June 2018

Volume 10 Issue 2

Land and Environment Court of NSW Judicial Newsletter

Legislation
- Statutes and Regulations
  - Planning
  - Local Government
  - Land and Environment Court Jurisdiction - Civil and Criminal (Mine Subsidence)
  - Water
  - Miscellaneous
- Acts assented to but not yet in force
- Bills
- State Environmental Planning Policies [SEPP] Amendments
- Miscellaneous
- Civil Procedure Amendments

Judgments
- United Kingdom
  - Privy Council
  - Supreme Court
  - Court of Appeal
- India
- High Court of Australia
- Federal Court of Australia
- Queensland Court of Appeal
- NSW Court of Appeal
- NSW Court of Criminal Appeal
- Supreme Court of NSW
- Land and Environment Court of NSW
  - Judicial Review
  - Compuslory Acquisition
  - Valuation of Land
  - Criminal
  - Criminal Appeals from Local Court
  - Civil Enforcement
  - Aboriginal Land Claims
  - Section 56A Appeals
  - Interlocutory Decisions
  - Costs
  - Easements
  - Merit Decisions (Judges)
  - Merit Decisions (Commissioners)
  - Registrar Decisions

Court News
- Arrivals/Departures

Legislation

Statutes and Regulations:

- Planning:

Environmental Planning and Assessment Amendment (ePlanning-Complying Development Certificates) Regulation 2018 - published 1 June 2018, amended the Environmental Planning and Assessment Regulation 2000 with respect to the lodgement of applications for complying development certificates on the NSW planning portal.

Environmental Planning and Assessment Amendment (Low Rise Medium Density Housing) Regulation 2017 - published 6 April 2018:

(a) permits a single application for a complying development certificate to be made for complying development comprising the erection of a dual occupancy, manor house or multi dwelling housing (terraces) on a lot and the subsequent subdivision of that lot or comprising the erection of dual occupancies, manor houses or multi dwelling housing (terraces) on existing adjoining lots;

(b) requires a certifying authority that issues a complying development certificate for development on bush fire prone land to send to the NSW Rural Fire Service a copy of any certification referred to in SEPP (Exempt and Complying Development Codes) 2008 that is required to carry out the development on bush fire prone land; and

(c) requires an application for a complying development certificate that relates to development involving the erection or alteration of, or an addition to, a dual occupancy, manor house or multi dwelling housing (terraces) to be accompanied by a statement by a qualified designer (being a person registered as an architect in accordance with the *Architects Act 2003 (NSW)*) or a person accredited as a building designer that:

(i) verifies that he or she designed, or directed the design of, the development, and

(ii) addresses how the design is consistent with the relevant design criteria in the Medium Density Design Guide published by the Department of Planning and Environment.

Environmental Planning and Assessment Amendment (South East Wilton Precinct) Regulation 2018 - published 13 April 2018, amended the Environmental Planning and Assessment Regulation 2000 to require development applications for consent to carry out development on land within the South East Wilton Precinct (as specified by SEPP (Sydney Region Growth Centres) 2006) to be accompanied by an assessment of the consistency of the proposed development with the South East Wilton structure plans.

Environmental Planning and Assessment Further Amendment Regulation 2018 - published 16 March 2018, made further savings, transitional and other provisions consequent on the enactment of the *Environmental Planning and Assessment Amendment Act 2017 (NSW)*, including provision relating to deemed refusal periods for the purposes of court appeals against the failure to deal with applications to extend the period before a consent expires or applications for building information certificates.

Environmental Planning and Assessment Amendment (Miscellaneous) Regulation 2018 - published 29 June 2018, amends the regulations under the *Environmental Planning and Assessment Act 1979 (NSW)* (**the principal Act**) in connection with the enactment of the *Environmental Planning and Assessment Amendment Act 2017 (NSW)* as follows:

(a) to continue arrangements applying before the enactment of the amending Act for applications for certain minor modifications of development consents in relation to regionally significant development to be dealt with by councils rather than by a Sydney district or regional planning panel;

(b) to ensure a Minister may continue to be appointed as the consent authority for development following the enactment by the amending Act of detailed provisions relating to the designation of the consent authority for development;

(c) to make a transitional provision consequent on the Independent Planning Commission (instead of the Minister) becoming the consent authority for State significant development;

(d) to extend to proposed modifications that involve minimal environmental impact or modification of consents granted by the Land and Environment Court an existing transitional provision dealing with modifications of previously approved former Pt 3A projects that relate to substantially the same development as the development as last modified;

(e) to provide that requests to modify previously approved former Pt 3A projects that cannot be dealt with under that Part (as continued under the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017) because they are made after 1 September 2018 or because insufficient information has been provided cannot be dealt with under the corresponding provisions of the principal Act;

(f) to ensure certain previously approved Pt 3A projects that are declared to be critical infrastructure projects or that have become State significant infrastructure will be subject to provisions of the principal Act relating to that category of development;

(g) to ensure penalty notices may continue to be issued for failure to comply with a brothel closure order;

(h) to make a savings provision to continue provisions for development control orders in relation to the enforcement of former Pt 3A project approvals; and

(i) to make a savings provision to continue an offence for the carrying out of a Pt 3A project without the approval of the Minister for Planning or in contravention of the conditions of such an approval.

Environmental Planning and Assessment Amendment (Snowy 2.0 and Transmission Project) Order 2018 - published 9 March 2018, declared development for the purposes of the Snowy 2.0 and Transmission Project to be State significant infrastructure and critical State significant infrastructure.

Standard Instrument (Local Environmental Plans) Amendment (Low Rise Medium Density Housing) Order 2017 - published 6 April 2018, amended the Standard Instrument (Local Environmental Plans) 2006, inter alia, to include manor houses.

Standard Instrument (Local Environmental Plans) Amendment (Minimum Subdivision Lot Size) Order 2018 - published 20 April 2018, excludes strata and community subdivisions.

- Local Government:

Local Government (Regional Joint Organisations) Proclamation 2018 - set 11 May 2018 as the date that the joint organisations are to commence and lists the councils in each organisation.

Local Government (General) Amendment (Regional Joint Organisations) Regulation 2018 - published 11 May 2018, amended the Local Government (General) Regulation 2005 as follows:

(a) to apply certain provisions of the Regulation to joint organisations and to modify the application of other provisions of the Regulation to joint organisations

(b) to require a joint organisation to include certain matters in its charter and to make the charter publicly available within 30 days of adoption of the charter;

(c) to provide for matters relating to meetings of joint organisations;

(d) to provide for the election of chairpersons of joint organisations;

(e) to provide for the appointment of alternates for voting representatives on the boards of joint organisations and for the conduct of meetings other than in person;

(f) to require a joint organisation to prepare a statement of strategic regional priorities, an annual revenue statement, an annual statement reporting on the implementation of its strategies and plans for delivery of those priorities and a policy concerning the payment of expenses;

(g) to specify functions that may not be delegated by a joint organisation;

(h) to provide for annual financial contributions and other contributions by member councils to joint organisations;

(i) to provide for matters relating to the staff of joint organisations, including the appointment of first executive officers and staff entitlements on transfers between joint organisations or councils and joint organisations;

(j) to exclude provisions conferring land acquisition powers and provisions relating to the determination of certain charges from applying to joint organisations; and

(k) to provide for other transitional and consequential matters.

- Land and Environment Court Jurisdiction - Civil and Criminal (Mine Subsidence):

Justice Legislation Amendment Act (No 2) 2018 (NSW) - commenced 30 June 2018.

Relevant to the Land and Environment Court, this Act amends the *Land and Environment Court Act 1979 (NSW)* to:

- provide that certain civil proceedings under the *Coal Mine Subsidence Compensation Act 2017 (NSW)* are to be dealt with in Class 4 of the Court's jurisdiction.
- provide that summary proceedings under that Act are to be dealt with in Class 5 of the Court's jurisdiction.

It also amends the *Supreme Court Act 1970 (NSW)* to clarify the powers of the Court of Appeal, when quashing a determination of a lower court, to make an order finally disposing of a matter rather than remitting the matter to the lower court.

- Water:

Water Management Amendment Act 2018 (NSW) - assented to and partially commenced on 27 June 2018, amended the *Water Management Act 2000 (NSW)* with respect to management plans, approvals and access licences, Murray-Darling Basin water resources, metering equipment, enforcement and liability by including proceedings under s 336E of the Act in Class 4 of the Court's jurisdiction, the provision of information and managing environmental water; and for other purposes. Section 336E permits the Minister to enter into enforceable undertaking and gives the Land and Environment Court jurisdiction with respect to breaches of such undertakings. In addition, Schedule 1[74] enables an appeal to the Land and Environment Court to be made against a decision by the Minister to amend the share component of a specific purpose access licence or to require a compliance audit or audits.

- Miscellaneous:

Coastal Management Act 2016 (NSW) - all provisions have now commenced.

The Act repealed the *Coastal Protection Act 1979 (NSW)* and the Coastal Protection Regulation 2011 and has been supplemented by a Coastal Management SEPP.

The Act amended the *Land and Environment Court Act 1979 (NSW)* to confer the same jurisdiction on the Land and Environment Court as was conferred with respect to the *Coastal Protection Act 1979*.

The Act abolished the NSW Coastal Panel and established the NSW Coastal Council; introduced

requirements for the granting of development consent under the Environmental Planning & Assessment Act to development for the purpose of protection works; and allows a consent authority to impose conditions of consent under the Environmental Planning & Assessment Act in relation to coastal protection works.

The following two pieces of subordinate legislation arise as a consequence of the coming into effect of the *Coastal Management Act 2016 (NSW)*:

(i) Standard Instrument (Local Environmental Plans) Amendment (Coastal Management) Order 2018 - published 23 March 2018, updated definitions in the instrument;

(ii) SEPP (Coastal Management) 2018 - published 23 March 2018, sets out the development controls for coastal areas and repealed:

- SEPP No 14 - Coastal Wetlands
- SEPP No 26 - Littoral Wetlands
- SEPP No 71 - Coastal Protection

Crown Land Management Act 2016 (NSW) No 58 - all provisions have now commenced. This Act confers significant jurisdiction on Land and Environment Court (the Court), including,

- Pt 7, Div 7.4 - the holder of a perpetual lease will be able to appeal to the Court against a forfeiture decision.
  - s 7.13 provides that "[t]he holder of a perpetual lease (but no other holding) may appeal to the Land and Environment Court against any declaration of forfeiture made under this Division."
  - s 8.13(3) provides that "[t]he regulations may make provision for or with respect to: (a) contributions to, or indemnification against, compensation payable by the State for the impact of relevant conduct on native title rights and interests, and (b) conferring jurisdiction on the Land and Environment Court to resolve disputes between the State and persons who engaged in relevant conduct concerning the allocation of responsibility for the payment of compensation for the impact of the conduct on native title rights and interests.
- Pt 9, Div 9.7 - enables certain persons to whom directions, notices and orders have been given under Pt 9 to appeal to the Court against them [Pt 9 regulates to protect Crown land]:
  - s 9.21(1) provides that "[a] person may appeal to the Land and Environment Court against a direction, notice or order under section 9.4, 9.9 (2) (a), 9.13 or 9.19 within 28 days (or such other period as is prescribed instead by the regulations) after being given the direction, notice or order."
- Part 10, Div 10.8 - Functions in relation to seized things:
  - s 10.32 confers on the Court power to "on application by any person, make an order directing that a seized thing be delivered to the person."
- Pt 11, Div 11.1 - enables proceedings for offences against the proposed Act and the regulations to be dealt with summarily by the Local Court or the Court or by way of a penalty notice if the regulations provide for it.
  - s 11.1 provides that proceedings for an offence against this Act or the regulations may be dealt with: (a) summarily before the Local Court, or (b) summarily before the Court in its summary jurisdiction.
- Pt 11, Div 11.3 provides for the Court to make orders in connection with offences (ss 11.9-11.17)
- Pt 11, Div 11.4 (s 11.19) - enables the Minister to accept a written undertaking given by a person in connection with a matter in relation to which the Minister has a function under the proposed Act. The Minister may enforce the undertaking in the Court.
- Pt 13 (s 13.5(2)(j)) - empowers the Governor to make regulations with respect to the conferral of jurisdiction on the Court to hear and determine appeals against specified decisions (or classes of decisions) of decision-makers under this Act or the regulations
- **Schedule 1**
  - s 15(4) empowers a person affected by the Minister's decision with respect to determining a purchase price for land to which a pending tenure purchase relates to appeal this decision to the Court.

- **Schedule 3**
  - s 47 provides that a person may appeal to the Land and Environment Court against any of the following: (a) a refusal of the Minister to grant a cultivation consent to the person, (b) a condition of a cultivation consent granted to the person, (c) the suspension or revocation of a cultivation consent granted to the person or the person's predecessor in title.

Crown Land Management Regulation 2018 - published 16 March 2018, makes provisions consequential on the commencement of the *Crown Land Management Act 2016 (NSW)* for:

(a) the regulation of entry to, and conduct on, certain Crown land (including activities that may be prohibited, the setting of fees and charges in relation to use and the parking or use of vehicles);

(b) the management of dedicated or reserved Crown land by non-council managers and statutory land managers (including record keeping requirements);

(c) administrative matters relating to statutory land managers (including appointment and duties of certain office holders and the procedures to be followed in respect of receipts and expenditure);

(d) development applications in respect of dedicated or reserved Crown land that do not require the Minister's consent;

(e) the local land criteria to be applied in deciding whether to vest Crown land in local councils;

(f) indemnification of the State by local councils for conduct by them that affects native title rights and interests;

(g) certain matters in relation to dealings with, and holdings and enclosure permits over, Crown land and former Crown land (including notifications, applications, fees, prohibited activities on easements for public access and short-term licences over dedicated or reserved Crown land)

(h) minimum annual rents and rates of interest on arrears;

(i) holdings over Crown land in the Western Division, including:

  (i) approved activities on land under a perpetual lease;

  (ii) annual rent for land under certain continued rural and urban leases;

  (iii) the extension of the terms of leases;

  (iv) the conversion of term leases into perpetual leases; and

  (v) the circumstances in which cultivation consents are not required.

Justice Legislation Amendment Act 2018 (NSW) No 4 - the provisions concerning the Land and Environment Court foreshadowed in the March 2018 Judicial Newsletter commenced on 21 March 2018.

Kosciuszko Wild Horse Heritage Act 2018 (NSW) commenced on 15 June 2018. The Act has, as its long title, *An Act to recognise the heritage value of sustainable wild horse populations within parts of Kosciuszko National Park and to protect that heritage*.

Valuation of Land Regulation 2018 - published 22 June 2018, repealed and remade, without substantial changes, the provisions of the Valuation of Land Regulation 2012. This Regulation makes provision for the following matters:

(a) prescribing certain classes of leases as Crown lease restricted for the purposes of valuation;

(b) the manner in which an objection to a valuation may be lodged and withdrawn;

(c) the manner in which notices required by the *Valuation of Land Act 1916 (NSW)* or this Regulation may be served; and

(d) other matters of a minor, consequential or ancillary nature.

Acts assented to but not yet in force:

Forestry Legislation Amendment Act 2018 (NSW) - assented to 27 June 2018 but had not commenced as at 1 July 2018. When commenced, this legislation will, inter alia:

(a) amend the *Local Land Services Act 2013 (NSW)* and other Acts to transfer responsibility for the regulation of private native forestry to Local Land Services, with the Environment Protection Authority maintaining its enforcement role; and

(b) amend the *Forestry Act 2012 (NSW)*, the *Biodiversity Conservation Act 2016 (NSW)* and other Acts to update the regulatory framework for public native forestry and the enforcement role of the Environment Protection Authority.

Bills:

Fair Trading Amendment (Short-term Rental Accommodation) Bill 2018, seeks to:

(a) amend the *Fair Trading Act 1987 (NSW)* to authorise the regulations to declare a code of conduct applying to participants in the short-term rental accommodation industry: and

(b) amend the *Strata Schemes Management Act 2015 (NSW)* to allow the by-laws for a strata scheme to prohibit short-term rental accommodation in the case of premises that are not the principal place of residence of the person who is giving the right of occupation.

State Environmental Planning Policy [SEPP) Amendments:

State Environmental Planning Policy (Affordable Rental Housing) Amendment (Parking for Boarding Houses) 2018 - published 1 June 2018, amended the SEPP (Affordable Rental Housing) 2009 to provide that in the case of development not carried out by or on behalf of a social housing provider-at least 0.5 parking spaces are provided for each boarding room. Additionally a social housing provider does not include a registered community housing provider unless the registered community housing provider is a registered entity within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012 (NSW)* of the Commonwealth.

The SEPP (Exempt and Complying Development Codes) 2008 has been amended by the following:

- SEPP (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017 - published 6 April 2018, provides the development standards for the low rise medium density housing in the code;
- SEPP (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) Amendment 2018 - published 18 May 2018, sets out which land use zones the development of manor houses comes under the code;
- SEPP (Exempt and Complying Development Codes) Amendment (Greenfield Housing Code) 2017 - published 6 May 2018, inserted Greenfield Housing into the code and sets out the conditions and standards to be met for such housing to be exempt or complying development.

SEPP (Three Ports) Amendment 2018 - published 20 April 2018, extends, with development consent, the permissible temporary uses of certain land.

SEPP Amendment (Affordable Housing) 2018 - published 20 April 2018, lists the Local Government Areas for where the government considers more affordable housing is needed.

State Environmental Planning Policy Amendment (Willoughby) 2018 - published 20 April 2018, amended the Willoughby Local Environment Plan 2012 in respect of the minimum lot size subdivision of land where there is a dual occupancy.

SEPP (Sydney Region Growth Centres) Amendment (South East Wilton Precinct) 2018 - published 13 April 2018, amended, inter alia, the maps in the Wollondilly Local Environment Plan 2011.

SEPP (State and Regional Development) Amendment (State Significant Development) 2018 - published 21 March 2018, made some changes to the designation of the consent authority for state significant development.

Miscellaneous:

Liquor Amendment (Special Events Extended Trading) Regulation (No 2) 2018 - published 25 May 2018, prescribes extended trading periods during which hotels and clubs may sell or supply liquor for consumption on licensed premises on days on which special events are to be held. This Regulation also

extends the temporary freeze on the granting of licences and other authorisations in prescribed precincts and excludes certain premises from the temporary freeze.

Liquor Amendment (Special Licence Conditions) Regulation 2018 - published 25 May 2018, changes the list of licensed premises that are subject to the special licence conditions set out in Schedule 4 to the *Liquor Act 2007 (NSW)*.

Civil Procedure Amendments:

Uniform Civil Procedure (Amendment No 85) Rule 2018 - published 11 May 2018, amended the Uniform Civil Procedure Rules 2005, following *Damm v Coastwide Site Services Pty Ltd* [2017] NSWSC 1361, to clarify that a court must be satisfied that all relevant parties to the proceedings have been notified before giving a consent judgment or ordering that such a judgment be entered.

Judgments

United Kingdom:

- Privy Council:

Beau Songe Development Limited v The United Basalt Products Limited (Mauritius) **[2018] UKPC 1** (Lords Kerr, Carnwath, Hughes, Lloyd-Jones and Briggs)

Facts: The Minister granted Beau Songe Development (**BSD**) an Environment Impact Assessment licence (**EIA licence**) for the residential subdivision of land at Beaux Songes, Mauritius (**the development**). United Basalt Products (**UBP**), the owner of a nearby stone-crushing plant, objected to the grant of the EIA licence, on the ground that the development was located within a one-kilometre radius of the crushing plant, in breach of the one-kilometre buffer zone in Development Management Map - Black River (**the Map**) to the *Outline Planning Scheme 2006*.

The *Outline Planning Scheme 2006* was introduced under the *Town and Country Planning Act 1954 (UK)* (**the 1954 Act**). At the time of the decision, some provisions of the *Planning and Development Act 2004 (UK)* (**the 2004 Act**), which was intended to repeal the 1954 Act, were in force. This included s 12, which required the Minister to adopt a National Development Strategy (**NDS**). The NDS prevailed over the *Outline Planning Scheme 2006* and the 1954 Act, to the extent of any inconsistency.

UBP appealed the Minister's decision to the Environment and Land Use Appeal Tribunal (**the Tribunal**). The key issue was what was the proper interpretation of the planning documents referring to the buffer zone: a "legalistic approach" of construction of the language of the documents or a more "flexible approach" of practitioners of planning informed by evidence of planners who drafted the documents. The Tribunal preferred the more "flexible" approach to the planning documents, relying on the expert evidence of Miss Koo, the former Chief Planner in the Ministry, who gave evidence that the Government's intention in drafting the NDS was to depart from "the blueprint rigid type of prescriptive planning". The Tribunal dismissed the appeal, finding that the one-kilometre buffer zone in the Map to the *Outline Planning Scheme 2006* was "indicative up to 1km extent".

UBP appealed the Tribunal's decision to the Supreme Court of Mauritius. The Supreme Court upheld the appeal, finding that the one-kilometre buffer zone in the Map to the *Outline Planning Scheme 2006* was "prescriptive of a 1km extent". The Supreme Court relied on Ch 5 ("Housing") to the NDS, which stated "new housing should not be permitted in close proximity to (ie within 1km of) 'bad neighbour' developments". The Supreme Court concluded "[i]t is therefore clear that the general development principle of the NDS is not to allow new housing within 1km of a bad neighbour".

BSD brought an appeal in the Privy Council against the Supreme Court's decision. In the Privy Council, BSD submitted that the Tribunal was entitled to accept and rely on the expert evidence of Miss Koo; that the Supreme Court did not have jurisdiction to overturn the Tribunal's findings, which were findings of fact, in the absence of perversity or serious misdirection; and that the Supreme Court relied on selective

parts of the NDS, without having regard to the effect of the NDS as a whole. UBP made submissions in support of the Supreme Court's reasoning.

Issue: Did the Supreme Court err in construing the one-kilometre buffer zone in the Map to the *Outline Planning Scheme 2006* as prescriptive of a one-kilometre extent.

Held: Appeal dismissed:

(1) The Tribunal's first task was one of legal interpretation of the planning documents to be decided by reference to "the language used, read as always in its proper context" (applying *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [18]) and not on a choice between the approaches of lawyers and planning practitioners; instead, the Tribunal allowed itself to be influenced unduly by the evidence of Miss Koo and others as to the supposed thinking within the Ministry rather than the analysis of the documents themselves; the Supreme Court were right to hold that in this respect the Tribunal had misdirected itself, and that its reasoning could not be supported: at [35], [37];

(2) The Supreme Court may have adopted a selective approach to the NDS, including by relying on the introductory text to Chapter 5 ("Housing") rather than the specific policies; this may have allowed the Supreme Court to underestimate the inconsistencies and ambiguities in the planning documents; there are indeed plenty of other references in the NDS to buffer zones of "up to 1km": at [38]-[41];

(3) However, the fact that the buffer zone for the UBP plant was introduced for the first time in the *Outline Planning Scheme 2006* supports the view that it was intended, as the Supreme Court thought, to supplement the NDS by providing a more precise indication of the buffer zone; to treat it as purely "indicative" would defeat the purpose of including it in the *Outline Planning Scheme 2006*; there is limited practical utility of an imprecise buffer zone designation, which may be anything between a zero- and a one-kilometre radius: at [43]; and

(4) The Supreme Court's reasoning is supported by the 1954 Act, under which the *Outline Planning Scheme 2006* was prepared; Sch 1 to that Act states that outline schemes are required to allocate and impose restrictions on "particular areas"; it does not state that outline schemes should include "indicative" designations; even if the 2004 Act intends to adopt a more flexible approach in due course, regard must be had for present purposes to the 2004 Act: at [41].

***Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37** (Lords Mance, Wilson, Carnwarth, Hughes and Briggs)

Facts: This case concerned the powers and functions of the Environmental Management Authority (**the Authority**) and the Minister under the *Environmental Management Act* 2000 *(UK)* (**the EM Act**) in relation to the establishment of a permit system for water pollution.

In accordance with s 18 of the EM Act, in 1998 the Authority established the National Environmental Policy (**the NEP**), which was later revised in 2006. Paragraph 2.3 of the NEP set out the "important elements" of the polluter pays principle including:

(a) charges are levied as an application or processing fee, purchase price of a licence or permit, which entitle the holder to generate specific quantities of pollutants; and

(b) money collected will be used to correct environmental damage.

Section 31 of the EM Act obliged the Authority and government entities, including the Minister, to "conduct their operations and programmes" in accordance with the NEP.

Section 72 of the EM Act provided for the establishment of an Environmental Trust Fund (**the fund**) to be used for the operations of the Authority under the EM Act, including the remediation of environmentally damaged sites. Under sub-ss 74(a)-(b), the resources of the fund can include amounts collected by the Authority from permits and licences issued under the EM Act.

In February 2005, in accordance with s 52 of the Act, the Authority published the Water Pollution Management Programme (**the WPMP**), which included an analysis of various permit fee models. The analysis concluded that model 2 (the Egalitarian Approach) had the lowest score and suffered from several deficiencies such as "the failure to distinguish between ability to pay; lack of consideration of pollution profile and load profile; and impact of pollutant on the environment" (at 32).

In 2001, under s 96 of the Act, the Minister made the Water Pollution Rules 2001 (**the 2001 Rules**) and the Water Pollution (Fees) Regulations 2001 (**the 2001 Regulations**) which established a permit system for water pollution and prescribed a fixed annual permit fee. The permit system was most equivalent to model 2 in the WPMP. On 18 December 2006, the Minister made the following amending rules and

regulations: the Water Pollution (Amendment) Rules 2006 (**the 2006 Rules**) and the Water Pollution (Fees) Amendment Regulations 2006 (**the 2006 Regulations**). These amendments did not change the fixed annual permit fee.

The applicant, a not-for profit organisation, commenced judicial review proceedings against the fee structure applied in the 2006 Regulations. The applicant contended that the fixed annual permit fee was inconsistent with sub-para 2.3(b) of the polluter pays principle in the NEP because no fees were being collected for correcting environmental damage and there was no ability to tailor the fee for different amounts of environmental damage. The applicant further submitted that in formulating the 2006 Regulations the Minister did not give proper consideration to the NEP or the analysis of permit fee models in the WPMP.

The primary judge held that the fixed fee structure was affected by legal error and made an order restraining the Authority from implementing the 2006 Regulations. The Court of Appeal of Trinidad and Tobago overturned the primary judge's decision and orders. The Court of Appeal granted final leave to appeal to the Privy Council.

Issue: Did the Court of Appeal err in finding that:

(1) The fixed fee structure in the 2006 Regulations did not breach sub-para 2.3(b) of the NEP; and that

(2) The Minister, in formulating the 2006 Regulations, gave proper consideration to para 2.3 of the NEP and the analysis of permit fee models in the WPMP.

Held: Appeal allowed; declaration that the fixed permit fee in the 2006 Regulations was invalid; order of mandamus directing the Minister to reconsider the permit fee and to make amendments accordingly:

(1) The Court of Appeal's interpretation of sub-para 2.3(b) of the NEP was rejected (at [41]); sub-para 2.3(b) must be given separate effect in accordance with its natural meaning (at [41]); it is directed, not to the general purpose of the permitting system nor to the implementation of permit conditions, but to the use by the Authority itself of the "money collected" by way of fees for the correction of environmental damage (at [41]); it was not sufficient that the polluter will necessarily expend its own money in complying with the permit conditions, and so contribute to the "correction" of environmental damage (at [41]); this interpretation was supported by the Authority's functions in s 16 of the Act, including its function to take appropriate action for pollution control, as well as the Authority's power under ss 72 and 74(a)-(b) to collect fees from permits for its operations funded under the Environmental Trust Fund (at [42]); providing for such work to be funded out of permitting fees was consistent with the polluter pays principle, in that it ensures that the cost is attributed at least in part to those responsible for polluting activities, rather than to the community at large (at [42]); sub-para 2.3(b) was left wholly out of account in setting the prescribed fee in both the 2001 and 2006 Regulations (at [43]); it follows that to this extent the 2006 Regulations fail to comply with the NEP and are therefore in breach of the Minister's duty under s 31 of the Act: at [45]; and

(2) The conclusion reached above made it unnecessary to determine the legality of the process by which the fee was set (at [46]); however, it was appropriate to do so for its implications for future cases (at [46]); the division of functions and responsibilities in the Act was such that the Minister, in exercising his or her functions, may properly take account of the expert advice of the Authority, but the exercise of judgment rests with the Minister (at [48]); that division was observed in setting to 2001 Regulations, when the then Minister considered the polluter pays principle in setting the fees, however, there was no evidence of any equivalent consideration by the Minister in setting the 2006 Regulations, when the Minister treated this consideration as delegated to the Authority (at [48]); further, there was no evidence that the Minister considered the analysis of permit models in the WPMP in setting the 2006 Regulations, including the recognised deficiencies of model 2 (at [48]); accordingly, the appeal must also be allowed on this ground: at [49].

- Supreme Court:

Dover District Council v CPRE Kent; CPRE Kent v China Gateway International Limited **[2017] UKSC 79** (Lady Hale, Lords Wilson, Carnwath, Black and Lloyd-Jones)

(related decisions: *CPRE v Dover District Council and China Gateway International* [2015] EWHC 3808 (Mitting J) and *CPRE v Dover District Council* [2016] EWCA Civ 936 (Laws and Simon LJJ))

Facts: On 13 May 2012, China Gateway International Limited submitted a planning application for major development of two sites, one of which was within a protected site, to the local planning authority, the Dover District Council. The development was classified as "EIA development" and accompanied by an environmental statement. Planning officers prepared a report for the Planning Committee detailing the various elements of the proposal, consultation responses, the applicable policies and relevant issues. The report concluded with a recommendation for the grant of conditional planning permission, but reduced the number of residential units in the protected site from 521 to 365 and required the completion of a planning agreement under s 106 of the *Town and Country Planning Act 1990 (UK)*. The Planning Committee considered and approved the application, subject to the recommended amendments, on 13 June 2013. On 1 April 2015, the planning agreement was executed and planning permission granted. The notification of grant contained no formal statement of the reasons for the grant. The decision was appealed for judicial review on a number of grounds, including lack of reasons. The primary judge dismissed the appeal. Permission to appeal to the Court of Appeal was granted solely on the issue of reasons. The appeal was allowed and the permission quashed. This further appeal was concerned with the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission.

Issues:

(1) Whether a local planning authority has a legal duty to state reasons for a decision to grant permission for development;

(2) If yes to (1), what are the sources, nature and extent of a local planning authority's duty to give reasons for the grant of planning permission; and

(3) If yes to (1), what are the legal consequences of a breach of the duty.

Held: Appeal dismissed; the order of the Court of Appeal affirmed:

(1) A specific duty to give reasons for a decision to grant permission for development exists under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (**the EIA Regulations**): at [50]. Special duties will arise where the application involves EIA development: at [31]. The EIA Regulations imposed requirements for a public statement and for decision-makers to take environmental information into consideration and state in the decision that they have done so: at [31]. Regulation 24(1)(c)(ii) did not limit the duty to "main" reasons: at [39]. Where there is a legal requirement to give reasons, what is needed is an adequate explanation of the ultimate decision: at [41];

(2) Local planning authorities are under no general common law duty to give reasons for grant of a planning permission: at [51]; however, principles of open justice, transparency and fairness justify the imposition of a common law duty to provide reasons for decisions (at [51] and [56]) in circumstances where projects are granted in the face of substantial public opposition and call for major departures from the development plan or other policies of recognised importance: at [59]; and

(3) The distinction drawn between notification of the decision and the reasons on which it is based are "artificial and unconvincing": at [48. The provision of reasons is an intrinsic part of the decision-making process: at [48]. As the defect in reasons went to the heart of the justification for permission, and consequently undermined the validity, the only appropriate remedy was to quash the permission: at [68].

- Court of Appeal:

Forest of Dean District Council and Resilient Energy Severndale Ltd v R (Peter Wright) **[2017] EWCA Civ 2102** (Court of Appeal: Hickinbottom LJ; Davis LJ concurring with additional reasons; McFarlane LJ concurring)

(decision at first instance: *R (Peter Wright) v Forest of Dean District Council* [2016] EWHC 1349 (Admin) (Dove J))

Facts: Forest of Dean District Council (**the council**) granted planning permission to Resilient Energy Severndale for the change of use of agricultural land and the installation of a single, community-scale 500kW wind turbine (**the development**). In determining whether to grant the permission, the council had regard to a proposed condition of the permission requiring the development to be undertaken via a community benefit society and an annual donation to be made to a community benefit fund based on 4%

of the development's turnover over its projected life of 25 years. A local resident commenced judicial review proceedings in the High Court of the council's decision to grant the permission, contending that the proposed donation to a community benefit fund was not a material planning consideration. In determining the development application, the council was obliged to have regard to material considerations and to have no regard to considerations that were not material. For a consideration to be "material", it had to satisfy the *Newbury* criteria by (1) having a planning purpose (i.e. relating to the character or the use of land) and (2) fairly and reasonably relating to the development: *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. The High Court found that the donation was not a material planning consideration and quashed the council's decision.

The council and Resilient Energy Severndale appealed the High Court's decision to the Court of Appeal, contending that the primary judge erred in determining that the donation was not a material planning consideration. While they accepted that a donation to a community benefit society by a commercial developer would not be a material planning consideration, they submitted that in this case, because the development was community-led, the donation was a material consideration. They submitted that it was uncontentious that the community-led structure of the development was a material consideration and that since the community benefits of the development had to be considered as a whole, consideration of the donation could not be separated from this community-led structure. Further, a UK Government policy, *Community Benefits from Onshore Wind Developments: Best Practice Guidance for England* (**DECC Guidance**), distinguished between community benefit funds sourced from commercial developers and those sourced from community developers. The appellants contended that in a community-led development, "every payment from the fund would evidence continuing community involvement in the operation of the scheme", and that a donation from a community led development "is not a gift or a bribe to obtain planning permission: it is an inextricable part of the scheme, and an inherent consequence of the development being community-led".

Issue: Whether the primary judge erred in finding that the proposed annual donation to a community benefit society was a not a material planning consideration that the council was bound to consider in determining whether or not to grant planning permission to the development.

Held: Appeal dismissed:

(1) Neither the source of the funds nor the fact that a matter is regarded as beneficial to the public make a matter a material consideration for planning purposes: at [51];

(2) An immaterial consideration cannot be made material by simply aggregating it with other considerations, some of which are or may be material: at [37];

(3) A community led scheme is not essentially different to a commercial scheme; in each scheme, although the emphasis and the distribution of income might be different, there are usually elements of both profit and voluntary contributions to the community: at [39];

(4) The DECC Guidance does not draw the distinction between commercial and community wind developments which the appellants seek to rely upon; the community benefit fund in this case falls firmly within the definition of "community benefit fund" in the DECC Guidance; it does not fall within the definition of "socio-economic community benefits" or "community investment"; there is nothing in the DECC Guidance to suggest that a donation which falls within "community benefit funds" is restricted to a donation from so-called "commercial" developers; the donation to the community benefit fund was outside the "socio-economic benefits" of the project and was, as the DECC Guidance confirmed, outside the scope of material planning considerations: at [42]-[44];

(5) At a higher level, although the DECC Guidance is not planning policy, even planning policy cannot convert something immaterial into a material consideration for planning purposes: at [46];

(6) No matter how well-intentioned the proposed donor might be (and, here, Resilient Energy Severndale is well-intentioned), and no matter how publicly desirable such a donation might be (and, here, the proposed community benefit fund would benefit the community), such a donation will not be material for planning purposes unless it satisfies those *Newbury* criteria: at [50]; and

(7) Although the proposed donation will be put into a community benefit fund and administered by local people for the benefit of the community, it will not have any other restriction, e.g. a restriction to use it for a planning purpose (at [51]); therefore, the donation will or may fund community causes which have no possible planning purpose or relation to the proposed development: at [55].

Lisle-Mainwaring v Carroll [2017] EWCA Civ 1315 (Court of Appeal: Lindblom LJ; Flaux LJ and McFarlane LJJ concurring)

(decision at first instance: *Carroll v Secretary of State for Communities and Local Government & Ors* [2016] EWHC 2462 (Admin) (Lang J))

Facts: Ms Lisle-Mainwaring applied for planning permission under the *Town and Country Planning Act 1990 (UK)* (**the 1990 Act**) for the change of use of land at 19 South End, London, from office use to residential use. The council refused to grant the permission. Ms Lisle-Mainwaring changed the proposed use to storage use, which did not require planning permission, as a permitted use under the Town and Country Planning (General Permitted Development) Order 1995.

Ms Lisle-Mainwaring subsequently applied for planning permission for the change of use of the land from storage use to residential use. The council did not determine the application. Ms Lisle-Mainwaring appealed to the inspector appointed by the Secretary of State for Communities and Local Government. In the inquiry before the inspector, the council submitted that, if the planning permission were to be refused, the land would likely revert to office use. This would be consistent with the aims of policy CF5 of the council's local plan to encourage a "range of business premises within the borough". The council submitted that the inspector was required to consider the potential reversion of the land to office use, which was a material consideration. The inspector determined to grant the planning permission, holding that "such an eventuality cannot properly be anticipated" and that "[t]he prospects of reversion … and the loss of that use contrary to Policy CF5 accordingly also carry minimal weight".

Ms Lisle-Mainwaring's neighbour, Ms Carroll, appealed the inspector's decision to the High Court. Under s 70(2) of the 1990 Act, in determining an application for planning permission, the decision maker must have regard to "material considerations". An alternate future use of the site of the development will only be a material consideration in "exceptional circumstances", where there is a conflict between the proposed development and a planning policy or other "planning harm": *R (on the applicant of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 (***Mount Cook***). The primary judge found that the inspector correctly determined that the matter involved "exceptional circumstances" due to the "planning harm" from the loss of the potential reversion of the land to office use. However, the primary judge quashed the inspector's decision, finding that he failed to assess objectively the likelihood of the reversion of the land to office use, in determining the weight to afford to the consideration. Ms Lisle-Mainwaring appealed this decision to the Court of Appeal.

Issue: Did the primary judge err in her application of the test in *Mount Cook*, by concluding that this matter involved "exceptional circumstances", in which an alternative office use for the land was a material consideration.

Held: Appealed upheld; primary judge's decision quashed; inspector's decision restored:

(1) An application for planning permission must be determined on its own merits, in accordance with the statutory scheme; if the proposed development is acceptable in its own right, an alternative proposal is normally irrelevant; the corollary is that only in "exceptional circumstances" will an alternative proposal be a material consideration; even in such an "exceptional case", if the alternative proposal is to be a material consideration there must also be at least a "real possibility" of it being implemented in the foreseeable future to justify the refusal of planning permission, applying *Mount Cook*: at [34];

(2) The primary judge's decision cannot be reconciled with the *Mount Cook* principles; a comparison between the proposed development and an alternative development is not generally a necessary or relevant exercise; if a proposed development is inherently acceptable because it would do "little or no harm" it will not normally be necessary for the decision maker to go further and consider whether some other proposal for the site might be even more acceptable, or at least no less; if a possible alternative use would always be a material consideration when it had the potential to provide greater benefits than the proposal in hand, or if it were always necessary for the decision-maker to consider whether that would be so, the principles in *Mount Cook* would have to be recast, and the concept of "exceptional circumstances" abandoned: at [42];

(3) The inspector did not find that the grant of planning permission for residential use would result in "planning harm" from the loss of the potential reversion of the land for office use; had his conclusion been expressed in terms of the *Mount Cook* principles, and assuming that this was an "exceptional case", he must be taken to have found that this hypothetical alternative must be discounted as having no "real possibility" of coming about, and that "little or no weight" should be given to it: at [46], [47];

(4) The inspector, rightly, did not regard this as a case in which there were "exceptional circumstances"; he found that the proposed development complied with relevant planning policy, including policy CF5, that it was not harmful in any other respect, and that, in fact, it had significant planning benefit; even if there were "exceptional circumstances", his conclusion that there was no real possibility of an office use coming about if he dismissed the appeals, was enough to exclude the loss of the potential office use of the land from the ambit of material considerations under the *Mount Cook* principles: at [52], [55]-[56]; and

(5) The inspector's finding that the potential reversion of the land to office use was "an eventuality" that could not "properly be anticipated" in the appeal was a proper basis for giving only "minimal weight" to the possible resumption of that use being foregone; this was plainly a conclusion as to the objective likelihood of office use being resumed (at [65]); the evidence before the inspector on the valuation and viability of the reversion of the land to office use was entirely consistent with this conclusion that the prospect of reversion to office use could carry only "minimal weight" and supported the view that there was no economic or commercial realism in that prospect: at [67]-[68].

India:

Manoj Misra v Delhi Development Authority (National Green Tribunal of India, Original Application No. 65 of 2016) (Justice Kumar, Justice Rahim and Member Sajwan, 7 December 2017)

(related decision: *Manoj Misra v Union of India* (National Green Tribunal of India, Original Application No. 6 of 2012, 13 January 2015))

Facts: In Original Application No. 6 of 2012, the Tribunal approved a project for the rejuvenation of the part of the river Yamuna falling within the National Capital Territory of Delhi (**NCT Delhi**). In its decision, the Tribunal demarcated the flood plain area of this part of the river and made orders prohibiting construction activity in that area and providing for the payment of environmental compensation if this prohibition is breached. The Tribunal established the High Powered Principal Committee (**the HP Committee**) to monitor and report on the project.

In 2015, the third respondent, the Art of Living Organization, commenced construction on the bank of the river Yamuna within the NCT Delhi for the purpose of hosting a festival of 3.5 million people on the site from 11-13 March 2016. The applicant brought an action in the Tribunal seeking orders restraining the third respondent from hosting the festival and imposing fines on the third respondent and the competent authority, Delhi Development Authority (**the DDA**), to compensate for any environmental damage to the flood plain caused by the third respondent's actions undertaken in preparation for the festival and, if the injunction is refused, in hosting the festival at the site.

On 9 March 2016, the Tribunal denied the applicant's interlocutory application for a prohibitory injunction to prevent the third respondent from holding the festival. In its decision, the Tribunal directed the third respondent to make an undertaking to pay environmental compensation for the cost of the restoration of the flood plain and to contribute to the costs of establishing a biodiversity park at the site. The third respondent made this undertaking on 11 March 2016.

Issues:

(1) Did the third respondent cause environmental damage to the flood plain of the river Yamuna in preparing for and holding the festival;

(2) Did the DDA and other government authorities breach their duties to prevent environmental damage to the flood plain and river by allowing the festival;

(3) Did the third respondent breach its undertaking to the Tribunal;

(4) Did the DDA breach the Tribunal's orders in Original Application No 6 of 2012; and

(5) What relief, if any, should be granted.

Held: The Tribunal declared that the third respondent caused environmental degradation to the flood plain of the River Yamuna; the third respondent was liable for the payment of environmental compensation for the restoration and restitution of the flood plain; the DDA was responsible for contributory negligence; the DDA was liable for assessing the extent of environmental damage and the cost of restoration and to ensure the establishment of a biodiversity park at the site:

(1) No valid and proper permission had ever been granted by the DDA to the third respondent; the DDA's letter to the third respondent dated 30 June 2015 purported to restore the permission granted in the DDA's letter of 18 May 2015; however, the DDA's letter of 18 May 2015 did not grant any such permission: at [45];

(2) There was sufficient evidence to establish the presence of wetlands at the site, including observations of wetland vegetation species at the site prior to the festival; the fact that the wetlands had not been identified in accordance with statute did establish that they were not in existence; the fact that satellite imagery relied on was taken in the late monsoon period, when there would be more water present, cannot be a reason to suggest that there were no water bodies or wetlands as such at the site: at [56]-[57];

(3) The third respondent submitted that the flood plains, if damaged in the ways suggested, cannot be restituted or restored and can only be rehabilitated, which was beyond the scope of s 15 of the *National Green Tribunal Act 2010 (India)* (**the NGT Act**); this submission was rejected; the words "restitution" and "restoration" in the NGT Act have to be construed with a view to achieve the objective of protecting the environment and the flora and fauna that existed prior to the destruction; in this context, these words have an identical meaning to "rehabilitation"; complete restoration or restitution of any pre-existing land mass or natural ecosystem is neither practicable nor possible: at [58];

(4) The third respondent was responsible for causing damage and environmental degradation of the flood plain of river Yamuna in the terms detailed in the HP Committee's reports (at [65]); following a site inspection on 19 February 2016, less than one month before the festival's commencement, the HP Committee reported that the entire flood plain had been levelled flat, all natural vegetation had been removed, and that the site had been compacted as a result of heavy machinery; further soil compaction caused during the festival by hosting millions of people on the site could not be ruled out; the HP Committee's recommendations for the restitution and restoration of the flood plain must be implemented: at [61];

(5) The applicant's contention that the third respondent was guilty of contempt of court for breaching its undertaking of 11 March 2016 was rejected; the Tribunal's focus in the present case had to be restorative and in the interest of the protection of the environment rather than punitive: at [61];

(6) It was the duty of the statutory authority and government, and the people at large, to protect and preserve the flood plains and River Yamuna; the riverbed and flood plains should be protected and put to such use within the ambit of regulated activities which would not have any adverse effects and would also be in consonance with the principle of intergenerational equity and the public trust doctrine (at [61]); flood plains are essential for the ecological functioning of healthy rivers and associated aquifers and they should not be treated as waste lands or utilised in a manner which has unacceptable impacts (at [61]); the ultilisation of the flood plain in a manner which would challenge the very basic characteristics of the flood plain would be impermissible; it is not an area that can be permitted for activities and particularly by making constructions of temporary or semi-permanent nature on the flood plain itself (at [61]); the DDA and other government authorities failed to perform their duties to act in consonance with environmental laws and to maintain the ecological functions of the river and flood plains (at [62], [66]);

(7) The Tribunal was mandated under s 17(3) of the NGT Act to apply the principle of absolute liability, which imposes an obligation on the project proponent to bear the consequences of its actions (at [62]); the onus lay on the third respondent to demonstrate it took all the precautions required to prevent damage to the flood plain and that in fact there was no damage or degradation to flood plain or the river (at [62]); the third respondent failed to discharge this onus in all aspects: at [64];

(8) The DDA was responsible for contributory negligence and failing to act in accordance with the Tribunal's directions in Original Application No. 6 of 2012: at [65].

Society for Protection of Environment & Biodiversity v Union of India (National Green Tribunal of India, Original Application No. 677 of 2016, Justice Kumar, Justice Rahim and Member Sajwan, 8 December 2017)

(related decision: *Society for Protection of Environment & Biodiversity v Union of India* (National Green Tribunal of India, Original Application No. 168 of 2016, 30 September 2016))

Facts: On 29 April 2016, the first respondent, the Ministry of Environment, Forest & Climate Change (**the MoEF&CC**) issued a draft amendment to the Environmental Impact Assessment Notification 2006

(**the EIA Notification**) under the *Environment (Protection) Act 1986 (India)* (**the EP Act**), which introduced exemptions for building and construction projects up to 20,000 square metres from environmental clearance. The applicant, an environmental conservation group, filed an application in the Tribunal challenging the draft amendment. In Original Application No. 168 of 2016, the Tribunal ordered the MoEF&CC to consider the applicant's objections before finalising the amendment.

The MoEF&CC issued the final amended EIA Notification on 9 December 2016. The final EIA Notification substantially differed from the changes proposed in the draft amendment. It provided additional exemptions for building and construction projects up to 150,000 square metres from provisions of the *Water Act 1974 (India)* and the *Air Act 1981 (India)* and provided new powers to local authorities.

The applicant, applied to the Tribunal for orders quashing and setting aside the final EIA Notification. The applicants brought the challenge on several matters of law and fact including that the final EIA Notification violates the non-regression principle by reducing the effect of environmental laws.

Issues:

(1) Is the final EIA Notification affected by an error of law; and

(2) Should the Tribunal quash the final EIA Notification due to its impact on the environment, ecology and natural resources.

Held: Some provisions of the final EIA Notification were quashed and remitted to the MoEF&CC; the MoEF&CC was restrained from acting on the final EIA Notification until it was amended according to the orders of the Tribunal:

(1) The Tribunal had jurisdiction to examine the validity and constitutionality of subordinate legislation and to hear the present proceedings on questions of law and fact: at [11] and [13];

(2) The final EIA Notification violated the non-regression principle, that environmental law should not be modified to the detriment of environmental protection, by diluting the environmental assessment framework and taking away legislative powers to determine applications for development consent (at [14]-[15]); the final EIA Notification regressed environmental laws to a pre-2004 situation (at [16]);

(3) The final EIA Notification violated the precautionary principle by diluting the entire environmental assessment framework; environmental conditions imposed were not comprehensive enough and were only a tick-a-box exercised by the project proponent without any prior environmental assessment process especially its impact on ecologically sensitive area and other environmentally vulnerable area: at [15]

(4) The final EIA Notification invalidly transferred the Central Government's statutory powers to assess and grant environmental clearance under the EP Act to a body constituted by state and local authorities; the Central Government cannot divest itself of legislative power through subordinate legislation: at [15];

(5) The final EIA Notification violated the principle of *nemo judex in sua causa* by providing local authorities with the power to stipulate the conditions of approval of building and construction projects as well as the power to the enforce the compliance of these projects with environmental laws (at [20]);

(6) The EP Act limited amendments to the EIA Notification to amendments for the purpose of protecting and improving the quality of the environment and preventing pollution; the final EIA Notification did not satisfy this limitation: at [25];

(7) The final EIA Notification was ultra vires of the MoEF&CC's power to make subordinate legislation because it excluded the operation of substantive laws, namely the Water Act and Air Act: at [26];

(8) On the issue of procedural fairness, there was no evidence that MoEF&CC did not consider the applicant's objections to the draft amendment to the EIA Notification; however, the changes implemented in the final EIA Notification were substantially different from those proposed in the draft and the applicants were deprived of their right to file objections to those aspects: at [28] and [30];

(9) The final EIA Notification derogated India's commitments under the Rio Declaration 1992, particularly principles 15 and 17, as well as the Paris Agreement of 2015; it breached the precautionary principle and the principle of sustainable development: at [31]; and

(10) The ultra vires and ineffective provisions of the final EIA Notification can be severed from the provisions that are legally sound and sustainable; the Notification promoted an effective purpose of providing affordable housing: at [31] and [32].

High Court of Australia:

Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns **[2018] HCA 15** (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelmann JJ)

(related decisions: *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 (Bathurst CJ, Beazley P and Leeming JA); *Burns v Corbett; Gaynor v Burns (No 2)* [2017] NSWCA 36 (Bathurst CJ, Beazley P and Leeming JA); *Burns v Gaynor* [2015] NSWCATAD 24 (Hennessy LCM (Deputy President)); *Burns v Gaynor* [2015] NSWCATAD 211 (Patten (Principal Member)); and *Burns v Corbett* [2015] NSWCATAD 188 (Wright J (President) and Boland ADCJ (Deputy President))

Facts: These proceedings comprised five appeals from decisions of the New South Wales Court of Appeal (**the Court of Appeal**) which considered whether the New South Wales Civil and Administrative Tribunal (**NCAT**) had jurisdiction to adjudicate matters between residents of different States. Mr Burns (a resident of New South Wales) complained to the Anti-Discrimination Board of New South Wales about statements made by Ms Corbett (a resident of Victoria) and Mr Gaynor (a resident of Queensland), which Mr Burns claimed were contrary to s 49ZT of the *Anti-Discrimination Act 1977 (NSW)*. On appeal from NCAT, the Court of Appeal held that NCAT had no jurisdiction to hear and determine the complaints against Ms Corbett or Mr Gaynor. Mr Burns, the State of New South Wales and the Attorney General for New South Wales each appealed by special leave to the High Court. It was common ground that the disputes were matters between residents of different States, within the meaning of s 75(iv) of the *Commonwealth of Australia Constitution Act 1900 (Imp)* (**the Constitution**), and that NCAT was not a "court of State" for the purposes of Ch III of the Constitution.

Issues:

(1) Whether the Constitution precludes the Parliament of a State from conferring jurisdiction on a tribunal in respect of a matter between residents of different States within s 75(iv) of the Constitution; and

(2) If the answer to (1) is "no", whether a State law which purports to confer jurisdiction on such a tribunal in respect of such a matter is rendered inoperative by virtue of s 109 of the Constitution on the basis that it is inconsistent with s 39 of the *Judiciary Act 1903 (Cth)* (**the Judiciary Act**).

Held: The High Court unanimously dismissed the appeals. Kiefel CJ, Bell and Keane JJ (at [1] to [66]) held that the Constitution contains an implied limitation that prevents State Parliaments from conferring jurisdiction to adjudicate matters in ss 75 and 76 on State tribunals. Gageler J (at [67] to [121]), Nettle J (at [122] to [146]), Gordon J (at [147] to [202]) and Edelman J (at [203] to [261]) concurred (substantially) with the conclusion in the joint judgment, but set out different reasons. In matter S183/2017, the appeal was dismissed and Mr Burns to pay Ms Corbett's costs. In matter S185/2017, the appeal was dismissed and Mr Burns to pay Mr Gaynor's costs. In matters S18562017 and S187/2017, the appeals were dismissed and the Attorney General for New South Wales to pay the second respondent's costs. In matter S188/2017, the appeal was dismissed and the State of New South Wales to pay the second respondent's costs:

Kiefel CJ, Bell and Keane JJ

(1) The exercise by a State court of adjudicative authority in respect of any of the matters listed in ss 75 and 76 of the Constitution, including matters between residents of different States, is an exercise of federal jurisdiction: at [26]. The only organs of State government which s 77 allows to be co-opted into the federal Judicature are those which are courts: at [50]. The expression of "Courts of the States" in s 77 rejects the possibility of adjudication of any of the matters listed in ss 75 and 76 by an organ of State government which is not a court of a State: at [58]; as an agent of executive government, NCAT was not one of the "courts of the States" referred to in s 77: at [59]. By negative implication, Ch III's express language provides that State Parliament cannot confer State judicial power on a State tribunal that is not a court of that State, with respect to the adjudication of matters in ss 75 and 76 of the Constitution: at [41]. Because the answer to (1) was yes, it was unnecessary to resolve (2): at [5];

(2) The provisions of the *Civil and Administrative Tribunal Act 2013 (NSW)* which purported to confer judicial power on NCAT to adjudicate ss 75 and 76 matters were invalid: per Kiefel CJ, Bell and Keane JJ at [64]; Gageler J at [119]; Nettle J at [146]; Gordon J at [199]; and Edelman J at [208];

Gageler J

(3) The "ultimate question" was formulated as follows: "The High Court has in the past made plain that, except with respect to the subject matters identified in ss 75 and 76 of the Constitution, a State Parliament cannot confer State judicial power on a State tribunal that is not a court of that State. The ultimate question now for determination is whether the exception is warranted": at [67]. The exception was warranted as a structural implication from Ch III: at [68];

Nettle J

(4) The issues for determination were whether "the Constitution armed the Parliament with legislative power to enact laws excluding the State jurisdiction of non-court State tribunals to adjudicate ss 75 and 76 matters; and, if so, whether by the enactment of s 39(2) of the Judiciary Act, the Parliament has done so": at [138]. Ch III implicitly provides that States cannot undermine the exclusive legislative power of the Commonwealth to invest and regulate federal jurisdiction: at [140]; and that power would be substantially undermined if the Commonwealth Parliament had no power to prevent non-court State tribunals from adjudicating ss 75 and 76 matters: at [140];

Gordon J

(5) By virtue of the operation of s 39 of the Judiciary Act in conjunction with s 109 of the Constitution, a State Parliament cannot vest jurisdiction to hear ss 75 and 76 matters in a non-court administrative tribunal (this conclusion did not depend on any implied constitutional limitation on State legislative power): at [148]; and

Edelman J

(6) The text of s 77(ii) does not require implication: at [218] to [224]; where an exercise of Commonwealth legislative power under s 77(ii) was intended to be a "complete statement" of jurisdiction, State laws purporting to confer judicial power on a tribunal to adjudicate ss 75 and 76 matters are rendered invalid and inoperative as a direct result: at [254]; and ss 38 and 39 of the Judiciary Act constituted a full exercise of the power to exclude non-court tribunals: at [256].

***Pike v Tighe* [2018] HCA 9** (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ)

(related decisions: *Pike v Tighe* [2016] QPEC 30 (Durward SC DCJ); *Tighe v Pike* (2016) 225 LGERA 121 (Fraser, Morrison and Philippides JJA))

Facts: These proceedings determined an appeal from the Court of Appeal of the Supreme Court of Queensland in relation to the operation of s 245 of the now repealed *Sustainable Planning Act 2009 (Qld)* (**the Planning Act**) which provided that a development approval attaches to land and binds successors in title.

In 2009, Townsville City Council approved an application by the then registered proprietors of the land for development by way of the reconfiguration of an existing lot into two lots. The approval was subject to conditions - including a requirement for an easement to allow pedestrian and vehicle access, onsite manoeuvring and connection of services and utilities (**condition 2**). An easement, in terms that did not comply with condition 2, was executed and the reconfiguration took place subsequently; a second easement, identical to the first easement, was registered in relation to each title. The Tighes (**the first respondents**) and the Pikes (**the appellants**) purchased Lot 1 (**the servient tenement**) and Lot 2 (**the dominant tenement**), respectively.

In 2015, the appellants filed an application in the Planning and Environment Court seeking:

(a) a declaration that Condition 2 of the Approval had been contravened; and

(b) an enforcement order directing the Tighes to comply with the condition.

The primary Judge granted the application, holding that s 245 of the Planning Act had the effect that the development approval conditions ran with the land. His Honour held that the first respondents had committed a development offence by failing to comply with Condition 2, which warranted the making of an enforcement order to provide the appellants with an easement in accordance with Condition 2, but did not make the enforcement order.

The first respondents appealed to the Court of Appeal. The appeal was allowed and the Court of Appeal found s 245 of the Planning Act bound only the person permitted by the approval to carry out the subdivision of the original lot. The Court of Appeal determined that to make an enforcement order, the development offence had to have been committed by the person against whom the order was sought.

Before the High Court, the appellants advanced two submissions:

(1) Where a development offence had been committed, this was sufficient to engage the power to make an enforcement order, even if the actual offender is not the person against whom the order was sought; and

(2) The circumstance, that the first respondents were not a party to the development approval, did not mean that an enforcement order cannot be made against them as s 245(1) of the Planning Act continued to operate notwithstanding the later reconfiguration.

Issues:

(1) Whether s 245 of the Planning Act obliges a successor in title to ownership of a parcel of land created by the reconfiguration of a larger parcel to comply with a condition of the approval for the reconfiguration that should have been, but was not, satisfied by the original owner prior to completion of the reconfiguration; and

(2) If the answer to (1) is "yes", whether the Planning and Environment Court of Queensland may make an "enforcement order" under ss 601, 604 and 605 of the Planning Act requiring the successor in title to fulfil the condition.

Held: Appeal allowed; orders 2 to 5 of the orders made by the Court of Appeal were set aside; in their place, the appeal to the Court of Appeal should be dismissed, and the matter should be remitted to the primary judge for the making of final orders; the first respondents to pay the appellants' costs of this proceeding and the proceedings in the court below:

(1) Section 245(1) of the Planning Act gives development approval conditions the character of personal obligations, capable of enduring beyond the completion of the development: at [35]; s 245(1) draws a distinction between "the land" the subject of development and "lot(s)" into which the land may be reconfigured: [36]; the obligations attached to all the land the subject of the application for development approval: at [35]; the terms of Condition 2 applied to the land in each of the two lots: at [41]. Accordingly, the conditions of the development approval bound the first respondents by reason of s 245(1) of the Planning Act and the answer to question (1) was "yes": at [42]; and

(2) Pursuant to s 604(1)(a) of the Planning Act, the Planning and Environment Court may make an enforcement order if satisfied that a development offence "has been committed": at [13]; the first respondents had ample opportunity to comply with Condition but failed to do so, thereby contravening the development approval and committing a development offence against s 580(1) of the Planning Act: at [45] and [46]. The answer to question (2) was "yes": at [2].

Federal Court of Australia:

***Spencer v Commonwealth of Australia* [2018] FCAFC 17** (Griffiths, Rangiah and Perry JJ)

(related decisions: *Spencer v Commonwealth of Australia* [2008] FCA 1256 (Emmett J); *Spencer v Commonwealth (No 2)* [2008] FCA 1378 (Emmett J); *Spencer v Commonwealth of Australia (No 3)* [2012] FCA 637 (Emmett J); *Spencer v Commonwealth of Australia (No 4)* [2012] FCA 1142 (Emmett J); *Spencer v NSW Minister for Climate Change, Environment and Water* [2008] NSWSC 1059 (Rothman J); *Spencer v Commonwealth of Australia* [2009] FCAFC 38 (Black CJ, Jacobson and Jagot JJ); *Spencer v Commonwealth* [2010] HCA 28 (French CJ, Gummow, Hayne, Heydon, Crenna, Kiefel and Bell JJ); *Spencer v Commonwealth* [2012] FCAFC 169 (Keane CJ, Dowsett and Jagot JJ); *Spencer v Commonwealth* [2014] FCA 1117 (Mortimer J); *Spencer v Commonwealth* [2014] FCA 1234 (Mortimer J); *Spencer v Commonwealth* [2014] FCA 1288 (Mortimer J); and *Spencer v Commonwealth of Australia* [2015] FCA 754 (Mortimer J))

Facts: Mr Peter Spencer (**the applicant**) was the owner of a farm at Shannons Flat in New South Wales, known as "Saarahnlee". The property was subject to the *Native Vegetation Act 2003 (NSW)* and previously subject to the *Native Vegetation Conservation Act 1997 (NSW)*. Both statutes restricted the Applicant's ability to clear native vegetation on his land. The Applicant claimed that the operation of State vegetation clearance laws rendered "Saarahnlee" unsuitable for commercial farming and effectively amounted to the acquisition of the Applicant's interests in the land, in particular his rights to carbon sequestration. The Applicant claimed that the acquisition had been on other than just terms and had been made in furtherance of four formal intergovernmental agreements, or an alleged informal intergovernmental arrangement, between the Commonwealth of Australia (**the Commonwealth**) and the

State of New South Wales (**the State**). Those formal agreements established a framework for the management and use of land, including native vegetation clearing, and allocated Commonwealth funds to the State for that purpose. The Applicant alleged that the agreements, and the Commonwealth legislation that authorised them, were invalid to the extent to which they effected or authorised the acquisition of property other than on just terms within the meaning of s 51(xxxi) of the *Constitution*.

On 12 June 2007, the Applicant commenced proceedings against the Commonwealth in the Federal Court seeking various forms of declaratory relief and damages arising out of what was alleged to be the acquisition of his property. The Commonwealth applied for, and was granted, summary judgment under s 31A of the *Federal Court of Australia Act 1976 (Cth)*. Upon appeal, the High Court held that the case had not been a suitable one for summary judgment and granted the Applicant special leave to appeal. The proceeding was remitted and, on 24 July 2015, Mortimer J made orders dismissing the application (for a summary of the procedural history up to the primary judgment see [39] to [50] of *Spencer v Commonwealth of Australia* [2015] FCA 754). These proceedings concern an appeal from the primary judgment.

The primary judge found, amongst other findings, that s 51(xxxi) would not be engaged unless the intergovernmental agreements *required* the State to acquire property as part of any native vegetation clearance regime on other than just terms (see [3] for a summary of relevant findings). The Applicant appealed against the primary judgment, claiming that it was only necessary to demonstrate "joint action" between the Commonwealth and State to acquire property.

Issues:

(1) Whether the primary judge erred in holding that State laws restricting native vegetation clearance did not effect an acquisition of property within the meaning of s 51(xxxi);

(2) Whether the primary judge erred in holding that the appellant's property had not been acquired by joint action of the Commonwealth and State governments;

(3) Whether the Commonwealth or State laws or intergovernmental agreements were invalid as being in contravention of s 51(xxxi);

(4) Whether the Commonwealth was unjustly enriched by any acquisition of the appellant's property;

(5) Whether the State had trespassed on the appellant's property and was liable to him in an action on the case; and

(6) Whether the primary judge erred in finding that the Applicant was offered just terms compensation.

Held: Appeal dismissed; application to adduce further evidence dismissed:

(1) The Applicant's submission that it was only necessary to demonstrate "joint action" between the Commonwealth and the State was too broad: at [210]; s 51(xxxi) is not engaged merely because the Commonwealth provided funds to a state intending that the State should acquire property on terms that are unjust: at [166]. Terms and conditions of an intergovernmental agreement requiring the State to acquire the property on other than just terms would enliven s 51(xxxi) (at [166]) but in the absence of a term or condition, it is for the State to choose how it implements the agreement: at [171]. The primary judge did not err in finding that the terms and conditions of the intergovernmental agreements did not require the State to acquire the property: at [187]; and s 51(xxxi) was not engaged: at [187];

(2) A Commonwealth law with respect to the acquisition of property will be invalid unless the acquisition is to be made on just terms: at [144]. The primary judge found that operation of the two federal laws challenged by the Applicant and effect as part of a scheme involving the four intergovernmental agreements, coupled with the NSW vegetation clearance laws, did not give rise to an acquisition of property in contravention of s 51(xxxi): at [3]. As this finding was not disturbed on appeal, there was no acquisition within the meaning of s 51(xxxi) and it was unnecessary to consider the Applicant's submission that the State legislation operated to acquire his property: at [236]. The laws and the agreements were not invalid: at [187] and [209];

(3) The Applicant failed to demonstrate the existence of any relevant informal arrangement: at [224]; and the primary judge did not err in concluding that there were no intergovernmental arrangements, formal or informal, which attracted the operation of s 51(xxxi): at [225];

(5) The Applicant's pleaded allegation of unjust enrichment was premised on the allegation that the Commonwealth had acquired his property: at [240]. As there was no error in the primary judge's finding that the Commonwealth had not acquired property from the Applicant, this claim could not succeed: at [240];

(6) As none of the Commonwealth or State legislation was invalid on the basis that it infringed the protection of s 51(xxxi), and there was no invalidity of the intergovernmental agreements: at [243] and [244]; there was no unlawful act entitling the Applicant to damages: at [243] and [244]; and

(7) The primary judge did not err in finding that the Applicant was offered just terms compensation: at [252] to [254].

Queensland Court of Appeal:

Longley v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection **[2018] QCA 32** (Gotterson and McMurdo JJA and Bond J)

(related decision: *Linc Energy Ltd (in liq): Longley & Ors v Chief Executive, Department of Environment & Heritage Protection* [2017] QSC 53)

Facts: Linc Energy Limited (**Linc**) operated a pilot underground coal gasification project on land it owned near Chinchilla. The Chief Executive of the Department of Environment and Heritage Protection (**the Chief Executive**) issued an environmental protection order (**EPO**) under s 319 of the *Environmental Protection Act 1994 (Qld)* (**the EP Act**) to Linc, requiring Linc to undertake certain work on the site. Subsequently, the liquidators of Linc (**the appellants**) gave notice disclaiming the land, licenses and environmental authorities held by Linc pursuant to s 568 of the *Corporations Act 2001 (Cth)* (**the Corporations Act**). The appellants claimed that the notice to disclaim discharged Linc's liabilities under the EPO. The Chief Executive contended that Linc remained bound to comply with the EPO, and that the appellants were bound to cause Linc to do so, as the EPO was not property which was capable of being disclaimed under s 568 of the Corporations Act.

The appellants applied under s 511 of the Corporations Act for a judicial direction that they would be justified in not causing Linc to comply with the EPO. The primary judge determined that Linc remained obliged to meet the requirement of the EPO and that the Appellants were obliged to cause Linc to do so. The primary judge held that s 5G(11) of the Corporations Act applied, resolving the inconsistency between the operation of ss 568 and 568D of the Corporations Act and ss 319 and 358 of the EP Act by giving effect to the EP Act provisions. The costs of the appellants and those of the Chief Executive, each calculated on an indemnity basis, were ordered to be costs in the liquidation of Linc.

Issues:

(1) Whether the company's liability to comply with the EPO was a liability in respect of property which the appellants disclaimed by the disclaimer notice;

(2) Whether the disclaimer terminated Linc's liability to comply with the EPO;

(3) Whether s 5G of the Corporations Act operated to avoid any inconsistency between the operation of the relevant sections of the Corporations Act and the EP Act;

(4) Whether the appellants should be directed that they are justified in not causing Linc to comply with an EPO; and

(5) Whether the Chief Executive's costs of the proceeding before the primary judge should be treated as costs in the liquidation of the company.

Held: Both appeals were allowed and the primary judge's orders set aside. In appeal 4657 of 2017, the costs of the appeal were left open pending written submissions as to costs and in appeal 6449 of 2017 the Chief Executive was ordered to bear his own costs of the proceedings:

(1) Although the requirements of an EPO will not have the requisite connection with property, such that its requirements would be liabilities in respect of property under s 568D, in every case (at [103]), this EPO was expressly issued with respect to the activities of Linc on the site: at [104]. Disclaimer of the land and licenses terminated Linc's authority and capacity to engage in those activities contained in the EPO and there was no activity that could be carried out by Linc to which the general environmental duty could attach: at [104] and [106]. Linc was no longer obligated to perform the requirements of the EPO because they were liabilities in respect of disclaimed property and thereby terminated upon the disclaimer, pursuant to s 568D: at [11];

(2) Because the requirements of the EPO were liabilities in respect of the disclaimed property, and the acceptance by the respondents of the disclaimer of the land and licenses was effectively an

acceptance that the disclaimer terminated the liabilities under the EPO, there was no cause to consider the operation of s 5G of the EP Act: at [115]. If necessary to consider the operation of s 5G, any inconsistency would be resolved in favour of the Corporations Act: at [131]. There cannot be disclaimers of varying effects (at [111]) and, as the disclaimer was undisputed, s 5G could not displace the effect of s 568D of the Corporations Act to rid Linc of some liabilities in respect of the disclaimed property but retain others: at [111] to [113];

(3) In light of the findings in (1) and (2), the appellants should be directed that they are justified in not causing Linc to comply with an EPO: at [167]; and

(4) The Chief Executive's costs ought not to fall upon the creditors of Linc whose interests would have been disadvantaged had his arguments ultimately prevailed: at [139].

NSW Court of Appeal:

Gordon v Lever **[2018] NSWCA 43** (McColl and White JJA, Sackville AJA)

(related decision: *Gordon v Lever* [2017] NSWSC 1282 (Sackar J))

Facts: Stanley and Christine Gordon (**the appellants**) and Allen Lever (**the respondent**) owned neighbouring properties. The appellants sought an order pursuant to s 88K of the *Conveyancing Act 1919 (NSW)* (**the Conveyancing Act**) for the creation of an easement of carriageway over the respondent's land. The appellants contended that the easement of carriageway was reasonably necessary for the effective use and development of a portion of their land which was used for both agricultural and residential purposes. The primary judge concluded that the easement sought should be granted, but limited to circumstances in which a river crossing on an alternate path that did not traverse the respondent's land was "impassable". The primary judge made a declaration to this effect and invited the parties to draft an easement conforming to the reasons for judgment. The declaration made by the primary judge did not identify the terms of the proposed easement.

These proceedings were an application for leave to appeal from the primary judge's decision. The application for leave to appeal was heard concurrently with argument on the substantive appeal. The appellants sought a declaration that was in substance the same as that made by the primary judge, but without the limiting qualification.

Issues:

(1) Whether the easement of carriageway that the primary judge proposed to impose was "reasonably necessary" pursuant to s 88K(1) of the Conveyancing Act;

(2) Whether the precondition set out in s 88K(2)(b) of the Conveyancing Act (that the owner of the servient tenement can be adequately compensated) had been satisfied; and

(3) Whether it was appropriate for the primary judge to have made a declaration in that form adopted.

Held: Leave granted to appeal; appeal allowed; cross-appeal allowed; Orders 1 to 4 made by the primary judge set aside; the respondent to pay 80 per cent of the appellants' costs of the appeal, including the appellants' costs of the application for leave to appeal; the appellants to pay the respondent's costs of cross-appeal; and proceedings remitted to the primary judge for determination consistent with this judgment:

(1) A court cannot determine whether a proposed easement is "reasonably necessary" for the purposes of s 88K(1) of the Conveyancing Act until the extent of permitted use of the easement is known: at [118]; further findings of fact needed to be made and for the terms of the proposed easement to be formulated with greater precision before a final determination could be made as to whether s 88K(1) of the Conveyancing Act was satisfied: at [122]; and, pursuant to s 88K(3), the court lacks power to make an order imposing an easement unless the terms of the easement are specified in the order itself: at [97];

(2) The appropriate amount of compensation depends on the degree of disruption to the servient owner's use or enjoyment: at [101]; the court could not be satisfied that the owner could be adequately compensated until the terms of the proposed easement were known: at [101]; and

(3) Declaratory relief is final: at [112]; because the terms of the easement were not finalised, the primary judge did not finally determine the right of the parties: at [114]; and the declaration could not stand: at [132].

Marketform Managing Agency Ltd v Amashaw Pty Ltd **[2018] NSWCA 70** (Meagher and Leeming JJA and Emmett AJA)

(related decisions: *Amashaw Pty Ltd v Marketform Managing Agency Ltd* [2017] NSWSC 612 (McDougall J) and *Amashaw Pty Limited v Marketform Managing Agency Ltd (No 2)* [2017] NSWSC 793 (McDougall J)

Facts: Marketform Managing Agency Ltd (**the appellant**) provided public liability insurance in respect of Amashaw Pty Ltd's (**the respondent**) petrol station between 5 December 2011 and 15 June 2012, plus a further 12 months. The policy indemnified the insured against "liability to pay damages … for and/or arising out of … damage occurring in its entirety during the Period of Insurance and arising out of Pollution, but only to the extent that the Insured can demonstrate that … such Pollution was the direct result of a sudden specific and identifiable event occurring during the Period of Insurance …". Damage was defined to include "nuisance".

From March 2013, 6,660 litres of ULP98 petrol were released from a failed check valve at the petrol station into a Sydney Water sewer main which lay underneath a lane bordering the northern boundary of the petrol station and an explosion occurred in June 2013. The respondent took short-term measures to remove contaminated groundwater from the sewer and later measures to prevent the spread of hydrocarbons from the petrol station. The relevant damage was loss actionable in nuisance for substantial interference with the enjoyment of rights in land. The respondent sought to recover the costs ($1,197,320) of these measures under the renewed policy. The appellant denied liability on three bases:

(a) that non-disclosure reduced its liability to nil under s 28(3) of the *Insurance Contracts Act 1984 (Cth)*;

(b) that those costs were not in respect of an insured liability; and

(c) that the insured liability only extended to the cost of short term measures.

The primary judge held that s 28(3) was not engaged and that while the release was a sudden, specific and identifiable event during the second period of insurance, which directly resulted in pollution by petrol-contaminated groundwater entering neighbouring properties and that the resulting damage occurred during the second period of insurance, the indemnity did not extend to the later measures. The appellant appealed against conclusions as to the existence of liability and the respondent cross-appealed against the conclusion as to quantum.

Issues:

(1) Whether a reasonable person in the respondent's circumstances could be expected to know that the existing site contamination was materially different from what the appellant could assume to exist in a property used as a service station for several years;

(2) Whether the liability for damage occurred in its entirety during the period of insurance and arising out of pollution;

(3) Whether the pollution was the direct result of a sudden, specific and identifiable event during the period of insurance;

(4) Whether the indemnity extended to later measures to prevent further contaminated groundwater from the petrol station; and

(5) Whether the respondent was entitled to a costs order.

Held: Appeal dismissed; cross-appeal dismissed; and appellant pay the respondent's costs of the appeal and the cross-appellant pay the cross-respondent's costs of the cross appeal:

(1) As at May 2012, a reasonable person in the respondent's position would have been justified in continuing to believe that the existing contamination was the result of historical leaks and spills, and neither out of the ordinary having regard to the earlier use of the site nor at risk of shifting to neighbouring properties: at [41] to [42];

(2) The nuisance only occurred when Sydney Water became aware of the risk of fire or explosion associated with the presence inside its sewer line of petroleum hydrocarbons on the surface of groundwater, which occurred in its entirety during the second period of insurance: at [55] to [56];

(3) The release of ULP98 petrol from March 2013 into Sydney Water's sewer main was sufficiently causal to be the "event" which directly resulted in the relevant pollution: at [60] to [61]. Notwithstanding the presence of contaminants released before the second period of insurance, the relevant damage arose out of that event because that causal criterion did not require the identification

of a sole cause: at [60] to [64]; and the large quantities of petrol released from March 2013 were sufficient to produce the fire and explosion risk: at [60] to [64];

(4) The later measures were only directed to existing contamination within the petrol station: at [68]; and this contamination did not expose neighbouring properties to an appreciable risk of fire or explosion, or any other actionable loss: at [68]. Accordingly, the indemnity only extended to the short-term measures: at [69]; and

(5) As the quantum of the insured's indemnity remained less than $500,000, the primary judge did not err in making no order as to the costs of the proceedings: at [70].

***McGinn v Inner West Council* [2018] NSWCA 90** (Beazley P, Ward JA and Simpson AJA)

(related decisions: *McGinn v Ashfield Council* [2011] NSWLEC 105 (Biscoe J); *McGinn v Ashfield Council* [2011] NSWLEC 84 (Biscoe J); *McGinn v Ashfield Council* [2012] NSWCA 238 (McColl JA, Sackville AJA and Gzell J))

Facts: In 2011, Ms Sophia McGinn (**the applicant**) brought proceedings in the Land and Environment Court challenging the validity of a development consent granted to the owner of a property adjoining her residence for the construction of an additional detached house at the rear of the existing house on the property. The application was dismissed by Biscoe J. On 6 August 2012, the Court of Appeal dismissed the applicant's appeal from the orders of Biscoe J. These proceedings concern a Notice of Motion filed by the applicant on 28 November 2017, seeking an order that the judgment of the Court of Appeal be set aside "on the ground that the judgment was fraudulently obtained", and that a new trial be ordered. The applicant relied on the discovery of new evidence: a s 149 certificate for the adjoining property which stated that "dual occupancies (detached) development are prohibited."

Issues: Whether there was new evidence on the basis of which judgment should be set aside.

Held: Notice of Motion dismissed with costs:

(1) Fraud must be established by strict proof on the basis of new material: at [17]. The application to set aside the judgment for fraud was based on a misconception: at [18]. Dual occupancies were prohibited under the Ashfield Local Environmental Plan 2013: at [15]; however, at the time the applicant challenged the development consent, the Ashfield Local Environmental Plan 1985 (**the ALEP**) was in force: at [15]; and the ALEP permitted detached dual occupancies with consent: at [15].

***Slade v Kempsey Shire Council* [2018] NSWCA 25** (McColl and Macfarlan JJA, Barrett AJA)

(related decisions: *Kempsey Shire Council v Slade* [2015] NSWLEC 135 (Biscoe J) and *Kempsey Shire Council v Slade (No 2)* [2017] NSWLEC 10 (Sheahan J))

Facts: In 2011, Michael Slade (**the first appellant**) became the lessee of a part of a Crown reserve at Kempsey, managed by Kempsey Shire Council (**the council**). The first appellant conducted a recycling business on the site with his father, Barry Slade (**the second appellant**). The business was incorporated and Mid Coast Skip Bins & Metal Recycling Pty Ltd (**the company**) took over the lease, which was terminated by the council in May 2012. In August 2012, the Environment Protection Authority (**the EPA**) issued a Clean-Up Notice to the company under s 91 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**); the council also issued Clean-Up Notices under s 91 to each of the appellants. Satisfactory clean-up did not occur and, in 2013, the EPA issued a notice to the council requiring it to clean up the site. The council carried out the clean-up and served notices on the appellants under s 104(2) requiring them to pay its reasonable clean-up costs and expenses.

The council brought proceedings in the Land and Environment Court against the appellants for recovery of the expenses owed and, following a hearing in August 2015, Biscoe J determined the issue of liability in favour of the council. The outstanding issue of quantum was dealt with at a hearing before Sheahan J in June 2016 and the amount was quantified as $1,286,452.62. Pursuant to s 58(1) of the *Land and Environment Court Act 1979 (NSW)*, the appellants appealed against both decisions. The appellants contended that, for the council to be entitled to recover its clean-up costs and expenses, it was necessary for the council to have effected that clean-up pursuant to the Clean-Up Notice issued by the EPA. The appellants claimed this did not occur because the EPA's notice required the council to provide an Asbestos Assessment Report and this was not complied with as the report provided, that of Mr Ellis, was

not one, as required by the notice, "prepared by a qualified and experienced Occupational Asbestos Hygienist."

Issues:

(1) Whether the council's rights conferred under ss 104 and 105 of the POEO Act were dependent upon compliance with the EPA's notice; and

(2) Whether the proposition that Mr Ellis' report provided to the EPA did not comply with the EPA's notice was a point capable of being raised on appeal.

Held: Appeal dismissed with costs:

(1) The council's notices to the appellants asserted that its clean-up occurred pursuant to the EPA's notice and, by inference, pursuant to s 92(1): at [28]; the council's reliance on s 92(1) did not preclude it from relying on s 92(2): at [28]. The council's clean-up action was taken of its own volition in accordance with s 92: at [27]; and the rights conferred by ss 104(2) and 105(1) were attracted: at [27]. Section 104(2) does not stipulate that the council must have complied fully with a notice under s 92(1) for s 104(2) to be applicable: at [29]. The council's right to recover its clean-up expenses owed from the appellants as a statutory debt under s 105 was not dependant on its compliance with the EPA's notice to it: at [24]; and

(2) Leave to raise a new point on appeal should not be permitted where it was not raised at the appropriate time at first instance: at [30] and [33]; the appellants' contentions relating to the Asbestos Assessment Report submitted by the council to the EPA were not raised before Biscoe J and were not permitted to be raised on appeal: at [30].

NSW Court of Criminal Appeal:

***Chen v R* [2018] NSWCCA 106** (Hoeben CJ at CL; Schmidt and Campbell JJ)

(related decision: *R v Chen* [2015] NSWDC (25 September 2015) (Buscombe ADCJ))

(NB: The following adapts the Supreme Court's Judgment Summary)

Facts: The Court of Criminal Appeal dismissed an appeal against conviction brought by Weidong Chen (**the appellant**). The appellant was convicted by a jury of knowingly taking part in the supply of not less than the commercial quantity of pseudoephedrine, and was sentenced to five years imprisonment, with a non-parole period of three years. At trial, the Crown's evidence against the appellant involved transcripts of intercepted phone calls, which were translated by an expert witness interpreter. Prior to trial, the appellant unsuccessfully applied to have the evidence excluded on the bases that the interpreter lacked the necessary expertise, was impartial and biased, and that the translations were inaccurate. At trial the appellant applied unsuccessfully to have the evidence withdrawn because the interpreter had not complied with the requirement under the Supreme Court Rules 1970 (NSW) (**the Supreme Court Rules**), which governed the proceedings that she read and acknowledge that she had read and was bound by the expert witness code of conduct.

Issues:

(1) Whether the trial judge erred in ruling that the evidence of the translator was admissible;

(2) Whether the trial judge erred in failing to exclude the evidence of the translator;

(3) Whether the trial judge erred in failing to withdraw the evidence of the translator from the jury where there was evidence that the translator had not read or agreed to be bound by the expert witness code of conduct; and

(4) Whether the trial judge erred in failing to issue appropriate warnings or directions following the Crown's address to the jury, where the Crown suggested a particular translation of a word should be accepted, because no alternative translation was provided, which amounted to a reversal of the onus of proof.

Held: Appeal dismissed:

(1) The trial judge was correct in refusing to exclude the evidence: at [36]. While the accuracy, credibility and reliability of the translations were challenged, these were matters for the jury to consider: at [71]. It was open to the trial judge to admit the evidence, as the translator also had the necessary specialised knowledge: at [63] and [70];

(2) While the Supreme Court Rules relating to the expert witness code of conduct were not complied with, this did not mean the evidence was inadmissible under the law of evidence: at [20]. This was because non-compliance with the rules governing the expert witness code of conduct did not confine the admissibility of the evidence, but had to be considered as part of the judge's discretion to exclude evidence that is unfairly prejudicial: at [21]; and

(3) There was no need for the disputed direction, and that even if it had accepted that the direction sought ought to have been given, the trial judge failing to do so had not resulted in a substantial miscarriage of justice: at [84]. This was because the direction sought related to a relatively small part of the evidence, and it was not apparent, given all of the other evidence the jury had to consider, that the absence of the direction resulted in any miscarriage of justice: at [91].

Erector Group Pty Ltd v Burwood Council; Liverpool Developing Pty Ltd v Burwood Council **[2018] NSWCCA 56** (Bathurst CJ, Hoeben CJ at CL and Button J)

(decision at first instance: *Burwood Council v Erector Group Pty Ltd; Burwood Council v Liverpool Developing Pty Ltd* [2017] NSWLEC 20 (Preston CJ))

Facts: Burwood Council (**the council**) granted development consent in respect of land at 248-250 Liverpool Road, Enfield. Liverpool Developing Pty Ltd (**Liverpool Developing**) was the owner of the land and Erector Group Pty Ltd (**Erector Group**) was appointed as the builder and head contractor for the development. Liverpool Developing and Erector Group were related companies.

Section 81A(2) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) required a principal certifying authority to be appointed and a construction certificate to be obtained prior to the commencement of the erection of a building. Condition 26 of the development consent required the council to be notified of the appointment of a principal certifying authority and "detailed plans and specifications" of the building to be endorsed with a construction certificate prior to the commencement of building work.

Initial demolition work was carried out on the land during early 2016 which did not require compliance with the requirements s 81A(2) or condition 26 of the development consent. On or about 29 February 2016, additional excavation work was carried out which did require compliance with these requirements, but these requirements had not been fulfilled. Following the additional excavation work, an adjoining building collapsed and several other adjoining buildings were damaged on 1 March 2016.

Liverpool Developing and Erector Group each pleaded guilty to two offences against s 125(1) of the EPA Act, one for the breach of s 81A(2) of the EPA Act and the other for the breach of s 76A(1) of the EPA Act by breaching condition 26 of the development consent. The sentencing judge found that the damage to the adjoining buildings had "in all probability" been caused by the offending conduct and that this damage was "substantial" so that it was an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. He rejected a submission that, in taking into account this damage, he was punishing Liverpool Developing and Erector Group for an offence with which they were not charged under cl 98E(1) of the Environmental Planning and Assessment Regulation 2000 (**the Regulation**) for failing to "protect and support" or "underpin" adjoining buildings.

Liverpool Developing and Erector Group brought an appeal against this sentence pursuant to s 5AB of the *Criminal Appeal Act 1912 (NSW)*.

Issues:

(1) Whether the sentencing judge erred in finding that the damage was caused by the additional excavation work; and

(2) Whether the sentencing judge, by taking into account the damage caused to the adjoining buildings, was punishing Liverpool Developing and Erector Group for an offence with which they were not charged.

Held: Appeal upheld; the sentencing judge's orders are set aside, save as to costs, and replaced with:

(i) Liverpool Developing and Erector Group are each convicted of two offences;

(ii) Liverpool Developing is fined $20,000 for the first offence and $15,000 for the second offence; and

(iii) Erector Group is fined $20,000 for the first offence and $15,000 for the second offence:

(1) (a) The sentencing judge did not apply the incorrect standard of proof in finding that the damage was "in all probability" caused by the offending conduct; while the phrase used is not desirable, the

sentencing judge was using the phrase "in all probability" as a substitute for "beyond reasonable doubt": [94] (Bathurst CJ); [134] (Hoeben CJ at CL); [135] (Button J);

(b) there was insufficient evidence to establish that the offending conduct was caused by the damage beyond reasonable doubt; there was no evidence which demonstrated that the initial demolition work had not caused the damage, or that complying with s 81A(2) or condition 26 of the development consent could have avoided the damage being caused: [97]-[101] (Bathurst CJ); [134] (Hoeben CJ at CL); [135] (Button J);

(2) (a) The sentencing judge had not punished Liverpool Developing or Erector Group for a failure to comply with cl 98E(1) of the Regulation, but for a failure to comply with s 81A(2) and condition 26 of the development consent: [108] (Bathurst CJ); [134] (Hoeben CJ at CL); [135] (Button J); and

(b) it is unnecessary to decide whether an offence is "more serious" than another for the purposes of the principle in *R v De Simoni* (1980) 147 CLR 383; [1981] HCA 31 is determined by its maximum penalty or by the objective seriousness of the offence: [109] (Bathurst CJ); [134] (Hoeben CJ at CL); [135] (Button J).

Supreme Court of NSW:

Calarco and Anor v Liverpool City Council **[2018] NSWSC 217** (Johnson J)

Facts: Guiseppe Calarco and Antonetta Calarco (**the plaintiffs**) were the registered proprietors of land on Gurner Avenue, Austral (**the land**). The land was comprised of two portions, one zoned RE1 Public Recreation and the other zoned SP2 Infrastructure and marked "Local Drainage" under the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (**the SEPP**). In February 2016, the plaintiffs made a hardship application for Liverpool City Council (**the defendant**) to acquire the land under the provisions of s 23 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Land Acquisition Act**). The defendant accepted that the plaintiffs had suffered hardship but concluded that while it was required to acquire the portion of the land zoned RE1, it was not required to acquire the remaining land zoned SP2.

The plaintiffs sought declaratory and prerogative relief compelling the defendant to acquire the whole of the land. The plaintiffs contended that the SP2 land zoned for local drainage was "prescribed as a public purpose" referred to in s 26(1)(c) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**), as a result of the SEPP**,** thus enlivening s 21(1)(b) of the Land Acquisition Act.

Issues:

(1) Whether the land zoned SP2 fell within the description "any other purpose that is prescribed as a public purpose for the purposes of this section" in s 26(1) of the EPA Act; and

(2) Whether the defendant was required to acquire the whole of the plaintiffs' land.

Held: The defendant was bound to acquire the whole of the land; the defendant had failed to comply with its statutory duty contained in s 24 of the Land Acquisition Act; order in the nature of mandamus compelling the defendant to acquire the whole of the land; and the defendant to pay the plaintiffs costs:

(1) The SEPP had legislative attributes so that the rules of statutory construction applied to its interpretation: at [90]; prescription by an EPI is permitted by s 5(6) of the *Interpretation Act 1987 (NSW)*: at [89]; cl 5.1 of Appendix 6 to the SEPP prescribes the use of land for local drainage as a use of land for public purpose: at [93]; the SEPP forms part of a coherent overall scheme which sheds light on the operation of s 26(1)(c) of the EPA Act: at [93]; and

(2) The two zoned components of the land had both been designated for acquisition for a public purpose: at [99]; this construction allowed the hardship provisions in the Land Acquisition Act to operate meaningfully and effectively: at [95] and [100]; ss 23 and 24 of the Land Acquisition Act applied to the whole of the land: at [99]; the defendant was bound to acquire the whole of the land under the hardship provisions in ss 23 and 24 Land Acquisition Act: at [102].

David Ian Mansfield as Trustee of the Bankrupt Estate of Maria Fokas v Maria Fokas **[2018] NSWSC 249** (Fagan J)

(related decisions: *Fokas v Mansfield* [2017] NSWCA 231 (White JA); *Fokas v Mansfield (No. 2)* [2017] NSWCA 261 (White JA); and *Fokas v Mansfield (No 3)* [2017] NSWCA 315 (Basten, Meagher and Payne JJA))

Facts: In 2016, David Ian Mansfield (**the plaintiff**), as trustee of the bankrupt estate of Maria Fokas, commenced proceedings claiming possession of real property at 14 English St, Kogarah. On 14 December 2016, the plaintiff obtained, at a hearing the defendant did not attend, judgment for possession of the property. A writ for possession was issued and executed on 30 January 2017. On 20 December 2017, the plaintiff entered into a contract to sell the property. Maria Fokas (**the applicant**) filed five Notices of Motion in the proceedings, between 12 December 2017 and 28 February 2018, seeking an array of orders to give effect to her contention that she was not a bankrupt and that the plaintiff was not entitled to sell the property. On seven previous occasions, the applicant had sought to reagitate the plaintiff's vested title to the property and his right to have vacant possession of it and to sell it.

Issues:

(1) Whether the court was able to entertain the applications made on the Notices of Motion; and

(2) Whether the applicant had "frequently instituted or conducted vexatious proceedings in Australia" as required by s 8 of the *Vexatious Proceedings Act 2008 (NSW)*.

Held: Notices of Motion filed by the applicant on 12 December, 13 December, 21 December, 27 December 2017 and 28 February 2018 dismissed; the applicant to pay costs of those Notices of Motion; the application for a stay of these orders refused; and the applicant is prohibited from instituting proceedings in New South Wales:

(1) The principal proceedings were at an end: at [5]; there was no basis upon which to consider any of the applications made on the Notices of Motion: at [16]. Other particular reasons why the applications must be dismissed included:

- the applicant's bankrupt status was a matter within the exclusive jurisdiction of the Federal Court or the Federal Circuit Court pursuant to s 27 of the *Bankruptcy Act 1966 (Cth)*: at [17];
- there was no jurisdiction in the Supreme Court to grant relief in relation to entries in the National Personal Insolvency Index: at [18]; and
- it was a clear abuse of process to re-agitate a matter which has already been finally settled by an order of the Court, and which the applicant had never sought to have set aside: at [20] to [21]; and

(2) The series of applications made in the Court of Appeal were instituted and pursued without reasonable grounds: at [26]; all Notices of Motion in these proceedings were an abuse of the process of Court as they sought to re-agitate matters already determined: at [24] and [26]; the applications never sought to set aside the primary judgment but pursued forms of relief precluded by that judgment: at [27]. Accordingly, the applicant had frequently instituted or conducted vexatious proceedings: at [28].

Desane Properties Pty Limited v State of New South Wales **[2018] NSWSC 553** (Hammerschlag J); and ***Desane Properties Pty Limited v State of New South Wales [No 2]*** **[2018] NSWSC 738** (Hammerschlag J)

Facts:

Primary decision: Desane Properties Pty Ltd (**the plaintiff**) owned and managed a commercial property located at 68-72 Lilyfield Road, Rozelle. A proposed acquisition notice (**PAN**) was given by the Roads and Maritime Services NSW (**the second defendant**), stating that the land was required "for a public purpose", to the plaintiff on 26 May 2017. The second defendant contended that the land was required as a construction site in connection with the WestConnex project. The plaintiff argued that the PAN was of no statutory effect because it failed to comply with the requirements of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Land Acquisition Act**), read together with the *Roads Act 1993 (NSW)* (**the Roads Act**), in that:

- the PAN did not conform to the Approved Form and was not accompanied by the claim for compensation form under s 39 of the Land Acquisition Act;
- the PAN did not identify the public purpose for which the Property was to be acquired; and
- if the PAN were not otherwise invalid, it would be invalid for the reason that it was given for a purpose beyond and extraneous to the power relied on by the second defendant to give it.

Additionally, the plaintiff claimed that the second defendant was carrying on a business and, in trade or commerce, engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 18(1) of Sch 2 to the *Competition and Consumer Act 2010 (Cth)* because the PAN and its covering letter misrepresented that the plaintiff's land was required for a public purpose.

Costs decision: Final orders were given in an ex tempore decision on 18 May 2018. The second defendant argued that it was appropriate to apportion costs because the plaintiff's claim for misleading or deceptive conduct failed. The plaintiff proposed final orders, including an order quashing the PAN and an injunction restraining the second defendant from relying on the PAN.

Issues:

(1) Whether failure by the second defendant to meet statutory requirements invalidated the PAN;

(2) Whether the proposed acquisition was issued for an improper purpose; and

(3) What were the appropriate final orders.

Held: The proposed acquisition notice was of no statutory effect; and the second defendant to pay the plaintiff's costs:

Primary decision

(1) A PAN must comply with statutory requirements: at [150]. The PAN had to be, but was not, in accordance with an Approved Form under the Land Acquisition Act and was not accompanied by a compensation claim form: at [167]. At the time it gave the PAN, the second defendant's purposes for acquisition had to be sufficiently formulated: at [280]. There was clear statutory necessary intendment or implication that when an owner of land was informed by an authority of State of its intention to take it, the notice will state the public purpose for which the land was to be required: at [223] and [247]. The PAN impermissibly stated the purpose of the acquisition simply as a public purpose: at [130]; and therefore the PAN was required to, but did not, state the public purpose for which the land was proposed to be acquired: at [218] to [223];

(2) The second defendant's power to give the PAN could be exercised only for the purposes of the Roads Act: at [276] and [281]. It was inferred that the dominant purpose in acquiring the property was the provision of open space and green parkland: at [295] and [331]; and this was not a purpose of the Roads Act: at [269]. The PAN was given for an improper purpose: at [337];

(3) The PAN was invalid for statutory non-compliance: at [200]; and, if not otherwise invalid, the PAN was invalid because it was issued for an improper purpose: at [337];

Costs decision

(4) As the general sub-stratum of fact dealt with by the Court concerned both the improper purpose case and the misleading or deceptive conduct case: at [7]; there was nothing to warrant departure from the ordinary rule that costs follow the event: at [7]; and apportionment of costs was not appropriate: at [7] to [8]. The declaration of invalidity was sufficient: at [6] and it was not appropriate to make orders quashing the PAN or granting an injunction: at [6].

[Note: Hammerschlag J detected tension between two High Court authorities providing direction on the level of detail which a PAN must provide as to the public purpose. His Honour noted, at [260], that the question of whether a description which refers merely to the purposes of the Roads Act is specific enough to be considered as disclosing a public purpose, and approved as such, may ultimately be thought to be appropriate for consideration by the High Court.]

EB 9 & 10 Pty Ltd v The Owners SP 934 (No 2) **[2018] NSWSC 546** (Kunc J)

(related decision: *EB 9 & 10 Pty Ltd v The Owners SP 934* [2018] NSWSC 464 (Kunc J))

Facts: EB 9 &10 Pty Ltd (**the plaintiff**) was the registered proprietor of Lot 89 (a car space) in an apartment block. In the principal proceedings, the Supreme Court of New South Wales considered whether it should make a declaration to determine the plaintiff's right to have access over a portion of

common property to park a car in Lot 89 and therefore prevent the Owners Corporation - Strata Plan 934 (**the defendant**) from developing that part of the common property in a way that would inhibit the plaintiff's right of access. The Court concluded that such a declaration was appropriate and proposed Draft Orders to the parties for consideration (at [2]). In relation to costs, the Draft Orders reflected the proposition that costs follow the event.

The parties were unable to agree on a form of orders to give effect to the principal judgment. In these proceedings, the Court dealt with the remaining disputes about the form of the declaration and costs. The defendant submitted that this was a case where, for the purposes of s 253(2) of the *Strata Schemes Management Act 2015 (NSW)* (**the Management Act**), the Court should form the opinion that the taking of the proceedings in this Court was not justified because the Management Act made adequate provision for the enforcement of the rights and remedies which the plaintiff sought to enforce in these proceedings and, as a result of the mandatory nature of s 253(2), the Court must order the plaintiff to pay the defendant's costs. Section 253 relevantly states:

> (1) Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot in a strata scheme or an owners corporation or covenant chargee may have in relation to any lot or common property apart from this Act.
>
> (2) In any proceedings to enforce any such right or remedy, the court in which the proceedings are taken must order the plaintiff to pay the defendant's costs if the court is of the opinion that, having regard to the subject-matter of the proceedings, the taking of the proceedings was not justified because this Act or Pt 4 of the Community Land Management Act 1989 makes adequate provision for the enforcement of those rights or remedies.
>
> (3) The defendant's costs are to be as determined by the court.

Issues:

(1) Whether the taking of the proceedings in the Supreme Court was not justified; and

(2) What were the appropriate orders.

Held: Declaration made; plaintiff to pay the defendant's costs:

(1) To form the opinion referred to in s 253(2), the Court must:

- (a) be satisfied that s 253 applied ("in any proceedings to enforce any such right or remedy … that an owner … may have in relation to any lot or common property apart from this Act"): at [28];
- (b) have "regard to the subject-matter of the proceedings": at [29];
- (c) be satisfied that the Management Act, "makes adequate provision for the enforcement of those rights and remedies" which are "apart from this Act": at [30]; and
- (d) if satisfied of (c), determine whether the "taking of the proceedings was not justified because [the Management Act] makes adequate provision for the enforcement of those rights or remedies": at [31];

(2) Because the Management Act did not confer an express right to obtain the remedy of a declaration: at [28], the plaintiff was seeking to enforce rights or remedies "apart from" the Management Act: at [36]; and the proceedings were subject to s 253(2): at [36];

(3) Adequate provision did not mean identical provision or relief: at [33], but meant sufficient for the purpose of enforcing those rights or remedies: at [30]. Under s 232(1)(a) of the Management Act, the New South Wales Civil and Administrative Tribunal (**NCAT**) could have enforced the same outcome secured by the declaration which the Court decided it would make: at [33] to [34]; and, accordingly, the Management Act made adequate provision for enforcement of the rights and remedies asserted by the plaintiff in these proceedings: at [33] to [36];

(4) The subject-matter of the proceedings was the enforcement of the plaintiff's right to have reasonable access over common area to park a car in Lot 89: at [36]. Whether the proceedings were justified depended on the resolution of the issue of "adequate provision for the enforcement of those rights and remedies": at [37]. Although the plaintiff was entitled to approach the Court for a declaration, the dispute could and should have been dealt with in NCAT: at [38]. Having regard to the subject-matter, these proceedings were not justified because the Management Act did make adequate provision for enforcement of the rights and remedies asserted in these proceedings: at [36];

(5) Once the Court formed the opinion referred to in s 253(2), the Court was required to order the plaintiff to pay the defendant's costs of the proceedings: at [37]; and

(6) Declarations should only be made where required to quell the dispute between the parties: at [22]; and it was necessary only to make the negative declaration set out in paragraph (2) of the Draft Orders: at [24].

Huang v Ceylan **[2018] NSWSC 306** (Parker J)

Facts: Kai Huang and Zuyi Chen (**the plaintiffs**) entered into a contract for sale of a residential apartment with Pelin Ceylan (**the respondent**) on 26 August 2016 and paid a deposit of $90,000 in accordance with the terms of the contract. The development approval for the apartment provided for two bedrooms, but an alteration to turn the "media room" into a third bedroom was made at some point between 2013 and 2016. In September 2016, the plaintiffs served a notice purporting to rescind the contract on the ground that the internal wall creating the third bedroom was illegal. The plaintiffs contended that the vendor had breached the warranty contained in Sch 3 Pt 1 cl 1(d) of the Conveyancing (Sale of Land) Regulation 2010 (**the Regulation**) and cl 16(3) of the Regulation entitled them to rescind the contract. Sch 3 Pt 1 cl 1(d) of the Regulation states:

> 1 The vendor warrants that, as at the date of the contract and except as disclosed in the contract:
>
> …
>
> (d) there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order…

In July 2016, the council of the City of Ryde issued a formal notice to the respondent that it proposed to serve an order under s 121B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) but did not take further action.

Issues:

(1) Whether the development was exempt;

(2) Whether it was open to the council to make a valid order which answers the description of an "upgrading or demolition order" in the statutory warranty; and

(3) Whether the plaintiffs validly rescinded the contract and whether the deposit was forfeited.

Held: Contract validly rescinded; defendant to pay the plaintiffs' costs:

(1) The development was not exempt as the alteration was not "specified development", nor did it comply with the "development standards", within Div 1 Pt 2 cll 2.51 and 2.52 of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008: at [27];

(2) Whether or not the council takes action is not determinative: at [19]; as no consent had been obtained for the alteration of the media room (at [23]), it was open to the council to make an order requiring removal of the wall and reinstatement of the apartment in accordance with the construction certificate plan: at [31]; therefore, the defendant was in breach of the statutory warranty: at [32]; and

(3) It followed that the plaintiffs validly rescinded the contract: at [34]; and the deposit was not forfeited by the plaintiffs: at [34].

Plumpton Park Developments Pty Ltd v SAS Trustee Corporation **[2018] NSWSC 461** (Sackville AJA)

Facts: From 1997, SAS Trustee Corporation's (**the defendant**) land in Plumpton was burdened by a right of carriageway for the benefit of certain adjacent lots. These benefited lots were later consolidated with nearby land, eventually creating the consolidated lot that now forms Plumpton Park Developments Pty Ltd's (**the plaintiff**) land. In these proceedings, the plaintiff argued that the whole of the consolidated lot was entitled to use of the right of carriageway. The defendant contended that only those parts of the consolidated lot which had benefited from the right of carriageway in 1997 were entitled to its use.

Issues: Whether the benefit of the easement extended to all the land creating the consolidated lot, including those parts which did not originally benefit from the creation of the right of carriageway.

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

(1) A right of carriageway may be construed as appurtenant to part of a lot, rather than to the whole of a lot: at [50]. The amalgamation of the lots did not alter the identity or dimensions of the benefited lots to which the easement is appurtenant: at [5]; nor did the amalgamation attach the benefit of the

easement to land not previously part of the dominant tenement: at [56]; and only those portions which were initially benefited by the right of carriageway were entitled to its use: at [59].

Robert Coshott v Charmaine Duarte **[2018] NSWSC 731** (Button J)

Facts: Mr Michael Coshott sued Ms Charmaine Duarte (**the defendant**) in the Local Court of New South Wales and obtained judgment against her for a sum a little more than $29,000. On 10 January 2017, Mr Robert Coshott (**the plaintiff**) swore an affidavit in support of a Notice of Motion in support of a garnishee order of Michael Coshott seeking to enforce his judgment against the defendant. On 31 January 2017, the Local Court made the garnishee order in support of the judgment obtained by Michael Coshott. The defendant sought to have the garnishee order set aside and Magistrate Freund made orders in favour of the defendant. Her Honour found that the evidence indicated that: the affidavit of the plaintiff overstated the amount of the judgment debt; the judgment debt had been reduced by payment of at least more than $22,000 received by Michael Coshott from the defendant; the plaintiff "would have been at least aware" of some of the reduction, because two of the cheques from the defendant were made personally payable to him by Michael Coshott; and in the same vein, the affidavit sought interest on an inflated sum. Indemnity costs were ordered against Michael Coshott on the basis that, in the proceedings before Magistrate Freund, he had sought to rely upon a falsely sworn affidavit.

An application for judicial review was brought by the plaintiff which sought the setting aside or quashing of the adverse finding of the Magistrate without disturbing the order that she had made as a consequence of it. The plaintiff submitted that, following the finding that he had deliberately sworn a false affidavit, his reputation was increasingly tarnished, which was an interest amenable to judicial review if procedural fairness was denied.

Issues:

(1) Whether, and if so to what degree, a judicial officer must provide an opportunity to be heard to a person tangentially involved in proceedings before making an adverse finding about the conduct of that person; and

(2) Whether denial of procedural fairness occurred.

Held: Summons dismissed and the plaintiff to pay the costs of the defendant:

(1) Potential damage to reputation can be a matter that attracts the need for procedural fairness: at [26]. There was authority for the need to provide procedural fairness to parties (at [29]) but none to support the proposition that a judicial officer is required to give a non-party an opportunity to be heard prior to an adverse finding being made about him or her: at [27] and [29]. The plaintiff had not been denied procedural fairness: at [34].

Shoal Bay Developments Pty Ltd v Port Stephens Council **[2018] NSWSC 286** (Parker J)

Facts: Shoal Bay Developments Pty Ltd (**the plaintiff**) owned land which formed part of the Lagoons Estate in Port Stephens. The plaintiff commenced proceedings in 2015 against Port Stephens Council (**the defendant**), claiming that its land was subject to flooding emanating from an adjoining development known as the Seabreeze Estate and that the defendant was responsible for that flooding. In August 2016, a report was prepared by Dr O'Loughlin. The defendant commissioned a report from Dr Martens which was, at least in part, a response to Dr O'Loughlin's report and was completed in October 2016. A subpoena requiring the production of all documents in the possession of Dr Martens and his firm concerning Lagoons Estate and Seabreeze Estate and associated water works, including documents related to Dr Marten's report, was issued on 22 January 2018. The defendant claimed litigation privilege over the 16 documents remaining in dispute on the basis of the common law definition of litigation privilege.

Issues: Whether the documents in dispute had the necessary connection with the litigation to establish litigation privilege.

Held: Claim for privilege over documents produced on subpoena rejected, and leave to inspect the documents granted; the costs of the application to be costs in the cause:

(1) Receipt of the documents by the solicitor who had carriage of the matter for the defendant indicated that the communications related directly to the issues in the proceedings: at [28]; however, the conclusions in Dr Martens' report were significantly wider than simply a response to Dr O'Loughlin's

report: at [17] to [19]; and to permit the respondent to demonstrate privilege as a matter of inference from the documents in dispute would have been seriously unfairness to the plaintiff, as they were not in a position to see and make submissions on those documents: [21] to [25]; especially where more direct evidence could have been given in support of the application: at [20]; [21] and [23]. Consequently, the defendant failed to establish that any of the disputed documents attracted litigation privilege: at [34].

Spring v North Sydney Council **[2018] NSWSC 463** (Parker J)

Facts: Mrs Spring (**the plaintiff**) was the owner of a property at Cremorne in North Sydney. The plaintiff wanted to redevelop the property by renovating and extending the existing residence, including the construction of a paved terrace and landscaping works onto the adjoining lot owned by North Sydney council (**the defendant**). The plaintiff sought orders under s 88K of the *Conveyancing Act 1919 (NSW)* to compel the defendant to grant an easement sufficient to allow the terrace and landscaping to extend onto the adjoining land.

In February 2018, the Minister for Planning made a direction under s 9.1 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) requiring the defendant to establish a local planning panel. The plaintiff sought, by way of notice of motion, an adjournment to enable the plaintiff to submit a development application for the proposed redevelopment to go before an independent planning panel (an option not available before). The plaintiff submitted that the planning outcome sought could be achieved by going to the independent planning panel and obviate the need to pursue the claim for a s 88K order.

Issues:

(1) Whether the creation of a new planning panel obviates the need for a s 88K application; and

(2) Whether the adjournment should be granted.

Held: Application for adjournment refused; and order made for separate and later determination of quantum of any compensation required for the grant of compulsory easement:

(1) In order for a development application for the proposed redevelopment to go before an independent planning panel, the consent of the defendant was required: at [13]; consent did not need to be provided at the time of lodgement, but could be provided any time prior to determination of the application: at [15]. However, unless the s 88K application was determined in the plaintiff's favour, there would be no basis on which the defendant could be compelled to provide the necessary consent: at [16], thus requiring determination of the hearing: at [17]; and

(2) The new planning system was "not an appropriate reason" to adjourn the plaintiff's s 88K application: at [18]. Even if it might be, this was not an appropriate case for adjournment: at [19]. The absence of prejudice to the defendant was not enough to allow the plaintiff's application to proceed: at [20]; the adjournment sought would effectively be open-ended: at [25]; and there was a public interest in bringing the proceedings to determination: at [25].

Land and Environment Court of NSW:

- Judicial Review:

Geoffrey John Lomman v Windbelt Pty Limited **[2018] NSWLEC 29** (Robson J)

Facts: The applicants filed a Summons seeking judicial review (**the Summons**) of the decision of the second respondent, Wingecarribee Shire Council (**the council**), to grant development consent to the first respondent, Windbelt Pty Ltd, to use 254 Centennial Road, Bowral (**the site**) for a maximum of four outdoor concerts per year from 10 February 2017 for a period of five years. The applicants resided on land adjoining the site.

Pursuant to the Wingecarribee Local Environment Plan 2010 (**the WLEP**), use of the site as a "function centre" or "entertainment facility" was prohibited. However, cl 2.8 of the WLEP provided flexibility in relation to prohibited uses where the proposed use was temporary. For a temporary use to be approved, council was required to form a state of satisfaction that the temporary use would not "adversely impact on

any adjoining land or the amenity of the neighbourhood". The applicants contended that council had not satisfied the requirements of cl 2.8.

Issues:

(1) Whether council had failed to reached the state of subjective satisfaction required as a precondition for the exercise of power under cl 2.8 of the WLEP; and

(2) Whether council failed to have before it adequate information upon which to reach the state of satisfaction required.

Held: The Summons should be dismissed and the applicants to pay the respondents' costs:

(1) Having regard to the information that was before council at the time it made the decision which showed that cl 2.8 was at the forefront of the councillors' minds, it could not be maintained that council had failed to reach the requisite state of satisfaction: at [91]; and

(2) It was not agreed between the parties precisely what ground of judicial review was raised in the second issue. As there was material before council, the applicants could not appropriately raise a "no evidence" ground. It was unnecessary to decide whether the requirement to have "adequate" information is a subset of a manifest unreasonableness ground (of a type not pressed in these proceedings) because the material before council was sufficient in any event: at [103].

- Compulsory Acquisition:

SNS Pty Ltd v Roads and Maritime Services **[2018] NSWLEC 7** (Pain J)

Facts: Part of SNS' land at Mascot was compulsorily acquired for the WestConnex road project. The parent parcel and the residue parcel were zoned for mixed use development allowing commercial and residential medium density development in multi-storey buildings. At issue was the amount of compensation payable for the partial acquisition of valuable developable land (in particular market value) and disturbance under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Land Acquisition Act**).

Issues:

Market value: In application of the "before and after" valuation approach requiring determination of assumptions of a prudent vendor and purchaser in relation to the sale of the parent parcel and the residue parcel at the date of acquisition:

(1) For "before" scenario:

(a) what was the appropriate assumption in relation to developable gross floor area of the parent parcel assuming development application (**DA**) granted at date of acquisition; and

(b) identification of comparable sales;

(2) For "after" scenario:

(a) what was the appropriate assumption in relation to developable gross floor area of the residue parcel; and

(b) whether a reduction of land value should take into account increased construction costs because no access to the residue land across the acquired land until the project was completed.

Disturbance: Whether SNS could claim disturbance under s 59(1)(f) of the Land Acquisition Act for:

(1) Stamp duty for the replacement land;

(2) Wasted costs of the parent parcel DA;

(3) Wasted costs of the residue land DA; and/or

(4) Costs of non-valuation consultants engaged to provide advice to SNS' valuer in the compensation claim.

Held:

Market value

(1) (a) No assumption that a DA would be granted as at date of acquisition was available so that density controls in council planning instruments remained relevant to assumptions of hypothetical parties;

(b) Mascot sales in immediate locality were preferable comparable sales: at [212];

(2) (a) Assumption of developable gross floor area was guided by density controls in council planning instruments and what had been achieved on neighbouring sites; and

(b) Reduction of land value for increased construction costs due to lack of access to acquired land warranted: at [317].

Disturbance

Disturbance could be claimed in respect of stamp duty and the consultants' costs ($314,000), but not for the costs of the parent parcel DA or the residue land DA.

(1) SNS was entitled to disturbance which related to the actual use of the acquired land: at [343]. Although the acquired land was vacant, it held a complying development certificate for demolition and therefore had a potential use: at [342]. The potential use of the land was consistent with the use of the land at the date of acquisition: at [343]. The development potential of the acquired land made it reasonable to find replacement land: at [344]. Further, "land banking" for future use could constitute an actual use of land: at [345], particularly as Mr Royal (director of SNS) was in the business of land development and SNS was part of his development portfolio: at [346]. It was therefore reasonable to find replacement land and thus the stamp duty for the replacement land was claimable: at [346];

(2) SNS knew of the reservation of the land by the RMS - suggesting concurrence for a DA was unlikely but pursued the parent parcel DA nonetheless: at [348]. The cost of the parent parcel DA was not wasted as SNS had knowledge of the likely acquisition: at [350]. The costs of the parent parcel DA were not claimable: at [350];

(3) The application of s 59(1)(f) relates to the actual use of the acquired land: at [351]. While the acquired land and residue land had the same potential use, they were not interdependent: at [351]. The costs of the DA for the residue land were therefore not claimable: at [351]; and

(4) Having held that the actual use of the land was for a development site, the costs of the non-valuation consultants arose directly as a consequence of the acquisition and could therefore be claimed: at [353]. There was no basis for construing s 59(1)(f) narrowly by reference to s 59(1)(b) and s 59(2) as submitted for the RMS: at [352]. The costs were reasonable in the circumstance and were therefore claimable: at [354].

United Petroleum Pty Limited v Roads and Maritime Services (No 2) **[2018] NSWLEC 64** (Robson J)

(related decision: *United Petroleum Pty Limited v Roads and Maritime Services* [2018] NSWLEC 35 (Robson J))

Facts: In *United Petroleum Pty Limited v Roads and Maritime Services* [2018] NSWLEC 35 (**the first judgment**), Robson J handed down a judgment containing findings in respect of the issues contested by the parties. The first judgment directed that the parties calculate an agreed quantum of compensation reflecting his findings so that the Court could enter orders accordingly.

The parties were unable to reach agreement as to the date from which the discount rate in the capitalised maintainable earnings calculation should apply. The applicant contended that the discount rate should apply from the date of vacant possession as this was consistent with the finding at [327] of the earlier judgment; the fact that s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Land Acquisition Act**) does not require disturbance to be calculated at the date of compulsory acquisition, and that this was the date at which the loss accrued.

The respondent contended that the discount rate should be applied from the date of compulsory acquisition. The respondent submitted this was because although the valuation experts agreed that the date of vacant possession would be fair, they were also of the view that the Land Acquisition Act required the date of compulsory acquisition to be used. The respondent further submitted this was consistent with the approach in *Qasabian Family Investments Pty Ltd v Roads and Maritime Services; Fishing Station Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 73 (***Qasabian***) which should be followed in the interest of judicial comity.

Issues: The date from which the discount rate should be applied.

Held: The discount rate should be applied from the date of vacant possession:

(1) As a matter of statutory construction, the Land Acquisition Act does not require disturbance to be calculated from the date of compulsory acquisition: at [14];

(2) *Qasabian* is not authority for the proposition that disturbance must be calculated from the date of compulsory acquisition: at [16]; and

(3) In accordance with the finding at [327] of the first judgment, discount rate should be applied from the date of vacant possession: at [17]; and as there were no other outstanding issues between the parties, the orders proposed by the applicant should be entered by the Court: at [18].

- Valuation of Land:

Olefines Pty Ltd v Valuer-General of New South Wales [2018] NSWLEC 18 (Molesworth AJ)

Facts: Olefines Pty Ltd (**the applicant**) is the registered proprietor of two lots, Lot 103 and Lot 5, of land located within the 73 hectare Botany Industrial Park (**the BIP**) in Banksmeadow, which is situated close to Botany Bay and its shipping terminal. Since 1942, the BIP has been developed into a major integrated chemical and plastic manufacturing complex.

Lot 103 is the site of substantial petrochemical plants, buildings and facilities used to convert ethane and LPG into, inter alia, ethylene. Lot 5 is the site of a utilities plant that services the BIP by providing, for example, steam and cooling water. Under the *Contaminated Land Management Act 1997 (NSW)* (**the CLM Act**), both Lot 103 and Lot 5 fall within the meaning of "significantly contaminated land". The uses of Lots 103 and 5 within the BIP petrochemical plant, are categorized as hazardous industry, falling within the definition of "heavy industry" which, within Zone IN1 General Industrial in the State Environmental Planning Policy (Three Ports) 2013, would be a land use which is prohibited were it not for the protection of the existing use provisions under the *Environmental Planning and Assessment Act 1979 (NSW)*.

The Valuer-General of New South Wales (**the respondent**) issued the applicant with land value determinations of Lot 103 and Lot 5 for the base dates of 1 July 2013, 1 July 2014 and 1 July 2015. With respect to Lot 103, the initial issued land values were $79,520,000 for 2013, $82,940,000 for 2014, and $86,870,000 for 2015. However, the issued land values for 2013 and 2014 were subsequently reduced to $70,000,000. With respect to Lot 5, the issued land values were $9,920,000 for 2013, $10,300,000 for 2014, and $12,800,000 for 2015.

The applicant objected to all six of the issued land values. The applicant commenced six similar proceedings appealing, pursuant to s 37 of the *Valuation of Land Act 1916 (NSW)* (**the Valuation Act**), against the respondent's land value determinations. The applicant's objections and its case on these appeals was, under s 34(1)(a) of the Valuation Act, that the land values assigned by the respondent were too high.

Issues:

(1) Ought the contamination of Lot 103 and Lot 5, and the costs of remediation, be taken into account in determining the value of the land pursuant to s 6A of the Valuation Act; and

(2) How ought the improvements on the land be dealt with in determining the value of the land pursuant to s 6A of the Valuation Act.

Held: Appeals dismissed, respondent's valuations confirmed:

(1) Relevant to determining the value of land is a use of that land which is currently occurring but which would be unlawful but for existing use rights. The characterisation of such a use must be determined with a high level of particularity. In order to precisely characterise the existing use of the land to be valued, s 6A(2)(b) provides a methodology by which the particular characteristics of the continuing land use can be precisely identified for the purposes of properly determining the attributes of the land to be valued: at [122];

(2) Improvements on the land are to be taken into account only insofar as to precisely identify what the highest and best use of the land is at the relevant date. The scheme of s 6A(2) is to allow the improvements to remain so as to act as a touchstone to precisely identify and characterise the use of the land being valued: at [124];

(3) Section 6A(2) requires the adoption of the assumption that the land may be used (at the date of valuation) or may continue to be so used. In circumstances where the required assumption is that the petrochemical plant may continue, thereby identifying how the subject land was used at each relevant

valuation date (and may continue to be so used), it is inappropriate for remediation costs of the contaminated land to be taken into account in the valuation exercise: at [131]; and

(4) Contamination would remain a relevant factual circumstance, which ought not be ignored but which does not trigger responsive obligations for as long as the extant petrochemical plant remains. A prospective purchaser carrying out a due diligence assessment of the extant petrochemical plant would be taken to be informed of the contaminated land, that their acquisition would not in and of itself trigger a requirement to clean-up the contamination; and the current legislative regime that requires, normally, the original polluter, if and when remediation is to occur, to be responsible for both the clean-up and the costs thereby incurred: at [138].

Verran v Valuer-General **[2018] NSWLEC 1086** (Maston AC)

Facts: Mr Verran (**the applicant**) appealed under s 37 of the *Valuation of Land Act 1916 (NSW)* against disallowance by the Valuer-General of the applicant's objection to the determination of the land value (**LV**) of 16 Reginald Avenue, Belmore (**the land**) as at 1 July 2016.

A direct comparison of comparable sales accumulated by the expert valuer for the Valuer-General was undertaken and analysis and adjustment of those sales and sales referred to by the applicant.

Issues:

(1) Consideration of sales to deduce the LV of the land;

(2) Determination of the "highest and best use" of the land and adoption of evidence of the expert town planner called by Valuer-General to determine that use;

(3) Consideration of statutory rights of Sydney Water to maintain a sewer main pipeline under the land parallel and adjacent to the eastern boundary of the land and its effect on land value; and value of similar rights and pipelines under comparable sale properties;

(4) Relevance of statistics relating to the Valuer-General's determinations of LV of other land between 2014 and 2016;

(5) Whether the “highest and best use” was for a single dwelling or for a dual occupancy development, both of which being permissible development under the Canterbury Local Environmental Plan 2012 (**the CLEP**), and for subdivision subject to certain development standards in the CLEP and provisions of Canterbury Development Control Plan 2012 (**the DCP**); and

(6) Proper method for determining land area of the land for the purposes of the CLEP and the DCP.

Held: Appeal dismissed; LV confirmed:

(1) The proper method for determining the land area of the land was to adopt the information in DP 307073 which indicated a land area of 594.4 square metres, which is less than the area of 600 square metres required for dual occupancy development under the CLEP: at [13] to [16];

(2) However, the town planner called by the Valuer-General relied on cl 4.6 of the CLEP and the recent decision relating to its application: *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7. This applied to cl 4.1A(3) of the CLEP as to the minimum lot size requirement of 300 square metres and to cl 4.1B(3)(a) - minimum subdivision requirements for dual occupancies and concluded a dual occupancy and subdivision could be approved for the land notwithstanding the minor variations required: at [19] to [20]; this portion was found to be correct: at [21]

(3) As to the comparable sales issue, the valuer for the Valuer-General adopted the sales in the immediate locality, analysed on a block value and not on the basis of a rate per square metre: at [23]. The result was a value range for the land of $1,260,000 to $1,376,000 which exceeded the issued land value: at [23];

(4) As to the applicant’s reliance on statutory valuation statistics, this approach had been rejected by the courts and the applicant’s contentions were rejected: at [26];

(5) As to the sewer main issue, reference was made to s 44 of the *Sydney Water Act 1994 (NSW)*: at [28]. The valuer for the Valuer-General produced sewer service diagrams to show that most of the comparable sales were equally affected: at [30]; as a consequence, no allowance for sewer line influence on the site is appropriate: at [30]; and

(7) The value of the land on the base date was $1,250,000 but, in view of the stance of the Valuer-General (who did not contend for an increase in value), the appeal was dismissed and the LV remained unaltered at $937,000: at [32].

- Criminal:

Campbelltown City Council v Craig Stephen Woolley **[2018] NSWLEC 82** (Robson J)

Facts: Stephen Craig Woolley (**the defendant**) pleaded guilty to two offences. The first was an offence under s 125(1) (now s 9.50) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) that he carried out development for which consent was required (**earthworks offence**). The second offence was pursuant to s 120(1) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) that he polluted waters (**water pollution offence**).

The earthworks offence involved the placing of between 560 and 840 tonnes of fill comprising soil, earth, mud, clay and similar material interspersed with building refuse which contained elements of asbestos (**the fill**) on the defendant's land (**the site**). As a result of heavy rain, approximately 500 tonnes of the fill was washed into natural watercourses including creeks flowing into the Georges River, this event constituting the water pollution offence.

Those parts of the fill containing building waste travelled approximately 155 metres from the rear boundary of the site. The defendant cooperated with Campbelltown City Council to perform remedial works, such works resulting in the defendant incurring costs of approximately $182,000.

Issues:

(1) The objective seriousness of the offences;

(2) Whether the Court should exercise its discretion under s 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**the Sentencing Act**) not to record a conviction;

(3) How the principle of totality should be applied; and

(4) In all of the circumstances, what penalty should be imposed.

Held: The defendant convicted; fined a total of $84,000; ordered to pay the council's costs:

(1) Both the earthworks offence and the water pollution offence fell within the "moderate" range of objective seriousness for offences of each type: at [89];

(2) Having regard to the seriousness of the offences and the importance of general deterrence, it was not appropriate for the Court to exercise its discretion under s 10 of the Sentencing Act: at [131];

(3) Given that each offence arose from the same factual scenario, it was appropriate that the sentence for each be discounted by 30% to avoid the risk of "double punishment": at [135]; and

(4) In all of the circumstances, the appropriate penalty for the earthworks offence was $100,000 discounted by 25% for the defendant's early guilty plea and a further 30% in the application of the principle of totality, giving a final penalty of $52,500: at [145]. The appropriate penalty for the water pollution offence was $60,000 discounted by 25% for the defendant's early guilty plea and a further 30% for the application of the principle of totality giving a final penalty of $31,500: at [145].

Environment Protection Authority v AGL Upstream Investments Pty Ltd **[2018] NSWLEC 32** (Pain J)

Facts: The defendant was charged with an offence under s 64(1) of the *Protection of the Environment Operations Act 1997 (NSW)* of failing to carry out a licensed activity in a competent manner. The licensed activity was "…petroleum exploration, assessment and production…" The competent "treatment, storage, processing, reprocessing, transport and disposal of waste generated by the activity" was a condition of the licence. During a flood event on 5 June 2016, three tanks were washed away at the Defendant's premises in Camden causing "produced water" to escape into flood waters. The Prosecutor submitted that the offence was proven if any one of the three tanks were shown to have been dealt with incompetently. The Defendant submitted that the topographical differences between the tanks and the different responses to them meant they were sufficiently different as to constitute separate offences. The Defendant filed a notice of motion seeking that the summons be redrafted to specify a single offence as it was duplicitous.

Issue: Was the summons duplicitous.

Held: The Summons was not duplicitous; the defendant's Notice of Motion dismissed:

(1) The issue was one of fact and degree which depended on the nature of the charge and the circumstances before the Court: at [55]; this case was distinguishable from *Environment Protection Authority v Truegain Pty Ltd* (2013) 85 NSWLR 125; [2013] NSWCCA 204 (***Truegrain***) where the pleading specified the licensed activities to include the "treatment, storage, processing, reprocessing, transport and disposal of waste generated by the [licensed] activity": at [52] and [61]; in *Truegain*, "storage" and "treatment" were found to be separate although related activities which gave rise to separate offences: at [61]; in this case, the offence related to a single licensed activity of "storage": at [61]; the three tanks were part of that one activity of "storage": at [61]; that the tanks were treated differently and different amounts of water escaped was immaterial: at [61]; there was no unfairness to the Defendant in not requiring the Prosecutor to make an election as the Defendant had been informed of the matters giving rise to competence: at [63]; the revised particulars would also overcome any unfairness to the Defendant: at [63]; charging for three offences would overstate the severity of the offence: at [63].

***Environment Protection Authority v Ardent Leisure Ltd* [2018] NSWLEC 36** (Robson J)

Facts: Ardent Leisure Ltd (**Ardent**) pleaded guilty to two offences. The first was an offence under s 120(1) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) that, at or near d'Albora Marina in Rushcutters Bay (**the marina**), it polluted waters (**Water Pollution Offence**). The second was an offence under cl 19(3) of the Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2014 (**UPSS Regulation**) that it failed to have current "as-built" drawings of an underground petroleum storage system (**UPSS Regulation Offence**).

Until it divested it in 2017, Ardent owned and operated the marina. On 17 May 2016, workers from Petrolink Pty Ltd (**Petrolink**) were working to decommission a disused diesel tank at the marina. Unbeknownst to Petrolink, a delivery line from the disused tank which was severed that afternoon was connected to an active diesel tank's delivery line. That evening, a member of the public used the fuel bowser attached to the extra diesel tank, causing diesel to flow through the severed line, which had been left uncapped, and into the pit in which the tank was housed. The pit captured approximately 1000L of diesel, but a further 5,845L overflowed the tank and polluted the waters of Rushcutters Bay before the delivery system was deactivated.

The majority of the diesel was cleaned up within three days. It was agreed that actual, albeit relatively transient, environmental harm was occasioned as a result of the Water Pollution Offence. Ardent pleaded guilty to both offences at the earliest opportunity. It submitted that its culpability was lessened by its reliance on Petrolink to perform its duties in accordance with professional standards and that there was a risk of double punishment if the principle of totality was not applied. The Prosecutor submitted that Ardent was on notice that it did not have current "as-built" drawings as required by the UPSS Regulation, and that it should therefore be inferred that the UPSS Regulation Offence was committed deliberately.

Issues:

(1) The objective seriousness of the offences;

(2) Whether Ardent's culpability was lessened by the conduct of Petrolink;

(3) Whether the principle of totality should be applied;

(4) Whether the UPSS Regulation Offence was committed deliberately; and

(5) What penalty should be imposed.

Held: Convicting Ardent of each offence; imposing a fine of $135,000 for the water pollution offence and $22,950 for the UPSS Regulation office; making a publication order; and ordering payment of the prosecutor's costs and investigation costs and expenses:

(1) The Water Pollution Offence fell within the moderate range of objective seriousness, and the UPSS Regulation Offence fell within the higher range of objective seriousness: at [115];

(2) Whilst it was understandable for Ardent to place some reliance on Petrolink, the Water Pollution Offence was unlikely to have occurred if Ardent had provided Petrolink with accurate as-built drawings. Both offences were therefore within Ardent's control: at [102];

(3) Although the Water Pollution Offence and UPSS Regulation Offence did not share "elements" in the strict sense, they had common characteristics such that it was appropriate to apply the principle of totality to remove the risk of double punishment: at [154];

(4) Although there was scant evidence as to why a recommendation that "as-built" drawings be prepared was not undertaken, the Prosecutor had not discharged its onus to prove beyond a reasonable doubt that the UPSS Regulation Offence was committed deliberately: at [113]; and

(5) In all of the circumstances, the appropriate penalty for the Water Pollution Offence was $200,000, adjusted by 25% for the early guilty plea and 10% for totality to give $135,000: at [161] and [162]. The appropriate penalty for the UPSS Regulation Offence was $34,000 adjusted by 25% for the early guilty plea and 10% for totality to give $22,950: at [161] and [162]. Ardent was additionally ordered to publish notices in various publications, and to pay the Prosecutor's investigative and legal costs: at [167].

Environment Protection Authority v Dib Hanna Abdallah Hanna **[2018] NSWLEC 80** (Preston CJ)

Facts: Mr Hanna pleaded guilty to committing five offences against s 144AB(2) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) by unlawfully transporting waste to and dumping waste at one private property and dumping waste at three other private properties in Western Sydney between November 2015 and January 2016.

Section 144AB of the POEO Act is the offence of "repeat waste offenders". A person commits an offence against s 144AB if the person is an individual who has been convicted of a waste offence and commits a waste offence on a separate subsequent occasion within five years after that conviction. A waste offence includes an offence against s 142A(1), polluting land, and s 143(1), transporting waste to a place that cannot be used as a waste facility, of the POEO Act: see s 144AB(1).

Mr Hanna has been convicted of a waste offence (the latest being the convictions by this Court on 23 September 2014 for two offences against s 143(1) and two offences against s 142A(1) of the POEO Act). He has committed one further offence against s 143(1) and four further offences against s 142A(1) on separate subsequent occasions between November 2015 and January 2016 (which is within five years after those convictions on 23 September 2014).

The Environment Protection Authority (**the EPA**) prosecuted Mr Hanna for eight offences against s 144AB(2), but agreed, on Mr Hanna being convicted for five offences, to discontinue the proceedings for three offences, which involved Mr Hanna transporting waste contrary to s 143(1) of the POEO Act. Mr Hanna admitted his guilt to these three offences and allowed the Court to take this into account when sentencing him for the five offences to which he pleaded guilty.

The relevant maximum penalties for each of the five offences against s 144AB(2) committed by an individual was a fine of $250,000 (being the maximum monetary penalty provided by the POEO Act for the commission of the waste offence against either s 142A(1) or s 143(1) of the POEO Act by an individual) or imprisonment for two years, or both: s 144AB(2).

Issue: To determine and impose sentences for the five offences against s 144AB(2) of the POEO Act.

Held: Defendant is convicted of the offences as charged and sentenced to an aggregate sentence of three years imprisonment, with a non-parole period of two years and three months; publication order made pursuant to s 250(1)(a) of the POEO Act, order for restoration made pursuant to s 225 of the POEO Act; defendant is to pay the prosecutor's costs:

(1) The POEO Act was amended to create the new repeat waste offence, with the more severe penalty of imprisonment for up to two years, to deter and punish repeat waste offenders (at [98]); the significant degree to which Mr Hanna's conduct offended against the objects of the POEO Act and the statutory provisions creating the waste offences and the offence of repeat waste offending and undermined the regulatory scheme increases the objective seriousness of the offences (at [102]);

(2) Mr Hanna's actions caused or were likely to cause harm to the environment of and around the four properties and exposed their occupants to the risk of harm to their health; this harm was intended and could reasonably have been foreseen; this harm is "substantial" and an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999 Act (NSW)* (**the Sentencing Act**): at [188];

(3) Mr Hanna committed the offences to save incurring the expense of paying the tipping fees charged by licensed waste facilities and thereby to increase the money he earned; the commission of the offences for financial gain increases the objective seriousness of the offences: at [126]-[128];

(4) Mr Hanna may have breached his commercial agreement with the land owners by committing the offences but he did not abuse any position of trust in relation to the land owners so as to engage the

aggravating factor in s 21A(2)(k) of the Sentencing Act (at [143]); the land owners were also not a vulnerable class of person so as to engage s 21A(2)(l) of the Sentencing Act (at [147]);

(5) The Court is not to have "additional regard" to any aggravating factor in sentencing for an offence if it is an element of the offence: see s 21A(2) of the Sentencing Act (at [156]); an element of the offence against s 144AB(2) is the commission of a waste offence within five years of being convicted of a waste offence (at [158]); the Court can, however, have regard to Mr Hanna's record of previous convictions for waste offences imposed more than five years before the commission of the current offences against s 144AB(2); these prior convictions indicate that more serious penalties for the current offences are warranted to achieve the purposes of retribution, deterrence (particularly individual deterrence) and protection of society (at [163]);

(6) Although there were delays in Mr Hanna entering pleas of guilty (at [166]), Mr Hanna pleaded guilty at a reasonably early opportunity and before the matter was fixed for hearing; he should be afforded a 20% discount, which is significant, but not the maximum, discount for the utilitarian value of his pleas of guilty to the criminal justice system: at [175]-[176];

(7) The Court cannot find that Mr Hanna is unlikely to reoffend; Mr Hanna's conduct in committing the offences was part of the systematic business of collecting and depositing waste; his failure to explain whether, and if so how, he intends to change the way he conducts his business reveals a lack of insight into his offending behaviour, a lack of genuine remorse, and a lack of a definite proposal to reform and rehabilitate himself as an offender and to protect the public: at [192]-[193];

(8) Having regard to the circumstances of the current offences committed by Mr Hanna and of Mr Hanna as the offender and the purposes of sentencing, no penalty other than imprisonment is appropriate for each of the offences (at [220]); applying an instinctive synthesis to these circumstances, an indicative term of imprisonment for each offence is one year and three months; these terms should be discounted by 20% for his early guilty plea to a term of one year (at [223]);

(9) Applying an instinctive synthesis and the totality principle, the appropriate way to achieve relativity between the total criminality involved in committing the five offences and the total sentence for the five offences is to impose an aggregate sentence of three years for all of the five offences: at [247];

(10) As there are no special circumstances, the non-parole period for the aggregate sentence is to remain at the minimum period of two years and three months: at [257];

(11) The imposition of a fine in addition to a sentence of imprisonment on Mr Hanna for any of the offences he committed will not better achieve any of the retributive, preventative or restorative purposes of sentences: at [259];

(12) A publication order should be made to publicise the detection, prosecution and punishment of the offences of repeat waste offending committed by Mr Hanna and to improve the deterrent effect of the sentence: at [257];

(13) A restoration order should be made in order to achieve the restorative sentencing purpose of making good the harm to the environment caused by the commission of the offences: at [277];

(14) An order for costs serves to compensate the prosecutor as the successful party, not to punish the offender as the unsuccessful party (at [280]); the fact that the prosecutor might not be able to recover all or any of the costs ordered from Mr Hanna, because he has insufficient funds, is not necessarily a reason not to make an order for costs (at [285]); it is appropriate to order that Mr Hanna pay the prosecutor's costs (at [289]).

Environmental Protection Authority v Laison **[2018] NSWLEC 76** (Sheahan J)

Facts: Matthew Laison (**the defendant**) pleaded guilty to an offence under s 144AA of the *Protection of the Environment Operations Act 1997* (**the POEO Act**). The Environmental Protection Authority (**the EPA**) prosecuted the defendant for supplying false or misleading information about waste to another person, in the course of dealing with that waste. On 29 October 2012, the defendant had supplied to Gesu Lustri two weighbridge dockets purporting to be issued by SITA Australia Pty Ltd (**SITA**), in the course of disposing waste from 33 York Street, Sydney. The two weighbridge dockets were false and not issued by SITA. On either 28 or 29 October 2012, the defendant unloaded the waste from his truck at the back of a property at Lot 120 Martin Road, Badgerys Creek. The offence first came to the attention of an EPA authorised officer on 4 December 2013.

The prosecutor sought an order pursuant to s 250(1) of the POEO Act that any financial penalty imposed should be made payable to the Environmental Trust for general environmental purposes. Further, the prosecutor sought an order of costs in an agreed sum of $45,000.

Issues: What was the appropriate penalty for the offence.

Held: The defendant convicted; ordered to pay $40,000 to the Environmental Trust; and pay the prosecutor's costs in the agreed sum of $45,000:

(1) *Objective seriousness*: The defendant's offending was "middle range": at [66]. Notably, the defendant's conduct offended against the objectives of the POEO Act: at [35]. The defendant acknowledged that his conduct undermined the administrative system for environment protection: at [39]. The defendant admitted that he knew that he was falsifying documents, and that the Martin Road property was not an authorised facility for accepting waste: at [40]. The defendant had a financial motive, as he avoided payment of the waste levy, and either he or Mr Lustri received payment for the tip fees: at [43]-[44]. The defendant's submissions that the waste was recyclable and that the prosecutor had the onus to prove it was not recyclable were rejected: at [45]-[48]. The defendant presented no evidence to support this claim, and that this claim did not necessarily negate the fact that harm was, or was likely to be, caused by the commission of the offence: at [48]; and

(2) *Subjective circumstances*: The relevant aggravating factor was financial motivation: at [63]. The relevant mitigating factors were the defendant's reasonably early guilty plea, his remorse, and his prospects of rehabilitation: at [63]. The defendant was entitled to a substantial discount, on account of a reasonably early guilty plea and some evidence of remorse and good character: at [64]. However, there was no evidence that the defendant assisted the prosecutor: at [64].

Hunters Hill Council v Carter **[2018] NSWLEC 84** (Moore J)

Facts: Mr Carter (**the defendant**) was charged with, and pleaded guilty to, an offence against s 125(1) of the *Environmental Planning and Protection Act 1979 (NSW)*. The conduct giving rise to the offence was that the defendant engaged an unknown tree-lopping contractor to lop/top 13 trees protected by the Hunters Hill Local Environmental Plan 2012.

Issues: What was the appropriate penalty.

Held: The defendant convicted; fined $45,000 and ordered to pay the prosecutor's costs in an agreed sum of $30,000; and further orders by consent for ongoing management of the trees:

(1) By reason of the trees' health, trunk size and height before their lopping/topping ([44] and [49]), and the unlikelihood of recovery following the lopping/topping ([45] to [46]), the offending conduct caused environmental harm of medium seriousness and was thus an aggravating factor: at [49] to [51];

(2) The defendant did not have any prior convictions: at [68]; and had otherwise been of good character: at [71]. The defendant expressed genuine contrition and remorse: at [76]; and cooperated with the prosecutor: at [78]. The defendant was entitled to a 25% discount given in recognition of entering his guilty plea at the earliest possible opportunity: at [77];

(3) There was a need for a modest element of specific deterrence to reinforce the defendant's understanding of the requirement to obtain/verify permits: at [83]. There was also a need for general deterrence to reinforce the necessity to obtain necessary permits: at [85] to [87];

(4) No evidence was provided concerning the defendant's financial capacity: at [96]; however, the defendant had agreed to pay the prosecutor's costs in the amount of $30,000: at [97];

(5) The offending conduct was classified as a Tier 2 offence falling under s 125B of the EPA Act and the maximum penalty applicable for the offending conduct was $500,000: at [29]. The conduct was at the middle of the low range of such offending: at [95]. Instinctive synthesis of objective and subjective factors determined an appropriate starting penalty of $60,000: at [114]. A discount of 25% was applied as a consequence of the defendant's early guilty plea: at [114]; and

(6) Consent orders were made for an ongoing regime to protect re-establishment of the trees.

***Inner West Council v Prilis* [2018] NSWLEC 72** (Sheahan J)

(related decision: *Prilis v Marrickville Council* [2012] NSWLEC 1348 (O'Neill C))

Facts: Anastasios Prilis (**the defendant**) pleaded guilty to an offence against s 125 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**). The council prosecuted the defendant for carrying out specified development, without development consent (**DC**) and in breach of s 76A(1) of the EPA Act. The defendant had used an existing building for the purpose of a boarding house, other than in accordance with his DC, which required him to hold an occupation certificate, a final fire safety certificate and a compliance certificate. From 19 December 2012 to 25 August 2014, the defendant conducted an unlawful "boarding house" at the Tresillian heritage building in Petersham, by:

(i) wholly or partly letting lodgings;

(ii) providing lodgers with a principal place of residence for three months or more;

(iii) having shared facilities, such as a communal kitchen;

(iv) having rooms, some of which had private bathroom facilities, that accommodated one of more lodgers; and

(v) not being used for the purpose of backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment for the purposes of the Instrument.

The significance of the charge period dates is as follows:

(1) 19 December 2012 was the date on which Commissioner O'Neill granted the defendant the relevant "adaptive re-use" DC for his boarding house project; and

(2) 25 August 2014 was the date on which some of the existing improvements on his land were seriously damaged as a result of an arson attack. The defendant was absent in Greece, between 7 July 2014 to about 12 or 14 September 2014, and there is absolutely no allegation against him or "anybody associated with him" in respect of the arson attack.

At the conclusion of the hearing, the parties agreed that: firstly, the prosecutor would provide an estimate of its costs and advise of any agreement with the defendant, and secondly, the defence would seek agreement of the prosecutor to the submission of some testimonials in support of the defendant.

Issues: What was the appropriate penalty for the offence.

Held: The defendant convicted; fined $115,500 and ordered to pay the prosecutor's costs as agreed or assessed:

(1) *Objective seriousness*: The defendant's offending was of high objective seriousness: at [101]-[103]. However, the principal victim of the physical harm was the defendant, in that he suffered $800,000.00 of uninsured damage: at [106]. The major harm for which the defendant stood to be sentenced was that done to the regulatory regime: at [106]. Apart from such harm, none of the statutory aggravating factors had been established: at [106]; and

(2) *Subjective circumstances*: Most of the statutory mitigating factors had been largely agreed to apply to the defendant: at [106]. These included: his good record, his co-operation, his plea, his character, and the unlikelihood of further offending: at [106]. In view of the low likelihood of further offending, the appropriate sentence did not need to reflect specific deterrence: at [106]. The defendant would be required to meet substantial legal costs for both sides, and that these financial impositions would impact heavily on his capacity to fix or finish his project: at [106].

***Secretary, Department of Planning and Environment v Shoalhaven Starches Pty Ltd* [2018] NSWLEC 23 (Moore J)**

Facts: On 28 January 2009, the Minister for Planning granted Project Approval in respect of Major Project Application MP 06_0228 for the Shoalhaven Starches Expansion Project. Shoalhaven Starches Pty Ltd (the defendant) made several applications to modify the MP Approval. Each modification application was accompanied by a political donations disclosure statement which disclosed donations made by the Manildra Group of which the defendant was part. These proceedings concerned five charges brought against the defendant pursuant to s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) for failing to disclose reportable political donations. Although the donations relating to the charges were made by one of the defendant's directors, there was an

obligation, in each instance, for the defendant to disclose the donations pursuant to Pt 6 the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* (**the EFED Act**).

On 25 August 2017, the defendant pleaded guilty to the five charges - one charge of single failure to disclose political donations (**Charge 5**) and four charges of failing to disclose multiple donations (**Charges 1 to 4**).

Issue: What were the appropriate penalties for the defendant's offences.

Held: The defendant convicted, fined a total of $107,000 and ordered to pay the prosecutor's costs of $40,000; a publication notice was ordered in relation to Charges 1 to 4:

(1) The reckless indifference or negligence of the defendant's Company Secretary constituted an aggravating factor: at [58]. The past record of the defendant was not considered a matter of aggravation: at [62]; and the offences were not carried out for financial gain: at [66];

(2) There was a need for specific deterrence to reinforce the defendant's understanding of the requirement to disclose reportable political donations: at [87]. There was also a need for general deterrence to highlight the desirability of appropriate recording and reporting arrangements: at [130];

(3) The defendant entered an early guilty plea, entitling it to a discount of 25%: at [122] to [123]; the defendant cooperated with the prosecutor: at [126]; and showed remorse and contrition: at [101];

(4) The maximum penalty applicable for each offence was $44,000: at [16]. The four offences where there were multiple failures to disclose were at the middle of the high range of such conduct: at [141]; and the failure to disclose the single donation was in the middle of the medium range of such offences: at [141]. The appropriate starting penalty was $36,000: at [154]; and a total discount of 27.5% was applied as a consequence of the defendant's early guilty plea and consideration of totality and accumulation: at [155] to [156]; and

(5) Fines totalling $107,000 were appropriate as an accumulatively discounted outcome: at [158]. The defendant was fined the following amounts in relation to each charge (at [175]):

- Charge 1 - $26,000
- Charge 2 - $24,000
- Charge 3 - $22,000
- Charge 4 - $20,000
- Charge 5 - $15,000**.**

Shoalhaven City Council v Hayes **[2018] NSWLEC 65** (Moore J)

Facts: Mr Hayes (**the defendant**) was charged with, and pleaded guilty to, one offence against s 125(1) of the *Environmental Planning and Protection Act 1979 (NSW)* (**Charge 1**) and two offences against s 12 of the *Native Vegetation Act 2003 (NSW)* (**Charges 2 and 3**). The conduct giving rise to the offences was that the defendant cleared native vegetation and carried out development without development consent, where development consent was required prior to the carrying out of the clearing and development.

Issues: What was the appropriate penalty for the defendant's offence.

Held: Defendant convicted; fined $75,600 and ordered to pay the prosecutor's costs as agreed or assessed; and the defendant was ordered to pay one-third of the prosecutor's investigation costs and expenses:

(1) The defendant committed the offence in anticipation of financial gain and this was an aggravating factor: at [52]. The cutting down of the 77 trees did not cause substantial harm to the environment for the purposes of constituting a factor of aggravation: at [46];

(2) The defendant did not have any prior convictions: at [54]; and had cooperated with the prosecutor: at [61]. The defendant was entitled to a 25% discount given in recognition of entering his guilty plea at the earliest possible opportunity: at [60];

(3) There was a need for specific deterrence to reinforce the defendant's understanding of the requirement to obtain/verify permits: at [68] to [69]. There was also a need for general deterrence to reinforce the necessity to obtain necessary permits: at [71];

(4) The defendant did not establish that he would be unable to pay the fine or the prosecutor's costs as assessed: at [107]; and

(5) The maximum penalties applicable for each of the offences was $500,000: at [42]. The conduct was at the upper end of the low range of such offending: at [87]. The appropriate starting penalty for each offence was $45,000: at [114]. A total discount of 30% (to $31,500) for each offence was applied as a consequence of the defendant's early guilty plea and having regard to the other positive subjective factors: at [132]. Charges 2 and 3 were adjusted for accumulation and totality (Charge 2 to $25,2000 and Charge 3 to $18,900): at [134] to [136].

- Criminal Appeals From Local Court:

Ku-ring-gai Council v Antony Comanos **[2018] NSWLEC 24** (Robson J)

(related decision: *Woollahra Municipal Council v Sahade* [2012] NSWLEC 76 (Preston CJ))

Facts: The proceedings were an appeal against a decision of the Local Court to dismiss proceedings against the respondent. Pursuant to s 42(2B)(b) of the *Crimes (Appeal and Review) Act 2001 (NSW)* (**the Appeal Act**) such an appeal is limited to a "question of law alone". Mr Antony Comanos (**the respondent**) had been charged with carrying out development that required development consent contrary to s 76A(1)(a) of the *Environmental Planning and Assessment Act 1979 (NSW)*. The development in question was a tiered entry including stairs at the front of the respondent's house.

At first instance, Reiss LCM held that the development constituted a pathway and was therefore exempt development pursuant to cl 2.55 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**the Codes SEPP**). In so doing, Reiss LCM placed reliance on the decision of Preston CJ of LEC in *Woollahra Municipal Council v Sahade* [2012] NSWLEC 76 (***Sahade***) in which his Honour held that a stairway can be a pathway for the purposes of the Codes SEPP.

The appellant argued that Reiss LCM fell into legal error by relying on *Sahade* because the legislative context had changed since the decision such that the statutory conclusion was no longer applicable. The respondent argued that the appeal did not raise a question of law alone and further that the decision at first instance was not affected by legal error.

Issues:

(1) Whether the appeal raised a question of law alone; and

(2) Whether Reiss LCM fell into legal error in dismissing the charge against the respondent.

Held: The appeal should be dismissed with costs:

(1) The appeal raises a question of law alone. A question of statutory construction is a question of law and provided that it can be articulated separately from its application to the facts it will meet the description of a question of law alone (at [40]).

(2) Whilst the statutory context of the Codes SEPP has changed since *Sahade*, Preston CJ of LEC dealt with the question of whether a stairway could be a pathway as an individual question of construction. Reiss LCM did not fall into error by relying upon this reasoned conclusion in dismissing the charge against the respondent (at [60]).

- Civil Enforcement:

Blacktown City Council v Saker (No 2) **[2018] NSWLEC 71** (Molesworth AJ)

(related decision: *Blacktown City Council v Saker* [2017] NSWLEC 46 (Preston CJ))

Facts: Mr Jason Saker (**respondent**) is the occupier and former joint proprietor of land at Shane Park Road, Shanes Park, New South Wales (**the land**).

The land is located in the Blacktown Local Government Area and is zoned RU4 Primary Production Small Lots under the Blacktown Local Environmental Plan 2015 (**the BLEP**). It is bounded to the north by a creek known as South Creek and is traversed by a small tributary known as "Stoney Creek".

Blacktown City Council (**the council**) alleged that from late 2016 to March 2017, the respondent caused or permitted the land to be used for the receipt of fill material (including building waste, soil, rocks and other material) and earthworks (**the works**).

This, the council submitted, was a prohibited development under the BLEP and the then s 76B (now s 4.3) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**). As such, the applicant council sought declaratory and injunctive relief, and orders under the then s 124 (now s 9.46) of the EPA Act relating to the preparation and execution of a remediation plan.

On 22 December 2016 the council made an order, and on 1 March 2017 an emergency order, under s 121B of the EPA Act ordering the respondent to cease the Works, lawfully dispose of the fill material, and restore the property to its natural level. The council alleged that the respondent failed to comply with these orders, and on 24 March 2017 and again on 31 March 2017 the council was granted interlocutory injunctive relief with respect to the Works.

Issues:

(1) Whether the matter ought to be heard ex parte;

(2) Whether the respondent's bankruptcy was a bar to proceedings;

(3) Whether the respondent undertook the Works;

(4) Whether the Works were prohibited development under the BLEP;

(5) Whether the Works were undertaken in contravention of s 76B of the EPA Act;

(6) Whether declaratory relief ought be granted; and

(7) Whether costs ought to be ordered on an indemnity basis.

Held: Declaratory and injunctive relief granted, respondent to pay council's costs on an indemnity basis:

(1) The Court was satisfied that the respondent had been or ought to have been aware that the matter had been set down for hearing and that he had been served with the substantive evidence of the council in the proceedings. As such, it was appropriate for the hearing to continue in the absence of the respondent: at [24]-[37];

(2) The respondent's bankruptcy did not prevent the proceedings or require that they be stayed, as they were not in respect of a "provable debt": at [17]-[18];

(3) There was no doubt that the respondent either carried out, caused to be carried out or allowed to be carried out the Works: at [107]. The respondent's suggestion- contained in records of interview- of an excuse, placing blame upon another person, lacked credibility and was likely a convenient self-serving response to the officers' questioning: at [113];

(4) There was no other appropriate description of the Works other than "earthworks". They were not "flood mitigation work": at [110]-[112];

(5) In the context of the land being zoned RU4 Primary Production Small Lots under the BLEP, the Works were prohibited and therefore were undertaken contrary to s 76B of the EPA Act: at [110];

(6) In the circumstances of this respondent, as a succinct statement of the Court's findings, the Court should make the declaration sought, together with all the consequential orders that the council sought: at [117]-[121]; and

(7) There was a sound basis for an order that the respondent pay all the council's costs on an indemnity basis. The approach that the respondent took in the proceedings put the council in a position where it had to go to far greater effort, all at an extra cost, to bring these proceedings while maintaining strict adherence to conduct which would ensure that principles of justice and fairness were met: at [122]-[125].

***Cumberland Council v Cando Management and Maintenance Pty Ltd* [2018] NSWLEC 83** (Pain J)

Facts: Cumberland Council (**the council**) sought various orders and declarations in relation to a multi-dwelling development in Guildford constructed in 2013 by Cando Management and Maintenance Pty Ltd (**the respondent**). The development consent was granted on 23 July 2004. Under s 95(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**), the consent lapsed on 23 July 2009, if not physically commenced. Demolition work was carried out in 2009. If the consent lapsed in 2009 the development was built in breach of s 76A(1)(a) as no consent existed. The development built in 2013 would also be prohibited development in breach of s 76B of the EPA Act due to changes in the Parramatta Local Environmental Plan in 2011. The development was built without a construction certificate as required by s 81A(2) of the EPA Act meaning it could not be issued with an occupation certificate. A principal certifying authority was not appointed as required by the conditions of consent.

The respondent submitted that the issue of lapsing should not be considered as it would have no practical effect and would be a merely technical exercise. In the event the Court did consider the issue of lapsing, the respondent initially relied on demolition work carried out in 2009 to prove physical commencement. In the course of the proceedings, it was agreed that the demolition work was carried out contrary to the consent. The respondent therefore sought to rely on further work carried out in 2009 being clearing of the site, clearing of trees and shrubs, water disconnection and the erection of temporary safety fencing.

The respondent filed a cross-claim seeking declarations that the consent had not lapsed and that the development could be occupied without an occupation certificate. The respondent also sought orders that a schedule of agreed works could be carried out to rectify the development in order to render it safe and fit for occupation which could then be independently certified as completed.

Issues:

(1) Should the Court consider the issue of lapsing of development consent;

(2) Which party had the onus of proving the consent had lapsed;

(3) Had the consent lapsed; and

(4) Should the council's declaration and order be made in the exercise of Court's discretion.

Held: Declaration that the respondent carried out prohibited development for which no development consent was in force in breach of s 76B of the EPA Act; the respondent was restrained from using the development for residential purposes until such a purpose was authorised by a development consent and a building certificate was issued for the development; no occupation certificate was issued as this would be a breach s 109M of the EPA Act; the respondent to pay the council's costs:

(1) The issue of lapsing should be determined: at [53]; the exercise of the Court's discretion to make a declaration and/or order is informed by the nature of the breach of the EPA Act: at [50]; the nature of the breach could not be resolved without first determining the issue of lapsing: at [50];

(2) The council as the moving party would ordinarily bear the onus on the balance of probability: at [80]; when the respondent relied on demolition to prove physical commencement, the council could readily discharge its onus: at [81]; when the respondent sought to rely on further works, the council had to respond without notice and could not be expected to have been aware of the further works without investigation: at [81]; the council need not always bear the onus of establishing lapsing where not all relevant matters are or could reasonably be expected to be within its knowledge: at [81]; the respondent accepted that it bore the onus of proof of physical commencement but not that development consent conditions were complied with; the respondent had the onus of establishing the consent had not lapsed including whether development consent conditions complied with so that lawful: at [85].

(3) Works must be lawful to be work "relating to" a development: at [78]; there was no evidence before the Court of site clearing: at [92]; there was no evidence before the Court that the trees and shrubs were removed by a qualified arborist or tree surgeon as required by the consent - meaning no conclusion could be made as to whether the clearing was lawful and therefore related to the development: at [89]; there was no evidence of the extent of the work involved in disconnecting water to the development such that it could be found to be physical work relating to the development: at [90]; no Principal Certifying Authority was appointed prior to the erection of safety fencing meaning this was done contrary to the consent: at [91]; the consent had lapsed: at [93].

(4) Declaration made and an order restraining the use of the premises until certain specified events occurred: at [100] and [112].

***Fordham v Environment Protection Authority* [2018] NSWLEC 28** (Molesworth AJ)

Facts: The Environment Protection Authority (**the EPA**) was investigating whether offences had been committed against the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) arising out of the transportation and application of waste to land on the banks of the Hawkesbury River near Spencer.

On 10 May 2016 the EPA executed a search warrant at the premises of Enviro Recycling Pty Ltd (**Enviro**) (now known as Violet St Investments Pty Ltd) and which had been the holder of an Environment Protection Licence (**EPL**) authorising waste storage and resource recovery at premises in Revesby.

The EPA subsequently issued the four notices pursuant to s 203 of the POEO Act:

(1) Notice No 1541013 dated 25 May 2016 issued to the First applicant, Mr Bruce Fordham - a director of Enviro from 1 May 2014 to 5 July 2017 (**Fordham Notice**);

(2) Notice No 1540836 dated 25 May 2016 issued to the Second applicant, Mr Andrew Leslie- the operations manager of Enviro (**Leslie Notice**);

(3) Notice No 1549216 dated 20 February 2017 issued to the Third applicant, Mr Yussef Fahda- the accounts manager and book keeper of Enviro (**First Fahda Notice**); and

(4) Notice No 1552370 dated 25 May 2017 issued to Mr Fahda (**Second Fahda Notice**).

Each notice stated that an identified authorised officer required the relevant applicant "to attend at a specified place and time to answer questions under s 203 of the [POEO] Act"

Three of the four notices nominated a place and time for the relevant applicant to attend and answer questions under s 203 of the POEO Act in the event of a failure to nominate a reasonable place and time by a stipulated deadline. Each notice warned (for the purposes of s 212 of the POEO Act) that it was an offence against the POEO Act to fail to comply with the notice unless there was a lawful excuse for not complying. The applicants did not comply with the notices.

On 28 July 2017 the applicants commenced Class 4 proceedings against the EPA seeking, inter alia:

(1) A declaration that on a proper construction of s 212(3) of the POEO Act, any information provided by the applicants in compliance with the notices is, on objection on the ground of self-incrimination, not admissible for the purpose of any prosecution of the applicants under s 169 of the POEO Act; or

(2) In the alternative, a declaration that, on the proper construction of s 211 of the POEO Act, the applicants have a lawful excuse to refuse to answer questions in circumstances where the applicants are in jeopardy of a future prosecution under s 169 and where the respondent refuses to provide an undertaking to the effect that the applicants' compelled answers will not be used against them in any such prosecution.

On 4 September 2017, the EPA filed a Cross Summons against the applicants, seeking:

(1) Declarations that each of the applicants, by failing to nominate a date and time to answer questions and/or failing to attend at the specified place, was in breach of s 203 of the POEO Act; and

(2) Orders that each of the applicants, in effect, comply with the relevant notices.

Issues:

(1) Whether information provided pursuant to s 203 of the POEO Act by the applicants, on objection on the ground of self-incrimination, was not admissible for the purposes of any prosecution of the applicants under s 169 of the POEO Act;

(2) Whether the applicants have a lawful excuse to refuse to answer questions; and

(3) Whether the applicants have contravened s 203 of the POEO Act.

Held: Application dismissed, cross application upheld, applicants to pay EPA's costs:

(1) Given that the applicants have not been charged and that there is no prosecution pending, the principles which the applicants rely upon in justification for not attending a specified place and time to answer questions do not apply: at [94]-[95];

(2) The relief sought by the applicants is, in effect, a request for an advisory opinion in relation to a hypothetical situation which does not currently, and may never, exist. It was not open to the Court to provide legal advice as to how s 212(3) would be applied if the applicants were prosecuted for special executive liability offences. It was only open to the Court to determine that, at that point in time, the applicants had not articulated a lawful excuse or acceptable justification to demonstrate that they were not in breach of the relevant requirements: [96]-[102];

(3) The applicants did not breach the notices (and, therefore, the POEO Act) by failing to nominate a place and time. When given an opportunity to do so, notified persons have an *option* to nominate a place and time, but the statutory scheme clearly envisages that when such affected persons fail to nominate, a default option is provided: this was that the second step was the nomination of such a place and time by the authorised officer: at [85]-[88]; and

(4) However, by failing to attend at a specified place (in respect of the Fordham Notice, Leslie Notice, and Second Fahda Notice), the applicants have failed to comply with a requirement made under s 203 of the POEO Act and therefore have breached the POEO Act: at [88]-[91], [102] and [104].

Strathfield Municipal Council v C & C Investment Trading Pty Ltd (No 3) **[2018] NSWLEC 69** (Sheahan J)

(related decisions: *Strathfield Municipal Council v C & C Investment Trading Pty Ltd* [2018] NSWLEC 17 (Moore J); *Strathfield Municipal Council v C & C Investment Trading Pty Ltd* [2017] NSWLEC 155 (Sheahan J); *C & C Investment Trading Pty Ltd v Strathfield Municipal Council* [2015] NSWLEC 1243 (Brown C); *C & C Investment Trading Pty Ltd v Strathfield Council* [2015] NSWLEC 1308 (Pearson C))

Facts: On the 11 July 2014, C & C Investment Trading Pty Ltd (**C&C**) lodged a development application (**DA**) for a boarding house development at 51-55 Homebush Road Strathfield, including balconies and a roof terrace. The site also contained a heritage building proposed to be used for boarding house purposes. The council refused the DA on grounds that included the detrimental effects of the terrace and balconies. On 2 July 2015, Brown C granted development consent (**DC**), on a deferred commencement basis, and on amended plans which excluded the balconies and roof terrace. By 10 December 2015, the council issued the deferred commencement consent, which was subsequently dealt with by the private certifier (**PCA**), Alex Mullin (**Mullin**).

On 11 April 2016, Ms Cai (**Cai**), on behalf of C&C, sent to Mullin a plan adding "nib walls" and balconies to the project, but no modification application was lodged. Mullin did not reply. On 15 April 2016, the council served an "emergency stop work" order. A further construction certificate was issued, approving a "Basement Plan" on 28 April 2016. By July 2016, C&C had commenced renting the rooms in the heritage building and they were fined by the council for this breach. On 16 December 2016, the council requested Mullin to audit the project, and Mullin responded to this request on 9 January 2017.

On 6 March 2017, the council issued an official warning letter to Cai regarding the unauthorised works. Cai lodged a s 96 modification application (to regularise non-compliances) and a Building Certificate (**BC**) application. Both were rejected and Class 1 appeals were lodged. Between 29 August 2017 and 6 September 2017, the council issued Notices of Intention to issue Orders (including s. 121B order). On 6 September 2017, council inspected the site and found no one in residence. However, they observed unauthorised elements of the development, including blade walls, a hard-stand courtyard, balconies on many rooms, and an enclosed outdoor area.

Around 11 to 15 September 2017, Mullin was replaced as PCA by the third respondent, Stanley Spyrou (**Spyrou**). C&C did not notify the council of this appointment until 22 September 2017. On 21 September 2017, the council issued to C&C a "Works Permit Inspection Checklist". Spyrou issued Cai with an interim occupation certificate. The council issued a s 121B order against Mr Ci Lin Cai (Cai's father), on behalf of Grand City Constructions (**Grandcity**). A neighbour subsequently complained to council that the premises were occupied. Accordingly, the council commenced these Class 4 proceedings and sought undertakings only from the corporate respondents. Cai lodged further Class 1 appeals against the council's orders.

On 17 November 2017, Sheahan J conducted an interlocutory relief hearing, and made interim orders and directions, regarding the occupants, amended summons and amended points of claim. In the interim, a s 34 conference was held for the two Class 1 appeals. It was unsuccessful in resolving the dispute, and the appeals were set down for hearing on 25 and 27 July 2018. Further orders were sought to vacate the Class 4 hearing dates pending those hearings, but Moore J, on 19 February 2018, declined to do so. The final hearing for the Class 4 matter was held on 22 Feb 2018, with judgment delivered on 9 May 2018.

Issues:

(1) Had the council proved that the development had not been built in accordance with the approved plans;

(2) If so, had the council proven that there had been a breach of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) by the first and second respondents, being the owner and builder respectively;

(3) Should the Interim Occupation Certificate (**the IOC**) granted by the third respondent be quashed; and

(4) What relief should the Court grant under s 124 of the EPA Act.

Held: Granted relief sought by the council against the first and second respondents (owner and builder); the third respondent's Occupation Certificate declared invalid; the first and second respondents were jointly and severally responsible for payment of the Applicant's costs:

(1) The Court rejected aspects of the respondents' submissions, being: first, the Court lacks jurisdiction to deal with these proceedings and, second, the council bears an onus higher than on the balance of probabilities. The respondents' assertions about the council's pleadings were not accepted: at [69]-[70];

(2) In relation to the first two issues, the development has not been built in accordance with the approved plans: at [74]-[75]. The respondents' submissions as to the credibility and weight to be given to the evidence of Ms Mansfield (a senior planner for the council) were rejected: at [75]. The submission as to the mutual independence of the two corporate respondents was not accepted. In particular, it was noted that Cai had completed the change of PCA form, noting she was the "person with the benefit of the DC": at [77]. Further, she provided her business name as C&C and her email address as Grandcity: at [77];

(3) Regarding the validity of the IOC, the Court considered the ordinary meaning of "not inconsistent", and applied the "reasonableness" principle in the "Wednesbury sense": at [83]; [88]. As the respondents had reinstated elements of a rejected proposal, the development was inconsistent with the DC: at [85]. Taking this into consideration, Spyrou had issued the IOC beyond power and in breach of the EPA Act: at [86]. Further, the Court found that no reasonable PCA, in the position of Spyrou, could have reasonably disregarded the discrepancies between the development with the approved plans, and subsequently provided the IOC: at [90]; and

(4) The three respondents did not raise any substantive discretionary grounds for declining or moderating the relief sought. The Court did not deem it necessary to exercise its discretion in favour of the respondents, for four reasons. First, the respondents' breaches of the consent were flagrant and far from minor or technical: at [95]. Second, criminal proceedings were an option, however the council sought to remedy, rather than punish, the breaches: at [96]. Third, the corporate respondents' actions had been calculated, as they had made no attempt to justify their departures or the reinstatement of elements of their initial proposal after securing Court approval of the amended plans: at [97]-[99]. Fourth, the corporate respondents had disregarded local government's normal requirements, with full knowledge of the concerns of the council and the neighbourhood: at [97]; [100].

Warrumbungle Shire Council v Yongmei Ou **[2018] NSWLEC 7** (Preston CJ)

Facts: Ms Yongmei Ou (**the respondent**) owns and resides on an urban allotment in the rural village of Mendooran in the central west of New South Wales. She did not obtain the necessary approvals under the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) and the *Local Government Act 1993 (NSW)* (**the Local Government Act**) to reside on the land. She partly erected a kit home, installed and lived in a garden shed, and installed and lived in a caravan on the land, without the necessary approvals.

Warrumbungle Shire Council (**the council**) commenced civil enforcement proceedings. The council submitted that the respondent breached s 4.2(1) of the EPA Act by partly erecting a building for the purpose of a dwelling house without development consent and by using the land, including the garden shed and the caravan, for residential accommodation without development consent. Development for the purpose of a "dwelling house" and other innominate development including "residential accommodation" is development permitted with consent in the relevant zone under the Warrumbungle Local Environmental Plan 2013 (**the WLEP**). Further, the council submitted that the respondent's installation and occupation of the caravan on the land breached s 68(1) of the Local Government Act by the installation of a moveable dwelling without the council's approval.

The council sought declarations concerning the various ways in which the respondent had breached the EPA Act and the Local Government Act. The council also sought orders that the respondent cease using the land for residential accommodation without the necessary approvals and that the respondent demolish and remove the partly erected kit home from the land.

The respondent did not appear to defend the proceedings brought by the council on any occasion.

Issues:

(1) Did the respondent breach s 4.2(1) of the EPA Act by partly erecting a building for the purpose of a dwelling house without development consent;

(2) Did the respondent breach s 4.2(1) of the EPA Act by using the land, including the garden shed and the caravan, for residential accommodation without development consent;

(3) Did the respondent breach s 68(1) of the Local Government Act by installing a moveable dwelling without obtaining council's prior approval; and

(4) What orders should the Court make to remedy any breaches of these Acts.

Held: Declarations that the respondent breached s 4.2(1)(a) of the EPA Act and s 68 of the Local Government Act; orders that the respondent cease using the land for residential accommodation without development consent and demolish and remove the partly erected building; costs awarded to the council:

(1) The erection of the steel structure of the kit home on the land involved the carrying out of development by the erection of a building (which includes a structure) that was intended when completed to be used as a dwelling house; the carrying out of that development on the land required prior development consent and was in breach of s 4.2(1) of the EPA Act: at [59];

(2) (a) Use of the garden shed on the land involved the carrying out of development by the use of land for residential accommodation; residential accommodation means "a building or place used predominantly as a place of residence"; the respondent used the shed (a building) and the land (a place) as her place of residence; this constituted a use of land for residential accommodation, which required development consent and was, therefore, in breach of s 4.2(1) of the EPA Act: at [60];

(b) the use of the caravan on the land also involved the carrying out of development by the use of land for residential accommodation; the caravan is not a building as defined as it is a moveable dwelling within the Local Government Act; nevertheless, the land on which the caravan is installed is a place; the respondent has used, and still is using, the land (including the caravan on the land) as her place of residence; the caravan is a means by which the land is made to serve as her place of residence; that development required development consent and was in breach of s 4.2(1) of the EPA Act: at [62];

(3) The table to s 68 of the Local Government Act specifies the activity of "install a manufactured home, moveable dwelling or associated structure on land" as requiring the prior approval of the council; as none of the exemptions in cl 77 of the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 apply, the respondent was required to, but did not, obtain council's approval to install and occupy the caravan on the land, in breach of s 68 of the Local Government Act: at [64]-[65]; and

(4) The Court should make declarations that the respondent has breached the planning laws in the various ways found (at [67]); it is appropriate to order the respondent to cease using the land (including the caravan and the shed on the land) for residential accommodation and to demolish and remove the partly erected building, but to stay the operation of the orders for a period of time to allow the respondent an opportunity to remedy the breaches of the planning laws (at [70]); if, notwithstanding the respondent's best efforts to obtain the necessary consents and approval in time, further time is still needed, the parties will have liberty to apply to the Court to extend the time period of the stay (at [70]); an order of substituted performance is also appropriate, such that if the respondent fails to comply with the Court's order to demolish and remove the partly erected structure, the council may carry out those works in her stead: at [72].

- Aboriginal Land Claims:

Minister Administering the Crown Lands Act 1989 v New South Wales Aboriginal Land Council **[2018] NSWLEC 26** (Pain J)

Facts: The Minister Administering the Crown Lands Act 1989 (New South Wales) (**the Minister**) sought a declaration that 66 Aboriginal land claims in three classes (covering some 9,000 parcels on the south coast of New South Wales) lodged by the New South Wales Aboriginal Land Council (**the NSWALC**) were invalid as not complying with s 36(4)(b) of the *Aboriginal Land Rights Act 1983 (NSW)* (**the ALR Act**). The Registrar of the ALR Act (**the Registrar**) was joined as the second respondent to the proceedings.

Section 36(4)(b) of the ALR Act required claims to "describe or specify" the land claimed. The Minister argued that the 66 claims did not "describe or specify" the land because each lot was not identified by its boundaries such as by lot and DP number. Public inconvenience arose in that firstly, it would take the New South Wales Department of Industry - Lands (**the Department**) approximately 15 years to identify

and investigate the claims. Secondly, restrictions on developing the claimed land would exist until the claims were finally determined per s 36B of the ALR Act. Thirdly, the time required to sufficiently identify the land would lead to degradation of evidence was required to assess claims as they existed at the date of lodgement.

The NSWALC and the Registrar submitted that "describe or specify" should not be narrowly construed.

Identification of the land claimed was not difficult according to the evidence.

Issues:

(1) Did the claims "describe or specify" the land within the meaning of s 36(4)(b) of the ALR Act; and

(2) Did the NSWALC need to have a reasonable basis for believing that the land was "claimable Crown lands" within s 36(1) of the ALR Act to make the claims.

Held: Summons dismissed; the Minister to pay the costs of the NSWALC and the Registrar:

(1) Nothing in the ALR Act supported a narrow construction of the words "describe" or "specify" given the breadth of the usual and ordinary meanings of those words: at [65] and [67]; the phrase "describe or specify" was disjunctive, meaning a mere description would be sufficient compared with the more exacting requirement to "specify": at [68]; a facilitative construction of the phrase "describe or specify" was consistent with the legislative history of the ALR Act as beneficial and remedial legislation: at [82]; many parcels of Crown land had only recently been brought under the *Real Property Act 1900 (NSW)* and therefore not all parcels could be described by reference to lot and DP numbers: at [84]; nothing in the text or context of s 36(4)(b) suggested a narrow construction requiring individual parcels of land to be identified: at [107]. Section 36(4)(b) required only that a claim identify the land sufficiently for the Minister to ascertain the boundaries of the claimed land as an aspect of his statutory duty to investigate and determine the claims under s 36(5) the public inconvenience alleged had no role in determining the construction of s 36(4) at [98]; and

(2) No part of the ALR Act supported the construction that by inference a land council was required to have a reasonable basis for making a claim: at [108].

- Section 56A Appeals:

***City of Ryde Council v Principal Healthcare Finance Pty Ltd (No 3)* [2018] NSWLEC 12** (Sheahan J)

(related decisions: *City of Ryde Council v Principal Healthcare Finance Pty Ltd* [2017] NSWLEC 126 (Molesworth AJ); *Principal Healthcare Finance Pty Ltd v City of Ryde Council* [2017] NSWLEC 1300 (Brown C); *Principal Healthcare Finance Pty Limited v Council of the City of Ryde* [2016] NSWLEC 88 (Pain J); *Principal Healthcare Finance Pty Limited v Council of the City of Ryde* [2016] NSWLEC 153 (Robson J))

Facts: Principal Healthcare Finance Pty Ltd (**the respondent**) lodged a development proposal with the City of Ryde Council (**the council**) to redevelop a site as a "residential aged care facility". The Sydney East Joint Regional Planning Panel (**the JRPP**) refused the application. On 28 April 2016, the respondent lodged a Class 1 appeal. On 8 June 2016, Pain J made orders for cl 26 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**the SEPP**) to be determined separately and prior to the Class 1 proceedings. On 5 August 2016, Robson J affirmed that the clause was a development standard. On 23 May 2017, consent orders were proposed and made. The Court's approval was therefore approved on conditions, which the parties had agreed upon and the respondent had filed on 19 May 2017. This included condition 15, which restricted the occupation of the development and condition 16 which imposed a further restriction on occupation of the development (to persons requiring high level care).

The council appealed the decision in accordance with s 56A of *Land and Environment Court Act 1979 (NSW)*, arguing that the Commissioner erred in law: firstly, in concluding that condition 16 could be validly imposed as part of the conditions of consent and secondly, by deciding to impose condition 16, in circumstances where the terms of cl 18 of the SEPP precluded the imposition of condition 16. Thirdly, the council appealed on the ground that the Commissioner lacked power to approve the development application, in accordance with the terms of cl 18 of the SEPP.

Issue: Whether condition 16, attached by the consent orders to the development consent, could be validly imposed having regard to cl 18 of the SEPP.

Held: Appeal dismissed; costs ordered on a party-party basis:

(1) The Court rejected the argument that the council should be estopped from raising the substantive issues, due to the representation, made at the hearing before the Commissioner, that it would consent to the proposal upon the entering of the consent orders: at [83]. In particular, the respondent had not presented sufficient evidence to substantiate that they had suffered some detriment as a result of reliance on the council's representation: at [86];

(2) The issue in contention was not a "new point" raised on appeal: at [90]. Accordingly, the consent orders entered may be set aside if they are found to have been based on an improper application of the SEPP: at [92];

(3) The Court rejected the council's argument that the SEPP requires all of the varying levels of care to be provided in each and every facility: at [103]. Clause 18 of the SEPP should not be construed so as to require provision of accommodation for all persons nominated in its subclauses: at [104]. Rather, Clause 14 of the SEPP states the objective of providing accommodation in a manner suited to the varying levels of care required by patients: at [103]; and

(4) The Court accepted the respondent's interpretation that conditions 15 and 16 do not permit persons not included within the SEPP to reside at the facility: at [109]. The SEPP does not include any provisions which intend to override prescribed limits on the "kinds of people referred to in" cl 18: at [107]. The two conditions are not ambiguous or uncertain. Rather, the two conditions can and should operate together, such that there are no additional groups of people who can be admitted outside the terms of cl 18 of the SEPP: at [73]; [111].

***Doyle v Hornsby Shire Council* [2018] NSWLEC 45** (Moore J)

(related decision: *James Patrick Doyle v Hornsby Shire Council* [2015] NSWLEC 1576 (Dixon C))

Facts: On 26 February 2016, Mr Doyle (**the appellant**) applied to modify a development consent, granted by Hornsby Shire Council (**the respondent**) in 2001 for the construction of a dwelling and associated works at 80A Manor Road, Hornsby, seeking a new driveway configuration with a maximum gradient of 34.05%. The appellant appealed against the respondent's deemed refusal of his modification application to the Court under s 97 of the *Environmental Planning and Assessment Act 1979 (NSW)*. The Commissioner concluded (amongst other conclusions) that she did not have sufficient information concerning the cross-fall of the proposed driveway, based on Mr Clare's evidence (an engineering expert for the respondent), to be satisfied that the proposed design was capable of being constructed so that its operation would be safe and dismissed the appeal. The appellant appealed against the Commissioner's decision on nine grounds. The primary grounds were whether Mr Clare should have been accepted as an expert and, if so, did his evidence provide a proper basis for the commissioner's decision.

Issues:

(1) What was the appropriate basis upon which the Commissioner should assess whether or not Mr Clare should have been permitted to give expert evidence on behalf the respondent;

(2) Whether it was properly open to the Commissioner to conclude that Mr Clare was appropriately qualified to give such expert evidence; and

(3) If yes to (2), whether the Commissioner's conclusion was one reasonably available to her on the evidence before her.

Held: Dismissing the appeal; appellant to pay the council's costs:

(1) There are different pathways available to acquiring the necessary specialised knowledge to qualify a potential witness to give evidence on an expert opinion basis: at [52]; Mr Clare had an appropriate and relevant qualification and significant relevant experience: at [71]; absence of a university-based qualification did not disentitle Mr Clare from being accepted as an expert: at [72]; the answer to (2) was yes: at [59]; and

(2) The modification application needed to provide sufficient information to enable merit assessment to reach a conclusion that the proposed driveway gradient was safe: at [96] and [99]; the Commissioner's factual findings of insufficiency of information did not found any error of law as there was no unreasonableness to give rise to such a legal defect: at [102] and [106]. It was open to the Commissioner to prefer Mr Clare's evidence in her weighing of the expert evidence (at [115]) and to conclude that she had insufficient evidence to be satisfied that the proposed design was safe: at [120].

JET Group Australia Pty Ltd v Environment Protection Authority **[2018] NSWLEC 49** (Moore J)
(related decision: *Jet Group Australia Pty Ltd v Environment Protection Authority* [2017] NSWLEC 1588 (Brown C and Bish C))

Facts: JET Group Australia Pty Ltd (**the appellant**) sought an Environment Protection Licence (**EPL**) to permit it to operate a composting, resource recycling and waste storage facility. Pursuant to s 287 the *Protection of the Environment Operations Act 1997 (NSW)*, the appellant appealed the deemed refusal by the Environment Protection Authority (**the EPA**) of an application for an EPL. The parties agreed that an EPL could be issued for the proposed operation on the site, but disagreed on the conditions to be attached to the EPL. The areas of dispute were: the specification for the leachate liner for the operations area and leachate dam; and the appropriate financial assurance as security against environmental harm. The relevant experts, Mr Bozinovski (for the appellant) and Mr Dixon (for the respondent), agreed that there was potential for gas build-up beneath the leachate liner that could have the effect of causing the liner to bubble (referred to as a "hippo" or "whale" effect) and a gas relief layer could be used to reduce this effect. The experts also agreed that a leachate liner was required but disagreed as to the permeability limit of the liner. In the Joint Report, the experts reached agreement that a gas relief layer was not a mandatory requirement of the EPL. The commissioners concluded that the stricter permeability limit proposed by Mr Dixon should be imposed and upheld the appeal, approving the EPL subject to conditions. The appellant subsequently appealed the decision. There was also a dispute between the parties about the quantum of financial security required.

Issues:

(1) Whether the Commissioners failed to give reasons for imposing the contested element of an operational condition; and

(2) Whether the Commissioners relied on the provisions of the wrong statute in imposing a condition requiring the appellant to provide financial assurance in a specified amount to the respondent.

Held: Appeal upheld; decision and orders made by the commissioners on 19 October 2017 set aside; proceedings remitted to be determined by a commissioner in accordance with this decision; and respondent to pay the appellant's costs of the appeal as agreed or assessed:

(1) Following agreement in the Joint Report, the question of mandating the inclusion of a gas relief layer was no longer in dispute between the experts: at [36]; the Commissioners were not bound to accept this outcome, but were free to reach some differing conclusion, provided that: at [37]:

   (a) there was a proper evidentiary basis for departing from an agreement reached by the experts; and

   (b) reasons were given as to why the commissioners have concluded that such a departure was warranted;

(2) The portion of the Commissioners' judgment dealing with the permeability standard for the leachate liner did not address the issue of the gas relief layer and whether or not such a layer should be designed and mandated as an integral element of the membrane for the leachate dam: at [33]; this issue was not, as argued by the respondent, merely subsidiary or incidental or subsumed by general findings concerned with the permeability standard for the leachate liner: [54]; and the Commissioners were obliged to give a sufficient explanation of the reasons for reaching that conclusion: [49]. The Commissioners did not disclose why they preferred the primary position of the appellant on the gas relief layer condition: at [57]; and the matter was required to be remitted for further consideration: at [59]; and

(3) In relying on "Section 86(6) to (10)" as the source of their power to impose a condition requiring the appellant to provide financial assurance, the Commissioners purported to rely on a provision in an inapplicable statute: at [19]. This ground was conceded by the respondent: at [19].

- Interlocutory Decisions:

Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services **(No 4) [2018] NSWLEC 31** (Sheahan J)

(related decisions (**ALF Litigation**): *Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 148 (Sheahan J); *Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services (No 2)* [2017] NSWLEC 175 (Sheahan J); *Alexandria Landfill Pty Ltd and Boiling Pty Ltd v Roads and Maritime Services (No 3)* [2017] NSWLEC 183 (Sheahan J))

(related decisions (**DADI litigation**): *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2016] NSWLEC 39 (Preston CJ); *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2017] NSWCA 73 (Beazley P, McColl and Leeming JJA))

Facts: During the hearing of this Class 3 compulsory acquisition matter, the applicant brought a notice of motion to strike out parts of the respondent's Further Amended Points of Defence. Throughout the proceedings, the applicant had requested that the respondent admit various matters concerning agency and special value. Between 23 November 2017 and 20 February 2018, the respondent amended its Points of Defence from "does not admit" to "denies", regarding its position on agency and special value. The applicant alleged that the respondent's amended points on denial of an agency relationship with the company Dial A Dump Industries Pty Ltd (**DADI**) should be struck out on the grounds of issue estoppel and/or abuse of process. The applicant contended that such issues had been decided in the DADI litigation.

Issue: Whether the relevant paragraphs in the respondent's Further Amended Points of Defence were subject to an issue estoppel or amounted to an abuse of process.

Held: Notice of Motion dismissed:

(1) *Issue Estoppel*: Issue estoppel would only preclude re-litigation in the present ALF proceedings, in the event that the Court of Appeal had decided an "ultimate issue of fact or law which was necessarily resolved as a step" in the DADI litigation: at [57]. The Court did not accept that the "agency relationship in respect of DADI's operations on the subject land" was the ultimate issue which needed to be resolved or was resolved in the DADI litigation: at [59]-[63]. Therefore, the ALF claims, based on DADI's role, will have to be litigated, as the substantive ALF hearing continues: at [65]; and

(2) *Abuse of Process*: Whilst abuse of process has a wider ambit than issue estoppel, the applicant was required to demonstrate some element of oppression, or unfavourable implications for the public's perception of the integrity of the system of justice: at [70]. Contrary to the applicant's submissions, the Court did not find abuse of process, as a result of the respondent not finalising its Points of Defence until after its cross-examination of ALF's CEO, Mr Biggs: at [75].

Central Coast Council v 40 Gindurra Road Somersby Pty Ltd **[2018] NSWLEC 79** (Molesworth AJ)

Facts: Central Coast Council (**the council**) sought an interlocutory injunction against 40 Gindurra Road Somersby Pty Ltd (**the respondent**) to restrain the respondent from continuing to fill the land at Lots 1-7 of SP 96758 and the common property of SP 96758, known as 40 Gindurra Road, Somersby (**the land**).

The respondent is the owner of Lots 1-7 of SP 96758 and was the owner of the predecessor title of the land. The land is within an area identified as the Somersby Business Park in the Gosford Local Environmental Plan 2014 (**the GLEP**) and is adjoined on its western and southern boundaries by public reserves owned by the council and identified in the GLEP as "Ecologically Significant and Aboriginal Heritage Lands". Each reserve contains an unnamed creek, both of which are tributaries of Piles Creek.

On 7 May 2007, council granted development consent for filling of the approved 7 lots to specified levels for each lot (**the landfill consent**). This consent required a 10-metre wide conservation buffer to the western and southern boundaries of (what was to later become) the land, adjoining council's public reserves, and also required erosion and sediment controls.

On 21 December 2015, a private certifier issued a complying development certificate that purported to approve development of "Master Plan - For 89 Factory Warehouse Units Plus Phase 1 Development - Industrial Building for Resource Recovery Use" (**Masterplan CDC**). The Masterplan CDC, as modified, is

expressed as approving bulk fill on the approved 7 lots, by "up to 1.95m", and does not refer to buffer zones at the western and southern (or indeed, any) boundaries of the land.

The council alleged that the respondent caused to be deposited significant quantities of fill on the land, and that in so doing was in breach of both the landfill consent and the Masterplan CDC. The council argued that there was a serious question to be tried in this matter. It contended that the photographic evidence demonstrated that extensive filling of the land had occurred, including in those areas designated as buffer zones in the landfill consent, and further that the filling is far in excess of levels authorised by the landfill consent or Masterplan CDC. The council submitted that this photographic evidence also documented fill material encroaching into the public reserves and the creeks therein, and that such sediment control measures that were in place were inadequate and were being breached by sediment and other fill material.

The respondent, represented by its company director, resisted the council's application and argued that the Masterplan CDC overrode the landfill consent with respect to the buffer zones. With respect to the amount of fill on site, the respondent submitted that this was permitted by cl 94 of the State Environmental Planning Policy (Infrastructure) 2007 (NSW) (**Infrastructure SEPP**). In relation to the fill encroaching the public reserves, the respondent disputed the survey showing such boundaries. Further, the respondent submitted that an interlocutory injunction would result in hardship being a significant financial impact upon it and the locality.

Issues:

(1) Whether there was a serious question to be tried; and

(2) Whether the balance of convenience favoured the granting of the injunctive relief.

Held: Injunction granted, no order as to costs:

(1) There are a number of serious questions to be tried based on the council's evidence and submissions. The respondent's submissions gave rise to additional serious questions, including in relation to the interplay of the landfill consent, Masterplan CDC and Infrastructure SEPP: at [39];

(2) The balance of convenience favoured restraining the respondent from importing further fill material to the land, because:

   (a) the Court was not persuaded that the hardship alleged by the respondent was established with any certainty nor represented hardship sufficient to overcome the public interest in upholding the rule of law (which would be the case should the council's case ultimately be established): at [40];

   (b) it was in the public interest that the injunctive relief be granted: at [42]; and

   (c) the Court did not confidence in the respondent's assurances of future compliant or responsible conduct obviating the need for an injunction: at [45]-[53]; and

(3) The usual undertaking with respect to damages was not required because the council was a public authority, acting in the public interest, seeking to uphold the integrity of the State's land use planning system: at [54].

Gloucester Resources Limited v Minister for Planning and Environment (No 2) **[2018] NSWLEC 1200** (Dixon SC)

Facts: This was a Notice of Motion brought by Groundswell Gloucester Inc (**the intervener**) seeking leave to be joined as a party to the Class 1 proceedings brought by Gloucester Resources Limited (**GRL**) against the Minister for Planning's refusal of the development of a greenfield site for an open-cut coal mine about five kilometres south of Gloucester.

Issues:

(1) Whether the Court was satisfied pursuant to s 8.15(2) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) that the intervener raised an issue that should be considered which would not likely be sufficiently addressed if they were not joined as a party;

(2) In the event that the Court was not satisfied about the requirements of s 8.15(2)(a), whether the joinder should be permitted in the interests of justice or as a matter of public interest; and

(3) Whether delay in bringing the application for joinder would cause disruption to the current timetable rendering the application too late.

Held: Joinder granted; Groundswell Gloucester Inc joined as a party:

(1) The intervener proposed to raise two issues that would not otherwise be sufficiently addressed unless it is joined as a party, namely; the unacceptable social impacts on the residents and community of Gloucester; and the impact of the development on greenhouse gases: at [9]-[11];

(2) It was in the interests of justice and the public interest to order joinder given the volume of submissions in respect of the application: at [35]; and

(3) As the intervener was to be joined as a respondent to the proceedings pursuant to s 8.15(2) of the EPA Act, the issue of the application made pursuant to s 8.12(3) being out of time did not need to be determined: at [18]. Further, the Court was satisfied that the intervener would not disrupt the existing timetable and, thus, the hearing dates were confirmed: at [38].

Raphael Shin Enterprises Pty Ltd v Minister for Planning **[2018] NSWLEC 42** (Molesworth AJ)

Facts: The substantive proceedings relate to a deemed refusal by the Minister for Planning (**the respondent**) of a development proposed by the Raphael Shin Enterprises Pty Ltd (**the applicant**) at Anna Bay, New South Wales (**the site**).

The proposed development, described as an "eco-tourist facility" by the applicant, included the construction of 148 hotel rooms, 288 units, undercover parking, a multipurpose theatre, dining and retail space, landscaping, and an onsite biodiversity offsets package.

The site was zoned RU2 under the Port Stephens Local Environmental Plan 2013 (**the PSLEP**). Within that zone, land uses permitted with consent include "eco-tourist facilities" and "tourist and visitor accommodation". Prohibited land uses are "backpackers' accommodation", "hotel or motel accommodation", "serviced apartments", and any development not specified in the "permitted without consent" or "permitted with consent" categories. The respondent argued that the proposal fell within a prohibited land use, whereas the applicant considered it an "eco-tourist facility" and therefore permissible with consent.

On 23 January 2018, the respondent filed a Notice of Motion pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 seeking orders that the Court hear and determine the following question separately from the balance of the issues in the proceedings:

Whether the development the subject of State Significant Development Application 13_5916 and of these Class 1 proceedings is properly characterised as either a "mixed use development" comprising: (a) "hotel or motel accommodation", (b) "serviced apartments" and (c) an "entertainment facility", or, alternatively, as an "eco-tourist facility", under the PSLEP.

Issues: Whether the Court should grant the hearing of a separate question.

Held: Notice of Motion dismissed, no order as to costs:

(1) The hearing of the separate question was unlikely to result in a saving in time and expense in the proceedings. The proposed question was a mixed question of fact and law and would require expert evidence to determine. Further, there was no clear cut distinction between the range of issues that needed to be addressed for the proposed separate question compared to the range of issues needed to be addressed for a full hearing of the Class 1 Application: at [45]- [50]; and

(2) The determination of the separate question was unlikely to be dispositive of the proceedings, even if answered in the affirmative, due to the prospect of an appeal or of an amendment of the proposed development: at [54]-[61].

- Costs:

Inner West Council v Sheree Waks **[2018] NSWLEC 41** (Robson J)

Facts: Inner West Council (**the council**) brought Class 4 proceedings seeking, inter alia, a declaration that the respondents cease to use their premises for anything other than the approved use as a dual occupancy, and that they remove all unauthorised additions, alterations, and goods presenting a fire risk. The authorised additions and alterations were subsequently regularised by way of a Building Certificate, and the other concerns resolved by way of consent orders. The only outstanding issue in the proceedings was therefore the question of costs.

Council contended that it was entitled to its costs under the usual rule that costs follow the event because the respondents had "surrendered". The respondents sought their own costs of the proceedings, or alternatively that there be no order as to costs, on the basis that council had not been successful in the Notices of Motion completed in the case and had engaged in disentitling conduct through its "bull terrier" approach to the litigation.

Issues: The issues in the case were:

(1) Whether the case was accurately described as one of "surrender" such that the default rule is that costs should follow the event;

(2) If so, whether council was precluded from recovering costs through lack of success in the Notices of Motion or otherwise through disentitling conduct; and

(3) What order should be made as to costs.

Held: Respondents to pay council's costs (subject to one specific exclusion):

(1) The case was one of surrender such that the ordinary rule that costs should follow the event had prima facie application: at [58];

(2) As an exercise of the Court's discretion there should be no order as to costs in respect of the only Notice of Motion decided by a judge as opposed to those resolved by consent orders: at [73]. Otherwise, council was entitled to take a firm position in relation to its concerns which involved matters of fire safety such that it did not act unreasonably in the proceedings and achieved the result it sought: at [79]; and

(3) Therefore, save for there being no order as to costs in respect a Notice of Motion heard before Moore J on 19 August 2016, the respondents were ordered to pay council's costs: at [84].

***Lister v Fraser* [2018] NSWLEC 25** (Molesworth AJ)

(related decision: *Lister v Fraser* [2017] NSWLEC 1707 (Fakes AC))

Facts: This matter was an application for costs made by the successful respondents in proceedings commenced under s 7 of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* (**the Trees Act**) in relation to a *Eucalyptus pilularis* (**Blackbutt**) growing at the rear of the respondents' property. The applicant owned the property abutting the rear of the respondents' property, and contended that the roots of the Blackbutt had damaged his garage, which could in turn collapse and cause injury.

The Acting Commissioner concluded that, given the insufficient evidence and the speculative nature of the expert opinions proffered, she could not be satisfied to the extent required by s 10(2)(a) of the Trees Act that the Blackbutt had caused the large crack in the corner of the garage. In relation to the Applicant's concern about the integrity of the building and the risk that it may pose to people should it fail, the Acting Commissioner concluded that the risk arose from the possible collapse of part of the building and not directly due to some impact of the Blackbutt.

Therefore, the Acting Commissioner ordered, inter alia, that the application be dismissed. With respect to the reimbursement of the costs of, and incidental to, the proceedings, the Acting Commissioner noted that commissioners of the Court do not have the jurisdiction to order payment of legal costs, costs of expert reports, application fees etc. Claims for these costs must be made by a notice of motion, which is heard and determined by a judge or registrar of the Court.

The respondents, by Notice of Motion filed 4 January 2018, sought orders that, inter alia, the applicant pay their costs of the proceedings, including their costs on the Motion.

Issues: Would any order for costs be fair and reasonable in the circumstances (pursuant to r 3.7 of the Land and Environment Court Rules 2007).

Held: Applicant to pay respondents' costs, including the respondents' costs of the motion:

(1) The making of an order for costs, and departing from the usual rule in this matter, is justified: at [57]; and

(2) This matter differs from other tree application cases in which costs have not been awarded to a successful respondent, because the applicant in this matter was informed on repeated occasions over the course of at least four years that real evidence was required to establish a sufficient nexus between the Blackbutt and the damage to his garage. The applicant nonetheless chose to pursue the application on insufficient evidence and speculative opinions which the Acting Commissioner had no alternative but to dismiss: at [49].

Smith v Kaddour (No 2) **[2018] NSWLEC 21** (Pain J)

(related decisions: *Smith v Kaddour* [2017] NSWLEC 117 (Pain J); *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 (Craig J))

Facts: In *Smith v Kaddour* [2017] NSWLEC 117, the applicants (representing themselves) applied unsuccessfully under s 9 of the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* for orders in relation to alleged damage to their property caused by a tree on the respondents' property in Castle Cove. The applicants sought orders in part that were not within the jurisdiction of the Court. The applicants also sought orders that, whilst within the Court's jurisdiction, had been determined in 2011 proceedings against former neighbours before Craig J. Issue estoppel prevented those orders from being relitigated. The respondents sought their costs on an indemnity or ordinary basis, having engaged legal representation for the dismissal application.

Issue: Was it fair and reasonable to award costs to the respondents for the dismissal hearing.

Held: The applicants were to pay half the respondents' costs of the dismissal hearing; the applicants were to pay half of the respondents' costs of the costs application:

(1) The usual rule in class 2 proceedings is that each party pays their own costs: at [25];

(2) The applicants seeking orders beyond the Court's jurisdiction did not amount to an improper purpose under r 3.7(3)(e) of the Land and Environment Court Rules: at [28]; that the applicants were unsuccessful in opposing the dismissal application did not mean that the proceedings were unreasonably commenced under r 3.7(3)(c) at [29]; the basis for the respondents' dismissal application was not identified until after proceedings had commenced, meaning the applicants commenced proceedings without an awareness of the legal issues and therefore without an awareness of whether they had reasonable prospects of success under r 3.7(3)(f) at [30]; and

(3) It was reasonable for the respondents to obtain legal representation given the complexity of the issues relating to the Court's jurisdiction and issue estoppel: at [35]; the history of the matter did not warrant awarding indemnity costs: at [26].

- Easements:

Acorp Developments Pty Ltd v HWR Pty Ltd **[2018] NSWLEC 68** (Robson J)

(related decision: *Acorp Developments Pty Limited v City of Ryde Council* [2016] NSWLEC 1650 (Brown C))

Facts: Acorp Developments Pty Ltd (**Acorp**) applied to the Court under s 40 of the *Land and Environment Court Act 1979 (NSW)* seeking orders imposing a carriageway easement and drainage easement (**the easements**) over land owned by HWR Pty Ltd (**HWR**). In earlier Class 1 proceedings, the Court had approved Acorp's development application (**Acorp's Consent**). Acorp's Consent included a deferred commencement condition requiring Acorp to acquire the easements. HWR subsequently received development consent for a residential flat building on its land (**HWR's Consent**). The building in HWR's Consent could be built notwithstanding the imposition of the easements, but there would be some amenity effects.

The site of Acorp's Consent constituted four lots including a frontage onto Monash Road. However, Acorp's Consent envisaged access from College Street, using the carriageway easement. It was contended by HWR that the carriageway easement was not "reasonably necessary" in the sense required by s 88K of the *Conveyancing Act 1919 (NSW)*. Acorp relied on Pt 4.6 of the Ryde City Council Development Control Plan 2014, which envisaged an access way in the place proposed for the carriageway easement and which sought to activate the Monash Road frontage by using it for retail purposes and minimising vehicular access. Acorp submitted that the "substantially preferable" planning outcome obtained in its consent as opposed to using the Monash Road frontage satisfied the requirement of reasonable necessity.

It was initially contended by HWR that the Court lacked the power to impose the easements because not all of the lots making up the development site were appurtenant to the servient land.

Issues:

(1) Whether the carriageway easement was reasonably necessary;

(2) If so, what compensation should be paid; and

(3) Whether the Court had the power to grant the easements.

Held: Application dismissed with costs:

(1) In circumstances where alternative access is available, a superior planning outcome, especially when it is not substantially superior, is not enough to warrant a finding that an easement is "reasonably necessary": at [136];

(2) The requirement of reasonable necessity also invites consideration of the effect of the easement on the servient tenement. In this case, the effect of the easements was "not insignificant", especially where alternative access is available: at [142];

(3) Although it was unnecessary to decide, compensation would have been payable for the easements in the sum of $563,000: at [168]; and

(4) Although the issue raised by HWR in respect of appurtenance was a real concern, it would not have been fatal to the application. Had the Court otherwise been minded to grant the easements, the making of final orders and declarations would have been stayed until the lots making up Acorp's development site were consolidated: at [180].

- Merit Decisions (Judges)

***SHMH Properties Australia Pty Ltd v City of Sydney Council* [2018] NSWLEC 66** (Preston CJ)

Facts: The City of Sydney Council (**the council**) granted development consent for the change of use of a building from existing club accommodation to a boarding house, subject to deferred commencement conditions requiring the lodgement of a BASIX certificate. The developer, SHMH Properties Australia Pty Ltd (**SHMH**), applied to the council under s 96(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) to modify the development consent by deleting these deferred commencement conditions. The council refused the modification application and SHMH appealed this decision to the Court under s 97AA of the EPA Act.

The EPA Act requires a development application for consent to carry out "BASIX affected development" to be accompanied by a BASIX certificate. In cl 3(1) of the Environmental Planning and Assessment Regulation 2000 (**the EPA Regulation**), "BASIX affected development" means, amongst other things, development that "involves a change of building use by which a building becomes a BASIX affected building" or "the alteration, enlargement or extension of a BASIX affected building" with construction costs exceeding $50,000 (for development applications made after 1 July 2007). "BASIX affected building" means "any building that contains one or more dwellings, but does not include a hotel or motel." A "dwelling" means "a room or suite of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile."

First, the council submitted that the development is BASIX affected development because it involves "a change of building use". The council argued that although the EPA Regulation does not define "a change of building use", the use of this phrase in the EPA Regulation should not be construed according to the definition in s 1.4(1) of EPA Act: "a change of use of a building from a use that the Building Code of Australia recognises as appropriate to one class of building to a use that the Building Code of Australia recognises as appropriate to a different class of building", and rather, that it should bear its ordinary meaning. The council contended that, nevertheless, the development falls within the definition of a "change of building use" under both constructions. Second, the council submitted that the development involves "the alteration, enlargement or extension of a BASIX affected building" with construction costs over $50,000 (they are expected to exceed $4.7 million).

The council submitted that the building, whose use is changed or which is altered, is a "BASIX affected building" with "one or more dwellings" because 39 of the 52 boarding units will contain kitchenettes with a bench, sink, microwave, fridge and freezer and the manager's room will have, in addition, a larger bench with a fixed cooktop. These units and the manager's room are "so constructed or adapted as to be capable of being occupied or used as a separated domicile".

SHMH disputed that the development involves a "change or building use" or "the alteration, enlargement or extension of a BASIX affected building". First, SHMH submitted that the development does not fall within the EPA Act definition of "change of building use" because the same classifications of building use in the Building Code of Australia (**the BCA**) that apply to the current building will apply to the proposed development. Second, SHMH submitted that the 39 boarding units with kitchenettes are not "dwellings" because they lack some of the basic features of a normal kitchen. In relation to the manager's room, SHMH proposed that the Court could impose a condition on any approval of the modification application requiring the deletion of the fixed cooktop.

In addition, SHMH contended that the definition of "BASIX affected building" should be construed so as to include only those buildings to which BASIX applies. SHMH submitted that BASIX does not apply to buildings of certain classes under the BCA. SHMH referred to NSW Section J of the BCA which separates energy efficiency requirements for different building classes. Note 1 of this Section states: "The need for separating these requirements … arises because, in NSW, Class 2 buildings and Class 4 parts of buildings are subject to BASIX … however Class 3 buildings are not." SHMH contended that the building is a Class 3 building and hence would not be subject to BASIX.

Issue: Whether the proposed development is "BASIX affected development" because it involves:

(a) a change of building use by which a building becomes a BASIX affected building; or

(b) the alteration, enlargement or extension of a BASIX affected building with costs exceeding $50,000.

Held: Appeal dismissed; the modification application refused:

(1) The development the subject of the development consent is "BASIX affected development" as defined; at the least, the development involves the alteration of a BASIX affected building, where the estimated construction costs of the development is more than $50,000: at [62];

(2) The building, which is being altered, is a "BASIX affected building"; each of the 39 boarding units and the manager's room meet the definition of "dwelling" as they contain the essential components of a domicile and a dwelling of sleeping, bathroom and kitchen facilities (at [63]); it is not appropriate to adopt a technologically constrained and dated view of what constitutes a kitchen (at [64]); the kitchenettes in the 39 boarding units includes a bench, sink, microwave, fridge, freezer and electrical sockets that can accommodate electrical cooking and food preparation devices (at [63]); the manager's room contains a separate bedroom, bathroom and a better equipped kitchen: at [67];

(3) SHMH's argument concerning the building being a Class 3 building to which BASIX does not apply does not displace the above conclusion (at [69]); the correct and only inquiry is that specified in the EPA Act and EPA Regulation; the development and the building cannot cease to be a BASIX affected development and a BASIX affected building because of the classification of the building under the BCA or, more particularly, the way in which NSW Section J of the BCA applies to buildings of different classes (at [70]); the definition of "BASIX affected building" in the EPA Regulation is clear and unambiguous and can be given effect according to its terms; the conditions in which a court is justified in reading additional words into a statutory provision are not satisfied in this case: at [71]; and

(4) Council's argument that the development is "BASIX affected development" because it involves a "change of building use" is rejected, not because the development will not involve a change of building use, but because the building does not become a BASIX affected building because of that change of use (at [77]); it is not necessary to decide whether the council's suggested construction of this expression in the EPA Regulation is correct; on either construction, on the facts, there would be a change in building use (at [80]); however, the definition of "BASIX affected development" presupposes that the building before the change of building use was not a BASIX affected building but becomes one by the change of building use; the approved plans of the existing building establish that the building contained one or more dwellings including a manager's apartment, and many of the units have the essential components of a dwelling of sleeping, bathroom and kitchen facilities; the existing building was therefore a BASIX affected development: at [81].

- Merit Decisions (Commissioners):

Al-Mabarat Benevolent Society Limited v Goulburn Mulwaree Council **[2018] NSWLEC 1261** (Dixon SC)

Facts: This was an appeal by the Al-Mabarat Benevolent Society Limited (**the applicant**) under s 8.7 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) against the refusal by Goulburn Mulwaree Council (**the council**) of DA/1021/1415 (**DA**) for the establishment of a cemetery and service hall at 247 Highland Way and 15213 Hume Highway, Marulan. The applicant also sought permission under the *Roads Act 1993 (NSW)* for road works on Highland Way and under the *Local Government Act 1993 (NSW)* to carry out water supply, sewerage and stormwater drainage work.

Issue: Was the development properly characterised as a "cemetery" as defined under the Goulburn Mulwaree Local Environmental Plan (**the GMLEP**).

Held: Appeal dismissed:

(1) The intended service hall did not conform to the definition of "cemetery" since its facilities and the proposed activities it was proposed to host fell outside the meaning of an "associated building" for "memorial services" under the GMLEP. Conditions were not able to overcome this as the Court must be required to determine the permissibility of all aspects of the development at the time at which consent is granted as, if the development is prohibited, it cannot be made permissible by imposition of a condition anticipatory of what must occur to overcome the prohibition: *Olsson v Goulburn Mulwaree Council* (2010) 176 LGRA 71; [2010] NSWLEC 47 at 26 per Craig J: at [41]; and

(2) Having concluded that the development was not permissible, it was not necessary to deal with the ecological issues or any other matter: at [66].

Ardill Payne and Partners v Byron Shire Council **[2018] NSWLEC 1220** (Bish C)

(related decision: *Ardill Payne and Partners v Ballina Shire Council* [2017] NSWLEC 1418 (Brown C))

Facts: Ardill Payne and Partners (**the appellant**) is the owner of a former sand and gravel quarry near the village of Suffolk Park, known as the Broken Head Quarry (**the quarry**), which has since ceased operation. The quarry is divided into two quarries, being the Eastern Quarry and the Western Quarry, located east and west of Broken Head Road, respectively. Rehabilitation with dwelling development has commenced on the Eastern Quarry. No rehabilitation has yet commenced on the Western Quarry, nor any development been approved. The appeal relates to a proposal for an on-site (household) effluent treatment facility located on the eastern margin of the Western Quarry, which was the site of water settling and process ponds, since filled and the land surface reshaped. The application for the on-site treatment facility would support a four-bedroom dwelling on the site. The treatment facility consists of a septic tank and "Wisconsin" mound for the dispersal of effluent through evaporation and infiltration. The application was made under s 68 of the *Local Government Act 1993* (NSW) (**the Local Government Act**) which was lodged with Byron Shire Council on 4 July 2016. The proposed site of the mound is cleared of vegetation and the remainder of the subject lot is covered by dense rainforest. The rehabilitation plan for the site was as artificial wetland habitat surrounded by regenerating rainforest for the benefit of threatened species, such as Eastern Long-Eared Bat. If the treatment facility is approved, then the rehabilitation plans for the Western Quarry would not be undertaken in this area, with possible implications to surrounding areas under rehabilitation due to interlinkages across the vegetation habitats and wetland system. The appellant appealed against refusal of the application on the grounds that development on the site would not impact future rehabilitation of the remaining Western Quarry. Prior to this application (in the Western Quarry), a dwelling was approved in the Eastern Quarry in *Ardill Payne and Partners v Ballina Shire Council* [2017] NSWLEC 1418.

Issues:

(1) Whether application for the on-site effluent treatment facility, with capacity to service a four-bedroom dwelling should be granted on reclaimed quarry area not yet rehabilitated;

(2) Whether the facility is ecologically sustainable pursuant to s 89(1)(c) and (3) the Local Government Act;

(3) Whether the facility will protect the environment and is consistent with cl 15(2)(b) and (e), cl 26(2) and (4), cl 29(2) of the Local Government (General) Regulation 2005;

(4) Whether the proposal satisfies the rehabilitation requirements as provided in the Environmental Impact Statement for the Western Quarry; and

(5) Whether the proposal results in significant impact to future land uses, as considered in cl 13(1) and (2) of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

Held: Appeal dismissed:

(1) The application for an on-site effluent treatment facility is not permissible: at [4], as it constrains future rehabilitation of the Western Quarry: at [59]; and would have adverse environmental impact: at [68];

(2) The requirement, as provided in the Flora and Fauna Management Plan, to revegetate the site consistent with a "regenerating rainforest", is a determinative factor in assessing protection of the environment: at [58];

(3) The Flora and Fauna Management Plan provided detail for future rehabilitation of the Western Quarry: at [56]; and is a fundamental component of the EIS that supported the approved development application for the quarry activities: at [50];

(4) Rehabilitation of the site is intended to re-establish regenerating rainforest that is a habitat to threatened species identified in the area, including the Eastern Long-Eared Bat: at [53]. The application does not adequately assess the implications to the surrounding habitat as a consequence of not undertaking rehabilitation to demonstrate protection of the environment;

(5) The lack of scientific evidence supports adopting the precautionary principle to satisfy the requirements of s 6(2) of the *Protection of the Environment Administration Act 1991 (NSW)* (**the POEA Act**): at [70]. The application does not satisfy s 6(2)(a) of the POEA Act due to lack of scientific certainty that relates to "threats of serious or irreversible environmental damage": at [68]; and

(6) The application could potentially adversely impact public interest due to the uncertainty in achieving conservation of biological diversity/ecological integrity, and intergenerational equity: at [76].

***Celik v Bayside Council* [2018] NSWLEC 1124** (Dickson C)

Facts: These proceedings arise from the deemed refusal of an application for the demolition and construction of a four-storey attached dual occupancy at Bardwell Park. Celik (**the applicant**) appealed, pursuant to s 8.10 of the *Environmental Planning and Assessment Act 1979 (NSW)*, against the deemed refusal by Canterbury-Bankstown Council (**the council**) of consent.

Rockdale Local Environmental Plan 2011 (**the RLEP 2011**) applied to the site. Pursuant to this instrument the site is zoned R2 Low Density Residential. A significant portion of the rear of the site is marked as "Biodiversity" on the Terrestrial Biodiversity Map under the RLEP 2011. The application relied on a variation to the height control of 8.5 metres above natural ground (cl 4.3 of the RLEP 2011). The non-compliance with the maximum height varied along and down the slope due to the existing topography of the land. The maximum exceedance related to the parapet of the first floor, the extent of the exceedance was disputed by the experts.

Issue:

(1) Whether the application was compatible with the objectives of the height control; and

(2) Whether the variation request was worthy of being upheld.

Held: Appeal dismissed and development consent refused:

(1) In undertaking a proper assessment of this application under cl 4.6 of RLEP 2011 it is necessary to be clear what the extent of variation sought is: [at 27];

(2) In these proceedings, there are no constraints that would preclude the applicant determining the level directly beneath the highest parts of the building at relevant locations across the site and determining the maximum building height: at [29]

(3) The applicant has provided insufficient evidence or analysis to verify the variation sought in accordance with the RLEP definition of building height: [at 29]. Ultimately this influenced the finding (at [69(2)]) that there was insufficient certainty, based on the information before the Court, to

conclude that the breach of the height limit does not cause an adverse solar impact to 8 Lambert Road or that the impact of the non-compliance will maintain satisfactory sky exposure as required by objective (f) of the height standard: at [69];

(4) As the onus is on the applicant to demonstrate by evidence reasoning that the variation is warranted and in the absence of necessary information (as noted in [69(2)]), the variation was not upheld: at [69(3)];

(5) That the height exceedance was exacerbated by the extent of variation, its location adjacent to the boundary with 8 Lambert Road, the overall volume of the building, its placement on the site and the material selection proposed. These factors and the vegetation removal proposed result in an overbearing building when viewed from the public reserve at the rear: at [69(4)];

(6) The development fails to achieve objective (b) of the height standard to permit building height that encourages high quality urban form: at [70]; and

(7) Applying the planning principle in *Seaside Property Developments Pty Ltd v Wyong Shire Council* [2004] NSWLEC 117, the non-compliant building height fails to achieve objective (d) of the height standard, namely to nominate heights that will provide an appropriate transition in built form and land use intensity: at [71].

***Johnson v Coffs Harbour City Council* [2018] NSWLEC 1094** (Gray C)

Facts: Ms Johnson owned two lots of land at Dirty Creek, Lots 200 and 201. Lot 200 was a narrow strip of land running through part of Lot 201. Lot 201 was divided into three parcels of land separated by Lot 200 and by a road, Solitary Islands Way. No physical characteristics of the land in Lot 200 distinguished it from Lot 201, and no markings on the site defined the boundary between Lots 200 and 201. Ms Johnson sought development consent to change the boundaries of the two lots so that there would be one lot wholly on the north of Solitary Islands Way, where one dwelling was already located, and one lot wholly on the south of Solitary Islands Way, where a second dwelling was located.

The dwelling on the northern side of Solitary Islands Way straddled both Lot 200 and 201 and was accessed from Dirty Creek Road, and the dwelling on the southern side was known by a different address and accessed from Flinty Road using a separate driveway. Both dwellings were entirely independent of each other. There was no access between the area of the site north of Solitary Islands Way and that to the south.

The application to change the boundaries would result in a lot size that did not meet the minimum lot size development standard, and no exception to the minimum lot size development standard was available under the Coffs Harbour Local Environmental Plan 2013 (**the CHLEP**). The only power available to grant consent to the application arose under cl 4.2D of the CHLEP, which required that the application was one that subdivides land "by adjusting the boundary between adjoining lots."

The council contended that the application should instead be characterised as an application for consolidation of the two lots, and then subdivision into two new lots, and therefore did not constitute an application for a boundary adjustment. The council also contended that the intent of the applicant to have developable lots could be taken into account in determining whether the application was for a boundary adjustment or for some other purpose.

Issues:

(1) What constitutes an "adjusting" of the boundary between adjoining lots; and

(2) Whether the application sought to subdivide land by adjusting the boundary between adjoining lots.

Held: Dismissing the appeal and refusing the development application:

(1) The task of determining whether the proposal is for a boundary adjustment is not concerned with the characterisation of the proposed land use, or the proposed purpose of the development: at [38]-[39];

(2) The task is one of statutory interpretation, and of determining whether the particular proposal falls within the description of it being a subdivision of land "by adjusting the boundary between adjoining lots": at [39];

(3) The ordinary meaning of "adjusting" connotes something that is slight or marginal: at [41];

(4) The question of whether a particular factual scenario fits within the meaning of "adjusting" depends on the degree of alteration that is sought in the context of the site as a whole: at [41];

(5) The degree of the alteration in the present application falls out of scope of a subdivision "by adjusting the boundary" for the reasons that: the change to the location of the boundary is so significant that it could not be considered to be marginal: at [45]; the proposed configuration of the lots bore no resemblance to their current configuration: at [46]; and the change in size of Lot 200 from comprising 6.6% of the total site area to 50% of the total site area was more than a slight or marginal change: at [47]; and

(6) Despite the fact that the proposed subdivision would result in a better pattern of subdivision, the proposal was not an "adjusting" of the boundary and that there was no power to grant development consent and the application must be refused: at [49].

Lemnian Association of NSW Maroula Club Ltd v Canterbury-Bankstown Council **[2018] NSWLEC 1075** (Gray C)

Facts: The Lemnian Association of NSW Maroula Club Ltd (**Lemnian**) operated a registered club known as the Lemnos Club (**the club**). Within the club was a space used for functions, for which the second respondent, Clarence Investment Pty Ltd (**Clarence**), provided catering services.

In 2014, works were carried out at the club to change the internal layout of the building, including an extension of the building at the rear to create additional floor space, and the demolition of internal rooms and walls to create a large auditorium space and kitchen. The result of these works was that the premises were comprised of a large auditorium, a foyer bar area, a large kitchen, and space on the lower ground floor used for storage. It was agreed that these works were carried out without development consent.

Lemnian lodged two separate appeals against decisions made by Canterbury-Bankstown Council (**the council**) concerning works at the club. The first (proceedings 2017/37468) was an appeal against the refusal of a building certificate application relating to the works carried out without development consent. In the second (proceedings 2017/156126), Lemnian sought development consent for alterations and additions to the club by the subdivision of the current auditorium to provide a smaller auditorium and a "Lemnian Room" for club members and their guests, together with a members' lounge and a ramp for disabled access. The development application included alterations and additions to that part of the building that was erected without development consent. Clarence supported the appeals.

The local environmental planning instrument prohibited use for the purpose of a registered club. Lemnian and Clarence relied on existing use rights. The existing use rights arose from the grant of development consent in 1965-66, at which time an application "for permission to erect a single storied brick clubhouse" was approved, with accompanying plans. The consent was modified, recorded by a stamped plan noting "Approved subject to Ordinances 44, 71 and 106 of the *Local Government Act 1919* …" and "The structure must be erected strictly in accordance with the approved Plans and Specifications as regards the position on the site and in all other respects." The council agreed that the whole of the land the subject of the proceedings had the benefit of an existing use for the purpose of a club.

The council opposed the grant of development consent on the basis that the works the subject of the application facilitated the use of the premises as a "function centre" which is a prohibited use, that the proposal results in an intensity of use that is inappropriate for the site, given its impact on neighbouring residents and the proposed areas to be dedicated to the use of the building as a registered club will not adequately cater for the members and guests attending the premises as a registered club. The council relied on evidence that the premises were currently being used for functions, and submitted that the premises had become a "function centre", which use was facilitated by the development application.

Clarence and Lemnian contended that development consent for use of the premises was not required, given that the whole of the land had the benefit of an existing use for the purpose of a club.

Issues:

(1) The nature and extent of the existing use;

(2) Whether the works sought to be approved through both the development appeal and the building certificate appeal were for the purpose of the existing use;

(3) Whether the development application sought the "enlargement, expansion or intensification" of an existing use;

(4) If the proposed development was for the "enlargement, expansion or intensification" of the existing use, whether the impacts could be managed through the imposition of conditions of development consent;

(5) Whether the proposed areas to be dedicated to the club use were appropriate for development for the purposes of a club;

(6) Whether the proposed development was appropriate for the site, considering the impacts of the development on adjoining residents and the other matters required by s 79C of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**); and

(7) What works were required to be completed prior to the issue of a building certificate.

Held: Allowing the appeals, directing the issue of a building certificate and granting development consent:

(1) The continued operation of the 1967 consent meant that the whole of the site benefits from an existing use for the purpose of clubhouse: at [57]. The existing use is defined by the terms of the existing consent, including the approved plans: at [58];

(2) The existing use is constrained first to use for the purpose of "clubhouse", and second to the building depicted in the plans as modified in 1970: at [61]. Therefore whilst the whole of the land benefits from the existing use, only the building envelope depicted in the approved plans is "the building" that benefits from that same use: at [64];

(3) In determining whether the use facilitated by the development application can be characterised as a use for the purpose of "clubhouse" consistent with the existing use, the Court needs only to be satisfied that the application seeks consent to carry out development for the purpose of a clubhouse, and that the proposed building can be used for that purpose: at [91]. Previous or current alleged illegality cannot be used to characterise the future use sought by the proposed development: at [90]. Whether there is a risk that the use of the premises might evolve into a prohibited use is irrelevant to considering whether consent should be granted for a permissible use: at [91]. Similarly, the risk that the building the subject of a building certificate application might be used for an impermissible use is not a reason for refusal of the building certificate: at [91];

(4) The development application does not seek consent for any use other than use for the purpose of a club house, for the following reasons: the activity of carrying out functions by its nature falls within a range of activities that are for the purpose of clubhouse: at [98]; there is nothing about the proposed configuration of the club premises as depicted in the plans lodged with the development application that renders it development for the purpose of something other than the clubhouse: at [99]; there is evidence that Lemnian will continue to carry out other club activities in addition to functions: at [100]; the carrying out of function activities is to be within the clubhouse building and is to be managed either by Lemnian or by another party with the authority conferred by their commercial relationship with Lemnian: at [101]; and the function activities and the lease to Clarence to cater and manage functions forms part of the activities to fund the continuing operation of the club: at [102];

(5) Before considering whether consent should be granted for alterations and additions to the extended part of the building, development consent is required for the expansion of the existing use to the extended part of the building as that extension was beyond the building footprint in the existing consent: at [110]-[121]. Development consent is also required for the intensification or expansion of the existing use because of the increased capacity of the building: at [127];

(6) The traffic and parking impacts of the intensification or expansion can be managed by conditions of consent limiting the number of persons who can be at the premises; requiring valet parking when more than 400 persons are expected to be at the premises; and limiting the occasions on which there are more than 400 persons expected to be at the premises: at [143]-[146];

(7) The acoustic impacts of the intensification or expansion of the use can be managed by conditions of consent requiring: the noise emission to be limited to specified criteria: at [162]; specified trading hours with functions to conclude by a specified time: at [166]; works to be carried out to reduce noise emitted from the premises and from plant and equipment: at [148]-[149], [164]-[165]; and appropriate measures to manage patron noise in the Plan of Management: at [168]-[169];

(8) As to whether the proposed areas to be introduced by the works were appropriate for the club use, they have sufficient floor space to allow flexibility in their use, and allow for a partition to facilitate that flexibility. The popularity of spaces within the clubhouse, or the adequacy of access from the kitchen to those spaces, is something for Lemnian to resolve in operating the clubhouse but is not relevant to determining whether consent should be granted: at [178];

(9) The lack of a building certificate for the premises does not warrant refusal of a development application for prospective works and use: at [186];

(10) In considering the remainder of the matters for consideration under s 79C of the EPA Act, the size of the site, its ability to accommodate car parking and its location at the end of a service road and beside the train line, make it suitable for the proposal to intensify and/or expand the existing use, as well as for alterations and additions to the building as sought. Development consent should be granted on conditions that reflect the findings in relation to the parking and acoustic impacts: at [192]; and

(11) Subsumed in the findings on the development application for the premises is the consideration of the "notional development application" for the southern extension of the building, which is relevant to Clarence and Lemnian's request for the issue of a partial building certificate. Subject to works being carried out and certification being obtained to ensure that the southern extension of the building complies with the Building Code of Australia, the building certificate should be issued: at [198].

Li v Willoughby City Council **[2018] NSWLEC 1262** (O'Neill C)

Facts: The applicant appealed under s 30(1) of the *Heritage Act 1977 (NSW)* (**the Heritage Act**) against the making of an Interim Heritage Order (**IHO**) by Willoughby City Council (**the council**) over the property at 9 Centennial Avenue, Chatswood. The applicant appealed under s 8.18(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) and s 190(1) of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) against the making of two emergency orders over the property at 9 Centennial Avenue, Chatswood. The site was located in an area zoned for low density housing. A complying development certificate (**CDC**) had been issued by a private certifier for the demolition of the dwelling house and the demolition was underway when a council officer visited the site. The council had commenced Class 4 proceedings in the Court to determine the validity of the CDC. A draft Heritage Inventory Sheet had been attached to the report considered by the council at its meeting when the council resolved to make the IHO. The draft Heritage Inventory Sheet was compiled by the council's heritage planner, using the template provided by the Heritage Branch and was based on two heritage reports prepared for the council in 1996 and 2009.

Issues:

(1) Whether on further inquiry or investigation the dwelling house may be found to be of local heritage significance; and

(2) Whether the jurisdiction for the council to have made the IHO was sufficiently engaged where the applicant contended that the council had not complied with condition (1)(b) of the Ministerial Order which authorised the council to make an IHO under s 25(1) of the Heritage Act.

Held: Upholding the appeals by amending the IHO and determining that the emergency orders had been sufficiently complied with:

(1) The draft Heritage Inventory Sheet for the dwelling house attached to the report considered when the council resolved to make the IHO was sufficient to satisfy condition (1)(b) of the conditions of the Ministerial Order requiring the council to consider a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the council. The jurisdiction for the council to have made the IHO was sufficiently engaged: at [23];

(2) If the IHO had been made in breach of the condition in the Ministerial Order, the Court had jurisdiction to consider afresh the council's decision to make the IHO because the council's decision was a decision purported to have been made in the exercise of the powers conferred by an enactment, whether or not as a matter of law it was validly made: at [31];

(3) The IHO should be retained and amended to apply to the curtilage of the dwelling house but to exclude the separate garage structure, which was not contemporaneous with the dwelling and was of no heritage significance: at [37]; and

(4) The emergency orders had been sufficiently complied with and the dwelling house was protected from demolition under s 57(1)(a) of the Heritage Act: at [40], [43].

***MKD Architects v Kiama Council* [2018] NSWLEC 1169** (Dickson C)

Facts: These proceedings relate to the site of the Grand Hotel at Kiama. MKD Architects (**the applicant**) sought approval for alterations and additions to the existing hotel and the construction of a new four-storey building for guest accommodation on the adjoining allotment. The application was refused by Kiama Council and the applicant appealed, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979 (NSW)*.

The Grand Hotel is a locally listed heritage item in the Kiama Local Environmental Plan 2011.

Issues:

(1) Whether the variations to the height and floor standard controls sought by the proposed development were well founded and worthy of support;

(2) Whether the acoustic impacts likely to arise from the development were certain and able to be managed satisfactorily by the proposed mitigation measures and Plan of Management (**POM**);

(3) The appropriateness of the proposed deferred commencement condition concerning acoustic treatment of windows in the Grand Hotel; and

(4) Whether the variation to the parking standard and the reliance on street parking for the proposed uses was acceptable.

Held: Variations to the height and floor space standard upheld; appeal dismissed; and development consent refused:

(1) That despite the variation to the height standard, the proposed development was consistent with the objectives of the height standard (at [49]). On the basis of the significant restorative works proposed and the agreed evidence of the planning experts (at [56]), there were sufficient environmental planning grounds to justify the variation: at [57];

(2) The planning experts agreed that the variation request for floor space should be upheld. Following a comparative assessment between the impacts arising from a compliant scheme and the proposal, it was found that the impacts arising from the additional floor space proposed were not sufficient to render the development antipathetic to the objectives of the floor space standard (at [85]). There were sufficient environmental planning grounds to justify the variation on the basis of the operational management benefit arising from the application of conditions of consent and implementation of a POM and the agreed evidence of the planning experts: at [97];

(3) The proposed deferred commencement condition to address the acoustic treatment of the windows in the Grand Hotel was not final or certain as it required a design process and detailed investigation of the fenestration of the existing building: at [141];

(4) The extent of impact on the heritage fabric to achieve the required acoustic rating was uncertain. Given the uncertainty, it was not possible to assess the impacts of any works on the significance of the Grand Hotel or confirm the acoustic performance could be achieved. Such an assessment was an essential matter for the application and was not to be done post consent: at [144];

(5) It was inappropriate to pursue an "amber light" approach in this matter as the Court was unable to prescribe with clarity the changes that would render the proposal acceptable: at [148]; and

(6) The applicant relied on an estimate of patronage numbers through sales data and limited parking data. The applicant provided insufficient evidence and data to determine with certainty the parking impacts that arose from the development or to allow a determination if a variation to the parking controls was warranted: at [146].

***Modog Pty Ltd v North Sydney Council* [2018] NSWLEC 1160** (Smithson C)

Facts: Appeal against the council's deemed refusal of an application to demolish an existing residential flat building (**RFB**) and construct a new RFB, on the basis that the site at 6 Thrupp Street, Neutral Bay benefited from existing use rights which permitted the proposed development.

The council contended that the applicant had not established that the site had existing use rights as defined under s 106 of the *Environmental Planning and Assessment Act 1979 (NSW)* and therefore the application could not be approved as RFBs were prohibited in the zone. If however, existing use rights were found to exist, then the application ought to be refused as a merit assessment would conclude that

the proposed RFB would have unacceptable adverse impacts on neighbours and on the low density area in which the site is located.

The applicant provided evidence indicating that the building on the site had been continuously used as flats since at least the 1920's. It was agreed between the parties that the council had issued a notice to upgrade the building on the site to meet RFB fire requirements in 2002 and had granted consent to the subsequent upgrading works which referenced RFB use of the building. Concurrence of the Department of Planning at the time also referenced this use. However, the council submitted that acceptance of the RFB building on the site did not constitute acceptance of that building's use.

The proposed RFB added an additional level beyond the height of the existing RFB which was surrounded by low density dwellings in close proximity to all boundaries. Neighbour objection to the new RFB was received. Resident and council contentions for refusal were in terms of impacts associated with the proposed setbacks, height, appearance, overshadowing, privacy and view loss.

Issue:

(1) Does the site benefit from existing use rights for the purposes of an RFB; and

(2) If so, should consent be granted for the existing RFB to be replaced with a new RFB given the impacts.

Held: Appeal dismissed and development application refused:

(1) On the evidence provided, the site does have existing use rights (at [94]) and an RFB building by its specific description refers to both the building and to the use thereof: at [91] to [92];

(2) It was within power to grant consent to replace the existing RFB with a new RFB under existing use provisions of the Environmental Planning and Assessment Regulation 2000 subject to a merit assessment of the proposal: at [94];

(3) The merit assessment had regard to the Court's planning principles established in *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71. These principles direct an assessment having regard to the relationship of the proposed bulk and scale to what is permissible on surrounding sites; the impacts on adjoining land; and the internal amenity of what is proposed: at [95];

(4) The new RFB replaces an existing RFB in character with its context with a new, bulkier building not in character and with streetscape and amenity impacts. The site is constrained by the close proximity of its lower density neighbours with five dwelling houses sharing a common boundary. Consequent unreasonable adverse amenity impacts would arise for these neighbours as a result of the height, length and extent of the proposed RFB: at [202]; and

(5) Whilst the applicant requested the opportunity to amend the application to lower the height should the Court not support the application in its current form, the outcome and potential impact of such a change was not sufficiently apparent to demonstrate key issues would be resolved. This request was therefore not granted: at [204] to [205].

***Wirrabara Village Pty Limited v The Hills Shire Council* [2018] NSWLEC 1187** (O'Neill C)

Facts: Wirrabara Village Pty Limited (**the applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EPA Act**) against the deemed refusal by The Hills Shire Council to grant consent to a seniors housing development consisting of a 72-bed residential aged care facility and 102 self-care dwellings, as well as community facilities and site works, including the construction of private roads, at 3-5 Pellitt Lane and 9 Wirrabara Road, Dural. The application was made pursuant to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**the SEPP**) as the land was zoned RU6 Transition under The Hills Local Environmental Plan 2012 (**the THLEP 2012**) and the proposal was prohibited under the THLEP 2012. The hearing had been expedited due to the potential expiration of a site suitability certificate (*Wirrabara Village Pty Limited v The Hills Shire* Council [2018] NSWLEC 6).

Issues:

(1) Whether the adjoining RE1 Public Recreation-zoned land was land zoned primarily for urban purposes;

(2) Whether the site was sufficiently proximate to land zoned primarily for urban purposes at a distance of 71.7 metres from the site so as to adjoin it;

(3) Whether the proposal must be refused because the site was incapable of complying with cl 26(2) of the SEPP requiring access to facilities and services;

(4) Whether the proposal adequately demonstrated that services required to be provided to the future residents of the self-care dwellings would in fact be provided;

(5) Whether the proposal resulted in unacceptable impacts on the endangered ecological community (**the EEC**) and the habitat of threatened species;

(6) Whether compliance with the eight-metre height development standard in the SEPP was unreasonable or unnecessary; and

(7) Whether the proposal was compatible with the rural residential character of the locality.

Held: Dismissing the appeal, refusing development consent:

(1) The adjoining land zoned RE1 Public Recreation was not land zoned primarily for urban purposes: at [59];

(2) The site was sufficiently proximate to the land zoned primarily for urban purposes so as to adjoin it: at [65];

(3) There was insufficient evidence to demonstrate that the services required to be provided to the future residents of the self-care dwellings would in fact be provided: at [72];

(4) There was insufficient evidence to demonstrate that the substantial modification of at least 31% of the EEC to form the asset protection zone for bushfire protection would not have a significant impact on the habitat of threatened species and that suitable mitigation measures had been designed and assessed: at [90];

(5) The exceedance of the eight-metre height development standard was not justified by the written request pursuant to cl 4.6 of the THLEP 2012 because the exceedance of the development standard was caused by the excessive fill required to level the terrain of the site and the bulk and scale of the development as a direct consequence of the raised ground level had a detrimental impact on the amenity of the northern neighbour: at [97]-[101];

(6) The amenity of villas 18-27 on the site was compromised by the insufficient seven-metre separation between the rear of the villas and the balconies of the nearby residential apartment buildings: at [103]-[106];

(7) The side setback of 2.3 metres from the shared boundary with the northern neighbour had a detrimental impact on the amenity of the adjoining property which could not be ameliorated by the addition of louvres to the first floor: at [107]; and

(8) The proposal failed to adequately respond to the rural character of the locality: at [108]-[110].

***Woolworths Limited v Randwick City Council* [2018] NSWLEC 1183** (Dixon SC)

(related decisions: *Woolworths Limited v Randwick City Council* [2017] NSWCA 179 (Leeming and Payne JJA and Preston CJ of LEC); *Woolworths Limited v Randwick City Council* [2016] NSWLEC 82 (Moore J))

Facts: Woolworths Limited appealed against Randwick City Council's refusal of a development application seeking development consent for a Dan Murphy's retail liquor store which, other than parking, was confined to the ground floor of the former Randwick Rugby Club premises (an existing commercial building) in Coogee. The application was to utilise the existing plant and equipment from the former club use of the site and 39 of the existing off-street car spaces and the loading dock.

The site was located within the R3 Medium Density zone under the Randwick Local Environmental Plan 2012 (**the RLEP**). Development for the purposes of a "shop" was permissible with consent subject to the provisions of cl 6.13 of the RLEP.

Issue: How were competing interpretations of the zone objectives and the provisions of cl 6.13(1)(a) and 3(b) of the RLEP requiring the development to be "small scale" to be resolved.

Held: Appeal upheld; development consent granted:

(1) The objective to be "small scale" was not relevant. In the present circumstances, the use was permissible and appropriate for the site in relation to its impacts: at [76]; and

(2) There was no reason to refuse this application on the grounds of traffic, social impact or town planning. With respect to the objectors' concerns and the public interest, these matters had been

appropriately addressed by the expert evidence coupled with the fact that the police had not raised any objection to the proposal and the proposed conditions of consent: at [84-86].

- Registrar Decisions:

Gloucester Resources Limited v Minister for Planning and Environment **[2018] NSWLEC 1185** (Froh R)

Facts: A Notice of Motion filed on 7 March 2018 on behalf of the Secretary, Department of Planning and Environment seeking, pursuant to r 33.4 of the Uniform Civil Procedure Rules 2005, to set aside the subpoena dated 21 February 2018 addressed to her and which was issued at the request of Gloucester Resources Limited (**GRL**).

In the substantive proceedings, GRL was appealing a determination by the Planning Assessment Commission, dated 14 December 2017 (under delegation from the Minister for Planning and Environment) to refuse State Significant Development Application No SSD 5156 for the Amended Rocky Hill Project.

The subpoena was narrowed in scope after it was issued and sought the production of:

(1) All documents including emails created between 18 December 2012 and 14 December 2017 relating to State Significant Development Application No. SSD 5156 for the Rocky Hill Coal Project and which disclose advice (other than privileged legal advice), recommendations, directions, analysis or views on the merits of the proposal.

(2) All documents including emails held by the Department of Planning & Environment relating to State Significant Development Application No. SSD 5156 for the Rocky Hill Coal Project and which disclose advice (other than privileged legal advice), recommendations, directions, analysis or views on the merits of the proposal.

GRL acknowledged that the task of responding to the subpoena would be costly and time consuming and agreed to pay the Secretary's reasonable costs of production and for a four-week time period from the date of decision to allow production under the subpoena to occur.

Issues:

(1) Whether the subpoena, in its narrowed form, had a legitimate forensic purpose; and

(2) Whether the documents sought went to the merits of the project in the substantive proceedings.

Held: Subpoena set aside:

(1) Whether there is a legitimate forensic purpose turns upon the connection between the issues raised in the proceedings and documents which are the subject of the subpoena. GRL failed to identify any issues to which the documents sought by the subpoena and which are not already available to it may or will relate: at [22]; and there was no basis for considering that documents within the scope of the subpoena fell outside those already accessible to GRL: at [36]; and

(2) Pursuant to the decision of Gray R (as she then was) in *Project 28 Pty Ltd v Minister for Planning* [2016] NSWLEC 1363, it was simply not "on the cards" that the documents sought will materially assist GRL to make good its contentions as set out in its Statements of Facts and Contentions in Reply as mere relevance is insufficient: at [26] and [37].

Court News

- Arrivals/Departures:

Commissioner Graham Brown retired as a Commissioner of the Court from 30 June 2018.