Land and Environment Court
of New South Wales

March 2023 / Vol 15 Issue 1

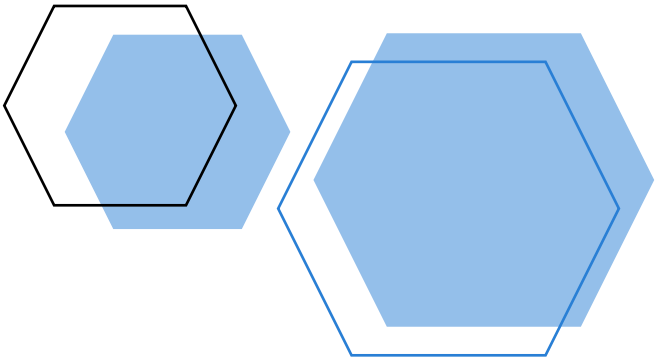
Judicial Newsletter

COURT NEWS

APPOINTMENTS

The following Acting Commissioners were appointed, with terms commencing on 20 February 2023 to 19 February 2025:

- Ms Louise Byrne
- Ms Gwenda Kullen
- Dr David Parker
- Ms Shona Porter
- Ms Nicola Targett



JUDGMENTS

NSW COURT OF APPEAL

Lahoud v Willoughby City Council **[2022] NSWCA 214** (Ward P and Mitchelmore JA)

(decision under review: *Lahoud v Willoughby City Council* [2022] NSWLEC 125 (Moore J))

Facts: By further amended summons filed in the Land and Environment Court (**LEC**) on 10 March 2022, Victor Lahoud (**Applicant**) sought judicial review pursuant to s 20 of the *Land and Environment Court Act 1979* (NSW) of a decision made by the Willoughby Local Planning Panel (**Panel**), on behalf of the Willoughby City Council (**Council**), to grant development consent for the adaptive conversion of a building in Northbridge (**substantive proceeding**). By notice of motion filed on 8 September 2022, the Applicant sought joinder of the Panel to the substantive proceeding pursuant to r 59.3(4), or alternatively r 6.24(1), of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**). If successful, the Applicant intended to seek leave to administer interrogatories on the Panel and to have the answers tendered in the substantive proceeding. On 13 October 2022, Moore J (**primary judge**) rejected the application for the Panel's joinder. By summons filed in the Court of Appeal, the Applicant applied for leave to appeal from that decision. The hearing of the application for leave to appeal was heard concurrently with the appeal.

Issues:

(1) Whether the matter warranted a grant of leave to appeal;
(2) Whether joinder of the Panel to the substantive proceeding was mandatory pursuant to r 59.3(4) of the UCPR, which required the "body or person responsible for a decision to be reviewed" to be joined; and
(3) Whether the primary judge erred in not exercising the discretion under r 6.24(1) of the UCPR to join the Panel as a necessary or proper party to the proceeding.

Held: Leave to appeal refused with costs:

(1) The matter, including the question of the proper construction of the expression "responsible for the decision to be reviewed" under r 59.3(4) of the UCPR, did not raise a sufficient issue of principle or general public importance to warrant a grant of leave to appeal. Furthermore, having regard to the merits of the appeal, the Applicant had not suffered an injustice which was reasonably clear: at [30];
(2) On the issue of mandatory joinder under r 59.3(4) of the UCPR, neither party sought to uphold, nor did the Court of Appeal endorse, the primary judge's reasoning that the body "responsible for" the decision was that which had the responsibility for giving effect to and administering the decision and that joinder of the Panel would contravene the principle in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13: at [18]. Rather, ss 2.19(1)(a), 4.5(d) and 4.8 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) made clear that a local planning panel (**LPP**) exercised its statutory functions "on behalf of" a council (the consent authority). The Council, rather than the Panel, was therefore the body "responsible for" the decision to be reviewed for the purposes of r 59.3(4) of the UCPR. Hence, the joinder of the Panel to the substantive proceeding in the LEC was not mandated by r 59.3(4). The fact that s 2.20 of the EP&A Act contemplated that in some instances an LPP may be joined as a party to proceedings or that an LPP has an obligation to give reasons for its decision did not change that conclusion: at [43], [48]; and
(3) In order to challenge the primary judge's exercise of discretion on joinder under r 6.24(1) of the UCPR, it was necessary for the Applicant to demonstrate an error in sense of *House v The King* (1936) 55 CLR 499; [1936] HCA 40. This was not demonstrated. In particular, it was found that:
    (a) Although the primary judge may have misunderstood the relief sought by the Applicant it did not follow that the Panel was a necessary party to the substantive proceeding in order to be bound by the decision. Amongst other things, it was noted

that a determination as to the validity of the development consent would have been binding and conclusive against the world generally, and not just the parties to the proceeding: at [55]-[58];

(b) The convenience of being able to issue interrogatories was not, of itself, a reason to join a party to the substantive proceeding. Indeed, the Applicant already had available to it written reasons and materials providing a detailed record of the Panel's decision-making process: at [59];

(c) Brevity of reasons delivered expeditiously in the context of interlocutory case management decision did not warrant a grant of leave to appeal: at [61]; and

(d) The primary judge did not err in taking into account as a relevant consideration whether it appeared on the case as pleaded that the interrogatories sought to be administered would or might advance the Applicant's case: at [62].

Seek Justice Pty Ltd v Minister for Planning **[2022] NSWCA 220** (Kirk JA)

(decision under review: Seek Justice Pty Ltd v Minister for Planning [2022] NSWLEC 127 (Pepper J))

Facts: Seek Justice Pty Ltd (**Seek Justice**) sought an expedited appeal of Pepper J's dismissal of its judicial review challenge on 25 October 2022. The appeal was heard on 27 October 2022. The initial claim by Seek Justice was a judicial review challenge to a consent granted by the Blue Mountains Local Planning Panel (**Panel**) and issued by the Blue Mountains City Council (**Council**) to USM Events Pty Ltd (**USM**), to hold the 2022 Ultra-Trail Australia Event (**event**) on 27 to 30 October 2022 in the Blue Mountains. Seek Justice challenged the decision on the basis that serious conflicts of interest were alleged that meant the Panel and Council could not lawfully determine the consent, and that expedition should be granted because the event was imminent.

Issue: Whether the expedition of the appeal should be granted.

Held: Application for expedition dismissed.

(1) The application for expedition was delayed such that the event the subject of the proceedings had already commenced, limiting the utility of any appeal: at [13]; and

(1) It was not in the interests of justice to allow expedition of the matter in circumstances where the event had already commenced, incurring significant costs for USM: at [14].

Feldkirchen Pty Ltd v Development Implementation Pty Ltd **[2022] NSWCA 227** (Macfarlan and Meagher JJA; Preston CJ of LEC)

(decision under review: *Feldkirchen Pty Ltd v Development Implementation Pty Ltd and Anor* [2021] NSWLEC 116 (Robson J))

Facts: Feldkirchen Pty Ltd (**Appellant**) appealed to the Court of Appeal under s 58 of the *Land and Environment Court Act 1979* (NSW) against the dismissal of judicial review proceedings it brought in the Court challenging the decision of Wingecarribee Shire Council (**Council**) to modify a development consent for a subdivision of land to be carried out by Development Implementation Pty Ltd. The Appellant argued that the Council erred in law in two ways in approving the modification application.

Issues:

(1) Whether the Court erred in law by finding no reasons were given by the Council for the grant of the consent that was sought to be modified and accordingly, the Council had not failed to take into consideration the reasons as required by s 4.55(3) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (**Ground 1**); and

(2) Whether the Court erred in law in finding that it had not been established that the Council had failed to form the necessary opinion of satisfaction that the development to which the consent as modified related was substantially the same development as the development for which consent was granted, as required by s 4.55(2)(a) of the EP&A Act (**Ground 2**).

Held: Dismissing the appeal with costs (Preston CJ of LEC; Macfarlan and Meagher JJA agreeing):

In relation to Ground 1

(1) The primary judge was correct in finding that no reasons were given by the Council for the grant of the consent that was sought to be modified. None of the three documents advanced by the Appellant as containing the Council's reasons recorded any reasons given by the

Council for the grant of the consent. In circumstances where the Council as the consent authority did not give reasons for the grant of the consent, it cannot be in breach of the obligation in s 4.55(3) of the EP&A Act: at [63]-[77];

In relation to Ground 2

(2) The primary judge did not err in finding that the Appellant had not discharged its onus of proving, on the balance of probabilities, that the Council did not form the necessary opinion of satisfaction under s 4.55(2)(a) of the EP&A Act before approving the modification application. Whilst explicit reference was not made in the modification assessment report considered by the Council or in the debate at the Council meeting to the terms of the precondition in s 4.55(2)(a), there were other indicators that the Council addressed the precondition in s 4.55(2)(a): at [104]-[115];

(3) The power to modify a consent in s 4.55(2) of the EP&A Act and the precondition in s 4.55(2)(a) are long established and commonly invoked by consent authorities. An inference would not readily be drawn that the Council was not aware of the need to fulfill the precondition in s 4.55(2)(a) before it could exercise the power under s 4.55(2) to approve the application to modify the consent: at [110]; and

(4) The absence of reference to the "material and essential features" of the two developments in the modification assessment report or the debate at the Council meeting did not indicate that the Council did not undertake the comparison required by s 4.55(2)(a) of the EP&A Act. As long as the Council addressed the substance of the question raised by s 4.55(2)(a), it did not have to refer to its precise terms or the ways in which courts have suggested that question might be addressed: at [113].

Ross v Lane **[2022] NSWCA 235** (Macfarlan and Beech-Jones JJA; Basten AJA)

(decision under review: *Olivia Ross v Patrick Lane (No 2)* [2021] NSWLEC 121 (Moore J))

Facts: Patrick Lane (**Lane**) sought and obtained development approval from the Council of the City of Sydney (**Council**), for modifications and extensions to his apartment on the top floor of a building including the construction of an additional storey. Olivia Ross (**Ross**) resided in an apartment in a neighbouring block. The construction of the additional storey substantially affected the views from one floor of Ross's apartment. Ross applied to the Land and Environment Court (**Court**) for orders declaring the development approval invalid. Ross contended that the development application was governed by State Environment Planning Policy 65 – Design Quality of Residential Apartment Development (**SEPP 65**) and the relevant Council had, amongst other matters, failed to refer the development application for approval to a design review panel for assessment, as required for developments to which SEPP 65 applies by cl 28(1) of SEPP 65. The Council determined that SEPP 65 was not applicable. Whether or not SEPP 65 was applicable depended on whether, in terms of cl 4(1)(a)(ii) of SEPP 65, the proposed development consisted of the "substantial redevelopment or the substantial refurbishment of an existing building".

Ross contended that whether or not cl 4(1)(a)(ii) of SEPP 65 was satisfied was a "jurisdictional fact" that was for the Court to authoritatively determine. The primary judge assumed, without deciding, that it was a matter for the Court to determine but nevertheless dismissed the proceedings. The primary judge found that the proposed development constituted neither a "substantial redevelopment" nor a "substantial refurbishment" of an existing building.

The decision was appealed.

Issues:

(1) Whether a determination of cl 4(1)(a)(ii) of SEPP 65 was satisfied is a matter for the Court or the consent authority to authoritatively determine; and

(2) If the determination of whether cl 4(1)(a)(ii) of SEPP 65 was satisfied is a matter for the Court to authoritatively determine, whether the primary judge erred in concluding that the proposed development is not a "substantial redevelopment or the substantial refurbishment of an existing building".

Held: Appeal dismissed (per Basten AJA; Macfarlan JA agreeing):

(1) Whether the application of SEPP 65 to a development application is a jurisdictional fact is a question of statutory construction. Although the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) does not expressly provide for the engagement of the power upon the satisfaction or opinion of the consent authority, such an intention may be inferred from the

nature of the power and the circumstances in which it comes to be exercised: at [75], [77];

(2) The principles established in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 422 in relation to the operation of the EP&A Act must be applied; however, the aspect of the statutory scheme which is engaged is different. In that case, the question was whether the proposed development was prohibited, or could be carried out with consent. That issue was characterised as "preliminary or ancillary to" the consent process, and as raising facts and matters "extrinsic to" that process. In the present case, there was no issue but that the development was permitted with consent; the question was whether SEPP 65 was a matter to be applied in the course of determining whether to grant consent: at [2], [87], [93], [94]; and

(3) Ordinarily, the legislature intends a decision-maker to determine issues requiring evaluative judgment, so that any error would be an error within jurisdiction. Where it may be difficult to characterise matters, as in s 4.15 of the EP&A Act which includes some criteria which are precisely defined and other criteria involving matters of degree, it is unlikely that the legislature intended some to be jurisdictional facts, but not others: the inconvenience of the conclusion that some matters could only be authoritatively decided by a court also militated against them being jurisdictional criteria: at [3]-[5], [80], [94]-[95]. Accordingly, the application or otherwise of SEPP 65 was a matter for the consent authority to determine: at [1], [73].

Weston Aluminium Pty Ltd v Environment Protection Authority **[2022] NSWCA 236** (Ward P; Basten AJA; Preston CJ of LEC)

(decision under review: *Weston Aluminium Pty Limited v Environment Protection Authority* [2021] NSWLEC 131 (Pepper J))

Facts: Weston Aluminium Pty Ltd (**Weston**) brought proceedings in the Court, seeking a declaration that it was exempt under cl 20(3) of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) (**Waste Regulation**) from the requirement to pay contributions to the Environment Protection Authority (**EPA**) under s 88 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**). Clause 20(3) grants an exemption to an "occupier of a scheduled waste facility" if "the facility is not a scheduled waste disposal facility" and "the facility is a scheduled waste facility because an activity listed in clause 26 (Metallurgical activities) of Schedule 1 to the Act is carried on at the facility". It was common ground that Weston operated a scheduled waste facility and conducted metallurgical activities at the facility. Accordingly, the primary issue before the Court was whether the facility was a scheduled waste disposal facility. The primary judge held that Weston was the occupier of a scheduled waste disposal facility and was therefore liable to pay contributions. Weston appealed to the Court of Appeal against this finding.

Issue: Whether the primary judge erred in finding that Weston was an occupier of a scheduled waste disposal facility such that the exemption from the requirement to pay contributions to the EPA did not apply.

Held: Appeal upheld; Weston was not an occupier of a scheduled waste disposal facility and was thus exempt from paying contributions to the EPA (per Basten AJA; Ward P and Preston CJ of LEC agreeing):

(1) Weston's facility was not a scheduled waste disposal facility because cl 20(3) of the Waste Regulation contemplates that a facility will be a scheduled waste facility because an activity listed in cl 26 is carried on at the facility, but which is not a scheduled waste disposal facility. There could be a scheduled waste facility on which metallurgical activities are carried out, but which is not used for the "disposal of waste". The destruction of waste in the course of metallurgical activities does not involve "disposal of waste" for the purposes of the definition of scheduled waste disposal facility: at [1], [23]-[26], [39];

(2) The primary judge erred by adopting the ordinary meaning of "disposal". Where a term is undefined in a statute or regulation, it does not follow that it should be given its ordinary or natural meaning. Dictionary definitions can only assist to identify the range of possible meanings. To determine the actual meaning, it is necessary to refer to the use of the term in its text and context: at [32]-[34]; and

(3) Having regard to the definition of scheduled waste disposal facility, a licence is required for premises at which an activity listed in Sch 1 to the POEO Act is carried on. The only candidate activity advanced by the EPA in Sch 1 for which a licence might be required if carried on at Weston's premises was that listed in cl 40. The requirement for a licence does not arise under cl 40 because the facility is used for the disposal of waste, but rather for treatment and processing. A waste facility

used for the disposal of waste will accordingly not be required to be licensed by reason of being an activity listed in cl 40. The definition of "scheduled waste disposal facility" is not engaged: at [36], [40], [50], [52], [57]-[59].

Bowers v Northern Beaches Council & Grigull Custodian Pty Ltd **[2022] NSWCA 253** (Kirk JA; Basten AJA; Preston CJ of LEC)

(decision under review: *Bowers v Northern Beaches Council and Anor* [2022] NSWLEC 8 (Robson J))

Facts: Mr Bowers appealed to the Court of Appeal under s 58 of the *Land and Environment Court Act 1979* (NSW) against the dismissal of judicial review proceedings he brought in the Court challenging the decision of the Northern Beaches Council (**Council**) to grant development consent for a caretaker's residence within an industrial building on land owned by Grigull Custodian Pty Ltd (**Grigull**). Mr Bowers advanced six grounds of appeal, three grounds challenging the primary judge's interlocutory rulings on procedure and evidence, and three grounds challenging the primary judge's final decision.

Issues:

(1) Whether the primary judge erred in not ordering an inspection of the caretaker's residence (**Ground 1**);
(2) Whether the primary judge erred in allowing Grigull to raise late objections to the affidavits read by Mr Bowers and in upholding some of those objections (**Grounds 2 and 3**);
(3) Whether the primary judge erred in his application of the rules in *Jones v Dunkel* (1959) 101 CLR 298 and *Browne v Dunn* (1893) 6 R 67 (**Ground 4**);
(4) Whether the primary judge erred in finding that Mr Bowers had not established that Grigull had committed a fraud on the Council in applying for development consent and that Mr Bowers had not established bad faith in the Council's decision to grant development consent (**Ground 5**); and
(5) Whether the primary judge erred in not finding that the Council's decision on ancillary use was perverse (**Ground 6**).

Held: Dismissing the appeal with costs (per Preston CJ of LEC; Kirk JA and Basten AJA agreeing):

In relation to Ground 1

(1) The primary judge did not err in not ordering an inspection of the caretaker's residence as Mr Bowers did not make a formal application at the hearing for such an order to be made. The power of the primary judge under s 53(1) of the *Evidence Act 1995* (NSW) was not engaged. An inspection would not in any event have assisted in resolving any ground of judicial review of the Council's decision: at [38]-[39], [41];

In relation to Grounds 2 and 3

(2) Mr Bowers did not articulate or demonstrate any error made by the primary judge in allowing Grigull to raise late objections to the affidavits read by Mr Bowers and in upholding some of those objections. The bare assertion that the primary judge erred in some respect is insufficient: at [46]-[48];

In relation to Ground 4

(3) The primary judge did not err in his application of the rules in *Jones v Dunkel* and *Browne v Dunn*. In regard to the rule in *Jones v Dunkel*, Mr Bowers did not explain what inference from the evidence should have been more readily drawn by the Council and Grigull failing to call the Council officer and Mr Grigull as witnesses. In regard to the rule in *Browne v Dunn*, Mr Bowers did not articulate or demonstrate how or why that rule had been infringed: at [51]-[52], [55], [58];

In relation to Ground 5

(4) The primary judge did not err in finding that Mr Bowers had not established that Grigull had committed a fraud on the Council in applying for development consent. Past illegal use neither precludes the grant of development consent for future legal use nor is a relevant factor in determining whether to grant development consent. Any intention of Grigull to use the premises otherwise than in accordance with the development consent once granted did not preclude Grigull from applying for development consent to use the premises for a permissible purpose or the Council from granting development consent for that purpose: at [62]-[66], [70]-[72];
(5) The primary judge did not err in finding that Mr Bowers had not established bad faith in the Council's decision to grant development consent. Mr Bowers' bad faith claim fails for the same reasons that his fraud claim fails: at [62], [76]; and

In relation to Ground 6

(6) The primary judge did not err in not finding that the Council's decision on ancillary use was perverse. The Council's decision that the use of the caretaker's residence would be ancillary and subservient to the dominant use of the building for industrial purposes was reasonably open to the Council on the material before it: at [7], [98], [102].

Broken Hill Cobalt Project Pty Ltd v Lord **[2022] NSWCA 271** (Ward P; Mitchelmore and Kirk JJA)

(decision under review: *David Anthony Lord v Broken Hill Cobalt Project Pty Limited* [2021] NSWLEC 126 (Duggan J))

Facts: Broken Hill Cobalt Project Pty Ltd and Cobalt Blue Holdings Ltd (**appellants**) appealed the decision of the primary judge which reviewed the final determination of an arbitrator in relation to a land access arrangement with David Lord and John Lord (**respondents**). The appellants were the holders of three exploration licences (**ELs**), being licences issued under Pt 3 of the *Mining Act 1992* (NSW) (**Mining Act**) covering about 7,000ha of land forming what is known as Thackaringa Station, a sheep farming property located near Broken Hill comprising freehold and leasehold title. This appeal related solely to the primary judge's determination of the compensation payable for any non-financial "compensable loss" as defined in s 262 of the Mining Act.

Issues: Whether the primary judge erred in:

(1) Finding that non-financial losses should be compensated by way of a lump sum per annum payment in the absence of evidence (**Ground 1**);
(2) In the alternative, denying procedural fairness by not providing notice of an intention to value non-financial losses in a manner materially different to evidence advanced by parties (**Ground 2**);
(3) Finding that the inference to management and influence upon management decisions caused by prospecting operations was likely to generate a non-financial compensable loss (**Ground 3**);
(4) Finding that damage to the land's surface was likely to be a non-financial compensable loss (**Ground 4**); and
(5) Failing to give adequate reasons as to how the determination of compensation for non-financial losses in the sum of $20,000 per annum per EL was calculated (**Ground 5**).

Held: Appeal allowed in part; matter remitted to primary judge (per Ward P; Mitchelmore and Kirk JJA agreeing):

(1) Ground 3 was not made out in that the finding that management time would be diverted consequent upon the fact that the appellants were present on the land was a loss that could not be measured simply by time spent in handling stock and so was a compensable loss: at [111], [127];
(2) The reasons for the finding raised by Ground 4 were sufficient to demonstrate that the damage to the fragile surface of the land that would be inherent in the prospecting or mining operations and would not simply have the consequence of an inability to graze on the land: at [112], [128];
(3) The extent to which the above two categories of compensable loss impacted the lump sum amount of $20,000 per annum per EL was insufficiently clear. Despite both parties having adopted arbitrary figure themselves, further reasons were required to understand how the calculation of compensation for those aspects had been carried out and so Ground 5 was made out: at [114]-[116];
(4) Ground 1 was not made out as some evidence was given by both parties' experts to provide a basis for the calculation of compensation, however as noted above, insufficient reasons were provided to demonstrate how such impacts resulted in the lump sum awarded: at [139]; and
(5) No denial of procedural fairness as raised by Ground 2 was found as the appellants were on notice of those aspects of non-financial loss the respondents were contending had been caused: at [152], [155].

Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 **[2022] NSWCA 275** (Gleeson JA; Basten AJA; Preston CJ of LEC)

(decision under review: *Darkinjung Local Aboriginal Land Council v Minister Administering the Crown Land Management Act – 'Gosford 1 & 2'* [2022] NSWLEC 68 (Pain J))

Facts: Darkinjung Local Aboriginal Land Council (**Land Council**) lodged in 2009 claims for Crown land at Gosford under the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**). The Minister administering the Crown Land Management Act 2016 (**Minister**) refused the land claims on the basis that the land was not "claimable Crown lands" under s 36(1)(c)

of the ALR Act. "Claimable Crown lands" includes "lands vested in Her Majesty that, when a claim is made for the lands under this Division – (c) are not needed, nor likely to be needed, for an essential public purpose." The Land Council appealed to the Court.

The primary judge held that the land was not claimable Crown lands as the land was needed for the essential public purpose of supported employment for disabled persons. The primary judge found that decisions of the executive government of the day in 1969 and 1971 to lease and reserve the land for the purpose of charitable organisations, together with the subsequent use of the land for that purpose, established that the land was needed for an essential public purpose when the claims were made in 2009.

The Land Council appealed to the Court of Appeal against the primary judge's decision on questions of law. The Land Council contended that the primary judge's decision involved misdirection and misapplication of the statutory test under s 36(1)(c) of the ALR Act and was not reasonably open on the evidence.

Issues:

(1) Whether the primary judge erred in finding that the land was needed for an essential public purpose at the date of the claims such that the primary judge's decision involved misdirection and misapplication of the statutory test of "claimable Crown lands" under s 36(1)(c) of the ALR Act; and
(2) Whether the primary judge's decision that the land was not claimable Crown land was manifestly unreasonable, in the sense that the decision was not reasonably open on the evidence.

Held: Appeal upheld; the primary judge's decision was infected by misdirection and misapplication of the statutory test and was not reasonably open on the evidence; Minister's notice of contention rejected (per Preston CJ of LEC; Basten AJA and Gleeson JA agreeing):

In relation to misdirection as to the statutory test

(1) The time for determining whether claimed land is needed for an essential public purpose is when the claim is made. Establishing whether land is needed at this date requires ascertaining the view held by the executive government on that date. For land to be needed, there should be an actual decision concerning the use of the land by the government: at [66], [67];
(2) Holding a view or making a decision that land is needed for an essential purpose involves the formation of a positive opinion of that fact by the government: at [68];
(3) The primary judge misdirected herself as to the statutory test under s 36(1)(c) of the ALR Act by relying on the decisions of the executive government of the day in 1969 and 1971 as evidencing that the executive government of the day in 2009 when the land claims were made had decided and held the view that the land claimed was needed for an essential public purpose: at [69], [71];
(4) The primary judge also misdirected herself in relying on evidence of use of the land for the purpose when there was no evidence that the government of the day when the land claims were made was aware of or consented to such use: at [12], [14], [74], [75], [100];

In relation to the decision not being reasonably open on the evidence

(5) The primary judge's decision that the government of the day held the view or had made a decision when the land claims were made that the land was needed for an essential public purpose was not reasonably open on the evidence: at [102]; and

In relation to the notice of contention

(6) On the evidence before the Court, the land could not be said to be likely to be needed for an essential public purpose at the date of the land claims: at [109], [111].

NSW COURT OF CRIMINAL APPEAL

Leda Manorstead Pty Ltd v Secretary, Department of Planning and Environment **[2022] NSWCCA 220** (Brereton JA; Preston CJ of LEC; Chen J)

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

Facts: Leda Manorstead Pty Ltd (**Leda**) was convicted by the Court of three offences against s 125(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for carrying out development otherwise than in accordance with conditions of a Project Approval in contravention of the then applicable s 75D(2) of the EP&A

Act. Two charges on which Leda was convicted related to the contravention of condition 21A of the Project Approval. The primary judge found that Leda breached condition 21A insofar as that condition required "bulk earthworks for the site" to be "limited to a maximum exposed disturbed area" of 5ha (later extended to 5.59ha). Leda appealed to the Court of Criminal Appeal as of right under s 5AB, read with s 5AA, of the *Criminal Appeal Act 1912* (NSW) against the convictions of those charges. The errors alleged by Leda concerned the primary judge's construction of condition 21A. Leda contended that had the primary judge correctly construed condition 21A, the offences would not have been proved on the facts.

Issues:

(1) Whether the primary judge erred in construing "the site" on which bulk earthworks must not exceed the maximum exposed disturbed area limit to be not only the precincts in which Leda was authorised to win fill (**borrow areas**), but also the areas on which Leda was authorised to place fill (**site ground**);
(2) Whether the primary judge erred in not excluding from the calculation of the maximum exposed disturbed area at any time, the areas approved to be disturbed in carrying out bulk earthworks under existing development consents (**existing consents ground**);
(3) Whether the primary judge erred in construing the phrase "exposed disturbed area" in condition 21A(b) to include not only areas disturbed by the winning of fill (cutting activities), but also areas disturbed by filling activities (**cause of the disturbed area ground**); and
(4) Whether the primary judge erred in failing to construe condition 21A in favour of Leda in the face of "latent ambiguity" (**construction of penal statute ground**).

Held: The primary judge erred in construing condition 21A in one respect, but this did not cause substantial miscarriage of justice; appeal dismissed (per Preston CJ of LEC; Brereton JA and Chen J agreeing):

In relation to the site ground

(1) The primary judge erred in finding that "the site" of the bulk earthworks referred to in condition 21A(b) was not limited to the borrow areas in the identified precincts, but extended to the areas on which Leda was authorised to place fill. The natural reading of condition 21A is that "the site" in 21A(b) refers to the "bulk earthworks in the borrow areas within [the identified precincts]" in 21A(a): at [3], [66];
(2) The context and subject matter of condition 21A, and the history in which it came to be inserted into the Project Approval are further indicators in support of that construction: at [56]-[72];

In relation to the existing consents ground

(3) Given the primary judge's unchallenged finding that the subject bulk earthworks were done in pursuance of the Project Approval, it matters not that there might have been some other consent or approval under which similar work could have been (but was not) done: at [11];
(4) There is no warrant, having regard to the text, context or purpose of the phrase "exposed disturbed area" to exclude areas authorised to be disturbed by other development consents. The outcome required by condition 21A(b) is to achieve a factual state of affairs – not having a disturbed area exceeding 5ha (or 5.59ha). It matters not why or how any disturbed area came about. What matters is the existence and extent of the disturbed area, and whether it exceeds the prescribed limit: at [87]-[88];
(5) The mere existence of another development consent authorising bulk earthworks in the same area creates only the potential to disturb that area, which is an insufficient basis upon which to exclude such an area from the calculation of the maximum exposed disturbed area: at [91]-[92];

In relation to the cause of the disturbed area ground

(6) There was no need in the calculation of the maximum exposed disturbed area to distinguish between an exposed disturbed area resulting from cutting and an exposed disturbed area resulting from filling. Both types of area are exposed disturbed areas for the purposes of condition 21A(b): at [98]; and

In relation to the construction of penal statute ground

(7) There was no need to resort to any principle concerning the construction of statutes imposing criminal liability. Neither the Project Approval nor condition 21A is properly to be characterised as being a penal statute. Further, there was no "latent ambiguity" in the meaning of condition 21A: at [106]-[108].

Kiangatha Holdings Pty Limited v Water NSW; Natale v Water NSW **[2022] NSWCCA 280** (Ward P; Davies and Button JJ)

(decision under review: *Water NSW v Kiangatha Holdings Pty Limited; Water NSW v Laurence Natale* [2022] NSWLEC 6 (Robson J))

Facts: By four separate summonses, Kiangatha Holdings Pty Ltd (**Kiangatha**) and Laurence Natale, the director of Kiangatha (**applicants**), were each charged with two offences against s 120(1) of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) in relation to the actual and deemed pollution of water during the construction of a dirt road on land owned by Kiangatha (**offences**). In 2018, the applicants made a request for further and better particulars of the alleged offences, and the prosecutor, Water NSW, provided a response including a map depicting the locations at which each offence was said to occur. In 2020, the Court of Criminal Appeal (in *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263) stayed the proceedings until the prosecutor particularised a single offence contrary to s 120 of the POEO Act in each of the summonses. In 2021, the prosecutor sought leave to amend each of the summonses to attach an aerial map of various sites and, in January 2022, Robson J in the Land and Environment Court granted leave (in *Water NSW v Kiangatha Holdings Pty Limited; Water NSW v Laurence Natale* [2022] NSWLEC 6). Pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912* (NSW), the applicants sought leave to appeal against the judgment of Robson J on the basis that the amended summonses changed the location of the s 120 offences by substituting new locations where the offences were said to have occurred. The amended summonses were based on an aerial inspection on the applicants' property by a drone.

Issues:

(1) Whether the primary judge erred in permitting the amendments to the location of the alleged sites of the alleged offences; and
(2) Whether the use of evidence obtained from what the applicants said was a trespass onto their land was not authorised by Ch 7 of the POEO Act or amounted to contempt.

Held: Leave to appeal refused (per Davies J; Ward P and Button J agreeing):

(1) There was no basis for interfering with the determination of the primary judge concerning the locations of the alleged offences and the materiality of the changes to those locations in the respective summonses. It could not be said that the primary judge's conclusions on the factual issues were not reasonably open: at [1], [66]-[69], [87];
(2) The use of the statutory powers in Ch 7 of the POEO Act after the commencement of proceedings does not amount to a contempt of Court in circumstances where the powers may be exercised pursuant to s 184 of the POEO Act and where the POEO Act provides no limitation on the exercise of the powers once criminal proceedings have been commenced. The provisions should not be read restrictively to prevent or limit their application after the commencement of criminal proceedings: at [1], [74]-[75], [83], [87]; and
(3) There were no issues regarding the privilege against self-incrimination in relation to the evidence gathered by the drone because there were no testimonial aspects involved and the primary judge was correct to note the distinction between orders or powers that might require a person to testify as to their guilt and the use of a power to do no more than gather or refine evidence. The sole and dominating purpose of using the drone was for obtaining evidence and the only advantage obtained by the prosecutor was the benefit of greater clarity in pinpointing the locations where each offence was alleged to have occurred: at [1], [76]-[81], [83]-[84], [87].

SUPREME COURT OF NSW

Chatterton v City of Parramatta Council **[2022] NSWSC 1603** (Henry J)

Facts: The plaintiffs sought orders pursuant to s 89 of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**) for the modification of two easements registered on title to their land (**the Land**). The City of Parramatta Council (**Council**), as the registered proprietor of the land benefitting from the disputed right of way which was community land known as Northmead Reserve, opposed the modification. The right of way extended across approximately six metres of the width of Lot 56 and the terms of the right of way specified passage "with or without horses, cattle and other animals, carriages, carts, motors (sic) and other vehicles".

Issues:

(1) Whether the width of the right of way was obsolete or impeded the reasonable use of Lot 56 without securing practical benefit to the persons entitled to the right of way;
(2) Whether the right of way had been abandoned in part;
(3) Whether the proposed modification would cause substantial injury to the persons entitled to the right of way; and
(4) If the plaintiff's application was successful, whether the Court should exercise its discretion.

Held: Summons dismissed; plaintiff to be pay defendant's costs:

(1) The impacts of the right of way on the convenience of building on the Land were not so severe that no reasonable use was possible, particularly where no evidence of the impact on the value was available and sufficient practical benefit to users was found: at [106]-[108];
(2) Notwithstanding the findings of non-use of the full width of the right of way by Council and its predecessors in title by vehicles (and horses, cattle other farm animals), such finding was insufficient to indicate the requisite firm intention by Council to not make use of the full width in the future: at [120];
(3) Applying the wide meaning of substantial injury as non-theoretical or having present substance, a modification to reduce the width would result in loss of amenity and the prospect of a less safe passage by pedestrians and so reached the standard of substantial injury: at [156]-[157]; and
(4) As the plaintiffs' application failed, the question of discretion did not arise: at [159].

Clough v Breen & Anor **[2022] NSWSC 1759** (Slattery J)

(related decision: *Clough v Breen & Anor* [2022] NSWSC 1026 (Slattery J))

Facts: The plaintiff was the registered proprietor of Lot 116 and the defendants of the adjacent Lot 118. Both lots were affected by multiple easements pursuant to s 88B of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**). These interlocutory proceedings dealt with one of multiple threshold issues to be resolved prior to trial, namely whether the defendants had the right to install a CCTV camera within part of an "easement for services" burdening the plaintiff's land. According to the plan and 88B instrument incorporating the statutory terms of Sch 8 Pt 11 of the Conveyancing Act, the easement for services was to use the burdened lot "to provide domestic services to or from each lot benefited". The camera allowed the defendants to view a passageway area outside two storage rooms.

Issue: Whether the defendants were entitled upon the true construction of the s 88B instrument and in the events which occurred to install and maintain a CCTV camera within the easement area.

Held: Easement declared unauthorised; order made that plaintiff at liberty to remove camera:

(1) Based on various definitions of "services" in usage according to the Macquarie Dictionary, similar ideas emerged of a commercial activity supplying something required by the public because it was commonly useful. A CCTV camera placed and used in these circumstances was private and discretionary and did not have the necessary connection with publicly demanded commercial and utility services: at [28];
(2) The additional qualification of "to or from each lot benefited" indicated a "service" that entered, left or somehow accommodated the benefited lot from a public place though the burdened lot and so excluded the placement of a CCTV camera on the burdened lot: at [29]; and
(3) Whilst only an inclusive definition, the statutory definition that "domestic services" include "supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes" was broadly consistent with the above interpretation: at [30].

El Khouri & Anor v Gemaveld Pty Ltd & Ors **[2023] NSWSC 25** (White J)

(decision under review: *Gemaveld Pty Ltd v Georges River Council* [2022] NSWLEC 1182 (Horton C))

Facts: Mr Peter and Ms Goumana El Khouri (**first** and **second applicant**), and Ms Effi Theodorakopoulos (**third applicant**) filed a summons for judicial review in the New South Wales Court of Appeal (**Court of Appeal**) against the decision of a commissioner of the Land and Environment Court (**Court**). The respondents to the summons were Gemaveld Pty Ltd (**first respondent**), the Land and Environment Court (**second**

respondent), and Georges River Council (**third respondent**). In October 2020, the third respondent refused the first respondent's development application in relation to 117 Stuart Street, Blakehurst (**site**). One year later the first respondent commenced Class 1 proceedings (**original proceedings**) at the Court against the third respondent's decision. A commissioner of the Court granted development approval for the site pursuant to s 34(3) of the *Land and Environment Court Act 1979* (NSW). None of the applicants were parties to the original proceedings.

The applicants contended that the order of the Court was void on the following grounds:

(1) The Court had no power to grant consent because the height of the proposed development exceeded the relevant height control in the Kogarah Local Environmental Plan (**KLEP 2012**) and there was no request to vary that standard as required by cl 4.6 of KLEP 2012; and
(2) The decision to grant the development consent was affected by jurisdictional error as the development application was not notified in accordance with the community participation requirements of the *Environmental Planning and Assessment Act 1979* (NSW) in that the third applicant, who is an adjoining land owner to the site, was not notified of the development application and was thereby denied procedural fairness.

The application raised questions of fact that were not appropriate for determination before the Court of Appeal. The matter was remitted to a judge in the Equity Division of the Supreme Court of New South Wales (**Supreme Court**), pursuant to s 51(4) of the *Supreme Court Act 1970* (NSW) for separate determination of the questions of fact, with the remainder of the dispute to be determined by the Court of Appeal at a later date.

Issues:

(1) Whether the proposed dwelling house approved by the commissioner exceeded the maximum building height for the purposes of cl 4.3(2) of the KLEP; and (**Question 1**)
(2) If the answer to question 1 was yes, whether the first and second applicants excavated the site prior to 7 April 2022 in the portion of the site that is in breach of the height of buildings development standard for the purposes of question 1, and if yes, the extent (**Question 2**).

Held:

(1) The proposed dwelling house exceeded the maximum building height: at [53]-[54], [72];
(2) The first and second applicants did not excavate a portion of the site prior to 7 April 2022: at [71]-[72]; and

In relation to Question 1

(3) The first respondent's submissions regarding the method for determining maximum building height were incorrect. The definition of "height of building" in KLEP 2012 provides that building height is measured from existing ground level vertically upwards to the highest point of the proposed building. Existing ground level is the existing level of a site at any point. On the face of the plans, the proposed building complied with the 9-metre height limit. However, expert evidence was accepted by the court that those plans were in error: at [23]-[24], [29], [53].

LAND AND ENVIRONMENT COURT OF NSW

CRIMINAL

Environment Protection Authority v Sydney Water (No 2) **[2023] NSWLEC 2** (Moore J)

(related decision: *Environment Protection Authority v Sydney Water* [2022] NSWLEC 100 (Moore J))

Facts: The Environment Protection Authority (Prosecutor) prosecuted Sydney Water Corporation (Defendant) on three charges alleging breaches of various provisions of the Protection of the Environment Operations Act 1997 (NSW) (POEO Act) arising out of a split in a rising main (600-millimetres in diameter) in Carrawood Reserve, Carramar, south-western Sydney. The Defendant pleaded not guilty to all three charges. Following a contested liability hearing on 11 August 2022, the Defendant was acquitted of two of the charges but convicted on one charge of polluting the waters of Prospect Creek (see related decision). The conviction was of pollution of waters in breach of s 120(1) of the POEO Act. The pollution arose from the discharge of untreated effluent from the wet well of a Sewage Pumping Station (Pumping station). During the sentencing hearing the Prosecutor

proposed that a portion of the appropriate total monetary penalty was to be paid to Fairfield City Council (Council) as a contribution towards the cost of the Quest Avenue Vegetation Swale Project (Project). The Project is an environmental water quality improvement program in the general vicinity of Carrawood Reserve. The Defendant was sentenced for the sole charge for which it had been convicted.

Issues:

(1) The appropriate penalty to be imposed;
(2) Whether the Defendant should be ordered to pay the Prosecutor's costs of the prosecution of the offence for which the Defendant had been convicted; and
(3) Whether any orders should be made pursuant to Pt 8.3 of the POEO Act.

Held: Taking into account the relevant sentencing considerations: 1) The appropriate monetary penalty to be imposed of $200,000 (comprising a fine of $155,000 and $45,000 to be applied to the Project); moiety of the fine (50%) to be paid to the Prosecutor; 2) The Defendant to pay the Prosecutor's costs; publication orders made; and letter of apology to be delivered to residences impacted by the pollution of Prospect Creek; 3) The Defendant's submission that it should not bear the Prosecutor's costs on the basis that it was acquitted of two of the three charges was rejected: at [130]-[139]. It was appropriate that the Defendant pay the costs of the Prosecutor of the prosecution of the offence for which the Defendant had been convicted: at [146]-[147]. The costs assessment process (if no agreement was reached between the parties) was the appropriate way to determine the amount of those costs: at [143].

Environment Protection Authority v ACE Demolition & Excavation Pty Ltd (No 2) [2023] NSWLEC 3 (Moore J)

(related decisions: *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd* [2022] NSWLEC 44; *Environment Protection Authority v ACE Demolition & Excavation Pty Ltd;* Allam [2022] NSWLEC 45; *Environment Protection Authority v Allam* [2021] NSWLEC 103; *Environment Protection Authority v Allam (No 2)* [2022] NSWLEC 7 (Moore J) and *Environment Protection Authority v Al-Sarray* [2022] NSWLEC 31 (Duggan J))

Facts: On 17 December 2020, the Environment Protection Authority (the **Prosecutor**) charged ACE Demolition & Excavation Pty Ltd (the **Defendant**) and its managing director, Mr Sami Allam (**Mr Allam**), with a number of offences alleging breaches of s 144AA of the *Protection of the Environment Operations Act 1997* (NSW) (the **POEO Act**). The Defendant was charged with three offences of transmitting information concerning waste during the dealing with waste knowing that the information conveyed was false or misleading in a material respect (s 144AA(2)). The Defendant was also charged with a single count of transmitting information concerning waste during the course of dealing with waste, where that information was false or misleading in a material respect (s 144AA(1)). Mr Allam was charged with three offences pursuant to the executive liability provisions contained in s 169C of the POEO Act. The Defendant and Mr Allam had pleaded not guilty to the charges laid against them. At the commencement of the hearing, the Defendant changed its pleas to guilty for the three charges laid pursuant to s 144AA(2), and the Prosecutor withdrew the three charges which had been laid against Mr Allam. A sentencing hearing was held.

The actions which gave rise to the three charges pursuant to s 144AA(2) were an important aspect requiring consideration for the purposes of sentencing. This was because such actions had been effected by the activities of Mr Al Sarray - a senior employee of the Defendant - who had falsified the information, the transmission of which underpinned the charges in question. Mr Al Sarray had, earlier, pleaded guilty to two charges pursuant to s 144AA(2) and had been sentenced for those offences by Duggan J (see related decision). Although he had falsified information underpinning the third of the charges pursuant to s 144AA(2) against the Defendant, in the circumstances of these proceedings, Mr Al Sarray had caused another employee of the Defendant (being Mr Al Sarray's subordinate) to effect the transmission of the falsified information. The operation of s 169C of the POEO Act made the Defendant liable for the activities of its employee's knowledge. With respect to the single charge pursuant to s 144AA(1), to which the Defendant had pleaded guilty, the identity of the transmitter of the information was not able to be identified by the Prosecutor. This ensured that the knowledge element required to establish the more serious offence was absent.

Issues:

(1) Whether the Defendant was entitled to a discount for its guilty pleas;

(2) The appropriate penalties to be imposed; and
(3) Whether a publication order was appropriate.

Held: Upon a consideration of the relevant sentencing considerations the Defendant was fined a total of $943,650; ordered to pay a moiety to the Prosecutor; ordered to pay the Prosecutor's costs; publication order made. In particular, these considerations gave rise to findings that:

(1) The offending conduct showed significant disregard for the regulatory schemes for waste management established by the Protection of the Environment Operations (Waste) Regulation 2014, and for the relevant development control established by the *Environmental Planning and Assessment Act 1979* (NSW). The extent of the harm to those regulatory schemes was significant, however, not so significant as to constitute a factor of aggravation: at [60]- [70];
(2) The offending conduct giving rise to the charge pursuant to s 144AA(1) of the POEO Act was, on the balance of probabilities, committed by the transmission of the falsified information by Mr Al Sarray: at [89]-[90]. The consequence of this, together with the role in which Mr Al Sarray played with respect to the charges laid pursuant to s 144AA(2) of the POEO Act, meant that all four charges faced by the Defendant were regarded as arising out of a single course of offending conduct. This gave rise to the necessity to consider the sentencing principles of totality and accumulation: at [219]; and
(3) Although the guilty pleas for the three breaches of s 144AA(2) came at the conclusion of a contested liability hearing, they were not taken at an early opportunity: at [198]. These not early guilty pleas were considered to have a sufficient (yet comparatively modest) functional utility for the administration of justice: at [213]. A 10% discount on each of the starting sentences was thus appropriate: at [216].

***Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator v Henry Payson Pty Ltd* [2023] NSWLEC 5** (Pepper J)

Facts: Henry Payson Pty Ltd (**Payson**) was prosecuted by the Natural Resources Access Regulator (**NRAR**) for, and pleaded guilty to, two offences of knowingly taking water from a water source while metering equipment was not operating properly contrary to s 91I(1)(b) of the *Water Management Act 2000* (NSW) (**WM Act**), one offence of using a dam without approval contrary to s 91B(1) of the WM Act, and one offence of constructing a dam without approval contrary to s 91B(1) of the WM Act. During the cotton seasons of 2016-2017 and 2017-2018, Payson, through its sole director and shareholder, Barnes, acquired knowledge of the under-recording of the volume of water pumped from Gwydir River and consequently increased his cotton crop plantation to 250 hectares and falsified his water budget. The meter was found to be under-recording by a factor of 1.8 during the offence periods. Barnes also constructed and used a dam without the requisite approval to store water for irrigating his crops.

Issue: The appropriate sentence to be imposed on Payson.

Held: Payson was convicted and fined $175,000 and $125,000 for the two meter offences; it was fined $43,750 and $10,000 for constructing and using the dam, publication orders were made; a moiety of 50% of each fine paid to NRAR; and it was ordered to pay NRAR's costs as agreed or assessed and investigation costs fixed at $2,374:

(1) The objective seriousness of the meter offences was increased by Payson's motivation of financial profit and the fact that a series of criminal acts were involved: at [197], [214];
(2) Payson's actions in deliberately deceiving the regulator about how much water was being taken and falsifying the water budget to ensure no other persons became aware of the under-recording also elevated the objective seriousness of the commission of the meter offences: at [133];
(3) The meter offences were committed knowingly: at [132];
(4) The dam use and construction offences were committed recklessly: at [143];
(5) The commission of the meter offences occasioned substantial harm to the integrity and consistent administration of the water management scheme in NSW: at [171];
(6) Payson was entitled to a discount of 12.5% for its guilty plea: at [244]; and
(7) Specific deterrence also played a role in sentencing because Payson continues to operate as a cotton farming enterprise: at [272].

***Secretary, Department of Planning and Environment v Aerotropolis Pty Ltd* [2023] NSWLEC 4** (Moore J)

Facts: The Secretary of the Department of Planning and Environment (**Prosecutor**) commenced 20 prosecutions of

Aerotropolis Pty Ltd (**Defendant**) in relation to the clearing of vegetation in Bringelly, New South Wales. Eight of the charges related to breaches of the *National Parks and Wildlife Act 1974* (NSW) (**National Parks Act**) (three of the alleged breaches were of s 118A(2) and five were of s 118D(1)), 12 charges related to breaches of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Conservation Act**). The National Parks Act and the Biodiversity Conservation Act contained identical time commencement provisions (s 190(1)(a),(b) and s 13.4(1),(2) respectively) requiring that such prosecutions be commenced within but not later than two years after the date on which the offence was alleged to have been committed, or within but not later than two years after the date on which evidence of the alleged offence first came to the attention of any authorised officer. Further identical provisions contained in the National Parks Act (s 190(3)) and the Biodiversity Conservation Act (s 13.4(3)) stipulated that such time commencement provisions applied "despite anything in the *Criminal Procedure Act 1986* (NSW) or any other Act". The Defendant's alleged offending conduct first came to the attention of an authorised officer on Saturday, 11 June 2020. Each of the prosecutions were commenced on Tuesday, 14 June 2022 (being the first working day after the Queen's Birthday long weekend that year).

The Defendant filed a Notice of Motion seeking to have all 20 prosecutions dismissed on the basis that they had not been commenced within the time permitted by each of the statutorily permitted time periods. The Defendant contended that the summonses were out of time on two separate bases. First, that time commenced to run from midnight on the day before the authorised officer became aware of the Defendant's alleged offending conduct, if correct, the prosecutions were all commenced out of time as they would have been required to have been commenced on 10 June 2022; secondly, the Prosecutor was not entitled to rely on s 36 of the *Interpretation Act 1987* (NSW) (**Interpretation Act**) in order to extend the time for filing the summonses until the next working day after the Queen's Birthday weekend and its associated public holiday, as the common qualification in the National Parks Act and the Biodiversity Conservation Act that the time commencement proceedings applied "…despite anything in the Criminal Procedure Act 1986 (NSW) or any other Act". Specifically, it was submitted by the Defendant that the use of the words "any other Act" operated to exclude the application of s 36 of the Interpretation Act. This proposition was supported, it was submitted for the Defendant, by what should be regarded as seriously considered data from Leeming JA in *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204 on this point.

The Prosecutor submitted that both bases of challenge advanced for the Defendant should be rejected and that the (20) prosecutions were validly commenced. In response to the first basis advanced for the Defendant, it was submitted that there was now a general rule of the common law derived from the decision in *Lester v Garland* (1808) 15 Ves Jun 248, which established that time ran from the end of the relevant day and not from midnight on the day before. The Prosecutor noted that this common-law rule did not require reliance on s 36(1) of the Interpretation Act. On the second proposition, it was submitted that decisions of intermediate appellate courts – those being *Wignalls Smallgoods Pty Ltd v Kent* (2002) 10 Tas R 460, a decision of the full Court of the Tasmanian Supreme Court and *Price v JF Thompson (Qld) Pty Ltd* [1990] 1 Qd R 278, a decision of the Court of Appeal of Queensland - held that the general statutory ouster provisions did not operate to exclude a relevant time extension provision as was here involved. Although the wording of the relevant interpretation legislation differed, there was interpretation legislation to identical effect of the Commonwealth and of each state and territory. Consistent with the decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (reinforced in June 2022 by that Court's decision in *Hill v Zuda Pty Ltd* [2022] HCA 21), in the present case *Wignalls* and *Price* were required to be followed.

Issues:

(1) Whether all 20 charges should be dismissed because time for their filing ran from midnight of the day prior to the authorised officer becoming aware of the Defendant's alleged offending conduct and that, consequently, the prosecutions had not been commenced within 2 years of that date; and

(2) If the first basis of challenge was rejected, was the Prosecutor able to take advantage of s 36 of the Interpretation Act so that the summonses filed on the first working day after the Queen's Birthday public holiday weekend in 2022 validly commenced the prosecutions of the Defendant?

Held: Both bases of challenge rejected; Notice of Motion dismissed; costs reserved.

(1) The proposition that the day that the alleged offending conduct came to the attention of the authorised officer

was to be excluded from the running of time - as derived from the decision in Lester - was now to be seen as a general rule of the common law: at [130];

(2) The *dicta* comment relied upon by the Defendant from the decision of Leeming JA in *Truegain* did not provide a proper basis to depart from the general common law position: at [128];

(3) Despite the Prosecutor disavowing reliance upon s 36(1) of the Interpretation Act, if it had been necessary to do so, this provision also provides a basis upon which the Defendant's argument concerning the time for commencement of the statutory period would also be rejected: at [133]-134];

(4) Although the interpretation of statutes of the Commonwealth, all the states and the two territories were not in identical terms, each of those enactments contained a provision in identical effect to s 36(2) of the Interpretation Act. The decision of the High Court in Farah Constructions applied by analogy. The result of this is that Wignalls and Price must be followed: at [138]-[139];

(5) The words "or any other Act" in the relevant provisions of the National Parks Act and the Biodiversity Conservation Act did not have the effect of ousting the operation of s 36(2) of the Interpretation Act: at [143]. This meant that, as the statutory time-period for commencing the proceedings concluded on the Saturday of the Queen's Birthday long weekend, time for commencement of the proceedings was extended until the next working day, being Tuesday 14 June 2022: at [131]-[132]; and

(6) The Defendant's claim that the words "or any other Act" did not encompass any legislation (other than the Interpretation Act) was to be rejected because the Prosecutor had drawn attention to the existence of the *Children (Criminal Proceedings) Act 1987* (NSW), which contained a similar provision to that in the Criminal Procedure Act 1986 (this Act being expressly excluded by the relevant provisions of the National Parks Act and the Biodiversity Conservation Act): at [144]-[145].

CONTEMPT

***Malass v Strathfield Municipal Council* [2022] NSWLEC 131** (Robson J)

(related decision: *Malass v Strathfield Municipal Council* [2020] NSWLEC 168 (Preston CJ of LEC))

Facts: On 27 November 202, the Court made orders (in *Malass v Strathfield Municipal Council* [2020] NSWLEC 168) partially staying the operation of a Development Control Order issued by the Strathfield Municipal Council (**Council**) and requiring Sarah Malass to stop all allegedly non-compliant development work on land in Strathfield except for minor works to avoid future damage to a building under construction. By notice of motion filed on 16 December 2021, Council sought orders that the defendant be found guilty of contempt for carrying out development work between 26 June 2021 and 8 November 2021 contrary to the orders. The defendant pleaded guilty to the charge.

Issue: The determination of an appropriate penalty for civil contempt of Court.

Held: Defendant found guilty of contempt; fined $20,000 and ordered to pay the Council's costs.

(1) The contempt was moderately serious in circumstances where the defendant undertook extensive work over a continued period of time, and without any appropriate excuse for her conduct. Furthermore, the defendant was aware of the nature, extent, and consequences of non-compliance with the orders and therefore acted wilfully: at [60]-[67];

(2) Although the Court did not accept the defendant's evidence in relation to her mental health, evidence of her mental state, plea of guilty, contrition and prior good character were relevant mitigating factors: at [74]-[77];

(3) In circumstances where there was no evidence in relation to any financial gain from the breach or the defendant's capacity to pay a fine, the Court did not place any significant weight on these factors: at [68]-[69], [78]; and

(4) There was a need for general deterrence to ensure that those who may otherwise be inclined to flout the authority of the Court are not tempted to do so; and for specific deterrence in circumstances where the defendant plead guilty to two other charges (in *Strathfield Municipal Council v Malass* [2022] NSWLEC 132): at [70]-[72].

***Strathfield Municipal Council v Malass* [2022] NSWLEC 132** (Robson J)

(related decision: *Strathfield Municipal Council v Malass* [2021] NSWLEC 112 (Pain J))

Facts: On 11 August 2021, the Court made interlocutory orders requiring Sarah Malass to cease all work being undertaken on a property in Strathfield until the finalisation of related Class 4 proceedings (**August Orders**). On 19 October 2021 (in *Strathfield Municipal Council v Malass* [2021] NSWLEC 112 (Pain J)), the Court made an order pursuant to r 23.8 (1) of the *Uniform Civil Procedure Rules 2005* (NSW) granting officers of Strathfield Municipal Council (**Council**) access to the property for an inspection (**October Orders**). By notice of motion, Council sought orders that the defendant be found guilty of contempt for failing to comply with the August Orders and the October Orders in that the defendant, first, continued to carry out development work at the property and, second, failed to provide Council's officers access to all areas of the property on 22 October 2021. The defendant pleaded guilty to the offences.

Issue: The determination of an appropriate penalty for civil contempt of Court.

Held: Defendant found guilty of both counts of contempt; fined a total of $27,500 and ordered to pay the Council's costs.

(1) Despite an overlap in the factual circumstances of the breaches, the Court considered each count of contempt as a discrete breach of the Court's orders: at [92];
(2) Both counts of contempt were found to be of moderate seriousness in light of the defendant's awareness of the nature, extent, and consequences of non-compliance with court orders and the lack of reasonable excuse for her conduct. The significance of the work carried out on the property until February 2022 contrary to the August Orders further added to the seriousness of that breach. The Court did not accept that the defendant blocked access to the property for 'safety reasons' and noted that her active opposition to the making of the October Orders supported a finding of wilful contempt: at [60]-[75];
(3) Although the Court did not accept the defendant's evidence in relation to her mental health, evidence of her mental state, pleas of guilty, contrition and prior good character were relevant mitigating factors: at [82]-[87];
(4) In circumstances where there was no evidence in relation to any financial gain from the breach or the defendant's capacity to pay a fine, the Court did not place any significant weight on these factors: at [77]-[78], [88];
(5) There was a need for general deterrence to ensure that those who may otherwise be inclined to flout the authority of the Court are not tempted to do so; and for specific deterrence in circumstances where there were two separate offences of contempt: at [79]-[81]; and
(6) The principle of totality was considered in assessing the appropriate fine for each breach: at [89]-[93].

JUDICIAL REVIEW

Seek Justice Pty Ltd v Minister for Planning **[2022] NSWLEC 127** (Pepper J)

Facts: Seek Justice Pty Ltd (**Seek Justice**) filed a judicial review claim on 7 October 2022 challenging the consent granted to USM Events Pty Ltd (**USM**), to hold the 2022 Ultra-Trail Australia Event (**event**) to be held on 27 to 30 October 2022 in the Blue Mountains. The development application (**DA**) for the event was determined by the Blue Mountains Local Planning Panel (**Panel**) by the grant of development consent.

Seek Justice sought declarations that the consent issued by the Council was invalid; and, that any eco-tourism licences issued by the Council to USM in respect of the event were invalid. Seek Justice contended that the Panel, which was constituted pursuant to s 2.17(2) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), could not lawfully determine the DA because of various conflicts of interest, both pecuniary and otherwise.

Issues:

(1) Whether the Panel could lawfully determine the DA for the event because of various conflicts of interest relating to, among other things, the use of Council owned land for the event; and
(2) Whether the Panel could lawfully determine the DA because of a pecuniary conflict of interest relating to the fees that the Council charged for the determination of the DA, eco-tourism licence and use of the Council-owned car park for the event.

Held: Judicial review application dismissed.

(1) The Panel could lawfully determine the DA because it was effectively independent from the Council by reason

of its constitution and function under ss 2.19 and 4.8 of the EP&A Act. The Panel had different members and a mandated structural separation from the Council: at [54]-[57];

(2) The Panel's decision to approve the DA was not infected by apprehended bias because a fair minded observer would not assume that merely because the Panel and Council shared similar names and offices, that the Panel was biased: at [58]-[64];

(3) The issue of whether the Council was biased by reason of any pecuniary interest it had in the issuing of an eco-tourism licence was irrelevant because no such licence was issued for the event: at [74]; and

(4) The Council's alleged pecuniary interest in the event does not prevent the Panel from lawfully determining the DA because the Panel and Council are separate entities. Further, any pecuniary interest was not substantial and would not give rise to apprehended bias: at [78].

***The Next Generation (NSW) Pty Ltd v State of New South Wales* [2022] NSWLEC 138** (Preston CJ)

Facts: The Independent Planning Commission (**IPC**) refused a development application made by The Next Generation (NSW) Pty Ltd (**Next Generation**) in respect of State significant development seeking consent for the construction and operation of an energy from waste facility on land at Eastern Creek (**SSD Application**). Next Generation appealed against the IPC's refusal of the SSD Application. The respondents to the appeal contended that the refusal was justified as the Protection of the Environment Operations (General) Regulation 2022 (NSW) (**Thermal Energy from Waste Regulation**) and the NSW Government, *Energy from Waste Infrastructure Plan*, September 2021 (**Plan**) prohibit the carrying out of the proposed thermal treatment of waste activity at the premises. Next Generation sought, in judicial review proceedings, a declaration that Pt 4 of Ch 9 of the Thermal Energy from Waste Regulation is invalid and of no effect. Next Generation also sought a declaration, contingent on the other declaration, that the Plan is of no effect.

Issue: Whether the Thermal Energy from Waste Regulation is a proper exercise of the regulation-making power under s 323 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).

Held: The Thermal Energy from Waste Regulation is a proper exercise of the regulation-making power; it is unnecessary to decide the challenge to the Plan in light of this finding; summons dismissed with costs.

(1) The Thermal Energy from Waste Regulation is "for or with respect to" matters that are permitted to be prescribed by the POEO Act, being the matters set out in cl 5 of Sch 2 to the POEO Act. The breadth of description of these matters is sufficient to support the provisions of the Regulation: at [44]-[46], [73];

(2) The Thermal Energy from Waste Regulation is "not inconsistent with" the POEO Act. While the Regulation does add prohibitions on the carrying out of an activity or work, this does not make it inconsistent with the POEO Act. There are already similar prohibitions in the POEO Act. The Regulation simply added other prohibitions with which a person must comply: at [56]-[58], [74];

(3) Section 145 of the Thermal Energy from Waste Regulation is not inconsistent with the discretionary power in s 55(1)(a) of the POEO Act. Section 145 simply directs that the power in s 55(1)(a) be exercised in a particular way (by refusal) if the circumstances specified in s 145 exist: at [59], [75];

(4) There is no inconsistency between s 145 of the Thermal Energy from Waste Regulation and s 55(2) of the POEO Act. The EPA can still comply with s 55(2) by taking the four steps required by that subsection: at [60], [76];

(5) The regulation-making power under s 323 of the POEO Act is broad enough to allow the making of a regulation restricting the locations at which the thermal treatment of waste can be carried out: at [64], [77];

(6) The regulation-making power expressly authorises a regulation to create an offence (s 323(3) of the POEO Act). Once it is recognised that the regulation-making power enables the making of a regulation prohibiting the carrying out of the thermal treatment of waste, the power can be seen to extend to enable creating an offence for breaching that prohibition: at [65]-[66], [78];

(7) The prohibition on the carrying out of the activities or work referred to in s 143(1) and (2) of the Thermal Energy from Waste Regulation and the offence for breaching that prohibition are coterminous. There is no inconsistency between the provision and purpose of Pt 4 of Ch 9 of the Regulation: at [67]-[68], [79]; and

(8) The provisions of the *Environmental Planning and Assessment Act 1979* (NSW) prevail over s 145 of the Thermal Energy from Waste Regulation in the event of

inconsistency. That interpretive outcome is recognised by the note to s 145 of the Regulation: at [62]-[63], [80].

The Hills Shire Council v Drenovac [2022] NSWLEC 139 (Duggan J)

Facts: Council brought judicial review proceedings in relation to the validity of two complying development certificates issued by the first and second respondents for the demolition and construction of multi dwelling development of terrace houses (**Terrace Housing CDC**) and subdivision (**Subdivision CDC**) (**CDCs**) at 2 Chapman Ave, Castle Hill (**Site**). The granting of the CDCs was notified on 3 November 2020 and these proceedings were commenced on 3 August 2021, by which time substantial works had been undertaken by the third to sixth respondents (**Owners**). Prior to subdivision, the area of the Site was 1324m^2. Clause 3B.33 of the State Environmental Planning Policy (Exempt & Complying Development Codes) 2008 (**Code SEPP**) specified a minimum lot size for "multi dwelling housing (terraces)" of 600m^2 where the relevant environmental planning instrument did not so specify. Clause 4.1A of the Hills Local Environmental Plan 2019 (NSW) (**HLEP 2019**) identified 1,800m^2 as the minimum for "multi dwelling housing".

Issues:

(1) The proper construction of the minimum site area pursuant to the Code SEPP and HLEP 2019;
(2) Whether such error produced invalidity of the Terrace Housing CDC;
(3) If invalid, whether the proceedings were brought out of time pursuant to s 4.59 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**);
(4) Whether the Subdivision CDC was consequently invalid; and
(5) If the CDCs were invalid, whether the Court would exercise its discretion to grant the relief sought.

Held: Amended Summons dismissed; Council to pay respondents' costs:

Site area

(1) Whilst cl 4.1A(3) of the HLEP 2019 provided the capacity of the certifier to vary the lot size based on merit considerations, such variation was dependent upon the form and expression of the proposed development rather than the size of the parent lot and so the numeric designation of 1,800m^2 was the correct characterisation of the specified minimum lot size: at [52];

Invalidity of Terrace Housing CDC

(2) Council impermissibly sought to have the Court undertake the task of determining a jurisdictional fact despite seeking to frame the question in a different way. To the extent that such approach has been ameliorated by the insertion of s 4.31 of the EP&A Act, such review for an error of construction was not available, particular when not pleaded in such a way: at [78], [91];
(3) A challenge to a bare error of law based upon an error of construction unrelated to impugning the satisfaction of the certifier pursuant to s 4.28 of the EP&A Act was unavailable as a separate ground leading to invalidity: at [92];

Section 4.59

(4) The proceedings were brought out of time. No exception to s 4.59 of the EP&A Act was found as the certifier's decision was not one unrelated to the legislative subject matter. The fact that the determination was erroneous did not have such consequence. Even in the case that it did, recourse to both the Code SEPP in conjunction with the HLEP 2019 was required and so such error was not apparent on the fact of the record: at [119]-[123];
(5) The error was not of such significance that it constituted a limitation or essential, indispensable, imperative or inviolable requirement: at [125];

Invalidity of Subdivision CDC

(6) Absent satisfaction s 4.59 did not apply there was no power to find the Subdivision CDC invalid: at [147]; and

Discretion

(7) Even if the Council had established reviewable error, discretionary considerations determined that the granting of the relief sought was not appropriate in the circumstances: at [193]-[197].

Civil Enforcement

William Lloyd Carey-Evans and Jennifer Anne Quist as Executors of the Estate of Robert Rufus Carey-Evans v Wenhao Wu [2022] NSWLEC 144 (Preston CJ)

Facts: Development consent was granted to Mr Wenhao Wu (**Wu**) to demolish an existing dwelling house and construct a new dwelling house on land in Vaucluse

(**Consent**). Mr William Carey-Evans and Ms Jennifer Quist are the Executors of the Estate of Mr Robert Carey-Evans (**Carey-Evans**) and in that capacity own the adjoining property. Wu's property is downhill and closer to Sydney Harbour than Carey-Evans' property, so that Carey-Evans' property looks over Wu's property towards Sydney Harbour. That overlooking of Wu's property towards Sydney Harbour from Carey-Evans' property is protected by rights for light, air and prospect across and above a specified horizontal plane, recorded in Dealing B823062 (**Dealing**), benefiting Carey-Evans' property as well as a neighbouring property, and burdening Wu's property. The new dwelling house will be higher than the horizontal plane specified in the Dealing.

Carey-Evans brought proceedings, commenced by a summons filed in the Supreme Court but transferred to this Court, to enforce compliance with the Dealing, seeking an injunction restraining Wu from erecting the new dwelling house above the specified horizontal plane. Wu brought proceedings, commenced by a cross summons filed in this Court, seeking a declaration that, by operation of cl 1.9A of Woollahra Local Environmental Plan 2014 (NSW) (**WLEP**), the Dealing does not apply to the extent necessary to serve the purpose of enabling the carrying out of the development in accordance with the Consent.

Issues:

(1) Whether cl 1.9A of WLEP operates to cause the Dealing to not apply to the extent necessary to serve the purpose of enabling the development to be carried out in accordance with the Consent; and
(2) If cl 1.9A of WLEP does not apply, whether the new dwelling house's exceedance of the specified horizontal plane in the Dealing would be a nuisance.

Held: Clause 1.9A of WLEP operated to cause the Dealing not to apply; there was no nuisance; Wu's cross summons upheld; declaration made as to the operation of cl 1.9A of WLEP; Carey-Evans' summons dismissed.

Applicability of cl 1.9A of WLEP

(1) The Dealing answers the description of not only being "any agreement, covenant or other similar instrument" but also one that "restricts the carrying out of that development". The consequence is that by reason of cl 1.9A of WLEP, the Dealing does not apply to the extent necessary to serve the purpose of enabling the development to be carried out in accordance with the Consent: at [59];
(2) The applicability of cl 1.9A of WLEP involves three steps: first, identifying what interest is created by the Dealing; second, ascertaining whether the Dealing is "any agreement, covenant or other similar instrument"; and third, determining whether the Dealing "restricts the carrying out of that development", being development in accordance with the Consent: at [60];
(3) The right to uninterrupted light and air created by the Dealing constituted a single easement. The right for prospect created by the Dealing is better described as a restrictive covenant: at [73], [75];
(4) That part of the Dealing that created the easement for light and air and the restrictive covenant for prospect falls within the description of instruments in cl 1.9A of WLEP of "any agreement, covenant or other similar instrument": at [82]-[85];
(5) The Dealing answers the description of being an instrument that "restricts the carrying out of that development". The erection of the dwelling house above the specified horizontal plane will interrupt the passage, access, transmission and enjoyment of light and air to, and the prospect from, the dominant land. The dominant owner's enforcement of this right to light and air, and right for prospect, would restrict the carrying out of the development in accordance with the consent: at [87]-[88], [91];
(6) Clause 1.9A of WLEP thus operated to cause the Dealing creating the easement and the covenant to "not apply to the extent necessary" to serve the purpose of enabling development on the servient land of Wu's property to be carried out in accordance with the Consent: at [92]; and

Interference with the easement

(7) The erection of the new dwelling house above the specified horizontal plane was not established to interfere with the right to light or air or to interfere substantially with the right for prospect, so that it will not cause a nuisance: at [101]-[102], [107]-[108].

Aboriginal Land Claims

Worimi Local Aboriginal Land Council v Minister Administering the Crown Land Management Act 2016 [2022] NSWLEC 126 (Pepper J)

Facts: Worimi Local Aboriginal Land Council (**Worimi**) filed an appeal under s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) appealed the refusals by the Minister Administering the *Crown Lands Management Act 2016* (**CLMA**) (**Minister**) of two land claims lodged on 12 November 2015 and 14 May 2019 over the same land being Lot 453 of DP705463 (**land**). That land was located at Tomaree Head and comprised parcels of land at Tomaree Lodge, a large residential care centre for people with intellectual disabilities. The land claimed by Worimi comprised a number of buildings and areas, namely, the fisheries facilities and area (t**he fisheries area**), the pool and pool facilities (**the pool area**) and an area on the headland in the northern part of the land (**the northern bushland**).

As at the dates of claim there were residents receiving care at Tomaree Lodge but the parties disputed whether those residents were using the pool area and northern bushland. Also, at the dates of claim, the fisheries area was in use pursuant to a collaboration deed between the NSW Department of Primary Industries and Southern Cross Shellfish Pty Ltd (**SCS**). However, that deed had expired as at the dates of claim and it was therefore disputed whether this was a lawful use of the fisheries area.

Issues: Whether the Minister could establish that, as at the date of claims, the land was not "claimable Crown lands" within the meaning of s 36(1)(c) of the ALR Act, namely:

(1) whether the land was "vested in Her Majesty" as at the date of the claims for the purpose of s 36(1) of the ALRA;
(2) whether the land was "able to be lawfully sold or leased" within the meaning of s 36(1)(b) of the ALRA;
(3) whether each of the disputed areas was lawfully used and occupied within the meaning of s 36(1)(b) of the ALRA as either a residential centre for people with disabilities or for the purpose of fisheries research; and
(4) whether each of the disputed areas was needed, or likely to be needed, for an essential public purpose within the meaning of s 36(1)(c) of the ALRA, namely, for the accommodation and care of persons with disabilities or for fisheries research.

Held: The land was not claimable Crown land as at the dates of claim:

(1) As at the date of the claims, the registered proprietor of the land on the folio was the "State of New South Wales" and that on its face it was therefore vested in Her Majesty: at [95];
(2) The land could not be lawfully sold or leased pursuant to s 34(1) of the *Crown Lands Act 1989* (NSW) and s 5.3(1) of the *Crown Land Management Act 2016* (NSW) because the land was vested in the Minister and not Crown land: at [168];
(3) The evidence demonstrated that both the pool area and northern bushland were used by the residents of Tomaree Lodge as at the dates of claim. The pool area was no longer used for recreational purposes but was maintained such that it was lawfully in use. The northern bushland was used for recreational purposes and was managed by Tomaree Lodge to reduce risks to the residents including from bushfires: at [202]-[222];
(4) Despite that Tomaree Lodge had been flagged for closure, it does not alter that, as at the claim dates, Tomaree Lodge was still being used for the essential public purpose of the accommodation and care of disabled persons: at [226]-[232];
(5) The evidence established that it was agreed or understood that SCS could continue its use and occupation of the fisheries area after the expiry of the collaboration deed. It may be inferred that a gratuitous licence was granted to SCS for it to occupy and use that area: at [190]; and
(6) Research of the benefit of the fisheries industry in NSW was being carried out at the fisheries area at the dates of claim, and therefore, the fisheries area was also being used for an essential public purpose: at [240]-[254].

New South Wales Aboriginal Land Council v Minister Administering the Crown Land Management Act – Waverton Bowling Club **[2022] NSWLEC 130** (Duggan J)

Facts: Pursuant to s 36(6) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**), the applicant appealed the refusal of two Aboriginal Land Claims made for land previously the site of the Waverton Bowling Club in the North Sydney Local Government Area (**Land**). The claims were refused by the respondent pursuant to ss 36(1)(b) and (c) of the ALR Act on the basis that the Land was "lawfully used and occupied by North Sydney Council" and/or members of the public and "needed for the essential public purpose of public recreation". The Land was crown land reserved for "Community and Sporting Club Facilities" and at the time of the claims, North Sydney Council held two licences generally for "access" and "site investigation" (**Licences**).

Issues:

(1) Whether the Land was lawfully used and occupied by both (or either) North Sydney Council pursuant to the Licences and to members of the general public; and
(2) Whether the Land was likely to be needed for the essential public purpose of public recreation, in particular, the continued provision of open space and community facilities within the area.

Held: Appeal upheld; Land to be transferred:

(1) The Council held licenses for the purpose of undertaking site investigations. Apart from the use and occupation necessary to facilitate site investigations, being the building report and the site risk assessment report (completed prior to the first claim), any other use or occupation by North Sydney Council was not related to site investigation. Accordingly, not lawfully used or occupied by Council: at [34];
(2) Ground maintenance work on the Land was not undertaken in performance of the Licences but in furtherance of the otherwise unlawful use by Council to provide access to the public for recreation. Even if incorrect, such use could only be characterised as nominal: at [35]-[38]; and
(3) The decision-making process relating to the future use of the Land was in its infancy. As at the claim dates that process had not progressed in any meaningful way whether taking into account a trajectory towards such a decision or a more concrete proposal. Accordingly, not likely to be needed for an essential public purpose: at [76].

New South Wales Aboriginal Land Council – Little Bay v Minister Administering the Crown Land Management Act **[2022] NSWLEC 142** (Duggan J)

Facts: The applicant appealed the respondent's refusal of its claim relating to Lot 91 in DP 270427 located at Little Bay (**Land**). The claim was refused pursuant to s 36(1)(b) of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) on the basis that the Land was "lawfully used and occupied for community purposes to more than a notional degree" due to it being the location of the head office of Surf Life Saving Sydney Incorporated (**SLSS**). In 2010, a 99-year lease was entered into between Landcom (as the Reserve Trust) and SLSS. The lease granted exclusive possession to the whole of the Land however specified that the curtilage areas around the building were not to be used for purposes other than access without the Lessor's consent. The applicant conceded at the hearing that the building and an outdoor paved area were lawfully used or occupied by the SLSS, but claimed balance of the Land.

Issues: Whether as at the date of claim, that part of the Land not occupied by the building area was lawfully used and/or occupied by SLSS and therefore not "claimable Crown lands" as per s 36(1)(b) of the ALR Act.

Held: Appeal upheld:

(1) Mere entitlement to exclusive possession pursuant to a lease was insufficient to establish land was claimable Crown land as s 36(1)(a) of the ALR Act specified claimable Crown land could be land able to be leased, therefore s 36(1) requires actual use and actual occupation: at [61];
(2) Where some part of the land was relied upon to demonstrate use of the whole pursuant to s 36(1) of the ALR Act, that particular use must possess some characteristic warranting the use of part as use of the whole. Such limited use and occupation for access (particularly in circumstances where the lease distinguished the building and the curtilage areas) did not import a characteristic to the balance of the curtilage such that it would be viewed as a whole, therefore the curtilage was not relevantly used or occupied except for the access path: at [72]; and
(3) The respondent's submissions that the curtilage area to the east of the building should be treated as separate to the balance to the west for reasons of privacy and amenity were not accepted, particularly in circumstances where no statutory discretion was available: at [74]-[75].

Compulsory Acquisition

Expandamesh Pty Ltd v Sydney Metro (No 3) **[2022] NSWLEC 137** (Moore J)

Facts: Expandamesh Pty Ltd (**Expandamesh**) owned a property at 175-177 Botany Road, Waterloo (**Site**). A substratum of the Site was compulsorily acquired by Sydney Metro for the purpose of constructing underground rail tunnels to serve its City and Southwest Project. The Valuer General determined that nil compensation was to be paid to Expandamesh by Sydney Metro. Expandamesh commenced proceedings pursuant to the *Land Acquisition (Just Terms*

Compensation) Act 1991 (NSW) (**Just Terms Act**) disputing the Valuer General's determination.

Issues:

(1) Whether compensation was payable under the Just Terms Act for acquisition of land for underground rail facilities. This depended upon whether the gateway provision in cl 2(1) of Sch 6B of the *Transport Administration Act 1988* (NSW) (**Transport Administration Act**) was satisfied, specifically:
   (a) Whether "the surface of the overlying soil [was] disturbed" within the meaning of cl 2(1)(a) of Sch 6B; or
   (b) Whether "the support of that surface [was] destroyed or injuriously affected by the construction of [underground rail] facilities" within the meaning of cl 2(1)(b) of Sch 6B; and
(2) If Expandamesh was permitted to make a claim for compensation, what compensation (if any) was to be paid for the acquired substratum.

Held: Sydney Metro ordered to pay Expandamesh compensation of $20,000 pursuant to s 56(1) of the Just Terms Act; Expandamesh's claim for compensation pursuant to s 55(f) of the Just Terms Act dismissed:

(1) The geotechnical evidence indicated that subsidence of at least 1.5 mm had in fact occurred as a result of the construction of rail tunnels under the north-western corner of the Site: at [63]. The wording of cl 2(1)(a) of Sch 6B of the Transport Administration Act, which required that "the surface of the overlying soil is disturbed", was plain and clear and there was no basis to conclude that the legislature intended that the provision should have any qualifying additional words read into it. Consequently, the disturbance of the Site's surface soil by at least 1.5 mm, although imperceptible, was sufficient to trigger the ability of Expandamesh to make a claim for compensation pursuant to the provisions of the Just Terms Act: at [90]-[92];
(2) Nothing arising out of the geotechnical evidence provided any basis to conclude that the support of the Site's surface has been "destroyed or injuriously affected" by the construction of the tunnels underneath it. Therefore, the gateway test in cl 2(1)(b) of Sch 6B of the Transport Administration Act was not satisfied: at [102]-[104]. However, this was not dispositive of the matter due to the finding at (1) above;
(3) Expandamesh was not entitled to compensation on the basis that the acquisition comprised a "blot on title" of the residual land akin to the acquisition of an easement by Sydney Metro. When an easement is to be regarded as a "blot on title", it remains owned by the proprietor over whose land the easement is established. By contrast, in this case, the substratum had been severed from the remainder of the land which remained in Expandamesh's ownership, by virtue of its compulsory acquisition: at [186]-[187]. Nonetheless, Expandamesh was still entitled to $20,000 in compensation pursuant to s 56(1) of the Just Terms Act because, as a matter of first principle, a hypothetical owner of the substratum of a compulsorily acquired site would not give it away to a hypothetical purchaser without compensation, but would require to be paid market value for it: at [188]-[190]; and
(4) The carrying out of the public purpose, namely, the construction of the Sydney Metro project incorporating Waterloo Station as a new public access option, would have increased the future development potential of the Site: at [162]-[165]. This would have increased the value of the Site by around $1 million, a significantly greater amount than the $140,000 that a hypothetical purchaser would have deducted from the maximum price it would have offered to acquire to Site to account for additional costs required to permit redevelopment. Expandamesh was therefore not entitled to compensation on the basis of a purported decrease in value of the surface land under s 55(f) of the Just Term Act: at [223]-[231].

Separate Question

Pyramid Consulting Pty Ltd v Georges River Council **[2022] NSWLEC 141** (Preston CJ)

Facts: Pyramid Consulting Pty Ltd (**Pyramid**) sought, by notice of motion, an order under r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) for a question to be heard and decided separately from all other questions in an appeal it has brought before the Court. The appeal was brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the deemed refusal of a development application for a boarding house development. The question that Pyramid sought to be heard and decided separately concerned the applicable State Environmental Planning Policy against which the proposed development is

to be assessed. Pyramid designed the proposed development and prepared its development application to conform with State Environmental Planning Policy (Affordable Rental Housing) 2009 (**ARH SEPP**). On the day Pyramid submitted the development application, the ARH SEPP was repealed and replaced by State Environmental Planning Policy (Housing) 2021 (**Housing SEPP**).

Issue: Whether it is appropriate to order a separate question.

Held: It is not appropriate to order a separate question; the appeal should be fixed for hearing, at which time all questions in the appeal should be determined; notice of motion dismissed.

(1) All questions in proceedings are usually heard and determined at the one time. The exercise of identifying whether the relevant environmental planning instrument is the ARH SEPP or the Housing SEPP does not warrant ordering that the question of which environmental planning instrument is relevant be heard and determined separately from other questions in the proceedings: at [24]-[26];
(2) The spectre of the parties, experts and objectors having to prepare their cases, evidence and submissions on alternative bases contingent on the application of either the ARH SEPP or the Housing SEPP is imaginary. There is only one development application before the Court, and only one development for which consent is sought in that development application. That is a development designed to conform to the ARH SEPP. The parties, experts and objectors need only address that development application and that development: at [27]-[32]; and
(3) The ordering of a separate question will not facilitate the just, quick and cheap resolution of all questions in the proceedings. The determination of the question of which SEPP applies will not be dispositive of the proceedings. Indeed, making orders for the decision of the question separately from other questions in the appeal may increase the delay and cost of the appeal. In contrast, if the Court were to hear and determine all questions in the appeal, the Court could dispose of the proceedings finally: at [33]-[37].

Encroachment of Buildings

Nicole-Anne Hickey v The Owners Strata Plan 78825 **[2022] NSWLEC 135** (Duggan J)

Facts: The owners of 154 Parkes Road, Collaroy Plateau (**Applicants**) brought proceedings for relief pursuant to ss 3(2)(b) and 4(1) of the *Encroachment of Buildings Act 1922 (NSW)* (**Encroachment Act**) regarding a gabion rock retaining wall they claim encroached onto their land. The gabion wall was constructed in 2005 on behalf of the previous owners of the neighbouring land at 118B Parkes Road, Collaroy Plateau (purportedly without the Applicants' knowledge nor consent) and crossed the common boundary between the two properties. The Respondents had owned the land since 2007; 18 months after the construction of the gabion wall. It was agreed between the parties that most of the total area of the gabion wall ($16m^2$) was located on the Applicants' land, with $0.4125m^2$ on the Respondent's land.

Issue: Whether the Applicants were the "encroaching owner" or "adjacent owner" pursuant to ss 2 and 3 of the Act. If the "encroaching owner", it was agreed the proceedings should be dismissed as no relief would be available.

Held: Application dismissed; Applicants encroaching owner; discretion not exercised:

(1) Nothing in the statutory language of the terms defined in s 2 of the Encroachment Act indicated that the subjective circumstances surrounding the construction of the encroachment were relevant to the determination of the primary location from which the encroachment "extends": at [47]-[49];
(2) Whilst some injustice in circumstances such as those of the Applicants may result, the statutory scheme provides for limited remedies for defined parties such that an objective assessment must be undertaken. Here, as the overwhelming majority of the gabion wall fell on the Applicants' land, they were the encroaching owner: at [50]-[51]; and
(3) If the circumstances surrounding construction were relevant, the gabion wall was constructed in the location shown on plans and so was not mistakenly, or through changing boundary lines, located somewhere it was not intended: at [53].

Merit Decisions (Commissioners)

Dallad Pty Ltd v Woollahra Municipal Council **[2023] NSWLEC 1021** (O'Neill C)

Facts: The Applicant appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (NSW) against the deemed refusal by Woollahra Municipal Council of the development application for a dual occupancy development and Torrens Title subdivision into two lots.
The site was zoned R3 Medium Density Residential under the Woollahra Local Environmental Plan 2014 (**WLEP 2014**) and semi-detached dwellings were a nominate permissible use in the R3 zone. The site area was 650.3m^2. The minimum lot size development standard for the site was 700m^2 (cl 4.1(2) of WLEP 2014). The minimum lot size for an attached dual occupancy development in the R3 zone was 460m^2 (cl 4.1A of WLEP 2014).

Issue: Whether the Torrens title subdivision was in breach of cl 6.5 of WLEP 2014. Clause 6.5 of WLEP was in the following terms:

> 6.5 Particular dual occupancy subdivisions must not be approved
>
> 1. Development consent must not be granted for a subdivision that would create separate titles for each of the 2 dwellings resulting from a dual occupancy development.
> 2. This clause does not apply in relation to a subdivision under—
>   a. the *Community Land Development Act 1989* (NSW), or
>   b. the *Strata Schemes (Freehold Development) Act 1973* (NSW).

Held: Directing the respondent to amend the conditions of consent to reflect a strata subdivision of the allotment and upholding the appeal:

(1) The development was properly characterised as a dual occupancy (attached) as defined under WLEP 2014: at [38]; and
(2) Development consent cannot be granted for a subdivision that would create separate titles for each of the two dwellings resulting from a dual occupancy, because cl 6.5 of WLEP 2014 is a prohibition, and not a development standard: at [40].

Gunlake Quarries Pty Limited v The Minister for Planning [2022] NSWLEC 1570 (Adam AC)

(related decision: *Gunlake Quarries Pty Limited v The Minister for Planning* [2017] NSWLEC 1342 (Dixon C)

Facts: The applicant operated a hardrock quarry near Marulan, in the Goulburn Mulwaree Local Government Area. The original approval for the quarry was granted under the then Pt 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) in 2008 (**2008 Consent**). The 2008 Consent included a condition requiring vegetation offset totalling 76.54 ha, in two discrete areas. The offset ratio included in the 2008 Consent was in the order of 19:1. The 2008 Consent was modified in 2013, 2014 and 2015. The 2014 modification imposed a condition increasing the size of the vegetation offset to 78.82 ha. In 2017, the Court granted further development consent for an extension to the quarry. The 2022 decision concerned the applicant's application to the Land and Environment Court under s 4.55(8) of the EP&A Act to modify the consent and reduce the offset area to 39.55ha.

The original ecology field work to support the 2008 application was conducted in 2006 – during a period of drought. The ecology survey of the site had considered that the vegetation that would be impacted by the quarry included what is now known as White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland (**Box Gum Woodland**) - an ecological community included in 2008 as an endangered ecological community on the schedule of the *Threatened Species Conservation Act 1995* (NSW), and now listed as a critically endangered ecological community (**CEEC**) under the *Biodiversity Conservation Act 2016* (NSW). Box Gum Woodland has a very wide geographical distribution from Southern Queensland to Victoria, which has been heavily modified by agricultural development.

Issues:

(1) Whether the jurisdictional prerequisites were met, under:
   (a) cl 7.2 of the *Goulbourn Mulwaree Local Environmental Plan 2009* (**GMLEP 2009**);
   (b) cl 14 of *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2007* (**Mining SEPP**) (now s 2.20 of *State Environmental Planning Policy (Resources and Energy) 2021* (**R&E SEPP**)); and
   (c) s 4.55(1A)(b) of EP&A Act - would the development, if the modification were approved be substantially the same as that approved in the 2017 Consent.

(2) Whether the offset ratio used to determine the area of vegetation offset in 2008 was excessive; and
(3) Whether the offset ratio should be derived using the Biodiversity Assessment Method Calculator (**BAMC**).

Held: Appeal dismissed.

(1) The Court did not have jurisdiction to determine the matter as the requirements of the GMLEP 2009, the Mining SEPP, and s 4.55 of the EP&A Act had not been met. Therefore, the Court could not make a determination to reduce the offset area: at [219]-[221], [268]-[279], [274]-[276];
(2) The Court accepted the offset ratio of 19:1 was high, but in the absence of data about the range of offset ratios which were applied, could not conclude that it was excessive. Additionally, the fact that Box Gum Woodland is a CEEC weighed in favour of the high offset ratio not being manifestly unreasonable: at [160]-[161], [174]; and
(3) Offsets under the *Biodiversity Conservation Act 2016* regime are calculated using the BAMC: at [152]. The calculator generates reproducible answers given the same data. However, decisions must be made about what variables to include in the calculation, and a different input may give very different results: at [159].

Eco Cycle Materials Pty Ltd v Environment Protection Authority **[2022] NSWLEC 1580** (Dixon SC)

Facts: Eco Cycle Materials Pty Ltd (**ECORR**) operates a resource recovery and recycling business under an environment protection licence (EPL 10699) (**EPL**) issued by the Environment Protection Authority (**EPA**).

Condition L2.1 of the EPL limits the type of waste materials that can be received by ECORR on the site and the input material that can be used for the manufacture of ECORR's road base and pavement products.

On 14 August 2020, ECORR made an application pursuant to s 58 of the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) to vary condition L2.1 of the EPL to allow it to receive additional waste type namely, "Soil that is classified as General Solid Waste (non-putrescible) and contains brick, concrete, timber or metal or the like". On 28 October 2021, the EPA determined to refuse consent to that licence variation application. Following the EPA's determination, ECORR commenced proceedings with the Court under s 287 of the POEO Act.

Issues:

(1) Would the increase of materials with lead concentrations limit in Table 2 of the Waste Classification Guidelines (**WCG**) pose a risk of environmental harm; and
(2) Was the increase contingent upon ECORR having a supply contract under an existing resource recovery exemption (**RRE**) or resource recovery order (**RRO**) that would permit application of materials with that lead concentration.

Held: Appeal upheld; licence variation application granted subject to conditions.

(1) The proposed variation posed no risk of environmental harm based on ECORR's proposal to incorporate the WCG concentration limits for lead in Table 2: at [51]-[52]; and
(2) There was no justification for requiring the licence variation to be contingent upon ECORR having a supply contract under an existing RRE or RRO that would permit application of material with the same concentration of lead. To do so would be both unnecessary and unworkable. ECORR's licence conditions are more restrictive than various resource recovery provisions and it would be unworkable to require a variation of its EPL each time a new RRE or RRO issued provided it with an opportunity to lawfully supply material. It was not possible to predict what new RREs and RROs would be issued and what the EPA would stipulate in terms of the concentration levels of substances, such as lead, that material supplied under them could contain: at [54]-[57], [61], [66]-[68].

Bennett v Hawkesbury City Council **[2022] NSWLEC 1630** (McEwen AC)

Facts: The Applicant commenced Class 1 proceedings appealing the deemed refusal by the Respondent of a development application to erect 19 seniors housing dwellings and to subdivide the land upon their completion (**DA**). All merit issues were resolved between the parties. The Applicant relied upon claimed 'existing use' rights. The existence of those rights was denied by the Respondent.

Development consent had been obtained by the Applicant in 1999 (**original consent**) for seniors housing upon land, then known as Lot 19, pursuant to State Environmental Planning Policy No 5—Housing for Older People or People with a Disability (**SEPP 5**). That development was carried out by 2014. In 2012, the Respondent approved the subdivision of Lot 19 into smaller allotments, including a residue lot (**Lot 6**). Lot 6 was the subject of the current DA.

On 31 March 2004 SEPP 5 was repealed by State Environmental Planning Policy (Housing for People with a Disability) 2004 (**SEPP HPD**) which contained a transitional provision (cl 6(1)(c)) preserving the continued application of SEPP 5 'in respect of the carrying out of any development for which development consent was granted under the policy (SEPP 5) before its repeal' but not otherwise: (cl 6(3) of SEPP HPD).

SEPP HPD continued the permissibility of seniors housing on Lot 6 until 29 July 2020, when SEPP HPD was amended by cl 4B, which excluded its application to certain land including the former Lot 19 and the subdivided Lot 6. From that date, seniors housing has been a prohibited land use under Hawkesbury Local Environmental Plan 2012 (**HLEP 2012**).

Issues:

(1) Whether the original consent was capable of qualifying as an 'existing use' pursuant to s 4.65(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) in spite of cl 6 of SEPP HPD;
(2) If the answer to (1) was yes, whether Lot 6 was part of the land the subject of the original consent and whether it was 'land on which the existing use was carried out immediately before the relevant date' as defined by cl 39 of Environmental Planning and Assessment Regulation 2000 (NSW); and
(3) Whether any 'existing use' that might be established for Lot 6 included the subdivision of that land.

Held: Appeal upheld with respect to seniors housing development on Lot 6 but not for the specified part of the DA proposing community title subdivision of Lot 6 which could not be approved.

(1) Seniors housing was an 'existing use' within the meaning of s 4.65(b) of the EP&A Act because it was 'the use of land for which development consent was granted before the commencement of a provision of an environmental planning instrument (**EPI**) having the effect of prohibiting that use'. The relevant EPI was HLEP 2012, the prohibitory effect of which was enlivened by the cl 4B amendment inserted into SEPP HPD on 29 July 2020 and which disapplied SEPP HPD, the only EPI then maintaining permissibility of seniors housing on the land: at [22]-[26], [48]-[57];
(2) Clause 6 of SEPP HPD did not preclude seniors housing from being an 'existing use' on Lot 6 because its protection extended only to the carrying out of the specific development approved by the original consent. Upon its proper interpretation, cl 6 of SEPP HPD made no reference to 'use of land'. This was a critical distinction. Section 4.65(b) focuses upon 'use of land': at [60]-[62]. The wording of cl 6 of SEPP HPD is similar in its language and effect to s 4.70 of the EP&A Act, which saves only an existing consent. It has been held that s 4.70 of the EP&A Act confers separate and lesser rights than those which pertain to an 'existing use': at [63]-[68];
(3) Lot 6 was a part of the unit of land for which the original consent was granted and was used for seniors housing immediately prior to the relevant date: at [41]-[57]; [75]-[79];
(4) The 'existing use' did not, and could not include subdivision. Subdivision is not the use of land: at [80] and s 4.65 of the EP&A Act is premised upon there being a 'use of land': at [82]. Further, the original consent did not approve subdivision: at [87]-[88];
(5) The regulation power in s 4.67(1) of the EP&A Act is relevantly limited to the making of provision 'for or with respect to existing use' and thus cannot apply to subdivision: at [82]. In the alternative, subdivision was not the 'enlargement, expansion or intensification' of an existing use: at [83]-[84]; and
(6) The proposed subdivision could not be approved pursuant to HLEP 2012 because of the proposed creation of undersized allotments: at [92].

Bennett v Northern Beaches Council [2022] NSWLEC 1720 (Gray C)

Facts: Mr Bennett (**Applicant**) appealed under s 8.7(1) of the *Environment Planning and Assessment Act 1979* (NSW) (**EP&A Act**) against the refusal of its development application (**DA**) for the construction of a 12 room boarding house (**site**). The site was located adjacent to a park and the shortest walking route to an adequately serviced bus stop was 287.6m through the park, 228m of which does not have a paved footpath. Longer walking routes were also available

to that bus stop, to bus stops located on another road, and to two separate neighbourhood centres, with each having varying proportions of hard surface footpath. The shortest distance that could be walked predominantly on a paved footpath to a bus stop was 505m.

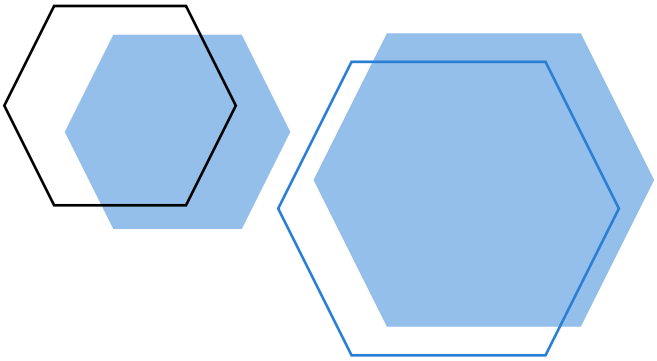
Development for the purpose of a boarding house remained permissible on the site under the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**SEPP ARH**) by operation of a savings proviso. Clause 27(2) of the SEPP ARH provided that "clauses 29, 30 and 30A do not apply to development on land within Zone R2 Low Density Residential or within a land use zone that is equivalent to that zone in the Sydney region unless the land is within an accessible area." Accessible Area was defined as being within "400 metres walking distance of a bus stop used by a regular bus service." As the paths to the bus stop that were less than 400m relied on lengths without a footpath, which would prevent access in periods of water inundation, in the night time period, and to those requiring wheelchair or pram access, it was contended that those paths did not meet the necessary definition. The term "walking distance" is defined in the SEPP ARH as "the shortest distance between 2 points measured along a route that may be safely walked by a pedestrian using, as far as reasonably practicable, public footpaths and pedestrian crossings."

Issues:

(1) Whether the site was in an accessible area within the meaning of the SEPP ARH; and
(2) Whether the site was suitable for the proposed development in the circumstances.

Held: Allowing the appeal and granting development consent:

(1) The question of whether the site is within an "accessible area" is not a determinative point, and relates only the question of whether cll 29, 30 and 30A of the SEPP ARH apply. If those clauses apply, there is no dispute that the site meets the requirements of those clauses: at [46];
(2) In determining whether the site is within an accessible area, the words of the definition of walking distance are unambiguous and must be given their ordinary meaning: at [51]. Whether something can be "safely walked by a pedestrian" will depend on the circumstances of the case, but the words ought not be used to create additional requirements that do not form part of the language of the statutory definition: at [52];
(3) The walking routes that traverse the park could be "safely walked by a pedestrian" as they traverse walkable surfaces that are open to the public, without any obstructions that make the routes impassable for someone walking. The routes are along public footpaths "as far as reasonably practicable" in the circumstances, given that the only part of the route that does not have a paved footpath is through the park. The "shortest distance", which is called upon by the definition of walking distance, is less than 400m, which means that the site is in an accessible area: at [48];
(4) The Council's requirement for it to be a paved footpath, with consistent lighting and flood-free, went beyond the ordinary meaning of the text of the definition of "walking distance": at [49]. None of the obstructions identified by the Council were obstructions that make the routes impassable on an ongoing basis: at [51]; and
(5) The definitions of "accessible area" and "walking distance" in the SEPP ARH stand in contrast to the requirements under the Pt 5 of the State Environmental Planning Policy (Housing) 2021 (SEPP Housing) concerning the site related requirements for housing for seniors and people with a disability. For such housing, a "suitable access pathway" was required, which was defined as "a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like". No such requirement is stipulated within the definition of either "accessible area" or "walking distance" in the SEPP ARH, which supports the finding that the Council's requirement for a paved footpath goes beyond the ordinary meaning of the definition of "walking distance": at [50].



LEGISLATION

STATUTES AND REGULATIONS

This is a selection of some relevant legislative changes made between 11 November 2022 and 27 February 2023.

PLANNING

Environmental Planning and Assessment (Development Certification and Fire Safety) Amendment (Fire Safety) Regulation 2022

The objects of this Regulation are to amend the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 to—

(a) clarify powers and responsibilities of the Fire Commissioner;
(b) make provision for essential fire safety measures for a building to be addressed by a performance Solution;
(c) make provision for the reissue of fire safety schedules; and
(d) make provision for the Commissioner for Fair Trading to approve certain forms.

Note: Schedule 1[1], [4]–[10], [13]–[19], [35], [36], [41], [44], [45] and [46] commence on 1 August 2023, and Schedule 1[22] and [42] commence on 13 February 2025.

Environmental Planning and Assessment Amendment (Miscellaneous) Regulation (No 2) 2022

The objects of this Regulation are as follows—

(a) to require the written consent of the owner of land if a development application is made by a person other than the owner;
(b) to provide that a development application for development involving mine grouting works may be made, in certain circumstances, by a person other than the owner of the land to which the development application relates and without the consent of the owner;
(c) to require an assessment of the consistency of development with the Macquarie Park Innovation
(d) District Place Strategy and Master Plan for development on land in the Macquarie Park Corridor under Ryde Local Environmental Plan 2014;
(e) to require certification that impacts on roads are, or will be, acceptable as a result of development for the purposes of waste or resource transfer stations carried out by or on behalf of public authorities;
(f) to require a design statement for certain complying development on Zone E3 Productivity Support, other than development involving only a change of use to premises or internal alterations to a building;
(g) to require a report confirming that development is consistent with a performance solution report for a building for development comprising internal alterations or a change of use to an existing building subject to a performance solution under the Building Code of Australia;
(h) to specify that development for the purposes of waste or resource transfer stations is not designated development in certain circumstances;
(i) to remove spent provisions and update incorrect references to provisions; and
(j) to make savings and transitional provisions.

BIODIVERSITY

Biodiversity Conservation Amendment (Bushfire-Affected Development) Regulation 2022

The object of this Regulation is to provide that certain bushfire-affected development involving the clearing of native vegetation is not taken to exceed the biodiversity offsets scheme threshold until 27 November 2023.

WATER

Water Management (General) Amendment Regulation (No 3) 2022

The objects of this Regulation are—

(a) to provide additional time for water access licence holders in certain parts of the State to comply with
(b) mandatory metering equipment conditions; and
(c) to make transitional arrangements for the metering of water taken under a floodplain harvesting (regulated river) access licence or a floodplain harvesting (unregulated river) access licence.

Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation 2023

The object of this Regulation is to amend the Water Management (General) Regulation 2018 to provide for replacement floodplain harvesting access licences, including by—

(a) setting out the circumstances in which a landholder may be eligible for a replacement floodplain harvesting access licence; and
(b) providing for the determination by the Minister for Lands and Water of the share components of replacement floodplain harvesting access licences.

POLLUTION

Protection of the Environment Operations Amendment (Waste Storage) Regulation 2023

The object of this Regulation is to provide that waste storage is not a scheduled activity in certain circumstances relating to community recycling centres and household chemical clean-out events.