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# Land and Environment Court of NSW Judicial Newsletter

**Revised COVID-19 Pandemic Arrangements Policy effective 1 December 2021.**



## Legislation

### Statutes and Regulations:

- **Planning:**

Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021 - this Regulation amended the Environmental Planning and Assessment Regulation 2000. Clause 256BA was inserted, which prohibits a fee being charged by a council for the exercise of the council's compliance or enforcement functions under the Act in relation to development carried out in the council's area (**a compliance fee**). Clause 298 was inserted and permits councils (listed under subcl 298(5)) to continue to charge a compliance fee in relation to a development application until 31 December 2021, subject to certain limitations. The limitations imposed are that the development application must be filed on or before 31 December 2021; the development application fee is taken to be reduced by the prohibited fee; the council may refuse to consider a development application if the fee is unpaid; and the amount of the prohibited fee must not be greater than the fee prior to cl 256BA coming into force.

Environmental Planning and Assessment Amendment (Glenfield Precinct) Regulation 2021 - the object of this Regulation is to require a person who applies for development consent for development on land in the Glenfield Precinct to submit, with the application, an assessment of the development's consistency with both the Glenfield Place Strategy and the Glenfield Precinct Structure Plan. Clause 275D was inserted into the Environmental Planning and Assessment Regulation 2000 giving effect to this amendment.

Environmental Planning and Assessment Amendment (Major Projects) Regulation 2021 - Sch 1.1 (on 1 July 2021) and Sch 1.2 (on 1 October 2021) have commenced; Sch 1.3 will commence on 1 July 2022.

This amendment of the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**) inserted provisions related to the expiry of environmental assessment requirements (Sch 1.1). The amendment inserted cl 194. Subclause 194(1) provides that environmental assessment requirements will expire within two years of the Planning Secretary's last notice. This provision applies to environmental impact statements that have not been submitted to the Planning Secretary within the two-year period provided for the environmental assessment requirements. Subclause 194(2) permits extensions to the expiry date for the environmental assessment requirements upon written request from a proponent. The Planning Secretary may then extend the expiry date more than once if the total period for extension does not exceed two years. This amendment also replaced subcl 3(7) of Sch 2 of the EPA Regulation providing that the environmental assessment requirements will expire for State Significant Development if the development application or the application for approval are not

submitted within two years of the last notice made by the Planning Secretary. For other development or activity, the responsible person must consult with the Planning Secretary regarding the preparation of the statement. Subclause 3(7A) allows for extensions of time for the expiry upon written request from the responsible person. Extension of time may occur more than once, but the total time of extension may not exceed two years. Schedule 1.2 will introduce new *State Significant Development Guidelines* and *State Significant Infrastructure Guidelines* and require certain applications, responses, requests to modify approvals and environmental impact statements to be prepared having regard to those guidelines. Schedule 1.3 of this amendment will introduce new *Registered Environmental Assessment Practitioner Guidelines* and require environmental impact statements for State Significant Development or State Significant Infrastructure to include a declaration by a registered environmental assessment practitioner that contains statements required to be provided under those guidelines.

Environmental Planning and Assessment Amendment (Modifications) Regulation 2021 – Sch 1 commenced 14 July 2021; Sch 2 commenced on 1 October 2021.

This instrument made amendments to the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**) regarding modification to development consent. Subclause 121(3) was inserted into the EPA Regulation and now requires that any modification to a development consent must have the details of the modification included in the application that is made available for inspection. Inserted cl 121A (relating to modification of development consent under ss 4.55(6) and 4.64(1)(q) of the *Environmental Protection and Assessment Act 1979* (NSW) (**EPA Act**)) allows a consent authority to request additional information from an applicant for a development consent, to specify the time period in which an applicant must provide the information, and when it may be deemed that an applicant has not provided the requested information. This amending Regulation also inserted cl 121B into the EPA Regulation. This clause concerns development consent modification under s 4.64(1)(q) of the EPA Act and allows the applicant for a development consent to modify the application before the consent authority determines the application, as long as the consent authority has agreed to allow the modification. The applicant must also provide the consent authority with the nature of the change to the application if the modification is to change the development. Clause 122B was inserted and identified the period of time between when the consent authority requests additional information regarding a development consent modification and, either when the applicant provides the information or when the applicant indicates that additional information will not be provided (whichever is earlier), is not to be included in the calculation of time for deemed refusal of an application. Similar conditions were inserted regarding Ministerial approval for State significant infrastructure as it relates to s 5.25(2) and s 5.29 of the EPA Act. Clause 196B was inserted into the EPA Regulation which allows for a request to modify the Minister's approval of State significant infrastructure at any point prior to the Minister's determination of the request as long as the Planning Secretary has agreed to the modification. The nature of the modification must be provided to the Minister. Schedule 2 of the amending Regulation has not yet entered into force but will insert subcl 196B(3) which will require the amendment to be lodged on the NSW planning portal.

**Note:** These changes overcome the problem highlighted by the recent decisions in *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 (see July 2021 Newsletter) and *Duke Developments Australia 4 Pty Limited v Sutherland Shire Council* [2021] NSWLEC 69 (Robson J) (see page 44 of this *Judicial Newsletter*) which held that there was no express or implied power in the EPA Act or the EPA Regulation for a consent authority (or the Court on appeal) to amend a modification application for development consent.

Environmental Planning and Assessment Amendment (Port Kembla Gas Turbine Power Station) Order 2021 - this Order declared certain development for the purposes of the Port Kembla Gas Turbine Power Station project to be State significant infrastructure and critical State significant infrastructure. The development involves the construction and operation of a gas-fired power station at Port Kembla, capable of operating with hydrogen fuel, and associated infrastructure.

Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation 2021 - postponed the commencement of the Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Amendment Regulation 2021 to 1 November 2021.

National Parks and Wildlife Amendment (Assets of Intergenerational Significance) Regulation 2021 - this amendment permits declarations to be made that land is an asset of intergenerational significance under s 188H(2) of the *National Parks and Wildlife Act 1974* (NSW). Clause 78B was inserted into the Regulation which lists the management actions allowed for land so declared. This provision lists the actions that may be taken for declared land management:

- management of known foreseeable risks including the protection of the land from bushfire risks;
- the preparation and approval of conservation action plans;
- the approval of conservation actions plans; and
- the carrying out of conservation activities under approved conservation action plans.

Amendments were made to Pt 7A, Div 2 (conservation action plans) which allow for the preparation of conservation action plans (cl 78C) for declared land, require the public exhibition of draft conservation plans (cl 78D), provide the mechanism and time period for conservation plan approvals by the Secretary (cl 78E), and require the publication of approved conservation action plans (cl 78F). The Secretary must ensure the conservation activities for declared land are carried out in accordance with the approved conservation action plan for the land under cl 78G, while cl 78H sets out the process for amending conservation action plans. Clause 78I mandates that information regarding the health and condition of the declared land must be published on a website maintained by the Department. Clause 78J creates the review process for implemented conservation action plans, which includes that implementation of the conservation plans is to be reviewed by an appointed panel of scientists five years after the approval of the conservation action plan. The review panel of scientists must be appointed in consultation with the Chief Scientist and Engineer.

Protection of the Environment Operations (Clean Air) Regulation 2021 - this Regulation remade, with minor changes, the Protection of the Environment Operations (Clean Air) Regulation 2010 which was repealed under s 10(2) of the *Subordinate Legislation Act 1989* (NSW) on 1 September 2021. Changes to numbering of clauses and some formatting were made.

Protection of the Environment Operations (General) Regulation 2021 - this Regulation remade, without significant changes, the provisions of the Protection of the Environment Operations (General) Regulation 2009, which was repealed on 1 September 2021 by the *Subordinate Legislation Act 1989* (NSW), s 10A and Sch 5, cl 13.

- **Local Government:**

Local Government (General) Amendment (Integrated Planning and Reporting) Regulation 2021 - inserted the requirement for councils to comply with the *Integrated Planning and Reporting Guidelines for Local Government in NSW* for the purposes of complying with s 406 of the *Local Government Act 1993* (NSW).

Local Government (General) Regulation 2021 - this Regulation repealed and remade the Local Government (General) Regulation 2005 on 1 September 2021 pursuant to s 10(2) of the *Subordinate Legislation Act 1989* (NSW). The remade Regulation did not make substantive changes to the 2005 Regulation.

Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 - this Regulation repealed and remade the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 which was scheduled to be repealed on 1 September 2021 pursuant to s 10(2) of the *Subordinate Legislation Act 1989* (NSW).

- **Mining and Petroleum:**

Petroleum (Onshore) Amendment Regulation 2021 - this Regulation replaced subcl 16(2) of the Petroleum (Onshore) Regulation 2016 which relates to the beneficial use of gas under s 28B of the *Petroleum (Onshore) Act 1991* (NSW). This amendment allows the beneficial use of gas for an assessable prospecting operation permitted by an activity approval if the approval specifically extends to the beneficial use of gas. The amendment to subcl 16(3) removed the words 'unless that recovery and use is authorised by a relevant development consent' which resulted in the removal of the royalty exemption for those activities that did not have development consent that specifically permitted the collection of royalties.

- **Miscellaneous:**

*Bushfires Legislation Amendment Act 2020* (NSW) – 10 September 2021 was proclaimed as the commencement date for Sch 1[26] of the *Bushfires Legislation Amendment Act 2020* (NSW). The commencement of Sch 1[26] inserted ss 100RA and 100RB into the *Rural Fires Act 1997* (NSW). Section 100RA permits the Minister to make, amend, or repeal a Rural Boundary Clearing Code (subss 100RA(1)-(2)) for the purposes of Div 9 - vegetation clearing work - under the *Rural Fires Act 1997* (NSW). However, this power to make, amend, or repeal a code is limited in that the Minister must have written agreements from the Ministers for Planning and Public Spaces, Energy and Environment, and Agriculture and Western NSW (subs 100RA(3)). A code may be made that allows the clearing of vegetation in a rural zone for bushfire hazard reduction (subs 100RA(4)). Subsection 100RA(5) lists the factors to which a code may have regard; being:

- the type of vegetation that may or may not be cleared;
- how the permitted vegetation may be cleared;
- whether consent is required from the land owner or occupier of the land;
- the clearing of vegetation in habitats of threatened species (pursuant to the *Biodiversity Conservation Act 2016* (NSW));
- the clearing of vegetation along riparian corridors;
- managing soil erosion and landslip risks related to vegetation clearing; and
- the protection of Aboriginal or other cultural heritage sites related to the clearing of vegetation.

A code, regarding its application to land, may have a general or limited application based on specific exceptions or factors, may have variable application based on specified conditions or factors; may 'authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body' (subs 100RA(6)). The code must be published in the *Gazette*, the point at which it commences (subs 100RA(7)), and must be made publicly available (subs 100RA(8)).

Subsection 100RB(1) allows for vegetation clearing work to be carried out if all of the following apply:

- the clearing occurs within 25 metres of the holding's boundary with adjoining land;
- the land is zoned rural land;
- the owner of the holding carries out the clearing or authorises the clearing of the vegetation;
- clearing of vegetation must be for bush fire hazard reduction;
- a Rural Boundary Clearing Code must be in force for the area in which the land is located; and
- vegetation is cleared according to the Code.

Clearing of vegetation under this section may occur despite any requirement for a licence, approval, consent, or other authorisation for the work made by the *Biodiversity Conservation Act 2016* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW), or any other Act or instrument made under any other Act, except the Code (subs 100RB(2)). A person who clears vegetation under the Code will not be guilty of an offence under the Acts listed in subs 100RB(3).

Court Security Regulation 2021 - this amending Regulation repealed and replaced the Court Security Regulation 2016, which was due to be repealed on 1 September 2021. This Regulation:

- identifies prescribed bags or containers in which exhibits that are restricted items must be enclosed when brought into court premises (cl 4);
- identifies the permissible use of recording devices (cl 5);
- identifies when, and by whom, it is permissible to transmit court proceedings (cl 6);
- lists the items that must be surrendered for safekeeping upon entering a court (cl 7); and
- mandates the form of certificates of identification for security officers (cl 8).

Schedule 1 of the Regulation lists the penalty notice offences and how the schedule is to be applied.

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

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Housing Diversity Code) 2021 - commenced on 2 July 2021 other than Sch 1[4] which commenced on 2 October 2021.

The date in subcl 1.19(3) has been changed from 30 November 2021 to 30 May 2022. This date is when subcl 1.19(2) ceases to have effect for land in the Mosman Local Government Area. Subclause 2.30(i) - Development Standards - was updated by the insertion of an "environmental zone" thus limiting the amount of fill able to be imported per lot in such a zone to 100 cubic metres. Subclause 5A.4(d) was added to the application of development standards and now includes "the construction of storage premises, other than storage premises used for the storage of data and related information technology hardware." Schedule 1[4] of the amending legislation will insert changes to the floor space ratios for the City of Blue Mountains and for Sutherland Shire.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (No 2) 2021 - this amendment updated the local government areas in which development for petroleum exploration, petroleum production and petroleum related works is prohibited or restricted. These were inserted into Sch 1 of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

State Environmental Planning Policy (Vegetation in Non-Rural Areas) Further Amendment 2021 - commenced 17 September 2021. Schedule 3 commences 18 December 2021.

This amendment replaced Pt 2 of the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017. Within this Part, cl 7 designates the types of clearing activities that require a permit or approval. Clause 8 identifies the clearing activities that do not require a permit and cl 8A permits some clearing activities without development consent if the clearing does not require a permit or approval. The other condition that must be satisfied to trigger cl 8A is the clearing activity is not ancillary to carrying out other development activities. If the vegetation is part of a heritage conservation area or Aboriginal place of heritage significance, or is an Aboriginal object or heritage item, then cl 8A does not apply.

Schedule 2 made changes to the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008. Subclause 1.16(3)(b) - under general requirements for exempt development - was replaced and now mandates that exempt development under this Policy must not involve the pruning or removal of a tree or other vegetation for which development consent, a permit, or approval is required. Under general requirements for complying development, subcl 1.18(h) was replaced and now requires a permit or approval to prune or remove a tree or vegetation to be issued prior to complying development consent being granted for a development activity.

## Judgments

### Queensland:

***R v Dumble*** **[2021] QCA 161** (Sofronoff P, Mullins and Bond JJA)

(decision under review: *R v Dumble* District Court at Brisbane - Unreported, 25 June 2021 (Clare SC DCJ))

Facts: The four respondents, who had each been directors of Linc Energy Limited (**Linc Energy**) at some point, were charged with contravening s 493(2) of the *Environmental Protection Act 1994* (Qld) (**Environmental Protection Act**) for failing to ensure that Linc Energy complied with that Act. Linc Energy was alleged to have contravened s 437(1) of that Act by wilfully and unlawfully causing serious environmental harm in the course of underground coal gasification works at five gasifiers near Chinchilla in the Western Downs Region of Queensland.

The District Court found that s 493(2) of the Environmental Protection Act did not apply to the respondent executive officers who had left Linc Energy before the alleged environmental harm occurred. The prosecutor referred that question to the Court of Appeal.

Issue: Whether an executive officer of a corporation could only be held liable under s 493(2) of the Environmental Protection Act if the environmental harm caused by that corporation for the purposes of s 437(1) of that Act occurred during the executive officer's tenure.

Held: District Court's ruling upheld:

(1) For the purposes of s 493(2) of the Environmental Protection Act, a corporation would be taken to have committed an offence against s 437(1) of that Act when serious environmental harm resulted from the corporation's causative wilful act. Therefore, a person who was an executive officer of the corporation when the harm was actually caused was guilty of an offence under s 493(2) of the Environmental Protection Act, subject to any available statutory defences: at [29].

(2) Under s 493(2) of the Environmental Protection Act at the moment when the offence was committed by the corporation, every executive officer of that corporation also committed an offence. Therefore, under s 493(2) of the Environmental Protection Act a person who was once an executive officer of the corporation, but who was not one at the time the offence was committed, did not answer the description of an executive officer who also committed an offence for the purpose of enlivening that provision: at [19];

(3) A corporation became criminally liable under s 437(1) of the Environmental Protection Act upon the occurrence of serious environmental harm. The corporation's executive officers at that time also committed the offence pursuant to s 493(2) of that Act: at [22]-[24];

(4) Section 493(2) of the Environmental Protection Act did not render an executive officer vicariously liable for the corporation's offence or liable as an accessory. Therefore, it was unnecessary for the prosecutor to prove that the respondents had any kind of connection with Linc Energy's causative act. With respect to executive officers who were in office at the time that the environmental harm occurred, but after the causative act, their lack of connection to the contravening act could be raised as a defence under s 493(4) of the Environmental Protection Act: at [25], [29]; and

(5) Conversely, where an executive officer attempted to escape liability by resigning before the environmental harm occurred they may be liable as a principal offender under s 437(1) of the Environmental Protection Act or as an accomplice by virtue of s 7 of the *Criminal Code Act 1899* (Qld): at [31].

## Tasmania:

***Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd*** **[2021] TASFC 12** (Blow CJ, Brett J, Porter AJ)

(decision under review: *The Wilderness Society v Wild Drake Pty Ltd* [2020] TASSC 34 (Estcourt J))

Facts: Wild Drake Pty Ltd (**Wild Drake**) sought to develop and use visitor accommodation and helicopter access in the Tasmanian Wilderness World Heritage Area, which is subject to the Tasmanian Wilderness World Heritage Area Management Plan 2016. Wild Drake held a lease over the proposed site at Halls Island in Lake Malbena, which is within the Walls of Jerusalem National Park. The land is also within the Central Plateau Conservation Area and is within the Environmental Management Zone of the Central Highlands Interim Planning Scheme 2015 (**Scheme**). The Central Highlands Council (**Council**) is the overseeing planning authority for the land which is also designated reserved land under the *National Parks and Reserves Management Act 2002* (Tas) (**NPRM Act**); the NPRM Act requires the land to be the subject of a management plan. The land in question also required a permit under the *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**).

Wild Drake applied to the Council for approval of the project, which was refused partly on grounds that the development proposal did not meet the standards of the Scheme. Wild Drake appealed the Council's decision to the Resource Management and Planning Appeal Tribunal (**Tribunal**) which overturned the Council's decision and granted a permit subject to conditions. The Tribunal found that the development proposal met the standards of the Scheme and proposed an acceptable solution. The Wilderness Society (Tasmania) Inc (**Wilderness Society**) appealed the Tribunal's decision to the Supreme Court of Tasmania to set aside the

Tribunal's decision but Escourt J dismissed the appeal. The Wilderness Society appealed Escourt J's decision to the Full Court.

Issues:

(1) Did the Resource Management and Planning Appeal Tribunal have jurisdiction to assess the proposal against the Tasmanian Wilderness World Heritage Area Management Plan 2016;

(2) What was the proper construction of the phrase "in accordance with" as it relates to cl 29.3.1 - Use Standards for Reserved Land in the Central Highlands Interim Planning Scheme 2015; and

(3) Did the granting of a business licence and lease to Wild Drake override the effect of the management plan.

Held: Appeal allowed; orders of the Supreme Court (6 July 2020) set aside; decision of the Tribunal (18 December 2019) set aside; and matter remitted to the Tribunal for reconsideration in accordance with cl 29.3.1 of the Scheme and the Tasmanian Wilderness World Heritage Area Management Plan.

(1) The argument that a planning authority, and by extension the Tribunal, does not have authority to review the land management function of the Director was found to be without merit because simultaneous operation of the LUPA Act and the Tasmanian Wilderness World Heritage Area Management Plan 2016 (which contemplates external assessment) was possible (Brett J, Porter AJ, Blow CJ agreeing): at [24]-[25], [91], [107];

(2) The ordinary meaning of "in accordance with" was the preferred construction for the phrase and meant that the provision's operation was constrained by the reserve management plan (Porter AJ with Blow CJ agreeing; Brett J dissenting at [33]): at [5], [160], [165], [168]-[169]; and

(3) The granting of a lease or a business licence by the Minister does not override or remove the operation of the relevant management plan (per Brett J with Blow CJ agreeing; Porter AJ agreeing in principle but concluding that a decision was not necessary on this point): at [4], [53], [177].

## New South Wales Court of Appeal:

***Bingo Holdings Pty Ltd v GC Group Company Pty Ltd*** **[2021] NSWCA 184** (Meagher, Payne, Brereton JJA)

(decision under review: *GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3)* [2021] NSWSC 252 (Stevenson J))

Facts: On 10 August 2021, the applicant sought leave to appeal from an interlocutory decision of Stevenson J in *GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 3)* (***GC Group Company No 3***). GC Group Company Pty Ltd (**GC Group**) was a subcontractor in a residential development in Albion Park. GC Group purchased recycled aggregate from Bingo Holdings Pty Ltd, Bingo Recycling Pty Ltd, Bingo Waste Services Pty Ltd, and Wollongong Recycling (NSW) Pty Ltd (collectively **Bingo**). GC Group alleged that aggregate that it purchased from Bingo between 1 June 2017 and 21 July 2017 was contaminated. GG Group claimed it suffered loss and damage because it had incurred costs that arose from "substantial reconstruction" work. GC Group claimed breach of contract as a result of false and misleading conduct on behalf of Bingo pursuant to Sch 2, s 18 of the *Competition and Consumer Act 2010* (Cth) (**Australian Consumer Law**), along with breaches of ss 54 to 56. Bingo sought to have the GC Group's losses determined as being an apportionable claim under s 34 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**), but on 20 May 2020 the primary judge ordered the relevant paragraphs in Bingo's Technology and Construction List Response (**response**) be struck out. Bingo filed a Notice of Motion (**NOM**) on 31 July 2020 and sought to amend its response and replead its defence of proportionate liability pursuant to s 87CB(3) of the Australian Consumer Law. The Notice to replead against s 87CB(3) was a close copy of the plea against s 34 of the Civil Liability Act. A list of 710 registered owners of delivery vehicles that delivered material from demolition sites and to the processing facility was included and Bingo submitted that the list was a list of potential concurrent wrongdoers. The judge was not persuaded that the list was not sufficient to establish that anyone on the list of registered owners actually delivered the material: *GC Group Company Pty Ltd v Bingo Holdings Pty Ltd (No 2)* [2020] NSWSC 1360. Bingo filed another NOM on 16 November 2020, again seeking to amend its response and replead proportionate liability. In *GC Group Company No 3*, the judge refused to grant leave to amend. That refusal was the basis for the application for leave to appeal to the Court of Appeal. Bingo made the concession that the contract and consumer guarantee

claims were not apportionable under s 18 of the Australian Consumer Law, therefore, apportionment would only arise if GC Group succeeded in its misleading and deceptive conduct claim but failed in its contract and consumer guarantee claims. Counsel for Bingo also conceded that because this was a matter under Commonwealth law, the Civil Liability Act was not operable in this matter.

Issues:

(1) Was it sufficient to identify a class of potential concurrent wrongdoers to apportion liability;

(2) Was Bingo a concurrent wrongdoer for the purposes of s 87CB(3) of the Australian Consumer Law; and

(3) To what extent, if any, did any of the 710 registered owners (customers) owe a duty of care to third parties for any contamination that may have occurred during their transport of the material.

Held: Summons seeking leave to appeal dismissed; applicants to pay the costs of the Summons:

(1) It was not sufficient merely to identify a class of potential concurrent wrongdoers any of whom *may* be a concurrent wrongdoer. There must be sufficient particularity as if a cross-claim were being alleged against a concurrent wrongdoer and setting out relevant material facts: at [30];

(2) Bingo's construction s 87CB(3) of the Australian Consumer Law was incorrect regarding Bingo being a concurrent wrongdoer: at [31]; and

(3) The Court doubted that it could be established that the customers owed a duty of care to third-parties but this question should await consideration in a case where the issue would require determination: at [32].

***Dincel Construction System Pty Ltd v Penrith City Council*** **[2021] NSWCA 133** (Gleeson, Payne and Brereton JJA)

(decision under review: *Penrith City Council v Dincel Construction System Pty Limited (No 4)* [2021] NSWLEC 1 (Robson J))

Facts: Dincel Construction System Pty Ltd (**Dincel**) and Gaonor Pty Ltd (**Gaonor**) appealed against four orders made by the Land and Environment Court (**Court**) in relation to the development and use of land at 919-929 Mamre Road, Kemps Creek (**Land**) and neighbouring land, being:

(a) the declaration that Dincel deposited fill and constructed an earthen platform at 931 Mamre Road in breach of s 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) (Order 4);

(b) the mandatory injunction requiring removal of the unlawful works, restoration of the ground level of the Land and restoration of the areas of 931 Mamre Road that had been affected by the unlawful works and use (Order 8(b));

(c) the mandatory injunction requiring disposal of the unlawful fill (Order 8(c)); and

(d) the costs order against Gaonor (Order 9).

Issue: Dincel and Gaonor raised ten grounds of appeal, primarily regarding whether the primary judge failed to properly exercise his discretion when making remedial orders requiring Dincel to remove fill it had unlawfully imported on the Land and hardstand it had unlawfully constructed.

Held: Appeal allowed in part; Order 4 set aside and an amended order made that did not refer to the construction of an earthen platform, and Order 8(b) set aside and an amended order made that excepted the earthen platform from the requirement to remove unlawful works and restore the ground level of the Land and 931 Mamre Road:

(1) The primary judge did not fail to consider the potential hardship that reinstatement orders would cause Dincel and its employees, and it was not erroneous to conclude that potential insolvency of Dincel and the potential consequences for its employees was not determinative: at [71], [74];

(2) The primary judge did not commit an error by failing to give the potential for Gaonor to "regularise" the development determinative weight. A development consent could not validly have been granted to regularise development that had already taken place, rather, the concept of regularising in the EPA Act relates to unlawful use: at [90]-[91]; and

(3) That the development had already been carried out and could not be "regularised" was not an irrelevant consideration, but rather one of many factors that the primary judge had regard to: at [95], [98];

(4) There primary judge did not commit an error in failing to regard the prospect that development consent for use of the Land might be obtained as a dispositive reason for not making any order for remediation of the Land: at [105];

(5) The Court does not need further justification to make a remediation order beyond a proven or admitted breach of the EPA Act. The appellants' submission that the Court must first consider what environmental harms were caused by the unlawful development, and whether the reinstatement orders would in fact remedy those harms, is inconsistent with the statutory power and confuses the Court's task with that of a consent authority: at [111], [120];

(6) The orders made by the primary judge requiring remediation were neither unreasonable nor unjust, having regard to all of the relevant factors, and the suspension of the orders appropriately ameliorated the effect of the injunctive relief: at [127];

(7) No prejudice to the appellants arose from the Penrith City Council being permitted to seek injunctive relief requiring Dincel to remove the unlawful fill from 931 Mamre Road, and the primary judge was correct to conclude that the owner of 931 Mamre Road was not a necessary party to the proceedings: at [136], [140];

(8) The primary judge was not in error by failing to consider the financial and other impacts of orders 8(b) and (c) to the extent they relate to 931 Mamre Road, in the absence of the appellant leading evidence of these impacts: at [143];

(9) The primary judge's findings that Dincel was responsible for placing unlawful fill on 931 Mamre Road were not established on the pleadings or by evidence: at [152]; and

(10) Gaonor, as the owner of the Land, was correctly held liable for the costs of the trial: at [169].

***KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc*** **[2021] NSWCA 216** (Basten and Payne JJA, Preston CJ of LEC)

(related decision: *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2)* [2020] NSWLEC 179 (Pain J)

Facts: The appellant, KEPCO Bylong Australia Pty Ltd (**KEPCO**) had applied for development consent to construct and operate a thermal coal mine in the Bylong Valley, 55 kilometres north-east of Mudgee, for export of coal to its own electricity generators in South Korea. The proposal was for State Significant Development for which the consent authority was the Independent Planning Commission (**Commission**). Relevant considerations were set out in the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**). The Commission refused consent and gave reasons for its decision. The Commission found that the proposal failed to contain steps minimising (i) greenhouse gas (GHG) emissions, and particularly Scope 3 emissions created by the use of the coal to generate electricity, and (ii) adverse effects on groundwater resources, to the greatest extent practicable.

KEPCO sought judicial review of the Commission's decision in the Land and Environment Court. The Bylong Valley Protection Alliance Inc was the active respondent. Pain J dismissed the proceedings. KEPCO appealed the decision.

Issues: Whether the primary judge erred:

(1) In failing to hold that the Commission had misconstrued cl 14(1)(c) of the Mining SEPP by asking whether KEPCO had minimised GHG emissions to the greatest extent practicable, rather than asking whether it, the Commission, could impose conditions having that effect;

(2) In failing to hold that the Commission had similarly misconstrued cl 14(1)(a) of the Mining SEPP, dealing with likely effects of the mining on groundwater resources;

(3) In concluding that any error made by the Commission in construing cl 14(1) was immaterial because the provision related to the imposition of conditions and thus only arose after the Commission had decided to grant consent;

(4) In failing to hold that the Commission had misconstrued cl 14(2) of the Mining SEPP as imposing on the Commission a duty to assess GHG emissions, as distinct from considering assessments which had been carried out of such emissions;

(5) In failing to hold that the Commission had misconstrued the reference to "applicable" policies in cl 14(2) by considering a policy concerning GHG emissions, rather than policies directed only to the assessment of GHG emissions; and

(6) In failing to hold that the Commission had failed to consider possible impacts on GHG emissions if KEPCO were forced to seek an alternative, and potentially inferior, source of coal.

Held: Appeal dismissed; appellant to pay first respondent's costs:

*Per Basten and Payne JJA, Preston CJ of LEC*

(1) The proposal being considered by the Commission involved a multiplicity of conditions. To say that the proponent had not minimised GHG emissions meant that it had not proposed a condition which, if implemented, would minimise GHG emissions. The Commission therefore considered whether conditions which would satisfy cl 14(1)(c) had been identified but found them absent. KEPCO's complaint was not to the construction of par (c), or par (a), but to the operation of the chapeau. KEPCO had proposed no condition which addressed the critical element, namely minimising the 98% of GHG emissions falling within Scope 3: at [37], [42]-[44];

(2) KEPCO's argument that the Commission had misconstrued cl 14(1)(c) focused on two sentences in the Commission's reasons, as though they purported to cover all the requirements of the clause. The reasons show that the Commission found that if the development were undertaken in accordance with the proposed conditions of consent, it would not ensure that impacts on GHG emissions were avoided or minimised to the greatest extent practicable: at [135]-[136], [138];

(3) The alleged misconstruction of cl 14(1) applied equally to par (a) as to par (c). The distinction between a description of how the mining operation would be undertaken and the conditions to which it was subject should be rejected: at [47]; [51]; [116];

(4) The proper construction of cl 14(1) does not involve a two-stage process: the single function being exercised by the consent authority is determining whether to grant or refuse consent, with or without conditions. The language of cl 14 does not permit the differential operation of (1), on the one hand, and (2) and (3), on the other: at [21]; [32]; [96]; [97];

(5) If there were a valid distinction between assessing assessments of GHG emissions and assessing GHG emissions, the former being mandatory and the latter not, it is clear that the Commission undertook the former exercise: at [56];

(6) The Commission was required to have regard to any applicable State or national policies "concerning greenhouse gas emissions". The NSW Climate Change Policy Framework, which the Commission had regard to, was such a policy. The obligation was not to be read down by removing the word "applicable" from its statutory context, so as to disregard the descriptor "concerning greenhouse gas emissions". Even if the Commission were not required to have regard to the policy, no legal error was identified in the use to which the policy was put: at [63], [65], [68]; [160]-[162]; [173]-[188];

(7) Whether there was "cogent evidence" in support of this ground was for the Commission to determine. The assertion that the Commission was not aware of any available evidence was untenable, as it is clear that it was cognisant of the material in which the issue of alternative supplies was raised: at [71]-[77]; [191]-[200]; and

(8) The Commission could not be said to have acted unreasonably or irrationally in determining that it had "no evidence" before it to determine whether KEPCO would secure an alternative source of coal of inferior quality. The Commission was not satisfied that the information supplied was rationally capable of supporting the finding sought, rather than that there was "no evidence" at all: at [78]-[81]; [205]-[206].

***Ku-ring-gai Council v Buyozo Pty Ltd*** **[2021] NSWCA 177** (Basten and Payne JJA, Preston CJ of LEC)

(decision under review: *Buyozo Pty Limited v Ku-ring-gai Council* [2021] NSWLEC 2 (Pepper J))

Facts: Buyozo Pty Ltd (**Buyozo**) constructed and is using a building for storage premises and separate commercial premises in accordance with a development consent granted by the Land and Environment Court. Condition 30 of the development consent, imposed under s 7.11(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), required the payment of a monetary contribution. Condition 30 was

determined in accordance with the Ku-ring-gai Contributions Plan 2010 (**Contributions Plan**). The Contributions Plan provided an applicable rate for a building used for "business" per square metre of gross floor area.

Buyozo paid the full amount of the contribution to the Ku-ring-gai Council (**Council**). After Buyozo had completed construction of the building and commenced use of the building, Buyozo applied to the Council to modify the development consent by amending condition 30 to reduce the amount of contribution. Following a deemed refusal of its modification application, Buyozo appealed to the Land and Environment Court.

The primary judge upheld the appeal and approved the modification of the development consent by amending condition 30 to substitute $674,151.05 as the amount of contribution payable for the amount of $987,242.37 stated in the original condition.

Issues:

(1) Whether the primary judge erred in concluding that there was power under s 4.55 of the EPA Act to modify condition 30, in circumstances where that condition required the payment of a contribution and that contribution had been paid by the time required under condition 30 such that the condition had been complied with and had no ongoing operation;

(2) Whether the primary judge misconstrued par (h) of the definition of "gross floor area" in the Ku-ring-gai Local Environmental Plan 2015 or erred in deciding, on the facts as found, that the area comprising the corridors in the building was for the purposes of par (h) an area of access to space used for the loading or unloading of goods; and

(3) Whether the primary judge erred in concluding that there was utility in modifying condition 30 on the three bases given in the judgment: first, that there was "public utility in correctly calculating the 'gross floor area' upon the proper construction of that term in the LEP"; secondly, that the modification of condition 30 would oblige the Council to "take the overpayment into account prior to the imposition of any condition in respect of any future development application"; and thirdly, that "the overpayment may also give rise to an equitable claim, such as that of unjust enrichment, albeit in another suit in another court".

Held: Appeal upheld; appeal dismissed; development consent refused; respondent to pay appellant's costs:

*Per Basten and Payne JJA:*

(1) The proposed modification had no environmental, or any other, effects. There was therefore no proposal to modify the development. The same building (which had already been completed) was to be used for the same purpose (which was its current use). Modification under s 4.56(1) is only available where some change is proposed with respect to the development for which consent was granted: at [10], [11];

*Per Preston CJ of LEC:*

(2) There was no power to modify the development consent to amend condition 30 in circumstances where the contribution had already been paid. A condition of consent imposed either on the grant of development consent or the modification of the development consent has the essential characteristic of requiring the doing or refraining from doing something in the future. A condition of consent can never be imposed so as to require the doing of something retrospectively but rather only to do something prospectively: at [43]-[45];

(3) A modification under s 4.56(1) of the EPA Act must effect some change to the development. Substituting a lesser amount for a greater amount of the monetary contribution could not effect any change to the development. In this circumstance, the preconditions to the exercise of the power in s 4.56(1) could have no application and s 4.56(1) was not an available source of power to modify the development consent: at [52], [64];

*Per Preston CJ of LEC, Basten and Payne JJA agreeing:*

(4) The only areas within the building that could properly be characterised as being spaces used for the loading or unloading of goods within par (h) of the definition of gross floor area are the areas that have been approved by the development consent for that activity. The inquiry demanded by par (h) of the definition of gross floor area is to identify the area within the building as a whole used for the loading or unloading of goods for the purpose authorised by the development consent: at [84], [86], [89];

(5) There is no public utility in the modification of condition 30. Neither does condition 30 as originally granted reveal nor would condition 30 as modified reveal anything on its face about how the amount of contributions required to be paid by the condition had been calculated: at [95];

(6) The payment involved the provision of a benefit as a condition of the grant of development consent within the terms of s 7.11(6)(a). Any subsequent modification of condition 30 cannot change this fact because first, the modification of a development consent only operates prospectively and secondly, the modification could not cause the payment of the monetary contribution that was required by the condition before it was modified to become a payment under the condition as modified: at [101], [102], [103]; and

(7) Both parties accepted that a restitutionary claim would not be available. Even if Buyozo had an arguable restitutionary claim, this possibility did not give utility to the proposed modification of condition 30: [105], [107].

***Nadilo v Eagleton* [2021] NSWCA 232** (Meagher and Brereton JJA, Preston CJ of LEC)

(decision under review: *Nadilo v Eagleton* [2021] NSWLEC 9 (Moore J))

Facts: Ms Nadilo (**appellant**) and Mr and Mrs Eagleton (**respondents**) are neighbours in the residential suburb of Wangi Wangi, New South Wales. The respondents had installed and operated two air conditioning units and a heat pump water heater on the outside of the side wall of their house facing the applicant's house. The applicant complained that the air conditioning units and hot water heater emitted excessive noise and brought proceedings in the Land and Environment Court (**Court**). She claimed that the installation and operation of the air conditioning units and hot water heater were in breach of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (NSW) (**Exempt Development SEPP**) and of s 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW) and cl 45(a) and cl 53(1)(a) of the Protection of the Environment Operations (Noise Control) Regulation 2017 (NSW) (**Noise Control Regulation**). Shortly before the final hearing the parties agreed to consent orders which included that the proceedings be dismissed. By that time the substantive dispute between the parties had been resolved by the respondents replacing the hot water heater and moving one of and enclosing both of the air conditioning units. The question of costs was reserved. In the absence of the court ordering "otherwise", the applicant would have been required under r 42.20(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) to pay the respondents' costs. Accordingly, she sought an order that the respondents pay her costs. The primary judge rejected that application, making no order as to costs of the proceedings, and ordered that the applicant pay the costs of the motion.

Issue: Whether the costs orders made by the primary judge were unreasonable or plainly unjust, so as to be set aside as involving error.

Held: Leave to appeal granted; appeal upheld; respondents to pay appellant's costs:

*Per Meagher and Brereton JJA and Preston CJ of LEC*

(1) The applicant had achieved the outcomes that she sought in bringing the proceedings, so as to render it plainly unjust for the primary judge not to have awarded the applicant her costs when exercising his discretion under r 42.20(1) of the UCPR. The applicant's success was to be evaluated by looking to the substance of the outcomes sought and obtained by the applicant: [1], [10], [85], [89];

(2) It did not matter whether the applicant would or would not have succeeded in the claim of breach of the Noise Control Regulation had the matter been fully tried. It was sufficient that the applicant would have almost certainly succeeded in the claim of breach of the Exempt Development SEPP and that the applicant secured the outcomes she had sought by bringing the proceedings: [1], [11], [90];

*Per Meagher and Brereton JJA*

(3) It is not necessary to demonstrate "unreasonableness" on the part of a defendant or respondent to obtain an "otherwise" order under r 42.20(1) of the UCPR in circumstances where that party has effectively capitulated without any element of compromise, making further prosecution of the litigation unnecessary. However, if there were such a requirement, the respondents' persisting in the defence of the proceedings whilst at the same time remedying progressively the subject matter of the applicant's complaint, and not availing themselves of the opportunity to avoid the applicant incurring costs, would satisfy it: [1], [12]; and

*Per Preston CJ of LEC*

(4) Establishing that the applicant would inevitably have succeeded is necessary, but insufficient; there needs also to be the extra circumstance that the respondents' conduct in defending the proceedings up to the time

they agreed to the primary judge making consent orders was unreasonable. The primary judge erred in failing to identify and give weight to the respondents' unreasonable conduct in delaying taking the actions and consenting to the orders that were ultimately taken and made: [94], [99].

***North Parramatta Residents' Action Group Inc v Infrastructure New South Wales*** **[2021] NSWCA 128** (Basten JA)

(decision under review: *North Parramatta Residents' Action Group Inc v Infrastructure New South Wales* [2021] NSWLEC 60 (Moore J))

Facts: The decision by Moore J in the Land and Environment Court that the proceedings commenced by the North Parramatta Residents' Action Group (**appellant**) be dismissed was handed down on 16 June 2021. The appellant had challenged the validity of the EIS produced for the Powerhouse Parramatta Museum that would require the relocation of a local heritage structure, Willow Grove. On the following Tuesday, 22 June 2021, the applicant filed a notice of appeal and sought an interim injunction against Infrastructure NSW (**INSW**) prohibiting any physical work on the Powerhouse Parramatta/Willow Grove site from commencing before the appeal was determined. The undertaking given by INSW in the proceedings before the Land and Environment Court (**Court**) expired on 21 June 2021. INSW declined to give another undertaking that it would not commence work on the Powerhouse Parramatta site for any length of time and opposed the injunction sought by the applicant which required the Court to sit immediately to hear the appellant's application. In the anticipation of having the injunction granted, INSW sought to have conditions imposed. The conditions INSW sought were for an injunction, if granted, not to extend to the removal of non-heritage portions of the Willow Grove building and asbestos from the ceiling.

Issues:

(1) Should the public interest in preserving Willow Grove intact prior to the resolution of the appeal be given weight;

(2) Would it be prejudicial to not apply the conditions sought by INSW to the injunction:

  (a) what would be the effect of removing the non-heritage listed components of Willow Grove;

  (b) was there urgency in removing the non-heritage components of Willow Grove; and

(3) Were the injunction conditions proposed by INSW warranted.

Held: Notice of Motion filed by INSW seeking conditions on the injunction dismissed:

(1) Weight should be given to the public interest to maintain Willow Grove intact until the outcome of the appeal was determined: at [15];

(2) Not applying INSW's conditions to the injunction was not prejudicial; the effects were speculative or of unknown significance at best: at [26];

  (a) there was no clear evidence presented detailing how the proposed partial demolition activities would impact Willow Grove: at [19];

  (b) no evidence was given as to how long the activities would take, nor how long it would take to disassemble and relocate Willow Grove if the non-heritage components were not removed now: at [19]-[25]; and

(3) The proposed conditions were not proven to be warranted based on the evidence before the Court: at [26].

***North Parramatta Residents' Action Group Inc v Infrastructure New South Wales (No 2)*** **[2021] NSWCA 146** (Bathurst CJ, Basten and Leeming JJA)

(decision under review: *North Parramatta Residents' Action Group Inc v Infrastructure New South Wales* [2021] NSWLEC 60 (Moore J))

Facts: The decision by Moore J in the Land and Environment Court that the proceedings commenced by the North Parramatta Residents' Action Group (**appellant**) be dismissed was handed down on 16 June 2021. The

appellant had challenged the validity of the Environmental Impact Statement (**EIS**) produced for the Powerhouse Parramatta Museum that would require the relocation of a local heritage structure, Willow Grove. The appellant contended that the primary judgment was in error for not considering cl 3 of the Secretary's environmental assessment requirements (**SEAR**); that cl 7(1)(c) of the Environmental Planning and Assessment Regulation 2000 (NSW)v (**EPA Regulation**), and there was an error in the finding that the EIS was not invalid.

Issues:

(1) What was the proper construction of cl 7(1)(c) of Sch 2 of the EPA Regulation to be taken as requiring analysis of feasible alternative sites when considered with cl 3 of the SEAR;

(2) Was it a failure of the EIS to not analyse feasible alternative sites for the Powerhouse Parramatta Museum under cl 7(1)(c) of the EPA Regulation;

(3) Was it a failure of the EIS attached to the development application (**DA**) to not analyse feasible alternative designs to maintain Willow Grove in situ;

(4) Did the EIS fail to comply with the SEAR; and

(5) Was there an error in finding the DA not invalid due to the EIS not being in the prescribed form.

Held: Appeal dismissed (Basten JA; Bathurst CJ and Leeming JA agreeing); appellant to pay costs of the first respondent:

(1) The EIS complies with cl 3 of the SEAR which, due to its specificity, expanded the requirements of cl 7(1)(c) of the EPA Regulation without conflicting with it resulting in limited significance of cl 7(1)(c). In the event that the SEAR modified or varied the obligations under cl 7(1)(c), then the SEAR would prevail: at [28];

(2) The choice of site was a condition precedent to the EIS and not subject to review by the consent authority and, therefore, cl 7(1)(c) was not to be read to require the EIS to address additional sites: at [30]-[31], [34];

(3) It was arguable that cl 7(1)(c) would require an analysis of infeasibility regarding alternative designs: at [55];

(4) There was no material failure of the EIS identified by the Secretary and the construction of the SEAR suggests that an EIS would not be invalid in the absence of a complaint from the Secretary, however, an analysis of compliance with the SEAR by the EIS should have been undertaken in the primary judgment: at [60]-[61];

(5) There was no basis on which to determine that the EIS was so defective as to be considered invalid: at [79]; and

(6) The EIS substantially complied with the various requirements that were to be addressed: at [79].

***R.I.G. Consulting Pty Ltd v Queanbeyan-Palerang Regional Council*** **[2021] NSWCA 130** (Basten and Leeming JJA, Preston CJ of LEC)

(decision under review: *R.I.G. Consulting Pty Ltd v Queanbeyan-Palerang Regional Council (No 2)* [2020] NSWLEC 184 (Pain J))

Facts: R.I.G. Consulting Pty Ltd (**RIG**) applied under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) for development consent to subdivide an existing neighbourhood lot into three lots pursuant to s 22 of the *Community Land Development Act 1989* (NSW) (**CLD Act**). Queanbeyan-Palerang Regional Council (**Council**) refused consent to the subdivision. The Council's reasons included that cl 4.1B of Palerang Local Environmental Plan 2014 (**PLEP 2014**) precluded the grant of development consent to the subdivision because, first, the average size of all the lots created by the subdivision would be less than the minimum size shown on the Lot Size Map in relation to the land, contrary to the requirement of cl 4.1B(4)(a) of PLEP 2014 and, secondly, the existing neighbourhood lot proposed to be subdivided was a "resulting lot", as defined in cl 4.1B(6) of PLEP 2014, which cannot be subdivided for the purposes of residential accommodation by reason of cl 4.1B(5) of PLEP 2014.

RIG appealed against the Council's refusal of consent to the Land and Environment Court. The primary judge determined four separate questions, and subsequently dismissed RIG's appeal. RIG contended that the primary judge erred in holding that cl 4.1B(4)(a) of PLEP 2014 applied to the proposed subdivision so that the

grant of development consent to the proposed subdivision was precluded by that subclause, and that the lot proposed to be subdivided was a "resulting lot" within the meaning of cl 4.1B(6) of PLEP 2014 so that the grant of development consent was precluded by cl 4.1B(5) of PLEP 2014.

Issues:

(1) Whether cl 4.1B(4) of PLEP 2014 applied to the proposed subdivision;

(2) Whether grant of development consent to the proposed subdivision was precluded by cl 4.1B(4) of PLEP 2014;

(3) Whether the existing neighbourhood lot proposed to be subdivided was a "resulting lot" within the meaning of cl 4.1B(6) of PLEP 2014; and

(4) Whether the grant of development consent to the proposed subdivision is precluded by cl 4.1B(5) of PLEP 2014.

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

*Per Basten and Leeming JJA, Preston CJ of LEC*

(1) Clause 4.1B(4) did apply to the subdivision. Because cl 4.1 of the PLEP 2014 did not apply to subdivision under the CLD Act, the phrase "despite clause 4.1" in cl 4.1B(4) had no work to do: at [9], [20]-[23], [55].

(2) Because the clauses were not engaged, the direction after cl 4.1(3) and cl 4.1AA(4) of the Standard Instrument - Principal Local Environmental Plan was not engaged and was not relevant to the interpretation of cl 4.1B(4): at [9]-[10], [17]-[19], [23], [64]-[65];

(3) If the direction had been engaged, RIG's argument that cl 4.1B(4) can only ever operate as an exception to a minimum subdivision lot size development standard fixed by either cl 4.1 or cl 4.1AA of PLEP 2014 nevertheless failed. An exception was permitted but was not mandatory. The direction was silent as to the form in which an exception may be made. The direction permitted an exception if the development standard applied to a particular kind of subdivision, but not if the development standard does not apply: at [9], [10], [65]-[70]; and

(4) Clause 4.1B(5) applies to preclude development consent being granted for the proposed subdivision of the existing neighbourhood lot, which is a resulting lot; a "resulting lot" is defined as including a lot created by a subdivision under cl 20 of Yarrowlumla Local Environmental Plan 2002. The lot proposed to be subdivided was so created: at [5], [13], [14], [79], [80].

***Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145** (Bell P, Brereton and McCallum JJA)

(decision under review: *Jong Mi Hong v Blacktown City Council* [2021] NSWLEC 38 (Pepper J))

Facts: By Notice of Motion the Secretary, New South Wales Department of Planning, Industry and Environment (**Secretary**) sought to set aside a subpoena to produce issued to it at the request of Blacktown City Council (**Council**). The subpoena was issued in principal proceedings brought in Class 3 of the Land and Environment Court's jurisdiction for the determination of compensation for the Council's compulsory acquisition of land belonging to Jong Mi Hong and Min Kyung Hong.

The Secretary sought to set aside the subpoena on grounds including that it lacked a legitimate forensic purpose. The primary judge found that the Council had a legitimate forensic purpose for seeking the documents and that the subpoena was valid.

On appeal, the Secretary contended that the primary judge had misconstrued and consequently misapplied the decision in *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd* [2009] NSWCA 307 (***ICAP***). The Secretary contended that the relevant test stated in *ICAP* for determining whether or not a subpoena should be set aside for lack of a legitimate forensic purpose was whether or not the subpoenaed documents would materially assist the case of the party which issued the subpoena.

Issues:

(1) The status and effect of the decision in *ICAP*; and

(2) Irrespective of the decision in *ICAP*, whether a legitimate forensic purpose would be established if it could be shown that it was likely that the subpoenaed documentation would (or on a reasonable basis beyond speculation was likely to) materially assist on an identified issue.

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

(1) *ICAP* did not provide authoritative guidance for the issues on appeal because it was a decision refusing an application for leave to appeal: at [23]-[31] (Bell P); [92] (Brereton JA); and [99] (McCallum JA);

(2) The primary judge correctly found that a legitimate forensic purpose would be established where it could be shown that the subpoenaed documents would materially assist on an identified issue, or there was a reasonable basis beyond speculation that it was likely that the documentation would materially assist on an identified issue. Put another way, a subpoena would be presumed to have been issued for a legitimate forensic purpose if the documents sought were apparently relevant to the issues in the proceedings: [65], [80] (Bell P); [89] (Brereton JA); and [98] (McCallum JA); and

(3) As the primary judge found, it was not necessary, in order to demonstrate a legitimate forensic purpose, that it be established that the documents sought by way of a subpoena would materially assist the case of the party that issued the subpoena. Therefore, the decision not to set aside the subpoena had not miscarried: [21], [81] (Bell P); [86], [96] (Brereton JA); and [98] (McCallum JA).

## New South Wales Court of Criminal Appeal:

***Chia v Ku-ring-gai Council*** **[2021] NSWCCA 189** (Hoeben CJ at CL, Harrison and Wilson JJ)

(decision(s) under review: *Ku-ring-gai Council v John David Chia (No 15)* [2019] NSWLEC 1 (Robson J); *Ku-ring-gai Council v John David Chia (No 16)* [2019] NSWLEC 184 (Robson J))

Facts: John Chia (**Mr Chia**) appealed against his conviction and sentence (requiring Mr Chia to pay a fine of $40,000 and the prosecutor's costs of the proceedings) in the Land and Environment Court for causing injury to 74 trees, the subject of the Ku-ring-gai Council Tree Preservation Order without consent, contrary to s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

Issue: Mr Chia raised eight discrete grounds of review. Relevant to the outcome of the appeal, Ground 2 was that the trial judge erred in finding Mr Chia vicariously liable for the tree removal in circumstances where his Honour failed to:

(1) Make a finding as to the terms of the direction given by Mr Chia to the contractor, Mr Edgar, in relation to the removal of the trees, when such a finding was a necessary precondition to a finding of vicarious liability;

(2) Make a finding that the tree removal was a necessary result of the specific direction given by Mr Chia to Mr Edgar when such a finding was a necessary precondition to a finding of vicarious liability; and

(3) Address the defence case that Mr Chia instructed Mr Edgar to comply with all relevant regulations and legislation, including the "10/50 Vegetation Clearing Code of Practice for NSWv" (**10/50 Code**).

Held: Appeal against conviction upheld on the basis that Ground 2 was made out; conviction quashed; and new trial ordered.

(1) Mr Chia's submission that his instruction or direction to Mr Edgar should have been found in specific terms has significant attraction, as one does not reach the point of assessing the factual question of whether any of the direct authorisation exceptions (to the general rule that there is no vicarious liability for the act of an independent contractor) may have been satisfied, until the terms of the alleged direction or instruction are clearly articulated and understood: at [68], [70];

(2) The trial judge failed to address the defence case that Mr Chia instructed or directed Mr Edgar to comply with all relevant regulations and legislation, including the 10/50 Code. As his Honour did not reject the evidence that Mr Chia specified to Mr Edgar that compliance with the 10/50 Code was essential, it was not open to the trial judge to conclude that Mr Chia had instructed or directed the contractor to carry out the clearing the subject of the charge: at [70]-[72]; and

(3) If Mr Chia gave a particular instruction or direction to Mr Edgar to comply with the 10/50 Code, it would necessarily operate as a constraint or limitation upon the width of his instructions in general, and would be (in effect) an instruction or direction not to fell trees that were not within the 10/50 zone, where Mr Chia could not be liable (vicariously or otherwise) if he did not instruct or direct the offending work to be performed. As such, the trial judge was required to, but did not, decide whether Mr Chia directed the contractor to comply with all relevant regulations and legislation, including the 10/50 Code: at [74]-[75].

***Peter James Harris and Jane Maree Harris v WaterNSW*** **[2021] NSWCCA 184** (Hoeben CJ at CL, Bellew and Beech-Jones JJ)

(decision under review: *WaterNSW v Harris (No.3)* [2020] NSWLEC 18 (Robson J))

Facts: Peter James Harris and Jane Maree Harris (**appellants**) appealed against their convictions for offences against s 91G(2) of the *Water Management Act 2000* (NSW) (**Water Management Act**), in that they were co-holders of a water supply works and water use approval (**approval**), and a term of the approval, prohibiting water from being taken when the flow in the Darling River at the Bourke gauge is equal to or less than 4,894 megalitres per day, was contravened by a person.

Issues:

(1) Had the trial judge erred by finding that WaterNSW had demonstrated beyond reasonable doubt that the flow rate at the Bourke gauge was less than 4,894 megalitres per day in the period 22 June to 27 June 2016;

(2) In determining that flow issue, had the trial judge further erred in five ways relating to understanding the evidence and its effect, treating alternatives as relevant considerations, and admitting certain evidence;

(3) Had the trial judge erred by finding that WaterNSW had demonstrated beyond reasonable doubt that a condition of the approval was that water was prohibited from being taken when the flow in the Darling River at the Bourke gauge was equal to or less than 4,894 megalitres per day (**alleged term**).

(4) In determining that condition issue, had the trial judge further erred in three ways relating to evidentiary findings that the appellants had consented to introducing a new term into the approval by e-mail to Mr Adams and that notice of the introduction of the alleged term had been given to the appellants, and further that the alleged term was a condition of the approval.

(5) The trial judge erred in finding that WaterNSW had proved beyond reasonable doubt that the appellants' had committed an offence against s 91G(2) of the Water Management Act.

Held: Appeals dismissed (Bellew J, Hoeben CJ at CL agreeing and Beech-Jones JA agreeing with additional comments):

(1) It was open to the trial judge to find that WaterNSW had demonstrated beyond reasonable doubt that the flow rate at the Bourke gauge was less than 4,894 megalitres per day in the period 22 June to 27 June 2016, in circumstances where the trial judge had considered the issue of the accuracy and reliability of the data, and accepted WaterNSW's evidence as to the reliability of the data and Mr McDermott's evidence as to the impact of the movement of the Bourke gauge: at [159], [162], [163];

(2) The preliminary analysis, consideration and assessment of Dr Martens' evidence by the trial judge indicated that the trial judge understood, but rejected, Dr Marten's evidence: at [165]-[167];

(3) Given Dr Martens had raised the existence of measuring devices that could have been, but weren't, installed to calculate flow rate, it was not irrelevant to consider and make reference to Dr Martens not having identified any other alternative methods of calculation: at [171]-[172];

(4) The trial judge did not err in admitting the departmental record of gauge node points, and evidence based upon that record, because: first, obtaining and/or recording data during and/or subsequent to a gauging was based on direct observation and did not involve forming an opinion; second, on the evidence it was open to the trial judge to find that the provisions of s 147 of the *Evidence Act 1995* (NSW) (**Evidence Act**) were satisfied such that the presumption in that section applies; and third, there was no identifiable basis for the evidence to be excluded in the exercise of his Honour's discretion under s 135 of the Evidence Act: at [183], [187], [192];

(5) The trial judge did not erroneously elevate Mr Cutler's evidence as evidence of what any person had actually done when carrying out a gauging: at [198];

(6) In circumstances where there was no evidence that the relevant procedures for data gathering had not been properly followed, it was open for the trial judge to proceed on the basis they had been followed: at [200]; and

(7) The grounds relating to the condition issue can be addressed by determining whether the trial judge committed an error in finding that the appellants had consented to introducing a new term into the approval by e-mail to Mr Adams, and that notice of the introduction of the alleged term had been given: at [203]. It was open to the trial judge to accept the evidence of Mr Wheatley that the appellants had consented to a specific method of varying or introducing a new term into the approval, despite Mr Wheatley being unable to remember some details of the conversation: at [216]-[127]. It was also open to the trial judge to conclude that an e-mail attaching the approval was sent by Mr Wheatley to Mr Adams on 23 September 2015, thus introducing the alleged term into the approval: at [222].

***Turnbull v Office of Environment and Heritage*** **[2021] NSWCCA 190** (Hoeben CJ at CL, Harrison and Button JJ)

(decision under review: *Chief Executive of the Office of Environment and Heritage v Grant Wesley Turnbull (No 4)* [2020] NSWLEC 124 (Duggan J))

Facts: Grant Wesley Turnbull (**defendant**) was charged with clearing native vegetation otherwise than in accordance with a development consent pursuant to s 12 of the now repealed *Native Vegetation Act 2003* (NSW). The defendant entered a plea of not guilty in those criminal proceedings. Separately, the defendant was the respondent in Class 4 civil enforcement proceedings commenced by the then-prosecutor for orders seeking restraint of further land clearing and remediation of the cleared land. The Chief Executive of the Office of Environment and Heritage (**prosecutor**) commenced the criminal proceedings at the conclusion of the Class 4 proceedings. The criminal proceedings concerned the same events as the Class 4 proceedings. In the Class 4 proceedings, following advice from counsel, the defendant made admissions related to the clearing by way of affidavit and during cross-examination. The prosecutor gave notice of its intention to adduce evidence of the admissions in the criminal proceedings. The defendant sought, by Notice of Motion (**NOM**), that the admissions made be excluded, and a temporary stay of the trial until persons who had access to evidence given by the defendant in the Class 4 proceedings were no longer involved in the prosecution of the defendant in the criminal proceedings. The NOM was dismissed by Duggan J on 13 August 2021 and formed the basis for this appeal to the New South Wales Court of Criminal Appeal.

Issue: Whether her Honour erred by failing to give primacy to the accusatorial principle.

Held: Leave granted to appeal out of time; leave granted to appeal; appeal dismissed (Hoeben CJ at CL, Harrison and Button JJ agreeing):

(1) The importance of the accusatorial principle was emphasised, however, it was noted that the practical application of the principle was not absolute and must sometimes yield to other principles. The right to silence can be limited or abolished by legislation of sufficient clarity: at [81];

(2) True compulsion was not held to be a necessary ingredient for the application of the principle: at [82];

(3) The measures sought in this case would have constituted an unwarranted and radical expansion of the limited practical solution applied by the High Court in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46; [2015] HCA 5: at [83]-[84], [88];

(4) A mechanism exists whereby admissions made in circumstances found to be unfair to their maker can be excluded by a presiding judge in criminal proceedings. The applicant had already sought to utilise this discretion pursuant to the *Evidence Act 1995* (NSW), including s 90: at [85]-[86];

(5) Parliament undoubtedly intended that one body could play two different roles in the context of alleged environmental wrongdoing that can be both a civil wrong and a criminal offence: at [87];

(6) The possibility that a different approach may have been taken by the applicant and his legal team was no reason for the prosecutor to be disadvantaged by the exclusion of probative evidence: at [89]; and

(7) The circumstances in this case were distinguished from other cases dealing with the accusatorial principle as no lack of good faith on the part of the prosecutor was found, nor was there any suggestion of incompetent non-compliance with orders or statute: at [90].

## Supreme Court of New South Wales:

***Aversa v Roads & Maritime Services*** **[2021] NSWSC 1047** (Lindsay J)

Facts: Ms and Mr Aversa (**plaintiffs**) served a Notice to Produce (**NTP**) on Roads and Maritime Services (**RMS**). RMS opposed the NTP and sought to have it set aside because it had no legitimate forensic purpose, the plaintiffs were involved in nothing more than a "fishing" exercise, the process of discovery was premature, and the scope of the NTP was oppressively large. The NTP was concerned with the compensation arising from the compulsory acquisition of the plaintiffs' property in Haberfield. The focus of the dispute from the plaintiffs was whether RMS had statutory authority to acquire the land or if RMS committed, and continued to commit, trespass on the plaintiffs' land. The plaintiffs also submitted that RMS had no authority to subdivide their land without their consent. This, the plaintiffs contended, occurred when RMS deposited plans that had underground subdivisions that arose from the proposed Westconnex M4-M5 tunnel development. The plaintiffs relied primarily upon ss 120 and 129 of the *Real Property Act 1900* (NSW) (**Real Property Act**) for their relief claims and as support of the forensic purposes for their Notice to Produce. The plaintiffs contended that the Real Property Act also dictated entitlements beyond that of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). If RMS was found to have acted without statutory authority, then there was the possibility that s 42 of the Real Property Act and ss 67 and 68 of the *Supreme Court Act 1970* (NSW) would also be engaged as they relate to compensation.

Issues:

(1) Was the documentation sought by the plaintiffs for genuine forensic purposes;

(2) Was the volume of documentation sought overly oppressive;

(3) Was the NTP a "fishing" exercise; and

(4) Was the NTP premature.

Held: Application to set aside the plaintiffs' NTP dismissed:

(1) The documentation sought was for genuine forensic purposes because it would materially assist on an identified issue: at [115]-[121], [138];

(2) The volume of documentation sought was not overly oppressive as the documents were identified with "sufficient particularity:" at [133]-[137], [138];

(3) The NTP did not amount to a "fishing" exercise; the documents relating to due diligence, feasibility studies, financial plans and reports, and transaction documents were not speculative for a project such as this and appropriate to produce given the sufficient detail given by the plaintiffs: at [129]-[132], [138]; and

(4) The NTP was not premature based on the questions under examination in the matter: at [138].

***Elmasri v Transport for NSW*** **[2021] NSWSC 929** (Beech-Jones J)

Facts: Mr and Ms Elmasri (**plaintiffs**) contended that Transport for NSW (**TfNSW**) did not make a genuine attempt to acquire the plaintiffs' land by agreement for at least six months prior to serving the notice, pursuant to s 10A(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**). The land in question was land at Clifton Avenue, Kemps Creek but was not the residential home of the plaintiffs. TfNSW sought to acquire the land for the construction of the proposed M12 Motorway which would connect the proposed Western Sydney Airport with Sydney's motorway network. This development had been designated "Critical State Significant Infrastructure". On 19 March 2021, the proposed acquisition notice (**PAN**) was issued. TfNSW submitted that the issue of a valid PAN was required by s 11 of the Land Acquisition Act and that was

a precondition to satisfying s 10A(2). TfNSW also submitted that it was necessary to know the start date for negotiations in order to determine the date at which the six-month period required by s 10A(2) would be satisfied for the genuine attempt to acquire by agreement (from March to September 2020 for this submission). The alternative submission by TfNSW was that it was only necessary to identify any six-month period prior to the PAN being issued (from September 2020 for this submission). The plaintiffs, in written submissions in reply, stated that the relevant six-month period had to be that period just prior to the issue of the PAN; however, their submission changed during oral submissions when they embraced the notion that the six-month period required by s 10A(2) could not be any six-month period prior to the issue of the PAN. The plaintiffs also alleged that TfNSW did not genuinely attempt to acquire their land through agreement.

Issues:

(1) Did TfNSW genuinely attempt to acquire the land from the plaintiffs within the meaning required by s 10A(2) of the Land Acquisition Act;

(2) Could the six-month period for genuine attempt to acquire by agreement required by s 10A(2) of the Land Acquisition Act be any six-month period before the PAN was issued, no matter how long prior to the issue of the PAN; and

(3) Was a non-publication order appropriate for the non-publication of the rate per square metre analysis or offer made.

Held: Proceedings dismissed:

(1) Reliance on any six-month period, no matter how far in advance of the issuance of the PAN, for showing the genuine attempt to acquire by agreement was inconsistent with s 3(1)(e) of the Land Acquisition Act, the time period is one that examines the entirety of the period from commencement of negotiations and the issuing of the PAN. TfNSW met the threshold of at least six months to attempt genuine agreement for the acquisition of the land in question: at [18]-[20];

(2) TfNSW did make a genuine attempt to secure agreement for the acquisition of the land, though the processes, timeliness, and communications were not perfect. TfNSW had engaged external expert advice, made offers of compensation, and had endeavoured to secure an agreement: at [124]; and

(3) A non-publication order was appropriate regarding the rate per square metre in order to preserve confidentiality in, and to prevent the compromise of, negotiations until negotiations were concluded (non-publication was provided an expiry date of 30 November 2022): at [137]-[138].

***Sheppard v Smith*** **[2021] NSWSC 1207** (Parker J)

Facts: This case concerned the extinguishment of a right of way. Mr Sheppard and Ms Chapman (**plaintiffs**) owned a terrace in Birchgrove and Mr Smith and Ms Munro (**defendants**) were the owners of the adjoining terrace. The right of way was a burden on the property of the plaintiffs and the defendants had the benefit of the right of way for accessing the rear of their property. The right of way was created in 1885 under Old System Title. The plaintiffs relied upon s 89(1)(a), (b), and (c) of the *Conveyancing Act 1919* (NSW) as the basis for the extinguishment of the right of way: the right of way was obsolete and the extinguishment would not substantially injure the defendants. Counsel for the plaintiffs submitted that it was a balancing exercise regarding substantial injury. The defendants have attempted to access the right of way but have had it barred by the plaintiffs' construction works that did not have development consent.

Issues:

(1) Was the easement obsolete; and

(2) Would the defendants be substantially injured if the easement was extinguished.

Held: Plaintiffs' claim to extinguish the right of way dismissed:

(1) The easement was not obsolete as there was still value for the defendants for it to be maintained for accessing the rear of the property: at [218]-[219]; and

(2) The defendants would be substantially injured if the easement were extinguished; it was not a theoretical injury, and the easement added value to the defendants' property: at [222]-[224].

## Land and Environment Court of New South Wales:

- **Judicial Review:**

***Central Coast Council v 422 Pacific Highway Wyong Pty Ltd*** **[2021] NSWLEC 64** (Moore J)

Facts: 422 Pacific Highway Wyong Pty Ltd (**Company**) had permitted approximately 76,000 cubic metres of fill to be deposited at 450 Pacific Highway, Wyong. The fill covered most of the property to an approximate depth of two metres. The site, for the purposes of this matter, included 450 and 422 Pacific Highway, Wyong (**site**). The deposit of fill on the site was said to be authorised by two complying development certificates (**CDC**) which Mr Dagger was said to have issued in 2018. In March 2018, Central Coast Council (**Council**) served a Stop Work Order to prevent further fill from being deposited on site. The Council then commenced Class 4 proceedings seeking declarations that the 2018 CDCs issued by Mr Dagger were invalid and of no effect.

Issues:

(1) Was CDC No 18-0124 (**first certificate**) invalid and of no effect; and

(2) Was CDC No 18-0403 (**second certificate**) invalid and of no effect.

Held: Declarations sought by the Council made:

(1) The first certificate was invalid and of no effect because (i) it had not been issued by Mr Dagger and (ii) lacked the necessary engineer's certificate which was a statutory prerequisite for validity: at [50]-[51]; and

(2) The second certificate was invalid and of no effect because it purported to approve development on land, other than the site, for which there was no owner's consent: at [52]-[55].

***Davis v Dodevski*** **[2021] NSWLEC 93** (Pain J)

Facts: Ms Davis (**applicant**) sought a declaration in judicial review proceedings that a development consent granted to Mr Dodevski and Ms Durrant (**first and second respondents**) by Nambucca Valley Council (**Council**) was invalid. The applicant also sought an order restraining the first and second respondents from carrying out development in accordance with the consent on a lot in a rural landscape zone with an area of 66 hectares. Clause 4.2A of the Nambucca Local Environmental Plan 2010 (**NLEP 2010**) set out conditions regulating the granting of development consent for the erection of dwelling houses and dual occupancies on land in certain rural and environmental protection zones. Clause 4.2A(3) prohibited development consent being granted on a lot on which no dwelling house or dual occupancy had been erected unless the lot met at least one of the conditions in subcl 4.2A(3)(a) to (d). Subclause 4.2A(3)(b) required that the lot be created before the plan commenced and the erection of a dwelling house or dual occupancy was permissible immediately before that commencement. Under the NLEP 1986, and all later NLEPs, the minimum size of a lot on which development consent could be granted was 100 hectares. The Council also took into account that it may be liable for loss pertaining to the removal of the dwelling entitlement when it had already recognised that there was an existing legal dwelling on the lot. The first and second respondents filed submitting appearances; there was no contradictor.

Issues:

(1) Whether the Council was wrong in law in relation to an essential precondition required by the NLEP 2010 in granting development consent;

(2) Whether the Council took into account an irrelevant consideration, namely that it may be liable to legal action if it refused development consent on the basis that there was no legal entitlement to build a dwelling on the land, given that its previous action suggested to the contrary.

Held: Declaration that the development consent was invalid and of no effect; costs and consequential orders reserved:

(1) On the evidence, the Council could not be satisfied that the land met the criteria set out in cl 4.2A(3)(b):

(a) in respect of cl 4.2A(3) generally, the Council found in its reports that there was an existing dwelling house on the land, meaning it could not be satisfied that it was a lot on which "no dwelling house … has been erected": at [29(a)];

(b) in respect of subcl 4.2A(3)(b), the requirement that the lot was created before the commencement of the NLEP 2010 was satisfied as the lot was created in 1911. However, the second requirement could not be met as, under NLEP 1995, the lot was subject to a restriction on the grant of development consent to land less than 100 hectares in area: at [29(c)]-[31], [47];

(c) there is no reference to an existing dwelling on the lot at any stage or the possibility of existing use right in the council reports considering the development application and no mention was made by the first and second respondents in their development application of a house being in existence at any other relevant time. No basis for considering existing use rights arose from the evidence. In the absence of existing use rights, that a dwelling house was permissible with consent on lots greater than 40 hectares under the former IDOs was irrelevant since these instruments were replaced by the NLEP 1986 and subsequent LEPs, all of which required and continue to require a minimum lot size of 100 hectares to build a dwelling house on the lot: at [50]-[51].

(d) satisfaction that the land met the criteria in cl 4.2A was a jurisdictional fact. Given the Council could not have been lawfully satisfied of the satisfaction of the jurisdictional fact, and the error at law was material to its decision to grant the consent, the consent is invalid: at [22]-[27], [35]-[36], [41], [45]; and

(2) Although it need not be considered, any potential for liability in negligence for loss pertaining to the removal of the dwelling entitlement was an irrelevant consideration to take into account in the review of the development application: at [37]-[38], [54].

***Elimatta Pty Ltd v Read*** **[2021] NSWLEC 75** (Robson J)

Facts: Elimatta Pty Ltd (**Elimatta**) challenged the validity of a development consent for a 10-lot subdivision of land at Sutton granted by Yass Valley Council (**Council**) to Mr Warren Read (**Mr Read**). Elimatta's grounds of review related to Council's construction and application of provisions in the Yass Valley Local Environmental Plan 2013 (**YVLEP 2013**) concerning lot size during the assessment of the development application; Council not forming the required state of satisfaction to grant the development consent; and Council not properly considering Elimatta's objection to the development application.

The development application included a variation request by Mr Read pursuant to cl 4.6 of the YVLEP 2013, seeking a departure from the purported development standard in cl 4.1B(3) (which required an average lot size of 40 hectares for the subdivision of land).

Issues:

(1) Whether cl 4.1B(3) of the YVLEP 2013 was a development standard that could be varied by cl 4.6, or whether it was an exception that modified the operation of the development standard in cl 4.1(3);

(2) If cl 4.1B(3) of the YVLEP 2013 was a development standard, whether the reference to "a development standard" in cl 4.6(6) of the YVLEP 2013 includes the minimum lot size specified in cl 4.1(3) or only refers to the minimum lot size specified in cl 4.1B(3)(b));

(3) Whether Council's decision to grant development consent was infected by a material error of law and Council failed to discharge the duty imposed by s 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) as a result of its approach to cl 4.6 of the YVLEP 2013;

(4) Whether Council failed to reach the required state of satisfaction in cl 4.6 of the YVLEP 2013 as a result of its erroneous reliance on cl 4.1B(3) and failure to consider cl 4.1(3), (or alternatively, if cl 4.1B(3) was a development standard, deficiencies in the variation request and Council's assessment of the development application); and

(5) Whether Council failed to engage with Elimatta's objection to the development application, in breach of s 4.15(1) of the EPA Act and procedural fairness obligations.

Held: Development consent quashed; declared invalid and of no effect:

(1) Clause 4.1B(3) of the YVLEP 2013 was not a development standard, but was instead an exception to the development standard in cl 4.1(3): at [48], [50];

(2) Where the conditions of using cl 4.1B(3) of the YVLEP 2013 were not met (because the average area of all the lots to be created was less than 40 hectares), the benefit of the exception was not available. As cl 4.1B(3) is not a development standard, it cannot be varied through the operation of cl 4.6: at [59], [65];

(3) While cl 4.1(3) of the YVLEP 2013 was the relevant development standard, it was contravened because six of the lots were less than the minimum size of 40 hectares. Further, cl 4.6 cannot be utilised because the proposed subdivision will result in two or more lots of less than the minimum size: at [27], [68];

(4) Even if cl 4.1B(3) of the YVLEP 2013 was a development standard, the reference to "a development standard" in cl 4.6(6) includes the minimum lot size specified in cl 4.1(3), and cl 4.1(3) precludes the use of cl 4.6 to vary the development standard: at [69];

(5) As Council's assessment of the development application and its decision to grant the development consent was undertaken on the basis that cl 4.1B(3) of the YVLEP 2013 was a development standard which could be varied pursuant to cl 4.6, it was infected by a material error of law: at [81], [83];

(6) Council did not form the required state of satisfaction to use cl 4.6 of the YVLEP 2013 because it erroneously proceeded on the basis that cl 4.1B(3) was the relevant development standard. Council could not have come to the required state of satisfaction in relation to cl 4.1(3) in any event: at [101], [107]; and

(7) On the evidence before the Land and Environment Court, Council engaged with the substance of Elimatta's objection: at [115].

***North Parramatta Residents Action Group v Infrastructure NSW*** **[2021] NSWLEC 60** (Moore J)

Facts: North Parramatta Residents Action Group (**applicant**) sought declaratory relief against Infrastructure NSW (**INSW**; first respondent) and the Minister for Planning and Public Spaces (**Minister**; second respondent) regarding the approval of the site for the new Powerhouse Museum in the Parramatta Central Business District (**Parramatta CBD**). On 23 April 2021, INSW filed a Notice of Motion, which sought to have the proceedings expedited to keep with the project development timeline. Two mutually acceptable dates for hearing the matter in May 2021 were available (24 and 25 May 2021), which negated the need for an order of expedition. The applicant sought to have the Minister's development consent granted for the State Significant Development for the Powerhouse Parramatta project in February 2021 declared invalid and of no force or effect. This declaration was sought as the applicant submitted that the Environment Impact Study (**EIS**), upon which the development consent was granted, was flawed and did not comply with statutory requirements, especially Sch 2, cl 7(1)(c) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**Regulation**) and the Secretary's Environmental Assessment Requirements (**SEAR**). The choice of the site for the new museum on Philip Street in the Parramatta CBD required that a locally listed heritage building under the Parramatta Local Environment Plan 2011 would need to be demolished or moved. The heritage structure, known as Willow Grove, was a Victorian Italianate, two-storey villa built in the 1870s. Willow Grove was one of four buildings of its type in the Parramatta local government area and the only example within the Parramatta CBD. The applicant also sought leave to rely upon an Amended Summons, which was not opposed by INSW and the Minister. INSW gave an undertaking that it would not commence physical works on the site before 21 June 2021 to allow the matter to be determined.

Issues:

(1) Did the EIS for the Powerhouse Parramatta Museum project comply with statutory regulations, especially Sch 2, cl 7(1)(c) of the Regulation and the SEAR;

(2) Did Sch 2, cl 7(1)(c) of the Regulation impose a duty to investigate alternative sites for the Powerhouse Parramatta Museum;

(3) Was there a feasible alternative site for the Powerhouse Parramatta Museum in the context of Sch 2, cl 7(1)(c) and the SEAR; and

(4) Was there a feasible design alternative that would have permitted Willow Grove to be maintained in its original site.

Held: Amended Summons dismissed; costs reserved:

(1) Schedule 2, cl 7(1)(c) did not impose an obligation to investigate alternative sites for the Powerhouse Parramatta Museum: at [264], [336];

(2) There was no feasible alternative site for the Powerhouse Parramatta Museum that could have been considered within the EIS: at [290], [336];

(3) There was no feasible design alternative that would have allowed Willow Grove to remain *in situ* given the criteria for the project in the context of Sch 2, cl 7(1)(c) and the SEAR; at [328]-[330], [336]; and

(4) The EIS substantially complied with the requirements of Sch 2, cl 7(1)(c) and the SEAR; at [337].

***Save Sydney's Koalas (South West) Inc v Lendlease Communities (Figtree Hill) Pty Limited (No 2)*** **[2021] NSWLEC 102** (Duggan J)

(related decision: *Save Sydney's Koalas (South-West) Incorporated v Lendlease Communities (Figtree Hill) Pty Limited* [2020] NSWLEC 91 (Moore J))

Facts: In September 2020, Development Application 2984/2020/DA-CW (**DA**) was lodged by Lendlease Communities (Figtree Hill) Pty Limited (**Lendlease** - first and sixth respondent) with the third respondent, Campbelltown City Council (**Council**), for tree removal, dewatering of dams and earthworks in relation to land situated at Appin Road, Mount Gilead (**land**). Consent was granted by the Campbelltown City Council Local Planning Panel (**second respondent**), subject to conditions on behalf of the Council, and became effective from 23 December 2020 (**consent**). The Mount Gilead Voluntary Planning Agreement was entered into by Council on 8 August 2018 and by Lendlease and others with the New South Wales Minister for Planning and Public Places on 17 May 2019 (**VPAs**). An order conferring biodiversity certification on the land was made by the Chief Executive Officer of Environment and Heritage as delegate of the Federal Minister for Energy and Environment on 28 June 2019. By its Second Further Amended Summons (**Summons**), Save Sydney Koalas (South West) (**applicant**) sought two declarations: that the consent was invalid; and that the Campbelltown Comprehensive Koala Plan of Management (**CCKPOM**) was not a validly approved Koala Plan of Management for the purposes of cl 10 of the State Environmental Planning Policy (Koala Habitat Protection) 2020 (**Koala SEPP 2020**).

Issues:

(1) Whether the Council's Campbelltown (Sustainable City) Development Control Plan (**DCP**) provided for a staging plan as required by cl 6.3 of the Campbelltown Local Environmental Plan 2015 (**CLEP 2015**) and if not, whether the grant of the consent was unlawful and invalid (**Ground 1**);

(2) Whether the CCKPOM was invalid, and if so, whether by operation of cl 10 of the Koala SEPP 2020, there was no power to grant the consent and the consent was invalid (**Ground 2**);

(3) In relation to Ground 2, whether leave should be granted to the applicant under r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) to bring a challenge to the validity of the CCKPOM as the proceedings were commencing more than 3 months after the making of the plan;

(4) If the CCKPOM was not invalid, whether there was an obligation by operation of cl 10 of Koala SEPP 2020 for the consent authority to be satisfied that the DA was consistent with the provisions of the CCKPOM (**Ground 3**); and

(5) In relation to Ground 3, whether, under ss 8.3 to 8.4 of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Act**), the biodiversity certification of the land operated such that the Koala SEPP 2020 did not have any operative effect on the consent and its assessment, meaning Ground 3 would fail.

Held: Leave to rely on Further Amended Summons refused; Summons dismissed; costs reserved:

*Ground 1*

(1) The requirements of a staging plan under s 6.3 of CLEP 2015 and sequencing will depend upon the circumstances and assessment of the particular urban release area and there is nothing precluding sequencing to be development occurring in a single stage: at [60];

(2) A number of factors weighed in favour of the Land and Environment Court's exercise of discretion to decline to make the declaration sought: the land was being developed by a single entity; the developer had entered into the VPAs; there was no identification that the consent had failed to make provision for necessary sequencing; the Council, as the party responsible for preparing the DCP, was responsible for ensuring its consistency with CLEP 2015; and the consent was for initial works not the whole development, meaning the Council could require further sequencing in future applications: at [66]-[68];

*Ground 2*

(3) With knowledge of the CCKPOM, the applicant provided no real explanation for the failure to bring the proceedings within the requisite three months: at [98], [100];

(4) Noting that the consent was granted after the expiration of the time period for bringing proceedings, and further development applications had been lodged since that time that relied upon the existence of the CCKPOM to enable determination, the potential prejudice to persons and public interest more generally weighed heavily against the exercise of discretion to extend time: at [102]; and

*Ground 3*

(5) The Biodiversity Act provides a separate assessment and certification process that is intended not to be required to be replicated by assessments under the *Environmental Planning and Assessment Act 1979* (NSW). Such replication would produce an overwhelming inconvenience to both consent authorities and persons making development applications and puts at risk the legality of any development consent. This inconvenience does not occur if the purpose of an environmental planning instrument (or any relevant part) is considered by having regard to the purpose it is intended to serve by the carrying out of the process it identifies. Such a construction is to be preferred: at [137].

- **Compulsory Acquisition:**

***Antonio Gaudioso v Transport for New South Wales* [2021] NSWLEC 91** (Duggan J)

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

Facts: On 9 February 2018, Antonio Gaudioso and Carmel Gaudioso (**applicants**) were the registered proprietors of 182 and 184-186 Parramatta Road, Camperdown (**land**). By acquisition notice dated 9 February 2018, Transport for New South Wales (**respondent**) compulsorily acquired the land for the purposes of the WestConnex Project (**public purpose**) and offered compensation to the applicants in the amount of $10,391,626. At the date of acquisition, the land was zoned IN2 Light Industrial (**IN2**) under the Leichhardt Local Environment Plan 2013 (**LLEP 2013**). Pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**), the applicants objected to the amount of compensation offered. The applicants contended that at the date of acquisition, the zoning of the land was an incident of the proposal to carry out the public purpose and as a result, when determining the market value of the land under s 55(a) of the Land Acquisition Act, that zoning should have been disregarded under the definition of market value in s 56 of the Land Acquisition Act.

Issues:

(1) Absent the proposal to carry out the public purpose, would the land have been zoned IN2 and, if not, what would the zoning of the land have been;

(2) If the land was zoned in accordance with the zoning determined in (1), would there have been a change in market value compared to its IN2 zoning;

(3) The appropriate quantum of compensation;

(4) Whether the legal costs (urban design) were legal costs incurred as a loss attributable to disturbance pursuant to s 59(1)(a);

(5) Whether the legal costs (real estate) were legal costs incurred as a loss attributable to disturbance pursuant to s 59(1)(a); and

(6) Whether the claims for stamp duty and mortgage discharge were claimable as disturbance pursuant to ss 59(1)(d) and 59(1)(e).

Held: Compensation determined in the sum of $10,781,707.60 plus statutory interest; respondent to pay applicants' costs as agreed or assessed:

(1) It was unlikely Council would have rezoned the acquired land for a zone other than IN2: at [114];

(2) Even if it were found that Council was likely to rezone the land to a B6 zoning, a B6 zoning with no permitted residential use would produce the same market value as land zoned IN2 and such residential use would not be permitted: at [116];

(3) It was a necessary incident of the giving of the relevant legal advice that the legal practitioner obtain advice from a third-party expert adviser. The legal costs (urban design) were legal costs and such costs were reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land: at [152];

(4) The legal costs (real estate) were not incurred in order for the applicants to receive advice regarding the offer of compensation for the acquisition, but related to what they should do with any compensation received by them and so these costs were not a matter connected with the acquisition and compensable: at [153]; and

(5) The claims for stamp duty and mortgage discharge were not claimable as disturbance as there was no evidence in this case that Mr and Mrs Gaudioso, as individuals, relocated as a consequence of the acquisition: at [156].

***Big Country Developments Pty Ltd v Transport for New South Wales*** **[2021] NSWLEC 86** (Pain J)

Facts: Big Country Developments Pty Ltd (**applicant**) sought a determination of the compensation payable for the compulsory acquisition, on 4 September 2020, of part of its land at Mulgoa Road, Jamisontown. The land was acquired for the public purpose of upgrading Mulgoa Road. The applicant claimed market value of $2,370,000 and the respondent submitted market value should be $1,115,000. The land acquired was a strip about 11.5-12 metres wide along Mulgoa Road. Endangered Forest Red Gum trees were a large part of the vegetation on the acquired land, providing a buffer between Mulgoa Road and the residue land.

Issue: Whether the area of Forest Red Gum trees on the acquired land should have a reduced land value rate compared with the rest of the acquired land.

Held: Adjustments made to valuation in accordance with findings:

(1) The Forest Red Gum trees represented a potential impediment to development over and above the 10-metre building setback otherwise required by the Penrith Development Control Plan 2014. A 50% discount should apply to the land value rate for the area with Forest Red Gum trees, adopting the evidence of the respondent's valuer in the absence of market evidence: at [69]-[70].

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

(related decision: *Antonio Gaudioso v Transport for New South Wales* [2021] NSWLEC 91 (Duggan J))

Facts: On 9 February 2018, Olde English Tiles Australia Pty Ltd (**applicant**) occupied 182 and 184-186 Parramatta Road, Camperdown (**land**). By acquisition notice dated 9 February 2018, Transport for New South Wales (**respondent**) compulsorily acquired the land for the purposes of the WestConnex Project and offered compensation to the applicant in the amount of $1,061,379 pursuant to s 55(d) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**). The applicant had occupied and carried out its tile business on the land since mid-2002, however no written lease agreement had

been entered into. It ceased carrying out its business on the land on 29 October 2018 and was not able to immediately secure alternative premises. Pursuant to s 66 of the Land Acquisition Act, the applicant objected to the amount of compensation offered for its interest in the land. The applicant claimed its interest was extinguished and could be characterised as a right, power or privilege over, or in connection with, the land pursuant to s 37 of the Land Acquisition Act.

Issues:

(1) Whether the applicant possessed an interest in the land as lessee pursuant to an oral lease;

(2) If an interest was established, the quantum of compensation the applicant was entitled to; and

(3) Whether business losses could be claimed as relocation (disturbance) costs.

Held: Proceedings dismissed; respondent to pay applicant's costs as agreed or assessed (by consent):

(1) The applicant held a right to occupy the land in the nature of a bare licence. Its right to occupation was of a personal nature and did not confer on the applicant any rights, powers or privileges over, or in connection with, the land. That bare licence was not capable of alienation and the applicant, therefore, had nothing that was divested, extinguished or diminished by the acquisition notice as referred to in s 37 of the Land Acquisition Act: at [84]; and

(2) The law is unsettled relating to whether a claim for loss of business profits is compensable as a disturbance claim under s 59(1)(c) where there has been a relocation. However, in light of the findings in this case that the applicant had no relevant interest in the land, this issue was not determined: at [86]-[87].

***Sales v Transport for NSW (No 2)*** **[2021] NSWLEC 96** (Robson J)

Facts: Nancy Eileen Sales, Paul Howard Roots and Gail Elizabeth Borg (**applicants**) brought proceedings seeking compensation for the compulsory acquisition of land at Luddenham (**acquired land**) by Roads and Maritime Services (now Transport for NSW) for the public purpose of upgrading and realigning The Northern Road (Stage 4) as a major road route to the proposed new Western Sydney Airport, pursuant s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**).

Issue: The compensation that the applicants were entitled to for the acquisition of the acquired land.

Held: Findings and directions made that be applied by the parties to determine the market value of the acquired land (including injurious affection) at the date of acquisition, after which the Court would determine the total compensation to which the applicants were entitled:

(1) The "before and after" valuation method for determining the value of the acquired land was adopted by the parties, requiring consideration of the terms of two hypothetical transactions between a hypothetical purchaser and the hypothetical vendor for the "parent parcel" before the acquisition (**before scenario**), and the "residue land" after the acquisition (**after scenario**): at [19], [27];

(2) As agreed by the parties, the highest and best use of the southern part of the parent parcel and residue land (**southern land**) was residential subdivision. Having regard to the interpretation and application of the Liverpool Local Environmental Plan 2008 (**LLEP 2008**) and the State Environmental Planning Policy (Western Sydney Employment Area) 2009 (**WSEA SEPP**), the highest and best use of the northern part of the parent parcel and residue land (**northern land**) was land banking for future employment purposes: at [46], [99];

(3) While cl 12 of the WSEA SEPP prevails over the LLEP 2008 due to inconsistency, such that theoretically any development can be undertaken on the northern land with development consent, the reference in cl 12(2) of the WSEA SEPP to "adjoining zoned land" is a reference to land in the Western Sydney Employment Area and zoned under the WSEA SEPP, with the consequence that development consent would not be granted for a residential subdivision on the northern land, as it would be inconsistent with the objectives and land uses in the adjoining zoned land: at [99];

(4) The parties to the hypothetical transactions would transact on the basis that Council would require additional open space to be provided in a residential subdivision in the before scenario and the after scenario, and would adopt Mr Rowan's residential subdivision layout of 78 lots and 7,510 square metres of public open

space for the parent parcel in the before scenario, and 59 lots and 5,677 square metres of public open space for the residue land in the after scenario: at [126];

(5) The parties to the hypothetical transactions would transact on the basis that Council would require a five-metre-high masonry wall on the eastern boundary of the residue land in the after scenario to mitigate the impacts of the public purpose: at [143];

(6) As agreed by the parties, $125 per square metre is the appropriate rate (derived using the "direct comparison approach" valuation methodology) when valuing the northern land for land banking for future employment purposes in both the before scenario and after scenario. It is preferable to use the "hypothetical development method" valuation methodology when valuing the southern land for residential subdivision in both the before scenario and after scenario: at [193], [202], [203];

(7) Both a target "profit and risk margin" of 25% and a target "internal rate of return" of 16.5% should be adopted as hurdle rates in the Estate Master Development Feasibility Program when undertaking valuations using the "hypothetical development method" valuation methodology of the southern land in both the before scenario and after scenario: at [241];

(8) As Council would require a 5m high masonry wall on the eastern boundary of the residue land in the after scenario, no further allowance needs to be made for injurious affection in the after scenario: at [243]; and

(9) The early town planning fees incurred by the applicants constitute legal costs for the purposes of s 59(1)(a) of the Land Acquisition Act, and that as a result, these fees should be included in the applicants' loss attributable to disturbance: at [269].

***The Trustee for Whitcurt Unit Trust v Transport for NSW*** **[2021] NSWLEC 82** (Pain J)

Facts: The Trustee for Whitcurt Unit Trust (**applicant**) conducted a golf driving range business at Tempe. The Inner West Council owned the land on which the applicant's business was conducted and the critical infrastructure necessary for that business such as nets, lights and buildings. The applicant sought compensation for the compulsory acquisition of its leasehold interest (terminable on two months' notice) in the amount of $4,035,165. The land was acquired by Transport for NSW (**respondent**). The basis of the claim was to enable the applicant to relocate to, or reinstate its business at, a vacant site at Campbelltown owned by the Campbelltown City Council. There are few golf driving ranges in the Sydney metropolitan area. The parties agreed that the Court of Appeal, in *Roads and Maritime Services v United Petroleum Pty Ltd* (2019) 99 NSWLR 297; [2019] NSWCA 41 (**UP(CA)**) foreclosed the possibility of a claim based on extinguishment of the business under ss 55(d) and 59(1)(f) of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**Land Acquisition Act**) (the basis on which the Valuer General determined compensation of $345,000). The applicant submitted that the claim should include relocation costs to the business, costs of reinstatement of critical infrastructure in another location and loss of profits foregone in the ramp-up of the new business. There was agreement that legal costs under ss 55(d) and 59(1)(a) and a business valuer's fees under ss 55(d) and 59(1)(b) were payable. The applicant did not own critical infrastructure the replacement cost of which it sought. The respondent submitted that no further compensation was payable.

Issues:

(1) Whether claim for compensation payable on basis of section 55(d) and 59(1)(c) for relocation of the business to Campelltown, including costs in relation to loss of profits;

(2) Whether claim for compensation payable on basis of ss 55(a) and 56(3) as market value for reinstatement of the business at Campbelltown where no general market for land used for the purpose of a golf driving range; and

(3) Whether claim for compensation payable as special value under ss 55(b) and 57.

Held: Appeal dismissed; compensation for disturbance under s 55(d) is determined in the sum of $118,380.98; costs reserved:

(1) (a) No authority supported, in the context of a market value claim, application of a 'but for the acquisition' test in relation to a disturbance claim under s59(1)(c). It could not be assumed for the purposes of such a claim that the applicant would have obtained a longer leasehold tenure at Tempe than it had at the

date of acquisition; the likelihood of an extension of the lease was irrelevant and the attitude of the lessor was irrelevant: at [132] - [134];

(b) it is highly relevant to ask who owns chattels and what as part of assessing the nature of the interest in land where the compensation sought is relocation: at [135]-[140]; and

(c) the claims for fitout costs and business relocation costs, as well as lost profits and surveyor fees, cannot succeed, as these are not compensating the applicant for its disturbance loss: at [149]-[153];

(2) No basis existed for a claim under s 56(3) because the claim being made does not reflect reinstatement of the interest for which compensation is payable; the applicant had a limited interest in the land: at [154]; and

(3) Given the limited leasehold interest of the applicant acquired, it is difficult to conceive how such an interest can give rise to a special value claim considering the matters identified in *Monti v Roads and Maritime Services (No 4*) (2019) 243 LGERA 302; [2019] NSWLEC 11 at [142]. No special interest was established: at [166].

***Trevor Allan McBride v MidCoast Council*** **[2021] NSWLEC 100** (Robson J)

Facts: Trevor Allan McBride (**applicant**) brought proceedings seeking compensation for the compulsory acquisition of three lots of land at Forster (**acquired land**) for drainage reserve and public road purposes by MidCoast Council (**Council**), pursuant s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Land Acquisition Act**).

Prior to the acquisition, the acquired land formed part of a larger contiguous area of land owned by the applicant (**parent parcel**). The applicant retained that part of the parent parcel that was not acquired by Council (**residue land**).

Issue: The compensation that the applicant was entitled to for the acquisition of the acquired land.

Held: Total compensation of $1,036,630.49 ordered for the acquired land:

(1) The "before and after valuation" method (rather than the "piecemeal valuation" method) should be adopted when assessing the compensation payable to the applicant. Accordingly, two hypothetical transactions were considered: at [26], [28];

(2) The highest and best use of the parent parcel and the residue land would be a Manufactured Home Estate (**MHE**), although the advice received by the parties to the hypothetical transactions would reflect a real concern about management of the significant constraints on the development of a MHE, and the parties would respond to this risk by paying more for the land that what would be paid for rural land but not as much as what would be paid for land highly likely to be developed as a MHE: at [81], [82];

(3) The parties to the hypothetical transactions would transact on the basis that:

(a) Dr Martens' advice as to the appropriate conceptual flood mitigation scheme to be implemented, and the impact of hydrological issues (flooding and stormwater management) on the land available for a MHE on the parent parcel in the before scenario and residue land in the after scenario would be preferred: at [114], [115], [120];

(b) Polygon 4 would likely, but not certainly, be able to be cleared and, further, polygon 7 would be likely to be able to be cleared, for development of a MHE, in the before scenario. A 10% discount would be applied to the rate for this land to reflect this risk: at [141], [142], [151], [237]; and

(c) ecosystem credits would only need to be retired for polygons where Noah's False Chickweed has been located: at [165];

(4) $25 per square metre was an appropriate rate for that part of the parent parcel in the before scenario, and the residue land in the after scenario, that could be developed as an MHE, as it captures both the potential for future development of a MHE and possible rezoning of the subject land taking into account all relevant findings: at [223];

(5) $5 per square metre was an appropriate rate for that part of the parent parcel in the before scenario, and the residue land in the after scenario, that could not be developed as an MHE due to hydrological and/or ecological constraints: at [225];

(6) Any loss due to severance of the residue land, and injurious affection due to the inability to use the drainage areas, was included along with market value in the difference between the value of the parent parcel in the before scenario, and the residue land in the after scenario, using the "before and after" valuation method, such that no further entitlement to compensation arises: at [250], [256]; and

(7) The applicant was entitled to compensation for other financial costs a direct and natural consequence of the acquisition of the acquired land pursuant to s 59(1)(f) of the Land Acquisition Act: at [262].

- **Criminal:**

***Chief Executive Office of Environment and Heritage v Somerville (No 2)*** **[2021] NSWLEC 78** (Pain J)

Facts: Mr Somerville (**defendant**) pleaded guilty to 22 strict liability offences for possession and harm of 244 eggs of protected and threatened bird species under former ss 101(1), 118A(1) and 118B(1) of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**). The defendant is a bird enthusiast and the eggs in his possession had been collected over many years since the 1950s. Some of the eggs were given to him by friends and colleagues. Forty eggs were the subject of harm offences and these had been collected between 2010 and 2016 from a national park, nature reserve and state conservation area near Dubbo. The harm was particularised as blowing the eggs. At the time of sentencing, the defendant was 76 years old, relied on the aged pension and had substantial health issues.

Issue: Appropriate sentence for the defendant.

Held: Defendant convicted of all offences and a community corrections order imposed under s 8(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) with a place restriction condition preventing entry into any national park, nature reserve, regional park, state conservation area and wilderness area for 14 months; defendant to pay prosecutor's costs as agreed or assessed:

(1) The offences clearly undermined the licensing system in the NPW Act in place for the protection of protected and threatened fauna: at [26]-[28]. The defendant knew it was against the law to possess or harm bird eggs without a licence. It was not proved by the prosecutor beyond reasonable doubt that the defendant knew he was harming or possessing threatened species: at [38]-[40];

(2) The maximum penalty possible for all offences was over $2 million and/or imprisonment for 24 years and six months: at [29]-[33]. Actual harm was caused to the 40 blown eggs. It was not proved by the prosecutor beyond reasonable doubt that viable local populations were put at risk because of the offences: at [35]-[37];

(3) The harm offences took place on several occasions where eggs were collected from a national park, nature reserves and state conservation area and involved premeditation and planning: at [46]-[47]. The offences were found to be in the high range of low objective seriousness: at [53]-[55];

(4) The defendant's age and health were mitigating factors: at [73]. The defendant demonstrated poor insight into his offending: at [61]. He was entitled to a 25% discount for early pleas of guilty and no further discount was applied for his cooperation with authorities: at [57]-[60], [65]-[72];

(5) It was debatable whether the totality principle applied because the charges did not arise out of the same time and facts: at [84]-[86]; and

(6) The custodial threshold was not reached and appropriate alternatives to imprisonment existed: at [90]-[94].

***Environment Protection Authority v Allam*** **[2021] NSWLEC 103** (Moore J)

Facts: Mr Allam (**defendant**) is the sole director, sole shareholder, and the Chief Executive of ACE Demolitions and Excavations Pty Ltd (**ACE**). The EPA (**prosecutor**) brought four charges against ACE for alleged breaches of s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) for providing false or misleading information about waste. The prosecutor also brought three executive liability charges against Mr Allam for alleged breaches of s 169A of the POEO Act. On 22 March 2018, a search warrant was executed which led to Mr Allam's mobile phone being seized. On 23 March 2018, a s 193 POEO Act Notice (**Notice**) was

issued by an authorised officer to Mr Allam to obtain the passcode to unlock Mr Allam's phone, which was provided on 26 March 2018 under compulsion of that Notice. The prosecutor was able to access text and WhatsApp messages contained on Mr Allam's phone and software was used to extract the messages. The messages were sorted, with those messages relating to legal professional privilege excluded; the remaining messages were analysed by the prosecutor and listed in a spreadsheet. Objections raised by the defence related to the messages. The defendant filed a Notice of Motion (**NOM**) on 16 July 2021 seeking advance evidentiary rulings: par 2(c) of the NOM. In par 2(c), the defence sought a ruling that the text and WhatsApp messages were inadmissible pursuant to s 212(3) of the POEO Act. The defence submitted s 212(3) protected the right against self-incrimination. In this instance, because this was a criminal proceeding, the information provided was compelled under the POEO Act, and the provision of the information had been objected to because it might be incriminating. The prosecutor submitted that s 212 of the POEO Act was completely cognisant of that fact and abrogated that right only for the information directly provided but not for derivative evidence. The prosecution submitted *Ku-ring-gai Council v Chia (No 4)* [2018] NSWLEC 75 (**Chia**) and *Lee v NSW Crime Commission* (2013) 251 CLR 196 as authorities for their proposition.

Issues:

(1) Did s 212(3) abrogate the right against self-incrimination; and

(2) Was the text and WhatsApp message evidence inadmissible.

Held: Order sought in 2(c) of the NOM of 16 July 2021 was refused:

(1) While s 212(3) did provide protection against self-incrimination for information directly obtained under compulsion, that protection was abrogated for derivative evidence obtained as a consequence of use of the passcode obtained under compulsion: at [55]-[58]; and

(2) The text and WhatsApp messages, being derivative evidence obtained as a consequence of use of the passcode obtained under compulsion, were not inadmissible pursuant to s 212: at [55]-[59].

***Fairfield City Council v Oztech Developments Pty Ltd; Fairfield City Council v Bellagio Investments Pty Ltd* [2021] NSWLEC 81** (Robson J)

Facts: These proceedings relate to the sentencing of Oztech Developments Pty Ltd (**Oztech**) and Bellagio Investments Pty Ltd (**Bellagio**) for three offences relating to the unlawful development of six dwellings on three lots in Fairfield. Oztech was being sentenced for the offence of carrying out development without consent, contrary to s 4.2(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) (**Oztech offence**). Bellagio was being sentenced for the offences of first, aiding, abetting, counselling or procuring Oztech to carry out development without consent, contrary to ss 9.50(3A) and 4.2(1) of the EPA Act (**first Bellagio offence**), and second, failing to comply with the terms of a development control order issued in relation to one lot, contrary to s 9.37(1) of the EPA Act (**second Bellagio offence**).

Issue: The imposition of proportionate and appropriate sentences for the offences.

Held: Oztech fined $94,500 for the Oztech offence, and Bellagio was ordered to pay fines of $76,950 for the first Bellagio offence and $17,820 for the second Bellagio offence; both Oztech and Bellagio to pay the prosecutor's costs, and to publicise details of the offences and court orders in newspapers:

(1) The offences were of medium objective gravity, with the second Bellagio offence of lower objective seriousness than the other two offences: at [60];

(2) Undertaking development without development consent, and failing to comply with enforcement mechanisms, threatens the integrity of the planning system. The maximum penalties for the offences indicate that Parliament views this as objectively serious: at [67], [69], [73];

(3) The environmental harm caused by the commission of the offences is low, but not "not substantial" such that this was a mitigating factor under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**Sentencing Act**): at [83];

(4) The offences committed by Oztech and Bellagio were intentional and premeditated. As Oztech was the builder and Bellagio was the owner of the land, they had control over the causes of each of the offences with which they were charged: at [99], [115];

(5) It was reasonably foreseeable that failing to comply with the planning system would cause harm. Further, there were practical measures available to prevent, mitigate, abate or control the harm caused: at [108], [110];

(6) The first Bellagio offence and the second Bellagio offence, but not the Oztech offence, were committed for financial gain. However, the offences were not part of "a planned or organised criminal activity" so this was not an aggravating factor: at [121], [123], [128];

(7) A 10% discount was appropriate for the utilitarian value of Oztech and Bellagio's pleas of guilty. Neither pre-trial disclosure nor assistance provided to authorities warrant being treated as a mitigating factor: at [137], [141];

(8) On the evidence before the Land and Environment Court, Oztech and Bellagio were aware of the consequences of their actions, so this was not a mitigating factor: at [145];

(9) Oztech and Bellagio had not shown remorse, such that this was not a mitigating factor under the Sentencing Act. Further, there was insufficient evidence to support Oztech and Bellagio's claim that they were unlikely to reoffend and had good prospects of rehabilitation: at [152], [158];

(10) Oztech and Bellagio's lack of prior convictions for environmental offences was a mitigating factor: at [155];

(11) Both general and specific deterrence are relevant considerations. Deterrence supports the integrity of the planning system. Oztech and Bellagio and their common sole director were involved in the property development and construction industry: at [165], [166], [171]; and

(12) It was appropriate to reduce the aggregate sentence for the first Bellagio offence and the second Bellagio offence on the basis of totality, as they arise from related facts and circumstances: at [186].

***Stephen James Orr v Narrabri Coal Operations Pty Ltd; Stephen James Orr v Narrabri Coal Pty Ltd*** **[2021] NSWLEC 85** (Pepper J)

Facts: Narrabri Coal Pty Ltd (**NC**) and Narrabri Coal Operations Pty Ltd (**NCO**) (together, **defendants**) pleaded guilty to 19 offences of contravening s 378D of the *Mining Act 1992* (NSW) (**Mining Act**) with respect to works undertaken at Narrabri Coal Mine (**mine**), including the unlawful construction of access tracks (**charges 1 to 3**), the unlawful drilling and rehabilitation of boreholes (**charges 4 to 9**) and the failure to prepare a site rehabilitation plan (**charge 10**).

Liability in respect of the charges against NC arose under s 378D of the Mining Act on the basis that it was the holder of Exploration Licence 6243 (**EL**) and Mining Lease 1609 (**ML**), various conditions of which were contravened. NCO was charged with contravening s 378D of the Mining Act by causing NC's contraventions pursuant to s 378EA of that Act.

NCO was appointed by NC and other parties to a joint venture management agreement (**JVMA**), as their agent having possession and control of the EL and the ML. NCO hired the personnel responsible for all activities relevant to the charges and provided them with training and supervision.

Issue: The appropriate sentences to be imposed on NC and NCO.

Held: Total fines were imposed on NC in the sum of $132,500 and on NCO in the sum of $240,000; half of those amounts were ordered to be paid to the prosecutor by way of moiety; publication order made:

(1) Licences permitting extraction must be strictly adhered to because the extraction of mineral resources is necessarily harmful to the environment: at [126];

(2) The commission of the offences the subject to charges 1 to 3 caused actual, albeit minimal, harm to the environment including the loss of species habitat: at [161]. Likely harm resulted from the charges arising from the defendants' failure to seal boreholes: at [163];

(3) Each of the contraventions of the Mining Act had the effect, albeit minor, of undermining the regulatory regime governing mining activities in this State: at [164];

(4) It was reasonably foreseeable by the defendants that if authorisation conditions were breached, environmental harm of the type that occurred would, or could, result. The fact that NC had delegated its duties to NCO under the JVMA could not absolve it from such a finding: at [169];

(5) The defendants were not criminally negligent in the commission of the offences because there was insufficient evidence that at the time of their commission either defendant was aware of an obvious risk or engaged in such a high degree of carelessness or indifference, that their conduct merited additional criminal punishment. The defendants' various systemic failures which resulted in the commission of the offences was not enough to meet this threshold: at [182]-[183];

(6) Charges 1 to 3 were at the lower end of medium objective seriousness: at [195]. Charges 4 to 10 were each of low objective seriousness given that no actual and minimal likely harm was caused by their commission: at [196];

(7) The considerable assistance provided by the defendants to the prosecutor was taken into account in the application of the instinctive synthesis to arrive at appropriate penalty, rather than by way of a direct reduction in the penalty imposed: at [205]-[208];

(8) Both general and specific deterrence were required to be taken into account. However, the importance of the latter was more limited given that the defendants had accepted responsibility for the contraventions and implemented measures to ensure future compliance with authorisations: at [227];

(9) The totality principle applied separately to charges 1 to 3, having regard to the commonality of fact, timing and location of the conduct giving rise to them, and again to charges 4 to 10: at [238];

(10) In circumstances where the prosecutor was unlikely to obtain any windfall gain if such an order was made, it was appropriate to order that the defendants pay a moiety: at [252]; and

(11) A publication order was justified given that the offences involved contraventions of mining authorisations, caused actual and likely environmental harm and where general deterrence was an important element in the imposition of an appropriate penalty: at [259].

- **Appeals from Local Court:**

***Marano v Tweed Shire Council*** **[2021] NSWLEC 95** (Pain J)

Facts: Ms Michelle Marano (**appellant**) appealed against the severity of sentence imposed by the Local Court for an offence of carrying out development without consent in contravention of ss 9.50 and 4.2 of the *Environmental Planning and Assessment Act 1979* (NSW). The development the subject of the offence was refurbishment of a house that had fallen into disrepair. The appellant had sought professional advice on the works. She believed that no approval was required for those parts of the refurbishment the subject of the charge. Development consent was subsequently granted. The appellant had a major depressive disorder and was experiencing a manic period at the time of the offence. The Local Court convicted the appellant, imposed a conditional release order for two years under s 9 of the *Crimes (Sentencing Procedure) Act 1991* (NSW) (**CSP Act**) and ordered the appellant to pay the costs of Tweed Shire Council (**Council**). The sentence imposed by the Local Court uniquely impacted the appellant in the context of her mental health.

Issue: Appropriate sentence for the appellant.

Held: An order under s 10(1)(a) of the CSP Act was made whereby the charge was dismissed and no conviction recorded. The prosecutor did not oppose the making of that order. No order was made to vary the costs order in the Local Court:

(1) The appellant's mental condition was identified as an extenuating circumstance under s 10(3)(c) of the CSP Act. Substantial mitigating circumstances included that the appellant had sought professional advice for the building work, had since obtained the necessary consent for the work the subject of the offence, her conduct resulted from her mental state and she was not fully aware of the consequences of her actions. She cooperated with the investigation, pleaded guilty in the Local Court and expressed remorse and contrition: at [33]-[37].

- **Contempt:**

***Randwick City Council v Arxidia Pty Ltd*** **[2021] NSWLEC 105** (Duggan J)

Facts: Arxidia Pty Ltd (**Arxidia**) pleaded guilty to the charge of contempt by its failure to comply with a court order made on 8 July 2017. The charge stated that on 20 June 2020, Arxidia caused, permitted and allowed the land in Lot 2, DP 939299, known as 23 Harbourne Street, Kingsford (**property**) to be used for a purpose for which development consent was required when no development consent had been granted and no occupation certificate had been issued. The property was zoned R3 Medium Density Residential under Randwick Local Environment Plan 2012 (**RLEP 2012**) where dwelling houses, boarding houses and multi-dwelling housing are permissible only with development consent. At the time of inspection, on 20 June 2020, the property was being used for the purpose of three separate residential dwellings.

Issue: The appropriate sentence for Arxidia Pty Ltd.

Held: Arxidia found guilty of contempt; fined $5,000:

(1) The limited period of the proven conduct, being one day, renders the conduct at the low end of wilful conduct amounting to contempt: at [72];

(2) Considering Arxidia consented to the court order being made and the service of the penal notice, it was or should have been aware of the consequences to it if it did not comply with the court order: at [75];

(3) There was no evidence that any benefit was obtained by Arxidia coming from an intention to give evidence: at [81];

(4) Whilst the then-director of Arxidia expressed regret, it warranted little weight. The Arxidia did not take positive steps other than deferring responsibility to the real estate agent to ensure that breaches were complied with: at [85]-[86];

(5) Arxidia was otherwise of good character: at [87]; and

(6) Specific deterrence was warranted as Arxidia only demonstrated regret regarding the initial conduct giving rise to the court order, rather than the obligation to comply with the order itself: at [90].

- **Civil Enforcement:**

***Blacktown City Council v Kellyville Ridge Health Centre Pty Ltd*** **[2021] NSWLEC 65** (Robson J)

Facts: Blacktown City Council (**Council**) brought civil enforcement proceedings against Kellyville Ridge Health Centre Pty Ltd (**Kellyville**), who did not appear in the proceedings, in relation to the use of premises in Kellyville (**premises**) for the purposes of a brothel or for sex related purposes.

Council asserted that Kellyville had breached s 4.3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) by undertaking prohibited development, and sought orders that Kellyville must not use, and must not cause, permit or allow the use of, the premises for the purposes of a brothel or for related sex uses.

Council also asserted that Kellyville had breached s 9.37(1) of the EPA Act by failing to comply with the requirements of a Brothel Closure Order (**BCO**) which required Kellyville to stop using the premises for sexual acts or services, massages (other than genuine remedial or therapeutic massage services) and adult entertainment, in exchange for payment, and sought a declaration that Kellyville has failed to comply with the BCO.

Issues:

(1) As a preliminary question, whether the Summons and other material related to the proceedings had been properly served on Kellyville and it was appropriate for the hearing to proceed in Kellyville's absence;

(2) Whether the premises were used as a used as a brothel and sex services premises;

(3) Whether Kellyville failed to comply with the BCO;

(4) Whether Kellyville has carried out prohibited development on premises in breach of s 4.3 of the EPA Act; and

(5) If so, whether Council is entitled to relief.

Held: Kellyville ordered not to use the premises, or cause, permit or allow the premises to be used, for the purposes of a brothel or for related sex uses, with the orders coming into effect five days after being made:

(1) Kellyville had been properly served and it was appropriate for the hearing to proceed in Kellyville's absence: at [15];

(2) Based on the evidence of a private inquiry agent and provisions of the relevant legislative regime, the premises were used as a brothel and sex services premises: at [42];

(3) After the BCO was properly issued and served on Kellyville, Kellyville failed to comply with the requirements of the BCO in breach of s 9.37 of the EPA Act: at [51];

(4) Sex service premises are prohibited development on land zoned B1 Neighbourhood Centre under the Blacktown Local Environmental Plan 2015. As the premises is zoned B1 Neighbourhood Centre, Kellyville had carried out prohibited development in breach of s 4.3 of the EPA Act: at [53];

(5) Taking into account the principles relevant to the Land and Environment Court's (**Court**) discretion to grant relief, Council was entitled to injunctive relief, which was appropriate, proportionate and likely to deter future breaches of the EPA Act by Kellyville: at [58]. However, the Court declined to grant declaratory relief on the basis that the Court was not convinced a declaration would serve a useful purpose and the judgment constitutes an appropriate public pronouncement that Kellyville has breached the law: at [66], [68].

***Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*** **[2021] NSWLEC 92** (Preston CJ)

Facts: A climate action group, Bushfire Survivors for Climate Action (**BSCA**), sought an order in the nature of mandamus to compel an environmental regulatory agency, the Environment Protection Authority (**EPA**), to perform a statutory duty to develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from climate change. The duty on the EPA is imposed by s 9(1)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**). In its terms, the provision requires the EPA to "develop environmental quality objectives, guidelines and policies to ensure environment protection".

Issues:

(1) Whether the duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection, includes a duty to develop instruments of the kind described to ensure the protection of the environment in New South Wales from climate change;

(2) Whether the EPA is in breach of the duty under s 9(1)(a) of the POEA Act; and

(3) If so, what order should be made to remedy the breach of duty.

Held: EPA ordered to perform its duty:

(1) The duty under s 9(1)(a) of the POEA Act to develop environmental quality objectives, guidelines and policies to ensure environment protection, in the current circumstances, includes a duty to develop instruments of the kind described to ensure the protection of the environment in New South Wales from climate change. What is required to perform the duty in s 9(1)(a) will evolve over time and place in response to the changes in the threats to the environment. On the evidence, at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected: at [68]; [69];

(2) The duty does not demand that such instruments contain the level of specificity contended for by BSCA, such as regulating sources of greenhouse gas emissions in a way consistent with limiting global temperature rise to 1.5°C above pre-industrial levels. The EPA has a discretion as to the specific content of the

instruments it develops under s 9(1)(a) to ensure the protection of the environment from climate change: at [97];

(3) The EPA has not fulfilled this duty under s 9(1)(a) to develop instruments of the kind described to ensure the protection of the environment from climate change. None of the documents on which the EPA sought to rely is an instrument for the purposes of s 9(1)(a) to ensure the protection of the environment from climate change: at [143]; and

(4) An order in the nature of mandamus should be made to compel the EPA to perform its duty. The terms of the order should reflect the content of the duty so that the EPA should be ordered to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change: at [148].

***J.K. Williams Staff Pty Limited v Sydney Water Corporation (No 2)*** **[2021] NSWLEC 72** (Preston CJ)

(related decisions: *J.K. Williams Staff Pty Limited v Sydney Water Corporation* [2021] NSWLEC 23 (Preston CJ))

Facts: In *J.K. Williams Staff Pty Limited v Sydney Water Corporation* [2021] NSWLEC 23, the Land and Environment Court (**Court**) gave judgment for J.K. Williams Staff Pty Ltd (**Williams**), finding that Sydney Water Corporation (**Sydney Water**) had breached the law in two respects. First, Sydney Water had breached s 75D(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) by carrying out the development of the Western Sydney Recycled Water Initiative Replacement Flows Project (**project**) in breach of condition 1.1 of the approval granted by the Minister for Planning under s 75J of the EPA Act for the carrying out of the project. Second, Sydney Water was liable in negligence for breaching its duty of care in relation to support for land under s 177 of the *Conveyancing Act 1919* (NSW). Sydney Water's discharge of treated effluent from Penrith Sewage Treatment Plant (**Penrith STP**) into Boundary Creek was a cause of the erosion of the bank of Boundary Creek within Williams' land. The parties addressed the Court on the orders the Court should make by way of mandatory injunctions to remedy the breaches and prohibitory injunctions to restrain the breaches.

Issues:

(1) What should be the time periods within which the steps for obtaining approval and undertaking the preliminary works and substantive works should be completed; and

(2) What flows should Sydney Water be restrained from discharging from Penrith STP if the substantive works are not completed within the timeframe set in the orders.

Held: Mandatory and prohibitory injunctive orders made:

(1) Mandatory injunctive orders should be made requiring Sydney Water, first, to design, apply for and obtain approval for preliminary works to minimise the risk of erosion of the main bank of Boundary Creek in Williams' land until the substantive works have been completed and, secondly, to design, apply for and obtain approval for substantive works to protect the main bank of Boundary Creek in Williams' land from erosion by Penrith STP flows and any future storm event up to the "0.5 EY" storm event. A prohibitory injunctive order should be made, if the substantive works are not completed within the time specified by the orders, restraining Sydney Water from discharging from Penrith STP specified flows, although the parties disagreed on how the flows should be specified: [3], [4];

(2) A shorter six-month timeframe should be allowed for the preliminary works. The purpose of the preliminary works is to hold the status quo pending the completion of the substantive works. Setting a shorter rather than a longer period for undertaking the preliminary works to provide some interim protection is therefore preferable: [9];

(3) A longer 30-month timeframe should be allowed for the substantive works. Nevertheless, there may be an advantage in urging Sydney Water to complete the substantive works earlier rather than wait until the last day of the specified period. To this end, the order should be worded to say "within preferably 23 months but by no later than 30 months of the date of these orders": at [12]; and

(4) If Sydney Water is restrained from disposing of the highly treated recycled water produced by the project, it will need to shut down the project. In this circumstance, it is not necessary to decide between Williams' and Sydney Water's competing arguments regarding the scope of the flows that should be included in the terms

of the mandatory order. It will be sufficient to include only the flows from the project, not because that is what is required by the earlier judgment, but simply because that will achieve the purpose of the mandatory order of driving compliance with the prohibitory order: at [20].

- **Section 56A Appeals:**

***Intrapac Skennars Head Pty Ltd v Ballina Shire Council*** **[2021] NSWLEC 83** (Preston CJ)

(decision under review: *Intrapak Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 1006 (Clay AC))

Facts: Intrapac Skennars Head Pty Ltd (**Intrapac**) is carrying out a residential subdivision within the Skennars Head Expansion Area in the Ballina local government area. Ballina Shire Council (**Council**), by the Northern Regional Planning Panel, granted development consent for Stage 1 of a residential subdivision subject to conditions, pursuant to s 4.16(1)(a) of *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The conditions of consent included condition 5.2 requiring the payment of monetary contributions, pursuant to s 7.11(1) of the the EPA Act. The monetary contributions so required were of a kind allowed by, and were determined in accordance with, two contributions plans, the Ballina Shire Roads Contributions Plan (**Roads Contributions Plan**) and the Ballina Shire Open Spaces and Community Facilities Contributions Plan 2016 (**Open Space Contributions Plan**).

Intrapac applied, under s 4.55(2) of the EPA Act, to the Council to modify the development consent by amending condition 5.2 to offset or reduce the monetary contributions payable for certain public amenities and public services.

The appeal was heard by Acting Commissioner Clay, who dismissed the appeal and refused the application to modify the consent: *Intrapak Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 1006. The acting commissioner found that Intrapac had not demonstrated that condition 5.2 was unreasonable in the particular circumstances of the case, so as to justify amending condition 5.2 to reduce the monetary contributions payable.

Intrapac appealed, under s 56A of the *Land and Environment Court Act 1979* (NSW), against the acting commissioner's decision and orders.

Issues:

(1) Whether the acting commissioner erred in law in characterising the application as seeking an exercise of power of the Council under s 7.11(5) of the EPA Act, rather than an application to amend the conditions of development consent under s 7.13(3) of the EPA Act;

(2) Whether, having erroneously characterised the application as effectively seeking the exercise of the Council's power under s 7.11(5), the Commissioner misdirected himself as to the relevant matters to consider as to whether the contributions imposed under the conditions of development consent were unreasonable;

(3) Whether the acting commissioner erred in law in concluding that the power under s 7.13(3) did not extend to unreasonableness arising from the requirement to carry out works under conditions of consent; and

(4) Whether the acting commissioner erred in law by concluding that he was bound by the policy implicit in the Contributions Plan provisions for determining the reasonableness of the conditions.

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

(1) The power of dispensation in s 7.13(3) of the EPA Act is not available to be exercised by the Land and Environment Court on an appeal under s 8.9 of EPA Act against the determination of an application to modify a development consent: at [52];

(2) Insofar as the acting commissioner examined and adjudicated Intrapac's case by reference to s 7.11(5), and the equivalent mechanisms in the contributions plans, and s 7.13(3), this was necessary in order to determine Intrapac's contentions regarding the unreasonableness of condition 5.2. The acting commissioner did not mischaracterise the power that he was exercising. He was aware that he was determining on appeal Intrapac's application to modify the development consent by amending condition 5.2

to reduce the monetary contributions payable and that the power to modify the development consent was in s 4.55(2) of the EPA Act: at [96], [97];

(3) The acting commissioner's consideration of the unreasonableness of the condition by reference to s 7.13(3) was responsive to Intrapac's argument that on appeal the Court's exercise of the modification power in s 4.55(2) involved the exercise of the power in s 7.13(3). The acting commissioner in considering s 7.13(3) was doing no more than addressing Intrapac's argument as to how he should determine its modification application. The acting commissioner did not misdirect himself by considering but rejecting Intrapac's erroneous argument based on s 7.13(3): at [100]

(4) The acting commissioner referred to s 7.11(6) in support of this finding that a material public benefit to be taken into account in determining the unreasonableness of a condition needs to be a benefit other than a benefit provided as a condition of consent. This was not to apply impermissibly s 7.11(6) to limit the exercise of the power under s 7.13(3), but only to explain his finding that, if the provision of a material public benefit that could be accepted under s 7.11(5) can be taken into account in determining whether a condition imposed under s 7.11 is unreasonable for the purposes of s 7.13(3) (contrary to his first reason), the benefit needs to be one provided otherwise than by a condition of the consent: at [131]; and

(5) The acting commissioner's reasoning does not reveal that the acting commissioner considered himself to be bound by the policy implicit in cl 5.3.3 of the Open Space Contributions Plan in determining whether condition 5.2 was unreasonable: [146].

***Jeffrey v Canterbury Bankstown Council* [2021] NSWLEC 73** (Preston CJ)

(decision under review: *Jeffrey v Canterbury-Bankstown Council* [2020] NSWLEC 1581 (Clay AC))

Facts: Vanessa Jeffrey (**Ms Jeffrey**) wished to adaptively reuse a building that was used for a shop for a particular type of business premises, a funeral home. The land was zoned R4 High Density Residential under the Canterbury Local Environmental Plan 2012 (**CLEP 2012**). Ms Jeffery applied for development consent to Canterbury Bankstown Council (**Council**). The Council refused consent. It said the development was prohibited. Jeffrey appealed to the Court.

The acting commissioner dismissed the appeal and refused development consent. The development did not comply with a development standard restricting the gross floor area of the development in cl 6.5(3)(b) of CLEP 2012. The acting commissioner was not satisfied that Jeffrey's written request seeking to justify the contravention of the development standard demonstrated the matters required to be demonstrated, or that the proposed development would be in the public interest. Jeffrey appealed against the acting commissioner's decision.

Issues:

(1) Whether the acting commissioner misconstrued the objective of the development standard;

(2) Whether the acting commissioner misconstrued the objective of the zone in which the development is to be carried out;

(3) Whether the acting commissioner constructively failed to exercise jurisdiction by not addressing all of the ways in which Jeffrey's written request sought to justify the contravention of the development standard; and

(4) Whether the acting commissioner denied Jeffrey procedural fairness by failing to warn her that he might regard her written request to be insufficient.

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

(1) The objective of the development standard in cl 6.5(3)(b) of CLEP 2012 needed to be ascertained for two reasons. First, the written request seeking to justify the contravention of the development standard needed to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, the first way identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (***Wehbe***) at [42]-[43]. Second, the objective of the development standard was relevant because the acting commissioner was required by cl 4.6(4)(a)(ii) of CLEP 2012 to be satisfied that the proposed development will be in the public interest because it is consistent with the objective of the development standard: at [14], [32];

(2) The acting commissioner did not err in accepting the objective identified in the written request as the relevant objective of the development standard rather than the objective of the clause. The objective of the clause as stated in cl 6.5(1) of CLEP 2012 is not the objective of the development standard fixed by cl 6.5(3)(b). First, cl 6.5(1) states only that it is "the objective of this clause", not that it is the objective of the particular provision fixing the development standard. Secondly, cl 6.5 does more work than only fix the development standard, and the statement of objective of the clause is therefore expressed at a high level of generality. Thirdly, the stated objective of the clause is uninformative regarding the objective of the development standard fixed by cl 6.5(3)(b): at [23]-[26];

(3) The relevant objective of Zone R4 was "to enable other land uses that provide facilities or services to meet the day to day needs of residents." The acting commissioner misconstrued this objective in finding that the phrase "day to day needs of residents" in the objective means "needs which arise for the majority of persons on a regular basis". The words "day to day" connote "on any day", so that the objective is to be understood as enabling other land uses that provide facilities or services to meet the needs of residents on any day. The word "residents" refers to a generic category of persons (residents), not the particular people who reside in any area, and hence the needs are those of this generic category of residents, not the needs of the particular people residing in any area. Applying this meaning of the objective of the zone, the proposed funeral home, being one type of business premises, can be seen to be a land use that does provide facilities or services to meet the day to day needs of residents: at [57] - [59];

(4) The objective of Zone R4 should be construed so as to promote the purpose of the threefold classification of development as being permitted without consent, permitted with consent or prohibited. The classification in the Land Use Table for a zone of the purposes of development that are permitted with consent creates a presumption that development for any of those purposes is consistent with the objectives of the zone: at [62], [64];

(5) The acting commissioner's overall decision was not vitiated by the error in his decision that the proposed development was not consistent with the objective of the zone. The acting commissioner's error in construing the objective of Zone R4 left unaffected his decision under cl 4.6(4)(a)(i) that the applicant's written request has not adequately addressed the matters required to be demonstrated by subcl (3): at [67]-[69];

(6) The applicant's written request identified only the first way in *Wehbe* that compliance with the development standard is unreasonable or unnecessary because the proposed development will achieve the objective of the development standard notwithstanding that it contravenes the development standard. The written request did not seek to demonstrate any of the other ways identified in *Wehbe.* In these circumstances, the acting commissioner correctly dealt with the applicant's written request in the terms that the written request was written: at [79], [80]; and

(7) The acting commissioner did not deny Ms Jeffery procedural fairness by not warning her that the applicant's written request might be regarded as insufficient in establishing that the development achieves the objective of the development standard so as to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case: [85]-[89]

- **Mining:**

***Visser v Department of Customer Service*** **[2021] NSWLEC 88** (Pain J)

Facts: The Vissers (**applicants)** commenced an appeal of a review of the Secretary (**respondent**) of the amount of compensation for a mine subsidence under the *Coal Mine Subsidence Compensation Act 2017* (NSW). Tahmoor Coal Pty Ltd (**Tahmoor**), an active mine proprietor, sought joinder as a party to the proceedings or, in the alternative, to participate under s 38(2) of the *Land and Environment Court Act 1979* (NSW). The respondent did not object to the application. The applicants opposed joinder. The applicants did not oppose Tahmoor's participation under s 38(2) on a limited basis. This was the first time an active mine proprietor has sought to join as a party to proceedings of this kind.

Issue: Whether Tahmoor should be joined as a party to proceedings under Pt 6, Div 5, rr 6.24 and 6.27 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**).

Held: Application for joinder refused; costs reserved:

(1) The statutory scheme under which the appeal was brought does not warrant a finding that Tahmoor ought to be joined as a party under r 6.24 UCPR. The statutory scheme provides that appeals under s 16 can be brought by a person seeking compensation or an active mine proprietor but does not suggest that an entity other than the Secretary through the Department would be a party to an appeal commenced by a person seeking compensation: at [30]-[31];

(2) The carefully structured statutory scheme under which the active mine proprietor has the same right of appeal as a person claiming compensation under s 16(2) and where the ability of the active mine proprietor to request a review of the referral of a claim under s 12 as limited by subs 12(8), inter alia, suggested the application of the general joinder provisions in the UCPR was not relevant on the question of who was a necessary party. Stating that Tahmoor's interests were affected by the outcome of the proceedings in that it will have to pay the amount ordered by the Court, essentially Tahmoor's submission, does not on its own lead to a finding that it is a necessary party. The authorities it relied on did not address the detailed statutory compensation scheme relevant to the joinder application: [38]-[39]; and

(3) Rule 6.27 of the UCPR provided no additional basis for consideration of joinder as a party: at [42].

- **Interlocutory Decision:**

***Farley Environment Care Inc v HL Fry Properties Pty Ltd*** **[2021] NSWLEC 77** (Pain J)

Facts: Farley (**applicant**) commenced judicial review proceedings challenging two development consents (a cemetery development which included a crematorium) issued by Maitland City Council (**second respondent**) to HL Fry Properties (**first respondent**). The applicant filed a Notice of Motion seeking orders that it be granted leave to adduce expert evidence of a funeral and cemeteries consultant and an ecologist in answer to specific questions. The parties were required to seek such a court direction under Pt 31, Div 2, r 31.19 of the Uniform Civil Procedure Rules 2005 (NSW). The first respondent opposed such orders.

Issues:

(1) Whether the expert evidence of the funeral and cemeteries consultant sought to be adduced was reasonably necessary to be placed before the Land and Environment Court (**Court**); and

(2) Whether the expert evidence of the ecologist sought to be adduced in relation to the concept plan approved by one of the development consents was reasonably necessary to be placed before the Court.

Held: Leave to adduce evidence granted:

(1) (a) The Court was being asked to determine a jurisdictional fact namely to characterise the use approved by the Council in the context of the Maitland Local Environmental Plan 2011 (**MLEP 2011**) to determine whether what has been approved is permissible or prohibited development and further, the dominant and ancillary purpose of what has been approved. Material not before the Council is permissible where the issue of characterisation arises, as occurred in *Pallas Newco Pty Ltd v Votraint No 1066 Pty Ltd* (2003) 129 LGERA 234; [2003] NSWLEC 232 at first instance, an approach upheld on appeal in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 422 at [86], [88]: at [38]; and

(b) Given the opacity of the definitions of "crematorium" and "funeral home" in the MLEP 2011, answers from a funeral and cemeteries' consultant on questions are permissible, "relevant and reasonably necessary for the resolution of the matters in dispute": at [39]; and

(2) Whether an ecologist was relevant to the challenge to the concept plan depended on a matter of statutory construction best left to the trial judge. Given the evidence of an ecologist in relation to the concept plan would be minimal, an ecologist can prepare evidence on that topic notwithstanding it may not ultimately be relevant: at [44].

***Ryan v Northern Regional Planning Panel (No 6)*** **[2021] NSWLEC 80** (Pain J)

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

Facts: *Ryan v Northern Regional Planning Panel (No 4)* (***Ryan (No 4)***) found that the relevant development consent issued to the third respondent, Winten (No 12) Pty Ltd, by Lismore City Council (**Council**) was invalid. An outstanding issue referred to in *Ryan (No 4)*, at [309], was whether consequential orders for site reinstatement ought to be made. Mr Michael Ryan (**applicant**) sought orders that an ecologist and construction engineer be appointed to assess the site for remediation, that access to the site be granted to that individual, and that the third respondent bear the costs of expert witnesses.

Issue: Whether an order should be made under s 9.46 of the *Environmental Planning and Assessment Act 1979* (NSW) and r 23.8(1) of the Uniform Civil Procedure Rules 2005 (NSW) in line with the applicant's Notice of Motion.

Held: Applicant to be granted access for a specified engineer, surveyor and ecologist with an agreed brief; third respondent to pay costs of the experts; parties to provide agreed orders:

(1) Access to the site was required because the site is a large one and assessing the extent to which reinstatement is reasonable and feasible in all areas of the site requires expert evidence: at [35];

(2) Given the time elapsed since *Ryan (No 4)*, the applicant was allowed to progress the claim for reinstatement by obtaining a scoping study inter alia: at [36]; and

(3) The third respondent was liable for the costs of experts' work: at [36].

- **Security for Costs:**

***Regional Architects Pty Ltd v Coffs Harbour City Council (No 2)*** **[2021] NSWLEC 106** (Duggan J)

(related decision: *Regional Architects Pty Ltd v Coffs Harbour City Council* [2021] NSWLEC 21 (Pain J))

Facts: These proceedings were the second Class 1 appeal of Development Application 0819/18DA4 (**DA**) for a 57-lot residential subdivision at Sawtell Road, Toormina. The first appeal related to a deemed refusal of the DA and these proceedings related to the actual refusal of the DA. By Notice of Motion (**NOM**), Coffs Harbour City Council (**Council**) sought orders that Regional Architects Pty Ltd (**Regional Architects**) provide security for costs under s 1335(1) of the *Corporations Act 2001* (Cth), that the proceedings be stayed until further order of the Land and Environment Court (**Court**) in the event of non-compliance, and that Regional Architects pay Council's costs of this NOM.

Issues:

(1) Whether the Council discharged its onus by establishing credible testimony that there was reason to believe the Regional Architects would be unable to pay the costs; and

(2) Whether the Court should exercise its discretion to make the order.

Held: Security for costs ordered: proceedings to be stayed in the event of non-compliance; Regional Architects to pay Council's costs on the NOM:

(1) On the basis of the indebtedness of Regional Architects from the previous proceedings, evidence that the company was not generating significant income, as well as records indicating a lack of holding real estate assets and minimal shareholder value, credible testimony was provided to prove on the balance of probabilities that Regional Architects would be unable to pay the Council's costs: at [16];

(2) No further evidence was provided in these proceedings to cure the deficiency in the reports which resulted in the discontinuation of the first appeal. On the material filed, it was fair and reasonable that the Court's discretion be exercised to award costs: at [28]-[30];

(3) As Regional Architects was not the owner of the land and had no interest in the outcome of the appeal (other than professional fees), it did not warrant the benefit of the underlying public benefit of the operation of the no costs rule: at [31]; and

(4) Absent any evidence by Regional Architects, it could not be established that the proceedings would be thwarted if a costs order was made: at [32].

- **Joinder Applications:**

***AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces*** **[2021] NSWLEC 76** (Duggan J)

(related decisions: *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2020] NSWLEC 159 (Duggan J); *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 (Meagher and Leeming JJA, Preston CJ of LEC))

Facts: AQC Dartbrook Management Pty Ltd (**Dartbrook**) made an application to modify a development consent for an underground coal mine in the upper Hunter Valley. The Independent Planning Commission (**IPC**), as delegate of the Minister for Planning and Public Spaces, approved in part and refused in part that application. Dartbrook appealed the IPC's decision to the Land and Environment Court and the parties participated in a s 34 conciliation conference under the *Land and Environment Court Act 1979* (NSW) (**Court Act**). An agreement was reached (**s 34 agreement**).

The proceedings in the first instance related to the request by Hunter Thoroughbred Breeders Association (**HTBA**) to be joined as a party to the proceedings under s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The joinder was allowed. Dartbrook sought leave to appeal that decision. That appeal was upheld without prejudice to HTBA's entitlement to seek to be heard as to the making of order pursuant to s 34(3) of the Court Act. In these proceedings, HTBA sought leave by Notice of Motion to be heard at any conciliation conference or hearing of this matter either pursuant to s 38(3) of the Court Act (**Double Bay Marina Order**) or as amicus curiae.

Issues:

(1) Whether it was in the Court's power to allow HTBA to participate in the process of a s 34 conciliation conference either pursuant to a Double Bay Marina Order or as amicus curiae;

(2) Whether in the exercise of the Court's discretion, such an order should be made in the circumstances of this case; and

(3) Whether, if leave were granted, HTBA should be granted the opportunity to submit written and oral argument in the matter, cross-examine witnesses and adduce evidence in relation to the power of the Court to impose conditions upon the approval the subject of the s 34 agreement.

Held: Leave granted for HTBA to participate in the proceedings:

(1) It was within the Court's power to make a Double Bay Marina Order permitting a non-party to participate on any matter in such manner as it thinks appropriate as the proper consideration of the matters before the Court permits: at [33];

(2) The power to permit such participation is a matter that will depend on the circumstances of each case and is to be exercised in the Court's discretion: at [34];

(3) Participation by HTBA was appropriate in the circumstances (and akin to the making of written submissions) on the issues of the cessation of mining of the Piercefield Seam and the coal-handling above-ground infrastructure, however not on the issue of the rejects emplacement area: at [44], [48]; and

(4) The issue of participation as amicus curiae did not need to be considered: at [56].

- **Costs:**

***Blues Point Hotel Property Pty Ltd v North Sydney Council (No 2)*** **[2021] NSWLEC 79** (Duggan J)

(related decision: *Blues Point Hotel Property Pty Ltd v North Sydney Council* [2021] NSWLEC 27 (Duggan J))

Facts: In the first instance, Blues Point Hotel Property Pty Ltd (**applicant**) sought a declaration that the first-floor external terrace of Blues Point Hotel at McMahons Point benefited from existing use rights for the purposes of a "pub" as defined under the North Sydney Local Environmental Plan 2013. The applicant succeeded on the first issue of whether the whole of the premises benefited from an existing use, however failed on whether that existing use extended to the first-floor external terrace and whether the use of that terrace for hotel patrons was an enlargement, expansion or intensification of an existing use requiring development consent. The Summons was dismissed. The applicant made an application that the usual order that costs follow the event under r 42.1 of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) not apply and that the Land and Environment Court, in its discretion, determine that each party should pay its own costs or, alternatively, that the applicant pay only part of the Council's costs to reflect its success on one of three issues. The Council sought the usual order for costs.

Issue: Whether the applicant's success in relation to one issue was an appropriate basis to make a costs order other than the usual order.

Held: Application for varied costs order dismissed; usual costs order made:

(1) The first issue on which the applicant had some success was not a clearly discrete issue from those on which the applicant failed as each issue was sufficiently linked with respect to determining the ultimate question of whether the outdoor terrace benefitted from existing use rights: at [19];

(2) The applicants was not in fact entirely successful on the first issue: at [20]; and

(3) The fact that an issue was articulated and determined separately to the other issues was not a sufficient basis for the exercise of the Court's discretion to apportion costs: at [21].

- **Parties to Appeal:**

***Stannards Marine Pty Ltd v North Sydney Council*** **[2021] NSWLEC 66** (Preston CJ)

Facts: Stannards Marine Pty Ltd (**Stannards**) applied for development consent for development including a new floating dry dock for maintenance and repair of marine vessels. The development was of a type declared to be designated development by the regulations as per s 4.10(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

North Sydney Council (**Council**), by the Sydney North Planning Panel, refused Stannards' development application. Stannards appealed the Council's decision to refuse the development.

The Council gave notice of Stannards' appeal, as required by s 8.12(1) of the EPA Act, to various persons, including persons who had made a submission by way of objection to the development application to carry out the designated development proposed by Stannards (**the objectors**). Seven of the objectors applied to be heard at the hearing of Stannard's appeal. The Registrar made orders that three of the objectors were entitled to be heard at the hearing of the appeal pursuant to s 8.12(3) of the EPA Act. Stannards applied by Notice of Motion to review and set aside the Registrar's decision and also sought orders that another four objectors were not entitled to be heard at the appeal.

Issue:

(1) Were the objectors entitled under s 8.12(1)(a) of the EPA Act to be given notice of the appeal; and

(2) Were the objectors entitled under s 8.12(3) of the EPA Act to be heard at the appeal.

Held: Notice of Motion dismissed:

(1) Stannards construed the words "in respect of which the objector has a right of appeal under this Division" in s 8.12(1) of the EPA Act as requiring that an objector be able to exercise a right of appeal under s 8.8(2) of the EPA Act. This construction of s 8.12 of the EPA Act, and the decision in *Barr Property and Planning Pty Ltd v Cessnock City Council* [2021] NSWLEC 20 on which this construction is based, are incorrect: at [48];

(2) The objectors were persons entitled under s 8.12(1)(a) to be given notice of Stannards' appeal under s 8.7(1) of the EPA Act and the Council was correct in giving notice under s 8.12(1) to them. The objectors were also persons who are entitled to be heard at the hearing of Stannards' appeal, provided they made application to the Court within 28 days after the notice was given: at [48], [82];

(3) The legislative scheme controlling the process for making an application for development consent for designated development, determining such a development application, and appealing a determination of such a development application has remained relevantly the same from the enactment of the EPA Act. This legislative scheme provides for twin entitlements of an objector to appeal or to be heard on an appeal against the determination of a development application for development consent for designated development. This legislative scheme continues to be reflected in s 8.12(1) EPA Act: at [52]-[64];

(4) The qualifying phrase in s 8.12(1)(a) limits the class of appeals by an applicant, in respect of which notice of an appeal is to be given to an objector, to appeals by an applicant against a determination by a consent authority of an application for development consent for designated development. Only such an application is one "in respect of which" an objector can have a right of appeal: [65]-[71];

(5) The qualifying phrase in s 8.12(1)(a) also operates to apply this generic category of "an objector" to the facts of the particular application for development consent for designated development and the particular persons who duly made submissions by way of objection to that application: at [72]-[73].

(6) It is not necessary, in order for a person to be the objector who "has a right of appeal", that the person be able to exercise this right of appeal. The text and context of s 8.12(1) support this construction: at [74]-[80] and;

(7) Provisions of the EPA Act increase public access to environmental information, community participation in environmental decision-making and access to justice. The construction of s 8.12(1) and (3) that promotes these purposes and objects of the EPA Act and is to be preferred: at [8]-[25], [81].

- **Merit Decisions (Judges):**

***Duke Developments Australia 4 Pty Limited v Sutherland Shire Council*** **[2021] NSWLEC 69** (Robson J)

Facts: Duke Developments Australia 4 Pty Limited (**Duke**) sought leave to rely on amended plans in an appeal under s 8.9 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), against the deemed refusal of an application to modify a development consent for a residential flat development in Cronulla by Sutherland Shire Council (**Council**). Duke also sought a minor amendment to the timetable for filing a joint expert report.

Issue: Whether the Land and Environment Court (**Court**) had the power to amend a modification application.

Held: The Court did not have the power to amend a modification application; leave to rely upon the amended plans refused; the date for filing the joint expert report varied:

(1) There was no express power to amend a modification application in the EPA Act or the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**), and further, the power could not be implied from the statutory provisions: at [57], [64];

(2) The conclusion of Preston CJ of LEC in *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 that there was no power residing to amend a modification application was to be preferred to the contrary conclusion in *Jaimee Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 245: at [56];

(3) If Duke sought to rely on amended plans then it needed to withdraw the existing modification application, and submit a new modification application that referred to the amended plans: at [65];

(4) The imposition of a condition reflecting the amended plans when approving the modification application may practically allow the development to occur as set out in the amended plans, however the imposition of such a condition would be a matter for when determining the proceedings: at [71], [76];

(5) Section 23 of the *Local Government Act 1993* (NSW) does not support the amendment of a modification application as something "supplemental or incidental" to Council exercising its power to determine a modification application under the EPA Act, because amendment is a discrete action that occurs prior to the determination of a modification application: at [85];

(6) While an interim judgment can be delivered in the course of the Court determining a modification application, this does not mean that the Court can "require" amended plans to be provided in an interim judgment. The comments of Preston CJ of LEC in *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 regarding the Court requiring amended documentation were in the context of the determination of a development application (which had the benefit of cl 55 of the EPA Regulation) and not a modification application (which did not have the benefit of an analogous provision): at [93], [95]:

(7) Section 34 of the *Land and Environment Court Act 1979* (NSW) cannot be used to facilitate an agreement between the parties that the amended plans should be utilised for the ongoing assessment of the modification application in the proceedings, as the section requires the parties to agree on a decision that would "dispose of the proceedings": at [100]; and

(8) Section 64 of the *Civil Procedure Act 2005* (NSW) cannot be used to modify the Class 1 application that instituted the proceedings so that it refers to the amended plans. This infringes on the power of the Court to determine a modification application on appeal pursuant to s 8.9 of the EPA Act, as the modification application on appeal would be different to the modification application refused by Council: at [106].

Note: Since *Duke Developments Australia 4 Pty Limited v Sutherland Shire Council* [2021] NSWLEC 69 was handed down, the EPA Regulation has been amended to include new cl 121B which explicitly provides for the amendment of a modification application.

- **Merit Decisions (Commissioners):**

***Contill Holdings Pty Ltd ATF Revay Discretionary Trust v Randwick City Council*** **[2021] NSWLEC 1543** (Dixon SC)

Facts: Contill Holdings Pty Ltd ATF Revay Discretionary Trust and Deer Valley Pty Ltd ATF Deer Valley Trust (**applicants**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the deemed refusal by Randwick City Council (**Council**) to grant development consent for a new 67-room boarding house with ancillary facilities and basement carpark at 87 and 89-91 Middle Street, Kingsford (**site**). Following constructive joint conferencing, the applicant proposed an amended application at the hearing. The amendments, while reducing the shortcomings of the original proposal, did not resolve the appeal.

The Council contended that the basement motorbike area should have been included in the gross floor area (**GFA**) calculation because "motorcycle parking" is not "car parking" within the definition of "GFA" under the Randwick Local Environmental Plan 2012 (**RLEP 2012**). If included, the application would have breached the RLEP 2012 floor space ratio (**FSR**) development standard. The applicant argued that motorcycle parking fell within the GFA definition.

Although accepting that the character of the local area is comprised of a wide range of building types, ages, heights, setbacks and landscape treatments, the Council contended that the development needed to be redesigned with regard to relevant planning controls to be compatible with the character of the local area. The applicant argued that the development satisfied the tests of compatibility in *Project Venture Developments v Pittwater Council* (2005) 141 LGERA 80; [2005] NSWLEC 191.

Issues:

(1) Whether the motorbike parking in the basement should be counted towards the GFA;

(2) If the motorbike parking in the basement is counted, whether the amended cl 4.6 written request pursuant to the RLEP 2012 should be upheld; and

(3) Whether the bulk and scale of the proposal, as it presents to Middle Street, was acceptable having regard to the character of the local area. Consequentially, whether the Land and Environment Court should refuse the application on the basis that the design of the development is not compatible with the character of the local area pursuant to cl 30A of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP ARH**); and

(4) The appropriate treatment of the fence along the boundary.

Held: Appeal upheld; development consent granted with conditions:

(1) The proposal provides sufficient onsite parking: at [32]-[34].

(2) Calculation of the GFA must be consistent with the definition of "gross floor area" in the Dictionary of the RLEP 2012. The reference in the GFA definition to "car parking to meet any requirements of the consent authority" necessarily includes all motor vehicles. As such, the motorbike parking in the basement is excluded from calculations of the GFA: at [41]-[42].

(3) The proposal complies with the FSR development standard. The amended cl 4.6 written request is not needed: at [41]-[42].

(4) The design is an appropriate response to the opportunities and constrains of the site and applicable planning objectives for the development of the site under the SEPP ARH. The proposed design is compatible with the character of the local area as considered under cl 30A at [57].

(5) A solid lapped and capped fence on the western boundary is appropriate. A palisade fence is appropriate for the street frontage: at [59].

***Mairds Pty Ltd v Campbelltown City Council*** **[2021] NSWLEC 1448** (O'Neill C)

Facts: Mairds Pty Ltd (**applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the refusal by Campbelltown City Council (**Council**) of the development application to demolish an existing shopping centre and construct a new shopping centre, consisting of two levels, including a supermarket with a floor area of 3,479.8 square metres, 12 specialty shops, a gym and parking for 200 cars, at 44 Riverside Drive, Airds.

The proposed development was prohibited in the B1 Neighbourhood Centre zone under Campbelltown Local Environmental Plan 2015 (**CLEP 2015**). The applicant relied on existing use rights submitting that the existing uses on the site were prohibited by CLEP 2015 when it commenced on 11 March 2016. The lawful use of the site was derived from prior development consents granted and in force.

Clause 5.4 of CLEP 2015 included controls for the maximum floor areas of a neighbourhood shop and a neighbourhood supermarket. There was a note referring to these controls beneath the definitions for each use in the Dictionary of CLEP 2015. Pursuant to cl 4.6(8) of CLEP 2015, the controls under cl 5.4 were not amenable to the flexibility afforded by cl 4.6. The applicant submitted that these provisions amounted to a prohibition for a neighbourhood shop over 100 square metres and a neighbourhood supermarket over 1000 square metres.

Issue: Whether the existing development had the benefit of existing use rights.

Held: Appeal dismissed:

(1) The note beneath each of the definitions of "neighbourhood shop" and "neighbourhood supermarket" in the Dictionary of CLEP 2015 referred the reader to a related provision of the instrument and was not part of the instrument. Subclause 4.6(8) of CLEP 2015 was not relevant to the construction of the definitions of the two uses, nor was it a prohibition: at [73] and [75];

(2) The space available to a supermarket is the clearest indicator of whether a supermarket can be characterised as a "neighbourhood shop": at [80];

(3) The existing supermarket was properly characterised as a "neighbourhood shop" at the commencement of CLEP 2015: at [79];

(4) The existing supermarket was not prohibited development at the commencement of CLEP 2015 and so the existing development was not an existing use within the meaning of the definition of an existing use at s 4.65 of the EPA Act: at [89];

(5) The existing supermarket was permissible under CLEP 2015 in force as a neighbourhood supermarket. There was no environmental planning instrument in force that had the effect of prohibiting the use of the existing supermarket: at [92];

(6) There is a difference in purpose between a neighbourhood supermarket and a full-line supermarket. The proposed development was not an enlarged, expanded or intensified version of the existing use: at [97]; and

(7) The proposed development was prohibited development in the B1 zone under CLEP 2015: at [99].

***Mirvac Retail Sub SPV Pty Limited v City of Canada Bay Council*** **[2021] NSWLEC 1598** (Dixon SC)

Facts: Mirvac Retail Sub SPV Pty Limited (**Mirvac - applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) against the deemed refusal by City of Canada Bay Council (**Council**) to grant development consent for "blanket approval" to carry out "fitout works" to a number of retail tenancies within the mixed use development known as Birkenhead Point Shopping Centre, Drummoyne (**site**).

The applicant sought "blanket approval" (not a defined planning term) in order to circumvent the need for multiple development applications to carry out fitout works at the site as and when new tenants require new or altered fitouts. The applicant submitted that the type of works contemplated would ordinarily be procured under the exempt and complying development regime found in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Complying Development SEPP**). However, the applicant accepted that, by cl 1.17A(1)(d) of the Complying Development SEPP, the policy has no application in the present case because the site has been identified as a local heritage item in the Canada Bay Local Environmental Plan 2013. Instead of detailed works, the application included plans with an inventory of heritage features which were identified as "existing heritage fabric" that cannot be touched, thereby narrowing the scope of potential future works in each tenancy.

The Council contended that, as the design of the fitout will vary between shops, and the materials used will similarly vary depending upon the tenant, there is simply no understanding of what is being approved, nor of the likely impacts of the development. Each required assessment before development consent could be granted.

Issue: Whether a "blanket approval" development application can be approved given the requisite assessment required under s 4.15 of EPA Act.

Held: Appeal dismissed; Development Application DA-2020/0206 refused:

(1) Without knowledge of the proposed works, the Land and Environment Court (**Court**) cannot know whether the ultimate development will be sympathetic to the existing heritage fabric or have an adverse impact: at [21].

(2) The Court did not have any detail of the prospective works and therefore did not have the requisite understanding of relevant matters and their significance to the decision to be made to allow a proper consideration of the impact of the development as required under s 4.15 of the EPA Act: at [5]-[6], [21]-[23].

# Court News

## Appointments/Retirements:

The following Acting Commissioners were appointed from 14 October 2021:

- Mr Michael Davidson
- Mr Stuart Harding
- Mr Christopher McEwen SC
- Ms Lynne Sheridan and
- Mr Andrew Smith

## COVID-19 continues:

- The Court still requires properly fitted masks to be worn whilst within the Court's premises. The premises includes the foyers and lift areas on Court floors.
- Masks may be removed when addressing a judge, commissioner, or registrar in Court or if exempted from wearing a mask.
- All attendees at site inspections (even if outside) are encouraged to wear a mask.