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# Land and Environment Court of NSW Judicial Newsletter

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## Legislation

### Statutes and Regulations:

#### • **Planning:**

The [Environmental Planning and Assessment Act 1979 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures\) Act 2020 \(NSW\)](#). Sections 10.17 and 10.18 were inserted, which confer powers on the Minister to make orders relating to planning approvals and allow for the electronic inspection of documents that would otherwise be required to be physically available.

Subsequent changes were made by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#). Alternative provisions were inserted that provided for the deferral of lapsing of development consents and continuance of, and limitations on, existing uses. This amendment also makes special provision for time within which appeals may be made, at s 8.10. At s 9.23, this amendment conferred authority on investigation officers to require answers by audio-visual link.

[Environmental Planning and Assessment Amendment \(Activation Precincts\) Regulation 2020 \(NSW\)](#) - commenced 12 June 2020. The objects of this regulation are:

- to require a development application and a complying development certificate application that relate to proposed development on land within an Activation Precinct under State Environmental Planning Policy (Activation Precincts) 2020 to be accompanied by a current Activation Precinct certificate issued under that Policy by the Regional Growth NSW Development Corporation or the Secretary of the Department of Planning, Industry and Environment, and
- to provide that development for certain purposes on land within the Regional Enterprise Zone in the Parkes Activation Precinct under State Environmental Planning Policy (Activation Precincts) 2020 is not designated development.

[Environmental Planning and Assessment Amendment \(Sydney Gateway\) Order 2020 \(NSW\)](#) - commenced 15 May 2020. This Order declares certain development for the purposes of the Sydney Gateway to be State Significant Infrastructure and Critical State Significant Infrastructure. The development is in Tempe, Street Peters and Mascot and includes the construction and operation of multi-lane roads around the Street Peters Interchange, Sydney Airport Terminals 1, 2 and 3, the Alexandra Canal and the Botany Rail Line, the construction of cycle and pedestrian pathways along the Alexandra Canal and other works.

#### • **Local Government**

[Community Land Management Amendment \(COVID-19\) Regulation 2020 \(NSW\)](#) - commenced 5 June 2020. The object of this Regulation is to provide for the following matters under the [Community Land Management Act 1989 \(NSW\)](#) for the purposes of responding to the public health emergency caused by the COVID-19 pandemic—

- altered arrangements for convening, and voting at, meetings of an association or its executive committee,

- (b) allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
- (c) the extension, to 6 months, of the time periods within which—
  - (i) the first annual general meeting of an association must be convened and held, and
  - (ii) an estimate must be made to reimburse an amount paid or transferred from an administrative fund or a sinking fund.

The [Crown Land Management Act 2016 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to granted officers the power to require answers be given by audio-visual link.

The [Local Government Act 1993 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures\) Act 2020 \(NSW\)](#). The amendment conferred power on the Minister to order for the postponement of elections if deemed unsafe due to the COVID-19 pandemic. It made provision for the appearance of council workers by audio-visual link where they would otherwise be required to appear in person.

The [Local Government Act 1993 \(NSW\)](#) was furthermore amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) whereby provisions pertaining to the shortfall of general income and the recovery of unpaid rates were inserted.

[Local Government \(General\) Amendment \(COVID-19\) Regulation 2020 \(NSW\)](#) - commenced 17 April 2020. The objects of this Regulation are—

- (a) to introduce the following temporary modifications to the application of provisions of the [Local Government Act 1993 \(NSW\)](#) in response to the public health emergency caused by the COVID-19 pandemic—
  - (i) deferring dates on which certain things must be done by councils (including the adoption of annual operational plans, preparation and auditing of financial records and the preparation of annual reports),
  - (ii) providing additional time for the payment of an instalment of annual rates and charges,
  - (iii) permitting councils to waive payment of, or reduce, a fee in a category of cases without first giving public notice of that category if the category relates to a response to the COVID-19 pandemic,
  - (iv) removing the need for councils to make certain documents available for inspection by members of the public in the offices of the councils and to instead make these documents available by other means, and
- (b) to remove requirements on councils to publish certain notices and advertisements in newspapers and to instead require publication on council websites and in other ways that a particular council (or in the case of a notice relating to a constitutional referendum or council poll, the relevant election manager) considers necessary to bring the notice or advertisement to the attention of appropriate persons, and
- (c) to provide that a water supply restriction may be imposed by a council by notice published on the website of the council rather than in a newspaper.

[Local Government \(General\) Amendment \(COVID-19\) Regulation \(No 2\) 2020 \(NSW\)](#) - commenced 24 April 2020. The object of this Regulation is to delay by two months, in response to the COVID-19 pandemic, the time within which the Remuneration Tribunal is required to determine the fees to be paid during the following year to councillors and mayors.

- **Biodiversity:**

The [Biodiversity Conservation Act 2016 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#). Section 12.19 was amended, with subsections (6)-(9) inserted. These new provisions permitted authorised officers to require that answers be given by audio-visual link.

The [Fisheries Management Act 1994 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to permit the giving of an answer or the production of records by audio-visual link.

- **Water:**

The [Water Management Act 2000 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to grant inspectors the power to require answers be given by audio-visual link.

- **Criminal:**

The [Criminal Procedure Act 1986 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures\) Act 2020 \(NSW\)](#). New rules were inserted regarding the use of pre-recorded evidence, judge-only trials and regulation making powers to respond to the COVID-19 pandemic.

- **Pollution:**

The [Protection of the Environment Operations Act 1997 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to granted inspectors the power to require answers be given by audio-visual link.

[Protection of the Environment Operations \(General\) Amendment \(Railway Systems Activities\) Regulation 2020 \(NSW\)](#) - commenced 1 May 2020. The object of this Regulation was to amend the Protection of the Environment Operations (General) Regulation 2009 to extend the period during which a requirement to hold an environment protection licence for the operation of rolling stock on a track is imposed on the occupier of the land on which the track is situated.

The requirement is imposed by cl 19 of Sch 8 to that Regulation. Clause 19 ceases to apply to an occupier of land 10 months after the commencement of the [Protection of the Environment Operations Legislation Amendment \(Scheduled Activities\) Regulation 2019 \(NSW\)](#), being 5 May 2020 (or on the day on which each person who operates rolling stock on the track holds an environment protection licence for that activity, if that date is earlier). The proposed amendment extended the application of cl 19 by 3 months, to 5 August 2020.

[Protection of the Environment Operations \(Waste\) Amendment \(Waste Contributions Exemption\) Regulation 2020 \(NSW\)](#) - commenced 1 May 2020. The object of this Regulation was to make the following changes to the exemption from waste contributions that applies to mixed waste organic outputs processed at an approved Scheduled waste facility and received at a Scheduled waste disposal facility— (a) extend the period during which the exemption is available by 2 years, until immediately before 2 May 2022, (b) provide that the notice published in the Gazette, by which Scheduled waste facilities are approved by the Environment Protection Authority for the purposes of the exemption, may specify the period during which the approval is to have effect, being no more than 12 months from the date of the notice or a variation of the notice.

The [Waste Avoidance and Resource Recovery Act 2001 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to allow the Environment Protection Authority to grant exemptions from any provision of the Act if it is deemed necessary by the EPA for the purposes of responding to the COVID-19 pandemic.

- **Miscellaneous:**

[COVID-19 Legislation Amendment \(Emergency Measures\) Act 2020 \(NSW\)](#) - commenced 25 March 2020. Repealed by s 30C of the [Interpretation Act 1987 \(NSW\)](#) on 26 March 2020. The object of this Act was to amend a number of Acts to implement emergency measures as a result of the COVID-19 pandemic.

[COVID-19 Legislation Amendment \(Emergency Measures—Attorney General\) Act 2020 \(NSW\)](#) - commenced 14 May 2020. This act amended the [Court Security Act 2005 \(NSW\)](#) and made special provision for the ability to deal with potentially sick people in court premises, including conferring a power on security officers to conduct health checks.

The [Electronic Transactions Act 2000 \(NSW\)](#) was amended by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*. The amendment permitted alternative arrangements for the signature and attestation of documents. Similar amendments were made, pertaining to alternative arrangements, by the *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020 (NSW)*.

[Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020 \(NSW\)](#) - commenced 22 April 2020. The objects of this Regulation are, during the COVID-19 pandemic—

- (a) to provide that documents that require a witness may be witnessed by audio visual link, and
- (b) to provide that tasks in relation to witnessing a document may be performed by audio visual link, and
- (c) to allow an oath, declaration or affidavit required for a purpose specified in [s 26](#) of the [Oaths Act 1900 \(NSW\)](#) to be taken or made before an Australian legal practitioner, and
- (d) to allow a statutory declaration to be made before a person before whom a statutory declaration under the [Statutory Declarations Act 1959 \(Cth\)](#) of the Commonwealth may be made.

The [Evidence \(Audio and Audio Visual Links\) Act 1988 \(NSW\)](#) was amended by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*. Section 22C was inserted, which permitted certain persons to appear by audio-visual link for the purposes of attending court, if the court so directed.

The [Interpretation Act 1987 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to modify statutory time periods and permit the regulation of altered arrangements regarding physical attendances.

The [Subordinate Legislation Act 1989 \(NSW\)](#) was amended by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*. This amendment provided for the postponement of the repeal of statutory rules that were due for repeal in 2020.

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

[State Environmental Planning Policy Amendment \(COVID-19 Response\) 2020 \(NSW\)](#) - commenced 20 March 2020. This SEPP amendment amends the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) and creates special provisions in response to the COVID-19 pandemic that provide for modified trading hours for retail supply chain premises and specifies development standards in relation to such premises.

[State Environmental Planning Policy \(Infrastructure\) Amendment \(Energy Storage Technology\) 2020](#) - commenced 17 April 2020. This SEPP amendment amends the [State Environmental Planning Policy \(Infrastructure\) 2007](#) and provisions with respect to electricity generation.

Notably, it inserts [cl 36\(3\)](#) which prescribes that development for the purpose of a solar energy system may be carried out by or on behalf of a public authority without consent on any land if it is ancillary to—

- (a) an existing infrastructure facility, or
- (b) an educational establishment within the meaning of [State Environmental Planning Policy \(Educational Establishments and Child Care Facilities\) 2017](#).

[State Environmental Planning Policy \(State and Regional Development\) Amendment \(State Significant Development\) 2020](#) - commenced 16 March 2020. This SEPP amendment amends the [State Environmental Planning Policy \(State and Regional Development\) 2011](#) and modifies [cl 8A\(2\)](#) which now states that the Independent Planning Commission, under [s 4.5\(a\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EP&A Act\)](#), is declared to be the consent authority in respect of an application to modify a development consent that is made by a person who has disclosed a reportable political donation under [s 10.4](#) of the EP&A Act in connection with the modification application.

[State Environmental Planning Policy \(State and Regional Development\) Amendment \(Water Treatment Facilities\) 2020](#) - commenced 15 May 2020. This policy operates to exclude the Cascade Water Filtration Plant, Nepean Water Filtration Plant and the Prospect Water Filtration Plant from the operation of [cl 4\(1\)](#) to [Sch 3](#) of the State Environmental Planning Policy (State and Regional Development) 2011.

## Mining Legislation Amendments

The [Mining Act 1992 \(NSW\)](#) was amended by the [COVID-19 Legislation Amendment \(Emergency Measures—Miscellaneous\) Act 2020 \(NSW\)](#) to grant inspectors the power to require answers be given by audio-visual link.

## Civil Procedure Amendments:

[Land and Environment Court \(Amendment No 1\) Rule 2020 \(NSW\)](#) - commenced 15 May 2020. The object of the rule is to amend the [Land and Environment Court Rules 2007 \(NSW\)](#) to:

- (a) Extend the application of r 3.10 relating to Court functions not exercisable by Commissioners to Commissioners exercising the jurisdiction of the Land and Environment Court or any other function under the [Land and Environment Court Act 1979 \(NSW\)](#), and
- (b) Update references to provisions of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#).

## Judgments

### United Kingdom Supreme Court:

***London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government and others* [2019] UKSC 33** (Reed, Carnwath, Black, Lloyd-Jones, Briggs LJJ)

**Facts:** This appeal concerns the permitted uses of a retail store in Streatham in the London Borough of Lambeth. Planning permission was granted by the Secretary of State (**first respondent**) in 1985, but the use was limited by condition to sale of DIY goods and other specified categories, not including food. The permitted categories were extended by later consents (under [s 73](#) of the [Town and Country Planning Act 1990 \(NSW\)](#) (**Planning Act**). The most recent consent was in 2014. In this permission, the proposed new wording included: “The retail unit hereby permitted shall be used for the sale and display of non-food goods only and ... for no other goods.” The conditions in the 2014 permission did not refer to the restriction on the sale of food goods, or to conditions in the previous permission from 2010.

Aberdeen Asset Management (**second respondent**) sought a certificate from London Borough of Lambeth (**appellant**) stipulating that the lawful use of the store extended to sales of unlimited categories of goods including food. A certificate to that effect was refused by the appellant, but granted by a planning inspector on appeal, on the basis that no condition was imposed on the 2014 permission to restrict the nature of the retail use to specific uses. This was upheld by the lower courts. The appellant, as the local planning authority, appealed to the United Kingdom Supreme Court.

**Issue:** Whether the certificate should be amended to exclude uses within the scope of the “proposed wording” in the decision notice.

**Held:** Appeal unanimously allowed; to be amended to exclude uses within the scope of the “proposed wording” in the decision notice:

*The statutory framework*

(1) Section 73 of the Planning Act envisages two situations - either:

- (a) the grant of a new permission unconditionally or subject to revised conditions; or
- (b) refusal of permission, leaving the existing permission in place with its conditions unchanged.

It does not say what is to happen if the authority wishes to change some conditions but leave others in place. Government guidance indicating that “to assist with clarity” planning decisions under s 73 “should also repeat the relevant conditions from the original planning permission” was given as advice, rather than as a statement about the legal position: at [13];



*Principles of interpretation*

- (2) Whatever the legal character of the document in question, the starting point for interpretation is to find “the natural and ordinary meaning” of the words there used, viewed in their particular context and in the light of common sense: at [19];

*Construction of the permission*

- (3) The 2014 permission needed to be seen through the eyes of a reasonable reader, who is assumed to start by taking the document at face value: at [28]. The wording of the operative part of the grant is clear and unambiguous. The council approved an application for “the variation of condition as set out below”, which is followed by precise and accurate descriptions of the relevant development, of the condition to be varied, and of the permission under which it was imposed. That is followed by statements of the “original wording”, then of the “proposed wording”, the latter stating in terms that the store is to be used for the sale of non-food goods only. The obvious and only natural interpretation of those parts of the document is that the council was approving what was applied for: The variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is nothing to indicate an intention to discharge the condition altogether, or to remove the restriction on the sale of food goods: at [29];
- (4) If s 73 gave no power to grant a permission in the form described, the logical consequence would be that there was no valid grant at all, not that there was a valid grant free from the proposed condition. There is no issue now as to the validity of the grant as such, and all parties agree there was a valid permission for something. That being the common position, the document must be taken as it is: at [32]. It has been normal and accepted usage to describe s 73 as conferring power to “vary” or “amend” a condition, so the reasonable reader would not see any difficulty in giving effect to the 2014 permission in the manner authorised by the section - ie as the grant of a new permission subject to the condition as varied. The absence of a reason for the condition does not affect its validity: at [33];
- (5) There are some internal inconsistencies in the second part of the notice but, reading the document as a whole, the second part can be given a sensible meaning without undue distortion. It is explanatory of, and supplementary to, the first part. The permitted development incorporating the amended condition is acceptable but only subject to the other conditions set out. In other words, they are additional conditions: at [34]-[35];

*The other 2010 conditions*

- (6) This appeal is not concerned with the status of the conditions in the 2010 permission, but the Court’s provisional view was that the 2010 conditions were not incorporated into the new permission, but continued to have effect under the 2010 permission, so far as they are consistent with anything in the new grant. The conditions remain valid and binding because there was nothing in the new permission to affect their continued operation: at [37]-[38]; and
- (7) Nothing in the present judgment was intended to detract from the advice contained in the decision by Sullivan J in *R (Reid) v Secretary of State for Transport* [2002] EWHC 2174 (Admin), at [59], that “it is highly desirable that all the conditions to which the new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing”: at [42].

**High Court of England and Wales:*****R (on application from McLennan) v Medway Council* [2019] EWHC 1738 (Lane J)**

**Facts:** In October 2017, Mr McLennan (**claimant**) was granted planning permission to install solar panels on the south-facing wall of his residential property in Rochester, Kent. In September 2018, his next-door neighbour (**second defendant**) applied to Medway Council (**first defendant**) for planning permission to construct dormer windows and a rear extension on their property (**proposed development**). The claimant objected to the proposed development on the basis that it would block the sun and adversely affect his ability to generate electricity from his solar panels.

Despite the claimant’s objection, in December 2018, the local planning board granted permission for the proposed development. The claimant challenged the Planning Board’s decision to grant permission for the proposed development in the United Kingdom High Court and argued that the planning board’s failure to treat the interference with his solar panels as a material planning consideration was *Wednesbury* unreasonable (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] KB 223,

[1947] EWCA Civ 1), in light of the language of the [Medway Local Plan 2003 \(MLP 2003\)](#) and, particularly, the [National Planning Policy Framework 2019 \(NPPF 2019\)](#).

**Issues:** Whether, in granting planning permission, the first defendant erred on a question of law by failing to consider that the proposed development would interfere with the claimant's use of, and ability to generate electricity from, his solar panels.

**Held:** First defendant erred on a question of law by failing to take into account the proposed development's adverse impact on the claimant's ability to generate electricity from his solar panels as a material planning consideration. The grant of planning permission by the first defendant to the second defendant on 6 December 2018 was quashed:

- (1) Both the MLP 2003 and, more particularly, the NPPF 2019 recognised the positive contribution that could be made to climate change by small-scale renewable energy Schemes. Under [s 19\(1A\)](#) of the [Planning and Compulsory Purchase Act 2004 \(UK\)](#), mitigation of climate change was a legitimate planning consideration. The fact that both [s 19](#) and the NPPF 2019 were framed in broad terms does not mean that their message vanished at the very point where consideration had to be given to a specific proposal. Such an approach would render the provisions a dead letter. Nor did the fact that they related to new rather than existing development defeat the rationality challenge. If the issue of climate change was regarded as having a material planning bearing on particular proposed development, it was illogical to regard that issue as suddenly becoming immaterial once the development had taken place: at [36]. Accordingly, the first defendant had not been entitled to reject as immaterial, in planning terms, the effect that another development proposal may have upon a renewable energy system, such as the claimant's solar panels. That stance was one that no reasonable authority could take and was irrational: at [37];
- (2) In so far as the first defendant's reports were based on the categorisation of the claimant's solar panels as a purely private interest, that conclusion was also flawed. No consideration had been given to why a person's ability to use the sunlight reaching his property to generate electricity fell into a materially different category from the same person's ability to enjoy sunlight falling into his living room or garden. Interference with the solar panels was a matter that engaged the public interest because of the part played by them, "however modestly and on an individual scale", in addressing climate change: at [45]. Submissions that the solar panels were for the use of a single household, rather than being part of an industrial production of renewable energy, were not to the point. They contributed to the reduction in reliance on non-renewable energy and the fact that, viewed on their own, did so in a very modest way did not entitle the first defendant to treat the matter as immaterial: at [47]; and
- (3) The court would not exercise its discretion under [s 31](#) of the [Senior Courts Act 1981 \(UK\)](#) to deny the claimant the relief which ordinarily flows from a finding that the decision under challenge was unlawful. The problem with the first defendant's statement that, despite the view that interference with the solar panels was not a material planning consideration, the extent of additional overshadowing of the solar panels had been considered and conclusion reached that any additional overshadowing would be negligible was that the claimant had made submissions with which the report failed to engage. The conclusion that the effect of the proposed development on the solar panels would be negligible also lacked reasoning: at [55].

### **Supreme Court of the United States:**

**County of Maui, Hawaii v Hawaii Wildlife Fund** [590 US \(2020\)](#) (Roberts CJ, Breyer, Ginsburg, Sotomayor and Kagan JJ, Kavanaugh J agreeing; Thomas, Gorsuch and Alito JJ dissenting)

(decision under review: *Hawaii Wildlife Fund v County of Maui* 886 F 3d 747 (9<sup>th</sup> Cir, 2018))

(related decision: *Hawaii Wildlife Fund v County of Maui* 24 F Supp 3d 990 (D Hawaii, 2014))

**Facts:** The County of Maui (**County**) operated a wastewater reclamation facility on the island of Maui, Hawaii, that collected the surrounding area's sewage, partially treated it and pumped the treated effluent through four underground wells. The treated sewage then travelled through groundwater to the ocean. In 2012, the Hawaii Wildlife Fund (**Fund**) brought proceedings against the County under the [Clean Water Act, 33 USC § 1251-1375 \(1972\) \(US\)](#) (**Clean Water Act**). The Clean Water Act prohibits the "addition" of any pollutant "from any point source" to navigable waters (a process known as "discharge") without a permit

from the US Environmental Protection Agency (EPA). Under the Clean Water Act, the discharge of any pollutant without the necessary permit was unlawful.

The Fund claimed that the County was releasing pollutants into the ocean without a permit. The District Court held in favour of the Fund, finding that the discharge from the County's wells into the groundwater was functionally into navigable water. On appeal, the Ninth Circuit affirmed the District Court's decision but phrased the standard differently. It stated that a permit was required when "the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water". The County sought from the Supreme Court a writ of certiorari to quash the Ninth Circuit Court's decision.

Issues:

- (1) Whether the Clean Water Act required the County to obtain a permit when pollutants originated from a point source but were conveyed into navigable waters (the ocean) by a nonpoint source (the groundwater);
- (2) Whether pollutants originating from a point source but conveyed into navigable waters by a nonpoint source meant that there had been a "discharge" of a pollutant "from" a point source; and
- (3) Whether within the context of the Clean Water Act the proper construction of the statute meant that the Ninth Circuit Court's decision was incorrect.

Held: The Ninth Circuit Court's decision set aside and the case remitted for redetermination:

- (1) A permit is required from the EPA when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge: at [15];
- (2) There were many factors that are relevant to determining whether a particular discharge was "the functional equivalent of a direct discharge". Time and distance are the most important, but other relevant factors include transit time; distance travelled; the material through which the pollutant travels; whether the pollutant becomes diluted or chemically different; the amount of pollutant entering the navigable waters compared to the amount that has left the point source; the manner in which the pollutant enters or is conveyed into the navigable waters; and the degree to which the pollutant at the time of entering the navigable waters has maintained its specific identity: at [16];
- (3) The Ninth Circuit Court's standard that a permit was required when a pollutant was "fairly traceable" from a point source into a navigable water in a way that made the discharge "the functional equivalent of a discharge into the navigable water" was too broad: at [10];
- (4) The County's argument that a permit was not required when a pollutant had travelled through any amount of groundwater before its conveyance into navigable waters risked interference with the EPA's regulatory powers over point source discharges and created an exception contrary to Congress' intention: at [10];
- (5) The Clean Water Act's structure and language reflected Congress' basic aim to assign substantial responsibility and autonomy to the States when it came to groundwater and nonpoint source pollution. Congress would not have intended for the EPA's authority to inhibit the States' autonomy in this context because, for example, it could allow the EPA to assert permitting authority over the release of pollutants that reach navigable waters many years later. Instead, the Clean Water Act confined the EPA's role in managing groundwater and nonpoint source pollution as one limited to study, information sharing with the States, and the provision of funding: at [6]-[7];
- (6) The Clean Water Act's legislative history strongly supported the conclusion that it was inappropriate to broadly construe the EPA's power to grant a permit for the discharge of a pollutant into navigable waters. In 1972, when Congress was considering the bills (that became the Act), the EPA proposed that the Clean Water Act should grant the EPA authority over groundwater. Congress rejected this suggestion and instead required the States to maintain control over any pollutants that may affect groundwater: at [7]-[8];
- (7) The EPA's historical regulatory practice evinced a requirement for a permit for pollution discharges from point sources into navigable waters that have travelled through groundwater: at [8]-[9]; and
- (8) While a proper construction of the Clean Water Act limited the phrase "from any point source" to a range of circumstances narrower than that of the Ninth Circuit Court's interpretation, it was broad enough to prevent exclusion of all discharges through groundwater: at [5].



**Federal Court of Australia:**

*Friends of Leadbeater's Possum Inc v VicForests (No 4)* [\[2020\] FCA 704](#) (Mortimer J)

(related decisions: *Friends of Leadbeater's Possum Inc v VicForests* [\[2018\] FCA 178](#); 260 FCR 1 (Mortimer J); *Friends of Leadbeater's Possum Inc v VicForests (No 2)* [\[2018\] FCA 532](#) (Mortimer J); *Friends of Leadbeater's Possum Inc v VicForests (No 3)* [\[2018\] FCA 652](#); 231 LGERA 75 (Mortimer J); *Friends of Leadbeater's Possum Inc v VicForests (No 5)* [\[2020\] FCA 705](#) (Mortimer J))

**Facts:** Friends of Leadbeater's Possum Inc (**applicant**) argued that VicForests had lost the benefit of an exemption otherwise conferred by [s 38\(1\)](#) of the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**EPBC Act**) in relation to 66 coupes that had either been logged (**logged coupes**) or were Scheduled to be logged (**Scheduled coupes**) in the Central Highlands region of Victoria by reason of non-compliance with provisions of the [Code of Practice for Timber Production 2014 \(Code\)](#) and the ["Management Standards and Procedures for timber harvesting operations in Victoria's State forests" \(Management Standards and Procedures\)](#) which were incorporated into that Code. The Code was picked up by [s 46](#) of the [Sustainable Forests \(Timber\) Act 2004 \(Vic\)](#) as a matter with which VicForests had to comply with. It was a prescribed legislative instrument pursuant to [Sch 2](#) of the [Subordinate Legislation \(Legislative Instruments\) Regulations 2011 \(Vic\)](#).

The applicant contended that due to the loss of the [s 38\(1\)](#) exemption, the provisions of [Pt 3](#) of the EPBC Act applied. It submitted that the forestry operations in the coupes were likely to have, or likely to have had, a significant impact on the Greater Glider contrary to [s 18\(4\)](#) of EPBC Act and on the Leadbeater's Possum contrary to [s 18\(2\)](#) of the Act. The Leadbeater's Possum was listed as critically endangered and the Greater Glider was listed as vulnerable under that Act.

Section 38(1) of the EPBC Act provided that "Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA". The 66 coupes were within a region covered by the Central Highlands Regional Forest Agreement (**CHRFA**). The Code was a key part of the substituted conservation system of the CHRFA.

The applicant submitted that there were two categories of breaches leading to the loss of the exemption. The first was a failure to apply the precautionary principle as required by [cl 2.2.2.2](#) of the Code in relation to the Greater Glider in sections of forest which had either been logged (**logged Greater Glider coupes**) or were Scheduled to be logged under Timber Release Plans (**Scheduled coupes**). The second consisted of miscellaneous breaches of the Code and the Management Standards and Procedures in the logged coupes.

The Glossary to the Code defined the precautionary principle as, "when contemplating decisions that will affect the environment, careful evaluation of management options be undertaken to wherever practical avoid serious or irreversible damage to the environment; and to properly assess the risk-weighted consequences of various options."

The applicant alleged that VicForests failed to apply the precautionary principle in relation to the Greater Glider because it did not conduct any or sufficient detection activities in any of the logged Greater Glider coupes, and it did not have in place effective policies to maintain suitable habitat if the species was detected in a particular coupe. It contended that any policies that were in place were based on flawed modelling, were insufficient, and were poorly implemented on the ground.

In relation to the alleged breach of [cl 2.2.2.2](#) of the Code, VicForests relied upon [cl 1.3.1.1](#) of the Management Standards and Procedures, that provided that "operations that comply with these Management Standards and Procedures are deemed to comply with the Code". VicForests submitted that because it had complied with the Management Standards and Procedures, it was deemed not to have breached [cl 2.2.2.2](#) of the Code. There was no specific prescription in the Code or the Management Standards and Procedures in relation to the Greater Glider.

VicForests further contended that the obligation in [cl 2.2.2.2](#) was an evaluative standard that was not capable of clear and objective practical application and thus its alleged breach could not lead to a loss of the exemption under [s 38\(1\)](#).

Finally, VicForests also contested the level of threat to the Greater Glider, arguing that the threshold for the application of the precautionary principle had not been reached, and that sufficient protections were in place for both the Greater Glider and the Leadbeater's Possum.

Issues:

- (1) What was the proper construction of cl 1.3.1.1 of the Management Standards and Procedures;
- (2) What was the “RFA forestry operation” to which the s 38(1) exemption applied;
- (3) Whether VicForests failed to implement the precautionary approach in the logged Greater Glider coupes such that the exemption in s 38(1) of the EPBC Act was lost;
- (4) Was VicForests likely to fail to apply the precautionary principle in the Scheduled coupes such that the exemption in s 38(1) of the EPBC Act was lost;
- (5) Was the s 38(1) exemption lost in specified logged coupes by reason of other breaches by VicForests of the Code and the Management Standards and Procedures;
- (6) If the s 38(1) exemption was lost, what were the consequences;
- (7) What was the “action” or “actions” to which the EPBC Act provisions should be applied;
- (8) Was the identified “action” or “actions” of VicForests’ in the coupes likely to have, or have had, a significant impact on the Greater Glider or the Leadbeater’s Possum, such that the prohibitions in s 18(2) and (4) of the EPBC Act applied; and
- (9) Was injunctive relief available under s 475(2) of the EPBC Act.

Held: In all of the 66 coupes, the s 38(1) exemption was lost and the prohibitions contained in s 18(2) and (4) of the EPBC Act were breached:

- (1) Clause 1.3.1.1 of the Management Standards and Procedures only operated where there was a true conflict between a mandatory action in the Code and a detailed instruction in the Management Standards and Procedures such that it was not possible for both to be obeyed. There was no conflict between cl 2.2.2.2 and the Management Standards and Procedures: at [700]-[702];
- (2) The “forestry operation” that must be assessed for its compliance with the Code was VicForests’ harvesting of forest products because this was how the applicant had pleaded its case. However, how that conduct was planned was relevant to this as it was reflected in the action taken or not taken on the ground: at [718] and [762];
- (3) A breach of cl 2.2.2.2 could lead to the loss of the exemption in s 38(1). While there may be a lack of certainty about the content of the obligation imposed by cl 2.2.2.2, the same could be said of many of the obligations contained in the Code when applied to a factual situation. The decision by VicForests to harvest timber in the coupes was clearly one which would “affect the environment”. In undertaking the forestry operations in the coupes, VicForests was “dealing” with those threats. The precautionary principle was therefore engaged. There was no evidence that VicForests carefully evaluated the management options to wherever practical avoid serious or irreversible damage to the Greater Glider, nor that it properly assessed the risk-weighted consequences of various options in relation to the Logged Glider Coupes. Therefore, VicForests had breached cl 2.2.2.2 in relation to the logged Greater Glider coupes: at [792], [841], [847], [849], and [949]-[950];
- (4) VicForests was likely to fail to comply with cl 2.2.2.2 of the Code in relation to the Scheduled coupes. It was not likely that less intensive silvicultural methods outlined in new policies would be employed, because VicForests’ practice had often departed from VicForests’ policy, the tendency evidence in relation to other coupes, and the lack of change to the intensive silvicultural methods specified in the amended Timber Release Plan released in 2019 established this. The prior conduct of VicForests and its rejection of the factual basis for the listing of the Greater Glider as a vulnerable species displayed a lack of commitment to change and an attitude that conservation of threatened species was an inconvenient disruption to its timber harvesting program. In these circumstances, the Court could not be confident that VicForests would modify its forestry operations in the Scheduled coupes to be more protective of hollow dependent species such as the Greater Glider. Even if new, less intensive harvesting methods were used, this would not be sufficient for compliance with cl 2.2.2.2 in relation to the Greater Glider: at [1009], [1012], [1038] and [1178];
- (5) Miscellaneous breaches of the Code and the Management Standards and Procedures occurred in 21 of the 26 logged coupes: at [1213], [1249], [1259], [1272] and [1287]-[1290];
- (6) The s 38(1) exemption was lost in relation to the entire identified forestry operation, not only in relation to how forestry operations might impact on, for example, the Greater Glider: at [178] and [789];
- (7) The “action” to which s 18 applied was each of the following: the forestry operation in each individual Logged Coupe and Scheduled coupe; each series of forestry operations in each geographical coupe group; the forestry operations in all of the logged coupes; the forestry operations proposed in all of the Scheduled coupes; and the forestry operations in all 66 of the impugned coupes. In each case, the

action included the preliminary planning and decision making leading up to the actual harvesting on the ground: at [1339] and [1341];

- (8) At every level of generality, or specificity, that the “action” could be characterised, VicForests’ forestry operations were likely to have a significant impact on both the Leadbeater’s Possum and the Greater Glider. The effectiveness of protective measures in relation to the Leadbeater’s Possum, such as the establishment of Timber Harvesting Exclusion Zones, even if properly observed and implemented on the ground, had not been shown to have a beneficial effect for the survival of the species, and the population of the Leadbeater’s Possum remained in decline. In relation to the Greater Glider, the impact was also likely to be significant having regard to the fact that the population was important, the likely number of animals affected, and the high quality of the habitat in the logged Greater Glider coupes and the Scheduled coupes, which was unlikely to be regained: at [1292], [1343]-[1344], [1368], [1374], [1432], [1435], [1443] and [1455]; and
- (9) [Section 475\(2\)](#) of the EBPC Act required there to be a correlation between the contravention and the injunctive relief granted. Any conduct restrained must therefore be the conduct constituting the contravention. In circumstances where there have been contraventions in all of the coupes, there was no impediment to exercising the power under s 475(2): at [1459]-[1460] and [1462].

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

***Apokis v Transport for NSW*** [\[2020\] NSWCA 39](#) (Basten, Leeming and Brereton JJA)

(related decision: *Apokis v Roads and Maritime Services* [\[2017\] NSWLEC 163](#) (Moore J))

**Facts:** Transport for NSW (then Roads and Maritime Services - RMS) acquired a parcel of land owned by Mr Apokis (appellant) near Dirty Creek in northern New South Wales for the purpose of a Pacific Highway upgrade. The Valuer General determined that the compensation payable to the appellant was \$252,000. The appellant sought to have the amount of compensation reviewed in the Land and Environment Court. Moore J determined that the amount payable ought to have been \$152,912.86, meaning the appellant then owed the RMS approximately \$75,000.

The appellant filed and served a notice of intention to appeal in December 2017. The notice noted that the appeal was to be filed by 4 March 2018 (though the correct date was 15 March 2018). A summons seeking leave to appeal was filed and served on 1 August 2019. A notice of appeal was filed in the Court of Appeal on 24 October 2019, almost two years following the Land and Environment Court decision. The summons was “withdrawn” in November 2019.

**Issues:**

- (1) Did the trial judge err in the determination of the value of the subject land; and
- (2) Did the trial judge err by not taking into account lost royalties said to arise due to prior works on the land.

**Held:** Appeal dismissed; appellant to pay respondent’s costs (Basten, Leeming JJA agreeing and agreeing with the additional remarks of Brereton JA, Brereton JA agreeing with additional remarks):

- (1) Mr Elali, an undischarged bankrupt and not a legal practitioner, was permitted to represent the appellant in these proceedings upon the receipt of written confirmation of authority from the appellant. This ruling was made to limit the costs of the respondent that would otherwise have been incurred by any future delay of the proceedings: at [6]-[7];
- (2) The model litigant policy and procedural rules overlap with the requirement to facilitate the just, quick and cheap resolution of real issues: at [12]; Though the RMS did not oppose the extension of time to bring the appeal, such lack of opposition may not advance the public interest in the quick, just and cheap resolution of the proceedings, whatever convenience the parties may prefer: at [13];
- (3) An appeal will enjoy limited prospects of success if the appellant fails to identify each order or decision on a question of law to be challenged, the alleged error in respect of each such order or decision, and how the error was material to the final determination of the case: at [17];
- (4) The trial judge did not “mischaracterise” the position of Mr Gray, an expert witness for the appellant. There was no legal error: at [32];
- (5) In determining the value of land, some factors which must be taken into account are well established, including zoning restrictions and the history of the use of the land. Future alleviation of restrictions on

land use may also be relevant. Where it is suggested that the greatest value may be obtained by a use for which the land is not presently fitted (ie subdivision), it will be prudent to assume that the hypothetical purchaser will obtain information as to the likely costs of preparing the land for subdivision: at [41];

- (6) A judicial valuer is not bound by the evidence of the experts. The judge only needs to determine the hypothetical point of agreement between the hypothetical vendor and hypothetical purchaser at the date of acquisition: at [44]; The assessment of value is essentially a factual matter: at [45];
- (7) In circumstances where there is no marketable parcel of land which is acquired, the statutory test is not capable of direct application. The conventional approach is to value the whole of the parcel of land from which the acquired land is excised by applying the statutory test to the land as it existed immediately prior to acquisition, then applying the same test to the adjoining land or lands after acquisition. The value of the land is then assessed as between those two figures: at [46];
- (8) Though the trial judge did not state whatever the agreed amount would have been, the case was not presented in that way. The challenge to the assessment of the market value of the acquired land must therefore be rejected: at [48];
- (9) The trial judge excluded value derived from the public purpose, being a market for the quarrying resource on the site, in accordance with [s 56\(1\)](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#). There was no error of law in his doing so: at [51];
- (10) The value which could have been extracted from continued ownership of the land which had been acquired under the Land Acquisition Act did not fall into the category of loss pursuant to [s 59\(f\)](#). It is an element to be included in the assessment of the market value of the acquired land: at [54];
- (11) Any loss calculated by reference to the royalties payable for the resource contained in the acquired land did not result from exploitation by the appellant, but from the use of the acquired land by the respondent as the new owner. The challenge to the refusal of the claim under [s 59\(f\)](#) must be dismissed: at [58]; and

*Per Brereton JA*

- (12) Whilst market value is a relevant consideration under [s 55](#), it is not the only consideration: at [66]; and the “bush block” could not have been used but for the project and thus any potential increase in value that it had was an error in favour of the appellant and was to be disregarded absent any cross-claim: at [70]-[71].

***Randren House Pty Ltd v Water Administration Ministerial Corporation*** [\[2020\] NSWCA 14](#) (Basten and Leeming JJA, Emmett AJA)

(related decision: *Randren House Pty Ltd v Water Administration Ministerial Corporation (No 4)* [\[2019\] NSWLEC 5](#) (Molesworth AJ))

**Facts:** Randren House Pty Ltd and Mr Andrews (**appellants**) owned a rural property in the Riverina. The appellants claimed that Lake Paddock, an area of 450 hectares on the northern side of Yanco Creek, was a dependent ecosystem and was adversely affected by water regulated under a Minister’s plan (**Minister’s plan**) made in 2016 pursuant to the [Water Management Act 2000 \(NSW\)](#) (**Water Management Act**). The appellants lost an administrative challenge to the Minister’s plan in the substantive proceedings in the Land and Environment Court. This appeal related to “Decision 8” in that challenge decision, one which concerned the ability of the Minister to have made the [“Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016”](#) pursuant to [s 50](#) of the Water Management Act.

**Issues:**

- (1) Was the Minister in error by failing to consider the effects of the relevant water sharing plan on Lake Paddock and its unnamed tributary; and
- (2) Could an extension be granted to apply for judicial review of the relevant water sharing plan.

**Held:** Leave for extension of time within which to appeal refused; notice of appeal dismissed as incompetent; appellants to pay the respondent’s costs (Leeming, Basten JA and Emmett AJA each agreeing with additional comments):

- (1) The effect of judicially reviewable error in the making of the plan is that the entire plan is invalid; if not invalid merely in its application to part of the land owned by the appellants: at [36];
- (2) The principle of legality has no application to reading down an instrument such as a plan: at [40];



- (3) Subject to the Water Management Act, a Minister's plan has the same effect as a management plan: at [63];
- (4) [Part 3](#) of the Water Management Act, which deals with management plans, indirectly informs the power to make a Minister's plan conferred by s 50: at [78];
- (5) An "ecosystem" is distinct from an area of land. An ecosystem comprises an interrelationship between populations of living things and the environment: at [120];
- (6) All textual and contextual considerations indicate that the existence of a dependent ecosystem is not a jurisdictional fact for the purpose of s 50: at [123];
- (7) The "duty" in [s 9](#) is expressed to apply to "all persons exercising functions under this Act". This applies to the Minister exercising functions at a State-wide level (such as making a Minister's plan), and to a departmental officer contemplating enforcing a condition on a particular access licence: at [134];
- (8) No directly enforceable duties flow directly from the water management principles themselves: at [137];
- (9) Even if s 9 created an enforceable duty, the question is whether a breach of that duty invalidates the exercise of executive power in making the plan. The issue is solely one of statutory construction. There is nothing in s 9 or anywhere else in the Water Management Act to suggest that even a serious contravention of the generally expressed "duty" in s 9 spells invalidity of the exercise of some other power or performance of some other function: at [140];
- (10) By its terms, [s 7](#) does not appear to establish a duty enforceable by a private person: at [149];
- (11) The primary judge correctly observed that the changing status of the molecules of water (regulated or unregulated) for the purposes of the plan is irrelevant to the environmental damage of which the appellants complained: at [154]-[155];
- (12) For every licence under the former legislation, [cl 3](#) of [Sch 10](#) of the Water Management Act deemed there to be an access licence and an approval under the Water Management Act: at [175];
- (13) The appellants are not entitled to a condition that is expressed in terms of regulated water: at [185];
- (14) The document sought to be adduced a year after the impugned decision, being the making of the 2016 plan, may be confirmatory of damage or corroborative of claims of damage to Lake Paddock, but it falls short of evidence that would be considered "highly probative": at [193];
- (15) There is no basis for granting the requisite extension of time within which to permit the appellants to appeal. The notice of appeal filed out of time was considered incompetent: at [201];

*Per Basten JA*

- (16) The Court of Appeal should be slow to find error on the part of a trial judge in concluding that an applicant has failed to establish that the lower court had jurisdiction to determine a claim, on the basis that the applicant had no reasonable opportunity to address that issue, in the absence of clear evidence of denial of such an opportunity: at [10];
- (17) A decision to pursue a public purpose is ordinarily not justiciable, despite the consequences for individual landowners and local residents. Polycentricity may affect the scope of statutory duties to consult or accord procedural fairness, with respect to particular forms of decision-making: at [13];

*Per Emmett AJA*

- (18) The decision made was in the nature of a political decision insofar as it was intended to benefit the community as a whole (albeit that it might be to the detriment of a significant group of individuals). To that extent, the decision is not justiciable: at [215];
- (19) Section 7(4) conveys an expectation that, if the relevant Ministers failed in the expectation expressed by Parliament, they would be accountable to Parliament. The provision does not give rise to any obligation enforceable by a private citizen: at [216]; and
- (20) The trial judge was not in error in concluding that there was no material difference with respect to obligations applying to decision-makers whether the water source concerned is within a regulated or unregulated system: at [217].

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

***Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd*** [\[2020\] NSWCCA 74](#) (Harrison, Hamill and Wilson JJ)



(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] NSWLEC 182 (Moore J))

**Facts:** Snowy Monaro Regional Council (**council**) had charged Tropic Asphalts Pty Ltd (**Tropic**) with three offences of breaches of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) for the alleged carrying out of a development in breach of its conditions of consent attached to the temporary operation of an asphalt batching plant. One of the charges was dismissed by Moore J in 2017 and the other two held to be duplicitous, a decision that was upheld on appeal in 2018.

Council then sought leave to amend the two remaining summonses to remove reference to engaging in a “course of conduct” and instead sought to replace that with reference to a particular day, with additional charges duplicated on a per day basis in each proceeding. Moore J rejected the proposed multi-count amendments and only granted council leave to amend on its alternative basis, being the nomination of a particular (but different) day in each charge.

Council sought leave to appeal pursuant to [s 5F](#) of the [Criminal Appeal Act 1912 \(NSW\)](#) on six grounds. Tropic also sought leave to appeal on three grounds.

**Issues:**

*Raised by council*

- (1) Did the primary judge err by denying the prosecutor procedural fairness as a result of not determining a principal contested issue upon which the decision to grant that leave depended;
- (2) Did the primary judge err in declining to grant leave to amend to substitute the multi-count amendments by not giving adequate reasons for rejecting the prosecutor’s submission;
- (3) Did the primary judge err in failing to undertake the comparison of alternatives presented;
- (4) Did the primary judge err by refusing the leave sought to reopen to rely on material in, and exhibited to, the affidavit of Mr Bradbury, the council’s solicitor (**Bradbury affidavit**);
- (5) Did the primary judge err by not considering relevant evidence going to the interest of justice in the multi-count amendments, namely the unredacted Bradbury affidavit; and
- (6) Did the primary judge err by denying the prosecutor procedural fairness by not considering a principal contested issue and failing to give reasons for why the multi-count amendments should be allowed pursuant to [s 68](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**).

*Raised by Tropic*

- (1) Did the primary judge err by failing to consider properly the argument that the original summons was a nullity and therefore incapable of amendment;
- (2) Did the primary judge err by not holding that the unamended summons was a nullity and therefore incapable of amendment, by reason that it was a charge which did not disclose a criminal offence; and
- (3) Did the primary judge err by not holding that the charge in the unamended summons was a nullity and therefore incapable of amendment as it did not disclose an essential element of the offence.

**Held:** Leave granted to council to appeal on Grounds 1, 2, 3 and 6 but refused on Grounds 4 and 5; council appeal dismissed; leave granted to Tropic to appeal on Grounds 1, 2 and 3; Tropic appeal dismissed (Harrison J with Hamill and Wilson JJ agreeing):

- (1) Implicit or inherent in the charges that the Court of Criminal Appeal had earlier found to be duplicitous, but which were not found to be a nullity, was the notion that Tropic had committed a breach of both conditions on all working days during the charge period. The charges did not say so in terms. The failure to specify that allegation was fatal: as the summonses alleged a course of offending conduct without specifying the day or days upon which the alleged breaches are said to have been committed, the charges were duplicitous and Tropic could not have been required to respond to charges framed in that way: at [42];
- (2) Council had permissibly sought to do no more than clarify the charges, by either nominating a single day upon which a breach of each condition was alleged to have been committed or by particularising every day upon which a breach of each condition is alleged to have been committed. This is not an attempt to formulate a new or different charge: the offences alleged, being breaches of the relevant conditions of consent, stay the same: at [44];

- (3) The charges as originally framed did not lack an essential element and were not a nullity; they merely failed to specify or particularise the days or dates upon which the offences were alleged to have been committed. The proposed amendments do no more than clarify what is already apparent on the face of the charge. This is a standard approach for a prosecutor to make when charges are found to be duplicitous: at [47];
- (4) The primary judge did not deny council procedural fairness: at [48];
- (5) The primary judge did not fail to consider properly the totality principle. The primary judge properly recognised that there is a range of “correct” sentences in any particular case, and the totality principle does not say otherwise: at [51];
- (6) Whilst council was dissatisfied with the decision, it could be shown that the primary judge’s view resulted from a flawed exercise of discretion and was not otherwise vitiated by *House v The King* (1936) 55 CLR 499 error: at [52];
- (7) The considerations in [s 21\(1\)](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) and s 68 of the Court Act do not alter the conclusion in (7): at [53];
- (8) The words “without injustice” in s 21(1) invite consideration only of the interest of a party in Tropic’s position, whereas the word “in the interests of justice” in s 68 have a wider reach. A failure to refer to s 68 unfairly favoured Tropic: at [56];
- (9) It is artificial and erroneous to maintain that council somehow lost the chance of a different outcome because the primary judge did not take account of the s 68 test in forming his opinion about multi-day amendments. Uncontroversially, the “interests of justice” test calls for a balancing exercise: at [57];
- (10) The primary judge did not fail to give adequate reasons for his decision: at [58]; and
- (11) The primary judge’s failure or refusal to read the Bradbury affidavit was of no consequence, nor a denial of procedural fairness: at [60].

***Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd*** [\[2020\] NSWCA 50](#) (Macfarlan, Meagher and Gleeson JJA)

(related decision: *Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [\[2019\] NSWLEC 117](#) (Sheahan J))

**Facts:** Universal 1919 Pty Ltd (**appellant**) had possession of premises under a registered lease, under which it operated a Greek-themed hotel. The premises are heritage listed. Within this hotel was an eight-metre by five-metre depiction of the Greek national flag. This depiction was created by removing part of the cement render on the wall, leaving parts of the differently coloured brickwork underneath exposed. This was done without development consent, but it was done at the same time as authorised renovations. The council of the City of Sydney (**council**) issued a development control order (**DCO**) which required the removal of the flag by way of reinstatement of the cement render on the wall. Council gave 122 Pitt Street Pty Ltd, the owner of the heritage-listed land (**owner**) an opportunity to comment, but they did not give the appellant any such opportunity.

**Issues:**

- (1) Was there a breach of procedural fairness by not inviting the appellant to comment on the making of the DCO;
- (2) Did the creation of the Greek flag require development consent or was it part of the renovation works approval; and
- (3) Was the DCO void because the notice that it was proposed to be made was not given to the principal certifier of the renovation works as required by [cl 9](#) of [Sch 5](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**).

**Held:** Appeal dismissed with costs (Macfarlan JA, Meagher JA agreeing and Gleeson JA agreeing with additional comments):

- (1) The appellant’s challenge that it had been denied procedural fairness under the general law can be adequately addressed by asking whether any right that Universal might have had under the general law to be given prior notice of the council’s proposal to make the DCO and the opportunity to make representations in response, was excluded by statutory provisions ([cl 1, 4, 5, 6, 7](#) and [11](#) of Sch 5 of the EP&A Act; [s 57\(1\)](#) of the [Heritage Act 1977 \(NSW\)](#) (**Heritage Act**)). That answer must be in the affirmative; these statutory provisions exclude general law requirements: at [20];

- (2) Whilst a requirement under the general law to afford procedural fairness can only be excluded “by plain words of necessary intendment”, the statutory Scheme in Sch 5 contains such sufficiently plain words: at [22];
- (3) The specifications for notice contained in [cll 8](#) and [14](#), as mandated by cl 7, are exhaustive: at [23];
- (4) Though, in some instances, works done on a property may be *de minimus*, in this case, given the size and prominence of the flag, it must be considered the “carrying out of a work” for the purposes of [s 1.5](#) of the EP&A Act: at [26];
- (5) The carving of the Greek flag cannot be considered part of the renovations as it was not expressly noted in the renovation plans. It was therefore unauthorised: at [28];
- (6) The substantial nature of the work (being the carving of the flag) amounted to an alteration of the building for the purposes of needing to seek consent under [s 57](#) of the Heritage Act: at [30];
- (7) Though the Heritage Council had given consent to the renovations, since the carving was not expressly included within the plans there was no consent from the Heritage Council for those works: at [31];
- (8) A principal certifier’s appointment to certify works does not extend to unauthorised works, especially since the certifying firm ensured that its 2016 certificate did not purport to cover it. In any event, the certifying firm had ceased working for the appellant in 2018 when the DCO was issued. The firm could therefore not be properly described as the “principal certifier” for the “development” in respect of which the council proposed to make the DCO: at [32]; and

*Per Gleeson JA:*

- (10) With regard to the issue of any requirement for the council to give notice to the principal certifier, this was raised for the first time at appeal. The appellant was not entitled to advance a fresh argument on appeal if that argument “could possibly have been met by the calling of evidence below”: *Water Board v Moustakas* ([1988](#)) [180 CLR 491](#) at 497; *Suttor v Gundowda Pty Ltd* ([1950](#)) [81 CLR 418](#) at 438. The present case was such a case: at [37].

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

***O’Haire v Barnes, Chief Regulatory Officer, Natural Resources Access Regulator***  
[\[2020\] NSWCCA 19](#) (Payne JA, Beech-Jones and N Adams JJ)

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

**Facts:** Mr Brian O’Haire 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 \(NSW\)](#). On 19 July 2019 counsel for Mr O’Haire informed the Court that he “would” enter a plea of guilty to all eight charges. The Court told the parties that it had formally noted the pleas of guilty and the matter was set down for a sentence hearing on 19 November 2019. On 16 November 2019, Mr O’Haire filed a Notice of Motion (**NOM**) seeking an order to correct the recording of guilty pleas 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. Mr O’Haire requested that the Court note that he “would” enter a plea of guilty on the first day of the sentence hearing. At the hearing of the NOM, the trial judge informed the parties that she had read the submissions in advance of the hearing, had conducted some preliminary research and was concerned about certain matters raised in Mr O’Haire’s submission. This prompted counsel for Mr O’Haire to make an application for the trial judge to recuse herself on the grounds of bias both actual and apprehended. Her Honour refused to do so. The NOM was dismissed on the basis that there was no evidence of an error arising from an accidental slip or omission on the part of either the Court or Mr O’Haire’s counsel. Moreover, the slip rule could not apply to Mr O’Haire because there was no judgment or order of the Court associated with the entry of the plea that could be corrected or amended by the slip rule. The trial judge clarified that the only option available to Mr O’Haire to change his guilty pleas would be to apply to withdraw them. The prosecution stated that there would be no opposition if Mr O’Haire applied to do so. Mr O’Haire filed an application for leave to appeal to the Court of Criminal Appeal (**CCA**) pursuant to [s 5F](#) of the [Criminal Appeal Act 1912 \(NSW\)](#) (**Criminal Appeal Act**).

**Issues:**

- (1) Whether or not the trial judge was correct to not recuse herself;

- (2) Whether or not the entering of a plea constituted an order or judgment for the purposes of the slip rule in [r 36.17](#) of the UCPR;
- (3) Whether or not the entering of the plea resulted from a mistake or an error arising from an accidental slip or omission; and
- (4) The utility of granting leave to appeal given the fact that Mr O'Haire would be entering a guilty plea and he could, in any event, seek to withdraw his guilty pleas.

**Held:** Appeal to appeal refused:

- (1) The trial judge was correct to refuse the application to disqualify herself for apprehended bias because it could not be concluded by a fair minded observer that her Honour might not bring an unbiased mind to the question before her. The test for apprehended bias was not made out by a judge having read the relevant papers before coming on to the bench. Nor was apprehended bias demonstrated by a judge suggesting that a proposition in written submissions was untenable. Mr O'Haire's counsel was correct to abandon reliance on a claim of actual bias because there was none: at [29], [31] and [33];
- (2) The slip rule did not apply because the entry of a plea of guilty was not a judgment or order of the Court. However, it was unnecessary finally to determine this issue: at [25];
- (3) The trial judge was correct to conclude, on the basis of the evidence before her, that no accidental slip or omission was made: at [39]; and
- (4) There would be limited utility in allowing the appeal in circumstances where Mr O'Haire intended to enter the plea that was sought to be corrected at a later stage with the result that he would lose the benefit of an early plea and in circumstances where Mr O'Haire could instead apply to withdraw the guilty pleas: at [41], [44] and [45].

***Somerville v Chief Executive of the Office of Environment and Heritage*** [\[2020\] NSWCCA 93](#)

(Johnson, Adamson and Bellew JJ)

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

**Facts:** Anthony Sommerville (**appellant**) was the subject of a two-month long surveillance operation, during which he was observed foraging for native bird eggs in National Parks and State Conservation Areas in the Dubbo region. Mr Wade, an officer of the Office of Environment and Heritage (**OEH**), together with another officer, obtained a search warrant in respect of premises in Dubbo (**premises**). The search, pursuant to the warrant, revealed that the appellant had a large collection of preserved native bird eggs. The OEH subsequently filed 23 summonses against the appellant which charged the appellant with offences of possession and harm of fauna.

Some of these charges were struck out as being time-barred. By Notice of Motion, the OEH contended that the remaining charges were not time-barred, relying on either [s 190\(1\)\(a\)](#) or [s 190\(1\)\(b\)](#) of the [National Parks and Wildlife Act 1974 \(NSW\) \(NP&W Act\)](#), as then in force. The primary judge held that s 190(1) does not require a prosecutor to elect between the limbs contained therein. Rather, it is open to the prosecutor to rely on either or both limbs simultaneously.

The appellant appealed against the dismissal of his application to have charges pending against him struck out. The basis of his application was that the proceedings were time-barred pursuant to s 190(1)(b) of the NP&W Act. Leave to appeal was not required in this case. There was no objection to an extension of time being granted for the appeal.

**Issues:**

- (1) Is a prosecutor bound to elect between s 190(1)(a) and s 190(1)(b) of the NP&W Act or may the prosecutor rely on one or both of these limitations; and
- (2) Are these provisions relevant to the charge of possession.

**Held:** Time extended for filing the notice of appeal; appeal dismissed; matter remitted to the LEC for determination (Adamson J, Johnson and Bellew JJ agreeing):

- (1) Section 190(1)(b) is an exception to the rule in s 190(1)(a) that proceedings must be commenced within two years. As the exception is one in favour of the prosecutor, it must be strictly construed (*Morgans v Director of Public Prosecutions* [\[1999\] 2 Cr App R 99](#) at 113): at [46];
- (2) Section 190(1)(b) would have no effect if it were not read as a true alternative to s 190(1)(a). The additional time bar in s 190(1)(b) must be regarded as an expansion of the prosecutor's right to bring



proceedings because it authorises the commencement of proceedings in the period after two years from the offence provided the proceedings are commenced within two years of the date on which the alleged offence first came to the attention of an authorised officer. In these circumstances, there is no justification for reading the separate bases in s 190(1)(a) and (b) as being other than true alternatives: at [47];

- (3) The offence of possession may be charged in respect of any day on which the accused person was in possession of the prohibited item or items. The term “possession” is not defined under the NP&W Act, nor is it subject to deeming provisions: at [50];
- (4) Continuing offences and possession are to be distinguished as statutory extension is not required for possession offences, which continue until possession is relinquished: at [52];
- (5) It follows from the use of the word “or” between s 190(1)(a) and s 190(1)(b) that the prosecutor is entitled to rely on either or both bases for commencing proceedings: at [56];
- (6) The prosecutor’s right to bring proceedings and the concomitant liability of the accused for the offences are not extinguished until the later of the two time periods specified in s 190(1): at [56];
- (7) There is a significant gap between having reasonable grounds to believe that an offence has been committed (being the formulation required for a warrant under [s 199](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#)) and having evidence of the commission of an offence come to one’s attention for the purposes of s 190(1)(b) of the NP&W Act: at [61];
- (8) The question of when time starts to run is ultimately a question of fact to be adjudged by applying the wording of s 190 to the facts of the given case: at [66];
- (9) Section 190(1)(b) must be judged by reference to the contemporaneous knowledge of the prosecutor and not by hindsight. Evidence obtained by the prosecutor before evidence of the commission of the offence first came to attention might be admissible as circumstantial evidence in an eventual hearing. However, it does not follow that such evidence constituted evidence of the commission of the offence for the purposes of s 190(1)(b) at the time it first came to the prosecutor’s attention: at [68]; and
- (10) If s 190(1)(b) does not have any practical operation for the possession offences with which the appellant was charged, this is a consequence of the circumstance that the offence of possession is neither an offence of commission or omission, but rather an offence which requires proof of a certain state. Thus the commission of the offence was simultaneous with the time at which the prosecutor found the eggs in the appellant’s possession. This circumstance does not provide a warrant for either reading down s 190(1)(b) or including a gloss on the words of the section: at [72].

### 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\(d\)](#) of the Land Acquisition 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].

**Lawson v Minister for Environment and Water** [\[2020\] NSWSC 186](#) (Ward CJ in Eq)

**Facts:** The [River Murray Waters Act 1915 \(Cth\)](#) (**Murray Waters Act**) was assented to on 17 February 1915 and commenced on 31 January 1917. This Murray Waters Act provided for the carrying into effect of an agreement between the Prime Minister and the Premiers of the States of New South Wales, Victoria and South Australia in respect of the River Murray, Lake Victoria and other waters. As part of this agreement and noted in the Second Reading Speech of the New South Wales Minister for Public Works, the area known as Lake Victoria would remain politically a part of New South Wales but would be vested in fee simple as the property of State of South Australia. The purpose of this agreement was fundamentally for the saving of water. A number of works were carried out pursuant to this agreement.

These present proceedings are founded on a claim that Daniel MacGregor, the great grandfather of Mrs Lawson (**applicant**), who had obtained possessory title by adverse possession over Lake Victoria pursuant to the operation of Imperial Statute 9 Geo.3, cl 6, *The Crown Suits Act 1769* or [Nullum Tempus Act](#). The applicant claimed that her paternal grandmother, Mary Alice Mitchell, was a descendant of Daniel MacGregor and therefore had a statutory entitlement for compensation for the compulsory acquisition of the area. As a successor to Mary Alice Mitchell, the applicant claimed that she held a statutory entitlement formerly held by Daniel MacGregor and Mary Alice Mitchell. The proceedings in the Supreme Court were for the determination of separate questions in the form agreed by the parties.

**Issues:**

- (1) Was the land the subject of the claim filed on 1 April 2015 vested in the State of South Australia in fee simple under s 18 of the Murray Waters Act upon its commencement;
- (2) If the answer to (1) is yes, was its effect to extinguish native title rights and rights through adverse possession; and
- (3) If the answer to (1) is yes, was the vesting of the land pursuant to the Murray Waters Act a “previous exclusive possession act” for the purposes of [s 23B](#) of the [Native Title Act 1993 \(Cth\)](#) (**Native Title Act**) and [s 20](#) of the [Native Title \(New South Wales\) Act 1994 \(NSW\)](#) (**Native Title NSW Act**).

**Held:** All questions for determination answered in the affirmative; applicant’s amended Notice of Motion dismissed; proceedings dismissed with costs:

- (1) The words “are hereby vested” convey the ordinary meaning that something is being vested *by* the statutory provision itself: at [118];
- (2) Section 18 of the Murray Waters Act does not create a *sui generis* bundle of statutory rights. It is to be read within its common law meaning: at [119];
- (3) The use of a semi-colon does not indicate that two clauses must be read as so closely connected that an ambiguity in one would render the other in any sense inoperative or invalid: at [126];
- (4) Section 18 must be read as a substantive provision intended to provide certainty in relation to the State of South Australia’s water rights: at [128];
- (5) The Murray Waters Act expressed the plain and clear intention to vest the land as an estate in fee simple to the State of South Australia’s benefit: at [132];
- (6) The vesting of an estate in fee simple that occurred under the Murray Waters Act was a previous exclusive possession act: at [179];

- (7) The exception in [s 23B\(9C\)](#) of the Native Title Act does not apply because the exception (being in [s 23B\(9C\)\(a\)](#)) is introduced with the prefatory words “unless, apart from this Act”. The Murray Waters Act fell within the exception and effected extinguishment for the purposes of the subsection: at [180];
- (8) An application to amend would have been granted had not the answers to the separate questions not been earlier set out: at [233];
- (9) However, the amendment application must fail because of the conclusions reached as to the questions for separate determination. No claim for compensation under the [Public Works Act 1912 \(NSW\)](#) is maintainable because no relevant private property right was resumed in 1922: at [237]; and
- (10) The land the subject of the claim was vested in the State of South Australia in fee simple. The consequence is that native title rights and interests in adverse possession were extinguished. The vesting of land by the Murray Waters Act was a “previous exclusive possession act” for the purposes of the Native Title Act and s 20 of the Native Title NSW Act: at [239](1).

**Mehmet v Carter** [\[2020\] NSWSC 413](#) (Ward CJ in Eq)

(related decision: *Mehmet v Carter* [\[2017\] NSWSC 1067](#) (Darke J); *Mehmet v Carter* (2018) 98 NSWLR 977; [\[2018\] NSWCA 305](#) (Bathurst CJ, Beazley P and McColl JA))

**Facts:** This matter involved a dispute regarding the termination of a contract for the sale of approximately 30 acres of land in Byron Bay. The land contained an ecological tourist resort then known as the Rainforest Resort. The contract for the sale of land was entered into contemporaneously with a contract for the sale of the Rainforest Resort business. The plaintiffs were the purchasers and the defendants/cross-claimants were the vendors under the relevant contracts. Each party claimed that the contracts were terminated validly.

The purchasers claimed that the vendors were not ready, willing and able to show that there were no “Aboriginal objects” on the land, and thus they could not show good title. The purchasers alleged that this was repudiatory conduct on the part of the vendors. As an alternative repudiation case, the purchasers claimed that the vendors’ reliance on what the purchasers maintained was an invalid notice to complete, and the vendors’ purported termination of the contract on that basis, amounted to a repudiation by the vendors of the contract - thereby entitling the purchasers to accept that repudiation and to bring the contract to an end. Finally, the purchasers asserted that the vendors made misleading representations as to the suitability of the land for development.

The vendors contended that the purchasers had not established that there were Aboriginal objects on the land, and that even if there were, this would not constitute a defect in the title. The purchasers had therefore repudiated the contract and the vendors claimed they were entitled validly to terminate the contracts. The vendors alleged that the presence of Aboriginal remains or Aboriginal objects (which was denied) did not affect their right to sell the land pursuant to the conditions of the contract. Therefore, the vendors maintained they were entitled to forfeit, and hence retain, the deposit paid.

**Issues:**

- (1) Did the presence of Aboriginal objects on the land constitute a defect in title;
- (2) Were the plaintiffs entitled to terminate the contract; and
- (3) Were the defendants entitled to terminate the contract.

**Held:** plaintiffs validly terminated the contract; plaintiffs entitled to the return of their deposit and to damages; cross claim for repudiation dismissed; and defendants to pay the plaintiffs’ costs:

- (1) There was a difference between evidence of traditional laws and customs and evidence or assertions relating to the existence or non-existence of particular facts for the purposes of [s 72](#) of the [Evidence Act 1995 \(NSW\)](#) (**Evidence Act**) - in this case, the existence or non-existence of Aboriginal objects: at [252]; The question of admissibility of evidence (under [s 74](#) of the Evidence Act) raises similar issues: at [273]; However, the exception in s 74 is not engaged: at [283];
- (2) Acknowledgement of the Aboriginal history on the land amounted to an admission by the former owner as to his belief that Harry and Clara Bray (known as the King and Queen of Bundjalung) lived on the land where the resort is located : at [302];
- (3) A defect in quality is such that the purchaser obtains appropriate title but the existence or non-existence of something relating to the property affects its value or desirability: at [401];

- (4) The relevant findings of the Court of Appeal (in the related proceedings) were obiter dicta regarding defect of title: at [409];
- (5) If an Aboriginal object was situated at a location on the land that would have little, if any, impact on the use of the land then it would not constitute a defect in title (whether the purchaser sought to rescind pursuant to the common law rule or the vendor had come to a court of equity seeking the decree of specific performance): at [419]; However, in this case, the location of the purported burial site was clearly significant: at [420];
- (6) A vendor has an obligation at common law to respond to any requisition concerning a possible latent defect. An inadequate response to a requisition may amount to a default on the part of the vendor which might thereby affect the vendor's ability to give notice to complete: at [428];
- (7) There was a plausible contention that there were Aboriginal objects, as defined in the [National Parks and Wildlife Act 1974 \(NSW\)](#), on the land. The presence of Aboriginal objects on the land was capable of constituting a defect in title: at [447]; The failure of the vendors to address this contention squarely amounts to repudiation of the contract: at [448];
- (8) A plaque lies within the ambit of "deposit, object or material evidence": at [578];
- (9) There is some force to the distinction between direct evidence of human habitation (i.e. a housing structure) and secondary materials recording habitation: at [587];
- (10) An object that is a marker of an Aboriginal place could also be an Aboriginal object for the purposes of the legislation. The statutory definition is tolerably broad: at [597]; If it can be established on the evidence that the memorial plaque and stone have borne witness to the presence of Aboriginal people or otherwise relate to Aboriginal "habitation" then there is little difficulty in concluding that the memorial plaque and stone are "Aboriginal objects": at [598];
- (11) The memorial stone and plaque fell within the definition of Aboriginal objects under the legislation: at [601];
- (12) However, the evidence does not support a conclusion that the remains of Harry and Clara Bray are located on the subject land. Rather, the evidence supports the belief that they are located on the land: at [607]. The same conclusion is reached of uncertainty of evidence of other burial sites (at [608]); of the gunyah (at [609]) and of the ceremonial mound (at [610]) being on the land;
- (13) A bunyah pine is not an "Aboriginal object" within the definition. Nor is it "material evidence" relating to human habitation: at [611]; and
- (14) The argument for return of the deposit pursuant to s [55\(2A\)](#) of the [Conveyancing Act 1919 \(NSW\)](#), due to injustice arising from the defect of title, would have been engaged in these circumstances (had it been necessary): at [674].

## Land and Environment Court of New South Wales:

### • Judicial Review:

***Benmill Pty Ltd v North Sydney Council (No 2)*** [\[2020\] NSWLEC 44](#) (Robson J)

**Facts:** Benmill Pty Ltd (**Benmill**) sought declaratory relief in relation to the approved use of three illuminated signs displayed on the roof structure of a 17-storey commercial office building in North Sydney (**Building**). The signs are comprised of fabricated "Bayer" lettering and an associated logo.

In 2007, a development consent in relation to the Building was granted by the Court in *Benmill v North Sydney Council* [\[2007\] NSWLEC 680](#) for a "roof sign" (**2007 Consent**). A further development consent was granted by council in 2016 approving a development application (**DA**) for "extension/continued use of rooftop sign approved by Land and Environment Court. No physical works proposed" (**2016 Consent**). Benmill seeks a declaration that the "roof sign" approved by the 2007 Consent (and as extended by the 2016 Consent) is a "roof or sky advertisement" for the purposes of [State Environmental Planning Policy No 64—Advertising and Signage \(SEPP 64\)](#). The respondent, North Sydney Council (**council**) maintains that the reference to "roof sign" is properly construed as a "building identification sign" under SEPP 64.

In 2018, a Commissioner of the Court dismissed two appeals concerning council's deemed refusal of two applications in relation to the signage on the Building: *Legge v North Sydney Council*

[\[2018\] NSWLEC 1288](#) (*Legge*). The first appeal was against council's deemed refusal of a DA for "removal of roof top BAYER signage and the installation of three dynamic/changeable LED advertising panels", while the second appeal concerned the deemed refusal of a modification application which sought "approval to amend the existing approved signage to the rooftop of Bayer building to dynamic/changeable LED advertising panels". In determining the modification appeal, the Commissioner made findings in relation to the construction of the term "roof sign" as originally approved by the 2007 Consent.

Issues:

- (1) Whether the proper construction of the term "roof sign" in the 2007 Consent had been finally determined by the Commissioner in *Legge* such that Benmill ought to be prevented from advancing its claim on the basis of either issue estoppel or abuse of process; and
- (2) Whether, on the proper construction of the term "roof sign" in the 2007 Consent, the approved use of the signs was for a "roof or sky advertisement" or a "building identification sign" within the meaning of SEPP 64.

Held: Declaration made as sought; respondent to pay applicant's costs:

- (1) The Commissioner's finding as to the proper construction of the 2007 Consent and 2016 Consent could not ground an issue estoppel: at [57];
- (2) The Commissioner, in hearing a merit appeal and thus making a discretionary administrative decision, was not exercising the requisite judicial power to adjudicate the existing dispute concerning the rights and obligations of the parties under the 2007 Consent and 2016 Consent. As such, the Commissioner had not "finally and conclusively established" those rights such that the current proceedings would be subject to the application of issue estoppel: at [65];
- (3) Further, the Commissioner's finding in relation to the construction of the 2007 Consent and 2016 Consent was subsidiary or collateral to the Commissioner's final decision that the modification appeal should be dismissed, and therefore was not capable of supporting an issue estoppel: at [75];
- (4) Given the Court's findings in relation to issue estoppel, the proceedings similarly do not constitute an abuse of process: at [90];
- (5) As the plain meaning of the words "roof sign" in the 2007 Consent are susceptible to more than one meaning under SEPP 64 (at [123]), the Court took into account the reasons given in the Court judgment which granted the 2007 Consent in order to construe the meaning of those terms: at [126]; and
- (6) Having regard to the reasons for granting the 2007 Consent, the conditions imposed and the approved plans incorporated within the 2007 Consent, the Court concluded that the appropriate construction of the use permitted by the 2007 Consent and, thereafter, the 2016 Consent was for a "roof or sky advertisement": at [127].

***Burwood Council v Lilli*** [\[2020\] NSWLEC 15](#) (Pain J)

Facts: On 15 January 2020 Burwood Council (**council**) received an e-mail from CVA Apartments Pty Ltd (**third respondent**) attaching a document purporting to be an interim occupation certificate (**IOC**) purported to be signed and issued by Mr Valerio Lilli (**first respondent**). On the same day, the council e-mailed the first respondent seeking confirmation from him whether an IOC had been issued and requesting a copy of that IOC. On 17 January 2020 the council received an e-mail purporting to be from the first respondent attaching a copy of the IOC. On 22 January 2020, the council received a further e-mail from the first respondent advising that he was unable to supply a copy of the IOC as requested as he did not issue any occupation certificates for the subject development. The first respondent requested a copy of the IOC that the council had received and, having reviewed it, on 23 January 2020 informed the council that the IOC appeared to have been fraudulently prepared and issued to council. It was agreed that the first respondent did not write or send the e-mail to council dated 17 January 2020 or authorise any of his staff to do so, nor did he issue the IOC or authorise any of his staff to do so. The parties agreed to and sought a declaration that the IOC was void and of no effect.

Issue: Should the Court exercise its discretion to make the declaration sought that purported IOC J190087 dated 23 December 2019 was void and of no effect, both as to substance and as to utility.

Held: Declaration sought was made:

- (1) As to substance, the purported IOC was an invalid document. Only the principal certifier had the power to issue the document and it was established that he did not issue it: at [5]-[6]. Further, as the statutory process leading to the issue of the IOC had been vitiated by fraud, the IOC should be declared a nullity



and void (*SZFDE v Minister for Immigration and Citizenship* [\(2007\) 232 CLR 189](#); [\[2007\] HCA 35](#) at [52]): at [7];

- (2) There was utility for the first respondent in having the purported IOC declared invalid so that his position in relation to this document in unrelated disciplinary proceedings was clear: at [8]; and
- (3) The reasoning of Robson J in *Inner West Council v Balmain Rentals Pty Ltd* [\[2019\] NSWLEC 24](#): at [46] was adopted - that the making of a declaration at least marks the disapproval of the Court of conduct that Parliament has proscribed and serves to discourage others from acting in a similar way: at [9].

***CVA Apartments Pty Ltd v Burwood Council; Marsden Hotel Burwood Pty Ltd v Burwood Council; The Marsden Hotel Pty Ltd v Burwood Council*** [\[2020\] NSWLEC 11](#) (Pepper J)

Facts: CVA Apartments Pty Ltd (**CVA**), Marsden Hotel Burwood Pty Ltd (**Marsden Hotel Burwood**) and The Marsden Hotel Pty Ltd (**applicants**) filed notices of motion in Class 1 appeals seeking a stay of three Development Control Orders (**Orders**) issued by Burwood Council (**council**) on 14 January 2020. The Class 1 appeals sought to revoke or modify the Orders. CVA owned land upon which there was an 11-storey mixed use development, consisting of a hotel, restaurant and café (**premises**). Marsden Hotel Burwood leased parts of the building and also operated the café and restaurant. The Orders required the applicants to stop using the premises on the basis that no valid occupation certificate (**OC**) had been issued in respect of the building. The Orders stated that building works were still being carried out at the premises, that no fire safety certificates had been lodged with the council, and therefore that the council had no assurance that the premises complied with relevant safety requirements and development standards. The day after the Orders were issued, the council received an e-mail attaching a document purporting to be an interim occupation certificate (**IOC**) signed by Mr Valerio Lilli dated 23 December 2019. Mr Lilli did not have an accreditation to issue an IOC as at that date. He informed the council on 22 January 2020 that he did not issue the IOC, later deposing that it was “a fake”. On 31 January 2020, the council commenced related Class 4 proceedings seeking declaratory and injunctive relief in respect of the purported IOC. A Fire Engineering Certificate and Report for the premises was provided to the council after the issuing of the Orders. The applicants contended that, if a stay of the Orders was not granted, they would suffer significant financial detriment. They further contended that no building work was being carried out at the site, that the building had development consent and was constructed in compliance with that consent, and moreover, that a variety of other compliance certificates had been issued in respect of it. They submitted that the stay was therefore necessary to prevent injustice in relation to the Class 1 appeals.

Issues:

- (1) Did the Court have the power to grant a stay of the Orders;
- (2) If so, did the Class 1 appeals raise a serious question to be tried; and
- (3) Did the balance of convenience favour the granting of a stay of the Orders.

Held: Orders were stayed on conditions that the applicants permitted the council immediate access to the premises to assess the safety of the premises; applicants pursue the grant of a new OC; there would be no further occupation or use of Levels 2 or 10; and no further building or construction works would be carried out on the premises:

- (1) The Court had the power to order the stay under either or both of [ss 22](#) and [23](#) of the [Land and Environment Court Act 1979 \(NSW\)](#). In the course of the hearing, the council resiled from the contention that the Court had no such power in its Class 1 jurisdiction insofar as it did not seek to argue that the authorities holding otherwise were plainly wrong: at [39];
- (2) While it was difficult to assess whether the Class 1 appeals raised a serious question to be tried because no Statement of Facts and Contentions had yet been filed by either party, the related Class 4 proceedings did raise such a question given that, if Mr Lilli did not issue the IOC, there would have been no decision at all to issue an IOC due to a constructive failure to exercise jurisdiction. The Class 4 proceedings would wholly dispose of the Class 1 appeals and were expedited: at [46]-[49]; and
- (3) The balance of convenience favoured the granting of the stay. The Fire Safety Certificate and Report indicated that only minor matters remained to be attended to in order to achieve compliance with fire safety standards and the grant of a new OC was imminent. The financial impact and reputational damage to the applicants was such that if a stay was not granted, the Class 1 appeals could be



rendered nugatory. The council could have sought urgent interlocutory relief in the Class 4 proceedings but had elected not to: at [54].

***David Goode v Gwydir Shire Council*** [\[2020\] NSWLEC 33](#) (Pain J)

**Facts:** Judicial review proceedings were commenced by Mr David Goode (**applicant**), a resident of Warialda in Gwydir Shire Council's local government area (**council**) alleging errors or shortcomings in council's determination to grant development consent on 14 January 2019 to Development Application (**DA**) No 10.2018.13.1, a truck-wash facility in Warialda. The council was the proponent for development.

**Issues:**

- (1) Was the council's consideration of the impacts of the truck wash facility and suitability of the site inadequate; and
- (2) Did the council fail to process the DA as "designated development", being a waste management facility to which [cl 32](#) of [Sch 3](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\) \(EP&A Regulation\)](#) applied.

**Held:** Amended summons dismissed:

- (1) There was no failure properly to consider the DA by the council. The merits of a decision cannot be considered in judicial review proceedings: *Gilbank v Bloore (No 2)* [\[2012\] NSWLEC 273](#) at [48] citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [\[1986\] HCA 40](#) at 42 (**Peko-Wallsend**). Grounds alleging a failure properly to consider relevant matters face a high hurdle where there is material prepared and assumed to have been considered by the council: *Peko-Wallsend* at 39. A fair reading of the grounds in the Amended summons and the applicant's written submissions was that the matters identified were only relevant to a merits assessment of the truck wash facility: at [72], [84]; and
- (2) The applicant bore the onus of establishing that the development fell within Sch 3 of the EP&A Regulation and was designated development for the purpose of [s 4.10](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#). In determining "dominant purpose" the focus must be on the end purpose served by an activity rather than considering individual components of that activity (*Chamwell Pty Ltd v Strathfield Municipal Council* (2007) 151 LGERA 400; [\[2007\] NSWLEC 114](#) at [27]-[45]). The "dominant purpose" of the development was a rural industry as defined in particular (f) of the [Dictionary](#) of the [Gwydir Local Environmental Plan 2013](#). The "dominant purpose" was not waste management and [cl 32](#) of [Sch 3](#) of the EP&A Regulation did not apply to this truck wash facility. Even if established that the truck wash facility was for waste management purposes, the applicant did not establish that the thresholds in [cl 32\(1\)\(a\)\(iii\)](#) about the amount of effluent or [cl 32\(1\)\(d\)](#) about proximity to a waterway applied as alleged: at [95], [99].

***Ryan v Northern Regional Planning Panel*** [\[2020\] NSWLEC 55](#) (Pain J)

**Facts:** Mr Ryan (**applicant**), a Bundjalung elder living in North Lismore, commenced civil enforcement proceedings challenging the decision of the first respondent, the Northern Regional Planning Panel (**Panel**) to approve a subdivision on part of the North Lismore Plateau and a construction certificate (**CC**) issued by the Second respondent, Lismore City Council (**council**). All respondents other than the Third respondent, Winten (No 12) Pty Ltd (**Winten**) (the developer), filed submitting appearances.

**Issues:**

- (1) Was a Species Impact Statement (**SIS**) required to be lodged before determination of the development application (**DA**) by the Panel under [s 78A\(8\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EP&A Act\)](#);
- (2) Did a breach of the [Heritage Act 1977 \(NSW\) \(Heritage Act\)](#) occur when the potential for a relic existing, being an inferred gravesite, was dug up without an excavation permit; and
- (3) Was the CC for work on a road and earthworks invalid because no development consent for the work had been given.

**Held:** Applicant successful on the SIS ground; declaration made that the development consent granted by the Panel was invalidly made, void and of no effect:

(1) At the time the DA was lodged, s 78A(8)(b) of the EP&A Act was in force which required that a SIS be prepared to accompany a DA if development was likely to significantly affect threatened species, populations or their habitats. The likelihood of significance was to be determined by reference to the seven-part test in [s 5A\(2\)](#) of the EP&A Act (s 5A(2)(a), (d) and (g) were identified by ecologists as relevant in this case): at [142]-[143]. Whether or not a SIS was required was a question of jurisdictional fact which the Court had to decide for itself on the evidence before it, per *Timbarra Protection Coalition Inc v Ross Mining NL* ([1999](#) 46 NSWLR 55; [\[1999\] NSWCA 8](#)): at [144]. The consideration of relevant factors was not limited to those in s 5A(2), that list not being exhaustive per *BT Goldsmith Planning Services Pty Limited v Blacktown City Council* ([2005](#) NSWLEC 210 (*BT Goldsmith*)) at [12] and *Friends of Tumblebee Inc v ATB Morton Pty Ltd (No 2)* ([2016](#) 215 LGERA 157; [\[2016\] NSWLEC 16](#)) at [82]: at [145]. The Threatened Species Assessment Guidelines (**Guidelines**) were a mandatory relevant consideration in the assessment of impact by virtue of s 5A(1)(b) and (3) of the EP&A Act: at [148]:

- (a) *Key threatening processes*: Under s 5A(2)(g) of the EP&A Act and as identified in evidence by expert ecologists, nine key threatening processes (**KTPs**) in relation to the white-eared monarch and 11 KTPs in relation to the eastern long-eared bat were likely to be exacerbated by the development: at [149];
- (b) *Application of “study area”, “local population” and “locality”*: In applying s 5A(2)(a) and (d) of the EP&A Act and the Guidelines, Winten’s argument that “study area” required additional areas to be considered because a local population of both species could exist beyond the developable footprint was circular in construction and application. The subject site was the location of the proposed development and “study area” meant the area likely to be affected by the proposal including the subject site and additional areas adversely affected directly or indirectly: at [156]. The applicant’s approach to “study area” was preferred which looked generally at the site of the development with consideration of the land immediately adjoining the site: at [160];
- (c) *Mobility of species*: Further informing the application of s 5A(2)(a) and (d), the ecological evidence gave rise to the inference that the site of the development was the centre of habitat for a local population of the eastern long-eared bat which did not range widely from its roosting site when foraging: at [166]-[167]. A breeding pair of white-eared monarchs, a sedentary species, used the site of the development and the land immediately adjoining, ranging only 10 to 15 hectares: at [168]-[169];
- (d) *Removal, modification, fragmentation and isolation of habitat*: The extent of habitat removal necessitated by the development was substantial: at [181]. Fragmentation of habitat was to occur given the large area of vegetation to be cleared by the development: at [183]. Proposed improvements to vegetation quality would take a substantial time to occur. Habitat to be cleared would have otherwise been permanently occupied and used at all stages of both species’ lifecycles: at [184];
- (e) *Adverse effect on lifecycle of viable population*: On the evidence before the Court, the development and consequent loss of habitat was likely to have an adverse impact on the lifecycle of both species so as to place them at risk of extinction: at [192], [195];
- (f) *Cumulative impact*: Cumulative loss of habitat of threatened species had to be considered in determining whether there was likely to be a significant impact on threatened species: at [197]; and
- (g) *Precautionary approach*: A precautionary approach to consideration of whether a SIS was necessary was required per *BT Goldsmith* at [68]-[73] and the Guidelines: at [145], [198].

In conclusion, adverse impacts were likely to occur and be significant for both species. A SIS was required in order to comply with s 78A(8) of the EP&A Act: at [198]-[199];

(2) The applicant alleged that Winten had reasonable cause to suspect that it had discovered a relic within the meaning of [s 139](#) of the Heritage Act in the form of an inferred gravesite, meaning its actions in excavating the inferred gravesite were unlawful as an excavation permit was required: at [202]. The inferred gravesite was first detected in reports prepared as part of the development approval process: at [239]. Winten engaged a different company to that which had originally detected the inferred gravesite to do the excavation work: at [241]:

- (a) *Role of police*: The strong inference arose that but for the request of the Lismore police Winten would not have engaged a company at all to do the excavation work: at [244]. The statutory Scheme was unclear in that if [Ch 5](#) of the [Coroners Act 2009 \(NSW\)](#) (**Coroners Act**) applied, the

Heritage Act permit provisions were rendered inapplicable. The Coroners Act was not relied on. Investigation of some sort may well be required to determine if the Coroners Act applies which work the Heritage Act regulates: at [245]. The role of the police in requesting that the work be done was irrelevant to whether s 139(1) of the Heritage Act was breached but was a clear exculpatory circumstance for Winten: at [244], [249]; and

- (b) *Breach of Heritage Act*: On the evidence, before the excavation work commenced Winten had reasonable cause to suspect a relic may have been present, and in engaging a company to do the excavation work acted in breach of s 139(1) of the Heritage Act. A request from the police alone to do excavation work did not overcome the requirement to obtain an excavation permit when there was reasonable cause to suspect the presence of a relic: at [247], [249].

In the exercise of discretion, the circumstances of the excavation suggested no declaration of breach ought to be made and the remedial relief sought by the applicant was unwarranted: at [249]; and

- (3) The applicant alleged that no development consent or CC approval was granted for work on a “haul road” and that a “borrow pit” approved in the CC was not approved in the development consent, making the CC inconsistent with the development consent: at [301]:

- (a) *Road*: References to a “haul road” in the CC were to “Road 1” plans approved with an earlier development consent granted in 2016 and amended and incorporated into the development consent issued in 2018 (**2018 DC**) by way of conditions of consent: at [304]. The CC was not inconsistent with the 2018 DC: at [305]; and

- (b) *Borrow pit*: The CC permitted the construction of the borrow pit meaning there was no relevant inconsistency between the development consent plans and the CC. That the words “borrow pit” were not used in certain plans did not give rise to inconsistency as identified in *Burwood Council v Ralan Burwood Pty Ltd (No 3)* ([\[2014\] 206 LGERA 40](#); [\[2014\] NSWCA 404](#) at [147]: at [307].

As there was no relevant inconsistency, whether the CC should be declared invalid did not arise: at [308].

- **Compulsory Acquisition:**

***UTSG Pty Ltd v Sydney Metro (No 6)*** [\[2020\] NSWLEC 63](#) (Pepper J)

(related decisions: *UTSG Pty Ltd v Sydney Metro* [\[2018\] NSWLEC 128](#) (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 2)* [\[2018\] NSWLEC 199](#) (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 3)* [\[2019\] NSWLEC 49](#) (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 4)* [\[2019\] NSWLEC 51](#) (Pepper J); *UTSG Pty Ltd v Sydney Metro (No 5)* [\[2019\] NSWLEC 107](#) (Pepper J))

**Facts:** UTSG Pty Ltd (**applicant**) appealed the amount of compensation offered to it by the respondent acquiring authority, Sydney Metro, in accordance with a determination of the New South Wales Valuer-General (**VG**) for the compulsory acquisition of its leasehold interest over premises at 40 Park Street, Sydney (**40 Park Street**) pursuant to [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**Land Acquisition Act**).

The case was commenced on 16 August 2017 and was beset by numerous interlocutory disputes, delays, and non-compliance with court orders on the part of UTSG, which was not legally represented from 25 October 2018 until the conclusion of the proceedings. During this period, the proceedings were conducted for UTSG by its directors, Ms Simran Singh and Dr Mirza Baig.

The amended Points of Claim that UTSG relied upon set out a claim for disturbance losses in the amount of \$19,160,626 on the basis that the business had relocated, or, in the alternative, \$50,878,359 on the basis that the medical centre business had been extinguished, plus legal costs and valuation fees, and the unquantified costs of Supreme Court proceedings brought by Dr Baig against UTSG. The relocation costs of the business were said to include lost profits under s 59(1)(c) or (f) of the Land Acquisition Act. The extinguishment claim included “Extinguishment Relocation Costs” and “Extinguishment Lost Profits”, again claimed under [s 59\(1\)\(c\)](#) or [\(f\)](#) of the Land Acquisition Act. The costs of the Supreme Court proceedings were claimed under s 59(1)(f) of the Land Acquisition Act.

UTSG ultimately did not press the extinguishment claim. During closing submissions, the applicant abandoned its claim for the costs of the Supreme Court proceedings, and added entirely new elements to its relocation claim, including a claim for doctors’ retainers and capability development costs. The

compensation sought increased to \$45,710,000. No formal application to amend the Points of Claim was made.

Sydney Metro did not oppose UTSG's claim for legal costs and valuation fees in the sum of \$137,516.76 but contended that the applicant was not entitled to any other compensation for the compulsory acquisition of its leasehold interest, and that UTSG owed Sydney Metro \$183,123.64 in unpaid rent. Sydney Metro also sought its costs of the proceedings, including a non-party costs order against Ms Singh, in light of the nil compensation awarded to UTSG once the set off of the rental arrears was made, and given the manner in which UTSG, through Ms Singh in particular, conducted its claim.

Issues:

- (1) Was UTSG entitled to claim for relocation costs under s 59(1)(c) or (f) of the Land Acquisition Act;
- (2) If so, what amount of compensation was UTSG entitled to;
- (3) Could the rent owed by UTSG to Sydney Metro be set off against the amount of compensation owed, if any, to UTSG;
- (4) Should a costs order be made in favour of Sydney Metro; and
- (5) If so, should Ms Singh be made personally liable for those costs.

Held: UTSG was entitled to compensation for its legal costs and valuation fees only. The rent owed by UTSG to Sydney Metro was set off against this amount, with the result that no payment was required to UTSG by Sydney Metro. UTSG was ordered to pay Sydney Metro's costs of the proceedings, for which Ms Singh was made jointly and severally liable:

- (1) The evidence established that UTSG's business was that of commercial property management, and not the provision of healthcare services as contended by UTSG. No claim was available under s 59(1)(f) of the Land Acquisition Act because UTSG did not make any "actual use of the land" as required by that section. UTSG's business did not relocate to 280 Pitt Street as claimed, rather another business associated with Dr Baig, namely, Arys Health, did. Therefore, no claim for relocation costs was available under s 59(1)(c): at [259], [293] and [303];
- (2) The financial evidence demonstrated that the business had no value as at the date of acquisition other than its assets, which were not acquired. The financial information supplied by UTSG to the VG and to the Court as the basis of its claim was unreliable, unverifiable, and self-serving. This included a business sale agreement, dated 1 November 2015, which purported to be an agreement to sell part of UTSG's business to 5G General Trading LLC for USD\$14,570,000. The business sale agreement was a sham. A company that UTSG suggested had independently audited its financial documents in fact did not legitimately exist but had been created by UTSG. Funds had been injected into UTSG's business by Ms Singh and others at her request in an attempt to artificially inflate the company's income in order to support UTSG's claim for compensation: at [178]-[188], [223]-[224] and [280]-[281];
- (3) The rent owed to Sydney Metro by UTSG was offset against the compensation awarded by the Court pursuant to s 34(4) of the Land Acquisition Act. This resulted in a negative balance, and therefore, no compensation was payable to UTSG: at [393]-[394];
- (4) It was appropriate that UTSG pay Sydney Metro's costs of the proceedings, despite the usual position in these proceedings that an applicant is entitled to its costs. UTSG repeatedly refused to accept the offer of compensation from Sydney Metro as determined by the VG, notwithstanding that this was based on the misleading financial evidence provided to the VG by UTSG. Despite the lack of any reliable evidence supporting UTSG's constantly evolving claim, the applicant continued to pursue the proceedings. UTSG made scandalous and baseless accusations during its conduct of the hearing impugning the character and integrity of the legal representatives of Sydney Metro. Evidence was fabricated by it. The conduct of UTSG in pursuing the proceedings was therefore unreasonable. Further, UTSG repeatedly failed to comply with the directions of the Court, which gave rise to unnecessary delays and expenditure: at [409]-[410]; and
- (5) Considering the principles governing the making of non-party costs orders, it was also appropriate that Ms Singh be made personally liable to pay Sydney Metro's costs. Ms Singh was a director and shareholder of UTSG and its guiding mind of the applicant at the commencement of, and throughout, the proceedings. She was largely responsible for UTSG's non-compliance with court orders. Ms Singh had a substantial interest in the applicant and the proceedings. Moreover, Ms Singh's conduct of the litigation was unreasonable and improper. She fabricated documents and other evidence to support the applicant's claim, and knowingly gave false oral and written testimony. The interests of justice required that Ms Singh be subject to a non-party costs order: at [412]-[425].



- **Criminal:**

***Environment Protection Authority v Hardman Chemicals Pty Ltd*** [\[2020\] NSWLEC 8](#) (Robson J)

**Facts:** Hardman Chemicals Pty Ltd (**Hardman Chemicals**) pleaded guilty to one offence against [s 64\(1\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) for contravening a condition of its Environmental Protection Licence in that it failed to undertake chemical production waste generation and dangerous goods production in a competent manner. Hardman Chemicals is a chemical manufacturing company and produces chemicals for use in the treatment of drinking water and in pharmaceutical, construction and agricultural industries.

On 3 May 2018, Hardman Chemicals added 160 litres of hydrogen peroxide to 10-12,000 litres of hydrochloric acid which caused a release of approximately 10 kilograms of chlorine gas into the atmosphere (**Incident**). Hardman Chemicals immediately reported the Incident to the Environment Protection Authority (**EPA**) and to WorkCover. Ten Hardman Chemicals employees were adversely affected by the chlorine gas, including three who were admitted to hospital overnight. A further fourteen employees and persons located at surrounding businesses reported a range of symptoms resulting from exposure to chlorine gas.

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

**Held:** Hardman Chemicals was convicted of the offence; ordered to pay \$60,000 to Blacktown City Council for certain environmental projects; ordered to pay the prosecutor's legal costs as agreed in the sum of \$100,000; ordered to publicise the offence; and ordered to take specified action to notify certain persons aggrieved by Hardman's conduct:

- (1) In imposing the sentence, the Court took into account the following objective circumstances:
  - (a) the maximum penalty for the offence: at [61];
  - (b) the harm caused was substantial and serious: at [70];
  - (c) the risk of harm was foreseeable and practical measures were available to prevent or abate the harm: at [75], [81];
  - (d) the offence was not committed for financial gain, nor was there any evidence suggesting that Hardman Chemicals' conduct was intentional, reckless or negligent: at [72]-[73];
  - (e) Hardman Chemicals had relevant and appropriate control over the causes of the harm: at [84];
- (2) Having considered the objective circumstances, the offence was determined to be in the low to middle range of objective seriousness: at [87];
- (3) The following subjective circumstances were taken into account:
  - (a) Hardman Chemicals entered an early guilty plea: at [88];
  - (b) The company and its directors had expressed genuine contrition and remorse: at [92];
  - (c) There was a lack of any prior criminality: at [93];
  - (d) Hardman Chemicals cooperated with the EPA at all times: at [95];
  - (e) The company had taken steps following the commission of the offence to improve its procedures and reduce its likelihood of reoffending: at [96]; and
- (4) It was considered it to be appropriate that Hardman Chemicals be ordered to both publicise the offence and send letters of apology to a number of persons impacted by the Incident: at [105]-[106].

***Environment Protection Authority v Warwick Ronald McInnes*** [\[2020\] NSWLEC 37](#) (Duggan J)

**Facts:** Mr McInnes (**defendant**) was a volunteer groundsman with the Mountain District Sporting Association, responsible for tasks such as carrying out line marking at the Mountain District Sportsground (**Premises**). The Premises included a separate disabled toilet only accessible via a Master Locksmiths Access Key (**MLAK key**), which disabled persons are able to obtain. The defendant had access to the disabled toilet with an MLAK key, one of at least one or two MLAK keys either issued to the Sporting Association or kept on the Premises. Sometime after 12 January 2014, the defendant decanted a product containing the pesticides Paraquat and Diquat into a Coca-Cola bottle (**Coke bottle**) and placed it in the disabled toilet under the sink, an area not enclosed in any way. He then discarded the original container.

On 10 August 2017, Mr Damien Terry, a 22-year-old autistic man who is non-verbal and suffers from severe developmental delay, attended the Premises with the “Life Without Barriers” group. A carer from the group opened the disabled toilet with an MLAK key. Later that afternoon, Mr Terry accessed the Disabled Toilet and consumed some of the contents of the Coke bottle. Shortly after, Mr Terry began to vomit and was taken to hospital, suffering numerous injuries. Life Without Barriers carers and Central Coast Council employees had inspected the disabled toilet prior to and following the incident and observed various items like sporting equipment, a ladder, sports bottles and a paint can in the disabled toilet. The defendant was charged with (1) negligently using a pesticide in a manner that injured another person ([s 7\(1\)\(a\)](#) of the [Pesticides Act 1999 \(NSW\)](#) (**Pesticides Act**)); and (2) using a pesticide in a manner that injured another person ([s 10\(1\)\(a\)](#) of the Pesticides Act). The defendant pleaded not guilty to both charges.

**Issues:**

- (1) Whether the defendant, by placing the Coke bottle in the disabled toilet, did “store” the pesticides within the [s 4](#) of Pesticides Act definition of “use” for the purposes of both offences charged; and
- (2) Whether the defendant acted in a manner capable of being characterised as criminal negligence.

**Held:** Convicted of using a pesticide in a manner that injured another person; the charge of negligently using a pesticide in a manner that injured another person dismissed:

- (1) The ordinary meaning of the word “store” is of a broad scope and has varying meanings, depending on context. As the dictionary definition makes plain, in some instances future use is an element of storage. However, in others, intention for future use is not a necessary element of such a characterisation: at [40]. In its legislative context, the structure of the *Pesticides Act 1999* is intended to “cover the field” from major to minor offences. As such, the conduct defined and the terms used - such as “use” and “possession” - are, in some cases, overlapping. The adoption of different terms does not evidence a legislative intent to isolate the terms without overlap, but rather to permit overlapping: at [43]-[44];
- (2) The construction identified is consistent with the meaning ascribed to “store” in other legislative contexts, particularly given the similarities with other legislative objects: at [45]-[46];
- (3) The statutory language and the ordinary meaning of “store” indicate that in order for a pesticide to be stored, the retention of the item must be in a place where items are habitually retained for more than a nominal period of time, for a purpose not necessarily related to the future use of that item: at [48];
- (4) The manner of storage objectively gives rise to a reasonable foreseeability of ingestion by a person who had access to the disabled toilet. A reasonable person would have known that the placement of the pesticides in a drink bottle would give rise to an obvious risk of harm of the type particularised in this case: at [74];
- (5) The risk of ingestion is higher when the facility in which the Pesticide was stored was a facility specifically for use by disabled persons that included those with developmental delays: at [75]; and
- (6) Foreseeability of the identified risk depends on whether there was capacity to access the Coke bottle on the relevant date. A reasonable person in the position of the defendant would not have been aware that access to the Disabled Toilet was generally available to all disabled persons who have been provided with an MLAK key. Further, the defendant’s belief that, on the relevant day, he held the only key to open the Disabled Toilet was not unreasonable: at [76]-[77], [87].

**Port Macquarie-Hastings Council v David Peter Waite (No 2)** [\[2020\] NSWLEC 60](#) (Duggan J)

(related decision: *Port Macquarie-Hastings Council v Waite* [\[2019\] NSWLEC 146](#) (Pepper J))

**Facts:** Mr Waite (**defendant**) is a registered proprietor of land on which Timbertown Heritage Theme Park is operated. The defendant lodged a development application seeking consent for a temporary caravan park, which the council granted. The consent was subject to a number of conditions, including “Approval under [Pt 1](#) of [Ch 7](#) of the [Local Government Act 1993 \(NSW\)](#) (**Local Government Act**) to operate a caravan park or camping ground (including of a temporary nature) on the land is to be obtained before the use of the land as such”. One month after consent was granted, council officers observed that two cabin buildings and toilet facilities had been erected on the property, and vehicles including a motor home and caravans were also observed. There was no application for approval, or any approval for the operation of a caravan park, installation of the cabins, or connection to sewer and water. The defendant was charged with three charges:

- (i) carrying out development otherwise than in accordance with the conditions of a development consent by failing to obtain Local Government Act approval;

- (ii) carrying out a specified activity without having obtained prior approval from the council; and
- (iii) erecting structures for use as toilet facilities and cabins without development consent.

The defendant pleaded guilty to all charges.

**Issues:** Determine the appropriate sentence.

**Held:** Defendant convicted on all charges; fines totalling \$7,500 imposed; fines to be paid to the council; defendant to pay prosecutor's costs:

- (1) A lack of awareness of the requirement to obtain approval under s 68 of the Local Government Act does not provide absolution from the obligation to ensure all necessary consents are obtained prior to carrying out use as a caravan park. It was not the council's responsibility to provide advice on consents that are required. It is the responsibility of every operator to ensure for themselves that they have obtained all necessary consents. The offence, being one of strict liability, emphasises the legislative intent that the responsibility rests on the person proposing to carry out the use. A lack of understanding or necessary investigation is not sufficient to reduce culpability: at [65];
- (2) Despite the prosecutor contending that the defendant was not genuine in his expressions of contrition and remorse for a number of reasons (including the publication of a leaflet relating to the premises, which the Prosecution submitted demonstrated a willingness to misrepresent the facts), the totality of the evidence was to the contrary. The defendant attempted to regularise the breaches, and his affidavit clearly attested to his regret in breaching the law. If the prosecutor wished to submit that the defendant was lying - the only inference to be drawn from this submission - then this proposition should have been put to the defendant during his cross-examination. The leaflet indicates dissatisfaction with the process, but publicly disagreeing with the council and the approach it has taken is a democratic entitlement. The leaflet, on its face, does not diminish the uncontested statements of remorse deposed to in the affidavit: at [76]-[80];
- (3) To impose a fine solely to achieve the object of "avoiding nominal fines" and thereby conveying a stronger message to potential offenders would not reflect the objective seriousness of the circumstances of these particular offences. General deterrence considerations cannot overcome the overarching principle that the sentence must be proportionate to the nature of the particular circumstances of the criminal actions to which it relates: at [94]; and
- (4) The fact that all the charges could have been commenced in the Local Court was a relevant consideration in determining the sentence: at [100].

***Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 5)***  
[\[2020\] NSWLEC 65](#) (Pepper J)

(related decisions: *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd* [\[2018\] NSWLEC 114](#) (Pain J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 2)* [\[2018\] NSWLEC 195](#) (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 3)* [\[2018\] NSWLEC 197](#) (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [\[2019\] NSWLEC 58](#) (Pepper J))

Facts: Leda Manorstead Pty Ltd (**Leda**) was the developer of Cobaki Estate, a major residential development located in the Tweed Shire. In *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [\[2019\] NSWLEC 58](#), Leda was found guilty of three charges relating to breaches of [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**). On 25 May 2018, Leda pleaded guilty to a fourth charge, namely, that it committed an offence against s 125(1) insofar as it commenced subdivision work without a construction certificate having been issued by the consent authority or an accredited certifier contrary to [s 81A\(4\)\(a\)](#) of the EP&A Act. The prosecution had also filed an additional summons that was later withdrawn (**withdrawn summons**). Six days before the sentence hearing commenced, by consent and with the leave of the Court, the prosecutor filed an Amended summons in respect of the second charge (**amended second summons**). The original second summons, which particularised that the offence was a Tier 1 offence that was committed intentionally and was likely to cause significant harm to the environment pursuant to [s 125A](#) of the EP&A Act, was amended to a Tier 2 offence pursuant to [s 125B](#) of the EP&A Act. That is, that the offence was committed recklessly or negligently.

At the commencement of the sentence hearing, the prosecutor informed the Court that it would not be making a submission that the actual or potential harm caused by the commission of all four offences ought

to be characterised as “significant” or “substantial”. This meant that any harm could not amount to an aggravating factor pursuant to [s 21A\(2\)\(g\)](#) of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) (**Sentencing Procedure Act**).

In response, Leda submitted that if the Court were to rely on the expert evidence as filed and served, this would contravene the *De Simoni* principle because the evidence was prepared on the basis of a Tier 1 charge and therefore risked the Court taking into account as an aggravating factor a circumstance that would punish the offender for a more serious offence than charged.

Leda filed a Notice of Motion, being an application pursuant to [s 10\(1\)\(a\)](#) of the Sentencing Procedure Act, that the first summons and the amended second summons be dismissed without conviction, or in the alternative, that upon conviction the proceedings the subject of those two summonses be disposed of without imposing any other penalty under [s 10A\(1\)](#) of that Act. Leda included the first summons in its application because the first and second summonses were, in effect, a single continuing offence because the two charge periods they related to were temporally contiguous.

Issues:

- (1) Whether reliance on the expert evidence as to harm would contravene the *De Simoni* principle;
- (2) Whether the expert evidence was infected by prejudicial consideration of whether there was significant environmental harm;
- (3) Whether Leda had lost the opportunity to enter guilty pleas to the first and second summonses in light of the amendment to the second summons; and
- (4) Whether costs had been wasted because Leda had met a case that was now abandoned by the prosecutor.

Held: Notice of Motion dismissed:

- (1) Taking the evidence into account in an assessment of the extent of any environmental harm caused by the commission of the offences will not, of itself, breach the *De Simoni* principle, provided that its consideration is limited to an overall assessment of the objective seriousness of the offence: at [45];
- (2) Leda’s application was premature. To determine an appropriate sentence, the Court must review the evidence in order to consider the factors affecting the seriousness of the offence pursuant to s 21A(1) of the Sentencing Procedure Act. Sentencing for environmental crime incorporates an assessment of any actual or potential environmental harm caused by the commission of the offence, a fundamental element of which includes the extent of that harm. Therefore, the Court needed to review the evidence regardless of its references to significant environmental harm because it was directly relevant to the extent of any actual or potential harm occasioned by the commission of the offences: at [41]-[42] and [44];
- (3) Similarly, in determining whether to make an order under s 10(1) of the Sentencing Procedure Act, to assess the “trivial nature of the offence” under s 10(3), the Court needed to review evidence of the extent and nature of the harm caused by the commission of the offences: at [48];
- (4) Although some of the expert evidence may have referred to “significant” or “substantial” harm, this could be divorced from the particulars of the original second summons. The prosecutor’s evidence was not directed specifically to the issue of “significant” or “substantial” harm; these terms were used as a convenient summary of the harm: at [49]-[50]. Leda failed to demonstrate how the expert evidence would have been materially different as a consequence of the amended second summons: at [53];
- (5) The amended second summons did not result in Leda being charged with a different offence; it remained a s 125(1) offence. There was nothing to prevent Leda entering a plea of guilty to the first or second summonses at any time and there was no evidence to suggest that Leda would have changed its plea. That the offence and its related maximum penalty was downgraded from a Tier 1 to a Tier 2 offence by the amended second summons did not result in Leda being denied the opportunity of pleading guilty to the charge. A plea of guilty is no more than an acceptance by the defendant of the elements of the offence, not to the particulars of that offence: at [54]-[59]; and
- (6) Where earlier proceedings were rendered otiose by reason of the amended second summons and as a result wasted costs were incurred to meet a case now abandoned by the prosecutor, an argument for the exercise of the Court’s discretion under [s 257B](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) to take these matters into account when ordering costs was compelling. Furthermore, the payment by Leda of the prosecutor’s costs was a matter that the Court would take into account in determining the appropriate penalty to be imposed for the commission of the four offences: at [61]-[62].



**Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 6)**  
[\[2020\] NSWLEC 68](#) (Pepper J)

(related decisions: *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd* [\[2018\] NSWLEC 114](#) (Pain J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 2)* [\[2018\] NSWLEC 195](#) (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 3)* [\[2018\] NSWLEC 197](#) (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [\[2019\] NSWLEC 58](#) (Pepper J); *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 5)* [\[2020\] NSWLEC 65](#) (Pepper J))

**Facts:** Leda Manorstead Pty Ltd (**Leda**) was the developer of Cobaki Estate, a major residential development located in the Tweed Shire. In *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [\[2019\] NSWLEC 58](#), Leda was found guilty of three charges relating to breaches of [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**). On 25 May 2018, Leda pleaded guilty to a fourth charge, namely, that it committed an offence against s 125(1) of the EP&A Act insofar as it commenced subdivision work without a construction certificate having been issued by the consent authority or an accredited certifier contrary to [s 81A\(4\)\(a\)](#) of the EP&A Act.

During the sentence hearing Leda objected to the admissibility of affidavits and expert reports prepared by Mr Aleksander Todoroski (**Todoroski evidence**), an air quality engineer engaged by the prosecutor. The Todoroski evidence consisted of a first affidavit and appended expert report (**first affidavit and report**), a second affidavit and appended expert report (**second report**), and a third affidavit. Prior to filing the first affidavit and report, Mr Todoroski had prepared a report (**original report**) that referenced that he had undertaken modelling and soil sampling to obtain data. However, the original report did not identify what model was used by him or how it was applied.

Leda requested that Mr Todoroski provide the modelling and relevant inputs so that its expert, Mr Damon Roddis, could properly analysis the original report. Mr Todoroski refused, claiming that the model was sensitive, confidential and “commercial-in-confidence”. After Leda subpoenaed Mr Todoroski for his modelling data, field notes, soil sampling results, and emissions calculations, Mr Todoroski prepared the first report, which included modelling that did not use sensitive, confidential or commercial-in-confidence information.

Mr Todoroski’s second report was prepared in response to Mr Roddis’ expert reports. It included corrections and clarifications of the modelling and results contained in his first report. The corrections were not insignificant and produced a different set of results.

**Issues:**

- (1) Whether Mr Todoroski had disclosed what model he used in his first report;
- (2) Whether the first and second reports could be read together so that the identification of the model in the second report cured any defect in his first report;
- (3) Whether, as a matter of admissibility, Mr Todoroski had properly identified the assumed or accepted facts upon which he built his modelling and/or applied his scientific methodology from which his opinions were derived;
- (4) Whether there was evidence available to the Court that could prove the assumed facts upon which Mr Todoroski’s opinions were based, especially in light of Mr Todoroski’s failure to provide field notes of his site visit and soil sampling at Cobaki Estate; and
- (5) Whether Mr Todoroski’s dust plume photos in the second report were admissible.

**Held:** Mr Todoroski’s first affidavit and report were admissible in part only. Mr Todoroski’s second report and third affidavit were each admissible as a whole:

- (1) The factual bases upon which the opinions proffered in the Todoroski evidence were established were sufficiently set out in the first and second Todoroski reports and affidavits: at [40];
- (2) The omission of Mr Todoroski’s field notes did not render the Todoroski evidence inadmissible. There was sufficient detail in the first report and third affidavit as to the conditions under which the site visit occurred and where the samples were collected: at [48];
- (3) The dust plume photos were admissible on the basis that the photos were used to demonstrate what a dust plume of that size and nature looked like. The undisclosed location of some of the photos did not render them inadmissible, since the reliance placed on them by Mr Todoroski was not location specific: at [50]-[51];

- (4) A bare reference to a model in the “References” section of the first report, without disclosing what model was used in the body of the report, was not enough to satisfy the requirement that an expert must set out all relevant criteria upon which their opinion was based: at [52]-[59];
- (5) Mr Todoroski’s refusal to provide the modelling used in the original report, and its subsequent replacement with the first report, which appeared to use different modelling, had a very real tendency to create considerable uncertainty as to what model he had used. This was complicated by the fact that Mr Todoroski claimed that the model in the original report was his own model, however, the model referenced at the end of the first report appeared to be a generic model. It was therefore unsafe to draw an inference that the model listed under “References” in the first report was the same model used by Mr Todoroski in the original report: at [61]-[65];
- (6) The fact that Mr Roddis was able to engage with the first report did not cure the fact that Mr Todoroski had not identified the model used in that report: at [66]; and
- (7) The second report sufficiently explained and identified the model used by Mr Todoroski to form his opinion and was therefore admissible: at [70]-[71].

• **Appeals from Local Court:**

***Hijazi v Georges River Council*** [\[2020\] NSWLEC 36](#) (Pain J)

**Facts:** Mr Hijazi (**appellant**) appealed against the severity of penalties imposed by the Local Court at Sutherland in September 2019 in four separate appeals. The four offences concerned breaches of [s 4.2](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) being the carrying out of development on residential premises in breach of the conditions of development consent. The appellant pleaded guilty to each of the offences and was fined \$30,000 for each offence in the Local Court.

**Issue:** What was the appropriate penalty for the offences.

**Held:** Appellant was partially successful in that two of the four appeals were upheld. In the two upheld appeals, the sentences imposed by the Local Court were set aside and a fine of \$10,000 was imposed in each offence. The other two appeals were dismissed:

- (1) The appellant’s culpability was at the high end of the low range of culpability in all four offences. Two of the offences, being the excavation to the boundaries of the property charge and the excessive underfloor renovation charge, were more serious given their potential for environmental harm: at [25]-[26];
- (2) On subjective factors, the appellant entered an early guilty plea which was required to be taken into account under [s 22\(1\)](#) of the [Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)](#) and which attracted a discount of 10 to 25 per cent: *R v Thomson*; *R v Houlton* ([2000](#)) [49 NSWLR 383](#); [\[2000\] NSWCCA 309](#) at [152]. The appellant had no prior convictions: at [28]-[29];
- (3) The principle of even-handedness required that the Court consider if there was any sentencing pattern for like offences in order to determine a consistent approach to penalty, subject to the particular circumstances of the case: *Hoare v the Queen* ([1989](#)) [167 CLR 348](#); [\[1989\] HCA 33](#) at 354. Recent similar cases showed higher penalties being imposed for similar offences and these have been considered in determining the appropriate penalty: at [32]-[40];
- (4) As the offences arose from essentially the same circumstances close together in time the totality principle was applied to some degree: *Environment Protection Authority v Wattke*; *Environment Protection Authority v Geerdink* [\[2010\] NSWLEC 24](#) at [98] citing inter alia *Mill v The Queen* ([1988](#)) [166 CLR 59](#); [\[1988\] HCA 70](#) at 62: at [41]; and
- (5) Applying the instinctive synthesis approach according to *Muldock v The Queen* ([2011](#)) [244 CLR 120](#); [\[2011\] HCA 39](#) at [26] unanimously following *Markarian v The Queen* ([2005](#)) [228 CLR 357](#); [\[2005\] HCA 25](#) at [51], the two appeals concerning the more serious offences were dismissed and a lesser penalty was imposed in the two upheld appeals: at [42]-[43].

- **Civil Enforcement:**

*Northcott v The Owners - Strata Plan No 31143* [2020] NSWLEC 62 (Robson J)

Facts: William and Olivia Northcott (**applicants**) commenced two separate proceedings relating to the absence of a protective balustrade around a landscaped roof garden area (**roof garden**) on the second level of a strata-titled building. The roof garden is separated from the applicants' tiled terrace by a handrail, which sits upon a small concrete upturn that also extends around the boundary of the roof garden. The handrail and the associated concrete upturn are part of the common property of the building and therefore reside with The Owners - Strata Plan No 31143 (**Owners Corporation**), whilst the tiled terrace and roof garden on either side of the handrail are part of the unit owned by the applicants.

The relief sought in both proceedings related to the applicants' concerns that, given that the handrail between the tiled terrace and roof garden is "easily navigable", the lack of a protective balustrade surrounding the roof garden presented a safety risk to the occupants as the outward edges of the roof garden were otherwise unprotected from a fall of several metres on each side.

In civil enforcement proceedings, the applicants sought relief requiring the Owners Corporation to construct a protective balustrade along the outward edges of the roof garden as the applicants claimed the roof garden was "designed for use by the occupants of the building". The applicants relied on the provisions of Local Government Ordinance No. 70 which, although now superseded, were in force at the time development consent was granted for the construction of the building in 1984.

In separate judicial review proceedings, the applicants challenged the validity of a development consent more recently granted to the Owners Corporation in 2017 which permitted the construction of a protective balustrade around the tiled terrace area. The applicants claimed that, as the development application sought the construction of the balustrade around the perimeter of the roof garden and not merely the tiled terrace, the fact that the consent was instead granted for a balustrade around only the tiled terrace was indicative that North Sydney Council (**council**) was attempting to regulate the use of the roof garden when the consent only sought the construction of a physical balustrade. The applicants therefore claimed that the decision to grant consent for a balustrade in a location different to what had been sought was, inter alia, manifestly unreasonable. The applicants further claimed that they were denied procedural fairness as they had not been informed that council was considering granting a development consent which would impact upon the use of their property.

Issues:

- (1) Whether the roof garden was "designed for use by the occupants of the building" such that the Owners Corporation were required to install a protective balustrade around that area in accordance with Local Government Ordinance No 70;
- (2) If any discretionary reasons to decline relief existed;
- (3) Whether the 2017 development consent was manifestly unreasonable such that the imposed conditions were invalid; and
- (4) Whether the applicants were denied procedural fairness by council when making the decision to grant the development consent.

Held: Proceedings dismissed:

- (1) In civil enforcement proceedings:
  - (a) by reference to the relevant approved architectural and landscaping plans from 1984, the continuous handrail separating the roof garden from the terrace was intended to prevent access to the roof garden such that the area was not "designed for use by the occupants of the building": at [77];
  - (b) the fact that the balustrade was relatively navigable and able to be stepped over was only due to the regulations in force at the time and nonetheless showed an intention for the handrail to separate the occupants from the roof garden: at [78];
  - (c) although the roof garden would on occasion be "used" for the purposes of landscaping and maintenance, it was not indicative that the area was designed for general use by the occupants such that other uses of the area would become available to the occupier other than for maintenance: at [83];

- (d) had a different outcome, the fact that the relief was sought 35 years following the construction of the building would have been a matter of concern: at [93];
- (2) In judicial review proceedings:
- (a) the conditions imposed upon the 2017 development consent fairly and reasonably related to the permitted development, as council was entitled to take into account the likely increase in the use of the roof garden that would have resulted from the movement of the physical handrail: at [120];
  - (b) in light of the assessment conducted by council which, inter alia, considered the privacy of adjacent premises, council's reasoning in imposing the conditions was orthodox and could not be said to be either manifestly unreasonable or lacking evident or intelligible justification: at [135];
  - (c) the grant of development consent to the Owners Corporation did not have such significant consequences as to generate an obligation on council to consult the applicants: at [145]; and
  - (d) the applicants were not denied procedural fairness by council in granting the development consent: at [153].

• **Valuation/Rating:**

***Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council*** [\[2019\] NSWLEC 66](#) (Moore J)

**Facts:** Mangoola Coal Operations Pty Ltd (**Mangoola**) operates a coal mine in the Muswellbrook Shire Council (**council**) local government area, about 18 kilometres west of Muswellbrook (**Site**). Mangoola retains ownership of the open-cut mine, and a large area of land surrounding the mine. Though the Site is comprised of many individual allotments, the Site has been aggregated into three distinct areas (with one of those areas being the mine) pursuant to the [Valuation of Land Act 1916 \(NSW\)](#) (**Valuation Act**) for rating purposes. Each of these three areas had been categorised as “mining” by council pursuant to the [Local Government Act 1993 \(NSW\)](#) (**Local Government Act**).

Mangoola applied to recategorise retrospectively two of the areas (with the mine remaining “mining”) as “farmland” for the 2016/17 and 2017/18 rating years. Council was taken to have refused the request, in accordance with procedure under the Local Government Act. The two areas are of different sizes and were described as the smaller assessment area (**SAA**) and the larger assessment area (**LAA**). The actual area of these two assessment areas changed between the rating years as a result of boundary adjustments. The SAA was comprised of two elements: an area to the northwest and the Sustainable Agricultural Offset area (**SAO**).

A range of uses was present on the SAA and LAA during the rating years. Importantly, Mangoola had an access licence agreement with Colinta Holdings Pty Ltd (Colinta), a cattle-grazing enterprise that operates at a number of locations across Australia. There were cattle on the Site during the rating years. Mangoola was required, as part of its consent, to establish biodiversity offset areas, vegetation screens and environmental monitoring stations on the Site. These formed uses of the land. Relevantly, the categorisation of the use of land is determined by its dominant use.

**Issues:**

- (1) Did [s 14F\(3\)](#) of the Valuation Act operate to automatically render the SAA as “farmland” for rating purposes under the Local Government Act;
- (2) What were the nature and extent of the uses on the relevant assessment parcel during each of the relevant years; and
- (3) Of those uses, which was the dominant one.

**Held:** Appeals dismissed; costs reserved:

- (1) The appropriate approach to determining dominant use was described in *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [\(2010\) 79 NSWLR 724](#); [\[2010\] NSWSC 867](#) at [69]-[70]: at [124];
- (2) The finding of a dominant use of each assessment area in conformity with the tests in [s 515](#) of the Local Government Act was necessary to give rise to a categorisation of “farmland”: at [129];
- (3) The question of whether aggregation has been validly undertaken pursuant to the Valuation Act is not one to be considered by this Court: at [144];



- (4) The words “valued and rated accordingly” contained in s 14F(3) of the Valuation Act, are required to be read as a composite concept. To the extent that the statutory provision may be regarded as preventing a local government authority from unfairly obtaining a windfall gain in terms of higher rates that come from land to which the section (validly) applies, that protection comes from the separate valuation rather than through Local Government Act categorisation: at [156];
- (5) Any issues arising under the Valuation Act were therefore irrelevant to these proceedings: at [173];
- (6) The provision of water and electricity supply services through the easement for purposes of the operation of the mine was to be given significant weight in the consideration of dominant use. Without these services, the mine could not operate: at [277];
- (7) The dominant use of the SAA for the 2016/17 assessment year was for the purpose of a coal mine: at [294];
- (8) Limited grazing and the use of the SAO for offset purposes gave rise to the conclusion that the dominant use of the south eastern element of the SAA was for a coal mine. In the north western element, the presence of mining monitoring equipment, track network and complete lack of grazing necessitates the dominant use be characterised for the purpose of a coal mine: at [295]-[299];
- (9) The boundary adjustment between the relevant rating years resulted in the pipeline related easement being moved from the LAA to the SAA. As this easement was a significant factor for the characterisation of land-use, the boundary adjustment reinforced the characterisation of the SAA for mining purposes. Therefore, the SAA was used as a mine for the 2017/18 rating year: at [301]-[308];
- (10) The creation and management of the offset areas were a required element of the approval of the coal mine: at [332]. The use of these areas is to be distinguished from the characterisation of buffers as considered by Preston CJ in *Peabody Pastoral Holdings Pty Limited v Mid-Western Regional Council* (2013) 211 LGERA 337; [2013] NSWLEC 86. The use of the offset areas was, in this instance, an active use: at [362]. The purpose served of the use (and the only use) of the offset areas is, therefore, a coal mine: at [365]; and
- (11) The absence of grazing in the northern expansion area in the LAA due to drought, coupled with the presence of environmental monitors, lends itself to the conclusion that the use of the portion of the LAA known as the Wybong land was for mining purposes: at [421]-[432]. The dominant use of the south-eastern portion of the LAA was by Colinta. The farming use outweighed the environmental monitoring use in this element of the LAA: at [464]-[465]. On a balance of these conclusions, the dominant use of the entire LAA must be considered to be for the purposes of a coal mine: at [470].

#### • Section 56A Appeals:

***Ballina Shire Council v Palm Lake Works Pty Ltd*** [2020] NSWLEC 41 (Preston CJ)

(related decision: *Palm Lake Works Pty Ltd v Ballina Shire Council* [2019] NSWLEC 1479 (Dickson C))

**Facts:** Ballina Shire Council (**council**) appealed on questions of law under s 56A of the *Land and Environment Court Act 1979 (NSW)* against the decision of Dickson C to grant deferred commencement consent to Palm Lake Works Pty Ltd (**respondent**) to carry out road, civil and infrastructure works in relation to an extension of a seniors housing development, Palm Lake Resort. The respondent’s development application (**DA**) proposed the construction of 75 new serviced self-care dwellings, roads, earthworks, stormwater management works, infrastructure works, environmental protection works as well as vegetation removal. The respondent appealed to the Land and Environment Court.

The council pressed six grounds of appeal, submitting that the commissioner’s errors of law were material and vitiated her decision to grant consent.

**Issues:**

- (1) Whether the commissioner erred by failing to consider the likely impacts of construction of road, civil and infrastructure works in the North Creek Road reserve, as required by s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**) (likely impacts ground);
- (2) Whether the commissioner erred in forming an opinion of satisfaction under cl 28(1) of *State Environmental Planning Policy (Housing for Seniors or People with Disability) 2004* (**Seniors SEPP**) in the absence of written evidence that the development will be connected to a

reticulated water system and have adequate facilities for the removal or disposal of sewage (provision of water and sewage services ground);

- (3) Whether the commissioner erred in characterising the access way from North Creek Road to the proposed development across land zoned RU2 Rural Landscape as being for the purpose of “road” (which is permissible with consent in the RU2 Zone) instead of serviced, self-care housing (seniors housing) (which is prohibited in the RU2 Zone) (characterisation of the access way ground);
- (4) Whether the commissioner erred in failing to consider whether the development, because of its nature and location, may have an adverse effect on a priority oyster aquaculture area, as required by [cl 15B](#) and [cl 15C](#) of [State Environmental Planning Policy 62 - Sustainable Aquaculture \(Sustainable Aquaculture SEPP\)](#) (impact on aquaculture ground);
- (5) Whether the commissioner erred in finding that the precondition in [cl 7.1\(3\)](#) of [Ballina Local Environmental Plan 2012 \(BLEP 2012\)](#) had been met in the absence of an Acid Sulfate Soils Management Plan that included all of the proposed works, including works to the Western Creek line (Acid Sulfate Soils Management Plan ground); and
- (6) Whether the commissioner erred in finding that [State Environmental Planning Policy \(Coastal Management\) 2018 \(Coastal Management SEPP\)](#) did not apply, and instead that [State Environmental Planning Policy 14 - Coastal Wetlands \(SEPP 14\)](#) did apply, when the opposite was the case, and further failed to form the required opinion of satisfaction that the proposed development would not significantly impact on the matters in [cl 11\(1\)](#) of the Coastal Management SEPP (**Coastal Management SEPP ground**).

**Held:** Council established five of the grounds of error on questions of law; appeal upheld; commissioner’s decision and orders set aside and matter remitted for redetermination:

- (1) The commissioner was required to make an evaluative judgment as to whether the likely impacts of the road, civil and infrastructure works to be undertaken in the North Creek Road reserve were likely impacts of the proposed development, and if so, to take those impacts into consideration in determining the DA for the proposed development: at [30]. The commissioner did not have an understanding of the likely impacts of the road, civil and infrastructure works in the North Creek Road reserve or undertake an evaluation of the relevant matter of the likely impacts of the proposed development with that understanding.

The commissioner instead deferred for later consideration “a complete environmental assessment of all works proposed in the North Creek Road” by granting consent subject to a deferred commencement condition under [s 4.16\(3\)](#) of the EP&A Act. The commissioner thereby failed to take into consideration a mandatory relevant matter: at [38];

- (2) The commissioner misdirected herself in forming an opinion of satisfaction under cl 28(1) of the Seniors SEPP that the proposed seniors housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage by imposing a deferred commencement condition requiring the respondent to apply to the council for approval of such water and sewage services: at [50]. First, the commissioner was on notice that there was a likelihood that the council might not approve the works by reason of adverse environmental impacts: at [51]. In these circumstances, the commissioner could not be satisfied that, by imposing the deferred commencement condition, the seniors housing development “will” be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage: at [53]. Second, the commissioner’s satisfaction as per cl 28(1) needed to be based on “written evidence” available to the commissioner before she exercised the power to grant consent to the DA. There was no such written evidence: at [54];
- (3) The council had not established that the commissioner erred in characterising the access way as being a road. The commissioner’s approach to determine first whether the access way could be characterised as being for the nominate permissible development of road was correct. If the access way could be characterised as being for the nominate permissible development of road, it would be permissible, irrespective of whether it could also be characterised as being a seniors housing development: at [66]. The commissioner did not fail to consider the purpose of the use of the access way: at [67];
- (4) The commissioner erred on questions of law by failing to consider mandatory relevant matters required by [cl 15B\(1\)\(a\)](#) and cl 15C of the Sustainable Aquaculture SEPP. The commissioner rolled up consideration of all issues concerning water quality and water quantity and failed to give the particular consideration required by cl 15B(1)(a) and cl 15C of the Sustainable Aquaculture SEPP: at [75]. The language of the relevant matters in cl 15B(1)(a) and cl 15C of the Sustainable Aquaculture SEPP is

particular. It framed and focused the task of consideration that the commissioner was required to undertake in determining the DA: at [87]. The commissioner's reasons reveal that she failed to consider the relevant matters in cl 15B(1)(a) and cl 15C with this frame and focus, but instead substituted a different approach of generalised consideration of water quality and water quantity: at [88];

- (5) The commissioner erred on questions of law by finding that the precondition in cl 7.1(3) of BLEP 2012 was satisfied and thereby granting consent for the carrying out of proposed works. Clause 7.1(3) requires the preparation of an acid sulfate soils management plan for all of the proposed works, not some of them: at [102]. As a matter of fact, the Acid Sulfate Soils Management Plan provided to the commissioner addressed some of the proposed works, but did not address other proposed works including the stormwater management works and vegetation management works in the Western Creek line: at [103]. These works were all "proposed works" the subject of the DA: at [114]. As a consequence, the Acid Sulfate Soils Management Plan provided to the commissioner did not fall within the statutory description in cl 7.1(3) of being "an acid sulfate soils management plan...prepared for the proposed works". In the absence of an acid sulfate soils management plan answering the statutory description, the commissioner had no power to grant consent under cl 7.1(3) to the proposed works: at [115]; and
- (6) The commissioner erred on questions of law by finding that the Coastal Management SEPP did not apply but instead that SEPP 14 applied and by failing to consider and form the required opinion of satisfaction under cl 11(1) of the Coastal Management SEPP. First, the commissioner held erroneously that the Coastal Management SEPP did not apply but instead that SEPP 14 did apply: at [128]. Secondly, in her consideration of the impacts of the proposed development, the commissioner never addressed the terms of cl 11(1) of the Coastal Management SEPP. The commissioner did not identify and describe "the adjacent coastal wetland" for the purposes of cl 11(1)(a) and (b) or its "biophysical, hydrological or ecological integrity" in cl 11(1)(a): at [129]. The global and generalised discussion about water quality and water quantity in [157]-[162] was not sufficient. The commissioner needed to focus on and make findings concerning the particular matters of "the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland" in cl 11(1)(b): at [130]. In the absence of forming the required opinion of satisfaction, the commissioner was precluded by cl 11(1) from granting consent to the proposed development: at [132].

***Tasman Property Holdings Pty Ltd v Canterbury-Bankstown Council*** [\[2020\] NSWLEC 59](#) (Pain J)

(related decision: *Tasman Property Holdings Pty Ltd v Canterbury-Bankstown Council* [\[2019\] NSWLEC 1310](#) (Smithson C))

**Facts:** Tasman Property Holdings Pty Ltd (**appellant**) appealed pursuant to [s 56A](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**) the decision of Smithson C in *Tasman Property Holdings Pty Ltd v Canterbury-Bankstown Council* [2019] NSWLEC 1310. In that decision, the Commissioner dismissed an appeal against Canterbury-Bankstown Council's (**council**) refusal of an application to modify a development consent that was granted by the Court following a successful [s 34](#) conciliation conference. The proposed modification was of a five-storey mixed use development on the southern side of Canterbury Road, Punchbowl, by seeking the addition of a sixth storey with a further 12 apartments. The modification sought to add an additional 906.5 square metres of gross floor area and would increase the building height from 18 metres to 24.16 metres. Construction of an additional level of basement parking to accommodate 12 additional car parking spaces was also sought.

The modification of a Court approved development consent is permitted by [s 4.55\(8\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**). As s 4.55(8) applied, [s 4.55\(2\)\(a\)](#) and [\(3\)](#) were the relevant provisions which applied in the appeal before the Commissioner. The initial threshold question in determining if a consent can be modified is s 4.55(2)(a) which requires that the development as proposed to be modified will be substantially the same development as the development for which consent was originally granted. The next step in determining an application for modification is s 4.55(3) which requires consideration of such matters referred to in [s 4.15\(1\)](#) as may be of relevance to the development and consideration of the reasons given by the consent authority for the grant of consent sought to be modified. The parties agreed that the Statement of Facts and Contentions and the Commissioner's judgment referred erroneously to [s 4.56\(1\)\(a\)](#) and [\(1A\)](#) when the applicable provisions were s 4.55(2)(a) and (3). As the provisions are effectively identical, nothing legally relevant arose from this.

Issues:

- (1) Did the Commissioner err in law by misdirecting herself when answering the threshold question under s 4.55(2)(a), whether the proposed development was substantially the same as the approved development, by reference to the circumstances in which the original consent was granted as referred to in s 4.55(3) (**Ground 1**);
- (2) Did the Commissioner err in law by misdirecting herself in determining whether the proposed development was substantially the same development as the approved development by reference to (i) whether the approved development consent was only supported by the council because the height would not be breached, (ii) that the s 34 agreement would not otherwise have been entered into, and (iii) that the Court would not have issued the development consent in accordance with the s 34 agreement (**Ground 2**);
- (3) Did the Commissioner err in law by misconstruing s 4.55(3) of the EP&A Act (**Ground 3**); and
- (4) Did the Commissioner err in law by finding that the appellant's submission that increasing the height as proposed by only 1% of the approved overall height was a minor increase was "legally flawed", and could not be relied upon to support the finding that the proposed modification was substantially the same (**Ground 4**).

Held: Appeal dismissed; appellant to pay council's costs:

- (1) Considering Ground 1, s 4.55(3) does not require regard to particular circumstances as relevant to the threshold issue in s 4.55(2)(a). The reason the Commissioner referred at all to 4.55(3) was because the council identified it as relevant: at [43]. The council was the likely source of the error before the Commissioner: at [44]. The matters to be considered in determining the s 4.55(2)(a) threshold question are not explicitly defined or confined and must reflect the facts of a particular case: at [49]. There was no error of law in the Commissioner informing herself on the threshold question by reference to the circumstances in which the original development consent was granted by the Court following a successful s 34 agreement: at [54];
- (2) There was no substantive difference between Grounds 1 and 2, it therefore followed that there was also no error of law in the Commissioner considering the circumstances of the council's decision to enter into the s 34 agreement as set out in Ground 2: at [54];
- (3) The Commissioner did misconstrue s 4.55(3) in the sense that it should not have been referred to as a mandatory matter: at [55]. The error in Ground 3 was not material and did not vitiate the Commissioner's overall findings: at [57]; and
- (4) Ground 4 focused on two words, "legally flawed", in a paragraph of the commissioner's decision, impermissibly applying a fine-tooth comb to the Commissioner's reasons. The Commissioner's judgment must be read fairly as a whole: at [63].

• **Separate Question:**

***Johnson Property Group Pty Limited v Lake Macquarie City Council (No 2)*** [\[2020\] NSWLEC 42](#) (Duggan J)

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

Facts: Johnson Property Group Pty Limited (**applicant**) lodged a development application (**DA**) with the Lake Macquarie City Council (**council**) for the construction of a cycleway and intersection improvement works. The council rejected the application due to a lack of owner's consent from all relevant landowners - the proposed site included public roads vested in the council, and the council did not provide consent. The applicant sought a review of the rejection, however, council refused the review application. In the prior decision, Pepper J ordered that the question of whether the applicant has a right of appeal against the council's rejection of the DA be determined separately from any other question in the proceedings. This separate question was the subject of this decision.

Issue: Whether, by application of [s 8.6](#) and/or [s 8.7\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**), the decision to reject the applicant's DA is subject to a right of appeal.

Held: No right to appeal; appeal dismissed:



- (1) The decision to reject a DA is not a decision that is subject to appeal as it is not a decision for which [Div 8.3](#) of the EP&A Act so provides: at [37];
- (2) Section 8.6(2) in conjunction with s 8.6(1) does not confer an independent right of appeal from all decisions made after a review, but includes decisions where a right of appeal is otherwise conferred by Div 8.3 of the EP&A Act: at [38]-[39];
- (3) Section 8.7(1) it is limited only to those appeals that relate to the determination of a DA as referred to in s 4.16 of the EP&A Act - that is, the determination to approve or refuse the application. This is distinct from a decision to reject a DA: at [41]; and
- (4) The decision in *Parkes v Byron Shire Council* (2003) 129 LGERA 156 (*Parkes*) is not correct and should be distinguished: at [46]-[47]. Fundamental to the determination of these proceedings and those in *Parkes* was that there must be an appeal right: at [56]. *Parkes* is both distinguishable and due to amendments to the relevant legislative provision it is also wrong: at [57].

• **Interlocutory Decisions:**

***Armidale Regional Council v O'Connor (No 3)*** [\[2020\] NSWLEC 56](#) (Robson J)

(related decision: *Armidale Regional Council v O'Connor* [\[2020\] NSWLEC 53](#) (Robson J); *Armidale Regional Council v O'Connor (No 2)* [\[2020\] NSWLEC 54](#) (Robson J))

**Facts:** Armidale Regional Council (**council**) and Susan Law (**CEO**) made an urgent application to the duty judge seeking injunctive relief restraining five councillors (**respondents**) from voting in a council meeting to remove the CEO from her position with council. The hearing was convened on the same afternoon as the council meeting and an ex tempore judgment was given immediately prior to the commencement of that meeting in *Armidale Regional Council v O'Connor* [2020] NSWLEC 53. The Court was reconvened the following morning and a second ex tempore judgment was delivered that afternoon in *Armidale Regional Council v O'Connor (No 2)* [2020] NSWLEC 54. The third judgment, *Armidale Regional Council v O'Connor (No 3)* [2020] NSWLEC 56, details the reasons for the grant and extension of injunctive relief across both ex tempore judgments.

The basis for the relief sought by the applicants was that the respondents had made a sustained series of serious allegations against the CEO and that, as each of the respondents was in the position of an “accuser” in relation to the CEO’s conduct, the meeting would consequently be infected by apprehended bias. The applicants further claimed that the CEO had not been informed as to the basis for the motion to remove her from her position, nor had she been afforded a reasonable opportunity to present her case before the councillors were Scheduled to vote on the motion.

**Issues:** Whether a grant of interlocutory relief was appropriate.

**Held:** Injunctive relief granted:

- (1) Interlocutory relief was appropriate given the urgency of the matter and the existence of a serious question to be tried: at [16];
- (2) The balance of convenience favoured the maintenance of a “holding pattern” in circumstances where the CEO continued to give the usual undertaking as to damages: at [24];
- (3) The initial grant of interlocutory relief was extended as a serious question existed in relation to whether the meeting would be infected by apprehended bias and, further, given the potential consequences that may ensue from a CEO being removed from their position, including the effect upon the proper attendance by council to its statutory duties and obligations: at [25]; and
- (4) The decision to extend the interlocutory relief was contingent upon the availability of the Court to provide an expedited hearing (within 30 days) such that any ongoing impact upon council could be mitigated: at [26].

***Ashworth v McSweeney*** [\[2019\] NSWLEC 50](#) (Robson J)

**Facts:** An urgent application was made to the duty judge seeking injunctive relief to restrain the respondent from removing a large mature tree. The tree was located on the respondent’s property and within a heritage

conservation area. The hearing of the matter was conducted ex parte and in circumstances where the Court had been informed that the tree was being removed as the application was being heard.

Issues: Whether a grant of ex parte interlocutory relief was appropriate.

Held: Injunctive relief granted:

- (1) There was a serious question to be tried as to whether the purported state of satisfaction of council, being that the tree should be removed, was unreasonable: at [8]; and
- (2) The balance of convenience favoured the granting of ex parte interlocutory relief in circumstances where an undertaking as to damages had been given and there was a risk of irreparable injury: at [11].

***Gaudioso v Roads and Maritime Services* [2020] NSWLEC 51** (Pain J)

Facts: The Gaudiosos (**first and second applicants**) commenced Class 3 proceedings pursuant to [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) (**Land Acquisition Act**) in relation to compensation offered by the Roads and Maritime Services (**respondent**) for the compulsory acquisition of land at Annandale for the purpose of “WestConnex Stage 3 M4/M5 Motorway Link”. By Notice of Motion filed 3 December 2019, the State of New South Wales (**State**) claimed public interest immunity as the basis for the respondent to be excused from producing certain documents in response to a notice to produce issued by the applicants.

Issue: Should the documents the subject of the claim for public interest immunity by the State because they were Cabinet in confidence documents be produced in whole or part.

Held: Disclosure of some parts of the documents the subject of the public interest immunity claim was appropriate; no final order made to enable the State to consider its position:

- (1) The documents that were the subject of the State’s public interest immunity claim had a legitimate forensic purpose: at [39];
- (2) The Court had a duty to balance competing public interests in favour of non-disclosure with that of disclosure of the documents: at [40]. The documents sought were technical reports prepared to support submissions to Cabinet about WestConnex made in the first half of 2016: at [40]. That current issues with WestConnex may need to be brought before Cabinet did not prevent material which had no current relevance from being disclosed: at [41]. The balancing of competing interests weighed in favour of disclosure of the documents: at [43]; and
- (3) It was appropriate that some parts of the documents the subject of the public interest immunity claim be made available to the applicants: at [44]. Any document produced could be the subject of a confidentiality agreement between the State and the applicants. The State was given the opportunity to consider its position in light of the Court finding: at [45]-[47].

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

Facts: Johnson Property Group Pty Ltd (**applicant**) sought the determination of a separate question prior to the final hearing of the appeal. 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 submitted 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**).

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 and the 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 Court to grant expedition. Rather, it merely outlined the exercise of the Courts jurisdiction. The power to grant expedition was located in [s 61](#) of the [Civil Procedure Act 2005 \(NSW\)](#) and [r 2.1](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#): at [41].

**Mulpha Norwest Pty Ltd v The Hills Shire Council** [\[2020\] NSWLEC 7](#) (Pepper J)

Facts: Mulpha Norwest Pty Ltd (**Mulpha Norwest**) sought the determination of a separate question in Class 1 proceedings concerning its development application (**DA**) to construct a 23 storey residential building. The site consisted of the whole of one registered lot (**Lot 22**) and part of another registered lot (**part Lot 2105**). The respondent, The Hills Shire Council (**council**), supported the application for a separate question. The DA was subject to [The Hills Local Environment Plan 2012 \(HLEP 2012\)](#). [Clause 4.4\(2\)](#) of HLEP 2012 provided that the floor space ratio (**FSR**) of a building on any land must not exceed the FSR for that land as shown on the Floor Space Ratio Map. The Floor Space Ratio Map identified a maximum FSR of 1:1 for Lot 22, and no applicable FSR development standard for part Lot 2105. The map also identified Lot 22 as "Area A". [Clause 4.5\(2\)](#) of HLEP 2012 defined the FSR as the gross floor area of all buildings within the site to the site area. [Clause 4.5\(3\)](#) defined "site area". [Clause 7.12](#) of HLEP 2012 provided that an increased FSR of 3:1 applied to land within Area A. The separate question as amended concerned whether, having regard to HLEP 2012, the FSR of the building had to be calculated separately for the land within Area A from the remainder of the site. At issue was the interaction between cl 4.4 and 7.12 of HLEP 2012 on the one hand, and cl 4.5 on the other. Mulpha Norwest contended that HLEP 2012 required that the site area used in the FSR calculation should include both Lot 22 and part Lot 2105, according to the definition of site area in cl 4.5(3). The council submitted that the definition of site area in cl 4.5(3) was subject to cls 4.4 and 7.12 of HLEP 2012. If the FSR was calculated by reference to the area of both Lot 22 and part Lot 2105, the FSR of the part of the development on Lot 22 would exceed the maximum FSR of 3:1 for that lot provided for in cl 7.12.

Issues: Should the hearing of a separate question be ordered.

Held: Separate question ordered:

- (1) If the separate question was determined in favour of the council it would be wholly dispositive of the appeal, and if determined in favour of Mulpha Norwest it would reduce the issues in dispute facilitating the just, quick and cheap resolution of the issues in dispute in accordance with [s 56](#) of the [Civil Procedure Act 2005 \(NSW\)](#): at [38](a) and (b);
- (2) If the proceedings progressed to conciliation, and thereafter to a hearing, the expenditure required for the preparation of expert evidence would be wasted if the issue the subject of the separate question was ultimately decided in the council's favour: at [33](c);
- (3) The hearing of the separate question would not require the preparation of any expert evidence or other voluminous evidence and the underlying facts were largely agreed: at [38](d) and (e);
- (4) If the question were determined in favour of Mulpha Norwest, the dates for the conciliation conference could be retained because there would still be sufficient time for the parties to prepare for such conference: at [38](f); and
- (5) The determination of the separate question had precedential value because the issue of the proper construction of cl 4.5 had arisen in other proceedings but had not been resolved: at [38](g).

***Palm Lake Works Pty Ltd v Ballina Shire Council*** [\[2020\] NSWLEC 1247](#) (Dickson C)

(related decision: *Ballina Shire Council v Palm Lake Works Pty Ltd* [\[2020\] NSWLEC 41](#) (Preston CJ); *Palm Lake Works Pty Ltd v Ballina Shire Council* [\[2019\] NSWLEC 1479](#) (Dickson C))

**Facts:** Palm Lake Works Pty Ltd (**applicant**) lodged the Development Application 2018/321 (**DA**) on 4 June 2018 with Ballina Shire Council (**council**). Their application sought to expand the existing seniors housing development by the construction of an additional 75 serviced self-care dwellings, roads, infrastructure and site works. This DA was refused by the council. The applicant appealed against council's refusal, and consent was granted by the Court to the DA by way of deferred commencement.

The council appealed against the decision pursuant to [s 56A](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**). Council's appeal was successful, and the Court set aside orders made by the commissioner in the previous decision and the matter was remitted to the commissioner.

On 21 May 2020, prior to the hearing of the remitted proceedings, the applicant filed a Notice of Motion with the Court seeking to adjourn the proceedings until 17 November 2020. The purpose of the adjournment was to allow the applicant to apply and be granted a new Site Compatibility Certificate (SCC). The orders sought were opposed by the council.

**Issues:** Whether the Court should exercise the discretion in s 66 of the [Civil Procedure Act 2005 \(NSW\)](#) (**Civil Procedure Act**) to adjourn the proceedings.

**Held:** Adjournment application refused:

- (1) To adjourn the proceedings for an uncertain length of time is inconsistent with the duty of the Court to make directions in order to facilitate the overriding objective of the Civil Procedure Act. The uncertainty of the length of the adjournment and the outcome of deliberations of the Northern Regional Planning Panel on the issue of a SCC are counter to the exercise of the discretion under s 66 of the Civil Procedure Act: at [18](4); and
- (2) In giving weight to the overriding purpose at s 56 of the Civil Procedure Act, namely, to facilitate the just, quick and cheap resolution of the issues in the remitted proceedings, the application was to be dismissed: at [19].

***Secretary, Department of Planning and Environment v Sell & Parker Pty Ltd (No 3)*** [\[2020\] NSWLEC 35](#) (Robson J)

**Facts:** Sell & Parker (**defendant**) sought an order that a subpoena issued by the Secretary, Department of Planning and Environment (**prosecutor**) be set aside.

The defendant is the operator of a metal recycling facility and has pleaded guilty to two offences against [s 9.50](#) (formerly s 125(1)) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) for carrying out development otherwise than in accordance with a development consent. The breaches of the development consent specifically relate to the receipt (but not the processing) of an amount of waste material in excess of the amount authorised by its development consent. The defendant is currently awaiting sentence.

The documentation sought in the subpoena concerned information which the prosecutor claimed was required in order to form the basis for a monetary benefits order pursuant to [s 249](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**). The prosecutor relied upon documents produced by the EPA including the "Protocol for calculating monetary benefits" (**Protocol**) prescribed by [cl 101A](#) of the [Protection of the Environment Operations \(General\) Regulation 2009 \(NSW\)](#), which the prosecutor submitted formed the basis of the subpoena and justified the drafting of the subpoena in its terms.

**Issues:**

- (1) Whether the subpoena lacked a legitimate forensic purpose;
- (2) Whether the *De Simoni* principle applied to prevent certain documents being sought in the subpoena; and
- (3) Whether certain paragraphs of the subpoena were oppressive.

**Held:** Motion to set aside the subpoena dismissed; subpoena amended in accordance with Annexure A to the judgment:

- (1) Although monetary benefits orders have been available since the commencement of the POEO Act, no court in New South Wales has considered or imposed such an order: at [23]. However, several



documents produced by the Environment Protection Authority have been gazetted or prescribed in recent years to assist in calculating monetary benefits: at [28]-[29];

- (2) The documentation sought in the subpoena related to an identified issue in the proceedings as the relief sought in the summons referred to orders under Pt 8.3 of the POEO Act, which includes monetary benefits orders: at [73];
- (3) Although the Protocol makes clear the forensic purpose of the subpoena by stipulating the formula through which a monetary benefit will be calculated, it nonetheless cannot displace the well-settled requirements that documents sought under a subpoena must have a legitimate forensic purpose; be connected to that purpose; and not be oppressive in the circumstances: at [87];
- (4) The *De Simoni* principle was not applicable at this stage in the proceedings. The correct test to be applied in determining whether the documentation referred to in the subpoena may be sought by the prosecutor is whether the documents are relevant to a legitimate forensic purpose and can be reasonably expected to be likely to assist that purpose: at [93];
- (5) The mere fact that documents may be sought in a subpoena does not bear upon their admissibility at a later stage in the proceedings: at [94];
- (6) In the circumstances, it would be artificial to separate documentation relating to the receipt of waste from documentation relating to the processing of waste at this stage of the proceedings: at [100]. It may also be necessary to follow any monetary benefits obtained by the receipt of waste by reference to the associated processing of that waste: at [101]; and
- (7) Paragraph 8 of the Schedule to the subpoena, which required documents detailing return on investments and debts from both the defendant and “related entities”, was amended to remove the reference to “related entities” as compliance with this requirement by a stranger to the proceedings would be oppressive: at [119].

***Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 2)***  
**[\[2020\] NSWLEC 10](#)** (Pepper J)

**Facts:** Central Coast Council (**council**) claimed client legal professional privilege and without prejudice privilege under both the common law and the [Evidence Act 1995 \(NSW\)](#) (**Evidence Act**) over documents sought to be tendered by Verde Terra Pty Ltd (**Verde Terra**) as well as documents produced in answer to a notice to produce issued to the council (**NTP**) and a subpoena issued to P J Donnellan & Co Pty Limited (**Donnellan subpoena**), a firm of solicitors who acted for the former Gosford City Council (**Gosford CC**) in related proceedings in 2014 (**documents**). In those related proceedings, which concerned breaches of a 1998 development consent granted to Verde Terra in relation to land (**site**), the Court made orders by consent (**consent orders**), requiring certain works to be carried out on the site. The consent orders were sought by the parties pursuant to a Heads of Agreement (**2014 agreement**). The proceedings concerned the meaning and enforceability of these consent orders. The council contended that the consent orders contained an implied condition that further development consent was required to carry out the works the subject of the orders, or in the alternative, that the consent orders were made beyond power and were therefore unlawful. Part of Verde Terra’s case was that the council was estopped from raising the existence of an implied term or denying the enforceability of the consent orders because it was a signatory to the consent orders.

The documents over which the council, the successor to Gosford CC, claimed privilege consist of communications made between Verde Terra and Gosford CC relating to the site and the negotiations leading up to the making of the consent orders. The council claimed client legal professional privilege both at common law and under [ss 118](#) and [119](#) of the Evidence Act, and without prejudice privilege under both the common law and s 131(1) of the Evidence Act. An application by the council to have the NTP and Donnellan subpoena set aside was refused in *Verde Terra Ltd v Central Coast Council* [2019] NSWLEC 166.

Verde Terra accepted that the documents were prima facie protected by both client legal professional privilege and without prejudice privilege. However, it argued that privilege had been waived by the council through conduct inconsistent with the maintenance of confidentiality in the documents pursuant to [s 122\(2\)](#) of the Evidence Act and at common law, and that the council had lost its entitlement to negotiation privilege, relying on the exceptions contained within [s 131\(2\)\(f\)](#) and [\(i\)](#) of the Evidence Act. In respect of both client legal professional privilege and without prejudice privilege, Verde Terra relied on the common law exception for communications made to further an illegal purpose arguing that the privilege did not apply. Finally,

Verde Terra relied on [s 11\(2\)](#) of the Evidence Act to argue that the privileges had been lost because the documents evidenced an abuse of process. The Court was provided with a random sample of the documents for the purposes of inspection.

Issues:

- (1) What was the applicable law in relation to access to and the tendering of the documents;
- (2) Whether the council had waived client legal professional privilege either at common law or under s 122(2) of the Evidence Act;
- (3) Whether without prejudice privilege had been lost under s 131(2)(f);
- (4) Whether without prejudice privilege had been lost under s 131(2)(i);
- (5) Whether both privileges had been lost at common law because the documents consisted of communications made to further an illegal or improper purpose; and
- (6) Whether the council was unable to rely upon the privileges claimed pursuant to s 11(2) of the Evidence Act because the documents tended to evidence an abuse of process.

Held: Privileges claimed by council were established and had not been waived or lost:

- (1) In respect of the NTP, the applicable law at both the stages of access to and tender of the documents was the Evidence Act. In respect of the Donnellan subpoena, at the stage of access the applicable law was the common law, while at the stage of tender, the Evidence Act applied. The Evidence Act applied to the documents sought to be tendered by Verde Terra: at [66]-[67];
- (2) Although the council alleged in its Cross-summons that the consent orders were made illegally insofar as the Court had no power to make them, this did not amount to conduct inconsistent with maintenance of the confidentiality because the council did not put in issue its state of mind or that of the parties in the making of the consent orders, nor did the council make any express or implied assertions about the content of the privileged communications: at [118];
- (3) The exception contained within s 131(2)(f) did not apply. The proceedings could not be correctly characterised as proceedings to enforce an agreement between the persons to settle a dispute, or a proceeding in which the making of such an agreement was in issue because there was no dispute that the 2014 agreement had been made (it had). Further, the 2014 agreement had been fully performed and there was nothing left to be enforced: [136]-[137];
- (4) The exception contained within s 131(2)(i) did not apply. That section requires that the communication or document over which privilege is claimed affects a right at the moment at which it is created. The *Anshun* estoppel claim raised by Verde Terra was not an independent cause of action or a right capable of meeting the description of that term in s 131(2)(i). Further, Verde Terra's right to rely on *Anshun* estoppel only crystallised at the point at which the council filed its Cross-summons. The documents did not affect a right at the time at which they were created. The Court held that s 131(2)(i) did not apply to documents which merely constituted evidence that could be used to establish the existence of a right: at [158]-[164];
- (5) The common law illegality exception did not apply because Verde Terra had failed to establish a prima facie case of any deliberate action, Scheme or moral obloquy on the part of the council in procuring the consent orders or 2014 agreement: at [123]; and
- (6) Privilege may be lost pursuant to s 11(2) where the evidence over which the privilege is claimed either alone, or in combination with other evidence, establishes an abuse of process. However in this instance, the documents did not support reasonable grounds for a finding that they were made or prepared in furtherance of an abuse of process. However, as further evidence is tendered in the proceedings, the question of admissibility pursuant to s 11(2) of the Evidence Act may be revisited: at [168], [175] and [177].

***Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 3)*** [\[2020\] NSWLEC 40](#) (Pepper J)

(related decisions: *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 2)* [\[2020\] NSWLEC 10](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council* [\[2019\] NSWLEC 166](#) (Pepper J))

Facts: Verde Terra Pty Ltd and related parties (**Verde Terra parties**) objected to the filing of evidence by the Central Coast Council (**council**) in part-heard proceedings resuming on 12 October 2020.

The substantive proceedings relate to the construction and enforceability of consent orders made by the Court in 2014 (**2014 orders**) in proceedings between Verde Terra Pty Ltd and the former Gosford City Council (now amalgamated to form the council).

On 6 December 2019, the Court relevantly made orders for the Verde Terra parties to file forensic accounting evidence (**Order 4**), and lay evidence (**Order 5**) relating to the financial expenditure incurred by the Verde Terra Parties in reliance on the 2014 orders. This evidence was relevant to the issue of the exercise of the Court's discretion to set aside the 2014 orders. The Court also granted leave for the council to file "affidavits responsive to the evidence filed by the Verde Terra parties" (**Order 6**).

The Verde Terra parties filed three lay affidavits pursuant to Order 5 but did not seek to file any forensic accounting evidence. The council then relevantly filed eight affidavits in purported reliance upon Order 6 (**further affidavits**), including from an expert forensic accountant, an expert hydrogeologist, and local residents. The council contended that the affidavits fell within the purview of Order 6 because, similar to the evidence filed by the Verde Terra parties pursuant to Order 5, it was relevant to the issue of discretion. In the alternative, the council sought leave to rely upon the further affidavits.

During the course of the hearing, the parties consented to the Court making a direction under [r 31.19](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) to allow the filing of the council's expert forensic accounting evidence provided that the Verde Terra parties were granted leave to rely upon an expert report in reply.

Issues:

- (1) Were the further affidavits within the scope of Order 6; and
- (2) If not, should the council be granted leave to rely upon the further affidavits in any event.

Held: Further affidavits were not allowed:

- (1) The further affidavits were not within the scope of Order 6 because they were not responsive to the evidence filed by the Verde Terra parties, save for four paragraphs of one of the council's affidavits. The evidence referred to in Order 6 was circumscribed by the content of the evidence filed by Verde Terra pursuant to orders 4 and 5. The further affidavits included evidence that related to hydrogeology and access to justice, and this was not "responsive to" evidence of the Verde Terra parties' financial detriment within the meaning of Order 6. The further affidavits overwhelmingly concerned issues that the council had been aware of prior to the proceedings being adjourned in December 2019 and should have been filed as evidence-in-chief: at [16]-[17]; and
- (2) Having regard to the overriding purpose contained in [s 56](#) of the [Civil Procedure Act 2005 \(NSW\)](#), leave should not be granted to the council to rely upon the further affidavits. The council provided no explanation for its delay in filing the evidence, some of which had been in its possession since May 2019. To allow reliance on it would cause the Verde Terra parties forensic disadvantage; would likely require further evidence to be called by the Verde Terra parties; would encourage further interlocutory applications by both parties; and would result in additional time and cost to the parties: at [11], [25] and [29].

**Verde Terra Pty Ltd v Central Coast Council (No 4)** [\[2020\] NSWLEC 45](#) (Pepper J)

(related decisions: *Verde Terra Pty Ltd v Central Coast Council*; *Central Coast Council v Verde Terra Pty Ltd (No 3)* [\[2020\] NSWLEC 40](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council*; *Central Coast Council v Verde Terra Pty Ltd (No 2)* [\[2020\] NSWLEC 10](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council* [\[2019\] NSWLEC 166](#) (Pepper J))

Facts: In this part-heard Class 4 matter, the Central Coast Council (**council**) issued a subpoena to Mangrove Mountain Landfill Pty Ltd (**MML**) seeking financial records to enable them to test evidence filed by Verde Terra Pty Ltd, MML and Mangrove Properties (NSW) Pty Ltd (**Verde Terra parties**) related to the financial detriment asserted by the Verde Terra parties if earlier orders made by consent by the Court in 2014 were set aside (**2014 orders**).

The subpoena required production of "the accounting data files of [MML] for the years ended 30 June 2015, 2016, 2017, 2018 and 2019" and log-in details for the relevant accounting software. The Verde Terra parties applied to set aside the subpoena to MML on the grounds that it lacked forensic purpose and was oppressive.

Over the course of the hearing, the council successfully applied to amend the Schedule to the subpoena to reflect an offer made in an affidavit of Mr Martin Ball, solicitor for the council, dated 22 April 2020

**(Ball affidavit).** The parties agreed to the amendment, but could not reach agreement as to the necessity or terms of a confidentiality order in respect of the documents to be produced.

In relation to costs, the Verde Terra parties submitted that although their application to set aside the subpoena was unsuccessful, they should not be liable for the council's costs because the subpoena in its original form would have been set aside, and because they had made a reasonable offer to narrow the scope of the subpoena prior to the hearing. The council submitted that costs should be the its costs in the cause because if the Verde Terra parties had accepted the offer contained in the Ball affidavit then, subject to the confidentiality controversy, the hearing could have been avoided, and because even in its original form the subpoena did not lack forensic purpose and was not oppressive.

The Verde Terra parties also sought their costs in relation to a notice to produce they had issued to the council in respect of e-mails passing between the expert forensic accountant engaged by the council, and Mr Ball. The council made an application to set aside the notice to produce on the ground that the communications were privileged. The Verde Terra parties subsequently accepted a redacted version of the e-mails, but submitted that they should be awarded their costs of the application to set aside the notice to produce because had they not issued the notice they would not have been provided with the e-mails.

Issues:

- (1) Should the amended subpoena be set aside;
- (2) If not, should the Court make confidentiality orders over the documents to be produced;
- (3) What was the appropriate costs order with respect to the application to set aside the subpoena; and
- (4) What was the appropriate costs order with respect to the application to set aside the notice to produce.

Held: Application to set aside subpoena dismissed; no orders concerning confidentiality made. costs of both applications costs in the cause:

- (1) The subpoena did not lack a legitimate forensic purpose. It was "on the cards" that the documents sought in the subpoena would shed light on whether or not the Verde Terra parties would suffer financial detriment if the orders are set aside. It was not a proper objection to a subpoena that it sought documents relating to credit for the purpose of forming a basis for cross examination. The subpoena could not be considered oppressive given the amendment narrowing its scope: at [50]-[58];
- (2) It was not necessary to make a confidentiality order. The information likely to be produced was standard accounting information that expert forensic accountants routinely dealt with, and both the parties and their experts would be bound by the usual implied undertaking not to use the documents for any purpose other than for the proceedings. The implied undertaking should only be expressly modified in an exceptional case or where there are particular reasons for doing so. This was not such a case: at [59]-[63];
- (3) The costs of the application to set aside the subpoena should be costs in the cause. While the original terms of the subpoena were sufficiently vague as to render it amenable to be set aside and the council should have moved to formally amend it earlier, the Verde Terra parties could nonetheless have accepted the offer contained in the Ball affidavit prior the hearing. The Verde Terra parties were also unsuccessful in the confidentiality dispute: at [68]-[69]; and
- (4) The costs of the application to set aside the notice to produce should be costs in the cause. There was insufficient evidence to establish that the Verde Terra parties would not have been provided with the redacted e-mails but for the notice to produce: at [22]-[23].

***Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 5)*** [\[2020\] NSWLEC 48](#) (Pepper J)

(related decisions: *Verde Terra Pty Ltd v Central Coast Council (No 4)* [\[2019\] NSWLEC 45](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 3)* [\[2020\] NSWLEC 40](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Verde Terra Pty Ltd (No 2)* [\[2020\] NSWLEC 10](#) (Pepper J); *Verde Terra Pty Ltd v Central Coast Council* [\[2019\] NSWLEC 166](#) (Pepper J))

**Facts:** The Central Coast Council (**council**) filed notices of motion in two related Class 4 proceedings seeking its costs in relation to a voir dire relating to Verde Terra Pty Ltd and associated entities' (**Verde Terra parties**) right to inspect and tender documents produced in answer to compulsory processes in those proceedings. The council successfully opposed inspection and tender of the documents on the basis of privilege. The council contended that the appropriate costs order was that costs follow the event,



defining the ‘event’ as its success on the voir dire. The Verde Terra parties contended that under [r 42.7](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (UCPR) the default position in respect of interlocutory applications is that costs should be costs in the cause, which could not be determined yet because the matter was part-heard. There was no reason for the Court to exercise its discretion to “order otherwise”.

Issues:

- (1) Is costs in the cause the default costs order in respect of interlocutory applications pursuant to s 42.7 of the UCPR; and
- (2) What was the appropriate costs order in this case.

Held: Costs order made in favour of the council:

- (1) [Rule 42.1](#) of the UCPR provides for a presumptive rule that costs follow in the event, however, the identification of the ‘event’ may be contested in the case of interlocutory proceedings. Rule 42.7 of the UCPR provides a default rule that costs should be costs in the cause in the case of interlocutory applications “or other step in any proceedings” because at that stage the substantive rights of the parties have yet to be determined. But the Court retains a broad discretion to depart from this default position by ordering otherwise: at [14]-[18] and [21]-[23]; and
- (2) The appropriate costs order was that the Verde Terra parties pay the council’s costs of the voir dire. The voir dire finally determined substantive rights of the council on a separate and discrete issue. The council was wholly successful in its privilege claim and did not engage in any discrediting conduct: at [28]-[32].

#### • Joinder Applications:

***Flaherty v Hawkesbury City Council*** [\[2020\] NSWLEC 29](#) (Pain J)

Facts: The Heritage Council of New South Wales (**Heritage Council**) filed a Notice of Motion seeking an order that it be joined as a party in the proceedings relying on [s 8.15\(2\)](#) of the [Environmental Planning and Assessment Act \(NSW\)](#) (EP&A Act). The proceedings (a Class 1 appeal) were commenced by the applicant following refusal by Hawkesbury City Council (**council**) of a development application (DA) for a large subdivision on part of the Yobarnie Farm, which is listed on the State Heritage Register. The applicant opposed the order for joinder. The council intended to enter into a [s 34](#) agreement with the applicant.

Issue: Should the Court exercise its discretion to order that the Heritage Council be joined as a party under s 8.15(2) of the EP&A Act.

Held: Pursuant to s 8.15(2) of the EP&A Act, the Heritage Council of New South Wales joined as a party:

- (1) The circumstances strongly suggested that the Heritage Council would raise issues not likely to be sufficiently addressed if it was not joined as a party: s 8.15(2)(a) of the EP&A Act. Although the council included heritage issues in its Statement of Facts and Contentions, it intended to enter into a s 34 agreement meaning there would not be a merits hearing if the agreement was made by the Court. The Heritage Council was not satisfied that the heritage concerns relevant to Yobarnie Farm were adequately protected and unless it was joined as a party the issue of state heritage significance would not be sufficiently addressed: at [28], [31]; and
- (2) The Heritage Council acted responsibly without delay in seeking information to understand the final form of the DA and inquiring with the council regarding whether discussions could be undertaken to avoid the need for joined: at [34]. Any prejudice to the applicant resulting from the s 34 agreement not being entered into immediately must be weighed against the real issues sought to be raised by the Heritage Council: at [35].

#### • Costs:

***Fairfield City Council v Camilleri*** [\[2020\] NSWLEC 43](#) (Pain J)

(related decision: *Fairfield City Council v Camilleri* [\[2019\] NSWLEC 95](#) (Sheahan J))

Facts: Proceedings were commenced by Fairfield City Council (**council**) in July 2016 seeking orders that Mr Camilleri (**respondent**) cease using two premises in Horsley Park (**Properties**) for the purpose of a

waste or resource management facility as defined in the [Fairfield Local Environmental Plan 2013](#), and remove all waste from the Properties. Orders were made to these effects. On 5 July 2019, the respondent was convicted of contempt for failing to comply with the court orders and two writs of sequestration of the respondent's proprietary interest in the Properties were issued. On 29 July 2019 the sequestrators lodged a motion in which they sought orders enabling them to administer the writs of sequestration effectively, inter alia. By amended Notice of Motion filed 27 September 2019, the council sought final orders in respect of the writs of sequestration and costs. Orders made by consent on 11 October 2019 discharged both writs of sequestration. As a result, the council indicated on 20 December 2019 that it only pressed prayer 5 of its Notice of Motion being costs incurred after 5 July 2019 on an indemnity basis.

**Issue:** Should the respondent be ordered to pay the council's costs incurred after 5 July 2019 to date on an indemnity basis.

**Held:** Council's amended Notice of Motion dismissed:

- (1) Costs are compensatory not punishment: per *Latoudis v Casey* (1990) 170 CLR 534; [1990] HCA 59. The fact alone that costs have been incurred is insufficient to justify an award of costs. Costs had already been ordered to be paid for earlier stages of the proceedings and the litigation was effectively finalised as a consequence of the orders made on 5 July 2019. The council's submission that earlier events leading up to 5 July 2019 in the overall proceedings were relevant to the determination of whether costs on an indemnity basis were payable from 5 July 2019 was not accepted: at [36]. There was no necessary role for the council's lawyers in relation to the administration of the writs of sequestration or the sequestrator's Notice of Motion: at [37], [39]. The council did not demonstrate, on its own evidence, why it was necessary to file its motion; incur the costs it had or obtain the costs it sought: at [40].

***Reulie Land Co Pty Limited v Lee Environmental Planning Pty Limited and Ors (No 2)*** [2020] NSWLEC 49 (Duggan J)

(related decision: *Reulie Land Co Pty Limited v Lee Environmental Planning Pty Limited and Ors* [2019] NSWLEC 194 (Duggan J))

**Facts:** Reulie Land Co Pty Ltd (**applicant**) is the owner of land at Wildes Meadow, New South Wales which is located in local government area of Wingecarribee Shire Council (**third respondent**). Lasovase Pty Ltd (**second respondent**) is the registered proprietor of the subject property, adjacent to the applicant's land. Lee Environmental Planning Pty Ltd (**first respondent**) were town planning consultants who acted on behalf of the second respondent. The primary proceedings concerned a challenge by the applicant to the validity of a development consent for staged development granted by the council to the first respondent with respect to a building envelope for a future dwelling house on the subject property owned by the Second respondent. The applicant was successful, and the development consent was held to be invalid. The purpose of these subsequent proceedings was to determine the costs of the proceedings. Of particular importance was that in the principal hearing each of the respondents filed submitting appearances "save as to costs".

**Issues:**

- (1) Determine the costs of the proceedings; and
- (2) Determine the costs effect of all respondents entering a submitting appearance.

**Held:** Respondents to pay the applicant's costs of the proceedings and the costs application; respondents to pay their own costs of the proceedings and costs application:

- (1) A party cannot rely on the filing of a submitting appearance alone as an absolute barrier to costs liability. There is no absolute exception to the general rule in [r 42.1](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#): at [29];
- (2) A submitting appearance is a relevant consideration in the exercise of the discretion to alter the general rule, but it is only one consideration and is not alone determinative: at [32]-[33]; and
- (3) Each respondent caused or contributed to the errors the subject of the proceedings: at [39]. Further, the applicant made offers to resolve the proceedings which were not accepted, ensuring the proceedings were inevitable: at [44], [46]. Where there are identified contributions to conduct on both sides, absent some clear and defining evidence that would permit a clear delineation of proportionate fault, it would be inappropriate to attempt to draw a clear line and designate the relative fault of individual

respondents on individual issues. As there was no such evidence available, accordingly, such proportions were not allocated: at [47].

**Zhang v Harutoonian** [2020] NSWLEC 39 (Pain J)

**Facts:** Jai Wen Zhang (**applicant**) commenced Class 4 proceedings seeking a declaration of invalidity of a development consent (**Consent**) granted by Lane Cove Council (**council**) to Mouna Harutoonian (**first respondent**) for demolition of an existing house and construction of a new dwelling. The applicant sent a letter to the first respondent on 16 October 2019 asserting, inter alia, the invalidity of the Consent and seeking an undertaking by two days later that no reliance be placed on the Consent and that it be surrendered. Similar letters were sent to the first respondent's husband and a firm of solicitors believed to be acting for the first respondent. As no reply was received, the applicant commenced proceedings on 31 October 2019 by summons together with a Notice of Motion for interlocutory orders to restrain reliance on the Consent. A letter dated 4 November 2019 from the first respondent's solicitor containing an undertaking in different terms to the letter of 16 October 2019 was not accepted by the applicant. A second proposal from the first respondent's solicitor that an independent surveyor be appointed together with the same undertaking in a letter dated 5 November 2019 was also not accepted. After further correspondence, on 7 November 2019 the first respondent's solicitor sent a letter agreeing to proposed consent orders which granted access, by 22 November 2019, for a surveyor to the first respondent's land by 22 November 2019. Orders were made by consent in Court on 8 November 2019 when the Notice of Motion for interlocutory relief was returnable. The first respondent filed an affidavit on 12 December 2019 which did not accept the applicant's survey as accurate and advised that, without admission, a new DA in essentially the same terms had been lodged with the council as this had more utility than incurring the cost of defending the proceedings. The Court made orders by consent on 13 December 2019, progressing the matter. The Consent was surrendered to the council on 5 February 2020. On 13 February 2020, the applicant filed a Notice of Motion seeking orders that the proceedings be dismissed and that the first respondent and the council pay the applicant's costs of the proceedings on an ordinary basis. The applicant later advised it no longer sought costs against the council.

**Issue:** Whether in dismissing the proceedings under [r 12.1](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\) \(UCPR\)](#) the Court should make an otherwise order under [r 42.19\(2\)](#) of the UCPR that the first respondent pay the applicant's costs because the first respondent:

- (i) capitulated; and/or
- (ii) acted unreasonably.

**Held:** Proceedings dismissed; each party ordered to pay its costs of the substantive proceedings; applicant ordered to pay first respondent's costs of the costs hearing:

- (1) The surrender of the Consent was made without admission by the first respondent. It should not be considered as a capitulation but rather as a supervening event which resulted in the subject matter of the litigation no longer being in existence: at [30];
- (2) On whether the first respondent acted unreasonably prior to the commencement of the litigation, the applicant's submission that it should not have needed to commence proceedings because the first respondent should have complied with its initial letter of demand to surrender the Consent in October 2019 was not accepted. Considering *Walker v Siasat* [2014] NSWLEC 86 (which had broadly similar facts), the events leading up to commencement of proceedings took place over a relatively short period and it was unknown, on the evidence, precisely when the first respondent received any of the correspondence sent to it before proceedings were commenced: at [32]. Applying *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2014] NSWCA 107 at [28] and [31], the applicant did not establish that there was any unreasonable behaviour by the first respondent before the litigation commenced: at [26]-[27]; and
- (3) On whether the first respondent acted unreasonably after litigation was commenced, the first respondent proposed consent orders 4 business days after proceedings were commenced, granted a surveyor access to her land and agreed to be bound by orders that she not disturb ground levels or rely on the Consent. The Consent was surrendered in a reasonable period of time, as such a decision cannot reasonably be expected to occur in the space of a few days: at [28]. No unreasonable behaviour of the first respondent arose from the events after the proceedings were commenced: at [29]. No basis was demonstrated for an otherwise order to be made in favour of the applicant: at [32].

• **Merit Decisions (Commissioners):**

***Bottomline Group Pty Ltd v Snowy Monaro Regional Council* [2020] NSWLEC 1115** (Adam AC)

**Facts:** Bottomline Group Pty Ltd (**applicant**) lodged a development application (**DA**) with Snowy Monaro Regional Council (**council**) for the creation of a 21-lot subdivision at 1A Jerrara Drive, East Jindabyne (**site**). The council refused the DA. The applicant appealed this decision in accordance with [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**).

The DA was amended multiple times during the course of the proceedings. The DA later became a DA for staged development. There remained outstanding contentions regarding whether the plans demonstrated compliance with the [Snowy River Local Environmental Plan 2013](#) (**SRLEP 2013**). Importantly, it was not disputed that there was the Monaro Tableland Cool Temperate Grassy Woodland (**Cool Temperate Grassy Woodland**) endangered ecological community (EEC) present on the site. This EEC later became designated a critically endangered ecological community. Its management thus became a central issue in the proceedings.

**Issues:**

- (1) Should leave be granted to rely on the amended plans;
- (2) Is the proposed subdivision compliant with applicable environmental planning instruments; and
- (3) Is the presence of a species impact statement a jurisdictional fact to the granting of consent.

**Held:** Applicant granted leave to rely on amended plans; appeal dismissed; development refused consent:

- (1) [Clause 1](#) in [Sch 1](#) of the SRLEP 2013 created, in effect, a de facto spot rezoning of particular land, the land the subject of these proceedings: at [46];
- (2) Regarding the chapeau to cl 1(2) of Sch 1, the words chosen by the draftsman shows an intent for “and” to be conjunctive so that the development must be for both subdivision and the construction of dwelling(s): at [91];
- (3) The DA was not, as required, one for the purpose of a subdivision and the erection of not more than 20 dwelling houses and should therefore be dismissed: at [130];
- (4) The fact that a community has “critically endangered” status should be given considerable weight: at [144];
- (5) Draft maps are not law, nor are they planning instruments or policy: at [149];
- (6) The fact that the majority of affected vegetation belongs to a critically endangered ecological community compelled a conclusion that the adverse impacts are significant: at [162];
- (7) Given the heterogeneity of the vegetation, slope and landform across the site, each new lot would require an individually prepared plan: at [216];
- (8) The Vegetation and Fauna Management Plan (**VFMP**) was not practical nor effective, and difficult to enforce. It therefore failed the test in *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* ([2010](#)) [210 LGERA 126](#); [\[2010\] NSWLEC 48](#): at [242];
- (9) The VFMP was so uncertain as to render any amelioration of potential threats to the critically endangered ecological community absent. A species impact statement was therefore required and becomes a jurisdictional fact: at [243];
- (10) The advantages that might flow from the implementation of the VFMP could not overcome the lack of jurisdiction to grant approval: at [268].

***Hatziandreou Holdings Pty Ltd v Bayside Council* [2020] NSWLEC 1191** (Gray C)

**Facts:** Following the carrying out of a mixed use development in Ramsgate in a manner contrary to the applicable development consent, Hatziandreou Holdings Pty Ltd (**Hatziandreou**) made a modification application to Bayside Council (**council**) to modify the development consent so as to incorporate the development as constructed as well as a number of proposed works to the building.

The development consent sought to be modified was granted on 1 April 2015, for the construction of a five-storey mixed use development comprising 20 residential units, two ground floor commercial tenancies, and two basement levels. The approved design comprised two component buildings, one fronting



Rocky Point Road and the other fronting a lane to the rear. On the ground floor, the separation of the two buildings was 11 metres, allowing for a central courtyard for communal open space of 110 square metres. A cut-out in the basement below created an area for deep-soil planting adjacent to the central courtyard. Each of Levels 1 to 3 comprised five units spread across the two component buildings, and Level 4 (the fifth storey) comprised three units, as well as a west-facing communal roof terrace of 40 square metres, and a central communal open space of 92 square metres.

However, the constructed development, which had since been strata subdivided, was not built in accordance with the approved design. In particular, there was a reduction in the separation of the two buildings (from 11 metres to 7.6 metres at the ground floor), an increase in the size of the commercial tenancies, the glass line of each residential unit was pushed out to increase the size of the unit and reduce the size of the balcony, plant rooms were changed to bedrooms for three of the units, an additional bedroom was added to one of the Level 4 units which reduced the area of communal open space on Level 4, the loading dock was not constructed and the configuration of the basement was changed. As a consequence, the constructed development had a greater floor space ratio (**FSR**) than what was approved; had a reduction of communal open space from 242 square metres to 128.4 square metres; had no deep-soil landscaping; and did not have sufficient carparking spaces.

The modification application sought to modify the development consent so as to incorporate the development as constructed as well as proposed works to the building. Hatziandreou appealed against the council's refusal of that application. The proposed works the subject of the modification application included works to the basement, works in the ground floor courtyard area, changes to privacy treatment, and the provision of a roof top communal area to provide 151 square metres of communal open space, to be accessed from Level 4. It was largely agreed that the proposed works created an improved outcome for the development when compared with what had been built. Nevertheless, the council argued that there was no power to grant the modification application and opposed the grant of the modification application.

Issues:

- (1) Whether the proposed modified development was substantially the same as the development the subject of the development consent;
- (2) Whether there was sufficient information on traffic and parking to assess the impacts of the modified development; and
- (3) Whether the FSR, height, quantum of deep soil landscaping, quality of the communal open space, setbacks and building separation of the proposed modified development was consistent with the desired future character of the area.

Held: Appeal dismissed and modification application refused:

- (1) As a result of the quantitative and qualitative changes sought in the modification application, the development as modified by the application would not be substantially the same as that for which consent was granted, and therefore the precondition to the exercise of the modification power under [s 4.55\(2\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) is not met:
  - (a) on a quantitative assessment, there is a loss of communal open space in the two main areas of 117 square metres as a result of the reduction in the separation of the two buildings from 11 metres to 7.6 metres, and the changes to the level 4 layout, and the provision of a roof terrace adds an additional residential floor to the building to which occupant access is required: at [75];
  - (b) on a qualitative assessment, the loss of that communal open space and deep soil area at the ground floor, the reduction in the separation between the two buildings, and the creation of the roof terrace, changes the built form outcome of the building: at [76];
  - (c) the provision of communal open space in the ground floor courtyard between the two buildings and contiguous with a deep soil area was a material or essential element of the development the subject of the original consent: at [77]. This is supported by the council report in support of the original development application, which made it clear that the plans were required by the Design Review Panel to be amended to remove a roof terrace, to delete two units at the ground floor to allow for a ground floor courtyard area, and to set the basement away from the boundary to allow deep soil in that same area: at [77];
- (2) There is insufficient information to find that the development would have an acceptable impact on traffic and parking in the immediate locality on the basis that: Firstly, there is a shortfall in the number of parking spaces to be provided, and the parking surveys are inadequate to establish that there is sufficient on street parking to accommodate the parking demand in lieu of the provision of car parking

spaces: at [80-83]; secondly, there is no assessment on the impact of queuing in Clelland Lane as a result of the absence of a loading dock: at [84]; and

- (3) There is no utility in making a determination on the remaining contentions given that the Court was not satisfied that the precondition to the exercise of the modification power under s 4.55(2) had been met, and where the Court would have otherwise refused the application based on inadequate information on the traffic and parking impact: at [86].

***Hennock v Queanbeyan-Palerang Regional Council [2020] NSWLEC 1070*** (Gray C)

Facts: On a residential property in Googong, a garage, a greenhouse, a gazebo and a shed (**structures**) were constructed without development consent. Mr and Mrs Hennock (**applicants**) applied to Queanbeyan-Palerang Regional Council (**council**) for the issue of a building information certificate for the structures. The council resolved to take no action with respect to the application for a building information certificate, and the applicants appealed to the Court.

The property on which the structures were located is within the Mount Campbell Estate, which is a community title subdivision subject to a Community Management Statement (**CMS**). The CMS is registered on the title of the community lot and contains by-laws, which, inter alia: restricts certain buildings (other than passive recreation features) from being constructed outside the boundaries of building envelopes that are indicated each lot; prevents the construction of buildings without the consent of the Executive Committee of the Community Association; and requires that the building envelopes only be varied with the consent of council and the unanimous consent of the Association.

The structures were erected without development consent where development consent was required; they were erected outside the boundaries of the building envelope applicable to the lot pursuant to the CMS; and without the consent of the Executive Committee of the Community Association.

In 2016, the applicants were unsuccessful in a motion for a unanimous resolution of the Community Association to amend the building envelope for the relevant lot, and a development application (**DA**) made on 8 January 2018 to the council to enlarge the building envelope remains undetermined - with the council on 13 June 2018 resolving to “take no action” with respect to that application.

Despite a letter from the council to the applicants on 18 March 2016 requesting that they remove the structures, the council made resolutions on 13 June 2018 and 13 February 2019 to “take no action” with respect to the matter, and sent a letter to the applicants on 18 February 2019 setting out that no enforcement action will be taken.

The council agreed that each of the structures were structurally sound and that no planning issues arose from their construction. Therefore, no issues were raised by the council regarding the planning merits of the application as a “hypothetical or notional development application” (as described as the task for consideration by the Court on an appeal of this nature, see *Taipan Holdings Pty Ltd v Sutherland Shire Council* [1999] NSWLEC 276).

Instead, the contentions raised by the council related to whether a building information certificate should be issued in circumstances where there is a breach of the by-laws in the CMS. The council argued that the enforceability of the CMS was preserved by [cl 1.9A\(2\)\(a\)](#) of the [Queanbeyan Local Environmental Plan 2012 \(QLEP 2012\)](#), as it is a covenant that was required to be imposed pursuant to the development consent for the community title subdivision. The council therefore submitted that the CMS was a jurisdictional bar to the hypothetical DA, and that the Court therefore ought not direct the issue of a building information certificate.

Issues:

- (1) Whether the by-laws in the CMS create a jurisdictional bar that would preclude consent to a hypothetical DA; and
- (2) Whether the council should be directed to issue a building information certificate.

Held: Allowing the appeal and appeal upheld; issuing of a building information certificate directed:

- (1) A building information certificate can be issued in circumstances where a development consent has not been granted (see *Ireland v Cessnock City Council* (1999) 110 LGERA 311; [1999] NSWLEC 153): at [49];
- (2) The terms of the CMS and the associated covenant concerning construction outside the building envelope are not determinative in considering the notional or hypothetical DA, even if their enforceability is preserved by [cl 1.9A\(2\)\(a\)](#) of the QLEP: at [54]. No part of the CMS requires that the unanimous

consent of the Community Association be obtained prior to the grant of the development consent, and the by-laws in the CMS do not prevent the lodgement, assessment or determination of a DA for the erection of the structures and/or for the expansion of the building envelope: at [54]; and

- (3) A building information certificate should be issued with respect to the structures in circumstances where:
- (a) the Council agrees that each of the structures is structurally sound and that there are no potential adverse environmental or amenity impact caused by their existence: at [51];
  - (b) the council has determined not to take any enforcement action to require the demolition of the structures, consistent with [s 6.25\(1\)\(b\)](#) of the EP&A Act: at [52];
  - (c) the issue of a building information certificate will not preclude either other lot owners, or the Community Association, from taking action to enforce the by-laws in the CMS: at [53]; and
  - (d) the gazebo and the greenhouse are “passive recreation features such as gazebos, outdoor eating areas, bird watching hides and the like”, which are permitted by the CMS to be constructed outside the building envelope (but which would still require development consent and the agreement of the Executive Committee of the Community Association): at [55].

***Newland Developers Pty Ltd v Tweed Shire Council*** [\[2020\] NSWLEC 1107](#) (Clay AC)

**Facts:** The Site the subject of the appeal is part of the Seabreeze Estate which has been developed over almost 20 years producing approximately 590 residential lots, shops, roads and open space including sports fields. The Site is identified in [Tweed Shire Development Control Plan 2008 \(DCP\)](#) as “potential School site”. Another site in the locality (**Dunloe Park**) is identified in the DCP as a site (presently not zoned for that purpose) for which a masterplan should acknowledge its potential use as a School site.

Newland Developers Pty Ltd (**applicant**) made a development application (**DA**) for the subdivision of the site into 68 residential lots in addition to public reserves and drainage reserves. If the DA was approved and the residential subdivision of the site proceeded, then the use of the site for a School will not be possible.

A similar, almost identical, DA was made to the Tweed Shire Council (**council**) in 2015 and refused by the council in 2015. On appeal the Court dismissed an appeal against that refusal (*Newland Developers Pty Ltd v Tweed Shire Council* [\[2017\] NSWLEC 1021](#)) (**2017 decision**).

**Issues:**

- (1) Whether the appeal should be dismissed as an abuse of process on the basis that it is the same as the application considered in the 2017 decision and there are no substantive changes in circumstances from the previous application; and
- (2) If not so dismissed, whether on proper construction and application of the DCP the subdivision should not be allowed so as to preserve the Site for the potential use as a School.

**Held:** Appeal dismissed:

- (1) The applicant has exercised its statutory right of appeal ([s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**)) which constitutes a fresh cause of action. The Court has all the functions and discretions which the council had in respect of the matter the subject of appeal ([s 39\(2\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**)). The appeal is by way of rehearing and fresh evidence or evidence in addition to, or substitution for, the evidence before the council when it made the decision may be given on the appeal ([s 39\(3\)](#) of the Court Act): at [100];
- (2) As to abuse of process, the question is whether in the circumstance of repeated applications, the application under consideration brings the Court into disrepute because it is a collateral attack on a previous decision or decisions of the Court. The body of material before the Court in the earlier appeal is to be compared to the body of material before the Court in the appeal under consideration. That comparison embraces the concept of whether or not there are changed circumstances: at [82];
- (3) Abuse of process must be determined as if the application has not been finally heard. It involves an analysis of the application and the body of material proposed to be relied upon by an applicant. The same approach should be taken if abuse of process is pleaded as a determining contention in a final hearing as it would be determined in the usual way as an interlocutory application. It is not the Court’s role to make findings at a final hearing to determine if the appeal “ought not be permitted to proceed”: at [98];

- (4) *Russo v Kogarah Municipal Council* ([1999](#) [105 LGERA 290](#); [\[1999\] NSWCA 303](#)) is not authority for the proposition that a proponent cannot avoid dismissal as an abuse of process by relying on evidence it could have led in the first appeal. The evidence before the Court in the second appeal is to be taken into account in determining whether or not there is an abuse of process even if the evidence could have been led in the earlier appeal: at [102];
- (5) Although the development the subject of the appeal was relevantly the same as that considered in the 2017 Decision, the applicant led demographic evidence which was not led in the first appeal. That was sufficient to avoid the finding of abuse of process. Other evidence about the intentions of the Department of Education as to the site and attempts to sell the site were also additional evidence and would also avoid dismissal as an abuse of process: at [107];
- (6) Even though the relevant provisions in the DCP date from 1999, the council had not abandoned any provision of the DCP and even if the specific demographic foundation of the strategic planning was now found to be wrong, the council was entitled to rely upon the DCP as its expression of its strategic planning: at [146]-[148]; and
- (7) The demographic evidence, and evidence from the Department of Education and, to a lesser extent, other education providers, showed the likelihood that a School site would be required in the locality within the next 15 years or so. The opportunity to provide a School on the Site should not now be lost having regard to the provisions of the DCP, given there was no level of certainty at all that a School would be provided as part of the development of the Dunloe Park Estate: at [228], [233].

***Warnervale Employment Zone Pty Ltd v Central Coast Council*** [\[2020\] NSWLEC 1139](#) (O'Neill C)

**Facts:** Warnervale Employment Zone Pty Ltd (**applicant**) appealed under [s 8.7\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EP&A Act**) against the refusal by Central Coast Council (**council**) of the development application for a warehouse and distribution centre at 40 Gindurra Road, Somersby.

The existing site is covered by fill and contains some industrial structures.

**Issues:**

- (1) Whether the application was a sham because the real use of the site to which consent was being sought was the filling and stockpiling of material;
- (2) Whether the application required owner's consent to enable the development to proceed, because the proposal required works to change the level of the driveway located on the adjoining property to achieve vehicular access to the site via the right of carriageway;
- (3) Whether the application was an application for designated development because the proposal was a waste or resource transfer station with a yearly volume of 90,000 tonnes pursuant to [Sch 3, cl 32](#) of the [Environmental Planning and Assessment Regulation 2000 \(NSW\)](#) (**EP&A Regulation**); and
- (4) Whether the site was potentially contaminated meaning the Court could not be satisfied that the site was suitable for the proposal in accordance with [cl 7](#) of [State Environmental Planning Policy No 55—Remediation of Land](#).

**Held:** Appeal dismissed:

- (1) Leave to amend the application was not granted because the amended proposal did not resolve any of the contentions raised in the Statement of Facts and Contentions; the amended proposal raised new contentions and the lateness of the amended proposal presented a prejudice to the respondent in being able to respond to the new issues; and the amendments made to the proposal were not made in response to expert evidence: at [10];
- (2) The application did not include owner's consent for necessary works to change the level of the driveway on the adjoining property to provide access across the right of carriageway to the site for B-Double trucks as proposed on the diagrammatic plan: at [32];
- (3) The proposal was designated development and the application was not accompanied by an environmental impact statement (**EIS**) prepared by or on behalf of the applicant in the form prescribed by [Sch 2](#) of the EP&A Regulation as required by [s 4.12\(8\)](#) of the EP&A Act: at [36]; and
- (4) The site was potentially contaminated by asbestos and there was no information submitted with the application that identified the extent of contamination on the site; whether remediation was required; and whether the site was suitable for the proposed use: at [39].



## **Court News**

### **Appointments/Retirements**

Commissioner Jennifer Smithson resigned on 27 March 2020.

Commissioner Elizabeth Espinosa was appointed on 1 June 2020.

The following Acting Commissioners were appointed on 8 April 2020:

- Acting Commissioner Peter Kempthorne
- Acting Commissioner Paul Knight
- Acting Commissioner Matthew Pullinger
- Acting Commissioner Jennifer Smithson

### **40<sup>th</sup> Anniversary Conference and Dinner**

The Court's 40<sup>th</sup> anniversary conference and dinner has been postponed to 2021 due to the COVID-19 restrictions. The date for the rescheduled conference will be announced in the future, once it is known when the restrictions will be lifted.