



**Land and
Environment Court
of New South Wales**

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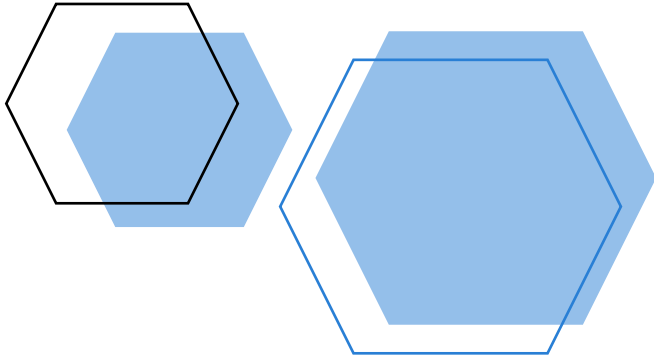
Judicial Newsletter



COURT NEWS

VALE BYRNE AC

Acting Commissioner Louise Byrne passed away on 5 August 2025. Louise was called to the Bar in 1998 and was appointed as an Acting Commissioner in the Land and Environment Court in February 2023.



JUDGMENTS

INTERNATIONAL COURTS

Obligations of States in Respect of Climate Change (Advisory Opinion) (Judgement) ([International Court of Justice, General List No 187, 23 July 2023](#)) (President Iwasawa, Vice-President Sebutinde and Judges Tomka, Abraham, Yusuf, Xue, Bhandari, Nolte, Charlesworth, Brant, Gomez Robledo, Cleveland Aurescu, Tladi)

Facts: On 29 March 2023, the United Nations (UN) General Assembly adopted resolution [A/RES/77/276](#), formally requesting an advisory opinion from the International Court of Justice (ICJ) on the obligations of states in respect of climate change.

The request was the result of a youth-led campaign by the Pacific Island Students Fighting Climate Change, an organisation of students from the University of the South Pacific. That campaign sought to persuade leaders of the Pacific Islands Forum to seek the ICJ's advisory opinion. In 2021, the Government of Vanuatu responded to the campaign by announcing it would lead efforts to gain an advisory opinion from the ICJ and received unanimous endorsement from the remaining members of the Pacific Islands Forum. After multiple rounds of consultation with other states, the resolution was put before the UN General Assembly, where it was unanimously adopted.

Issues: The General Assembly's request to the ICJ comprised of two questions:

- (1) What are the obligations of states under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (GHG) for states and for present and future generations; and
 - (2) What are the legal consequences under these obligations for states who, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment.
- Held:** The ICJ's opinion, as well as the [separate opinions](#) of the judges, traversed the obligations of states across multiple international treaty regimes as well as customary international law. The opinion also considered the legal framework for assessing contraventions of the state obligations identified and the consequences that may follow from such contraventions. The most significant parts of the opinion are as follows:
- (1) The Court identified the climate change treaties, being the [United Nations Framework Convention on Climate Change \(UNFCCC\)](#), [Kyoto Protocol](#) and [Paris Agreement](#), as the most directly relevant applicable law. In addition to these treaties, the Court noted that a range of other environmental treaties, human rights treaties and customary international law also formed part of the most directly relevant applicable law. The Court rejected the argument that the climate change treaties operated to exclude any other relevant and applicable international law by application of the *lex specialis* principle: at [113]-[173];
 - (2) The Court determined that state parties to the climate change treaties had an overarching obligation to achieve the "ultimate objective" of those treaties as outlined in [art 2](#) of the UNFCCC, namely to achieve "the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." According to the Court, this set the objective to which all other provisions in the climate treaties were to be interpreted and applied: at [116]-[121], [174]-[195];
 - (3) The Court further found that state parties to the climate treaties may also be bound by the decision of bodies established under those treaties (such as the Conference of Parties (COP)), in so far as those decisions expressed an agreement between the parties. Accordingly, the Court found that the primary temperature goal under the Paris Agreement was to maintain global warming below 1.5 degrees Celsius, as agreed in the [Glasgow Climate Pact](#) at the twenty-sixth COP: at [184], [224];
 - (4) State parties to the Paris Agreement each had an obligation under [art 4\(2\)](#) to prepare and submit successive nationally determined contributions (NDC) that outline that state's commitment to reduce GHG emissions. The content of a state's NDC, in the Court's

view, was not entirely within the discretion of the state party and instead was subject to an objective standard, namely, that the NDC must be capable of achieving the temperature goal of limiting warming to 1.5 degrees and the ultimate objective of the climate change treaties. The Court went on to note that the Paris Agreement also required that state parties adopt domestic measures that were capable of achieving the objectives set out in their NDC. The Court found these obligations to be obligations of conduct, which required states to exercise a “stringent” level of due diligence, meaning state parties must do their utmost to ensure the standard of conduct was met: at [230]-[254];

- (5) Further, the Court held that under customary international law, states had a duty to prevent significant harm to the environment by acting with due diligence, which demanded that states use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system or environment. A threat of significant harm, as noted by the Court, may be present where harm is caused by the cumulative effect of various acts undertaken by various states and private actors. States are thus under a duty to assess the possible cumulative effect of their acts on the climate system. States are also under a customary duty to commit to sustained forms of good-faith co-operation to prevent such harm: at [271]-[308];
- (6) The Court determined that a state, who is not a party to one or more climate change treaties, may still be bound by obligations under those treaties where those obligations find expression in customary international law: at [309]-[315];
- (7) The Court recognised that a clean, healthy and sustainable environment was a precondition to the enjoyment of many other human rights and that it was difficult to see how states could effectively fulfill their human rights obligations without also safeguarding the right to a clean, healthy and sustainable environment. As a result, the Court determined that states have a human rights obligation to protect the climate system: at [408], [393];
- (8) The Court considered that the established rules of state responsibility were both applicable to state breaches of climate change treaty obligations and capable of overcoming the factual and legal complexities of attributing climate harms to specific actors and actions. The Court clarified that the infringing conduct need not be the actual emission of GHG but rather the failure of a state to regulate the emission of GHG in compliance

with either treaty or customary obligations. Accordingly, emissions generated by private actors may be attributed to the state, and internationally wrongfully acts may include “fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licenses or the provision of fossil fuel subsidies”: at [420], [425]-[438];

- (9) The customary duties outlined by the Court, were noted to be obligations *erga omnes* and thus owed to the international community as a whole. The obligations under the climate change treaties were held to be obligations *erga omnes partes* and thus owed to all states who are parties to those treaties. This enabled injured and non-injured states alike to invoke responsibility from a contravening state. However, the Court noted the position of a state may impact upon the remedies available: at [439]-[443]; and
- (10) The consequences resulting from a breach may require a state to cease the wrongful actions or omissions, or provide assurances and guarantees of non-repetition where the infringing act is continuing. Additionally, reparation to injured states in the form of restitution, compensation and satisfaction may be ordered in certain circumstances: at [444]-[455].

Climate Emergency and Human Rights (Advisory Opinion)
[\(Inter-American Court of Human Rights, OC-32/25, 29 May 2025\)](#) (President Hernández López and Judges Mudrovitsch, Sierra Porto, Ferrer Mac-Gregor Poisot, Pérez Manrique, Gómez and Pérez Goldberg)

Facts: On 9 January 2023, the governments of Chile and Colombia submitted a request to the Inter-American Court of Human Rights (IACtHR) for an advisory opinion clarifying the human rights obligations of states under the [American Convention on Human Rights](#) and other inter-American treaties in the context of the climate crisis.

Accepting the request, the Court held hearings in Barbados and Brazil in 2024. The court heard submissions and accepted over 260 amicus curiae briefs from states, Indigenous communities, youth organisations, civil-society organisations, and academics. The Court handed down its advisory opinion on 29 May 2025.

Issues: The request made to the IACtHR sought the Court’s opinion on the scope of states’ human rights obligations in the context of a climate emergency. The Court in responding to the request formulated three distinct questions:

- (1) What obligations do states have to ensure substantive rights are respected and guaranteed in light of the impacts or threats caused or exacerbated by climate change;
- (2) What obligations do states have to ensure procedural rights are respected and guaranteed in light of climate change; and
- (3) What further obligations do states have to protect the rights of vulnerable populations in the context of climate change.

Held: The IACtHR's opinion was extensive and multifaceted. The opinion considered a range of substantive and procedural human rights obligations which, in the Court's view, were threatened by climate impacts. With regards to each of the various rights identified by the Court, the opinion detailed a highly specific framework of obligations that states must comply with so as to safeguard each of those rights. The most salient aspects of the Court's opinion were as follows:

Substantive rights

- (1) The Court recognised the right to a healthy environment as being the key substantive right affected by climate change. The Court considered that the right to a healthy environment was an autonomous right distinct from, although connected to, other human rights. The right, as formulated by the Court, served to protect both the environment as whole, as well as the inextricably interrelated components and systems that make up the environment, the protection of which necessarily results in the protection of the balance that makes present and future life possible. The climate system was considered by the Court to be one of these components and thus the right to a healthy environment gives rise to a right to a healthy climate: at [266]-[274], [298]-[304];
- (2) In light of these rights, states are under a due diligence obligation to adopt effective measures to prevent severe or irreversible damage to the environment and its components, including the climate. The Court noted that in failing to adhere to this obligation, states risk rupturing the vital equilibrium that generates the conditions for present and future life. To provide legal protection against this "existential threat", the Court considered that the obligation to prevent severe and irreversible damage to the environment constituted a *jus cogens* norm, meaning the duty is one that cannot be derogated from and is binding on all states: at [228]-[230], [287]-[297];

- (3) The Court noted that a corollary of the duty to protect the environment was a right of nature to "conserve its essential ecosystem processes." The Court emphasised that placing nature as the subject of rights "transcends inherited legal concepts that conceived nature exclusively as an object of ownership or an exploitable resource" and "emphasises [nature's] structural role in the vital balance of the conditions that make this planet inhabitable." Noting these benefits, the Court also acknowledged a growing trend to recognise nature as the subject of rights in both international and domestic legal frameworks: at [279]-[286];
- (4) In the context of a climate emergency, the right to a healthy climate gave rise to three obligations: to take action to mitigate greenhouse gas (GHG) emissions; to protect nature and its components; and, to adopt progressive measures toward sustainable development. The first of these obligations contains a number of subsidiary duties. Notably, states must regulate GHG emissions by defining a mitigation target that represented that state's highest possible ambition, define and implement a human rights-based strategy to achieve that target, and regulate the emissions of private companies to ensure compliance with the target. States must also monitor and control progress toward the mitigation target and require and approve environmental impact studies of all emitting projects: at [320]-[363];

Procedural rights

- (5) The Court identified several procedural obligations centred around three subject areas: access to information; public participation; and access to justice. Regarding access to information, states must disseminate climate information especially when doing so will enable the protection of human rights, such as through early warning systems. The Court also emphasised the need for states to provide clear, truthful, accessible and timely information that aligns with the best available science and to take measures against climate disinformation. As to public participation, the Court held that states must ensure that meaningful public participation is central to all climate decision-making and policy formulation. This also encompassed a duty to consult Indigenous and Tribal Peoples. Finally, to ensure access to justice, the Court stressed the significance of providing ongoing climate training and resources for judicial bodies, relaxing standing requirements, developing new evidentiary standards to overcome the complexities of proving causation and attribution in climate litigation

and ensuring the availability of adequate remedies for climate related human rights violations: at [488]-[560]; and

Rights of vulnerable populations

(6) The Court acknowledged the disproportionate impact of climate change on vulnerable populations, whose vulnerability to climate change was exacerbated by existing structural inequalities that leaves these populations the least equipped to address climate impacts. In particular, the Court noted the existing vulnerability of populations in poor regions, children, and Indigenous and Tribal Peoples, as well as the likelihood of new forms of vulnerability. The Court found that states must implement measures of differentiated protection that are “necessary to guarantee real equality in the enjoyment of rights in the context of the climate emergency.” The Court also emphasised the important role of environmental defenders and highlighted the “heightened risk” that such defenders will suffer rights violations due to their activities in the context of the climate emergency. Accordingly, states must design and implement strategies to respond to and prevent further instances of violence or intimidation against environmental defenders: at [560]-[629].

ENGLAND AND WALES HIGH COURT

Friends of the Earth Limited v Secretary of State for Levelling Up, Housing and Communities, West Cumbria Mining Limited and Cumbria County Council [2024] EWHC 2349 (Admin) (Holgate J)

Facts: On 7 December 2022 the Secretary of State for Levelling Up, Housing and Communities (the **SoS**), on the recommendation of the Planning Inspector (the **Inspector**), granted West Cumbria Mining Ltd (**WCM**) planning permission for a new underground coal mine in Whitehaven, Cumbria. The application sought approval for a mine that would extract and process metallurgical coal for a period of 25 years between 2025 and 2049. The coal extracted and processed at the site was intended to be blended with coal sourced from elsewhere to produce coke that was to be used in the production of steel.

As part of the approval process, WCM was required to provide an environmental impact assessment (**EIA**).

Pursuant to the [Town and Country Planning \(Environmental Impact Assessment\) Regulations 2017](#), that EIA was required to include “the likely significant effects of the development on the environment”. The EIA presented by WCM noted that the residual emissions of the project were “significant” and subsequently proposed to enter into a planning obligation under [s 106](#) of the [Town and Country Planning Act 1990 \(UK\)](#) to compensate for those emissions by purchasing offsets. On that basis, WCM claimed that the mine would be a “net zero mine”. However, at the public inquiry held in October 2021, WCM argued that the downstream greenhouse gas emissions (**GHG**) attributable to the burning of the coal produced at the mine went beyond the scope of the EIA, as these were not effects, whether direct or indirect, of the proposed mine. Accordingly, an assessment of these emissions were not covered in the EIA. WCM further argued that there was no legal requirement for such emissions to be considered as they would not comprise any additional emissions compared to the existing baseline as the coal produced would substitute, rather than be additional to, other coking coals already in use.

The Inspector, in assessing the proposal, agreed with WCM that the downstream emissions of the project, whilst significant, were not indirect significant effects of the proposed development. The Inspector arrived at this conclusion after determining that WCM would have no knowledge over the processes or mitigation measures of the downstream users and that the use of the coal was subject to decisions yet to be made. The Inspector recommended to the SoS that the mine be approved and the SoS accepted that recommendation.

Two environmental organisations, Friends of the Earth Limited (**FoE**) and South Lakeland Action on Climate Change (**SLACC**) commenced proceedings in the High Court of Justice seeking that the SoS’s approval be quashed. Following the commencement of proceedings, the United Kingdom Supreme Court handed down its judgment in *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20 (**Finch**), in which it was held that the downstream emissions caused by burning fossil fuels were to be considered as likely significant effects of fossil fuel extraction projects. As a result, the SoS agreed to submit to judgment on some but not all grounds, whilst WCM continued to defend each of the grounds of challenge.

Issues: The claimants jointly brought three grounds of appeal and each separately brought a further ground of appeal (grounds 4 and 5 below):

- (1) Did the SoS breach the Regulations by determining that the GHG emissions from the burning of coal produced at the mine was not a likely significant effect of the proposed development (**Breach of the regulations**);
- (2) Did the SoS err by finding that the development would have a neutral or beneficial effect on global GHG emissions on the basis that the coal produced would substitute for other coal in the global market (**Market substitution**);
- (3) Did the SoS fail to have regard to the effect of granting permission to the mine on the UK's capacity to perform its leadership role in promoting international climate action (**Impact on UK's leadership role**);
- (4) Did the SoS err by determining that the mine would be "net zero" for the purpose of reaching the UK's sixth carbon budget, despite WCM's reliance on international offset credits that did not count toward the UK's carbon budget (**Reliance on offsetting arrangements**); and
- (5) Did the SoS unlawfully apply a different threshold on FoE and SLACC's evidence and arguments at the public inquiry compared to WCM's evidence and arguments (**Disparity in the treatment of the parties' cases**).

Held: Holgate J upheld the appeal on all but the final ground and quashed the decision of the SoS:

Breach of the regulations

- (1) It was common ground that the coal produced at the proposed mine would eventually be combusted and cause the emission of GHG. Following the decision of the Supreme Court in *Finch*, those emissions were to be considered likely significant indirect effects of the proposed mine, which were required to be assessed in the EIA. Given the scale and significance of the likely downstream emissions of the project, the assessment of those emissions was an "obviously material consideration that the SoS was obliged to take into account": at [101]-[102];
- (2) The Inspector also had regard to a number of factors which the Supreme Court in *Finch* held to be irrelevant considerations. This included the fact that the coal would be subject to intervening processes, that WCM had no knowledge or control over those processes or the mitigation measures downstream users may employ and that the use of the coal was subject to downstream decisions that were yet to be made: at [94]-[95];
- (3) The possible offsetting effect that any potential substitution would have was not a relevant factor in determining whether the burning of coal from the proposed mine was a likely significant effect. Whether

the extraction of coal from the proposed mine was a legally relevant cause of other coal remaining in the ground was not the same question as whether the extraction was, in law, a cause of the GHG emissions produced when that coal is burnt. The burning of coal from the proposed mine was an inevitable impact but there was no finding made by the Inspector or SoS that it was inevitable that other coal would remain in the ground as a result of the proposed mine being approved: at [104]-[110];

Market substitution

- (4) WCM's argument, that a decision-maker did not need to consider the emissions caused by the combustion of the coal produced at the proposed mine because it would substitute for coal produced elsewhere, was reliant upon that decision-maker accepting that a perfect or virtually perfect substitution was possible. However, the SoS in finding that the mine's downstream effects could be "slightly beneficial" only found that there would be a partial substitution or failed to reach any consistent conclusion on the issue. Accordingly, it was not open to the SoS to find that the proposed mine would not lead to a net increase in GHG emissions: at [163]-[189];

Impact on UK's leadership role

- (5) The Inspector and SoS each accepted that the proposed mine would be a "net zero" mine and therefore would not impact upon the UK's ability to meet its obligations under international climate agreements. This conclusion was reached following the SoS's previous findings that any emissions from the burning of coal produced at the mine would substitute for the emissions generated by burning coal produced elsewhere. As this conclusion was not available, the SoS could not rely upon it to avoid consideration of the effect of the mine on the UK's capacity to reach its international commitments: at [208]-[209];
- (6) The SoS further failed to consider the possibility that granting approval to the proposed mine would encourage other similar offset dependent projects that would be undesirable as offsets are a finite resource: at [210];

Reliance on international offsetting arrangements

- (7) Given the significance of offsetting to the SoS finding that the mine would have a "net zero" effect on emissions, the deliverability and legality of the offsetting arrangements proposed by WCM was a relevant planning consideration that the SoS was required to take into account. The SoS failed to give

sufficient consideration to the FoE's arguments that any offsetting arrangements instituted by WCM needed to be done in accordance with UK policy on offsetting that only counted UK based offset gains toward the carbon budget: at [212]-[226]; and

Disparity in the treatment of the parties' cases

(8) There was no inconsistency in the approach of the Inspector and SoS to the evidence and arguments raised by the parties at the hearing: at [227]-[230].

HIGH COURT OF AUSTRALIA

La Perouse Local Aboriginal Land Council v Quarry Street Pty Ltd [2025] HCA 32 (Gageler CJ, Gordon, Edelman, Steward and Jagot JJ)

(Related decisions: *Quarry Street Pty Ltd v La Perouse Local Aboriginal Land Council* [2024] NSWCA 107 (White, Adamson, Stern JJA); *Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016* [2023] NSWLEC 62 (Preston CJ of LEC))

Facts: On 19 December 2016, the New South Wales Aboriginal Land Council (**NSWALC**) lodged a claim under s 36(2) of the *Aboriginal Land Rights Act 1983 (NSW)* (**ALR Act**) for Crown land in the La Perouse Local Aboriginal Land Council area. The land was the subject of a special lease in favour of the Paddington Bowling Club. That lease, after being renewed for a term of 50 years in 2010 was transferred in 2011 with the consent of the Crown to CSKS Holdings Pty Ltd (**CSKS**). Whilst the proprietor of the lease, CSKS undertook no purposeful activity on the land and subsequently transferred the lease in 2018 to Quarry Street Pty Ltd (**Respondent**) again with the consent of the Crown.

By the time of the claim in 2016 and subsequent transfer in 2018, the site had fallen into disuse, apart from the northern end of the site which was used by the Wentworth Tennis Club (**WTC**) under an oral sublease. On 10 December 2021, the Minister administering the *Crown Land Management Act 2016* (**Minister**), determined that the land was "claimable Crown lands" within the meaning of that term under s 36(1) of the ALR Act and, as a result of s 36(5), granted the claim by transferring the land to the NSWALC. The Minister arrived at the conclusion that the land fell under the definition of claimable Crown lands in s 36(1) after determining that the land was "not lawfully used or

occupied" under s 36(1)(b) at the time the claim was lodged, as apart from the land used by the WTC, the land was not being used or occupied. And despite being used by the WTC, the northern end of the site was not being lawfully used, as the oral sublease to the WTC was contrary to the lease agreement.

The Respondent commenced Class 4 proceedings in the Land and Environment Court (**LEC**) seeking an order preventing the transfer of the land, an order in the nature of *certiorari* to quash the Minister's decision and a declaration that the land was being lawfully used or occupied at the time of the claim. The Respondent argued that the WTC's use of the northern part of the site did amount to a lawful use or alternatively that the Crown itself was using the land by leasing it to CSKS. Further, the Respondent argued that the Minister failed to consider the Respondent's argument that the Crown itself was using the land and therefore denied the Respondent procedural fairness. The LEC rejected each of these arguments and dismissed the appeal. The Respondent appealed to the Court of Appeal, which upheld the appeal and quashed the decision of the Minister, finding that the Crown was using the land at the time of the claim by leasing it to CSKS. Key to the Court of Appeal's reasoning was that the term "used", as it appeared in s 36(1)(b), was to be interpreted by reference to the definition of "land" under s 4(1), which included "any estate or interest in the land, whether legal or equitable." Thus, it was not necessary that the use of the land be a physical use.

The La Perouse Local Aboriginal Land Council appealed to the High Court of Australia, who granted special leave to hear the appeal on 5 September 2024.

Issue: Was the land, the subject of the claim, being "used" by the Crown through its lease to CSKS and therefore did not constitute claimable Crown lands under s 36(1) of the ALR Act.

Held: A majority of the High Court upheld the appeal (per Gageler CJ, Edelman and Jagot JJ, Gordon and Steward JJ dissenting) and restored the first instance decision of Preston CJ of the LEC:

- (1) The term "land", as defined under s 4(1) of the ALR Act, was inclusive and is capable of encompassing both "any estate or interest in land, whether legal or equitable" as well as its common or ordinary definition of being "a physical mass or tract of ground." The definition in s 4(1) of the ALR Act was also subject to a caveat that the definition applied "except in so far as the context or

subject-matter otherwise indicates.” Other subsections under s 36 of the ALR Act both contemplate and can only have applicability to land as a physical entity or tract of ground. This indicates that where the term “land” appears in s 36 of the ALR Act, it is referring to land as a physical entity and not proprietary rights or interests: at [11]-[35], [219]-[239];

- (2) To be claimable Crown lands under s 36(1) of the ALR Act, the land must be “able to be lawfully sold or leased” or “reserved or dedicated for any purpose” (s 36(1)(a)). If the capacity to sell or lease the land is a qualifying condition, it would be incoherent or incongruent if the existence of a such a lease disqualified the land from being claimable Crown lands, as a result of that lease constituting a use under s 36(1)(b). To overcome this potential incoherence a distinction should be made between “constructive use” and “actual use”. An actual use of the land may not require the physical use of the land, as what constitutes a use will depend on the purpose of that use. What is required is the “actual use” of land in fact, in the sense of a more than merely notional, present and not merely contemplated or intended, use of the land. Such necessary use is not present where the only use is a lease granted in respect of it. Land is therefore “used” by a purposeful interaction with it at the date of the claim and not merely continuing an exploitation of the rights attached to it at the date of the claim: at [36]-[42], [142]-[154], [240]-[257]; and
- (3) The Court of Appeal’s reasoning identified that the word “used”, as it appeared in s 36(1)(b) of the ALR Act, had its protean or core ordinary meaning and that the fact of the existence of a lease would be sufficient in each case to demonstrate that land was in fact being “used”. The Court of Appeal made no factual findings as to what terms of the lease to CSKS resulted in the land being “used” and thus the only fact that rendered the land as being “used” was the mere fact of the existence of the lease. This conclusion would prohibit a decision-maker under the ALR Act from finding that land, the subject of a claim, was not being used where a lease existed over the land, despite the full range of facts and circumstances indicating that the land was not being “used”. Such reasoning was irreconcilable with existing High Court authority and thus erroneously found that it was not open to the Minister on all the facts and circumstances available to find that the land was “not lawfully used”: at [197]-[213].

FEDERAL COURT OF AUSTRALIA

Pabai v Commonwealth of Australia (No 2) [2025] FCA 796 (Wigney J)

Facts: Mr Pabai Pabai and Mr Guy Paul Kabai (**applicants**) are each elders of the Guda Maluyligal Nation residing in the small low-lying islands of Boigu and Saibai in the Torres Strait. Each had experienced the damage that climate change had on their respective islands and the consequent effect of those impacts on the capacity for Torres Strait Islander Peoples to maintain the practice of their traditional culture and customs. In particular, climate change had a disproportionate impact on Torres Strait Islander Peoples, as their traditional homelands had been inundated by seawater and rendered inarable by salination, sacred sites had been destroyed, traditional sources of food had become scarce and their ability to practise traditions and customs had been severely impacted by the damage to their lands and island ecosystems.

In response to these impacts, the applicants commenced proceedings in the Federal Court, alleging that the Commonwealth Government owed a duty of care to Torres Strait Islander Peoples to protect them and the Torres Strait Islands from the climate impacts by taking reasonable steps to set adequate greenhouse gas (**GHG**) emissions reduction targets, having regard to the best available science. The applicants argued that the Commonwealth breached that duty of care when setting emissions reduction targets in 2015, 2021 and 2022, as these targets were set without the Commonwealth having regard to the best available science and therefore could not prevent or minimise climate impacts in the Torres Strait.

Alternatively, the applicants argued that the Commonwealth had failed to take reasonable steps to implement adaptation measures, being the provision of funding for the construction of seawalls to prevent or minimise the current and projected impacts of climate change on the Torres Strait Islands. This failure, in the applicants’ argument, constituted a breach of a duty of care owed to the applicants by the Commonwealth to protect Torres Strait Islander Peoples from marine inundation and erosion.

The loss or damage claimed as a result of both breaches was the collective loss for all Torres Strait Islander Peoples of knowledge systems, traditions, laws, protocols and practices

that together form Ailan Kastom (or island custom). In respect of each of these claims, the applicants sought declarations that the Commonwealth owed the duties of care alleged and that each were breached. Further, the applicants sought damages for the claimed loss of Ailan Kastom.

Much of the scientific and factual evidence regarding the existence and effects of climate change was not disputed by the Commonwealth. The Commonwealth primarily resisted the applicants claim on the basis that the tort of negligence was an unsuitable vehicle to challenge decisions that involved matters of government policy, and thus the duties alleged by the applicants did not exist. However, if such duties did exist, the Commonwealth argued that there was no breach and that the damage suffered by the applicants was not a compensable loss.

Issues:

- (1) Does the Commonwealth owe a duty of care to Torres Strait Islanders Peoples to protect them, their Ailan Kastom and the marine environment of the Torres Strait from the current and projected impacts of climate change by taking reasonable steps to set GHG emissions reduction targets with regard to the best available science. If so, did the Commonwealth breach that duty of care (**emissions reduction targets duty of care**);
- (2) Alternatively, does the Commonwealth owe a duty of care to Torres Strait Islander Peoples to take reasonable care to protect against marine inundation and erosion and if so, did the Commonwealth breach that duty of care (**adaptation duty of care**); and
- (3) Is the loss of fulfilment of Ailan Kastom, arising from damage to or degradation of the land and marine environment of the Torres Strait Islands, compensable under the law of negligence (**loss of Ailan Kastom**).

Held: Applicants' primary and alternative claims dismissed; orders as to costs to be finalised at a later hearing:

Emissions reduction targets duty of care

- (1) The duty alleged by the applicants regarding the Commonwealth's setting of emissions reductions targets concerned matters of core or high government policy and political judgment that were ultimately unsuitable for judicial determination. Existing authorities indicated that such matters should not be subjected to the common law duty of care in negligence: at [852]-[855];
- (2) Courts have the capacity to assess and determine whether targets set by the Commonwealth are

consistent or compatible with the best available science. However, such a determination does not resolve the question of whether the target set by the Commonwealth constituted a reasonable step to protect Torres Strait Peoples from climate impacts. That assessment would likely involve consideration of matters beyond the best available science, such as economic, social and political considerations, and would require value judgements and policy choices on which reasonable minds may differ. In these circumstances it would be inappropriate and impractical for a court to assess the reasonableness of the Commonwealth's actions regarding the setting of emissions reduction targets and equally inappropriate to impose the alleged duty of care on the Commonwealth: at [862]-[866];

- (3) In addition to the finding that it was not appropriate to impose the alleged duty given the political nature of the decision to set emissions reduction targets, the Court found, through salient features analysis, that the relationship between the Commonwealth and Torres Strait Islander Peoples was not of a nature that gave rise to the duty of care alleged: at [941]-[949];
- (4) If, contrary to the Court's earlier findings, a duty of care did exist with respect to the setting of emissions reductions targets, the standard of care would not be that the Commonwealth was to set a target in line with the best available science and implement measures to achieve this target as this would require that the Commonwealth to have regard only to the best available science. Rather, it should be open to the Commonwealth to consider a range of matters, along with the best available science, when setting reduction targets: at [1010]-[1013];
- (5) In any event, it could not be concluded that the Commonwealth's setting of, what were found to be low and unambitious, targets in 2015, 2020 and 2021 had a material impact on climate change in a specific region. The Court however emphasised that this finding did not excuse or justify the Commonwealth's lack of ambition: at [1093]-[1094];

Adaptation duty of care

- (6) The Commonwealth's decisions regarding adaptation measures, and in particular the provision of funding for sea walls, concerned matters regarding the appropriation of public monies across three forms of government and therefore were matters of high or core government policy that were inappropriate to be subject to the common law duty of care in negligence. Further, if the duty did exist, there was no breach as all

of the funding for the seawalls was eventually provided and any such breach if found did not cause the damage suffered by the applicants: at [1152]-[1165], [1214]; and

Loss of Ailan Kastom

(7) The Court considered, noting the lack of caselaw recognising the loss of similar interests as separate forms of actionable and compensable damage, that it did not have the capacity to recognise that the participation in, or observance of, customs, traditions, knowledge systems, protocols and practices that together form Ailan Kastom, constituted rights or interests capable of being protected by law: at [1131]-[1132].

NSW COURT OF APPEAL

Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd [2025] NSWCA 163 (Ward P, Adamson JA and Price AJA)

(Decision under review: *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2024] NSWLEC 86 (Robson J))

Facts: The appellant Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc (**Denman**) challenged under s 58(1) of the *Land and Environment Court Act 1979 (NSW)* (**LEC Act**) the dismissal by Robson J in the Land and Environment Court (**LEC**) of its application for judicial review of a decision made by the second respondent, the Independent Planning Commission of NSW (**IPC**), which granted consent to the first respondent MACH Energy Australia Pty Ltd (**MACH**) for a State significant development approving the optimisation of the Mount Pleasant Coal Mine (**Project**) and extending the existing development consent for 22 years. By amended notice of appeal, Denman contended that Robson J had erred in concluding that the IPC did not fail to consider certain mandatory considerations under s 4.15(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**) on two grounds: first, whether conditions could be imposed to minimise Scope 3 emissions (as required by cl 2.20 of the *State Environmental Planning Policy (Resources and Energy) 2021* (**Resources SEPP**), by operation of s 4.15(1)(a)(i) of the EPA Act) (**Ground 1(a)**); and second, the likely environmental impacts of the

Project on the natural and built environment in the locality (as required by s 4.15(1)(b) of the EPA Act) (**Ground 1(b)**).

Issues:

- (1) Whether the appeal should be allowed on any of the grounds advanced by Denman; and
- (2) If the appeal was allowed, what relief should be granted.

Held: Appeal allowed on Ground 1(b) (per Ward P, with Price AJA agreeing, Adamson JA agreeing as to orders but writing separately), and the matter was remitted to the LEC for consideration under [Div 3 of Pt 3](#) of the LEC Act:

Ground 1(a)

- (1) Ground 1(a) was not made out, as the fact that the IPC accepted that Scope 3 emissions were “regulated” and accounted for elsewhere sufficiently indicated that the IPC had considered there to be no need for imposing minimisation conditions in relation to the Scope 3 emissions: at [81], [245];
- (2) As a result of its decision not to proffer potential conditions for the IPC’s consideration, Denman could not dispute the IPC’s conclusion that the Scope 3 emissions were regulated elsewhere: at [83], [245];
- (3) All that cl 2.20 of the Resources SEPP required was that the IPC consider whether to impose conditions on Scope 3 emissions, and if so, what conditions should be imposed. The weight to be placed on any factor was a matter for the IPC and not for the Court, which reflects the principle that judicial review cannot trench beyond its boundaries nor be used as a decoy to review the merits of a decision: at [232], [245];

Ground 1(b)

- (4) Ground 1(b) was made out, as the IPC had not considered the mandatory consideration of the Project’s impacts on the environment in the locality of the Project under s 4.15(1)(b) of the EPA Act, nor had the IPC considered the impact of climate change on the locality (which was required): at [106]-[108], [245];
- (5) The IPC’s statutory obligation to consider the likely impacts of the Project on the locality required it to address the potentially adverse effects of climate change in the locality which could not be discharged by general references to global warming’s effects. The IPC had failed to comply with s 4.15(1)(b) of the EPA Act: at [236], [245];

Appropriate relief

- (6) The primary judge could impose conditions pursuant to Div 3 of Pt 3 of the LEC Act which would validate the consent. As such, the matter should be remitted to the

LEC, which had not been able to consider whether to make an order under Div 3 of Pt 3 but has a statutory obligation to do so: at [119]-[124], [242]-[243], [245]; and

- (7) MACH was ordered to pay Denman’s costs of the appeal, and given that the matter was remitted to the LEC, the costs of the proceedings at first instance should be determined on the remittal: at [127]-[128], [245].

The Owners – Strata Plan No 7114 v Northern Beaches Council [2025] NSWCA 197 (Ward P, Stern and Free JJA)

(Decision under review: *Northern Beaches Council v Strata Plan 7114* [2024] NSWDC 648 (Weber SC DCJ))

Facts: Northern Beaches Council (**Council**) was the owner of Lots 185 to 430 in registered Strata Plan no 7114 (**SP**), each being a carparking space. The Appellant was the Owners Corporation for the SP (**Owners Corporation**). The Council operated a carparking facility using Lots 185 to 383 and 389 to 411 in the SP. Since at least 1996, the Council licensed to the Owners Corporation 19 carparking spaces, comprising Lots 412 to 430 in the SP (**Licensed Lots**), which were made available to residents and other authorised individuals. Between June 1999 and January 2024, the rights and obligations of both parties were governed by a deed (**1996 Deed**), which the Owners Corporation terminated on 8 January 2024. After June 2016 the Owners Corporation ceased paying the licence fees but otherwise continued to act as if the 1996 Deed was in effect. The primary judge upheld the Council’s claim for unpaid licence fees between June 2016 and 8 January 2024 and rejected the Owners Corporation’s claim that the licence fees paid between 30 June 2009 and June 2016 were under a mistake of law. The Council’s claim for trespass or alternatively nuisance in relation to the restriction of access to the Licensed Lots via a roller door controlled by the Owners Corporation was upheld. The Owners Corporation’s claim for unpaid electricity usage prior to 21 March 2013 was rejected.

Issue: Whether the Owners Corporation was obliged to make payments to the Council whilst the licence remained in force.

Held: Appeal dismissed (per Free JA, with Ward P and Stern JA agreeing):

- (1) The Owners Corporation was obliged to pay the licence fees as required by the 1996 Deed until it was terminated on 8 January 2024. The Owners Corporation

did not labour under a mistake in paying the licence fees between June 2009 and May 2016: at [43]-[58];

- (2) The roller door remaining in place after the termination of the 1996 Deed constituted a real and substantial interference with the Council’s right to enjoy the Licensed Lots: at [59]-[77];
- (3) The primary judge’s determination of damages was appropriate, considering the possible revenue using the Licensed Lots as a public carpark, less an amount to reflect the commercial vicissitudes: at [78]-[79]; and
- (4) The rejection of the Owners Corporation’s claim for electricity usage on the basis that the claim was out of time was correct: at [80]-[92].

Seek Justice Pty Ltd v Blue Mountains Local Planning Panel/Blue Mountains City Council; Seek Justice Pty Ltd v Minister for Planning [2025] NSWCA 201 (Leeming, Mitchelmore and Stern JJA)

(Related decision: *Seek Justice Pty Ltd v Blue Mountains City Council; Seek Justice Pty Ltd v Minister for Planning* [2025] NSWCA 120 (Griffiths AJA))

Facts: The Applicant sought to set aside the orders of Griffiths AJA in two appeal proceedings dismissing an application to set aside the orders of the Registrar of the Court of Appeal (**Decision**). The orders made by the Registrar dismissed two appeal proceedings (**2023 Appeal** and **2024 Appeal**) pursuant to [r 13.6](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**UCPR**) for the Applicant’s failure to appear, notwithstanding notices issued to the Applicant (**Registrar’s Orders**). The Applicant also sought to set aside the Registrar’s Orders. The 2023 Appeal sought an appeal of an ex-tempore decision of Moore J dismissing the proceedings under [r 13.4](#) of the UCPR, after his Honour refused an application to restrain development being undertaken in reliance upon development consent (**DA**) granted by Blue Mountains City Council (**Council**) for an ultra-trail running event (**2022 Event**). The 2024 Appeal sought to challenge the orders of Pepper J for dismissing an application for declaratory relief in relation to the DA for the 2022 Event and eco-tourism licences issued by the Council, and orders of Pritchard J dismissing a challenge to the validity of two local planning panel decisions, a challenge to a modified DA for the 2022 Event and whether the conditions of the DA for the 2022 Event had been complied with.

Issues:

- (1) Whether there was a misapprehension of the facts or the law affecting the Decision or that there was some matter calling for review, such that the orders be set aside pursuant to [r 36.15](#) of the UCPR, or with regard to the principles as set out in [\[14\]-\[17\]](#) of this judgment; and
- (2) Whether the interests of justice required the Decision be set aside or whether there was a real likelihood that it would be unjust to the Applicant to allow the judgment to stand, such that the Decision be set aside pursuant to [r 36.16\(2\)\(b\)](#) of the UCPR.

Held: Application dismissed (per Stern JA, with Leeming and Mitchelmore JJA agreeing):

- (1) There was no procedural unfairness to the Applicant in the Decision made in the absence of the Applicant. There was nothing procedurally unfair or improper in Griffiths AJA's decision having regard to emails on the Court file for the limited purpose of identification: at [\[40\]-\[44\]](#);
- (2) There was no explanation for the Applicant's non-attendance on the date of the Decision or for the hearings in relation to the Registrar's Orders: at [\[46\]-\[52\]](#);
- (3) There was no utility in the Applicant being permitted to pursue the 2023 Appeal and there was no evidence that such an appeal would have any realistic prospects of success: at [\[53\]-\[54\]](#);
- (4) Considerations of utility weighed against the Applicant being permitted to reinstate the 2024 Appeal, nor was there any arguable error in Pritchard J's refusal to order declaratory relief: at [\[55\]](#); and
- (5) There was no real likelihood of injustice for the decisions of the lower Courts to stand and for this reason there was no basis to set aside the orders under [r 36.16\(2\)\(b\)](#) of the UCPR: at [\[56\]](#).

SUPREME COURT OF NSW

Budvalt Pty Ltd v The Minister for Lands and Water; Hospitality and Racing, the Minister Administering the Water Management Act 2000 [\[2025\] NSWSC 609](#) (Elkaim AJ)

(Related decision: *Ramsay v Minister for Land and Water; Hospitality and Racing, The Minister Administering the*

Water Management Act 2000 [\[2023\] NSWCA 299](#) (Bell CJ, Payne and Adamson JJA))

Facts: These proceedings concerned a judicial review of a NSW Government Minister's (**Minister**) decision to issue a flood plain harvesting licence (**Decision**). The Decision applied to two adjacent properties known as Geera and Miralwyn, situated within a floodplain near the town of Moree, owned by Budvalt Pty Ltd (**Budvalt**). The river was the Barwon-Darling River. On 14 March 2023, Budvalt was advised that by Decision made on 17 February 2023 that it would be granted the Geera/Miralwyn Access Licence with a share component of 9,702 units. In accordance with cl 39(d1) of the [Water Sharing Plan for the Barwon-Darling Unregulated River Water Source 2012](#) (**Water Sharing Plan**), one share unit equated to one megalitre of water. Budvalt sought to set aside the Decision, contending that the model used to determine the entitlement did not produce a result that reflected what was required by [reg 23l](#) of the [Water Management \(General\) Regulation 2018 \(NSW\)](#) (**the Regulation**).

Issue: Whether the Minister erred in making the Decision on the grounds of legal unreasonableness, jurisdictional error, jurisdictional facts and no evidence.

Held: The Decision was set aside and remitted for determination in accordance with law:

- (1) The accounting rules in [s 85](#) of the [Water Management Act 2000 \(NSW\)](#) (**WM Act**) and cl 42 of the Water Sharing Plan can be seen as the accrual of the licence holder's asset into its account with the limit being 5 times the annual entitlement: at [\[77\]-\[84\]](#);
- (2) Regulation 23l(2) of the Regulation required a precise calculation and did not permit flexibility. The Regulation did not make allowances for averaging and averaging produced a result above the share entitlement granted by the Decision: at [\[85\]-\[95\]](#);
- (3) The model used to determine the entitlement left out an important element, being the consideration of direct irrigation to crops. The Minister therefore did not do what the Regulations prescribed. This was the basis for judicial review, not the exercise of any discretion by the Minister: at [\[96\]-\[112\]](#);
- (4) The definition of "flood runners" fell within the definition of "eligible water supply work" in reg 23l of the Regulation. The Minister's submission that the model considered direct crop irrigation, by considering temporary storage was contrary to the expert report: at [\[113\]-\[120\]](#);

- (5) Budvalts' complaint was material: at [121]-[123]; and
- (6) The case was one of jurisdictional error and the grounds of no evidence and jurisdictional facts were rejected. This was a case of the Minister not acting in accordance with its jurisdiction, namely the path dictated by the Regulations: at [126]-[134].

***Darley v City of Parramatta Council* [2025] NSWSC 990**
(Schmidt AJ)

Facts: These proceedings concerned a challenge to the City of Parramatta Council's (**Council**) decision to formally censure the Applicant in accordance with [s 440G\(1\) of the Local Government Act 1993 \(NSW\)](#) (**LG Act**) (**Censure Decision**) and the validity of a report prepared for Council (**the Report**). The Council resolved via closed session to enter a strategic partnership with the Parramatta Eels Rugby League Club (**Decision**). The Applicant disagreed with the Decision and communicated those views via social media posts and an interview. Complaints were made regarding the Applicant's alleged disclosure of confidential information, the disclosure of financial information known to be untrue and the making of untrue statements about the partnership (**Complaints**). The Complaints were referred to the Council's Ombudsman and Conduct Co-ordinator, in which a Conduct Reviewer then undertook an investigation and prepared the Report. The Applicant sought judicial review of the Report's recommendation to censure the Applicant, pursuant to [s 69 of the Supreme Court Act 1970 \(NSW\)](#). The Council resolved not to defer its consideration of the Report until after the judicial review proceedings had concluded and made the Censure Decision public.

Issues:

- (1) Whether the Council should have resisted the application to set aside the Censure Decision;
- (2) The proper construction and operation of the LG Act, the Council's Code of Conduct (**Code**) and the applicable procedures;
- (3) Whether the Conduct Reviewer or Conduct Co-ordinator departed from the requirements of the Code and applicable administrative procedures;
- (4) Whether the Report was invalid;
- (5) Whether the Applicant was denied procedural fairness;
- (6) Whether there was apprehended bias in relation to the Conduct Reviewer;
- (7) Whether the Report failed to provide reasons for the recommendation to censure the Applicant;
- (8) Whether there were further departures from the Code and the LG Act for the failure to provide the annexures

to the Report to the Councillors for their consideration; and

- (9) Whether there was apprehended bias in relation to the Council meeting resolving to censure the Applicant.

Held: The Report and the Censure Decision were quashed:

- (1) In relation to the Censure Decision, the Council should have submitted to the Court's jurisdiction and there was not a proper basis to depart from the principles in *The Queen v Australian v Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13: at [21]-[58];
- (2) Procedures and aspects of the Code were not complied with rendering the Report invalid: at [59]-[61];
- (3) The Conduct Co-ordinator departed from the requirements of the Code: at [69]-[87];
- (4) The Conduct Reviewer did not comply with the requirements of the Code and procedures in taking advice or guidance from the Conduct Co-ordinator. The Code required the Report and its annexures to be placed before the Council: at [88]-[100];
- (5) The Conduct Reviewer did not have an impartial and unprejudiced mind in the resolution of the questions for determination: at [101]-[109];
- (6) The obligation to provide reasons in the Report was not met: at [110]-[118];
- (7) The Council failed to comply with the Code and relevant procedures when deciding to censure the Applicant. The meeting did not involve a consideration of the Report, the Applicant's submissions or whether further information or a supplementary report was required: at [123]-[127];
- (8) The Censure Decision was not the result of apprehended bias: at [153]-[158];
- (9) The Applicant was not afforded procedural fairness in relation to the Censure Decision: at [159]-[165]; and
- (10) It is possible that the Councillors may have arrived at a different conclusion when deciding to censure the Applicant had they considered the Report, its annexures and the Applicant's submissions. The Censure Decision was invalid: at [166]-[175].

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

Environment Protection Authority v Appleton [2025] NSWLEC 62 (Pritchard J)

Facts: Luke Appleton (**defendant**) pleaded guilty to one offence under [s 144\(1\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**). The defendant permitted his property in Jindera to be used as a waste facility for the storage of over 10,000 waste tyres without lawful authority, in contravention [s 144\(1\)](#) of the POEO Act.

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

Held: The defendant was found guilty of operating a waste facility without lawful authority, imposed a total penalty of \$25,000, and made ancillary orders including a restoration order under [s 245](#) of the POEO Act:

Objective seriousness of the offence

(1) The Court found the offence was at the upper end of the low range of objective seriousness. There was no actual environmental harm, although there was a risk of harm to the environment arising from the risk of fire which the defendant ought reasonably to have foreseen. The defendant had general control of whether his property was used as an unlawful waste facility, although this control was not specific as he was not involved in sourcing or transporting the waste tyres: at [98];

Subjective seriousness of the offence

(2) The Court found that the subjective considerations were overwhelmingly favourable to the defendant. The financial consequences of the failed business enterprise were “catastrophic” to the defendant as he lost the property and was declared bankrupt. The defendant was slow to commence removal of tyres, but brisk once the project commenced. The defendant’s prior convictions for firearms offences were neither mitigating nor aggravating factors. The defendant demonstrated a commendable level of remorse, taking responsibility for his actions through his cooperation with the Environment Protection Authority. He entered an early guilty plea: at [129]; and

Other considerations

(3) The Court considered general and specific deterrence, consistency in sentencing and the defendant’s capacity to pay a fine. The defendant was bankrupt, receiving Centrelink benefits, and had limited prospects of employment, making a lower penalty than would otherwise be appropriate. General deterrence meant that a nominal fine was not appropriate. Applying the instinctive synthesis approach, the Court applied a 50% discount: at [141]-[151].

WaterNSW v Kiangatha Holdings Pty Ltd; WaterNSW v Laurence Natale (No 4) [2025] NSWLEC 83 (Pepper J)

(Related decisions: *WaterNSW v Kiangatha Holdings Pty Ltd; Laurence Natale* [2019] NSWLEC 185 (Robson J); *Kiangatha Holdings Pty Ltd v WaterNSW* [2020] NSWCCA 263 (Hoeben CJ, Rothman and Fagan JJ); *WaterNSW v Kiangatha Holdings Pty Ltd; Laurence Natale* [2022] NSWLEC 6 (Robson J); *Kiangatha Holdings Pty Ltd v WaterNSW; Natale v WaterNSW* [2022] NSWCCA 280 (Ward P, Davies and Button JJ); *WaterNSW v Kiangatha Holdings Pty; Natale* [2023] NSWLEC 142 (Pritchard J))

Facts: Kiangatha Holdings Pty Ltd and its director, Laurence Natale (together, **defendants**), sought their costs of four withdrawn proceedings pursuant to [s 257D\(1\)](#) of the [Criminal Procedure Act 1986 \(NSW\)](#) (**CP Act**) or, in the alternative, [s 2](#) of the [Costs in Criminal Cases Act 1967 \(NSW\)](#) (**CCC Act**).

WaterNSW commenced Class 5 proceedings against the defendants charging each with actual and likely pollution of waters offences against [s 120\(1\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**). It alleged that Kiangatha, under Natale’s direction, had constructed an unsealed road with insufficient sediment controls resulting in the pollution of ephemeral drainage lines (alleged “waters”).

The defendants challenged the summonses for duplicity. Robson J dismissed the challenge (*Kiangatha (No 1)*).

The defendants appealed the decision of Robson J to the NSW Court of Criminal Appeal (**CCA**). The CCA found that each placement into the stream constituted a complete offence and could not, therefore, be brought under one charge (*Kiangatha CCA*).

WaterNSW was put to an election and sought leave to rely on the Sites A and B (the former actual pollution charges) and Sites C and D summonses (the former likely pollution charges). Robson J granted leave having found that the references to the Sites reflected the locations of the offences and therefore did not constitute fresh charges (*Kiangatha (No 2)*).

The defendants appealed. The CCA refused leave on the basis that Robson J's factual findings did not in of itself warrant the granting of leave (*Kiangatha CCA (No 2)*).

WaterNSW then obtained an expert report which opined that Sites A and B were not "waters" under the POEO Act, but Sites C and D were. The Board of WaterNSW (**Board**) resolved to withdraw the Sites A and B charges but waited a month to notify the defendants.

In the intervening period, the defendants commenced a challenge against the lawfulness of the offences charged in the Sites A to D summonses. Pritchard J dismissed the challenge on the basis that it was not brought in a timely manner, and that an insufficiency as to particulars did not render the offences unknown to law (*Kiangatha (No 3)*).

The defendants sent letters to WaterNSW requesting the withdrawal of the remaining charges. The Board resolved to discontinue the remaining proceedings on public interest grounds three months after the last letter was sent.

Issues:

- (1) Whether WaterNSW conducted an unreasonable or improper investigation pursuant to s 257D(1)(a) of the CP Act;
- (2) Whether WaterNSW initiated the proceedings without reasonable cause pursuant to s 257D(1)(b) of the CP Act;
- (3) Whether WaterNSW unreasonably failed to investigate relevant matters pursuant to s 257D(1)(c) of the CP Act;
- (4) Whether exceptional circumstances warranted the award of costs pursuant to s 257D(1)(d) of the CPA; and
- (5) Whether the defendants were entitled to a costs certificate pursuant to s 2 of the CCC Act.

Held: Costs awarded in relation to Sites A and B after the date of the service of the expert report. Costs certificate granted in relation to the Sites A and B proceedings. No order as to costs for Sites C and D:

- (1) The investigation was not unreasonable or improper. WaterNSW thoroughly investigated the offences by obtaining extensive evidence from site inspections,

conducting witness interviews, and engaging experts: at [175];

- (2) The proceedings were not initiated without reasonable cause. The framing of the charges as a single criminal transaction was not obviously duplicitous until the CCA held it to be so. That WaterNSW could not prove one element of the offence the pollution of "waters" as statutorily defined was not known to it when it commenced the proceedings: at [200]-[201];
- (3) The Sites A and B proceedings were conducted improperly. The one-month interval between the Board's decision to withdraw the proceedings and this being communicated to the defendants remained unexplained. Had the Board communicated its decision earlier, the defendants' challenge before Pritchard J in respect of those Sites would not have been pursued: at [212], [214];
- (4) The Sites C and D proceedings were not conducted improperly. While the defendants argued that all four Sites should have been withdrawn at the same time, there being no material difference between them, WaterNSW was entitled to rely on its expert who opined that Sites C and D were different insofar as they were "watercourses": at [219]-[220];
- (5) There was no unreasonable failure to investigate. No evidence suggested that anyone other than the defendants were responsible for the alleged offences, and WaterNSW was not alerted to the fact that the ephemeral drainage lines may not constitute "watercourses", and therefore "waters", during the investigation: at [227], [230];
- (6) WaterNSW's failure to expeditiously withdraw the Sites A and B summonses once it became apparent that they were not "waters" constituted exceptional circumstances: at [235]; and
- (7) The institution of the Sites A and B proceedings was unreasonable for the purposes of the CCC Act because had WaterNSW been in possession of its expert evidence that opined that those Sites were not "watercourses", the charges ought not to have been brought as an element of the offence could not be established beyond reasonable doubt. The same could not be said in relation to Sites C and D given that WaterNSW's expert concluded that they were "waters": at [251]-[252].

Secretary, Department of Planning and Environment v Aerotropolis Pty Ltd (No 2) [2025] NSWLEC 88 (Robson J)

(Related decision: *Secretary, Department of Planning and Environment v Aerotropolis Pty Ltd [2025] NSWLEC 48* (Robson J))

Facts: A sentencing decision was handed down on 22 August 2025 concerning a case in which Aerotropolis Pty Ltd (**defendant**) had been found guilty of 20 offences against the [National Parks and Wildlife Act 1974 \(NSW\)](#) (**NPW Act**) and the [Biodiversity Conservation Act 2016 \(NSW\)](#) (**BC Act**). The offences related to the clearing of native vegetation from a property in the period between 10 April 2016 and 28 May 2020. There were three categories of offence relevant to seven “charge periods”: first, harming or picking plants (namely, the critically endangered ecological community (**EEC**) Cumberland Plain Woodland in the Sydney Basin Bioregion (**CPW**)); second, damaging the habitat of an EEC (namely, CPW); and third, damaging the habitat of a threatened species, the Cumberland Plain land snail *Meridolum corneovirens* (**land snail**), which occurred due to the destruction of CPW.

Issue: The appropriate sentence to be applied to the defendant for each of the offences.

Held: The defendant was convicted and fined for each offence in differing amounts totalling fines in the amount of \$587,200 of the BC Act from 12 September 2017 to 28 May 2020:

Objective seriousness

- (1) The objective seriousness of most of the offences was in the mid to low range, except for the three charges relating to clearing in 2019 (Charge Group 6) which were at a higher level of seriousness because of the significance and the amount of clearing: at [54]-[60];
- (2) The offending was objectively serious, as it was committed intentionally, planned and motivated by financial gain; the clearing was conducted over a lengthy period of time; the defendant’s director was closely involved in the clearing; and significant harm was caused to the environment (including an EEC being CPW, the land snail and their habitat) where the risk of harm was entirely foreseeable: at [53];

Subjective circumstances of the defendant

- (3) By way of mitigating circumstances, the defendant had no previous convictions, although there was no evidence that the defendant had shown any remorse or provided any voluntary assistance to authorities. The

defendant’s inability to pay a fine relating to its entry into voluntary liquidation was not a decisive factor: at [61], [63]-[66], [71]-[72]; and

Other considerations

- (4) As to consistency in sentencing, the significant environmental harm caused by the offences was not double counted, while the common elements and similar criminality within each group of offences were taken into account before considering the principle of totality. As to totality, it was just and appropriate to reduce each fine by 20% (resulting in total fines of \$587,200) to reflect the internal relationship and overlap between the offences and the total criminality: at [78]-[81], [85]-[87].

Environment Protection Authority v Maules Creek Coal Pty Ltd (No 4) [2024] NSWLEC 92 (Pritchard J)

(Related decisions: *Environment Protection Authority v Maules Creek Coal Pty Ltd [2023] NSWLEC 94* (Pritchard J); *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 2) [2023] NSWLEC 97* (Pritchard J); *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 3) [2024] NSWLEC 97* (Pritchard J); and *Maules Creek Coal Pty Ltd v Environment Protection Authority [2023] NSWCCA 275* (Leeming, Payne and Kirk JJA, Wilson and Fagan JJ)).

Facts: In *Environment Protection Authority v Maules Creek Coal Pty Ltd (No 3)*, the Court found Maules Creek Coal Pty Ltd (**defendant**) guilty of three offences against s 64(1) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (**POEO Act**) in carrying out a blast other than in a competent manner contrary to condition O1.1 of its Environment Protection Licence (**EPL**) and one offence against s 140(1) of the POEO Act in causing the emission of noise due to improper handling of materials. The offences related to an overburden blast carried out by the defendant at its open-cut coal mine in Boggabri.

Issue: The appropriate sentence to be applied to the defendant in respect of the offences.

Held: The defendant was convicted of the three offences against s 64(1) of the POEO Act and one offence against s 140(1) of the POEO Act and ordered to pay a moiety of \$100,000 to the EPA and a contribution of \$100,000 to the NSW National Parks and Wildlife Service to contribute to the Brush-tailed Rock-wallaby Mount Kaputar National Park Translocation Project: at [230]:

Objective seriousness

The Court found that the offending fell within the low to mid-range of objective seriousness: at [151]. The blast complied with the specific conditions of the EPL (other than condition O1.1) and there was no actual harm to the environment or human health: at [69]-[70], [113], [119]. However, there was a risk of harm to the environment and human health, and the defendant failed to take practical measures to prevent the likelihood of harm and had control over the causes giving rise to the offences: at [134]-[135], [146];

Subjective circumstances of the defendant

In relation to mitigating circumstances, the Court found that the defendant had prior environmental convictions and showed no remorse: at [157]-[161]. While some community contributions made by the defendant were taken into account for the purpose of good character, many of the contributions relied upon were made by the defendant's parent company: at [169]. The defendant made no significant changes to its governance or procedures following the blast and there was insufficient evidence to enable the Court to make a positive finding in relation to the defendant's likelihood of reoffending or prospects of rehabilitation: at [171]-[172]; and

Other considerations

The Court found that there was a need for general and specific deterrence: at [186]-[187]. It applied the totality principle, noting the significant overlap between the four offences: at [216].

***Greer v City of Canada Bay Council* [2025] NSWLEC 93** (Pepper J)

Facts: George Greer (**defendant**) appealed against the severity of his sentence imposed by the Local Court for committing the offence of transporting waste to an unlawful waste facility contrary to [s 143\(1\)\(a\)](#) of the [Protection of the Environment Operations Act 1997 \(NSW\)](#). The offence related to the placement of a washing machine frame and tub (**items**) onto Rodd Lane by the defendant for less than one week. The Local Court ordered that the defendant pay a \$2,500 fine and the prosecutor's costs. The defendant, who was self-represented during the appeal, had initially appealed against liability and sentence but later amended his summons to appeal against sentence only.

Issue: The appropriate sentence to be imposed in respect of the offence.

Held: The charge was dismissed pursuant to [s 10\(1\)\(a\)](#) of the [Crimes \(Sentencing Procedure\) Act 1992 \(NSW\) \(CSP Act\)](#) and the defendant was ordered to pay a monetary penalty of \$2,500:

Objective seriousness of the Offence

(1) The offending conduct was at the lowest end of objective seriousness. It was not committed intentionally given that the defendant had temporarily placed the items onto Rodd Lane until he could obtain assistance to move them to a scrap metal yard. The offending conduct also occasioned no actual or likely environmental harm given its limited duration. While the defendant had previously committed an offence carrying a term of imprisonment, little weight was given to its commission given it had occurred fifteen years earlier: at [41], [46], [49];

Subjective circumstances of the Defendant

- (2) The subjective circumstances of the defendant operated to mitigate the penalty to a considerable degree. The defendant was elderly and of diminished health. The defendant was generally of good character and had shown remorse which limited the need for specific deterrence, although the prevalence of dumping offences necessitated a penalty that would deter the community: at [54]-[61], [72], [74];
- (3) The defendant could not pay a fine of more than a nominal amount. He subsisted on the maximum amount of pension and was unable to afford legal representation: at [63]-[64];
- (4) The defendant did not enter a guilty plea and was therefore not entitled to any discount in respect of the penalty: at [69]; and

Section 10 of the CSP Act

- (5) Having regard to the factors in [s 10\(3\)\(a\)-\(c\)](#) of the CSP Act including the defendant's diminished health, the trivial nature of the offence, and his temporary placement of the items, no conviction was recorded: at [83]-[85].

CONTEMPT

***Sader v Elgammal (No 5)* [2025] NSWLEC 63** (Pepper J)

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

Facts: The respondent partially demolished a wall and excavated the rock which underpinned it to accommodate

two concrete slabs (**Northern and Southern slabs**) on his property at 26 Bowden Crescent, Connells Point (**works**). The applicant, the registered proprietor of the neighbouring lot, sought a declaration in relation to the validity of the works.

Duggan J earlier held that the respondent's Construction Certificate was invalid, rendering the works unlawful. Her Honour ordered, amongst other things, that the respondent demolish the Northern slab and wall (**order 4(a)**) and ensure that no "building or construction material" was placed on either the Northern or Southern slabs (**order 6**). If, however, the respondent obtained a building information certificate (**BIC**), demolition of the portion of the "wall adjacent to the Northern slab" to which the BIC applied would not be required (**order 5**).

The applicants filed a motion charging the respondent with contempt of orders 4(a) and 6. The respondent pleaded not guilty to both charges on the basis that compliance with order 5 meant that he had not breached orders 4(a) and 6.

Issues:

- (1) Whether the Respondent was guilty of contempt;
- (2) Whether order 4(a) was ambiguous with respect to the retention of the wall and sections of the Northern slab when read with order 5;
- (3) Whether the BIC applied to the works the subject of order 4(a); and
- (4) Whether the respondent had breached orders 4(a) and 6.

Held: The respondent was guilty of contempt of orders 4(a) and 6:

- (1) Order 4(a) was in and of itself clear, in that, it required the removal of the Northern slab and wall. This construction was consistent with the demolition's purpose to eliminate the structures' unsoundness: at [100];
- (2) Doubt arose as to the extent to which order 5 spared the wall's demolition. This was because: first, the location specified by order 4(a) ("between the mean high water mark and the approved dwelling") qualified only part of the Northern slab and the wall; second, only a portion of the wall was "adjacent" to the Northern slab, the wall having been partially constructed on top of that slab; and third, the photographs annexed to the order circled the entire wall which was inconsistent with the word "portion" in order 5: at [95]-[97];

- (3) The respondent had sought approval for the entire wall in the BIC. But the Council only approved retention of the portion of the wall that was not underpinned by the slab. While there was no statutory power to approve only part of the subject of the BIC application, the respondent did not argue that the BIC was invalid, the corollary of such a finding would, in any event, have been that the respondent could not benefit from the dispensation provided for in order 5: at [117]-[118], [120]-[121], [125];
- (4) The BIC made it clear what portion of the wall it applied to, and therefore, what fell within the dispensation provided by order 5. Accordingly, the respondent was required to demolish the portion of the wall that fell outside the BIC's scope and was captured by order 4(a), which he had failed to do: at [129]-[130]; and
- (5) The respondent breached order 6. Photographic evidence showed rubble on the slabs that had not been removed as required. The emplacement was attributed to the respondent as the registered proprietor of the site with supervision of the works: at [178], [186].

Fairfield City Council v Camilleri (No 2) [2025] NSWLEC 75 (Robson J)

(Related decision: *Fairfield City Council v Camilleri* [2024] NSWLEC 56 (Robson J))

Facts: By notice of motion filed 5 September 2024 and amended 4 April 2025, Fairfield City Council (**Council**) sought orders that Saviour Camilleri be found guilty of contempt of the Land and Environment Court (**Court**) for disobeying or failing to comply with orders made by the Court on 3 November 2022 (**Orders**), that he be punished by a conviction and imprisonment for disobeying the Orders, and that the sentence of imprisonment be wholly suspended upon certain conditions.

Issue: Whether Mr Camilleri committed contempt of the Court as charged, and if so, what form of punishment would be appropriate.

Held: Mr Camilleri was guilty of contempt of the Court for disobeying or failing to comply with the Orders, was fined \$45,000 for his contempt, and payment of the fine of \$45,000 was suspended on condition that Mr Camilleri cease his conduct constituting the contempt and remove and dispose of specified waste materials within 28 days, failing which Council would be directed to perform those works at Mr Camilleri's cost:

Liability for contempt

- (1) The evidence before the Court established beyond reasonable doubt that, first, the Court made the Orders; second, the terms of the Orders were clear and unambiguous and capable of compliance; third, the Orders had been served on Mr Camilleri; fourth, Mr Camilleri had knowledge of the terms of the Orders; and fifth, Mr Camilleri had breached the terms of the Orders: at [26];
- (2) Mr Camilleri's breach was contumacious which involved deliberate defiance of the requirements of the Orders in circumstances where he had been well aware of the Orders and had continued to breach them: at [27];

Appropriate punishment

- (3) The relevant factors in determining the appropriate penalty were that Mr Camilleri's contempt represented a high level of objective seriousness as his conduct was intentional and ongoing; Mr Camilleri had a history of similar contempt convictions; Mr Camilleri displayed no apology, remorse or contrition; there was a need for both general and specific deterrence; Mr Camilleri's personal circumstances were very limited; and imprisonment would cause significant hardship to Mr Camilleri: at [39]-[50], [61]; and
- (4) In light of the evidence, imprisonment (with suspension) was not warranted. Mr Camilleri should be given a final opportunity to purge his contempt such that the penalty was suspended conditionally. As such, the appropriate punishment for the contempt was a monetary penalty of \$45,000, the operation of which was to be suspended upon conditions that Mr Camilleri undertake works to remove the specified waste materials in accordance with the Court's orders, and should he not do so Council was directed to enter the land to perform the works at his cost (pursuant to [r 40.8](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) and/or [s 23](#) of the [Land and Environment Court Act 1979 \(NSW\)](#)): at [56]-[58], [62].

JUDICIAL REVIEW

Emu Rider Pty Ltd ATF the Trustee for the Griffiths Investment Trust and Others v Minister administering the Water Management Act 2000 [2025] NSWLEC 64 (Preston CJ of LEC)

Facts: Six landholders from the NSW Border Rivers area (together, the **applicants**), challenged decisions made by the

Minister administering the *Water Management Act 2000* (**Minister**) relating to the issuance of replacement floodplain harvesting (**FPH**) access licences.

The Minister claimed to have issued replacement FPH access licences to the applicants on 21 February 2022, pursuant to the [Water Management \(General\) Amendment Regulation 2021 \(NSW\)](#) (**2021 Regulation**). The 2021 Regulation, published on 17 December 2021, was made in respect of [s 57A](#) of the [Water Management Act 2000 \(NSW\)](#) (**WM Act**), which provides that the regulations may make provision for the licensing of "actual or proposed" floodplain water usage. However, the applicants argued that the Minister had no power to make the 2021 Regulation, as it was published four days before the proclamation applying [Ch 3, Pt 2](#) (in which [s 57A](#) is located) to the Border Rivers Area was made under [s 55A](#) of the WM Act. Further, the proclamation that was made on 18 February 2022, being the [Water Management \(Application of Act to Certain Water Sources\) Proclamation 2022 \(Proclamation\)](#), did not nominate the floodplain as the relevant water source.

The 2021 Regulation required the Minister to: adopt and publish information about three models, used to determine the share component of each FPH access licence ([cl 23G](#)); determine the share components by using the models ([cl 23C\(2\)](#)); give written notice to landholders and 28 days to make submissions ([cl 23F\(a\)](#)); consider any submissions made ([cl 23F\(b\)](#)); and finally give written notice to the landholders of the final determination of the share components, which resulted in the FPH access licences taking effect ([cl 23K\(1\)](#)). The Minister purported to make each of these decisions on 21 February 2022, three days before the 2021 Regulation was disallowed by the NSW Legislative Council.

The applicants claimed that the Minister had failed to follow the procedure detailed in the 2021 Regulation by not providing written notice to the applicants and 28 days to make submissions, not considering any submissions made, and by failing to publish information on the models. The Minister claimed that written notice was not required, as the Department had corresponded with the applicants a year prior to the 2021 Regulation coming into force in February 2021 and provided the applicants a chance to make submissions, although only in respect of "an error or omission" in the determination of share components (**2021 consultation**). The Minister also claimed that two reports, released in 2020, fulfilled the requirement to publish information on the models.

The applicants also argued that the decision to adopt the models was legally unreasonable, asserting that the models were not capable of representing the applicants' actual or proposed floodplain water usage. The applicants also alleged that the Minister's use of a computer program (**utility program**) when determining the share components was contrary to the statutory process outlined in the 2021 Regulation.

Issues: The challenges raised by the applicants formed nine grounds of review. A further two grounds, relating to Heads of Agreement made between the parties in an effort to settle the proceedings, were raised only in regard to costs:

- (1) Ground 1: was a proclamation, applying Ch 3, Pt 2 of the WM Act, required in order for the Minister to validly make the 2021 Regulation (**invalidity of the 2021 Regulation ground**);
- (2) Ground 2: whether the Proclamation, in failing to identify the floodplain as a water source for the purposes of s 55A of the WM Act, caused Ch 3 Pt 2 not to apply to the floodplain (**wrong water source ground**);
- (3) Grounds 3, 4 and 5: whether the Minister failed to comply with cl 23F of the 2021 Regulation by not providing the applicants written notice and 28 days to make submissions, as well as not considering those submissions, before determining the share components (**failure to notify and consider submissions ground**). Alternatively, whether the 2021 consultation satisfied the requirements of cl 23F (**ineffective notice ground**);
- (4) Ground 6: whether the Minister was required to adopt the models prior to written notice being given under cl 23F(a) of the 2021 Regulation (**timing of the model adoption ground**) and whether the two reports published by the Department in 2020 satisfied the requirement to publish information about the models under cl 23G(2) (**failure to publish the model information ground**);
- (5) Grounds 7 and 9: whether the Minister's adoption of the models was attended by jurisdictional error or legal unreasonableness (**model adoption grounds**);
- (6) Ground 8: whether the Minister's use of the utility program was contrary to the statutory process outlined in the 2021 Regulation (**failure to use models ground**); and
- (7) Whether the Minister's actions in relation to the Heads of Agreement warranted an order of indemnity costs.

Held: Appeal upheld on grounds 3, 4, 5 and 6; replacement FPH access licences declared invalid; Minister to pay the

applicants' costs of the proceedings on a party and party basis:

Invalidity of the 2021 Regulation ground

- (1) The power to make regulations is found under the general regulation-making power in s 400(1) of the WM Act, not s 57A. Further, s 57A operates independently from s 55A, such that regulations for the purpose of s 57A could be made under s 400(1) irrespective of whether a proclamation had been made. A proclamation would be required to apply the regulation to a specific water source, but this did not affect the Minister's power to make the regulation: at [83]-[86];

Wrong water source ground

- (2) Whilst cl 4(2) of the Proclamation identified the "water between the bed and banks" of specified rivers as the water to which Ch 3, Pt 2 applied, this did not result in the 2021 Regulation having no application to the actual or proposed floodplain water usage by the landholders. The application of the 2021 Regulation to the identified water source did not preclude consideration of the use of water from the floodplain of the identified rivers. This was confirmed by s 57A(4), which operates to deem water taken from the floodplain as having been taken from an identified river, which would not be necessary if the floodplain also needed to be identified in the Proclamation: at [97]-[101];

Failure to notify and consider submissions, and ineffective notice grounds

- (3) The Minister failed to provide the applicants notice and 28 days to make submissions as required under cl 23F(a). Further, the 2021 consultation did not constitute written notice under cl 23F(a) as the process for consultation was self-contained in the 2021 Regulation and no steps outside that process could constitute a step under cl 23F. In any event, the 2021 consultation, by limiting submissions to errors or omissions in the licence determination process, did not meet the purpose of the notice required by cl 23F(a), which was to provide the Minister submissions that were to be considered before making the share determination: at [106]-[116],[122]-[125];
- (4) As no notice or 28 days to make submissions was ever provided under cl 23F, the Minister was not able to satisfy the requirement to consider submissions made under cl 23F(b), as no submissions could have been made: at [132]-[134];

Timing of the model adoption and failure to deal with models ground

- (5) As the three models were to be used to determine share components, the Minister needed to adopt the models under cl 23G(1) prior to determining the proposed share components under cl 23C(2), and hence prior to providing written notice under cl 23F(a). Adopting the models after notice was purportedly given under cl 23F(a), albeit on the same day, further precluded the Minister from complying with cl 23F: at [150]-[151];
- (6) The duty, under cl 23G(2), to publish information about the models could only be performed once those models were adopted. Accordingly, the Minister's decision to publish information about other models, two years earlier in 2020, could not satisfy cl 23G(2): at [156]-[157];

Model adoption grounds

- (7) The decision to adopt the models was not attended by any error or unreasonableness, as the decision fell within an area of decisional freedom afforded to the Minister under cl 23G(1). The models were required to be capable of fulfilling the purpose specified for each under [cl 23H](#), [23I](#) and [23J](#), and meet the overarching purpose of s 57A of the WM Act. Whether the models adequately achieved these purposes was for the Minister to decide: at [224]-[228];

Failure to use models ground

- (8) The process for the determination of share components was iterative, requiring modellers to successively test iterations of the share components produced by the models against specified criteria. The utility program merely sped this process up and did not introduce a methodology or criteria separate or different to the models. The use of the utility program was not contrary to the 2021 Regulation: at [239]-[240]; and

Costs

- (9) The conduct of the Minister in deciding not to amend the models, as outlined under the Heads of Agreement, did not justify indemnity costs. The Minister retained a discretion to determine that the models were fit for purpose under the Heads of Agreement and whether to amend the models. Although minds may differ as to whether that decision was correct, it was not manifestly unreasonable: at [277]-[281].

Huang v Waterhouse [\[2025\] NSWLEC 71](#) (Pritchard J)

Facts: Mincong Huang (the **applicant**) challenged the validity of a development consent for alterations and additions to an existing garage/studio situated on the adjoining property (**site**) granted by Woollahra Municipal Council (**Council**) on 26 June 2007 (**development consent**). David Waterhouse (**first respondent**) was the owner of the site at the time of judgment.

Prior to the commencement of any work, the development consent required a copy of the dilapidation report to be given to Council and the adjoining building owner, and a survey report to be provided to the principal certifying authority under the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EPA Act**).

The applicant sought a declaration that the development consent had lapsed under [s 95](#) of the EPA Act which provided that a development consent lapses five years after the date from which it operates, unless building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies. Prior to 26 June 2012, the date the development consent was set to lapse under s 95, some preliminary work relating to drainage and structural engineering was undertaken at the site.

In the alternative, the applicant challenged the validity of a 2024 modification to the development consent, approved by Council (**2024 modification**).

Issues:

- (1) Whether the 2007 development consent had lapsed on 26 June 2012 under s 95 of the EPA Act;
- (2) If not, whether the 2024 modification was invalid because:
 - (a) Council failed to consider the original reasons for granting consent pursuant to [s 4.55\(3\)](#) of the EPA Act;
 - (b) Council failed to form the required satisfaction that the modified development was "substantially the same" as originally approved pursuant to s 4.55(1A)(b) of the EPA Act; or
 - (c) The decision was legally unreasonable.

Held: Declaration made that the development consent had lapsed and ordered the first respondent to pay the applicant's costs:

- (1) The development consent had lapsed on 26 June 2012, five years after it was granted, as the preliminary work undertaken on the site prior to that date was conducted in breach of the development consent. The preliminary work occurred before a dilapidation report was provided to the applicant and prior to the completion of a survey report, as required by the development consent. Work prohibited by a development consent is not work “relating to” that development for the purpose of preventing a development consent’s lapse pursuant to s 95 of the EPA Act: applying *Iron Gates Developments Pty Ltd v Richmond-Evans Environmental Society Inc* [1992] 81 LGERA 132 at 135 (Handley JA): at [113]; and
- (2) Although not strictly necessary to decide, the Court found that the applicant had failed to establish the three alternative grounds concerning the 2024 modification: at [135]-[136], [152]-[153], [159]-[160].

Briscoe-Hough v Minister for Local Government (No 3)
[2025] NSWLEC 78 (Beasley J)

(Related decision: *Briscoe-Hough v Minister for Local Government (No 5)* [2025] NSWLEC 94 (Beasley J))

Facts: Mr Gregory Briscoe-Hough (**applicant**) brought a Class 4 challenge to the validity of a Performance Improvement Order (**PIO**) issued by the Minister for Local Government (**Minister**, the first respondent) to the Edward River Council (the **Council**, the second respondent). The applicant alleged that there was a defect in the Minister’s “Notice of Intention to issue a Performance Improvement Order” (**Notice of Intention**) as it failed to comply with the requirements of s 438C(2)(b) of the *Local Government Act 1993 (NSW)* (**LG Act**) because it did “not provide the required evidence that the Minister relied on for his reasons” that improvement was necessary. This alleged non-compliance was said to amount to a jurisdictional error rendering the subsequently issued PIO invalid. The applicant also claimed that the Minister failed to meet the PIO requirements in respect of two compliance reports and claimed that the PIO, which was issued to the Council on 22 July 2024, was of no effect once there were new councillors elected at the Council elections held on 14 September 2024. At the time of these proceedings, the Council had already complied with the PIO.

Issues:

- (1) Whether prior to issuing a council with a PIO under s 438A of the LG Act, the Minister must have issued a Notice of Intention under s 438C;
- (2) The proper construction of s 438C(2)(b), and whether the Notice of Intention was in compliance with this provision;
- (3) If the Notice of Intention was not in compliance with s 438C(2)(b), whether non-compliance rendered the subsequently issued PIO invalid; and
- (4) Given the Council’s compliance with the PIO, should relief be granted in any event.

Held: The applicant’s summons was dismissed and costs reserved (subsequently the applicant was ordered to pay the Minister’s costs):

- (1) A Notice of Intention pursuant to s 438C(2)(b) must be issued prior to issuing a PIO. The statutory language used, the regime for submissions set out in s 438C and the regime for consultation in s 438I and s 438K, were strong indications that the Minister must have issued a Notice of Intention to the Council (as was done): at [17];
- (2) The Notice of Intention was in compliance with s 438C(2)(b). The primary requirement of s 438C(2)(b) was for the Minister to specify “reasons” why he proposed to issue a PIO. That requirement was satisfied if those reasons were sufficiently outlined, as they were in the Notice of Intention. The reference to “evidence” in the parentheses of the subsection required at most that the Notice of Intention refer to what the general nature of the evidence was, as the Minister did. It did not require physical attachment to the Notice of Intention of all “the evidence” in support of the reasons why the Minister proposed to issue a PIO: at [32];
- (3) Even if the Notice of Intention did require evidence to be attached or a greater specificity of “reasons,” this would not invalidate the PIO because it fell into that category of breach for which there could not be considered a legislative purpose to invalidate a subsequent PIO, as evidenced by statutory provisions which provided opportunities for consultation and submission: at [34];
- (4) In any event, the applicant failed to establish materiality to make good a claim of jurisdictional error leading to invalidity and there would have been no utility in granting any relief in circumstances where the Council had accepted the outcome and fully complied with the PIO: at [35]-[38];
- (5) The order relating to the compliance reports did not relate to any issue to be determined before the Court as

the compliance reports were not tendered in evidence and relevant grounds were not set out in the summons: at [14]; and

- (6) The PIO did apply to the current Council. The Notice of Intention, and the subsequently issued PIO, referred to actions to be taken by the “Council,” not by individually named councillors. Furthermore, there was no utility in varying the order, for the reasons stated above: at [15].

Ross v Randwick City Council [2025] NSWLEC 89 (Pritchard J)

Facts: Irina Ross (**applicant**) challenged Randwick City Council’s (**Council**) 2024 decision to approve a modification application pursuant to [s 4.55\(2\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EPA Act**) for a duplex development at 8 Hamel Road, Matraville (**property**).

Council’s modification application decision approved alterations to a 2022 development consent, including a decreased first-floor rear setback and deep soil permeable surfaces of 32.38% of the site area. At the time, the Randwick Comprehensive Development Control Plan 2023 (**Randwick DCP 2023**) required deep soil permeable surfaces of a minimum of 40% of the site area and provided a minimum rear setback.

Council submitted that in accordance with [s 4.15\(3A\)](#) of the EPA Act, the provisions of a development control plan were not statutory requirements and must be applied flexibly.

The property was also the subject of a separate subdivision development application approved by Council which the applicant contended should have been considered by Council in determining whether the modification application was “substantially the same” as the original development consent pursuant to [s 4.55\(2\)](#) of the EPA Act.

Issues:

- (1) Whether Council failed to consider relevant provisions of Randwick DCP 2023, as required by [ss 4.15\(1\)\(a\)\(iii\)](#) and [4.55\(3\)](#) of the EPA Act; and
- (2) Whether the modified development was “substantially the same” as the 2022 development consent pursuant to [s 4.55\(2\)\(a\)](#) of the EPA Act.

Held: The Court declared that the modification decision was invalid, and Council was ordered to pay the applicant’s costs: at [12]-[13]:

- (1) Council was required to turn its mind to whether the development application complied with provisions of the Randwick DCP 2023 in order to be flexible in applying its provisions pursuant to [s 4.15\(3A\)](#) of the EPA Act. As Council had considered a preceding 2013 development control plan rather than Randwick DCP 2023, it had failed to consider the mandatory consideration rendering the modification decision invalid: at [77]-[79]; and
- (2) The application for the subdivision of the property was a separate application and not part of the modification decision. The modification application decision remained “substantially the same” as the original and the second ground was therefore rejected: at [86].

COMPULSORY ACQUISITION

UPG 72 Pty Ltd v Blacktown City Council [2025] NSWLEC 77 (Pepper J)

(Related decision: [UPG 72 Pty Ltd v Blacktown City Council](#) [2025] NSWLEC 29 (Pepper J))

Facts: Blacktown City Council (**Council**) compulsorily acquired land owned by UPG 72 Pty Ltd (**UPG**). UPG commenced Class 3 proceedings objecting to the Council’s statutory offer of \$2,494,984.44 for the acquired land pursuant to [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#).

At trial UPG argued that but for the public purpose of constructing trunk drainage (**drainage**) and creating habitat for the Green and Golden Bell Frog (**GGBF**), the acquired land would have been zoned R2 Low Density Residential, and therefore, sought compensation based upon a market value totalling approximately \$7 million and \$35,521 for disturbance losses.

The Council offered nil compensation. It argued that the public purpose for the acquisition was mainly to release land for urban purposes and that but for this purpose, the land would have been zoned its pre-existing rural zoning or, in the alternative, E2 Environmental Conservation. It also contended that UPG owned land adjoining the acquired land whose value increased and thus exceeded that of the acquired land (**betterment**).

The Court held that the Council's purpose for acquiring the land was for drainage and GGBF habitat. But for that purpose, the acquired land would have been predominantly zoned E2 given that the presence of the GGBF militated against an R2 zoning. Additionally, no betterment arose by reason of the public purpose. The Court determined that the compensation payable to UPG was \$1,235,521.

Given that UPG obtained more compensation than the Council contended for, the Council was ordered to pay UPG's costs unless either party sought an alternative costs order. By notice of motion, the Council sought that UPG pay its costs up to the first date of the hearing, and that each party bear its own costs incurred thereafter.

Issues:

- (1) Whether the outcome of the litigation constituted a substantial failure on UPG's behalf; and
- (2) Whether UPG unreasonably continued the proceedings having been furnished with expert reports that ventilated key issues concerning zoning.

Held: Notice of motion dismissed:

- (1) The litigation outcome did not automatically entitle the Council to costs. UPG did not obtain compensation commensurate with, or greater than, the statutory offer, nor the quantum that it sought in the proceedings. However, it obtained more than what the Council contended for and acted reasonably in doing so insofar as it raised legitimate issues at trial on contestable evidence without delay or in a way that inflated costs: at [37], [45]; and
- (2) The issues raised by the expert evidence could not be easily resolved absent cross-examination or the making of submissions in relation to that evidence. UPG had the right to challenge the statutory offer and proceeded to do so with cogent evidence: at [39], [41].

SECTION 56A APPEALS

Bowie Ferris Investments Pty Ltd v Woollahra Municipal Council [2025] NSWLEC 60 (Duggan J)

(Decision under review: *Bowie Ferris Investments Pty Ltd v Woollahra Municipal Council* [2024] NSWLEC 1774 (Dixon SC))

Facts: These proceedings concerned an appeal by Bowie Ferris Investments Pty Ltd (**Appellant**) of the decision of the Senior Commissioner of this Court, in dismissing its appeal for a development application (**DA**). The DA sought a change of use of the Village Inn Hotel located in Paddington (**Building**) to ground floor retail use and an office on the first and second floor. The Building was listed as an item of local heritage significance under the [Woollahra Local Environmental Plan 2014](#). The Senior Commissioner delivered her reasons in *Bowie Ferris Investments Pty Ltd v Woollahra Municipal Council* [2024] NSWLEC 1774 (**Reasons**). It was held that the continued operation of the hotel was identified as an element of heritage significance, and on the evidence before the Court, the loss of the pub use by granting the DA would be an adverse heritage impact that ought to be avoided.

Issues: Whether the Senior Commissioner erred on a question of law by:

- (1) Focusing on the issue of cessation of pub use rather the development as proposed in the DA, as set out at [8]-[9] and at [104] of the Reasons; and
- (2) Focusing on the viability of the hotel, concerning the finding that justification of the impact of the proposed development was required, as set out in the Reasons at [101]-[103].

Held: Appeal dismissed, with the Appellant to pay the Council's costs:

- (1) Part of the heritage significance of the Building was that it had been continuously used as a pub. The change of use as proposed by the DA would not be a continuation of the pub use, resulting in a diminution of the heritage significance of the heritage item. The Senior Commissioner considered the impact of the development as proposed in the DA and not on the assumption that the development proposed included the cessation of the pub use as "development" to which the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) applied: at [5]-[19]; and
- (2) The issue of viability was not dealt with as a matter of principle and a finding that justification of the impact was necessary was not identified by the Reasons. It was a merit consideration in the context of being the sole reason for support by the Appellant's heritage expert for the cessation use of the Building as pub, contending that the continuation of the pub use was not viable: at [25]-[30].

Inner West Council v XYZ Services Pty Limited [2025] NSWLEC 68 (Preston CJ of LEC)

(Decision under review: *XYZ Services Pty Limited v Inner West Council* [2024] NSWLEC 1765 (Walsh C))

Facts: XYZ Services Pty Limited (**XYZ**) appealed the deemed refusal of a development application by Inner West Council (**Council**). The development application sought consent for the demolition of existing structures on the site, the subdivision of the site into two lots, and the erection of a dwelling house on each new lot. The site is situated on the harbour foreshore in Balmain, with part of the site identified as “Foreshore Area” on the Foreshore Building Line Map under [cl 6.5\(2\)](#) of the [Inner West Local Environmental Plan 2022 \(IWLEP\)](#). Clause 6.5(3) of the IWLEP restricted the development that could be carried out within the Foreshore Area, with exceptions to this restriction outlined in [cl 6.5\(3\)\(a\)](#) and [\(b\)](#). The proposed dwelling houses encroached into the Foreshore Area and did not satisfy either of the exceptions. To overcome the restriction, XYZ lodged a written request under [cl 4.6](#) of the IWLEP (as it existed when the development application was lodged) seeking to justify the contravention.

On appeal, the Council contended that [cl 6.5\(3\)](#) was not a development standard but rather a prohibition, and as a result the contravention could not be justified by way of a [cl 4.6](#) request. Alternatively, the Council contended that the Court could not be satisfied that XYZ’s written request adequately addressed the matters required to be demonstrated under [cl 4.6\(3\)\(a\)](#) as the request failed to address the heritage impact of the development. In addition, the Council claimed that the construction of one dwelling house would encroach onto a narrow adjoining lot. The owner of this lot had not been identified. The Council argued that the owner’s consent was required and absent this, development consent could not be granted. Finally, the Council raised the issue of a restrictive covenant that operated to prevent the construction of new dwelling houses beyond a foreshore building line set by the covenant. The Council contended that the covenant was not covered by [cl 1.9A](#) of the IWLEP, which provided that any covenant that restricts the carrying out of a development consent does not apply, as it was a covenant imposed by the Council ([cl 1.9A\(2\)\(a\)](#)).

The Commissioner upheld the appeal and granted development consent, finding that [cl 6.5\(3\)](#) was a development standard and that the written request

adequately addressed the matters under [cl 4.6\(3\)](#). Further, the Commissioner found that no owner’s consent was required as the application did not propose any development in the adjoining lot. Finally, the Commissioner, upon considering the covenant as required under [s 39\(4\)](#) of the [Land and Environment Court Act 1979 \(NSW\) \(LEC Act\)](#), found that it did not impede his capacity to grant consent.

The Council appealed the decision of the Commissioner under [s 56A](#) of the LEC Act.

Issues: The Council raised six grounds of appeal, largely mirroring the contentions raised before the Commissioner:

- (1) Grounds 1 and 2: whether the Commissioner erred in construing [cl 6.5\(3\)](#) of the IWLEP as a development standard (**development standard ground**) and whether the Commissioner failed to make a finding that the development met an exception to the restriction in [cl 6.5\(3\)](#) by being an “extension, alteration or rebuilding of an existing building” (**rebuilding of existing building ground**);
- (2) Ground 3: alternatively, if [cl 6.5\(3\)](#) was a development standard, whether the commissioner erred in upholding the [cl 4.6](#) written request (**cl 4.6 request ground**);
- (3) Ground 4: whether the Commissioner erred in finding that owner’s consent was not required for the making of the development application (**owner’s consent ground**);
- (4) Ground 5: whether the Commissioner failed to give proper regard to a relevant consideration, being the covenant (**covenant ground**); and
- (5) Ground 6: whether the Commissioner failed to give adequate reasons in respect of each of the contentions raised by the Council at the hearing before the Commissioner (**inadequate reasons ground**).

Held: Appeal dismissed with the Council to pay XYZ’s costs of the appeal:

Development standard ground

- (1) The test for determining whether a provision in an environmental planning instrument is or is not a development standard is a statutory test, namely does the provision fall within the definition of “development standards” under [s 1.4](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EPA Act\)](#). There is no other test. Judicially developed approaches to the determination of whether a provision is a development standard provide guidance as to how to apply the statutory test, but do not replace the statutory test. The Commissioner did not err by going directly to the

definition of “development standards” instead of the judicially developed approaches: at [36]-[39];

- (2) The Commissioner was correct in finding that cl 6.5(3) was a development standard. The provision fixed a standard in respect of the location or siting of an otherwise permissible purpose, falling within paragraph (c) of the definition of “development standards” under s 1.4 of the EPA Act: at [40]-[47];

Rebuilding of existing building ground

- (3) As the Commissioner found that cl 6.5(3) was a development standard, the Commissioner did not need to decide whether the proposed development constituted an “extension, alteration or rebuilding of an existing building” as the contravention could be justified through a cl 4.6 written request: at [53]-[54];

Clause 4.6 request ground

- (4) The Commissioner, in determining that the compliance with 6.5(3) was unreasonable and unnecessary, as the objectives of the standard in cl 6.5(1) would be achieved, was not obliged to consider impacts of the proposal on the heritage significance of the area, as this was only a permissible, but not mandatory, consideration. Further, the Commissioner correctly focused his examination of whether there was sufficient environmental planning grounds to justify contravening cl 6.5(3) on the contravening elements of the proposal: at [64]-[75];

Owner’s consent ground

- (5) The development application only sought consent to carry out development on the site and not on the adjoining lot, which was demarcated on the plans as an area to which there was “no development proposed”. This negated the need for the consent of the owner of the adjoining lot: at [91];

Covenant ground

- (6) The Commissioner adequately considered the effect of the covenant. The operation of the covenant was a matter of private and not public law, and thus could not prevent a consent authority, or the Commissioner, from exercising the statutory power to grant consent under [s 4.16](#) of the EPA Act. The factual findings made by the Commissioner as to the effect of the covenant, and the weight afforded to it, did not give rise to an error on a question of law: at [99], [114]-[116]; and

Inadequate reasons ground

- (7) The Commissioner gave adequate reasons in respect of each of the Council’s contentions: at [41], [75], [94], [115].

***Canterbury-Bankstown Council v Hamptons Property Services Pty Ltd (No 2)* [2025] NSWLEC 86** (Preston CJ of LEC)

(Related decision: *Canterbury-Bankstown Council v Hamptons Property Services Pty Ltd* [2025] NSWLEC 41 (Preston CJ of LEC))

Facts: Canterbury-Bankstown Council (**Council**) appealed under [s 56A\(1\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) against a decision of a Commissioner of the Court to grant a development consent to a development application lodged by Hamptons Property Services Pty Ltd (**Hamptons**) for the carrying out of a residential development and subdivision. At the hearing of the s 56A appeal, the Council raised four grounds of review. The Council was successful on two of the grounds, which were largely interrelated, but was unsuccessful on the other grounds. The Court, in following the usual order that costs follow the event under [r 42.1](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (**UCPR**), ordered that Hamptons pay the Council’s costs of the appeal.

At the hearing of the s 56A appeal, the parties had been asked to make submissions as to the cost order the Court should make in alternative outcomes of the appeal. The parties each made submissions, with counsel for Hamptons acknowledging that the usual order is that costs follow the event but requested that if the Council was successful, that Hamptons be given the opportunity to review the judgment and then make submissions on costs. By doing so, Hamptons submitted that it believed it was reserving to itself a right to make submissions on costs at a later time.

Hamptons filed a notice of motion seeking to vary the cost order made by the court under [r 36.16\(3A\)](#) of the UCPR to apportion the costs based upon the number of grounds the Council was successful on. Hamptons argued that the costs order should be varied to reflect the fact that the Council was only successful on the two related grounds and not on the two other grounds. In Hamptons’ argument, the Council succeeded on only one third of the issues and was thus entitled to only 30% of the costs.

Issues:

- (1) Should the appeal be reopened to allow the question of costs to be reargued; and
- (2) Should the costs order made by the Court be varied so that Hamptons be ordered to pay only 30% of the Council’s costs of the appeal.

Held: Hampton’s notice of motion was dismissed; no variation to the orders made by the Court following the s 56A appeal; no orders as to the costs of the notice of motion, with the intention that each party pays their own costs:

- (1) Ordinarily any submissions as to the costs order that the Court should make in disposing of an appeal are to be made at the hearing, so that all of the issues of the appeal can be dealt with at one time. Parties should not expect that they can await the outcome of the appeal before arguing the issue of costs. Leave to do so may only be sought in special circumstances, with a party’s failure to make submissions as to costs when it had the opportunity to do so not usually a reason to set aside or vary a costs order made by the Court. Adherence to this principle upholds the public interest in maintaining the finality of litigation: at [5]-[7];
- (2) Exercise of the Court’s power under r 36.16(3A) of the UCPR to vary an order requires that the party seeking the reopening show that the Court proceeded on a misapprehension as to the facts or the law, there is some matter calling for review, or the interests of justice so require. Hampton’s misapprehension as to its ability to reserve the right to make submissions on costs at a later time did not meet these requirements. The Court nevertheless determined that not reopening the appeal would occasion an injustice and thus determined that doing so was appropriate, especially given that this course was unopposed by the Council: at [15]-[17];
- (3) The Court found that Hamptons had failed to establish that an apportionment of costs was appropriate in the circumstances, noting that the mere fact an appellants succeeds on some, but not all, of grounds raised is not by itself sufficient for the Court to depart from the usual rule that costs follow the event: at [29]; and
- (4) Whilst a court retains a discretion under [s 98\(1\)](#) of the [Civil Procedure Act 2005 \(NSW\)](#) to apportion costs having regard to the issues upon which a party failed, this is influenced by a number of factors. These include whether the issues were clearly dominant, separable or discrete, whether those issues took up a considerable part of the hearing, whether the time taken on each issue can be realistically estimated, whether the issues lacked any real merit and whether the applicant unreasonably pursued an issue or behaved improperly or unreasonably. The Court found that none of these factors were apparent in the circumstances of the case: at [30]-[37].

Tamworth Regional Council v Barr Property and Planning Pty Ltd [\[2025\] NSWLEC 110](#) (Preston CJ of LEC)

(Decision under review: *Barr Property and Planning Pty Ltd v Tamworth Regional Council* [\[2025\] NSWLEC 1313](#) (Horton C))

Facts: Barr Property and Planning Pty Ltd (**Barr Property**) appealed against the refusal of a development application by Tamworth Regional Council (the **Council**). The development application sought approval for the installation of a digital advertisement situated on the chamfered corner of a shopping centre wall in Tamworth. The advertising display was designed to curve around the chamfered wall such that each end of the display was proposed to be 200mm away from the wall, whilst the apex of the curve of the display would be 1170mm away from the wall. The advertisement was proposed to be positioned partially on the wall of the building and partially on the wall of the parapet of the building.

The proposed advertisement was signage under [s 3.4](#) of the [State Environmental Planning Policy \(Industry and Employment\) 2021](#) (the **SEPP**) to which [ch 3](#) of the SEPP applied. As a result, the advertisement was subject to the controls contained under that chapter. The Council argued that the sign was either or both of a “roof or sky advertisement” or “wall advertisement” as defined under [s 3.2\(1\)](#) of the SEPP. Each of these particular types of advertisement were subject to further specific controls under [ss 3.19](#) and [3.20](#) respectively, with which the proposed advertisement did not comply.

A “roof or sky advertisement” was defined to include an advertisement that was “displayed on, or erected on or above, the parapet or eaves of a building.” The Council argued that, as the proposed advertisement was positioned on both the wall of the building and the parapet wall, it satisfied the definition. A “wall advertisement” was defined to include advertisements that are either “painted on or fixed flat to the wall of a building.” The Council argued that as the advertising structure that held the display was fixed flat to the wall at the points of attachment to the wall it met the definition.

The Commissioner, in upholding Barr Property’s appeal and granting consent, determined that the advertisement was neither a roof or sky advertisement nor a wall advertisement. The Commissioner reasoned that for an advertisement to be a roof or sky advertisement it must be placed atop the

parapet and not simply on the face of it, as this would otherwise constitute a wall advertisement. The Commissioner also reasoned that the sign could not be a wall advertisement as it protruded 300mm from the wall and did not adopt the alignment of the wall to which it was fixed.

The Council appealed against the Commissioner's decision under [s 56A\(1\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#).

Issues: The Council raised two grounds of appeal:

- (1) Was the advertisement proposed by Barr Property a "roof or sky advertisement" as defined under s 3.2(1) of the SEPP and thus subject to the controls under s 3.19; and
- (2) Was the advertisement proposed by Barr Property a "wall advertisement" as defined under s 3.2(1) of the SEPP and thus subject to the controls under s 3.20.

Held: Appeal allowed, decision of the Commissioner to uphold the appeal and grant consent set aside, proceedings remitted to the Commissioner to be redetermined, Barr Property to pay the Council's costs of the appeal:

Roof or sky advertisement

- (1) The preposition "on" as it appeared in the definition of roof or sky advertisement takes on a different meaning depending upon the verb it appears with. As a result, the preposition in the phrase "erected on or above" indicates that the advertisement is positioned above or in contact with the supporting surface of the parapet or the eaves of the building. The Commissioner, therefore, did not err in construing the meaning of "erected on or above" as referring to an advertisement which was placed atop the parapet. The Commissioner did, however, err in the construction of the phrase "displayed on". The term "display" changes the meaning of the preposition such that the term "displayed on" can refer to an advertisement that is in contact with any surface of the parapet. The definition of a roof or sky advertisement therefore encompasses advertisements and their structures erected for the purposes of display atop the parapet as well as advertisements that simply use the parapet or eaves of the building for the purposes of display: at [27]-[37];
- (2) The Commissioner further erred in construing the definition of roof or sky advertisement so as to avoid overlap with the definition of wall advertisement. The definition does not mandate that the advertisement be wholly displayed on the parapet, and an advertisement

will answer the description of being an advertisement displayed on the parapet of the building despite it being on both the wall of the building and the wall of the parapet. The SEPP also envisages that certain advertisements may be subject to multiple controls, specifying under [s 3.27](#) that each applicable control applies: at [38]-[42];

Wall advertisement

- (3) The definition of wall advertisement in s 3.2(1) of the SEPP required that the advertisement be "fixed flat" to the wall of a building, whilst the definition of "advertisement" includes both the signage and the advertising structure. Considering the inclusive definition of advertisement, the requirement of being "fixed flat" can be achieved by fixing flat the advertising structure to the building with there being no further requirement that the signage also be fixed flat to the wall of a building. This construction of a wall advertisement is supported by the control in [s 3.20\(2\)\(c\)](#) of the SEPP, which notes that consent may not be granted if the advertisement protrudes more than 300mm from the wall. This control could never apply if the definition requires the entire advertisement to be fixed flat to the wall: at [55]-[60]; and
- (4) The method of fixing an advertisement to the wall of a building will vary depending on the particular advertisement, the particular wall and the structural forces at play in fixing an advertisement of that kind to a wall of that kind. Whether an advertisement is to be considered fixed flat will depend on the particular facts and circumstances. As a result, it was open on the evidence to find that the proposed advertisement was fixed flat and therefore the Commissioner erred in finding that such a conclusion was not open given the proposed advertisement protruded from the wall by more than 300mm and did not adopt the alignment of the wall: at [61]-[73].

REVIEW OF REGISTRAR'S DECISIONS

Potter v Woollahra Municipal Council [\[2025\] NSWLEC 80](#) (Beasley J)

(Related decision: *Potter v Woollahra Municipal Council (No 2)* [\[2025\] NSWLEC 95](#) (Beasley J))

Facts: Collette Potter (**applicant**) filed a notice of motion in a Class 1 proceedings (*Potter v Woollahra Municipal Council*

(No 2) [2025] NSWLEC 95 seeking to vary orders made by the registrar pursuant to [r 49.19\(1\)](#) of the [Uniform Civil Procedure Rules 2005 \(NSW\)](#) (UCPR). The registrar made various orders on 4 July 2025 granting leave for the respondent (Woollahra Municipal Council (**Council**)) to rely on the expert evidence of Mr Smith and Mr Castor in substitution for their previous two experts, Mr Kenworthy and Mr McMahon, and for the new experts to prepare joint reports with the applicant’s corresponding experts. The applicant sought to have the registrar’s orders set aside on the grounds of it being “expert shopping”. By way of background, this matter concerned a deemed refusal by the Woollahra Local Planning Panel (**WLPP**) (who later provided reasons) of a residential development application.

Issues:

- (1) Whether the registrar erred in granting the respondent leave to substitute their experts; and
- (2) Whether the Court should exercise its discretion to review and dismiss the registrar’s orders per [r 49.19\(1\)](#) of the UCPR.

Held: The registrar’s orders were set aside, and costs were reserved (in a subsequent judgement, an order was made that each party should bear their own costs):

- (1) The orders made on 4 July 2025 should not have been made. The reasons given by the respondent for the leave sought were that Mr Kenworthy and Mr McMahon “could not support all of the WLPP’s reasons for refusal” which was held not to be a proper reason for substituting new experts for them: at [38]. It would subvert the objects and purposes of [Div 2 of Pt 31](#) of the UCPR, of the [Expert Code](#), and of this Court’s relevant practice note, if, only because they had formed an opinion that was not entirely in agreement with the WLPP’s reasons for refusal, leave was given to dispose of them as the Council’s experts, and substitute instead witnesses that had been found that said they could support all of the WLPP’s reasons for refusal: at [41]; and
- (2) Legal error was identified. The registrar’s decision related to an order of practice and procedure. Although she did not refer to it, she was clearly exercising a discretion under [r 31.20](#) of the UCPR in making the orders in accordance with the July motion that she did. As to her reasons for making those orders she stated that “expert shopping is actually a matter that is more appropriately dealt with in cross-examination, going to the opinion of the expert”. This did not address the central complaint the applicant was making in the

hearing before the registrar of “expert shopping”, nor did it address the issue of whether it was appropriate to grant the orders sought. With respect, noting the time pressure on the registrar and the complexity of the notice of motion, this was a failure to take into account matters the registrar should have, such that the registrar failed to properly or adequately exercise her discretion, in a manner referred to in [House v The King](#) (1936) 55 CLR 499: at [43]-[44].

MERIT DECISIONS (COMMISSIONERS)

Rahe v Inner West Council [2025] NSWLEC 1434 (Porter C)

Facts: The Applicant appealed against the failure to issue a building information certificate (**BIC**) by Inner West Council (**Council**) for works associated with a dwelling house under construction in Rozelle.

Issues:

- (1) What documentation formed part of the BIC;
- (2) Was the information provided pursuant to s 6.26 of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EPA Act**) additional information or an amendment to the BIC; and
- (3) The adequacy of the BIC information to issue a BIC.

Held: The appeal was dismissed:

- (1) It was common ground that there was no express or implied power to amend a BIC application, as found by Pain J in *Scarfe v Shoalhaven City Council* [2021] NSWLEC 128 at [57]-[59]: at [14]. There were no equivalent provisions for BIC applications that existed for a development application ([s 37](#) of the [Environmental Planning and Assessment Regulation 2021 \(NSW\)](#) (**EPA Reg**)) or a modification application ([s 113](#) of the EPA Reg);
- (2) The unauthorised works that formed part of the BIC application were those described on the BIC application form and supporting documentation: at [45];
- (3) Council had issued a request for information pursuant to [s 6.26\(2\)](#) of the EPA Act (**s 6.26 Request**). The information submitted in response to the s 6.26 Request included different or inconsistent works to those shown on the as filed BIC application. However, this information was generally consistent with the works observed on site: at [25]-[29], [46]. Section 6.26 of the EPA Act does allow for supplementary or

supporting information to be provided to the consent authority after lodgment of a BIC, but does not allow for information that would effectively amend the works as originally sought in a BIC application. Therefore, the information provided by the Applicant in response to the s 6.26 Request could not form part of the BIC application: at [46]-[50];

- (4) As the unauthorised works were inconsistent with the original BIC application, a BIC could not be issued: at [51]-[54]; and
- (5) In considering if the unauthorised works would have been acceptable had development consent been sought for these works, the BIC application lacked sufficient evidence to meet [s 6.25\(1\)](#) of the EPA Act: at [55].

LFD Homes Pty Ltd ATF The LFD homes Unit Trust v Council of the City of Sydney [2025] NSWLEC 1492 (O’Neill C)

Facts: The applicants appealed under [s 8.7\(1\)](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\) \(EPA Act\)](#) against the refusal by The Council of the City of Sydney (**Council**) of a development application for the conversion of an existing 32-bedroom boarding house in Paddington to provide four attached dwellings, with associated alterations and additions, and associated subdivision of the site from two lots into four lots (**proposal**).

Part 3 Retention of existing affordable rental housing of [State Environmental Planning Policy \(Housing\) 2021 \(SEPP Housing\)](#) applied to the proposal: [s 46\(1\)\(a\)](#). The existing development was a “low-rental residential building” within the meaning of the definition under [s 45](#), because the existing development was being used as a boarding house during the relevant period (being the period commencing 5 years before the day on which the application was lodged on 7 August 2023).

Under [s 47\(2\)](#) of SEPP Housing, the consent authority must take into account the Guidelines for the Retention of Existing Affordable Rental Housing, published by the Department of Planning in October 2009 (**Guidelines**) and the following in determining whether to grant development consent:

- (a) Whether the development will reduce the amount of affordable housing in the area;
- (b) Whether there is available sufficient comparable accommodation to satisfy the demand for the accommodation;
- (c) Whether the development is likely to result in adverse social and economic effects on the general community;

- (d) Whether adequate arrangements have been made to assist the residents who are likely to be displaced to find comparable accommodation;
- (e) The extent to which the development will contribute to a cumulative loss of affordable housing in the local government area;
- (f) Whether the building is structurally sound, including:
 - (i) The extent to which the building complies with relevant fire safety requirements;
 - (ii) The estimated cost of carrying out work necessary to ensure the building is structurally sound and complies with relevant fire safety requirements;
- (g) Whether the imposition of an affordable housing condition requiring the payment of a monetary contribution would adequately mitigate the reduction of affordable housing resulting from the development; and
- (h) The financial viability of the continued use of the boarding house.

Issue: Whether the proposal would result in the unacceptable loss of affordable rental boarding house accommodation in the area.

Held: Appeal dismissed:

- (1) The eight criteria under [s 47\(2\)](#) of SEPP Housing were mandatory considerations in determining whether to grant consent to the proposal but were not jurisdictional requirements that must be satisfied prior to the grant of consent. The weight to be attributed to each criterion and the balancing exercise between the criteria was discretionary: at [67];
- (2) The loss of 32 boarding house rooms in an older style, traditional boarding house was unacceptable in the context of the shortage and decline of this form of accommodation and its loss would contribute to the cumulative loss of affordable housing options for low-income earners in the inner-city: at [68], [95];
- (3) Sufficient comparable accommodation was conclusively taken not to be available, as deemed under [s 47\(3\)](#) of SEPP Housing: at [73];
- (4) The loss of 32 boarding house rooms in an older style, traditional boarding house with shared kitchens and bathrooms would contribute to a cumulative loss of affordable housing in the local government area and impact the lowest income earners, as boarding rooms in older style, traditional boarding houses are the lowest priced private rental housing in the market. While the loss was a relatively small proportion of the overall count of housing classified as affordable to very

low-income earners, it was significant in relation to the diminishing supply of older style, traditional boarding houses and other private rental housing affordable to the lowest income earners: at [87], [93]; and

- (5) The loss of 32 boarding rooms in an older style, traditional boarding house in the inner-city was major and adverse and could not be adequately mitigated by the imposition of an affordable housing condition requiring the payment of a monetary contribution because the older style, traditional boarding houses are declining in number: at [89], [93].

Doon v Snowy Valleys Council [2025] NSWLEC 1514 (Dickson C)

Facts: The proceedings were an appeal in connection with the issue of a prevention notice (**Notice**) by Snowy Valleys Council under [s 96](#) of the [Protection of the Environment Operation Act 1997 \(NSW\)](#) (**POEO Act**). The Notice directed the applicant, Mr Doon, to take preventative action to address noise being emitted from his residential property.

The Notice was subsequently varied on 30 March 2025 pursuant to [s 110](#) of the POEO Act (**Amended Notice**) to contain directions relating to the emission of noise.

The applicant appealed against the Notice and sought for the Amended Notice to be revoked by the Court.

Issues: The role of the Court was to re-exercise the functions of the regulatory authority, the Snowy Valleys Council, in determining:

- (1) Whether the Notice should be revoked; and
- (2) In the alternative, whether the Notice should be amended in its terms (pursuant to [ss 289](#) and [292](#) of the POEO Act and [s 39](#) of the [Land and Environment Court Act 1979 \(NSW\)](#)).

Held: The appeal be upheld and the Notice revoked:

- (1) At the time of issuing the Notice or the Amended Notice, Council had not formed the required reasonable suspicion that an activity had been or was being carried out in an environmentally unsatisfactory manner on the site. Further, there was insufficient evidence before the Court to enable it to form this conclusion: at [111]); and
- (2) Section 96 of the POEO Act required the appropriate regulatory authority to have had a reasonable suspicion that an activity was or had been carried out in an environmentally unsatisfactory manner. On the evidence, the respondent had not formed the necessary

subjective suspicion that the activities had been carried out in an environmentally unsatisfactory manner, and that the suspicion held by council was not reasonable because there was no evidentiary foundation for the suspicion: at [99]-[100], [109]-[111]). Accordingly, the statutory requirement had not been met.

Buttai Gravel Pty Ltd v Independent Planning Commission [2025] NSWLEC 1525 (Walsh C and Young AC)

(Related decisions: *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147 (Basten JA, Gleeson JA, Preston CJ of LEC); *Dungog Shire Council v Hunter Industrial Rental Equipment Pty Limited* [2019] NSWLEC 132 (Duggan J))

Facts: Buttai Gravel Pty Ltd (applicant) appealed under [s 8.7](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (**EPA Act**) against the refusal of a development application (**DA**) which would provide for an expansion of an approved hard rock quarry at Martins Creek in the Hunter Valley. The quarry was located in Dungog Shire Council (**DSC**) Local Government Area (**LGA**). The quarry haulage route extended into Maitland City Council (**MCC**) LGA. The DA was State significant development within the meaning of [s 4.36\(1\)](#) of the EPA Act, and the consent authority was the NSW Independent Planning Commission, the first respondent in the proceedings. MCC and DSC were joined as second and third respondents, respectively.

The quarry had been operating since 1914. The site had a rail spur and was initially established to supply railway ballast and other quarry products for the State's rail network. In 1991, DSC granted a development consent (DA 171/90) to expand quarrying activities, subject to conditions, including that no more than 30% of the quarry products should be transported by road. According to the evidence and other legal proceedings, since 2012, but not over the last five years or so, there have been periods when road haulage tonnages from the quarry have substantially exceeded that control.

The DA sought consent to extract, process and transport by road and rail up to 1.1 million tonnes per annum (**tpa**) of quarry materials. Up to 450,000 tpa would be via the road haulage route, up from a maximum of 150,000 tpa under pre-existing approvals. Commitments were made in relation to road upgrade works, truck movement hours and other limitations, driver behaviours and in relation to ongoing community consultative arrangements and financial contributions.

Public notification of the DA indicated considerable public interest. A key point of the objections was the increased truck quarry truck movement along the haul route which passed through the residential settlements of Martins Creek, Paterson, Bolwarra Heights, Bolwarra and East Maitland.

Issues:

- (1) Acceptability of predicted increased truck movements on traffic and pedestrian safety and traffic efficiency along the road haulage route, including through residential settlements;
- (2) Acceptability of predicted increased noise in relation to both the quarry operation and truck movements along haul route;
- (3) Acceptability of asserted social impacts;
- (4) Economic benefits of the proposal, in particular in relation to capacity to supply State and regional infrastructure projects, but also having regard to localised benefits;
- (5) Feasibility of rail haulage mindful of [s 2.22](#) of [State Environmental Planning Policy \(Resources and Energy\) 2021 \(SEPP Resources\)](#), which requires consideration of consent conditions “that some or all of the transport of materials in connection with the development is not to be by public road”;
- (6) Sufficiency of information accompanying the DA; and
- (7) Whether the public benefits of the proposal outweigh impacts.

Held: Appeal dismissed. Development application determined by refusal of consent:

- (1) Traffic: the traffic impacts of the DA were found to be unacceptable on three bases:
 - (a) The proposed road upgrade works aimed at addressing traffic implications of increased road haulage. Works were proposed at three sites north of Paterson. The concept schemes failed to comply with minimum sight stopping distances under relevant Austroads standards. The implications of this raised delivery uncertainty. Notwithstanding the provisions of [s 4.38\(1\)](#) of the EPA Act, especially enabling appropriate post consent decision-making for State significant DAs, there was such a significant deficiency in understanding of the scope of works involved, that an adequate assessment of impacts was unable to be undertaken: at [97];
 - (b) Road safety concerns (after proposed improvements and contributions). Road safety audits identified a large number of identified high level risks along the route. The applicant brought

an inadequate evaluation of incremental risk and what mitigation strategy was warranted: at [126]-[131];

- (c) The impacts at the busy, higher order intersection at Melbourne St/New England Highway in East Maitland were uncertain due to inadequate data collection. There was insufficient knowledge of the effects of the additional quarry trucks on this intersection;
- (2) Noise impact: it was accepted that the proposal with various proposed mitigation strategies satisfied noise-related regulatory criteria; in particular the EPA’s Noise Policy for Industry and Road Noise Policy: at [157]-[160], [165]. However, residual impacts (that is, even given compliance with numerical standards) remained at issue and were joined to the consideration of social impacts;
- (3) Social impacts: certain evidence arguing historical unauthorised high level road haulage through residential settlements provided a social impact “baseline” was rejected. The proposed additional truck (and attached trailer or “dog”) movements would bring about “high” and at times “extreme” social impact risk under the social impact assessment risk matrix (at [217]), including to certain identified vulnerable groups: at [238]. The additional truck movements would effect a notable change within the village of Paterson, through the week (quarry haulage would not occur during weekends), which would have a significant effect on social interaction and community life: at [254]. These social amenity effects would be less as the haul route approached Maitland. The proposal placed an over-reliance on under-identified post approval social impact analysis and actions;
- (4) Strategic and localised economic benefits: approval of the proposal would assist in the supply of hard rock for the ongoing rollout of State infrastructure, and other construction works, assisting with production costs. However, the evidence was insufficient to suggest this quarry product was not otherwise replaceable. There were both localised benefits (certain increased local employment directly, and indirectly, associated with the quarry) and disbenefits (associated with tourism income losses and general commerce, in Paterson in particular): at [297]-[301];
- (5) Rail feasibility: section 2.22(1) of SEPP Resources required a consideration of whether some or all of the transport of materials in connection with the development should not be by public road. The feasibility of a proposition that rail haulage be

employed instead of road haulage at some proportionate level, as a means of addressing road haulage impacts, was significantly under examined in the application material or evidence otherwise;

- (6) Sufficiency of information: the applicant had not made its case on certain matters which warranted further resolution in regard to: traffic safety, certain social impacts, rail feasibility and certain economic effects; and
- (7) Weighing benefits and impacts: in this qualitative exercise, the negative impacts the proposed quarry trucks would bring along the proposed haul route, in regard to road safety and social amenity, outweigh the strategic and more localised economic benefits of increased supply of hard rock from this quarry.

***Lynch v The Council of the City of Sydney* [2025] NSWLEC 1574** (Miller AC)

Facts: The applicant appealed a development consent issued by the City of Sydney for the demolition of an existing dwelling and the construction of a new dwelling house on land in Rosebery. The appeal related to a number of conditions of the consent, however following the conciliation phase the only remaining issue in dispute was whether an affordable housing contribution imposed on the consent was ‘reasonable’. The approved development replaced an existing single dwelling house with a new larger single dwelling house.

The condition in dispute required the payment of an affordable housing contribution of \$218,377.50 in accordance with [s 7.32](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (EPA Act), [Ch 2 Pt 1](#) of [State Environmental Planning Policy \(Housing\) 2021](#), [cl 7.13](#) of [Sydney Local Environmental Plan 2012 \(SLEP 2012\)](#) and the City of Sydney Affordable Housing Program (AHP).

Clause 7.13 of SLEP 2012 provided a discretionary power to require a contribution towards affordable housing. The consent authority may impose a condition requiring a contribution not exceeding an affordable housing levy contribution of 3% of the total floor area that is intended to be used for residential purposes (cl 7.13(2C)(b)(i)) where the development is within the area identified as ‘residual land’ and has a GFA of greater than 200m². The proposed development met those requirements.

The development had a “total floor area” calculated in accordance with the definition of 625m². Consistent with

the current square metre rate, the relevant contribution had been calculated by the parties at \$218,377.50 which equated to 10.3% of the build cost.

Issues:

- (1) Whether the proposed affordable housing contribution was ‘reasonable’ in accordance with s 7.32(3)(c) of the EPA Act which provided that a condition may be imposed under the section only if “the condition required a reasonable dedication or contribution, having regard to any other dedication or contribution required to be made by the applicant under this section or section 7.11”; and
- (2) Whether only the matters specified in s 7.32(3)(c) may be considered in determining whether a proposed dedication or contribution was ‘reasonable’ or whether other relevant matters may be considered: *Willoughby City Council v Blanc Black Projects Pty Ltd* [2023] NSWLEC 54 (*Blanc Black*).

Held: The appeal was upheld:

- (1) Having regard to the mandatory considerations, the quantum of the proposed contribution was not reasonable and therefore should not be applied in this instance for three reasons as:
 - (a) Firstly, no other dedication or contribution is required to be made by the applicant therefore the total of all contributions required to be paid, if the condition were imposed, would be \$218,377.50;
 - (b) Secondly, the total contribution of \$218,377.50, which represented 10.3% of the total building cost of the proposed new dwelling was a substantial sum and represented an unreasonable burden to apply to one family seeking to rebuild (and enlarge) an existing family home. At this rate the proposed contribution was significantly greater than that applied to other forms of dwelling on a per dwelling basis and also significantly above (with one exception) the rate, as a percentage of development cost, applied to other similar examples of single dwelling house DAS referred to in evidence;
 - (c) Thirdly, the rate sought to be applied did not differentiate between land uses with the same rate applying to a single dwelling as would apply to a residential flat building or commercial development where the potential existed for the cost burden to be spread across a number of owners: at [70];

- (2) In the alternative, if other relevant circumstances are able to be considered as per *Blanc Black* the same conclusion would be reached, that is, that the proposed contribution is unreasonable for the reasons outlined and the proposed contribution rate sought to be applied by the Council was a blanket rate that had been determined having regard to feasibility analysis undertaken for more intensive forms of development and did not appear to have regard to the circumstance of the case, being the redevelopment of a single family home. While an affordable housing contribution can readily be considered to be a cost of development, that should be factored in to any proposed development, for it to be legally applied it must be reasonable. In this circumstance it is determined that this is not the case: at [71]; and
- (3) The Court considered that a more moderate “reasonable” affordable housing contribution should be imposed on the development however under the terms of cl 7.13 of SLEP 2012 this is not open to the Court on appeal. Accordingly, no affordable housing contribution is applied: at [73].

Bullen v Waverley City Council [2025] NSWLEC 1610 (Thorpe AC)

Facts: The applicants appealed against the deemed refusal by Waverley City Council (**Council**) of a development consent for the construction of parking garages at two adjoining semi-detached dwellings in Bondi. The site was in a residential street with a steeply sloping grassed embankment between the footpath and the roadway. Because of the topography, the proposal involved substantial excavation of both of the applicants’ properties and the public domain. The Council had not provided consent for works in the road reserve.

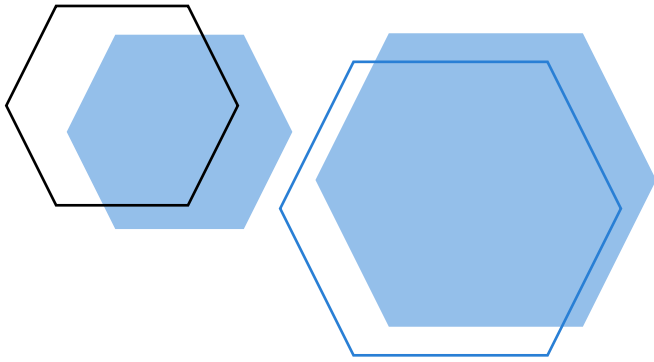
Issues:

- (1) Whether the proposed earthworks were excessive pursuant to [cl 6.2](#) of [Waverley Local Environmental Plan 2012 \(WLEP\)](#);
- (2) Whether the proposal involved unacceptable impacts on the streetscape and achieved design excellence;
- (3) Whether the proposal involved unacceptable impacts on traffic, parking, manoeuvring and pedestrian access;
- (4) Whether the proposal was in the public interest, noting the parties agreed that approval would create a precedent; and

- (5) Whether owners’ consent should be granted for works on council land pursuant to [s 39\(2\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#) (**Court Act**).

Held:

- (1) The proposed excavation would have a negative impact on amenity and the likely future use and development of the road reserve. While the applicants had minimised excavation by joining together to provide a single access point, this must be considered against the option of not constructing any garage given Council policy and planning controls which discouraged the provision of on-site car parking. The proposed excavation was excessive, consent should not be granted pursuant to cl 6.2 of WLEP: at [31]-[32];
- (2) The proposal would have adverse impacts on the streetscape and would not achieve design excellence: at [35];
- (3) The proposal would have adverse impacts on safety for pedestrians and vehicles and would result in the loss of more than one parking space: at [45]-[49];
- (4) The proposal prioritised private interests to the detriment of the public interest, particularly the public interest in amenity, sustainability and accessibility as set out in WLEP and other council policy and controls: at [54]; and
- (5) Owner’s consent for excavation in the public domain should not be granted pursuant to s 39(2) of the Court Act: at [32].



LEGISLATION

STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between March 2025 and May 2025.

MISCELLANEOUS AMENDMENTS

[Environmental Legislation Amendment Act 2025 \(NSW\)](#)

An Act to make miscellaneous amendments to legislation administered by the Minister for Climate Change and the Minister for the Environment to strengthen environmental protection and for related purposes. The Act amends:

- (i) [Climate Change \(Net Zero Future\) Act 2023](#);
- (ii) [Contaminated Land Management Act 1997](#);
- (iii) [Land and Environment Court Act 1979](#);
- (iv) [Pesticides Act 1999](#);
- (v) [Plastic Reduction and Circular Economy Act 2021](#);
- (vi) [Product Lifecycle Responsibility Act 2025](#);
- (vii) [Protection of the Environment Administration Act 1991](#);
- (viii) [Protection of the Environment Operations Act 1997](#);
- (ix) [Protection of the Environment Operations \(General\) Regulation 2022](#)
- (x) [Stock Medicines Act 1989](#); and
- (xi) [Waste Avoidance and Resource Recovery Act 2021](#).

The Act inserts after [section 20\(1\)\(dl\)](#) of the [Land and Environment Court Act 1979 \(NSW\)](#):

- (dm) proceedings under the [Plastic Reduction and Circular Economy Act 2021](#), section 46A,
- (dn) proceedings under the [Product Lifecycle Responsibility Act 2025](#), section 45A,
- (do) proceedings under the [Waste Avoidance and Resource Recovery Act 2001](#), section 53,

WATER

[Water Management \(General\) Amendment \(Exemptions for Infrastructure\) Regulation 2025](#)

The object of this regulation is to provide exemptions from the requirement to hold an access licence for the taking of water from a water source in the following circumstances and to deal with other consequential matters:

- (a) until 30 June 2029, for the taking of water from coastal areas in connection with the construction, other than maintenance, of infrastructure;
- (b) for the taking of water by public authorities in connection with the construction of essential infrastructure; and
- (c) for the taking of water by persons in connection with the construction of private water industry infrastructure permitted under the [Water Industry Competition Act 2006](#).

[Water Management \(General\) Amendment \(Landholder Negotiation Scheme\) Regulation 2025](#)

The objects of this regulation are as follows:

- (a) to establish a scheme to facilitate negotiation between the Water Administration Ministerial Corporation and owners and occupiers of land, and other persons, who may be affected by proposed releases of water for environmental purposes,
- (b) to set out the circumstances in which the scheme applies,
- (c) to provide for the making of guidelines for the conduct of the negotiations,
- (d) to require Water NSW to notify landholders affected by certain releases of water for environmental purposes.

[Water Management \(General\) Amendment \(Water Return Flow Rules and Exemptions\) Regulation 2025](#)

The object of this regulation is to amend the [Water Management \(General\) Regulation 2025](#) to:

- (a) establish water return flow rules to enable water allocations that are used under prescribed access licences for taking water from regulated river water sources for certain environmental purposes to be recredited to the licences, and
- (b) provide exemptions subject to conditions from the requirement to hold a water access licence:

- (i) for certain public authorities for taking water from unregulated river water sources for environmental purposes, and
- (ii) for the Murray-Darling Basin Authority, Water NSW and other persons for taking water from regulated river water sources when delivering water in certain circumstances.

POLLUTION

[Protection of the Environment Operations \(General\) Amendment \(Regulation of PFAS\) Regulation 2025](#)

The object of this regulation is to amend the [Protection of the Environment Operations \(General\) Regulation 2022](#) to:

- (a) declare the EPA as the appropriate regulatory authority for matters arising from the use of PFAS firefighting foam in accordance with certain exemptions, and
- (b) exempt the use of PFAS firefighting foam from the offence under the [Protection of the Environment Operations Act 1997](#) (the Act), [section 296C](#) in certain circumstances, and
- (c) repeal the offences and exemptions relating to PFAS firefighting foam, consequent on the listing of certain PFAS chemicals in the register under the [Industrial Chemicals Environmental Management \(Register\) Act 2021](#) of the Commonwealth on 1 July 2025.

LAND ACQUISITION

[Valuation of Land Regulation 2025](#)

The object of this regulation is to repeal and remake, without substantial amendments, the [Valuation of Land Regulation 2018](#), which would otherwise be repealed on 1 September 2025 by the [Subordinate Legislation Act 1989](#), [section 10\(2\)](#). This regulation:

- (a) prescribes kinds of leases that make subject land Crown lease restricted for the determination of land value under the [Valuation of Land Act 1916](#), [section 14I](#), and
- (b) provides for the way objections to valuations may be lodged or withdrawn and other notices given.

This regulation comprises or relates to matters set out in the [Subordinate Legislation Act 1989](#), [Schedule 3](#), namely:

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

FORESTRY

[Forestry Amendment \(Energy Transmission Projects\) Regulation 2025](#)

The object of this regulation is to amend the [Forestry Regulation 2022](#) to permit the Forestry Corporation to issue a licence authorising the taking of timber or forest products from land identified as an environmentally significant area in relation to approved State significant infrastructure under the [Environmental Planning and Assessment Act 1979](#) for certain energy transmission projects.

PROCEDURE

[Uniform Civil Procedure \(Amendment No 105\) Rule 2025](#)

The object of this rule is to amend the circumstances in which a party to proceedings requires leave of the court before issuing a subpoena under [rule 7.3](#).

[Uniform Civil Procedure \(Amendment No 106\) Rule 2025](#)

The object of this rule is to amend the restriction on the use of generative artificial intelligence to generate the content of affidavits to ensure consistency with the restriction on the use of generative artificial intelligence to generate the content of witness statements under [rule 35.3B](#).

HOUSING

[Environmental Planning and Assessment Amendment \(Housing and Productivity Contributions Scheme\) Regulation 2025](#)

The object of this regulation is to authorise payments from the Strategic Biodiversity Contributions Fund and the Housing and Productivity Fund, established under the [Environmental Planning and Assessment Act 1979](#) (the Act):

- (a) to a person who has made a housing and productivity contribution that exceeded the amount of the contribution required by a Ministerial planning order, or
- (b) to the Consolidated Fund, in circumstances where a payment has been made to a person out of that Fund in relation to the person making a housing and productivity contribution.

[State Environmental Planning Policy \(Housing\) Amendment \(Diverse Housing\) 2025](#)

Makes amendment to the [State Environmental Planning Policy \(Housing\) 2021](#), [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) and [State Environmental Planning Policy \(Transport and Infrastructure\) 2021](#) to resolve issues in, and make improvements to earlier regulations made in February 2025 that sought to give effect the Government's low and mid-rise housing policy.

Further, the amendments to the [State Environmental Planning Policy \(Housing\) 2021](#) extend the application of the Transport Oriented Development program under [Chapter 5](#) in two respects. First, where the chapter applies to only part of a lot, it is taken to apply to the whole lot. Second, where the proposed development proposes the amalgamation of a number of lots, the chapter is taken to apply to each of the lots where it applies to one or more of the lots in the proposed amalgamation.

[State Environmental Planning Policy \(Housing\) Amendment \(Group Homes\) 2025](#)

Amends the [State Environmental Planning Policy \(Housing\) 2021](#) to make amendments relating to group homes, build-to-rent housing, seniors housing and infill affordable housing.

[State Environmental Planning Policy \(Exempt and Complying Development Codes\) Amendment \(Events and Culture\) 2025](#)

Amends the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) to proscribe and amend development standards for numerous types of complying and exempt development.
