Land and Environment Court
of New South Wales

June 2025 / Vol 17 Issue 2

Judicial Newsletter

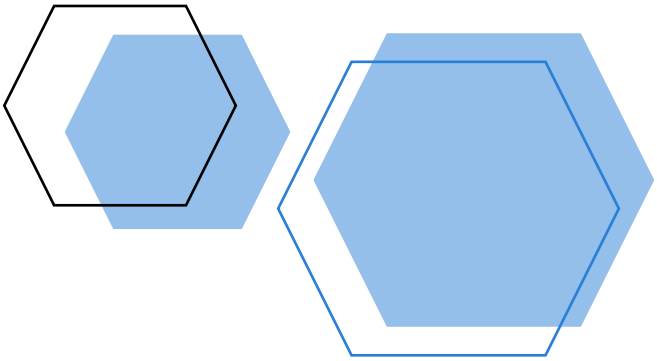
COURT NEWS

APPOINTMENTS

Richard Beasley SC has been appointed as a judge of the Land and Environment Court.

KING'S BIRTHDAY 2025 HONOURS LIST

The Honourable Peter Biscoe KC, former judge of the Land and Environment Court, was appointed as a Member of the Order of Australia (AM) in the 2025 King's Birthday Honours for his significant service to the judiciary, to the law, and to local planning.



JUDGMENTS

COURT OF SESSION (OUTER HOUSE)

Petitions by Greenpeace Limited & Uplift [2025] CSOH 10
(Lord Ericht)

Facts: The Jackdaw Field and Rosebank Field were each proposed major oil and gas projects to be carried out off the northern coast of Scotland. Consent was granted for each project to proceed in 2022 and 2023 respectively. The proposed Jackdaw project was to be developed by BG International Limited (part of the Shell Group) and was expected to produce gas from the Jackdaw field for 8 years, producing 6.5% of the UK's gas production at its peak. The Rosebank field was estimated to be the largest undeveloped oil and gas field in the UK's continental shelf. The proposed project, to be developed by Equinor UK Limited (with Ithachana SP E&P Ltd), was expected to produce over 300 million barrels of oil over its 25-year production life and 21 million standard cubic feet of gas a day.

The petitioners, Greenpeace and Uplift, brought judicial review proceedings in the Scottish Court of Session challenging the consents granted by the Secretary of State to the two projects on the basis that the consents were unlawful, as the environmental impact assessments (**EIA**) that accompanied the applications for each project did not consider the downstream emissions of the projects. The developers were required to submit an EIA outlining the effects of the proposed projects under the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020, which implemented the European Union Directive 92/11/EU (**EU Directive**). The parties agreed each consent was unlawful due to the UK Supreme Court's decision in *R (On the application of Finch on behalf of the Weald action Group) v Surrey County Council and others* [2024] UKSC 20 (***Finch***). In *Finch* it was held that an EIA submitted under regulations implementing the EU Directive was required to consider the downstream emissions of a proposal.

Each of the consents was granted prior to the Supreme Court's decision in *Finch* and after the High Court's decision (overturned by the Supreme Court) which held that the consideration of downstream emissions was not required. By the time of the hearing, work had commenced on the projects with each of the developers incurring substantial costs. Due to the similarity in issues, the cases were dealt with together.

Issues: What remedy should the Court grant in respect of the unlawful decisions? In particular, should the decisions be reduced (the Scottish legal equivalent of quashing the decision) and be remade, or should the Court declare that the decisions were unlawful but allow the decisions to stand and the projects to proceed?

Held: Appeal upheld; decisions to grant of consent reduced and ordered to be remade; effect of reduction suspended until the decision was remade:

(1) Although the usual remedy to an unlawful decision was reduction, the court retained a wide discretion in selecting the appropriate remedy. The appropriate remedy in judicial review is fact specific, requiring the court to consider all the circumstances to arrive at a result which is equitable in the particular case: at [87]-[90];

(2) The factors to be considered in determining what remedy to order may include: the public interest in authorities acting in accordance with the rule of law; what practical effect the person seeking reduction will achieve if the decision is reduced; the public interest in certainty and finality of decisions; and the potential prejudice to public and private interests. In this matter the three main interests to be balanced were the public interest in public authorities acting lawfully, the private interests of members of the public in respect of the climate change impacts of the proposed projects and the private interests of the developers: at [89]-[98];

(3) Although an applicant does not need to establish that a decision might have been different had the error not been made in order to seek reduction, the error in this case was a material one as the consideration of downstream emissions would add a new and significant factor to the assessment process. In these circumstances, the Court considered that the public

interest in public authorities acting lawfully strongly favoured reduction: at [104]-[107];

(4) The effect of burning fossil fuels on climate change and the lives of individual persons was well recognised in law. Members of the public therefore have an interest in being able to contribute to a decision by expressing their concerns. The Court found that this weighed strongly in favour of reduction: at [108]-[115];

(5) The developers ought to have known that when the consents were granted the law concerning EIA was uncertain as the proceedings in *Finch* had not concluded. The developers were not entitled to proceed with certainty on the basis that the decision to grant consent was lawful unless and until the 3-month time limit for bringing judicial review proceedings had expired, and if proceedings had been commenced, unless and until finally dismissed. Any works undertaken in this period of uncertainty were a commercial decision taken at the developer's own risk: at [121], [125]-[126] and [137];

(6) Reducing the decision had no effect on inward investment into the UK as inward investors were not entitled to certainty that an unlawful decision would be given effect to, only that decisions would be made in accordance with the law and that the legal system would act impartially in ensuring the law was upheld: at [148]; and

(7) Despite reducing the decision, the court found that it would be wrong and disproportionate for the reduction to take effect immediately so as to require work on the projects to cease before the decisions were remade. If the consents were granted upon re-consideration, the adverse impact of ceasing work for the period of reconsideration on the cost of the project would be significant. To ensure that the continuation of work did not impact upon the environment in the circumstance the consents were not granted, the Court ordered that no oil or gas could be extracted in the period before reconsideration. The effect of suspending the reduction enabled the developers to make the most appropriate commercial decision on how to proceed: at [157]-[160].

HIGHER REGIONAL COURT OF HAMM

Lliuya v RWE AG, **Oberlandesgericht Hamm [Higher Regional Court of Hamm], I-5 U 15/17, 28 May 2025**
(Presiding Judge Dr Meyer)

(Related decision: *Lliuya v RWE AG*, Amtsgericht Essen [District Court of Essen], 2 O 285/15, 15 December 2016)
(Presiding District Judge Krüger, District Judge Dr Bender, and District Judge Sommer))

Facts: In 2015, a Peruvian farmer, Saúl Luciano Lliuya (**Lliuya**), brought a claim against the German multinational energy company, RWE AG, in the Amtsgericht Essen [District Court of Essen] claiming that RWE's greenhouse gas (**GHG**) emissions had contributed to climate induced glacial melting and instability, which subsequently rendered his property vulnerable to the impacts of glacial lake outburst flooding (***GLOF***). Lliuya resides in the Andean city of Huaraz, Peru. The town is situated below a glacial lake, Lake Palcacocha, which was susceptible to GLOF that can cause severe floods and mudslides that endanger the properties and lives of the residents of Huaraz. Since the 1970s, the volume of water within Lake Palcacocha had increased significantly, with this increase intensifying since 2003. Lliuya claimed that this increase was attributable, in part, to the melting of glaciers in the Andes that had been caused and intensified by anthropogenic climate change.

RWE, as Germany's largest electricity producer, is responsible for 21.59% of Germany's GHG emissions and approximately 0.47% of total global emissions between 1966 and 2010. Lliuya claimed that there was causal and foreseeable connection between RWE's emissions, which had contributed to global climate change, and the melting of glaciers, which had increased the volume of water in Lake Palcacocha and risk of GLOF.

Lliuya claimed that RWE's emissions constituted an interference under s 1004 of the *Bürgerliches Gesetzbuch* [German Civil Code] (**Civil Code**). Section 1004 provided that a property owner may seek that an interference with their property be removed, where the owner is under no obligation to tolerate that interference, and additionally may seek a prohibitory injunction if there was concern of further interference. Lliuya sought that RWE pay the costs of protection measures for his property proportionate to RWE's share of global GHG emissions, revised to 0.38%. Alternatively, Lliuya sought that RWE take appropriate

measures to ensure that the volume of water in Lake Palcacocha was permanently reduced by an amount proportionate to RWE's share of global GHG emissions, being 0.38%. RWE argued that there was no causal relationship between its emissions and the climate induced glacial melting, and that the possible contribution of any single emitter to a particular climate harm could not be established with sufficient certainty. RWE also asserted that s 1004 of the Civil Code did not create an unlimited strict causal liability for climate impacts as this would grant any person the capacity to bring a claim against any emitter.

In December 2016, the District Court of Essen dismissed the claim at first instance finding it to be inadmissible. The Court also found that it was not possible to establish a causal chain between RWE's emissions and the risk of GLOF, and that RWE's emissions were so minor that they could not have caused an adequate impairment to justify relief. Further, the Court found that any climate related damages could not be attributed to RWE as the contributions of all emitters were indistinguishably mixed.

Lliuya subsequently appealed to the Oberlandesgericht Hamm [Higher Regional Court of Hamm], which recognised the claim as admissible. As part of the evidentiary phase in the proceedings the Court appointed independent experts and visited Huaraz and Lake Palcacocha.

Issues: In determining the claim, the Higher Regional Court of Hamm was confronted with two issues:

(1) Was s 1004 of the Civil Code a suitable basis for the claim?
(2) Did the risk of GLOF constitute an imminent impairment, so as to justify relief under s 1004 of the Civil Code?

Held: The Higher Regional Court of Hamm dismissed the claim, finding that the District Court of Essen was correct in dismissing the matter at first instance:

(1) The Court found that Lliuya could make a claim under s 1004, finding that there was a sufficient causal relationship between RWE's emissions and climate induced glacial melting in the Andes. The Court noted that for a claim under s 1004 of the Civil Code to be successful, an adequate causal link must be established. An adequate causal link will include all outcomes other than those which can no longer be reasonably attributed to the actions of the defendant. The Court found that a reasonable observer in the role of an energy producer like RWE, would have recognised since the mid-1960s that a significant increase in GHG emissions would lead to global warming and the consequences alleged by the Lliuya. The Court accepted, on a common knowledge basis under s 291 of the *Zivilprozessordnung* [German Civil Procedure Code] (akin to judicial notice), that the effects of sustained emissions have been foreseeable since the mid-1960s: at 43-46.;The Court found that, contrary to RWE's claims, RWE's emissions were substantial. The Court noted that neither RWE's share of 0.38% of industrial CO2 emissions nor its share of 0.24% of all global CO2 emissions was insignificant, especially given the respective causal shares of the world's largest emitters are no more than 3.6%. This places RWE as one of the largest emitters, with a share of global emissions equal to a tenth of the causal share of the world's largest emitter. The fact that RWE was one of several emitters that caused the climate induced glacial melt did not impair Lliuya's claim, with the Court noting that a claim exists against each of them: at 46-47, 57.;
(2) Further, the Court rejected RWE's argument that cumulative, distant and long-term damages were not to be regulated under private liability law, as this would result in courts being overburdened by the enforcement of individual claims ("everyone against everyone"). RWE argued that climate liability was better regulated through political forums such as the legislature. The Court rejected the argument as one that did not relate to the legal examination of the claim brought under s 1004 of the Civil Code and thus had no legal basis: 52-53, 56-57; and
(3) Despite these findings, the Court found that the risk posed by GLOF to Lliuya's property was not imminent and therefore did not constitute an impairment under s 1004 of the Civil Code. The Court determined that, in the circumstances of the case, 30 years was the maximum amount of time in which GLOF could be considered an imminent threat. However, the Court, in agreeing with the expert evidence before it, found that the risk of Lliuya's property being affected in the next 30 years by GLOF caused by the detachment of ice, avalanche or rockslide into Lake Palcacocha was only around 1%. This probability of occurrence could not be considered an imminent threat under s 1004 of the Civil Code, thus barring Lliuya's claim to relief: at 81-117.

HIGH COURT OF AUSTRALIA

Commonwealth of Australia v Yunupingu **[2025] HCA 6** (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ)

(Related decision: *Yunupingu v The Commonwealth* (2023) 298 FCR 160 (Mortimer CJ, Moshinsky and Banks-Smith JJ))

Facts: These proceedings related to an appeal from a decision of the Full Court of the Federal Court of Australia (**FCAFC**), for compensation by the Gumatj Clan or Estate Group of the Yolngu People (**Gumatj Clan)** under the *Native Title Act 1993* (Cth) (**NT Act**). The claim concerned past acts attributable to the Commonwealth for appropriations to the Commonwealth and grants to third parties of interests in land in the Grove Peninsula in the Northern Territory by or under ordinances pursuant to the *Northern Territory (Administration Act) 1910* (Cth). The appeal concerned the position of native title prior to the commencement of the NT Act.

Issues:

(1) Whether the power conferred on the Commonwealth by s 122 of the *Commonwealth Constitution* (**Constitution**) to make laws for a government of a territory extended to making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution;
(2) Whether the extinguishment, by or under a law of the Commonwealth, of native title recognised at common law before the commencement of NT Act constituted an acquisition of property within the meaning of s 51(xxxi) of the Constitution; and
(3) Whether the grant of a pastoral lease in 1903 by the Governor of South Australia under the *Northern Territory Land Act 1899* (SA) extinguished any non-exclusive native title rights over minerals on or under the subject land.

Held: Appeal dismissed with costs (per Gageler CJ, Gleeson, Jagot and Beech-Jones JJ with Gordon, Edelman and Steward JJ writing separately):

(1) The power conferred on the Commonwealth by s 122 of the Constitution to make laws for the government of a territory did not extend to making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the Constitution: at [44];
(2) The common law rule by which native title rights and interests were recognised at common law was an unconditional and absolute rule of recognition. Before the commencement of the NT Act cessation of recognition of native title rights and interests occurred because of a legally authorised and legally effective exercise of legislative or executive power prevailing over the operation of an antecedent common law rule of recognition. On this construction, the withdrawal of recognition takes from the native title holders a bundle of rights: at [74]-[84]; and
(3) Effect must be given to the ordinary meaning of the text. In this case the pastoral lease was a mere exception or reservation in favour of the Crown of all minerals, it was not an appropriation to the Crown of those minerals, and it therefore did not involve extinguishment of any non-exclusive native title rights: at [97].

Forestry Corporation of New South Wales v South East Forest Rescue Incorporated **[2025] HCA 15** (Gageler CJ, Edelman, Steward, Jagot and Beech-Jones JJ)

(Related decisions: *South East Forest Rescue Inc v Forestry Corporation of New South Wales (No 2)* [2024] NSWCA 113 (Adamson AJ, Basten and Griffiths AJJA); *South East Forest Rescue Incorporated INC9894030 v Forestry Corporation of New South Wales* [2024] NSWLEC 7 (Pritchard J))

Facts: The Forestry Corporation of New South Wales (**appellant**) appealed a decision of the New South Wales Court of Appeal that found that South East Forest Rescue Incorporated (**respondent**) had standing to bring proceedings to enforce obligations it contended were imposed on the appellant under a Coastal Integrated Forestry Operations Approval (**CFIOA**) and Part 5B of the *Forestry Act 2012* (NSW) (**Forestry Act**).

The respondent commenced Class 4 civil enforcement proceedings in the Land and Environment Court seeking declaratory and injunctive relief to restrain the appellant from conducting forestry operations under the CIFOA unless "broad area habitat searches" were conducted in a manner that included particular searches for "nest, roost or den trees", which it contended were required under the CIFOA. In addition, the respondent sought an interlocutory injunction to restrain the appellant from conducting operations in specific compartments of six state forests.

The primary judge dismissed the respondent's motion, finding that the respondent did not have a "sufficient special

interest" in the subject matter of the proceedings to give it standing at common law. Despite finding that the respondent lacked standing, the primary judge also rejected the appellant's contention that s 69ZA of the Forestry Act excluded common law standing such that only those persons identified in s 69ZA(3) of the Forestry Act were entitled to institute proceedings to remedy or restrain a breach of the Forestry Act.

The respondent appealed to the New South Wales Court of Appeal, arguing that the primary judge had erred in finding that it lacked a sufficient special interest. The appellant repeated its submission that s 69ZA of the Forestry Act precluded a person who met the common law test for standing from commencing an appeal. The Court of Appeal allowed the appeal, finding that the respondent possessed a sufficient special interest that was more than a mere intellectual or emotional concern for the environment and went beyond the interest of the public generally in upholding the law. The Court of Appeal also rejected the appellant's contention, finding that much clearer language than what appeared in s 69ZA was required to oust common law standing.

The appellant was granted special leave to appeal to the High Court on the sole ground that the Court of Appeal erred in finding that s 69ZA of the Forestry Act did not exclude common law standing.

Issue: Whether the Court of Appeal erred in concluding that a private person or entity who met the common law test for standing could bring proceedings to enforce the duties and obligations imposed by an CIFOA.

Held: The appeal was dismissed with costs (per Gageler CJ, Edelman, Steward, Jagot and Beech-Jones JJ):

(1) The Land and Environment Court (**LEC**) is a superior court of record vested with the power to grant all remedies in respect of a legal or equitable claim before it. In its Class 4 jurisdiction, the LEC possessed the same civil jurisdiction as the Supreme Court to enforce any right, obligation or duty conferred or imposed by any planning or environmental law. The jurisdiction allowed the court to grant declaratory or injunctive relief to persons who met the common law test for standing. As the Forestry Act was a planning or environmental law, the LEC was vested with an equitable jurisdiction in relation to the enforcement of any right, obligation or duty imposed under Part 5B of the Forestry Act. As a result, the Court found that a provision would need to convey a "clear and unmistakable statutory intention" for it to withdraw or limit the LEC's jurisdiction or liberty of access to the LEC to a person whose private rights were affected or who had a sufficient special interest: at [7], [10], [13], [40];
(2) The necessary "clear an unmistakable intention" was not apparent in s 69ZA of the Forestry Act or the cognate provisions of the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**), being ss 13.13, 13.14, and 13.14A: at [40];
(3) Section 69ZA did not affect common law standing, but rather was directed at limiting the effect of other statutory provisions that enabled "any person" to commence proceedings "whether or not any right of the person has been or may be infringed": at [28]-[30], [38]-[39]; and
(4) No implication could be drawn from Part 5B of the Forestry Act or the cognate provisions of the BC Act that s 69ZA precluded common law standing, as these cognate provisions did not limit the LEC's jurisdiction or liberty of access to the LEC for a person bringing civil enforcement proceedings: at [31]-[33].

NSW COURT OF APPEAL

Owners Corporation Strata Plan 533 v Random Primer Pty Ltd **[2025] NSWCA 8** (Kirk JA, Gleeson and Mitchelmore JJA)

(Related decision: *Random Primer Pty Ltd v The Owners Corporation Strata Plan 533* [2024] NSWSC 919 (Williams J))

Facts: Ku-ring-gai Council (**Council**) refused Random Primer Pty Ltd's (**Respondent**) Development Application (**DA**), for the replacement of existing building with an apartment block and a driveway extension, as Owners Corporation Strata Plan 533 **(Appellant)** did not provide owner's consent. The Appellant's land was Lot 1 and the Respondent's land was Lot 2, in the deposited plan. Council deemed the Appellant's consent necessary, under reg 23(1) of the Environmental Planning and Assessment Regulation 2021. Lot 1 was benefitted by a registered right of way over a shared driveway on Lot 2 (**ROW**), and the proposed extension to the driveway was to be wholly on Lot 1.

On 30 July 2024, the Supreme Court granted an order to the Respondent, requiring the Appellant to consent to the DA. This decision was appealed to the Court of Appeal.

Issues:

(1) Whether it was not unreasonable for the Appellant to withhold owner's consent as the proposed development required the occupants of Lot 2 to drive over Lot 1, when exiting the property outside the situs of the ROW; and

(2) Whether it was not unreasonable for the Appellant to withhold its owner's consent until claimed deficiencies in the DA were resolved.

Held: Appeal dismissed (per Kirk JA, Gleeson and Mitchelmore JJA agreeing):

(1) The extension of the driveway slightly beyond the boundary of the ROW could not be reasonably characterised as a use outside the situs of the ROW. The proposed use did not unreasonably interfere with the Appellant's rights as a servient owner and the Appellant's refusal to consent to the DA substantially interfered with the Respondent's ability to exercise the rights granted by the ROW: at [44]-[55]; and

(2) The Respondent proposed to widen the driveway into its own property to obtain development consent and in those circumstances the Appellant's refusal was unreasonable and a substantial interference with the Respondent's rights: at [67]-[69].

Theunissen v Barter **[2025] NSWCA 50** (Mitchelmore and Kirk JJA, and Griffiths AJA)

(Related decision: *Barter v Theunissen* [2024] NSWSC 326 (Richmond J))

Facts: This appeal concerned the construction of the effect of an easement affecting two adjoining lots in the locality of Mosman. The easement was located on a roof top terrace area on the lower front lot (**Servient Tenement**) and sat immediately in front of the dwelling on the back lot (**Dominant Tenement**) (collectively, **the Easement**). The Appellant in the proceedings was the owner of the Dominant Tenement and the Respondent was the owner of the Servient Tenement. The Respondent sought declarations and orders clarifying whether the Easement granted the Appellants the exclusive right to use the roof top terrace for the stated purpose or whether the Respondent was also entitled to use the area for those purposes. Richmond J held that the rights were not exclusive.

Issues:

(1) Whether leave to appeal was required;

(2) Whether the primary judge erred in holding that on the proper construction of the Easement rights granted to the dominant owner were not exclusive;

(3) Whether and to what extent physical characteristics of the tenements could be taken into account;

(4) Whether the Easement would be invalid if construed as granting exclusive rights; and

(5) If the rights were not exclusive, whether the primary judge erred by holding that servient owner was entitled to use the area at the same time as dominant owner.

Held: Appeal allowed (per Kirk JA, with Mitchelmore JA and Griffiths AJA agreeing):

(1) Leave to appeal was not required: at [7]-[13];

(2) A reasonable person in the position of the parties would conclude that the Easement granted the dominant owner the exclusive use and enjoyment of the Servient Tenement for the purposes of recreation and enjoyment and as a balcony, terrace or garden. It was permissible to consider the physical characteristics of the tenements at the time of the grant, which was reasonably ascertainable by a third party at that time. In this case, the physical layout of the tenements, location of the roof top terrace and privacy implications of a shared use area could be considered and strengthened the conclusion that the rights were exclusive: at [26]-[117]; and

(3) The Easement would not be rendered invalid by being construed as granting an exclusive set of rights to use the rooftop for recreational purposes: at [118]-[150].

Dickson v Petrie **[2025] NSWCA 110** (Stern and Ball JJA, Griffiths AJA)

(Decision under review: *Petrie v Dickson* [2024] NSWSC 972 (Parker J))

Facts: These proceedings concerned the nature of easements affecting two lots in Palm Beach. The easement, the subject of the dispute was for garden use (**Easement**) and related to a trapezoidal-shaped area at the southern tip of Lot 2, comprising two parts. The Easement benefited Lot 1, owned by the Appellants and burdened Lot 2, owned by the Respondent. The first part of the Easement granted the dominant owners rights in relation to gardening, paving and landscaping, and the storage of related equipment and materials (**Part 1**). The second part of the Easement granted the dominant owners rights to erect a building and to use it for storage and/or domestic laundry activities (**Part 2**). Parker J held that the rights granted by both parts of the

Easement were exclusive and that the Easement was invalid in that it failed to satisfy the fourth characteristic in *In re Ellenborough Park* [1956] CH 131 (***Ellenborough Park***).

Issues:

(1) Whether the primary judge erred in holding that the Easement granted the dominant owners exclusive rights over the subject area; and

(2) Whether the primary judge erred in holding that the Easement was invalid for failing to meet the fourth characteristic in *Ellenborough Park*.

Held: Appeal allowed in part and the cross appeal was dismissed (per Griffiths AJA, with Stern and Ball JJA agreeing):

(1) Considering the circumstances of the case, both parts of the Easement conferred exclusive or sole rights on the dominant owners for the stated purposes. It was not open to conclude that those rights were inconsistent with the servient owner's proprietorship of possession of the affected area: at [103]. The concept of "reasonable use" did not inform the task of construction and only arose once the terms of an easement had been construed: at [109]-[112];

(2) In relation to Part 1, there was nothing in the terms of the Easement that precluded the servient owner from exercising their right of access for the stated purposes: at [113]. The servient owner's right to install devices on the roof of the shed, such as solar panels, was not defeated by the dominant owner's right to demolish and replace the shed, as provided in Part 2: at [126]. Although the plans approved by the council and referred in the Easement were relevant extrinsic aids, they did not assist in the determination of the proper meaning of the Easement as there were inconsistencies between: the plans; the Easement; and what was constructed: at [128]; and

(3) The Easement did not infringe the fourth characteristic of validity in *Ellenborough Park*: at [129]-[148]. The considerations supporting this conclusion included that the rights of the dominant owners were exclusive for the stated purposes, but not for all purposes, the servient owner retained significant positive and negative rights, and subject area was small, and the Easement did not have a major impact on the enjoyment by the servient owner of the servient tenement: at [149]-[153].

Sader v Elgammal **[2025] NSWCA 111** (Kirk and Free JJA, Griffiths AJA)

(Decision under review: *Sader v Elgammal* [2024] NSWLEC 126 (Pritchard J))

Facts: The appellants and first respondent live in adjacent properties in Connells Point. The development of the first respondent's land gave rise to a series of litigious disputes concerning works prescribed in the underlying construction certificate. That construction certificate underwent several modifications, with its most recent iteration excluding a landscape plan and external works plan.

The appellants sought leave to appeal from a costs order made on 29 November 2024 by Pritchard J in relation to Class 4 proceedings in the Land and Environment Court (which had been dismissed by consent by the parties). Pritchard J declined to make orders as to costs, finding that the removal of the two plans from the construction certificate did not amount to a capitulation, and rather formed part of a compromise. Pritchard J also found, assuming without deciding that this was relevant to costs: see *Nadilo v Eagleton* [2021] NSWCA 232, that the conduct of the first respondent was not unreasonable in pursuing his defence.

Issue: Whether to grant leave to appeal from the costs order.

Held: Leave to appeal was refused, with costs (per Griffiths AJA, with Kirk and Free JJA agreeing):

(1) Concerning Pritchard J's reasoning as to why this case involved a compromise and not a surrender or capitulation, the appellants did not identify any issue of principle, matter of general importance or clear injustice to warrant a grant of leave to appeal; nor did they demonstrate any error of fact or law which was more than merely arguable: at [41];

(2) Concerning Pritchard J's reasoning as to why the first respondent's conduct of his defence was not unreasonable, no sufficiently arguable error had been demonstrated: at [26], [55]; and

(3) While there may be rare and exceptional cases, intermediate courts of appeal will generally adopt a restrained approach in determining whether to grant leave to appeal from a costs order. This is in the interests of finality in litigation, and in recognition that costs are properly characterised as involving a matter of practice or procedure: at [39]-[40], [56].

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

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

Facts: Aerotropolis Pty Ltd (**defendant**) was charged with 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 located in Bringelly 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. The defendant did not appear at the hearing.

Issue: Whether the defendant should be found guilty of the offences.

Held: The defendant was guilty of all 20 offences as charged, which were against s 118A(2) and s 118D(1) of the NPW Act from 10 April 2016 to 24 August 2017 and against s 2.2(1)(b) and s 2.4(1) of the BC Act from 12 September 2017 to 28 May 2020:

Possible defences

(1) Both the NPW Act and the BC Act contained possible defences to the charges, including ss 118A(3) and 118G of the NPW Act, ss 2.8, 2.9 and 2.10 of the BC Act and cl 2.17 of the Biodiversity Conservation Regulation 2017: at [43]-[51];

(2) Each of those defences did not apply in this case, as they could not be established on the evidence in respect of each charge: at [47], [51], [87]-[89], [118], [127], [139];

Harming or picking plant offences

(3) Based on expert evidence, the prosecutor proved beyond reasonable doubt that vegetation was cleared (and thereby picked and damaged) and that the vegetation was part of an EEC. The Court was also satisfied beyond reasonable doubt that the defendant "picked a plant" or carried out clearing on the property involving the "picking of plants" that were part of an EEC: at [86], [115]-[116], [125], [138]-[140], [151], [171], [177];

(4) The harming or picking plant offences under the NPW Act and the BC Act were offences of strict liability and attract the principles of vicarious liability, and the defendant's liability in undertaking the clearing which picked plants that were part of an EEC was either direct or vicarious: at [87], [126], [140], [200]-[207]; and

Habitat offences

(5) Based on the evidence, the Court was satisfied beyond reasonable doubt that the defendant damaged the habitat of an EEC (CPW) and the habitat of a threatened species (land snail) by removing or relocating the habitat and causing or permitting such damage, while having the corporate knowledge that the damaged habitat was habitat of that kind: at [90], [96]-[107], [115]-[117], [141]-[143], [152], [172], [179], [200]-[208].

Chief Executive, Office of Environment and Heritage v Kurstjens Onroerend Goed AU B.V.; Kurstjens; Beefwood 1 Pty Ltd; Beefwood 2 Pty Ltd **[2024] NSWLEC 140** (Robson J)

Facts: Gerardus Johannes Jacobus Kurstjens, Kurstjens Onroerend Goed AU B.V., Beefwood 1 Pty Ltd and Beefwood 2 Pty Ltd (collectively, **defendants**) pleaded guilty to five offences (**Offences 1 to 5**) under s 12 of the *Native Vegetation Act 2003* (NSW) (**NV Act**). The offences related to three land clearing events in 2017 at "Beefwood Farms", a grain growing and cattle grazing business in Moree.

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

Held: Each defendant was convicted of the offence against s 12 of the NV Act as charged and fined and ordered to pay the prosecutor's costs:

Objective seriousness

(1) The objective seriousness of the offences was in the mid to low range of seriousness: at [112];

(2) The environmental harm in each offence was low when considering the evidence and various matters agreed between the parties: at [93]-[94];

(3) The defendants: should have foreseen the risk of harm to the environment that would be caused by clearing vegetation; had complete control over the causes giving rise to the offences; and, there were practical measures that could have been but were not taken by each defendant to prevent the harm. The clearing was undertaken for financial gain and committed recklessly or negligently: at [95]-[98], [110];

Subjective circumstances of the defendants

(4) By way of mitigating circumstances, none of the three defendant companies had a criminal history and Mr Kurstjens was of prior good character. However, there was no evidence of good corporate character of the defendant companies. There was a need for general and specific deterrence in relation to each defendant: at [113], [119]-[124], [142]-[146]; and

Other considerations

(5) As to appropriateness in sentencing, the monetary penalty for each offence was discounted by 15% due to the utilitarian value of the guilty plea. Considering totality, it was just and appropriate to reduce the aggregate of the penalties for Offences 4 and 5 by a further 30% (being $53,550 for each offence) as the objective circumstances of those offences and the subjective circumstances of those offenders were the same: at [153], [158].

Burwood Council v Alam **[2025] NSWLEC 2** (Duggan J)

Facts: This matter relates to the sentencing proceedings for two charges of carrying out development otherwise than in accordance with a development consent in breach of s 4.2(1)(b) *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The development related to partial demolition of a dwelling listed as an item of local heritage significance under Pt 1 of Sch 5 of Burwood Local Environmental Plan 2012. The dwelling was described as a Victorian cottage and formed part of a group of cottages on different lots. Mr Alam (**Defendant**) pleaded guilty to both charges.

Issue: The appropriate sentence to be imposed on the Defendant, taking into account the objective seriousness of the offence and the subjective circumstances of the offender.

Held: In each of the two offences, the Defendant was convicted and ordered to pay a fine in the sum of $46,875 and the Prosecutor's legal costs in the agreed sum of $26,500. Publication orders were also made:

Objective Seriousness of Offences

(1) Both offences were Tier 2 strict liability offences and carried the maximum penalty for an individual of $500,000, under s 9.53 of the EPA Act: at [54];

(2) The offending conduct caused substantial environmental harm to the heritage item itself and the integrity of the group of which it formed part: at [60];

(3) The Defendant did not turn his mind to whether the development consent authorised demolition works: at [66];

(4) The Defendant accepted that the risk was foreseeable, that practical measures could be taken to avoid harm and that he had control over the causes of the harm: at [67]-[68];

(5) The objective seriousness of the offending in each proceeding was at the high-end of the low range of objective seriousness: at [73];

Subjective Circumstances of Offender

(6) The Defendant had no prior convictions for environmental crime: at [74];

(7) The Defendant was of good character, had good prospects of rehabilitation and was unlikely to re-offend: at [78]-[79];

(8) The defendant was genuinely remorseful for his conduct: at [83];

(9) A full 25% discount for the utilitarian value of the early pleas was applicable: at [84];

(10) The Defendant provided assistance to the Burwood Council (**Prosecutor**) in answering questions: at [85];

(11) As the Defendant was now fully aware of the requirement for consent, specific deterrence was not necessary: at [86];

(12) General deterrence was necessary, in circumstances where the EPA Act makes statutory provision for the modification of development consent: at [88]-[89];

Other Considerations

(13) No pattern of sentencing was relevant in this case: at [91];

(14) The parties agreed for the Defendant to pay the Prosecutor's costs: at [92]-[93];

(15) The principle of totality applied, with each sentence reduced by 50% to reflect the differing elements of the dwelling demolished, whilst recognising the offending was a single course of conduct: at [102]-[103]; and

(16) A publication order was appropriate: at [105].

Environment Protection Authority v Metropolitan Collieries Pty Ltd **[2025] NSWLEC 23** (Robson J)

Facts: Metropolitan Collieries Pty Ltd (**defendant**) pleaded guilty to two offences committed in September and October 2022 (**September Water Pollution Offence and October Water Pollution Offence, respectively**) under s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) and one offence under s 64(1) of the POEO Act which took place from July to October 2022 (**Licence Breach Offence**). The Water Pollution Offences related to pollution

of waters with water containing sediment and coal fines, while the Licence Breach offence involved a breach of a condition of an environment protection licence held by the defendant. The offences occurred at the defendant's underground coal mine near Helensburgh NSW.

Issue: The appropriate sentence to be imposed on the defendant for the offences.

Held: The defendant was convicted of and fined $70,200 for the September Water Pollution Offence and $49,140 for the October Water Pollution Offence. The defendant was also convicted of the Licence Breach Offence and fined $77,220 for that offence. The defendant was ordered to pay fines in the sum of $196,560, pay the fine to the NSW National Parks and Wildlife Service and the prosecutor's costs and expenses, and to publish details of the offences and orders made against it on various publications and websites:

Objective seriousness

(1) The objective seriousness of each of the offences was in the mid to low range of seriousness: at [111];

(2) Actual, likely and/or potential environmental harm was caused in each offence: at [96], [111];

(3) It was foreseeable that the defendant's polluted discharges would give rise to a risk of harm to the environment in respect of the Water Pollution Offences, and it was reasonably foreseeable that some harm would result from the Licence Breach Offence. The defendant had control over the causes giving rise to all three offences and there were practical measures that could have been but were not taken by the defendant to prevent the harm before the commission of the offences, although the defendant took certain practical measures to prevent recurrence of the offences after their commission: at [95]-[103], [105]-[107];

Subjective circumstances of the defendants

(4) By way of mitigating circumstances, the defendant had no prior convictions, was of good character, demonstrated remorse, and entered relatively early pleas of guilty for each offence (for which a 22% discount was applied to each offence). However, there was a need for general deterrence given the nature of the coal mining industry in which the defendant was involved: at [113]-[118], [121]-[123]; and

Other considerations

(5) As to the totality principle, it was just and appropriate to reduce the fine for each offence by a further 10% (producing total fines of $196,560) to reflect the overlapping circumstances of the offences and the total criminality: at [131]-[133].

Secretary, Department of Planning, Housing and Infrastructure v CEAL Limited (Trading as Multiquip Quarries); Secretary, Department of Planning and Environment v CEAL Limited (Trading as Multiquip Quarries) **[2025] NSWLEC 26** (Pain J)

Facts: The Defendant (**CEAL**) entered pleas of guilty to two offences under s 9.51 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), in that it carried out development contrary to the conditions of consent and therefore contrary to s 4.2(1)(b) of the EPA Act. The offences occurred at the Ardmore Park Quarry (**Site**), a State Significant Development (**SSD**). Project approval for the Site was granted in 2009 and the consent had been modified on three occasions. The extant consent at the time of the offences was MOD 3.

Charge 1 was that CEAL did not comply with MOD 3 in its use of silt cells and silt and oversize management areas. Charge 2 was that CEAL did not comply with MOD 3 in that it imported virgin excavated natural material (**VENM**) to the Site when the Planning Secretary had not approved a Waste Management Plan for the Site. CEAL's quarry manager believed at all material times that MOD 2 was the extant consent and that it was complying with MOD 2. Under MOD 2 CEAL was permitted to import VENM to the site and the quarry manager believed the silt cells and oversize management areas were in accordance with MOD 2.

In relation to charge 1, the location of the silt cells was disclosed to an authorised officer of the Prosecutor prior to the prosecutions commencing. Charge 2 was disclosed on the advice of CEAL's environmental consultants in a notification of non-compliance report to the Prosecutor, although CEAL itself did not believe it was in non-compliance at the time of the notification. A director of CEAL apologised for the commission of both offences, attended in Court and detailed charitable endeavours a wholly owned subsidiary of CEAL is involved in.

Issues:

(1) The objective seriousness of the offences;

(2) Whether an order under s 10(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) was appropriate for both offences; and

(3) If not, the appropriate sentence to be imposed for the offences.

Held: CEAL was convicted of both offences, fined $56,000 for charge 1 and $42,000 for charge 2 and ordered to pay

half of each fine and costs in the amount of $45,000 to the Prosecutor. A publication order was made regarding both charges:

The objective seriousness of the offences:

(1) The Site was SSD and a large development site. The integrity of the EPA Act regime relies on persons obtaining development consent and complying with the terms of such consent. CEAL's actions undermined the development control system established under the EPA Act: at [19];

(2) The maximum penalties for the offences were substantial: at [20];

(3) The commission of both charges was unintentional and it was accepted CEAL's quarry manager held a reasonable belief he was acting in accordance with MOD 2: at [22], [24];

(4) No harm or likelihood of harm arose from either offence: at [26]-[27];

(5) CEAL had control over the causes of the offences: at [28];

(6) The objective seriousness of charge 1 was at the low end of a low range of objective seriousness: at [29];

(7) The objective seriousness of charge 2 was at the low to mid range of a low range of objective seriousness: at [30];

The suitability of a s 10(1) order:

(8) A conditional release order under s 10(1)(b) of the CSP Act is more appropriately made in the case of a natural person rather than a company: at [37];

(9) While the objective seriousness of both offences was low to very low the offences were not trivial and the circumstances for either offence were not extenuating, such that orders under s 10(1) of the CSP Act were not suitable: at [38];

The subjective circumstances of the offences:

(10) A relatively prompt plea of guilty was entered in relation to charge 1 and there was a slightly greater delay in entry of plea in relation to charge 2. A discount of 20% was appropriate on the sentence for charge 1 and a discount of 15% was appropriate on the sentence for charge 2: at [44]-[45];

(11) No substantial harm was caused by the offences: at [46];

(12) CEAL had no previous convictions: at [47];

(13) The likelihood of reoffending was low but not negligible given that CEAL had not provided evidence of how company procedures had or would be changed to avoid similar offences in future: at [48];

(14) A director of CEAL giving evidence of an apology and attending the proceedings demonstrated contrition and remorse in relation to both offences: at [50];

(15) Voluntarily self-reporting the offence underlying charge 1 and CEAL's proposed remediation of the affected area of the Site demonstrated contrition and remorse: at [54];

(16) Self-reporting the offence underlying charge 2 was in response to a regulatory notice to provide information from the Prosecutor and carried less weight in supporting an expression of remorse: at [55];

(17) CEAL was accepted to be of good character: at [56];

(18) Assistance was given to authorities in relation to charge 1: at [57];

(19) Proceedings in the Local Court could have been considered for both charges: at [58];

(20) In light of all the circumstances specific deterrence had some relevance for CEAL: at [62];

(21) The penalty for charge 1 was $70,000 reduced by 20% to reflect the early plea of guilty to $56,000: at [68];

(22) Making some allowance for the totality of the seriousness of the offences, the penalty for charge 2 was $50,000 reduced by 15% to $42,500: at [69]; and

(23) A publication order was appropriate as a deterrent given the circumstances of the two charges and that CEAL is a company operating a large quarry: at [71].

Environment Protection Authority v Cadia Holdings Pty Limited **[2025] NSWLEC 27** (Pritchard J)

Facts: Cadia Holdings Pty Limited (**defendant**) operated Cadia Valley Operations, one of Australia's largest gold mining operations.

The defendant pleaded guilty to three offences under s 128(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), which provided that the occupier of any premises must not operate any plant in such a manner as to cause or permit the emission at any point specified in or determined in accordance with the regulations of air impurities in excess of the standard of concentration or the rate prescribed by the regulations.

The offences involved the emission of air impurities from surface exhaust fans installed in December 2020 at Ventilation Rise 8 (**VR8**) which exceeded the standard concentration of 100 milligrams per cubic metre for total suspended particulate prescribed by Sch 4 to the Protection of the Environment Operations (Clear Air) Regulation 2021

and Sch 2 to the Protection of the Environment Operations (Clear Air) Regulation 2022.

The first offence occurred between 3 and 5 November 2021 (**November 2021 offence**). In December 2021, the defendant received the results of November 2021 sampling from the VR8 confirming particle exceedances.

The second offence occurred on or about 1 March 2022 (**March 2022 offence**). In April 2022, the defendant received the results of March 2022 sampling from the VR8 confirming particle exceedances. In August 2022 the defendant received an air quality audit.

The third offence occurred between 24 and 25 May 2023 (**May 2023 offence**). In April 2023 the defendant engaged AECOM to consider dust mitigation measures and installed filtration scrubbers.

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

Held: The defendant was fined $105,000 for the November 2021 offence, $105,000 for the March 2022 offence, and $140,000 for the May 2023 offence, in addition to an order in relation to legal costs, a publication order and an environmental service order:

Objective seriousness of the offences

(1) The November 2021 and March 2022 offences were of low objective seriousness. The May 2023 offence was in the low to mid range of objective seriousness: at [165(1)];

(2) The May 2023 offence was the most objectively serious offence as, by that time, the defendant had been provided with the March 2022 sampling results and the August 2022 air quality audit: at [165(13)(c)];

(3) Although the defendant exceeded the allowable standard concentration for total suspended particulate, a significant volume of the mud globules sampled could not have remained suspended in the air: at [165(2)];

(4) While the offences involved actual environmental harm, this harm was minimal as the offences caused the deposition of mud in the immediate vicinity of VR8: at [165(3)];

(5) At the time of the November 2021 and March 2022 offences, there were limited practical measures available to the defendant and the offending was not reasonably foreseeable. This was not so for the May 2023 offence, which occurred after the defendant was provided with the March 2022 sampling results and the August 2022 air quality audit: at [165(3)];

(6) The defendant's conduct in relation to the March 2022 offence was negligent to the criminal degree as it did not seek advice in relation to the requirements of the 2021 Clean Air Regulation concerning particle exceedances after receiving the 2021 sampling results: at [165(6)];

(7) Concerning the November 2021 offence, it was reasonably foreseeable that the defendant's failure to test the impact of the new surface fans on the concentration of total suspended particulate that would be emitted and include a dust emission threshold increased the risk of environmental harm: at [165(11)(a)];

(8) Concerning the March 2022 offence, it was reasonably foreseeable that the defendant's lack of action to reduce the emission of air impurities from VR8 would continue that risk of environmental harm: at [165(11)(b)];

(9) Concerning the May 2023 offence, the defendant had taken steps to reduce the emission of TSP from VR8 below the prescribed standard of concentration through the installation of two filtration scrubbers: at [165(11)(c)];

(10) The defendant exercised control of the causes that gave rise to the offences: at [165(12)];

Subjective seriousness of the offences

(11) The mitigating subjective factors included: the defendant's good character and lack of prior convictions; unlikelihood of reoffending; expression of remorse; and guilty plea at the earliest opportunity, in addition to the absence of evidence of specific harm: at [184];

(12) The defendant was entitled to a 25% discount for its early plea, and the other mitigating factors entitled the defendant to a 30% discount: at [185];

Other considerations

(13) Having regard to even-handedness and consistency in sentencing, the acts were materially different and objectively less serious than those the subject of *Environment Protection Authority v Unomedical Pty Limited (No 4)* [2011] NSWLEC 131 which was decided under s 128(2) of the POEO Act: at [200]; and

(14) The Court applied the principle of totality, noting that the offences were discrete and did not overlap in time: at [200].

M.&S. Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations (No 3); M.&S. Investments (NSW) Pty Ltd v Boutros; M.&S. Investments (NSW) Pty Ltd v Carbone; M.&S. Investments (NSW) Pty Ltd v Carbone; M.&S. Investments (NSW) Pty Ltd v Boutros **[2025] NSWLEC 30** (Pain J)

Facts: The Prosecutor (**M&S**) brought numerous criminal charges under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) against six defendants. The charges against all the defendants were: s 115(1)– disposal of waste – harm to the environment; s 142A(1)– pollution of land; s 143(1)– unlawful transporting or depositing of waste; s 144AAA(1)– unlawful disposal of asbestos waste. An additional charge under s 144(1)(b)– use of a place as a waste facility without lawful authority was commenced against Futurepower Developments Pty Ltd (**Futurepower**) (now in liquidation), Mrs Carbone and Mr Carbone, respectively the third, fourth and fifth defendants in the proceedings.

The charges arose from the deposition of soil on a property jointly owned by M&S and Futurepower (**property**) between September and November 2016 by the first, second and sixth defendants in the proceedings (**Boutros Defendants**) purportedly at the request of Mr Carbone. Mr Carbone had been the solicitor for M&S and Futurepower. Mrs Carbone was a director of Futurepower. Mr Bilaver, the director of M&S, had a business relationship with Mrs Carbone as the two were joint owners of the property through their respective companies. The companies undertook a subdivision development for which they had consent from Liverpool City Council (**LCC**) and the property was the residue of that development where it was intended that further subdivision would occur in stage 3.

The Boutros Defendants and Mr and Mrs Carbone filed collectively 22 notices of motion seeking permanent stays of all charges against them or alternatively orders that the proceedings be struck out on the basis the charges were an abuse of process. M&S filed 22 notices of motion in all matters concerning the Boutros Defendants and Mr and Mrs Carbone alleging that the defendants' notices of motion were an abuse of process and should be permanently stayed. The same notices of motion were filed in the multiple proceedings against Futurepower. These were not before the Court.

The defendants relied on direct and indirect evidence. Mr Bilaver gave direct oral evidence. In cross-examination he stated that Mr and Mrs Carbone were prosecuted so that they would remove at their expense the soil he considered to be unauthorised on the property. He did not give instructions to commence prosecution of the Boutros Defendants. He stated that prosecution of the Boutros Defendants was a decision of his counsel and he did not have it in mind.

In relation to indirect evidence, in 2018 Mr Carbone, as the solicitor for M&S and Futurepower, made representations to LCC to the effect that the soil was to be used for approved development and was not contaminated. In 2019, a solicitor for M&S wrote to LCC in response asking the Council to refrain from issuing any notice as the soil posed no environmental or other danger. M&S later commissioned a waste classification report regarding the stockpiled soil. The report found that one of the five samples obtained from the site contained asbestos. M&S had made several attempts to divest its interest in the property or alternatively purchase Futurepowers' interest prior to commencement of proceedings.

On 1 March 2021, M&S received advice from counsel which inter alia stated:

(1) The refusal of Mr Carbone and Futurepower to remove the soil stockpile and the continuing presence of the stockpile was providing an obstacle to both the development of the land and its sale;
(2) The commencement of criminal proceedings was necessary as they would provide the best chance of compelling the removal of the soil at the expense of Futurepower in addition to Mr Carbone and Mrs Carbone personally; and
(3) Commencement of criminal proceedings against Mr Boutros, second defendant, would provide him with the necessary incentive to cooperate in prosecuting and obtaining convictions against Futurepower, Mr Carbone and Mrs Carbone by holding out to him the incentive of not prosecuting him and his businesses for his cooperation.

On 2 September 2021, M&S's solicitor wrote to Mr Boutros, second defendant, and provided a proposed agreement for inter alia providing evidence and supporting the prosecution of Futurepower, Mrs Carbone and Mr Carbone (**draft agreement**). The draft agreement sought to bind the Boutros Defendants to support any steps taken by M&S in proposed prosecutions and separate civil proceedings. It also provided that the Boutros Defendants would waive their right to object to evidence on any grounds including

legal professional privilege or the privilege against self-incrimination.

M&S's counsel was also cross-examined and stated that the nature of the indemnity to be offered to the Boutros Defendants changed over time, from firstly offering not to prosecute them if they provided evidence consistent with Mr Bilaver's evidence, to then undertaking not to press for a penalty if pleas of guilty were entered and evidence was given that supported Mr Bilaver's evidence (as the draft agreement provided).

Issues:

(1) Whether the defendants had discharged their onus of proving, on the balance of probabilities, that the multiple prosecutions were an abuse of process; and
(2) Whether M&S had discharged its onus of proving, on the balance of probabilities, that the defendant's notices of motion were an abuse of process.

Held: Staying all charges against the defendants:

(1) The defendants bore a heavy civil onus in proving that the prosecutions were an abuse of process being commenced by M&S for an improper collateral purpose. Matters in s 140(2) of the *Evidence Act 1995* (NSW) and *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 at 362 (Dixon J), must be considered. The seriousness of the allegation of improper purpose and the power to stay proceedings for abuse of process was to be exercised only in the most exceptional circumstances. The defendants satisfied their onus. The charges against all defendants were permanently stayed: at [171];
(2) M&S's notices of motion were dismissed: at [173]. The defendants' notices of motion were not vexatious or untenable, nor did they harass M&S or have an improper purpose of delaying the prosecutions and bringing the administration of justice into disrepute: at [173];
(3) The proper purpose of a prosecution was generally considered in the context of public prosecutions. Here allegations of improper purpose arose from private prosecutions of public environmental laws. The purpose of prosecutions of public environmental laws by a public regulator was generally to achieve a criminal conviction in order to protect the public from environmental harm. The question arose of whether these prosecutions were being used to determine if criminal offences have been committed and to seek the imposition of appropriate penalties, or for an alternative improper purpose: at [120]-[121];
(4) The evidence demonstrated that the charges against Mr and Mrs Carbone were commenced to apply pressure to remove the soil at their expense, thus providing M&S a commercial advantage: at [151]-[152];
(5) The attempt to have the Boutros Defendants enter into an agreement in the terms identified in the draft agreement and the evidence concerning how they came to be prosecuted in addition to Mr and Mrs Carbone supported the conclusion that those prosecutions were commenced for an improper collateral purpose: at [158]; and
(6) A secondary consideration to determining that the prosecutions were commenced for an improper purpose, lack of compliance with the Office of the Director of Public Prosecutions' *Prosecution Guidelines*, the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (**Barrister Rules**) and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) was relevant to assessing whether the further conduct of the prosecutions may bring the administration of justice into disrepute, which was another established basis for staying proceedings for abuse of process: at [165].

***Environment Protection Authority v Blacktown Waste Services Pty Ltd* [2025] NSWLEC 31** (Pepper J)

Facts: The Environment Protection Authority (**EPA**) brought three charges against Blacktown Waste Services Pty Ltd (**Blacktown**) for offences against the *Protection of the Environment Operations Act 1977*(NSW). Each of the three charges arose from the same factual matrix. The EPA was ordered to file and serve "a separate s 247J notice" under the *Criminal Procedure Act 1986* (NSW) (**CP Act**) with respect to each charge (the **order**). The EPA initially filed a single s 247J notice contrary to the Court's order. It subsequently filed separate but identical notices in each proceeding. By way of notices of motion, Blacktown sought orders that the EPA (i) serve separate and distinct s 247J notices that were directed to each charge and (ii) identify content from the record of interviews (**ROI**) for the purpose of each charge.

Issues:

(1) Whether the EPA had complied with the order; and
(2) Whether the EPA had to identify each question and answer in the ROI that it would rely upon under s 247T of the CP Act for the purpose of each charge.

Held: Notices of motion dismissed:

(1) The EPA had complied with the order as it had filed and served s 247J notices in each proceeding. The language and context of s 247J of the CP Act did not support the disclosure to the level of specificity for which Blacktown contended. Nor did the coextensive duty of disclosure at common law: at [26] and [29];
(2) The Court would not exercise its discretion to control its own processes to prevent injustice given there was nothing inadmissible about a single body of evidence across multiple charges being heard together: at [31];
(3) The evidence disclosed in the s 247J notices was common to all three charges and, at the time, was *prima facie* relevant and admissible in each proceeding: at [34]; and
(4) Blacktown proffered no evidence to establish unfair prejudice by the s 247J notices in their current state, whereas the EPA's case risked unjust circumscription were it to treat each proceeding as if it were to be heard separately: at [36] and [40].

Secretary, Department of Planning, Industry and Environment v Balmoral Farms Pty Ltd **[2025] NSWLEC 40** (Pritchard J)

Facts: The Secretary, Department of Planning, Industry and Environment (**prosecutor**) charged Balmoral Farms Pty Ltd (**defendant**) with five offences under s 12 of the *Native Vegetation Act 2003* (NSW) and one offence under s 60N of the *Local Land Services Act 2013* (NSW) alleging clearing of native vegetation without approval on two properties owned by the defendant in the Walgett Local Government Area.

In opening submissions, the prosecutor indicated that it intended to tender a certificate issued under s 60F(5) of the *Local Land Services Act 2013* certifying that part of certain land identified in the certificate was category 2-regulated land for the purposes of the Act (**certificate**).

The defendant objected to the tender of the certificate.

Issues:

(1) Whether, in Class 5 proceedings, the defendant could raise a collateral challenge to the validity of a statutory certificate;
(2) Whether there was proof of the delegated authority of the certifier (Mr Black) to issue the certificate; and
(3) Whether the certificate was validly issued in any event. The defendant impugned the validity of the certificate on various grounds including that Mr Black's reasons for concluding that the land was category 2-regulated land were "formulaic and conclusory".

Held:

(1) The defendant could raise a collateral challenge to the validity of a statutory certificate: at [18];
(2) The prosecutor provided the defendant with the Instrument of Delegation of Functions of the Chief Executive of the Office of Environment and Heritage under Pt 5A of the *Local Land Services Act 2013* and, at the hearing, the defendant accepted that there was satisfactory proof of the delegated authority of the certifier to issue the certificate. The Court therefore held that receipt of the tender of the certificate would not cause the defendant to suffer any prejudice on this ground: at [26]-[28], [35]; and
(3) None of the matters raised by the defendant impugned the validity of the certificate. The relevant statutory procedures in 60F of the *Local Land Services Act 2013* were followed. The defendant's grounds of challenge to the certificate were not conventional grounds of judicial review: at [53]-[54].

Appeals from Local Court

Kingfisher Properties Pty Limited v Northern Beaches Council **[2025] NSWLEC 39** (Preston CJ)

(Related decision: *Northern Beaches Council v Kingfisher Properties Pty Limited* (unreported, Manly Local Court, 16 August 2024) (Stapleton LCM))

Facts: In August 2020, Kingfisher Properties Pty Limited (**Kingfisher**) constructed a carport at a residential property it owned at 163 Pacific Road, Palm Beach. The carport was of a size and in a location that required development consent under the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), which was not obtained by Kingfisher prior to its erection. On 25 January 2021, Northern Beaches Council (**the Council**) issued a Development Control Order (**DCO**) under s 9.34(1)(a) and the table to Part 1 of Schedule 5 of the EPA Act. The form of DCO that the Council imposed on Kingfisher was a Compliance Order under item 11 of the table to Part 1 of Schedule 5 of the EPA Act. However, as Kingfisher had not obtained consent for the carport and thus the carport did not fail to comply with either a planning approval or any

relevant development standards, the Council had no power to impose such a Compliance Order. A Compliance Order could only be issued to require a person to 'comply with a planning approval', 'do whatever is necessary so that any building or part of a building that has been unlawfully erected complies with relevant development standards' or 'carry out works associated with subdivision'. The absence of any development consent for the erection of the carport also meant that the terms of the order were made outside power.

Despite this, Kingfisher chose not challenge the validity of the Compliance Order and instead appealed against it under s 8.18(1) of the EPA Act in the Land and Environment Court's (**the Court**) class 1 jurisdiction. The Court, pursuant to s 8.18(4)(c), substituted for the Council's Compliance Order a further DCO that was agreed between the parties at a conciliation conference arranged under s 34 of the *Land and Environment Court Act 1979* (NSW): see *Kingfisher Properties Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1088. The further DCO was issued under item 3 of the table to Part 1 of Schedule 5 of the EPA Act, as a Demolish Works Order. Yet, the Demolish Works Order was also made outside power, as it required Kingfisher to carry out certain building works that did not fall under the remit of a Demolish Works Order, which could only be issued to require a person to 'demolish or remove a building.' The Demolish Works Order required Kingfisher to demolish the carport roof and construct a new carport roof according to certain specifications, including the installation of gutters on the replacement roof, and submit an executed survey plan to the Council. The DCO also required that Kingfisher pay a security bond to the Council and have all stormwater drainage works certified as compliant with all relevant Australian standards and codes.

Again, Kingfisher did not challenge the validity of the Demolish Works Order. In accordance with the Demolish Works Order, Kingfisher removed the roof of the carport and constructed a replacement roof within the time specified. However, the replacement roof did not comply with the specifications outlined in the Demolish Works Order and Kingfisher failed to submit the works as executed survey plan. Kingfisher also failed to pay the security bond and did not obtain stormwater drainage certification. On 21 April 2023, the Council issued a penalty notice to Kingfisher in the amount of $6,000 for the offence of failing to comply with the terms of the Demolish Works Order under s 9.37(1) of the EPA Act. Kingfisher elected to have the penalty infringement notice determined by the Local Court, pleading guilty to the offence on the day of the hearing on 1 August 2024. On 16 August 2024, the Local Court convicted Kingfisher of the offence, fined it $100,000, ordered it to pay the Council's costs and ordered a two thirds moiety of the fine to the Council.

Kingfisher appealed as of right under s 31(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) to the Court against the severity of the sentence imposed by the Local Court.

Issue: What was the appropriate sentence to be imposed for the offence of failing to comply with the Demolish Works Order?

Held: The Court set aside the fine of $100,000 imposed by the Local Court and instead fined Kingfisher $9,000; the moiety of two-thirds of the fine imposed by the Local Court to the Council was set aside and instead a moiety of one-half of the fine be paid to the Council was ordered; no order was made as to costs:

(1) The offence committed by Kingfisher was at the very low end of the range of objective seriousness. To the extent that Kingfisher failed to comply with terms of the Demolish Works Order that were issued outside power, namely, to construct the roof according to the specifications in the Demolish Works Order, submit an executed survey plan and submit certification of stormwater drainage works, that conduct did not undermine the purpose of the statutory provision as each were terms that ought not to have been imposed: at [33]-[37];

(2) Kingfisher chose not to comply with the terms of the Demolish Works Order, believing that the requirement to install guttering, arrange for stormwater drainage certification and pay a security bond was unnecessary. Further, Kingfisher did submit an executed survey plan, yet due to Kingfisher's mistakes in constructing the replacement carport roof, the plan did not show the roof meeting the specifications outlined in the Demolish Works Order. Whilst these justifications demonstrated that Kingfisher intentionally breached the order and did not legally justify the non-compliance, they did provide a plausible explanation for the non-compliance, making the offending conduct less objectively serious: at [39]-[41];

(3) No part of the offending conduct caused or was likely to cause harm to the environment. Kingfisher's failure to install guttering on the replacement roof, as required by the Demolish Works Order, did not result and was not likely to result in uncontrolled runoff or erosion as even

without the guttering, rainfall runoff from the roof fell into the existing drainage system. The failure to submit an executed survey plan and pay the security bond did not and could not cause any harm to the environment: at [42]-[45]; and

(4) The subjective circumstances of Kingfisher mitigated the seriousness of the offence. Kingfisher accepted responsibility for its actions and remedied all aspects of its non-compliance with the Demolish Works Order other than the payment of the security bond, although the failure to pay the bond could no longer be remedied once all other demolition and building works had been completed. This demonstrated Kingfisher's remorse. Further, Kingfisher had a low likelihood of reoffending and had no previous convictions. A 10% discount was applied for Kingfisher's early guilty plea: at [51]-[59].

JUDICIAL REVIEW

Phelps and Ors v Minister Administering the Water Management Act 2000 [2025] NSWLEC 4 (Robson J)

Facts: Jonathon Phelps, Dale Smith and Richard Schwager (collectively, **the applicants**) sought judicial review of a decision of the Minister administering the *Water Management Act 2000* (NSW) (**WM Act**) to make the Available Water Determination Order for Regulated River Water Sources 2023 (**2023 AWD**). By summons filed 22 September 2023 and amended 8 March 2024, the applicants sought relief on eight grounds claiming the 2023 AWD was invalid on the basis that the "Namoi Source Model", a new hydrological computer model which was used to calculate water usage and which reduced the applicants' share entitlement for access to supplementary water in the "Lower Namoi Water Source", was not approved and should not have been used to determine the "Current Extraction" under the Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2016 (**Namoi WSP**).

Issue: Whether the applicants' judicial review claims in their amended summons filed 8 March 2024 should succeed.

Held: The amended summons filed by the applicants should be dismissed, as their claims were not made out:

Namoi Source Model Grounds – Grounds 1 and 4

(1) Grounds 1 and 4 were not made out, as the power in cl 30 of the Namoi WSP was not constrained by the words "at the time" and the Namoi Source Model was an approved model able to be used for the relevant water year: at [81];

Jurisdictional Error Grounds – Grounds 2, 3, 5, 6 and 7

(2) The decision-maker did not take into account irrelevant matters or matters outside the legislative scope of power conferred, and the decision-maker did not rely upon an invalid or unapproved hydrologic computer model, did not fail to exercise jurisdiction and did not fail to apply the proper statutory test. As such, the applicants did not make out their claims in Grounds 2, 3, 5, 6 and 7: at [139]; and

Apprehended Bias Ground – Ground 8

(3) The evidence did not suggest that a fair-minded lay observer would have a reasonable apprehension that Mr Isaacs, the Department's Chief Knowledge Officer who made the decision to adopt the Namoi Source Model, was predisposed to being partial to adopting a hydrologic computer model which used the Source Model developed by the company "eWater Ltd" because of his position as a director of eWater Ltd. Thus, the adoption of the Namoi Source Model was not affected by apprehended bias: at [43], [180].

Reisinger v Placek [2025] NSWLEC 11 (Pain J)

Facts: In 2024, Woollahra Municipal Council (**Council**), the third respondent, approved a development application (**2024 DA**) made by the first and second respondents for an inclinator on their property.

The 2024 DA was largely identical to a development application filed in 2023 by the first and second respondents (**2023 DA**). Separate assessment officers and separate determining officers were assigned to the 2023 DA and 2024 DA. The 2023 DA was challenged in judicial review proceedings by the applicant, a neighbour of the first and second respondents, in the Land and Environment Court. In the **2023 proceedings** the Council played an active role in defending its consent to the 2023 DA. The 2023 proceedings were discontinued on 21 November 2024 before judgment was delivered.

The applicant objected to the 2024 DA. In correspondence to the Council the applicant said that it should be independently assessed by a body other than the Council. The determining officer did not accept the applicant's request for independent assessment and approved the 2024 DA.

The applicant commenced judicial review proceedings challenging the 2024 DA. The applicant argued the Council's participation in the 2023 proceedings would give rise to an apprehension of bias in determining the 2024 DA, applying the test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 (***Ebner***). The applicant relied on the principle in *R v Australian Broadcasting Tribunal; Ex Parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13 at 35-36 (***Hardiman***) that a decision-maker should refrain from taking an active role in proceedings challenging its decisions due to a risk that doing so creates an apprehension of bias in subsequent applications to it in relation to the same matter. The applicant sought a declaration that the 2024 DA approval was invalid and of no effect and an order that the Council refer the 2024 DA to:

(1) A local planning panel constituted by the Council; or
(2) A person, not being an employee of the Council, to whom the function of determining the DA is validly delegated for determination, on behalf of the Council.

Issues:

(1) Whether in the absence of finalised judicial review proceedings the principle in *Hardiman* could found a determination that a fair-minded lay observer might reasonably apprehend that the determining officer might not bring an impartial and unprejudiced mind to the determination of the 2024 DA;
(2) Whether the active role played by the Council in the 2023 proceedings would give rise to an apprehension of bias by a fair-minded lay observer when different council officers assessed and approved the 2024 DA, given the principle in *Hardiman*; and
(3) Whether the Court may order the Council to refer the 2024 DA for determination by a local planning panel or a person not being an employee of the Council to whom the function of determining the DA was validly delegated.

Held: Summons dismissed:

(1) There was no basis for novel application of the principle in *Hardiman* to declare a development consent invalid solely because of the participation of the decision-maker in proceedings to defend an earlier decision where those proceedings were not finalised. Cases which consider the principle in *Hardiman* do so when determining whether costs should be limited or exclusionary remitter orders made following the determination of substantive judicial review grounds: at [50]-[52];
(2) The statutory scheme governing development applications under Pt 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) must be considered in assessing the allegation of apprehended bias: at [53]. Relevantly:
    (a) Under the EPA Act the Council was the consent authority for the 2024 DA and that function had been delegated lawfully to council officers: at [54];
    (b) The EPA Act enabled the delegation of functions to officers. Different authorised officers in the Council assessed and determined the 2023 DA and 2024 DA and no criticism was made of their delegations, nor the assessment report or reasons for determination of the 2024 DA: at [55]; and
    (c) The EPA Act required that a development application be determined by a consent authority based on the considerations in s 4.15(1) of the EPA Act. Any action taken by the Council through its lawyers in the 2023 proceedings was not relevant to that statutory determination: at [56];
(3) No evidentiary basis existed for inferring that the 2023 proceedings were considered in determining the 2024 DA: at [57];
(4) That the Council's determining officer did not adopt the position of the applicant that an independent assessment of the 2024 DA was required did not support a finding of apprehension of bias by a fair-minded lay observer aware of the factual circumstances: at [58];
(5) No evidentiary basis existed for attributing to the determining officer of the 2024 DA any knowledge of or role in the determination of the 2023 DA: at [59];
(6) Local councils are generally large, complex organisations which out of necessity must operate through their officers in carrying out their many functions. The Council's actions were not to be regarded as monolithic so that any action by a council as a corporate entity such as participating in court proceedings meant that all council officers were to be assumed to adopt that position regardless of the duties they were undertaking: at [65];
(7) That numerous council officers who might have been involved in assessing the 2023 DA were also engaged in the assessment of the 2024 DA on topics such as tree management and heritage did not mean a fair-minded observer would consider they were required to adhere to the position they took in relation to the 2023 DA: at [66];
(8) No statutory or other basis existed to draw a distinction in relation to independence from a council between a

local planning panel and a council officer exercising delegated functions. Under the Council's Code of Conduct and the EPA Act, an officer was not subject to direction by the council or a councillor in relation to the provision of advice or a recommendation: at [68];

(9) The assessing and determining officers of the 2024 DA had relevant expertise which was another reason why additional independent assessment would not be warranted: at [69]; and

(10) As the applicant was unsuccessful on the substantive case the question of relief did not need to be determined: at [73]. Pain J made the following observations in obiter:

(a) Resolution of the question of relief would require the Court to determine whether it had power to direct a council in the exercise of its statutory function of determining a development application and whether a council had statutory power to refer that decision to a local planning panel or a third party delegated with that function. If a council does not have such power neither does the Court to make such an order: at [73]; and

(b) Assuming power existed to do so, whether the Court would exercise its discretion to make such an order in circumstances where a properly delegated officer had determined the 2024 DA in a way which was not otherwise criticised would have arisen: at [74].

Hanave Pty Ltd v Waverley Council **[2025] NSWLEC 19** (Pritchard J)

Facts: Waverley Local Planning Panel (**second respondent**), on behalf of the first respondent, Waverley Council (**Council**), granted two development consents to Hanave Pty Ltd (**first applicant**) and Cadele Pty Ltd (**second applicant**) together to redevelop a property in Bondi with conditions requiring that the applicants make contributions for affordable housing.

The applicants filed a Class 4 judicial review application seeking declarations that the affordable housing conditions were invalid as they were not authorised under the Waverley Local Environmental Plan 2012 (**WLEP 2012**) as required by ss 4.17(1)(h) and 7.32 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

The respondents purported to impose the impugned affordable housing condition pursuant to cl 48 of State Environmental Planning Policy (Housing) 2021 (**SEPP (Housing)**).

The respondents contended that the affordable housing condition imposed pursuant to SEPP (Housing) was valid because of the operation of cl 15A of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017.

Clause 15A was made on 1 July 2009 and provided that, until the commencement of Pt 5B of the EPA Act, an affordable housing condition authorised to be imposed by a LEP under s 94F(3)(b) (as it then was) of the EPA Act is to be construed as a "condition authorised to be imposed by a SEPP or a LEP".

On 1 July 2009, the *Environmental Planning and Assessment Amendment Act 2008* (NSW) (**2008 Amending Act**) sought to introduce Pt 5B to the EPA Act. On 1 March 2018, before Pt 5B took effect, Sch 12 to the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (**2017 Amending Act**) repealed the 2008 Amending Act.

Issues:

(1) Whether the second respondent was authorised to impose an affordable housing contribution condition in the consent in circumstances where the WLEP 2012 did not authorise the imposition of such a condition; and

(2) Whether, if the affordable housing contribution condition was invalid, it could be severed from the consent.

Held: The affordable housing condition in the development consent granted by the second respondent on 27 September 2023 was invalid and of no force or effect:

(1) The second respondent was not authorised to impose an affordable housing condition in the consent. Clause 15A was a transitional provision intended to operate "until" the commencement of Pt 5B of the EPA Act and had no effect once Pt 5B was repealed by the 2017 Amending Act: at [93]; and

(2) The affordable housing condition could be severed from the development consent. The test of whether a condition could be severed from a development consent was whether it "would result in the residue operating differently to the manner in which the whole would have operated". As the severance of a monetary contribution does not cause the balance of the development approval to operate differently, the affordable housing contribution could be severed and the consent thereby remained: at [109]-[115] (*Interpretation Act 1987* (NSW) s 32; *King v Bathurst Regional Council* (2006) 150 LGERA 362; [2006] NSWLEC 505; and *Community Action for Windsor Bridge Inc v*

NSW Roads and Maritime Services [2015] NSWLEC 167 applied).

Monaltrie Area Community Association Incorporated v Santin and Anor **[2025] NSWLEC 38** (Robson J)

Facts: Monaltrie Area Community Association Incorporated (**MAC**) brought judicial review proceedings against Lismore City Council's (**Council**) approval of a modification application lodged by Michael Bruno Santin to extend a quarry development at Monaltrie. MAC sought declaratory relief that Council's approval was invalid and consequential relief. By amended summons filed 3 May 2024, MAC advanced five grounds of review: Council lacked power to approve the modification because the original consent had lapsed (**Ground 1**); Council failed to properly consider the acoustic impacts of the modification (**Ground 2**); Council lacked the required state of satisfaction that the proposed development was substantially the same as the original development (**Ground 3**); any state of satisfaction reached in Ground 3 was unreasonable (**Ground 4**); and Council lacked power to impose a condition providing for variation of the modification's operating hours (**Ground 5**).

Issue: Whether MAC was entitled to the relief it had sought in its amended summons.

Held: MAC succeeded in establishing Ground 1 and was therefore granted relief for its judicial review proceedings:

Ground 1 – lapse of consent ground

(1) Ground 1 was made out, as the consent had "lapsed" in the sense of having expired on the end date of the quarry development as provided for by Conditions 2 and 3 of the relevant modified consent and could not be modified further, although the consent had not "lapsed" under s 4.53(4) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**): at [10], [46];

Ground 2 – acoustic ground

(2) Council had taken into account the potential acoustic and noise impacts in light of the material before it (including various reports). The relevant conditions of consent in relation to acoustic impact were not an unlawful deferral of consideration of an important aspect of the modified development. Ground 2 was not made out: at [74]-[75];

Ground 3 – substantially the same development ground

(3) The evidence did not indicate that Council did not form the necessary opinion of satisfaction when approving the modification application. The essential question in s 4.55(2)(a) of the EPA Act must be determined by considering the whole of the circumstances, which did not justify drawing a negative inference regarding the necessary satisfaction. Ground 3 was not made out: at [107]-[108];

Ground 4 – satisfaction not reasonably open ground

(4) Council's satisfaction was not sufficiently lacking in rational foundation, nor was it plainly unjust, arbitrary or capricious or lacking commonsense having regard to the terms, scope and purpose of the statutory source of power. Thus, Council's state of satisfaction was not unreasonably formed. Ground 4 was not made out: at [130]; and

Ground 5 – Condition 11 variation ground

(5) Part only of Condition 11 was unlawful and the severance of that part was otherwise appropriate and would not result in the residue operating differently. Although not determinative of the proceedings, Condition 11 would not have voided the consent. Ground 5 was partially made out: at [140].

Compulsory Acquisition

UPG 72 Pty Ltd v Blacktown City Council **[2025] NSWLEC 29** (Pepper J)

Facts: On 10 December 2021, Blacktown City Council (**Council**) compulsorily acquired Lot 31 in DP 1246761 (**acquired land**) for the stated purpose of constructing trunk drainage (**drainage**) and creating habitat for the Green and Golden Bell Frog (**GGBF habitat**). The Council offered UPG 72 Pty Ltd (**UPG**) compensation in the sum of $2,494,984.44 as determined by the Valuer General under s 42(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), which comprised $2,460,000 for market value and $34,984.44 for disturbance losses.

UPG commenced Class 3 proceedings objecting to the amount of compensation pursuant to s 66 of the Just Terms Act. It contended that but for the public purpose of constructing drainage and GGBF habitat, the acquired land would have been zoned R2 Low Density Residential (**R2**) pursuant to the land releases that comprised the broader Riverstone Precinct urbanisation project (**Project**). It therefore sought compensation based upon a market value calculated by reference to R2 zoning that totalled approximately $7 million and $35,521 for disturbance losses.

By contrast, the Council argued that the public purpose for the acquisition was that of the NSW Government's and that in delivering drainage, the Council was the vehicle by which the NSW Government achieved part of its purpose in rezoning land for urban purposes. It argued that but for this purpose, the acquired land would have been zoned according to its pre-existing Rural zoning or, in the alternative, E2 Environmental Conservation (**E2**) zoning. The Council offered nil compensation as it contended that UPG owned land adjoining the acquired land (**Lot 30**) which value increased and thus exceeded that of the acquired land when it became available for development due to the construction of Precinct wide drainage.

Issues:

(1) What was the public purpose for which the acquired land was acquired?
(2) What was the acquired land's underlying zoning absent the public purpose?
(3) If the land was zoned R2, what drainage solution was required?
(4) Whether the issue of betterment under s 55(f) of the Just Terms Act arose in determining market value.

Held: Compensation for the compulsory acquisition of UPG's land was payable in the sum of $1,200,00 for market value under s 55(a) and $35,521 for disturbance losses under s 55(d) of the Just Terms Act:

(1) The statutory power conferred upon the acquiring authority – the Council – did not include the power to acquire land in order to release it for urban purposes, but it did include the power to acquire the land for drainage under ss 24 and 186(1) of the *Local Government Act 1993* (NSW): at [144]-[145], [148];
(2) The Council's public purpose in acquiring the land was for drainage and GGBF habitat. This purpose served a different function to the development carried out on other allotments insofar as the drainage did not accept stormwater and its need specifically arose from the biocertification process: at [156],[158];
(3) The acquired land was unlikely to have been zoned Rural given that the land release strategy specified that the Riverstone Precinct was the first to be released for urbanisation: at [173];
(4) The acquired land would have been predominantly zoned E2 with a portion zoned R2. The E2 zoning was consistent with the planning documents before the Minister which made clear that the GGBF habitat required preservation, whereas the R2 zoning was consistent with the acquired land's "highest and best use" in permitting a single dwelling entitlement: at [175], [193];
(5) In the alternative, if the conclusion above was incorrect and the land was zoned R2, a vegetated riparian corridor drainage solution would have been preferrable to the drainage scheme that UPG proposed given that the latter did not comply with the Council's Development Control Plan and design principles: at [199]-[200];
(6) No betterment arose on the facts. The value of Lot 30 did not increase by reason of the public purpose found by the Court given that land in the Riverstone Precinct would have been released with drainage on it and the temporary on-site detention (**OSD**) basin on Lot 30 would have remained. Even if the OSD basin became permanent, a prudent owner could relocate the basin onto the least valuable land – the acquired land – to develop Lot 30: at [216]-[217]; and
(7) The Court adopted the direct comparison approach to determine the market value of the acquired land given there were sufficient comparable sales and the alternative method proffered by UPG was more speculative in nature. The compensation to which UPG was entitled was $1,235,521: at [205], [219], [221].

Telado Pty Ltd; CFT No. 8 Pty Ltd v Sydney Metro **[2025] NSWLEC 42** (Duggan J)

Facts: Telado Pty Ltd (**Telado**) and CFT No.8 Pty Ltd (**CFT 8**) (together, **the Applicants**) objected to the compensation offered by Syndey Metro (**the Respondent**) pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), for the compulsory acquisition of its interest in land. On 11 May 2022, the Applicants were issued with Proposed Acquisition Notices (**PANs**) in respect of 28 O'Connell Street, Sydney (**28 O'Connell**) and 48 Hunter Street, Sydney (**48 Hunter**) (together, **the Acquired Land**). CFT 8 was the owner of 28 O'Connell and Telado was the owner of 48 Hunter. On 2 September 2022, the Respondent compulsorily acquired the Acquired Land by notice in the NSW Government Gazette (**Date of Acquisition**). The Respondent offered CFT 8 compensation in the sum of $ 128,082,003 (comprising $127,500,00 for market value and $582,003 for disturbance) and Telado in the sum of $49,582,003 (comprising $49,000,000 for market value and $592,003 for disturbance) pursuant to s 42(1) of the Just Terms Act. The market value compensation claimed in these proceedings by CFT 8 was $320,235,616 and by Telado was $110, 964,384.

Issues:

(1) Was the highest and best use of the Acquired Land a combined redevelopment in conjunction with 33 Bligh Street, Sydney (**33 Bligh St**), having regard to statutory disregard in s 56(1)(a) of the Just Terms Act and if the acquisition of 33 Bligh St was not to be disregarded in whole or in part, would the hypothetical purchaser consider that 33 Bligh would be available for redevelopment at the Date of Acquisition or some later date;

(2) If the highest and best use was a combined redevelopment in conjunction with 33 Bligh St, on what assumptions as to the development of the Acquired Land and 33 Bligh St should the determination of value be made and what would the market value of the Acquired Land be on the basis of the assumptions as determined;

(3) If the highest and best use was the current use as at the Date of Acquisition what is the market value of the Acquired Land; and

(4) Disturbance.

Held: Compensation pursuant to Pt 3, Div 4 of the Just Terms Act in the sum of $ 54,315,085.65 for 48 Hunter and $146,815,085.65 for 28 O'Connell, plus statutory interest:

(1) The public purpose of the acquisition of the Acquired Land was for the purpose of Metro West and the public purpose for the acquisition of 33 Bligh St was Metro West and Metro CSW: at [67]. Metro CSW was a separate public purpose than the public purpose for which the Acquired Land was acquired and was not to be disregarded for the purposes of s 56(1)(a) of the Just Terms Act. At the Date of Acquisition 33 Bligh St would have been acquired for the purpose of Metro CSW and would not have been available for combined redevelopment. The acquisition of the 33 Bligh St would not have been limited to construction purposes and therefore could not be limited in time: at [104];

(2) The highest and best use of the Acquired Land was for the current use of the Acquired Land without a capacity for redevelopment in conjunction with 33 Bligh St. The market value of the Acquired Land was determined in the agreed sum of $200,000 and was apportioned between the Applicants on a pro rata land size basis, comprising $53,750,000 for Telado and $146,250,000 for CFT 8: at [219]-[220]; and

(3) The parties agreed disturbance in sum of $565,085.65 for each of the Applicants, comprising $469,000.23 for legal fees and $96,085.42 for valuation fees: at [214].

Nicolaou v Minister for Education and Early Learning **[2025] NSWLEC 56** (Beasley J)

Facts: The applicants brought these proceedings pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**), objecting to the amount of compensation offered by the respondent, the Minister for Education and Early Learning (**Education Minister**), for the acquisition of Lot 299 in DP 1285364, being part of 50 Terry Road, Box Hill (**Acquired Land**). Immediately prior to the compulsory acquisition, the Acquired Land had been part of Lot 29 DP 10157 (**Parent Parcel**). As a result of the acquisition, the applicants, who were the registered proprietors of the Parent Parcel at the date of acquisition, now owned the remaining 1.516ha of the Parent Parcel - Lot 300 in DP 1285364 (**Residue Land**). Prior to the commencement of the hearing, the parties' expert valuers reached agreement that the market value of the Acquired Land was $27,000,000. The parties also reached agreement as to compensation for disadvantage from relocation ($85,350.00), legal costs ($61,654.00) and valuation fees ($21,230.00). However, the applicants further sought $4,327,393.00 for a decrease in the value of the Residue Land and disturbance losses. The respondent contended that these latter claims should be assessed at nil.

Issues:

(1) What was the public purpose for which the Acquired Land was acquired and specifically, was the Residue Land zoned RE1 for the public purposes of creating a school with recreational land in the rear (the rear being the Residue Land);

(2) Had there been any decrease in the value of the adjoining Residue Land by reason of the carrying out or the proposal to carry out the public purpose, and if so, what was that decrease. Had the Residue Land become landlocked by reason of the acquisition and had this caused a decrease in the value of the land;

(3) Market value; and

(4) What was the Applicant's entitlement to compensation regarding disturbance losses, and did s 61(b) of the Just Terms Act preclude this compensation.

Held: Compensation under Pt 3, Div 4 of the Just Terms Act in the sum of $27,168,234.00 plus statutory interest, and costs reserved:

(1) The public purpose for which the Education Minister acquired the Acquired Land was for the purposes of a school, pursuant to s 125(1) of the *Education Act 1900* (NSW). That the school was adjacent to or near land

zoned for public open space (the Residue Land) which may in the future be usable by the students of the proposed school (albeit on land that would ultimately be operated and owned by the Council) did not make this part of the proposal to carry out the public purpose acquisition of the SP2 zoned Acquired Land. It only added to the desirability of acquiring the Acquired Land, that is, near land zoned for public open space, and which could ultimately be acquired by the Council: at [117];

(2) The carrying out of, or proposal to carry out the public purpose acquisition of the Acquired Land was immaterial to the RE1 zoning of the Residue Land. The Residue land was zoned for public open space by the Planning Minister for the Council's purposes. The public purpose of the acquisition of the Acquired Land was for the purpose of a school and has caused no impact on the value of the Residue Land: at [122]. The Residue Land had not been landlocked as an easement was granted benefiting the Residue Land and therefore there was no decrease in value of the Residue Land on that basis: at [124];

(3) The agreed rate of $950 per square metre, and the experts' accumulation, analysis, adjustment and application of comparable sales evidence in the direct comparison approach, leading to the market value of $27,000,000, was accepted: at [129]; and

(4) Given the Acquired Land was assessed "on the basis that the land had potential to be used for a purpose other than that for which it is currently used," in this case R3 Residential, s 61(b) rendered inoperative the Applicants' claims for disturbance loss. The loss would "necessarily have been incurred" in realising the potential of the underlying zoning and therefore s 61(b) was engaged to deny the disturbance claims: at [135].

Section 56A Appeals

***Ermis v Boutros* [2025] NSWLEC 5** (Pain J)

(Decision under review: *Ermis v Boutros* [2024] NSWLEC 1521 (Galwey AC))

Facts: The two appellants commenced an appeal under s 56A of the *Land and Environment Court Act 1979* (NSW) alleging numerous errors of law in relation to an Acting Commissioner's (**AC**'s) decision on their application under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (**Trees Act**). The appellants sought, under Pt 2 of the Trees Act, orders to prevent several trees growing on the respondent's property from causing damage or injury and, under Pt 2A of the Trees Act, orders to remedy and prevent severe obstruction of sunlight and views by other trees. The AC made orders under Pt 2 to prune several trees and refused the appellants' Pt 2A application.

On appeal the appellants sought orders under Pts 2 and 2A for the pruning works refused at first instance.

Issues:

In relation to the refusal of the Pt 2A application

(1) Whether the requirement in s 14F(o) of the Trees Act to consider 'the amount *and* number of hours per day' of sunlight lost as a result of obstruction (emphasis added) required reference to the amount of lost sunlight per day for each affected surface as a ratio (expressed as a percentage loss) in addition to evidence of numbers of hours per day;

(2) Whether an error relating to a question of law arose out of the AC's alleged failure to consider s 12(e) of the Trees Act [noting that s 12(e)'s equivalent in Pt 2A is s 14F(h)];

(3) Whether an error relating to a question of law arose out of the AC's alleged failure to apply s 14E(2)(ii) (severe obstruction of views);

(4) Whether an error relating to a question of law arose out of the AC's failure to enter the Appellants' house during the site inspection, when the AC was not requested to do so at the site inspection;

In relation to the refusal of the Pt 2 Application

(5) Whether an error relating to a question of law arose from the AC's determination, as required by s 10(2) of the Trees Act, that certain trees at the front of the Respondents' property were not likely to cause injury or damage; and

(6) Whether an error relating to a question of law arose from the AC's alleged failure to properly apply s 12(i)(ii) of the Trees Act in not identifying that no steps had been taken by the Respondents to prevent any injury since the Bangalow palms were planted.

Held: The appeal was dismissed:

(1) An appeal under s 56A must be made in relation to a question of law generally to be identified in the reasoning (or possibly absence of reasoning) of an AC. The merits of an AC's decision cannot be the subject of an appeal under s 56A: at [3];

In relation to the refusal of the Pt 2A application

(2) It was open to conclude as a matter of statutory construction that evidence of number of hours per day was sufficient to satisfy s 14F(o) of the Trees Act and there was no material error in the overall reasoning on this topic: at [11];

(3) There was no obligation on the AC to refer to every argument put by the appellants provided that the substantive matters raised were addressed and the AC's reasoning in relation to these was identified. Section 12(e) [14F(h)] as submitted before the AC was not fundamental to the matters before the AC: at [15];

(4) The AC explicitly dealt with s 14E(2)(ii). It was difficult to discern a question of law from the Appellants' arguments, these being largely a criticism of the merits assessment undertaken by the AC in concluding that there was no severe obstruction of views: at [16];

(5) The AC was under no obligation to expand the area of the site inspection he conducted beyond what the parties requested him to undertake: at [18];

In relation to the refusal of the Pt 2 application

(6) There was no basis to find that s 10(2)(a) and/or (b) of the Trees Act was disregarded by the AC. This topic was dealt with explicitly at [8]-[23] by the AC. The submissions were otherwise seeking to impermissibly deal with merit matters: at [20]; and

(7) The AC found the Respondents had sourced a report from a tree lopper and this showed the Respondents had made some effort towards responsible tree management. The AC stated that he had considered s 12 of the Trees Act, which was a sufficient reference in the context of what was before him: at [21].

Billyard Ave Developments Pty Limited v The Council of the City of Sydney **[2025] NSWLEC 22** (Preston CJ)

(Decision under review: *Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust v The Council of the City of Sydney* [2024] NSWLEC 1825 (Walsh C))

Facts: Billyard Ave Developments Pty Limited (**Billyard**) appealed against the deemed refusal of a development application by the Council of the City of Sydney (**Council**). The development application sought approval to demolish two existing residential flat buildings and erect two new residential flat buildings in their place in Elizabeth Bay. The proposed development would alter the existing housing mix in the locality, as although the type of housing would remain the same, residential flat building, the new buildings would contain more two- and three-bedroom apartments where the existing buildings largely comprised of only one-bedroom apartments. The proposed development therefore decreased the number of domiciles but increased the number of people that could be housed in the buildings. The proposed development also contravened the height controls set by cl 4.3 of the Sydney Local Environmental Plan 2012 (**SLEP**). Billyard appealed under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). Despite their failure to reach agreement at a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (**Court Act**), the parties continued to negotiate prior to the hearing and eventually reached agreement in the form of "consent orders", seeking that the Court at the hearing of the appeal grant development consent subject to agreed conditions.

The Commissioner refused to grant consent in accordance with the consent orders. As the development contravened the height controls set by the SLEP, the Commissioner needed to uphold Billyard's written request under cl 4.6, justifying the contravention. To uphold the request, cl 4.6(4)(a)(ii) of the SLEP at the time of determination, required that the Commissioner be satisfied that the proposed development was in the public interest because it was consistent with the objectives of the zone. The Commissioner found that the development was inconsistent with the first objective of the R1 General Residential zone, which was "To provide for the housing needs of the community". The Commissioner found that the proposed development was inconsistent with that objective as the decrease in domiciles:

(1) Decreased housing provision overall; and

(2) Decreased the availability of more affordable housing. The Commissioner also considered the merits of the proposed development, finding that consent should be refused due to the negative social and environmental impacts of the proposal that were not in dispute between the parties at the hearing.

Billyard appealed under s 56A(1) of the Court Act. The Council made a submitting appearance on all matters other than costs.

Issues: Billyard raised four grounds of appeal:

(1) Grounds 1 and 2: Whether the Commissioner misconstrued the first objective of the R1 General Residential Zone (misconstruction of zone objectives ground); and

(2) Grounds 3 and 4: Whether the Commissioner denied Billyard procedural fairness by deciding the appeal on

issues that were not raised or in dispute between the parties without giving notice to Billyard (procedural fairness ground).

Held: Appeal upheld on each ground; matter to be remitted back to a Commissioner other than the Commissioner at first instance; no order as to costs:

Misconstruction of zone objectives ground

(1) The Court found that the Commissioner misconstrued the first objective of the zone by construing that objective by reference to the opinion evidence of the parties as opposed to construing the text itself by applying the settled principles of statutory construction. The Commissioner's two alternative interpretations of the zone objective were not interpretations at all, as each derived from opinions about the consistency of the proposed development with the zone objective. Such an approach conflated the first step of construction with the subsequent step of application. This "fundamentally erroneous" evidentiary approach to construction undermined the Commissioner's analysis of the text, context and mischief of the first objective: at [33]-[53];

(2) The Commissioner's analysis of the text of the objective was contrary to orthodox methods of statutory interpretation. The Commissioner substituted different words in place of the actual words used in the provision, such as 'need' for 'needs' and the contradistinction of 'want' and 'need' despite the term 'want' not appearing in the objective. The Commissioner also engaged in an atomistic construction of the individual words, which when coupled with an inappropriate use of the dictionary, eschewed the true meaning of the objective: at [54]-[62];

(3) The Commissioner's analysis of the context of the zone objective and the 'mischief' that the provision was seeking to remedy was also erroneous and antithetical to the principles of statutory interpretation. The Commissioner, through reference to extraneous material, found that the zone objective was aimed at addressing "deep-seated problems with providing required levels of housing to meet essential community needs." Contrary to this, the Court found that the zone objective did not seek to remedy any mischief but rather was merely descriptive of the purpose of that particular zone. Accordingly, the mischief that the Commissioner found could not be derived from the text, context or purpose of the first objective: at [63]-[74];

Procedural fairness ground

(4) There will be a denial of procedural fairness where the Court determines a matter on a basis that was not in issue or argued in the proceedings. At the time of hearing the Council no longer pressed any substantive contentions, including that the cl 4.6 written request should not be upheld: at [76]-[77];

(5) The matter in cl 4.6(4)(a)(ii) went to the jurisdiction of the Court to grant development consent and was therefore an issue in the proceedings. However, the parties had agreed that the proposed development was consistent with the objectives of the zone, with this issue not being argued at the hearing. If the Commissioner wished to decide the matter contrary to the parties' agreed position, the Commissioner needed to notify them and give them an opportunity to be heard. By failing to do so, the Commissioner denied Billyard procedural fairness: at [79]-[82];

(6) The Commissioner further denied Billyard procedural fairness by considering both the view-loss from neighbouring properties and the negative environmental effects of the proposed development, each of which were not at issue between the parties. If the Commissioner wished to raise either issue, he needed to notify the parties and give them an opportunity to be heard: at [83]-[91]; and

Exclusionary remitter

(7) The Court determined that the Commissioner did not make all the findings of fact necessary to grant consent and as a result, the Court on appeal could not grant consent under s 56A(2)(b) of the Court Act. The Court found that an exclusionary remitter order was appropriate given the interrelationship between the errors of law made by the Commissioner and his determination of the merits, and the reasonable apprehension that the Commissioner had pre-determined the issues of fact that would need to be determined on the remitter: at [92]-[103].

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

(Decision under review: *Hamptons Property Services Pty Ltd v Canterbury-Bankstown Council* [2024] NSWLEC 1742 (Espinosa C))

Facts: Hamptons Property Services Pty Ltd (**Hamptons**) appealed against the refusal of a development application by Canterbury-Bankstown Council (**Council**). The development application sought approval for a number of

developments to be carried out in four sequential stages. The first stage involved the demolition of existing structures, clearing of trees, remediation works, and the construction of a private road and associated stormwater works. The second stage involved subdivision of the land into nine lots under the *Community Land Development Act 2021* (NSW) (**CLD Act**), being one community lot comprising of a private road, seven residential lots and one lot to be dedicated to the Council as a public reserve by operation of s 49 of the *Local Government Act* 1993 (NSW) (**LG Act**). The third stage involved the erection of a dwelling house on one of the residential lots and six dual occupancies on the other six residential lots. The fourth stage involved a further subdivision under the CLD Act, dividing each of the dual occupancies on the residential lots to create 12 residential lots each with one dwelling.

The parties at the class 1 hearing disputed which minimum lot size and floor space ratio (**FSR**) development standards under the Canterbury-Bankstown Local Environmental Plan 2023 (NSW) (**CBLEP 2023**) were to be applied to each of the developments. As both of the proposed subdivisions were subdivisions under the CLD Act, cl 4.1AA(3) of the CBLEP 2023 applied, which set a minimum lot size of 460m^2. However, cl 4.1A(5) imposed a minimum lot size standard for the subdivision of dual occupancies of 300m^2, which applied to the subdivision of the dual occupancies at stage 4. Each of the lots produced by the proposed subdivision at stage 4 complied with the 300m^2 standard in cl 4.1A(5) but not the 460m^2 standard in cl 4.1AA(3). The parties' disagreement as to FSR turned on whether the use of the private road constructed in stage 1, was to be considered 'significant development' under cl 4.5(6) of the CBLEP 2023 for the developments at stages 2-4, so that the community lot with the road was to be considered as part of the 'site area' under cl 4.5(3). This impacted whether the developments in the stages met the applicable FSR standard under cl 4.4. The Council also resisted the dedication of the public reserve on merit grounds.

The Commissioner upheld the appeal, granting consent to the development application. The Commissioner disagreed with the Council's objections to the dedication of the public reserve, finding that it raised no compelling or credible reason for not accepting the dedication. The Commissioner resolved the minimum lot size issue by applying the maxim *generalia specialibus non derogant,* which provides that the specific provision overrides the general where there are clauses that are unable to be reconciled in the one instrument. Applying that maxim the Commissioner found that cl 4.1A(5) was a specific clause, applying only to the subdivision of a dual occupancy, that could not be reconciled with the cl 4.1AA(3) which applied to community title subdivision under the CLD Act generally. Thus, the second subdivision's inconsistency with cl 4.1AA(3) was immaterial. In dealing with the FSR issue, the Commissioner favoured a 'global' approach to the calculation of site area, finding that the use of the driveway was significant development and thus the community lot should be considered as part of the site area.

The Council appealed the decision of the Commissioner under s 56A(1) of the *Land and Environment Court Act 1979* (NSW).

Issues: The Council raised four grounds of appeal:

(1) Ground 1: Whether the Commissioner erred in finding the Court had the power to compel the Council to accept the dedication of the public reserve lot (**dedication of public reserve ground**);

(2) Grounds 2 and 3: Whether the Commissioner misconstrued cl 4.1AA and cl 4.1A(5) of the CBLEP 2023 by finding that the clauses were inconsistent, and that the inconsistency could be resolved by applying the maxim that the specific provision prevails over the general, so that cl 4.1A(5) prevailed over cl 4.1AA (**minimum lot size grounds**); and

(3) Ground 4: Whether the Commissioner erred in finding that the calculation of site area should include the community lot (**floor space ratio ground**).

Held: Appeal upheld on grounds 2 and 3; decision and order of the Commissioner set aside and remitted to the Commissioner to be redetermined; Hamptons to pay the Council's costs of the appeal:

Dedication of public reserve ground

(1) The Court found that the Commissioner did not seek to exercise the power under s 49 of the LG Act and did not make a finding that the Court possessed the power under s 49 to compel the Council to accept the dedication under s 49 or otherwise. Further the Commissioner did not grant development consent subject to a condition that Hamptons dedicate a lot free of cost to the Council: at [11]-[14];

(2) The only power that the Commissioner exercised was the power to grant consent under s 4.16(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (***EPA Act***) to a plan of subdivision (being the second development) which identified Hampton's intention to dedicate one lot as a public reserve. Section

49 of the LG Act only operated to dedicate the land to the Council once the subdivision had been carried out in accordance with the development consent and the plan of subdivision was registered with the registrar-general: at [8], [14];

(3) As the Commissioner had the power to grant consent to the subdivision, being a form of development under s 1.5(1) of the *EPA Act* capable of being consented to, the Council failed to raise a question of law in respect of ground 1: at [15]-[24];

Minimum lot size ground

(4) The Commissioner misconstrued cl 4.1AA(3) and cl 4.1A(5) of the CBLEP 2023 by finding that the two clauses could not be reconciled and erroneously applied the principle that the specific provision prevails over the general, as that principle was only available where two inconsistent provisions could not be reconciled as a matter of ordinary interpretation: at [39]-[41];

(5) Clauses 4.1AA and 4.1A of the CBLEP both outlined minimum lot size standards for subdivision but did so on different bases. Clause 4.1AA did so on the basis of the title of the subdivision, namely community title subdivision under the CLD Act, whilst cl 4.1A did so on the basis of the type of development, namely the subdivision of dual occupancies. Given the clauses had mutually exclusive domains of operation, cl 4.1A(5) merely added another development standard for a subdivision of dual occupancies. With there being no inconsistency between the clauses, the second subdivision was required to comply with both minimum lot size requirements: at [42]-[56];

Floor space ratio ground

(6) The FSR controls in cl 4.4 of the CBLEP 2023 apply only to development for the erection of use of a building and have no operation to development for the subdivision of land. The controls in cl 4.4 therefore could only be applied to the proposed development at stage 3, being the erection of the dual occupancies and dwelling house and had no application to the developments proposed at the three other stages: at [61]-[62]; and

(7) Ground 4 did not raise an error on a question of law. The Commissioner's findings as to whether the community lot was a lot 'on which the development was proposed to be carried out' and thus taken to form part of the site area under cl 4.5(3) of the CBLEP 2023 was a question of fact and not law. This also applied to the Commissioner's finding that the use of the road on the community lot was 'significant development' to avoid being excluded from the site area by operation of cl 4.5(6) of the CBLEP 2023. There could only be an error on a question of law if the facts found were necessarily within or without the statutory description and a contrary decision was made. It could not be said that the Commissioner's findings of fact were incapable of falling within that statutory description: at [77]-[81].

Strata Schemes Redevelopment

The Owners-Strata Plan 934 v T&P Chimes Development Pty Ltd **[2025] NSWLEC 9** (Pritchard J)

(Related decision: *The Owners-Strata Plan 934 v T&P Chimes Development Pty Ltd (No 2)* [2025] NSWLEC 28 (Pritchard J))

Facts: The Owners–Strata Plan 934 (**applicant**), the owners corporation of a strata plan building in Potts Point (**building**), filed a Class 3 application on 3 October 2023 with the support of T&P Chimes Development Pty Ltd (**first respondent**), the owner of the majority of lots in the building. The application sought an order giving effect to a strata renewal plan dated 2 March 2023 (**plan**) for the purpose of redeveloping the building pursuant to s 182(1) of the *Strata Schemes Development Act 2015* (NSW) (**SSD Act**).

The second to twenty-first respondents, all owners of lots in the building at the time of the hearing, were initially dissenting owners to the plan within the meaning of s 154 of the SSD Act. At the commencement of the hearing, however, all except one dissenting owner entered into a contract for the sale of their lot(s) with the first respondent and gave a support notice in support of the plan, within the meaning of s 174(1) of the SSD Act (**support notice**). This left only lot 19, who was not a party to the proceedings, as a dissenting owner to the plan.

At hearing, the applicant, with the support of the respondents, sought to vary the plan pursuant to s 182(2) of the Act to:

(1) Increase the purchase price for lot 19 from $900,000 to $1,400,000; and

(2) Include the terms in the contracts of sale agreed between the second to twenty-first respondents and the first respondent.

Issues: Because the plan did not address the scenario where a previously dissenting owner subsequently provided a support notice and entered into a contract for sale of a lot with the first respondent, a preliminary issue arose

concerning whether the plan should be varied pursuant to s 182(2) of the SSD Act. The court cannot vary a plan unless:

(a) The variation is of a minor nature that does not affect the plan in any substantial way; and

(b) Written agreement to the variation has been given by the owner of each lot in relation to which a support notice for the plan has been given: s 182(3) of the SSD Act.

Therefore, the court considered whether:

(1) The plan "needed" to be varied to reflect the contracts of sale between the formerly dissenting owners and first respondent, which contained higher purchase prices than the purchase prices proposed in the plan;

(2) The court should vary the proposed purchase price of lot 19 in the plan; and

(3) The proposed variations were of a "minor nature that does not affect the plan in any substantial way", within the meaning of s 182(3)(a) of the SSD Act.

Held:

(1) The plan did not "need" to be varied because the broad definition of "Option Agreement" in the plan included documents "to a similar effect" to an option agreement, which her Honour found included contracts of sale between the formerly dissenting lot owners and the first respondent: at [3], [128]-[129];

(2) The court could vary the proposed purchase price of lot 19 as the terms of sale were just and equitable in all the circumstances in accordance with s 182(1)(f) of the SSD Act, as the proposed purchase price exceeded the compensation values derived by the valuers for the respondents, and were the same amount as that offered to lot 18, which was comparably adjacent to lot 19: at [133], [141]; and

(3) The proposed variation to the purchase price of lot 19 was of a "minor nature that does not affect the plan in any substantial way" within the meaning of s 182(3)(a) of the SSD Act, as it only varied the proposed purchase price of one of 107 lots in the building: at [146].

Her Honour directed the applicant to seek from the owner(s) of each lot in relation to which a support notice had been given for the plan, written agreement to the variation to the plan to increase the purchase price for lot 19.

After written agreement was received, the court decided to give effect to the varied plan pursuant to s 182(2) of the SSD Act in *The Owners-Strata Plan 934 v T&P Chimes Development Pty Ltd (No 2)* [2025] NSWLEC 28.

Interlocutory Decision

Malass v Strathfield Municipal Council **[2025] NSWLEC 44** (Pain J)

Facts: In 2024 the applicant (**Mrs Malass**) lodged a development application (**2024 DA**) seeking consent for partial demolition and alterations, including associated landscaping, at a property in Strathfield (**the Property**) responsive to the previous litigation. A Commissioner of the Court had previously upheld Strathfield Municipal Council's (**Council's**) decision to refuse an earlier development application (**2020 DA**): *Malass v Strathfield Municipal Council* [2022] NSWLEC 116 (***Malass 2022***) on grounds that the application made under cl 4.6 of the *Strathfield Local Environment Plan 2012* (NSW) to vary the floor space ratio control was not upheld.

The 2024 DA was refused by the Council. Mrs Malass commenced Class 1 merit appeal proceedings challenging the Council's refusal of the 2024 DA (**2024 Class 1 appeal**). One argument Mrs Malass sought to make was a new argument not previously made in *Malass 2022* that a cl 4.6 variation of the floor space ratio control was not required. Development at the Property had been the subject of extensive litigation in the Court including contempt proceedings.

The Council filed a notice of motion seeking to dismiss the 2024 Class 1 appeal as an abuse of process due to the 2024 DA's similarity to the previously dismissed 2020 DA. It was agreed that the physical differences between the 2020 DA and the 2024 DA were quantitatively minor. The parties disagreed on whether the changes were qualitatively different for the streetscape and neighbours but agreed that did not need to be resolved for the purpose of the notice of motion. The parties agreed there was otherwise no change in statutory controls or the surrounding neighbourhood since the determination of *Malass 2022.*

Issue: Whether the 2024 Class 1 appeal was an abuse of process due to the similarity between the 2024 DA and the previously dismissed 2020 DA.

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

(1) The Council bore a heavy onus in establishing abuse of process with the power to grant a permanent stay only to be exercised in exceptional circumstances: at [36];

(2) The categories of what constituted abuse of process were not closed but there were three established categories:
   (a) The court's processes would be invoked for an illegitimate or collateral purpose;
   (b) The use of the court's procedures would be unjustifiably oppressive to a party; or
   (c) The use of the court's procedures would bring the administration of justice into disrepute;

   The primary basis relied on by the Council was that the appeal would bring the administration of justice into disrepute: at [36];
(3) Several cases had considered whether bringing multiple similar development applications before the Court was an abuse of process due to bringing the administration of justice into disrepute. The Council principally relied on *Russo v Kogarah Municipal Council* [1999] NSWCA 303 (***Russo***), where an abuse of process was found. Most cases which have considered *Russo* have not accepted that an appeal of a later development application was an abuse of process. Ultimately each case must be determined on its own facts and circumstances: at [39];
(4) This was the second development application Mrs Malass had made to the Council in relation to the Property, distinguishing her circumstances from the reference to multiple applications in *Russo:* at [41];
(5) Mrs Malass sought to make a new argument not previously made in *Malass 2022* that a cl 4.6 variation of the FSR control is not required: at [42];
(6) It was relevant that the overall merits of the 2020 DA were not considered by the Court in the previous appeal. There was potential for additional issues not already considered by the Court to arise for consideration: at [44]; and
(7) Weighing up in the exercise of discretion the matters outlined the 2024 Class 1 appeal was not an abuse of process: at [47].

JOINDER APPLICATIONS

Wheeldon v Woollahra Municipal Council **[2025] NSWLEC 55** (Beasley J)

Facts: Two motions were brought in relation to a Class 1 Appeal commenced by the substantive applicant (**Wheeldon**) against the substantive respondent, Woollahra Municipal Council (**Council**), following the Council's refusal of Wheeldon's development application to, inter alia, construct a new dwelling. An agreement was reached during a s 34AA conciliation conference between the substantive parties. Before the date of the Commissioner's decision upholding that agreement, but after the agreement was made, a number of owners of land surrounding Wheeldon's property sought to be joined to the Class 1 Appeal (**joinder applicants**). A motion was filed (**Joinder Motion**) which sought a stay on the proceedings and an order for joinder under r 6.24(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) or alternatively under s 8.15(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). The basis for their joinder application was several restrictive covenants the joinder applicants held over Wheeldon's property that they claimed entitled them to be joined. In the notice of motion list, the senior deputy registrar listed the Joinder Motion before a judge but did not order the stay on the basis that she considered that she did not have the power. On 31 March 2025, Commissioner O'Neill's decision was handed down reflecting the s 34 agreement and upholding the appeal. The joinder applicants filed a second motion (**Stay/Set Aside Motion**) to have the appeal stayed *nunc pro tunc* to a date before the Commissioner's judgment was delivered (but after the s 34 agreement was made) and to have her judgment set aside. The basis for the second motion was, among other things, that the senior deputy registrar had made a jurisdictional error in not ordering a stay to which all parties had consented. During the hearing, the joinder applicants also sought leave to amend their Stay/Set Aside Motion to return the proceedings to a date before the s 34 agreement was reached.

Issues:
(1) Should the joinder applicants be joined to the Class 1 proceeding on a date before judgment was delivered, but after the s 34 agreement was reached;
(2) If leave to amend the Stay/Set Aside Motion was given to address the above issue, would it change the outcome; and
(3) Had there been a jurisdictional error and should the judgment and orders of the Court on 31 March 2025 be set aside.

Held: Both motions were dismissed, leave to amend the Stay/Set Aside Motion was refused, and costs reserved:
(1) At the point in time when agreement was reached between Wheeldon and the Council, the Court had a very limited role to play. Rather than making her own specific merits assessment of the issues in the Class 1

Appeal, the sole question for the Commissioner became this: is the decision the parties have agreed on one which could have been made in the proper exercise of the Court's functions, per s 34(3) of the *Land and Environment Court Act 1979* (NSW)?: at [58]. No submission was made that the agreement reached between Wheeldon and the Council did not reflect a decision that the Court could make in the proper exercise of its functions. In those circumstances, despite all other matters raised by the joinder applicants, granting the orders sought in the Joinder Motion would have no utility: at [67];

(2) The joinder applicants held property rights under the covenants. However, cl 1.9A of the Woollahra Local Environmental Plan 2014 operated as a suspension of the restrictions contained within them (to the extent necessary) after the grant of consent. Even if cl 1.9A did not extinguish the covenants, the impact on the restrictions in the covenants because of cl 1.9A were so significant that the contention that the joinder applicants "ought" to have been joined to the Class 1 Appeal could not be maintained. For this reason, leave to amend the Stay/Set Aside Motion would not change the outcome and leave was dismissed: at [7]; and

(3) The senior deputy registrar did have power to order the stay by consent, however, she did not make a jurisdictional error. When the transcript of that directions hearing was analysed closely, she was not required by the parties, including the legal representative for the joinder applicants, to make a determination on the stay order: at [99]. If a jurisdictional error had occurred, the Stay/Set Aside Motion would still be dismissed because, for the reasons set out above, the joinder applicants should not be joined to the proceedings and there would be no utility in setting aside the Commissioner's judgment, only to have her be bound to deliver an identical judgment based on the agreement reached between Wheeldon and the Council at the s 34AA conference: at [15].

Merit Decisions (Commissioners)

Save the Robots Pty Ltd v The Council of the City of Sydney **[2025] NSWLEC 1081** (Thorpe AC)

Facts: The applicants appealed against the refusal by the City of Sydney (**council**) of consent for alterations and additions to buildings adjoining Taylor Square, Darlinghurst (**site**) for uses including a café, restaurant, art gallery, hotel accommodation, a rooftop bar and a digital advertising sign (**proposed billboard**). At the hearing, the only issue in contention concerned the proposed billboard. Transport for NSW joined the hearing as second respondent because of road safety concerns arising from the proposed billboard.

The site occupied a prominent position with frontages to Oxford and Flinders Streets, both classified roads. It was within a heritage conservation area (**HCA**). Section 3.8 of State Environmental Planning Policy (Industry and Employment) 2021 (**Industry SEPP**) continued provisions which prohibited the display of advertising signage in HCAs. There was an existing static billboard on the roof of the cornermost building which the applicant said benefitted from existing use rights under Div 4.11 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**).

Issues:

(1) Whether the proposed billboard benefitted from existing use rights;

(2) Whether the proposed billboard would have adverse impacts on road safety;

(3) Whether the proposed development would result in unacceptable heritage impacts; and

(4) Whether the proposed development exhibited design excellence.

Held: Appeal upheld, consent granted for the development excluding the proposed billboard:

(1) The advertising use did not benefit from existing use rights: at [84]. The applicant had not discharged the onus of demonstrating continuous lawful use: at [85]; and existing use rights would be inconsistent with the terms of various consents granted for rooftop signs between 1979 and 1999: at [89];

(2) The intersection of Oxford and Flinders Streets was a black spot and as such ruled out for digital advertising: at [111]; the proposed billboard was likely to reduce road safety in contravention of Ch 3 of the Industry SEPP: at [114]-[115];

(3) The heritage impacts of the proposed billboard were unacceptable under cl 5.10 of Sydney Local Environmental Plan 2012 (**SLEP**) and Ch 3 of the Industry SEPP: at [128]. The proposed billboard would be "a detracting element on top of an important contributory building at the conclusion of a significant vista": at [136]. The proposed development was otherwise consistent with the heritage controls;

(4) The proposed billboard prevented the development from achieving design excellence as required by cl 6.21C of SLEP: at [152]. It was not integral to the proposed development which, without it, did achieve design excellence: at [153]; and

(5) Even if the existing billboard did benefit from existing use rights, the magnitude of the road safety, heritage and design-excellence related impacts of the proposed billboard would have the consequence that it was beyond the scope of rebuilding permissible under s 166 of the Environmental Planning and Assessment Regulation 2021: at [154].

Bird in the Hand 1 Pty Ltd v Tweed Shire Council **[2024] NSWLEC 1709** (Walsh C)

Facts: The applicant appealed against the respondent's deemed refusal of development consent for a 22-lot rural residential community title subdivision. The site included quite steeply sloping terrain, with gradients exceeding 36% and 58%. The site was also bushfire prone land and accommodated certain threatened species. Consequently, the resolution of housing pad locations and the central access road horizontal and vertical alignment involved intricate multifactorial analysis.

Issues:

(1) Ecological and biodiversity outcomes: whether threatened species in general and the plant species Lepiderema pulchella (Lepiderema) in particular, were reasonably avoided with the proposal, in particular Lepiderema locations within bushfire asset protection (APZ) zones;

(2) Civil engineering and the spine road: The proposal involved significant cut and fill along the spine road with retaining walls up to and exceeding 5m. Tweed Development Control Plan (TDCP) adopted a maximum permissible combined height of retaining walls of 1.8m. The issue was not capacity to design and construct such structures but the residual risk and consequences of failure in the circumstances of the case. Maintenance responsibility would sit with a (future) community association;

(3) Bushfire: Whether adequate provision for access to bushfire hazard line to facilitate effective bushfire suppression; and

(4) Ongoing maintenance and management: Certain features of the community titles proposal, in its setting, raised critical "in perpetuity" management and financing questions. Relatedly, the Court raised a query whether there should, in turn, be a need to factor in changing externalities over time related to bushfire and climate change risk. The bushfire experts indicated that climate change was not commonly factored into bushfire risk analysis in development assessment, or in relevant policy instruments (including "Planning for Bushfire Protection": at [69]). The experts agreed that, in this case, the proposal responded to the fact of the severe 2019/20 fire season, including with respect to the fires in rainforest in the north coast area. The proposal included APZs exceeding common policy requirements.

Held: The appeal was dismissed:

(1) The larger positive ecological and biodiversity outcomes for the site, in particular associated with the removal of woody weeds and regeneration of rainforest, adequately accounted for Lepiderema loss within APZs: at [88]-[91];

(2) While risk of road failure was low, the proposal's reliance on a single regular vehicle access point to the trunk road system, meant the consequences of such failure were potentially significant. The spine road, as proposed, was held to be a significant adverse factor in the evaluation of the proposal: at [37];

(3) It was insufficient to rely on firefighters traversing on foot to access hazard lines in certain areas due to sleep slopes. It would be necessary, in some areas of the site, to provide road access around certain perimeter areas so firefighting vehicles could more directly access hazard lines, something unable to occur with the proposal: at [62]-[66]; and

(4) It was unnecessary to make findings in relation to bushfire and climate change risk: at [83].

Metro Donnelly Road Pty Ltd v Willoughby City Council **[2024] NSWLEC 1736** (Walsh C)

Facts: The applicant appealed the respondent's refusal of a development application for demolition of two former school buildings and certain tree clearing, along with construction of multi dwelling housing, a new parish hall and various other works including heritage interpretation works. The site was a parish complex in Naremburn. All of the site (church, school buildings, presbytery and grounds) was listed as a heritage item under Willoughby Local Environmental Plan 2012 (WLEP).

Issues:

(1) Effect of demolition of school buildings on heritage significance of the HCA; and

(2) Whether other aspects of proposal outweigh heritage conservation concerns.

Held: The appeal was dismissed:

(1) Demolition of the main school building would bring a substantial detrimental effect on the heritage significance of the heritage item. The site in its entirety was of social and cultural significance in the local area. Arguments suggesting a disassociation between the school buildings and the church were rejected, given both historical and physical connections. Demolition would significantly diminish the sense of a representative symbiotic operation of religious and educational functions contained within a single spatial precinct, evident as a landmark in the local area. While listing as a heritage item did not automatically mean a building should be conserved, there was insufficient examinable evidence of the non-feasibility of an adaptive reuse alternative for the main school building: at [53]-[60]; and

(2) The proposed heritage interpretation works would be a positive factor but would not adequately offset the spatial setting effect of demolition on the heritage significance of this heritage item. The provision of the proposed housing was another positive aspect of the proposal, assisting with the meeting of zone objectives. But this level of housing could not be weighted sufficiently to overcome the substantial effect of the proposal on the heritage significance of the heritage item occupying the site: at [61]-[65].

XYZ Services Pty Ltd v Inner West Council **[2024] NSWLEC 1765** (Walsh C)

Facts: The applicant appealed against the respondent's deemed refusal of a development application for demolition of existing buildings and construction of two new detached dwellings and associated land subdivision into two separate parcels. The site was located within Iron Cove heritage conservation area (**HCA**) calling up the provisions of cl 5.10 of Inner West Local Environmental Plan 2022 (**IWLEP**) and Leichhardt Development Control Plan 2013 (**LDCP**). The site's northern boundary was to Iron Cove and certain non-permissible building works were proposed mindful of the "limited development on foreshore area" provisions established under cl 6.5 of IWLEP. A private covenant also restricted certain foreshore development. A "sliver" of land, abutting site and the property to the immediate west was of non-determined ownership.

Issues:

(1) Effect of development on heritage significance of the HCA including implications of heritage provisions of LDCP;

(2) Whether cl 6.5 of IWLEP, relating to foreshore development, was a development standard;

(3) Whether powers under cl 4.6 of IWLEP, to grant consent despite the contravention of cl 6.5, were available, and the general merits of the proposal; and

(4) Implications of sliver of land abutting the site and neighbouring property, including whether owner's consent was required.

Held: The appeal was upheld:

(1) The contribution of the existing building to the HCA was not high as a consequence of past changes to its fabric. The significance of the HCA would be maintained with demolition of the existing building, as the proposed building was complimentary to and compatible with its own setting within the HCA (*Helou v Strathfield Municipal Council* (2006) 144 LGERA 322 [2006] NSWLEC 66 [46]): at [35]-[42];

(2) Clause 6.5 was a "development standard" under s 1.4 of the *Environmental Planning and Assessment Act 1979* (NSW) as it fixed a standard in respect of the distance of "a building … from (a) specified point" and it set a standard in respect of the "location" and "siting... of a building or work". When read in its context, the objectives of cl 6.5 might be achieved without a building being located precisely in compliance with a standardised setback: at [22]-[25];

(3) The permissive powers under cl 4.6(2) were, relevantly, available given the Court's findings of satisfaction with respect to cl 4.6(4). Issues relating to visual impact (from both streetscape and waterway), side setbacks, overshadowing were all found to be satisfactory in the particulars of this contextual setting on the merits: at [43]-[59]; and

(4) The application before the Court did not include any development on the sliver of land, therefore no owner's consent was required. However, there was a need to consider likely impacts. Conditions of consent were adopted to manage potential impact: at [86].

Solid Gold Custodians Pty Ltd ATF SGH Property Trust v Inner West Council **[2024] NSWLEC 1835** (Gray C)

Facts: The applicant sought development consent for the fit-out of an existing industrial and commercial building in Marrickville for the purpose of a hair and beauty salon which was refused. The applicant appealed the refusal.

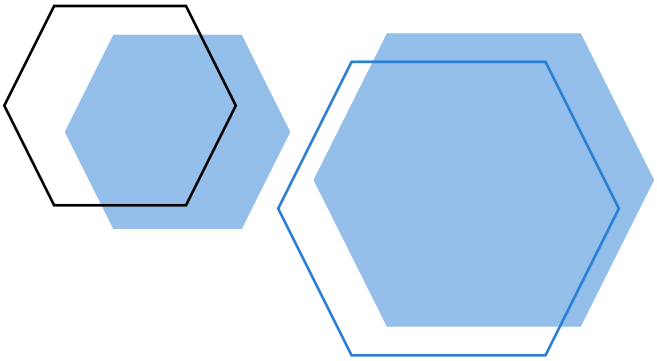
It was common ground that a hair and beauty salon was a type of business premises, and business premises were a sub-set of commercial premises. At the time the consent was granted for the existing building, commercial premises were permissible with development consent on the site. Pursuant to the instrument now applicable, the Inner West Local Environmental Plan 2022 (**IWLEP**), commercial premises were a nominated prohibited use in the E4 General Industrial zone in which the site was located. However, the site fell within an area on the key sites map which benefitted from cl 6.21 of the IWLEP. Clause 6.21(3) precluded the grant of consent "for the purposes of business premises or office premises on land to which this clause applies unless the consent authority is satisfied that the development will be used for creative purposes, including… (d) design". The stated objective of cl 6.21 was, at sub-cl(1), "to promote certain types of business and office premises in Zone E3 Productivity Support and Zone E4 General Industrial". It was common ground that cl 6.21 of the IWLEP, although expressed in the negative, should be interpreted as making business and office premises permissible with consent in the relevant area of the E4 zone, if they were premises that "will be used for creative purposes", and that the category "creative purposes" was not confined by the list set out in the clause. The Council opposed the grant of consent on the basis that a hair and beauty salon was prohibited in the zone and, because it was not a use for creative purposes, that it did not satisfy the requirements of cl 6.21 which would otherwise have made it permissible on the site. The Council agreed that all other issues had been resolved.

Issues:

(1) Whether cl 6.21 of the IWLEP overcame the prohibition against business and office premises in the land use table for the E4 zone if the requirements of the clause were met;
(2) Whether a hair and beauty salon was a type of business premises that was used for 'creative purposes';
(3) Whether the hair and beauty salon would be contrary to the desired future character or will push out legitimate industrial uses from the zone; and
(4) Whether a hair and beauty salon was permissible on the site either pursuant to the existing consent for the industrial and commercial building, or as an existing use.

Held: Appeal upheld, development consent granted:

(1) Although cl 6.21(3) of the IWLEP was expressed in the negative, it had the same substance of a provision expressed permissibly: at [55] (*Strathfield Municipal Council v Poynting* (2001) 116 LGERA 319; [2001] NSWCA 270 referred to); the objective of cl 6.21 could not be met unless cl 6.21(3) was understood to be making business and office premises permissible if the clause applied and the requirements of the sub-clause were met: at [56]; to interpret cl 6.21 in any other way would render the clause otiose with respect to the E4 zone: at [57];
(2) There were three elements that needed to be satisfied with respect to land in the E4 zone to meet the requirements of cl 6.21(3): first, the development must be for the purposes of business premises or office premises: at [59]; secondly, it must be on land within Area 19 of the Key Sites Map: at [60]; thirdly, the consent authority must be satisfied that the type of business premises or office premises that were proposed were one that would be used for 'creative purposes': at [61]. In determining whether a particular development was one that "will be used for creative purposes" was a question of fact and degree that turned on the facts of the particular type of office or business premises proposed: at [62];
(3) A hair and beauty salon was a business premises that would be used for creative purposes and was therefore permissible pursuant to cl 6.21: it involved skillful design: at [64]-[67]; there were a diversity of designs that could be applied and styles that could be achieved, such that creativity was used: at [68]-[72]; and the style applied was a form of creative self-expression for the wearer: at [73]-[74];
(4) The hair and beauty salon would not be out of character in the area: at [82]; and the concern about pushing out legitimate industrial uses was not made out given the limited area that was mapped as Area 19: at [83]; and
(5) Given the finding that the proposed use was permissible pursuant to cl 6.21, there was no need to consider the breadth of the existing consent or questions concerning whether there was an existing use: at [86].



LEGISLATION

STATUTES AND REGULATIONS

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

MISCELLANEOUS AMENDMENTS

Environmental Planning and Assessment Amendment Act 2025 (NSW)

An Act to make miscellaneous amendments to the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**); and for related purposes. Specifically, the Act amends the EPA Act by:

(a) Making changes related to or consequential on the abolition of the Six Cities Region and the cities that comprise the region and inserts a savings provision regarding the effect of district and regional strategic plans made under the Six Cities Region framework;
(b) Defining *residential accommodation* by reference to the *Standard Instrument LEP.* Removing the requirement that the minister obtain and make available advice from the IPC before declare SSD if the development includes residential accommodation. Reduces the minimum public exhibition period for SSD that contains residential accommodation from 19 to 14 days;
(c) Clarifying, under s 1.4(8) that a power to make or amend a strategic plan includes a power to revoke or amend the strategic plan;
(d) Enabling the Minister for Planning and Public Spaces to declare housing targets for regions and local government areas and that the Planning Secretary may, but is not required, include those housing targets in a strategic plan. Strategic plans are to be given effect to by a planning proposal authority in preparing a planning proposal and councils must review and amend LEPs to give effect to such strategic plans once made;
(e) Providing that, s 4.24, which deals with concept development applications, does not prevent the determination of a further development application for a site that is inconsistent with a concept development consent if the consent authority, in determining the application, requires the modification or surrender of the concept consent;
(f) Providing that a consent authority is not prevented from modifying a consent under ss 4.55(1A) or (2) or 4.56(1) merely because the modification only modifies a condition of consent and would not result in a change to the development the subject of the consent;
(g) Amending s 7.32, which deals with conditions requiring land or contributions for affordable housing, so that it applies in relation to any development application to carry out development within an area for which a SEPP has identified a need for affordable housing and that a condition may be imposed where the condition is authorised to be imposed by a SEPP or LEP;
(h) Clarifying that a submission in relation to a plan, application or other matter that is made after the end of the minimum period of its public exhibition under Schedule 1, Part 1 is not considered a submission under the EPA Act, the EPA Regulations or any EPI; and
(i) Inserting a Henry VII provision that allows the regulations to amend Schedule 9, which defines the Sydney Local Government Areas, by adding or removing local governments from that schedule.

WATER

Water Management (General) Amendment (Metering) Regulation 2025

This regulation is made pursuant to the *Water Management Act 2000 (NSW)*. The objects of this regulation are:

(a) To make amendments about reporting requirements for the taking of water in addition to any metering requirements,
(b) To require additional information to be recorded on the register of approvals,
(c) To clarify and further specify the metering requirements for works during floodplain harvesting,
(d) To clarify and make further provision for the circumstances in which works are exempt from

metering and reporting requirements in relation to the taking of water, including—

i. to exempt approval holders and licence holders from metering requirements in relation to small works in groundwater sources formerly specified in the Water Management (General) Regulation 2018, Schedule 9 before its substitution by this regulation, and

ii. to require approval holders and licence holders in relation to large works in groundwater sources to install and maintain telemetry equipment,

(e) To make further provision for persons prescribed as duly qualified persons in relation to the installation, maintenance, repair and validation of metering equipment and other kinds of work.

Bush Fire

Environmental Planning and Assessment Amendment (Bush Fire Protection Mechanisms) Regulation 2025

The object of this regulation is to prescribe, for the *Environmental Planning and Assessment Act 1979* (NSW) s 4.14(1)(a), a revised version of Planning for Bush Fire Protection consequent on the publication of an addendum to the document.

Biodiversity

Biodiversity Conservation Amendment (Strategic Offset Delivery Agreements) Regulation 2025

The object of this regulation is to amend the Biodiversity Conservation Regulation 2017 (NSW) to prescribe entering a strategic offset delivery agreement as a biodiversity conservation measure in relation to certain State significant development and State significant infrastructure.

The regulation also requires a public register of strategic offset delivery agreements to be kept and made available. The register must include information for each strategic offset delivery agreement about expenditure incurred and actions that benefit biodiversity values.

Land Acquisition

Notice under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

Notice pursuant to Schedule 1A of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), the maximum amount of compensation in respect to disadvantage resulting from relocation: $97,218 for acquisitions of land on or after 1 July 2025.