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# Land and Environment Court of NSW Judicial Newsletter

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## Legislation

### Statutes and Regulations:

- **Planning:**

[Environmental Planning and Assessment Amendment \(Central Coast Council Local Planning Panel\) Regulation 2019](#) - commenced 15 November 2019. The object of this regulation is to amend the [Environmental Planning and Assessment Regulation 2000](#) to require the Central Coast Council to establish a local planning panel for the whole area of the council. The local planning panel will have the functions determined in accordance with [s 2.19](#) of the [Environmental Planning and Assessment Act 1979](#).

[Environmental Planning and Assessment Amendment \(Community Participation Plans\) Regulation 2019](#) - commenced 29 November 2019. The objects of this Regulation are to amend:

- (a) the Environmental Planning and Assessment Act 1979 (the Act) for the following purposes—
  - (i) to set out the minimum public exhibition periods for certain development consent applications and certain modification of development consent applications;
  - (ii) to set out the mandatory notification or advertising period for the review of certain determinations and decisions of consent authorities;
  - (iii) to insert definitions for the purposes of the new provisions;
  - (iv) to make related law revision amendments; and
- (b) the Environmental Planning and Assessment Regulation 2000 for the following purposes—
  - (i) to omit community participation requirements that are no longer required to be included in the Regulation as a consequence of the insertion of community participation requirements in Schedule 1 to the Act,
  - (ii) to remove certain notification and advertising requirements and to refer instead to the equivalent requirements set out in Schedule 1 to the Act or in the relevant community participation plan,
  - (iii) to prescribe the Lord Howe Island Board as a body that the Minister for Planning and Public Spaces may direct to be a planning proposal authority,
  - (iv) to permit Sydney district, regional and local planning panels to rely on the relevant council's community participation plan when exercising that council's functions,
  - (v) to establish public exhibition requirements for nominated integrated development, threatened species development and Class 1 aquaculture development,

- (vi) to prescribe deemed refusal periods for construction certificates, subdivision works certificates, occupation certificates and subdivision certificates issued under [Pt 6](#) of the Act,
- (vii) to prescribe activities under [Div 5.1](#) of the Act as planning functions, and
- (c) the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 for the following purposes—
  - (i) to permit Transport for NSW (TfNSW) to issue subdivision certificates under Pt 6 of the Act in relation to subdivisions carried out by or on behalf of TfNSW until 1 December 2020,
  - (ii) to clarify the meaning of former building and subdivision provisions for the purposes of a transitional arrangement relating to certain interim occupation certificates, final occupation certificates and development consents.

- **Biodiversity:**

[Biodiversity Conservation Act 2016](#) - final determination regarding *Hibbertia circinata* commenced 31 October 2019.

[Biodiversity Conservation Amendment \(Controlled Action\) Regulation 2019](#) - commenced 22 November 2019. This Regulation excludes from the application of the variation rules in the Biodiversity Conservation Regulation 2017 the impact on listed threatened species or ecological communities within the meaning of the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), or their habitats, of development or an activity that—

- (a) is required to be authorised by certain planning approvals under the Environmental Planning and Assessment Act 1979, or vegetation clearing approvals under the [Local Land Services Act 2013](#) or [State Environmental Planning Policy \(Vegetation in Non-Rural Areas\) 2017](#), and
- (b) is a controlled action requiring environmental assessment and approval under the Environment Protection and Biodiversity Conservation Act 1999.

This Regulation also limits the circumstances in which amounts paid into the Biodiversity Conservation Fund may be applied towards securing biodiversity offsets relating to the impact (including by excluding the use of the variation rules for the purpose of retiring biodiversity credits).

[Biodiversity Offsets Payment Calculator Order 2019](#) - commenced 31 October 2019. Revokes the Biodiversity Offsets Payment Calculator Order dated 24 August 2019 and replaces that order with an order establishing a new offsets payment calculator for the purpose of determining the amount that may be paid into the Biodiversity Conservation Fund under [Div 6](#) of [Pt 6](#) of the [Biodiversity Conservation Act 2016](#).

- **Water:**

[Water Supply \(Critical Needs\) Act 2019](#) - commenced 21 November 2019. The purpose of the Act is to facilitate the delivery of water supplies to certain towns and localities to meet critical human water needs and to declare certain development relating to dams to be critical State significant infrastructure.

[Water Management \(General\) Amendment \(Exemptions for Floodplain Harvesting\) Regulation 2020](#) - commenced 7 February 2020. The object of this regulation is to provide for exemptions from requirements under the [Water Management Act 2000](#) to hold a water access licence to take water from a water source for the purpose of floodplain harvesting and to hold a water supply work approval to use a work for that purpose.

The exemption from the requirement for a water access licence applies only in relation to water management works, and the exemption from the requirement for a water supply work approval applies only in relation to water supply works:-

- (a) Located on a floodplain; and

- (b) Constructed on or before 3 July 2008, or after 3 July 2008 in accordance with an approval under the Act, or a licence or approval under [Pt 2](#) or [Pt 8](#) of the [Water Act 1912](#), for which an application was pending on that date.

[Water Management \(General\) Amendment \(Groundwater Exemptions\) Regulation 2019](#) - commenced 6 December 2019. The object of this regulation is to provide exemptions from the requirement to hold a water access licence under the *Water Management Act 2000* for the following activities:

- (a) The taking of more than three megalitres of groundwater in a water year from specified groundwater sources when using a water supply work for the purposes of excavation required for certain construction work in certain circumstances; and
- (b) The taking of up to three megalitres of groundwater in a water year by certain aquifer interference activities for a purpose other than its consumption or supply. (This exemption replaces three existing exemptions that apply in relation to the taking of water for prospecting or fossicking, water bore testing and the taking of water from or by an exempt monitoring bore.)

Each exemption is conditional on the person claiming the exemption meeting certain record keeping requirements in relation to water taken under the exemption.

[Water Management \(General\) Amendment \(Metering\) Regulation 2019](#) - commenced 22 November 2019. The object of this regulation is to amend the [Water Management \(General\) Regulation 2018](#) as follows:

- (a) To make the terminology used in relation to the application or disapplication of provisions relating to mandatory metering equipment conditions on water supply work approvals and certain other water licences and entitlements consistent with the terminology used in the *Water Management Act 2000*;
- (b) To postpone the commencement of the application of certain provisions;
- (c) To update references to certain water sharing plans;
- (d) To clarify the operation of certain permanent exemptions from mandatory metering equipment conditions;
- (e) To clarify that mandatory metering equipment conditions do not apply to certain inactive water supply works;
- (f) To make further provision regarding the obligations of duly qualified persons carrying out certain activities relating to metering equipment;
- (g) To make further provision regarding the recording of information under a mandatory condition where metering equipment cannot record the information;
- (h) To impose a mandatory condition on water supply work approvals and certain other water licences and entitlements to require water take data to be reported in certain circumstances where telemetry reporting is not otherwise required under a mandatory metering equipment condition;
- (i) To make further provision regarding recording of water taken where metering equipment is not required to comply with mandatory metering equipment conditions;
- (j) To make further provision regarding the standards and other requirements relating to metering equipment required under mandatory metering equipment conditions;
- (k) To extend an exemption from the requirement for controlled activity approvals in relation to certain controlled activities carried out on waterfront land by State owned bodies to Commonwealth owned bodies; and
- (l) To make other amendments of a machinery or law revision nature.

- **Pollution:**

[Protection of the Environment Operations \(Waste\) Amendment \(Waste Contributions Exemption\) Regulation 2019](#) - commenced 1 November 2019. Extended, for a further six months (to 1 May 2020),

the current waste contributions exemption that applies to mixed waste organic outputs generated by certain waste facilities.

[Protection of the Environment Operations \(Waste\) Amendment Regulation 2019](#) - Sch 1.2 commenced 1 December 2019. The purpose of the amendment was to provide that a penalty notice may be issued for the offence under [s 39](#) of the [Waste Avoidance and Resource Recovery Act 2001](#) of supplying a beverage in a container without a refund marking under the container deposit scheme and to specify the amount payable. The amounts payable were inserted into [Sch 6](#) of the [Protection of the Environment Operations \(General\) Regulation 2009](#).

- **Miscellaneous:**

[Right to Farm Act 2019](#) - commenced 21 November 2019. The objectives of the Act are:

- (a) To prevent an action for the tort of nuisance being brought in relation to a commercial agricultural activity where it is occurring lawfully on agricultural land,
- (b) To require a court to consider alternative orders to remedy a commercial agricultural activity that is found to constitute a nuisance rather than order the activity to cease,
- (c) To extend the circumstances of aggravation for an offence of entering inclosed lands without permission or failing to leave inclosed lands when requested to do so and to increase the maximum penalty for the aggravated offence,
- (d) To create an offence of directing, inciting, procuring or inducing the commission of the aggravated offence,
- (e) To modify offences of leaving a gate open on inclosed lands to apply the offences where the gate is removed or disabled, to specify that a gate includes a cattle grid or any moveable thing used to inclose land and to increase the maximum penalties for the offences,
- (f) To specify how proceedings for an offence under the [Inclosed Lands Protection Act 1901](#) are to be dealt with.

[Music Festivals Act 2019](#) - commenced 21 November 2019. The objectives of the Act are:

- (a) To provide that the Independent Liquor and Gaming Authority (**ILGA**) may direct music festival organisers for high-risk festivals to prepare a safety management plan for the proposed festivals for approval by ILGA;
- (b) To make it an offence for music festival organisers for high-risk festivals to hold the festival unless there is an approved safety management plan for the festival;
- (c) To impose other obligations on music festival organisers for high-risk festivals, including to provide briefings for health service providers, to keep records relating to incidents that occur at festivals or in their vicinity and to make the approved safety management plan available to police officers and other persons if requested to do so;
- (d) To provide for the enforcement of the proposed Act;
- (e) To provide for other related matters.

[Conveyancing \(General\) Amendment \(WaterNSW Infrastructure Pty Ltd\) Regulation 2019](#) - commenced 13 December 2019. The object of this amendment is to prescribe WaterNSW Infrastructure as an authority in whose favour an easement without a dominant tenement may be created for the purpose of, or incidental to, the supply of a utility service to the public.

[Crown Land Management Amendment \(Maximum terms for Leases and Licences\) Regulation 2019](#) - commenced 13 December 2019. The object of this regulation is to increase the maximum term for which a new lease or licence over dedicated or reserved Crown land may be granted during a transitional period (eg pending the adoption of a plan of management) to emergency services organisations, non-for-profit organisations or community groups from five years to 21 years.

[Dams Safety Regulation 2019](#) - commenced 1 November 2019. The object of the regulation is to provide for the following matters:

- (a) The declaration of dams;
- (b) The consequential categorisation of declared dams;
- (c) Operation and maintenance plans and emergency plans for declared dams;
- (d) Dam safety management systems for declared dams;
- (e) Other safety requirements for declared dams;
- (f) The provision of dams safety standards reports to Dams Safety NSW;
- (g) The keeping of records;
- (h) The appointment of authorised officers; and
- (i) Savings and transitional provisions consequent on the commencement of the [Dams Safety Act 2015](#).

[Forestry Amendment \(Transitional Arrangements\) Regulation 2019](#) - commenced 11 October 2019. The object of the regulation is to extend, until 9 November 2020, the transitional arrangements under [cl 17A](#) of [Sch 3](#) to the [Forestry Act 2012](#) relating to bee-keeping and grazing carried out in accordance with the provisions of an integrated forestry operations approval in force immediately before 9 November 2018.

[Justice Legislation Amendment Act 2019 Proclamation](#) - commencing provisions on 6 December 2019 that amend the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) and regulations made under that Act, enabling applications for notices to produce documents to be made by email and any other method authorised by the regulations, at all time.

### **Bills:**

[Environmental Planning and Assessment Amendment \(Territorial Limits\) Bill 2019](#) - currently in the Legislative Assembly, awaiting second reading debate. This Bill seeks to prohibit the imposition of conditions that purport to regulate the impacts of the developments that occur outside Australia or any impact of development carried out outside Australia. This Bill seeks to amend the *Environmental Planning and Assessment Act 1979* accordingly. This Bill also seeks to remove the term “including downstream emissions” from [cl 14\(2\)](#) of [State Environment Planning Policy \(Mining, Petroleum Production and Extractive Industries\) 2007](#). This Bill was referred to a Legislative Council Committee for inquiry and report. The [report](#) was issued in March 2020, recommending the Bill not proceed.

### **State Environmental Planning Policy (SEPP):**

[State Environmental Planning Policy \(Koala Habitat Protection\) 2019](#) - commenced 1 March 2020. This new SEPP replaces the old [State Environmental Planning Policy No 44 - Koala Habitat Protection](#). A new definition of “core koala habitat” has been created, with two maps to assist protection. The aim of the policy is to encourage the conservation and management of areas of natural vegetation that provide habitat for koalas to support a permanent free-living population over their present range and reverse the current trend of koala population decline.

### **State Environmental Planning Policy (SEPP) Amendments:**

[State Environmental Planning Policy \(Infrastructure\) Amendment 2019](#) - commenced 20 December 2019. This amendment policy inserts “or an educational establishment within the meaning of [State Environmental Planning Policy \(Educational Establishments and Child Care Facilities\) 2017](#)” after

“infrastructure facility” in cl 36(3)(a). The amendment policy also permits emergency service facilities to be constructed by Fire and Rescue NSW within five metres of a property boundary pursuant to cl 48(5A).

[State Environmental Planning Policy Amendment \(Miscellaneous\) 2019](#) - commenced 15 January 2020. [Schedules 2.19, 2.21, 2.28](#) and [6](#) came into effect the day they were published on the New South Wales legislation website, being the 13 December 2019. Schedule 1 of this amendment rectifies numbering matters present in various local environmental plans, which arose as a consequence of the *Environmental Planning and Assessment Amendment Act 2017* coming into effect. Schedule 2 of this amendment likewise makes changes as a consequence of the [Crown Land Management Act 2016](#) coming into effect. Schedule 3 of this amendment changes “any development” to “any other development” within land use tables of various local environmental plans, consequent of the [Standard Instrument \(Local Environmental Plans\) Amendment \(Primary Production and Rural Development\) Order 2019](#) coming into effect. Schedules 4 and 5 of the amendment make miscellaneous changes to environmental planning instruments. Schedule 6 makes a range of changes to the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#).

[State Environmental Planning Policy Amendment \(Planning for Bush Fire Protection\) 2020](#) - commenced 1 March 2020. This amendment policy alters some regional local environmental plans by linking an updated “Planning for Bush Fire Protection” document created by the New South Wales Rural Fire Service with the cooperation of the Department of Planning, Industry and Environment. Various changes are made to provisions to make them consistent with this updated document. Similar changes are made in the [Greater Metropolitan Regional Environmental Plan No 2 - Georges River Catchment](#). This amendment policy also inserts more rigorous planning protocols for bushfire risks in the following SEPPs:

- [State Environmental Planning Policy \(Affordable Rental Housing\) 2009](#)
- [State Environmental Planning Policy \(Educational Establishments and Child Care Facilities\) 2017](#)
- [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#)
- [State Environmental Planning Policy \(Housing for Seniors or People with a Disability\) 2004](#)
- [State Environmental Planning Policy \(Infrastructure\) 2007](#)
- [State Environmental Planning Policy \(Kurnell Peninsula\) 1989](#)

[State Environmental Planning Policy Amendment \(Repeal of Operational SEPPs\) 2019](#) - commenced 1 February 2020. This amendment repeals:

- (a) [State Environmental Planning Policy No 1 - Development Standards](#); and
- (b) [State Environmental Planning Policy \(Miscellaneous Consent Provisions\) 2007](#).

The schedules to this amendment outline the necessary changes made to environmental planning instruments consequent on these repeals.

[State Environmental Planning Policy \(Sydney Region Growth Centres\) 2006](#) is amended by the following policies:

- [Blacktown Local Environment Plan Amendment \(Sydney Regional Growth Centres—North West Growth Centre\) \(No 2\) 2019](#) - commenced 22 November 2019;
- [State Environmental Planning Policy \(Sydney Region Growth Centres\) Amendment \(Greater Macarthur\) 2019](#) - commenced 6 December 2019; and
- [The Hills Local Environmental Plan Amendment \(Sydney Region Growth Centres—North Kellyville Precinct and The Hills Growth Centre Precincts\) 2019](#) - commenced 20 December 2019.

Each of these amendments updates mapping in accordance with maps approved by the local plan-making authority.

### **Civil Procedure Amendments:**

[Uniform Civil Procedure \(Amendment No 92\) Rule 2019](#) - commenced 8 November 2019. Amended the [Uniform Civil Procedure Rules 2005](#) to provide for rules concerning interpreters based on the Model



Rules set out in the Recommended National Standards for Working with Interpreters in Courts and Tribunals prepared by the Judicial Council on Cultural Diversity.

## Judgments

### United Kingdom Court of Appeal:

*Plan B Earth v Secretary of State for Transport* [\[2020\] EWCA Civ 214](#) (Lindblom, Singh and Haddon-Cave LJ)

Facts: In June 2018, the Secretary of State for Transport (**Secretary of State**) designated a new policy called the “Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England” (**ANPS**). The ANPS considered alternatives for bolstering airport capacity around the London area, so that it could maintain its reputation as a “hub” of international air traffic. Each option posited involved considerable construction works to one of the airports around London. The two most serious options were the construction of a new runway at Gatwick Airport or the construction of a new runway at Heathrow Airport. Ultimately, the construction of a new runway at Heathrow was considered the more favourable option. However, this presented alleged conflicts with the United Kingdom’s (**UK**) emissions reductions policy, as increased aviation would mean increased emissions.

Three separate but similar judicial review claims were “rolled up” for the purposes of these proceedings to be dealt with in a single judgment. The first claim was brought by five local authorities, Greenpeace Ltd and the Mayor of London. The second claim was brought by Friends of the Earth. The third claim was brought by Plan B Earth. The World Wildlife Fund (**WWF**) appeared as an intervener.

Issue: Was the Divisional Court wrong to conclude that the Government’s policy in favour of the development of a third runway at Heathrow was lawful? In answering this question, the court had to have regard to:

- (1) The operation of EC Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (**Habitats Directive**);
- (2) The operation of EC Council Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment (**SEA Directive**); and
- (3) Issues relating to the UK’s commitments on climate change.

Held: The statutory regime for the formulation of government policy was not complied with; declaration made preventing the ANPS from having any effect in its present form:

#### *Habitats Directive*

- (1) *Wednesbury* irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. It was appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. There was no justification for applying a more intense standard of review than “*Wednesbury*” to the operation of the provisions of article 6(4) of the Habitats Directive: at [75];
- (2) The same standard of review ought to have applied for both Arts 6(3) and 6(4) of the Habitats Directive, and that the appropriate test to be applied was that in “*Wednesbury*”: at [79];
- (3) The Secretary of State was not in breach of any provision of the Habitats Directive or the Habitats Regulations in finding the Gatwick second runway scheme failed to meet the “hub objective”: at [80];
- (4) Article 6(4) requires an iterative assessment of adverse effects, so far as is practical, at each stage of a procedure comprising more than a single stage: at [105];

- (5) The Divisional Court rightfully concluded that it was, in the circumstances, reasonable and lawful for the Secretary of State to exclude the Gatwick second runway scheme as an “alternative solution” because in his view the evidence before him clearly indicated that it did not comply with the qualifying conditions for an “alternative solution” under the Habitats Directive: at [106];

#### *SEA Directive*

- (6) The court’s role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I of the SEA Directive when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information “may reasonably be required” when taking into account the considerations referred to - first, “current knowledge and methods of assessment”; second, “the contents and level of detail in the plan or programme”; third, “its stage in the decision-making process”; and, fourth, “the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment”. These requirements leave the authority with a wide range of autonomous judgment on the adequacy of information provided: at [136]
- (7) There is no warrant for a more taxing approach to be taken in reviewing compliance with the SEA Directive than that indicated in *Blewett*. The *Blewett* approach could and should be applied in claims alleging breaches of the legislative regime for SEA Directive: at [143]-[144].
- (8) The SEA regime and the regime for Environmental Impact Assessment (EIA) will operate, at different stages of the process under the [Planning Act 2008 \(UK\)](#) (Planning Act), to ensure that the cumulative impacts of the development are fully assessed: at [162];
- (9) The Divisional Court was right to conclude that the Secretary of State’s decision, on expert advice, to use indicative flight paths in the noise assessment lay squarely within his decision-making discretion: at [175];

#### *Climate change*

- (10) The Planning Act 2008 (UK) (the Act) sets out, in s 5, the requirements by which a statement may be designated as a national policy statement for the purposes of the Act. “A national policy statement must give reasons for the policy set out in the statement” (s 5(7)). Importantly in the context of this decision, “The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change” (s 5(8)). The Act also requires in s 10 that, when the Secretary of State exercises functions under s 5, this must be done with the objective of contributing to the achievement of sustainable development and (in particular) when doing so the Secretary of State must have regard to the desirability of mitigating, and adapting to, climate change. It was clear that it was the Government’s expressly stated policy that it was committed to adhering to [the Paris Agreement](#) to limit the rise in global temperature to well below 2°C and to pursue efforts to limit it to 1.5°C: at [216];
- (11) The advice supplied to the Secretary of State asserted that he did not need to take the Paris Agreement into account and that he was legally obliged not to take it into account was a material misdirection of law. That misdirection then fed through the rest of the decision-making process and was fatal to the decision: at [227];
- (12) The executive must comply with the will of Parliament, as expressed in the terms of [s 5\(8\)](#) of the Planning Act: at [229];
- (13) The duty in s 5(8) of the Planning Act does not require the executive to conform to its own policy commitments, rather it must simply take them into account and explain how it has done so: at [231];
- (14) As to section 10 of the Planning Act, the Secretary of State was advised that he was not permitted as a matter of law to take into account the Paris Agreement because he should for relevant purposes confine himself to the obligations set out in the Climate Change Act. He therefore did not ever consider whether to take the Paris Agreement into account as a matter of discretion: at [236];
- (15) The only reasonable view open to the Secretary of State was that the Paris Agreement was so obviously material that it had to be taken into account. As a matter of public law, there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker. As to the third category, there can be some unincorporated international obligations



that are “so obviously material” that they must be taken into account. The Paris Agreement fell into this category: at [237];

(16) The Secretary of State was not obliged to act in accordance with the Paris Agreement or to reach any particular outcome. His only legal obligation was to take the Paris Agreement into account when arriving at his decision: at [238];

(17) The failure to consider the Paris Agreement also represented an error of law by way of the SEA Directive, as it mandated a consideration of law at the international level. This included unincorporated international agreements because otherwise, if an agreement had been incorporated into either EU law or domestic law, there would be no need to refer to the international level at all: at [243];

(18) In line with the precautionary principle, and as common sense might suggest, scientific uncertainty was not a reason for not taking something into account at all, even if it cannot be precisely quantified at that stage: at [258];

#### *Conclusion and remedy*

(19) The Government is required to approach the decision-making process in accordance with the law at each stage, not only in any current review of the ANPS or at a future development consent stage. The stages of the decision-making process are inter-dependent. The formulation of the ANPS sets the fundamental framework within which further decisions will be taken: at [275]; It was a basic defect in the decision-making process that the Secretary of State expressly decided not to take into account the Paris Agreement at all: at [276]; and

(20) Declaration to be made that the designation decision was unlawful and preventing the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with all the relevant statutory provisions: at [280];

## **High Court of Australia:**

***Kadir v The Queen; Grech v The Queen*** [\[2020\] HCA 1](#) (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ)

**Facts:** Mr Zeki Kadir and Ms Donna Grech (**appellants**) were jointly charged on indictment with acts of serious animal cruelty under [s 530\(1\)](#) of the [Crimes Act 1900 \(NSW\)](#). The charges related to the use of live rabbits in the training of greyhounds at Mr Kadir’s property. The prosecution relied upon seven video-recordings that were covertly obtained by Animals Australia trespassing on Mr Kadir’s private property and in contravention of [s 8\(1\)](#) of the [Surveillance Devices Act 2007 \(NSW\)](#) (**surveillance evidence**). The prosecution also relied upon material obtained by the RSPCA in the execution of a search warrant of Mr Kadir’s property (**search warrant evidence**) and admissions made by Mr Kadir during the search (**admissions**). The appellants successfully applied in the District Court to exclude the evidence under [s 138](#) of the [Evidence Act 1995 \(NSW\)](#) (**Evidence Act**). The surveillance evidence, the search warrant evidence, and the admissions were held to be inadmissible because the evidence was unlawfully or improperly obtained. The New South Wales Court of Criminal Appeal (**CCA**) granted the prosecution leave to appeal. The prosecution argued that the trial judge did not properly assess the difficulty in obtaining the evidence without contravening the law, which was a relevant factor under [s 138\(3\)\(h\)](#) of the Evidence Act. The CCA found that the District Court had erred in excluding the video recordings, the admissions and the search warrant evidence. Their Honours held that under [s 138\(3\)\(h\)](#) of the Evidence Act, the difficulty of lawfully obtaining evidence of acts of animal cruelty at Mr Kadir’s private property “tipped the balance” in favour of admitting the evidence. The appellants appealed to the High Court.

#### Issues:

(1) Whether the CCA correctly determined the admissibility of the evidence; and

(2) Whether the CCA correctly applied the [s 138\(3\)](#) factors in relation to the admissibility of the evidence.

**Held:** The appeal was allowed in part. The High Court held that all of the surveillance evidence was inadmissible, but that the search warrant evidence and the admissions were admissible:

- (1) The significance of s 138(3)(h) of the Evidence Act to the balancing of the public interest under [s 138\(1\)](#) will vary depending on the circumstances; confirming the reasoning in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54, that ease of compliance with the law was a "wholly equivocal factor" in determining the gravity of misconduct, but noting that this was not a case of "cutting corners" in which there were simple steps which could have been taken for compliance to have been achieved. Furthermore, in a case where action is taken in circumstances of urgency to preserve evidence from loss or destruction, this factor may weigh in favour of admission. Uncertainty remains about the standard by which a court assesses the impropriety of the conduct of private individuals who obtain evidence by improper or illegal conduct, but that the question did not arise in this case because it was common ground that the surveillance evidence was obtained in contravention of law: at [14] and [18]-[20];
- (2) Notwithstanding the difficulty of lawfully obtaining evidence of the commission of acts of animal cruelty at the Londonderry property, because the illegality involved was deliberate, this weighed against admitting the surveillance evidence: at [20];
- (3) Both the search warrant evidence and the admissions were, however, admissible: at [9]. This was because it was obtained as the result of the lawful execution of the search warrant and the exercise of powers conferred on the RSPCA inspectors under [s 24G](#) of the [Prevention of Cruelty to Animals Act 1979 \(NSW\)](#): at [1]; and
- (4) The limited causal connection between the contravention of Australian law and the obtaining of the admissions was unlikely to convey curial approval or encouragement of the contravention: at [51].

### **Federal Court of Australia:**

***The Wilderness Society (Tasmania) Inc v Minister for the Environment*** [\[2019\] FCA 1842](#) (Mortimer J).

**Facts:** Wild Drake Pty Ltd (**Wild Drake**) proposed to construct and operate a small-scale tourist operation on Halls Island, Lake Malbena (**site**). Activities for the site included kayaking, bushwalking, cultural interpretation, wildlife viewing and citizen science opportunities. The site was located within the Walls of Jerusalem National Park in the Meander Valley region of the Tasmanian Wilderness World Heritage Area. As a consequence, it was required to be considered under the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**Environment Protection & Biodiversity Conservation Act**). For transport to the site, it was proposed that a helicopter pad be constructed on the mainland opposite Lake Malbena. Activities in this region were regulated by the [National Parks and Reserves Management Act 2002 \(Tas\)](#). In addition, such an activity required approval to be granted by the Tasmanian Parks and Wildlife Service under a "Reserve Activity Assessment" (**RAA**). The project application was allegedly divided into two stages, with cultural concerns (among other things) comprising the second stage. The matter was referred to the Federal Minister for the Environment. The delegate who assessed the proposal determined that the project was not a controlled action, and did not require further assessment or approval. The manner of assessment was challenged by way of judicial review.

**Issues:**

- (1) Did the delegate's decision involve an error of law or jurisdictional error because of the delegate's reliance on the impact assessment conducted by the Parks and Wildlife Service under the RAA process (**Ground 1**);
- (2) Was the delegate required to consider the terms of [s 77A](#) (**Ground 2**); and
- (3) Was the delegate required to consider whether to exercise power in [s 74A](#) of the Environment Protection & Biodiversity Conservation Act before making a decision under [s 75](#) (**Ground 3**).

**Held:** Ground 1 failed in its terms; Ground 2 succeeded; and Ground 3 succeeded on the facts; question of relief was reserved; usual costs awarded:

- (1) It was not open to the Department to use the RAA as a substitute assessment process: at [114]-[116];
- (2) The Minister's reliance on the fact that other State-based approvals were required before the action could be taken by Wild Drake did not ameliorate the situation: at [123];
- (3) The legislative scheme of the Environment Protection & Biodiversity Conservation Act recognises that environmental protection was a matter in which the Australian community had an interest. What was not intended by the scheme is that a de facto assessment process be conducted by the Department in negotiation with a proponent and out of public view: at [125]-[126];
- (4) The delegate did not consider [s 74A\(1\)](#) in the determination of the matter: at [158].
- (5) The failure to consider s 74A represented a failure to perform the statutory task required of the delegate under s 75 for this referral because s 74A was a power of relevance only before a decision has been made under s 75: at [163].
- (6) Wild Drake complied with [reg 4.03\(1\)](#) of the [Environment Protection and Biodiversity Protection Regulations 2000](#): at [164];
- (7) The purpose of s 74A was to engage the Minister (or delegate) in the question of whether there was in reality, a larger action which needed to be assessed as a whole, and if so, to compel a referral of the larger action under [s 74A\(2\)](#). In the alternative, the Minister may have decided, having considered the matter, there was not any larger action, or even if there was, that it was nevertheless appropriate for part of the action to proceed for consideration under s 75: at [170];
- (8) There was a need to consider whether, in reality, there is only one "action", even if a proponent presents the action as activities designed to occur in stages. The present case was an apposite example: at [171]; and
- (9) Section 74A could only operate prior to a decision being made under s 75: it has a "once off" effect: at [173].

### **New South Wales Court of Appeal:**

***Croghan v Blacktown City Council*** [\[2019\] NSWCA 248](#) (Meagher JA, McCallum JA, Simpson AJA)

(decision under review: *Croghan v Blacktown City Council* [\[2019\] NSWLEC 2](#) (Molesworth AJ); *Croghan v Blacktown City Council* [\[2019\] NSWLEC 9](#) (Molesworth AJ))

**Facts:** On 12 August 2016, Blacktown City Council (**Council**) compulsorily acquired part of Mr Croghan's (**appellant**) land. The appellant objected to the Valuer-General's determination of compensation in the amount of \$4.8 million and commenced proceedings in the Land and Environment Court (**LEC**), initially seeking \$11.1 million before reducing his claim to \$8.4 million shortly before the hearing in February 2018.

The primary judge awarded the appellant compensation totalling \$4.2 million and ordered the Council pay the appellant's costs of the proceedings on the ordinary basis until 27 September 2017. After this date, the appellant was to pay the Council's costs on an indemnity basis. On that date, the Council made a formal offer of compromise under [Uniform Civil Procedure Rules 2005 \(NSW\) \(UCPR\) r 20.26](#) to resolve the proceedings for \$5.2 million. That offer was not accepted. In making costs orders in accordance with UCPR [r 42.15\(2\)](#), the primary judge declined to exercise his discretion to "order otherwise". The applicant sought leave to appeal from those orders in the New South Wales Court of Appeal.

**Issue:** Whether the primary judge erred in not considering whether in all the circumstances the appellant had acted reasonably in not accepting the offer of compromise when determining whether to "otherwise order" under UCPR r 42.15.

**Held:** Costs orders set aside; Council to pay the appellant's costs on the ordinary basis for LEC proceedings; Council to pay appellant's costs of the appeal and application for leave to appeal:

- (1) The primary judge erred in considering the reasonableness of the conduct of the appellant in pursuing his claim instead of focusing on whether it was just and fair that the appellant should pay the costs of the proceedings from the date of the offer of compromise and on an indemnity basis. The primary judge failed to take into account the nature of the proceedings from the date of the offer of compromise and the general nature of the proceedings, the circumstances in which that offer was made and not accepted, and the purposes of the offer of compromise provisions: at [20], [35];
- (2) The LEC should order “otherwise” under r 42.15. The appellant acted reasonably in not accepting the offer of compromise. At that time, the parties had not formulated their respective positions in pleadings and no expert reports, joint or otherwise, had been exchanged. In those circumstances, the appellant and his advisers could not assess the position taken by the Council by reference to the evidence it proposed to rely on, or make a realistic assessment of the likely outcome of the litigation: at [36], [37];
- (3) The Council should pay the costs of the proceedings in the LEC as the appellant did not act unreasonably in pursuing his claim for compensation. The presumption that costs follow the event does not apply to Class 3 proceedings in recognition of the unique position of a claimant in compulsory acquisition compensation proceedings: at [45].

**Gordon v Lever (No 2)** [\[2019\] NSWLEC 275](#) (Bell P, Payne JA, Emmett AJA)

(decision under appeal: *Gordon and Anor v Lever* [\[2018\] NSWSC 1888](#); *Gordon v Lever* [\[2019\] NSWSC 571](#) (Sackar J))

(related decisions: *Stanley Robert Gordon and Anor v Allen John Lever* [\[2017\] NSWSC 1282](#) (Sackar J); *Gordon v Lever* [\[2018\] NSWCA 43](#) (McColl JA, White JA and Sackville AJA))

**Facts:** Mr and Mrs Gordon (**appellants**) and Mr and Mrs Lever (**respondents**) owned neighbouring properties adjacent to the Richmond River in the Northern Rivers region of New South Wales. For many years the appellants accessed their property via a bridge and access route over a gully wholly on the respondents’ land. However, in December 2015, the bridge and access route were washed away. After this, the only way to access the appellants’ land was by crossing the Richmond River over a ford. Even this route was limited as, at certain times of the year, it was either not possible or not safe to cross at the ford. As the ford was Crown land, its use would also breach [s 13.3\(6\)](#) of the [Crown Land Management Act 2016 \(NSW\)](#).

The appellants applied to the Supreme Court for an easement over the respondents’ land, following the route which had been used, and whose use had been allowed by the respondents until the bridge washed away in 2015. In terms of useability, the easement would require the construction of a new bridge over the gully which would be wholly on the respondents’ land, who would receive little practical benefit from it.

The initial proceedings (*Gordon v Lever* [2017] NSWSC 1282) were successfully appealed by the appellants in *Gordon v Lever* [2018] NSWCA 43. In those proceedings, the primary judge made a declaration to the effect that an easement should be created, limited to circumstances in which the river was “impassable”. The Court of Appeal held that it was necessary for further findings of fact to be made and for the terms of the proposed easement to be formulated with greater precision before a final determination as to whether [s 88K](#) of the [Conveyancing Act 1919 \(NSW\)](#) (**Conveyancing Act**) was satisfied. The matter was then remitted to the primary judge to be determined in accordance with the reasoning of the Court of Appeal and it is from the primary judge’s second decision that this appeal is brought.

In the current proceedings (*Gordon and Anor v Lever* [2018] NSWSC 1888; *Gordon v Lever* [2019] NSWSC 571), the primary judge ordered the creation of such an easement for a right of carriageway over the respondents’ land, in favour of the appellants. However, the primary judge also imposed terms which included a limitation on the period during which persons (other than emergency vehicles) wanting to access the appellants’ land could use the easement to those times when the river at the ford was 300 millimetres or more above the level of the riverbed at that location, this being assessed to be “low hazard” and safe.

Issues:

- (1) Whether the primary judge erred in imposing limitations on the easement in circumstances where the appellants contended that the easement was “reasonably necessary” all of the time; and
- (2) Whether the primary judge erred in imposing restrictions on the terms of the easement which the appellants contended were not practically or legally workable, and/or were uncertain in their practical operation.

Held: Appeal allowed in part. Order of Sackar J made on 18 December 2018 varied to alter terms of the easement. Respondents to pay appellants’ costs of the appeal.

- (1) The primary judge erred in imposing limitations on the easement in the circumstances. The easement was “reasonably necessary” within the meaning of s 88K of the Conveyancing Act at all times, including because use of the ford, which was Crown land, and would involve a trespass to land: at [54]-[55], [60] (Bell P); [103] (Payne JA); [106] (Emmett AJA); and
- (2) The primary judge erred in imposing restrictions on usage of the easement which were not practically workable in all the circumstances of the case: at [61] (Bell P); [103] (Payne JA); [106] (Emmett AJA).

***Olsen v Mentink*** [\[2019\] NSWCA 279](#) (Leeming JA)

(related decision: *Olsen v Mentink* [\[2019\] NSWSC 1299](#) (Sackar J))

Facts: In *Olsen v Mentink* [2019] NSWLEC 1299 (**primary hearing**) orders were made against Ms Mentik (**defendant**) on 25 October 2019 in the amount of \$2,203,328.67 plus interest in the amount of \$369,089.37, plus costs. Ms Mentik was given until 25 January 2020 to pay. On the same day as those orders, Ms Mentik filed a Notice of Intention to Appeal, which would give her until late January 2020 to file an appeal. In response to this, Mr Olsen (**plaintiff**) filed a Summons in the New South Wales Court of Appeal (**NSWCA**) seeking an order that any Notice of Appeal concerning the primary hearing be filed by 22 November 2019, or, in the alternative, any other such time that the NSWCA saw fit. The Summons also sought orders in the nature of expedition.

Issue: Whether a respondent to a potential appeal (with the Notice of Intention to Appeal being filed and served per [r 51.9](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) can shorten the three-month period within which any appeal can be brought.

Held: Paragraph 1 of Summons dismissed with costs. Balance of Summons stood over to the Registrar’s List on 3 February 2020 and treated as a Notice of Motion for expedition in the event that an appeal has been filed.

- (1) Rule 51.9 identifies the time within which an appellant may commence an appeal. It does not mention the party who will become the respondent to the appeal when and if a notice is filed. Only a litigant who is dissatisfied with an order may appeal: at [39], [41]; and
- (2) [Rule 51.9\(b\)](#) authorises an application to be made for a period other than three months for filing and service when an appeal has been commenced. It does not authorise a person who is not now and may never be a respondent to apply to abridge the time within which a Notice of Appeal may be filed: at [50].

### **New South Wales Court of Criminal Appeal:**

***R v Kennedy*** [\[2019\] NSWCCA 242](#) (Payne JA, Fullerton and Adamson JJ)

(decision under review: *R v Kennedy* [\[2019\] NSWDC 283](#) (Grant DCJ))

Facts: Former National Rugby League player, Mr Martin Kennedy (**plaintiff**), pleaded guilty in District Court proceedings to five offences under the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**Environment Protection & Biodiversity Conservation Act**) and one



offence under the [Criminal Code Act 1995 \(Cth\)](#) (**Criminal Code**). Four of the Environment Protection & Biodiversity Conservation Act offences related to the import and export of wildlife on three separate occasions between July and October 2016. The fifth Environment Protection & Biodiversity Conservation Act offence related to possession of two live non-native CITES (Convention on International Trade in Endangered Species)-regulated pythons without a licence. The plaintiff was also found to be in possession of \$43,550 in cash, being the suspected proceeds of crime, for which he was charged with an offence under the Criminal Code.

The District Court classified the objective seriousness of the importation and exportation offences as “serious”, the possession offence as “low”, and the proceeds offence as “towards the low end”. In doing so, the Court noted that the plaintiff’s motivation was financial, that he knew his actions were illegal, the importation posed a biodiversity risk to Australia, and that some of the specimens died. But the Court determined that the plaintiff had excellent prospects of rehabilitation. It also referred to the need for both general and specific deterrence. The Court applied a 25% discount for the plaintiff’s early plea of guilty, and the principle of totality, sentencing the plaintiff to three years imprisonment to be served by way of Intensive Correction Order. The maximum term of imprisonment was 10 years for the exportation and importation offences, five years for the possession offence and two years for the proceeds of crime offence. The Commonwealth Director of Public Prosecutions appealed the sentence on the basis that it was manifestly inadequate.

Issue: Was the sentence imposed by the District Court manifestly inadequate.

Held: Appeal upheld and defendant resentenced:

- (1) An appeal based solely on the ground of manifest inadequacy must focus on the sentence imposed, rather than identifying any specific error in the reasons given or any findings of fact made by the sentencing court: at [77], [78] and [82];
- (2) The sentence was manifestly inadequate because it failed to reflect the overall gravity of the offending and did not satisfy the general principles of sentencing having regard to the applicable maximum penalties, the potentially catastrophic consequences of the importation offences on the Australian ecosystem, and the importance of specific and general deterrence, punishment and denunciation for offending which is “notoriously difficult to detect”. These circumstances elevated the importance of general deterrence and accountability above the objective of rehabilitation: at [85]-[87];
- (3) The Court’s residual discretion to leave the sentence undisturbed should not be exercised, due to the speed with which the appeal was brought, the seriousness of the offences, and the guidance that the resentencing would provide for sentencing courts in the future: at [98]. The sentence, if left undisturbed, would not serve the purpose of general deterrence, which is a highly significant factor in the present case: at [101]; and
- (4) An aggregate sentence of four years imprisonment with a non-parole period of two years and six months was imposed: at [99] and [100].

## **Supreme Court of New South Wales:**

***Blacktown City Council v Concato (No 4)*** [\[2020\] NSWSC 9](#) (Campbell J)

(related decision: *Blacktown City Council v Concato* [2018] [NSWSC 1039](#) (Campbell J))

Facts: Blacktown City Council (**Council**) brought judicial review proceedings against the Valuer-General (**third defendant**). The Council sought to challenge the amount of compensation payable to the first and second defendants (**Former Owners**). Payable compensation arose when the Council acquired the land of the Former Owners. Whilst this was a simple cause of action, the challenge was made by the Council, not the Former Owners. There was no right for the Council to directly challenge the decision-maker in such cases under the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**Land Acquisition Act**). The challenge raised questions of whether or not the Valuer General fell into error in (a) the approach to the valuation exercise undertaken by the retained contract valuer; and (b)



whether three heads of loss attributable to disturbance were allowed under s 55(d) Just Terms Act in contravention of s 61 of that Act.

**Issue:** Did the Valuer-General fall into jurisdictional error in the course of calculating the amount of compensation payable.

**Held:** The Valuer-General fell into jurisdictional error; and the determination was void. Matter remitted to the Valuer-General to redetermine the compensation payable in accordance with the Land Acquisition Act. Former Owners ordered to pay Council's costs:

- (1) [Section 43A\(2\)](#) of the Land Acquisition Act confers an implied power on the Valuer-General to "change", amend, or redetermine the amount of compensation to be offered: at [63];
- (2) The clear intention of Parliament was that where a determination was not affected by jurisdictional error, if it is accepted by the dispossessed owner then the acquiring authority is bound by it: at [89];
- (3) The *Pointe Gourde* principle, as expressed in [s 56\(1\)](#) of the Land Acquisition Act, is a matter of compensation principle applicable when determining the just compensation payable in respect of the acquired land. It does not inflexibly or invariably apply to the analysis of comparable sales: at [100];
- (4) It was legitimate, and indeed to be expected, that the decision-maker would make some evaluation of what the Council in its capacity as a consent authority would make of the relevance of the draft amendment to the relevant planning instruments: at [112];
- (5) Disturbance loss cannot be used to include an amount in compensation that is otherwise precluded from being taken into account by the Land Acquisition Act: at [138]; and
- (6) The Valuer-General fell into jurisdictional error by considering that relocation costs and stamp duty costs were losses attributable to disturbance: at [140]-[143].

## Land and Environment Court of New South Wales:

### • Judicial Review:

***Bobolas v Waverley Council (No 4)*** [\[2019\] NSWLEC 163](#) (Moore J)

(related decisions: *Bobolas v Waverley Council* [\[2019\] NSWLEC 148](#) (Moore J); *Bobolas v Waverley Council (No 2)* [\[2019\] NSWLEC 157](#) (Moore J) ; *Bobolas v Waverley Council (No 3)* [\[2019\] NSWLEC 162](#) (Moore J))

**Facts:** This matter concerned two Class 4 challenges by the Bobolas family (**applicants**) to orders made by Waverley Council (**Council**) in each of two earlier proceedings concerning the accumulation of waste at the family's property at Bondi (**property**). This matter was heard together with *Bobolas v Waverley Council (No 2)* [\[2019\] NSWLEC 157](#) (**Class 1 proceedings**) and *Bobolas v Waverley Council (No 3)* [\[2019\] NSWLEC 162](#) (**Class 2 proceedings**).

The first of the Class 4 proceedings filed in the Land and Environment Court (**LEC**) challenged the decision of Sheahan J in 2015 (*Waverley Council v Bobolas (No 2)* [\[2015\] NSWLEC 66](#)) (**2015 decision**). Those proceedings resulted in a lengthy suite of orders (**2015 Orders**). Those proceedings were initiated by Waverley Council (**Council**) because of the accumulation of waste on the property that had occurred over a period of years. This included Order (4) which ordered the applicants to refrain from keeping waste on the premises. The Council entered the property following the 2015 Orders and undertook a clean-up of the waste material on the property as allowed by the orders.

The second of the Class 4 proceedings challenged the decision of Pain J in 2018 (*Waverley Council v Bobolas (No 2)* [\[2018\] NSWLEC 144](#)). Her Honour made a comprehensive suite of orders (**2018 Orders**). These orders, although encompassing the ability for the Council to enter the site and effect a clean-up of the now accumulation of waste, differed in their terms and scope from the orders

made by Sheahan J in 2015. The 2018 Orders were confined to permitting a council clean-up of waste that had accumulated on the site and which had not been removed by the Bobolas family as required by an Order 22A issued to each of them by the Council on 22 November 2017. The Council completed this clean-up in February 2019.

Issues:

- (1) Were the 2015 Orders still operative; and
- (2) Were the 2018 Orders spent, as they only authorised clean-up activities for February 2019, not ongoing clean-up.

Held: Council given directions contingent on it pursuing further access orders pursuant to Order (4) of the 2015 Orders. The 2018 Orders declared exhausted and Council restrained from undertaking any further waste removal activities on the property in purported reliance on the 22A Orders of November 2017:

- (1) The LEC's "refrain" order in the 2015 Orders obliged each member of the Bobolas family to act in a fashion that did not cause future accumulation of waste on the property after the order for removal of waste in the 2015 Orders was given effect by the Council. This order had ongoing validity and provided a basis for further clean-up intervention by the Council. However, there was no current ability for the Council to enter the property to effect a clean-up pursuant to Order (4) of the 2015 Orders: at [78]-[83];
- (2) The 22A Orders issued on 22 November 2017 were exhausted as a consequence of the clean-up activities conducted by the Council commencing 13 February 2019 founded on the orders of Pain J made in September 2018: at [103]; and
- (3) Absent any ongoing "refrain" order in the order issued on 22 November 2017, it is clear that the giving effect to the September 2018 orders of Pain J commencing on 13 February 2019 not only exhausted the orders that were made by her Honour but also exhausted, in their entirety, the operative elements of the 22A Orders dated 22 November 2017: at [104].

***Boomerang & Blueys Residents Group Inc v New South Wales Minister for the Environment, Heritage and Local Government and MidCoast Council (No 2)*** [\[2019\] NSWLEC 202](#) (Robson J)

Facts: Boomerang & Blueys Residents Group Inc (**applicant**) commenced judicial review proceedings seeking declaratory relief in relation to decisions made in late 2017 by the New South Wales Minister for the Environment, Heritage and Local Government (**Minister**) and MidCoast Council (**Council**) to prepare, certify and adopt the [Great Lakes Zone Management Plan \(GLZMP\)](#). This certification included the categorisation of coastal hazards at Blueys Beach and Boomerang Beach as an "extreme or high risk". As the GLZMP was certified prior to the commencement of the [Coastal Management Act 2016 \(NSW\)](#), the relevant legislative framework governing the preparation and certification of the GLZMP was instead contained within the (now repealed) [Coastal Protection Act 1979 \(NSW\)](#) (**Coastal Protection Act**).

Issues:

- (1) Whether the applicant had standing to bring the proceedings;
- (2) Whether the impugned decisions were reviewable;
- (3) Whether the impugned decisions were either unreasonable or non-compliant with the Coastal Protection Act and the *Guidelines for Preparing Coastal Zone Management Plans* (**Guidelines**); and
- (4) Whether there was a deficiency of information when preparing the GLZMP and/or a rational basis for the method of risk assessment.

Held: Proceedings dismissed; unless alternate order sought, applicant to pay Minister's costs:

- (1) The Court was required to consider the common law principles of standing as there is no automatic statutory right to bring judicial review proceedings in relation to decisions made under [Pt 4A](#) of the Coastal Protection Act: at [61]. Despite the applicant not having a private right or equity at risk, it nonetheless had a "special interest" as the evidence demonstrated that the organisation had both historically and consistently maintained concerns regarding the treatment of hazards at the beach:

[94]. Although the applicant was not a “peak environmental organisation”, it was also not a “mere busybody”: at [95];

- (2) The only mandatory requirement of the Minister in exercising her functions under [s 55A](#) of the Coastal Protection Act was to have regard to the objects of the legislation: at [205]. Other than from asserting that the decision was not reasonably open, the applicant did not otherwise identify reviewable errors in the usual sense: at [206]. The Court held that, with the exception of obligations contained in [ss 55C](#) and [55D\(1\)](#) of the Coastal Protection Act, Council’s discretion in preparing the draft plan was unconfined: at [214];
- (3) The Guidelines did not impose mandatory requirements or have a “rule-like quality”: at [220]-[221]. Rather, the Guidelines acted as a framework for the preparation of a management plan: at [222]. The Court therefore held that the Guidelines had been complied with: at [225];
- (4) The Options Study, which is described as “Annexure A” to the GLZMP, was considered by the Court to be part of the GLZMP: at [227]. This was due to the fact that the Options Study: was before the Minister when the plan was certified; contained a level of scientific, analytical and photographic material that must be seen as both complementary and intimately related to the GLZMP; was referred to as a “companion document” in the GLZMP; and was provided to the Minister as part of the draft GLZMP: at [227]. The Options Study was also reflective of the minimum requirements contained within the Guidelines: at [238];
- (5) The Council’s approach toward assessing hazards and their associated risks was not illogical or unreasonable: at [256]. The Coastal Protection Act does not mandate a particular methodology to be used when assessing risk: at [260]. The process by which the hazard risk maps were generated, although complex, was based upon detailed background material and was properly considered by Council: at [258]; and
- (6) The decision to certify the GLZMP did not lack an “evident and intelligible justification”, nor was it contrary to the “overwhelming weight of the material”, such to involve jurisdictional error: at [273]. The decisions were therefore within power and reasonably open to both Council and the Minister: at [272].

***Burwood Council v Iglesia Ni Cristo (No 2)*** [\[2019\] NSWLEC 159](#) (Robson J)

(related decision: *Burwood Council v Iglesia Ni Cristo* [\[2019\] NSWLEC 75](#) (Robson J); *Iglesia Ni Cristo v Burwood Council* [\[2019\] NSWLEC 1579](#) (Gray C))

**Facts:** Burwood Council (**Council**) commenced proceedings against Iglesia Ni Cristo (**Iglesia**), a Christian religious organisation, seeking declaratory and consequential injunctive relief in relation to the use of premises, Lots 25 and 26 in DP 9297 and known as 10 Daisy Street, Croydon Park (**premises**), as a place of public worship. Although the parties agreed that, as at 5 April 1979, the use of the buildings and land was an existing use, the parties were at issue in relation to the characterisation of the use and whether it had been enlarged, expanded or intensified.

Council proposed a characterisation of the use that was limited to worship on Sundays and Christian holy days for residents from the immediate neighbourhood, with the occasional wedding and funeral. Iglesia adopted a broader approach and contended for a characterisation of the premises as a place of public worship. In the absence of any of any conditions limiting hours of operation and patronage, Iglesia submitted that there was no enlargement, expansion or intensification of the use within the meaning of [s 4.66\(2\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) so as to require development consent. Even if Iglesia’s use of premises was properly characterised as being of the same genus of use as the historic use, Council submitted that the present use was an enlargement, expansion or intensification of the use as at 3 February 1986 for which development consent was required.

After these proceedings were commenced, Iglesia filed a Class 1 appeal seeking development consent for the continued use of the premises.

**Issues:**

- (1) What was the characterisation of the use; and

(2) Had the use been enlarged, expanded or intensified.

Held: Declaration that the premises could be used as a place of public worship one day a week; for occasional religious days of significance; and for funerals and weddings; Iglesia was restrained from using the premises as a place of public worship beyond that scope until development consent was obtained for the enlargement of the use; orders suspended for three months; costs reserved:

- (1) The characterisation did not specify a particular Christian denomination or be constrained to local residents. The appropriate designation of the purpose being served by the use of the premises at the material date was a place of public worship. Subject to consideration regarding scope and intensity of the use, it was clear that Iglesia was conducting church services and ancillary activities at the premises - a use which was really and substantially a use for the purpose of a place of public worship: at [71]-[72];
- (2) Iglesia's submission that in the absence of any conditions limiting hours of operation and patronage, there was no enlargement, expansion or intensification of the use within the meaning of s 4.66(2) of the EP&A Act so as to require development consent was not accepted: at [106];
- (3) The unchallenged evidence of long-term residents provided an understanding of the activities undertaken at the premises as at February 1986 and demonstrated that the use at that time was more modest. The extension of the hours of operation of the Church resulted in an enlargement of the use as it existed in February 1986 so as to require development consent: at [107], [109];
- (4) The increase in attendees and the consequences thereof were not determinative in circumstances where it was held consent was required for the enlargement on the basis of increased frequency of services: at [108];
- (5) Council was entitled to relief in the form of a declaration and consequential injunctive relief. The use was confined to one day per week based on the evidence that as at 1986, the premises were used one day per week, in addition to further use for religious days of significance and weddings and funerals: at [120]-[121]; and
- (6) The granting of relief was suspended to allow Iglesia time to seek development consent for enlargement of the use (as sought in the Class 1 appeal proceedings): at [122].

***S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd t/as Planners North v Northern Regional Planning Panel (No 2)*** [\[2019\] NSWLEC 199](#) (Pain J)

(related decision: *S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd t/as Planners North (ABN 56 291 496 553) v Northern Regional Planning Panel* [\[2019\] NSWLEC 156](#) (Pain J))

Facts: In 2016, Planners North (**applicant**) lodged a development application (**DA**) with Ballina Shire Council for a seniors living development in Skennars Head (**property**). At the date the DA was lodged the [Coastal Protection Act 1979 \(NSW\)](#) (**Coastal Protection Act**), [State Environmental Planning Policy No 14—Coastal Wetlands \(SEPP 14\)](#) and [State Environmental Planning Policy No 71—Coastal Protection \(SEPP 71\)](#) were in force. The property was mostly zoned RU1 Primary Production under the [Ballina Local Environmental Plan 2012](#). Part of the property was zoned 1(b) Rural (Secondary Agricultural Land) and a small area zoned 7(a) Environmental Protection (Wetlands) under the [Ballina Local Environmental Plan 1987](#).

In March 2019, the Northern Regional Planning Panel (**Panel**) refused a site compatibility certificate (**SCC**) under the [State Environmental Planning Policy \(Housing for Seniors or People with a Disability\) 2004 \(Seniors Housing SEPP\)](#). Seniors Housing SEPP ([s 4\(6\)](#)) does not apply to land described in [Sch 1 Environmentally Sensitive Land](#), being land identified in another environmental planning instrument by any of the descriptions listed in Sch 1 such as coastal protection or natural wetlands, or by like descriptions. At the time the SCC was applied for in July 2018, the [Coastal Management Act 2016 \(NSW\)](#), the successor to the Coastal Protection Act, was in force. SEPP 14 and SEPP 71 had been repealed and the [State Environmental Planning Policy \(Coastal Management\) 2018 \(Coastal Management SEPP\)](#) was in force. The applicant challenged the Panel's refusal of the SCC.

Issues:

- (1) If the Coastal Management SEPP does not apply, is the Panel required to consider and determine the application for a SCC in accordance with "former planning provisions" as defined in [cl 21](#) of the Coastal Management SEPP; and

- (2) On the assumption the Coastal Management SEPP does apply, is the part of the property comprising “proximity area for coastal wetlands” under the Coastal Management SEPP environmentally sensitive land within the meaning of Sch 1 to the Seniors Housing SEPP, making it land to which the Seniors Housing SEPP does not apply.

Held: Declaration made that the determination of the Panel to refuse to issue a SCC pursuant to Seniors Housing SEPP is void and of no effect; declaration made that Seniors Housing SEPP does not preclude the issue of SCC for that part of the property mapped as “proximity area for coastal wetlands” in the “Coastal Wetlands and Littoral Rainforests Area Map” of Coastal Management SEPP:

- (1) The Panel was correct to consider the Coastal Management SEPP when it made its determination, as the transitional provisions in cl 21 had no application to the SCC application before it. Accordingly, the Panel was not required to determine the SCC on the basis of former planning provisions, in particular SEPP 14 and SEPP 71: at [48]; and
- (2) Schedule 1 to the Seniors Housing SEPP does not apply to that part of the applicant’s land which is identified as within the “proximity area for coastal wetlands” in the “Coastal Wetlands and Littoral Rainforests Area Map” of Coastal Management SEPP. Consequently the Seniors Housing SEPP applies to that part of the land and an SCC can be applied for in relation to it: at [91].

***Syncept Chatham Pty Ltd v City of Ryde Council*** [2019] [NSWLEC 170](#) (Duggan J)

(related decisions: *Syncept Chatham Pty Ltd v Council of the City of Ryde* [2019] [NSWLEC 115](#) (Robson J); *Syncept Chatham Pty Ltd v Council of the City of Ryde (No 2)* [2019] [NSWLEC 128](#) (Robson J))

Facts: Syncept Chatham Pty Ltd (**applicant**) was the owner of two adjoining parcels of land (**site**) located in the Ryde Local Government Area. The applicant lodged a development application with City of Ryde Council (**Council**) to redevelop the Land and, as part of that proposal, sought approval to demolish the two existing dwellings on the land (**DA**). The Minister responsible for the [Heritage Act 1977 \(NSW\)](#) (**Heritage Act**) had granted a Ministerial Authority (**authority**) to the Council pursuant to [s 25\(1\)](#) of that Act to impose an Interim Heritage Order (**IHO**) on the site. During the course of the consideration of the DA, the Council resolved to place an IHO on the site.

Issue: Was the IHO invalid on the basis that it was made in contravention of a condition of the authority given by the Minister to the Council pursuant to [s 25\(2\)](#) of the Heritage Act.

Held: The IHO ruled invalid:

- (1) Any Interim Heritage Order made by the resolution of the Council on 27 February 2019 pursuant to [s 25](#) of the Heritage Act in respect of the site was made in breach of paragraph 1(b) of the authority made on 12 April 2013 and was invalid: at [62];
- (2) The requirement to have “considered” a report was not met by the mere constructive reading of reports on the Council file. For the Court to be satisfied that the Council “considered” the relevant reports, a focused consideration of the required assessment was necessary. The consideration of the assessment must comprise a fundamental element in the Council’s deliberations; a mere reading of the reports (whether an actual or a constructive reading) was akin to “mere advertence” to the required assessment and would be insufficient, on its own, to provide evidence that the Council could be found to have considered the required assessment: at [28];
- (3) Having regard to the totality of the evidence, an inference was to be drawn that the Council had not “... considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the Council ...” before it made the Council resolution to make an IHO: at [45];
- (4) The operation of s 25 of the Heritage Act and the terms of the authority provide a limitation on the power of the Council to make an IHO and a breach of the condition contained in paragraph 1(b) of that authority (being a breach of [s 25\(4\)](#) of the Heritage Act) was intended to comprise an action beyond the scope of the power conferred and was therefore invalid: at [48].



- **Criminal:**

**Chief Executive of the Office of Environment and Heritage v Somerville** [\[2019\] NSWLEC 155](#)  
(Pepper J)

Facts: Mr Anthony Somerville (**defendant**) sought an order that 22 charges for the possession and harm of threatened species under [ss 101](#), [118A](#), and [118B](#) the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**National Parks & Wildlife Act**), be struck out because the proceedings were time barred pursuant to [s 190\(1\)\(b\)](#) of that Act.

[Section 190\(1\)](#) of the National Parks & Wildlife Act imposes a time limitation on the commencement of criminal proceedings of two years after the date on which the offence is alleged to have been committed ([s 190\(1\)\(a\)](#)), or two years after the date on which evidence of the alleged offence first came to the attention of any authorised officer ([s 190\(1\)\(b\)](#)).

Evidence was adduced which indicated that New South Wales Parks and Wildlife Service (**NPWS**) had knowledge of activities by Mr Somerville within the Beni State Conservation Area (**Beni SCA**) from at least 9 September 2016. Affidavit evidence from a senior investigator with NPWS indicated that Mr Somerville was under surveillance from 18 October to 8 November 2016. During this time, Mr Somerville and a younger male had been seen driving to council parks and easements; looking at and climbing trees; entering private property; and looking through foliage. On 9 November 2016, NPWS investigators obtained a search warrant for Mr Somerville's property which was executed the following day. Investigators located more than 3,000 eggs on Mr Somerville's property, including those of threatened species.

The Summonses for all 22 charges listed the date on which evidence of the offence first came to the attention of an authorised officer as 10 November 2016 (the date that the search warrant was executed). The Summonses were filed on 6 November 2018. Mr Somerville argued that because of the circumstantial evidence obtained by NPWS prior to 6 November 2016, the offences first came to the attention of an authorised officer prior to that date and, therefore, the Summonses were time barred.

Issues:

- (1) Who bore the onus of establishing that the 22 proceedings were brought out of time;
- (2) Whether the Office of Environment and Heritage (**OEH**) was required to elect in each Summons whether it relied on [s 190\(1\)\(a\)](#) or [s 190\(1\)\(b\)](#) of the National Parks & Wildlife Act for the purpose of commencing proceedings, or whether it could rely on both, provided that either limb was satisfied;
- (3) If only [s 190\(1\)\(b\)](#) applied, what was the proper construction of that provision having regard to the definition of "evidence" in [s 190\(4\)](#); and
- (4) Whether the circumstantial evidence that first came to the attention of an authorised officer prior to 6 November was sufficient to constitute "evidence of any act or omission constituting the offence" within the meaning of [s 190\(4\)](#).

Held: Proceedings were commenced within time:

- (1) To the extent that OEH relied upon [s 190\(1\)\(a\)](#) of the National Parks & Wildlife Act, it bore the onus of establishing this to the criminal standard. Given the language of [s 190\(2\)](#) of the National Parks & Wildlife Act, to the extent that Mr Somerville sought to rely on [s 190\(1\)\(b\)](#), he bore the onus of proving, on the balance of probabilities, that the charges were brought out of time: at [43]-[44];
- (2) In relation to the possession offences, OEH had satisfied both limbs of [s 190\(1\)](#) of the National Parks & Wildlife Act and was not required to elect which time limit it relied upon: at [55]; and
- (3) Evidence of ancillary acts, such as foraging, was not evidence of an act constituting the offence for the purposes of [s 190\(1\)\(b\)](#). There was nothing unlawful in itself about Mr Somerville being present in the Beni SCA or looking into bushes and trees. Properly construed, [ss 190\(1\)\(b\)](#) and [190\(4\)](#) required, at a minimum, that the acts or omissions must be referable to the elements of the offence the subject of the Summons: at [64]-[66].



**Chief Executive, Office of Environment and Heritage v Grant Wesley Turnbull (No 3)**  
[\[2019\] NSWLEC 165](#) (Pain J)

**Facts:** Mr Grant Turnbull (**defendant**) pleaded not guilty to a charge of unlawful clearing of native vegetation contrary to [s 12\(2\)](#) of the [Native Vegetation Act 2003 \(NSW\)](#) (**Native Vegetation Act**), between January and August 2014, on a property in northern New South Wales. The postponed trial was to commence on 8 October 2019, following *Chief Executive, Office of Environment and Heritage v Turnbull (No 2)* [\[2019\] NSWLEC 145](#). On that day, the defendant filed a Notice of Motion seeking the following pre-trial orders:

- (1) A permanent stay of the proceedings of the charge that the defendant committed an offence against the Native Vegetation Act in that he cleared native vegetation otherwise than in accordance with a development consent inter alia for the period between 1 January and 1 March 2014 because this period was statute-barred pursuant to [s 42\(4\)](#) and [\(5\)](#) of the Native Vegetation Act. The defendant submitted that the date when the evidence first came to the attention of the authorised officer was earlier than that stated in the Summons (4 March 2014);
- (2) A permanent stay of the proceedings that the defendant committed an offence against the Native Vegetation Act between 1 January and 20 August 2014 because the charge was duplicitous and was not a continuous offence within the meaning of the Native Vegetation Act; and
- (3) That admissions made by the defendant in previous civil enforcement and merit appeal proceedings were inadmissible in these criminal proceedings.

**Issue:** Whether the above pre-trial orders should be made.

**Held:** Notice of Motion dismissed:

- (1) *Knowledge of the authorised officer:* The defendant failed to discharge its onus of establishing that the offence came to the attention of the authorised officer on a different day to that identified in the Summons: at [56]. None of the extracts of the diary of the authorised officer relied on by the defendant were shown to be relevant to the charge the subject of these proceedings: at [55]. The fact that the remote sensing specialist relied on by the prosecutor and the authorised officer had contact before 4 March 2014 did not prove that the officer knew something earlier about the clearing. There was more than one investigation into clearing ongoing in early 2014 and a number of proceedings were on foot: at [56];
- (2) *Whether there was a continuing offence:* A charge of native vegetation clearing can be continuous and proof can be established by intermittent events: at [64]. Images from every month of the alleged clearing period were not required to prove continuous clearing. It was appropriate that the issue of whether the offence is continuous be determined at trial: at [68]; and
- (3) *Exclusion of evidence:* The admissions sought to be relied on by the prosecutor were made in previous proceedings in June 2014 and March 2015 and these criminal proceedings commenced in March 2016. This was the first time the prosecutor has commenced civil enforcement proceedings seeking remedial orders in relation to clearing contrary to the Native Vegetation Act, followed later by criminal proceedings under the Native Vegetation Act in relation to the same clearing event. The defendant submitted that he was unfairly treated and should not have his earlier admissions in the previous proceedings used against him in these criminal proceedings. The admissions were voluntarily made with the benefit of legal advice before the hearing commenced and in the defence filed in the civil enforcement proceedings. Since the prosecutor had not determined to commence criminal proceedings when the civil enforcement proceedings were commenced, there was no indication that the prosecutor should have told the defendant that criminal proceedings were also to be commenced: at [105]. The possibility of criminal proceedings arising in the future did not cause [s 132](#) of the [Evidence Act 1995 \(NSW\)](#) about the availability of [s 128](#) (privilege in respect of self-incrimination in other proceedings) to arise here given the voluntary and up-front nature of the admissions made by the defendant: at [106]. That the defendant was not aware when he gave evidence in the civil enforcement proceedings that he could be prosecuted for a criminal offence in relation to the clearing and was not informed of this by the prosecutor or his own lawyers was insufficient to prompt the Court to exercise its discretion under s 90 to exclude the admissions, applying *Em v The Queen* [\(2007\) 232 CLR 67](#); [\[2007\] HCA 46](#). The weight to be given to the admissions could be determined at trial: at [100] and [113].

***Environment Protection Authority v Gammasonics Institute for Medical Research Pty Ltd***  
**[2019] NSWLEC 190** (Duggan J)

**Facts:** Gammasonics Institute for Medical Research Pty Ltd (**defendant**) undertakes research in the areas of radiation protection, measurement and detection. The defendant pleaded guilty to three charges arising from the [Radiation Control Act 1990 \(NSW\)](#) (**Radiation Control Act**), that on or about 28 May 2016:

- (1) The defendant failed to comply with a “Source Transport Plan” as required by [s 14\(6\)](#) of the Radiation Control Act. This was referred to as the “Transport Security Charge”;
- (2) The defendant caused a radioactive substance to be transported in a manner inconsistent with the Australian Radiation Protection and Nuclear Safety Agency’s *Code for the Safe Transport of Radioactive Material (2014)* (**Code**) in breach of [cl 36](#) of the [Radiation Control Regulation 2013 \(NSW\)](#) (**Radiation Control Regulation**). This was referred to as the “Transport Safety Charge”; and
- (3) That between 28 May 2016 and 12 February 2018, the defendant failed to have in place a Source Security Plan in breach of [s 14\(1\)](#) of the Radiation Control Act. This was referred to as the “Source Security Plan Charge”.

The offences all related to the same “sealed radioactive source” which was a fusion welded stainless steel capsule that contained Caesium-137. This capsule was housed within a Nordion Gammacell 1000 container (**Irradiator**). The Irradiator was designed to sterilise blood and was utilised in research and personnel training conducted by the defendant. The contravention of the Radiation Control Act and Radiation Control Regulation came about when the defendant transported the Irradiator to its new premises in a manner inconsistent with the Source Transport Plan and non-compliant with the standards and procedures set out in the Code. The third charge was because the defendant failed to obtain a security plan for the radioactive source once it was rehoused to the new premises.

The defendant pleaded guilty on all counts at the earliest possible opportunity.

**Issue:** What sentence should be imposed.

**Held:** Defendant convicted on all three charges; fined a total of \$132,000; ordered to pay the prosecutor’s costs:

- (1) The offences created under the Radiation Control Act and the Radiation Control Regulation imposed strict liability: at [25]-[30];
- (2) In relation to all three charges, while there was no evidence of actual harm (at [32]), the legislative provisions require the consideration of potential harm (however remote) which could have arisen in relation to transporting radioactive materials. As such, the potential risk was objectively higher in the circumstances (at [40]). Subjective factors were considered: the defendant’s remorse, lack of prior convictions and that there were events which frustrated its ability to legally transport the device (such as sale of their previous premises on short notice and the absence of an approved transportation container in Australia): at [57]-[65];
- (3) While the Local Court does have jurisdiction to deal with prosecutions under the Radiation Control Act, given the objective seriousness of the case and the lower jurisdictional limit of the Local Court set in [s 25\(3\)](#) of the Radiation Control Act, it was not appropriate to consider prosecution in the Local Court instead of the Land and Environment Court as a factor in sentencing: at [72]-[74];
- (4) In relation to all three charges, while there was a need for specific deterrence to ensure the defendant remained vigilant, general deterrence was also required: at [66]-[69];
- (5) The offences were in the moderate range of objective seriousness (at [46]-[56]). After applying a discount for the early guilty plea, application of the totality principle and subjective factors, monetary penalties (for the Transport Security Charge of \$70,000; for the Transport Safety Charge of \$12,000; and for the Source Security Plan charge of \$50,000) were imposed: at [89]-[93]; the defendant was convicted on all three charges: at [91]-[93];

- (6) A publication order was inappropriate in the circumstances as it would pose a significant risk to the reputation and livelihood of individuals not charged who were connected to the defendant: at [84]-[88]; and
- (7) The defendant was ordered to pay the prosecutor's costs: at [91]-[94].

***Environment Protection Authority v GrainCorp Operations Limited*** [\[2019\] NSWLEC 143](#) (Pepper J)

**Facts:** GrainCorp Operations Limited (**defendant**) pleaded guilty to an offence under [s 64\(1\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**) for contravening a condition of the Environment Protection Licence (**EPL**) which it held in relation to the Port Kembla Grain Terminal (**premises**) for the licensed activities of "chemical storage" and "shipping in bulk". As part of its operations, GrainCorp was permitted to fumigate grain with methyl bromide or phosphine (**fumigants**) at the premises to meet domestic and export regulatory requirements.

The defendant breached Condition O1 of the EPL, which required it to carry out the licensed activities in a competent manner, when it incorrectly calculated and recorded the emission rate of the fumigants from vent stacks located on the premises between February 2016 and January 2018. The error arose because the defendant's fumigators incorrectly interpreted the display of the volumetric flow rate (measured in L/s), labelled as "fan speed" on the control system, as a measure of flow velocity (measured in m/s). As a result, the maximum emission rates prescribed by the EPL for the fumigants were exceeded.

It was agreed that the commission of the offence did not cause any actual harm, however, during a one-hour period on 14 May 2017 (Sunday), the concentration of fumigants reached levels that would have caused mild transient health effects had any person been present in the immediate vicinity of the top of one of the vent stacks.

**Issue:** The appropriate sentence to be imposed.

**Held:** Defendant ordered to pay \$40,200 to the Environmental Trust for general environmental purposes; pay the Environment Protection Authority's (**EPA**) professional costs; and publish the details of its conviction and sentence in three newspapers, its website, the next issue of its *Sustainability Report*, and on its Facebook and Twitter accounts:

- (1) While the defendant submitted that the words "likely harm" in [s 241\(1\)\(a\)](#) of the POEO Act did not extend to incorporate "potential harm" and that the decision in *Environment Protection Authority v Waste Recycling and Processing Corporation* [\[2006\] NSWLEC 419](#) had put an unwarranted gloss on the statutory definition of harm in the POEO Act, it did not go so far as to contend that the decision in *Waste Recycling* was plainly wrong. This issue, therefore, did not require resolution. The potential for harm to human health during the one-hour period on 14 May 2017 was sufficient to constitute harm for the purpose of the POEO Act: at [161];
- (2) The defendant's staff were suitably qualified and its training procedures were adequate. It also took appropriate preventative measures by seeking specialist advice from an external consultant. However, the defendant ought to have had in place more stringent quality assurance and oversight mechanisms to prevent the human error which led to the commission of the offence: at [185]-[187];
- (3) The offence was at the lower end of objective seriousness because it was committed inadvertently; the potential for environmental harm was minimal; and the defendant took practical measures to avoid the harm: at [189]; and
- (4) The defendant was entitled to a 33% discount on its sentence for the utilitarian value of its early guilty plea; its assistance to the EPA; its demonstrated contrition and remorse; its good corporate character; and its lack of prior convictions: at [192], [193], [195], [203], [204], [227], and [207].

***Environment Protection Authority v Minto Recycling Pty Limited*** [\[2019\] NSWLEC 193](#) (Moore J)

(related decision: *Environment Protection Authority v Minto Recycling Pty Ltd* [\[2019\] NSWLEC 91](#) (Moore J))

**Facts:** Minto Recycling Pty Ltd (**defendant**), a wholly owned subsidiary of Bingo Industries Ltd, operated a waste recycling facility at 13 Pembury Road, Minto (**premises**). The defendant had been issued an Environment Protection Licence (**EPL**) by the Environment Protection Authority (**EPA**). The EPL authorised the defendant to receive and process up to 30,000 tonnes of waste at the premises within an annual period of 25 November 2016 to 24 November 2017. During that period, the defendant received and processed some 169,695.34 tonnes of waste material. This represented 139,695.34 tonnes of waste in excess of its EPL conditions. The defendant was charged by the EPA under [s 64](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) with breach of its EPL. The defendant pleaded guilty to this charge. The matter proceeded to a contested hearing on the facts to determine the basis and nature of the appropriate penalty.

**Issues:**

- (1) What were the aggravating and mitigating factors; and
- (2) What was the appropriate sentence for the offence.

**Held:** Defendant convicted; ordered to pay \$90,000 to the Environmental Trust and pay the prosecutor's costs. Publication orders made:

- (1) Aggravation on the basis of environmental harm was not able to be established on a factual basis: at [77];
- (2) Aggravation on the basis of financial benefit was established: at [83];
- (3) Aggravation on the basis of impacts to human health resulting from dust emissions was not established: at [87];
- (4) Aggravation on the basis of an increase in traffic movements was not established: at [93];
- (5) The fact that the defendant had consent for State Significant Development was irrelevant as the consent had not been acted upon, nor did it alter the limitations imposed by the EPL: at [96] and [99];
- (6) The defendant had complete control over its activities that gave rise to the breach of the relevant condition of its EPL: at [103];
- (7) The attempt by the defendant to regularise its unlawful activities by seeking a new State Significant Development consent was not an act of contrition: at [119];
- (8) Cooperating with the prosecutor, where to do otherwise would constitute another breach of law, could not be regarded as "providing assistance" to the prosecutor: at [123];
- (9) The settlement of prior related proceedings was irrelevant to the consideration of assistance to the prosecutor in this case: at [125];
- (10) Specific deterrence was unnecessary as the defendant had ceased trading: at [130];
- (11) General deterrence by way of publication order ancillary to financial penalty was necessary: at [133];
- (12) The offence in question was determined to be at the top of the low range of objective seriousness: at [145];
- (13) A discount of 25% on penalty was appropriate as the defendant had pleaded guilty at the earliest reasonable opportunity: at [167]; and
- (14) Publication notice ordered to appear in the *Australian Financial Review*, the *Daily Telegraph*, the *Campbelltown-Macarthur Advertiser* and the *Inside Waste Magazine*. Publication in the format determined by the Land and Environment Court was also ordered to be included in the *Annual Report of Bingo Industries Ltd* published to the Australian Stock Exchange: at [185].

***Environment Protection Authority v Mouawad*** [\[2020\] NSWLEC 1](#) (Robson J)

**Facts:** Mr Mouawad (**defendant**) sought leave to withdraw guilty pleas entered in relation to two charges of knowingly supplying false and misleading information about the disposal of asbestos waste, contrary to [s 144AA\(2\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**). The defendant asserted that, at the time the pleas were entered, he did not have clarity of mind, was unrepresented, was not in possession of all material documentation, did not entertain a genuine consciousness of guilt, did not enter pleas of guilty for the sake of convenience, and may have had other possible defences. At the time, the defendant entered his guilty pleas, a number of separate prosecutions were on foot against him in the Local Court in relation to dishonestly obtaining a financial benefit by deception contrary to [s 192E\(1\)](#) of the [Crimes Act 1900 \(NSW\)](#) (**Local Court offence**) and other waste-related offences under the POEO Act in the Land and Environment Court.

**Issues:**

- (1) Whether the defendant's mental state was of such a degree so as to have affected the integrity of his pleas;
- (2) Whether a miscarriage of justice would occur if the application to withdraw the pleas was refused; and
- (3) Whether the rule against double jeopardy applies.

**Held:** Withdrawal of pleas rejected:

- (1) The defendant failed to establish that a miscarriage of justice would occur if his application to withdraw his pleas was refused, either on the grounds of his mental state or for any other reason: at [65]. Evidence of the defendant's psychiatrist opined that he did not exhibit any "formal thought disorder" and that he "showed good insight into his problems and his current judgment is assessed to be fair": at [60]. The defendant was unable to identify how any legal advice, or lack thereof, caused him to plead guilty: at [72]. Further, he had not been deprived of "all material documentation" as the evidence indicated that all relevant documentation had been both personally provided to him and to the legal representatives who were acting for him: [75];
- (2) In order to prove that a miscarriage of justice would result if leave to withdraw the pleas were refused, an "issuable question of guilt" must exist: at [56]. The evidence was indicative of an acknowledgement of guilt: at [63]. There was also no evidence to indicate that he did not understand the nature of the charges or that he did not intend to admit his guilt through the making of the pleas: at [74]. Further, on the day he entered the pleas, he entered not guilty pleas in the Land and Environment Court in relation to separate charges in other proceedings: at [61]; and
- (3) The Local Court offence of dishonestly obtaining a financial benefit by deception to which he pleaded guilty and the present offences under s 144AA(2) of the POEO Act are not relevantly "the same offence", noting that the existence of common elements between the offences could be taken into account on sentence in a way which was not compromised by his guilty pleas: at [83]. A plea of *autrefois acquit* was unavailable to him as he had not been acquitted in the Local Court. Further, a plea of *autrefois convict* was unavailable as his conviction in the Local Court was not on indictment: at [79].

***Environment Protection Authority v Newcastle Port Corporation*** [\[2020\] NSWLEC 6](#) (Pain J)

**Facts:** On 10 December 2018, the Environment Protection Authority (**EPA**) commenced criminal proceedings alleging water pollution by the Newcastle Port Corporation (**defendant**) between 12 and 14 December 2017 at Eden. The EPA subsequently filed a Notice of Motion on 23 August 2019 seeking leave to rely on an amended Summons relying on the deeming provision in [s 257](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**) as an alternative basis of liability of the defendant arising from the same circumstances specified in the original Summons. The Notice of Motion was opposed by the defendant.

**Issues:**

- (1) Does pleading reliance on s 257 of the POEO Act give rise to duplicity;



- (2) Does the amendment give rise to a fresh charge which was not commenced within the one-year limitation period specified in [s 216\(1\)\(b\)](#) of the POEO Act and was therefore statute-barred; and
- (3) Does [s 258\(2\)](#) of the POEO Act mean there can only be one occupier of premises at any one time.

**Held:** EPA granted leave to file an amended Summons in the form sought:

- (1) Pleading reliance on s 257 of the POEO Act does not create a separate offence but rather provides alternative ways for the offence to be committed. The EPA's case pleads with sufficient precision alternative bases for liability for the one offence of water pollution. To rely on s 257 does not give rise to duplicity: at [43]-[44];
- (2) No statute-bar arises. An amendment is permitted out of time when the offence charged remains the same: at [49]-[50]; and
- (3) It is inappropriate to rule finally in an application to amend pleadings on the construction of s 258(2) in the context of the whole POEO Act. This is a matter to be considered at trial: at [51].

***Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v O'Haire***  
**[\[2019\] NSWLEC 158](#)** (Pepper J)

**Facts:** Mr Brian O'Haire (**defendant**) was charged with eight offences of unlawful taking of water other than in accordance with a water allocation licence contrary to [s 60C\(2\)](#) of the [Water Management Act 2000 \(NSW\)](#). At a directions hearing on 19 July 2019, counsel for the defendant informed the Land and Environment Court (**LEC**) that his client "would be" entering a plea of guilty to all eight charges. The LEC told the parties that it had formally noted that a plea of guilty was being entered and with the consent of the parties set down the matter for hearing on sentence. Following the entry of the pleas of guilty, media coverage adverse to Mr O'Haire ensued.

Mr O'Haire filed a Notice of Motion seeking to correct the recording of pleas of guilty pursuant to the slip rule contained in [r 36.17](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**UCPR**) on the basis that they had been mistakenly entered by the Court.

In an affidavit, Mr O'Haire deposed that his counsel accurately communicated his instructions when he informed the Court that Mr O'Haire "would be" entering a plea of guilty to each charge. Mr O'Haire stated that he had not instructed his counsel to enter a plea of guilty on 19 July 2019 and that it remained his intention to enter a plea of guilty on the first day of the sentence hearing, as permitted by [s 192](#) of the [Criminal Procedure Act 1986 \(NSW\)](#).

**Issues:**

- (1) Whether there had been an "error arising from an accidental slip or omission" within the meaning of [r 36.17](#) of the UCPR; and
- (2) Whether the slip rule contained in [r 36.17](#) of the UCPR applied to the entry of a plea.

**Held:** Motion dismissed:

- (1) Having regard to the relevant case law on the scope and application of the slip rule:
  - (a) Rule 36.17 can extend to correct accidental mistakes made by a party's legal representative: at [38];
  - (b) Rule 36.17 can be used in order to reflect the true objective intention of the decision maker at the time the orders were made. If the error requires the decision-maker to reconsider the original decision, the appropriate method to correct the mistake is by way of appeal: at [40];
  - (c) Rule 36.17 must be construed by reference to the overriding purpose contained in [s 56](#) of the [Civil Procedure Act 2005](#): at [44]-[45]; and
  - (d) the test for whether a mistake or omission is accidental is whether if the matter had been brought to the Court's attention the correction would have been made at once: at [47];
- (2) An objective reading of the transcript from 19 July 2019 revealed that Mr O'Haire's counsel had deliberately communicated to the LEC that his client intended to enter pleas of guilty on that



occasion. This was evidenced by his counsel failing to correct the LEC when it was stated that pleas of guilty were formally entered, as well as the fact that the matter was set down for a hearing on sentence, and not set down for a contested hearing on liability. There was no evidence of an error arising from an accidental slip or omission on the part of either the LEC or Mr O'Haire's counsel: at [35]-[36] and [49];

- (3) Section 192 of the *Criminal Procedure Act* applied in lower courts only: at [37];
- (4) Even if an error had occurred on 19 July 2019, there was no utility in using the discretion under r 36.17 to correct it because of Mr O'Haire's stated intention to plead guilty and that a plea or finding of guilt was necessary for the matter to progress to a sentence hearing: at [50]-[51]; and
- (5) The slip rule in r 36.17 of the UCPR did not apply because there was no judgment or order of the LEC associated with the entry of the plea: at [54].

***Ku-ring-gai Council v John David Chia (No 16)*** [\[2019\] NSWLEC 184](#) (Robson J)

(related decisions: *Ku-ring-gai Council v John David Chia (No 15)* [\[2019\] NSWLEC 1](#) (Robson J); *Ku-ring-gai Council v Edgar* [\[2017\] NSWLEC 49](#) (Moore J))

**Facts:** After a hearing over 25 days, John David Chia (**defendant**) was found guilty of an offence against [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) in that, over the course of approximately eight days in 2014, he directed contractors to cut down and remove 74 trees on land which included his property; a Crown reserve adjacent to his property; and Roseville Golf Club (**Golf Club**), in breach of the Ku-ring-gai Council Tree Preservation Order (**TPO**).

The defendant entered into a Deed of Settlement (**Deed**) pursuant to which he paid \$16,890 to the Golf Club to be used for defined bush regeneration works relating to a portion of the area which was the subject of the offence. Subsequent contact with the Golf Club and the issue of a subpoena to the Golf Club did not produce any evidence that the bush regeneration works contemplated by the Deed had been carried out.

At the hearing, senior counsel for the defendant indicated that he had received instructions to submit that the matter of penalty be dealt with under [s 10](#) of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) (**Sentencing Act**).

**Issue:** What was the appropriate sentence for the offence the defendant committed.

**Held:** Defendant convicted of the offence as charged; fined \$40,000; and ordered to pay the prosecutor's costs:

- (1) The commission of the offence prevented prospective assessment of the likely impact of the proposed clearing, foreclosed Council's prerogative to decline to allow such works to be undertaken or to impose limitations or conditions thereon, and caused actual environmental harm. The offence also undermined the purpose of the TPO. The conduct of the defendant and its consequences offended against the objectives enshrined in [s 5](#) of the EP&A Act and undermined the principles that underpin the planning regime: at [26];
- (2) While the Deed did not provide for works over the whole of the area cleared, the defendant was entitled to expect that the Golf Club would use the settlement sum to fund regeneration works: at [39];
- (3) The fact that the defendant entered into the Deed, and that this should be considered a mitigating factor, was to be taken into account. Having regard to the evidence, the commission of the offence caused actual environmental harm of medium seriousness. In reaching this conclusion, the number of trees removed, the extent of canopy removed was significant, and the size in diameter of many of the tree stumps was significantly greater in dimension than the minimum dimension protected under the TPO was taken into account: at [40];
- (4) It was beyond reasonable doubt that the commission of the offence caused substantial harm to the environment within the meaning of [s 21A\(2\)\(g\)](#) of the Sentencing Act: at [41];

- (5) Viewed objectively, a reasonable person in the defendant's position would have known that the clearing, given its nature and extent, involving 74 trees and three separate landholdings, required consent of Council, and would have foreseen the risk that the clearing would be done otherwise than in accordance with lawful authority. The defendant's conduct was negligent to the criminal standard: at [49];
- (6) The most probable motivation for the defendant directing the clearing work was to address a potential fire hazard, and the evidence did not establish that the defendant was motivated by financial gain: at [51];
- (7) The offence was found to be of moderate objective seriousness: at [54];
- (8) The defendant did not have a prior criminal record, and was otherwise a person of good character: at [56], [59];
- (9) The defendant had not demonstrated any insight into his offending conduct. He did not accept responsibility for the offence, nor did he express any contrition: at [64];
- (10) The documentary material in relation to the defendant's financial position was unhelpful in determining his capacity to pay a fine. However, the submission made on the defendant's behalf that he no longer owned any real property, that he was in receipt of the aged pension, and that the defence of the proceedings had undoubtedly been extremely costly was accepted. The evidence was insufficient to justify reducing the appropriate penalty on account of the defendant's financial circumstances: at [70]-[71];
- (11) The defendant was found to be unlikely to re-offend: at [73];
- (12) The defendant's mental state did not contribute to the commission of the offence. However, it was accepted that mental health problems of an offender need not amount to a serious psychiatric illness before they would be relevant to sentencing: at [78];
- (13) In the circumstances and having regard to the defendant's health, it was appropriate to moderate the need for the sentence to serve the purpose of general deterrence. As the defendant was unlikely to re-offend, the need for specific deterrence was low: at [84]-[85];
- (14) The parity principle arose as a relevant consideration, and the Court had regard to the penalty imposed on Craig Maurice Edgar, the contractor retained by the defendant who cut down the trees protected by the TPO: at [92];
- (15) In light of the objective seriousness of the offence, an order pursuant to s 10 of the Sentencing Act was inappropriate: at [104];
- (16) After considering the relevant objective and subjective circumstances, including the principle of parity and consistency in sentencing, the appropriate penalty to impose on the defendant was \$40,000: at [105];
- (17) The fact that the defendant would be ordered to pay the prosecutor's costs of the proceedings was not a reason to impose a lesser fine than was otherwise appropriate. The defendant had not established that he would be unable to pay both the fine and the prosecutor's costs: at [111]; and
- (18) If the defendant would not be able to pay the aggregate sum of the fine and the costs order, a lesser penalty could be imposed. However, ordinarily, it would be more appropriate to reduce the amount of costs payable rather than the amount of the fine given that fines and cost orders serve different purposes. In circumstances where the defendant made a series of forensic decisions over a protracted period throughout the course of the trial, it was not appropriate to reduce the amount of costs otherwise payable. In light of the evidence in relation to the defendant's capacity to pay, the penalty should not be reduced (so as to achieve the proper purposes of sentencing): at [112].

***Natural Resources Access Regulator v Budval Pty Ltd; Harris; Harris; Timmins***  
**[\[2019\] NSWLEC 169](#)** (Duggan J)

**Facts:** The substantive proceedings concerned four defendants, charged with multiple offences under the **[Water Management Act 2000 \(NSW\)](#)** (**Water Management Act**) The prosecutor sought an order

pursuant to [s 29](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) (**Criminal Procedure Act**) that the 10 charges relating to multiple alleged offences on two different sites, issued against the defendants be heard together, or in the alternative, that the seven charges relating to what were described as the “metering offences” be heard together with a separate trial for what were described as the “channel offences”. The defendants consented to the proceedings being heard in three groups but opposed the joinder as proposed by the prosecutor.

The prosecutor submitted that the notion of a “series” merely requires that there be more than one offence of the same or similar character. It was submitted that the several charges met this definition as the timing and nature of the offences was of a similar character.

Issues:

- (1) Should the matters be heard together; and
- (2) What is the meaning of “series” in [s 29](#) of the Criminal Procedure Act.

Held: Ordered that the metering offences at the Mercadool site be heard separately to the channel offences at the Miralwyn site; and, further, the metering offence at the Miralwyn site was also to be heard separately:

- (1) The ordinary meaning of the word “series” indicates that there must be a “sufficient correlation” to enable the offences to be described as a series and that timing, in itself, is insufficient to provide such correlation: at [26].
- (2) The defendant’s submissions were accepted that the prosecutor had failed to establish there was a series of offences as defined in s 29 of the Criminal Procedure Act. The differences between offences with respect to the identity of the defendant; the specific location of water pumped, the time and date of the offence; and the differences in the circumstances of the particular breach, established the offences as being separate offences against the same prohibition in the Water Management Act, rather than a series of offences of a similar character: at [27].
- (3) The necessary circumstances identified in [s 29\(2\)\(b\)](#) and/or [\(c\)](#), supported the grouping as proposed by the defendants so that the proceedings were ordered to be heard in the three trials as identified by the defendants: at [28].

**Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd; Merrywinebone Pty Ltd; Greentree; Harris** [\[2019\] NSWLEC 187](#) (Pain J)

Facts: The Secretary, Department of Planning, Industry and Environment (**prosecutor**) charged two individuals and two companies with eight offences each (32 charges in total) in relation to eight native vegetation clearing events allegedly committed between December 2016 and January 2019. Due to the timing of the eight clearing events, charges were issued pursuant to the [Native Vegetation Act 2003 \(NSW\)](#) and the [Local Land Services Act 2013 \(NSW\)](#). In the Harris and Merrywinebone Pty Ltd (**Merrywinebone**) proceedings, the defendants pleaded not guilty to all 16 charges. In the Greentree and Auen Grain Pty Ltd (**Auen Grain**) proceedings, no plea had been entered. The prosecutor’s evidence in relation to all 32 charges had been filed and served. Harris and Merrywinebone agreed their matters should be heard together. Greentree and Auen Grain agreed their matters could be heard together. The prosecutor filed two Notices of Motion seeking orders that all 32 matters be heard together, relying on [s 29\(2\)](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) (**Criminal Procedure Act**). These were opposed by Merrywinebone. Auen Grain did not consent to or oppose the orders.

Issue: Whether all 32 criminal proceedings should be heard together.

Held: All 32 matters to be heard and determined together:

- (1) Section 29(2) of the Criminal Procedure Act allows a court to hear and determine proceedings in relation to offences alleged to have been committed by two or more accused persons where the offences arise out of the same set of circumstances ([subs \(b\)](#)) and where the offences form or are part of a series of offences of the same character ([subs \(c\)](#)). There was no dispute that the multiple offences arose from the same set of circumstances and also that the offences form part of a series of

offences with the same character. The issue was whether the prosecutor's Notices of Motion ought be made in the interests of justice, as referred to in [s 29\(3\)](#): at [15]; and

- (2) In considering s 29(3), the interests of justice extend beyond the accused person to the Crown, witnesses and the public: *Roach v R* [\[2019\] NSWCCA 160](#). Relevant considerations include conserving costs, avoidance of inconvenience to witnesses and the desirability of common enterprises being jointly tried so as to avoid inconsistent verdicts (*Symss v The Queen* [\[2003\] NSWCCA 77](#)). The only prejudice to the defendants of having the proceedings heard together is the extra costs likely to be incurred by participation in a longer trial. According to an affidavit of the prosecutor's solicitor, the prosecutor will seek to rely on extensive evidence (including expert evidence) in relation to all defendants. Given the substantial inconvenience to the prosecutor, the witnesses and the Court in having the same evidence presented twice in separate trials, that prejudice does not suggest that it is in the interests of justice that separate trials take place: at [19] and [21].

***Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd*** [\[2019\] NSWLEC 182](#) (Moore J)

(related decisions: *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [\[2017\] NSWLEC 109](#), (Moore J); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [\[2018\] NSWCCA 202](#) (Bathurst CJ, Fullerton and Campbell JJ); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [\[2019\] HCASL 86](#))

**Facts:** On 13 January 2015, Snowy Monaro Regional Council (**prosecutor**) granted development consent to Tropic Asphalts Pty Ltd (**Company**) to operate a mobile asphalt-processing plant. Two important conditions were imposed on the Company, namely, that (a) plant production not exceed 150 tonnes per day at any time during the operations; and (b) that the number of trucks accessing and/or existing the site not exceed 12 per day (**conditions**). The prosecutor initiated three proceedings against the Company for alleged breaches of these conditions.

The extended legal history of the matter involved sequential challenges to the legal validity of charges laid by the prosecutor in regard to these conditions, including a refused application to the High Court for special leave. The first charge was considered defective and warranted dismissal, whereas the second (**Charge 2**) and third charges (**Charge 3**) were found to be duplicitous.

The prosecutor filed Notices of Motion in both the Charge 2 and Charge 3 proceedings. These were subsequently amended. The amended Notices of Motion were in substantially similar terms as the original Notices of Motion. However, the prosecutor sought to have added 40 charges and 39 charges for Charge 2 and Charge 3 respectively. There were, therefore, 81 proposed charges in total before the Court. The charge in each instance purported to allege the same offence, drafted in identical terms save for the date. In the eventuality that this was rejected, the prosecutor proposed alternative charges, being a single amended charge for each of Charge 2 and Charge 3 but applying only to a single day. The nominated day for Charge 2 was different for the nominated day for Charge 3, but this was irrelevant for the purposes of the proceedings.

The prosecutor also sought to rely on an affidavit from its solicitor and documents annexed to it. This was opposed by the Company on the basis that the documents had been unlawfully obtained.

**Issues:**

- (1) Would allowing the multi-count amendment to the Notices of Motion be unconscionable or unjust; and
- (2) Should leave be granted for the single amendment to Charge 2 and Charge 3.

**Held:** The multi-count amendments refused; leave granted to amend the terms of the proposed single charge. Each party bears its own costs:

- (1) Multi-count amendments in this case would have offended against [s 21\(1\)](#) of the [Criminal Procedure Act 1986 \(NSW\)](#): at [31];
- (2) Multi count amendments would lead to radically higher maximum penalty exposure: at [42];
- (3) The principle of totality applied for multi-count pleadings as part of the sentence determination process: at [44];

- (4) Multiple convictions would weigh more heavily against the Company than a single one on either charge: at [54];
- (5) Subjecting the Company to substantial reputational risk when concerning publication orders was a significant factor contributing to the injustice of permitting multi-count amendments to either charge: [61];
- (6) It was unjust to permit the prosecutor to revisit its original forensic decision about the laying of duplicitous charges by now permitting the multi-count amendments when the laying of fresh charges is now statute-barred: at [67];
- (7) Permitting multiple charges for each offence would be an injustice and therefore unconscionable: at [68];
- (8) It was inappropriate to read the affidavit and material exhibited to it, as, even if taken at its highest, the multi-charge amendment was not to be permitted: at [70];
- (9) Amendment to allow for single-charge offences was permissible and should have been made in the current circumstances because the Company was aware of the nature of the offences: [93];
- (10) The power of amendment is broad and only limited by unfairness to a defendant, which does not here arise. Amending the dates of the single amended charges would not unfairly prejudice the defendant: [96]; and
- (11) Each party had been equally successful in their applications so no costs order should be made: at [103].

***Water NSW v Kiangatha Holdings Pty Limited; Water NSW v Laurence Natale*** [\[2019\] NSWLEC 185](#)  
(Robson J)

**Facts:** By four separate Summonses filed by Water NSW (**prosecutor**), Kiangatha Holdings Pty Limited (**Kiangatha**) and Laurence Natale (collectively **defendants**) were each charged with two offences against [s 120\(1\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**). Each defendant was charged with an offence in relation to likely pollution and an offence in relation to actual pollution from an alleged failure to implement sediment and erosion control measures to control erosion and sediment flow adequately from earthworks involved in the construction of a road.

In response to a request for further and better particulars, the prosecutor provided further information in relation to the charges, including a map of the relevant land marked with 35 red dots (**red-dot locations**), being places where the prosecutor alleged water pollution occurred.

The defendants filed Notices of Motion in each matter seeking orders that the Summonses be quashed and set aside or permanently stayed on the basis of patent or latent duplicity and uncertainty. The defendants submitted that the problem with each Summons was that multiple offences were disclosed in relation to the 35 red-dot locations and also by longitude and latitude coordinates in the table forming part of the prosecutor's letter of particulars as regards the actual pollution charges, and in relation to different drainage lines or parts of the drainage line network in relation to the likely pollution charges. The defendants contended that the extended charge period also gave rise to the potential for multiple offences at the same location, but at different times.

Although there was no formal application before the Land and Environment Court (**LEC**) to amend the Summonses, the prosecutor attached amended Summonses to its submissions and accepted that all four Summonses were patently duplicitous in respect of the particularisation of the waters.

**Issue:** Whether the Summonses were patently or latently duplicitous.

**Held:** Each Summons found to be bad for duplicity; prosecutor given the opportunity to seek leave to amend the Summonses:

- (1) Despite the defendants' reliance on the nature of an offence against [s 120](#) of the POEO Act, being a "result offence", the LEC did not consider that descriptor to be determinative. The construction of the road could be characterised as a continuous course of conduct, and there could be "results" which occurred as it was being constructed: at [47], [81];



- (2) The prosecutor accepted, and the LEC found, that all four Summonses were patently duplicitous as they particularised more than one body of receiving waters where pollution of either would be sufficient to establish the offences: at [51];
- (3) Having regard to the subject matter and language of s 120, offences under that provision could be continuing offences: at [72];
- (4) The offences involved the construction of a road, which was able to be (and could be found at trial to be) a continuous process whereby each step was not only closely related to the next, but was relatively indistinguishable in terms of process: at [76];
- (5) Characterising the conduct as a single enterprise avoided an artificial breaking up of the individual acts involved in the construction of the road and gave effect to the broad scope and purpose of the legislation: at [82];
- (6) In relation to the “land” identified in the Summonses, the evidence served demonstrated the locations where it was alleged that soil and sediment had been placed directly in drainage lines, and there was sufficient evidence for the defendants to understand the case against them: at [103];
- (7) The LEC found, and the prosecutor accepted, that there was patent duplicity in relation to the particularisation of “waters” in each Summons and uncertainty in relation to “manner of breach” in the actual pollution Summonses: at [107];
- (8) Whether the defence of honest and reasonable mistake of fact could still be made out in relation to some discrete locations or otherwise was found to be a matter for the ultimate trier of fact: at [109];
- (9) While it was not a complete response by the prosecutor that the criticisms made by the defendants would be addressed by further evidence, the proposed narrowing of the areas affected the by the deletion of 10 lots in the actual pollution Summonses would address the concerns of the defendants in relation to those discrete matters. The proposed amendment to the definition of “pollutant” would make it clear that the pollutant was the soil and sediment from the earthworks only, and the proposed amendment to the “manner of breach” in the actual pollution Summonses would make it clear that the prosecution case was restricted to discrete places where pollutant had been placed directly into ephemeral drainage lines: at [116];
- (10) As the time, place and manner of polluting waters were essential factual ingredients, not essential legal elements, of an offence under s 120 of the POEO Act, they were capable of particularisation or amendment. As it appeared that the prosecutor proposed to amend the Summonses only in relation to essential factual ingredients, the LEC allowed the prosecutor to seek leave to amend the Summonses: at [124]-[125]; and
- (11) Subsequent to reasons for judgment being given, the proceedings were listed for mention. Senior counsel for the prosecutor indicated that the prosecutor now sought leave to amend the Summonses generally in accordance with the proposed amendments considered at the hearing of the Notices of Motion. As there was no objection from the defendants, leave was granted to the prosecutor to amend the Summons in each proceeding, and the parties agreed that it was otherwise appropriate to dismiss the motions: at [127].

- **Civil Enforcement:**

***Hy-Tec Industries (Queensland) Pty Ltd v Tweed Shire Council*** [\[2019\] NSWLEC 175](#) (Pain J)

(related decision: *Hy-Tec Industries (Queensland) Pty Ltd v Tweed shire Council (No 2)* [\[2020\] NSWLEC 5](#) (Pain J))

**Facts:** Hy-Tec Industries (Queensland) Pty Ltd (**applicant**) operates a rock quarry at Dulguigan in northern New South Wales. It became the beneficiary of development consent (**2004 consent**) issued by the first respondent, the Tweed Shire Council (**Council**), when it became the owner of the quarry. Condition 2 of the consent provided that the “maximum annual rate of extraction” in any 12-month period was 200,000 cubic metres and the “maximum average rate of extraction” was 195,000 cubic metres over any three-year period. The applicant also had an Environment Protection Licence (**EPL**) permitting the

carrying out of scheduled activities of “land-based extractive industries”. The applicant sought the following declarations and orders:

- (1) Two declarations that the 2004 consent conferred a right on the applicant to extract from the land to which the consent applied a volume of resource material of up to 200,000 cubic metres as measured in situ at the time of extraction in any 12-month period, and a right to extract an average volume of material of up to 195,000 cubic metres as measured in situ at the time of extraction over a three-year period; and
- (2) An order setting aside the Environment Protection Authority’s (EPA) determination dated 21 August 2019 purporting to vary Condition A1.2 of the EPL so as to limit extraction in any one annual return period to a maximum weight of 340,000 tonnes and in any three annual return periods, to a maximum annual average weight of 331,500 tonnes.

Issues:

- (1) Whether the annual and three-year average extraction limits in Condition 2 related to volume of the material in “its bulked state” (the volume of the material after it has been extracted, processed and stockpiled) as distinct from its “in situ state” (the volume of the material in the ground at the time of extraction); and
- (2) Whether the EPA’s decision to vary Condition A1.2 of the EPL was based on legal error by adopting Council’s interpretation of the 2004 consent without independently assessing it.

Held: Two declarations and order made; costs reserved:

- (1) *Condition 2 of the 2004 consent was not ambiguous* The ordinary meaning of the word “extraction” is taking out of the ground: at [50]. Since there was no ambiguity, it was unnecessary to consider other material directly or inferentially in the construction of the condition. Further, the materials relied on by the Council were irrelevant. For example, the 1998 environmental impact statement relied on was prepared for a different development application (DA) than the 2004 DA: at [54];
- (2) *August 2019 variation of EPL invalid* The numerous variations to Condition A1.2 of the EPL over time until August 2019 were premised on the volume of material being extracted, not the extracted material once processed and transported (meaning bulked). The EPA exhibited legal error in its approach to the August 2019 variation based solely on the Council’s erroneous purported construction of Condition 2 of the 2004 consent, which was expressly referred to in the recitals to the August 2019 variation notice and email correspondence between EPA officers and the Council: at [62]; and
- (3) *Utility in making the above declarations and order* There was utility in making the declarations as clarification of the applicant’s legal rights was necessary in light of a letter dated April 2019 from the Council outlining its intention to enforce its view of Condition 2 of the 2004 consent effective immediately: at [58]. There was also utility in making the order setting aside the August 2019 variation of the EPL as its imposition of the reduced limit on the volume of material able to be dealt with had a direct adverse impact on the applicant’s business: at [63].

***Inner West Council v Findlay*** [\[2019\] NSWLEC 96](#) (Moore J)

(related decision: *Findlay v Ashfield Council* [\[2016\] NSWLEC 1219](#) (Hussey AC))

Facts: In 2016, Mr Findlay (**respondent** in the current proceedings) brought proceedings against the Inner West Council (**Council**) in a Class 2 appeal of Council orders requiring Mr Findlay to cease keeping his pony at his premises (*Findlay v Ashfield Council* [2016] NSWLEC 1219). Hussey AC made orders requiring Mr Findlay to cease keeping his pony at his premises by 21 October 2016. These orders were made with the acting commissioner exercising the power given to him by [s 180](#) of the [Local Government Act 1993 \(NSW\)](#) (**Local Government Act**) to make orders in substitution for the orders that had originally been made by the Council.

On 13 November 2017, the Council brought enforcement proceedings against the respondent for continuing to keep the pony on the premises in contravention of the orders of the acting commissioner in 2016 and seeking an order that the respondent be restrained from housing the pony. There was an issue

in the proceedings as to the status of the 2016 decision, whether it was a judgment in rem or not. However, the Land and Environment Court found that it was unnecessary to consider this issue, as under [s 676\(1\)](#) of the Local Government Act, the proper exercise of discretion was not to require the removal of the pony from the respondent's residence.

**Issue:** Whether to exercise discretion, pursuant to s 676(1) of the Local Government Act, to require compliance with the Class 2 orders.

**Held:** Summons dismissed; applicant to pay the respondent's costs:

- (1) Factors weighing against the respondent included: the conclusion and orders of the acting commissioner in the Class 2 proceedings; the current proceedings were enforcement proceedings undertaken by a public authority for the purpose of upholding the integrity of the planning system; and the extent of complaints from the neighbouring property owner: at [79];
- (2) Factors weighing in favour of the respondent included: no existing Council policy that a pony would not be allowed on the premises; evidence of recent inspections showed no real impact on neighbouring properties; the ameliorative steps taken by the respondent to remove impacts on the neighbouring property owner; veterinary evidence the pony was well cared for; the neighbouring property owner was an unimpressive witness; no evidence of specific complaints from the neighbouring property owner to Council after the acting commissioner's decision; evidence from other neighbours was consistent with the conclusion that there were no adverse impacts arising from the pony: at [80]; and
- (3) Overall, the factors weighed in favour of permitting the pony to continue to reside with the respondent: at [81].

***Penrith City Council v Dincel Construction System Pty Limited and Gaonor Pty Limited (OSSM case)*** [\[2019\] NSWLEC 198](#) (Robson J)

(related decision: *Penrith City Council v Dincel Construction System Pty Limited and Gaonor Pty Limited* [\[2019\] NSWLEC 197](#) (Robson J))

**Facts:** Penrith City Council sought declaratory and consequential injunctive relief against the Dincel Construction System Pty Limited and Gaonor Pty Limited in connection with the unlawful installation and construction of an on-site sewage management system (**OSSM**). The parties reached an agreement concerning these proceedings as the respondents had sought approval for an OSSM in a different location. The parties requested that the Land and Environment Court (**LEC**) grant the declaratory and injunctive relief in terms that had been agreed between the parties.

**Issue:** Whether the LEC should accede to the parties' request to make declarations and orders in accordance with the agreement now reached between the parties.

**Held:** Declarations and orders made; respondents to pay the Council's costs

- (1) A breach of the [Local Government Act 1993 \(NSW\)](#) (**Local Government Act**) was established and there was potential for off-site environmental and human health impacts: at [10]. Although the LEC had jurisdiction to make the declarations requested by the parties, there remained a reluctance to grant declaratory relief as the existence of a statutory breach does not automatically result in the granting of declaratory relief: at [10]. Further, declarations of breach of a statute in civil proceedings should not be used as a substitute for criminal proceedings: at [17];
- (2) To achieve the purpose of exposure and denouncement of the conduct, the mere pronouncement of the judgment alone would not constitute sufficient relief: at [16]. Further, the making of declarations marks the disapproval of the LEC of the conduct that Parliament has proscribed and also has a deterrent and educative effect: at [18]; and
- (3) Declaration that Gaonor Pty Limited installed and constructed an OSSM in contravention of its approval and thus breached [s 672](#) of the Local Government Act: at [20].

- **Section 56A Appeals:**

**Stokes v Waverley Council (No 2)** [\[2019\] NSWLEC 174](#) (Robson J)

(related decision: *Stokes v Waverley Council* [\[2019\] NSWLEC 1137](#) (Bish C))

Facts: Ms Stokes appealed against Waverley Development Assessment Panel's (**Panel**) refusal of a development application (**DA**) seeking consent for alterations and additions to an approved five-storey building for use as a dual occupancy and for additional excavation on Lot 43 DP 10771 and known as 21 Thompson Street, Tamarama (**site**).

Bish C heard the appeal and found that the proposed development relied upon existing piling, including two piles located on an adjoining property, being Lot 44 DP 10771 and known as 19 Thompson Street, Tamarama (**Lot 44**). As no owner's consent had been provided by the owners of Lot 44, in light of [cl 49\(1\)\(b\)](#) and [50\(1\)\(a\)](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) (**EP&A Regulation**), the commissioner concluded that "a fundamental jurisdictional hurdle" had not been overcome, and dismissed the appeal.

Ms Stokes commenced this [s 56A](#) appeal seeking orders that the decision of the commissioner be set aside, and that the appeal be remitted to a different commissioner for determination according to law. Ms Stokes raised five grounds of appeal which fell into two categories - an error as to a purported lack of jurisdiction, and a denial of procedural fairness. Waverley Council (**Council**) filed a submitting appearance in the appeal proceedings.

Issues:

- (1) Whether the commissioner erred in disposing of the appeal on the basis that landowner's consent from the owner of Lot 44 was required and had not been obtained; and
- (2) Whether the commissioner erred by denying Ms Stokes procedural fairness.

Held: Appeal upheld; proceedings remitted to Bish C; no order as to costs:

- (1) As no development was being carried out on Lot 44, no consent was required from the owner of that land. The absence of consent from the owner of Lot 44 was not a "jurisdictional hurdle" and the commissioner's finding that it was constituted legal error: at [76]-[78];
- (2) The commissioner misdirected herself by conflating "the land to which the development application relates" for the purposes of [cl 49](#) and [50](#) of the EP&A Regulation, with the words "works that the development relies upon". The test is whether the development "relates" to the land on which development particularised in the application is to take place, and the concept of reliance is not incorporated in the statutory scheme explicitly or by necessary implication: at [79];
- (3) The commissioner denied Ms Stokes procedural fairness by disposing of the appeal due to what she determined to be an absence of jurisdiction (because there was no landowner's consent for off-site works), a matter not raised in Council's Statement of Facts and Contentions or at the hearing: at [94];
- (4) Where the "jurisdictional hurdle" apparently came about as a consequence of information received in evidence during the hearing, the parties were entitled to be notified and afforded with an opportunity to be heard on the issue: at [96];
- (5) While there had been a denial of procedural fairness, this was not determinative of an exclusionary remitter order being appropriate: at [103]-[104]; and
- (6) As the parties agreed that irrespective of the outcome of the proceedings, it was appropriate that there be no order as to costs, no order for costs was made, with the effect that each party would bear its own costs: at [105].

- **Separate Question:**

***Cavanagh v Wollondilly Shire Council (No 2)*** [\[2019\] NSWLEC 181](#) (Robson J)

**Facts:** This separate question arise in Class 1 proceedings brought by Mr Cavanagh (**applicant**) in relation to Wollondilly Shire Council's (**Council**) deemed refusal of a development application seeking consent for the subdivision of Lot 6 DP 1128635, known as 11 Westminster Place, Razorback (**site**), into five Torrens Title lots in two stages. The separate question for determination was whether the proposed development was prohibited under [cl 4.1B](#) of the [Wollondilly Local Environmental Plan 2011 \(WLEP 2011\)](#).

The necessity for the separate question arose from a dispute between the parties as to the proper construction of cl 4.1B in circumstances where the site was partially zoned RU2 Rural Landscape and partly E4 Environmental Living and comprised part of a larger, single land unit identified as an "Original holdings" under the WLEP 2011. The applicant adopted a textual approach to the interpretation of cl 4.1B, with the result that the clause applied to land identified on the Original Holdings Map. Council proposed a construction that had regard to context, including legislative history and the other subclauses in cl 4.1B, with the result that the clause applied to land that was both on the Original Holdings Map and zoned E4 Environmental Living.

**Issue:** Whether the proposed development was prohibited under cl 4.1B of the WLEP 2011.

**Held:** Separate question answered in the negative; costs reserved:

- (1) The wording of [cl 4.1B\(2\)](#) and [4.1B\(3\)](#) was clear, and the clause did not require the area the subject of the subdivision to be both zoned E4 Environmental Living and be identified as an original holding: at [42];
- (2) The heading of cl 4.1B did not displace the clear and ordinary meaning of the text in cl 4.1B(2). Using the heading would impose an unnaturally constricted meaning upon the words of the substantive provisions: at [43];
- (3) Recourse to the legislative history was neither necessary or appropriate in the circumstances: at [47];
- (4) The reference to "objective" in cl 4.1B(1) was different from an "objects clause" as commonly understood and, although there was some force in Council's overall construction of cl 4.1B arising from cl 4.1B(1) particularly due to its reference to "certain land within Zone E4 - Environmental Living", the Council's construction was not persuasive in light of the stark nature of the terms that followed in cl 4.1B(2), (3) and [\(4\)](#): at [50]; and
- (5) The matters of "mischief" referred to by Council did not assist in the interpretation of the clause given the clear text therein. That is, the legislative history or the extrinsic material referred to by Council did not displace the ordinary meaning of the text in cl 4.1B: at [56].

***Johnson Property Group Pty Limited v Lake Macquarie City Council*** [\[2020\] NSWLEC 4](#) (Pepper J)

**Facts:** Johnson Property Group Pty Ltd (**applicant** in Class 1 proceedings) sought the determination of a separate question. The Class 1 appeal concerned a development application (**DA**) for integrated development at a site that included road reserves. Part of the site that was proposed for use as a cycleway and intersection ran along several reserves that were used as public roads vested in the Lake Macquarie City Council (**Council**) as the roads authority. The Council did not provide consent in its capacity as the owner on the roads on which the construction of the cycleway and intersection was proposed. The DA was rejected by the Council because there was no evidence of owner's consent from all relevant owners as required by statute.

A discrete legal question arose because the Council argued that under the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EP&A Act\)](#), a decision to reject a DA may be the subject of review but once reviewed the decision could not be subject to further review.



The Council further contended that under the EP&A Act, the legal consequence of a rejected DA was that the DA was taken to have never existed. The Council put that there was a clear distinction between a rejection and a determination of a DA and that appeal rights arose only in respect of the latter. Therefore, because the Council had rejected the DA, it was considered never to have been made and no right of appeal was available. The separate question went to the competency of the present Class 1 appeal - that is, whether the applicant had a right of appeal against the Council's rejection of its DA. Both parties agreed that the application for a separate question should be granted.

In the alternative, the applicant sought to expedite the entirety of the final hearing and determination of the Class 1 appeal pursuant to [s 33](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**), which set out the different classes of the Land and Environment Court's (**LEC**) jurisdiction.

Issues:

- (1) Whether the application for a separate question should be granted; and
- (2) Whether the s 33 application was misconceived.

Held: Application for a separate question granted; s 33 application rejected:

- (1) The application all but compelled the ordering of the separate question because, if answered in the Council's favour, the Class 1 proceedings would be terminated. Moreover, the evidence required to answer the separate question was confined and was largely documentary in nature: at [48]; and
- (2) The application under s 33 of the Court Act was without merit because that provision did not empower the LEC to grant expedition. Rather, it merely allocated the powers to exercise the LEC's jurisdiction. The power to grant expedition was provided for in [s 61](#) of the [Civil Procedure Act 2005 \(NSW\)](#) and [r 2.1](#) of the [Uniform Civil Procedure Rules 2005](#): at [41].

***Williams v Shellharbour City Council*** [\[2020\] NSWLEC 3](#) (Moore J)

(related decision: *Williams v Shellharbour City Council* [\[2019\] NSWLEC 135](#) (Pepper J))

Facts: Mr Williams (**applicant**) applied to Shellharbour City Council (**Council**) to subdivide a parcel of land at 167 Swamp Road, Dunmore (**site**). The development application (**DA**) sought consent for the subdivision of the site to create six community title allotments, comprising five rural lots and one common lot. A local heritage dwelling known as "Seaview" was located on the site. The DA was refused consent. The applicant then commenced Class 1 proceedings to appeal the refusal.

Following a [s 34](#) conciliation conference pursuant to the [Land and Environment Court Act 1979 \(NSW\)](#), the applicant was granted leave by the Land and Environment Court to amend the DA and to rely upon amended plans and documentation. The Council subsequently successfully sought a separate question hearing held on a jurisdictional point. The applicant conceded that if the answer to the separate question was negative, then the DA must be refused.

Issue: Was the proposed development, which is a community title subdivision, "development for any purpose" pursuant to [cl 5.10\(10\)](#) of the [Shellharbour Local Environmental Plan 2013](#) (**SLEP 2013**).

Held: The proposed development was not "development for any purpose" and was prohibited; appeal dismissed; and costs reserved:

- (1) The proposed subdivision of the site did not satisfy [cl 4.1AA\(3\)](#) of the SLEP 2013 and therefore this provision did not operate to facilitate this proposed subdivision: at [16];
- (2) Clause 5.10(10) of the SLEP 2013 made it expressly clear that the concept of *development for any purpose* was unconstrained by the Land Use Table or any other provision of SLEP 2013 by incorporation of the words "even though development for that purpose would otherwise not be allowed by this Plan". However, subdivision must still be established as development for a purpose for this clause to apply: at [40];
- (3) [Clauses 4.1](#), [4.1AA](#), [4.2A](#) and [4.2B](#) of the SLEP 2013 did not contain, expressly or by implication, any notion of purpose: at [41];

- (4) “Separate development” means development subject to a subsequent application made to the relevant consent authority. This analysis was entirely consistent with the position that follows from *Smith v Randwick Municipal Council* (1950) 17 LGR (NSW) 246 and *Wehbe v Pittwater Council* [2007] NSWLEC 827: at [43];
- (5) The earthworks described as part of the development fell within [s 1.5\(1\)\(d\)](#) of the *Environmental Planning and Assessment Act 1979 (NSW)*, not s 1.5(1)(a). Therefore the earthworks were preparatory works and part of the subdivision, not part of any subsequent use of the land: at [44];
- (6) The conclusion reached by Tobias JA in *Lennard v Jessica Estates Pty Limited* [2008] NSWCA 121 at [61]-[63] was confined to the factual circumstances of the subdivision there considered: at [49]; and
- (7) The position adopted by the Council was correct and therefore “development for any purpose” in cl 5.10(10) did not incorporate this subdivision within its scope: at [52].

#### • **Strata Schemes Redevelopment:**

**Application by the Owners - Strata Plan No 61299 (No 2)** [2019] NSWLEC 154 (Pain J)

(related decision: *Application by the Owners - Strata Plan No 61299* [2019] NSWLEC 111 (Pain J))

**Facts:** Orders in *Application by the Owners - Strata Plan No 61299* [2019] NSWLEC 111 (**SP No 61299 (No 1)**) gave effect to a strata renewal plan (**SRP**) for the collective sale of a 159-lot strata scheme. The SRP required the 159 owners to sell their lots in accordance with a deed of agreement between the purchaser and the strata renewal committee. The completion of all sales was to occur by 18 November 2019. All but one owner (owner of Lot 63) had complied. The Owners Corporation of the strata plan (**OC**) sought various ancillary orders to give effect to the SRP by appointing a trustee to Lot 63 and discharging the mortgage associated with the lot.

**Issues:**

- (1) Whether an order should be made pursuant to [s 186\(1\)](#) of the *Strata Schemes Development Act 2015 (NSW)* (**Strata Schemes Development Act**) to appoint a trustee to Lot 63; and
- (2) Whether the costs of the ancillary orders application and the trustee’s costs should be payable from the proceedings of the sale of Lot 63 (rather than being borne by the OC).

**Held:** Trustee appointed for the sale of Lot 63; trustee to exercise the obligations as an owner of Lot 63 pursuant to orders made in *SP No 61299 (No 1)* giving effect to the SRP; HSBC Bank Australia Limited (**HSBC**) to deliver to the trustee the certificate of title and executed discharge of mortgage to permit settlement of the sale of Lot 63; owner of Lot 63 to pay the OC’s costs of the application; and trustee’s fees to be paid from the proceeds of sale of Lot 63:

- (1) *Appointment of trustee appropriate* The appointment of a trustee of property in order to facilitate its sale is expressly provided for in [s 186\(2\)\(a\)](#) of the Strata Schemes Development Act. An order requiring the provision of the owner’s certificate of title to the trustee can be made under [s 186\(2\)\(c\)](#): at [5]. The owner of Lot 63 was already bound by the orders made in *SP No 61299 (No 1)* to do that which is required to give them effect. The appointment of a trustee would enable the orders already made to be given effect and was therefore appropriate: at [6]. The proposed trustee had the necessary experience and qualifications to execute the contract for sale and ensure the discharge of the mortgage held by HSBC, the mortgagee of Lot 63: at [7]. HSBC holds the certificate of title for Lot 63 and, as mortgagee, is bound by the orders made in *SP No 61299 (No 1)*. Orders binding HSBC to deal with the discharge of the mortgage and delivery of the certificate of title as required to effect the collective sale of the strata scheme were appropriate: at [8]; and
- (2) *Costs* The Strata Schemes Development Act does not have any provisions dealing with ancillary orders such as the payment of costs of an application for an ancillary order or payment of a trustee’s fees: at [10]. The only costs provision applies to dissenting owners to a SRP: Strata Schemes Development Act s 188(1)(a). [Section 98](#) of the *Civil Procedure Act 2005 (NSW)* provides a general

power to make a costs order subject to the rules of a court, if any. [Rule 3.7](#) of the [Land and Environment Court Rules 2007](#) did not apply to these Class 3 proceedings. The costs discretion was therefore at large subject to being exercised judicially, taking into account relevant matters: at [11]. This was the first ancillary order application under the Strata Schemes Development Act considered by the Land and Environment Court. Compulsory acquisition cases under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (**Land Acquisition Act**) are a category of Class 3 matters where the costs' discretion is also at large: at [12]. The process under the Strata Schemes Development Act is different to the Land Acquisition Act as compensation is determined for active dissenting owners at the same time as an order is made enabling the sale of property: at [13]. Compensation offered for the sale of lots in a strata scheme must be just and equitable in all the circumstances: Strata Schemes Development Act [s 182\(1\)\(d\)](#). The owner of Lot 63, through her failure to comply with court orders made in *SP No 61299 (No 1)*, would cause unnecessary expense to be incurred by all the complying lotholders in relation to the appointment of a trustee and this ancillary order application if no costs order was made. It was fair and equitable that she be responsible for these costs: at [14].

- **Mining:**

***Morris v Hutchison*** [\[2019\] NSWLEC 164](#) (Moore J)

(related decision: *Morris v Hutchison (No 2)* [\[2019\] NSWLEC 189](#) (Moore J) (see "Costs"))

**Facts:** On 25 May 2015, in the Lightning Ridge region, Mr Morris (**applicant**) and Mr Hutchison (**first respondent**) entered into an arrangement that the applicant would mine opal on the first respondent's mineral claim (**Claim 1**). The arrangement was fruitful to both parties, with Claim 1 yielding roughly \$840,000 worth of opal. However, after a dispute between the applicant and the first respondent, the first respondent purported to terminate the agreement between them in August 2017. The first respondent locked the applicant out of Claim 1 and also blocked the entrance to the underground workings on Claim 1 so the applicant could not retrieve his Super Digger, a piece of machinery that was invaluable to his mining work.

In early 2018, the applicant commenced proceedings seeking relief with respect to the arrangement he had with the first respondent, the blocking of access to his Super Digger and costs for work on his Super Digger that the applicant submitted was for the first respondent's benefit. The first respondent filed a cross-claim seeking damages for breach of the mining arrangement.

The exact terms of the arrangement were in dispute between the parties. The applicant contended that the arrangement included not only Claim 1 but also a second claim the parties had agreed he would mine once he had completed Claim 1 (**Claim 2**). The first respondent disputed this, asserting he had sold Claim 2 to a third party, a Mr Hawkins (**second respondent**) who also resided in the region.

**Issues:**

- (1) Whether the arrangement between the applicant and the first respondent for the mining of Claim 1 was a partnership;
- (2) What were the terms of that arrangement;
- (3) Did either party breach the terms of the arrangement;
- (4) If so, what were the consequences (if any) of such breaches on the arrangement between the applicant and the first respondent to mine Claim 1;
- (5) Did the arrangement between the applicant and the first respondent also encompass future mining of Claim 2;
- (6) How was the transfer of Claim 2 by the first respondent to the second respondent to be viewed;
- (7) Was it appropriate to contemplate making orders concerning the renewal of Claims 1 and 2, when their present terms expire in late 2019;
- (8) Did the first respondent unlawfully prevent the applicant from accessing his Super Digger;

(9) Who should pay for the cost of the Parkes Hydraulic Services Pty Ltd's (**Parkes Hydraulics**) work; and

(10) What relief should the applicant be awarded if arrangement was terminated without valid cause.

Held: First respondent was to cause title to Claim 1 to be registered in the name of the applicant and pay the associated costs; the applicant's claim for compensation for the detention of the applicant's mining equipment underground on Claim 1 dismissed; first respondent to pay the applicant the sum of \$10,000 for works on the applicant's Super Digger undertaken for the benefit of the first respondent; first respondent's cross-claim dismissed; first respondent to pay applicant's costs:

- (1) Where it would require making significant semantic and legal assumptions, contrary to both of the parties' evidence in order to force a conclusion that there was a partnership in a legal sense, it was not appropriate to do so: at [161];
- (2) The arrangement was a contractual profit-share arrangement. It encompassed an arrangement whereby the applicant would mine Claim 1 to exhaustion of its potential before moving on to mine Claim 2 on a similar basis. It was confined to the share of profits to be derived from opal mined from the claims after reimbursement to the applicant of his fuel costs: at [7]-[8];
- (3) The arrangement was unilaterally terminated by the first respondent on or about 10 August 2017 without valid cause: at [10];
- (4) As there was no breach by the applicant found, no consequences of such a breach needed to be considered: at [10];
- (5) The first respondent's evidence was, in part, fabricated and was generally unreliable so his evidence was not to be accepted unless independently corroborated: at [123] and [130];
- (6) The applicant's oral evidence was preferable to the first respondent's regarding future mining. The applicant's oral evidence that the arrangement with the first respondent included Claim 2 was accepted: at [184];
- (7) The transfer between the first respondent and second respondent was a sham. The first respondent remained the beneficial owner of Claim 2 despite having transferred the nominal ownership of that claim to the second respondent: at [17], [18];
- (8) The working relationship between the applicant and the first respondent had irretrievably broken down, therefore the appropriate way to compensate the applicant for the unlawful termination of the arrangement was to order the first respondent to transfer Claim 1 to the applicant within 14 days of the date of the orders in these proceedings: at [302], [303];
- (9) The first respondent had no valid basis to block the entrance to the underground workings on Claim 1 to prevent the applicant from removing his Super Digger. However as there was no proper available basis to calculate compensation, the applicant was denied any relief on this ground: at [19]-[20];
- (10) Of the work undertaken by Parkes Hydraulics on the applicant's Super Digger, a significant portion of that work was requested by the first respondent. As that work was organised only for the benefit of the first respondent, he should bear the cost of this: at [21]; and
- (11) As no specific order was sought against the second respondent it was not appropriate to make any orders against him, only note that he held Claim 1 as trustee for the first respondent: at [305].

• **Interlocutory Decisions:**

***Bobolas v Waverley Council*** [\[2019\] NSWLEC 148](#) (Moore J)

(related decisions: *Bobolas v Waverley Council (No 2)* [\[2019\] NSWLEC 157](#) (Moore J); *Bobolas v Waverley Council (No 3)* [\[2019\] NSWLEC 162](#) (Moore J); *Bobolas v Waverley Council (No 4)* [\[2019\] NSWLEC 163](#) (Moore J))

**Facts:** Four matters were to be heard before the Land and Environment Court (**LEC**) relating to the residence of Mrs Mary Bobolas, and her two daughters, Elena and Liana Bobolas (**applicants**), in a longstanding dispute with Waverley Council (**Council**). This included two judicial review matters, a Class 1 appeal and a Class 2 appeal.

On the morning of the first day of the hearing, the applicants filed a Notice of Motion with the LEC seeking that the hearing dates be vacated. The reasons for this request included that the applicants' pro bono counsel was not available, that the applicants' pro bono counsel had not been served with Council documents, that the Council had not complied with timetabling of orders regarding evidence and had not supplied the correct documents, and lastly that weather, illness, school holidays and computer trouble made it impossible for the applicants to have their evidence and documents in on time and an extension was needed to remedy this.

**Issue:** Whether the applicants' request to have the hearing dates vacated should be granted.

**Held:** Application to vacate dismissed:

- (1) There was no validity in the complaint about the service of the documents: at [30];
- (2) There was no evidence that the pro bono counsel actually intended to appear at the hearing. The applicants had been on notice of the hearing dates for nearly three months with liberty to restore at any time: at [33]-[35];
- (3) The applicants had six weeks to complain about Council documents to the LEC, including the liberty to relist before the Duty Judge and had not done so: at [35]; and
- (4) To allow the application would have been entirely contrary to the objectives of [s 56](#) of the [Civil Procedure Act 2005 \(NSW\)](#) for the just, quick and cheap disposition of the issues generally in dispute between the parties as there was no merit in the application: at [38]-[39].

***Byron Shire Council v Ardill Payne & Partners*** [\[2019\] NSWLEC 153](#) (Duggan J)

(related decision: *Ardill Payne & Partners v Byron Shire Council* [\[2019\] NSWLEC 1297](#) (Smithson C))

**Facts:** Byron Shire Council (**Council**) commenced an appeal pursuant to [s 56A](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**) against the decision to approve a tourist hotel development. By Notice of Motion filed on 19 September 2019 the Council sought an order that pursuant to [r 7.3](#) of the [Land and Environment Court Rules 2007 \(NSW\)](#), the time for commencement of the appeal be extended. The respondent neither consented nor opposed the order sought in the Notice of Motion and did not rely on any evidence or assert any prejudice in the event that the order was made.

**Issue:** Should an extension of time be granted.

**Held:** Extension of time to commence appeal granted:

- (1) The Council was granted leave to amend the Summons in accordance with the Amended Summons filed 24 October 2019 and pursuant to [r 50.3\(1\)\(c\)](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**UCPR**) the time for commencement of the appeal was extended to 27 August 2019: at [14]; and
- (2) Consistent with the earlier decision of decision in *Northern Beaches Council v Tolucy Pty Ltd* [\[2019\] NSWLEC 151](#), the relevant appeal time for s 56A was in fact 28 days under [r 50.3](#) of the UCPR: at [4]. Although the time for appeal is 28 days (and therefore the delay was 33 days), the



length of the delay was still relatively small. Applying the principles of *Jackamarra v Krakouer* (1998) 195 CLR 516 in relation to the discretion, the extension of time was granted: at [8]-[13].

***Charara v Ku-ring-gai Council* [2019] NSWLEC 183** (Pain J)

**Facts:** Ms Charara (**applicant**) commenced these Class 1 proceedings under [s 8.18\(4\)](#) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**) challenging a stop work order dated 16 April 2019 issued by Ku-ring-gai Council (**Council**) to the applicant. The stop work order issued under [s 9.34](#) of the EP&A Act prohibited the removal of trees or building work on the applicant's land for the specified reason that certain development consents had lapsed in September/October 2015. The applicant, in her Statement of Facts and Contentions (**SOFAC**), asserted that the development consents had been validly modified in February 2015. Work had commenced (relying on construction certificates issued in September 2015) and the applicant had incurred substantial costs, including payment of a substantial [s 94](#) contribution. The Council stated in its SOFAC in Reply that the development consents had lapsed due to the operation of [s 95\(6\)](#) (now [s 4.53](#)) of the EP&A Act and could not have been lawfully modified in February 2015 (and were thus a nullity), and the related construction certificates were also invalid.

The applicant filed a Notice of Motion seeking an order striking out the Council's SOFAC in Reply relying on [r 14.28](#) of the *Uniform Civil Procedure Rules 2005* (**UCPR**) and [s 23](#) of the *Land and Environment Court Act 1979 (NSW)* (**Court Act**). The applicant submitted that the Council's contention that the relevant development consents and the construction certificates were invalid could only be raised in Class 4 proceedings.

**Issue:** Whether the Council's SOFAC in Reply (unilateral re-exercise of power under the EP&A Act by asserting that the modified development consents were a nullity at law) ought be struck out as it disclosed no reasonable cause of action known in Class 1 proceedings and was an abuse of process: UCPR [s 14.28\(1\)\(a\)](#) and [\(c\)](#).

**Held:** Application upheld; Council's SOFAC in reply to be struck out; orders delayed for two weeks to permit the Council to consider if it wished to commence Class 4 proceedings:

- (1) The Council's actions infringe the fundamental administrative law principle that once administrative power has been exercised, however mistakenly, an administrative decision-maker cannot on its own re-exercise power to revoke or treat its decision (here to issue modification of development consents) as a nullity - only a court of competent jurisdiction can: *Coalcliff Community Association Inc v Minister for Urban Affairs and Planning* (1999) 106 LGERA 243, [\[1999\] NSWCA 317](#). This fundamental principle is subject to any relevant statutory provisions. [Section 4.57](#) of the EP&A Act provides for the revocation of development consents subject to particular processes being followed. None of these processes were followed by the Council: at [27].
- (2) A Class 1 appeal is in the nature of a merits review of the decision under appeal: *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [\[2019\] NSWCA 28](#) at [150] and [173] and Court Act [s 39\(2\)](#): at [38]. [Section 22](#) of the Court Act, which requires the Land and Environment Court (**LEC**) to grant "all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by that party", does not support a finding that all relevant matters necessary to resolve the issues between the parties can be considered in these Class 1 proceedings: at [39].
- (3) The circumstances underpinning the stop work order are legally complex and would require the LEC to consider whether declarations of nullity of the modified development consents and invalidity of the construction certificates issued in reliance on them should be made. If Class 4 proceedings seeking such declarations are commenced by the Council, it would potentially have to overcome any statute-barred period under [s 4.59](#) of the EP&A Act and/or [r 59.10](#) of the UCPR. Even if warranted legally, there would be discretionary issues relevant to the utility of making declarations of invalidity. The wide powers of the LEC in Class 4 proceedings are identified in [s 20\(2\)](#) of the Court Act: at [40].

**Michael Ryan v Northern Regional Planning Panel (No 3)** [\[2019\] NSWLEC 168](#) (Robson J)

(related decision: *Michael Ryan v Northern Regional Planning Panel (No 2)* [\[2019\] NSWLEC 167](#) (Robson J))

**Facts:** Mr Michael Ryan (**applicant**) commenced proceedings against the Northern Regional Planning Panel (**Panel**), Lismore City Council (**Council**), Winten (No 12) Pty Ltd (**Winten**), W A Sexton (**fourth respondent**) and Glorbill Pty Ltd (**fifth respondent**) seeking declaratory and injunctive relief in relation to a development consent granted by the Panel on 17 October 2018 (**consent**). The consent related to development comprising the subdivision of land at North Lismore to create 390 residential allotments, a local centre allotment, open space, and areas for environmental management.

The applicant filed a Notice of Motion (**motion**) seeking an order that Winten be restrained from carrying out any development pursuant to the consent; from clearing or damaging native vegetation or carrying out earthworks; and from damaging the habitat of threatened species. The only two bases upon which relief in the motion was sought related to threatened species (microbats) and flood risk.

On the date that judgment was due to be handed down in the motion, the applicant was given leave to file in court a further motion (**second motion**) seeking, inter alia, leave to reopen his case and an order that the applicant's ecological expert be permitted to attend the site for the purposes of preparing a report on the impact on threatened species and threatened species habitats of the works undertaken at the site. For reasons which the Land and Environment Court (**LEC**) separately delivered, the second motion was dismissed.

**Issue:** Whether the urgent interlocutory relief sought by the applicant should be granted.

**Held:** Notice of Motion dismissed; costs reserved:

- (1) In light of the preliminary nature of the expert ecological report prepared for the applicant (**Milledge Report**) and taking into account that it did not make any reference to the flora and fauna assessment report prepared for Winten, or the adequacy or otherwise of the surveys and other work undertaken therein, the Milledge Report (in its present form) was not persuasive, apart from raising the results of Mr Milledge's recent investigations: at [49];
- (2) The compendious nature of the Milledge Report, even if fully accepted, was not, on its own, on a fair reading, indicative of a serious question to be tried. Even if there was a serious question to be tried, the evidence regarding the balance of convenience favoured not granting interlocutory relief: at [50], [52];
- (3) The preliminary observations contained in the Milledge Report were not sufficient on their own to persuade the LEC that the applicant had made out his case for interlocutory relief in relation to concerns regarding microbats. The findings in the Milledge Report did not precisely indicate the presence of relevant bat species on that part of the land undergoing development at the time: at [53];
- (4) The only evidence relied upon by the applicant in relation to flood risk included the North Lismore Flood Impact Assessment undertaken on behalf of Winten (which was before the Panel), various letters from the Office of Environment and Heritage in relation to flood impact, and a response from the hydrological engineer retained by Winten (**material**): at [65];
- (5) The material indicated that Council (and it follows, the Panel) had before it detailed expert material in relation to likely flooding. It was also clear that there was material suggesting that Council formed the requisite state of satisfaction pursuant to [cl 6.3](#) of the [Lismore Local Environmental Plan 2012](#): at [67]; and
- (6) Reliance upon the material referred to above (and/or any other material before the LEC) did not justify a finding that there was a serious question to be tried. Even if there was a serious question to be tried, the balance of convenience favoured Winten: at [68].

**Northern Beaches Council v Tolucy Pty Ltd** [\[2019\] NSWLEC 151](#) (Duggan J)

**Facts:** Northern Beaches Council (**applicant**) filed a [s 56A](#) appeal under the [Land and Environment Court Act 1979 \(NSW\)](#) from the decision of a commissioner approving a development application made by Tolucy Pty Ltd (**respondent**) for a residential aged care facility and serviced self-care dwellings at Terrey Hills. The s 56A appeal was filed 33 days after the date of the decision. The respondent contended that a s 56A appeal must be lodged within 28 days of the material date and therefore the appeal was five days out of time and should be dismissed as incompetent. The applicant contended that the time for the lodgement of the s 56A appeal was 60 days and therefore in time. In the alternative, if the appeal was filed out of time, the applicant sought an extension, which extension was opposed by the respondent.

**Issues:**

- (1) Was the time for s 56A appeals governed by the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**UCPR**) or by the [Land and Environment Court Rules 2007 \(NSW\)](#) (**Court Rules**), and
- (2) Whether discretion should be exercised to extend time.

**Held:** Extension of time to lodge the appeal granted; Notice of Motion otherwise dismissed:

- (1) [Rule 7.1](#) of the Court Rules does not apply and the time for filing a s 56A appeal is governed by [r 50.3](#) of the UCPR and therefore must be commenced within 28 days from the material date or such other date as may be fixed by the Land and Environment Court (**LEC**) upon an application being made in accordance with [r 50.3\(2\)](#) of the UCPR: at [42]; and
- (2) The applicant submitted that the proper time requirements for s 56A appeals were guided by [r 7.1](#) of the Court Rules. The respondent's submissions were accepted and the time for filing was in fact governed by r 50.3 of the UCPR (thus departing from the previous decision of Pepper J in *The v Dormer* [\[2016\] NSWLEC 42](#)). Upon the proper construction of r 7.1, to extend the meaning of "appeal" to matters arising under s 56A would produce inconsistencies: at [35]-[43]. Specifically, r 7.1 applies to a rehearing not an appeal pursuant to s 56A: [38]. The proper time being 28 days, time was extended, on the basis that there was no unreasonable delay in commencing the appeal: [48]-[69].

**Penrith City Council v Dincel Construction System Pty Limited and Gaonor Pty Limited** [\[2019\] NSWLEC 197](#) (Robson J)

**Facts:** Penrith City Council (**Council**) sought leave to rely upon an expert report which was filed late and raised potential contamination issues that had not been the subject of a claim or pleading. The report also addressed "shortfalls" in previous expert reports.

**Issue:** Whether leave ought to be granted to the applicant to rely on an expert report which had been produced late and may cause prejudice to the respondent.

**Held:** Leave granted to rely on expert report:

- (1) The evidence sought to be relied upon was material to the matters before the court: at [21]. Further, the nature and extent of any contamination of the fill deposited was an important matter in relation to the relief sought by Council, as the presence or otherwise of contaminated material could influence any order made by the Court: at [22];
- (2) The evidence could be dealt with in an expedient manner that was also just, quick and cheap, as the respondent's expert was available and able to give viva voce evidence in response at the hearing: at [22]; and
- (3) Although the Council's conduct in providing the report late should not be rewarded, Council was seeking to enforce the planning regime which is a matter of public importance: at [23]. Despite some prejudice flowing to the respondents, an appropriate balance between each of the parties and the interests of justice would be met by an order granting leave to Council to rely on the expert report: at [24].

***RD Miller Pty Ltd v Roads and Maritime Services NSW (No. 2)*** [\[2019\] NSWLEC 173](#) (Duggan J)

(related decision: *RD Miller Pty Ltd v Roads and Maritime Services NSW* [\[2019\] NSWLEC 129](#) (Robson J))

**Facts:** In the substantive proceedings, RD Miller Pty Ltd (**applicant**) commenced proceedings in Class 3 relating to a claim for compensation pursuant to [s 68\(1\)](#) of the [Roads Act 1993 \(NSW\)](#) (**Roads Act**) for loss of access across the boundary of its land (**land**) to the adjoining road formerly known as the Princes Highway (now known as Newtown Road) (**road**). By an earlier Notice of Motion, Roads and Maritime Services NSW (**RMS**) was successful in its application to strike out paragraphs 37(a) and (b) of the applicant's Points of Claim.

The applicant sought leave to amend its Points of Claim under [s 64](#) of the [Civil Procedure Act 2005 \(NSW\)](#) (**Civil Procedure Act**) to make various amendments and to add redrafted paragraphs 37(a) and (b). The RMS did not oppose the inconsequential amendments but opposed the proposed amendment to include paragraphs 37(a) and (b) and the incidental amendments to paragraphs 34 and 35A.

**Issue:** Should the applicant be granted leave to amend its Points of Claim.

**Held:** Amendment permitted in part:

- (1) The applicant was granted leave to amend its Points of Claim, with the exception of those relating to paragraphs 34, 35A, 37(a) and 37(b), for which leave was refused: at [28]; and
- (2) The refused amendments were seeking to reargue the same essential question before Robson J as to whether the legislative scheme permits a claim for compensation under the Roads Act relating to a restriction on access (either physical or by some other means) that arises earlier in time than the date of the order restricting or denying access to the Road as a controlled access road ([s 67](#) of the Roads Act). As a consequence, the proposed amendments could not be distinguished from those earlier rejected and were not to be permitted: at [16] and [17].

***TL & TL Tradings Pty Ltd v City of Parramatta Council*** [\[2019\] NSWLEC 160](#) (Robson J)

(related decisions: *TL & TL Tradings Pty Ltd v City of Parramatta Council* [\[2019\] NSWLEC 1372](#) (O'Neill C); *TL & TL Tradings Pty Ltd v City of Parramatta Council* [\[2017\] NSWLEC 142](#) (Moore J); *TL & TL Tradings Pty Ltd v City of Parramatta Council* [\[2016\] NSWLEC 150](#) (Moore J))

**Facts:** TL & TL Tradings Pty Ltd (**applicant**) appealed against the City of Parramatta Council's (**Council**) deemed refusal of an application to modify a development consent which provided for the use of Unit 7, 1-3 Sutherland Street, Clyde (**premises**) as a brothel subject to a two-year trial period. The modification application sought a continuation of the use on a permanent basis. The applicant filed a Notice of Motion seeking orders that the sole contention (**Contention 1**) raised in Council's Statement of Facts and Contentions filed be struck out in its entirety, that Council file and serve an Amended Statement of Facts and Contentions, and that the listed [s 34](#) conciliation conference be vacated.

The applicant submitted that Contention 1 did not articulate impacts and, properly construed, it relied upon alleged unlawful past conduct. The applicant contended those matters were not relevant to the Land and Environment Court's (**LEC**) consideration of the application. Council submitted that [s 4.56\(1A\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) clearly provides that the LEC "must take into consideration" the reasons given by the consent authority for the grant of the consent that is sought to be modified.

**Issue:** Whether it was appropriate in the circumstances to strike out Contention 1.

**Held:** Notice of Motion dismissed; s 34 conciliation conference vacated; applicant ordered to pay Council's costs of the Notice of Motion:

- (1) In the absence of discrete evidence, and on the assumption that Council would be in a position to marshal evidence in relation to its concerns as articulated in Contention 1 at the substantive hearing, the applicant had not made out its case for striking out Contention 1: at [34];

- (2) Contention 1 provided that a trial period should be imposed because of a concern as to the “inability to safely manage the subject premises as a brothel”. Although it was particularised in some detail, the contention did not provide that the trial period was required *due* to past breaches: at [35];
- (3) When considering a later application for an enduring consent, the LEC is entitled to consider the operation and the details thereof during a trial period: at [36];
- (4) Whether the impacts of the ongoing use of the premises could be identified with precision and whether it was appropriate to impose a trial period were matters for consideration at the final hearing: at [38];
- (5) Council’s submission was correct that the final sentence of s 4.56(1A) of the EP&A Act requires the LEC (at hearing) to take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified: at [39];
- (6) As the relief sought by the applicant was not to be granted, there was no need to make an order in relation to re-pleading: at [44]; and
- (7) There was agreement between the parties that there was no utility in conducting a s 34 conciliation conference given that the parties had already undertaken without prejudice discussions. Vacating the conciliation conference would promote the just, quick and cheap resolution of the issues in dispute: at [45].

- **Costs:**

***Hy-Tec Industries (Queensland) Pty Ltd v Tweed Shire Council (No 2)*** [\[2020\] NSWLEC 5](#) (Pain J)

(related decision: *Hy-Tec Industries (Queensland) Pty Ltd v Tweed Shire Council* [\[2019\] NSWLEC 175](#) (Pain J))

**Facts:** In *Hy-Tec Industries (Queensland) Pty Ltd v Tweed Shire Council* [2019] NSWLEC 175, Pain J set aside the determination of the Environment Protection Authority (EPA) to vary an Environment Protection Licence (EPL). Pain J found that the EPA exhibited legal error in its approach to the EPL variation based solely on Tweed Shire Council’s (**Council**) erroneous purported construction of a condition of development consent. The EPA filed a submitting appearance save as to costs.

**Issue:** Whether the Council only, or both the Council and the EPA, should be liable for the applicant’s costs as the successful party in the substantive proceedings.

**Held:** Council to pay the applicant’s costs of the substantive proceedings; Council to pay the EPA’s costs of the costs hearing:

- (1) The primary outcome that must be achieved in a costs decision is the appropriate compensation of the successful applicant: at [29]-[31]; the usual approach to costs where a submitting appearance is filed is that costs are not awarded after that is filed. In proceedings which are actively defended by another contradictor, the mere fact that the decision-maker is ultimately found to have erred in its approach is not a sufficient reason to order costs against it, being costs incurred after the entry of a submitting appearance: at [26]-[27].

***Kenneth William Allport v Lismore City Council*** [\[2019\] NSWLEC 177](#) (Robson J)

(related decision: *Kenneth William Allport v Lismore City Council* [\[2017\] NSWLEC 1606](#) (Bish C))

**Facts:** In 2017, the Lismore area was affected by ex-Tropical Cyclone Debbie. As a result, there was a land slip which impacted Mr Allport’s (**applicant**) land and Lismore City Council’s (**Council**) land. Council issued an order (**Council Order**) to the applicant requiring the applicant to place his land in a safe condition and remediate damage caused by the land slip. The applicant commenced Class 2



proceedings appealing against the Council Order. After a conciliation conference, an agreement was reached and orders (**orders**) were entered.

The orders provided, inter alia, for Council to complete remediation works in accordance with a joint report prepared by the parties and the applicant was required to permit access to his land for the carrying out of those works. Council's contractor found asbestos containing material (**ACM**) at the site which had the effect of increasing the cost of the works. The ACM needed to be transported to, and disposed of in, Queensland. Due to a new waste levy being introduced, there would be additional costs for its disposal after 30 June 2019. In April 2019, the applicant withdrew his consent allowing Council to access his land. As a result, in May 2019, Council filed a motion (**Contempt Motion**) seeking, inter alia, orders that the applicant was guilty of contempt by failing to provide Council with access to his land for the purpose of carrying out works in contravention of orders made by the Land and Environment Court. On the day that the Contempt Motion was filed, the applicant gave Council permission to access his land subject to conditions. Council then filed a motion (**Expedition Motion**) seeking orders that the Contempt Motion be heard on an expedited basis. After negotiations between the parties, the applicant granted Council access to his property pursuant to an agreement for lease, and Council no longer pressed the substantive orders sought in either the Contempt Motion or the Expedition Motion.

This case concerned a motion filed by the applicant seeking orders that the Contempt Motion and the Expedition Motion each be dismissed, and an order that Council pay the applicant's costs on an indemnity basis.

Issue: Whether the applicant was entitled to his costs in relation to the two motions filed by Council.

Held: Contempt Motion dismissed; Expedition Motion dismissed; costs motion filed by the applicant dismissed; no order for costs:

- (1) Notwithstanding the fact that ACM was subsequently discovered when Council's agents were properly attending to preliminary works to effect the agreement provided for in the orders, the applicant's submission that Council was either responsible for the conduct which led to the ACM being on the site in the first place was not accepted, nor was it accepted that there was any conduct, material or evidence indicating that Council should have been aware that there was ACM on or about the site: at [35];
- (2) The extent of the ACM on the site meant that the anticipated increase in the costs of the work to be undertaken was a matter that was not otherwise able to be anticipated and was not the result of Council's conduct. It was also beyond Council's control that the Queensland Government would significantly increase the rates payable for waste disposal: at [37];
- (3) Council's concern that it could not access the applicant's land to undertake the works required due to the applicant's withdrawal of consent was properly a matter of importance to Council when it filed the Contempt Motion in an attempt to facilitate performance of the orders. It followed that the urgency with which it sought to have the Contempt Motion proceed resulted in the Expedition Motion being filed. Council's conduct in this regard was both reasonable and understandable: at [38];
- (4) The applicant's letter to Council purportedly granting access to his land was subject to such restrictions that it did not amount to effective permission to access the land as required by the orders: at [40];
- (5) Council's communication to the applicant that, as a result of the lease allowing Council to access his land, Council no longer sought the relief in the two motions was found to be fair and reasonable in the circumstances: at [42]; and
- (6) Council did not act unreasonably in filing either of the motions. It would not be fair and reasonable to make any costs award in the applicant's favour: at [43].

**Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW (No 4) [2019] NSWLEC 140** (Pain J)

(related decision: *Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW* [2019] NSWLEC 20 (Pain J))

**Facts:** In *Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW* [2019] NSWLEC 20 (**LDM No 2**), Pain J dismissed Local Democracy Matters (**LDM**) judicial review proceedings. Under challenge was the decision of the Minister for Planning, the third respondent (**Minister**), to approve a concept plan and Stage 1 works for the demolition of the Sydney Football Stadium (**SFS**) at Moore Park Sydney. LDM submitted that each party should pay their own costs relying on r 4.2(1) of the [Land and Environment Court Rules 2007 \(NSW\)](#) (**Court Rules**). The three active respondents sought orders that LDM pay their costs.

**Issue:** Whether departure from the usual costs rule that costs follow the event is warranted per r 4.2(1) of the Court Rules such that each party should pay its own costs. According to *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd* (2010) 178 LGERA 411, [2010] NSWCA 353 (**Caroona**), the application of r 4.2(1) of the Court Rules requires satisfaction of a three-step test. LDM submitted that:

- (1) First, the litigation was characterised as having been brought in the public interest;
- (2) Second, there was “something more” than the mere characterisation of the litigation as being brought in the public interest; and
- (3) Third, there were no relevant countervailing circumstances to prevent departure from the usual costs order.

**Held:** Each party to pay their own costs:

- (1) LDM acted in the public interest because it was a community group established to promote democracy in specified local government areas; it would gain no benefit directly if the proceedings were successful, and the grounds raised in the proceedings alleged important matters concerning the assessment of the SFS and raised matters of considerable public importance given the location and size of the SFS: at [47];
- (2) Ground 2 in *LDM No 2* concerned the application of [cl 6.21](#) in the [Sydney Local Environmental Plan 2012](#) which required consideration of design excellence. Given the significance of the SFS building the approach to design excellence by the Minister was significant in a legal and environmental sense: at [56];
- (3) Ground 3 concerned the application of [cl 7\(1\)](#) of [State Environmental Planning Policy No 55—Remediation of Land](#) which raised new issues concerning the application of that clause in the context of the concept plan approved by the Minister which had not previously been explored;
- (4) Accordingly two out of the three grounds of review satisfied the “something more” requirement outlined in *Caroona*: at [57];
- (5) The submission that LDM served a political interest (because members of LDM were also members of The Greens political party) and constituted a countervailing circumstance was rejected. LDM was not a political party. That participation in a usual democratic process (the State election) was occurring at the same time as the litigation reflects the timing of events in the election cycle and government decision-making about the SFS: at [58];
- (6) The Council was a democratically elected representative body under the [Local Government Act 1993 \(NSW\)](#) which expressed concern in various ways about the impact of the SFS redevelopment. Due to the physical and public significance of the SFS site, the proceedings were public interest in nature: at [77];
- (7) As above, Ground 2 of *LDM No 2* (Council’s sole ground) considering design excellence satisfied the “something more” requirement in *Caroona*: at [78]; and
- (8) No countervailing considerations arose since the Council was efficient in the manner in which it argued the case and did not duplicate LDM’s submissions on this ground: at [79].

**Morris v Hutchison (No 2)** [\[2019\] NSWLEC 189](#) (Moore J)

(related decision: *Morris v Hutchison* [\[2019\] NSWLEC 164](#) (Moore J))

**Facts:** The substantive nature of the dispute was decided in the previous Class 8 proceedings. As part of the orders made by the Land and Environment Court, Owen Hutchison (**first respondent**) was required to pay Shane Morris (**applicant**) costs as agreed or assessed. However, the parties were given the right to propose alternative costs orders. The applicant's legal representative exercised this right and sought an alternative costs order. A letter of settlement offer was made during the prior proceedings, which the applicant sought to rely on for indemnity costs.

In conjunction with the costs hearing, substituted performance orders were made to permit transfer of Mineral Claim 56861 from the first respondent to the applicant as the first respondent had failed to do so within the time required by the orders in the substantive proceedings.

**Issue:** On what basis should the costs be apportioned between the parties.

**Held:** Costs awarded on a gross sum amount basis generally with indemnity costs appropriate for the substitute performance element of the hearing:

- (1) The letter of offer of 6 March 2019 was not a valid offer. Consequently, failure to accept the "offer" could not trigger costs consequences: at [26];
- (2) The availability of the option to seek an alternative costs order did not allow an impermissible canvassing of previous determinations regarding costs: at [37];
- (3) It was not appropriate to make costs orders against Justin Hawkins, the second respondent, in these circumstances, as he was a "passenger" in the proceedings: at [34] and [38];
- (4) It was appropriate to order that the costs of the substituted performance application be paid on the indemnity basis: at [50];
- (5) Timing was an appropriate consideration when there is potential for frustration of court orders: at [52]-[53];
- (6) Legal fee rates were not liable to challenge in a costs dispute where no evidence had been tendered to that effect: at [58]; and
- (7) Reimbursement of mineral claim transfer fees was appropriate to be ordered: at [62].

• **Merit Decisions (Judges):**

**Bobolas v Waverley Council (No 2)** [\[2019\] NSWLEC 157](#) (Moore J)

(related decisions: *Bobolas v Waverley Council* [\[2019\] NSWLEC 148](#) (Moore J); *Bobolas v Waverley Council (No 3)* [\[2019\] NSWLEC 162](#) (Moore J); *Bobolas v Waverley Council (No 4)* [\[2019\] NSWLEC 163](#) (Moore J))

**Facts:** On 20 March 2019, Waverley Council (**Council**) issued two emergency orders to Ms Mary Bobolas (**applicant**) at her premises in Bondi. The first order was made pursuant to [s 124](#) of the [Local Government Act 1993 \(NSW\)](#) (**Local Government Order**). The second order was made pursuant to [s 9.35](#) and [Sch 5, Pt 1](#) of the [Environment Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act Order**).

This decision concerned the Class 1 application made by the applicant regarding the EP&A Act Order made by Waverley Council on 20 March 2019. This order was made due to numerous safety concerns to the applicant's premises. The applicant filed an appeal against the order on 6 June 2019.

The applicant questioned the validity of the order. The applicant submitted that the order was based on evidence from a structural engineer retained by the Council who obtained the evidence to write the report illegally, and therefore there was no valid foundation for the order. The applicant also submitted that the terms of the order were vague and therefore unenforceable.

The Council contended that the appeal was statute barred as filed well after the expiry of the time limit imposed by the EP&A Act for the commencement of such an appeal. The Council also contended that the order was appropriate and necessary with the appeal having no merit foundation.

Issues:

- (1) Whether the appeal was statute barred as it was filed after the expiry of time limit imposed by the EP&A Act; and
- (2) Whether the EP&A Order was validly made.

Held: Appeal dismissed; costs reserved:

- (1) The appeal was statute barred due to being outside the 28 days given for appeals of this nature by [s 8.18\(3\)\(a\)](#) and [s 10.11](#) of the EP&A Act: at [62]-[63];
- (2) It was not possible to extend time for filing such an appeal. This is a consequence of the combination of [r 7.1\(2\)](#) and [r 7.3](#) of the [Land and Environment Rules 2007 \(NSW\)](#). The first of these rules acts to prevent, expressly, extensions of time limits when those time limits are established by an Act (as is here the case) and, whilst [r 7.3](#) contains a more general, facultative provision concerning the extension of time, it does not apply to time limits set by Acts of Parliament and, thus, cannot be read as modifying the prohibition contained in [r 7.1\(2\)](#): at [64]; and
- (3) It was unnecessary to consider matters of merit as the appeal was statute barred: at [68].

***Bobolas v Waverley Council (No 3)*** [\[2019\] NSWLEC 162](#) (Moore J)

(related decisions: *Bobolas v Waverley Council* [\[2019\] NSWLEC 148](#) (Moore J); *Bobolas v Waverley Council (No 2)* [\[2019\] NSWLEC 157](#) (Moore J) ; *Bobolas v Waverley Council (No 4)* [\[2019\] NSWLEC 163](#) (Moore J))

Facts: As noted in *Bobolas v Waverley Council (No 2)* [\[2019\] NSWLEC 157](#) (**Class 1 proceedings**), on 20 March 2019 Waverley Council (**Council**) issued two emergency orders to Ms Mary Bobolas (**applicant**) at her premises in Bondi. The first order was made pursuant to [s 124](#) of the [Local Government Act 1993 \(NSW\)](#) (**Local Government Act**) (**Local Government Order**). The second order was made pursuant [s 9.35](#) and [Sch 5, Pt 1](#) of the [Environment Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act Order**).

This decision concerned the Class 2 appeal made by the applicants regarding the Local Government Order made by Waverley Council (**Council**) on 20 March 2019. This order was made due to numerous safety concerns relating to the applicant's premises. The applicant filed an appeal against the order on 6 June 2019.

As in the Class 1 proceedings, the applicant questioned the validity of the order - submitting that the evidence the order was based on was obtained illegally, and therefore there was no valid foundation for the order. Again the applicant submitted that the terms of the order were vague and therefore unenforceable.

As in the Class 1 proceedings, the Council contended that the appeal was statute-barred as filed well after the expiry of the time limit imposed by the Local Government Act for the commencement of such an appeal. The Council also contended that the order was appropriate and necessary with the appeal having no merit foundation.

Issues:

- (1) Whether the appeal was statute barred as it was filed after the expiry of time limit imposed by the Local Government Act; and
- (2) Whether the Local Government Order was validly made.

Held: Appeal dismissed and costs reserved:

- (1) The appeal was statute barred due to being outside the 28 days given for appeals of this nature per the 28 day time limit imposed by [s 180\(3\)](#) of the Local Government Act: at [66]-[67];

- (2) It was not possible to extend time for filing such an appeal. This is a consequence of the combination of [r 7.1\(2\)](#) and [r 7.3](#) of the [Land and Environment Court Rules 2007 \(NSW\)](#). The first of these rules acts to prevent, expressly, extensions of time limits when those time limits are established by an Act (as is here the case) and, whilst [r 7.3](#) contains a more general, facultative provision concerning the extension of time, it does not apply to time limits set by Acts of Parliament and, thus, cannot be read as modifying the prohibition contained in [r 7.1\(2\)](#): at [64]; and
- (3) It was unnecessary to consider matters of merit as the appeal was statute barred: at [72].

• **Merit Decisions (Commissioners):**

***Andersen v Tamworth Regional Council*** [\[2019\] NSWLEC 1580](#) (Dixon SC)

**Facts:** The Longyard Golf Course is a privately owned golf course located near Tamworth CBD, and the land is zoned RE2 Private Recreation and SP3 Tourist under the [Tamworth Regional Local Environmental Plan 2010](#) (TRLEP 2010).

In May 2018, Tamworth Regional Council (**Council**) approved the subdivision of the land into two lots. The approval was followed by a development application (**DA**) for the construction of a manufactured home estate (**MHE**) (DA 2019/0037). The proposed development was to include the construction of 120 dwelling sites and community facilities. Council refused the DA as it did not satisfy the objectives of the relevant zones within the TRLEP 2010. The TRLEP 2010 prohibits “residential accommodation” on land that is zoned RE2 Private Recreation and SP3 Tourist. The development was also said to be incompatible with adjoining land uses, the character of the area and the existing sewage services.

Mr Andersen (**applicant**) appealed against Council’s deemed refusal of the construction of an MHE on the site pursuant to [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**). The appeal was based on an amended application which sought consent for the construction of 99 dwelling sites.

**Issues:**

- (1) Whether the proposed use was compatible with RE2 Private Recreation; and
- (2) Whether the development could be sited adjacent to the sporting precinct without unreasonable adverse impacts and conflicts with that precinct.

**Held:** Appeal upheld; development consent granted for an MHE and clubhouse:

- (1) As to the objectives of the RE2 Private Recreation Zone, the proposal was a compatible land use with the golf course. Mitigation measures had been introduced to ensure the safety of the residents of the MHE, and a strike zone had been incorporated in the estate design: at [38];
- (2) The proposed development will not be directly impacted by the lighting from the adjoining sports and entertainment precinct: at [63]; and
- (3) Conditions to address acoustic impacts intended to preserve the amenity for the 26 dwellings that may be affected by noise on limited occasions from the stadium and car-park use were incorporated into the Council’s proposed conditions. Acoustic amenity at the site would be acceptable and was unlikely to cause land use conflicts or unreasonable restraint of the future use of the sporting complex: at [58].

***Beaini Projects Pty Ltd v Cumberland Council*** [\[2019\] NSWLEC 1547](#) (Gray C)

**Facts:** In previous proceedings, following a conciliation conference, development consent was granted by the Land and Environment Court (**LEC**) for the construction of a 12-storey mixed use development at 108-120 Station Street, Wentworthville. The conditions of the consent required the construction of a public road over land to be dedicated as a laneway, and for the payment of a monetary contribution



pursuant to [s 7.11](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (EP&A Act). The land dedication formed part of a voluntary planning agreement (VPA) that accompanied a planning proposal to amend the [Holroyd Local Environmental Plan 2013](#) (HELP 2013).

[Section 7.11\(5\)\(b\)](#) of the EP&A Act allows a consent authority to accept “the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction” of a condition imposed for the payment of contributions. There was no discount given on the monetary contribution for the cost of the works to construct the laneway to the standard of a public road. The laneway formed part of a laneway network identified as being an opportunity for the revitalisation and renewal of the Wentworthville centre in the Wentworthville Centre Planning and Place Making Strategy (**Wentworthville Strategy**). The parties agreed that the works to construct the laneway to the standard of a public road were a “material public benefit”. The developer contribution was calculated from the [Holroyd Section 94 Contributions Plan 2013](#) (HCP 2013). HCP 2013 contained cl 2.17, which allowed a reduction of contributions amounts if benefits provided under a planning agreement (including works) are considered to be of a material public benefit. Consistent with the terms of cl 2.17, but after the hearing commenced, Beaini (**applicant**) submitted a formal offer to the Council to enter into a Planning Agreement (**draft VPA**) to deliver works associated with the construction of the laneway.

In these proceedings, the applicant applied to the LEC to modify the consent pursuant to [s 4.55\(8\)](#) of the EP&A Act. Specifically, the applicant challenged the quantum of monetary contribution payable on the basis that it should be reduced to reflect the cost associated with the construction of the public road along the laneway. It relied on the broad power pursuant to the provisions of [s 4.55](#) of the EP&A Act, and the power of the LEC to disallow or amend a condition imposed under s 7.11. This power is contained in [s 7.13\(3\)](#) of the EP&A Act.

The Council’s position was that there is no power for the LEC to permit such a reduction. Relying on *Colonial Credits Pty Ltd v Pittwater Council* [2015] NSWLEC 188, the Council argued that any unreasonableness in the condition arose from the burden of constructing the public road, and not from the application of the contributions plan, and therefore fell outside the scope of s 7.13(3).

Issues:

- (1) Whether the LEC had power to vary the contribution payable;
- (2) If it did, was it appropriate to vary the contribution payable in the circumstances; and
- (3) How the contribution should be calculated.

Held: Modification application granted; contribution payable reduced:

- (1) As a result of the failure to use the mechanism in cl 2.17 of the HCP 2013 to accommodate works that the parties agree provide a material public benefit, the contribution payable is unreasonable. The unreasonableness does not arise from the economic burden of constructing the laneway of itself, but instead arises from the way that the HCP 2013 has been applied. Section 7.13(3) is therefore engaged and there is power to disallow or amend the condition requiring the payment of the contribution: at [58]-[60];
- (2) There is also power to amend the contribution payable as a result of the broad power pursuant to s 4.55(8). In exercising that power, the discretion should be exercised in a manner that is consistent with s 7.11(3) of the EP&A Act and cl 2.17 of the HCP 2013. In exercising that power, the LEC is required to take into account the draft VPA: at [61];
- (3) The consequence of the unreasonableness in applying the contributions plan without utilising the mechanism in cl 2.17 is that the applicant has the economic burden of both providing the material public benefit and paying the undiscounted monetary contribution. It is therefore appropriate to reduce the monetary contribution: at [62];
- (4) Whilst exercise of the power pursuant to s 4.55(8) was available to apply the HCP 2013, a strict application of cl 2.17 of the HCP 2013 would require a condition to be imposed requiring the entry into the draft VPA, the exercise of the power pursuant to s 7.13(3) to reduce the monetary contribution is a more appropriate course, as there is no power for the LEC to compel the Council to enter into a VPA: at [63]; and
- (5) A comparison between the cost of the laneway construction and the cost of “the appropriate class of access driveway” is the appropriate comparison upon which to calculate the fair value of the reduction

in contributions, given that the driveway construction would have been required by application of the [Holroyd Development Control Plan 2013](#) if the laneway construction was not. The condition requiring payment of the contribution was therefore reduced by the difference in cost between the construction of the appropriate class of driveway and the construction of the public road: at [64]-[67].

***Captive Vision Pty Ltd v Ku-ring-gai Council (No 3)*** [\[2019\] NSWLEC 1472](#) (Dixon SC)

(related decisions: *Captive Vision Pty Ltd v Ku-ring-gai Council* [\[2019\] NSWLEC 1331](#) (Froh R); *Captive Vision Pty Ltd v Ku-ring-gai Council (No 2)* [\[2019\] NSWLEC 109](#) (Pepper J))

**Facts:** On 25 October 2016, Ku-ring-gai Council (**respondent**) granted development consent DA/0164/16 (**consent**) to Captive Vision Pty Ltd (**applicant**) for the erection of two electronic advertising signs (**signs**) on each side of the existing pedestrian air bridge over the Pacific Highway at Gordon (**site**).

When granted, the consent included Condition 10, which required that, prior to commencement of the works associated with the installation of the signs, consent under [s 138](#) of the [Roads Act 1993 \(NSW\)](#) (**Roads Act**) was to be obtained from the roads authority. In this case, the respondent is the roads authority for works on, above or below the Pacific Highway, albeit with the concurrence of Roads and Maritime Services (**RMS**), because the Pacific Highway is a classified road under the Roads Act.

On January 2017, the applicant made two applications to the respondent, (1) a Roads Act application as required by Condition 10 of the consent; and (2) a construction certificate application. The respondent referred the application to RMS seeking its concurrence to the application pursuant to [s 138\(2\)](#) of the Roads Act.

On 3 February 2017, RMS sought further information from the respondent to enable a proper assessment to be made of the proposal under [State Environmental Planning Policy No 64 - Advertising and Signage \(SEPP 64\)](#). That same day, the respondent advised RMS that it did not require an approval under SEPP 64 and provided RMS with the information it requested.

The RMS had, as at the hearing of these proceedings, refused to give its concurrence under [s 138\(2\)](#) of the Roads Act.

On 26 July 2018, the respondent granted consent to the applicant's modification application, deleting Condition 10 and inserting Condition 8(a). Upon the grant of consent, [Pt 6, Div 6.3](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) was engaged.

Before building works could be carried out, a construction certificate under Pt 6 was required. [Section 6.8\(1\)\(a\)](#) provides that a construction certificate cannot be issued unless the requirements of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) have been met. In this case, the requirement imposed by Condition 8(a) must be satisfied prior to the issue of the certificate, being that the respondent must approve the erection of the signs pursuant to [s 138\(1\)](#) of the Roads Act.

The applicant also submitted that this meant the respondent must approve the erection of the signs pursuant to [s 138\(1\)](#) of the Roads Act. However, consent could not be granted without the concurrence of RMS under [s 138\(2\)](#) of the Roads Act.

As concurrence has not been provided by RMS, the respondent refused to issue the construction certificate.

The applicant appealed under [s 8.16](#) of the EP&A Act against the refusal to grant a construction certificate under Pt 6 of the EP&A Act.

**Issue:** Was there power to grant consent under [s 138\(1\)](#) of the Roads Act, despite the absence of concurrence from RMS, in the course of determining the appeal under [s 8.16](#) of the EP&A Act.

**Held:** Appeal dismissed:

(1) The requirement to obtain a [s 138](#) consent derives from the Roads Act, not from a condition of the development consent for the reasons as explained in *Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 4)* (2009) 172 LGERA 1; [\[2009\] NSWLEC 226](#) (Preston CJ) and as submitted by RMS in this case. The statutory requirement exists independently of the development consent which approved the design and use of the signs: at [69];

- (2) Absent any express statutory provision, a consent under the EP&A Act cannot bring an independent statutory scheme within the jurisdiction of the Land and Environment Court (**LEC**): at [74];
- (3) The terms of Condition 8(a) are irrelevant to the issue of the construction certificate: at [75];
- (4) Although the LEC has wide powers on appeal, they do not extend to the grant of a s 138 of the Roads Act consent. The application for that consent was simply not an application in respect of which the LEC may dispense with concurrence. The LEC's jurisdiction is either enlivened or not; there can be no relevant concept of "sufficient engagement": at [76]; and
- (5) The LEC cannot import jurisdiction where there clearly and expressly is none. The words in [s 39\(6\)](#) of EP&A Act are clear and when read in context, they identify the extent and limitations of the LEC's power in respect of all Class 1, 2 and 3 matters. The LEC is unable to veto the concurrence requirement under s 138 by operation of s 39(6) in this instance, as the subject matter of the appeal is the construction certificate, not the Roads Act approval. The two Acts operate separately: at [78].

**David Fox v North Sydney Council** [\[2020\] NSWLEC 1056](#) (Walsh C)

**Facts:** Mr David Fox (**applicant**) lodged a development application (**DA**) with North Sydney Council (**Council**) for demolition of existing buildings; repair restoration and conservation of the existing heritage-listed slipway structures and certain other conservation initiatives; and construction of a new three-level building that would contain a boatbuilding and repair facility and a dwelling. The site is located in McMahons Point and has a common boundary with Sydney Harbour. It was used historically for boatbuilding and other marine industry purposes with ancillary on-site residential accommodation. More recently the land has come into disuse. The applicant appealed under [s 8.7\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) against the deemed refusal of the application by the Council.

The site falls under the ambit of [Sydney Regional Environmental Plan \(Sydney Harbour Catchment\) 2005 \(Sydney Harbour SREP\)](#) and is within the Sydney Opera House buffer zone. The site is zoned RE1 Public Recreation under [North Sydney Local Environmental Plan 2013 \(NSLEP 2013\)](#), and is identified for future acquisition as regional open space. The proposed development would not be permissible under NSLEP 2013 due to its zoning and certain provisions relating to acquisition. The site is a listed heritage item of local significance. [Clause 5.10\(10\)](#) of NSLEP 2013 provides incentives for conservation of heritage items (**heritage incentives clause**). The proposed development could be made permissible provided certain tests were satisfied under this clause.

**Issues:**

- (1) The threshold test of permissibility, having regard to the heritage incentives clause;
- (2) The extent of influence of a positive determination under the heritage incentives clause with respect to other provisions associated with the site's RE1 zoning and status as subject to acquisition; and
- (3) Merits considerations including: view impacts relating to Sydney Opera House under Sydney Harbour SREP; heritage benefits (including the consideration of delivery risks); and impact on existing and future use of the adjacent park.

**Held:** Appeal dismissed:

- (1) The heritage incentives clause was a "remedial" or "beneficial" provision which should be construed to afford "the fullest relief which the fair meaning of its language will allow" (*DEM (Australia) Pty Limited v Pittwater Council* (2004) 136 LGERA 187; [\[2004\] NSWCA 434](#) at [47]). The approach to its use should be "in a facultative fashion" rather than restrictively (*Retirement by Design Pty Limited v Warringah Shire Council* [\[2006\] NSWLEC 656](#) at [79]). The five tests involved in the heritage incentives clause were satisfied and the development was therefore permissible: at [36]-[42];
- (2) The facultative approach adopted with regard to the heritage incentives clause was limited to the question of permissibility and limited directly associated factors. Evaluation of the DA involved weighing up the quality and extent of heritage conservation benefits to be delivered against the controls which otherwise apply to the site: [63];

- (3) Neither views between Sydney Opera House and other public spaces, nor the visual prominence of the Sydney Opera House when viewed from public spaces would be diminished by the proposal: at [65];
- (4) The essential heritage benefit which would be required to be delivered with the proposal was the “reactivation” of boat building and repair operations on the site. There was insufficient evidence of such reactivation and its maintenance over time, in the face of a reasonably anticipated tension between it and residential accommodation on the site, a tension which had been intrinsically managed in the historical use: at [79]; and
- (5) The secondary heritage and other public benefits were insufficient to offset risks of adverse effects to the existing heritage item and detrimental impact on prospects for future acquisition and public use of the land: at [93].

***Gabeti Pty Ltd v Bayside Council*** [\[2019\] NSWLEC 1471](#) (Dixon SC)

**Facts:** Gabeti Pty Ltd (**applicant**) appealed a decision of the Bayside Council (**Council**) refusing a development application (**DA**) for a proposed development at 25 Grace Campbell Crescent, Hillsdale (**site**). The proposed development involved the demolition of the existing dwelling and the construction of five, three-storey townhouses with basement parking. The site was zoned R3 Medium Density Residential under the [Botany Bay Local Environmental Plan 2013 \(BLEP 2013\)](#). The Council argued that the site was located near a “consultation region.” Under the [Botany Bay Development Control Plan 2013 \(BBDHCP 2013\)](#), if a proposed development is located in a “consultation region”, a risk assessment must be undertaken if the proposed development will result in “residential intensification”. The Council refused the DA on the basis of “societal risk” because the development would cause “residential intensification” to the site, which was located approximately 70m from two major hazards: the Botany Industrial Park; and the Dangerous Goods Transport route along Denison Street. In addition, the DA was refused because of the following planning concerns: (a) overdevelopment; (b) streetscape; (c) height; (d) landscaping; (e) setbacks; and (f) roof design. The applicant contended that an adverse risk assessment should not be a determinative factor in refusing the DA. It relied upon a risk modelling report published in 2018 that stated that the “risk is not unacceptable but that it is not negligible”. The applicant also submitted that the DA should be approved because the proposed development was a permissible use under the R3 Zone of the BLEP 2013.

**Issues:**

- (1) Whether there would be an unacceptable level of societal risk caused by the proposed development; and
- (2) Whether the proposed development complied with the BLEP 2013 and BBDHCP 2013 planning controls.

**Held:** Appeal dismissed:

- (1) It could not be established that the proposed development was consistent with the objects in [s 1.3](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EP&A Act\)](#) or that approval of the DA would be in the public interest under [s 4.15](#) of the EP&A Act because of the societal risk posed by the development: at [54];
- (2) The applicant’s assessment of the societal risk of the proposed development was inadequate because of an absence of updated risk analysis evidence: at [51];
- (3) The amendments proposed by the applicant did not go far enough to rationalise appropriately the size of the proposed development and, if it was approved, it would not be in context with the adjoining site: at [70]; and
- (4) After consideration of both the level of risk and the relevant planning controls, the site was unsuitable for the proposed development: at [74].

**Gowing Bros Ltd v Coffs Harbour City Council** [\[2020\] NSWLEC 1027](#) (Walsh C)

**Facts:** Gowing Bros Ltd (**applicant**) lodged a development application (**DA**) for a service station in Moonee Beach. It would occupy a corner site with frontage to Moonee Beach Road (which provides a link to the Pacific Highway via a full interchange) and Sullivans Road (a major access to the local shopping centre). The DA was refused by Coffs Harbour City Council (**Council**).

The proposal was permissible under [Coffs Harbour Local Environmental Plan 2013 \(CHLEP 2013\)](#). [Clause 7.12 \(design excellence clause\)](#) of CHLEP 2013 applies to the site given its B2 Local Centre zoning. Under this clause, consent must not be granted for development “unless the consent authority considers that the development exhibits design excellence”. The consent authority was required to have regard to a set of listed matters, with one of the many on the list “pedestrian, cycle, vehicular and service access, circulation and requirements”.

**Issues:**

- (1) Whether the development exhibited design excellence (including how a consent authority should properly consider this test in regard to a functional service station development);
- (2) Safety and traffic efficiency consequences of proposed principal vehicle ingress (right turn off Sullivans Road), in particular, its proximity to the Moonee Beach Road/Sullivans Road roundabout; and
- (3) Other merits considerations including: safety and health risks to an adjacent child care centre; amenity risks to nearby residences; and risks of downstream impacts on the natural environment.

**Held:** Appeal dismissed:

- (1) Four framing principles were adopted in regard to the application of the design excellence clause:
  - (a) “listed matters” were to be considered as “cumulative matters which, when considered together, determine whether the proposed development, as a whole, exhibits design excellence” (*Aloke Holdings Pty Ltd v Council of the City of Sydney* [\[2019\] NSWLEC 1177](#)): at [85];
  - (b) inclusion of the clause in an LEP brings a reasonable expectation that an approvable development would exhibit design qualities superior to standard levels;
  - (c) in considering the “listed matters” in a cumulative manner, different weights would apply to different “matters”, depending on significance. The question of “significance” would depend on the circumstances of the case;
  - (d) the “listed matters” should not be considered exhaustive when considering whether a development exhibits design excellence and, with design the point of attention, interrelationships between listed items may be significant: at [43];
- (2) The provision of an optimal arrangement for functional service station use, as argued by the applicant, can be relevant to the assessment of design excellence: at [44];
- (3) In these circumstances, the proposed optimally functional design would come at a cost significant in planning terms. Site access arrangements were substandard, and would bring negative effects to local traffic management on important local roads. Access was a decidedly significant aspect of a service station development given the centrality of its function in attracting and dispersing cars to and from the local road system. Insufficient “superior” design aspects or interrelationships were evident to offset negative effects: at [45]; and
- (4) The development as a whole did not exhibit design excellence. There was no jurisdiction to approve the development in the circumstances. Merit aspects of the proposal therefore did not require evaluation: at [45].



***Iglesia Ni Cristo v Burwood Council*** [\[2019\] NSWLEC 1579](#) (Gray C)

(related decisions: *Burwood Council v Iglesia Ni Cristo (No 2)* [\[2019\] NSWLEC 159](#) (Robson J); *Burwood Council v Iglesia Ni Cristo* [\[2019\] NSWLEC 75](#) (Robson J))

**Facts:** In related Class 4 proceedings, the Land and Environment Court (**LEC**) found that the site at 10 Daisy Street, Croydon Park, benefitted from an existing use as a place of public worship, but that the current use was an expansion of that use which required development consent.

In these proceedings, Iglesia Ni Cristo (**applicant**) sought development consent to enlarge or expand the existing use to allow them to hold worship services on Wednesdays and Sundays, to hold three week long occasions of celebration each year, and to hold other church related activities on a regular basis. Iglesia was prepared to limit the number of persons who can attend the site for each of the activities and services, with a limit of 140 for the services on Wednesday evening and Sunday morning, 140 for weddings, 120 for bible expositions, and various lower limits for the other activities and services. The application was also accompanied by a Plan of Management (**POM**) to manage the noise emanating from the premises, and the car-parking behaviour of attendees. No alterations or additions were proposed by the development application.

Burwood Council (**Council**) agreed to the granting of development consent subject to conditions of consent that would limit the number of persons who can attend the site at any one time to 70. The basis for the Council's position was that is sought to limit the traffic, parking and acoustic impacts of the activities of the applicant at the site, given its context within a residential area. Affidavit evidence from local residents described disturbance caused to them by the current use of the site, including the noise from the air-conditioning units, the loss of available on-street parking, and driver behaviour.

The [Burwood Development Control Plan - Amendment 4 \(BDCP\)](#) required that a place of worship provide one on-site parking space for every 10 seats where fixed seating is provided, resulting in a requirement of 14 spaces where there is seating for 140 patrons. Only two spaces exist on the site. The applicant argued that the BDCP requirements have no effect as they are inconsistent and incompatible with the incorporated provisions in [Pt 5](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\) \(EP&A Regulation\)](#), relying on [s 3.43\(5\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EP&A Act\)](#), which provides:

“(5) A provision of a development control plan (whenever made) has no effect to the extent that—

(a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or

(b) it is inconsistent or incompatible with a provision of any such instrument.”

The applicant argued that the incorporated provisions were “a provision of an environmental planning instrument” because they are incorporated into the [Burwood Local Environmental Plan 2012 \(BLEP 2012\)](#) by the terms of the EP&A Regulation.

**Issues:**

- (1) Whether the requirements of the BDCP are inconsistent or incompatible with the existing use provisions incorporated in the BLEP 2012 by the operation of the EP&A Regulation;
- (2) The relevance of, and the weight to be given to, the evidence given by the residents concerning the current use;
- (3) Whether the acoustic impact of the expanded existing use was unacceptable; and
- (4) Whether the parking and traffic impact of the expanded existing use was unacceptable.

**Held:** Appeal allowed; development consent granted:

- (1) A clause of the BDCP that prescribes a certain car-parking provision rate was not, of itself, “inconsistent or incompatible” (within the meaning of s 3.43(5) of the EP&A Act) with the incorporated provisions, and was therefore a relevant matter for the LEC's consideration: at [21]-[27];

- (2) Whilst the evidence of current amenity impacts could be relevant in evaluating the likely impacts of the proposed development, there were key differences between the past use the subject of the residents' evidence and what was proposed in the development application: at [30]-[32];
- (3) As a result of the imposition of conditions of consent, there would be an acceptable acoustic impact on the neighbouring residents: at [37]-[44];
- (4) The parking and traffic impacts of the proposed expansion of the existing use were acceptable for the following reasons: the parking surveys showed sufficient parking available on the street to accommodate 140 parishioners and the parking needs of residents: at [52-54]; the use of the on-street parking as an alternative solution was appropriate in circumstances where an existing use was relied upon, where there was no building works proposed and where the parking demand generated by the site was occasional rather than constant: at [55]; the POM would manage the parking behaviour of attendees in an acceptable manner: at [56]; and the driving of vehicles up and down the street looking for parking would not cause an unacceptable traffic or amenity impact: at [57]; and
- (5) The current parking pressure within Daisy Street that was expressed by the residents was exacerbated by the residents' expectations that the street parking should only be available to them, and their resulting decision to park their cars and trailers on the street rather than in their driveways: at [59]. The "double-parking" issue would be resolved by the provision in the POM for church members to be dropped off and picked up on the driveway of the church: at [60].

### **Registrar Decisions:**

***Nielsen v Wingecarribee Shire Council*** [\[2019\] NSWLEC 1529](#) (Froh R)

**Facts:** In November 2015, Alexandra Nielson (**applicant**) lodged a development application with Wingecarribee Shire Council (**Council**) for additions to an existing dwelling. The plans lodged with the application contained a notation in the following terms:

*"Replace existing fence with new fence to comply with the requirements of Bowral DCP 2015"*

On 9 March 2016, the Council granted development consent (**consent**) to the applicant for additions to dwelling in accordance with the plans (**development**). On 8 April 2016, the Council issued a construction certificate for the development.

In accordance with the consent, the applicant carried out the development excluding any works related to the replacement of the existing fence.

As at 19 December 2018 and continuing to date, the applicant had not commenced any works related to the replacement of the existing fence and the existing fence remains.

On 20 June 2018, the Council issued a Notice of Proposed Order purportedly in accordance with [s 9.34](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**). The Council required compliance with the Notice of Proposed Order within 28 days of its date.

On 19 December 2018, the Council issued the applicant an Order No 11 in accordance with s 9.34 and [Sch 5](#) of the EP&A Act (**order**) and required the applicant to install a solid fence consisting of either "timber lap and cap" or "hardwood timber" fencing on the boundary alignment of the eastern boundary of the land and 10 Merilbah Road, Bowral. The Council required compliance with the order by 5.00 pm on 27 January 2019.

The applicant's solicitor wrote to the Council on 10 January 2019 making submissions on the terms of the order, its validity and seeking its withdrawal. That letter was sent on a without prejudice basis save as to costs and foreshadowed an application being made to the Land and Environment Court. No reply was ever received to that letter.

On 15 February 2019, a Court Attendance Notice (**CAN**) was issued to the applicant for an alleged offence of failing to comply with the order.

On 22 February 2019, the applicant's solicitor again wrote to the Council seeking the withdrawal of the order and the CAN. That letter also foreshadowed the applicant would be filing an application to the LEC and seek her costs.

That same day, the Council replied to this letter confirming it would not withdraw the CAN and setting out its belief that the LEC had no jurisdiction to hear an appeal concerning the order as it was more than 28 days from the date the order was issued to the applicant.

By Summons filed on 15 March 2019, the applicant commenced these proceedings seeking a declaration that the order issued by the Council was void and of no effect. The applicant also sought an order for her costs of the proceedings.

On 17 April 2019, the Council revoked the order before the first directions hearing and the applicant discontinued the substantive proceedings on 7 May 2019.

Issue: Whether the Council should pay the applicant's costs.

Held: Respondent to pay applicant's costs:

- (1) The effect of [r 42.19](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) is that an applicant who discontinues must pay the costs of the respondent, unless that respondent forgoes the entitlement or the LEC orders otherwise. The LEC retains discretion with respect to costs despite commencing with a predisposition that unless there is some sound positive ground or good reason for departing from the ordinary course, the discontinuing party should pay the costs of the proceedings: at [23];
- (2) The revocation of the order was a supervening event which has left the only issue in dispute between the parties being costs, placing this cost dispute squarely within the second test set out in Preston CJ's decision in *Kiama v Grant* (2006) 143 LGERA 441; [\[2006\] NSWLEC 96](#) and the items set out in [17] of *Ibrahim v PERI Australia Pty Limited* [\[2013\] NSWCA 328](#) (Beazley P): at [32];
- (3) The Council was on notice that the applicant intended to file an application in the LEC disputing the validity of the order: at [35]; and
- (4) The applicant was clearly put in a position where she had little option but to commence these proceedings against the Council: at [36]. The applicant had been put to unnecessary costs and that it was appropriate, in this case, to exercise discretion and award the applicant her costs: at [39].

### **New South Wales Civil and Administrative Tribunal:**

***Boyce v Building Professionals Board (No 2)*** [\[2020\] NSWCATOD 14](#) (Blake and O'Carrigan, Senior Members).

(related decision: *Boyce v Building Professionals Board* [\[2019\] NSWCATOD 94](#) (A Suthers, Principal Member))

Facts: Mr PeterJohn Boyce (**applicant**) was previously determined by the Building Professionals Board (**respondent**) to have engaged in professional misconduct and unsatisfactory professional conduct, arising from a prior investigation under [ss 21](#) and [27](#) of the [Building Professionals Act 2005 \(NSW\)](#) (**Building Professionals Act**). Accordingly, the applicant's certificate of accreditation was cancelled.

The respondent found that there was substandard performance of the applicant's statutory duties under the Building Professionals Act. The applicant was found to have issued complying development certificates (**CDC**), occupation certificates (**OC**) and construction certificates (**CC**) in an unsatisfactory manner. The applicant initiated an administrative review of the findings pursuant to [s 33](#) of the Building Professionals Act.

Issues:

- (1) Did the issuing of the CDC constitute unsatisfactory professional conduct;
- (2) Did the issuing of the OC constitute unsatisfactory professional conduct;
- (3) Did the issuing of the CC constitute unsatisfactory professional conduct;

- (4) Did the lack of appropriate action regarding building height and boundary encroachments constitute unsatisfactory professional conduct; and
- (5) Was the respondent correct in its disciplinary measures against the applicant.

Held: Respondent made the correct and preferable decision in relation to action to be taken against the applicant; date of accreditation cancellation was varied:

- (1) Whilst the Tribunal found that the respondent had rightly identified a breach of [s 66\(1\)\(a\)](#) of the Building Professionals Act, this consideration had been excluded from analysis as the complaint brought was not based on such a breach of the Building Professionals Act: at [57];
- (2) [Section 85\(1\)\(b\)](#) of the Building Professionals Act falls into a category of statutory offences in which the prosecution must negative the honest and reasonable belief in innocence if there is sufficient basis advanced to be capable of raising a reasonable doubt of such a belief. This honest and reasonable belief had not been negated: at [59];
- (3) The respondent correctly found that the applicant issued an interim OC for a building that he could not have reasonably determined was consistent with the CDC: at [67]-[92];
- (4) The applicant contravened s 85(1)(b) of the Building Professionals Act: at [93];
- (5) The respondent correctly found that the side setback of the dwelling did not comply with cl 3.16(2)(b)(ii) of the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008 \(Codes SEPP\)](#): at [103];
- (6) The respondent correctly found that the proposed development did not meet the relevant provisions of the Building Code of Australia with respect to smoke alarms and balustrades: at [104];
- (7) The applicant failed to comply with the statutory duty in then [s 85A\(3\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) as issuing this CDC under such conditions was an unreasonable decision: at [105];
- (8) It was not established that the applicant had an honest and reasonable belief that this CDC was not false or misleading. Accordingly, the applicant breached [s 85\(1\)\(b\)](#) of the Building Professionals Act: at [106];
- (9) The proposed development did not comply with the Codes SEPP: at [107];
- (10) The respondent correctly found that the applicant issued a CDC for proposed alterations and additions to an existing dwelling and with endorsed structural engineering drawings that depicted a different development for a new dwelling: at [112];
- (11) The applicant did not establish that he had an honest and reasonable belief that the CDC was not false or misleading: at [119]-[121];
- (12) Although the conduct of the applicant fell below the standard of competence and diligence expected of an accredited certifier, it did not fall below the standard of integrity. The conduct was still characterised as unsatisfactory professional conduct: at [133](1);
- (13) The conduct in issuing an OC fell below the standard of competence and diligence, but not below the standard of integrity. The applicant did not have an honest or reasonable mistaken belief. The applicant failed to comply with the statutory duty of the then [s 109H\(3\)\(d\)](#) of the EP&A Act when read with [cl 154\(1B\)](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\) \(EP&A Regulation\)](#). Accordingly the conduct was constituted as unsatisfactory professional conduct: at [135];
- (14) The conduct of the applicant in failing to account for continuing complaints fell below the standard of competence and diligence, but not the standard of integrity. There was no evidence that the applicant wilfully disregarded any matters to which he was required to have regard in exercising his functions as a certifying authority: at [137];
- (15) The conduct of issuing the CC fell below the standard of competence and diligence, but not below the standard of integrity. The applicant failed to raise the defence of honest and reasonable mistaken belief. The applicant, in issuing the CC failed to comply with the statutory duty in [s 109F\(1\)\(a\)](#) of the EP&A Act when read with [cl 146\(c\)](#) of the EP&A Regulation: at [138];

- (16) The appellant's conduct was found to be of a sufficiently serious nature to justify suspension or cancellation of the applicant's certificate of accreditation: at [142];
- (17) The respondent was correct in finding that the applicant's actions occasioned loss or damage and prejudice: at [161];
- (18) The complained actions were foreseeable and avoidable: at [162];
- (19) The respondent was correct in its characterisation of the applicant exhibiting a pattern of neglect in exercising his functions as an accredited certifier: at [163];
- (20) The respondent was correct in its characterisation of the extent and range of the applicant's actions demonstrating a lack of understanding and/or sufficient application of a certifier's statutory role and public duties across multiple functions. Some of the actions demonstrated wilful disregard through reckless carelessness. The delegation of his functions proved risky as it exposed him to inadequate or incompetent advice from his employees: at [164];
- (21) The applicant failed to demonstrate consciousness of his obligations under the Building Professionals Act. The applicant ignoring complaints showed that he was derelict in his public duty. Such a finding was made despite his character references: at [165]; and
- (22) Both specific and general deterrence required that the applicant's certificate of accreditation under the Building Professionals Act be cancelled: at [170].

***Da Silva v Building Professionals Board*** [\[2019\] NSWCATOD 177](#) (K Ransome, Senior Member and P O'Carrigan, Senior Member)

**Facts:** On 5 December 2018, under [s 31\(4\)](#) of the [Buildings Professionals Act 2005 \(NSW\)](#) (**Building Professionals Act**), the Building Professionals Board (**respondent**) made a finding that Mr Da Silva (**applicant**) was guilty of unsatisfactory professional conduct, issued him with a reprimand (under [s 34\(1\)\(a\)](#) of the Building Professionals Act) and ordered him to pay a fine of \$25,000 within 28 days (under [s 34\(1\)\(f\)](#) of the Building Professionals Act) (**decision**).

The decision was the result of an investigation of a complaint against the applicant in relation to a construction certificate issued by him on 30 July 2014 for a development in St Peters. The respondent found that the applicant had issued a construction certificate (**CC**) in contravention of [cl 145\(1\)\(a\)](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) as the CC was issued for building work that had a design and construction was inconsistent with the development consent. Under [s 6.8](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) a CC must not be issued with respect to the plans and specifications for any building work unless the requirements of the regulations have been complied with and the respondent's finding therefore demonstrated the applicant had breached the EP&A Act.

**Issue:** Whether the decision of the respondent was the correct and preferable decision.

**Held:** Decision affirmed; fine of \$25,000 to be paid within 60 days:

- (1) The finding of unsatisfactory professional conduct against the applicant was substantiated: at [46];
- (2) The matter of most concern was that the applicant failed to understand his statutory responsibilities and the limits of his role. His role was not to facilitate construction of the building in circumstances where it was clear there were problems with the plans which had received development consent. His role was to determine whether what he was being asked to approve was not inconsistent with the development consent. That the applicant has argued he acted correctly cast doubt on whether he would not act in a similar manner in the future: at [53];
- (3) The penalty imposed was not excessive in the circumstances, having regard to the seriousness of the conduct and the Disciplinary Penalty Guidelines set by the respondent: at [54].



***The Owners - Strata Plan No 91157 v Yoolee Holdings Pty Ltd Limited; Yoolee Holdings Pty Limited v The Owners - Strata Plan 91157*** [\[2020\] NSWCATAP 6](#) (Cole DCJ and Curtin SC)

**Facts:** The Civil and Administrative Tribunal of New South Wales (**Tribunal**) at first instance determined two actions between The Owners - Strata Plan No 91147 (**Owners Corporation**) and Yoolee Holdings Pty Limited (**Yoolee**). The disputes concerned a multi-storey building at Milsons Point (**site**). The site contained 129 residential lots, three retail lots and four commercial lots. Yoolee purchased all the retail lots and three of the commercial lots.

The proposed development the subject of the development application (**DA**) included a change of the use of the building from “residential and retail/commercial use” to “residential use, commercial use and use as an education and training facility”. Works were due to occur in significant areas of common property, including physical works both within and outside of Yoolee’s lots. Consent by the Owners Corporation was allegedly required for any DA to be validly lodged pursuant to the by-laws. This did not occur. Therefore, the lodgement was refused.

Yoolee applied to the Tribunal to challenge this determination. Yoolee was successful in its application, which the Owners Corporation appealed. Yoolee cross-appealed against the Owners Corporation, alleging invalidity of by-laws in Strata Plan No 91147.

**Issues:**

- (1) Was the Owner’s Corporation required under By-law 37.1 to grant consent to the lodgement of a development application (**DA proceedings**);
- (2) Could Yoolee rely on [s 232](#) of the [Strata Schemes Management Act 2015 \(NSW\)](#) (**Strata Schemes Management Act**) to order the Owner’s Corporation to grant consent; and
- (3) Were the amendments made to By-law 8.3 unconscionable (**By-laws proceedings**).

**Held:** In the DA proceedings, the Owners Corporation’s appeal allowed and Order 1 of the Tribunal at first instance was quashed. Yoolee’s cross-appeal allowed. Matter remitted to the Tribunal at first instance for reconsideration.

In the By-laws proceedings, the Tribunal at first instance misdirected itself. Question remitted back to the Consumer and Commercial Division of the Tribunal for reconsideration:

- (1) It was agreed between the parties that, contrary to the determination of the Tribunal at first instance, the Tribunal has jurisdiction under [s 232\(1\)](#) and [\(6\)](#) of the Strata Schemes Management Act to hear and determine the application with respect to the decision by the Owners Corporation to decline consent to the lodgement of the DA under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**): at [26];
- (2) [Regulation 49\(1\)\(b\)](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) (**EP&A Regulation**) gave an Owners Corporation the ability to “veto” a potential development application because the written consent of the owner was a precondition to the ability to lodge the DA with the relevant authority: at [41];
- (3) Inferences which might be drawn from Conditions I8 about the obligations that the Council intended to impose upon the individual non-residential lot owners necessarily influences the interpretation of by-law 37.1 had no evidentiary basis: at [45];
- (4) There was no reason to interpret by-law 37.1 as if it were “advice to the world” that the Owners Corporation would not “apply its veto power” in relation to retail and commercial lots: [46];
- (5) The by-laws in question here were not remedial legislation: at [49];
- (6) There was no basis to infer that by-law 37.1 was intended to deal with proposed physical works, or with a proposed change of use to the common property, or with the change of the mix of uses of the building in the absence of express reference to them: at [52];
- (7) It was inappropriate to answer the challenge of interpretation of reg 49(1)(b) in these proceedings, as such questions of interpretation are not encompassed within the category of issues which can be decided by way of collateral challenge: at [60]-[61];

- (8) The Tribunal at first instance erred by not incorporating considerations mandated by s 232(6) of the Strata Schemes Management Act: at [68];
- (9) The meaning of “unconscionable” was not entirely reflected by “unreasonably excessive”. A by-law could be unconscionable if it was contrary to conscience, in the sense of being unethical or unjust: at [81];
- (10) A by-law which discriminates against a minority group of lotholders could be oppressive: at [83];
- (11) The Tribunal at first instance misled itself by considering whether the amended by-law 8.3 was harsh, unconscionable or oppressive only in the context of the making of a development application: at [84]; and
- (12) The Tribunal at first instance misdirected itself in its assessment of whether by-law 8.3 as amended was harsh, unconscionable or oppressive. This led the Tribunal failing to take into account relevant considerations: at [86].

## **Court News**

### **Appointments/Retirements**

The following Acting Commissioners were reappointed for a further term of 26 February 2020 to 24 February 2021:

Acting Commissioner Paul Adam

Acting Commissioner Julie Bindon

Acting Commissioner Megan Davis

Acting Commissioner David Galwey

Acting Commissioner Norman Laing

Acting Commissioner John Maston

Acting Commissioner Ross Speers

The following Acting Commissioners were reappointed for a further term of 21 December 2019 to 21 December 2021:

Acting Commissioner John Douglas

Acting Commissioner Sue Morris

Acting Commissioner David Parker resigned on 17 January 2020 (Dr Parker was subsequently appointed the Valuer General of New South Wales in January 2020).

Acting Commissioner Ed Blakeley retired on 25 February 2020.