# Land and Environment Court of New South Wales

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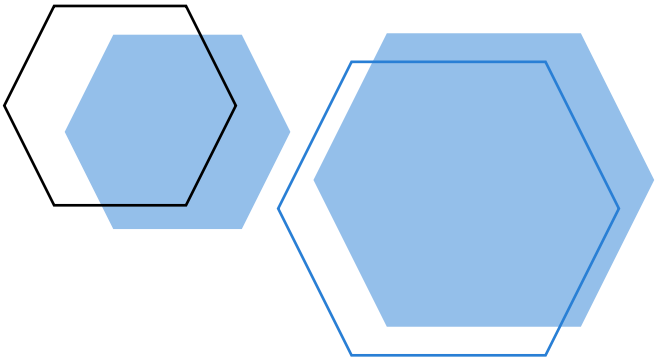
Judicial Newsletter



# COURT NEWS

## UPDATED PRACTICE NOTE AND COURT POLICY

The Class 3 Compensation Claims Practice Note and Site Inspections Policy was updated on 10 September 2024.



# JUDGMENTS

## UNITED KINGDOM

***R (On the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others*** **[2024] UKSC 20**
(Lord Kitchin, Lord Sales, Lord Leggatt, Lady Rose and Lord Richards)

(Related decisions: [2020] EWHC 3566 (Admin); [2021] PTSR 1160 (Mr Justice Holgate); [2022] EWCA Civ 187; [2022] PTSR 958 (Lord Justice Lewison, Sir Keith Lindblom and Lord Justice Moylan))

Facts: Horse Hill Developments Ltd (**developer**) had applied to Surrey County Council (**Council**) for planning permission to retain and extend two wells at an existing site and drill four new wells, for the purpose of extracting hydrocarbons for commercial production. The oil was to be extracted for over 20 years, producing 3.3 million tonnes of oil which, on the evidence before the Supreme Court, amounted to 10.6 million tonnes of carbon dioxide emissions. The developer required an Environmental Impact Assessment (**EIA**) to support its application, under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (**Regulations**), which implemented European Union Directive 92/11/EU (**EIA Directive**). An EIA was required to "identify, describe and assess … the direct and indirect significant effects of a project" on factors including climate (art 3(1) of the EIA Directive).

The Council granted development consent and accepted the developer's approach that the EIA should be confined to assessing only direct releases of greenhouse gas (**GHG**) emissions at the project site, and not include an assessment of the impact of the combustion of the extracted oil on the climate. The developer's reasons were that this was appropriate because the oil combustion was not part of the proposed development, was out of the control of the site operators, and that the Council should not regulate such downstream emissions which were regulated by other regimes. No information about combustion emissions was considered by the Council or made available to the public. The EIA took into account only the "direct" GHG emissions and therefore described the effects of the proposed development on the climate as "negligible".

The appellant brought a judicial review challenge to this decision on three grounds, the first ground being that the Council failed to comply with its EIA obligations under the Regulations and EIA Directive by failing to assess the downstream GHG emissions. At first instance in the High Court, all three grounds were dismissed by a single judge ([2020] EWHC 3566 (Admin); [2021] PTSR 1160), who accepted it was inevitable that the oil would be combusted, producing GHG emissions. Nevertheless, the judge held that, in relation to the first ground, it was impossible to say where the oil produced would be used or refined and therefore the combustion was incapable of falling within the scope of the EIA. In the alternative, if it was legally possible to view that combustion emissions come within the scope of the EIA, it was impossible to say that the Council's opinion that the emissions were not indirect effects of the proposed development was irrational or otherwise unlawful. The appellant appealed to the Court of Appeal in relation to the first ground, where a majority (two to one) dismissed the appeal ([2022] EWCA Civ 187; [2022] PTSR 958), upholding the primary judge's alternative reasoning.

Issue: Whether it was lawful for the Council not to include the combustion emissions as "direct or indirect … effects of the project" under the EIA, under the EIA Directive and the 2017 Regulations.

Held: Appeal allowed (per Lord Leggatt, with Lord Kitchin and Lady Rose agreeing; Lord Sales dissenting with Lord Richards agreeing):

(1) The question was one of causation. The agreed facts included that the extraction of oil was both necessary and sufficient to bring about the burning of it as fuel. This was the "strongest possible form of causal connection" and much stronger than the legal "but for" test: at [80]; there was no conjecture or speculation about what would happen to the oil which would inevitably be burnt as fuel: at [123]. Next, estimating the emissions caused by the combustion was "not a difficult task" which could "easily have been performed by the developer": at [81]. Had this figure been

included in the EIA, the GHG emissions attributable to the project could not have been dismissed as "negligible": at [82];

(2) Regarding the developer's arguments to exclude the combustion emissions, the Council was wrong to confine the EIA to emissions occurring only at the project site. "Indirect" emissions by their nature occur away from the project location: at [102]. Further, the impact of GHG emissions by their nature does not depend on where the emissions occur: at [97]. The argument that GHG emissions from beyond the project boundary were out of the site operator's control was flawed as if no oil is extracted, no combustion emissions will occur and therefore these emissions are "entirely within" the operator's control: at [103]. Finally, the fact that other regimes would operate to avoid or mitigate significant environmental effects does not remove an obligation to assess the effects of the combustion in the EIA: at [108]. However, no separate pollution control or non-planning regimes which could be used to avoid or reduce the combustion emissions were identified and as such, the combustion emissions would be unavoidable if the project proceeded: at [110];

(3) The purpose of the EIA was to ensure that decisions were made with full knowledge and public awareness of the likely environmental consequences: at [154]; and

(4) Therefore, the Council's decision was unlawful because first, the EIA failed to assess the climate effects of the combustion of the oil and second, the reasons for disregarding this effect were flawed: at [174].

## HIGH COURT OF AUSTRALIA

***Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue*** **[2024] HCA 20** (Gageler CJ, Gordon, Edelman, Steward and Jagot JJ)

(Related decisions: *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* [2023] NSWCA 44 (Kirk JA, Simpson AJA and Griffiths AJA); *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 430 (Ward CJ in Eq)

Facts: On properties known as 'Kelvinside' and 'Woodlands' in the Hunter Valley, NSW, Godolphin Australia Pty Ltd (**Appellant**) conducted an equine business involving both the training and maintaining of thoroughbred horses (**racing purpose**) and the breeding and sale of such horses (**sale purpose**). Between 2014 and 2019, the Chief Commissioner of State Revenue (**Respondent**) assessed the Appellant as liable for land tax in respect of the subject properties. The Appellant challenged that decision on the basis that the subject properties were exempt from such assessment under s 10AA(1) of the *Land Tax Management Act 1956* (NSW) (**Land Tax Act**), which applied to "land used for primary production". Relevantly, s 10AA(3)(b) defined "primary production land" as land the "dominant use of which is for ... the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". In the Supreme Court of New South Wales, Ward CJ in Eq (as her Honour then was) upheld the Appellant's objection, relying on the proposition that the properties were used as a part of an "integrated operation" which combined the racing and sale purposes and therefore engaged of the exemption provided for by s 10AA(3)(b). The Court of Appeal (per Kirk JA and Simpson AJA, Griffiths AJA dissenting) upheld the Respondent's appeal. Kirk JA held that, in light of the 'use-for-a-purpose' test as applied to s 10AA(3)(b) and qualified by the word "dominant", the racing purpose constituted the dominant use of subject properties, thereby disentitling the Appellant of the relevant tax exemption. The Appellant appealed on the basis of the proper construction of s 10AA(3)(b) of the Land Tax Act.

Issue: Whether, on a proper construction, having regard to effect of the word "dominant" in respect of "use" and "purpose" in particular, the exemption provided for by s 10AA(3)(b) of the Land Tax Act, applied to the subject properties.

Held: Appeal dismissed (per Gageler CJ, Gordon, Edelman, Steward and Jagot J):

(1) The Court held that, given the relevant statutory language and context, as well as extrinsic materials, s 10AA(3)(b) was to be construed such that "dominant" qualifies the composite phrase "use of which is for ... the maintenance of animals ... for the purpose of selling them": at [4], [38], [91]. The approach of the Court of Appeal was upheld: at [28], [79]; and

(2) The Court further held, applying the relevant test, that the Appellant failed to demonstrate that the dominant purpose for which the subject properties was being used was the maintenance of animals for their sale, or their produce or progeny: at [37].

***Attorney-General for the State of Tasmania v Casimaty*** **[2024] HCA 31** (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

(Related decisions: *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2 (Pearce, Brett and Geason JJ); *Casimaty v Hazell Bros Group Pty Ltd (No 2)* [2022] TASSC 9) (Blow CJ)

Facts: The Tasmanian Government Department of State Growth (**Department**) made a proposal for the construction of a new interchange at a road junction near Hobart Airport. In 2017, the proposal was referred to and reported upon by the Parliamentary Standing Committee on Public Works (**Committee**). Subsequently, the Department engaged Hazell Bros Group Pty Ltd (**Hazell Bros**) to construct a new interchange, which differed in cost and design from the original proposal. Mr Casimaty (**Respondent**), who claimed an interest in land adjacent to a parade connected to the junction, brought proceedings seeking declaratory and injunctive relief against Hazell Bros on the basis that the updated proposal had not been referred to or reported upon by the Committee in contravention of s 16(1) of the *Public Works Act 1914* (Tas) (**Public Works Act**). Relevantly, s 16(1) provided as a condition precedent to the commencement of public works covered by s 15 that such works were referred to and reported upon by the Committee. The Attorney-General of Tasmania, joined to the proceedings by virtue of s 58(1)(j) of the *Supreme Court Civil Procedure Act 1932* (Tas), in turn sought on an interlocutory basis that the Defendant's statement of claim be struck out or the proceedings dismissed. The primary judge (Blow CJ) struck out the statement of claim and dismissed the proceeding given that, were the Supreme Court to adjudicate upon the differences as between the original and updated proposals for the interchange, it would offend privilege of the Tasmanian Parliament. The Full Court of the Supreme Court (**Full Court**), allowed the Respondent's appeal (Brett J, with whom Pearce J agreed, Geason J dissenting), holding that s 16(1) of the Public Works Act created a public obligation judicially enforceable under general law. The Attorney General sought, and was granted, special leave to the High Court of Australia.

Issues:

(1) Whether the Full Court erred in construing s 16(1) of the Public Works Act as creating a public obligation enforceable by a Court; and
(2) Whether the Full Court ought to have concluded that the primary judge was correct to consider that adjudication of the proceedings contravened Parliamentary privilege.

Held: Appeal upheld, setting aside the Full Court's Orders and costs (per Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ, Edelman J writing separately):

(1) The Court held that, on its proper construction, the statutory consequence of non-compliance with the condition precedent prescribed by s16(1) of the Public Works Act lay in a political, not judicial, context, with political accountability and the concomitant principle of responsible government specifically: at [43], [104]. The majority, with whom Edelman J largely agreed, justified that conclusion on the basis of the "traditional view", as was referred in *Western Australia v The Commonwealth* (1995) CLR 373, whereby courts do not interfere with the internal affairs or inter-mural activities of Parliament: at [42], [103]. The second and more specific justification provided by the majority was the inconvenience to private contractors employed by Government departments or State authorities, as well as the general public, were curial relief granted in the circumstances: at [42]; and
(2) As a result of the first ground being upheld, the second ground did not arise for determination: at [12].

## QUEENSLAND COURT OF APPEAL

***Chiodo Corporation Operations Pty Ltd v Douglas Shire Council*** **[2024] QCA 153** (Flanagan JA, Brown AJA and Bradley J)

(Related decision: *Chiodo Corporation Operations Pty Ltd v Douglas Shire Council* [2023] QPEC 44 (Kefford DCJ))

Facts: On 28 September 2021, Chiodo Corporation Operations Pty Ltd's (**Appellant**) application seeking a development permit for a material change of use of vacant land at 71-85 Port Douglas Road, Port Douglas, so as to enable the development of a luxury resort complex (**development**), was refused by Douglas Shire Council (**Respondent**). On 14 November 2023, the Planning and Environment Court of Queensland (**P&E Court**), assuming the role of "assessment manager" under s 45 of the *Planning Act 2016* (Qld) (**Planning Act**), dismissed the Appellant's appeal against the refusal of its development application. Ultimately, the primary judge held that while the

development was not without its merits, it remained, on account of its modern design, "wildly discordant" with the unique character and amenity of the Port Douglas area. On 20 December 2023, the Appellant sought leave to appeal the decision of the P&E Court pursuant to s 63(1) of the Planning Act, which required demonstration of a material error or mistake in law.

Issues:

(1) Whether the primary judge erred by failing to give separate consideration to whether the development complied with Performance Outcome 4 (**PO4**) of the Port Douglas/Craiglie Local Plan Code (**Planning Code**);
(2) Whether the primary judge failed to apply the correct legal test to various provisions of the Douglas Shire Planning Scheme 2018 (**Planning Scheme**), notably ss 3.5.5.1(1) and (2) of Part 3: Strategic Framework (**Strategic Framework**); and
(3) Whether the primary judge failed to identify an inconsistency, under the Planning Scheme, between provisions of the Tourist Accommodation Zone Code and the Access, Parking and Servicing Code.

Held: Application for leave to appeal dismissed with costs (per Flanagan JA, Brown AJA and Bradley J agreeing):

(1) The Court held that the primary judge's reasons demonstrated consideration of PO4 of the Planning Code, which provided for whether the development's landscaping complemented Port Douglas's existing character: at [56], [102]-[103]. Any such failure, assuming it was made out, was not in the Court's view material, in the sense that it could not have been said to have materially affected the decision in question: at [58];
(2) The Court denied that the primary judge's reasons revealed any error as to the construction or application of the relevant provisions of the Strategic Framework within the Planning Scheme, holding that her Honour's conclusion that the development was inconsistent with said provisions was based on a determination that the development was discordant with the character of Port Douglas: at [99], [102]-[103]. The Court also noted that this ground was not relevantly material: at [4], [100]; and
(3) It was accepted by the Appellant that the third ground only arose in the event that either, or both, of the above grounds were made out, and as such did not fall for consideration: at [10]-[11], [102]- [103].

## NEW SOUTH WALES COURT OF APPEAL

***M. & S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd*** **[2024] NSWCA 151** (Ward P, Mitchelmore JA and Preston CJ of LEC)

(Decision under review: *M & S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (No 2); M & S Investments (NSW) Pty Ltd v Boutros; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Boutros* [2023] NSWLEC 111 (Pain J))

Facts: M. & S. Investments (NSW) Pty Ltd (**M&S**) commenced proceedings in September 2021, charging the defendants with each committing an offence against s 144AAA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). The summonses contained a defect in that they stated the offence was committed on "a day or days in the period 1 September 2016 to 17 November 2016", whereas s 144AAA did not commence until 25 January 2019. M&S applied to amend the summonses to change the date of the offence to 30 August 2019 and the defendants applied to quash the summonses.

The primary judge dismissed each of the summonses. The primary judge first dealt with the defendant's motion to dismiss on the basis that the summonses did not disclose an offence known to the law. The primary judge then dealt with M&S's motion to amend the summonses, to cure this defect. The primary judge granted each of the defendant's motions to dismiss each summons "as it does not disclose any offence known to law as s 144AAA … did not exist when the offence alleged occurred".

Issues: M&S sought to review and appeal this decision, by filing a summons for judicial review and an appeal under s 5F of the *Criminal Appeal Act 1912* (NSW). The grounds of review and appeal were that the primary judge erred in law in:

(1) Dismissing the summonses pursuant to s 17(1) of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) which provision did not apply in the court below;
(2) Denying M&S procedural fairness by dealing first with the defendants' motions to dismiss the summonses before dealing with M&S's motion to amend the summonses;

(3) Finding that the summonses were nullities on the ground that because the summonses stated wrongly the time at which the offences were committed, being a time when s 144AAA of the POEO Act did not exist, they did not disclose an offence known to law;
(4) Finding that the summonses could not be amended as, being nullities, no summonses existed to be amended;
(5) Finding that there was no power to amend the summonses, as s 68(1) or (2) of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**) could not be relied on;
(6) Finding that M&S's argument was that the s 144AAA offences were continuing offences when it was that there was a continuing act giving a cause of complaint from day to day whilst s 144AAA was being disobeyed by the defendants;
(7) Finding that the s 144AAA offence was directed, by virtue of the definition of "dispose" in s 144AAA(2), to positive acts and not also omissions;
(8) Finding that the date in 2019, which M&S sought to substitute for the dates in 2016 as being the date on which the offence was committed, was not identified by reference to any action within the definition of "dispose" in s 144AAA(2) taken by the defendants; and
(9) Taking into account irrelevant discretionary considerations in deciding not to allow the amendment of the summonses.

Held: Appeal upheld on some grounds; leave granted; exclusionary remitter application denied (per Preston CJ of LEC, Ward P and Mitchelmore JA agreeing):

**Leave to file notice of appeal out of time – leave granted**

(1) As the defendants did not oppose the Court giving leave to file the notice of appeal after the expiry period and as the grounds of appeal overlapped substantially with the grounds of review and would be dealt with together, leave should be granted: at [8];

**Ground (a) – appeal upheld**

(2) Section 16(1)(g) and (h) of the Criminal Procedure Act states that an indictment is not "bad, insufficient, void, erroneous or defective" on the ground that it states the time the offence was committed wrongly or imperfectly, or on an impossible day. As time is not an essential ingredient for s 144AAA of the POEO Act, the summonses cannot be "bad, insufficient, void, erroneous or defective" for stating the time at which the offence was committed "wrongly" or "imperfectly";
(3) Section 16(2)(a) and (b) of the Criminal Procedure Act provides that no objection is allowed to any indictment for any offence that is to be dealt with summarily on the grounds of an alleged defect in substance or form, or any variance between it and the evidence adduced for the offence charged. A wrong statement in the summonses of the date of the offence is a defect of substance for which M&S should be given leave to amend: at [10]-[19];
(4) The summonses did disclose an offence known to law, contrary to the primary judge's findings, and so were not nullities for failing to do so. The offence in s 144AAA of the POEO Act does not lose its character as an offence known to law because the summonses wrongly stated that the offence was committed prior to the section coming into operation: at [20]-[21];

**Grounds (c)-(i) – appeal upheld**

(5) The primary judge's first reason for not giving leave to amend the summons was in error as the summonses were not nullities: at [22]-[23];
(6) The primary judge's second reason that s 68(2) of the LEC Act does not give power to amend the summonses was correct, as this section did not apply. Nevertheless, the Land and Environment Court has power to allow amendment of the summonses to change the date on which the offences were committed under ss 20 and 21 of the Criminal Procedure Act. The primary judge erred in not considering exercising these provisions to allow the amendment: at [22]-[24];
(7) The primary judge's third reason that as s 144AAA was not a continuing offence, the date of the offence cannot be changed from the date on which the disposal of the waste occurred, to a date when the offence is said to continue to be committed by the defendants omitting to dispose of the waste at a place that could lawfully receive the waste, was in error. It misunderstood M&S's argument that s 144AAA created a positive obligation to dispose of asbestos waste at a place that can lawfully receive the waste, not a negative obligation not to dispose of asbestos waste at a place that cannot lawfully receive the waste. The primary judge's misunderstanding of this argument denied M&S the opportunity to be heard at a trial: at [22], [25]-[27];
(8) The primary judge's fourth reason that there was no evidence that the defendants did anything on the date included in the summonses which amounted to the disposal of waste, and no such evidence was put before the judge when seeking leave to commence the proceedings, was in error. M&S's case was not that the disposal occurred on that date but that the defendants continued to disobey the s 144AAA obligation to dispose of the waste at a place that could lawfully

receive it on that date. The lack of evidence M&S put before the judge was not material: at [22], [28]-[29];

**Ground (b) – unnecessary to determine**

(9) Given the decisions in relation to the other matters, it was unnecessary to decide M&S's contention that the primary judge denied M&S procedural fairness: at [32]; and

**M&S's application for exclusionary remitter – application denied**

(10) No conduct of the primary judge in not acceding to M&S's application for an adjournment and instead in hearing the defendants' notices of motion to dismiss the summonses could give rise to a reasonable apprehension of bias, such that the primary judge might not bring an impartial mind to the resolution on remitter of M&S's notice of motion. The case for exclusionary remitter is not made out: at [35]-[37].

***Lahoud v Willoughby City Council*** **[2024] NSWCA 163**
(Meagher, Leeming JJA and Preston CJ of LEC)

(Decision under review: *Lahoud v Willoughby City Council* [2023] NSWLEC 117 (Moore J))

Facts: Willoughby Local Planning Panel (**Panel**), on behalf of Willoughby City Council (**Council**), granted development consent to Helm Pty Ltd (**Helm**) for the adaptive reuse of an existing commercial building, including the erection of an additional level and the change of use to ground level business premises, with 14 apartments above (the **development**) at 131 Sailors Bay Road, Northbridge (the **land**). Mr Lahoud brought judicial review proceedings in the Land and Environment Court (**LEC**) challenging the development consent, which were heard and determined by Moore J (**primary judge**). The primary judge dismissed the proceedings and ordered Mr Lahoud to pay 80% of Helm's costs of the proceedings.

Issues: Mr Lahoud appealed against the primary judge's decision and orders under s 58 of the *Land and Environment Court Act 1979* (NSW) (**LEC Act**). Mr Lahoud's 12 grounds of appeal can be grouped in four categories:

(a) the Panel's failure to be satisfied under cl 4.6 of Willoughby Local Environmental Plan 2012 (**WLEP**) before granting development consent to the development that contravened the height standard under cl 4.3 of WLEP (the height standard grounds);

(b) the Panel's satisfaction that the development would have an active street frontage, contrary to cl 6.7(3) of WLEP (the active street frontage ground);

(c) the Panel's acceptance of the development being for the permissible use of shop top housing (the shop top housing grounds); and

(d) the Panel's failure to consider contamination matters under cl 7 of State Environmental Planning Policy 55 – Remediation of Land (**SEPP 55**) (the contamination grounds).

Helm raised five contentions in its notice of contention, alleging that the primary judge should have:

(a) found that the validity of the Panel's decision was not capable of being challenged because the proceedings were not commenced within time (contention 1);

(b) dismissed the height standard ground on the basis that Mr Lahoud failed to establish that the Panel's decision was affected by the jurisdictional errors alleged (contention 2);

(c) dismissed the active street frontage ground on the basis that Mr Lahoud failed to establish that the Panel's decision was affected by the jurisdictional errors alleged (contention 3);

(d) dismissed the contamination grounds on the basis that Mr Lahoud failed to establish that the decision was affected by the jurisdictional errors alleged (contention 4); and

(e) considered Helm's contention that even if the Panel's decision was affected by jurisdictional error, the Court could make an order suspending the operation of the development consent and specifying the terms that could validate the consent pursuant to s 25B of the Court Act (contention 5).

Held: Appeal dismissed, notice of contention upheld in part, and the appellant ordered to pay the second respondent's costs of the proceedings in the LEC and the Court of Appeal (per Preston CJ of LEC, Meagher and Leeming JJA agreeing):

**The height standard grounds**

(1) The height standard grounds of appeal were based on incorrect assumptions of the statutory scheme. On a correct understanding of the statutory scheme, the height standard grounds of appeal were unfounded: at [26], [31], [36], [38];

(2) The development as required to be amended by the conditions of consent was the development for which development consent was granted. The grant of development consent to this amended development was within the power under s 4.16(1) as enabled by s 4.16(4) of the *Environmental Planning and Assessment*

*Act 1979* (NSW) (**EPA Act**): at [39]. The Panel was satisfied under cl 4.6 of the WLEP with respect to this amended development: at [38];

(3) The power to determine the development application by granting consent subject to conditions was in s 4.16(1). The primary judge's finding that the Panel had exercised the power in s 4.16(1) in the way permitted by s 4.16(4)(b) did not raise a new issue in respect of which notice needed to be given to the parties and an opportunity afforded for them to be heard. There was no denial of procedural fairness in the primary judge identifying how the power in s 4.16(1) was exercised by the Panel: at [40];

**The active street frontage ground**

(4) The question of whether the building as proposed to be redeveloped would be a building that had an active street frontage within the statutory description was not a jurisdictional fact: at [60]. The Panel's conclusion, that the building fell within the statutory description, was reasonably open to the Panel: at [67]. No jurisdictional error was involved: at [68];

**The shop top housing grounds**

(5) The appellant's argument was based on two incorrect interpretations of the definition of "shop top housing." The first was that the phrase "ground floor retail premises or business premises" demands that the whole of the ground floor of the building be used for retail premises or business premises. The second was the conflation of the definition's use of the word "dwellings" with "residential use". The proposed development can, on the correct construction of the definition of "shop top housing", be characterised as being for shop top housing: at [78]-[81];

**The contamination grounds**

(6) The evidence did not support the conclusion that the Panel did not consider SEPP 55 or cl 7(1) of that SEPP 55 as to whether the land is contaminated: at [105];

(7) The appellant failed to discharge his onus of establishing that the land on which the development was proposed to be carried out was land specified in cl 7(4) of the SEPP 55, and therefore failed to establish that the Panel breached their obligation to consider contamination under cl 7(2): at [110], [115]; and

**Whether proceedings were time-barred**

(8) The notifications given by the Council on 30 June and 1 July 2021 were not notices for the purposes of s 4.59 of the EPA Act, as they were not given in accordance with the regulations or the EPA Act. Only the 15 July 2021 notice constituted a public notice for the purpose of s 4.59 of the EPA Act. Therefore, the proceedings were not time-barred: at [126]-[128].

***Sydney Metro v C & P Automotive Engineers Pty Ltd* [2024] NSWCA 186** (Meagher, Payne and Kirk JJA)

(Decision under review: *Nohra v Sydney Metro; C & P Automotive Engineers Pty Ltd v Sydney Metro* [2023] NSWLEC 95 (Pain J))

Facts: In March 2021, Sydney Metro (**appellant**) compulsorily acquired land in Clyde, New South Wales. C & P Automotive Engineers Pty Ltd (**respondent**) had a lease over the acquired land for five years from 1 April 2020 with an option to renew for five years. The respondent relocated its hire, storage, sale and repair business from the acquired land, first to three temporary rental premises and then to rental premises in Granville.

The primary judge awarded the respondent compensation in the amount of $2,418,759.99 pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**). The appeal concerned a portion of the compensation awarded for disturbance of leasehold interest under s 55 of the Just Terms Act, being relocation costs. The primary judge found that the respondent was entitled to compensation for two categories of costs incurred in relation to relocation within the meaning of s 59(1)(c) of the Just Terms Act: (1) $1,914,404 (GST exclusive) for costs of constructing new landlord's fixtures at the replacement of the permanent lease site; and (2) $88,173 (GST exclusive) for the difference in rent between the acquired property and the new site for the remainder of the term under the lease (i.e. four years).

Issues:

(1) Whether construction costs claimed by the respondent were incurred in connection with relocation within the meaning of s 59(1)(c), where those financial costs were incurred in the construction of new landlord's fixtures on the new property replicating landlord's fixtures which existed at the acquired property;

(2) Whether the respondent was entitled to compensation for disturbance in constructing new landlord's fixtures given the respondent had been compensated for the loss of the right to use the landlord's fixtures as part of the market value of the acquired leasehold right; and

(3) Whether the respondent was entitled to compensation under s 59(1)(c) for the increased rent at the replacement premises.

Held: Appeal allowed. Order of the primary judge set aside. Compensation awarded to the respondent including $185,182.99 for disturbance losses under s 55(d) comprising $145,600 (GST exclusive) for relocation costs involving relocating to temporary sites under s 59(1)(c) (per Payne JA, Meagher JA agreeing at [1], Kirk JA agreeing at [154]):

(1) Section 59(1)(c) does not permit compensation to be paid to a tenant for the costs of constructing new landlord's fixtures at new premises. "Relocation" within the meaning of s 59(1)(c) is neutral about the quality of the premises to which the relocation occurs and does not provide for relocation to "like-for-like" premises. It is a significant expansion to the Just Terms Act to read s 59(1)(c) as permitting compensation to a lessee who spends money on landlord's fixtures which enhance the value of the new landlord's property: at [111]-[117];
(2) The respondent's loss was of the right to use fixtures pursuant to, and for the term of, the lease. This was compensated as the loss of the right to use the improvements as part of the market value of the lease under s 55(a). To award further compensation for disturbance in respect of relocation so as to include the cost of construction of similar improvements at the relocation site compensates for the loss of the same thing twice: at [124]-[140]; and
(3) It is open to a dispossessed lessee to purchase or lease whichever replacement property they wish to relocate their business. Where rent for a leasehold interest in a property is greater than the rent payable under the acquired leasehold interest, compensation for disturbance under s 55(d) of the Just Terms Act is not payable for the additional cost: at [147]-[152].

***oOh!media Fly Pty Ltd v Transport for NSW*** **[2024] NSWCA 200** (Leeming, Kirk and Adamson JJA)

(Related decisions: *oOh!media Fly Pty Limited v Transport for NSW* [2023] NSWLEC 26; *oOh!media Fly Pty Limited v Transport for NSW (No 2)* [2023] NSWLEC 112 (Moore J))

Facts: oOh!media Fly Pty Ltd **(Appellant)** brought an appeal against a decision of the Land and Environment Court (**LEC**) challenging the award of compensation in respect of the compulsory acquisition by Transport for NSW (**Respondent**) of a leasehold interest over a strip of land next to Qantas Drive (**Lease**), in the vicinity of Sydney Airport. Upon learning in May 2016 of the acquisition, which was for the purpose of the construction, operation and maintenance of the 'Sydney Gateway' road project, the Appellant decided to discontinue it plans to digitise its advertisement signs over Qantas Drive. The Valuer-General originally determined the compensation payable in the circumstances to be $3.8 million. That determination was appealed in the LEC, in which the Appellant originally sought $52.2 million, or alternatively $32.6m, by way of compensation. Rejecting the substance of that claim, the primary judge (Moore J) awarded the Appellant $2.7 million.

Issues:

(1) Whether the primary judge denied the Appellant procedural fairness by specifically rejecting a "profit rent approach" to its entitlement to compensation under s 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**);
(2) Whether the primary judge incorrectly applied the "statutory disregard" test in s 56(1)(a) of the Just Terms Act in rejecting the Appellant's claim for compensation on the basis of notionally digitised signs;
(3) Whether, in the alternative, the primary judge erred in not making allowance for the potentiality of the signs to be digitised when assessing the market value of the Lease; and
(4) Whether the primary judge failed to give adequate reasons for rejecting the Appellant's claim for a "tax gross-up" either as a "special value" of the land under s 57 of the Just Terms Act or as a "loss attributable to disturbance" under s 59(1)(f) of the Just Terms Act.

Held: Appeal dismissed (per Kirk JA, Leeming and Adamson JJA agreeing):

(1) The Court held that no breach of procedural fairness could be made out in respect of the primary judge's reasoning concerning his rejection of the profit rent method of valuation contended for by the Appellant: at [1], [44], [98]. That conclusion was open to the primary judge on the basis of the Respondent altering its position in the course of oral submissions as between valuation methodologies, as well as the nature of the expert evidence provided during the proceedings: at [43];
(2) The Court held that the primary judge's approach to the "statutory disregard" required by s 56(1)(a) was not erroneous: at [1], [75], [98]. The primary judge's approach was consistent with the Court of Appeal's decision in *Sydney Metro v G & J Drivas Pty Ltd* [2024] NSWCA 5: at [48]. Accordingly, a putative increase in market value achieved not in fact due to the claimant's own choices prior to acquisition was not required to be disregarded pursuant to s 56(1)(a): at [74];

(3) The Court held that the primary judge's conclusion as to potentiality for the digitisation of advertising signs along Qantas Drive did not admit of error: at [1], [88], [98]. The Appellant conflated the issue of the primary judge's counterfactual finding regarding what it would have done in terms of digitising its advertising signs by the date of acquisition, but for the Sydney Gateway project, with the separate issue of how the market would have viewed the development potential of the site as at that date: at [84]. Otherwise, the Appellant was found to have been seeking to re-open its case: at [86]-[87]; and

(4) The Court rejected the ground as to the supposed inadequate reasons provided regarding the "tax gross-up" claimed as a part of the Applicant's market valuation in respect of its relevant scenarios. The tax gross-up was not claimed as special value under s 57 of the Just Terms Act, except in limited circumstance which were rejected at first instance and otherwise unchallenged, and/or a claim had not been sought under s 59(1)(f) of the Just Terms Act: at [1], [91], [96], [98].

***Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd*** **[2024] NSWCA 205** (White, Adamson JJA and Price AJA)

(Related decision: *Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Limited* [2024] NSWLEC 17 (Duggan J))

Facts: Bingman Catchment Landcare Group Incorporated (**Appellant**) brought an appeal against a decision of the Land and Environment (**LEC**) concerning an unsuccessful application for judicial review of a determination of the Independent Planning Commission (**Second Respondent**). The subject development, of which the Bowdens Silver Pty Ltd (**First Respondent**) was the proponent, was for an open cut sliver, lead and zine mine (**Mine**) north of Lue, in NSW. On 14 May 2020, the First Respondent lodged a development application for the Mine with the Second Respondent, being the relevant consent authority for State significant developments (**SSD**). Whilst the environment impact statement accompanying the application stated that an external electricity wire – originally contemplated to be a 132kV, but later revised to a 66kV, transmission line (**Transmission Line**) – was required for the Mine, the Transmission Line was not originally part of the development application, the intention being that the line would, given the uncertainty as to its precise alignment, be the subject of a further application. On 3 April 2023, the Second Respondent granted consent for the Mine, assuming that the Transmission Line would be the subject of a later determination. The Appellant sought judicial review of that decision in the LEC. The primary judge found that, to the extent the Transmission Line did not form part of the "single proposed development" within the meaning of s 4.38(4) of the *Environmental Planning and Assessment 1979* (NSW) (**EPA Act**), the Second Respondent was not required to consider it as a part of the application for the Mine and nor, in particular, its environmental effects. Further, the primary judge held that, as the route for the Transmission Line had not yet been determined, its potential environmental effects did not fall for consideration as "likely impacts" for the purposes of s 4.15(1)(b) of the EPA Act.

Issues: The appeal raised three grounds:

(1) Whether the primary judge erred in concluding that the Transmission Line was not part of a "single proposed development" within the meaning of s 4.38(4) of the EPA Act, the impacts of which were not, though otherwise required to be, considered by the Second Respondent;

(2) Whether the primary judge erred in failing to conclude that the Transmission Line was a "likely impact" of the Mine for the purposes of s 4.15(1)(b) of the EPA Act which the Second Respondent was otherwise required to take into account as a mandatory relevant consideration; and

(3) In the alternative to (ii), whether the primary judge erred in failing to conclude that the Second Respondent committed a jurisdictional error in failing to consider the Transmission Line as a "likely impact" of the Mine.

Held: Appeal allowed. Orders of LEC set aside. Development consent declared void and of no effect (per White, Adamson JA, Price AJA dissenting in part):

(1) The Court held that the Transmission Line was part of a single proposed development, being the Mine, to which s 4.38(4) applied: at [20], [119]; cf. [129], [135]. Section 4.38(4) was construed as requiring the Second Respondent to assume the role of consent authority for development that would not otherwise require development consent under Div 4.7 of the EPA Act, provided that it was part of a single development requiring consent: at [61]. However, s 4.38(4) did not, of itself and without regard in particular to s 4.15(1)(b), require consideration of the impacts of the Transmission Line, given that more than one

development application may be lodged for a single SSD: at [62];

(2) The Court held that as the proposed Mine required electrical power, the likely impacts of the Transmission Line providing such power were a mandatory relevant consideration pursuant to s 4.15(1)(b) of the EPA Act: at [24], [71], [119]; cf. [128]. The evidence did not establish that it was not possible to identify such impacts: at [109]; and

(3) The Court held that, as the Second Respondent made no mention of the Transmission Line in its Statement of Reasons, it could be inferred that it did not take the Transmission Line into account in its determination, thereby failing to consider its likely environment impacts: at [102]-[105], [119], [130].

***191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd*** **[2024] NSWCA 221** (Ward P, Payne and Stern JJA)

(Related decision: *191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd* [2024] NSWSC 297 (Pike J))

Facts: On 23 March 2022, 191 Bells Pty Ltd (**Purchaser** or **Appellant**) and WJ & HL Crittle Pty Ltd (**Vendor** or **First Respondent**) executed a put and call option deed (**Option Deed**) in respect of the subject land located in Meroo Meadow, NSW (**Land**). Prior to execution of the Option Deed, the parties were covered by an exclusivity period (**Exclusivity Period**) as provided for by an exclusivity agreement (**Exclusivity Agreement**), of which cl. 3(a)(iii) relevantly stipulated that the Vendor was to assist the Purchaser as far possible in the due diligence process concerning the Land. Within the exclusivity period, on 16 March 2022, JKE Environments Pty Ltd (**JKE**) provided the Purchaser with a draft report that indicated that there were no visual or olfactory signs of contamination as observed on a site inspection of the Land. After entry into the Option Deed, on 14 June 2022, JKE then communicated to the vendor by a final report that the Land contained two localised waste burial pits. Through a detailed site inspection conducted by Environment and Natural Resource Solutions Pty Ltd (**ENRS**), those pits were confirmed to contain contaminants such as asbestos, tyres and deceased animals (**Contamination**). A Draft Contract for Sale (**Draft Contract**) which was attached to the Option Deed, whilst including certain disclosure documents, did not disclose the presence of Contamination on the Land. On 19 September 2023, the Purchaser commenced proceedings in the Supreme Court in relation to the failure of the Vendor to disclose the Contamination, alleging that this amounted to misleading and deceptive conduct under s 18 of the *Competition and Consumer Act 2010* (Cth) Sch 2 – Australian Consumer Law (**ACL**). The primary judge dismissed the Purchaser's claim, holding that that the Vendor was not under a positive obligation to disclose all matters of potential relevance to the due diligence process. The Purchaser appealed.

Issues:

(1) Whether the primary judge erred in finding that there was no misleading or deceptive conduct on the part of the Respondent, in respect of both the Exclusivity Agreement and Draft Contract, contrary to s 18 of the ACL;

(2) Whether the primary judge erred by fusing two independent approaches to s 18 of the ACL, and their application, being the 'positive representation giving rise to a half-truth' approach and 'reasonable expectation of disclosure arising from the whole of the circumstances' approach; and

(3) Whether the primary judge erred by failing to assess the whole of the circumstances regarding the alleged contravention of s 18 of the ACL.

Held: Appeal dismissed with costs (per Ward P, Payne and Stern JJA agreeing):

(1) The Court found that the primary judge did not err in dismissing the claim concerning the alleged contravention of s 18 of the ACL on the basis of the construction of the relevant terms of either the Exclusivity Agreement or Draft Contract for Sale: at [131], [185]-[186]. Clause 3(a)(iii) of the Exclusivity Agreement did not impose upon the Vendor a positive obligation of disclosure concerning any matter of potential relevance in the context of the due diligence process, the words 'as far as possible' referrable instead to the extent of assistance to be provided by the Vendor: at [125], [127]. Clause 11 of the Draft Contract did not create a reasonable expectation of disclosure, going to matters other than the Contamination, namely relevant conveyancing legislation and regulations: at [128];

(2) The Court rejected the Appellant's submission regarding the primary judge's putative conflation of the two relevant assessments undertaken for the purposes of s 18 of the ACL: at [153], [185]-[186]. The primary judge's rejection of the positive misrepresentation based on a half-truth approach was premised on there being no relevant misrepresentation, rendering it distinct from the manner in which the reasonable expectation of disclosure approach was dealt with,

notwithstanding that the same set of circumstances were traversed in respect of both approaches: at [146], [148]; and

(3) The Court held that the primary judge did not approach the impugned conduct in a singular or fragmented manner, but rather, as is legislatively required, holistically taking into account all of the relevant circumstances: at [178], [185]-[186].

***Transport for NSW v Hunt Leather Pty Ltd; Hunt Leather Pty Ltd v Transport for NSW*** **[2024] NSWCA 227** (Bell CJ, Leeming and Mitchelmore JJA)

(Related decisions: *Hunt Leather Pty Ltd v Transport for NSW* [2023] NSWSC 840 (Cavanagh J); *Hunt Leather Pty Ltd v Transport for NSW (No 4)* [2024] NSWSC 140 (Cavanagh J); *Hunt Leather Pty Ltd v Transport for NSW (No 5)* [2024] NSWSC 776 (Cavanagh J))

Facts: In 2011, Transport for NSW (**Appellant**), a statutory corporation, commenced planning of the construction of the Sydney Light Rail (**SLR**), being the rail system that runs from Circular Quay to Moore Park and either Randwick or Kingsford. Construction of the SLR was undertaken by private contractors pursuant to a Project Deed (**Project Deed**), attached to which was an 'Initial Delivery Program' (**IDP**) that divided the construction of the SLR into distinct stages known as 'fee zones'. In May 2015, the Appellant issued a media release indicating both the commencement date and anticipated completion dates of construction within each of the fee zones reflecting the IDP. Construction was beset by substantial delay, due in large part to the treatment of utilities – both known and otherwise – under the route of the SLR. On 7 November 2022, the Respondents – comprised of Hunt Leather Pty Ltd (**First Respondent**), operator of two luxury goods stores in Sydney CBD and its CEO, Ms Sophie Hunt (**Second Respondent**), and Ancio Investments Pty Ltd (**Third Respondent**), trustee in respect of a restaurant in Kensington and its sole director, Mr Nicholas Zisti (**Fourth Respondent**) – commenced representative proceedings under Part 10 of the *Civil Procedure Act 2005* (NSW) on behalf of proprietors said to be affected by the construction works. The primary judge (Cavanagh J) held that, by failing to subcontract on terms that sufficiently discouraged delay in the construction of the SLR, the Appellant had foreseeably created a state of affairs which had led to a substantial and unreasonable interference with the First and Third Respondents' respective businesses, thus making out the claim in private nuisance in light of an amended IDP (**Amended IDP**) before the primary judge. The primary judge however rejected the public nuisance claim brought by Second and Fourth Respondents, along with the Respondents' submission that the 40% commission payable to a litigation funder should form a component of the overall damages. The Appellant appealed on 11 grounds, with the Respondents bringing a cross-appeal.

Issues:

(1) Whether the primary judge erred by finding that private nuisance was made out against the First and Third Respondents having regard to the Amended IDP (ground 1);

(2) Whether the primary judge erred in failing to find that the Appellant did not exercise reasonable care in connection with the construction of the SLR and whether such an issue was determinative of the proceedings (grounds 2a and 2b);

(3) Whether the primary judge erred in finding that the Appellant bore the onus of proof in demonstrating it took all reasonable care in the circumstances (ground 4);

(4) Whether the primary judge erred in finding that the Appellant failed to show that the nuisance caused by the construction of the SLR was inevitable (ground 6);

(5) Whether the primary erred in the calculation of damages, based upon, in the case of the First Respondent, a 12 month 'recovery period' additional to the relevant period of substantial interference (ground 7);

(6) Whether the primary judge erred in finding that construction activities were delayed because of previously unknown utilities (ground 8);

(7) Whether the primary judge erred in the construction and application of s 43A of the *Civil Liability Act 2002* (NSW) (**CL Act**) (grounds 9,10 and 11); and

(8) On the cross-appeal, whether the primary judge erred in denying the Respondents' claim of including a litigation funder's free within the assessable damages.

Held: Appeal allowed, cross-appeal dismissed (per Bell CJ, Leeming and Mitchelmore JJA):

(1) The Court, finding that there was a want of evidence regarding pre-construction investigations of the kind capable of identifying in advance the utilities that ultimately led to the delay experienced in the construction of the SLR, overturned the primary judge's finding as to private nuisance: at [97]. Absent such evidence, which in the Court's view would not have necessarily demonstrated that the relevant

interference would have been reduced in any case, a critical element of the First and Third Respondents' claim for private nuisance, based on a deviation from the timeline as provided by the amended IDP, was lacking;

(2) The primary judge did not err in failing to make a negative finding that the Appellant did not fail to exercise reasonable care, given that that the converse proposition was disavowed by the Respondent: at [103], [106]. Further, the Court rejected the Appellant's submission, to the effect that as construction of the SLR was a legitimate activity nuisance and in particular the element of reasonable care could not be made, and observed that reasonableness of use is conceptually distinct from the reasonableness of a defendant's conduct in such actions: at [137], [146];

(3) Whilst of relevance, it was not strictly necessary for a plaintiff in an action for nuisance to prove that the defendant had failed to take reasonable care, the overarching question instead being, and applicable where the claim related to the provision of public infrastructure, whether the relevant interference was substantial and unreasonable: at [135]-[153];

(4) In the circumstances, the Appellant had failed to demonstrate that the delay that occurred in the construction of the SLR was inevitable: at [132]- [133];

(5) The challenge to the damages awarded to First Respondent for an additional 12-month recovery period did not arise, however to the extent that it otherwise would, such a ground was underpinned by the principled consideration that recovery for loss in claims for nuisance was necessarily factually and contextually specific: at [154], [159];

(6) There was no error in the primary judge's conclusion, founded on evidence, that the discovery of unknown utilities was a substantial contributor in the delay of the construction of the SLR: at [114];

(7) There was no error in the primary judge's reasoning concerning either the construction or application of s 43A of the CL Act: at [180]. Section 43A, which on its proper construction attenuated the standard of care required to be proved when establishing civil liability in tort against public authorities exercising relevant powers, was deemed irrelevant to the present claim, being one of nuisance allegedly involving the Appellant's failure to exercise reasonable care: at [181]; and

(8) The funding fee was not recoverable as damages for nuisance. That fee was a voluntary act on the part of a particular plaintiff, as opposed to a foreseeable loss caused by the nuisance: at [193]-[210].

## NSW COURT OF CRIMINAL APPEAL

***Secretary, Department of Planning and Environment v Harris*** **[2024] NSWCCA 88** (Hulme AJ, Adams, Sweeney JJ)

(Decision under review: *Secretary, Department of Planning and Environment v Harris; Secretary, Department of Planning and Environment v Harris; Secretary, Department of Planning and Environment v Balmoral Farms Pty Ltd; Secretary, Department of Planning and Environment v JP & LR Harris Pty Ltd; Secretary, Department of Planning and Environment v Woolondoon Pty Ltd* [2024] NSWLEC 43 (Pain J))

Facts: The prosecutor commenced Class 5 proceedings in the Land and Environment Court against the defendants alleging 16 offences of clearing of native vegetation, set for three separate hearings.

Five months before the first trial the prosecutor advised the defendant of their intention to seek leave to file an amended s 247E notice which included three expert reports of Mr Watts to clarify aspects of his primary report and a supplementary expert report of Dr Hammill to clarify matters in her primary report. The defendants resisted this course. Four months before the first trial at the request of the defendants and as directed by the Court, the prosecutor provided to the defendants the experts' updated reports including 'tracked change' versions to indicate what was new in the reports.

The primary judge refused the prosecutor leave to rely on the updated expert reports. The prosecutor sought leave to appeal in the Court of Criminal Appeal. The Court's jurisdiction to determine the application depended on whether the primary judge's judgment was an 'interlocutory judgment or order' pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912* (NSW).

Issues:

(1) Whether the primary judge's judgment was an interlocutory judgment or order;

(2) Whether the primary judge erred in refusing leave to rely on the updated expert reports on the basis the

defendants would suffer prejudice and whether this prejudice was capable of being cured; and

(3) Whether the primary judge failed to consider the prejudice to the prosecutor's case if the expert evidence was not able to be relied on.

Held: Appeal allowed. Order made by the primary judge quashed and in lieu thereof an order was made granting the prosecutor leave to file and serve an amended s 247E notice including the expert reports (per Sweeney J at [2], Adams J agreeing at [1] and Hulme AJ agreeing at [88]):

(1) The primary judge's judgment was an interlocutory judgment or order. The order not to serve the expert reports effectively precluded the prosecutor from relying on that evidence in its case against the defendants. This was not a ruling on the admissibility of evidence but concerned an anterior step in the proceedings concerning the case the prosecutor was entitled to bring the appeal: at [52]-[57];

(2) The material was served four months before the first trial and provided in track change format to permit the defendants to understand the extent of new material. This was fair and sufficient time for the defendants to absorb the new evidence. It was not clear on the evidence before the primary judge that a question of admissibility would be raised on behalf of the defendants, or if it was, why that had to be dealt with before the trial. If the defendants sought to obtain an expert report and if none was available, then they would seek to have the trial dates vacated or varied. In consideration of prejudice to the defendants the primary judge anticipated problems which may arise but which had not yet arisen based on the evidence before her: at [83]-[85]; and

(3) The primary judge failed to take into account prejudice to the prosecution. It was clear that the expert opinions were important or essential to prove elements of the offences charged. The primary judge did not take into account this material consideration and it is in the interests of justice to intervene: at [86].

## SUPREME COURT OF NSW

***Snowy Mountain Bush Users Group Inc v Minister for the Environment*** **[2024] NSWSC 711** (Harrison CJ at CL)

Facts: By Notice of Motion filed 7 May 2024, the Snowy Mountain Bush Users Group Inc (**Plaintiff**) sought interlocutory relief to prohibit the Minister for the Environment (**First Respondent**) from engaging in aerial shooting and other culling operations of wild horses in the Kosciuszko National Park (the **Park**) in a manner that allegedly resulted in a diminution of the number of such horses below 3,000. The First Respondent adopted the Amended Kosciuszko National Park Wild Horse Heritage Management Plan (the **Plan**), a draft of which was prepared by the (now) Secretary of the Department of Climate Change, Energy, the Environment and Water (**Second Respondent**). The Plan provided for in cll 6.3 and 5.3, aerial shooting of horses as a control method in the park and that the total number of wild horses to be "retained" was 3,000. The Notice of Motion seeking interlocutory relief was opposed by the Defendant on numerous grounds, including that the Plaintiff had failed to establish standing; the existence of a serious issue of the tried; the evidence necessary to support its submissions; and that the balance of convenience supported the relief sought being granted.

Issues:

(1) Did the Plaintiff have standing to sue?

(2) Was there a serious question to be tried?

(3) Was the Plaintiff unreasonably delayed in the commencement of the proceedings?

(4) Would damages be an adequate remedy where an injunction was not granted?

(5) Would the Plaintiff have been entitled to interlocutory relief when it had not proffered an undertaking as to damages?

(6) Did the balance of convenience favour the granting of an injunction?

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

(1) The Court held, applying the 'special interest' test (*Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493), that the Plaintiff had established standing for the purposes of the current proceeding: at [26]. In respect of the substantive proceedings, the question of standing was however deferred: at [28];

(2) The Court found that the Plaintiff had demonstrated the existence of a serious and therefore triable issue, notwithstanding the doubt expressed as its chances of success otherwise: at [19], [22];
(3) The Court did not express a view, having regard both the alleged breach of s 10 of the *Kosciuszko Wild Horse Heritage Act 2018* (NSW) and the adoption of the plan in light of the time limitation imposed by r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW), as to whether the Plaintiff was out of time: at [46];
(4) The Court observed that the adequacy of damages was a moot point, given that, both in respect of its apparent motivation and desired outcome, the Plaintiff's application was not capable of being quantified in monetary terms: at [29];
(5) The Court found that the Plaintiff's failure to provide an undertaking as to damages, particularly in light of the uncertainty stemming from the outcome of the substantive proceedings and the potential financial ramifications were the first Respondent's culling activities limited in the outcome of such proceedings, weighed heavily in favour of the refusal of interlocutory relief: at [40]; and
(6) In the Court's opinion, the balance of convenience favoured refusal of the interlocutory relief sought by the Applicant: at [48]. Justifying this conclusion was the want of evidence supporting the Applicant's contentions either that the wild horses were being killed in a manner that was causing unnecessary or unjustifiable harm or that the population of such horses would fall below the relevant 3,000 threshold prior to 1 July 2024. To similar effect was the potential of the restrictions sought be the Applicant in respect of the first Respondent's operations to themselves pose environmental harm: at [49]-[51].

***Snowy Mountain Bush Users Group Inc v Minister for the Environment* [2024] NSWSC 1040 (Davies J)**

(Related decision: *Snowy Mountain Bush Users Group Inc v Minister for the Environment* [2024] NSWSC 711 (Harrison CJ at CL))

Facts: By Amended Summons filed 6 June 2024, the Snowy Mountain Bush Users Group Inc (**Plaintiff**), being a non-for-profit organisation which advocates for various rights in respect of the Kosciuszko National Park (**Park**)**,** sought to challenge a decision of the Minister for the Environment (**First Respondent**). That decision, which was made on 23 October 2023 and a draft of which was prepared by the (now) Secretary of the Department of Climate Change, Energy, the Environment and Water (**Second Respondent**), amended the Amended Kosciuszko National Park Wild Horse Heritage Management Plan (**Amended Plan**). The amendment made possible, *inter alia*, the aerial shooting of wild horses within the Park as a method by which to control their overall numbers, of which 3,000 were to be 'retained'. In respect of the amendment, the Plaintiff sought a declaration that the Amended Plan was invalid and ought to be set aside, a further declaration that the Defendants were acting in contravention of s 10 of the *Kosciuszko Wild Horse Heritage Act 2018* (NSW), under which the Amended Plan was made, and an injunction prohibiting the Defendants from continuing with aerial horse culling operations in the Park.

Issues:
(1) Whether the implementation of aerial shooting as a control method was inconsistent with relevant requirements of the Amended Plan inclusive of relevant Standard Operating Procedures (**SOPs**);
(2) Whether the adoption of aerial shooting in the Amended Plan was based on incomplete and misleading advice from the Second Respondent concerning animal welfare considerations such that it was infected by error; and
(3) Whether the First Respondent's decision to approve in the Amended Plan aerial shooting in the Park lacked an evident or intelligible justification in light of the known animal welfare risks such that it was legally unreasonable.

Held: Amended Summons dismissed with costs:
(1) The Amended Plan was not being carried out contrary to law: at [94]. The evidence for such a proposition was lacking: at [91]-[92]. The Plaintiff's submissions as to the putative inconsistency between the 2011 and 2023 SOPs was largely denied: at [86]-[90];
(2) In the circumstances where animal welfare considerations were but one relevant factor, among others, and the advice provided by the Second Respondent to the First Respondent contained information relevant to animal welfare outcomes, the latter's decision was not made on the basis of incomplete or misleading information: at [69];
(3) When measured against the high standard of legal unreasonableness set in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, applicable, as in this case, to delegated legislation, could not be made out: at [78]. The First Respondent's

decision in respect of the Amended Plan was, to the extent that it took into account relevant animal welfare considerations, within the contemplated ambit of power: at [76]; and

(4) The Court also held, separate from the resolution of the above grounds, that the Plaintiff did have a "special interest" sufficient to establish standing, and granted an extension to it, under r 59.10 of the Uniform Civil Procedure Rule 2005 (NSW), thereby obviating the delay it experienced in commencing proceedings: at [108], [120].

***Seaforth Securities Pty Limited v Zoya Investments Pty Limited*** **[2024] NSWSC 1061** (Harrison AsJ)

(Related decision: *Environment Protection Authority v Zoya Investments Pty Ltd* [2022] NSWLEC 149 (Moore J))

Facts: By Notice of Motion filed 8 March 2024, Seaforth Securities Pty Limited (**Plaintiff**) sought compensatory and exemplary damages, in addition to legal costs, against Zoya Investments Pty Limited (**Defendant**). The parties owned adjoining properties in Kawal, on the NSW Central Coast. Since August 2017, the Defendant was aware that its property, on which a petrol station business was being conducted, had caused petroleum hydrocarbon contamination to the Applicant's land. On 11 December 2018, the Environmental Protection Authority (**EPA**) confirmed as much, declaring the Defendant's property and part of the Applicant's significantly contaminated pursuant to s 11 of the *Contaminated Land Management Act 1997* (NSW) (**CLM Act**). The Defendant's failure to carry out the requirements imposed on it pursuant to a management order under s 14 of the CLM Act led to the EPA commencing proceedings in the Land and Environment Court (**LEC**). On 16 December 2022, the Defendant was convicted of a breach of s 14(6)(a) of the CLM Act by Moore J and fined $320,000. On 8 March 2024, in the Supreme Court of NSW, default judgment was entered in favour of the Applicant against the Defendant for damages, which, as the subject of this decision, required assessment. Subsequently, in April 2024, the original directors of the Defendant resigned and the Defendant was wound up and placed into voluntary administration. On 2 July 2024, the Supreme Court made orders pursuant to s 500(2) of the *Corporations Act 2001* (Cth) granting leaving to the Applicant to continue its action.

Issues:

(1) The Applicant's entitlement to compensatory damages, in circumstances where the Defendant's nuisance and negligence had led to a diminution in the value of its property;

(2) The Applicant's entitlement to exemplary damages, in circumstances where the Defendant appeared to have shown a conscious and contumelious disregard for its rights; and

(3) Costs.

Held: Damages in the sum of $9,376,614.74 awarded to the Applicant:

(1) The Court found that the Applicant was entitled to compensatory damages in the sum of $8,676,614.74: at [87]. Of that, $1,226,614.74 was awarded to the Applicant on the basis of the costs it had incurred since December 2016 in remediating its property, inclusive of legal costs. $7,450,000 was awarded for the diminution in the value of the Applicant's land suffered as a result of foreseeable harm stemming from the contamination. That sum was determined on the basis of the difference between the present value of the Applicant's property and the value of the property were the Defendant to have acted reasonably either upon purchasing its property or since it had become aware of the contamination, and making allowance for the site's contamination history: at [59], [65];

(2) The Court found that the Applicant was entitled to exemplary damages in the sum of $700,000: at [84]. The Court did so on the basis of the Defendant's contumelious disregard of the Applicant's rights since 2017, when the latter was first made aware of the contamination, and due to the fact that the source of the contamination remained ongoing: at [84]. The Court took into consideration the previous fine imposed by the LEC and the attendant overlap between that and the current proceedings, as well as the contamination history of the Defendant's property: at [72]; and

(3) The Defendant was ordered to pay the Applicant's legal costs: at [86].

# LAND AND ENVIRONMENT COURT OF NSW

## CRIMINAL

***Natural Resources Access Regulator v Lidokew Pty Ltd* [2024] NSWLEC 59 (Duggan J)**

(Related decision: *Natural Resources Access Regulator v Lidokew Pty Ltd* [2023] NSWLEC 130 (Duggan J))
Facts: On 28 November 2023, Lidokew Pty Ltd (**Defendant**) was found guilty of three of the six offences it was charged with under the *Water Management Act 2000* (NSW) (**WM Act**). The offences, which took place on a property known as 'Havana North' in Wee Waa NSW between January and April 2019, concerned the taking of water from metering equipment that were found to have under-recorded the relevant quantities of water. Duggan J ([2023] NSWLEC 130) found that the Natural Resources Access Regulator (**Prosecutor**) proved beyond reasonable doubt that three of the Defendant's meters were not operating properly during the relevant period contrary to s 91I(1) of the WM Act.

Issue: The appropriate sentence to be applied to the Defendant in respect of the three charges, taking into account the objective seriousness of the offences and the subjective circumstances of the Defendant.

Held: The Defendant was fined $25,000, being the sum total divided across the three offences, in addition to a publication order:

**Objective Seriousness of Conduct**

(1) The objective seriousness of the offending conduct was at the low end of the range of criminality: at [32];
(2) The strict liability nature of the offence created by s 91I(1) of the WM Act, coupled with the quantum of its maximum penalty, were indicative of the seriousness in terms of which Parliament viewed such offences: at [14];
(3) The conduct was further found to undermine the efficient and equitable sharing of water, as well as future decision-making with respect to the allocation of water, contrary to the objects set out in s 3 of the WM Act: at [18];
(4) However, in respect of relevant considerations pursuant to s 364A of the WM Act, neither the Defendant's state of mind – characterised by "inaction" and exacerbated by the fair wear and tear of the equipment over many years – nor the market value of the water added to the objective seriousness of the offending conduct: at [27], [31];

**Subjective Circumstances of Defendant**

(5) By way of mitigating circumstances, the Defendant was genuinely remorseful and was otherwise of good character: at [35]-[36], [38];
(6) The Defendant's implementation of new metering equipment effectively precluded the need for specific deterrence, whilst the orders of the Court were found to be sufficient by way of general deterrence: at [41]-[42]; and

**Other Considerations**

(7) As to the principle of totality, the Defendant's criminality ought to be judged as a single course of conduct, with the effect that the sum total monetary penalty imposed on the Defendant took into account each of the three similar offences: at [53].

***Environment Protection Authority v Forestry Corporation of New South Wales* [2024] NSWLEC 78** (Pepper J)

Facts: The Environment Protection Authority (**prosecutor**) commenced two prosecutions against Forestry Corporation of NSW (**defendant**) for breaches of s 69SA(1)(b)(i) of the *Forestry Act 2012* (NSW) (**Forestry Act**) in that it contravened conditions of its Integrated Forestry Operations Approval for the Coastal Region, granted on 16 November 2018 (**CIFOA**), during the preparation for, and while conducting harvesting operations within, compartment 299A of the Yambulla State Forest (**Forest**).

The summonses alleged one contravention of the CIFOA for failing to show two known "Environmentally Significant Areas" (**ESAs**) on an operational map prepared for harvesting operations in compartment 299A of the Forest (**mapping offence**), and one for the carrying out of forestry operations within one of the two known ESAs (**harvesting offence**). The ESAs were identified for protection by site specific operating conditions imposed upon the defendant following the catastrophic Black Summer bushfires that burnt the Forest between June 2019 and May 2020. The defendant pleaded guilty to both offences.

Issue: What was the appropriate sentence to be imposed on the defendant taking into account the objective seriousness of the offence and the subjective circumstances of the offender.

Held: The defendant was fined a total monetary penalty of $360,000, half of which was payable to the prosecutor by way of moiety. Publication orders were also made:

**Objective seriousness of the offences**

(1) The commission of the offences undermined the integrity of the regulatory system for ecologically sustainable forest management under s 69L of the Forestry Act: at [78]-[80];

(2) The maximum penalty for the commission of each offence was $2,000,000 under s 69SA(1)(b)(i) of the Forestry Act: at [82];

(3) The commission of the harvesting offence caused substantial actual and potential environmental harm in that it caused the felling of 53 trees which, together with the compaction and disturbance to ground cover, disrupted the refugial status of the ESA in a forest that had been severely impacted by bushfire. The commission of the mapping offence had the potential to cause the same environmental harm because forestry operations could have been carried out in the second ESA: at [104] and [106];

(4) The harm caused was reasonably foreseeable because the defendant knew that its failure to identify the ESAs on the operational map would result in harvesting trees that were otherwise to be retained: at [108];

(5) The defendant failed to take the preventative measure of implementing a robust process for reviewing the operational map to ensure that the ESAs were properly identified on it: at [119];

(6) The defendant had complete control over the causes giving rise to the commission of the offences: at [122];

**Subjective circumstances of the offender**

(7) The defendant's contrition and remorse was represented by only a "bare expression" because it had not taken any steps in remediation and did not wholly accept responsibility for the extent of the harm that it had caused insofar as it rejected the refugial status of the ESA: at [129];

(8) Only a 10% discount for the utilitarian value of the plea of guilty was appropriate due to the defendant entering its plea on the morning of a contested liability hearing that was listed for four days: at [132];

(9) The defendant provided assistance to the prosecutor in the prosecution of the offences including by participating in the preparation of a statement of agreed facts and cooperating throughout the investigation: at [133];

(10) The defendant had a lengthy record of prior convictions for environmental offences, including a significant history of unlawfully carrying out forestry operations: at [134];

(11) The likelihood of the defendant reoffending was not low and it did not have good prospects of rehabilitation: at [140]-[141];

(12) There was a need for general deterrence to ensure that those conducting forestry operations operate in a manner that is compliant with licence conditions: at [144];

(13) There was also a need for specific deterrence because the defendant continued to hold the CIFOA, had a pattern of environmental offending, did not provide compelling evidence of measures it took to prevent reoffending and did not accept the true extent of the harm it caused: at [145]; and

(14) The totality principle did not apply because the criminality involved in each offence was distinct: at [148]-[150].

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

Facts: The Forestry Corporation of NSW (**FC**) pleaded guilty to offences against s 69SA of the *Forestry Act 2012* (NSW) relating to forestry activities at or near Wild Cattle Creek State Forest in northern NSW. The Bellingen Environment Centre Incorporated (**BECI**) applied to appear as amicus curiae at the sentencing hearing.

The BECI is a voluntary non-government organisation with a history of promoting environment protection and biodiversity in the Bellingen Valley. The BECI sought to assist the Court by making submissions on various matters, including: (1) the impact of the offences on the proposed 'Great Koala National Park' (**GKNP**). The site of the offences was within the proposed GKNP. The BECI had been heavily involved in the development and promotion of the GKNP proposal, which at the time of the judgment the current NSW government had committed to create; (2) local community "outrage" regarding the commission of the current offences given earlier prosecutions arising from forestry activities in the same area; (3) bringing to the Court's attention prior offences committed by the FC; (4) the impact of the offences on the interests of the Gumbayngirr First Nations community; (5) concerns regarding the EPA's exercise of prosecutorial discretion in exclusively charging the FC rather than individual contract loggers; and (6) advising on appropriate financial penalties and potential orders for the Court to make.

The BECI, the prosecutor the Environment Protection Authority (**EPA**) and FC agreed that the Court had discretion to allow the appearance of an amicus at the sentencing hearing and to specify the basis on which this was to occur. The application was opposed by the EPA and the FC.

Issues:

(1) Whether the BECI could make submissions as amicus on the significance of the area damaged by the offences with regards to the proposed GKNP and whether publicly available reports could be tendered to support the submissions;
(2) Whether the BECI could make submissions on community "outrage" at the commission of the offences; and
(3) Whether the BECI could make submissions on prior offences committed by the FC, the interests of the Gumbaynggirr First Nations community, the EPA's prosecutorial discretion and appropriate financial penalties and orders.

Held: The BECI was allowed limited participation as amicus:

(1) The BECI's participation would be closely defined and its conduct subject to the direction of the Court at the sentencing hearing to avoid incurring disproportionate costs;
(2) The BECI was permitted via limited submissions and three supporting reports to address the Court on the actual and likely environmental harm caused by the offences specifically with regards to the proposed GKNP. The EPA was yet to determine what if anything it would submit on the GKNP. The BECI had a unique perspective concerning the environmental values of the region over which the GKNP was proposed: at [24]-[31], [45]-[47];
(3) There was no indication that steps had been taken by the EPA to engage with the BECI. The aspect of the BECI's application as to raising matters relating to the moral sense of the community was stood over to enable the EPA and BECI to confer on whether the EPA intended to make submissions in relation to the impact of the offences on the wider community as advised by the BECI: at [32]-[33]; and
(4) The BECI was not permitted to make submissions as amicus on the remaining matters. The EPA would place any relevant prior offences before the sentencing judge. The Court could not make an order regarding the interests of the Gumbaynggirr community without a specific application by its members. The Court could not consider the EPA's exercise of prosecutorial discretion. Advice about the appropriate penalty level was irrelevant and the EPA would be able to propose appropriate orders to the Court without the assistance of the BECI: at [34]-[44].

***Secretary, Department of Planning, Housing and Infrastructure v CEAL Ltd (t/as Multiquip Quarries)*** **[2024] NSWLEC 89** (Pain J)

Facts: The Secretary, Department of Planning, Housing and Infrastructure (**prosecutor**) alleged that during the period of 18 September 2020 to 20 April 2022, CEAL Ltd (t/as Multiquip Quarries) (**defendant**) committed an offence against s 9.51 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) in that it carried out development other than in accordance with the conditions of development consent for the operation of the quarry, contrary to s 4.2 of the EPA Act. The prosecutor was granted leave to rely on an amended summons which alleged the use of three silt cells and two oversize management areas to the west of an acoustic bund wall. Development consent had been granted to conduct quarry activity to the east of the acoustic bund wall. The defendant filed a notice of motion alleging patent duplicity in the amended summons in that each of the three silt cells and two oversize management areas should have been the subject of a separate offence. The defendant sought an order that the prosecutor be put to an election to ensure that the amended summons alleged only one offence.

Issue: Whether the amended summons was patently duplicitous.

Held: The defendant's notice of motion was dismissed:

(1) No duplicity arose and no election was needed. The nature of the offence charged was that in carrying out development for a single period of approximately 18 months the defendant failed to comply with the conditions of the development consent granted for the operation of a quarry. The three silt cells and two oversize management areas were collectively part of a single system of slurry management supporting the production of sand to which the quarry operation was directed. Each of the five physical features were interrelated and in close proximity. That they existed separately did not render the use of each a separate offence given the nature of the charge. There was also no need to consider an exception to the rule against duplicity whereby separate acts may be able to be charged as a single criminal enterprise. That was not the nature of this charge.

## JUDICIAL REVIEW

***Maules Creek Community Council Incorporated v Environment Protection Authority*** [2024] NSWLEC 71 (Preston CJ)

Facts: Maules Creek Community Council Incorporated (**the Community Council**) brought a challenge under s 252 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) against the Environment Protection Authority's (**EPA's**) review of the Maules Creek Coal (**MCC**) mine's environment protection licence (**EPL**). The EPL was granted in 2013 and was required to be reviewed every five years under s 78(1) of the POEO Act. Section 78(5) of the POEO Act prohibits proceedings being brought under the POEO Act for breaches of the requirements of "this section". The Community Council alleged that the review of the EPL conducted by the EPA in June 2023 breached s 45 of the POEO Act, which set out the matters the regulatory authority was required to take into consideration. These requirements include s 45(f) regarding whether the person is a fit and proper person, and s 45(c) and (d) regarding pollution.

Issues:

(1) Whether the privative clause in s 78(5) of the POEO Act precluded the Community Council bringing the proceedings under s 252 of the POEO Act alleging a breach of s 45 in undertaking the licence review (**section 78(5) issue**);

(2) Whether the EPA failed to consider the requirement in s 45(f) as to whether MCC was a fit and proper person both directly (**ground 1**) and by s 83(2), which sets out matters the EPA may take into account when considering s 45(f) (**ground 2**); and

(3) Whether the EPA failed to consider s 45(c) and (d), concerning the pollution the mine was causing or was likely to cause, and the likely impact of that pollution and the practical measures to mitigate that pollution and to protect the environment from harm as a result of that pollution (**ground 3**).

Held: The proceedings were dismissed: although s 78(5) did not prevent the proceedings being brought, the three grounds of challenge were not established:

**Preliminary question: Section 78(5) issue**

(1) The phrase "requirements of this section" in s 78(5) only refers to the requirements expressly stated in subsections (1) to (4A) of s 78. This did not include the requirements of any other section of Chapter 3 of the POEO Act, including s 45. The source of the requirement to consider the matters set out in s 45 in the exercise of the licence review requirement is s 45, not s 78 and therefore a failure to consider the matters listed in s 45 was a breach of s 45, not s 78. Section 78(5) operated only to preclude proceedings alleging a breach of the requirements of s 78 itself: at [32], [34]-[35].

**Grounds 1 and 2: Fit and proper person grounds**

(2) To establish that an administrative decision-maker has failed to consider a matter is to establish a negative fact which, absent of the decision-maker admitting they did not consider the matter, requires drawing inferences from other positive facts. The minimal facts stated on the EPA's Licence Review Record checklist form for the EPL review was insufficient to draw that inference for three reasons:

   (a) there were other available inferences that could be drawn from what was, and was not, stated in the Licence Review Record other than that the EPA failed to consider if MCC was a fit and proper person;

   (b) an inference to be drawn regarding the EPA's consideration of whether MCC was a fit and proper person must have regard to all of the material before the reviewing officer. In addition to considering the inspection report from the mine visit, the EPL, and the Licence Review Record, it was reasonable to infer the EPA had regard to other documents and information which contained information relevant to s 45(f) considerations; and

   (c) the EPA's review of the EPL took place in the context of the EPA's heightened regulatory and compliance oversight of MCC and its licensed activity, as evidenced by the EPA's numerous enforcement actions against MCC: at [95]-[99].

**Ground 3: Pollution ground**

(3) The Community Council failed to establish that the EPA failed to consider s 45(c) and (d) matters, for six reasons:

   (a) the lack of specific reference to the seven categories of air pollutants emitted by the scheduled activities at the mine in the Licence Review Form did not necessarily establish that the reviewing officer did not consider those air pollutants;

(b) the material before the reviewing officer required or enabled the consideration of s 45(c) and (d) matters;
(c) the EPA's regulatory and compliance oversight of MCC must be taken into account;
(d) it was reasonable to infer that the fact that the pollution was regulated by the POEO Act and the development consent for the mine would have been considered by the EPA;
(e) another explanation for the reviewing officer not referring to the air pollutants was that the officer considered the regulation of this pollution was best achieved through an audit under s 78(4A) on an industry-wide or regional basis, rather than on an individual licence basis; and
(f) the explanation that the officer considered an industry-wide approach was best was corroborated by the EPA's Climate Change Policy and Climate Change Action Plan, which provide for a staged regulatory approach: at [159]-[164].

***Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated (INC2200560) v MACH Energy Australia Pty Ltd and Anor*** **[2024] NSWLEC 86** (Robson J)

Facts: The Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated (**DAMSHEG**) brought Class 4 judicial review proceedings challenging the determination of the Independent Planning Commission of NSW (**Commission**) made pursuant to s 4.38(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) to grant development consent to the extension of the life of the Mount Pleasant Coal Mine (**Project**), an established open cut coal mine operated by MACH Energy Australia Pty Ltd (**MACH**) under an existing development consent within the Upper Hunter Valley, approximately 3km north-west of Muswellbrook.

Issues: DAMSHEG challenged the decision by the Commission on eight grounds:

(1) In purporting to consider s 4.15(1)(a)(i) of the EPA Act, the Commission failed to consider whether the consent should be issued subject to the conditions aimed at ensuring that the greenhouse gas emissions are minimised to the greatest extent practicable as required by cl 2.20(1) of the State Environmental Planning Policy (Resources and Energy) 2021 (**Resources SEPP**); and, further, failed to assess downstream emissions (scope 3 emissions), of the Project having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions as required by cl 2.20(2) and thereby failed to have regard to mandatory considerations (**Ground 1 – Resources SEPP Ground**);
(2) The Commission failed to consider the likely impacts of scope 3 emissions, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality, and by that omission misconstrued the expression "likely impacts of the development…" in s 4.15(1)(b) of the EPA Act by treating that expression as encompassing an "accounting" treatment of scope 3 emissions instead of considering the direct and indirect impacts of the Project. The Commission thereby either failed to take account of the mandatory considerations stipulated in s 4.15(1)(b) and/or engaged in an irrational and illogical form of reasoning by proceeding on the basis that the "accounting" of the scope 3 emissions by the downstream consumer country obviated the need to consider the impacts of those emissions (**Ground 2 – Likely Impacts Ground**);
(3) The Commission failed to consider the likely impacts of scope 3 emissions in its assessment of the public interest as required by s 4.15(1)(e) of the EPA Act, or alternatively, engaged in an irrational and illogical form of reasoning with regard to the public interest by proceeding on the basis that the "accounting" of scope 3 emissions by the downstream consumer country obviated the need to consider the environmental, social and economic impacts of those emissions (**Ground 3 – Public Interest Ground**);
(4) In assessing the public interest as required by s 4.15(1)(e) of the EPA Act, the Commission engaged in an irrational and illogical form of reasoning by first, stating that in the absence of conditions being imposed, the predicted negative impacts of the Project would warrant refusal, and thereafter granting approval together with conditions in relation to scope 1 and scope 2 emissions that were merely a hypothetical means of reducing those emissions because they imposed aspirational targets (or were based on hypothesised future technology) rather than binding obligations (**Ground 4 – Conditions of Approval Ground**);
(5) The Commission failed to consider DAMSHEG's specific submissions including specific expert reports in relation to the effect of the scope 3 emissions of the Project on

the global carbon budget, and thereby failed to consider a mandatory consideration specified in s 4.15(1)(d) of the EPA Act (**Ground 5 – Public Submissions Ground**);

(6) The Commission failed to consider the impacts of vegetation clearing on biodiversity within parts of the site where vegetation clearing could not have been carried out under the pre-existing development consent because it erred in its construction and application of s 4.63(3)(a) of the EPA Act by failing to properly determine what development "could have been carried out but for the surrender of the [pre-existing development] consent" a (**Ground 6 – Surrender of Consent Ground**);

(7) By deferring and delegating for later consideration the impacts of the proposed development on the newly identified species of Legless Lizard, the Commission failed to exercise its statutory power under s 4.15(1)(b) of the EPA Act (**Ground 7 – Lizard Ground**); and

(8) The Commission failed to adhere to the standard of reasonableness when reaching its conclusions, first, that the air quality impacts of the Project could be adequately minimised, managed or compensated to achieve an acceptable level of environmental performance; and second, that the Project will have no significant social impacts (**Ground 8 – Air Quality Ground**).

Held: Summons dismissed:

(1) Ground 1 – Resources SEPP Ground: although no specific conditions were imposed in relation to scope 3 emissions, the Commission made a permissible evaluative decision under cl 2.20 of the Resources SEPP not to impose conditions relating to scope 3 conditions to "avoid double counting". The Commission had regard to applicable State or national policies, programs or guidelines concerning greenhouse gas emissions and considered that scope 3 emissions from the Project were more appropriately regulated through broader national policies and international agreements such as the Paris Agreement and, therefore, the Commission did not fail to have regard to mandatory considerations: at [76]-[77], [79];

(2) Ground 2 – Likely Impacts Ground: the Commission did not fail to consider the likely impact of scope 3 emissions from the Project and the Commission understood the submissions before them relating to greenhouse gas emissions, including scope 3 emissions and their effect on climate change and did not disregard the submissions. The Commission was aware of the cumulative effect of greenhouse gas emissions and accepted that the impact of scope 3 emissions was felt globally: at [104]-[107];

(3) Ground 3 – public Interest Ground: the Commission did not fail to consider the likely impacts of scope 3 emissions in its assessment of the public interest. The Commission understood and weighed the predicted benefits of the proposed development against its negative impacts. In its consideration of the public interest, the Commission specifically noted its consideration of the principles of Ecologically Sustainable Development: at [130];

(4) Ground 4 – Conditions of Approval: the conditions imposed by the Commission were not redolent of irrational or illogical reasoning. Conditions imposed by the Commission had a proper relationship with the Project and the conditions' reliance on the potential technology was a well understood adaptive management tool in major projects. Further, it was open to the Commission to conclude that the conditions it imposed were adapted to reducing the predicted negative impacts of the Project's scope 1 and scope 2 emissions: at [150]-[153];

(5) Ground 5 – Public Submissions Ground: the Commission was not obliged to refer to each submission in its reasons for providing development consent for the Project. The Commission's duty was to consider the submissions, not to summarise the matters before it. The Commission's commentary and findings throughout the reasons demonstrate that the Commission considered the submissions before it and was aware of the uncontested evidence set out in the submissions including from experts on the likely negative impacts of scope 3 emissions: at [167], [170];

(6) Ground 6 – Surrender of Consent Ground: the Commission did not err in its application of s 4.63(3) of the EPA Act. This ground turned on the construction of the pre-existing consent, which was originally granted in 1999 and modified on five occasions. The pre-existing consent properly construed provided for surface disturbance across an area of the site referred to as the "pale taupe area" and therefore, the Commission was not required to re-assess the impacts of a previously approved project in that area: at [186], [192];

(7) Ground 7 – Lizard Ground: the Commission did not leave undetermined the issue of potential impacts of the Project on the newly identified Legless Lizard species to be later determined by the Planning Secretary. Specifically, Condition 63 required that the biodiversity management plan demonstrate how the Project would be carried out in a manner that avoided

or minimised to the greatest extent practicable any serious or irreversible damage to the survival of the Legless Lizard. The Commission's reasoning indicated that there was an assessment of the potential impacts and considered that any impacts could be sufficiently managed through the conditions imposed: at [216]-[218];

(8) Ground 8 – Air Quality Ground: the Commission did not act (legally) unreasonably when concluding that, with the imposition of the conditions, the impacts on air quality and social impacts could be adequately minimised and managed. Furthermore, in circumstances where the Commission imposed conditions specifically to ensure the MACH took proactive and reactive air quality mitigation measures, accounted for affected receivers and implemented the Air Quality and Greenhouse Gas Management Plan to ensure compliance with the air quality criteria, it could not be said that the Commission denied that there were negative impacts associated with the Project or that there were no significant social impacts: at [242]-[246]; and

(9) The Court noted that although these proceedings raised matters of the utmost public interest, and while there was no doubt that the continuation of coal mining would contribute to the global total of greenhouse gas concentrations which affects the climate system and causes climate change impacts, the jurisdiction of the Court in these judicial review proceedings was confined to ensuring that the Commission carried out its functions in accordance with the statutory provisions that govern the performance of those functions and exercise of the relevant powers.

***Liverpool City Council v Minister for Local Government and Ors*** **[2024] NSWLEC 94** (Robson J)

Facts: Liverpool City Council (**Council**) commenced Class 4 judicial review proceedings seeking declaratory and consequential injunctive relief in relation to various decisions made (and to be made) by the Minister for Local Government (**first respondent**) and a delegate of the Departmental Chief Executive, Office of Local Government (**OLG**)(**second respondent**), involving an investigation, the making and publishing of an interim report, and a public inquiry into the conduct of Council.

On 6 May 2024, the second respondent determined that there be an investigation under s 430 of the *Local Government Act 1993* (NSW) (**Act**) into aspects of Council's work and activities (**s 430 Investigation**) regarding whether Council had complied with the statutory obligations and its policies in relation to recruitment and selection for relevant employment positions; whether there were conflicts of interest which may have influenced recruitment for those positions; and whether Council's finances were being adversely affected as a result of staffing decisions.

On 11 July 2024, before the completion of the s 430 Investigation, the second respondent prepared and signed the "Interim Report of the Section 430 Investigation into Liverpool City Council" (**Interim Report**), which contained serious allegations against Council, its councillors, the Mayor, and employees, some of whom were directly named and others who were identifiable by their position within Council.

On 18 July 2024, the first and second respondents published the Interim Report on the website of the OLG, which contained a recommendation that a public inquiry under s 438U of the Act be held. The first respondent also issued a media release containing a hyperlink to the Interim Report on the website of the OLG. The first respondent also sent a "Notice of Intention to Issue a Suspension Order" to Council, inviting Council to make submissions (by 26 July 2024) in respect of the first respondent's intention (based on the contents of the Interim Report) to: (1) postpone local government elections (scheduled for September 2024) under s 318B(1) of the Act; (2) suspend the Council under s 438W; and (3) appoint an administrator to Council under s 438Y (**adjunct decisions**).

These proceedings were commenced by Council on 24 July 2024 and in their response to summons filed 3 August 2024, the active respondents, being the first, second and the fifth respondent (State of New South Wales) (**respondents**) admitted that none of the allegations in the Interim Report had been notified to Council or those individuals identified or identifiable, and conceded that the investigation was made and published without first notifying the individuals of the adverse material or proposed findings and the individuals were not afforded an opportunity to address the allegations against them (**concession**).

Issue: In light of the contention, was it still necessary for the Court to consider the other bases on which the lawfulness of the Interim Report was challenged.

Held:

(1) Declared that the second respondent failed to observe the requirements of procedural fairness when reporting on Council in the Interim Report and otherwise dismissing the other grounds in the summons;
(2) The first respondent had power to make and publish the Interim Report. The first and second respondents were not actually biased or acted in a manner to give a reasonable apprehension of bias on the part of the hypothetical reasonable observer in relation to the decision to publish the Interim Report: at [110];
(3) The first respondent's decision to appoint the commissioner to hold the public inquiry was separate to the decision to publish the Interim Report such that any invalidity of the Interim Report does not render unlawful the first respondent's decision to later appoint the public inquiry because, first, the validity of the Interim Report was not a statutory precondition to the exercise of power under s 438U of the Act; and second, although the Interim Report was, from a legal perspective, a nullity, it continued to exist in fact when the first respondent made the decision to appoint the public inquiry: at [110]; and
(4) Council had not discharged its onus to prove that the first respondent relied solely upon the contents of the Interim Report in appointing the public inquiry and the first respondent did not consider any irrelevant considerations in making this decision nor was first respondent's decision attended by legal unreasonableness: at [111].

***Nicholas Tang Holdings v Berbic and Wingecarribee Shire Council*** **[2024] NSWLEC 95** (Robson J)

Facts: Nicholas Tang Holdings Pty Limited (**applicant**) commenced Class 4 judicial review proceedings challenging the validity of a development consent granted on 18 January 2023 by Wingecarribee Shire Council (**Council**) for a dwelling house at 3A Holly Road, Burradoo (**site**).

On 11 May 2022, the first respondent lodged development application SA 22/1717 (**DA**) with Council. The DA was referred for consideration and assessment to Hugh Halliwell, an external consultant planner retained by Council.

In July 2022, Mr Halliwell prepared a draft assessment report and a draft Notice of Determination (collectively '**draft report**') which, on 21 October 2022, was forwarded by Mr Halliwell to certain Council officers "for review".

After enquiries were made by the owner in December 2023, Council's electronic recording system showed that Mr Lindsay, the Senior Accredited Certifier who determined the consent under delegated authority of Council, (**the delegate**) accessed various documents on 17 and 18 January 2023 including the statement of environmental effects, various plans, the objections received, and the draft assessment report prepared by Mr Halliwell. On 18 January 2023, Mr Lindsay granted consent to the DA. Mr Halliwell provided a "final" copy of the report which was dated 17 February 2023.

The applicant sought a declaration that the decision to grant development consent was invalid and advanced various grounds including that Alan Lindsay, failed to properly assess the development application before consent was granted; and that certain mandatory relevant considerations as required by subcll 5.21(2) and (3) of the WLEP 2010 and s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) were ignored.

Issues: The applicant contended that the consent was invalid for three reasons.

(1) Whether the delegate carried out the required exercise to assess the application under s 4.15(1) of the EPA Act; and
(2) Whether the delegate considered the mandatory considerations under s 4.15(1) including, first, cl 5.21 of the WLEP 2010 (which required the consent authority be satisfied, inter alia, that a development was compatible with flood behaviour of the land and that the development would not adversely affect flood behaviour in a way that resulted in detrimental increases in the potential flood affectation of other development or properties); and second, any public submissions.

Held: Declaring the development consent invalid:

(1) The underlying circumstances in cl 5.21 of the WLEP 2010 were not questions of fact to be assessed by the Court and it is the state of satisfaction of Council as decision-maker which was the "jurisdictional fact": at [70];
(2) The evidence from Council's records marshalled by the applicant discharged its onus and was sufficient for the Court to draw the inference that Council did not form the state of positive satisfaction in relation to cl 5.21 of the WLEP 2010 when granting the consent: at [37], [80]; and

(3) The first respondent was not entitled to rely on the presumption of regularity to contend that Council had considered all relevant matters when granting the consent. The presumption arises more easily in relation to formal requirements of juridical or administrative acts as opposed to matters of substance and even if the substantive information in the objectors' submissions (including the matters relating to cl 5.21 of the WLEP 2010) were effectively before Mr Lindsay during his consideration of the application, they were not capable of showing that Mr Lindsay reached the positive state of satisfaction by consideration of the required matters: at [84].

## Aboriginal Land Council

***Registrar Appointed Under the Aboriginal Land Rights Act 1983 v Toomey*** **[2024] NSWLEC 92** (Pepper J)

Facts: On 19 December 2023 and 30 January 2024, the Registrar appointed under the *Aboriginal Land Rights Act 1983* (**Registrar**) provided the Electoral Commissioner of NSW with certified rolls for the election of a counsellor to represent the Central Region of the New South Wales Aboriginal Land Council (**NSWALC**), which did not take into account the membership roll for the Dubbo Local Aboriginal Land Council (**Dubbo LALC**). As a result, the certified electoral roll did not contain the names of all persons entitled to vote in the election. This led to non-compliance by the Registrar with the requirements for the certification of rolls under cl 56(2) of the Aboriginal Land Rights Regulation 2020 (NSW) (**Regulations**), and for the election of councillors pursuant to s 121(1) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**). Due to the administrative error, the nomination of a candidate to run in the election was incorrectly rejected and the election was therefore uncontested. By amended summons, the Registrar sought a declaration that the election was void and that a fresh election be held. The proceedings were commenced two days out of time as prescribed by the ALRA.

Issues:

(1) Whether the Court had the power to extend the time limit contained in s 125(2) of the ALRA;
(2) Whether the Court ought to exercise its discretion to grant an extension of time;
(3) Whether invalidity was the effect of non-compliance with s 56(1) of the Regulations and s 121(1) of the ALRA; and
(4) Whether the Court ought to exercise its discretion to grant the declaratory relief sought.

Held: The amended summons was statute barred, the Court had no jurisdiction to hear the application for judicial review and the amended summons was dismissed with costs:

(1) The Court did not have the power to extend the time limitation in s 125(2) of the ALRA. The text of the provision allowed for 28 days within which "any person may" make an application to the Court after the returning officer had publicly declared the election result. There is no express power to extend the time bar in s 125(2) and the use of the word "may" did not confer upon the Court an implicit discretion to permit challenges after the 28-day period had lapsed. The context within which s 125(1) was located did not support departure from this interpretation. Neither did the purpose for which the provision was enacted, which was to ensure certainty of an election result: at [58]-[103];
(2) In the event that the Court was in error, and an implicit power to extend time existed, it was reasonable for the Court to exercise its discretion to extend the time limit because the genesis of the challenge was inadvertent error, the challenge was foreshadowed upon the mistake being discovered, and the proceedings were commenced no more than two days out of time: at [104]-[110];
(3) A breach of cl 56 of the Regulations and s 121(1) of the ALRA was intended by Parliament to give rise to invalidity. Both provisions imposed an essential precondition to the exercise of the power to conduct an election pursuant to s 121 of the ALRA. A finding of invalidity was further justified having regard to the public interest in the fair conduct of NSWALC elections and the interest of electors protected under the ALRA. Section 127 of the ALRA, which stipulated the materiality threshold that would apply before a Court can grant relief invalidating an election, did not alter this conclusion because the error made a material difference to the election result in that the election would have been contested but for the administrative oversight: at [111]-[145]; and
(4) If the challenge was not time barred, the Court would err in favour of a declaration of invalidity. The discretion to refuse relief in respect of an election for the NSWALC that did not involve a contested ballot due

to the rejection of a person's nomination arising from a failure to comply with cl 56(2) of the Regulations was narrow. The personal and financial cost to individual councillors of a new election did not weigh heavily against the grant of relief: at [146]-[155].

## COMPULSORY ACQUISITION

***North Sydney Council v Transport for New South Wales*** **[2024] NSWLEC 100** (Duggan J)

Facts: On 26 March 2021, Transport for New South Wales (**Respondent**) compulsorily acquired a leasehold interest for a period of 4 years and 11 months over three areas of parkland in North Sydney, NSW. Those areas comprised part of Cammeray Park, including Cammeray Golf Course (**Golf Course**), part of Anzac Park and part of St Leonards Park (together, the **Acquired Land**). Relevantly, the Acquired Land was Crown Land under the *Crown Land Management Act 2016* (NSW) (**CLM Act**), in respect of which North Sydney Council (**Applicant**) was the Crown land manager under s 3.1(1) of the CLM Act. On 9 March 2022, the Valuer-General determined the amount of compensation payable to the Applicant in respect of the Acquired Land at $35,003, comprising $3 for market value pursuant to s 55 of the *Land Acquisition (Just Terms) Compensation Act 1991* (NSW) (**Just Terms Act**), and $35,000 for disturbance pursuant to s 59(1) of the Just Terms Act. On 3 June 2022, the Applicant commenced the proceedings objecting to that determination of compensation. It was agreed between the parties that, to the extent that the Acquired Land constituted Crown land and the Council was a Crown land manager, the operative provision for the determination of compensation was s 2.24 of the CLM Act, a provision that had not received judicial consideration. The Applicant sought compensation under three separate heads, ss 2.24(3)(b), (d) and (e) of the CLM Act.

Issues:

(1) The Applicant's entitlement to compensation pursuant to s 2.24(3)(b) of the CLM Act for the loss attributable to the reduction in public benefit attributable to the loss of public open space arising from the acquisition;

(2) The Applicant's entitlement to compensation pursuant to s 2.24(3)(d) of the CLM Act in respect of the loss incurred by it as Crown land manger in acquiring additional land having environmental benefits comparable to the Acquired Land; and

(3) The Applicant's entitlement to compensation pursuant to s 2.24(3)(e) of the CLM Act for losses attributable to disturbance including legal, valuation and reinstatements costs.

Held: The Applicant was entitled to compensation under ss 2.24(3)(b) and (e) totaling $ 622,165, plus statutory interest:

(1) The Court held that the Applicant was entitled to $481,813 as compensation for the Acquired Land under s 2.24(3)(b) of the CLM Act and s 54 of the Just Terms Act: at [88]. The Acquired Land was "public open space". The Acquired Land permitted active and passive forms of recreation and that its acquisition, in reducing such activities, led to a reduction of public benefit: at [27]. In terms of financially quantifying such loss, on the evidence adduced, it was determined that the compensation payable to the Applicant in respect of the Acquired Land was to be determined applying a "recreational value" approach with a base rate of $3/m$^2$ that derived from a lease over the Golf Course: at [84]-[86];

(2) The Applicant's alternative claim under s 2.24(3)(d) was not required to be determined due to the findings as to compensation under s 2.24(3)(b): at [91]; and

(3) The Court held in relation to the s 2.24(3)(e) claim that, apart from the legal and valuation costs as agreed between the parties which totalled $140,352.40 within ss 55(1)(a) and (b) of the Just Terms Act, the Applicant was not entitled to the losses it sought for disturbance under s 59(1)(f) of the Just Terms Act, arising from the reinstatement of the Acquired Land to its pre-acquisition state: at [108], [118]

## VALUATION/RATING

***C & V Engineering Co Pty Ltd as Trustee for the Pizzolato Settlement v Department of Planning Industry and Environment - Valuer General of NSW; CV Property Holdings Pty Ltd as Trustee for the Mascot Property Trust v Department of Planning Industry and Environment - Valuer General of NSW*** **[2024] NSWLEC 57** (Pain J)

Facts: The applicants appealed against land valuations for 2019 under s 37(1) of the *Valuation of Land Act 1969* (NSW) of two adjoining parcels in Mascot, one on John Street and another on Church Avenue, on the basis the valuations were too high. The parties engaged a range of experts requiring

the assessment of architectural, town planning and valuation evidence to determine if the highest and best use of the parcels would be based on mixed use or boarding house development. Structural engineering evidence raised concerns with the viability of basement excavations on John Street due to unstable soil conditions and a high water table. At the request of the applicants the parties' architects prepared specific building schemes for mixed use and boarding house development on both parcels. The applicants' valuer adopted mixed use with basement car parking as highest and best use for both parcels. Based on his assessment of the risks attached to obtaining boarding house approval the applicants' valuer disregarded any consideration of boarding house for both parcels and only utilised comparable mixed use sales. The respondent's valuer adopted boarding house as the highest and best use for both parcels and used both boarding house and mixed use sites as comparable sales.

To the extent that the respondent's valuer derived a value greater than the issued value of the Valuer-General, the respondent sought confirmation of the issued value for each property.

Issues:

(1) Whether the hypothetical parties would consider the highest and best use for each of the parcels is mixed use or boarding house taking into account:
   (a) whether a basement car park could be built on John Street based on structural engineering evidence;
   (b) whether the valuers' assessment of risks based on the architectural and town planning evidence was appropriate;
   (c) whether upon assessment of the comparable sales a boarding house is more valuable as a development proposition than mixed use; and
   (d) the appropriate adjustments of comparable sales for mixed use and boarding house.

Held: The appeal was dismissed and the values issued by the Valuer-General confirmed:

(1) The hypothetical parties would assume basement car parking was not viable on John Street based on the respondent's structural engineering evidence. It was highly likely that a potential developer would consider other permissible uses on John Street that did not require a basement such as a boarding house: at [61]-[63];
(2) In undertaking a valuation exercise the appropriate response to the architectural and town planning evidence was to consider that a boarding house on both parcels was feasible with some adjustment for planning risk inter alia as done by the respondent's valuer. The applicants' valuer should not have discounted boarding house use entirely;
(3) The provision of detailed architectural evidence should not have generally occurred as the matter did not concern whether a particular development was likely to be considered achievable. The outcome was that other expert disciplines exclusively focused on the viability of the specific schemes produced by the architects. This level of detail was similar or greater than what the hypothetical parties would obtain: at [37], [115]-[128];
(4) The respondent's valuer derived higher values for boarding house for both parcels compared to mixed use. This demonstrated that a boarding house use was more valuable than mixed use on both parcels: at [129]-[134]; and
(5) The adjustments of comparable sales for mixed use and boarding house by the respondent's valuer were reasonable on the evidence. The respondent's valuer derived greater value for both parcels based on boarding house rather than mixed use after adjustments. This confirms that the highest and best use for both parcels is a boarding house use: at [135]-[169].

## Section 56A Appeals

***C-Corp Nominees Pty Ltd v Inner West Council*** **[2024] NSWLEC 65** (Preston CJ)

(Decision under review: *C-Corp Nominees Pty Ltd v Inner West Council* [2023] NSWLEC 1746 (O'Neill C))

Facts: C-Corp Nominees Pty Ltd (**C-Corp**) applied for development consent for the demolition of buildings at 5 Bruce Street, Ashfield, including a two-story building (the **building**), and the construction of a new residential flat building. The Inner West Council (**Council**) refused the application. The site was in the Federal Fyle Heritage Conservation Area (**FF HCA**), designated under the Comprehensive Inner West Development Control Plan 2016 (**DCP**). Clause 5.10(4) of the Inner West Local Environmental Plan 2022 (**LEP**) required the consent authority to "consider the effect of the proposed development on the heritage significance of the item or area concerned", for which guidance is provided in the DCP. The DCP listed the site as a

"detracting" building, for which demolition was "permissible". Further, the DCP's Character Statement identified the building as a "non-contributory element" by listing it as an example of "recent or heavily altered houses with difficult to reverse uncharacteristic alterations". The Commissioner found that both the classification and the identification were incorrect, in part because the building was constructed within the Key Period of Significance for the FF HCA and therefore could not be classified as a detracting building. The Commissioner dismissed C-Corp's appeal and refused the development application on the basis that the proposal to demolish the existing building would be detrimental to the heritage significance of the FF HCA ([2023] NSWLEC 1746).

Issues: C-Corp raised five grounds of appeal, each alleging an error of law by the Commissioner from her consideration of the DCP by:

(1) Concluding that the FF HCA classification of the site as detracting was incorrect as it was not open to the Commissioner to ask this question;
(2) Failing to make the DCP's classification of the site as detracting a fundamental element for consideration in determining the development application;
(3) Disregarding the assessment of the building as a "non-contributory element";
(4) Finding that, under cl 5.10(4) of the LEP, the demolition of the building would be detrimental to the identified heritage significance of the FF HCA; and
(5) Finding that the heritage study which identified the heritage significance of the FF HCA in the Character Statement was "cursory" when there was no evidence to support that finding.

Held: Appeal dismissed with each ground rejected and appellant ordered to pay respondent's costs:

(1) Grounds 1 and 2: The Commissioner was correct in finding that the classification of the building was incorrect. The Commissioner did not re-classify the building for the purpose of the FF HCA Character Statement or application of the relevant provisions of the DCP and therefore did not set aside the DCP standard and apply her own standard. What she did do was undertake the consideration required by cl 5.10(4) of the LEP on the correct factual basis, that the building was not detracting. Therefore, the Commissioner did not ask and answer the wrong question, nor fail to consider a relevant matter of the classification of the building: at [48]-[52];
(2) Ground 3: It was open to the Commissioner to find, as she did, that the assessment in the FF HCA Character Statement of the building as an example of a non-contributory element, being one of "recent or heavily altered houses with difficult to reverse uncharacteristic alterations", was incorrect. This finding informed her consideration under cl 5.10(4) of the LEP and as such she did not ask or answer the wrong question nor fail to consider a relevant matter: at [53]-[54];
(3) Ground 4: As the Commissioner did not err on the questions of law as alleged in grounds 1 to 3, her consideration under cl 5.10(4) could not consequentially miscarry. Further, the Commissioner was not bound to apply the assessment of the building in the Character Statement: at [55]-[56]; and
(4) Ground 5: This ground was baseless, as any error describing the heritage study as "cursory" was not an error on a question of law, as there was some evidence that the study was cursory: at [57].

***Unsworth v Hennessy* [2024] NSWLEC 82** (Preston CJ)

(Decision under review: *Hennessy v Unsworth* [2023] NSWLEC 1773 (Galwey AC))

Facts: Mrs Unsworth brought an appeal pursuant to s 56A of the *Land and Environment Court Act 1979* (NSW) against a Commissioner's decision. The Commissioner ordered Mrs Unsworth to prune her lilly pilly hedge, which ran along the dividing fence between Mrs Unsworth's property and the neighbour, Mrs Hennessy's property, following an application under s 14B of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**Trees Act**) by Mrs Hennessy. At the time of the original application, the trees were 600mm above the fence. Two days prior to the Commissioner's on-site visit, Mrs Unsworth pruned the trees to 400mm, but stated in evidence at the hearing that she would allow the trees to grow back to their previous height of 600mm above the fence. The Commissioner considered the "ongoing state of affairs" of the trees approximately 200mm above what they were at the date of the hearing. The Commissioner found that the trees severely obstructed the view from Mrs Hennessy's house and ordered Mrs Unsworth to prune the trees twice yearly to a height of no greater than 150mm above the fence.

Issues:

(1) Whether the Commissioner misinterpreted and misapplied s 14E(2(a)(ii) of the Trees Act by assessing the obstruction caused by the trees not as the trees

existed at the hearing date, but by the degree of obstruction of the trees as they would be under the most likely state of affairs (**erroneous date of assessment issue**);

(2) Whether the Commissioner misinterpreted and misapplied s 14D(1) of the Trees Act by not limiting the order to prune the trees to only those trees found to cause a severe obstruction of the view, rather than to all of the trees in the hedge (**erroneous order issue**); and

(3) Whether the Commissioner denied Mrs Unsworth procedural fairness, by not giving her a reasonable opportunity to address the assessment of the degree of obstruction caused by the trees when 200mm higher than they were at the hearing date (**procedural fairness issue**) (as an alternative to the erroneous date of assessment issue).

Held: The appeal was dismissed and the appellant ordered to pay the respondent's costs:

**The erroneous date of assessment issue:**

The Commissioner did not misinterpret s 14E(2)(a) by considering the ongoing state of affairs of the trees, for seven reasons:

(1) The use of the present continuous tense "are obstructing" in s 14E(2)(a), instead of the present simple tense "obstruct", should be seen as purposive, to address not only an obstruction occurring right now but also an obstruction that will occur in the future: at [29]-[32];

(2) The language used regarding the "trees concerned", beginning in s 14E(2)(a) and traced through ss 14A – 14D, signified that the obstruction from the trees was ongoing, occurring both now and into the future: at [33]-[40];

(3) The assessment of the obstruction caused by the "trees concerned" must take into account the fact that trees are dynamic living organisms that grow and change over time; for example, deciduous trees may cause a severe obstruction in summer, but not winter: at [41]-[44];

(4) Section 14F sets out matters the Court is to consider before making a determination, which includes considerations which require assessment over a longer timescale, such as the amount and number of hours per day sunlight is lost, and whether the trees lose their leaves during the year: at [45]-[49];

(5) The applicant may seek under s 14B and the Court may make orders under s 14D "to prevent" a severe obstruction. The words "are severely obstructing" in s 14E(2)(a), being the precondition to making orders under s 14D(1), must be construed in this context. The assessment of whether the trees "are severely obstructing" can have regard to not only an obstruction that has occurred or is occurring, but also an obstruction that will occur: at [50]-[51];

(6) There is a distinction between the time at which the assessment of the degree of obstruction under s 14E(2)(a) is to be undertaken, which is when the Court makes an order, and the actual time period over which the state of the trees and degree of obstruction may be assessed. The assessment may be based on a longer time period: at [52]-[54];

(7) Requiring the assessment of the obstruction to be limited to only the hearing day is inconsistent with the purpose of the statutory scheme, being to provide simple and practical dispute resolution for neighbours. The assessment could be impacted by respondents pruning the tree just before the hearing, or depend on the date the Court sets for hearing. An interpretation which gives rise to such inconsistencies is not to be preferred over a construction that does not give rise to such inconsistencies: at [55]-[59];

**The erroneous order issue**

(8) The Court may make orders under s 14D(1) in relation to all of the trees in the group of trees that form the hedge, regardless of whether every tree in the group of trees is found to severely obstruct sunlight or a view. Section 14D(1) requires the obstruction to occur due to "trees that are the subject of the application concerned", for an order to be made. Therefore, the trees for which an order can be made are all of the trees in the group of trees the subject of the application: at [76]-[83]; and

**The procedural fairness issue**

(9) On a proper construction of s 14E(2)(a), the Commissioner could have regard to the likely ongoing state of affairs of the trees in assessing whether the trees are severely obstructing a view from Mrs Hennessy's house. Therefore, the Commissioner was not obliged to give notice to the parties of the correct interpretation of s 14E(2)(a) or the application of that interpretation to the facts that he might find on the evidence before the Court. The evidence upon which the Commissioner made his decision was available to and in part advanced by Mrs Unsworth, who made submissions on the evidence of whether the trees at their height at the hearing or 200mm higher severely obstructed the view. Therefore, there was no denial of procedural fairness: at [88].

***Georges River Council v Eskander*** **[2024] NSWLEC 98** (Robson J)

(Decision under review: *Eskander v Georges River Council* [2024] NSWLEC 1006 (Gray C))

Facts: In a Class 1 hearing before a commissioner, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW), Shady Eskander (**Eskander**) appealed against the refusal of a development application by Georges River Council (**Council**). The development application sought consent for the construction of a detached dual occupancy at 12 Ogilvy Street (**site**), with one dwelling being accessed from Ogilvy Street and the second dwelling being accessed from a street to the rear of the site known as David Place. Council refused development consent on the basis that there was no legal right of access to the site from David Place due to a narrow parcel of land (owned by Council) between the site and David Place over which Eskander did not have an easement. In the Class 1 proceedings, the commissioner considered and applied cl 6.9 of the Georges River Local Environmental Plan 2021 (**GRLEP**), which relevantly provided that development consent "must not be granted" unless the consent authority is satisfied that "adequate arrangements have been made to make [suitable vehicular access] available when required". On 16 January 2024, the commissioner found that the precondition in cl 6.9 of the GRLEP was satisfied on the basis that Eskander had commenced Class 3 proceedings seeking an easement over the narrow parcel of land and upheld the appeal (with a deferred commencement condition relating to the easement). Council appealed against the commissioner's decision under s 56A of the *Land and Environment Court Act 1979* (NSW).

Issues:

(1) Whether the commissioner's application of cl 6.9 of the GRLEP was based on a misunderstanding of, or misdirection on, the content of cl 6.9 because a proper consideration of the requirements of cl 6.9 should have led the commissioner to form the view that no adequate arrangements had been made for suitable vehicular access with the consequence that there was no power to grant the consent; and

(2) Whether, given cl 6.9, development consent could be granted subject to a deferred commencement condition (that adequate arrangements would be in place to provide for suitable vehicular access).

Held: Appeal upheld and the matter remitted back to the commissioner to be re-determined:

(1) The Commissioner's opinion of satisfaction was dependent upon Eskander being successful in his application in the Class 3 easement proceedings brought pursuant to s 40 of the Court Act. In circumstances where Council maintained its opposition to the grant of the easement, there remained a prospect that the Court would not grant the easement, and this would have been known to the commissioner. The commissioner erroneously applied cl 6.9 of the GRLEP when forming the view that arrangements for suitable vehicular access had "been made". The Commissioner substituted the requirement in cl 6.9 – that there needed to be an adequate arrangement to make suitable vehicular access – with a different requirement such as commencement of a process which might result in an easement: at [60], [67];

(2) The state of satisfaction required that there must be a current "arrangement" that had "been" made. Furthermore, there must be some form of objective and tangible proof to constitute an arrangement as something "made" whereby the term "arrangement" within the context of an environmental planning instrument means "something in the nature of an understanding between two or more person": at [56]-[57]; and

(3) The commissioner's satisfaction of the matters in cl 6.9 was not anterior to her decision to grant consent with the deferred commencement condition, such that the commissioner did not reach the required level of satisfaction by determining that the development consent could be granted subject to a deferred commencement condition: at [60].

## Interlocutory Decisions

***McNeill v Clarence Valley Council*** **[2024] NSWLEC 85** (Pritchard J)

Facts: On 23 June 2024, Mr Craigh McNeill filed an application in Class 3 of the Court's jurisdiction which attached a Class 1 application form seeking an injunction against Clarence Valley Council (**Council**), the Land and Environment Court and Northern Regional Planning Panel in relation to Council's flood planning and evacuation procedures under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW)

(**EPA Act**). Mr McNeill's application attached a notice of motion seeking some 26 orders (**the Class 3 proceedings**). On 5 July 2024, the list judge gave Mr McNeill leave to file an amended claim in Class 4.

On 10 July 2024, Mr McNeill filed a summons in Class 4 of the Court's jurisdiction seeking 12 orders (**the Class 4 proceedings**). Mr McNeill's key concerns related to the Council's resolution "07.24.093" on 25 June 2024 to adopt the Lower Clarence Flood Model Update 2022 (**the flood model**). Mr McNeill sought orders including requiring Council to obtain: an independent review of the flood model; a detailed assessment of the Yamba River gauge; reassessment of the Clarence River entrance type classification; a detailed study of Lake Wooloweyah's hydrodynamics; a review and recalculation of the 1% AEP storm tide peak; and a wave runup study for Yamba, and to undertake corrective actions to restore natural flow of floodwaters within the West Yamba Urban Release Area. Mr McNeill also sought a declaration that Council bore the burden of proof to demonstrate that the flood model was accurate, reliable, and fit for purpose.

On 31 July 2024, Council filed notices of motion in the Class 3 and Class 4 proceedings seeking that the proceedings be dismissed as frivolous or vexatious pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**), and that Mr McNeill pay Council's costs of the motions. At the hearing on 16 August 2024, Council did not move on its motion to dismiss the Class 3 proceedings because the Court granted Mr McNeill leave to file a notice of discontinuance.

Issues:

(1) Whether it was fair and reasonable for the Court to make an order that Mr McNeill pay Council's costs in the Class 3 proceedings pursuant to r 3.7 of the Land and Environment Court Rules 2007 (NSW) (**LEC Rules**);
(2) Whether the Class 4 proceedings should be dismissed for being frivolous and vexatious pursuant to r 13.4 of the UCPR; and
(3) Whether Mr McNeill should pay costs of the Class 4 proceedings pursuant to r 42.1 of the UCPR, or whether the proceedings were brought in the public interest and the Court should decline to make an order for costs pursuant to r 4.2 of the LEC Rules.

Held: Motion granted in the Class 4 proceedings. No order as to costs in the Class 3 proceedings:

(1) No order as to costs in the Class 3 proceedings because Mr McNeill had taken steps to file a notice of discontinuance after repleading his case in Class 4, his circumstances as a self-represented litigant, and his sincere belief that the proceedings were brought in the public interest: at [56]-[58];
(2) The Class 4 proceedings dismissed pursuant to r 13.4(1)(a) and (b) of the UCPR for being frivolous or vexatious and disclosing no reasonable cause of action. The orders sought by Mr McNeill were beyond the scope of the judicial review functions of the Court, and Mr McNeill had made numerous attempts to amend his pleadings and their deficiencies were not curable: at [65], [67], [71]-[74]; and
(3) Two of the countervailing considerations identified by the Chief Judge in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3)* (2010) 173 LGERA 280; [2010] NSWLEC 59 at [61] weighed in favour of an award of costs in the Class 4 proceedings. First, the applicant "unreasonably pursues or persists with points which have no merit": at [61(e)]; and second, "disentitling conduct of the applicant": at [61](f)]. Therefore, Mr McNeill to pay Council's costs of the Class 4 proceedings as agreed or assessed: at [78]-[80].

## Merit Decisions (Judges)

***CWO Pty Ltd v Muswellbrook Shire* Council [2024] NSWLEC 61** (Duggan J)

(Related decisions: *CWO Pty Ltd v Muswellbrook Shire Council and Commonwealth of Australia* [2023] NSWLEC 37 (Robson J); *CWO Pty Ltd v Muswellbrook Shire Council* [2023] NSWLEC 1049 (Froh R))

Facts: These proceedings concerned a Class 1 appeal by CWO Pty Ltd (**Applicant**) against the deemed refusal by the first respondent, Muswellbrook Shire Council (**Council**), of a development application (**DA**) in respect of the subject site known as 516 Rosemount Road Denman (**site**). On or about 4 November 2021, the Applicant lodged the DA seeking the change of use of the site from a winery, storage and distribution complex to an "information and education facility" known as the "Museum of Colour" which focussed on light art (**Museum**). Directly adjoining the Site to the north and north-east was the Myambat Explosive Ordnance Depot (**EO Depot**) owned by the Commonwealth of Australia

(**Commonwealth**). Given the nature of the materials stored at the EO Depot, it was classified as a "Major Hazard Facility" by Comcare, a Federal, work health and safety statutory authority, and accordingly required a licence for its operation. On 6 February 2023, by orders of Registrar Froh, the Commonwealth were joined to the proceedings as Second Respondent. On 4 April 2023, Robson J varied those orders such that the scope of the Commonwealth's participation as a party to the proceedings was limited to two discrete issues, being the impact of the proposed development on the EO Depot and the impact of the EO on the proposed development. On 19 July 2023, the Applicant's motion seeking leave for an amended DA (**amended DA**), which was submitted with the Council's agreement and comprised mainly of the Museum being confined within an identified "Zone A" and amended hours of operation, was granted.

Issues:

(1) The suitability of the site of the development in respect of the EO Depot; and
(2) The likely impacts of the development on the EO Depot.

Held: Appeal upheld, with the amended DA granted subject to conditions:

(1) The Court held that, for the purposes of s 4.15(1)(c) of the *Environmental Protection and Assessment Act 1979* (NSW) (**EPA Act**), the site was not unsuitable for the use proposed in the Amended DA, subject to the imposition of the conditions as identified in Annexure A of the judgment: at [107]. In light of the Department of Defence's Explosives Regulations, ostensibly an internal policy document, it was determined that the risk posed by the EO Depot to the proposed Museum, having regard to its intended capacity, building composition and location, was acceptable: at [83] This conclusion was otherwise unaffected by expert evidence led by the Commonwealth regarding the possibility of residual risk and, in the event of a major explosive incident at the EO Depot, either debris and other fragments or existing emergency response procedures: at [92], [101], [107]; and
(2) The Court held that the impacts of the proposed development would not adversely affect the operation of the EO Depot so as to warrant refusal of the Amended DA: at [126]. Accepting that the amended DA may trigger a reporting obligation on the part of the Commonwealth to the EO Depot's licensor, Comcare, such an impact was not deemed "likely" within the meaning of s 4.15(1)(b) of EPA Act, and instead treated as speculative and without basis in evidence: at [123], [125].

***Goldcoral Pty Ltd (Receiver and Manager Appointed) v Richmond Valley Council*** **[2024] NSWLEC 77** (Preston CJ)

Facts: Goldcoral Pty Ltd (Receiver and Manager Appointed) (**Goldcoral**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the refusal by the Northern Regional Planning Panel on behalf of Richmond Valley Council (**Council**) of a development application (**DA**) for concept proposals and detailed proposals for the first stage of a residential subdivision (**development**) in Evans Head. Ms Barker, a traditional owner of Country, opposed the development and was joined as a respondent to the appeal.

The proposed development was on land zoned to permit development for residential purposes. The concept proposals included: the provision and upgrade of infrastructure; subdivision of land, including as a community title scheme; use of land for residential development, open space purposes and a community building; and land for environmental conservation. The proposals for the first stage of development included: demolition of buildings and infrastructure; subdivision of land; construction and upgrade of infrastructure; vegetation management works; and bulk earthworks.

Issues:

(1) Whether development consent could be granted for unauthorised works already constructed and not proposed to be removed under the amended DA (**unauthorised works issue**);
(2) Whether development consent could be granted if the proposed development is designated development under cl 2.7 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (**RAH SEPP**) (**designated development issue**);
(3) Whether the proposed development had been designed to mitigate and minimise significant environmental impacts, including on koala habitat, wallum froglet habitat and littoral rainforest (**ecology issues**);
(4) Whether the proposed development was consistent with the desired future character of the locality, and minimised impacts on sensitive environmental and cultural areas within and adjacent to the land (**character and layout issues**);

(5) Whether the proposed development would adversely affect the exercise and enjoyment of native title rights on land and waters near the land (**impact on native title rights issue**); and

(6) Whether the proposed development would unacceptably impact Aboriginal cultural values of the land and surrounding areas (**impact on Aboriginal cultural values issue**).

Held: Appeal upheld and development consent granted, subject to conditions:

**Unauthorised works issue**

(1) Development consent can be granted to carry out works that would amend works that are unlawful and to use in the future the amended works: at [53];

**Designated development issue**

(2) The development was not designated development as the RAH SEPP did not apply. Rather, State Environmental Planning Policy No 14 – Coastal Wetland (**SEPP 14**) and State Environmental Planning Policy No 71 – Coastal Protection (**SEPP 71**) did apply. These SEPPs were in force at the time Goldcoral lodged the DA in 2014. The DA was saved by the savings provisions of State Environmental Planning Policy (Coastal Management) 2018 which repealed and replaced SEPP 14 and SEPP 71, and by operation of s 30(2)(b) and (d) of the *Interpretation Act 1987* (NSW). Goldcoral therefore had a right to have its DA determined under those instruments: at [63]-[76]. *The Dubler Group Pty Ltd v Minister for Infrastructure, Planning and Natural Resources* (2004) 137 LGERA 178; [2004] NSWCA 424 applied;

**Ecology issues**

(3) (a) *The Koala issue:*

i. Goldcoral had an accrued right for the DA to be determined under State Environmental Planning Policy No 44 – Koala Habitat Protection (**SEPP 44**), by operation of s 30(2)(b) and (d) of the *Interpretation Act*: at [84]-[90];

ii. The DA did not propose to carry out development on land that was a potential koala habitat;

iii. There was insufficient evidence to be satisfied, under cl 8(1) of SEPP 44, that the land was a 'core koala habitat so as to prevent the Court from granting consent to the DA: at [105]-[111];

(b) *The Wallum Froglet issue*: the removal and replacement of the existing drainage channel would not affect the Wallum Froglet or its habitat on the land or adjoining land: at [116];

(c) *The littoral rainforest buffer issue*: the concept rehabilitation areas plan and cross-sections indicate an adequate buffer zone (15m or more) between the residential development and the littoral rainforest to protect from bushfire and edge effects: at [124];

**Character and layout issues**

(4) The development was only proposed in areas that were already cleared. The development as finally amended was designed, sited and would be managed to avoid any significant adverse environmental impact, including on the littoral rainforest endangered ecological community, threatened species, including the Wallum Froglet and Oxleyan Pygmy Perch, and coastal wetlands, thereby meeting cl 6.6(4)(a) of Richmond Valley Local Environmental Plan 2012: at [133];

**Impact on native title rights issue**

(5) The proposed development would be visually and acoustically screened from the lands and waters to the south, mitigating unacceptable impacts on the exercise and enjoyment of native title rights and interests in those areas: at [138]-[140]; and

**Impact on Aboriginal cultural values issue**

(6) The proposed development would not unacceptably impact on (a) the significant cultural landscape of the Dirruwung (Goanna) Story; (b) the midden in the southwest corner of Lot 276; and (3) a burial site in the vicinity of the hill in the west of the land: at [141]-[153].

## Merit Decisions (Commissioners)

***Brentford Properties Pty Ltd v Central Coast Council* [2024] NSWLEC 1300** (Walsh C)

Facts: The applicant appealed against the respondent's deemed refusal of a development application seeking the grant of consent for land subdivision and associated works at Jensen Road, Wadalba which fell within the confines of Wadalba South Urban Release Area (**WSURA**). A total of 45 lots would be created. However, as the site was not presently linked to WSURA's planned infrastructure, and in this sense was "out of sequence", the subdivision rollout would follow a series of stages, and involve the provision of certain interim infrastructure, before linking up with the

ultimate infrastructure strategy. This included provision of interim road access, stormwater detention basins and an interim sewage pump station (**SPS**) all on the site, along with a rising main external to the site link up with an existing higher order SPS.

Issues:

(1) The sufficiency of the extent of the analysis of environmental impacts and whether the likely environmental impacts associated, in particular, with sewerage were unreasonably adverse; and

(2) Whether proposed interim arrangements for water and sewerage were at odds with the principles of orderly and economic development.

Held: Appeal allowed:

(1) There were two locations warranting particular attention in regard to potential environmental impact: (a) the environs of the existing SPS, and (b) the environs of the interim SPS. In both instances, the concern was sewage overflow. In relation to both of these matters a concern was whether sufficient environmental impact assessment had been undertaken. Both on and off-site effects of the development on the existing SPS must be considered (*Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638; [2011] NSWCA 349 [44]. There was evidence in regard to potential adverse impact, partly via written evidence and partly via oral evidence in the course of the hearing. This evidence suggested an appropriate environmental response strategy was available, which would be subject to a further approval by the respondent, and there was no significant evidence to suggest such approval might be withheld (*Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41: at [51], [54]; and

(2) The respondent had prepared a Development Servicing Plan (DSP) for water supply and sewerage infrastructure including in relation to WSURA. The DSP indicated a staging schema supportive of development "moving from east to west" within WSURA, a schema supportive of a relatively early release of the site for subdivision. The DSP also included provisions for "Works In Kind and Temporary Works", with which the proposal would generally comply.

## PROCEDURAL MATTERS (EVIDENCE)

***CFT No. 8 Pty Ltd; Telado Pty Ltd v Sydney Metro* [2024] NSWLEC 60 (Duggan J)**

Facts: The substantive proceedings concerned the Applicants' claim for compensation for the compulsory acquisition of their land by Sydney Metro (**Respondent**). By Notices of Motion, the Respondent sought leave to file the expert report of town planner, Mr Tim Blythe (**Mr Blythe**). The circumstances necessitating such leave stemmed from the fact that the originally nominated town planner, Ms Helena Miller, was appointed to the Court as an Acting Commissioner in May 2024. The Applicants opposed the Notices of Motion, contending that Mr Blythe's nomination as a town planning expert gave rise to a conflict of interest. In particular, it was submitted by the Applicants that there was a possibility that any commercially sensitive or confidential information that Mr Blythe may, by virtue of his firm, Urbis, or otherwise as a result of other consultative work, come into contact with, would be misused – unintentionally if not intentionally.

Issue: Whether leave ought to be granted to the Respondent to file the expert town planning report of Mr Blythe.

Held: Leave was granted to adduce expert from Mr Blythe:

(1) Having regard to the applicable principles, as set out by Nicholas J in *Australia Leisure and Hospitality Pty Ltd & Anor v Dr Judith Stubbs & Anor* [2012] NSWSC 215, it was held that the evidence before the Court was insufficient to demonstrate that the alleged possibility of the misuse of commercially sensitive or confidential information by Mr Blythe was real or sensible: at [19];

(2) There was a want of evidence demonstrating that Mr Blythe would intentionally act in breach the undertaking binding on him as an expert regarding the Applicants' confidential information: at [18]; and

(3) Similarly, it could not be established, to the requisite standard, that Mr Blythe would inadvertently breach such an undertaking: at [18].

## PROCEDURAL MATTERS (JOINDER)

***Fuse Architecture Pty Ltd v Georges River Council*** **[2024] NSWLEC 1294** (Orr Dep Reg)

Facts: The Owners – Strata Plan 89161 (**the Intervener**) own the common property at 21-35 Princes Highway, Kogarah, which was burdened by three existing rights of carriageway. The applicant in the proceedings, Fuse Architecture Pty Ltd ("Fuse Architecture"), sought development consent for demolition of the existing dwelling and ancillary structures and construction of a ten-storey "shop top" housing development over three levels of basement parking on an adjoining site at 37-39 Princes Highway, Kogarah. The vehicular access to the development was proposed to be from a rear access lane by way of the rights of carriageway, provided through each of the three basement levels of the Intervener's property. By notice of motion, the Intervener sought leave to be joined as a party to the Class 1 proceedings pursuant to s 8.15(2) of the *Environmental Planning and Assessment Act 1979*.

Issues:

(1) Whether the Intervener had demonstrated that they were able to "raise an issue that should be considered in relation to the appeal but would not be sufficiently addressed if the person were not joined as a party" (s 8.15(2)(a)); or

(2) Whether the Intervener had demonstrated that "it is in the interest of justice" they should be joined as a party (s 8.15(2)(b)(i)); and

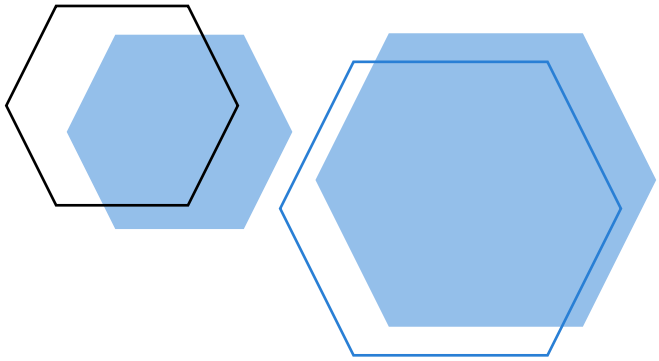
(3) Whether, in the circumstances of the application, the Court should exercise its discretion to order the Intervener be joined as a party to the proceedings.

Held: The Intervener, Owners – Strata Plan No 89161, were joined as the second respondent to the proceedings:

(1) The Court found that the issues sought to be raised by the Intervener in relation to the subject appeal, namely, the intensification of use and the inadequate information regarding the structural integrity of its site caused by the proposed works had not been raised or considered in relation to the appeal. Therefore, these issues would not be likely to be sufficiently addressed if the Intervener were not joined as a party, sufficient to satisfy the first limb of s 8.15(2): at [31];

(2) Notwithstanding the satisfaction of s 8.15(2)(a), the Court also considered whether the Intervener's participation as a party would be in the "interest of justice": s 8.15(2)(b)(i). The Court found that it was in the interests of justice for the Intervener to be afforded the opportunity to be joined as party in circumstances whereas a result of these proceedings, the use and enjoyment of their property rights were likely able to be directly, and adversely, affected: at [38]-[39]; and

(3) The Court found the Intervener was "no ordinary third party objector" and raised more than "mere dissatisfaction" about the adverse effect the proposed development could potentially have on their property rights: *Morrison Design Partnership Pty Limited v North Sydney Council and Director-General of the Department of Planning* (2007) 159 LGERA 361. The Court, balancing the need for efficiency with the need to have all relevant matters before it, considered that as the Intervener would be raising different contentions and leading evidence in respect of those contentions only, joinder would not lead to inefficiency nor duplication of evidence. As a result, Court was satisfied to exercise its discretion to order the Intervener be joined as a party: at [43]-[45].



# LEGISLATION

## STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between July and October 2024.

### ENERGY

***Energy Legislation Amendment (Clean Energy Future) Act 2024 No 41***

An Act to make miscellaneous amendments to various Acts relating to energy and associated matters (assented to 24 June 2024).

**Schedule 5 Amendments relating to financial benefits to landowners for transmission infrastructure**

**5.1 *Electricity Supply Act 1995 No 94***

[1] Section 44 Acquisition of land
Insert after section 44(3)—

(4) Despite the *Land Acquisition (Just Terms Compensation) Act 1991*, section 55, a strategic benefit payment to which a person is entitled must be disregarded in determining the amount of compensation to which the person is entitled under that Act, Part 3.

(5) In this section—
***strategic benefit payment*** means a payment required to be made by the holder of a transmission operator's licence under a condition imposed on the licence by the Minister under Schedule 2, clause 6(2)(i).

**5.2 *Energy and Utilities Administration Act 1987 No 103***

[1] Section 15 Acquisition of land
Insert after section 15(3)—

(4) Despite *the Land Acquisition (Just Terms Compensation) Act 1991*, section 55, a strategic benefit payment to which a person is entitled must be disregarded in determining the amount of compensation to which the person is entitled under that Act, Part 3.

(5) In this section—
***strategic benefit payment*** has the same meaning as in the *Electricity Supply Act 1995*, section 44.

**Section 55 Relevant matters to be considered in determining amount of compensation**

**5.3 *Land Acquisition (Just Terms Compensation) Act 1991 No 22***

Insert at the end of section 55—

**Note**— See also the *Electricity Supply Act 1995*, section 44(4) and the *Energy and Utilities Administration Act 1987*, section 15(4).

### TREES

**Trees (Disputes Between Neighbours) Regulation 2024**

**Explanatory note**
The object of this regulation is to repeal and remake, without substantive changes, the Trees (Disputes Between Neighbours) Regulation 2019, which would otherwise be repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2).

This regulation prescribes certain plants as trees for the purposes of the *Trees (Disputes Between Neighbours) Act 2006*. This regulation comprises or relates to matters set out in the Subordinate Legislation Act 1989, namely—

(a) matters of a machinery nature, and

(b) matters that are not likely to impose an appreciable burden, cost or disadvantage on a sector of the public.

### WATER

**Water Management (General) Amendment (Miscellaneous) Regulation 2024**

**Explanatory note**
The object of this regulation is to amend the Water Management (General) Regulation 2018 to—

(a) replace the methodology that must be used to determine the value of water taken from a water source in contravention of *Water Management Act 2000*, Chapter 3, Part 2, Division 1A, and

(b) increase the amounts payable for penalty notices issued for certain offences against the Act.

**20A Determining value of water illegally taken**

(1) The value of water illegally taken from a water source (relevant water source) must be determined in accordance with this clause.

(2) If there are 20 or more relevant dealings during the relevant water year that are within the relevant water source, the value of the illegally taken water is determined by multiplying the VWAP of the relevant dealings by the volume of the illegally taken water.

(3) If subclause (2) does not apply, but there are 20 or more relevant dealings during the relevant water year that are within or between water sources to which the water sharing plan that applies to the relevant water source also applies, the value of the illegally taken water is determined by multiplying the VWAP of the relevant dealings by the volume of the illegally taken water.

(4) If subclauses (2) and (3) do not apply, but there are 20 or more relevant dealings during the relevant water year that are within or between water sources in the same water region as the relevant water source, the value of the illegally taken water is determined by multiplying the VWAP of the relevant dealings by the volume of the illegally taken water.

(5) If subclauses (2)–(4) do not apply, the value of the illegally taken water is the gross margin value for the water region for the relevant water source, multiplied by the volume of the illegally taken water.

(6) For subclause (3), if the relevant water source is a groundwater source, the 20 or more relevant dealings must be only within or between groundwater sources.

(7) For subclauses (3) and (4), the 20 or more relevant dealings must be only within or between— (a) if the relevant water source is a regulated water source— regulated water sources, or (b) if the relevant water source is an unregulated water source— unregulated water sources.

**[5] Schedule 7 Penalty notice offences**

Insert in appropriate order—

| | | |
|---|---|---|
| Section 60A(2) | $7,700 | $15,400 |
| Section 60B(1) | $3,000 | $6,000 |
| Section 60B(2) | $3,000 | $6,000 |
| Section 60C(2) | $7,700 | $15,400 |
| Section 60D | $3,000 | $6,000 |
| Section 91A(1) | $3,000 | $6,000 |
| Section 91A(2) | $3,000 | $6,000 |
| Section 91B(1) | $3,000 | $6,000 |
| Section 91B(2) | $3,000 | $6,000 |
| Section 91C(1) | $3,000 | $6,000 |
| Section 91C(2) | $3,000 | $6,000 |
| Section 91D(1) | $3,000 | $6,000 |
| Section 91D(2) | $3,000 | $6,000 |
| Section 91E(1) | $3,000 | $6,000 |
| Section 91E(2) | $3,000 | $6,000 |
| Section 91F(1) | $3,000 | $6,000 |
| Section 91F(2) | $3,000 | $6,000 |
| Section 91G(1) | $3,000 | $6,000 |
| Section 91G(2) | $3,000 | $6,000 |
| Section 91H(1) | $3,000 | $6,000 |
| Section 91H(2) | $3,000 | $6,000 |
| Section 91H(3) | $3,000 | $6,000 |
| Section 91I(2) | $7,700 | $15,400 |
| Section 91IA | $3,000 | $6,000 |
| Section 91J(1) | $3,000 | $6,000 |
| Section 91K(2) | $7,700 | $15,400 |
| Section 256(1) | $3,000 | $6,000 |
| Section 336C(1) | $3,000 | $6,000 |
| Section 340A(1) | $3,000 | $6,000 |
| Section 345(2) | $7,700 | $15,400 |
| Section 346 | $3,000 | $6,000 |