from six years ago: at [92];

(7) Crush and Haul's early plea of guilty attracted the full discount of 25% for the utilitarian value of the plea of guilty to the criminal justice system: at [93];

(8) The Court accepted statements by Mr Cauchi and Mrs Cauchi that Crush and Haul was remorseful for committing the offence: at [94]-[101];

(9) Mr Cauchi was replaced by Mrs Cauchi as the sole director of Crush and Haul. The Court accepted that there was a risk that Crush and Haul might reoffend while Mrs Cauchi is the sole director of Crush and Haul as Mrs Cauchi has been a director of companies that have breached the POEO Act: at [102]-[106];

Publication order

(10) The Court ordered Crush and Haul to publish the publication order in the *Sydney Morning Herald* and the *Northern Rivers Times*, as these have greater circulation than the *Daily Telegraph* and the *Coffs Coast News of the Area* and thus better achieve the purpose of general deterrence: at [112]-[114];

Held: Mr Cauchi convicted; fined $22,500; publication order made; moiety of 50% of the fine to the EPA; ordered to pay the EPA's costs as agreed or assessed:

Objective seriousness of the offence

(1) While Mr Cauchi's commission of the offence did not cause actual environmental harm, his failure to control Crush and Haul's conduct undermined the integrity of the regulatory scheme: at [117]-[118];

(2) The EPA did not establish beyond reasonable doubt that Mr Cauchi committed the offence recklessly. The matters identified by the EPA as evidencing Mr Cauchi's recklessness in committing the offence were not evidence of recklessness, but illustrations of Mr Cauchi committing the offence: at [119]-[129];

(3) Mr Cauchi had control over the causes of the offence as he was the director of Crush and Haul: at [132];

(4) By reason of the factors above, the Court found that the offence committed by Mr Cauchi was of low objective seriousness: at [133];

Subjective circumstances of the offender

(5) The penalty notice issued to Mr Cauchi did not cause him to have a significant record of previous convictions as the notice was for a different offence at a different place six years ago: at [135];

(6) The Court accepted that Mr Cauchi is a person of prior good character, taking into consideration three character references tendered by Mr Cauchi that spoke of him being an honest and hardworking man who sought to conduct his business in accordance with the law: at [136];

(7) Mr Cauchi's early plea of guilty afforded him the full discount of 25% for the utilitarian value of the plea of guilty to the criminal justice system: at [137];

(8) The Court accepted Mr Cauchi's statements as evidencing his remorse for committing the offence: at [138];

(9) The Court found that Mr Cauchi is unlikely to reoffend as he had insight into his offending, was genuinely remorseful, and had changed his business: at [139]-[140]; and

Publication order

(10) The publication order should refer to Mr Cauchi, as persons involved in the management of corporations carrying on scheduled activities are more likely to be deterred if they know that they too might be named in a publication order if they commit an offence against s 169A(2) of the POEO Act: at [149].

Environment Protection Authority v Forestry Corporation of NSW **[2022] NSWLEC 70** (Robson J)

Facts: Forestry Corporation of New South Wales (**Defendant**) pleaded guilty to four offences against s 2.14(2) of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**) while conducting forestry operations in Wild Cattle Creek State Forest in north-east New South Wales, in contravention of conditions of its biodiversity conservation licence (**BCL**): First, one "rolled-up" offence that, between 12 and 19 April 2018, it constructed or operated two snig tracks within a Koala high-use area exclusion zone (**KEZ**) and, on or about 23

to 24 April 2018, felled four trees within the KEZ (**Koala offence**); second, that on or about 12 February 2018, it felled two trees in an area mapped as "Rainforest" (**RA1 offence**); third, that on or about 14 September 2018, it felled one tree in an area mapped as "Rainforest" (**RA2 offence**); and, fourth, that on or about 11 June 2018, it felled two trees in an exclusion zone around "warm temperate rainforest" (**WTRF offence**).

Issue: The appropriate sentence to be imposed.

Held: Convicted and fined $60,000 for the Koala offence; $27,000 for the RA1 offence; $27,000 for the RA2 offence, and $21,600 for the WTRF offence, 50% of each penalty to be paid to the Environment Protection Authority (**Prosecutor**); ordered to pay costs in the agreed sum of $150,000; and to publicise the sentences:

(1) The Koala offence was in the medium range of objective seriousness, and each of the RA1 offence, RA2 offence and WTRF offence were in the low to moderate range of objective seriousness, with the WTRF offence being less objectively serious than the RA1 and RA2 offences: at [159]-[160]:

   (a) the offences, which amount to undertaking prohibited activities within exclusion zones other than in accordance with conditions of the BCL undermined the protective statutory scheme of the Biodiversity Conservation Act and the *Forestry Act 2012* (NSW): at [57]-[58];

   (b) each of the offences caused, or were likely to have caused, harm to the environment, which, in the case of the Koala offence, RA1 offence and RA2 offence was substantial such as to be an aggravating factor. The Court was not constrained by the *De Simoni* principle from considering harm to Koala habitat, and the Court found that the Koala offence caused actual harm by reducing the size and quality of Koala breeding habitat. The RA1 offence (which occurred in a redeveloping rainforest) and RA2 offence (which likely occurred in rainforest) caused environmental harm in that each caused ecological impacts including canopy gap, loss of habitat, removal of tree seedling banks, increased bushfire risk and would take at least a century to recover. The WTRF offence caused harm to the environment, including deleterious effects on the rainforest and its edge, however, due to its (smaller) area of disturbance, not so much as to be substantial: at [121]-[138];

   (c) there were practical measures the Defendant could have taken to prevent the harm caused by the commission of each offence, including avoiding entering and disturbing the exclusion zones, marking exclusion zones in the field, and (in relation to the Koala offence) ensuring a system to check contractors had available the latest harvest plan operation map (**HPOM**) where contractors had not received the HPOM which recorded the KEZ: at [144];

   (d) the Defendant could reasonably have foreseen the environmental harm caused or likely to be caused by the offences where the Defendant lacked a process to ensure contractors had available the latest HPOM; and where the Defendant was responsible for the provision of GPS equipment and programs to contractors and knew that there were issues (including GPS inaccuracy) in relation to their use: at [146], [148];

   (e) the Defendant had control over the causes giving rise to the offences in that it determined the HPOM and provided instructions to contractors about how to conduct forestry operations: at [150]; and

   (f) there was no evidence that the Defendant committed the offences intentionally or for financial gain: at [153]-[154];

(2) The Defendant's record of prior convictions was not a significant aggravating factor, while its pleas of guilty (which received full utilitarian value), assistance to authorities, good character and low likelihood of similar reoffending (where it amended its processes as a result of the offences), and remorse for the offences were all mitigating factors: at [166]-[167], [170], [176], [180];

(3) An element of general deterrence was appropriate where s 2.14(4) of the Biodiversity Conservation Act forms a critical aspect of the regulatory framework for environmental protection; and specific deterrence was appropriate where the Defendant has prior convictions and has a responsibility to ensure forestry activities are undertaken in a manner that complies with its BCL: at [183], [186];

(4) It was appropriate to make orders for the publication of the sentences in newspapers and on the Defendant's social media pages considering their significant educative and deterrent function: at [196];

(5) The Court was unable to make an order pursuant to s 13.25(1)(e) of the Biodiversity Conservation Act for the payment of an amount into the Biodiversity Conservation Fund where the prosecutor had not specified the project to which an amount would be paid: at [202]; and

(6) The principle of totality was relevant to the RA1, RA2 and WTRF offences and resulted in a 10% reduction in penalty for those three offences, because their criminal behaviour was causally, temporally, and spatially linked: at [208].

Environment Protection Authority v Forestry Corporation of NSW **[2022] NSWLEC 75** (Moore J)

Facts: In April 2019, an employee of the Forestry Corporation of NSW (**Defendant**) identified a disused mineshaft whilst conducting a mark-up of Dampier State Forest (**site**). He considered the mineshaft a safety hazard and marked a 10-metre boundary around it using pink tape. Pink tape had also been used to mark other exclusion zones throughout the site. Upon later inspection, the Defendant's ecologist concluded that the mineshaft met the definition of a disused mineshaft and potential subterranean bat roost under the Threatened Species Licence (**Licence**) in Appendix B to the Southern Region Integrated Forestry Operations Approval. A 40-metre temporary exclusion zone was consequently entered into the Defendant's web-based harvesting operations application (**MapApp**). The mineshaft was later confirmed to be a roost for Eastern Horseshoe Bats; however, the Defendant never returned to mark a physical 40-metre exclusion zone around the mineshaft. On about 2 May 2019, an employee of the Defendant's harvesting contractor carried out tree felling at the site with a harvesting machine. He had with him a Forestry Corporation of NSW iPad with access to MapApp, however, he did not consult the application and instead followed the pink tape when harvesting. The employee inadvertently cleared 0.2 hectares within the mineshaft exclusion zone. The Defendant pleaded guilty to three charges brought against it by the Environment Protection Authority (**Prosecutor**) under s 69SA(1) of the *Forestry Act 2012* (NSW) (**Forestry Act**) for failing to comply with conditions of the Licence. Specifically, the offences comprised "failing to mark the boundary of an environmentally sensitive area as an exclusion zone where a specified 'Forestry Activity' (tree felling) would come within 50 metres of that part of the boundary" (**Breach 1**), "carrying out tree felling in an exclusion zone" (**Breach 2**), and "using harvesting machinery in an exclusion zone" (**Breach 3**).

Issues: The appropriate sentence to be imposed on the Defendant.

Held: Defendant fined a total of $185,000; ordered to pay Prosecutor a moiety of 50% of the total fine; ordered to publish notices of its offences in two specified local publications and two specified trade publications; made subject of an order concerning auditing and training pursuant to s 13.25(1)(d) of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**); and ordered to pay Prosecutor's costs as agreed or assessed and pay Prosecutor's reasonably incurred costs and expenses of $8,000 for the investigation of the offence:

(1) Although the actual harm was (as agreed) minor, the combination of the risk of harm and the damage to the integrity of the regulatory system established through the licensing regime to which the Defendant was subjected (and which it breached) meant that it was not appropriate to regard all of these matters as being at the low end of the low range of harm: at [45];

(2) The Defendant had been convicted five times since December 1988 for offences arising out of its forestry operations. However, although the Defendant had also received 24 official cautions and been issued with 13 penalty notices by the Prosecutor over the past five years, these did not fall within s 21A(3)(e) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as forming part of the Defendant's "record … of previous convictions". They were not to be taken into account for sentencing purposes: at [53]-[54];

(3) The steps being taken by the Defendant to improve its mapping performance (when coupled with the training mandated arising from these proceedings) meant that there was a low likelihood of the Defendant reoffending in the same fashion which had given rise to the present charges: at [60];

(4) Mandating additional training for Defendant's employees and contractors would act as a preventative measure to minimise or avoid future mapping errors. The agreed training had the potential to act in a prophylactic fashion and lessen the risk of future breaches. The preparedness of the Defendant to embrace the commenced and future remedial actions was demonstrative of genuine contrition and remorse: at [67]-[68];

(5) The Defendant's offending conduct, regarded collectively, was toward, but not at, the lower end of the low range of conduct falling within the scope of s 69SA of the Forestry Act: at [84];

(6) As the Defendant engages contractors to undertake activities on its behalf in its extensive forest estate, it was appropriate to send a deterrent message to those contracting to the Defendant, who may undertake activities of a similar mapping type, to be aware of the potential consequences of insufficiently diligent control of such location-defining mapping and marking activities: at [91];

(7) The appropriate starting sentence for each offence was $120,000: at [111];

(8) The Defendant was entitled to the maximum discount of 25% for its early guilty pleas: at [115];

(9) As all three charges arose out of a single course of conduct, it was appropriate to moderate, to some extent, the total penalty to be imposed on the Defendant: at [124]; and

(10) The Defendant was also ordered to pay $45,000 to the Australasian Bat Society Inc to support a specified Eastern Horseshoe Bat research project pursuant to s 13.25(1)(e) of the Biodiversity Conservation Act: at [128]-[129], [159].

Environment Protection Authority v Sphere Healthcare Pty Ltd **[2022] NSWLEC 92** (Duggan J)

Facts: Sphere Healthcare Pty Ltd (**Defendant**), pleaded guilty to the offence of polluting waters pursuant to s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) as occupier of the premises. The offence related to a large fire which occurred at the Defendant's manufacturing facility which resulted in plastic drums containing approximately 31,500 litres of ethanol catching fire and descending into stormwater drains and waters downstream thereof to Clinches Pond, resulting in the pollution of the waters and harm to aquatic fauna. The Defendant's standard operating procedures for the storage of the ethanol had not been followed for the totality of the ethanol, with the relevant portion being stored in an unbunded canopy area adjacent to a stormwater drain, rather than in the flammable goods store as was required.

Issue: Appropriate sentence for the Defendant pursuant to s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 241 of the POEO Act.

Held: Defendant fined $297,500; Defendant to pay the Environment Protection Authority's (**Prosecutor**) legal and investigative costs; publication order made:

(1) Taking into consideration the relevant aggravating features of this offence, being the evidence of significant actual harm to the environment and its amenity; that the Defendant could have implemented practical measures to mitigate risks and did not, as well as the foreseeable nature of the harm caused, the objective seriousness of the offending was at the upper middle range of objective seriousness: at [28], [32], [38], [50]; and

(2) Relevant mitigating factors included the contrition and remorse demonstrated by the Defendant's words and actions in voluntarily undertaking clean-up action; the assistance it provided to the Prosecutor in the clean-up process, the Defendant's guilty plea, and the lack of prior convictions for environmental offences: at [57], [60], [62], [63].

Environment Protection Authority v Sydney Water **[2022] NSWLEC 100** (Moore J)

Facts: Sydney Water Corporation (**Defendant**) operated sewage treatment plants and an associated reticulation system in southern Sydney. Sewage Pumping Station SP0213 (**pumping station**) at Waterside Crescent, Carramar formed part of the reticulation system. The pumping station collected wastewater and pumped it uphill to the North Georges River Submain via a 600-millimetre pressurised pipe (**rising main**) that passed underneath Carrawood Reserve, Carramar. Approximately 80% of the flow into the pumping station came from the nearby Sewage Pumping Station SP0187 via another rising main. This rising main contained a junction and isolation valve (**isolation valve**) through which wastewater could be diverted along a secondary rising main leading to Liverpool Water Recycling Plant.

On the afternoon of 14 January 2019, a sewage overflow was detected at Quest Avenue, Carramar, which was traced to a split in the rising main. Sewage flowed across Carrawood Reserve and into Prospect Creek over the course of approximately 32 hours. During this time, the Defendant organised for inspections and various works to be undertaken to divert the sewage and reduce the overflow. Contractors were sent to operate the isolation valve to divert incoming effluent to Liverpool Water Recycling Plant, however, they were unable to do so. Around 11.50 pm on 15 January 2019, the Defendant shut down the pumping station in order to repair the rising main. It considered the risk that sewage would overflow from the wet well of the pumping station while it was shut down and arranged for tankers to be present to transfer inflowing sewage to an alternative location. The tankers were unable to keep up with the inflow into the pumping station and sewage overflowed into Prospect Creek via an overflow pipe for approximately 1.5 hours.

The Environment Protection Authority (**Prosecutor**) charged the Defendant with three breaches of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), specifically:

(i) the Defendant committed an offence against s 64(1) of the POEO Act in that condition O2.1(a) of its environment protection licence (**EPL**) was contravened. Condition O2.1 stated: "All plant and equipment installed at the premises or used in connection with the licensed activity: a) must be maintained in a proper and efficient condition". It was alleged that the Defendant failed to maintain the isolation valve in a proper and efficient condition, resulting in it being inoperable from about 14 to 16 January 2019, a consequence of

which was that untreated sewerage was unable to be diverted to Liverpool Water Recycling Plant (**valve charge**); and

(ii) the Defendant committed two offences against s 120(1) of the POEO Act in that it "polluted waters" by causing untreated sewage (amongst other pollutants) to:

- enter the rising main and subsequently flow through a split in the rising main into Carrawood Reserve and into Prospect Creek (**rising main charge**); and
- flow into a wet well within the pumping station when it was isolated and subsequently overflow into Prospect Creek (**pumping station charge**).

The Defendant pleaded not guilty to each of the three charges. In relation to the rising main charge, the Defendant sought to rely on the statutory defence in s 122(1) of the POEO Act, namely, that conditions of its EPL had not been contravened. The Defendant also raised the defence of honest and reasonable mistake of fact - the fact being that the rising main would be fit for purpose until at least 2025, with there being no risk of failure before 2023, and only 10% risk of failure arising after 2023. To the pumping station charge, the Defendant raised the defence of necessity, specifically, that the actions leading to the overflow event giving rise to the charge were necessary to avoid the much more dire consequences of failing to repair the rising main. To the valve charge, the Defendant said that it was operator error, not failure to maintain, that prevented use of the valve to divert effluent to the Liverpool Water Recycling Plant.

Issue: Whether the Defendant was guilty of offences under ss 64(1) and 120(1) of the POEO Act, or whether it could rely on the defences pleaded.

Held: Defendant not guilty and acquitted with respect to the valve charge and the rising main charge; Defendant guilty and convicted with respect to the pumping station charge:

(1) In relation to the valve charge, the Prosecutor had not proved beyond reasonable doubt that the failure by one of the Defendant's contractors to operate the isolation valve to divert the sewage stream from Sewage Pumping Station SP0187 arose from a defect in the valve equipment rather than from operator error. It was therefore unable to establish beyond reasonable doubt that condition O2.1(a) of the Defendant's EPL had been contravened: at [169]-[176], [185]-[187];

(2) In relation to the rising main charge, the discharge of the sewage across Carrawood Reserve into Prospect Creek arising from the split in the rising main fell within one of 122 "dry weather" overflow events permitted by the combined operation of conditions L1.3 and L7.4 of the Defendant's EPL, properly construed. This enabled the Defendant to rely on the statutory defence provided for in s 122 of the POEO Act: at [356]-[391]. Alternatively, the Defendant had also established, on the balance of probabilities, the defence of honest and reasonable mistake of fact. The Prosecutor had not established, beyond reasonable doubt, that this defence lacked foundation: at [397]-[417]; and

(3) The Defendant was found guilty in relation to the pumping station charge. The Prosecutor did not submit that the defence of necessity was not available to the Defendant. However, for the Defendant to rely upon a defence of necessity, it had to first establish, on the balance of probabilities, that a relevantly responsible person held a belief on any basis that there was a real and imminent risk of serious harm to human health or life as a consequence of the untreated sewage being discharged into Prospect Creek. The Defendant had not established this belief on the factual evidence: at [531]-[536].

- **Contempt:**

Blacktown City Council v Jason Gabriel Saker (No 4) **[2022] NSWLEC 80** (Pepper J)

(related decisions: *Blacktown City Council v Saker* [2017] NSWLEC 46 (Preston CJ); *Blacktown City Council v Saker (No 2)* [2018] NSWLEC 71 (Molesworth AJ); *Blacktown City Council v Jason Gabriel Saker (No 3)* [2021] NSWLEC 148 (Pepper J))

Facts: Jason Saker (**Respondent**) was found guilty of contempt in *Blacktown City Council v Saker (No 3)* [2021] NSWLEC 148 for failing to comply with the final orders of *Blacktown City Council v Saker (No 2)* [2018] NSWLEC 71 (**Saker (No 2)**). Those orders required Saker to prepare a Waste Removal and Remediation Plan (**plan**) and to provide that plan to the Blacktown City Council. The plan was ordered to remediate waste and fill that had been unlawfully placed onto the Respondent's property and the environmental impacts caused by that fill.

Issue:

(1) What was the appropriate sentence to be imposed on the Respondent;

(2) Whether the Respondent's contemptuous conduct was properly characterised as wilful or contumacious;

(3) Whether the Respondent was aware of the consequences of his contemptuous conduct and the reasons for the commission of the contempt; and

(4) Whether the contempt occasioned likely or actual environmental harm.

Held: Respondent fined $40,000 and ordered to pay an additional periodic fine of $10,000 per calendar month so long as the final orders made in *Saker (No 2)* were not complied with (suspended for a period of 60 days to permit compliance); ordered to pay the Council's costs on an indemnity basis:

(1) The Respondent's contempt was wilful and contumacious because he conceded that the final orders made in *Saker (No 2)* were served on him on 26 February 2020; because he was aware that the Council had commenced contempt proceedings against him; and because he did not intend to purge the ongoing contempt. His conduct therefore disclosed a specific intent to defy judicial authority: at [44]-[55];

(2) Saker was aware of what he was doing by continuing the contempt and he was aware of the consequences of not preparing the plan: at [56]-[58];

(3) The Respondent stated that he committed the contempt because of ongoing flooding on his property. He also explained that the fill was partially caused by others and that his mental illness had limited his capacity to purge the contempt. Those reasons were not accepted. In light of the Respondent's testimony that he would not purge the contempt, it was held that the Respondent had committed the contempt because of his defiance of the Court's authority: at [61]-[65];

(4) The failure to prepare the plan meant that the environmental harms occasioned by the fill were ongoing. Therefore, the Respondent's contempt caused actual environmental harm to an endangered ecological community and threatened species, and potential environmental harm by elevating flooding risks to properties upstream: at [66]-[74];

(5) The Respondent's contempt evinced a disregard for public safety because his ongoing non-compliance with the final orders meant that the flood risks to other properties resulting from the unlawful deposition of the fill were ongoing and that the Respondent was aware of this: at [75]-[78];

(6) The Court, however, was not satisfied beyond doubt that the Respondent committed the contempt for financial gain because the Council did not provide any evidence of such a motivation: at [79]-[82];

(7) There were no mitigating factors weighed in the Respondent's favour: at [84]-[98]; and

(8) General and specific deterrence was warranted to ensure that those minded to flout the Court's authority did not do so and because the Respondent continued to refuse to purge his contempt: at [99]-[104].

- **Civil Enforcement:**

Bronger v Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy **[2022] NSWLEC 91** (Pain J)

Facts: Mr and Mrs Bronger (**Applicants**) commenced civil enforcement proceedings to restrain the use of a pharmacy in Wetherill Park. The Applicants firstly alleged a breach of s 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) because the pharmacy was operating a retail pharmacy or "shop" use which was prohibited in the B5 Business Development zone under the Fairfield Local Environmental Plan 2013 (NSW) (**FLEP 2013**). Secondly, by virtue of the alleged retail pharmacy/shop use, they alleged a breach of the complying development certificate (**CDC**) which authorised a medical centre use. The occupation certificate (**OC**) specifically excluded a "Retail Pharmacy (not including a Medical Pharmacy)". Section 6.4 of the EPA Act states that an OC is taken to be part of the development consent (the definition of which includes a CDC unless expressly or impliedly excluded) to which it relates. The Applicants separately alleged a breach of s 6.9 and s 6.3 of the EPA Act because, relying on the asserted retail pharmacy use, they asserted that the use was being carried out without an OC or in contravention of an OC.

The pharmacy was located in a shopping centre in the middle of a "one-stop shop" hub for medical needs which included doctors' suites and allied health professionals (**Greenway Medical Hub**). The retail pharmacy or shop use was said to arise from the facts that the pharmacy served customers who were not also patients of the medical professionals in the neighbouring suites of the Greenway Medical Hub and also sold personal care products.

The CDC was issued on 30 September 2019 and the OC on 25 June 2020. The Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (NSW) (**Savings Regulation**) affected some provisions of the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (**EPA Amendment Act**) such that an issue of statutory construction arose as to whether the former EPA Act (prior to the commencement of the amendments) or the current EPA Act applied to the CDC/OC. The Savings Regulation stated that the former building and subdivision certification provisions continue to apply in respect of a development consent granted before 1 December 2019. If the former EPA Act applied, s 6.3 and the words added at the end of s 6.4(c) (**tailpiece**) of the EPA Amendment Act would not apply, in circumstances where no equivalent to those provisions was present in the former EPA Act.

Issues:

(1) Whether the former EPA Act or current EPA Act provisions applied to the CDC/OC;

(2) Whether the pharmacy was being used for the purpose of a shop/retail pharmacy, which use was prohibited in the zone;

(3) Whether the pharmacy was being used for the purpose of a medical centre or a retail pharmacy and whether, if the latter, that constituted a breach of the CDC as augmented by the OC, a contravention of the OC, or occupation without an OC.

Held: Amended Summons dismissed; Applicants to pay the Respondent's costs:

(1) As a preliminary conclusion, Pt 4A of the former EPA Act continues to apply to the CDC and OC, although the determination of the other issues posed by the proceedings meant it was ultimately unnecessary to determine the matter finally: at [59]-[73];

(2) The pharmacy was not being used for the purpose of a shop: at [238]. Pharmacists provide a health service and are health practitioners under the *Health Practitioner Regulation National Law 2009* (NSW). They satisfy the definition of "health care professional" under FLEP 2013 (and therefore the pharmacy could satisfy the description of a "medical centre"): at [226]-[227]. The dispensing of drugs by sale pursuant to the ethical obligations and duties of pharmacists as health care practitioners is not to be equated with a retail sale transaction for the purposes of selling personal care products in a shop: at [233]. The volume of products sold that could be characterised as personal care products, although still ancillary to the improvement or maintenance of human health, was minor in the overall operation of the pharmacy business: at [237]. The sale of those items was ancillary to the pharmacy operation as they are complimentary to the sale of medicines and other therapeutic goods: at [238]. No independent shop use was occurring at the pharmacy considering the sale of those items was conducted within the footprint of the pharmacy as identified on the CDC Plans, were low in volume, and limited in range: at [238]; and

(3) The Applicants did not establish that the pharmacy was a retail pharmacy, not a medical pharmacy, in breach of the CDC or OC, even if (contrary to what was found) ss 6.3 and 6.4 of the current EPA Act applied, and even if a breach of s 109N(1)/s 6.9(1) could be relied on in circumstances where an occupation certificate was issued: at [242]-[244], [249]. It is difficult to give the terms "retail pharmacy" and "medical pharmacy" work to do in the absence of any definitions in the planning context: at [245]. Since the retail sale of medicines was integral to the dispensing of medicines by pharmacists in a medical centre with a dispensary, the distinction was not readily apparent: at [246]. A medical pharmacy may be conceived of as one which largely, although not necessarily exclusively, sells medicines to anyone, to be contrasted with a "full service" retail pharmacy which sells items that are not complementary and ancillary to the maintenance and improvement of human health or prevention of disease in humans: at [246]. The existing pharmacy operation did not sell items in that category. The pharmacy operation was limited by the small size of the gondolas [a descriptor used in the judgment] in front of the dispensary, its location at the rear of the medical centre and its self-imposed limits on what it sells: at [247]. No principle of construction justifies a finding that what was occurring was a retail as opposed to a medical pharmacy. Defining those terms by reference to whether customers are patients of the medical centre or not does not serve any obvious planning purpose: at [247]. The signage and advertising does not assist: at [248]. Restrictions on who the pharmacy could sell items to were not warranted in any case. The dispensing of medicines to anyone, be they patients of the medical centre or members of the public, was consistent with the duties of pharmacists: at [251].

Ryan v Northern Regional Planning Panel (No 8) **[2022] NSWLEC 110** (Pain J)

(related decisions: *Ryan v Northern Regional Planning Panel (No 7)* [2021] NSWLEC 125 (Pain J); *Ryan v Northern Regional Planning Panel (No 6)* [2021] NSWLEC 80 (Pain J); *Ryan v Northern Regional Planning Panel (No 5)* [2020] NSWLEC 101 (Pain J); *Ryan v Northern Regional Planning Panel (No 4)* [2020] NSWLEC 55 (Pain J); *Michael Ryan v Northern Regional Planning Panel (No 3)* [2019] NSWLEC 168 (Robson J); *Michael Ryan v Northern Regional Planning Panel (No 2)* [2019] NSWLEC 167 (Robson J); *Michael Ryan v Joint Regional Planning Panel* [2019] NSWLEC 21 (Robson J)

Facts: In *Ryan v Northern Regional Planning Panel (No 4*) [2020] NSWLEC 55 (***Ryan (No 4)***), the Land and Environment Court (**Court**) found the development consent granted to Winten (No 12) Pty Ltd (**Third Respondent**) for a subdivision in Lismore to be invalid. The Third Respondent used earth from a borrow pit for construction work on another part of the subject land. The borrow pit and other parts of the site located at a higher elevation were accessed by trucks via a haul road which the Third Respondent constructed by upgrading an existing farm access four-wheel-drive track. The haul road area was subject to significant erosion and scour and both the haul road and borrow pit areas required ecological remediation. Mr Ryan (**Applicant**) sought orders consequential on *Ryan (No 4)* pursuant to ss 9.46(1) and (2)(c) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for reinstatement of the land, so far as was practicable, to the state it was in immediately before the breach of the EPA Act was committed. The Applicant sought orders for ecological work, as well as extensive engineering work, on the south-west batter and reinstatement of the four-wheel-drive track. The Applicant also sought orders for a walkover of the site by the Applicant and an Aboriginal Sites Officer. The Third Respondent opposed the Applicant's proposed orders and sought orders for ecological work as agreed in the joint expert report of the ecologists, but opposed any orders for engineering work, primarily on the basis that the damage to the haul road area would have occurred regardless of the Third Respondent's use of the haul road.

Issue: Whether orders should be made for the reinstatement of the land pursuant to ss 9.46(1) and (2)(c) of the EPA Act, in relation to:

(a) ecological works;

(b) engineering works; and

(c) a walkover of the site by the Applicant and an Aboriginal Sites Officer.

Held: Third Respondent's proposed ecology orders be made; engineering orders for stabilisation of the south-west batter be made; orders be finalised with the parties:

(1) (a) Orders for ecological work reflecting the agreement of the expert ecologists and proposed by the Third Respondent should be made: at [134]-[135], [159]. The Applicant provided no evidentiary basis to support the making of the proposed additional orders given the limitations of the conferral of power in ss 9.46(1) and (2)(c) to orders restoring the land to the state it was in immediately before the breach was committed, when remedying the established breach of the EPA Act: at [129], [133]-[137];

(b) Orders for engineering work to stabilise the south-west batter should be made: at [160]. Accepting that erosion would have been caused to the farm access four-wheel-drive track regardless of whether the haul road use had occurred, the extent of that erosion was not identified on the evidence: at [153]. The haul road use greatly exacerbated the erosion that resulted in most of the sediment along the former haul road being washed away: at [152]-[153]. The haul road use occurred with inadequate erosion protection measures: at [55], [56], [61], [71]-[73], [152]. The farm access four-wheel-drive track performed more favourably over a longer period, including through severe flooding in 2017, than the haul road: at [60], [153]. In January 2022, before the severe February/March 2022 flooding, the haul road was already impassable: at [69], [153]. The civil engineering experts agreed that engineering work should be carried out to stabilise the site, and the subsequent engineering evidence of a multidisciplinary engineer engaged to provide evidence on a different topic did not undercut that agreement: at [154]. It was unnecessary for the four-wheel-drive track to be reinstated: at [156]; and

(c) There is no power to make the additional order for a walkover under ss 9.46(1) and (2)(c) as those subsections are directed to remedying the breach of the EPA Act by reinstating the land altered by the breach of the EPA Act found in *Ryan (No 4)*: at [158]. While accepting the Applicant's evidence about the significance of the site and his role in protecting it, a ground of review based on Aboriginal heritage was not pursued in *Ryan (No 4)* and no finding of breach in relation to Aboriginal artefacts or human remains on the site was made: at [158].

Sader v Elgammal **[2022] NSWLEC 107** (Duggan J)

Facts: Mr Yasser Elgammal (**First Respondent**) had commenced works on his property at 26 Bowden Crescent, Connells Point (**site**) pursuant to Development Consent DA 2020/0430 (**DC**) and Construction Certificate 26BOW/2021 (**CC**). Mark Sader and Sandra Sader (**Applicants**), as the owners of the adjacent land at 24 Bowden Crescent, commenced proceedings against the First Respondent, as well as the principal certifier, Mr Abdul Hammoud (**Second Respondent**), and the owner of the land adjacent to the site fronting Connells Bay, being the State of New South Wales (**Third Respondent**). By the conclusion of the hearing, the Applicants' case was narrowed to the issue of whether the First Respondent was lawfully entitled to carry out a series of works, including the construction of a northern concrete slab and a southern concrete slab, and the validity of the CC landscape plans (**disputed works**). The Applicants sought declarations pursuant to ss 9.46(1) and 6.32 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and alleged breaches pursuant to ss 4.2(1)(a) and 4.2(1)(b) of the EPA Act.

Issues:

(1) Upon a proper construction of the DC were the disputed works authorised to be carried out;

(2) If not, to the extent that the CC authorised the carrying out of all or part of the disputed works, was it invalid in that it was not consistent with the DC; and

(3) To the extent that the disputed works comprised work that was not authorised by either the DC or the CC were such works development carried out in breach of the provisions of the EPA Act in that they were development for which development consent was required and not obtained.

Held: CC declared invalid to the extent it incorporated the CC landscape plans; parties to confer prior to the making of final orders:

(1) To the extent that the CC made provision for the demolition of the wall and the natural rock and proposed the demolition of the existing stairs and the construction of new stairs and a pergola, the CC was inconsistent with the DC as the two instruments could not operate consistently with each other: at [79];

(2) Regardless of which zone the northern slab was in, development consent was required for the earthworks undertaken to facilitate its construction and such consent was not obtained. Further, its construction was not exempt development and therefore required development consent: at [93];

(3) The southern slab could be classified as a building pursuant to the EPA Act and the carrying out of its construction required the undertaking of earthworks, being development requiring development consent for which consent was not obtained: at [94]; and

(4) In accordance with the Court's discretion, it was appropriate that both the northern slab and the southern slab be demolished. There was no evidence as to the manner in which the northern slab was constructed and insufficient evidence that it was structurally sound. Whilst there was evidence of the assumed manner of construction of the southern slab, this was an after-the-fact assumption as it was constructed without conformity to any engineering design or supervision. The issue of costs and amenity impacts did not weigh sufficiently against demolition: at [110]-[116].

- **Valuation/Rating:**

AMP Macquarie Pty Ltd v Valuer-General **[2022] NSWLEC 114** (Moore J)

Facts: AMP Macquarie Pty Ltd, AMP Capital Funds Management Ltd and Dexus Wholesale Property Ltd (**Applicants**) are joint owners of the Macquarie Shopping Centre (**Centre**) located in north-western Sydney. The land upon which the Centre is located (**site**) was valued by the Valuer General of New South Wales (**VG**) at $215 million on 1 July 2016 and $310 million on 1 July 2017 pursuant to the *Valuation of Land Act 1916* (NSW) (**Valuation of Land Act**). The Applicants objected to the VG's valuations and appealed for judicial determinations to be made of the land value as at 1 July 2016 and 1 July 2017 (**valuation dates**) pursuant to s 40(1) of the Valuation of Land Act. In submissions, the Applicants contended that the land values were $184 million on 1 July 2016 and $209 million on 1 July 2017, whilst the VG contended that the respective land values were $438 million and $450 million. In coming to these contended valuations, and on the required assumption that the site was notionally stripped of development (but for land improvement excavation), each party proposed a hypothetical development scheme which would have been postulated as advice for the hypothetical prudent purchaser (**HPP**) as at the valuation dates. The Applicants proposed that a large retail shopping centre covering, effectively, the entirety of the site and non-retail towers above the retail podium would

have been developed by an investment fund envisaging long-term ownership in order to harvest income and capital gains (**Applicants' scheme**). The VG proposed that a retail shopping centre covering a majority, but not the entirety, of the site would have been constructed and on-sold to a long-term investor. It also proposed that standalone residential towers would have been developed on the balance of the site and the apartments within them sold (**VG's scheme**).

Issues:

(1) Whether the Applicants' scheme or the VG's scheme should be preferred as reflecting the "highest and best use" of the site, taking into account the following contested factors:

  (a) which scheme better fitted the town planning vision for the site, and in particular, the extent to which the site's "retail core" designation in the Ryde Development Control Plan 2014 (**RDCP 2014**) could have been achieved by the VG's scheme's comparatively smaller retail footprint and more limited potential for future retail expansion, compared to the Applicants' scheme;

  (b) which scheme provided a better economic return model for the site;

  (c) whether an exemption would have been granted under cl 4.6 of the Ryde Local Environmental Plan 2014 (**RLEP 2014**) to allow the VG's scheme's proposed 1.8% exceedance of the maximum gross floor area (**GFA**) permitted to be developed on the site under RLEP 2014 2014;

  (d) Whether the Applicants' scheme accorded with RDCP 2014 controls for car-parking, pedestrian permeability, and street frontage "activation"; and

  (e) The commercial profile of the HPP of the site;

(2) Whether valuation of the site should be undertaken on a static basis (as proposed by the Applicants) or a discounted cashflow basis (as proposed by the VG); and

(3) What was the value of the site as at 1 July 2016 and 1 July 2017, applying s 6A(1) of the Valuation of Land Act.

Held: Appeal upheld; site valued at $188.6 million as of 1 July 2016 and $209 million as of 1 July 2017:

(1) The Applicants' scheme would better fit the town planning vision for the site. Although the site was zoned B4 Mixed Use, the overall planning intention of the designation of "retail core" across the whole of the site, together with the aspiration that it acted as a retail "regional attractor", marginally tipped the planning considerations in favour of the Applicants' scheme over the VG's scheme: at [341];

(2) The Applicants' scheme provided a better economic return model for the site than the VG's scheme. Regard could be had to the mature physical development of the residential target market, and it could be assumed that this would have provided a significant pre-existing economic base that was potentially accessible for any shopping centre hypothetically developed on the site. It was also found that a significant number of relatively affluent customers would have been drawn from the St Ives area to a hypothetical shopping centre at the site. These factors provided support for the Applicants' scheme, which had a larger retail offering and greater potential for future retail expansion. By contrast, the VG's scheme's proposed standalone residential towers would have compromised the amount of space available for future retail expansion. The Applicants' scheme also had an economic advantage since it proposed car-parking levels at, or near, grade to each retail level, increasing the convenience and attractiveness of its hypothetical retail offering: at [342]-[356];

(3) As of 1 July 2016, a request under cl 4.6 of RLEP 2014 2014 to exceed the relevant floor space ratio control would not have had any possibility of success. The VG had failed to provide coherent and specific justification in support of such a request in its evidence and submissions. Consequently, the GFA exceedance in the VG's scheme would have acted as a significant brake on the HPP seeking to rely on that scheme for making a purchasing decision on either valuation date: at [238]-[248];

(4) Although the Applicants' scheme as originally advanced did not comply with requirements in the RDCP 2014 regarding above-ground car-parking, pedestrian permeability, and street frontage "activation", this would not have incurably prevented approval of the scheme so as to be perceived by a HPP as a barrier to purchasing the site:

  (a) a HPP would have been advised that s 79C(3A) (as it was then) of the *Environmental Planning and Assessment Act 1979* (NSW) would have enabled approval of the Applicants' scheme because the intent of what was sought by cl 8.7 of Pt 4.5 of the RDCP 2014 (lamination of above-ground car-parking) could have been achieved in a fashion which differed from what was specified by that control, namely, façade treatment of above-ground parking frontages or substitution of outer edges of above-ground parking with one-apartment-deep residential development: at [268]-[275];

(b) the Applicants' scheme was sufficiently similar in its design to the vision of pedestrian permeability in s 4.0 of Pt 4.5 of the RDCP 2014 that a competently advised HPP would not have regarded any inadequacies in the scheme as being incurable defects: at [286]-[291]; and

(c) although the Applicants' scheme did not provide for activation along the Waterloo Road frontage as envisaged by the RCDP 2014, this would not have acted as a barrier to approval given the Applicants' scheme's otherwise significantly greater consistency with the overall desired planning outcome for the site when compared to the VG's scheme: at [292]-[295];

(5) The HPP would likely have focused on developing a super-regional shopping centre as the primary use of the site, with other uses such as residential apartments being ancillary to the primary use: at [323];

(6) Based upon a synthesis of the town planning, economic, and hypothetical potential purchaser evidence, the preferred hypothetical development scheme was the Applicants' scheme: at [360]-[361];

(7) The VG's dynamic cashflow methodology to valuation was rejected. Empirical evidence of the costing cycle from 1999 to 2020 indicated significant positive and negative annual variation. Hence, it was inappropriate to rely on the VG's model because it adopted a smoothed long-term growth factor. The Applicants' static model was preferrable - it would have enabled the HPP to have a costing based on what was the position at the time of the hypothetical purchase: at [394]-[400];

(8) As steps antecedent to valuing the site, various factual findings were made. Specifically, it was found that the hypothetical purchase would have been based on a valuation model incorporating five tower elements along the site's Herring Road frontage, that these five towers would all have been constructed for residential purposes on a build-to-rent basis, and that the Applicants' valuer's deferral rates and deferral intervals for construction of these hypothetical towers were applicable: at [470]; and

(9) On the basis of the findings in (8), and accepting that the rate-per-square-metre GFA for build-to-rent residential towers in the Applicants' scheme was $969 as of 1 July 2016, the appropriate valuations for the site were $188.6 million on 1 July 2016 and $209 million on 1 July 2017: at [469]-[470].

- **Section 56A Appeals:**

***Canterbury Bankstown Council v Dib* [2022] NSWLEC 79** (Preston CJ)

(related decisions: *Dib v Canterbury-Bankstown Council* [2021] NSWLEC 1553 (Pullinger AC); *Dib v Canterbury-Bankstown Council (No 2)* [2021] NSWLEC 1591 (Pullinger AC))

Facts: Mr William Dib (**Dib**) applied for development consent to construct a boarding house with 21 rooms on land zoned R2 Low Density Residential (**R2 Zone**) under Bankstown Local Environmental Plan 2015 (**BLEP 2015**). Development for the purposes of boarding houses was regulated by State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP (ARH)**). Clause 30AA of SEPP (ARH) precluded a consent authority granting development consent to a boarding house on land within the R2 Zone "unless it is satisfied that the boarding house has no more than 12 boarding rooms".

Dib appealed against the deemed refusal of Canterbury Bankstown Council (**Council**) of his development application. The Acting Commissioner determined that, subject to specified amendments to the development being made, development consent should be granted (*Dib v Canterbury-Bankstown Council* [2021] NSWLEC 1553). Upon the amendments being made, the Acting Commissioner determined to uphold the appeal and grant development consent (*Dib v Canterbury-Bankstown Council (No 2)* [2021] NSWLEC 1591). In the first judgment, the Acting Commissioner found that cl 30AA of SEPP (ARH) was a development standard. The Council appealed against the Acting Commissioner's decision and orders under s 56A(1) of the *Land and Environment Court Act 1979* (NSW).

Issue: Whether the Commissioner erred in law:

(i) in deciding that cl 30AA of SEPP (ARH) was a development standard within the definition of s 1.4(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**development standard ground**); and

(ii) in granting development consent to the boarding house without having formed the opinion of satisfaction specified in cl 30AA that the boarding house had no more than 12 rooms (**jurisdictional precondition ground**).

Held: Appeal dismissed; Appellant to pay Respondent's costs of the appeal:

Rejecting the development standard ground

(1) The starting point in determining whether a provision is a development standard is to identify the development that may be carried out with consent. A provision of an environmental planning instrument can only be a development standard if it is "in relation to the carrying out of development": at [50];

(2) Clause 30AA did not define the development that was permitted to be carried out with consent. Clause 30AA served the function of specifying the circumstance in which a consent authority could grant development consent to a "boarding house". That is, whether the consent authority is satisfied that the boarding house has no more than 12 boarding rooms. This was not an essential element of the development, but rather conditioned the exercise of the power to grant development consent: at [62];

(3) Clause 30AA therefore answered the description of "development standards", being a provision "in relation to the carrying out of development" and a provision "by or under which requirements are specified or standards are fixed in respect of any aspect of that development": at [49], [63], [64];

(4) The fact that cl 30AA required the consent authority to form the state of satisfaction that the boarding house had no more than 12 boarding rooms did not mean that it cannot be a development standard: at [69];

(5) The context of cl 30AA demonstrated that the clause fell within the definition of "development standards". State Environmental Planning Policy (Housing) 2021 (**SEPP Housing**) repealed and replaced SEPP (ARH). Clause 30AA was moved to new cl 25 of the SEPP Housing. Clause 25 mirrors former cl 30 of SEPP (ARH) and bears the same heading "Standards for boarding houses". The legislative drafter of the SEPP Housing evidently considered that former cl 30AA of SEPP (ARH) fixed development standards in the same way as cl 30 of SEPP (ARH), so that it was appropriate to include the provisions together in new cl 25 of the SEPP Housing: at [71], [79], [80];

Rejecting the jurisdictional precondition ground

(6) Clause 30AA of SEPP (ARH) did not have a dual function. Rather, the clause only had the single function of fixing a standard. The clause fixed the standard in subjective terms, requiring the consent authority's satisfaction that the boarding house had no more than 12 boarding rooms: at [92];

(7) Clause 4.6(2) of BLEP 2015 empowered the consent authority to grant development consent to a boarding house even though the consent authority had not formed the opinion of satisfaction that the boarding house had no more than 12 boarding rooms. The exercise of the dispensation power under cl 4.6(2) overcame both the development standard and the jurisdictional fact, which were coterminous: at [93].

***Mildred v Steinhauer* [2022] NSWLEC 88** (Pain J)

(decisions under review: *Mildred v Steinhauer* [2022] NSWLEC 1148 (Douglas AC))

Facts: Mr Mildred (**Appellant**) applied for an order under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**Trees Act**) for removal of a tree on Mr Steinhauer's (his neighbour - the **Respondent**) land. At first instance, the Acting Commissioner ordered pruning of the tree, with the Appellant to pay 70% of the costs of the pruning. The Appellant appealed the whole of the decision on a question of law under s 56A of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), save the finding that the Court's jurisdiction was enlivened under s 10(2)(b) of the Trees Act. The Acting Commissioner sent a letter to the Appellant stating that it was unnecessary for the Appellant's arborist to attend the site visit. The Appellant was not provided with a letter sent to the Court by the agent for the Respondent. The Acting Commissioner accepted, during oral submissions, that s 10(2)(a) of the Trees Act was enlivened, a position which was reversed in the judgment; stated that the Appellant had seen all of the material from the Respondent; and twice declined to refer a question to the Appellant's arborist when that course was offered by the Appellant. The Acting Commissioner was very critical of the Appellant's arborist's report and qualifications in the judgment.

Issues:

(1) Whether the Acting Commissioner failed to accord procedural fairness on the site visit and in the final hearing (**Ground 1**);

(2) Whether the Acting Commissioner made an error of law in dismissing the Appellant's claim under s 10(2)(a) of the Trees Act (**Ground 2**);

(3) Whether the Acting Commissioner made an error of law in ordering an inappropriate remedy and denying the Appellant's request to order removal of the tree (**Ground 3**);

(4) Whether the Acting Commissioner made an error of law in ordering the Appellant to pay 70% of the costs of the tree remediation (pruning) work as the Respondent as owner of the tree should pay those costs (**Ground 4**).

Held: Considered cumulatively, the issues raised demonstrated a failure to accord procedural fairness to the Appellant; appeal upheld in relation to Ground 1; Grounds 2 to 4 not established; proceedings remitted to a commissioner other than the Acting Commissioner for rehearing and determination:

(1) A failure to accord procedural fairness can give rise to a decision on a question of law under s 56A of the Court Act: at [69]-[71]. A judicial officer is not generally required by procedural fairness to make a running commentary upon a party's prospects of success or to identify their deliberations: at [72]-[73];

(2) That the Acting Commissioner changed his stated position on whether jurisdiction under s 10(2)(a) was enlivened was not material as jurisdiction was enlivened under s 10(2)(b): at [75]-[78];

(3) Decisions not to refer questions on minor matters on two occasions during the hearing to the arborist were not material: at [81];

(4) The Acting Commissioner materially failed to accord procedural fairness by denying the Appellant the opportunity to present his case to the Court when he told the arborist not to attend the site visit and subsequently expressly referred to the Appellant's failure to point out termite activity during the site visit in his reasons: at [82];

(5) The Acting Commissioner should have ensured the Appellant had the letter from the Respondent's agent, which he referred to in the judgment: at [90];

(6) The parties were not legally represented or qualified arborists and there was no effective contradictor to the Appellant's case including an absence of critical assessment from the Respondent of the arborist's report: at [91]. Decision-makers are required to advise the parties of proposed conclusions that are surprising or not easily anticipated: at [92]. The Acting Commissioner should have expressed his substantial concerns to the arborist so that he had the opportunity to address these: at [93]. The strenuous criticism of the arborist's report alone did not give rise to procedural unfairness as this came within the Acting Commissioner's expertise: at [94].

(7) No error of law was established in relation to Ground 2 when reading the judgment fairly as a whole: at [97]-[101];

(8) No error of law was established in relation to Ground 3: at [114]. A number of matters of merit were raised which is impermissible in s 56A appeals: at [105], [113]. The Acting Commissioner was not required to consider risk of injury to the Respondent and did not fail to consider risk of injury to the Appellant and another neighbour: at [109]-[111]; and

(9) The Acting Commissioner had broad discretion under s 9 of the Trees Act as to the terms of remedial orders, in this case, liability for the costs of the tree pruning, and no error of law was established in relation to Ground 4: at [115]-[116].

***Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117** (Preston CJ)

(related decision: *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 1017 (Morris AC))

Facts: Toga Penrith Developments Pty Limited (**Appellant**) lodged a development application with Penrith City Council (**Council**) seeking development consent for a mixed use development. The Appellant appealed against the deemed refusal of the application to the Court. The Acting Commissioner determined that the appeal should be dismissed and the application refused: *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 1017. The Appellant appealed against the Acting Commissioner's decision and orders under s 56A(1) of the *Land and Environment Court Act 1979* (NSW). The Council sought, by Notice of Contention, to affirm the Acting Commissioner's decision on grounds other than those raised by the Acting Commissioner.

Issues:

(1) Whether the Acting Commissioner erred on questions of law:

  (a) in her construction and application of cl 8.2 of Penrith Local Environmental Plan 2010 (**PLEP 2010**) (**cl 8.2 grounds**); and

  (b) in her construction and application of cl 8.4 of PLEP 2010 (**cl 8.4 grounds**).

(2) Whether to affirm the Acting Commissioner's decision, with regard to the Council's Notice of Contention, on the ground that the jurisdictional precondition in cl 8.4(3) of PLEP 2010 had not been satisfied (**Notice of Contention**).

Held: Appeal dismissed; Notice of Contention upheld; Appellant to pay the Council's costs:

Clause 8.2 grounds

(1) The structure and operation of cl 8.2 of PLEP 2010 demonstrated that the Acting Commissioner did not err on a question of law in her construction and application of the clause: at [36]-[48];

(2) As to structure, subcl (3) of cl 8.2 specified the scope of operation of the clause to be with respect to land on which development was to be carried out, and not land that was overshadowed by such development. While the subclause expressly specified that the land on which the development was to be carried out must be "land to which this Part applies", which was defined in cl 8.1 to be "land identified as Penrith City Centre on the Clause Application Map", it did not specify that the public open space that was overshadowed by development must be land identified as Penrith City Centre: at [36]-[41];

(3) The above construction of cl 8.2(3) fits with its context. The objective of cl 8.2 was "to protect public open space from overshadowing" (cl 8.2(1)). There was no reason to read this down so as to only protect public open space within the Penrith City Centre from overshadowing and not public open space generally. Further, consideration of the Council's extrinsic materials was of no assistance as s 34 of the *Interpretation Act 1987* (NSW) did not apply to environmental planning instruments such as PLEP 2010: at [42]-[47];

(4) The Acting Commissioner's finding that the jurisdictional fact in cl 8.2(3) was satisfied therefore stands, precluding the grant of development consent to the development: at [136];

Clause 8.4 grounds

(5) The Acting Commissioner failed to consider the matters in cl 8.4(2) of PLEP 2010 to which a consent authority must have regard in deciding whether a development exhibits design excellence for the purposes of cl 8.4(1). Rather than following the statutory requirements in cl 8.4(2), the Acting Commissioner merely considered the evidence of the urban design experts on the general topic of whether the development exhibited design excellence. While the Acting Commissioner's error of law precluded the grant of development consent by reason of cl 8.4(1), this error of law was not material to her ultimate decision to refuse development consent as the non-satisfaction of the jurisdictional fact in cl 8.2(3) remained: at [70]-[77], [137];

(6) The Acting Commissioner did not err in law by failing to have regard to the views of the Design Integrity Panel (**Panel**) in deciding that the development did not exhibit design excellence. The views of the Panel were not matters that the Acting Commissioner, exercising the functions of a consent authority, was obliged, either expressly or impliedly, to take into account in deciding whether the development exhibited design excellence for the purposes of cl 8.4(1) of PLEP 2010: at [92]-[104], [106], [138];

Notice of contention

(7) The Acting Commissioner misconstrued cl 8.4(3) of PLEP 2010 as she failed to ask herself the correct question of whether the development for which development consent was sought was the same or substantially the same as the development in relation to which the architectural design competition had been held. This error was material to the Acting Commissioner's finding that the jurisdictional fact in cl 8.4(3) had been satisfied and was a further impediment to the grant of development consent: at [124]-[133], [139]-[140]; and

(8) The Acting Commissioner did not err in finding that the architectural design competition that was held in relation to the development was conducted in accordance with the procedures approved by the Director-General in the Guidelines: at [134]-[135], [139].

- **Separate Question:**

CK Design Pty Ltd v Penrith City Council (No 2) **[2022] NSWLEC 97** (Robson J)

Facts: On 6 April 2021, CK Design Pty Ltd (**Applicant**) lodged a development application with Penrith City Council (**Council**) seeking development consent for a two-to-three-storey boarding house in Kingswood. On 21 July 2021, Penrith City Council Local Planning Panel (**Panel**) refused the application under s 4.8 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Although State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP ARH**) was in force and applied at the date the development application was lodged, and at the time of the Panel's determination, on 26 November 2021, subsequent to the refusal, State Environmental Planning Policy (Housing) 2021 (**SEPP Housing**) came into force and repealed SEPP ARH. On 6 July 2022, the Court ordered separate determination of the question whether the development application "was made, but not yet determined, on or before the commencement date of

[SEPP Housing]" pursuant to s 2(1)(a) of Sch 7A (**Savings Provision**), and a consequent question (if the first question was to be answered in the affirmative) whether SEPP ARH applied to the development application.

Issues:

(1) Whether the development application was "made, but not yet determined", on or before the commencement date of SEPP Housing (**Issue 1**); and

(2) If Issue 1 determined in the affirmative, whether SEPP ARH, as in force on 25 November 2021, applied to the development application (**Issue 2**).

Held: Issue 1 answered in the affirmative; Issue 2 answered in the affirmative; no order as to costs:

(1) Adopting the general principles of statutory interpretation (particularly considering the context of words, and the intent of the legislature) rather than a literal approach, the development application was made, but not yet determined, prior to commencement of SEPP Housing because: the term "determined" in the EPA Act generally refers to the decision of a consent authority which is substituted by the Court's "final decision" on appeal, such that although the Panel had refused the development application prior to the commencement of SEPP Housing, the development application (on appeal to the Court) was not "determined" for the purpose of the Savings Provision; and the term "determined" must be read in the context of the words "but not yet" (which must be given work to do), indicative that the development application had not been finally decided, settled or resolved: at [34]-[45], [50]; and

(2) It was not fair and reasonable for a costs order to be made where the determination of the separate questions would not be determinative of the whole proceedings, and where their determination involved a real controversy which was substantially narrowed, promoted the just, quick and cheap resolution of the proceedings and protected the utility of a conciliation conference: at [53]-[54].

Commitment Pty Ltd v Georges River Council (No 2) **[2022] NSWLEC 94** (Pain J)

(related decision: *Commitment Pty Ltd v Georges River Council* [2022] NSWLEC 87 (Pepper J))

Facts: Commitment Pty Ltd (**Applicant**) commenced Class 1 proceedings appealing the deemed refusal by Georges River Council (**Council**) of a development application (**DA**) relating to a property in Narwee. The Court ordered the determination of separate questions in the proceedings in *Commitment Pty Ltd v Georges River Council* [2022] NSWLEC 87. The DA was submitted to the New South Wales Planning Portal on 30 September 2021 and an automated e-mail was sent to the Applicant acknowledging the submission. The DA fee was paid on 8 October 2021. The Georges River Local Environmental Plan 2021 (**GRLEP 2021**) commenced on 8 October 2021, repealing and replacing the Hurstville Local Environmental Plan 2012. Clause 1.8A of the GRLEP 2021 stated that if a DA had been "made" prior to the commencement of the GRLEP 2021 the DA was to be determined as if the GRLEP 2021 had not commenced. The Georges River Development Control Plan 2021 (**GRDCP 2021**) also came into effect on 8 October 2021, with a similar savings provision. The Applicant submitted that the DA was "made" on 30 September 2021 before the commencement of the GRLEP 2021 and therefore the former LEP and DCP applied to the DA; whereas the Council submitted that the DA was made only when the DA fee was paid on 8 October 2021 and therefore the GRLEP 2021 and GRDCP 2021 applied. The parties agreed that the answer to question (a) determines the answer to question (c); that the answer to question (b) would be "yes" regardless; and that question (d) did not need to be answered.

Issue: The determination of the separate questions as follows, subject to the agreement noted immediately above:

(a) whether, on the true construction of cl 1.8A of the GRLEP 2021, the DA was made before the commencement of the GRLEP 2021;

(b) if the answer to question (a) is yes, whether the GRLEP 2021 applies to the subject DA;

(c) whether, on the true construction of control 1.7 of the GRDCP 2021, the DA was made before the commencement of the GRDCP 2021; and

(d) if the answer to (c) is "yes", whether the GRDCP 2021 applies to the subject DA.

Held: DA was not made before the commencement of the GRLEP 2021:

(1) The Council's construction of the statutory scheme in the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**) gives purposive effect to the provisions considered and is to be preferred: at [47]. A DA is made for the purposes of cl 1.8A of the GRLEP 2021 when there is substantial compliance with each of the requirements of the EPA Act and EPA Regulation applicable to the making of DAs: at [47]. The

Applicant's approach did not give sufficient effect to cl 50 of the EPA Regulation, to which s 4.12(1) of the EPA Act is subject: at [47]-[48]. "Lodgement" of a DA is required by cl 50(1)(d) and must be read with subcl 50(9). A DA is not taken to be lodged until the fees notified to an applicant by means of the New South Wales Planning Portal have been paid: at [50]. That a DA can be refused within 14 days of its receipt under cl 51 of the EPA Regulation does not undermine this construction: at [52]. That a matter or process required for the making of a DA, such as identification and notification of the DA fee and notification of lodgement, is within the control of persons other than the Applicant is not obviously relevant to the task of statutory construction and does not mean that the Council's construction should be rejected: at [56]. "Lodgement", as identified by cl 50 of the EPA Regulation, is essential to the making of a DA: at [57]. An applicant submits a DA via the Planning Portal, lodges it when the fee is paid and makes the DA when there is substantial compliance with cl 50 of the EPA Regulation: at [59]. The answer to questions (a) and (c) is "no": at [60]-[61].

***Lawson v Minister for Environment and Water (South Australia) and the State of New South Wales* [2022] NSWLEC 50** (Robson J)

(related decisions: *Lawson v Minister for Environment & Water (SA)* [2021] NSWCA 6 (Bathurst CJ, Basten JA, McCallum JA); *Lawson v Minister for Environment and Water* [2020] NSWSC 186 (Ward CJ in Eq); *Lawson v South Australian Minister for Water and the River Murray* [2017] NSWLEC 62 (Moore J); *Lawson v South Australian Minister for Water and the River Murray (No 2)* [2014] NSWLEC 189 (Biscoe J); *Lawson v South Australian Minister for Water and the River Murray* [2014] NSWLEC 158 (Biscoe J))

Facts: By Notice of Motion filed 9 February 2022, Ms Dorothy Lawson (**Applicant**) sought leave, first, to file and serve a further amended application and claims in Class 3 proceedings, and, second, an order pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) that the question of the liability of the State of New South Wales (**Second Respondent**) for any compensation for the resumption of land in 1922 under the *Public Works Act 1912* (NSW) be determined separately to the question of the quantum of any compensation payable. The Applicant's claim for compensation is on two bases: first, that her grandmother had a portion of a legal estate in the land, acquired through adverse possession which it is alleged ripened in 1848; and, second, in the alternative, that at the date of resumption, her grandmother was a member of a native title group which held native title rights and interests in the land that are capable of being resumed and thus compensated.

Issue: Whether it was appropriate to make an order for the separation of the liability and quantum issues.

Held: Separate question granted:

(1) It was appropriate to make an order for the separate determination of the liability question where, first, there is unlikely to be any overlap between evidence called on liability (which would be extensive) and quantum (which would likely involve an expert land valuer); second, the preliminary resolution of the novel liability question is likely to facilitate the just, quick and cheap resolution of proceedings by making findings in relation to matters including the boundary of the land, the extent of any interest held, and the tenure of any rights and interests in the land; third, where the Applicant is of advanced years and her evidence is required in relation to liability, but not as to quantum; fourth, where the question of liability may facilitate early settlement; and fifth, giving consideration to the respective parties' support for the separate determination: at [16]-[22].

***Sydney Fish Market Pty Ltd v Valuer-General of New South Wales* [2022] NSWLEC 71** (Pepper J)

Facts: In 1994 the State government authorised the sale of the undertaking of the Fish Marketing Authority and deregulated fish marketing, pursuant to the *Fish Marketing Act 1994* (NSW)h (**Fish Marketing Act**). As part of that deregulation, the Minister for Fisheries, purporting to act on behalf of the Crown, entered into a lease over Crown land at Pyrmont (**lease**), which relevantly contained the Sydney Fish Market site (**land**), in favour of Sydney Fish Market Pty Ltd (**Fish Market**). In 2007, the State transferred its interest in the land, that is, its interests as the registered proprietor and lessor, to the State Property Authority (**SPA**), which eventually changed its name to Property NSW, pursuant to s 19 of the *Property NSW Act 2006* (NSW) (**PNSWA**). The parties agreed that, by 2019, the land was not "Crown land" within the meaning of the *Crown Lands Management Act 2016* (NSW) (**CLM Act**) and subject to the PNSWA. The parties disagreed on whether the land, by reason of the lease, was "Crown lease restricted" within the meaning of s 14I of the *Valuation of Land Act* (**Valuation of Land Act**) as at the valuing dates of 1 July 2019 and 1 July 2020 (**valuing dates**). That section of the Valuation of Land Act relevantly provided that "Crown lease restricted" land included any land subject to

a "holding" within the meaning of the CLM Act. Fish Market argued that the land was "Crown lease restricted" because the lease had been entered into on behalf of the Crown, and therefore, was subject to the *Crown Lands Act 1989* (NSW) (**Crown Lands Act**), the predecessor to the CLM Act. It followed that, due to the definition of "holding" in s 1.5 of the CLM Act, which extended to continuing leases entered into under the Crown Lands Act by reason of the savings and transitional provisions contained in Sch 7 of the CLM Act, the land was "Crown lease restricted" as at the valuing dates. By contrast, the Valuer General of New South Wales (**VG**) contended that the lease did not take the benefit of the savings and transitional provisions within the CLM Act because it was the Minister for Fisheries who had entered into the lease in 1994 under the Fish Marketing Act, and not the Crown pursuant to the Crown Lands Act. The lease therefore did not fall within the definition of a "holding" under the CLM Act, and consequently, was not "Crown lease restricted" for the purpose of s 41I of the Valuation of Land Act.

Issues:

(1) Whether the land was "Crown lease restricted" within the meaning of s 14I of the Valuation of Land Act as at the valuing dates;

(2) Whether the lease was granted under the predecessor to the CLM Act, the Crown Lands Act;

(3) Whether, notwithstanding the transfer of the land to the SPA, the land remained subject to the lease;

(4) Whether from the date of transfer of the land to the SPA to the date of the repeal of the Crown Lands Act in 2016, the lease remained a lease under the Crown Lands Act; and

(5) Whether the lease continued as a lease under the CLM Act because it had been granted under the Crown Lands Act, and was therefore preserved by reason of the savings and transitional provisions of the CLM Act.

Held: The land was "Crown lease restricted" within the meaning of s 14I of the Valuation of Land Act:

(1) The lease was granted pursuant to the Crown Lands Act because, first, the land was transferred to the Crown upon dissolution of the Fish Marketing Authority in 1994 pursuant to s 11 of the Fish Marketing Act. It followed that the lease provided that the lessor was the Crown. The Minister for Fisheries signed the lease on behalf of the Crown. Second, in 1994, dealings in Crown land were constrained by s 6 of the Crown Lands Act which relevantly stated that Crown land could not be leased otherwise than as authorised by that Act. Therefore, the lease could only have been granted under the Crown Lands Act. Third, the provisions of the Fish Marketing Act provided that an alternative mechanism for the transfer of the land did not displace the primacy of s 6 of the Crown Lands Act: at [74];

(2) The transfer of the land to the SPA did not nullify the lease because the transfer was subject to any pre-existing interests and restrictions upon the land, including the lease, under s 18(1) of the PNSWA: at [94];

(3) The fact that the owner of the land was the SPA did not change the character of the lease as land vested in the Crown because the SPA was a statutory body with the same status and power to deal with the land as the Crown (ss 4 and 13 of the PNSWA). Therefore, the land remained vested in the Crown pursuant to s 3(1) of the Crown Lands Act: at [95];

(3) The transfer of the lease to the SPA did not change the character of the lease as a lease under the Crown Lands Act: at [96]; and

(4) The lease fell within the definition of "holding" under the CLM Act because it was a lease granted pursuant to the Crown Lands Act, and therefore, continued as a lease under the CLM Act by reason of that Act's savings and transitional provisions: at [105]-[108].

- **Costs:**

Blanc Black Pty Limited v Willoughby City Council (No 2) **[2022] NSWLEC 105** (Robson J)

Facts: On 11 June 2021, Blanc Black Pty Limited (**Blanc Black**) commenced Class 1 proceedings appealing Willoughby City Council's (**Council**) deemed refusal of Blanc Black's development application for the demolition of two existing buildings and the construction of a residential flat building at Northbridge. On 1 December 2021, the hearing of the appeal commenced before an Acting Commissioner of the Court and shortly after midday on the first day of hearing, Council served its draft conditions of consent in relation to an affordable housing monetary contribution (**Affordable Housing Condition**) pursuant to cl 6.8 of the Willoughby Local Environmental Plan 2012 and, on the second day of hearing, Blanc Black provided its draft conditions in response striking out the Affordable Housing Condition. The Court thereafter allowed an adjournment for the

preparation of evidence in support of the draft Affordable Housing Condition, which resulted in the proceedings becoming part-heard and proceeding to final hearing (with further expert evidence in relation to the Affordable Housing Condition) several weeks after the initial hearing. After the determination of the Class 1 appeal, Blanc Black, on 29 June 2022, filed a Notice of Motion seeking an order that Council pay its costs relating to the adjournment. The parties disputed whether the adjournment was requested by Council or whether it was offered to Council by the Court.

Issues:

(1) Whether Blanc Black's application for costs was made out of time; and

(2) Whether it was fair and reasonable to make an order for costs.

Held: Notice of Motion dismissed; each party to bear its own costs of the motion:

(1) Blanc Black's application was not time-barred:

   (a) by cl 36.16 of the Uniform Civil Procedure Rules 2005 (NSW) (and r 7.6 of the Land and Environment Court Rules 2007 (NSW)) because cl 36.16 does not apply in circumstances where the Acting Commissioner did not have power to make orders as to costs and, therefore, there was no judgment relating to costs being set aside or varied; and, as Davies J considered in *Yarraford Pastoral Co Pty Ltd v Lewington* [2017] NSWSC 316 at [36]-[44], the finality principle was not offended where s 98 of the *Civil Procedure Act 2005* (NSW) permits applications after proceedings are concluded and the questions of costs simply had not been dealt with by the Court: at [50]-[51]; or

   (b) by [106] of the Court's Practice Note - Class 1 Development Appeals (**Practice Note**) where, although the Practice Note should not be dismissed as merely a "guide", it is not a statutory time bar and there was no significant prejudice that would require the costs application to be refused because of non-compliance with the Practice Note: at [52]-[55];

(2) It was not fair and reasonable to grant costs to Blanc Black where Council's conduct (in putting on the draft Affordable Housing Condition late) is somewhat explained by the fact that the time available to Council for the preparation of draft conditions was shortened by Blanc Black's decision to seek amendments to the development application, which required a revision of the Statement of Facts and Contentions (**SOFAC**) and the briefing of experts; a delay by Blanc Black in identifying the names of its experts, which delayed joint conferencing; where, although Council's SOFAC (and amended SOFAC) did not properly articulate the requirement for a cl 6.8 condition, in circumstances where Blanc Black's Statement of Environmental Effects had acknowledged the likelihood of an Affordable Housing Condition, such that each party experienced an element of surprise in relation to the contest regarding the condition; and, furthermore, the two days initially allocated to the hearing would not have been sufficient for the completion of the hearing considering the nature and extent of evidence subsequently marshalled in relation to the draft Affordable Housing Condition: at [61]-[73].

***Boensch v Parramatta City Council* [2022] NSWLEC 78** (Robson J)

Facts: Mr Boensch commenced Class 2 proceedings appealing against three orders issued by Parramatta City Council (**Council**), pursuant to s 124 of the *Local Government Act 1993* (NSW), which required him to remove a number of vehicles and trailers from council land at various locations in Rydalmere. On 22 January 2021, Council issued a notice of its intention to issue an order and, on 5 February 2021, Mr Boensch requested additional time to comply with that notice to obtain legal advice. On 17 February 2021, Council issued the order which Mr Boensch thereafter disputed on the grounds of invalidity and that he was being "targeted" by Council. On 26 March 2021, Mr Boensch commenced these proceedings and, on 9 June 2021, Council revoked the order before the appeal was set down for hearing. By Notice of Motion, Mr Boensch then sought an order pursuant to r 49.19 of the Uniform Civil Procedure Rules 2005 (NSW) setting aside a decision by the Registrar of the Court to dismiss his application for costs of the uncompleted Class 2 proceedings, and an order (other than the presumptive rule under r 3.7(2) of the Land and Environmental Court Rules 2007 (NSW)) that Council pay his costs.

Issues:

(1) Whether there were grounds to review the Registrar's decision;

(2) Whether it would be fair and reasonable to order Council to pay Mr Boensch's costs of the proceedings.

Held: Motion dismissed:

(1) There was no error made by the Registrar or material change in circumstances that would empower a review of the Registrar's decision: at [51]; and

(2) Notwithstanding the first finding, it was not fair and reasonable to make an order that Council pay Mr Boensch's costs (at [51]) because:

(a) first, Council had not conducted itself unreasonably in making an order which Mr Boensch alleged to be unlawful where it was not appropriate to determine its lawfulness on this motion (*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622); where, although Mr Boensch may have enjoyed some success in his collateral challenge, that was not determinative; and where, in any event, the Court was not satisfied that Mr Boensch would have succeeded had the matter been fully tried: at [52]; and

(b) second, it was not unreasonable for Council not to allow Mr Boensch further time to obtain legal advice in circumstances where Council considered, responded to, and addressed Mr Boensch's representations; where Council's refusal to allow further time on its own (or with other circumstances) was not a sufficient reason to award costs; and where the Court could not find that Council had acted unreasonably leading up to, or in relation to, the proceedings: at [53].

- **Merit Decisions (Judges):**

Alramon Pty Ltd v City of Ryde Council **[2022] NSWLEC 108** (Pain J)

Facts: The Applicant in the Class 1 proceedings appealed the refusal of a development application (**DA**) by the City of Ryde Council (**Council**) for a centre-based childcare facility on a commercial high street in North Ryde. The Applicant in the Class 4 proceedings sought the imposition of an easement under s 88K of the *Conveyancing Act 1919* (NSW) for vehicular access between a car-park owned by the Council (**council land**) and the Applicant's neighbouring commercial premises. Egress from the Applicant's land over the council land had been occurring without a formal legal right to do so for decades. The easement sought was integral to the proposed child care use but was also sought on the basis of the current use of the Applicant's land if the DA was refused. The council land was zoned SP2 Infrastructure (**SP2 Zone**) under the Ryde Local Environmental Plan 2014 (**RLEP 2014**) and child care facilities were not permitted in the zone. The Applicant in the Class 1 proceedings contended that the easement was for the purpose of a road, a permitted purpose in the SP2 Zone. The Court heard extensive expert evidence from traffic engineers, town planners, urban designers and valuers relating to the potential for alternative vehicular access to the Applicant's land, future development options for the council land with or without the easement, and the issue of compensation to the Council for the imposition of the easement.

Issues:

(1) Whether the DA should be refused because the use of the council land for the easement was prohibited in the zone;

(2) Whether the easement was reasonably necessary for the effective use or development of the Applicant's land;

(3) Whether the use of the Applicant's land would not be inconsistent with the public interest;

(4) Whether the Council could be adequately compensated for the loss or disadvantage arising from the imposition of the easement;

(5) Whether all reasonable attempts have been made by the Applicant's for the order to obtain the easement or an easement having the same effect but have been unsuccessful; and

(6) Whether in its exercise of discretion the Court would grant or refuse the easement.

Held: Class 1 proceedings dismissed; Class 4 proceedings dismissed; Applicant to pay the Respondent's costs of the Class 4 proceedings:

(1) The use of the easement for access to the Applicant's land over the council land was not a road as defined under RLEP 2014 (which was permissible in the SP2 Zone): at [168]. Under the *Roads Act 1993* (NSW), the definition of road (which was applicable by virtue of RLEP 2014) includes airspace, whereas the easement sought was effectively a tunnel, given the height-limit proposed: at [168]. A car-park is not a road and car-parks are not envisaged to be used as a thoroughfare or street or means of access to neighbouring land: at [169]-[170]. The easement use was designed to serve the child care centre use unlike a regular road, there was no physical definition of the area intended to be a road and the design, shape, intended use and terms of the easement were not reflective of a road use; rather what was sought was a carriageway serving the childcare centre: at [174]. The purpose of the easement on the council land was indivisible from, and integrated with, the rest of the child care centre which could not

function in the proposed form without it, meaning its primary purpose was for a child care centre, a prohibited use on SP2-zoned land: at [174]. The easement use was also not permissible as ancillary or subordinate to the car-park use identified on the zoning map: at [176]. The creation of a carriageway to allow vehicular access to the Applicant's land could not be deferred as this would postpone an essential element of the development, which is impermissible under the principle established in *Mison and Ors v Randwick Municipal Council* (1991) 23 NSWLR 734 at 740: at [180];

(2) The Applicant could not establish that the easement was reasonably necessary for the effective use of the Applicant's land: at [270]. When the particular terms and shape of the easement were considered, the effective use intended to be facilitated was the use of the current buildings on the Applicant's land, rather than the land per se, which was arguably fatal to the application: at [229]. Two-way access to the Applicant's land without the use of neighbouring land was feasible, despite requiring a change to the present configuration of buildings, supporting a finding that the Applicant had a mere preference, as opposed to a reasonable necessity, to continue to use the current arrangements for access: at [235]-[236]. Longstanding use by itself was insufficient to establish reasonable necessity: at [237]. The peculiar terms of the easement alone would create a substantial burden on the use of the council land: at [243]. The imposition of the easement would create a substantial burden on the future use of the council land as a multi-storey car-park or for other developments (such as a skate park, park, mixed commercial-residential development, or community facility): at [248]-[270];

(3) The current use of the Applicant's land was not inconsistent with the public interest: at [275];

(4) The Court could not be satisfied that the Council could be adequately compensated for the loss or disadvantage arising from the imposition of the easement: at [293]. Given there was a reasonable likelihood that the Council would develop the land in the near future, assessing compensation on the basis of a continuing use as an at-grade car-park was inadequate: at [287]. The evidence of the Council's valuation expert was accepted to the effect that the intangible loss or disadvantage arising could not be adequately compensated: at [290];

(5) The Court could not be satisfied that reasonable attempts were made to secure an easement having the same effect as the one sought because there was no evidence of the Applicant attempting to obtain an easement that did not rely on the council land or a different easement over the council land: at [300], [302]; and

(6) That the easement would prioritise the Applicant's land over the efficient and preferred use of council land, adding complexity to the use of public land for the benefit of the community, militated against the grant of an easement in the exercise of the Court's discretion: at [303].

***Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99** (Preston CJ)

(related decisions: *Stannards Marine Pty Ltd v North Sydney Council* [2021] NSWLEC 66 (Preston CJ); *Stannards Marine Pty Ltd v North Sydney Council (No 2)* [2022] NSWLEC 112 (Preston CJ))

Facts: Stannards Marine Pty Ltd (**Stannards**) owns land and leases other land and waters in Berrys Bay, part of Sydney Harbour. Noakes Group Pty Ltd (**Noakes**) operates a boatyard on that land and in those waters. Noakes wished to modify its activities at the boatyard in two ways. First, it wished to moor and use a floating dry dock (**FDD**) it had already purchased in the waters to carry out repair and maintenance of larger vessels not as easily accommodated in the boatyard. Second, it wished to use an existing relocatable shed (**RS**) in new locations at the boatyard to carry out repair and maintenance of smaller vessels.

On 5 March 2019, Stannards lodged a development application for the mooring and use of the FDD in the waters (**FDD DA**). On 23 December 2021, Stannards lodged a development application for the use of the RS and installation of an air quality pollution control system in the RS and existing sheds (**RS DA**). On 1 September 2020, the Sydney North Planning Panel refused the FDD DA. On 4 March 2021, Stannards appealed to the Court against that refusal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) (**FDD appeal**). On 9 February 2022, Stannards appealed to the Court against the deemed refusal of the RS DA under s 8.7 of the EPA Act (**RS appeal**). The FDD appeal and the RS appeal were heard together. Various objectors, who were the owners of nearby residential properties who might be adversely affected by the proposed development, and community groups were held to be entitled to be heard on the FDD appeal (*Stannards Marine Pty Ltd v North Sydney Council* (2021) 250 LGERA 318; [2021] NSWLEC 66).

Issue: Whether development consent should be granted for the FDD DA and the RS DA.

Held:

Upholding the RS appeal and granting development consent to the RS DA, subject to conditions

(1) Development consent to the RS DA should be granted as the contentions raised by North Sydney Council (**Council**) in opposition to the grant of consent, that is, in respect of the structural integrity, acoustic, air quality and land contamination impacts of the RS, could be addressed by the imposition of appropriate conditions of consent. The Court directed the parties to confer and, if possible, agree on conditions of consent: at [22], [56], [66], [72], [83], [95], [106], [107], [301], [303];

(2) The parties supplied competing versions of these conditions which were resolved by the Court in *Stannards Marine Pty Ltd v North Sydney Council (No 2)* [2022] NSWLEC 112;

Dismissing the FDD appeal and refusing development consent to the FDD DA

(3) Development consent to the FDD DA should be refused as the FDD would have unacceptable visual and landscape character impacts. The FDD is too large and obtrusive for Berrys Bay, part of Sydney Harbour, which has high visual and landscape character and national and heritage significance: at [112], [302], [303];

(4) These findings were dispositive of the FDD appeal, such that it was not necessary for the Court to decide whether the FDD would also have unacceptable environmental impacts in the various other ways argued by the Council and the objectors: at [113], [300];

(5) The findings of the Council's visual expert that the landscape character and visual impacts of the FDD would be high were accepted. These high impacts were unacceptable having regard to Ch 10 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 and the Sydney Harbour Foreshores and Waterways Development Control Plan 2005, and the concept of the public trust and the principle of intergenerational equity embedded in these instruments: at [263], [271], [290], [299];

(6) The concept of the public trust that government holds certain common natural resources, such as harbours and navigable waters, in trust for the benefit of the public constrains government in its dealings with and management of the natural resources. One of these constraints is that ownership of the navigable waters of the harbour and of the lands underneath them are held in trust for the benefit of the whole people of the State: at [291];

(7) Sydney Harbour has been recognised as being a public asset of national and heritage significance in two Australian judicial decisions: *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 243 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190: at [179]-[186];

(8) The concept of the public trust is related to the principle of intergenerational equity as the public trust had been described as the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users: at [187];

(9) The introduction of a large, unarticulated, building-like vessel, which is clearly a human artifact, in the confined, natural waterway of Berrys Bay cannot protect, enhance or maintain that waterway as an outstanding natural asset. The FDD affects the waterway's status as a public asset of national and heritage significance as its presence in the waterway emphasises the alienation of an area of the public resource of Sydney Harbour for private purposes. The national and heritage significance of Sydney Harbour as a public asset is thereby diminished: at [273]-[275]; and

(10) The mooring and use of the FDD in Berrys Bay would be inconsistent with the principle of intergenerational equity as its high landscape character and visual impacts are inconsistent with the conservation of quality principle that requires the present generation to maintain the quality of the waterways and foreshores of Sydney Harbour such that they are passed on to future generations in no worse condition than they were received from the past generation and the conservation of access principle that requires the present generation to give its members equitable rights of access to the legacy of past generations and to conserve this access for future generations: at [297]-[298].

- **Merit Decisions (Commissioners):**

***Enares Pty Ltd v City of Canada Bay Council* [2022] NSWLEC 1375** (Walsh C)

Facts: Enares Pty Ltd (**Applicant**) appealed under s 8.7(1) of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the refusal of its development application (**DA**) for alterations and additions to Gladesville Bridge Marina (**marina**). The marina involved both land- and water-based elements. The water-based elements included: (i) an increase in the number of permanent commercial berths from

55 (50 floating and five onshore) to 109 (floating), and (ii) an increase in the capacity for the marina to meet demand for larger vessels (DA provides for the berthing of 12 vessels of 24 metres-plus in length, classified as superyachts, and a further 34 vessels of 20 metres and greater).

The water-based elements of the DA were subject to the provisions of Ch 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021.

Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005 (**SHFW DCP**) was a matter for consideration in the evaluation of the DA.

Issues:

(1) Whether the proposal would maintain, protect and enhance the visual qualities of Sydney Harbour and its foreshores;

(2) Did the public benefits outweigh the public disbenefits;

(3) Land-based vehicle parking; and

(4) Heritage conservation.

Held: Appeal dismissed:

(1) The SHFW DCP included objective evaluative tools which assisted in testing the rigour of the visual impact assessment undertaken by appointed experts. The Respondent's visual impact expert used these tools more completely and this expert's analysis, consequently, was more persuasive: at [14];

(2) This evidence made clear that the presentation of a linear massing of large vessels, cumulatively around 250 metres in total length, would provide for a significant visual intrusion into a current visually appealing harbour setting: at [140];

(3) While the proposal would provide a public benefit, including addressing demand for additional wet berths west of Sydney Harbour Bridge, there was insufficient evidence on why this marina should accommodate this quantum of larger vessels and consequential impacts: at [142]; and

(4) The public benefits did not outweigh the public disbenefits associated with visual impact and the disenfranchisement of that portion of the existing public waterway to be overtaken by the marina: at [144].

Garbourg v Ku-ring-gai Council **[2022] NSWLEC 1429** (Bradbury AC)

Facts: Late in 2020, Mr Garbourg (**Applicant**) had obtained development consent for the erection of a dwelling house in St Ives. The Applicant applied to the Ku-ring-gai Council (**Council**) to modify the consent to enable design changes to be made. The principal changes were within the approved building envelope but involved the construction of a home office and an additional bedroom and bathroom, the enlargement of a rumpus room and closure of the garage forecourt.

The proposed modification would increase the total floor area of the proposed development by some 80 square metres from 358.71 square metres to 438.94 square metres with a resultant increase in the floor space ratio (**FSR**) of the development from 0.375:1 to 0.46:1. The new FSR would exceed the maximum permissible FSR under cl 4.4 of the Ku-ring-gai Local Environmental Plan 2015 (**KLEP 2015**) by 22%.

The Council refused the modification application and the Applicant appealed to the Court.

An inspection of the development by council officers, after the appeal had been commenced, revealed that many of the modifications had already been completed.

Issue: Whether the development, to which the consent as proposed to be modified relates, was substantially the same development as the development for which consent was originally granted.

Held: Appeal dismissed; modification application refused:

(1) The relevant principles were summarised by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 at [173]: at [30];

(2) Those principles require that the Court identify and compare the material and essential features of the development as originally approved and the development as proposed to be modified in order to assess whether the modified development would be substantially the same as the originally approved development: at [31];

(3) It would be too simplistic to describe the material and essential elements of the development, both as approved and as proposed to be modified, as being a "dwelling house with parking", as the Applicant had submitted: at [46];

(4) While the proposed modifications would not change the characterisation of the development as being for the purpose of a dwelling house, that finding does not answer the question posed by s 4.55(2)(a) of the *Environment Planning and Assessment Act 1979* (NSW) of whether the modified development is substantially the same as the development originally approved: at [46];

(5) Similarly, while the proposed modification would not result in unreasonable or increased impacts when compared with the approved development, the absence of such impacts did not mean that the modified development would be substantially the same as the approved development: at [46];

(6) While, at the highest level of generality, the development might be described as "a dwelling house and parking", the material or essential elements of the development also included the size of the dwelling house: at [47];

(7) The approved development has a floor area of 358.7 square metres and complies with the FSR development standard in KLEP 2015, while the modified development would have a floor area of 438.94 square metres (an increase of some 80 square metres) and would exceed the FSR development standard by some 22%: at [48];

(8) While the discernible built form of the development, both when viewed from the street and from adjacent properties would remain largely unchanged (because the proposed modification will take place within the "envelope" of the previously approved building), the infilling of the space within the building envelope to the extent proposed resulted in a development that was not substantially the same as the development originally approved. The modifications would transform the proposal from one that was within the scope of the bulk and scale outcome sought by the FSR standard in KLEP 2015 to one that notably departed from that standard: at [49];

(9) While the FSR development standard in KLEP 2015 did not directly apply to the modification application, it was a clear indication that the bulk and scale of dwelling houses was a material consideration for residential development in the relevant zone under KLEP 2015: at [50];

(10) The proposed increase in FSR, even though contained within the approved building envelope, was a very substantial increase and one that resulted in the modified development not being substantially the same as the development the subject of the consent: at [51]; and

(11) Given the finding that the modified development would not be substantially the same as the approved development, there was no power to approve the modification application and the appeal must be dismissed: at [52].

Ooh!Media Limited v Willoughby City Council **[2022] NSWLEC 1332** (Bradbury AC)

Facts: This was an appeal from Willoughby City Council's (**Council**) deemed refusal of Ooh!Media Limited's (**Applicant**) proposal to modify a 1986 development consent to enable the conversion of a large illuminated static advertising roof sign (**existing sign**) to a digital advertising sign (**proposed sign**).

The existing sign was located above a commercial building at the intersection of the Pacific Highway, Boundary Street and Corona Avenue, Roseville. Both the Pacific Highway and Boundary Street are classified roads. Transport for NSW (**TforNSW**) refused its concurrence to the granting of development consent and exercised its right to appear in the appeal pursuant to s 64(1) of the *Land and Environment Court Act 1979* (NSW) (**Court Act**).

The existing sign consisted of a vinyl skin attached to a steel support structure with rear safety gantry. Advertising was printed on the vinyl skin and was changed monthly. The existing sign was illuminated until 10.00 pm each day by three floodlights mounted along its bottom edge.

The proposed sign was to be slightly smaller than the existing sign but would be positioned in the same location; have the same orientation; and use the same support structure. The steel safety gantry was to be removed from the rear of the existing structure and the existing frame and tensioned vinyl advertising copy replaced by a steel cabinet housing a digital screen. The application sought approval to display advertisements from 6.00 am to 10.00 pm, with each advertisement being displayed for a "dwell time" of 10 seconds before changing to another advertisement in accordance with a predetermined play cycle. There was to be a transition time of 0.1 seconds between advertisements.

Each party led expert evidence on road safety. The Applicant's expert gave evidence that the proposed sign would not increase the risk of collisions at the intersection, while the experts called by both the Council and TforNSW gave evidence that the proposed sign would distract drivers in what they said is already a complex intersection and that this would jeopardise traffic safety and increase the likelihood of traffic collisions.

Issues:

(1) Whether the proposed sign would be substantially the same as the existing sign, having regard to the check on jurisdiction contained in s 4.55(2)(a) of the *Environment Planning and Assessment Act 1979* (NSW) (**EPA Act**);

(2) Whether the proposed sign would be acceptable in terms of road safety; and

(3) Whether the impacts of both the existing sign and the proposed sign in relation to road safety and visual character may be taken into consideration in the determination of the modification application.

Held: Appeal dismissed; modification application refused:

(1) Section 4.55(2)(a) imposes an express statutory limitation on the consent authority's power to modify a development consent. A consent authority can only modify a development consent if it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted: at [12];

(2) What was proposed by the modification application did not involve the modification of the existing vinyl sign but, instead, its replacement with a new and essentially different type of sign. The proposed modification would involve a "radical transformation" of the existing sign and the advertising sign as proposed to be modified would not be "essentially or materially having the same essence" as the existing sign: at [17];

(3) While the proposed sign would be of a similar size and orientation as the existing sign, there Was an essential difference between the existing static sign, which consisted of a metal frame with tensioned vinyl advertising copy which was replaced manually every 28 days, and the proposed digital sign, which would comprise a steel cabinet housing a digital LED screen with advertisements changing every 10 seconds. The proposed sign would be not unlike a very large LED television and the difference between the existing sign and the proposed sign was analogous to the difference between a painting or poster, on the one hand, and an LED television, on the other. While they may each display an image they were fundamentally different: at [17]-[18];

(4) The proposed sign would be qualitatively, essentially and substantially different to the existing sign and the Court could not be satisfied that the development to which the consent as proposed to be modified relates would be substantially the same development as the development for which consent was originally granted, as required by s 4.55(2)(a): at [20];

(5) It followed that the essential precondition to the exercise of the power to modify the consent was not satisfied and consequently that the Court did not have the power to approve the modification application: at [20];

(6) On road safety grounds, the modification application should also be refused: at [59];

(7) In considering the impacts of the proposed sign, the Court was not confined to a consideration of the impacts that were additional to those of the existing sign (see *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 (at 476-477) per Mason P (with whom Sheppard AJA agreed)): at [28]; and

(8) The proposed sign would reduce safety for road users in a busy and complex intersection. The proposed sign would unacceptably increase the potential for driver distraction and consequently the risk of collisions and for that reason should be refused: at [56] to [60].

- **Procedural Matters:**

Evidence:

***Secretary Department of Planning, Industry and Environment v Edenmore Farms Pty Ltd; Keelendi Farms Pty Ltd; T J O'Brien Investments Pty Ltd; O'Brien (No 2)* [2022] NSWLEC 76** (Pain J)

(related decisions: *Secretary, Department of Planning, Industry and Environment v Edenmore Farms Pty Ltd; Keelendi Farms Pty Ltd; T J O'Brien Investments Pty Ltd; O'Brien* [2022] NSWLEC 63 (***Edenmore (No 1)***) (Robson J))

Facts: Twelve prosecutions for unlawful clearing of native vegetation were set down for hearing on 11 July 2022 for 10 days. By Notice of Motion, dated 15 June 2022 (heard 20 June 2022), the Prosecutor sought leave under s 68 of the *Land and Environment Court Act 1979* (NSW) to amend its notice under s 247E of the *Criminal Procedure Act 1986* (NSW) to adduce two additional affidavits of its aerial surveying witness, Mr Watts,

and its ecologist, Dr Hammill Stone, and consequently amend its s 247J notice. The Defendants had sought to vacate the hearing dates, unsuccessfully, on 22 April 2022 in *Edenmore (No 1)*.

On 17 May 2022, *Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd (No 6)* [2022] NSWLEC 62 (***Namoi Valley (No 6)***) was delivered by Pain J, in which similar reports by Mr Watts, in another unlawful clearing prosecution, were excluded for failure to meet s 79 of the *Evidence Act 1995* (NSW). The experts were asked in the Edenmore proceedings to prepare supplementary reports after the decision in *Namoi Valley (No 6)*. The Defendants' expert ecologist and aerial imagery expert could not prepare a report until August 2022.

Issue: Whether to grant the Notice of Motion and allow the Prosecutor to adduce additional expert evidence at the hearing.

Held: Notice of Motion partially granted allowing the Prosecutor to rely on parts of the new expert reports; significant sections of the reports were not permitted to be relied upon; hearing dates not vacated:

(1) The reports were relevant and generally admissible: at [34]. The prejudice to the Defendants of allowing the reports to be adduced about three weeks prior to trial without an expert retained was recognised: at [35]. It was not appropriate to take into account the absence of attempts by the Defendants to find another expert after their motion to vacate was dismissed on 22 April 2022, in circumstances where the Defendants could not have been on notice that the Prosecutor would seek to rely on additional expert reports: at [36]. That both parties accepted that allowing the reports to be adduced would result in a vacation of the hearing dates and a trial in 2023 weighed heavily in the consideration in light of *Edenmore (No 1)*: at [38]. Considerations of fairness and justice informed by the history of the matter led to the conclusion that the parts of Mr Watts' report containing much of the new material could not be relied on by the Prosecutor: at [39]. Aside from the paragraphs confirming her earlier opinion, the balance of Dr Hammill Stone's report could not be relied on as it sought to confirm Mr Watts' opinions and was essentially new material, or the necessity of the material had not been demonstrated to the extent it repeated her previous report: at [40]. It was not necessary to vacate the hearing dates: at [43].

Joinder:

Jon Garling v Northern Beaches Council **[2022] NSWLEC 102** (Pepper J)

Facts: On 21 March 2022 Jon Garling (**Applicant**) filed a Class 1 appeal against the part refusal by the Northern Beaches Council (**Council**) of a third modification application (**Mod 3**) in respect of a development consent granted in 2016 by the Council (**development**). The development concerned the construction of a new dwelling on land known as 24 Lancaster Crescent, Collaroy (**Garling property**) and Mod 3 sought to modify that development to allow for an increase in the height of a privacy screen and new vegetation along the boundary of the Garling property and a property at 22 Lancaster Crescent, Collaroy, owned by Joanne Jefferies (Jefferies). In 2017, Jefferies commenced Class 4 proceedings against the Applicant for alleged breaches of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) in the carrying out of the development. The matter was settled by Consent Orders on 12 October 2017 (**Class 4 Consent Orders**).

On 22 July 2022, Jefferies filed a motion for joinder to the proceedings pursuant to s 8.15(2) of the EPA Act. Jefferies sought to be joined to the Class 1 appeal on the basis that approving Mod 3 would result in breaches to the Class 4 Consent Orders and that there was no contradictor that would raise these issues with the Court.

Issues:

(1) Whether the Class 4 Consent Orders would be taken into account by the Court in the assessment of Mod 3 irrespective of whether Jefferies was joined as a party, and therefore, whether joinder should be granted; and

(2) Whether the interests of justice otherwise required joinder in the circumstances of the case.

Held: Notice of Motion dismissed; joinder refused:

(1) The issues raised by Jefferies could be sufficiently addressed absent joinder because the Class 4 Consent Orders were an instrument that fell within s 39(4) of the *Land and Environment Court Act 1979* (NSW) and, therefore, the Court had to have regard to them: at [51] and [68];

(2) All other merits contentions raised by Jefferies were already addressed by the Council as having been raised by an objector: at [64]-[65];

(3) Jefferies would be given an opportunity to make submissions as an intervenor to the Class 1 appeal prior to the conciliation conference and, therefore, the interests of justice did not require joinder: at [68]; and

(4) Pursuant to s 56 of the *Civil Procedure Act 2005*, joining Jefferies would not have facilitated the just, quick and cheap resolution of the real issues in dispute: at [68].

Separate Question:

CK Design Pty Ltd v Penrith City Council **[2022] NSWLEC 82** (Pepper J)

Facts: On 6 April 2021, CK Design Pty Ltd (**CK Design**) lodged a development approval for a boarding house in Kingswood (**DA**). That DA was refused by the Penrith City Council (**Council**) on 21 July 2021, and CK Design subsequently filed a Class 1 appeal in this Court. However, the parties disagreed on a preliminary legal matter, namely, whether the *State Environmental Planning Policy (Housing) 2021* (**SEPP Housing**), which commenced on 26 November 2021, or the *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**SEPP ARH**), which was repealed on that same day, applied to the DA. The SEPP Housing contained a savings provision that provided that a DA that had been "made, but not yet determined" on or before the commencement of that instrument was to be assessed under the SEPP ARH. The Council contended that the DA had been "determined" prior to the commencement date because it had been refused in mid-2021. By contrast, CK Design argued that because the appeal process had not been exhausted, the DA was not yet "determined" for the purpose of the SEPP Housing. The two planning schemes imposed significantly different standards upon the DA. For example, the SEPP ARH did not require the DA to include landscaping, whereas the SEPP Housing mandated that 40% of the land be set aside for that purpose.

Issue: Should leave be granted for the hearing of a separate question, namely, whether the DA had been "determined" prior to the commencement date of the SEPP Housing and, therefore, whether the SEPP ARH applied to the DA.

Held: Leave granted for the determination of a separate question; consequential timetabling orders made:

(1) The hearing of the separate question would not require evidence beyond that contained in an Agreed Statement of Facts and gave rise to a real issue that requires determination: at [34]-[35];

(2) The determination of the separate question would substantially narrow the evidential and factual fields of controversy because it would allow the parties to prepare the Class 1 appeal and s 34 conciliation conference on the basis that either the SEPP Housing or the SEPP ARH applied to the DA, rather than both contingently: at [36];

(3) The Court accepted that if the separate question was not determined, the utility of the s 34 conciliation conference between the parties would be eroded and would cast doubt upon the enforceability of any agreement that might be reached at that conciliation: at [37]-[38];

(4) The determination of which planning regime applied to the DA would avoid potential confusion for objectors and ensure that any evidence they provided would be relevant: at [39]; and

(5) The hearing of the separate question promoted the just, quick and cheap resolution of proceedings, pursuant to s 56 of the *Civil Procedure Act 2005* (NSW): at [40]-[41].

Court News

Appointments:

Dr Sarah Pritchard SC was appointed a Judge of the Court from 15 November 2022.

The following Registrars were appointed:

- Ms Donette Holm, Senior Deputy Registrar, on 24 August 2022
- Ms Elizabeth Orr, Deputy Registrar, on 31 October 2022.