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# Land and Environment Court of NSW Judicial Newsletter



## Legislation

### Statutes and Regulations:

- Planning:

Environmental Planning and Assessment Amendment (Low Rise Medium Density Housing) Amendment Regulation 2018 - published 5 July 2018, amended the Environmental Planning and Assessment Amendment (Low Rise Medium Density Housing) Regulation 2017 to include definitions for manor house and multi dwelling housing (terraces) and now requires a consent authority to take into account the Medium Density Design Guide for Development Applications when assessing development for the purposes of a manor house or multi dwelling housing (terraces), but only if the consent authority is satisfied that there is no relevant development control plan.

Environmental Planning and Assessment Amendment (Low Rise Medium Density Housing) Regulation 2017 - commenced 6 July 2018 (upon commencement of the State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017). The objects of this Regulation are:

- to permit 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,
- to require 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 State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 that is required to carry out the development on bush fire prone land, and
- to require 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* or a person accredited as a building designer that:
  - verifies that he or she designed, or directed the design of, the development, and
  - 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 (Identification of Buildings with External Combustible Cladding) Regulation 2018 - published 31 August 2018, make provision for the identification of, and collection of information about, buildings to which external combustible cladding has been applied. The proposed scheme applies only to class 2, class 3 and class 9 buildings of two or more storeys and to any Class 4 part of a Class 9 building of two or more storeys. The proposed scheme:

- requires the owner of a building to which external combustible cladding has been applied to provide to the Secretary of the Department of Planning and Environment details of the building and the external combustible cladding, and
- authorises the Secretary to maintain a register of buildings to which external combustible cladding has been applied.

This Regulation also provides for the referral of certain plans and specifications to Fire and Rescue NSW in certain cases where an alternative solution is proposed involving external combustible cladding and the alternative solution does not apply the verification method in the Building Code of Australia in its entirety.

Environmental Planning and Assessment Further Amendment (Miscellaneous) Regulation 2018 - commenced 1 September 2018, to amend Schs 1 and 5 to the *Environmental Planning and Assessment Act 1979*, and the regulations made under that Act, in connection with the enactment of the *Environmental Planning and Assessment Amendment Act 2017*, to:

- enable the public notification of the reasons for certain decisions by reference to other documents,
- clarify an item relating to restore works orders,
- update references to the Planning Secretary and Independent Planning Commission,
- update terminology and update cross-references to the principal Act,
- make further savings and transitional provisions,
- clarify that a consent authority may refuse to grant development consent, issue a complying development certificate or issue a construction certificate on the basis that any building product or system relating to the development is prohibited under the Building Products (Safety) Act 2017,
- enable the Planning Secretary to reduce or waive development application fees,
- extend the date by which councils within the Greater Sydney Region must exhibit and make their first local strategic planning statements,
- extend the date by which a planning authority is required to prepare its first community participation plan, and
- postpone the commencement of Pt 6 (Building and subdivision certification) of the principal Act. The commencement of this part has been postponed from 1 September 2018 to 1 September 2019.

Environmental Planning and Assessment Amendment (Sydney Metro City and Southwest Project) Order 2018 - published 28 September 2018, amended the declaration of Sydney Metro City and Southwest as critical State significant infrastructure to include the suburbs of Earlwood and Yagoona as land on which development may be carried out.

- Local Government:

Local Government (Regional Joint Organisations) Amendment Proclamation 2018 - published 6 July 2018, constituted the Far North West Joint Organisation and Far South West Joint Organisation, and removed the Cobar council area from the joint organisation area for the Orana Joint Organisation.

Local Government (Regional Joint Organisations) Further Amendment Proclamation 2018 - published 10 August 2018, amended the Local Government (Regional Joint Organisations) Proclamation 2018 to add certain local council areas to the joint organisations of New England, Orana and Riverina and Murray.

- Biodiversity

Biodiversity Conservation (Savings and Transitional) Further Amendment Regulation 2018 - published 10 August 2018, amended the Biodiversity Conservation (Savings and Transitional) Regulation 2017 to make further provisions of a savings and transitional nature that are consequential on the enactment of

the *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016*. The Biodiversity Conservation (Savings and Transitional) Further Amendment Regulation 2018:

- extended the new procedure for biodiversity assessment set out in the *Biodiversity Conservation Act 2016* so that it applies to the consideration of applications to modify planning approvals granted in accordance with the former planning provisions;
- varied the procedure applicable in those cases, so that the biodiversity development assessment report prepared for the application for modification is required to consider only those impacts of the development on the biodiversity values of the land that result from the modification of the development and not those associated with the development as approved; and
- extended the power of the Environment Agency Head to accept an enforceable undertaking under the Biodiversity Conservation Act 2016.

- Criminal:

Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 - assented to 24 October 2017, commenced 24 September 2018 to amend the *Crimes (Sentencing Procedure) Act 1999* (see Judicial Newsletter November 2017).

- Mining and Petroleum:

Coal Mine Subsidence Compensation Amendment (Miscellaneous) Regulation 2018 - published 31 August 2018, commenced 1 September 2018 to amend the Coal Mine Subsidence Compensation Regulation 2017 to:

- continue for a further period of 6 months (ending on 30 June 2019) provisions of the repealed *Mine Subsidence Compensation Act 1961* relating to certificates of compliance and certificates of claims paid, and
- declare the new mine subsidence district of Branxton.

- Water:

Fisheries Management Legislation Amendment Regulation 2018 - commenced 1 July 2018, the objects of this Regulation are:

- to make amendments as a consequence of the commencement on 1 July 2018 of some of the remaining uncommenced provisions in the Fisheries Management Amendment Act 2015, including:
  - to specify the commercial fishing activities that require a fishing boat licence,
  - to make provision for fishing boat licences, including the matters to be specified on a licence and the licence conditions, and
  - to set out the boat marking requirements for commercial fishing boats,
  - to provide exceptions to the new offence of removing or possessing a shark fin or part of a shark, and
  - to remove provisions relating to commercial fishing boat crew members as they are no longer required to be registered.
- to make further provision for the transfer of endorsements and shares by fishing business owners in restricted fisheries and share management fisheries,
- to prevent the making of appeals against an allocation of quota shares by a person who has already transferred some or all of those shares,
- to require a commercial fisher who carries out fishing activities on behalf of the Fisheries Administration Ministerial Corporation to make records of those fishing activities, as commercial fishers are generally required to do,
- to include restricted fishery endorsements and aquaculture leases as fishing assets, which the Minister for Primary Industries may acquire for the purpose of benefiting Aboriginal communities as part of Aboriginal fishing assistance programs,

- to make other minor and consequential amendments, including transferring provisions from the share management plans for the abalone and lobster fisheries to the Fisheries Management (Supporting Plan) Regulation 2006.

*Water Management Amendment Act 2018* - assented to and partially commenced on 27 June 2018, amended the *Water Management Act 2000* (NSW). On 9 August 2018, Sch 1 [60] to the Act commenced, which enabled the Minister for Regional Water to temporarily prohibit or restrict the taking of water if satisfied that it is necessary to do so to manage water for environmental purposes.

Water Management (General) Regulation 2018 - published 24 August 2018, repealed and remade, with some changes, the Water Management (General) Regulation 2011 to make provision for, inter alia, water access licences, water use approvals and lodgement of applications, claims and objections.

Access Licence Dealing Principles (Macquarie and Cudgegong Regulated Rivers Water Sources) Order 2018 (2018-528) - published 11 September 2018, has the effect, together with the Temporary Water Restriction (Macquarie and Cudgegong Regulated Rivers Water Sources) Order (No 2) 2018, that only 70% of the water in a water allocation account of a Macquarie regulated river (general security) access licence as at 1 July 2018 is available for take or trade.

Fisheries Management Legislation Further Amendment Regulation 2018 - published 21 September 2018, amended a number of regulations under the *Fisheries Management Act 1994* to:

- provide for the creation and issue of new shares in the estuary general, ocean hauling, ocean trap and line and ocean trawl share management fisheries (referred to as quota shares),
- provide for the allocation and transfer of quota shares among the relevant shareholders,
- require fishing determinations of the total allowable catch of certain species, and of the total allowable fishing effort for prawn fishing, to be made in the estuary general, ocean hauling, ocean trap and line and ocean trawl share management fisheries,
- require the Secretary of the Department of Industry (the Secretary) to allocate various fishing determinations as quota among the holders of quota shares in the estuary general, ocean hauling, ocean trap and line and ocean trawl share management fisheries,
- introduce bag limits for various species of fish in the estuary general, ocean hauling, ocean trap and line, ocean trawl and lobster share management fisheries,
- to set out the information about fishing activities and catch that fishers in the estuary general, ocean hauling, ocean trap and line and ocean trawl share management fisheries are required to provide to the Secretary via the real time reporting system,
- further provide for the rights of priority of endorsement holders using prawn nets (set pocket) and prawn running nets in the estuary general share management fishery, and
- to make various other minor and miscellaneous amendments

- Miscellaneous:

Biosecurity (National Livestock Identification System) Amendment (Pig Standards) Regulation 2018 - published 25 July 2018, amended the Biosecurity (National Livestock Identification System) Regulation 2017 in relation to the identification and tracking of the movement of pigs.

*Statute Law (Miscellaneous Provisions) Act 2018* - assented to and partially commenced on 15 June 2018. Schedule 2 commenced on 1 August 2018 and amended provisions of various Acts and Regulations that require notices to be published in newspapers in a manner that persons required to publish them are satisfied is likely to bring them to the attention of the persons to whom they are directed. The amendment enabled the publication of notices online where appropriate, including in newspapers that are available in a digital form. The amended Acts include the *Environmental Planning and Assessment Act 1979*, the *Environmental Trust Act 1998*, the *Fisheries Management Act 1994*, the *Heritage Act 1977*, the *Local Government Act 1993*, the *National Parks and Wildlife Act 1974*, the *Protection of the Environment Operations Act 1997* and the *Water Act 1912*.

Building Professionals Amendment (Accredited Certifiers) Regulation 2018 - published 3 August 2018, the object of this Regulation is to authorise Category A1, A2, A3 and B1 accredited certifiers to issue complying development certificates in relation to pipeline infrastructure for water supply and sewerage that is complying development under cl 130 of State Environmental Planning Policy (Infrastructure) 2007.

Conveyancing (General) Regulation 2018 - published 10 August 2018, repealed and remade, with some changes, the Conveyancing (General) Regulation 2013 to update references to relevant provisions and to

simplify its structure. The Conveyancing (General) Regulation 2018 introduced a two-year time limit on the validity of Survey Certificates accompanying a plan of survey (unless the plan is accompanied by a certificate of currency).

Community Land Development Regulation 2018 - published 31 August 2018, repealed and remade, with minor amendments, the Community Land Development Regulation 2007. This Regulation deals with the following matters:

- community, precinct and neighbourhood plans (Pt 2);
- plans and instruments relating to certain transactions, including boundary adjustment plans;
- community, precinct and neighbourhood plans of consolidation and subdivision, acquisition plans;
- the conversion of development or neighbourhood lots to association property and the severance of development lots (Pt 3);
- development contracts and management statements (Pt 4); and
- other matters of a minor, consequential or ancillary nature, including fees payable under the Act (Pts 1 and 5).

Building Professionals Amendment (Swimming Pools) Regulation 2018 - published 31 August 2018, commenced 1 September 2018 to specify the categories of accreditation under the *Building Professionals Act 2005* that enable the holder of that category of accreditation to carry out inspections and issue certificates and notices under the *Swimming Pools Act 1992*.

Swimming Pools Regulation 2018 - commenced 1 September 2018, repealed and remade, with some changes, the provisions of the Swimming Pools Regulation 2008. The main changes made by this Regulation are to:

- provide for a securely fastened and lockable child-resistant structure to restrict access to a spa pool,
- require a warning sign to be erected during the construction of certain swimming pools,
- update the content of warning signs for swimming pools,
- increase the fees for exemption applications and inspections,
- require information about certificates of non-compliance to be entered on the Register, and
- require public access to all applicable Australian Standards.

Conveyancing (General) Amendment (Optus Fixed Infrastructure Pty Limited) Regulation 2018 - published 5 October 2018, amended the Conveyancing (General) Regulation 2018 to prescribe Optus Fixed Infrastructure Pty Limited as a prescribed authority for the purposes of s 88A of the *Conveyancing Act 1919* so that easements without dominant tenements may be created in favour of that corporation. Any such easements may be created in favour of the corporation only if they are for the purpose of, or incidental to, the supply of a utility service to the public.

## Bills:

Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018 seeks to amend the Strata Schemes Management Act 2015 (NSW) to:

- increase the maximum penalty that a developer of a strata scheme may be liable to pay for the offence of failing to provide a building bond from 200 penalty units to 10,000 penalty units;
- require developers to lodge a building bond before applying for the occupation certificate (rather than at any time before an occupation certificate is issued, as is currently required);
- make it an offence for developers to provide false or misleading information to the Secretary in relation to the contract price or the building bond;
- provide for the claiming, payment, recovery of an amount secured by a building bond and cancellation of building bonds;
- confer new investigative and enforcement powers on authorised officers to require a person to provide information or answer questions and entry to premises and search warrant powers; and
- include “good faith” liability protection for building inspectors, and the professional associations that appointed them, which excludes them from liability for anything done (or omitted to be done) in “good faith” in conducting an inspection.

## State Environmental Planning Policy [SEPP) Amendments:

State Environmental Planning Policy (Gosford City Centre) 2018 - published 12 October 2018, established a new planning framework and amended the assessment and approvals pathway for certain developments within Gosford City Centre. Central Coast Council will now assess development applications up to $10m while the Department of Planning and Environment will assess developments greater than $10m.

*State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017* - commenced 6 July 2018, amended the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* to insert a new complying development code: the Low Rise Medium Density Housing Code.

State Environmental Planning Policy Amendment (Artisan Food and Drink Industries) 2018 - published 27 July 2018, made amendments to several SEPPs and LEPs to alter definitions for "artisan food and drink industry" and clarify floor space controls.

State Environmental Planning Policy Amendment (Garden Centres) 2018 - published 27 July 2018, made amendments to the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 and three LEPs to alter definitions of "garden centre".

State Environmental Planning Policy Amendment (36-50 Cumberland Street, The Rocks—Sirius Site) 2018 - published 3 August 2018, amended the State Environmental Planning Policy (State Significant Precincts) 2005 to clarify existing provisions and apply planning controls to the site.

State Environmental Planning Policy Amendment (Rural Land Sharing) 2018 - published 3 August 2018, amended the State Environmental Planning Policy (Rural Lands) 2008 to provide for the development of rural land sharing communities, including planning controls and matters to be considered by a consent authority.

The State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 has been amended by the following:

- State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017 - published 6 April 2018, has now commenced and inserted a new complying development code: the Low Rise Medium Density Housing Code;
- State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) Further Amendment 2018 - published 5 July 2018, amended the State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing) 2017 to include definitions for manor house and multi dwelling housing (terraces) and to defer the application of Pt 3B to land in certain local government areas until 1 July 2019;
- State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Low Rise Medium Density Housing Exemptions) 2018 - published 13 July 2018, added local government areas to the list in cl 3B.63;
- State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Greenfield Housing Code) 2018 - published 24 August 2018, amended maps adopted by State Environmental Planning Policy (Exempt and Complying Development Codes) 2008; and
- State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Inland Code) 2018 - published 28 September 2018, will commence 1 January 2019 to expand complying development to include one and two storey homes and home renovations in inland NSW where the proposal meets all of the relevant development standards in the Code. Changes will also be made to the General Exempt Development Code to expand farm building standards.

State Environmental Planning Policy (Vegetation in Non-Rural Areas) Amendment 2018 - published 24 August 2018, amended the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 to extend the special transitional provisions for existing allowable NV Act clearing within R5, E2, E3 and E4 zones to 25 August 2019.

State Environmental Planning Policy Amendment (Exempt Development— Cladding and Decorative Work) 2018 - published 31 August 2018, commenced on 22 October 2018 to amend various State Environmental Planning Policies in relation to work involving external combustible cladding from exempt development.

State Environmental Planning Policy Amendment (Land Use Terms) 2018 - commenced 31 August 2018, amended various State Environmental Planning Policies and Local Environmental Plans to change in relation to bulky good premises, including a number of amendments to LEPs to replace references to "bulky goods premises" with "specialised retail premises".

State Environmental Planning Policy Amendment (Remediation of Land) 2018 - commenced 31 August 2018, amended the State Environmental Planning Policy No 55 - Remediation of Land to make provisions to ensure that adequate arrangements are in place to minimise and manage the risks associated with the containment cell on the site of the former Cockle Creek zinc and lead smelter and Incitec fertiliser factory (and other land within that site that has not been fully remediated) so as to protect human health and the environment in perpetuity.

State Environmental Planning Policy (Infrastructure) Amendment 2018 - commenced 31 August 2018, amended the State Environmental Planning Policy (Infrastructure) 2007. The State Environmental Planning Policy (Infrastructure) Amendment 2018, inter alia:

- Expanded the range of infrastructure-related development permissible either with development consent or without consent in circumstances where that type of development would not have otherwise been permissible, including new provisions for correctional services, emergency and police services facilities and bushfire hazard reduction, ports and roads infrastructure, including facilities for electric vehicles, and other operational and housekeeping improvements;
- Amended cl 20B by inserting (C1) requiring that development will not be complying development unless it is carried out in accordance with relevant provisions of the Blue Book; and
- Introduced new consultation requirements for certain types of activities.

These amendments do not apply to development for which a development application was lodged, or for which development had commenced prior to 31 August 2018 or for an activity which a determining authority began to consider under Pt 5 of the *Environmental Planning and Assessment Act 1979* before that date.

State Environmental Planning Policy (State Significant Precincts) Amendment (Sydney Olympic Park) 2017 - published 31 August 2018, amended provisions that regulate development on the Sydney Olympic Park State Significant Precinct in Sch 3 to the State Environmental Planning Policy (State Significant Precincts) 2005.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Air and Noise Impacts) 2018 - published 21 September 2018, amended the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007. Clause 12AB now aligns the non-discretionary standards with the Environment Protection Authority's revised policies for air and noise. The non-discretionary standards restrict a consent authority from requiring more onerous air and noise standards than the revised assessment criteria. Clause 12A now refers to the revised Voluntary Land Acquisition and Mitigation Policy and requires the consent authority to give consideration to the Voluntary Land Acquisition and Mitigation Policy before determining an application.

State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment 2018 - published 2 October 2018, amended the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 to make minor amendments to the rules for site compatibility certificates and to make the relevant planning panel the determining authority for site compatibility certificates issued under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

## Judgments

### High Court of Australia:

***Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30** (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ)

Facts: The Minister for Immigration and Border Protection (**the Minister**), sought to set aside a decision of Full Court of the Federal Court of Australia (**the FCAFC**) (**the FCAFC decision**) on the ground that the Refugee Review Tribunal's (**the Tribunal**) exercise of power under s 426 of the *Migration Act 1958 (Cth)* was not beyond power and not unreasonable.

A delegate for the Minister had refused protection visas for SZVFW and his wife (**the delegate's decision**). Accordingly, SZVFW and his wife applied to the Tribunal to contest the delegate's decision. The Tribunal sought further information and requested their attendance at a scheduled hearing by registered post. The Tribunal did not send communications by phone or e-mail. SZVFW and his wife did not respond. Accordingly, the Tribunal refused their application, noting that they had failed to attend the scheduled interviews (**the Tribunal's decision**).

The Federal Circuit Court of Australia upheld the appeal from the Tribunal's decision (**the FCCA decision**). Barnes J decided that the Tribunal had acted unreasonably in exercising its discretion to finalise the merits review without taking further steps to contact SZVFW and his wife.

The Minister appealed the FCCA decision to the FCAFC. The FCAFC dismissed the appeal, unanimously, on the grounds that the Minister had not demonstrated any appellable error of law or fact, analogous to discretionary judgments as per *House v The King* (1936) 55 CLR 499.

Issue: Whether the Tribunal's exercise of power under s 426A was beyond power because it was unreasonable.

Held: Appeal allowed; application to the Tribunal dismissed; Minister to pay respondent's costs.

*Per Nettle and Gordon JJ:*

(1) Rejected that the FCAFC decision that the primary judge's judicial review of a decision constituted an exercise of judicial discretion: at [87];

(2) The Court was required to assess a decision's reasonableness against the scope, purpose and objects of the legislation: at [79]. Abuse of statutory power is not restricted to "categories of conduct, process of outcome" or decisions which are "manifestly unreasonable": at [81]-[82]; and

(3) Section 426A conferred upon the Tribunal a power to consider, or conduct, a review without taking any further action to enable an applicant to appear at hearing. Section 425 specified the methods by which Tribunal must invite the applicants to appear: at [88]-[92]. Since the Tribunal complied with the notification requirements, the Tribunal could make a decision without taking any further action to allow an applicant to appear at the hearing: at [93], [99] and [119]. The Tribunal's decision was not unreasonable in light of the statutory power and the conduct of SZVFW and his wife: at [123];

*Per Kiefel CJ:*

(4) Rejected that the FCCA decision had overlooked the Tribunal's powers under s 426A: at [7]. Upon satisfying the statutory notification requirements, the Tribunal was entitled to proceed with the decision: at [8]. The statute did not require the Tribunal to exercise its powers in favour of SZVFW and his wife: at [12]-[16];

*Per Gageler J:*

(5) Rejected the FCAFC decision on two grounds. First, the FCAFC decision was required to determine the administrative decision's reasonableness, with due consideration to the Tribunal's statutory power: at [20]-[21] and [54]. Second, the FCAFC's jurisdiction was to decide the correctness of the primary judge's decision: at [55]-[56];

(6) The Tribunal's decision was not unreasonable (at [71]) for three reasons. First, the Tribunal had complied with the notification requirements outlined in s 425: at [69]. Second, SZVFW and his wife had failed to appear: at [69]. Third, the Tribunal was mindful in exercising its discretion under s 426, by considering the "exhortations to be fair and just" and its requirements "to be economical and quick": at [69];

*Per Edelman J:*

(7) The appeal concerned two key issues. First, whether the Tribunal's decision was unreasonable and, second, examining the "circumstances in which judicial restraint should be exercised on appeal": at [128]-[130];

(8) Rejected the facts relied upon in the FCCA decision establishing unreasonableness: at [136]-[139]. Rather, the Tribunal had acted reasonably, by complying with the terms, scope, purpose and object of the statute: at [131], [133], [135] and [140]. In obiter, Edelman J added three further reasons why the Tribunal's decision was not unreasonable: SZVFW and his wife had not informed the department of any postal address changes; the Tribunal sent the notification letters to the specified address; and the applicants did not attend the scheduled interview after numerous attempts to contact them: at [141]; and

(9) Rejected that "judicial restraint" would limit a finding of unreasonableness: at [154].

NSW Court of Appeal:

***Al Maha Pty Ltd v Huajun Investments Pty Ltd*** **[2018] NSWCA 245** (Basten and Leeming JA; Preston CJ of LEC)

(decision under review: *Huajun Investments Pty Ltd v City of Canada Bay Council* [2018] NSWLEC 1087 (Smithson C))

Facts: Huajun Investments Pty Ltd (**Huajun**) applied to City of Canada Bay Council (**the Council**) for development consent to develop its land at 38-42 Leicester Avenue (**Huajun's land**) for a residential flat building. The Council refused the development application and Huajun appealed to the Land and Environment Court of NSW (**the LEC**). The LEC arranged a conciliation conference between Huajun and the Council. The parties were unable to reach agreement at the conciliation conference. The conciliation conference was terminated and the LEC fixed the proceedings for hearing.

The hearing of the proceedings commenced before two commissioners. At the request of the parties, the LEC adjourned the hearing and arranged a second conciliation conference under s 34(1)(a) of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**). At the second conciliation conference, the parties reached agreement and requested the commissioner to dispose of the proceedings in accordance with their agreed decision under s 34(3)(a) of the Court Act. The commissioner decided to do so and made orders granting leave to Huajun to further amend its development application and plans, upholding the appeal and granting development consent to the further amended development application subject to the conditions agreed between the parties (**the development consent decision**). The further amended development application described the development as "sixty two residential apartments (62) with temporary access to Leicester Avenue, and sixty three (63) residential apartments with permanent access to Hilts Road."

Al Maha Pty Ltd (**Al Maha**), the owner of neighbouring land at 36 Leicester Avenue, brought proceedings in the Supreme Court under s 69 of the *Supreme Court Act 1970 (NSW)* to quash the development consent decision. Al Maha raised four grounds of appeal challenging the commissioner's jurisdiction under s 34 of the Court Act to make the development consent decision. First, Al Maha contended that the development consent granted to the further amended development application approved the carrying out of development on Al Maha's land, without Al Maha's consent. Al Maha submitted that the approved development included the construction of a driveway over Al Maha's land to provide permanent access between the basement car-park and Hilts Road. Second, Al Maha contended that the commissioner did not form the required opinions of satisfaction under cl 4.6 of the Canada Bay Local Environmental Plan 2013 (**the CBLEP 2013**) before determining the development consent decision. The commissioner was required to form these opinions of satisfaction because the development contravened the height development standard in cl 4.3 of the CBLEP 2013. Third, Al Maha contended that the development consent decision was legally unreasonable because the further amended plans were inconsistent and failed to demonstrate how access from Hilts Road to the basement car-park would be achieved. Fourth, Al Maha contended that the second conciliation conference was invalidly constituted for two reasons:

(i) because the Court could not re-exercise the power under s 34(1) to arrange a second conciliation conference; and

(ii) because two commissioners presided over the second conciliation conference in contravention of s 34(2) of the Court Act.

Before the hearing of the appeal, Huajun and the Council applied, by consent, in the LEC for the commissioner to amend the development consent decision, by exercising the power in r 36.17 of the Uniform Civil Procedure Rules 2005 (NSW) (**the slip rule**). The parties applied for the orders, the conditions of development consent, and the plans approved by the consent to be amended in various ways in order to limit the approved development and the land on which the approved development could be carried out to Huajun's land and not Al Maha's land. The commissioner made the orders requested by the parties, purportedly exercising the power under the slip rule (**the slip rule decision**).

Al Maha amended its claim in the appeal proceedings to raise an additional ground of appeal challenging the commissioner's slip rule decision.

Issues:

(1) Was Al Maha's consent to the further amended development application required before the commissioner had the power to determine the development application;

(2) Did the commissioner form the requisite opinions of satisfaction under cl 4.6 of the CBLEP 2013 before determining the development consent decision;

(3) Was the development consent decision legally unreasonable and so lacking in certainty and finality as to leave open the possibility of a significantly different development;

(4) Was the second conciliation conference invalidly constituted and the development consent decision that resulted from that conciliation conference invalid; and

(5) Was the slip rule decision authorised by the slip rule.

Held: Commissioner's decision quashed; development consent declared invalid; Huajun to pay applicant's costs.

(1) The power of the commissioner to dispose of the proceedings in accordance with the parties' decision is made conditional on that decision "being a decision that the Court could have made in the proper exercise of its functions" (in s 34(3) of the Court Act): at [71] (Preston CJ of LEC); at [11] (Basten JA); at [41] (Leeming JA);

(2) The requirement in the *Environmental Planning & Assessment Act 1979 (NSW)* (**the EP&A Act**) and the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**) that a development application contain evidence of the owner's consent to the application and the requirement in the applicable environmental planning instrument that development consent not be granted except if some condition is satisfied (for example cl 4.6 of the CBLEP 2013), are jurisdictional prerequisites that need to be satisfied in order for the consent authority (and the Court on appeal exercising the functions of the consent authority) to be able to exercise the function of determining a development application by granting consent to the development application: at [79] (Preston CJ of LEC); at [11] and [18] (Basten JA); at [41] (Leeming JA);

(3) The owner whose consent to the making of the development application is required is the owner of the land on which the development the subject of the development application is to be carried out; this is "the land to which the development application relates" (cl 49(1) of the EP&A Regulation) (at [89] (Preston CJ of LEC)); the land on which the development is to be carried out is to be determined not only from the address and formal particulars of title shown on the development application form but also from the documents that must accompany the development application (at [91] (Preston CJ of LEC)); the land on which the further amended development is to be carried out, and the land to which the further amended development application relates, includes Al Maha's land (at [151] (Preston CJ of LEC); at [9] (Basten JA); at [41] (Leeming JA));

(4) The commissioner had a specific obligation to give reasons with respect to the check on the jurisdiction of the Court, which is required by s 34(3) of the Court Act, to make a decision disposing of the proceedings in accordance with the parties' decision (at [201] (Preston CJ of LEC); at [30] (Basten JA); at [41] (Leeming JA)); the commissioner did not identify any jurisdictional prerequisite or indicate why the prerequisite was satisfied in her judgment or orders; the inference should be drawn from the absence of reasons that the commissioner did not form the necessary opinions of satisfaction under cl 4.6(4) of the CBLEP 2013 (at [203] (Preston CJ of LEC); at [35] (Basten JA); at [41] (Leeming JA));

(5) The plans, as further amended, are inconsistent and unclear in describing the internal access and circulation within the basement car-park: at [211] (Preston CJ of LEC); at [13] (Basten JA); at [41] (Leeming JA):

  (a) the check on jurisdiction required by s 34(3) of the Court Act required the commissioner to determine whether the development application with these deficiencies was a development application that answered that description under the EP&A Act and EP&A Regulation; the inconsistencies are not of such magnitude so as to cause the development application not to comply with the essential statutory prescriptions for a development application: at [223] (Preston CJ of LEC); at [41] (Leeming JA);

  (b) Al Maha framed its ground as a challenge based on the legal unreasonableness of the consent; it is not necessary to determine whether this was an appropriate formulation of the ground, nor whether the deficiencies in the plans were such as to allow them to be characterised in this way; Al Maha succeeds on other grounds: at [16] (Basten JA); at [41] (Leeming JA);

(6) Based on the notations on the Court file and the judgment and the orders of Smithson C, only Smithson C exercised the function of presiding over the conciliation conference and, more importantly, made the decision and orders disposing of the proceedings in accordance with the parties' decision under s 34(3)(a) of the Court Act: at [240] (Preston CJ of LEC); at [6] (Basten JA); at [41] (Leeming JA);

(7) The function under s 34(1) of the Court Act to arrange a conciliation conference is facultative and may be exercised from time to time; there is nothing in the terms of s 34 or any other provision of the Court Act (including s 34C), which indicates an intention to displace this capacity to exercise the function of arranging a conciliation conference from time to time: at [241] (Preston CJ of LEC); at [6] (Basten JA); at [41] (Leeming JA); and

(8) The slip rule decision purported to modify the development consent so as to no longer authorise the carrying out of the development on Al Maha's land by amending certain conditions of consent and substituting an amended plan; these modifications could not be described as corrections of "a clerical mistake" or "an error arising from an accidental slip or omission" and was outside the slip rule power: at [266] (Preston CJ of LEC); at [7] (Basten JA); at [41] (Leeming JA).

***Breen v Clough*** **[2018] NSWCA 172** (Gleeson JA, Sackville and Emmett AJJA)

(related decisions: *Breen v Clough* [2017] NSWSC 1681 (Darke J) and *Breen v Clough (No 2)* [2018] NSWSC 158 (Darke J))

Facts: These proceedings arose out of a dispute between neighbours relating to easements. On 21 November 2014, Mr Breen and Ms Dillon (**the appellants**) brought proceedings against Ms Clough (**the respondent**), claiming she had wrongfully interfered with their rights to use an inclinator located at or near to the boundary of the two neighbouring lots owned by the parties. The primary judge made orders in favour of the appellants, including judgment against the respondent in the sum of $6,000 by way of damages for nuisance. On 2 March 2018, the appellants filed a Notice of Appeal, challenging the primary judge's rejection of the bulk of their claim for damages for nuisance. The appellants" Notice of Appeal did not include a certificate from their solicitor in accordance with Uniform Civil Procedure Rules 2005 (NSW) r 51.22(2). The respondent filed a Summons seeking leave to cross-appeal from part of the decision of the primary judge. Section 101(2)(r) of the *Supreme Court Act 1970 (NSW)* provided that an appeal shall not lie to the Court of Appeal except by leave of the Court of Appeal from "a final judgment or order in proceedings of the Court, other than an appeal: (i) that involves a matter at issue amounting to or of the value of $100,000 or more, or (ii) that involves (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $100,000 or more." The Court raised the competency of the appeal during the hearing, whereupon the appellants made an oral application for leave to appeal.

Issues:

(1) Whether the appellants had a realistic prospect on appeal of obtaining judgment in their favour of at least $100,000;

(2) Whether leave should be granted and the appeal allowed; and

(3) Whether leave should be granted and the cross-appeal allowed.

Held (the Court): The Notice of Appeal dismissed as incompetent; the oral application by the appellants for leave to appeal refused; leave to appeal with respect to the proposed cross-appeal by the respondent refused; and each party bear their own costs.

(1) The schedule of damages claimed nearly $340,000 as damages: at [35]. Claims itemised in the schedule either lacked evidence or did not relate to any acts of nuisance allegedly committed by the respondent: at [36] and [38]. Accordingly, the appeal was incompetent: at [40];

(2) The appellants' submissions did not raise any issue of principle (at [42]), nor did they establish that they would suffer injustice if leave to appeal was refused: at [43]. The costs incurred by the parties were wholly disproportionate to the value and significance of the issues in dispute and, should leave be granted and the appeal allowed, the consequence would be further litigation: at [44]. Additionally, one of the arguments the appellants wished to belatedly arise on appeal was contrary to a position which they had held over a lengthy period: at [45]; and

(3) The question was whether the right or property in issue on the appeal was valued at more than $100,000: at [50]. The respondent did not contend that the right or property in issue was valued

at more than $100,000: at [50]. No question of principle or public importance was identified (at [51), nor was there any injustice to the respondent in denying leave to cross-appeal: at [51].

***Carlewie Pty Ltd v Roads and Maritime Services*** **[2018] NSWCA 181** (Basten, Payne and White JJA)

(related decision: *Carlewie Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 78 (Sheahan J; Maston AC))

Facts: This is an appeal from a decision concerning the amount of compensation to be paid for the compulsory acquisition of a site at St Peters, which was resumed for the WestConnex Motorway Project. Those proceedings were heard jointly by a judge and an acting commissioner of the Land and Environment Court. Carlewie Pty Ltd, the appellant company (**the company**), challenged the amount of compensation awarded by the Valuer General, and claimed an amount of compensation in the area of $36 million for the market value of the land, in addition to amounts for disturbance. The appropriate amount of compensation was determined as being $23 million.

In the appeal, the company challenged the determination. Although various grounds of appeal were pleaded, the Court of Appeal dealt with only the argument that the decision was invalid, because an acting commissioner played an adjudicatory role in the proceedings, in contravention of s 37 of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**). Section 37(3) of the Court Act provides that a commissioner may "assist and advise the Court, but shall not adjudicate on any matter before the Court." The appellant's claim in respect of this argument was based on the nature of the language used in the judgment, including the repeated use of first person plural language, such as "we" and "our".

Issues:

(1) What is the scope of the function conferred on a commissioner who sits with a judge under s 37 of the Court Act;

(2) What role did the commissioner undertake in the proceedings before the Court; and

(3) Did this render the decision invalid.

Held (Basten JA; Payne and White JJA agreeing): Appeal allowed; judgment and orders set aside; respondent to pay the company's costs.

(1) The function of a commissioner is distinct from that of the Court; and s 37(3) of the Court Act constrains the function of a commissioner to assisting and advising, while prohibiting adjudication of any matter before the court: at [10];

(2) The language used in the Court's judgment prevented a certain conclusion that the appropriate separation of the functions of a judge and a commissioner were maintained: at [38]. The acting commissioner therefore played an adjudicatory role in the proceedings, in contravention of s 37(3) of the Court Act: at [39]; and

(3) That the commissioner was not to play an adjudicatory role in proceedings was an essential precondition to the valid exercise of the Court's powers: at [52].

***Cmunt v Snowy Monaro Regional Council*** **[2018] NSWCA 237** (Basten JA, Leeming JA and Emmett AJA)

(decision at first instance: *Snowy Monaro Regional Council v Cmunt* [2017] NSWLEC 95 (Preston CJ))

Facts: In August and November 2015, Snowy River Shire Council issued the appellants, Mr and Mrs Cmunt (**the appellants**), with a notice under s 96 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) and two orders under s 121B of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) (collectively **the Notices**) concerning land situated at Kiparra Drive, Berridale (**the premises**). The notice under s 96 of the EP&A Act directed the appellants to take preventative action concerning the keeping of dogs at the premises (**the Prevention Notice**). The first order under s 121B of the EP&A Act directed the appellants to remove from the premises certain structures greater than 1.8 metres in height, two poles and laser light fencing (**the Structures Order**). The second order under s 121B of the EP&A Act directed the appellants to remove advertisements and an advertising structure (**the Advertising Sign Order**). The appellants did not comply with the Notices.

By the Local Government (Council Amalgamations) Proclamation 2016 (NSW) (**the Proclamation**), Snowy Monaro Regional Council (**the Council**) was formed by the amalgamation of

Snowy River Shire Council, Bombala Council and Cooma Monaro Council (**the Previous Councils**). The Council brought civil enforcement proceedings in the Land and Environment Court of NSW (**the LEC**) under s 252 of the POEO Act and s 123 of the EP&A Act, seeking to enforce the Notices. Justice Preston made orders declaring that the appellants had failed to comply with the Notices and had carried out development in breach of the EP&A Act and requiring the appellants to cease keeping dogs at the premises and to comply with the Structures Order and the Advertising Sign Order (**the August Orders**).

The appellants commenced appeal proceedings against the August Orders in the Court of Appeal of NSW. In the appeal proceedings, the appellants appeared in person without legal representation. The Court was assisted by *amici curie.*

Issues:

(1) Did the Council have power to issue the Notices and standing to bring proceedings in the LEC;

(2) Was there sufficient evidence before the primary judge; and

(3) Did primary judge deny the appellants procedural fairness?

Held (Emmett AJA, Basten and Leeming JJA agreeing): Appeal dismissed with costs.

(1) The Council was formed by the amalgamation of the Previous Councils; the relevant Previous Council had power to issue the Notices and to commence proceedings to remedy or restrain breaches of the POEO Act and EP&A Act by reason of failure to comply with them; cl 17 of the Proclamation provided that anything done by a Previous Council continues to have effect as if it had been done by the Council: at [20]:

   (a) an action by the Council includes its delegate; under cl 18 of the Proclamation, such delegation continued following amalgamation; the primary judge made no error in concluding that the relevant Previous Council had power to issues the Notices and that Mr Broder had authority to exercise that power on behalf of the Previous Council: at [21];

(2) The primary judge's finding that dogs were being kept on the premises by the appellants in breach of the Prevention Notice was amply supported by evidence (at [26]); there can be no contention that the primary judge's findings were contrary to any incontrovertible facts or uncontested testimony or that they were glaringly improbable or contrary to compelling inferences: at [27];

   (a) there was no error in the fact-finding process undertaken by the primary judge; it is clear that the structures and advertising sign existed; Mrs Cmunt accepted in cross-examination that they had been built at her request: at [29];

   (b) where the primary judge accepted evidence as unchallenged, it was because there was no contrary evidence, not because any contrary evidence had not been put to the Council's witness (at [34]); it is clear that the appellants were aware of their entitlement to cross-examine: at [35];

(3) The primary judge dealt with the matters raised by Mrs Cmunt in her letter of 6 March 2017, including the question of evidence as to the measurement of the fences, the existence of the laser light fence, the presence of cameras on the poles, the contention that the advertising sign was lawful, the contention that a Prevention Notice can only be given to the owner of a dog and the contention that the fences were lawfully erected: at [39]-[45]:;

   (a) on two occasions during the hearing when it was recorded that Mrs Cmunt was not present in Court; there is no basis for concluding there was any practical injustice or lost opportunity for Mrs Cmunt to advance her case arising from any temporary absence: at [47]; and

   (b) the primary judge provided the appellants with a detailed explanation of the process that was to be followed, including the need for them to inform him what documents they wanted the Court to consider: at [48].

***Fordham v Environment Protection Agency*** **[2018] NSWCA 167** (Meagher and Leeming JJA, Sackville AJA)

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

Facts: The Environment Protection Authority (**the EPA**), as part of an investigation into whether offences had been committed against the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) by the company of which the appellants were directors or executives, issued notices under Pt 7.5 of that Act to the appellants requiring them "to attend at a specified place and time to answer questions under s 203 of the [POEO] Act."

It is an offence under s 211 of the POEO Act "without lawful excuse" to neglect or fail to comply with such a notice. Section 212 of the POEO Act provides that, relevantly, self-incrimination is not such an excuse, however that any answer given by a natural person in compliance with such a requirement is not admissible in evidence against that person in criminal proceedings if the person objected or was not warned that they could object.

At first instance, the appellants sought declarations in the Land and Environment Court that any answers given by an appellant in an interview under Pt 7.5 of the POEO Act (with respect to the actions of the company) would not be admissible in proceedings against that appellant pursuant to s 169 of the POEO Act (which provides for 'special executive liability" with respect to certain offences). The EPA, by Cross-Summons, sought declarations that the appellants had contravened s 203 of the POEO Act by failing to attend at the specified place and time.

On 23 March 2018, the primary judge found against the appellants, holding that the decision sought would be an impermissible advisory opinion, and made the declarations sought by the EPA.

After the filing of the appeal, the EPA conceded the issue which had given rise to the primary proceedings, however on a different basis to that argued by the appellants. This concession, broadly, was that one element of the "special executive liability" offence to be proven by evidence admissible against the director is that the corporation has contravened a provision which attracts that liability. The concession satisfied the appellants' concerns as to self-incrimination and they indicated they were prepared to attend to answer questions.

The appeal nevertheless proceeded.

Issues:

(1) Whether there was a legal controversy before the primary judge capable of being the subject of declaratory relief; and

(2) Whether the declarations and orders made by the primary judge should be set aside in circumstances where, following the judgment in *Fordham v Environment Protection Authority* [2018] NSWLEC 28 and the commencing of the appeal, the EPA conceded the question that had given rise to the litigation, but not on either of the bases argued for by the appellants.

Held: Appeal allowed in part.

(1) There was a legal controversy before the primary judge capable of being the subject of declaratory relief. There was an issue between the appellants and the EPA as to whether the former were protected by the immunity in s 212(3) of the POEO Act from the use of information or answers given where the offence charged was a special executive liability offence and the evidence was to be relied on in proceedings against the relevant corporation to establish a contravention. The appellants argued first that the immunity provided by s 212(3) extended to those circumstances, and secondly that if it did not, the absence of the immunity provided them with a lawful excuse for not answering the questions. From their perspective, the choice the appellants had was to object under s 212(3) and then answer the question on the basis that their answers were protected by the immunity, or to decline to answer the question on the basis that they had a lawful excuse to do so. If they did not have a lawful excuse they would be guilty of an offence under s 211(1) of the POEO Act. These matters did not raise merely abstract or hypothetical questions: at [34];

(2) The Court should not now make a declaration in favour of the appellants in the terms sought, or in the terms of the concession. There is no longer a controversy between the parties as to the application of s 212 of the POEO Act; and a declaration should not be made in the general terms sought: at [35];

(3) The declarations made in favour of the EPA did not correctly identify the provision found to have been breached (s 211(1) of the POEO Act) and should be set aside: at [38];

(4) There must be a good reason for making a declaration on the civil standard of proof as to specific conduct constituting an offence. New declarations, particularly in light of the concession made by the EPA, would serve no useful purpose where there is no longer a justification for making remedial orders: at [39]; and

(5) If the EPA's concession had been made before the primary judge, there would have been no need to make the remedial orders. Those orders should be set aside; the requirement for some "legal, factual, or discretionary error" being satisfied because the further evidence admitted on appeal would have produced a different result if it had been available at first instance and requires a different result by reference to the circumstances as they now exist: at [41].

***Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd*** **[2018] NSWCA 240** (Basten JA; Meagher JA; Preston CJ of LEC)

(decisions at first instance: *Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd; Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* [2017] NSWLEC 37 (Moore J)); *Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd; Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd (No 2*) [2017] NSWLEC 147 (Moore J))

Facts: Louisiana Properties Pty Ltd (**Louisiana**) owned land adjoining the Wyong District Hospital. Louisiana obtained development consent for a medical centre on the eastern part of the land (abutting the hospital land) and a nursing home on the western part (abutting Louisiana Road) (**Louisiana's development consent**). A condition of the consent required Louisiana to obtain an easement across the Wyong District Hospital (**the Hospital land**) for the purpose of constructing a link road to connect with a perimeter road around the hospital buildings. A plan annexed to the consent showed a road running from the western boundary of Louisiana's land to its eastern boundary, to meet the proposed link road on the Hospital Land. Another condition of the consent, condition 16, stated:

"Prior to this issue of a Construction Certificate for the project, the layout and design for the part of the link road within and up to the eastern boundary of Lot 102 DP 1091897 is to be submitted to and approved by Council. All works to be decided in accordance with AS 2890. The pavement is to be designed to withstand all proposed loads including construction loads."

Louisiana later obtained development consent to subdivide the land, such that the part of the land with the proposed nursing home became Lot 101 and the part of the land with the proposed medical centre became Lot 102. A plan of subdivision was registered, with an instrument under s 88B of the *Conveyancing Act 1919 (NSW)* (**the s88B instrument**), which granted the owner of Lot 101 a "right of access" by way of easement over Lot 102. Louisiana retained Lot 102, but sold Lot 101.

Hakea Holdings Pty Ltd (**Hakea**) purchased Lot 101 and obtained development consent to construct a nursing home on the land (**Hakea's development consent**). A condition of the consent required a means of egress other than by the most direct route onto Louisiana Road (which was flood-prone). Plans annexed to the consent showed a road running across Lot 102 and onto the Hospital Land. To comply with the condition of consent, Hakea, through its building contractor, Caverstock Group Pty Ltd (**Caverstock**), built a road across Lot 102 to the point on the boundary of the Hospital Land where the link road was proposed to meet Lot 102. The road more closely aligned with the plan annexed to Louisiana's development consent than the plans annexed to Hakea's development consent.

Hakea brought proceedings against Louisiana, seeking an easement over Lot 102 to fulfil a separate condition of Hakea's development consent requiring an asset protection zone (**APZ**). Louisiana filed a cross-summons in the proceedings claiming that the construction of the road on Lot 102 constituted a trespass and seeking damages. Louisiana commenced separate proceedings against both Hakea and Caverstock seeking a declaration that the road had been constructed without development consent, in breach of s 76A(1)(a) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**), and orders for the removal of the road and other remedial work under s 124(1) of the EPA.

The matters were heard together in the Land and Environment Court. In the first judgment, the primary judge upheld Louisiana's claims that the road had been constructed without development consent in breach of s 76A(1)(a) of the EP&A Act and that the construction of the road constituted a trespass. The primary judge adjourned the proceedings for a further hearing on whether the Court should exercise its discretion to make orders for removal of the road and remediation of the land under s 124(1) of the EP&A Act. After the hearing, the primary judge delivered a second judgment, in which he determined to make orders under s 124(1) of the EP&A Act, finding that the road was also not constructed "in accordance with" development consent in breach of s 76A(1)(b) and s 81A(2) of the EP&A Act.

Hakea brought an appeal against the first and second judgment in the Court of Appeal. First, Hakea challenged the primary judge's finding that the road was constructed without development consent, in breach of s 76A(1)(a) of the EP&A Act, because Hakea could not rely on Louisiana's development consent. Second, Hakea challenged the primary judge's finding that the road was not constructed "in accordance with" Louisiana's development consent, in breach of s 76(1)(b) of the EP&A Act. The primary judge found that the construction of the road was not in accordance with Louisiana's development consent in three ways:

(a) the road was constructed in breach of condition 16 of Louisiana's development consent;

(b) the road was constructed without Hakea first obtaining a construction certificate, in breach of condition 16 of Louisiana's development consent and s 81A(2) of the EP&A Act, and

(c) the road was not constructed along the alignment approved in Louisiana's development consent.

Third, Hakea submitted that the primary judge erred in construing the right of access in the s 88B instrument by reference to Pt 14 of Sch 8 of the Conveyancing Act. The primary judge found that the road was not constructed for a purpose permitted by Pt 14 of Sch 8 because it was not constructed such that persons exercising the right under the easement could not "pass across" Lot 102; they could only go to the boundary of Lot 102 without the right to go any further by passing onto the Hospital Land.

Issues:

(1) Did the primary judge err in holding that the road was constructed without development consent, in breach of s 76A(1)(a) of the EP&A Act;

(2) Did the primary judge err in holding that the construction of the road was not carried out in accordance with development consent, in breach of s 76A(1)(b) of the EP&A Act; and

(3) Did the primary judge err in holding that the construction of the road was not authorised by the right of access in the s 88B instrument and hence, constituted a trespass?

Held: Appeal allowed; orders set aside; in lieu thereof, substitute orders dismissing the proceedings; Louisiana to pay Hakea's costs.

(1) Hakea had development consent to construct the road; that consent arose from the Louisiana's development consent and not Hakea's development consent; a development consent is "not personal to the applicant but enures for the benefit of subsequent owners and occupiers"; Hakea's development consent did not apply to Lot 102; accordingly, so far as the plan attached to Hakea's development consent identified a roadway across Lot 102, it was merely "indicative" and did not purport to modify Louisiana's development consent: at [54] (Basten JA); [122]-[125] (Preston CJ of LEC); [13] (Meagher JA);

(2) Louisiana did not claim that Hakea's construction of the road was in breach of s 76A(1)(b) of the EP&A Act; this was not an issue in the proceedings and hence, the primary judge's determination of this issue was in excess of jurisdiction: at [126] (Preston CJ of LEC); at [13] (Meagher JA);

(3) In finding that the construction of the road was not in accordance with Louisiana's development consent, in breach of s 76A(1)(b) of the EPA, the primary judge relied on evidence that had been admitted in the second hearing on the limited basis of the Court's discretion to make orders under s 124 of the EP&A Act to remedy the found breach of s 76A(1)(a) of the EP&A Act; the primary judge could not use this evidence for the different purpose of establishing a breach of s 76A(1)(b) of the EP&A Act: at [75] and [103] (Basten JA); [131] and [141] (Preston CJ of LEC); [13] (Meagher JA);

(4) The primary judge's enquiry of whether the construction of the road was in breach of s 81A(2) of the EP&A Act was in excess of jurisdiction as this was not an issue in the proceedings; the enquiry also involved misdirection in determining the issue of whether the road was constructed contrary to condition 16 of Louisiana's development consent, and hence in breach of s 76A(1)(b) of the EP&A Act; even if under s 81A(2) the construction of the road on Lot 102 could not commence until a construction certification for that work had been issued, that fact could not establish a breach of condition 16: at [135]-[136] (Preston CJ of LEC); [13] (Meagher JA);

(5) In any event, whether a construction certificate was required under s 81A(2) of the EP&A Act depended upon the construction of the road satisfying the phrase "erection of a building" in s 81A(2); the question is the extent to which the reference to structure in the definition of "building" in s 4(1) of the EP&A Act expands the concept of a building; a structure that is never described as having been "erected" does not fall within the concept of a building; it follows that the road the subject of these proceedings did not fall within the requirements of s 81A(2): at [85]-[98] (Basten JA); [137] (Preston CJ of LEC); [13] (Meagher JA);

(6) The primary judge did not err by construing the right of access by reference to Pt 14 of Sch 8 of the Conveyancing Act; pursuant to s 181A(2) of the Conveyancing Act, the expression "right of access" in the s 88B instrument has effect as if the words identified in Pt 14 of Sch 8 were inserted instead of this expression: at [56] (Basten JA); at [144] (Preston CJ of LEC); [13] (Meagher JA);

(7) Section 181A(3) of the Conveyancing Act permits the expression "right of access" to be varied by an instrument in which it is used; the 88B instrument in this case did not purport to vary the meaning in Pt 14 of Sch 8 of the Conveyancing Act: at [144] (Preston CJ of LEC); [13] (Meagher JA);

(8) The primary judge erred in finding the right to "pass across" in Pt 14 of Sch 8 of the Conveyancing Act required the right to commence at one boundary and exit by another; it would be sufficient to go from part of the lot benefited onto the lot burdened: that would include passing across part of the lot burdened, and, in so doing, going "from" the lot benefited: at [59] (Basten JA); at [148] (Preston CJ of LEC); [13] (Meagher JA);

(9) If the particular construction of Pt 14 of Sch 8 of the Conveyancing Act suggested above were not accepted, the same conclusion may be reached by treating the identification of the right of access as applying to the whole of Lot 102 in the s 88D instrument, as a variation of Pt 14: at [60]-[61] (Basten JA); and

(10) The primary judge therefore erred in finding that Hakea's construction of the road on Lot 102 was not authorised by the s 88B instrument and was a trespass: at [101] (Basten JA); at [149] (Preston CJ of LEC); [13] (Meagher JA).

***Lowe v Kladis* [2018] NSWCA 130** (Meagher and White JJA, Sackville AJA)

(related decisions: *Kladis v Lowe* [2016] NSWSC 1834 (Beech-Jones J); *Kladis v Lowe* [2017] NSWSC 249 (Beech-Jones J); *Kladis v Lowe (No 3)* [2017] NSWSC 815 (Beech-Jones J); and *Kladis v Lowe (No 4)* [2017] NSWSC 1259 (Beech-Jones J))

Facts: Mr Kladis (**the respondent**) lodged a development application for the construction of an elevated driveway from a public street to his property (**No 26**). The proposed driveway was to be constructed partly on No 26, on a strip of land over which neighbouring properties (Nos 24, 28, 30 and 34) had rights of carriageway (**Strip 1**), and on neighbouring land (No 28) over which the respondent's land had a right of carriageway (**Strip 2**). The respondent claimed that the elevated driveway was the only means of obtaining vehicular access to No 26. The primary judge found that the proposed works would result in "not insubstantial affectations", but was not satisfied that the proposed use of the easement of carriageway was unreasonable. Accordingly, orders were made requiring the owners of the neighbouring properties (**the appellants**) to consent to the lodgement of a development application by the respondent. The appellants appealed against the primary judge's decision.

Issues:

(1) Whether the primary judge erred in requiring the parties affected by the proposal to consent to the lot owner's development application;

(2) Whether the proposal unreasonably interfered with the rights of carriageway held by the appellants over Strip 1;

(3) Whether the proposal unreasonably interfered with the rights of the owner of Strip 2; and

(4) Whether the lot owners affected by the proposed driveway should have been joined as parties.

Held (Sackville AJA; Meagher JA agreeing and White JA agreeing with additional comments): Appeal allowed; orders made by the primary judge set aside; orders dismissing proceedings; plaintiff to pay respondent's costs of the primary proceedings; respondent to pay appellants' costs of the appeal; and respondent have a certificate pursuant to the *Suitors Fund Act 1951 (NSW)*.

(1) As servient owner, the respondent was not entitled to undertake works on Strip 1 that would substantially interfere with the exercise by the appellants of their rights of carriageway: at [116]. The proposed development would deny the owner of No 28's rights of unimpeded pedestrian access on Strip 1, necessarily involving a substantial interference with those rights: at [111]-[116];

(2) The proposed development would unreasonably interfere with the rights of the owner of No 28 by denying use of Strip 2 at ground level (its own land): at [122]-[128]. The primary judge had erred in finding that the proposed elevated driveway would not interfere so substantially with the rights of the owner of No 28 as to be unreasonable: at [131]; and it was unnecessary to consider the extent to which the proposal would interfere with the rights of the owner of No 30: at [131];

(3) The ancillary right of the respondent, as dominant owner of Strip 1, to require the appellants to consent to the lodgement of a development application raised two separate questions:

(i) whether the proposed use is authorised by the terms of the easement; and

(ii) whether the proposed development unreasonably interfered with the reasonable use of Strip 1 by the appellants: at [100].

The primary judge erred in making orders compelling the appellants to consent to the lodgement of the development application: at [101] and [128]; and

(4) Joinder is not necessary where the party would suffer no prejudice by not being joined to the proceedings: at [71]. It was not necessary to join the owner of No 34 because he actively participated in the proceedings, was fully aware of the impact of the proposed development application on No 34 and had the opportunity to adduce evidence and advance arguments: at [72]. However, it was the responsibility of the respondent to join all those whose rights were directly affected: at [76]; and this included the owners of No 24 who were, by not being joined as parties to the proceedings, denied the opportunity to prevent the proposed works reaching the stage of development consent: at [79]. The owners of No 24 should have been joined as their rights were directly affected by the development application: at [76].

***Minister for Local Government v Blue Mountains City Council*** **[2018] NSWCA 133** (Bathurst CJ, McColl and Leeming JJA)

(related decisions: *Blue Mountains Council v Minister for Local Government* [2018] NSWSC 183 (Schmidt J); *Blue Mountains Council v Minister for Local Government (No 2)* [2018] NSWSC 193 (Schmidt J))

Facts: On 14 February 2018, the Minister for Local Government (**the Minister**) wrote to the Mayor of Blue Mountains City Council advising of her intention to suspend the Council pursuant to s 438I the *Local Government Act 1993 (NSW)* (**the Local Government Act**). A precondition to exercising the power under s 438I was giving notice under s 438K. The Council sought, and was granted, an injunction restraining the Minister from suspending the Council. The Minister was advised of the order and the following day applied to dissolve the injunction. The primary judge refused, stating that there was a serious question to be tried, namely, that when a s 438K notice is issued the Minister must hold the reasonable belief referred to in s 438I, and that there was no indication in the letter that the Minister had held that belief. The primary judge also relied on a factual error in the Minister's letter. Her Honour then made an order transferring the proceedings to the Land and Environment Court (**the Court**). The Minister appealed, primarily on the basis that the primary judge erred in considering that there was a serious question to be tried. A further issue was raised by the Court concerning whether the Supreme Court had jurisdiction to issue the injunction, given that s 20(1)(d) of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**) provides that the Court has jurisdiction to hear and dispose of proceedings to restrain breaches of the Local Government Act under s 673 of that Act.

Issues:

(1) Whether Class 4 jurisdiction of the Court was exclusive to that Court;

(2) Whether the Supreme Court had jurisdiction to give injunctive relief for the apprehended breach of the Local Government Act;

(3) Whether it was necessary, at the time of notifying of intention to appoint an administrator, for the Minister to hold the belief that appointment was necessary to restore proper or effective functioning of the Council; and

(4) Whether the factual error in the Minister's notice gave rise to a serious question to be tried that the exercise of the power would be vitiated.

Held (Leeming JA; Bathurst CJ and McColl JA agreeing): Leave to appeal granted; Minister to file a Notice of Appeal in an amended form of the Draft Notice to Appeal; appeal allowed; order 3 made on 22 February 2018 set aside; and stay the operation of the previous order for seven days from the date of decision:

(1) Section 71 of the Court Act reserves Class 4 of the jurisdiction of the Court as exclusive to that Court: at [59]. All proceedings brought pursuant to s 673 of the Local Government Act are proceedings in the Court: at [60];

(2) However, the Summons seeking an injunction in the Supreme Court was not a proceeding falling within s 20(1)(d) of the Court Act, as the present proceedings were not brought under s 673 of the Local Government Act, but were in the nature of an application for an injunction to enforce a

statutory scheme: at [61] and [88]. Accordingly, the Supreme Court had jurisdiction to issue the injunction: at [85]-[90];

(3) The primary judge erred in construing ss 438I and 438K: at [8]. At the time a s 438K notice is issued, the Minister is not required to hold the belief referred to in s 438I: at [106]. The Minister is only required to hold an "intention" to suspend the Council referred to in s 438K: at [101]. The primary judge erred in proceeding on the basis that, before giving a Council notice under s 438K, the Minister must form the "reasonable belief" referred to in s 438I(1) and, accordingly, there was no serious question to be tried: at [100]-[106]; and

(4) The erroneous description of Mr Mulligan as Chief Safety Officer in the Minister's letter did not give rise to a serious question to be tried that any future exercise of the power would be vitiated: at [118]-[121].

***Roads and Maritime Services v Desane Properties Pty Ltd*** **[2018] NSWCA 196** (Bathurst CJ, Ward and Payne JJA)

(related decisions: *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: These proceedings involved an appeal brought by Roads and Maritime Services (**the appellant**) against the primary judge's decision that the Proposed Acquisition Notice (**PAN**) concerning an attempted compulsory acquisition of property owned by Desane Properties Pty Ltd (**the respondent**) for the purposes of the New South Wales Government's WestConnex Motorway Project (**WestConnex**) was invalid. The respondent owned land located on the site of the proposed Rozelle Interchange, part of Stage 3B of WestConnex. Following the completion of Stage 3B, the New South Wales Government had announced that the area covering the respondent's property would be transformed into open space and parkland. In 2017, following a negotiation period, the appellant issued the respondent a PAN in order to commence the compulsory acquisition process under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* (**the Land Acquisition Act**). While the PAN and accompanying compensation form reflected the information in the Land Acquisition Act, it departed from a form for such notices which had been approved by the Minister (**the approved form**). The respondent challenged the PAN, claiming that it was invalid for failure to comply with the approved form. The respondent also claimed that the appellant was actuated by an improper purpose in issuing the PAN because it sought to acquire the property for meeting the New South Wales Government's commitment to parkland and open space irrespective of whether the Rozelle Interchange project proceeded. The respondent also sought an injunction preventing the appellant from acting on the PAN. The primary judge found that the PAN was invalid and that the appellant was actuated by an improper purpose at the time it issued the PAN. However, the primary judge did not grant the respondent injunctive relief. On 1 June 2018, the appellant filed a Notice of Appeal containing several grounds. The respondent cross-appealed, claimed the primary judge had erred in failing to grant an injunction to restrain RMS from acting on the PAN.

Issues:

*The issues on the appeal*

(1) Whether the primary judge erred in finding that the PAN was invalid for lack of compliance with the approved form and that compliance was a necessary precondition for a lawful acquisition;

(2) Whether the primary judge erred in finding that the approved form could no longer invoke the machinery of the Land Acquisition Act following a 2016 amendment to the Land Acquisition Act;

(3) Whether the primary judge erred in finding that the Land Acquisition Act required that the PAN strictly comply with the approved form;

(4) Whether the primary judge erred in finding that the PAN did not substantially comply with the approved form;

(5) Whether the primary judge erred in finding that there was a requirement that the PAN state the public purpose for which the acquisition was sought;

(6) Whether the primary judge erred in finding that the appellant was actuated by an improper purpose in issuing the PAN; and

*The issue on the cross-appeal*

(7) Whether injunctive relief restraining the appellant from acting on the PAN should be granted in the event that the PAN was not invalid but still unlawful.

Held: Appeal allowed; set aside orders 1-4 made by the primary judge on 22 May 2018 and, in lieu thereof, make the following orders:

(a) Summons and Further Amended Commercial List Statement dismissed; and

(b) The plaintiff to pay the costs of the second defendant of the trial as agreed or assessed; and the respondent pay the costs of the appellant of the appeal as agreed or assessed.

*The appeal decision*

(1) As a matter of construction, the Land Acquisition Act as a whole evinced an intention that failure to comply with the procedural requirements in the Act did not go to the validity of a PAN: at [206]-[244]. The PAN was not required strictly to comply with the approved form and was not invalid: at [224];

(2) On its proper construction, s 15(a) of the Land Acquisition Act did not require that any approved form precisely adopt the language of the Act at the date of the issue of a PAN or lead to the conclusion that any difference between the language in an approved form and the Act give rise to invalidity of the approved form: at [249]-[254]. The approved form did not cease validly to be able to invoke the machinery of the Land Acquisition Act following the 2016 amendment to the Act: at [254];

(3) Because the Land Acquisition Act did not evince an intention that strict compliance was necessary, it followed that s 80(1) of the *Interpretation Act 1987 (NSW)* applied to make it sufficient that the PAN substantially complied with the approved form: at [225]-[230];

(4) The reference to "the disadvantage resulting from relocation" in the PAN was an accurate statement about a statutory entitlement, which entitlement was materially the same as the repealed concept of "solatium" referred to in the approved form: at [234]-[243]. One was merely the Latin cognate of the English phrase: at [233]-[243]. The identification of a period of "within 45 days" for the giving of a compensation offer referred to in the PAN was a legally correct statement about the obligation imposed on an authority of the State by s 42(1) of the Land Acquisition Act and encompassed the period identified in the approved form of "generally within" 30 days: at [244]-[248];

(5) There was no requirement for a valid PAN to state the public purpose for which acquisition was sought: at [275]. There was nothing in the Land Acquisition Act requiring the implication of such a requirement because the legislative scheme facilitates the provision to the owner of land to whom a PAN is issued of much more information than a bare statement of the public purpose: at [255]-[277]. In any event, the covering letter accompanying the PAN clearly identified the public purpose of the proposed acquisition: at [278]-[280];

(6) The appellant was not actuated by an improper purpose: at [311]. The appellant was not actuated by an improper purpose at the time the PAN was issued: at [301]. The critical time for assessing purpose was not at the time the PAN was issued but at the time the power to acquire was exercised, being at the time of acquisition: at [299]-[300]. The totality of the evidence was that the respondent's property would be used as a site for the construction of the Rozelle Interchange, notwithstanding that it would be turned into parkland and open space following completion of the construction: at [308]-[310]. While there remained uncertainty as to how the land would be used within the envelope of a construction site, there was no uncertainty that it would be used as part of a construction site and no need to identify the specific use with precision at the time the PAN was issued: at [308]. The legitimacy of this purpose was not invalidated because there was a risk, inherent in every large-scale construction project, that the purpose may not at some future point be realised: at [310]. To the extent that the appellant contemplated use of the property for open space and parkland, this was not until after the construction would be concluded and did not mean that the appellant was actuated by an improper purpose: at [301]-[311]; and

*The cross-appeal decision*

(7) The issue of the grant of injunctive relief did not arise as the PAN substantially complied with the approved form and was thus not unlawful: at [291]. In any event, the court would exercise its discretion to refuse injunctive relief in circumstances where the PAN provided legally accurate information about the respondent's rights under the Land Acquisition Act: at [292]-[295].

***Scevola v Minister Administering National Parks and Wildlife*** **[2018] NSWCA 171** (Meagher and Gleeson JJA)

(related decisions: *Esposito v Commonwealth of Australia* [2013] FCA 1039 (Foster J); *Esposito v Commonwealth of Australia* [2013] FCA 546 (Griffiths J); *Esposito v Commonwealth of Australia* [2014] FCA 1440 (Foster J); *Esposito v Commonwealth* [2015] FCAFC 160 (Allsop CJ, Flick and Perram JJ); *Scevola v Minister Administering National Parks and Wildlife* [2017] NSWLEC 106 (Pain J) and *Scevola v Minister Administering National Parks and Wildlife (No 2)* [2017] NSWLEC 139 (Pain J))

(NB: The following adapts the Court of Appeal's Headnote)

Facts: Mr Scevola (**the applicant**) owned a lot in the Heritage Estates, near Jervis Bay. The Heritage Estates, as originally subdivided and zoned, did not permit residential development on individual lots. In June 2012, the State of New South Wales (**New South Wales**) and the Commonwealth entered into an agreement under which land in the Heritage Estates would be voluntarily acquired using Commonwealth funds, and become part of Jervis Bay National Park. For that purpose, the Foundation for National Parks and Wildlife (**the Foundation**) agreed with New South Wales that the Foundation would acquire the land with those Commonwealth funds. In the implementation of the agreement, the Shoalhaven Local Environmental Plan 2014 (**the SLEP 2014**) was made, which rezoned the land to E2 Environmental Conservation. The Foundation then invited from landowners offers to sell to the NSW Office of Environment & Heritage, representing the Minister administering the *National Parks and Wildlife Act 1974 (NSW)* (**the respondent**). Whilst many landowners made such offers that were then accepted, the applicant did not. This is an application for leave to appeal from two decisions of the Land and Environment Court (**the LEC**) which summarily dismissed a claim of the applicant to declaratory and other relief in relation to the alleged compulsory acquisition of land in the Heritage Estates near Jervis Bay and ordered that the applicant pay the costs of the respondents' motions for summary dismissal.

Issues:

(1) Whether the primary judge erred in summarily dismissing the claim to relief;

(2) Whether the primary judge correctly dealt with the challenge to the validity of the SLEP 2014; and

(3) Whether the primary judge erred in rejecting the submissions that a costs order should not be made.

Held (the Court): Extend time for filing of applicant's application for leave to appeal; dismiss applicant's application seeking leave to appeal from judgments and orders of the LEC of 24 August 2017 and 23 October 2017; dismiss application of Shoalhaven Landowners Association Incorporated to extend time for filing application for leave to appeal; and order applicant pay respondent's costs of the application for an extension of time and for leave to appeal.

(1) There was no arguable basis for maintaining that the primary judge erred in summarily dismissing the claim to relief: at [16]. The conclusion that there had been no compulsory acquisition was correct: at [17] and [18]. The argument that there had been a "constructive" acquisition did not accommodate the terms of the *Land Acquisition (Just Terms Compensation) Act (NSW)*, or identify any acquisition of property: at [17]. There was no basis for the injunctive relief sought: at [16]-[20];

(2) The primary judge correctly dealt with the challenge to the validity of the SLEP 2014 (at [22]) and by holding that no landowner has a proprietary interest in the "unformed" roads within the Heritage Estates: at [23]; and

(3) The primary judge did not err in rejecting the submissions that a costs order should not be made because the proceedings were brought in the public interest and that such an order might cause the applicant hardship: at [24].

NSW Court of Criminal Appeal:

***Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd*** **[2018] NSWCCA 202** (Bathurst CJ and Fullerton and Campbell JJ)

(related decision: *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2017] NSWLEC 109 (Moore J))

Facts: On 16 December 2016, Snowy Monaro Regional Council (**the prosecutor**) commenced proceedings against Tropic Asphalts Pty Ltd (**the defendant**) in the Land and Environment Court of New South Wales for three offences for breaches of s 76A(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). The contraventions related to the operation of a temporary mobile asphalt batching plant on a property at Springs Road, Rock Flat, New South Wales, other than in accordance with the development consent which was in force for that property.

The particulars of contravention for the first charge stated that the defendant had "engaged in a course of conduct" by operating the plant "to a maximum daily production capacity of more than 150 tonnes" during the period from 20 January to 18 March 2015, contrary to condition 1 of the consent conditions. The particulars of contravention for the second charge stated that the defendant had "engaged in a course of conduct" by operating the plant "to produce more than 150 tonnes per day" during the period from 20 January to 18 March 2015, contrary to condition 4 of the consent conditions. The particulars of contravention for the third charge stated that the defendant had "engaged in a course of conduct" by operating the plant "so that more than 12 trucks per day were accessing and exiting its site" during the period from 20 January to 18 March 2015, contrary to condition 6 of the consent conditions.

The defendant moved to strike out each of the three charges. The primary judge struck out the first charge on the ground that it did not allege an offence known to law and held the second and third charges bad for duplicity. At the request of the prosecutor, the primary judge submitted three questions to the Court of Criminal Appeal for determination.

Issues:

(1) Whether the primary judge erred in striking out the first charge on the ground that it did not allege an offence known to law; and

(2) Whether the primary judge erred in finding each of the second and third charges bad on the ground of duplicity.

Held (per Bathurst CJ, Fullerton and Campbell JJ agreeing): No error in the primary judge's findings; defendant to pay prosecutor's costs.

(1) The primary judge did not err in striking out the first charge on the ground that it did not allege an offence known to law as condition 1 of the consent conditions did not impose a requirement that the plant not produce more than 150 tonnes per day: at [36]-[37]; and

(2) The primary judge did not err in finding the second or third charges bad on the ground of duplicity: at [61]-[62]. A separate contravention of conditions 4 and 6 occurred on each day that the plant produced more than 150 tonnes or that more than 12 trucks entered or left the site: at [58]-[61]. It was duplicitous to assert that those conditions were contravened by engaging in a "course of conduct" over a period of time: at [59]-[61].

NOTE: A special leave application has been made in the High Court concerning the decision about charges 1 and 2.

***Turnbull v Chief Executive of the Office of Environment and Heritage*** **[2018] NSWCCA 229** (Payne JA; Simpson AJA; Wilson J)

(decision at first instance: *Chief Executive of the Office of Environment and Heritage v Grant Wesley Turnbull* [2017] NSWLEC 141 (Preston CJ of LEC))

Facts: Grant Turnbull (**the appellant**) pleaded guilty to a charge of clearing native vegetation on his farming property without appropriate authority, contrary to s 12(1) of the *Native Vegetation Act 2003 (NSW)* (**the Native Vegetation Act**). The appellant's plea of guilty, whilst admitting the essential elements of the offence, did not admit the nature and extent of the native vegetation that was cleared or that the extent of environmental harm was as alleged by the prosecutor. The sentencing hearing was

held at the same time as the sentencing hearing for Cory Turnbull, who pleaded guilty to a charge of clearing native vegetation contrary to s 12(1) on a neighbouring property and who similarly contested a large part of the factual basis of the prosecutor's case against him.

The primary judge, Preston CJ of the Land and Environment Court, found that the appellant had illegally cleared 103.6 hectares of native vegetation (including at least 1,086 trees and shrubs) and that Cory Turnbull had illegally cleared 316 hectares (including at least 3,700 trees and shrubs). The maximum penalty for the offence was $1,100,000: s 12(2) of the Native Vegetation Act and s 126(1) of the *Environmental Planning & Assessment Act 1979 (NSW)*. The primary judge convicted the appellant of the offence as charged, imposed a fine of $315,000 (after allowing a discount of 12.5% for the utilitarian value of the plea of guilty) and ordered him to pay the prosecutor's costs. The primary judge also convicted Cory Turnbull of the offence as charged, imposed a fine of $393,750 (again after a discount of 12.5%) and made a similar costs order.

The appellant appealed to the Court of Criminal Appeal against the severity of the fine imposed. The appellant contended that, having regard to the greater volume of clearing undertaken by Cory Turnbull, there ought to have been a greater degree of disparity in the fines imposed. The appellant assessed the relative severity of the fines imposed by numerically dividing the amount of each fine by the number of hectares cleared, and by the number of trees or shrubs found to have been destroyed.

Issues:

(1) Did the primary judge fail to apply "the parity principle between co-offenders", thereby creating "unjustified disparity" between the sentences imposed on the appellant and Cory Turnbull; and

(2) Was the fine imposed manifestly excessive and unreasonable.

Held (Simpson AJA; Payne JA and Wilson J concurring): Appeal dismissed.

(1) The ground of appeal, as formulated, assumed that the appellant and Cory Turnbull were co-offenders; that was not the case: at [20] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J);

(2) The parity principle has wider application than only to co-offenders: at [23] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J);

(3) The appellant's way of going about the assessment of the relative severity of the fines imposed is entirely simplistic, and, indeed, fallacious; it fails to take account of the careful analysis undertaken by the primary judge of the various relevant sentencing factors and the degree of environmental harm done; it gives pre-eminent and undue weight to one only of a plethora of relevant sentencing considerations, to all of which the primary judge directed considerable attention: at [26] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J);

(4) The starting point of the fine imposed on Cory Turnbull (before the reduction allowed for the plea of guilty) was $450,000, against a starting point of the fine of $360,000 imposed on the appellant, an increment of 25%; that is significant differentiation that adequately takes account of the difference in the scale of the offending: at [28] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J);

(5) While it may be accepted that consistency in sentencing is a desirable goal, consistency in sentencing does not require identity of outcome; relevant consistency is consistency in the application of the relevant legal principles, "not some numerical or mathematical equivalence" (*Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45): at [30] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J); and

(6) There is nothing in the material presented on behalf of the appellant that persuades the Court that the sentence imposed is out of step with an appropriate range of sentencing for the offence to which the appellant pleaded: at [31] (Simpson AJA); at [1] (Payne JA); at [34] (Wilson J);.

## Supreme Court of NSW:

***Blacktown City Council v Concato* [2018] NSWSC 1039** (Campbell J)

Facts: Blacktown City Council (**the plaintiff**) acquired the former landowners' (**the first and second defendants**) land on 9 March 2018. The first and second defendants' claim for compensation was determined by the Valuer General. The plaintiff sought judicial review of this determination in the Supreme Court under s 69 of the *Supreme Court Act 1970 (NSW)*. The plaintiff filed a Notice of Motion on 26 June 2018 seeking an interim declaration in terms that the plaintiff is not required to comply with

s 42 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* pending determination of the proceedings.

Issue: Whether the power to grant the relief sought should be exercised.

Held: The Valuer General's determination was stayed until the disposition of the proceedings on the conditions that:

(a) the plaintiff pay to the first and second defendants the sum of $12,650,000 after deduction of the amount necessary to discharge the mortgage over the property; and

(b) the additional sum of $3,984,381 be paid into a controlled money account on trust for the first and second defendants against the contingency that the plaintiff's Summons was dismissed; costs to be costs in the proceedings:

(1) The grounds expressed in the Summons provided an arguable basis for orders in the nature of certiorari and mandamus: at [22]. If the factual matters underpinning the plaintiff's complaints were made good at the hearing, it would be fairly arguable that the determination did not conform to the requirements of statute: at [22]; and

(2) The first and second defendants carried an evidential onus to demonstrate that, if paid the whole amount of the compensation determined by the Valuer General, they would be in a position to make good promptly any overpayment: at [23]; and given the absence of any such evidence, and the large sums involved, there was an inference of risk that the first and second defendants would not be able to promptly repay any significant overpayment and with interest: at [23].

***Cudgegong Australia Pty Ltd v Transport for New South Wales* [2018] NSWSC 929** (Davies J)

(related decisions: *Golden Mile Property Investments Pty Ltd (in liquidation) v Cudgegong Australia Pty Ltd* [2014] NSWCA 224 (Beazley P); *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [2015] NSWCA 100 (Macfarlan, Emmett and Gleeson JJA); *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [2016] NSWCA 224 (Basten, Meagher and Ward JJA); *Cudgegong Australia Pty Ltd v Transport for NSW* [2014] NSWLEC 19 (Pain J); *Cudgegong Australia Pty Limited v Transport for NSW (No 2)* [2014] NSWLEC 36 (Pain J); *Cudgegong v Transport for NSW (No 3)* [2015] NSWLEC 185 (Pain J); *Cudgegong Australia Pty Limited v Transport for NSW (No 4)* [2015] NSWLEC 195 (Pain J))

Facts: Transport for NSW (**the defendant**) gave notice of its intention to acquire land compulsorily in connection with the construction of the Northwest Rail Link and subsequently the land was acquired. At the time of both notice and acquisition, the land was the subject of an uncompleted contract of sale under which Cudgegong Australia Pty Ltd (**the plaintiff**) was still to pay the purchase price. The plaintiff contended that it had an interest in the land sufficient to entitle it to compensation. Following the Valuer General's determination that compensation was not payable, the plaintiff commenced proceedings in the Land and Environment Court where, after the matter was remitted from appeal, the plaintiff obtained an advance compensation payment. In these proceedings, the plaintiff sought declarations to the effect that the defendant invalidly exercised its power of compulsory acquisition, and orders including that the defendant reconvey to the plaintiff the land, or that portion of it "upon which the defendant does not propose to carry out construction of the Northwest Rail Link." The primary cause of action was that a portion of the land was acquired for purposes not authorised by legislation, including the construction of recreational and retail facilities. The defendant made two primary submissions in support of summarily dismissing the proceedings on the basis that no reasonable cause of action was disclosed: First, that estoppel by representation provided a complete defence to the proceedings and, second, that the proceedings were filed more than three months after the date of compulsory acquisition in contravention of r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**).

Issues:

(1) Whether the Court should summarily dismiss the proceedings on the basis that no reasonable cause of action was disclosed;

(2) Whether the plaintiff represented that it accepted the validity of the acquisition by suing for and accepting compensation;

(3) Whether proceedings should be summarily dismissed on the basis that proceedings were brought outside of the time limit in the UCPR, r 59.10;

(4) Whether r 59.10 had retrospective application to proceedings concerning a decision which predated the commencement of the rule; and

(5) Whether contravention of the rule justified summary dismissal.

Held: The proceedings summarily dismissed pursuant to r 13.4; plaintiff to pay defendant's costs.

(1) In circumstances where a limitation defence has been shown to provide a complete answer to a claim being brought, it has been held that no reasonable cause of action is disclosed: at [35]. Estoppel provided a complete defence to the proceedings: at [74]; and no reasonable cause of action was disclosed by the plaintiff: at [74]. The actions of the plaintiff in relation to the claim for compensation amounted to an acceptance by the plaintiff of the validity of the acquisition: at [65]. The defendant acted to its detriment in incurring the costs involved in the compensation proceedings, in continuing with the development of the land and construction of the railway station, and in paying advance payments of compensation: at [66] and [67];

(2) Although the plaintiff was required by legislation to commence compensation proceedings within 90 days after receiving notice of the acquisition, it was open to the plaintiff, throughout that time, to institute appropriate proceedings impugning the validity of the acquisition without relinquishing the opportunity to obtain compensation: at [61]; and

(3) If r 59.10 were merely procedural then, whilst it may operate retrospectively, non-compliance would not ordinarily justify summary dismissal: at [89]. Conversely, if the rule were to have the effect of a statutory limitation period, the contravention of which would justify summary dismissal, then it would affect substantive rights in such a way that it could not operate retrospectively: at [89] and [90]. The rule did not operate retrospectively: at [90]; and accordingly the proceedings were not commenced contrary to r 59.10 and no basis was demonstrated for summary dismissal of the proceedings based upon that rule: at [92].

***Dr Leo Shanahan v Jatese Pty Ltd: In Re Chynoweth and section 128 of the Evidence Act 1995 (NSW)*** **[2018] NSWSC 1097** (Hammerschlag J)

(related decision: *Dr Leo Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 (Hammerschlag J))

Facts: This judgment concerned an evidentiary question which arose during the hearing of the principal proceedings. Evidence given in cross-examination by Mr Chynoweth revealed that he had asked for, and received, money from the majority shareholders in respect of services which he provided as a director of Canberra Eye Hospital Pty Ltd, without the minority knowing about it contrary to the Shareholders" Agreement. His Honour found that this evidence may tend to prove that Mr Chynoweth committed an offence against or arising under an Australian law, or is liable to civil penalty, and raised the question of whether the Court could or should give him a certificate under s 128(5) of the *Evidence Act 1995 (NSW)* (**the Evidence Act**). Objection on Mr Chynoweth's behalf to the evidence already given was sought to be made and a certificate applied for.

Issue: Whether s 128(1) has the effect that s 128 applies if a witness objects to "giving" particular evidence, or evidence on a particular matter, after the evidence has been given.

Held: Section 128 of the Evidence Act does not apply; certificate under s 128(5) not given.

(1) Section 128 operates as a whole and congruently in a sequential way: at [13] (see [14]-[19] for steps). The operation of s 128 is to be determined in accordance with the text of the section: at [45]. The plain meaning of the text and structure of s 128 makes it clear that the objection must and can only be taken before evidence is given: at [12] and [20]. Section 128(1) is in the present tense and applies only if a witness objects to giving evidence, rather than to an objection to evidence that has been given: at [21]. The expression "or evidence on a particular matter" in s 128(1) further indicated that the objection must be before the evidence is given, as the exact scope of the evidence will not yet be known: at [22]. The option to give evidence willingly under the protection of a certificate, as envisaged in s 128, cannot be exercised subsequent to the evidence having been given: at [24]. Furthermore, s 128(3) has no work to do once the evidence is given because the Court will no longer be in a position to require the witness to give it: at [26]. Accordingly, Mr Chynoweth was not entitled to a certificate under s 128 of the Evidence Act: at [47].

***George Thomas Hotels (Campsie) Pty Ltd v Station House Campsie Pty Ltd*** **[2018] NSWSC 916** (Bellew J)

(related decisions: *Buckley v Independent Liquor and Gaming Authority* [2016] NSWSC 1533 (Adams J); *George Thomas Hotels (Campsie) Pty Limited and Anor v NSW Independent Liquor and Gaming Authority and Ors* [2017] NSWSC 994 (Sackar J))

Facts: On 16 December 2015, the Independent Liquor and Gaming Authority (**the Authority**) determined, pursuant to s 34 of the *Gaming and Liquor Administration Act 2007 (NSW)*, to refuse an application made by Mr Buckley to increase the gaming machine threshold at the Station House Hotel. Relevantly, cl 36(2) of the Gaming Machines Regulation 2010 (NSW) stated that, "The gaming machine threshold for a new hotel … cannot be increased if the hotel or club premises are in the immediate vicinity of a school, place of public worship or hospital." The Authority found that the distance of between 50 and 70 metres between Station House Hotel and Campsie Public School was sufficiently close to find that Station House Hotel was within the "immediate vicinity" of Campsie Public School. Mr Buckley commenced proceedings for judicial review of that decision and, on 2 November 2016, Adams J made orders (inter alia) quashing the decision of the Authority and remitting the matter to the Authority to be determined according to law. On 10 January 2018, the Authority approved the application and increased the gaming machine threshold at the new hotel to 27. In doing so, the Authority determined that it was not satisfied that the premises of the new hotel were situated in the immediate vicinity of any school, place of public worship or hospital. These proceedings concerned judicial review of that determination.

Issues:

(1) Whether the Authority erred in determining that the hotel premises were not situated in the immediate vicinity of a school;

(2) Whether the Authority had asked itself the wrong question;

(3) Whether the reasons of the Authority were inadequate; and

(4) Whether the decision of the Authority was unreasonable.

Held: Proceedings dismissed; plaintiffs to pay defendant's costs as agreed or assessed.

(1) The words "in the vicinity" have no defined statutory meaning and no technical legal meaning: at [57]. What is within the "immediate vicinity" is a matter of fact (at [49]) and will vary according to the context: at [59]. The question of "immediate vicinity" was not merely a matter of distance (at [60]-[61]) and lineal distance was but one relevant consideration: at [61]. It was necessary for the neighbourhood as a whole to be taken into account: at [62]. The Authority's approach was consistent with the authorities considered and no error was demonstrated: at [62];

(2) The Authority's conclusion, expressed in terms that it was "not satisfied" that the new hotel was in the "immediate vicinity" of the school for the purposes of cl 36(2), was not indicative of it having asked itself the wrong question: at [64]. The fact that the particular requirement of cl 36(2) is expressed objectively is not decisive: at [64]; and

(3) The Authority's reasons were comprehensive and reflected a proper consideration and evaluation of authorities: at [63]; and the Authority's determination was not unreasonable in the relevant sense: at [65].

***Re Estate Jerrard, deceased*** **[2018] NSWSC 781** (Lindsay J)

Facts: The Supreme Court made a distribution order under s 134 (in Pt 4.4) of the *Succession Act 2006 (NSW)* (**the Succession Act**), for administration of the intestate estate of a young Aboriginal man valued at about $360,000, determining competing claims made by his parents. All three lived in Tingha, near Inverell, in northern New South Wales, as members of the Nucoorilma Clan of the Gomeroi People. This was the first case under Pt 4.4 in which the Court had been called upon to consider competing claims on the estate of a deceased Indigenous person made by claimants within the same indigenous community. The deceased had never married. He died without a partner, children, dependants or debts. Under the general rules of intestacy (found in Pts 4.2 and 4.3 of the Succession Act), his estate would be divided equally between his parents. His mother (**the plaintiff**) claimed that she should receive the whole of his estate because, as a single mother, she had had sole custody of him, and she had nurtured him, without substantial involvement on the part of the father (**the defendant**). Under s 134(3), in formulating the terms of a distribution order, the Court must have regard to "the laws, customs, traditions and

practices of the indigenous community or group to which the intestate belonged." However, the Court cannot make a distribution order "unless satisfied that the terms of the order are, in all the circumstances, just and equitable": s 134(4). The plaintiff contended that the expression "in all the circumstances, just and equitable" required an assessment of what was "just and equitable" by reference only to "the laws, customs, traditions and practices of the indigenous community or group to which the intestate belonged."

Issues:

(1) What is the nature of the evidence required to establish, as a fact, the existence, and content, of "the laws, customs, traditions and practices of the indigenous community or group to which the intestate belonged";

(2) Whether the expression "in all the circumstances, just and equitable" is confined to a consideration of "the laws, customs, traditions and practices of the indigenous community or group to which the intestate belonged"; and

(3) Whether a distribution order should be made, modifying the general rules of intestacy for which Pts 4.2 and 4.3 of the Succession Act provide, in favour of the plaintiff.

Held: A legacy of $39,706.57 be paid to defendant; residue of estate of the deceased, after payment of testamentary expenses and costs, to pass to plaintiff. (The effect of this was that the mother was to receive about 80%, rather than 50% of the estate, under the general intestacy rules in the Succession Act, after payment of costs.)

(1) The plaintiff adduced evidence in the form of bare declarations about the "traditional customary lore" which were not independently verifiable by the Court except by the drawing of inferences: at [78]. Exceptions to the hearsay and opinion rule (ss 72 and 78A of the *Evidence Act 1995 (NSW)*) facilitated the admission of this evidence by focusing on relevance and probative value: at [76]. There was significant probative value in the fact that Elders, other members and official representatives of the community agree upon a formulation of "traditional customary lore": at [97]. In the absence of any challenge, the plaintiff's articulation of that "lore" was found to accurately state "the laws, customs, traditions and practices of the indigenous community or group to which [the deceased] belonged": at [96];

(2) The purpose of Pt 4.4 is to do what is just and equitable in the particular circumstances of an individual case, to accommodate the fact that, in an indigenous community, concepts of family may differ radically from concepts of family upon which the general intestacy rules are based: at [20] and [22]. Although Pt 4.4 looks uniquely to "the laws, customs, traditions and practices" of an indigenous community, it does so in the context of legislation in which there is a broad public interest in the due administration of estates generally: at [106]. The expression "just and equitable" does not admit of exhaustive definition (at [108]), nor is it a matter of unfettered individual opinion: at [109]. Therefore, to confine a consideration of what is "just and equitable" to "the laws, customs, traditions and practices" of a particular indigenous community would impose on the expression a meaning more limited than it naturally bears (at [110]) and would go beyond the requirement of s 134(3) to "have regard" and disregard the word "however" in s 134(4): at [111]. The plaintiff's contention that expression "in all the circumstance, just and equitable" in s 134(4) of the Succession Act must be confined to a consideration of "the laws, customs, traditions and practices of the indigenous community or group to which the interstate belonged" should be rejected: at [105]; and

(3) The starting point for determining whether a distribution order should be made was consideration of the personal perspective of the deceased (at [122]) and, subsequently, Pt 4.4 invited the Court to make a rational calculation of what the deceased would have done if required to make a will: at [123]. The evidence was silent as to the deceased's testamentary intentions (at [40]), including whether he would have been content to abide by the general intestacy rules or "traditional customary lore": at [40]. The deceased lived in the same household as the plaintiff and the plaintiff was always his principal carer: at [63]. The defendant was not, in any real, factual sense, a person responsible for the deceased's care: at [103]. If required to make a will, the deceased was likely to have favoured his mother, but he was likely not to have done so to the extent of excluding his father (at [131]), given contact between father and son and the respect which, albeit with misgivings, the son had shown to the father during his lifetime: at [134].

Land and Environment Court of NSW:

- Judicial Review:

***Balnaves Foundation Pty Ltd v Minister for Planning (No 2)*** **[2018] NSWLEC 163** (Pepper J)
(related decision: *Balnaves Foundation Pty Ltd v Minister for Planning* [2018] NSWLEC 152 (Pepper J))

Facts: Balnaves Foundation Pty Ltd (**Balnaves**) commenced judicial review challenging the validity of a regulation permitting the imposition of a condition of consent imposing an affordable housing contribution.

Section 94F(3)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) authorised the condition to be imposed by a local environmental plan (**LEP**). There was no relevant LEP authorising condition 13 to be imposed in the consent. The condition was purportedly imposed pursuant to the State Environmental Planning Policy (Affordable Rental Housing) 2009.

On 15 March 2016, Balnaves was granted development consent by Waverley Council (**the Council**) to alter and add to an existing residential flat building in Dover Heights (**the consent**). Condition 13 of the consent mandated payment of an affordable housing contribution of $181,000 under s 94F(3)(b) of the EP&A Act.

On 20 June 2017, Balnaves' solicitor wrote a further letter to the Council outlining the invalidity of condition 13. After exchanges between the parties, Balnaves submitted a modification application, which included a requirement that condition 13 be removed. The Council approved the modification application, but refused to remove condition 13 (**the modification decision**). The Council justified the imposition of condition 13 by relying upon the operation of cl 15A of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**).

Upon the enactment of the Environmental Planning and Assessment Amendment (Plan Making) Regulation 2009 (NSW), cl 15A of the Regulation purported to operate as a transitional provision allowing s 94F(3)(b) of the EP&A Act to be amended to authorise the imposition of affordable housing conditions by a State environmental planning policy (**SEPP**) or an LEP.

On 4 December 2017, Balnaves paid the affordable housing levy of $181,000 on a "without prejudice" basis.

Issue: Whether cl 15A of the Regulation could validly impose an affordable housing contribution under the EP&A Act.

Held: Summons dismissed; applicant to pay respondent's costs.

(1) The validity of the regulation-making power at the time consent was granted was to be considered, first, by construing the meaning and scope of the legislative provision conferring the regulation-making power; second, determining the meaning and effect of the subordinate legislation; and, third, determining whether the subordinate legislation was within the ambit of the construed statutory power: at [46]-[48];

(2) Section 94F of the EP&A Act was not the enabling provision for the Regulation: at [60]. Rather, ss 157 and 159 were the enabling provisions which gave effect to the regulation-making power in cl 1 of Sch 6 of the EP&A Act: at [61];

(3) Clause 1(1) of Sch 6 of the EP&A Act authorised regulations to depart from the operation of the empowering statute, including s 94F of the EP&A Act: at [64]. Clause 1(1) of Sch 6 was not confined by other transitional provisions contained in Sch 6: at [64]. Clause 1(1) permitted the Regulation to alter the provisions and operation of the EP&A Act: at [64]. The legislative intent of cl 1(1) would have been unworkable if the savings or transitional regulation-making power could not function in this manner: at [85];

(4) As at the date of consent, cl 15A operated as a savings or transitional provision permitting affordable housing contribution conditions to be imposed by SEPPs and LEPs: at [86]-[88]; and

(5) Clause 15A was not impermissibly inconsistent with s 94F of the EP&A Act: at [92]. As at the date of the consent, cl 15A was expressed to have a temporary effect on the savings and transitional provisions in the EP&A Act, including s 94F: at [93].

***Benson v Tattersall Lander Pty Ltd*** **[2018] NSWLEC 121** (Sheahan J)

Facts: Mr Benson (**the applicant**) challenged the grant of development consent by Wollondilly Shire Council (**the second respondent**) to proposed improvements at a turkey farm located in Lakesland, New South Wales. The subject development application (**DA**) was lodged by Tattersall Lander Pty Ltd (**the first respondent**), and sought approval for the construction of new poultry sheds, with a consequential increase in the site's poultry stocking capacity. Approval was also sought for the potential to switch operations on the site from turkey farming to chicken farming at a future time.

The DA became the subject of two council reports, which were considered, respectively, at two meetings of the second respondent in October and November 2016. At both meetings, resolutions were passed, purportedly giving consent to the DA. The content of the two council reports, and the practices adopted in the lead up to, and at, the two council meetings, were central to the applicant's pleaded case.

The applicant's principal challenge was that there was a failure to consider matters relevant to development, in accordance with s 79C(1) of the *Environmental Planning & Assessment Act 1979 (NSW)* (**the EP&A Act**), especially the traffic and odour impacts of chicken farming. The applicant's challenge was also based on the contention that the resolution to grant consent at the second council meeting was invalid, as it was made in the absence of a Notice of Motion seeking to rescind or alter the resolution made at the first meeting, in line with the requirements laid down in s 372 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**). Further grounds of challenge relating to the applicable development control plan (**DCP**), and the uncertainty of one of the conditions of consent, were pleaded. Both respondents filed submitting appearances.

Issues:

(1) Did the failure to comply with the requirements s 372 of the Local Government Act render the second council resolution invalid;

(2) Was there a failure to consider matters relevant to development under s 79C(1) of the EP&A Act;

(3) Was the consent invalid for uncertainty, because it did not impose limits on the stocking rates of poultry if there were to be a mixture of turkeys and chickens;

(4) Did the failure to impose conditions ensuring compliance with the relevant DCP render the consent manifestly unreasonable;

(5) Did the decision to grant consent to permit a transfer from turkey farming to chicken farming lack plausible justification; and

(6) Whether, in consideration of the duty imposed by s 25E of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**), an order should be made under Pt 3 Div 3 of the Court Act, rather than declaring the development consent invalid.

Held: Development consent declared invalid; costs reserved.

(1) The applicant's challenge, based on s 372 of the Local Government Act, was not pleaded in the Summons, but it should be dealt with as a threshold issue: at [70]. At the second council meeting, the second respondent was entitled to review its earlier decision, but the correct processes were not followed, and, accordingly, the second resolution was made without power and was invalid: at [80]-[81];

(2) The second respondent failed to consider the matters required by s 79C of the EP&A Act: at [120]. The various circumstances surrounding the composition of the reports and the conduct of the council meetings led to an inference that the second respondent did not adequately consider the application at the first council meeting: at [124];

(3) Although changes were made to the second council report, these were not sufficient to provide for an adequate assessment by the second respondent of the relevant impacts: at [128];

(4) The absence of conditions in the consent to ensure compliance with the DCP did not necessarily mean there was a failure to consider the DCP: at [142]. The failure to include conditions ensuring compliance with a control will not necessarily render a consent manifestly unreasonable: at [143];

(5) The consent was not invalid for uncertainty, because the turkey and chicken farming operations were envisaged to be alternatives, and a mixed used for chickens and turkeys was not an objective: at [152]; and

(6) Given that the second council resolution was found to have been made wholly without power, an order should not be made under Pt 3 Div 3 of the Court Act: at [161].

***Henroth Investments Pty Ltd v Sydney North Planning Panel*** **[2018] NSWLEC 112** (Pain J)

Facts: Henroth commenced judicial review proceedings against the Sydney North Planning Panel (**the Panel**) (a Sydney Planning Panel created under the now repealed Pt 3 of the *Greater Sydney Commission Act 2015*) and the Northern Beaches Council (**the Council**) challenging a recommendation of the Panel. The Panel had recommended that a rezoning review proposed by Henroth should not proceed to Gateway Determination under s 56 of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).

In November 2012, Pittwater Council (which became part of the Northern Beaches Council) and the Department of Planning and Environment (**the department**) prepared the Warriewood Valley Strategic Review Report which was endorsed by the department in May 2013. The Council prepared the Warriewood Valley Strategic Review Addendum Report (**the Strategic Addendum Report**) in November 2014 which was not endorsed by the department.

On 30 August 2016, the Minister for Planning issued a media release and a planning circular which provided for the Sydney Planning Panels, such as the Panel, to conduct independent reviews of various council and departmental decisions. The planning circular required Sydney Planning Panels to conduct a strategic merit test in respect of any rezoning reviews which included an assessment of any relevant local strategy endorsed by the department. In evidence were the Code of Conduct and Operational Procedures dated September 2016 for Sydney Planning Panels.

On 1 November 2016, the Council offered to purchase Henroth's land for recreational use pursuant to s 94 of the EP&A Act. In December 2016, Henroth submitted a rezoning request to the Council to have land (zoned RU2 Rural Landscape under the Pittwater Local Environmental Plan 2014) rezoned to partly R3 Medium Density Residential, B2 Local Centre, RE1 Public Recreation and E3 Environmental Management for development of a bulky goods retail centre, associated food and drinks premises and 25-30 residential dwellings.

On 23 January 2017, the Council extended the time for Henroth to accept the Council's offer. Henroth did not accept the Council's offer. The Council made a number of referrals to external organisations regarding the rezoning request. On 13 February 2017, the Office of Environment and Heritage (**the OEH**), being one of the external organisations, wrote a letter responding to the Council's referral (**the OEH letter**). The OEH letter stated that the site of the proposed rezoning request was flood-prone. However, in terms of flood risk, only the OEH did not object to the rezoning request should the on-site flood storage capacity be increased and flood evacuation routes upgraded.

On 22 March 2017, Henroth applied to the Panel for a review of the rezoning request, as the Council had not indicated its support within 90 days. On 28 March 2017, the Council recommended that Henroth's rezoning request not proceed to Gateway Determination. On 30 March 2017, the Council again extended the time for Henroth to accept the Council's offer. Henroth did not accept the offer.

On 31 May 2017, the Panel conducted the rezoning review. Henroth, the department and the Council provided written material to the Panel for consideration. Henroth's written submissions alleged that the Council had a conflict of interest in wanting to maintain the existing zoning of the land because it could purchase it more cheaply than if rezoned. At a meeting with the Panel, Henroth's director was not permitted to make oral submissions on the Council's alleged conflict of interest. On the same day, the Panel recommended that the rezoning request should not proceed to Gateway Determination.

Issues:

(1) Was Henroth denied procedural fairness due to actual or apprehended bias of the Panel considering the Council's views in the rezoning review process;

(2) Alternatively, was Henroth denied procedural fairness due to actual or apprehended bias from the Panel preventing Henroth's director from making oral submissions at the meeting on 31 May 2017;

(3) Did the Panel fail to conduct an independent review of the rezoning review;

(4) Did the Panel fail to have regard to mandatory relevant considerations in failing to conduct a strategic merit test;

(5) Did the Panel take into account irrelevant considerations in considering flooding at Henroth's land; and

(6) Did the Panel fail to take into account a relevant consideration being flooding.

Held: Amended Summons dismissed; applicant to pay respondents' costs.

Generally, the rezoning review determination undertaken by the Panel was not underpinned by any specific provision in the EP&A Act. It was effectively a recommendation to the Greater Sydney Commission which would have the effect that the Greater Sydney Commission would not appoint a relevant planning authority under s 54(2) of the EP&A Act to recommend whether a rezoning request should proceed to Gateway Determination under s 56.

(1) That the Panel stated, in its reasons, that it received the views of the Council did not prime facie give rise to bias or a reasonable apprehension of bias: at [100]; the weight the Panel attributed to the Council's views was a matter for the Panel: at [100]; a requirement to be independent did not equate to a prohibition on taking into account third party submissions: at [101]; for bias in a third party to infect a decision-maker, there must have been participation in the making of a decision: at [108]; no specific failure to comply with the Code of Conduct was alleged by Henroth: at [113]; Henroth had the opportunity to communicate its concerns, including any allegation of bias, in its written submissions prior to the rezoning review: at [114]; the Operational Procedures specifically stated that oral submissions should not merely repeat what was stated in written submissions and there was no evidence that Henroth wished to raise additional material: at [114]-[115]; there was no apprehended or actual bias in the Council and it took appropriate steps to consider potential conflict issues by contracting for a probity report to be undertaken: at [119]; a reasonable apprehension of bias was not established: at [121];

(2) A failure to carry out an independent review is not a recognised ground of judicial review: at [131]; no factual matter was established by Henroth to support a finding that the Panel failed to conduct an independent review of the rezoning request: at [134];

(3) Whether a matter is a mandatory relevant consideration arises expressly or by inference from the relevant statutory scheme: at [151]; the Planning Circular could not, without a statutory basis, be a mandatory relevant consideration: at [155]; the Panel was providing a recommendation to the Greater Sydney Commission to assist in deciding whether to exercise power under s 54(2) to appoint a relevant planning authority and no express mandatory relevant considerations arose: at [160]; no relevant legal failure arose from the Panel considering the Strategic Addendum Report, which was not endorsed by the department, given the absence of statutory context: at [160]; there was no failure to conduct a strategic merit test: at [162]; the Panel indicated in its reasons that it had done so: at [162];

(4) Henroth did not establish that an irrelevant consideration had been taken into account due to the absence of a statutory basis for the rezoning review decision: at [174]; and

(5) This was an impermissible attempt at merits review of the Panel's decision that Henroth's land was flood-prone: at [192]; the OEH letter was not an express or implied mandatory relevant consideration given the lack of statutory basis for the rezoning review: at [194]; in any event, the OEH letter was not inconsistent with the Panel's finding as it stated the suggested flooding amelioration plans required further development: at [199].

***Luna Park Sydney Pty Ltd v Minister for Planning*** **[2018] NSWLEC 89** (Molesworth AJ)

Facts: Luna Park Sydney Pty Ltd (**the applicant**) challenged the decision, dated 21 March 2017, of McKenzie Group Consulting (NSW) Pty Ltd (**the certifier**) to refuse to grant a construction certificate in respect of the installation of a new amusement ride known as the "Flying Carousel" in Luna Park (**the refusal decision**).

On 31 January 2002, consent, subject to conditions, was given under s 80(4) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) for a "masterplan" for the Luna Park site setting parameters around matters including land uses, building envelopes, access arrangements, noise levels and hours of operation (**the masterplan consent**).

On 21 January 2003, the Minister for Planning granted, subject to conditions, development consent in relation to two further applications for the site (**the subsequent consents**).

On 17 March 2017, the applicant lodged with the certifier an application for a construction certificate in relation to "foundation footings and installation of amusement ride" for a ride known as the Flying Carousel (**the proposal**).

On 21 March 2017, the certifier notified the applicant of the refusal decision - that it had decided, pursuant to cl 142 of the Environmental Planning and Assessment Regulation 2000 to refuse to issue a construction certificate "on the grounds that the application does not satisfy cl 145(1)(a) of the [EP&A

Regulation] as the works cannot be demonstrated as not inconsistent with the development consents as it was unclear whether the development consents authorise the installation of new rides."

Issues:

(1) Whether the masterplan consent or the subsequent consents gave approval for the installation of new rides, specifically, the Flying Carousel, without requiring that a further development consent be obtained; and

(2) Whether the certifier made an error of law in failing to find that the proposal was "not inconsistent" with the relevant development consents.

Held: Application dismissed, applicant to pay first respondent's costs as agreed or assessed.

(1) "Development" for the purposes of the EP&A Act encompasses, inter alia, both the use of land and works or construction activities: at [103];

(2) The successive applications and consents for Luna Park were interlocking parts of a staged development approval process under s 80(4) of the EP&A Act. The masterplan consent was directed at approving proposed land uses and associated externalities (for example, access arrangements) rather than the "development works" (in the building/construction sense) required for those uses: at [104];

(3) The certifier was correct to conclude that it was unclear whether the development consents authorised the installation (that is, development works) of new rides, as distinct from land use: at [108]; and

(4) There was no basis to find that the necessary development consent for the development works for the Flying Carousel was in place, as distinct from the generic approval of the use of such new open rides, together with certain operational externalities: at [111].

***Platford v van Veenendaal and Shoalhaven City Council*** **[2018] NSWLEC 27** (Preston CJ)

Facts: The applicant and the first respondent are neighbours who own adjoining residential properties at Hyams Beach, New South Wales. The applicant owns the more southerly property, which has extensive views to the east to the sea and to the north over the first respondent's property along the beach.

Shoalhaven City Council (**the Council**) granted the first respondent development consent to demolish the existing dwelling on his property, to erect a new dwelling on the western portion of his property and to build a "boathouse arm", a non-habitable, ancillary building, involving a boathouse room and a concrete screen wall linking the boathouse room to the new dwelling. The screen wall varies in height from 3.7 metres to 4.12 metres and is set back 900 millimetres from the southern boundary with the applicant's property. The wall extends to 7.5 metres from the eastern boundary, which is in the sands of the beach. The development consent was subject to conditions, including condition 6 requiring the first respondent to amend the building plans for the boathouse room to mitigate the effects on wave run-up, condition 36 prohibiting filling or retaining walls in the wave run-up area; and condition 43 requiring the sea wall within the property, which was originally built by the Council, to be maintained.

The applicant brought judicial review proceedings challenging the validity of the development consent.

First, the applicant submitted that, by imposing condition 43, the Council extended the approved development to include development for the purposes of a sea wall. Under cl 129A(2) of the State Environmental Planning Policy (Infrastructure) 2007 (**the Infrastructure SEPP**), only the Coastal Panel has the power to determine development applications for this purpose. Condition 43 requires the carrying out of maintenance work and a change of the purpose for which the sea wall is to be used (from a temporary measure to a permanent measure to protect the boathouse arm), both of which are within the definition of "development" in s 4 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) and s 37 of the *Coastal Protection Act 1979 (NSW)* (**the Coastal Protection Act**)) and for the purposes of a sea wall.

Second, the applicant contended that the Council failed to consider the height controls in Ch G12 of the Shoalhaven Development Control Plan 2014 (**the SDCP**). The screen wall exceeds three metres, which, under s 5.3.8 of Ch G12 of the SDCP, is above the height limit in Acceptable Solution A22.1 for ancillary structures in the applicable zone. Alternatively, if the Council did consider these height controls, the Council's conclusion on this issue was manifestly unreasonable.

Third, the applicant contended that the Council failed to consider the coastal induction risks of and on the screen wall, which the Council was obliged to consider under s 79C(1)(a)(ii) and (iii) of the EP&A Act, G6

of the SDCP, cl 5.5(3)(d) of the Shoalhaven Local Environmental Plan 2014 (**the SLEP 2014**), and cl 8(j) of the State Environmental Planning Policy No 71 - Coastal Protection (**the Coastal Protection SEPP**). Alternatively, if the Council did consider this risk, the Council's consideration of this issue was manifestly unreasonable.

Fourth, the applicant contended that the Council, by granting consent subject to condition 43 requiring the existing sea wall to be maintained, granted consent to development for the purpose of coastal protection works within the meaning of s 4(1) of the Coastal Protection Act. As a consequence, the Council was required to, but did not, consider the matters in s 55M(1)(a) and (b) of the Coastal Protection Act.

Issues:

(1) Was the Council the relevant consent authority to determine the development application;

(2) Did the Council fail to take into account the height controls for ancillary structures in Ch G12 of the SDCP? Alternatively, was the Council's conclusion on this issue manifestly unreasonable;

(3) Did the Council fail to consider the coastal induction risks of and on the screen wall in the boathouse arm? Alternatively, was the Council's consideration of this issue manifestly unreasonable; and

(4) Did the Council fail to consider the matters in s 55M of the Coastal Protection Act in assessing development for the purpose of coastal protection works.

Held: The development consent set aside and declared invalid and of no effect; an injunction granted restraining the first responding from relying on the development consent.

(1) The development application did not seek consent for development for the purposes of a sea wall (at [14]); the identification of the consent authority cannot operate retrospectively by reference to the determination to grant development consent (including the conditions of the consent) (at [15]); the Council has power under s 80A(1)(f) of the *Environmental Planning and Assessment Act 2003 (NSW)* to impose conditions of consent requiring the carrying out of works (at [17]); the imposition of such a condition did not involve the grant of consent to the carrying out of those works: at [17];

(2) The Council did not fail to take into account the relevant height controls for the boathouse arm (at [42]); height controls in the SDCP are of two types: Performance Criteria, which identifies how a development should perform to achieve the desired objectives, and Acceptable Solutions, which indicate how the development can achieve the desired performance (at [22]); the report to the council meeting concluded that, although the boathouse arm did not comply with Acceptable Solution A22.1, in that the screen wall exceeded three metres, it did achieve Performance Criteria P22.1, in that its impact on the amenity and solar access of the applicant's property will be minimal (at [25] and [28]); the report found that high quality views, including from living areas, will be unaffected and that the views lost will be limited to the applicant's side boundary (at [26]); this conclusion was not manifestly unreasonable because it was reasonably open on the material before the Council: at [30]-[31];

(3) The Council failed to take into account the relevant matters in Ch G6 of the Shoalhaven DCP, cl 5.5(3)(d) of the SLEP 2014 and cl 8(j) of the Coastal Protection SEPP by failing to consider the likely effect of coastal inundation by wave run-up on the screen wall in the wave run-up area and the likely effect of the screen wall on wave run-up flows; while the report to the Council meeting assessed the coastal induction risks of and on the boathouse room, the other part of the boathouse arm in the wave run-up area, and recommended measures to mitigate these risks (adopted in conditions 6 and 36), the report did not assess the same risks of and on the screen wall; as the Council did not consider these matters, the grounds of unreasonableness do not arise: at [66]-[68];

(4) The development application did not seek consent for development for the purpose of coastal protection works; the imposition of condition 43 requiring the carrying out of works for maintaining the sea wall did not involve the granting of consent to the carrying out of those works; accordingly, the Council was not required to be satisfied of the matters in s 55M(1): at [69]-[70].

***Wirrabara Village Pty Limited v The Secretary of the Department of Planning and Environment*** **[2018] NSWLEC 138** (Pepper J)

Facts: Wirrabara Village Pty Ltd (**the applicant**) sought to set aside the Secretary of the Department of Planning and Environment's (**the respondent**) decision to revoke a site compatibility certificate issued on 23 March 2018 (**the 2018 certificate**) (**the revocation decision**).

On 9 June 2016, the respondent issued the applicant with a site compatibility certificate (**the 2016 certificate**). The 2016 certificate expired on 9 June 2018.

On 22 September 2017, the applicant lodged an application for a further site compatibility certificate in similar terms. On 16 November 2017, the applicant also lodged a development application for the land (**the DA**). The DA sought to demolish the existing structures and construct a 72-bed aged care facility, 117 self-care dwellings, community facilities, private roads, bulk earthworks and retaining walls. The Council refused the DA, so the applicant lodged a Class 1 application on 25 January 2018 (**the Class 1 appeal**).

On 23 March 2018, the respondent issued the 2018 certificate. Upon the Court dismissing the Class 1 appeal on 19 April 2018, the respondent revoked the 2018 certificate. The respondent stated that the Council and the applicant had not advised the Department of Planning and Environment (**the department**) of the Class 1 appeal.

On 16 August 2018, the department advised the applicant that the Council had notified the Planning Panels Secretariat of the Class 1 appeal on 9 March 2018. However, the respondent had not been informed of this fact when making the revocation decision. The parties agreed that the decision was infected with jurisdictional error, and therefore, invalid.

Issue: Whether the revocation decision should be set aside.

Held: Declared revocation decision was invalid; respondent to pay applicant's costs.

(1) The Court accepted that the revocation decision was not consistent with the nature, terms and purpose of any revocation power conferred by s 1.4(8) of the Environmental Planning and Assessment Act 1979 (NSW), when read in the context of cl 25 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004: at [25]-[26]. Accordingly, the Court set aside the decision: at [29].

***Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd*** **[2018] NSWLEC 92** (Sheahan J)

Facts: Wilpinjong Coal Pty Ltd, the first respondent (**the company**), carried out mining activities at an open-cut coal mine near Wollar, approximately 40 kilometres north east of Mudgee, New South Wales. The company had carried out such activities pursuant to an approval dating from 1 February 2006. In 2017, consent was granted, on conditions, for the temporal continuation and physical extension of the approved mining operations. This approval was given by the State's Planning Assessment Commission (**the PAC**), to whom decision-making was delegated by the Minister for Planning, the second respondent (**the Minister**). In these judicial review proceedings, the approval for the project was challenged by Wollar Progress Association Incorporated (**the association**).

The association's principal challenge was that the PAC failed to consider matters required by cl 14(2) of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**the Mining SEPP**), which required that a consent authority, in determining a development application for mining activities, must consider an assessment of greenhouse gas emissions, including downstream emissions, and in doing so must have regard to "any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions." The association supported this argument by tendering policy documents, including a New South Wales Government document entitled "NSW Climate Change Policy Framework" and the United Nations' Paris Agreement. The association's second ground concerned biodiversity, and alleged that there was a failure to consider the totality of the subject matter as described in the development application. The association submitted that it was a requirement that both the impact of the mine in the proposed expansion, and the impact of the existing approval, had to be considered, pursuant to s 79C of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**).

Issues:

(1) Whether the Minister, by his delegate, the PAC, failed to consider matters required by cl 14(2) of the Mining SEPP in granting consent for the mine extension; and

(2) Whether there was a constructive failure to exercise jurisdiction by failing to consider the totality of the subject matter as described in the DA, especially the environmental impacts of clearing in areas not yet mined under the first approval.

Held: Summons dismissed; costs reserved.

(1) The PAC gave the requisite consideration to the issues and the materials in the present case and the company's submissions in relation to ground 1 are to be preferred: at [180]. All the information and

material surveyed in the judgment were before the PAC, and considered by it, as it reached its decision and prepared its determination report: at [181]. The company submitted that the two policies identified by the applicant could not meaningfully guide the task of the consent authority: at [141]; that the PAC had before it an assessment of the greenhouse gas emissions: at [142]; that the targets in relation to greenhouse gas emissions, derived from the Paris Agreement, were "not directed to the process of assessment" and "cannot be said to be … capable of application by a consent authority": at [149]; and

(2) The company's submissions in relation to ground 2 were to be preferred: at [180]. Granting relief in respect of this ground would be futile, given that clearing could occur under the previous approval: at [168]-[170]; and the PAC did give the requisite consideration pursuant to s 79C of the EP&A Act, finding such impacts acceptable when protection and mitigation measures and recommended conditions are put in place: at [171].

- Criminal:

***Bega Valley Shire Council v Williams*** **[2018] NSWLEC 124** (Pain J)

Facts: Mr Williams pleaded guilty to a charge under s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) of carrying out development which required consent being clearing of native vegetation in Jiguma Reserve on the New South Wales south coast without a development consent contrary to s 76A(1)(a) of the EP&A Act. Mr Williams admitted to clearing and poisoning vegetation in Jiguma Reserve on an unspecified number of occasions in July 2016. He also agreed to having entered Jiguma Reserve on the night of 6 September 2016 and cutting a casuarina branch and a pittosporum branch with a small pruning saw.

When questioned by council officers in September 2016, Mr Williams was asked whether he had undertaken to clear and poison the vegetation to obtain a "view corridor" to his property opposite Jiguma Reserve, Mr Williams responded that this had not been his sole intention. Mr Williams stated that he had wanted to "clear up" Jiguma Reserve, which he believed had become overrun with invasive species, such as pittosporum, and had been neglected by Bega Valley Shire Council (**the Council**). The Council alleged 1,000 square metres was cleared and/or poisoned, relying on a file note of a council officer and an aerial image delineating two areas purporting to show the Council's initial estimation of 1,600 square metres cleared. Mr Williams objected to the Council's aerial image as not accurately depicting the area cleared on account of the Council's revised position of 1,000 square metres and submitted that no more than 250 square metres was damaged.

Issues:

(1) What was the level of environmental harm caused by the offence;

(2) What was Mr Williams' motive in clearing and poisoning;

(3) What was the appropriate penalty for the offence; and

(4) Should the Council receive its costs in full.

Held: Mr Williams fined $5,250 and to pay the Council's costs in the amount of $15,000.

(1) Three matters were in issue in determining environmental harm: being the size of the area cleared, the range of species damaged, and Mr Williams' intention and purpose: at [4]; the Council did not prove beyond reasonable doubt that approximately 1,000 square metres was cleared and poisoned: at [81]; Mr Williams' estimate of the area cleared was accepted: at [81]; the cutting of several small pittosporum trees resulted in short-term environmental harm with ultimately long-term beneficial effects due to the invasive nature of pittosporums: at [85]; short-term harm to plants affected by poisoning and the use of an inappropriately strong mix of poison while a breeze was blowing caused the most significant environmental harm: at [86]-[87]; the environmental harm caused by cutting the two branches on 6 September 2016 was minuscule: at [88]; Mr Williams admitted that he had cleared and poisoned intentionally: at [91];

(2) The Council did not establish beyond reasonable doubt that Mr Williams was motivated by a desire for an ocean view: at [97];

(3) *Objective circumstances*: the offence undermined the objects of the EP&A Act: at [75]; the maximum penalty for the offence was $500,000 for an individual: at [76]; it was undesirable for Mr Williams to

enter public land and interfere with vegetation despite his good intention: at [90]; there were practical measures available to Mr Williams to prevent the harm: at [98]; Mr Williams had control over the causes of the offence: at [99]; the offence was at the mid-level of the low range of objective seriousness: at [100].

*Subjective circumstances*: Mr Williams entered an early guilty plea: at [102]; Mr Williams was of good character: at [103]; Mr Williams was unlikely to reoffend: at [104]; Mr Williams was genuinely remorseful: at [107]; Mr Williams had no prior convictions: at [108]; Mr Williams admitted to council officers his activities in July 2016 unprompted and assisted with the Council's investigation: at [109].

*Purposes of sentencing*: general deterrence was relevant: at [110]; specific deterrence was not relevant: at [111]; denunciation and retribution were taken into account: at [112]; the circumstances of the case were unusual given the relatively large area cleared and/or poisoned combined with an absence of long-term environmental harm and good intentions of Mr Williams: at [116]; and

(4) Mr Williams submitted that he should be penalised as if before the Local Court: at [117]; the offence was not trivial or minor, it was not inappropriate that the offence was dealt with in the Land and Environment Court: at [118]; the Council's costs and disbursements were substantial, close to $40,000. Given that the Council was not successful on key aspects of its case a limited costs order was made pursuant to s 257B of the *Criminal Procedure Act 1986 (NSW)*: at [119].

***Burwood Council v Pan Pac Investments Pty Ltd* [2018] NSWLEC 110** (Pain J)

Facts: Pan Pac Investments Pty Ltd (**the respondent**) pleaded not guilty to three charges under the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). Two charges arose under s 125(1) of the EP&A Act from alleged non-compliance with an order issued pursuant to s 121B of the EP&A Act requiring the respondent to cease using its residential property as a boarding house and to remove a plasterboard wall it had installed. The other charge arose under ss 119M and 125(1) of the EP&A Act from alleged non-compliance with a Notice to Produce information and records pursuant to s 119J of the EP&A Act.

At the hearing, the respondent was represented by its sole director, Ms Wu. In relation to using the property as a boarding house, Ms Wu submitted, on behalf of the respondent, that she had received an order in 2014 requiring the respondent to cease using the property as a boarding house. The 2014 order had not been pursued by the Council following what Ms Wu believed to be a mediation with a council officer and the issue was not raised again until 2016. She submitted that the Council should have followed the same course of action in 2016. If the Council had changed its policy the respondent should have been notified. Ms Wu also submitted that the property was being used for independent assisted living for aged people and people with disabilities. In relation to the plasterboard wall, Ms Wu submitted that the wall was minimal and therefore exempt development. Ms Wu submitted that the notice pursuant to s 119J was an abuse of process and an invasion of privacy as it required production of her personal records and did not contain a privacy disclaimer.

Issues:

(1) Did the Council establish non-compliance with the order requiring the respondent to cease using its property as a boarding house;

(2) Did the Council establish non-compliance with the order requiring the respondent to remove the plasterboard wall; and

(3) Did the Council establish non-compliance with the notice requiring the respondent to furnish the council with information and records.

Held: Respondent found guilty on all three charges.

(1) The Council established beyond reasonable doubt that there had been non-compliance with the order requiring the respondent to cease using its property as a boarding house: at [80]-[82]; the order had been issued lawfully: at [82]; Ms Wu's description of the respondent's use of the property during two recorded interviews with council officers met the definition of "boarding house" in the Burwood Local Environmental Plan 2012 and the evidence of council officers who inspected the property confirmed the order had not been complied with at [85]; Ms Wu's submission that the property was used for independent assisted living was not supported by evidence as no mention of the respondent or Ms Wu was made in documents adduced to purportedly show registration as an independent assisted living property: at [87]; the definition of "boarding house" under the *Boarding Houses Act 2012 (NSW)*

was not relevant to these proceedings under the EP&A Act: at [93]; there was no evidence that the property was used for any other type of accommodation such as "residential care facility" or "group home": at [91]; there had been no denial of procedural fairness to the respondent: at [96]; no evidence of an honest and reasonable mistake of fact was identified by the respondent: at [98];

(2) The Council established that there had been non-compliance with the order requiring the respondent to remove the plasterboard wall: at [101]; the plasterboard wall was not exempt development: at [102]; and

(3) The Council established that there had been non-compliance with the Notice to Produce information and records: at [118]-[119]; that Ms Wu did not have time to go through her records and may have had to supply her personal bank statements and tax returns was not a reasonable excuse for non-compliance: at [122] and [124]; the *Privacy Act 1988 (Cth)* did not apply: at [123]; the *Privacy and Personal Information Act 1998 (NSW)* had no application in circumstances of an authorised council officer issuing a statutory notice in performing law enforcement functions: at [123].

***Chief Executive, Office of Environment and Heritage v Merriman* [2018] NSWLEC 96** (Pain J)

Facts: Mr Merriman pleaded guilty to clearing 12.5 hectares of native vegetation contrary to s 12(1) of the now repealed *Native Vegetation Act 2003 (NSW)* (**the Native Vegetation Act**). Mr Merriman was a grain farmer and cleared the native vegetation on his property in Goolgowi, near Griffith, in New South Wales between April and November 2015. Mr Merriman had multiple interactions with Land Services Officers in which he was made aware of the need for a Property Vegetation Plan or development consent to clear before the clearing.

Mr Merriman tendered a letter from his doctor which identified that, at the time of the offence, he was 76 years' old, had a history of major surgery associated with benign brain tumours and had a severe hearing impairment. The letter also identified that Mr Merriman had impaired short-term memory, meaning written or verbal instructions could quickly be forgotten. Mr Merriman also provided evidence of his limited financial means, deposing to his debts of $1.5 million incurred as a result of extended periods of drought and high businesses expenses. In the preceding financial year, Mr Merriman's business had run at a loss.

Mr Merriman agreed, prior to the hearing, to enact a positive covenant over 84 hectares on his property for remediation works, to implement a Remediation Plan and to pay the prosecutor's costs of $60,000.

Issue: What was the appropriate penalty for Mr Merriman's offence against s 12(1) of the Native Vegetation Act.

Held: Mr Merriman found guilty of the charge; no conviction recorded upon Mr Merriman entering a good behaviour bond for two years under s 10(1)(b) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*; Mr Merriman agreed to pay the prosecutor's costs of $60,000.

(1) *Objective circumstances*: The offence thwarted the objects of the Native Vegetation Act: at [26]; the maximum penalty was $1,100,000: at [27]; the offence was one of strict liability and therefore Mr Merriman's state of mind was not an element of the offence: at [28]; although the clearing was deliberate, Mr Merriman's age, impaired hearing and short-term memory impairment meant the instructions of Land Services Officers would likely have been forgotten: at [28] and [33]; Mr Merriman cleared the vegetation to prevent weed infestation in his crops and to "square up" the cleared area to improve access for large machinery: at [36]; he did not clear for financial gain: at [38]; not insignificant environmental harm was caused: at [39]; the harm was reasonably foreseeable: at [41]; there were practical measures which could have been taken to prevent the risk of harm such as refraining from clearing: at [42]; Mr Merriman had complete control over the causes of the harm: at [43]; the offence was at the high end of the low range of objective seriousness: at [44]; and

(2) In considering whether a bond pursuant to s 10(1)(b) would be an appropriate penalty, the Court must have regard to the factors in subs (3): at [50]; Mr Merriman's antecedents being his age, mental and physical impairments and debts were significant considerations (subs (3)(a)): at [51] and [55]; the offence was not trivial given that the clearing was deliberate (subs (3)(b)): at [53]; there were no other extenuating circumstances in which the offence was committed (subs (3)(c)): at [54]; the mitigating and personal circumstances of Mr Merriman, in combination with the significant mitigation of the environmental harm by the positive covenant, weighed in favour of ordering Mr Merriman entering into a bond: at [55]-[57]; any penalty imposed would have been minimal: at [56].

***Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd* [2018] NSWLEC 145** (Robson J)

Facts: The defendants were charged with offences pursuant to s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). Each charge arose from the same incident and related to the erection of a mosque in 2014. The development was undertaken with development consent but without a construction certificate, contrary to s 81A of the EP&A Act.

The proceedings were commenced on 3 May 2018, which was outside the time limit for the commencement of proceedings provided by s 127(5) of the EP&A Act. However, s 127(5A) provided that proceedings for an offence may be commenced within two years of the date on which evidence of the alleged offence first came to the attention of an authorised officer. It was conceded during the course of the hearing that evidence of the offence had come to the attention of an authorised office more than two years before 3 May 2018, but the prosecutor argued that evidence of the identity of the defendant was also required for the time limit provided by s 127(5A) to commence and that this had not occurred.

The alleged commission of the offence preceded the introduction of s 125(3A) of the EP&A Act which provided, inter alia, that a person who aids, abets, counsels or procures another person to commit an offence under the EP&A Act is liable as a principal offender. The defendants argued that, s 125(3A) not being available, there was no power for the Court to hear the charges laid by the prosecutor in the alternative that each of the defendants was guilty as an accessory.

Issues:

(1) Whether the proceedings had been commenced in time; and

(2) If so, whether the Court had jurisdiction to hear the charges in relation to accessorial liability.

Held: Summonses dismissed.

(1) On a proper reading of s 127(5A), the evidence required to be brought to the attention of an authorised officer is evidence capable of indicating that an offence has been committed. It does not require evidence of the identity of the defendant to come to the prosecutor's attention: at [78];

(2) In those circumstances, the Summonses were been commenced out of time, with the consequence that they must be dismissed: at [85]; and

(3) Had the Summonses been commenced in time, the Court would have had jurisdiction to hear the charges in relation to accessorial liability because the accessorial offences are not separate offences at law: at [96], [104].

***Environment Protection Authority v Ditchfield Contracting Pty Limited* [2018] NSWLEC 90** (Preston CJ)

Facts: Ditchfield Contracting Pty Ltd (**Ditchfield**) was engaged by Newcastle City Council (**the Council**) to construct a landfill cell at a waste facility. Ditchfield installed a 69,200 litre capacity fuel container (**the fuel farm**) on the site to store diesel. The diesel was pumped from the fuel farm into a fuel tanker (**the fuel cart**), which was driven around the landfill to refuel plant and equipment. When refuelling from the fuel farm, the fuel cart was parked over a spill grate with a 1,350 litre capacity. A label on the fuel cart stated that: "Fuel system is not auto shut off. Fuel must be shut off manually."

On 3 September 2016, a Ditchfield employee began refuelling the fuel cart from the fuel farm, when he left to work on another machine. An hour later he noticed that diesel had overflowed from the fuel farm and was spilling onto the ground. He immediately shut off the fuel system. Shortly after, Ditchfield notified the Council of the spill, who reported the incident to the Environment Protection Authority (**the EPA**). On 3 September 2016 and over the following days, Ditchfield took steps to contain and clean up the spill including building an earth bund to contain the flow of diesel in a nearby creek and excavating the contaminated soil from the drainage line and the creek. On 10 September 2016, the fuel farm was decommissioned and offsite fuelling arrangements were made.

A total of 2,771 litres of diesel spilt from the fuel cart, of which 1,586 litres escaped the spill grate and discharged onto the ground. The flow path of the diesel to its eventual containment point at the bund in the creek was approximately 200 metres. The site of the landfill cell had previously been used as a colliery. The diesel travelled 140 metres along the existing mine overburden and coal chitter material and 60 metres along the drainage line and into the creek.

The EPA charged Ditchfield with an offence against s 120 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) for polluting waters. Ditchfield pleaded guilty to the offence.

Issue: To determine and impose a sentence for the offence against s 120 of the POEO Act.

Held: Ditchfield convicted of the offence as charged; sentenced to pay $105,000 to the Environmental Trust for general environmental purposes and to publicise the detection, prosecution and punishment of the offence in specified newspapers; and to pay the prosecutor's costs.

(1) The long term impact of the diesel spill was adequately limited in extent and exposure time because of the containment of the pollutant by the bund in the creek and the rapid remediation and removal of polluted soils: at [41]; as a result, the actual harm to the environment was low: at [42];

(2) The risk that diesel might spill during the transfer of diesel from the fuel farm to the fuel cart was reasonably foreseeable: at [44]; there was no physical means to contain the diesel fuel if a leakage or spillage of diesel did occur away from the spill grate or of a volume that exceeded the capacity of the spill grate: at [46]; the topography of the land sloped from the fuel farm to the drainage line and creek: at [46]; Ditchfield could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence: at [47];

(3) There were practical measures that Ditchfield could have taken that would have prevented, controlled, abated or mitigated the pollution of waters, including that the fuel farm and fuel cart could have been fitted with an automatic shut off valve, the spill grate could have had a larger capacity, there could have been an external bund to contain spillage and refuelling could have occurred offsite, as was done after the offence: at [49]-[50];

(4) Ditchfield has expressed genuine remorse for the offence, including by accepting responsibility for its actions and acknowledging and making reparation for the harm caused to the environment by its actions: at [57]; and

(5) The sentence needs to act as a general deterrent to ensure that people and businesses carrying out activities near waters do not pollute waters and take the necessary precautionary and preventative measures: at [69]; however, having regard to Ditchfield's lack of prior convictions, its genuine remorse for the offence, its good corporate character, its actions taken at the time of and following the spill to address the causes of the spill and to prevent reoccurrence, and the unlikelihood of it reoffending, there is no particular need for the individual deterrence of Ditchfield: at [70].

***Environment Protection Authority v Edward Gilder*** **[2018] NSWLEC 119** (Robson J)

Facts: Edward Gilder (**the defendant**) pleaded guilty to an offence against s 144(1) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**). His liability arose by way of s 169 of the POEO Act, in that he was a person concerned in the management of Newcastle Waste Recycling Pty Ltd (**the company**), which caused a place to be used as a waste facility without lawful authority.

The place used by the company as a waste facility was the land at 509 Tomago Road, Tomago (**the site**). The waste stored at the site by the company was 20,000 cubic metres of material including mixed construction and demolition waste; brick and concrete; rubble; soil; rubbish; timber; woodchips and/or green waste; and asbestos waste.

Issues:

(1) The objective seriousness of the offences; and

(2) What penalty should be imposed.

Held: Fines imposed; defendant to pay prosecutor's costs.

(1) Having regard to all of the objective circumstances, the offence fell within the lower range of objective seriousness for offences under s 144(1) of the POEO Act: at [147]; and

(2) Taking into account the objective circumstances, the subjective circumstances of the defendant, and the defendant's relatively modest means (pursuant to s 6 of the *Fines Act 1996 (NSW)*), the appropriate penalty was $50,000, discounted by 25% for the utilitarian value of the early guilty plea, to give a final fine of $37,500: at [187].

***Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2018] NSWLEC 99** (Pain J)

Facts: Grafil Pty Ltd (**the company**) pleaded not guilty to a charge under s 144(1) of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**) of using land as a waste facility without lawful authority between 29 October 2012 and 15 May 2013. Mr Mackenzie, as a director of the company, pleaded not guilty to an executive liability charge for the s 144(1) offence by virtue of s 169(1) of the POEO Act. Grafil runs a sand-processing business at Salt Ash on Lot 8 DP 833 768 (**Lot 8**). Mr Mackenzie and his father were directors of a related sand extraction business known as Macka's Sand Pty Ltd (**Macka's Sand**) operating at Lot 218 DP 1044608 and Lot 220 DP 1049608. In September 2009, Macka's Sand obtained approval pursuant to the now repealed Pt 3A of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) for a sand extraction facility and haul road. A modification was approved for the Pt 3A approval permitting an alternate haul road, inter alia.

The Environment Protection Authority (**the EPA**) conducted an investigation into the transportation of processed demolition and construction material (**recovered fines**) and excavated natural material (**ENM**) leaving Sydney in 2012-2013. This resulted in the investigation of the company. The EPA alleged that recycling centres in Sydney transported waste material via a number of trucking companies (**the transporters**) to the company. The material was in two stockpiles, which became known as Stockpiles 1 and 2. On 15 May 2013, the EPA conducted a search-and-seizure operation of the company's land and undertook chemical and physical testing and a volumetric and topographic survey of Stockpiles 1 and 2. Asbestos was detected. On 15 May 2013, the EPA issued the company with an order that no waste was to be brought onto the site or altered or land applied. The EPA conducted further testing in October 2015. The nature and amount of material in Stockpiles 1 and 2 was disputed.

*Statutory scheme*

Section 5 of the POEO Act specifies that scheduled activities for the purpose of the POEO Act are those listed in Sch 1. Section 48 required scheduled activities to be carried out with an Environment Protection Licence (**EPL**). The dictionary to the POEO Act defines "waste" and "waste facility". The definition of "waste" has five limbs. Subclause (d) defined "waste" as including "any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in circumstances prescribed by the regulations …" Schedule 1 Pt 1 listed various scheduled activities, the two relevant for this matter being cl 39 "waste disposal by application to land" and cl 42 "waste storage". Schedule 1 Pt 3 defined "special waste" as including "asbestos waste", a term also defined in that Part.

The Protection of the Environment Operations (Waste) Regulation 2005 (NSW) (**the Waste Regulation**) in cl 3B defines the prescribed circumstances referred to in subcl (d) of the POEO dictionary definition of "waste". Clause 42 of the Waste Regulation specified special requirements relating to the transport, disposal, re-use or recycling of asbestos and provided an offence of not meeting those requirements. Clauses 51 and 51A provided for the making of resource recovery exemptions which exempted the need for certain persons or entities to hold an EPL for the receipt and use of what would otherwise be waste materials. Two exemptions were in issue in the proceedings, being the continuous process recovered fines (**CPRF**) exemption 2010 and the ENM exemption 2012. These exemptions refer to processors or generators who respectively process or generate recovered fines or ENM to meet certain physical and chemical requirements which is then supplied to consumers. The four main processors sending material to the company attested to testing and certifying their material as compliant with the exemptions. After receiving material from processors, consumers are able to use the recovered fines or ENM for specified purposes and must comply with certain conditions in doing so.

Issues:

(1) Was the material in Stockpiles 1 and 2 "waste" as defined in the dictionary of the POEO Act;

(2) Was Lot 8 used as a "waste facility" as defined in the dictionary of the POEO Act;

(3) Did the company require an EPL (lawful authority);

(4) Was there compliance with the conditions of the resource recovery exemptions by the company as a consumer;

(5) Was the presence of asbestos relevant to the offences;

(6) Did the company require a development consent (lawful authority);

(7) Was a continuing offence proved; and

(8) Were the charges brought within the limitation period.

Held: The company and Mr Mackenzie were found not guilty; no final order acquitting the defendants was made pending a stated case application by the EPA.

(1) Waste falling within subcl (d) of the definition of "waste" in the dictionary of the POEO Act was intended to be exempt from regulatory requirements for waste if it was beneficially applied, did not cause environmental harm and was fit for purpose: at [272]; the addition of subcl (d) suggested that where waste had been processed or recovered it would cease to be waste: at [265]-[276]; the correct approach to construction of the definition of "waste" was that material which was processed, recycled, re-used or recovered ceased to be waste; there was no need to satisfy one of the resource recovery exemptions to be exempted from the waste requirements through subcl (d), although the CPRF exemption was satisfied in any event: at [279]; the material in Stockpiles 1 and 2 would only become "waste" when "applied to land" in circumstances prescribed by the regulations as stated in the POEO Act dictionary: at [281]; the material could not be "waste" concurrently under another limb of the definition of "waste" otherwise subcl (d) would have no work to do: at [281]; the material in Stockpiles 1 and 2 was not "waste" unless it was applied to land in the circumstances specified in the Waste Regulation: at [284];

(2) A distinction must be made between deposition of material on land and its application to land: at [293]; the phrase "application to land" could not be construed as meaning that material had to be directly applied to a project with no temporary stockpiling being lawful: at [293]; the distinction between temporary stockpiling and application to land and/or storage was recognised in the resource recovery exemptions: at [294]; the material in Stockpiles 1 and 2 was being temporarily stockpiled pending use in a haul road: at [299]; the EPA had not established that the material in Stockpiles 1 and 2 was disposed of by application to land: at [300]; Lot 8 was therefore not used as a "waste facility" as the materials in Stockpiles 1 and 2 were not "waste" and the material was not disposed of by application to land and/or stored as contemplated in cll 39 and 42 of the Waste Regulation: at [306];

(3) Lawful authority - was an EPL required:

The application of the resource recovery exemptions determined whether there was lawful authority: at [309]; the resource recovery exemptions were to be interpreted in a beneficial and practical manner and in a way that would not extend the category of criminal offences: at [316]-[318]; the notes to the resource recovery exemptions did not impose an obligation on processors or consumers: at [319]; the EPA accepted that it had the onus of proving an absence of lawful authority beyond reasonable doubt: at [325]; the onus of proof in relation to the application of the resource recovery exemptions should follow the onus of proof in relation to lawful authority: at [331]; lawful authority was an element of the offence, the EPA therefore had to negative the application of the resource recovery exemptions beyond reasonable doubt: at [337]; the company had the evidentiary onus to raise the application of the exemptions: at [337];

(4) Was there compliance with conditions of the resource recovery exemptions:

- Condition 7.2 of the CPRF exemption provided that recovered fines could only be applied to land for construction or landscaping. Condition 7.2.7(a) stated that recovered fines could not be used for the construction of roads on private land unless the recovered fines were land applied to the minimum extent necessary. Mr Mackenzie's intention to use the recovered fines in a road and reasonable belief as to the quantity needed based on previous road building experience was sufficient to satisfy condition 7.2.7(a) in terms of the volume of material needed: at [415]-[417]; condition 7.2.7 makes no mention of the consumer needing to form an opinion about the suitability of the material for a road base in terms of particle size or chemical characteristics: at [423]-[424]; testing for compliance with the particle size and chemical characteristics specified in the exemptions is for processors not consumers: at [424]; the presence of asbestos was not relevant to compliance with condition 7.2.7(a): at [431];
- Condition 7.2.7(b) of the CPRF exemption stated that recovered fines could not be used for the construction of roads on private land unless a development consent had been obtained. A development consent for the construction of a road on private land need not be in place at the time the material is delivered and need only be in place at the time of constructing the road: at [436]; in any event Macka's Sand had a Pt 3A approval in the charge period in relation to Lot 8, inter alia: at [437]; non-compliance with condition 7.2.7(b) not established: at [438]-[439];

- Condition 9.3 of the CPRF and ENM exemptions required that recovered fines and ENM be land applied within a reasonable period of time. But for the actions of the EPA in issuing an order to the company to cease receiving material and preventing them from using the material it is likely the material would have been applied for the purpose of a road: at [435]; no breach of condition 9.3 was established: at [435];
- Condition 9.1 of the CPRF exemption and condition 9.2 of the ENM exemption required consumers to keep records of material received. Mr Mackenzie admitted to not keeping records: at [440]; a breach of the exemptions was established but was not sufficient to disentitle the company from benefiting from the exemptions: at [442]-[445];
- Condition 9.2 of the exemptions required that consumers ensure the material was not applied on or beneath water including groundwater. As the material was taken not to have been land applied in the context of cl 39 of Sch 1 of the POEO Act, this question did not strictly arise: at [452]; in any event the state of the ground of Lot 8 where Stockpiles 1 and 2 were formed as at October 2012 was not established and therefore deposition on water could not be proved beyond reasonable doubt: at [454]; and
- No failure to comply with the CPRF or ENM exemption was established and therefore no EPL was required: at [508];

(5) Clause 42 of the Waste Regulation operated separately to cll 51 and 51A: at [347]; a breach of cl 42 would result in a separate offence unrelated to the operation of the exemptions: at [348]; processors and consumers did not have a responsibility to exclude asbestos from recovered fines produced under the CPRF exemption: at [352] and [365]; processors have EPL conditions which prohibit them receiving asbestos and requiring them to implement Asbestos Management Plans: at [353]; the ENM exemption imposed obligations on generators to exclude asbestos: at [354]; a failure to comply with a condition of an exemption by a consumer does not result in the exemption not applying at all, only fundamental breaches would do so: at [376]; the company's non-compliance with the record-keeping condition of the CPRF and ENM exemptions was not a fundamental breach: at [376];

(6) Lawful authority - was a development consent required:

- The temporary stockpiling of recovered fines and ENM was arguably ancillary to the 1977 development consent for sand extraction: at [565]; the intended use of the material for the construction of a road was approved by the Pt 3A approval: at [566]; no failure to obtain development consent was established: at [572];

(7) The offences were charged as continuing offences occurring between 29 October 2012 and 15 May 2013: at [528]; it was therefore necessary to show that non-exempt waste was being stored and/or disposed of by the company in that period: at [533]; there was no evidence of deposition of non-exempt waste on any particular day during the charge period and therefore a continuing offence was not established: at [534]-[535];

(8) The s 144(1) offence had a three-year limitation period: at [536]; the charge period ended on 15 May 2013: at [536]; the Summons was filed on 11 May 2016, meaning the charge had to have continued until at least 11 May 2013 to be brought within the limitation period: at [536]; no deposition of material on Lot 8 was recorded by the EPA as occurring on 15 May 2013: at [549]; despite the EPA adducing photographs of material being deposited on Lot 8 on 13 and 14 May 2013, there was no evidence that this material was non-compliant and therefore it could not be established that the offence continued until at least 11 May 2013: at [549]; and

(9) As the offence against s 144(1) of the POEO Act was not established beyond reasonable doubt, the executive liability charge against s 169(1) of the POEO Act also failed.

***Hunters Hill Council v Liu*** **[2018] NSWLEC 108** (Moore J)

Facts: Ms Liu (**the defendant**) was charged with, and pleaded guilty to, an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). The conduct giving rise to the offence was that the defendant engaged an unknown tree-lopping contractor to remove two Cheese Trees protected by the Hunters Hill Local Environmental Plan 2012 from her neighbour's property. Her neighbour had not consented to the removal of the trees.

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

Held: Defendant convicted; fined $48,000; ordered to pay prosecutor's costs of $35,000; and further orders by consent for replanting of two replacement trees on defendant's property and ongoing arboricultural monitoring.

(1) The defendant conceded that the environmental harm caused was of some significance and thus a factor of aggravation: at [31]. By reason of the trees' health, trunk size, life expectancy, significance rating and height, the two Cheese Trees were substantial specimens of their type (at [32]) and the harm was sufficient to constitute a factor of aggravation: at [36];

(2) Because the defendant made contact with the Council prior to the cutting down of these two trees and had made a previous application (and was granted consent) for the removal of ten trees, her action was deliberate whilst knowing that consent of the Council was required before that activity could be undertaken: at [41];

(3) The defendant did not have any prior convictions: at [43]; and had otherwise been of good character: at [46]. The defendant expressed a modest degree of contrition and remorse: at [51]; and cooperated with the prosecutor: at [53]. The defendant was entitled to a 25% discount given in recognition of entering her guilty plea at the earliest possible opportunity: at [52];

(4) There was a need for a modest element of specific deterrence to reinforce the defendant's understanding of the requirement to obtain permits: at [57]. There was also a need for general deterrence to reinforce the necessity to obtain necessary permits: at [58]-[60];

(5) No evidence was provided concerning the defendant's financial capacity: at [70]; however, the defendant had agreed to pay the prosecutor's costs in the amount of $35,000: at [71]; and

(6) The offending conduct was classified as a Tier 2 offence falling under s 125B of the EP&A Act and the maximum penalty applicable for the offending conduct was $500,000: at [7]. The conduct was at the middle of the low range of such offending: at [69]. Instinctive synthesis of objective and subjective factors determined an appropriate starting penalty of $64,000: at [114]. A discount of 25% was applied as a consequence of the defendant's early guilty plea: at [93].

***Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd*** **[2018] NSWLEC 114** (Pain J)

Facts: Leda Manorstead Pty Ltd (**the defendant**) was charged with five offences arising from alleged bulk earthworks contrary to conditions of its development consent under the now repealed Pt 3A of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) contrary to s 76A of the EP&A Act. The defendant filed a Notice of Motion raising the issues set out below primarily concerning Summonses 1 and 2. Summons 1 alleged bulk earthworks took place on or from about 21 April 2014 continuing to 30 June 2015. On 31 July 2015, the three-tiered penalty regime for offences committed under the EP&A Act came into effect. Section 125A of the EP&A Act required that a prosecutor specifically plead any aggravating factors it relied on to prove a Tier 1 offence. Summons 2 alleged bulk earthworks took place on and from 31 July 2015 continuing to 7 March 2017.

Issues:

(1) Should Summons 2 be struck out as the conduct it alleged was a component of a continuing act the subject of Summons 1 or should Summons 2 be permanently stayed as an abuse of process;

(2) Were the matters in ss 125A(1)(a) and (b) of the EP&A Act elements of an offence constituted by s 125A or were these matters concerning sentence for a serious breach (Tier 1) of s 125(1) of the EP&A Act; and

(3) If the matters in s 125A(1)(a) and (b) were elements concerning sentence, should the Court order that evidence concerning the aggravating factors identified pursuant to s 125A not be adduced at trial.

Held: Both Summonses to stand; no evidence going to the determination of s 125A(1) factors was to be adduced at the hearing; the prosecutor to file further amended notices pursuant to ss 247E and 247J of the *Criminal Procedure Act 1986 (NSW)*.

(1) The effect of the changes to the EP&A Act effective on and from 31 July 2015 was that a different penalty regime existed from that date: at [43]; no issue of retrospective application arose as the prosecutor only pleaded the aggravating factors in s 125A with respect to the alleged conduct on and after 31 July 2015: at [44]; no issue of duplicity or double punishment arose in that while the two charge periods were contiguous, they did not overlap: at [46]; the broader interests of the community

as represented by the prosecutor were better served by having two Summonses: at [49]; Summonses 1 and 2 should not be struck out : at [52];

(2) The opening words of s 125A(1) state the section applies to an offence against the EP&A Act under s 125(1), suggesting an offence must be proven to exist under s 125(1) before the matters in s 125A can arise: at [58]; the matters in s 125A(1) were not elements of the offence under s 125(1) and do not need to be established to prove an offence under s 125(1): at [59]; the three-tiered regime under the EP&A Act can be contrasted to the three-tiered offence regime in the *Protection of the Environment Operations Act 1997 (NSW)* in which ss 115 and 116 expressly specify offences with the terms "… is guilty of an offence" whereas s125A does not so provide: at [61]; the matters in ss125A(1)(a) and (b) are not elements of an offence constituted by s 125A: at [65] these matters are elements concerning sentence for a breach of s 125(1): at [66]; and

(3) The Court ordered that evidence as to the aggravating factors relevant to sentence identified pursuant to s 125A(1)(a) and (b) should not be adduced at trial: at [68].

- Contempt:

***Snowy Monaro Regional Council v Cmunt (No 2)*** **[2018] NSWLEC 136** (Sheahan J)

(related decision: *Snowy Monaro Regional Council v Cmunt* [2017] NSWLEC 95 (Preston CJ))

Facts: These contempt proceedings arose from the alleged disobedience of orders made by Preston CJ in civil enforcement proceedings in August 2017. Preston CJ ordered the respondents, Marie Cmunt and Jiri Cmunt, to cease keeping dogs at their premises in Berridale, New South Wales, beyond 60 days of those orders being handed down. Snowy Monaro Regional Council (the Council) tendered a volume of video, audio and photographic evidence, in addition to a number of affidavits of neighbours and council officers, in support of their contention that the respondents continued to keep a number of dogs on their property in breach of Preston CJ's orders.

A preliminary issue in these contempt proceedings was whether the service of Court and Council documents was properly effected upon the respondents. The Council relied on various provisions of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) to demonstrate that service had been effected. In particular, the Council relied on r 10.26 of the UCPR, which governs personal service on a person who "keeps house".

Issues:

(1) Was service of the Council and Court documents properly effected upon the respondents in accordance with the provisions of the UCPR;

(2) Were the respondents in contempt of Court by continuing to keep dogs at their residence in breach of Preston CJ's orders of August 2017;

(3) What were the appropriate penalties to be applied in these contempt proceedings; and

(4) Whether it was appropriate to make a substituted performance order permitting Council officers to remove dogs from the respondents' property.

Held: Both respondents found guilty of contempt; Marie Cmunt fined $15,000 and Jiri Cmunt fined $5,000. In addition, daily penalties of $1,500 and $500, respectively, were ordered, if the respondents continued to keep dogs on their premises after 60 days.

(1) The Court could properly infer that all of its material had come to the attention of the respondents: at [34]. There is ample evidence before the Court that the respondents have "kept house" so as to allow the Council to rely on r 10.26 of the UCPR: at [35]. All orders of the Council's Notice of Motion seeking directions that the relevant documents have been taken to be served upon the respondents were made: at [37];

(2) The evidence clearly demonstrated that the Cmunts had failed to comply with the order to cease keeping dogs on their property: at [61]. The contempt was serious and deliberate, causing substantial and unreasonable harm: at [73]. Marie Cmunt's conduct was "contumacious", while that of Jiri Cmunt was considered "wilful": at [78]; and

(3) Although a substituted performance order was declined by Preston CJ in his 2017 decision, it was now appropriate, and it was ordered that the Council be permitted to remove dogs from the respondents' property, if they remained in breach of the Court's orders: at [66].

NOTE: Shortly after this hearing, the Court of Appeal (**the CoA**) heard the Cmunts' appeal against the judgment of Preston CJ. The CoA had earlier declined to stay the 2017 orders, but asked the Court, at the conclusion of the appeal hearing, to vary the times in Sheahan J's orders, to enable the CoA to give its judgment on the appeal.

- Civil Enforcement:

***Fairfield City Council v Saha*** **[2018] NSWLEC 104** (Pain J)

Facts: Fairfield City Council (the Council) sought orders to remedy breaches of the *Swimming Pools Act 1992 (NSW)* (**the Swimming Pools Act**) relating to the fencing around Mr Saha's swimming pool. The Council alleged Mr Saha had breached s 7 of the Swimming Pools Act (requiring swimming pools to be surrounded by a child-resistant barrier at all times), s 15 of the Swimming Pools Act (requiring any such child-resistant barrier to be in a good state of repair) and the relevant Australian standard AS 1926.1-2012. On 17 August 2017, the Council issued a direction pursuant to s 23 of the Swimming Pools Act requiring Mr Saha to undertake work to fix the fencing inter alia. Mr Saha submitted that the problems with the swimming pool fence were partly attributable to a dispute he had with neighbours who had not maintained a boundary fence which formed part of the pool fencing.

Issues:

(1) Was a breach of the Swimming Pools Act established; and

(2) Should the Court exercise discretion to grant relief sought.

Held: Relief sought by the Council granted; Mr Saha ordered to pay the Council's costs as agreed or assessed.

(1) The Council established on the balance of probabilities that a breach of the Swimming Pools Act was occurring: at [17]; there was no evidence before the Court to suggest the work required in the direction issued on 17 August 2017 had been completed: at [19]; Mr Saha's complaints about his neighbours were not relevant: at [18]; and

(2) Discretion to grant relief should be exercised: at [19].

***Fairfield City Council v Thuy Thanh Truc Nguyen*** **[2018] NSWLEC 113** (Robson J)

Facts: Fairfield City Council (**the Council**) brought Class 4 proceedings by way of a Summons, filed 18 December 2017, seeking relief in relation to two secondary dwellings which Council alleged Ms Thuy Thanh Truc Nguyen (**the respondent**) had constructed without consent. The Summons sought an order in respect of each secondary dwelling that the building be demolished. The matter proceeded ex parte but some evidence tendered by Council indicated that the secondary dwellings were being occupied.

Issues:

(1) Whether Council had established the secondary dwellings were constructed without consent;

(2) Whether the fact the orders sought could render residents homeless meant that the relief should not be made; and

(3) Whether costs should be granted in a specific sum.

Held: Secondary dwellings were constructed without consent; orders to demolish each secondary dwelling; order that evidence be provided to Council that the disposal of waste from the demolitions had occurred at a scheduled waste facility; respondent to pay Council's costs as agreed or assessed.

(1) The secondary dwellings had been constructed without consent and did not constitute "exempt development": at [56].

(2) The evidence tendered by Council sufficiently addressed the Court's concerns in relation to the possibility of residents being rendered homeless. The information provided to the residents, as well as the further time allowed for compliance with the orders proposed by the Council, afforded the residents the opportunity of seeking alternative accommodation: at [61].

(3) Council was entitled to its costs on a party-party basis but it was inappropriate for the Court to order costs in a specific sum when the matter had been conducted ex parte: at [65].

***Georges River Council v Stojanovski*** **[2018] NSWLEC 125** (Pepper J)

Facts: Georges River Council (**the Council**) brought civil enforcement proceedings against Messrs Steven Stojanovski and Robert Stojanovski (**the respondents**), for works carried out without development consent on two properties in Mortdale. By Summons, the Council sought two orders pursuant to s 9.46 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) to:

(1) Restrain Mr Steven Stojanovski from using the sheds as a habitable dwelling unless and until development consent had been obtained; and

(2) Demolish the unlawful structures, being the sheds and the concrete slab.

The proceedings were heard ex parte. Despite being properly served, the respondents took no active steps in the proceedings The Council evidence confirmed:

(a) inspections of the site;

(b) the existence of the unlawful works on the site;

(c) that no development consent was obtained by the respondents;

(d) that the works appeared to be carried out for human habitation without appropriate development consent;

(e) that the works were non-compliant with the Building Code of Australia (**the BCA**);

(f) the service of various stop work orders upon Mr Steven Stojanovski that had been ignored;

(g) that complaints had been received by the Council from neighbouring properties; and

(h) that the works were not structurally sound, fire safety compliant, or fit for human habitation.

The respondents had made no attempt to regularise the works or to respond to the Council's stop work orders, Summons or civil enforcement proceedings.

Issues:

(1) Whether the structures constituted unlawful works carried out without development consent in breach of s 4.2 of the EP&A Act; and

(2) Whether the Court should exercise its discretion to grant relief by way of a demolition order.

Held: Orders to restrain the use of the sheds and require the demolition of the unlawful works within 28 days.

(1) The evidence established that from September 2016 onwards the building works continued without the Stojanovskis obtaining development consent: at [16]-[21]. There were genuine concerns with the structural adequacy, fire safety and BCA compliance of the structures: at [22]. No steps were taken to regularise the works: at [24]. Accordingly, the works breached s 4.2 of EP&A Act: at [28];

(2) Making a demolition order was appropriate because: at [30]:

  (a) the potential environmental impacts of the unlawful works could not be properly measured;

  (b) the absence of the Stojanovskis at any stage of the proceedings;

  (c) the historic non-compliance of the Stojanovskis, despite the Council's attempt to obtain compliance by issuing s 121B notices;

  (d) Mr Steven Stojanovski had obtained a private advantage by constructing a dwelling which was not regularised by way of development consent; and

  (e) no steps were taken by the Stojanovskis to demonstrate hardship or the cost of works being demolished.

***Hawkesbury City Council v Kara-Ali (No 2)*** **[2018] NSWLEC 129** (Sheahan J)

(related decision: *Hawkesbury City Council v Kara-Ali* [2018] NSWLEC 105 (Robson J))

Facts: In these civil enforcement proceedings, Hawkesbury City Council (**the Council**) claimed orders and declarations in respect of various works and planned uses of a river-frontage site at Colo, north-west of Sydney, New South Wales. The subject land was owned by Southern Chariot Stud Pty Ltd

(**the company**), who held the land on trust for the unincorporated not-for-profit charity, Diwan al Dawla (**the charity**). Dr Mustapha Kara-Ali (**the first respondent**) is known as the Imam or spiritual leader of the charity, while Diaa Kara-Ali (**the second respondent**) is the sole director and shareholder of the company. None of the respondents participated in the proceedings, and the interlocutory and substantive hearings proceeded on an ex parte basis.

The Council alleged that, since about October 2017, various works constituting "development" under the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) had been carried out without the required consent. Such works included vegetation-clearing, earthworks, and the erection of various structures including a gate entranceway and fencing, flagpoles, a river entry ramp, concrete slabs upon which works had commenced to erect further structures, and the installation of moveable dwellings. The Council further contended that the respondents had threated to use the land as a place of religious worship.

In correspondence with the Council, the respondents claimed that because of their charitable status, obtained through registration with the Australian Charities and Not-for-profits Commission, they were exempt from complying with Australian laws, and beyond the Court's jurisdiction.

Issues:

(1) Were the various works, including earthworks, vegetation-clearing and erection of structures, carried out on site in breach of the relevant planning instruments;

(2) What were the appropriate orders and declarations to be made in respect of the works carried out; and

(3) Did the charitable status of the Diwan al Dawla exempt the respondents from complying with Australian laws.

Held: Declarations and orders made; respondents to pay Council's costs as agreed or assessed.

(1) The Court was satisfied that none of the works had been authorised by the Council. Some of the works required consent while others were prohibited: at [36]. None of the works qualified for a relevant exemption: at [37]; and the works therefore infringed the relevant planning controls: at [38];

(2) Amongst other orders, the respondents were restrained from carrying out further vegetation-clearing, earthworks, or constructing structures on the subject land until development consent was granted. Additionally, the respondents were restrained from using the site as a place of public worship, and for religious activities, until development consent was granted. The respondents were further ordered to demolish and remove various works on the land and to take steps for the rehabilitation and revegetation of the subject land: at [59]; and

(3) The respondents' assertion that their charitable status exempts them from compliance with the planning laws of the State is incorrect, and there is no authority for their claims to such exemptions: at [46]-[47]. They are not beyond the jurisdiction of the Courts: at [53].

***The Hills Shire Council v Needham (No 2)*** **[2018] NSWLEC 98** (Pain J)

(related decisions: *The Hills Shire Council v Needham* [2018] NSWLEC 1 (Pain J); *The Hills Shire Council v Needham* [2017] NSWLEC 180 (Moore J))

Facts: The Hills Shire Council (**the Council**) commenced civil enforcement proceedings seeking a declaration and orders restraining Ms Needham from using her property for development that was prohibited under s 76B of the *Environment Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). The Council alleged Ms Needham was using her property for purposes prohibited in the RU6 Rural Transition Zone by The Hills Shire Council Local Environmental Plan 2012 (**the THSCLEP 2012**) as a "function centre" (for parties and weddings) and as "commercial premises" (for commercial videography and photography). The Council became aware of the use of the property for these purposes through numerous complaints made Ms Needham's neighbours and by a number of inspections by council officers.

In *The Hills Shire Council v Needham* [2017] NSWLEC 180, Moore J granted an interlocutory injunction restraining Ms Needham from using the property as a function centre and from advertising the property as available for use as a function centre. In *The Hills Shire Council v Needham* [2018] NSWLEC 1, Pain J made orders vacating the original hearing dates in February 2018 in order for Ms Needham to obtain legal representation and restraining Ms Needham from using the property as a function centre and for use as commercial premises on a limited basis and from advertising the property as available for

those uses. On Monday 4 June 2018 (the first adjourned hearing date), counsel and instructing solicitor appeared for Ms Needham without notice to the Court or Council and stated that legal advice had only been sought by Ms Needham on Friday 1 June 2018.

Issues:

(1) Was use of the property as a function centre established by the Council;

(2) Was use of the property for commercial purposes established by the Council; and

(3) Should costs be awarded on an indemnity basis.

Held: Declaration that Ms Needham had unlawfully carried out development contrary to s 76B of the EP&A Act; Ms Needham restrained from using the property as a function centre and as commercial premises and from advertising or promoting the property as available for those uses; Ms Needham to pay the Council's costs on an indemnity basis.

(1) The definition of a function centre in the THSCLEP 2012 was focused on the nature of the activities carried out at a property rather than on the form of the building being used. A dwelling house could therefore be used as a function centre within the meaning of the definition: at [143]; whether the property was used as a function centre was a matter of fact and degree indicated by evidence of regular use for such purposes, the scale of the events (number of attendees and vehicles and extent of planning required), advertisement of the property as available for hire and events being held for profit inter alia: at [146]; there was evidence of 16 functions or events held at the property between 2016 and 2018: at [147], [152] and [154]; Ms Needham's submission that she had used the property as a bed-and-breakfast which was permissible in the Rural Transition Zone was rejected: at [57]; unlawful activity could occur on premises which had been rented for an ostensibly lawful use: at [57]; use of the property as a function centre was established: at [162];

(2) Regular use of the property for commercial videography and photography satisfied the definition of "business premises" in the THSCLEP 2012: at [164]; a business premises was a commercial premises and therefore prohibited under the THSCLEP 2012 in the zone: at [163]; there was evidence of two instances of the property being used for commercial videography and photography: at [165]-[166]; use of the property on these two occasions was in breach of the court orders made in February 2018: at [175]; use of the property for filming or erecting tents or marquees was not exempt development under Pt 2 subdivs 4 and 6 of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008: at [167]; use of the property as a commercial premises was established: at [166]; and

(3) It was appropriate to exercise discretion to award costs on an indemnity basis due to Ms Needham's dilatory conduct in the proceedings and breach of the interim court orders made in February 2018: at [182].

***Waverley Council v Bobolas* [2018] NSWLEC 116** (Pain J)

Facts: Waverley Council (**the Council**) commenced civil enforcement proceedings arising from a failure of Mrs Mary Bobolas, Ms Elena Bobolas and Ms Liana Bobolas (**the respondents**) to comply with three orders issued pursuant to item 22A of s 124 of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) (**the orders**) requiring the removal of waste from the property in Bondi New South Wales at which they reside. The Council sought a declaration that the respondents had not complied with the orders. It also sought orders pursuant to s 678(10) of the Local Government Act that the Council be permitted to enter the property to carry out waste removal works and that the respondents be restrained from interfering with the works inter alia.

On the first day of the hearing Ms Elena Bobolas and Ms Liana Bobolas sought to have the hearing adjourned as Mrs Mary Bobolas had been hospitalised. The Court refused to grant an adjournment and held that should it determine to make the declaration and orders sought by the Council it would only do so against Ms Elena Bobolas and Ms Liana Bobolas.

Issues:

(1) Were the orders properly issued;

(2) Were the orders complied with;

(3) Did the Court have power to issue the orders sought by the Council;

(4) Was the Summons validly served; and

(5) Should the Court exercise discretion to grant the declaration and orders sought by the Council.

Held: Orders to respondents properly issued; orders not complied with by respondents; power to make the orders sought in these proceedings; summons validly served; appropriate to make orders sought; second and third respondents to pay Council's costs as agreed or assessed; orders provided in draft to permit parties (particularly the first respondent) to comment on them.

(1) There was no requirement that notice be given of an intention to issue an order pursuant to item 22A of s 124 of the Local Government Act and there was no right of appeal to the Court for issuing such an order as the orders of this nature are intended to address public health concerns: at [62]; the Council's environmental health surveyor who issued the orders was duly authorised: at [64]; the orders were served as required by s 144 of the Local Government Act in accordance with r 10.5(1) of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) being posted by prepaid letter and leaving a copy at the relevant property: at [65]; receipt of the orders need not be proved to establish that service was effected: at [66];

(2) The Council established that the respondents were the occupiers of the property: at [67]; the Council established that the orders were not complied with in the timeframe specified being 28 days: at [68]; whether the Council's environmental health surveyor leaning over a fence of the property to take photographs was trespass did not need to be decided given that he had taken other photographs without leaning over the fence and his personal observations were sufficient to form a belief that the orders were necessary: at [68]-[69];

(3) The respondents submitted that by virtue of the note at the end of s 678 of the Local Government Act referring to s 193 of the Local Government Act, s 200 of the Local Government Act applied and the Court could not order the Council to lawfully enter the property as it was a residential property: at [74]; in *Bobolas v Waverley Council (No 4)* [2015] NSWCA 337, at [46]-[48], the Court of Appeal held that the note in s 678 of the Local Government Act did not render the power conferred by that section as subject to s 200: at [74]; the Court had power to make the orders sought by the Council: at [75];

(4) The respondents submitted that service of the Summons commencing the proceedings was unlawful as the process server was not entitled to enter the property as he was told to leave by Ms Elena Bobolas: at [76]; service was lawful as the process server deposed to entering the property through open gates suggesting he did not trespass: at [78]; an inference arises from r 10.21 of the UCPR that personal service could be effected within the boundaries of a person's home: at [79]; and

(5) It was not necessary to make the declaration sought by the Council: at [84]; it was appropriate to exercise discretion to make the orders sought given the findings of fact made above: at [85]; the order seeking the Council's costs incurred in undertaking a clean-up would not be made: at [87]; as genuine and reasonably substantial steps had been taken by the respondents to clear the waste at the property since the hearing, the orders were amended by consent to allow for additional removal to occur without council involvement: at [83]; draft orders were provided to parties for further consideration before their finalisation with an opportunity provided to Mrs Mary Bobolas to comment on them: at [89].

- Easements:

***A.T.B. Morton Pty Ltd v Community Association DP270447 (No 2)*** **[2018] NSWLEC 87** (Robson J)

Facts: A.T.B. Morton Pty Ltd (**ATB Morton**) applied to the Court pursuant to s 40 of the *Land and Environment Court Act 1979 (NSW)* seeking orders imposing a carriageway easement (**easement**) over land owned by Community Association DP270447 (**the CA land**). In earlier Class 1 proceedings, the Court had approved ATB Morton's development application subject to a deferred commencement condition requiring it to obtain a right of carriageway over an existing private access road on the CA land (**the consent**).

The CA land was part of an estate owned by Community Association DP270447 (**CA**) and was used for access by the other lots in the estate, which were occupied and used for a variety of industrial and ancillary uses. It was contended by CA that the easement was not "reasonably necessary" in the sense required by s 88K of the *Conveyancing Act 1919 (NSW)* (**the Conveyancing Act**). The easement was only to be used by large trucks, as ATB Morton's site was accessible from the north but a bridge overpass meant that the road could not be used by trucks over three metres in height. CA contended that the easement was not "reasonably necessary" because not all uses of the ATB Morton site required

truck access and because options regarding the lowering of the road under the bridge had not been properly investigated.

CA also contended that the estate owners could not be adequately compensated for the loss and other disadvantage that would be occasioned by the imposition of the easement as required by s 88K(2)(b) of the Conveyancing Act. It also submitted that Ausgrid and Reliance Hexham, who both had easements on the CA land, would be affected by the easement and the fact that they were not joined to the proceedings, notwithstanding the fact that they had been informed of them, meant that the Court was without power to impose the easement.

CA further submitted that all reasonable steps had not been taken to obtain the easement as required by s 88K(2)(c) of the Conveyancing Act and the Court therefore did not have power to impose the easement. In this regard, CA noted that no offer had been made by ATB Morton based on the terms of the easement relied upon in the proceedings, that alternative locations had not been adequately investigated, and that insufficient information had been provided.

Issues:

(1) Whether the carriageway easement was reasonably necessary;

(2) Whether CA could be adequately compensated for the imposition of the easement;

(3) Whether the Court was without power to grant the easement because Ausgrid and Reliance Hexham were not parties to the proceedings;

(4) Whether all reasonable steps had been taken to obtain the easement;

(5) The terms upon which the easement should be granted; and

(6) The compensation payable to CA.

Held: Easement ordered subject to conditions; compensation awarded.

(1) The easement was reasonably necessary having regard to the fact that there was no reasonably possible alternative method of access for large trucks to ATB Morton's site and large trucks were reasonably necessary for the site, which was zoned for industrial uses (at [122]). Reasonable necessity also required consideration of the effect upon the CA land, but these impacts were not so severe as to warrant a finding that the easement was not reasonably necessary: at [163];

(2) Although members of the CA estate could not be compensated for the effect upon their individual properties, because the easement did not run over their land, this was neither fatal to the application nor a discretionary reason upon which the application for the easement should be refused: at [193];

(3) Reliance Hexham and Ausgrid were appropriately informed about the matter before the Court and chose not to take part. In those circumstances, it was not necessary they be joined to the proceedings: at [181];

(4) In circumstances where the parties' discussions about the easement commenced in 2010 and continued in 2011, 2014, 2015, and 2016, and formal mediation had been unsuccessful, all reasonable steps had been taken to obtain the easement (at [206]). It was not necessary for an offer to be put to CA in the precise terms presently used as the terms were not dissimilar to earlier offers which had been refused: at [204];

(5) The number of truck movements on the easement should be limited to 50 per day, and the contribution to maintenance should be adjusted from one-sixth to 50%: at [225]; and

(6) Appropriate compensation to CA was the sum of $262,000: at [245].

- Valuation:

***Square Holdings Pty Ltd v Valuer General of New South Wales*** **[2018] NSWLEC 140** (Robson J)

Facts: Square Holdings Pty Ltd (**the applicant**) brought two Class 3 appeals pursuant to s 37 of the *Valuation of Land Act 1916 (NSW)* (**the Valuation Act**) against valuations made by the Valuer General of New South Wales (**the respondent**). The appeals related to the valuation by the respondent of the land being Lot 22 in DP 978820, known as 144 Flinders Street, Paddington (**the site**) on 1 July 2015 in the amount of $1,680,000 (**the 2015 appeal**) and on 1 July 2016 in the amount of $1,920,000 (**the 2016 appeal**).

At each valuation base date, the site was improved by a heritage-listed boarding house, meaning that the valuations attracted the operation of s 14G of the Valuation Act. Expert evidence for the respondent proposed valuations of $1,750,000 in respect of the 2015 appeal and $1,875,000 in respect of the 2016 appeal. The applicant did not rely upon any expert evidence.

Issue: Whether the applicant had established error on the part of the respondent's expert.

Held: The expert valuation evidence of the respondent accepted; the 2015 appeal dismissed; the 2016 appeal upheld; and valuation set in the amount of $1,875,000.

(1) The approach of the respondent's expert was in accordance with both accepted approaches to valuation generally and judicial consideration of s 14G of the Valuation Act: at [38]; and

(2) In the absence of expert evidence from the applicant, and in view of the transparent findings of Mr Hill, the expert evidence of the respondent should be accepted: at [49], [61]-[63], [72], [78], [82]-[83].

- Section 56A Appeals:

***Abrams v The Council of the City of Sydney (No 2)*** **[2018] NSWLEC 85** (Robson J)

(related decision: *Abrams v The Council of the City of Sydney* [2017] NSWLEC 1371 (Brown C))

Facts: The proceedings were an appeal against the decision of Brown C to dismiss an appeal against the Council of the City of Sydney's (**the Council**) decision to refuse development application D/2016/631 (**the DA**) for the demolition of an existing commercial building and the construction of a new four-storey residential flat building containing 19 residential apartments (**the proposed development**), at 9 Power Avenue, Alexandria (**the site**).

The proposed development exceeded the Floor Space Ratio development standard (**the FSR standard**) provided for in the Sydney Local Environmental Plan 2012 **(the SLEP 2012**), and the DA consequently included a variation request pursuant to cl 4.6 of the SLEP 2012. The appellant contended that the commissioner had fallen into legal error by refusing to take into consideration previous development consents on the site which had also breached the FSR standard. The appellant submitted that the prior consents were relevant considerations for the cl 4.6 request and mandatory considerations pursuant to s 39(4) of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**).

Issue: Whether the commissioner erred by failing to consider the prior consents for the site.

Held: Appeal dismissed with costs.

(1) Although development consents are "instruments" for the purposes of s 39(4) of the Court Act, and whilst it was unnecessary to decide in the circumstances of the case, a commissioner would not necessarily fall into legal error by failing to consider a development consent or other instrument that was only relevant by reason of s 39(4) of the Court Act: at [39];

(2) On a proper reading of the commissioner's decision, he did not reject the relevance of the prior consents but found that they were of minimal relevance. That was not an incorrect approach as the terms of cl 4.6 must be satisfied by the consent authority in respect of each application: at [53]; and

(3) Even if the commissioner's approach to the prior consents was affected by error, it did not vitiate his decision as cl 4.6(4)(ii) was not satisfied in the circumstances of the case, and this was dispositive of the appeal against Council's decision: at [56].

***Australian Childcare Solutions v Orange City Council*** **[2018] NSWLEC 93** (Preston CJ)

(related decision: *Australian Childcare Solutions Pty Ltd v Orange City Council* [2017] NSWLEC 1737 (Martin SC))

Facts: Australian Childcare Solutions (**ACS**) lodged a development application with Orange City Council (**the Council**) for consent for a childcare centre in a residential area. The Council refused the development application. ACS appealed to the Court. The appeal was heard by Martin SC who dismissed the appeal and refused the development application.

ACS appealed against the Senior Commissioner's decision under s 56A(1) of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**), raising as grounds of appeal that the Senior Commissioner erred

in law in two ways. First, ACS contended that Martin SC misdirected herself and asked herself the wrong question in construing the objectives and planning outcomes for setbacks and visual bulk in cl 7.7 of the Orange Development Control Plan 2004 (**the ODCP 2004**). Second, ACS contended that the Martin SC misdirected herself and asked herself the wrong question when determining that a Class 3A standard car-park design was required to be provided, rather than the Class 3 standard proposed in the development application, and accordingly failed to properly consider the traffic impacts of the development under the former s 79C(1)(b) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**).

Issue: Whether Martin SC erred on a question of law by:

(a) misdirecting herself or asking herself the wrong question in construing the objectives or planning outcomes for setbacks or visual bulk in cl 7.7 of the ODCP 2004; or

(b) misdirecting herself or asking herself the wrong question in determining that a class 3A standard car-park design was required to be provided, and accordingly failing to consider the traffic impacts of the development under the former s 79C(1)(b) of the EP&A Act.

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

(1) ACS has not established that Martin SC misdirected herself or asked herself the wrong question in construing the planning outcomes or objectives for visual bulk in cl 7.7-6 of the ODCP 2004: at [25];

  (a) whilst Martin SC did not make findings about all the planning outcomes for visual bulk, it was sufficient for her to address only the planning outcomes that were not satisfied in order to found her conclusion that the development did not achieve the design element of visual bulk: at [28];

  (b) ACS's argument that Martin SC misdirected herself was based on what she said in [54] of the judgment, but this this was not the primary place she addressed the design element of visual bulk: at [29];

  (c) Martin SC's failure to expressly refer to the Bulk and Scale Objectives for visual bulk did not involve an error of law (at [34]); s 79C(1)(a)(iii) of the EP&A Act only obliged the consent authority to consider the provisions of the ODCP 2004 that were of relevance to the development the subject of the development application (at [35]); there is no provision of the ODCP 2004 that expressly required consideration of those objectives or that stated how those objectives should be taken into consideration (at [35]); in any event, the parties ran the primary proceedings on the basis that there was no issue about the proposed development not achieving those objectives: at [36];

(2) Martin SC did not err on a question of law in her consideration of the planning outcomes for setbacks in cl 7.7-4 of the ODCP 2004 (at [48]); she made findings on, and applied, the standard in the guideline in cl 7.7-4(a); the guidelines in cl 7.7-4 indicate ways of achieving the planning outcomes in cl 7.7-4 (at [50]); whilst Martin SC did not use the language of the planning outcome in expressing her finding about the consequence of the inconsistency in setbacks, she nevertheless made a finding that had the same effect as if she had used that language: at [53]; and

(3) Martin SC did not misdirect herself or ask the wrong question about the car-park for the development (at [67]); she did not, as ACS contended, impermissibly consider development different to the Class 3 car-park proposed in the development application (at [68]); rather, she considered whether this standard was sufficient for the particular childcare centre proposed; she accepted the Council's evidence to find that it would be desirable to have Class 3A as the appropriate car-park design for the proposed childcare centre; that is a factual finding and does not involve any error on a question of law: at [72].

***Baron Corporation Pty Ltd v Wingecarribee Shire Council* [2018] NSWLEC 132** (Pain J)

(related decision: *Baron Corporation Pty Ltd v Wingecarribee Shire Council* [2018] NSWLEC 1243 (Bish C); *Baron Corporation Pty Ltd v Wingecarribee Shire Council (No 2)* [2018] NSWLEC 137 (Pain J))

Facts: Baron Corporation Pty Ltd (**Baron**) appealed pursuant to s 56A of the *Land and Environment Court Act 1979 (NSW)* the decision of a commissioner to refuse a construction certificate for a subdivision in Moss Vale, New South Wales (**the site**). Development consent for the subdivision was given on 1 July 2016 and an infrastructure report lodged with the DA proposed a design for stormwater disposal off-site.

An existing drainage reserve owned by the Council (**the Council's Reserve**) was approximately 450 metres south of the site. Baron applied for and obtained an approval pursuant to s 138 of the

*Roads Act 1993 (NSW)* (**the s 138 approval**) permitting works to be undertaken in the public road adjoining the site. External works for stormwater drainage were approved by the s 138 approval. Baron submitted that the s 138 approval allowed stormwater to drain from the site to the Council's Reserve. Baron contended that the commissioner erred in considering works external to the site as these were irrelevant to the construction certificate application which concerned internal works only.

Section 81A(4)(a) of the *Environmental Planning and Assessment Act 1979 (NSW)* provided that subdivision works must not be commenced until a construction certificate was issued. Clause 145 of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**) provided that a certifying authority must not issue a construction certificate unless the relevant development was not inconsistent with the development consent. Clause 146 of the EP&A Regulation provided that a certifying authority was not to issue a construction certificate unless each condition of a development consent which had to be complied with before issuing a construction certificate had been complied with. Condition 22 of the development consent for the subdivision required the provision of adequate stormwater infrastructure and for adequate future provision of stormwater infrastructure to ensure the post development peak discharge from the site was no greater than the pre-development discharge and proof of a legal right to discharge stormwater off-site.

Issues:

(1) Did the commissioner err in considering stormwater disposal external to the site;

(2) Did the commissioner err in her construction of the s 138 approval in holding that only one plan was approved; and

(3) Did the commissioner err in finding that the post development rate of discharge would be greater than the pre-development rate of discharge.

Held: Appeal dismissed; Baron ordered to pay the Council's costs.

(1) It was not in dispute that the plans for works internal to the site satisfied s 81A(4)(a) and cl 145(2): at [35]; the commissioner held that the plans for external works were contrary to both cll 145 and 146 as they were not consistent with the DA and did not comply with condition 22 of the consent as Baron did not have a right to discharge into the Council's Reserve: at [36]; the s 138 approval did not provide a legal right to discharge into the Council's Reserve: at [40] and [43]; the commissioner was not in error in considering works external to the site: at [45]-[47]; the grounds of appeal relating to this issue failed to acknowledge the obligations in cll 145(2) and 146 of the EP&A Regulation to comply with condition 22: at [48]; the discharge of stormwater into the Council's Reserve was a fundamental component of the proposed off-site stormwater drainage system but was not the system approved in the development consent: at [48];

(2) It was necessary to construe the s 138 approval by reference to the document itself and only referring to extrinsic material if it was unclear: at [59]-[69]; the s 138 approval only referred to one plan; that plan was annotated in handwriting as "sheet 1 of 1"; there was no error in finding that only one plan had been approved as part of the s 138 approval: at [70]; and

(3) No material error in the overall finding of the commissioner on the post development peak discharge was established given that both Baron and the Council's experts agreed that there would be an increase in post development discharge: at [79].

***Camden Council v Cranney* [2018] NSWLEC 127** (Robson J)

(related decision: *Cranney v The Council of Camden* [2018] NSWLEC 1036 (Brown C))

Facts: The proceedings were an appeal against the decision of a commissioner to uphold an appeal against Camden Council's (**the Council**) refusal of development application 2016/1034/1 for strata subdivision, the change of use of an existing dwelling and secondary dwelling to semi-detached dwellings, and minor amendments (**the proposed development**) on the land known as 14 Davidson Street, Oran Park (**the site**).

The commissioner held that the strata subdivision component of the proposed development did not require consent by virtue of cl 2.6 of Appendix 1 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (**the Growth Centres SEPP**) which relevantly provided that consent was not required for strata subdivision "except where the building has been designed or approved for occupation as a single unit."

Council contended that the commissioner erred in law by asking himself the wrong question and mistakenly directing attention towards whether the proposed development before him was designed as a single unit as opposed to the existing building. It also raised six other grounds of appeal which it said meant that the commissioner's decision should be set aside, and the appeal against Council's decision either dismissed or remitted for determination by a commissioner according to law.

Issues:

(1) Whether the commissioner erred in holding that the proposed development related to a building which had not been designed or approved for occupation as a single unit;

(2) Whether the commissioner erred in granting consent to development which did not require consent;

(3) Whether the commissioner erred in upholding an appeal which resulted in a contravention of a development standard in cl 4.1A of Appendix 1 of the Growth Centres SEPP without a cl 4.6 request;

(4) Whether the commissioner erred in upholding an appeal in circumstances where, in the absence of a cl 4.6 request, he did not have power to uphold the appeal by virtue of s 4.16(2) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**);

(5) Whether the commissioner erred in not giving reasons in relation to the proposed development's alleged failure to provided legible and convenient front door access and its alleged failure to encourage casual surveillance of the street;

(6) Whether the commissioner erred in failing to consider cl 7.7.1 of the Oran Park Precinct Development Control Plan 2007 (**the OPPDCP**);

(7) Whether the commissioner erred in failing to consider Council's submission that the proposed development should be refused because it was not in the public interest; and

(8) What was the appropriate disposition of the appeal.

Held: Appeal upheld; respondent to pay the Council's costs and the matter remitted for determination by a commissioner.

(1) Properly understood, cl 2.6 of Appendix 1 of the Growth Centres SEPP referred to the existing building rather than the proposed development (at [43]). The commissioner erred in asking himself the wrong question, but even if he simply infelicitously stated the test, he erred because the existing building was "designed or approved as a single unit": at [44], [53];

(2) It was not necessary to decide ground 2, but even if the commissioner erred by granting consent to development which did not require consent, it would not have been an error which vitiated his decision, but rather would have constituted a superfluous order: at [70];

(3) Properly understood, the development standard in cl 4.1A of Appendix 1 of the Growth Centres SEPP could only apply to the size of the lot prior to strata subdivision (at [82]). Consequently no development was proposed that would contravene the development standard and no cl 4.6 request was required: at [83];

(4) Section 4.16(2) of the EP&A Act did not deprive the commissioner of power to approve the proposed development because no development was proposed that would contravene a development standard: at [90];

(5) The commissioner was only required to give reasons in respect of each genus of contested issues. The issues relating to front door legibility and street surveillance are properly considered "species" of the genus of the issue relating to streetscape and frontage, which the commissioner dealt with in substance: at [110];

(6) Although the commissioner described cl 7.7.1 of the OPPDCP as "inappropriate", he nevertheless proceeded to deal with it in substance and in those circumstances did not fall into legal error: at [120];

(7) The commissioner was not required to deal explicitly with Council's contention that the proposed development was not in the public interest because it was not a principal contested issue between the parties: at [128]; and

(8) In the circumstances, it was appropriate for the commissioner's orders to be set aside, and the proceedings remitted for determination in accordance with the reasons for judgment.

***Initial Action Pty Ltd v Woollahra Municipal Council*** **[2018] NSWLEC 118** (Preston CJ)

(decision at first instance: *Initial Action Pty Ltd v Woollahra Municipal Council* [2017] NSWLEC 1734 (Smithson C))

Facts: Initial Action Pty Ltd (**the applicant**) sought development consent for a residential flat building in Double Bay. The proposed building did not comply with the applicable development standard for height under Woollahra Local Environmental Plan 2014 (**the WLEP 2014**). The applicant made a written request under cl 4.6 of the WLEP 2014 seeking to justify the contravention of the height development standard.

The applicant appealed against the deemed refusal of the development application by Woollahra Municipal Council (**the Council**) to the Court. Commissioner Smithson heard the appeal. She found that the contravention of the height development standard was not justified. As satisfaction with cl 4.6 was a precondition to granting consent, the commissioner refused the development application and dismissed the appeal.

The applicant appealed against the decision and orders of the commissioner on questions of law pursuant to s 56A of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**). The grounds of appeal fall into two main categories: first, misdirection about, and applying the wrong test under, cl 4.6 of the WLEP 2014 and, secondly, denial of procedural fairness.

Issues:

(1) Did the commissioner err on a question of law by misinterpreting and misapplying cl 4.6;

(2) Did the commissioner err on a question of law by denying the applicant procedural fairness; and

(3) If an error on a question of law is established, what form of remitter order should the Court make.

Held: Appeal upheld; commissioner's decision and orders set aside; exclusionary remitter order made; respondent to pay applicant's costs.

(1) Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard: at [13]:

  (a) the first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii): at [14];

    (i) the first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3); these matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)): at [15];

    (ii) the second opinion of satisfaction, in cl 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out; the second opinion of satisfaction differs from the first opinion of satisfaction in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed this matter: at [26];

  (b) the second precondition in cl 4.6(4) that must be satisfied is that the concurrence of the Secretary has been obtained (cl 4.6(4)(b)) (at [28]): see full discussion of the correct approach to cl 4.6: at [5]-[28];

(2) The commissioner asked the wrong question and applied the wrong test in a number of ways in concluding that she was not satisfied of the matters in cl 4.6(4); this misdirection about cl 4.6 affected the findings the commissioner made and vitiated her decision and orders: at [83]:

  (a) the commissioner misdirected herself in considering under cl 4.6(4)(a)(i) whether she was satisfied that the applicant's written request had adequately addressed the two matters required to be demonstrated by cl 4.6(3): at [84];

    (i) in relation to the first matter in cl 4.6(3)(a), the commissioner applied the wrong test in two ways: first, by directly determining the matter under cl 4.6(3)(a) of whether she considered

that compliance with the height development standard was unreasonable or unnecessary, rather than determining whether the applicant's written request had adequately addressed this matter; and secondly; in requiring that the development that contravened the height development standard have a neutral or beneficial effect relative to a development that complies with the height development standard: at [85];

(ii) in relation to the second matter in cl 4.6(3)(b), the commissioner applied the wrong test by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard; cl 4.6 does not directly or indirectly establish this test: at [88];

(b) the commissioner misdirected herself in considering whether she was satisfied of the matter in cl 4.6(4)(a)(ii); the applicant contended that the commissioner made errors on questions of law in four main categories: first, misconstruction and misdirection concerning the height development standard in cl 4.3; secondly misdirecting herself in considering the consistency of the development with the objectives of the development standard; thirdly, misdirecting herself in considering the consistency of the development with the objectives of the zone; and fourthly, substituting a test of compliance for the test of consistency with the objectives of the zone; the commissioner made errors on questions of law in the second category, but not in the first, third or fourth categories: at [44] and [91];

(i) as to the second category of errors, the commissioner misdirected herself concerning the consistency of the development with the objectives of the height development standard, including by holding incorrectly that the lack of adverse amenity impacts on adjoining properties is not a sufficient ground justifying the development contravening the development standard, when one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts: at [94];

(3) The commissioner denied the applicant procedural fairness by considering the impacts of the development on views from properties other than the one property raised by the Council in its contentions; the principal contested issue joined between the parties concerning view loss was limited to the view loss from the Georges Centre: at [127]; the commissioner failed to give notice to the parties that she intended to determine the appeal by reference to matters beyond the issue joined between the parties: at [130]; it cannot be said that compliance with the requirements of procedural fairness by the commissioner could have made no difference to the conclusion reached by the commissioner: at [132]; and

(4) In the circumstances of this case, it is appropriate to make an exclusionary remitter order: at [138]; on the rehearing on remittal, the commissioner will have to determine the same issues of fact about the impacts of the development on view loss and the consistency of the development with the objectives of the development standard and the objectives of the zone concerning minimising view loss that the commissioner prejudged; in these circumstances, a fair minded lay observer might reasonably apprehend that the commissioner might not bring an impartial mind to the resolution of the same issues on the rehearing of the matter: at [140].

***The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council*** **[2018] NSWLEC 158** (Preston CJ)

(related decision: *The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* [2018] NSWLEC 1129 (O'Neill C))

Facts: The Uniting Church in Australia Property Trust (NSW) (**the applicant**) made a concept development application to Parramatta City Council (**the Council**) under s 4.22 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) for a staged mixed use development comprising two building envelopes. The two building envelopes were either side of the historic Leigh Memorial Uniting Church. One building envelope was for a 13-storey mixed use building (**Epworth House**). The other building envelope was for a 19-storey mixed use building (**Fellowship House**).

The applicant appealed against the Council's deemed refusal of the concept development application. A commissioner of the Land and Environment Court (**the Court**) dismissed the appeal and refused the concept development application on two main grounds:

(1) The overshadowing of the protected area of Parramatta Square by the Fellowship House building envelope was excessive and contrary to the objective of cl 7.4 of Parramatta Local Environmental Plan 2011 (**the PLEP 2011**); and

(2) The commissioner was not satisfied that the Fellowship House building envelope exhibited design excellence under cl 7.10 of the PLEP 2011, which precludes the grant of development consent to development to which cl 7.10 applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.

The applicant appealed against the commissioner's decision and orders on questions of law under s 56A of the *Land and Environment Court Act 1979 (NSW)* (**the Court Act**), raising five grounds of appeal. The first ground challenged the commissioner's finding that cl 7.10 of the PLEP 2011 applied to the applicant's concept proposals for development. The applicant submitted that cl 7.10 does not apply to a concept proposal because it does not involve "the erection of a building" (as required by cl 7.10(2)). The second ground contended that the commissioner impermissibly applied the floor space ratio (**FSR**) development standard in cl 4.4 of the PLEP 2011 to only part of the concept development application, being the building envelope for Fellowship House, rather than the whole site. The fourth ground contended that the commissioner erred in determining that the social benefits of the proposal were not a relevant consideration for the purpose of considering the public interest under s 4.15(1)(e) of the EP&A Act and s 39(4) of the Court Act. The third and fifth grounds concerned whether the commissioner denied the applicant procedural fairness.

Issues:

(1) Did the commissioner err in her construction and application of cl 7.10 of the PLEP 2011 to the concept development application;

(2) Did the commissioner err in her construction and application of cl 4.4 of the PLEP 2011 in determining the compliance of the proposed development with the FSR development standard;

(3) Did the commissioner deny the applicant procedural fairness by not affording the applicant an opportunity to be heard before she made the finding that the Fellowship House building envelope would breach the FSR development standard;

(4) Did the commissioner err in finding that the public and social benefits of the proposed development were not relevant matters for consideration as part of the broader public interest; and

(5) Did the commissioner deny the applicant procedural fairness by not affording the applicant an opportunity to be heard before she concluded that the public and social benefits were not relevant matters.

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

(1) The commissioner did not err in finding that cl 7.10 of the PLEP 2011 applied to the applicant's concept proposals for the development of the site involving the two building envelopes: at [35]:

  (a) the applicant argued that cl 7.10 of the PLEP 2011 only applies to development applications seeking consent to carry out a particular subset of "development" within the meaning of that term in s 1.5 of the EPA, namely "the erection of a building": at15]; however, the language used in cl 7.10(2) differs from the language in the definition of "development" in s 1.5(1) of the EP&A Act: at [49]; cl 7.10(2) does not say that the clause applies to development that "is" the erection of a building, instead, the clause refers to development "involving" the erection of a building; the word "involving" widens the class of development to which cl 7.10 applies: at [50];

  (b) the concept development application sought consent for the building envelopes within which the two mixed use buildings could be erected once consent is subsequently granted to further development applications for the erection of the buildings; any consent granted on the determination of the concept development application would fix the parameters of any new building that could be erected within the approved building envelope (s 4.24(2) of the EP&A Act); the development the subject of the concept development application thereby involved the erection of a new building within the meaning of that expression in cl 7.10(2) of PLEP: at [52];

(2) The commissioner did not err in interpreting and applying the FSR development standard in cl 4.4 of the PLEP 2011: at [90]; the commissioner correctly identified and applied the FSR development standard to the whole site; she did not misapply the FSR development standard to only the Fellowship House land: at [91]; the commissioner used the FSR development standard to explain how and why the additional volume of the Fellowship House building envelope, proposed by the applicant to take advantage of the design excellence clause bonus in cl 7.10(8) of the PLEP 2011,

led to greater overshadowing of Parramatta Square, contrary to the objective of cl 7.4 of the PLEP 2011 and the DCP controls: at [92];

(3) The third ground depended on the applicant establishing, in the second ground of appeal, that the commissioner did in fact find that the Fellowship House building envelope breached the FSR development standard; the third ground is, therefore, not established: at [98]-[99];

(4) The applicant did not contend that the commissioner failed to take into consideration the public interest in her determination of the concept development application: at [131]; rather, the applicant contended that the commissioner failed to have regard to the particular factual matters concerning the social benefits that might result from the redevelopment of the site in the ways proposed by the applicant; amongst these social benefits were that parts of the new buildings, which might be approved by consents granted to subsequent development applications, could be used to provide social welfare services to socially disadvantaged people and that sale of the residential and commercial space in the new buildings would yield funds for the Parramatta Mission's work for charitable purposes: at [132]; whilst consideration of potential social benefits might be permissible, they are not matters which the consent authority is bound to take into account; the EP&A Act neither expressly nor by implication from the subject matter, scope and purpose of the Act makes consideration of the potential social benefits claimed by the applicant a condition of the valid exercise of the power to determine the concept development application: at [131]; and

(5) The commissioner did not deny the applicant procedural fairness: at [156] and [158]; the commissioner was under no obligation to warn the applicant that she might not accept the applicant's arguments, including that she might find that the social benefits of the proposal were not relevant considerations that she was bound to take into account: : at [157].

- Separate Question:

***Whittaker v Northern Beaches Council (No 3)*** **[2018] NSWLEC 143** (Pepper J)

(related decisions: *Whittaker v Northern Beaches Council* [2017] NSWLEC 1379 (Gray C); *Whittaker v Northern Beaches Council (No 2)* [2018] NSWLEC 94 (Robson J))

Facts: Russell Whittaker (**the applicant**) sought to appeal the Northern Beaches Council's (**the Council**) deemed refusal of a development application. The applicant had sought consent to demolish the existing dwellings and construct a 12-unit seniors living development, with basement parking, landscaping and a strata subdivision, on two properties at Avalon Beach (**the site**). Part of the site was mapped as a "geotechnical hazard" under the Pittwater Local Environmental Plan 2014 (**the PLEP 2014**). Noting that the PLEP prohibited seniors housing, the applicant applied for consent pursuant to the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**the Housing for Seniors SEPP**), which rendered the development permissible with consent.

On behalf of the Council, the Northern Beaches Local Planning Panel (**the Panel**) refused approval of the DA. The Panel identified the site as "environmentally sensitive land" under the Housing for Seniors SEPP. Therefore, the Panel was not satisfied that the Housing for Seniors SEPP applied to the site.

On 20 June 2018, the Court ordered that a separate question be determined to decide whether the development would be permissible with consent under the Housing for Seniors SEPP.

Issue: Whether the term "geotechnical hazard" in the PLEP 2014 was a "like description" for the expression "natural hazard" in Sch 1 of the Housing for Seniors SEPP.

Held: A "geotechnical hazard" was not a "like description" of a "natural hazard". The development was therefore permissible with consent under the Housing for Seniors SEPP.

(1) The general principles of statutory construction are relevant to construing subordinate legislation, including environmental planning instruments such as the Housing for Seniors SEPP or the PLEP 2014: at [28];

(2) Neither the PLEP 2014 nor the Housing for Seniors SEPP defined the terms "geotechnical hazard" or "natural hazard": at [45]. The Court adopted a textual approach in determining whether the terms were a "like description": at [46];

(3) The scope of the term "hazard" could not be construed only on the basis of occurrence or location: at [67]-[68]. To do so was too broad and resulted in all "hazards" occurring in (located) in nature, and therefore, all "hazards" being "natural hazards": at [69]. Rather, the Court construed the term "hazard" in terms of cause, that is, what was the cause of the "hazard": at [71]; and

(4) Most (but not all) "geotechnical hazards" were the product of human intervention: at [74]. The PLEP 2014 managed "geotechnical hazards," which were primarily described in terms of human activity: at [79]. By contrast, Sch 1 of the Housing for Seniors SEPP had specifically used the term "natural" in order to differentiate between natural occurrences and other non-natural or artificial affectations: at [76]. Therefore, the Court's construction of "natural hazard" was not inconsistent with the objects of the PLEP 2014 or the Housing for Seniors SEPP: at [78].

- Interlocutory Decisions:

***Balnaves Foundation Pty Ltd v Minister for Planning*** **[2018] NSWLEC 152** (Pepper J)

(related decision: *Balnaves Foundation Pty Ltd v Minister for Planning (No 2)* [2018] NSWLEC 163 (Pepper J))

Facts: By way of an application instanter Balnaves Foundation Pty Ltd (**Balnaves**) sought to commence judicial review proceedings out of time.

On 15 March 2016, Balnaves was granted development consent by Waverley Council (**the Council**) to alter and add to an existing residential flat building in Dover Heights (**the consent**). Condition 13 of the consent mandated payment of an affordable housing levy of $181,000.

On 20 June 2017, Balnaves' solicitor wrote a further letter to the Council outlining the invalidity of condition 13. After exchanges between the parties, Balnaves submitted a modification application, which included a requirement that condition 13 be removed. The Council approved the modification application, but refused to remove condition 13 (**the modification decision**).

On 4 May 2018, Balnaves filed a Class 1 appeal against the modification decision. Balnaves also filed a Class 4 Summons to challenge the validity of condition 13 on 31 May 2018. On 2 August 2018, the parties agreed to discontinue the Class 1 appeal pending the outcome of the Class 4 proceedings.

Issue: Whether the Court should exercise its discretion under r 59.10 of Uniform Civil Procedure Rules 2005 (NSW) to allow judicial review proceedings to be commenced out of time.

Held: Time for proceedings to be commenced extended to 31 May 2018, applicant to pay respondent's costs.

(1) The Court characterised the length of delay as "grossly excessive": at [34]. Balnaves had not challenged the consent conditions until more than two years after the Council had granted the consent: at [34];

(2) The Court accepted that the case was fairly arguable in light of the determination: at [36];

(3) Neither party demonstrated any prejudice arising from the Court extending time for commencing the proceeding: at [37]. Equally, Balnaves had not demonstrated any prejudice, if time was not extended other than the loss of $181,000: at [38]. Balnaves held an otherwise valid consent: at [38];

(4) Balnaves was obliged to commence proceedings within a reasonable timeframe: at [39]. On the other hand, Balnaves had raised a matter of public interest regarding the Council's power to impose condition 13 and mandate the payment of affordable housing contributions: at [40]. Immediately prior to the application, the parties were ready to argue the matter to finality: at [41]. If an extension was not granted, the parties' legal costs would be wasted: at [41];

(5) The reasons for delay were troubling. First, Balnaves provided no explanation of the delay between 15 March 2016 and 20 June 2017: at [43]. Second, Balnaves had filed the proceedings well out of time: at [44]. If the Court had been confined to considering the factor of delay alone, leave would not have been granted: at [42];

(6) Balnaves had misguidedly attempted to resolve the issue, first, by a modification application, and subsequently, by negotiation with the Council and the filing of the Class 1 appeal: at [46]-[48]. The delay was not intentional, nor was the Class 1 appeal utilised to circumvent the time limit: at [49];

(7) The Minister for Planning had not had raised the timing issue until the filing of a response to the Summons: at [50]. Nonetheless, Balnaves was obliged at all times to bring the proceedings within the requisite time period: at [50]; and

(8) The Court granted an extension of time because the respondents had not opposed the application; both parties were ready and had expected that the matter would be finally heard that day; and the unreasonable delay in filing the application was neither intentional, nor a result of the Class 1 proceedings being utilised to circumvent the time limit for judicial review: at [52].

***Bella Ikea Ryde Pty Ltd v City of Ryde Council*** **[2018] NSWLEC 142** (Robson J)

Facts: Bella Ikea Ryde Pty Ltd (**the applicant**) appealed against City of Ryde Council's (**the Council**) deemed refusal of development application LDA2017/0063 for the construction of 33 two-storey dwelling houses (**the proposed development**). The proposed development relied upon Div 1 of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW) (**the ARH SEPP**).

Clause 10 of the ARH SEPP provides, inter alia, that Div 1 does not apply to development on land in the Sydney region unless all or part of the development is within an accessible area. "Accessible area" is defined in cl 4 of the ARH SEPP.

Clause 8 of the ARH SEPP provides that where there is an inconsistency between the ARH SEPP and any other environmental planning instrument, the ARH SEPP prevails to the extent of the inconsistency. Clause 14(1)(b) of the ARH SEPP provides that a consent authority must not refuse consent to development to which Div 1 of the ARH SEPP provides on the grounds of site area if the site area on which it proposed the development be carried out is at least 450 square metres. Clause 4.5A of the Ryde Local Environmental Plan 2014 (**the RLEP 2014**) provides that development consent must not be granted to the erection of multi-dwelling housing on land in the low density residential zone unless the site area for the building is at least 300 square metres (for each one, two or three-bedroom dwelling) or 365 metres (for each four-or-more-bedroom dwelling) and each dwelling will have its own contiguous private open space.

By Notice of Motion, the applicant sought (and Council did not oppose) a preliminary hearing pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 (NSW) to have two questions resolved:

(1) Whether the proposed development is on land which is within an accessible area for the purposes of cl 10 of the ARH SEPP (**the first question**); and

(2) Whether there is an "inconsistency" between cl 4.5A of the RLEP 2014 and cl 14(1)(b) of the ARH SEPP for the purposes of cl 8 of the ARH SEPP (**the second question**).

Issue: Whether a preliminary hearing should be ordered for the hearing of the separate questions.

Held: It was appropriate to make the orders sought in the applicant's Notice of Motion.

(1) Given the very narrow scope of the evidence to be relied upon and that Council's success in the first question would be determinative of the proceedings (which meant that evidence in relation to seven discrete expert disciplines would not be required to be called), it was appropriate to order a preliminary hearing in relation to the first question: at [21]; and

(2) As it could not be dispositive of the proceedings, it may not have been appropriate to order a preliminary hearing in relation to the second question if it were not for the fact one was already ordered in relation to the first question. However, given that the second question raised a pure question of law for which no evidence was required and that an answer to the second question would substantially narrow the field of controversy between the parties, it was appropriate that the second question be heard together with the first question: at [24].

***Boomerang & Blueys Residents Group Inc. v New South Wales Minister for the Environment, Heritage and Local Government*** **[2018] NSWLEC 139** (Sheahan J)

Facts: In these interlocutory proceedings, the Minister for the Environment, Heritage and Local Government (**the first respondent**) applied to the Court to set aside a Notice to Admit Facts (**NAF**).

In the substantive proceedings, the applicant association (**the association**) is challenging decisions made by the Minister and the second respondent (**the Council**) in relation to the *Coastal Protection Act 1979 (NSW)* and the Great Lakes Coastal Zone Management Plan (**the GLCZMP**). The NAF related to

interactions between the association, the relevant Minister (from time to time), officials and Council officers in the development of the GLCZMP.

The NAF procedure is governed by r 17.3 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) and the parties agreed that the Court had the power to set aside the NAF.

The subject NAF sought the admission by the respondent Minister of 20 "facts" (of which nine were pressed), to ensure clarity about which facts were genuinely in dispute.

Issue: Should the NAF be set aside because it:

(a) pertained to facts not capable of admission,

(b) related to matters that were irrelevant, or

(c) because it was oppressive and therefore amounted to an abuse of process.

Held: Notice of Motion seeking the setting aside of the NAF dismissed.

(1) There were no elements of oppressiveness or abuse of process in the present case: at [101]; and

(2) The NAF process in this case would expedite the identification of key issues in the dispute, a key objective of the *Civil Procedure Act 2005 (NSW)*.

***Environment Protection Authority v Aussie Earthmovers Pty Ltd* [2018] NSWLEC 91** (Robson J)

Facts: The Environment Protection Authority filed a Notice of Motion seeking orders allowing substituted service on the defendant, Aussie Earthmovers Pty Ltd (**Aussie Earthmovers**), of the Summonses in each of two Class 5 proceedings. Aussie Earthmovers had no current address, directors, or company secretaries. It was proposed that service be effected by personal service upon either Mr Mouawad, being a former representative and signatory of the company, or Ms Mouawad, being the company's most recent director and company secretary.

Issue: Whether orders for substituted service should be made.

Held: Substituted service with power in Class 5; substituted service ordered.

(1) Rule 10.14 of the Uniform Civil Procedure Rules 2005 (NSW) applies to proceedings in Class 5 of the Court's jurisdiction: at [6]; and

(2) Service could not be practicably served upon Aussie Earthmovers, and it was therefore appropriate to make the orders sought in the motion: at [15].

***M.H. Earthmoving Pty Ltd v Cootamundra-Gundagai Regional Council (No 2)* [2018] NSWLEC 101** (Robson J)

Facts: M.H. Earthmoving Pty Ltd's (**MH Earthmoving**) development application for the expansion of an existing solid waste, non-putrescible, landfill facility at 303 Burra Road, Gundagai (**the DA**) was determined by way of refusal by the Sothern Regional Joint Planning Panel (**the SRJPP**). Pursuant to what was then s 23G(5A) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), the refusal was taken to be made by Cootamundra-Gundagai Regional Council (**the Council**). MH Earthmoving appealed, with Council as the respondent.

On 1 March 2018, a suite of amendments to the EP&A Act came into force, which MH Earthmoving contended had the effect of abolishing the SRJPP and establishing a new body in its place, the Southern Regional Planning Panel (**the Panel**). On 11 May 2018, a conciliation conference commenced between MH Earthmoving and Council. During the course of that conference, the outstanding merit matters were resolved to Council's satisfaction, but the Panel, pursuant to s 8.15(4) of the EP&A Act, directed Council not to enter an agreement.

On 20 June 2018, three notices of motion came before the duty judge. The first was a Notice of Motion filed by the Panel seeking joinder. The second was a Notice of Motion filed by MH Earthmoving seeking the determination of two separate questions (relating to whether the Panel was the same legal entity as the SJRPP and whether it had the power to control and direct Council) and seeking costs of the terminated s 34 conciliation conference. The third was a Notice of Motion filed by MH Earthmoving seeking expedition.

Issues:

(1) Whether it was appropriate to decide the separate questions together with the motion for joinder;

(2) Whether SJRPP was the same legal entity as the Panel;

(3) Whether the Panel had the power to control and direct Council;

(4) Whether the Panel should pay MH Earthmoving's costs of the terminated conciliation conference;

(5) Whether the Panel should be joined to the proceedings; and

(6) Whether the proceedings should be granted expedition.

Held: Joinder ordered and expedition granted.

(1) It was appropriate to decide the separate questions together with the joinder motion because similar arguments would be made in respect of each in any event: at [15].

(2) The SRJPP and the Panel are the same legal entity. Accordingly, the Panel has the power to control and direct Council: at [42].

(3) The Panel's conduct was not so unreasonable as to dislodge the presumptive rule against costs being awarded in Class 1 proceedings and in those circumstances it was inappropriate to make an order for costs in respect of the conciliation conference: at [68].

(4) It was appropriate to order that the Panel be joined to the proceedings, as this facilitated the "just, quick and cheap" resolution of the proceedings as opposed to requiring that the Panel use its power to control and direct Council in its conduct of the appeal: at [97].

(5) Given that MH Earthmoving would suffer prejudice by further delay, it was appropriate to make an order for expedition: at [107].

***Port Macquarie-Hastings Council v Mansfield*** **[2018] NSWLEC 107** (Sheahan J)

Facts: Paul Scott Mansfield (**the defendant**) (in two Class 5 prosecutions) moved to have the Land And Environment Court (**the Court**) set aside Subpoenas which were issued to two third party companies. The criminal proceedings concerned alleged illegal works occurring at a site located between Camden Haven and Port Macquarie.

The defendant challenged the subpoenas on various bases, including that Port Macquarie-Hastings Council (the prosecutor) was "fishing" to find a case, that the subpoenas were "too broad" and "seeking discovery", had no apparent relevance, and that they lacked a legitimate forensic purpose. The defendant's principal challenge involved a notice which was issued to him by the prosecuting council under s 119J (now s 9.22) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**). The defendant argued that it was through the s 119J notice that information about one of the third party companies came to the attention of the prosecutor, and that the s 119J notice was issued for the impermissible purpose of criminal prosecution. Accordingly, key issues became whether the subpoenas issued on the basis of the s 119J notice had a legitimate forensic purpose, whether such a notice was ultra vires and whether the reliance on the s 119J notice amounted to an "abuse of process". The defendant relied substantially on the case of *Zhang v Woodgate and Lane Cove Council* (2015) 208 LGERA 1*;* [2015] NSWLEC 10 (***Zhang***). The prosecutor argued that the s 119J notice was issued in order to gather information, which could assist in deciding whether Class 4 or Class 5 proceedings should be commenced against the defendant.

Issues:

(1) For what purpose did the prosecutor issue the s 119J notice;

(2) Whether the prosecutor, in issuing the subpoenas, had a legitimate forensic purpose and whether the s 119J process deployed by the prosecutor was ultra vires or amounted to an "abuse of process"; and

(3) Whether the subpoenas were otherwise invalid, based on the other remaining grounds of challenge.

Held: The subpoenas issued to both companies in the two Class 5 proceedings were set aside.

(1) The prosecutor issued the s 119J notice in order to clarify matters which would go on to found "particulars of charge", as opposed to being used in order to decide between Class 4 and Class 5 proceedings: at [315]. The option to pursue a Class 5 prosecution was a "substantial", if not the primary, purpose for issuing the s 119J notice: at [316];

(2) In accordance with *Zhang,* the prosecutor failed to establish that the issuing of the subpoenas was "legitimate" and the Court therefore cannot be satisfied that the prosecutor's forensic purpose was legitimate: at [317]. The correctness of Preston CJ's decision in *Zhang* was accepted: at [322]; and

(3) While some of the other challenges to the issued subpoenas, such as the breadth of the subpoenas, had substance, these need not be discussed, as the principal challenge surrounding the s 119J process succeeded: at [289].

***Sydney Tools Pty Ltd v Oxford*** **[2018] NSWLEC 134 (Pepper J)**

Facts: Sydney Tools Pty Ltd (**Sydney Tools**) sought, by Notice of Motion, to stay and/or vary the terms of notice abatement order (**the order**) made by the Local Court over 102 Bonds Road, Roselands (**the land**), by the Local Court under s 268 of the *Protection of the Environment Operations Act 1997 (NSW)* (**the POEO Act**). The Local Court had stayed the order until 1.00 pm on 16 August 2018. The order was the subject of Class 1 appeal by Sydney Tools to this Court.

Ms Robyn Oxford (**the respondent**), who had obtained the order below, opposed the application. The respondent relied upon affidavit evidence and video footage, from herself and two neighbours, of purported breaches of the order.

Although Sydney Tools occupied and carried out operations on two separate Lots, the Magistrate only directed the order to apply to one of the lots, namely, 102 Bonds Road, Roselands. No application was made or granted to amend the application to include both Lots.

Sydney Tools relied upon two bases for granting a stay of the order. First, on the basis that it enjoyed consent to use the land permitted "hardware and building supplies" and as a "warehouse distribution centre" under the Canterbury Local Environmental Plan 2012 (IN2 Light Industrial zone); second, because financial hardship would result if the order was not stayed. In particular, the order would prevent Sydney Tools from dispatching trucks to restock its stores across New South Wales and collecting 56 shipping containers.

Issue: Whether the order should be stayed or varied.

Held: The order was stayed subject to terms.

(1) The order did not define the land the subject of the order: at [11]. Therefore the order only applied to Sydney Tools" activities on 102 Bonds Road, Roselands (as per the original application for the order in the Local Court), and not the entire property over which the activities were carried out. This favoured the granting of a stay: at [12];

(2) Sydney Tools enjoyed "the benefit of the lawful use of the land": at [29]. However, the concerns of Canterbury-Bankstown Council with the land's present use and its adverse impact on the amenity of neighbouring residential properties was to be considered: at [29];

(3) The Class 1 appeal raised a serious question for determination because Ms Oxford had not adduced cogent evidence to demonstrate the objective "offensive" nature of the noise: at [46]-[48]. That is, the respondent did not adduce any expert acoustic evidence to demonstrate that the noise was "offensive noise" pursuant to the POEO Act: at [46]. By contrast, Sydney Tools had adduced expert acoustic evidence to refute Ms Oxford's wholly subjective evidence in this regard: at [45]; and

(4) Sydney Tools would suffer "significant adverse commercial detriment" if the order was not stayed: at [61]. This consideration needed to be balanced against the disturbance to the respondent's amenity if the stay was granted: at [70]. Sydney Tools was willing, however, to vary the terms of the order and to have the stay granted on terms: at [72]. The Court considered that the varied terms appropriately minimised the impact of Sydney Tools' activities on Ms Oxford's amenity in the context of a stay application: at [73]-[74].

***Wingecarribee Shire Council v Uri Turgeman trading as Uri T Design*** **[2018] NSWLEC 146** (Pepper J)

Facts: Wingecarribee Shire Council (**the Council**) commenced judicial review proceedings out of time. By Notice of Motion it sought to extend time to commence proceedings.

On 20 July 2016, Uri Turgeman trading as Uri T Design (**Uri**) sought consent to erect a residential flat building at 1 Kangaloon Road, Bowral (**the original DA**). On 10 August 2016 the Council publicly notified affected parties of the proposed development. More than 20 objections were lodged.

On 4 April 2017, the Council refused the original DA. On 11 May 2017 Uri lodged a review application, which was allocated to a contract town planner, Mr Wayne McDonald. On 14 June 2017, the Council

received a report that the full Council would determine the review application. The review application was not publicly notified.

On 14 September 2017, Mr McDonald purported to determine the review application and granted the consent subject to conditions (**the determination**).

On 9 November 2017, a third party, Mr Lunham, sent a letter to the Council, advising that the review application was not publicly notified. The letter was forwarded to Mr McDonald, however, he did not reply. On 14 December 2017, the Hon Jai Rowell MP, on behalf of Mr Lunham, raised the issue with the Council's General Manager, Mr Wilton.

Between 22 December 2017 and 15 January 2018, Mr Wilton investigated the Council's records and had sought legal advice regarding the invalidity of the determination. This process was delayed by the holiday period.

On 17 January 2018, the Council sought to revoke the consent. Between 23 January 2018 and 29 March 2018, the Council attempted to resolve the dispute. On 6 April 2018 the Council filed a Summons seeking a declaration that the consent was invalid.

Issue: Whether the Court should exercise its discretion under r 59.10 of the Uniform Civil Procedure Rules 2005 (NSW) (**the UCPR**) to commence judicial review proceedings out of time.

Held: Time for commencement of proceedings extended to 6 April 2018; each party to bear its own costs.

(1) The Court must exercise its discretionary power with regard to the factors outlined in s 59.10(3) of the UCPR: at [7];

(2) The Council had both an interest and responsibility in challenging the decision because: the review application had not been publicly notified, despite there being 20 objections to the original DA; the Council was required to maintain a consistent approach to its notification policy; the decision was of importance to the local community; and the review application had not been referred to Water NSW or the RMS: at [36]. Accordingly, the public interest in upholding and enforcing the statutory scheme for approvals outweighed an interest in the certainty and the finality of a decision to grant an approval: at [50]-[54];

(3) The length of delay was "not undue" having regard to the Council's evidence: at [41]. Neither Uri nor Kangaloon Investments Pty Ltd (**Kangaloon**), the second respondent, demonstrated any prejudice: at [39]-[41]. Kangaloon did not adduce any evidence that it had acted upon the consent: at [39];

(4) The Court distinguished between "intentional or contumelious" delay and delay resulting from a "bona fide mistake", mere "oversight" or attempts to solve the matter without litigation: at [44]. The Council's delay was not unreasonable (at [46]); the Council investigated the decision before commencing proceedings (at [47]); unavoidable delay in the investigation process was caused by the holiday period (at [47]); and the Council had attempted to resolve the matter absent litigation: at [48]; and

(5) The Council had a fairly arguable case because the decision-maker did not have delegated power to make the determination (at [61]) and the review application had not complied with public notification requirements (in either the Council's Notification Policy or s 82A(4) of the *Environmental Planning and Assessment Act 1979*) prior to the grant of consent: at [66]-[67].

- Costs:

***Moseley v Queanbeyan-Palerang Regional Council (No 3)* [2018] NSWLEC 111** (Pain J)

(related decisions: *Moseley v Queanbeyan-Palerang Regional Council* [2016] NSWLEC 165; *Moseley v Queanbeyan-Palerang Regional Council (No 2)* [2017] NSWLEC 52)

Facts: The Court dismissed an appeal by Mr Moseley (**the applicant**) against his conviction in the Queanbeyan Local Court for carrying out development which required development consent without development consent. The applicant requested the Court file a Stated Case with the Court of Criminal Appeal. The applicant initially appeared unrepresented in the proposed stated case. He then retained senior counsel who prepared a revised stated case. Queanbeyan-Palerang Council (**the Council**) responded to the original and the amended stated case. Several directions hearings were

held. The Council sought some of its costs of the stated case. The applicant opposed the making of a costs order in the Council's favour.

Issues:

(1) Did the Court have jurisdiction to award costs in these circumstances; and

(2) Should costs be awarded.

Held: Costs not awarded; each party to pay their own costs of finalising the stated case and of the costs matter.

(1) The case can be distinguished from *Queanbeyan City Council v Kocacevic (No 2)* [2015] NSWLEC 196 in that there was no abuse of process in requesting the Court to file a stated case: at [15]-[16]; the case involved complex legal and factual issues: at [16]; and

(2) Discretion to award costs not exercised: at [16]; once the applicant retained legal representation it was still necessary for several short hearings to finalise the stated case, particularly given the complexity of the matter: at [16].

***Nerringillah Community Association Inc v Laundry Number Pty Ltd* [2018] NSWLEC 157** (Pepper J)

Facts: By Summons, Nerringillah Community Association Inc (**the association**) challenged Shoalhaven City Council's (**the Council**) decision to grant development consent (**the decision**) to Laundry Number Pty Ltd (**Laundry Number**) on 13 February 2018. It also sought a unilateral protective costs order to cap Laundry Number's costs entitlement to $20,000 and the Council's costs entitlement to zero.

On 13 March 2017, Cowman Stoddart Pty Ltd (**Cowman Stoddart**) lodged development application DA17/1264 (**the DA**) to construct and operate an eco-tourism facility at 77C Nerringillah Road, Bendalong (**the site**). The DA included deferred commencement consent for associated primitive camping. The DA was notified, first, from 10 April 2017 to 8 May 2017 and, second, from 3 August 2017 to 31 August 2017.

The Council received 75 submissions, including 73 objections regarding the DA. On 20 July 2017, Cowman Stoddart provided a further submission, increasing the number of guests able to stay overnight on the site from 30 to 60 and reducing the number of "nature themed" functions per year to 18. On 22 January 2018, the decision was to grant consent.

Issue: Whether the Court should exercise its discretion, pursuant to r 42.4 of the Uniform Civil Procedure Rules 2005 (NSW), to order a unilateral maximum costs order in favour of the applicant.

Held: If the association was unsuccessful in the proceedings, Laundry Number could only recover a maximum amount of $40,000 in costs and the Council could not recover any costs.

(1) The discretion to impose a protective costs order had to be exercised in conformity with the obligations imposed by ss 56 to 60 of the *Civil Procedure Act 2005 (NSW)*: at [56];

(2) The association had applied for the order without delay: at [73]. Given that the grounds of review were confined and had sufficiently crystallised, the application was not filed prematurely: at [75];

(3) The case was fairly arguable, despite Laundry Number's attempts to refute the association's case: at [76] and [79]. First, the association raised a matter of genuine debate about the interpretation of "eco-tourist facility": at [105]. Having regard to the increase in onsite overnight guests, ground two raised sufficient doubt on whether the function centre was ancillary to the eco-tourist facility: at [110] and [115]-[116]. Third, it was arguable that the Council had not adequately considered mandatory considerations relating to upgrading the right of way for the site: at [120];

(4) The association did not solely aim to protect their private amenity: at [134]-[135]. The litigation served the public interest. First, the association sought to protect Conjola National Park, the development affected waterways including Nerrindillah Creek and the amenity of Nerringillah Valley: at [124]. Second, the association challenged the decision in order to uphold the integrity of the Council's decision-making processes and the State planning laws: at [124]. Third, the association had wide public support for the litigation: at [141];

(5) The case involved "something more". First, eco-tourist facilities were usually permitted in sensitive environmental and rural zonings: at [147]. This test case sought to clarify the characterisation of an eco-tourist facility to prevent commercial developments from circumventing the development requirements in the Shoalhaven Local Environmental Plan 2014 and the Standard Instrument -

Principal Local Environmental Plan: at [148] and [150]. Second, there had been no substantive judicial consideration of the definition of "eco-tourist facility": at [149]. Finally, Conjola National Park and its surrounds were of environmental significance: at [152]; and

(6) The association had received donations to fund the case and had secured arrangements to minimise its legal fees: at [160]-[161]. It would not derive any financial benefit if the consent was set aside: at [159]. If a protective costs order was not granted, the association would discontinue proceedings: at [163]. Although its solicitors and counsel were not acting pro bono, both were acting on contingent basis and at reduced rates: at [180] and [182]-[184]. Considering the proposed development was a $1.6 million commercial enterprise, Laundry Number would not likely suffer financial hardship by the making of the order: at [185]. Because the maximum costs order was unidirectional and the association's legal fees were only payable on a contingent basis, the maximum costs order was increased: at [192].

***Statewide Planning Pty Ltd v Penrith City Council (No 3)*** **[2018] NSWLEC 109** (Sheahan J)

(related decisions: *Statewide Planning Pty Ltd v Penrith City Council* [2017] NSWLEC 1133 (Brown C, Dickson C); *Statewide Planning Pty Ltd v Penrith City Council (No 2)* [2017] NSWLEC 1440 (Brown C, Dickson C))

Facts: Penrith City Council (**the Council**) sought costs in Class 1 proceedings against Statewide Planning Pty Ltd (**the company**). These proceedings involved an appeal against Council's deemed refusal of a development application (**the DA**) for a subdivision, lodged by the company in September 2015. That subdivision proposal was subject to a number or revisions, over a period of 2.5 years. During this time, much correspondence and exchange of various documents occurred between the parties, as the company attempted to satisfy orders made by the Court. Final orders in the proceedings were not made until 16 August 2017.

The Council lodged a Notice of Motion (**NOM**) in October 2017, seeking costs orders. Paragraph 3 of the NOM sought the payment by the company, on a party-party basis as agreed or assessed, apart from those in respect of which the Court has already made costs orders. Paragraph 4 sought the payment by the company of the Council's costs of the motion. The company opposed those orders. There had been unsuccessful negotiations to settle the costs claims.

Rule 3.7 of the *Land and Environment Court Rules 2007 (NSW)* required that the Court was not to make an order for the payment of costs unless such an order was "fair and reasonable in the circumstances". The Council argued that such orders were appropriate in this case, pinpointing the extensive delays on the part of the company in providing amended documents and information.

Issues:

(1) Whether leave should be granted to file the NOM outside of the 28-day period;

(2) Whether it was fair and reasonable to depart from the usual order in Class 1 proceedings that each party pay its own costs; and

(3) Whether the company was to pay the Council's costs of the NOM.

Held: Leave granted; costs ordered (including on the costs application).

(1) Leave was granted to the Council to file the NOM for costs more than 28 days after the Court made final orders in the appeal: at [9], [169]. The delay in filing the NOM was adequately explained, and there was no serious prejudice to the company for the NOM to proceed: at [8];

(2) The company was ordered to pay the outstanding elements of the Council's costs of the proceedings on a party-party basis as agreed or assessed: at [169]. In the present case, the company infringed the appropriate standards the Court should apply to the conduct of a Class 1 appeal: at [147]. The Council was subjected to numerous delays in provision of material by the company, which had "significant cost consequences" for the Council: at [156]; and

(3) The company was ordered to pay the Council's costs of the NOM. The Council was successful in its application for costs, and the costs of that should follow the "event", also on a party-party basis as agreed or assessed: at [167].

***Young v King (No 13)*** **[2018] NSWLEC 150** (Sheahan J)

(related decisions: *Young v King (Nos 1-12)* (Land and Environment Court); various related decisions of other Courts)

Facts: The respondents, Brendan and Kristina King (**the Kings**), filed a Notice of Motion (**NOM**) seeking personal costs orders against the two lawyers who represented Mrs Young (**the applicant**) in the substantial proceedings, Mr Leonardo Muriniti and Mr Robert Newell (**the lawyers**). The factual background of these proceedings surrounded a dispute between the applicant and the Kings, who were neighbours, in relation to alleged unlawful work carried out by the Kings on their own property and on its boundary with the applicant's property. These costs proceedings were "but one strand of a complex web of interlocking litigation". In various related proceedings, the lawyers repeated failed arguments that the applicant was the victim of a "conspiracy". In the previous instalment of these proceedings, *Young v King (No 12)* [2017] NSWLEC 150, Sheahan J rejected an application by the lawyers that he recuse himself from hearing the present NOM. The legislative provision relevant to the issues in this decision is s 99 of the *Civil Procedure Act 2005 (NSW)*, which governs the liability of legal practitioners for unnecessary costs, and a recent authority on the making orders pursuant to this provision is found within the related decision of *King v Muriniti* [2018] NSWCA 98.

Issue: Whether there should be personal costs orders against the lawyers.

Held: The Kings' NOM, seeking personal costs orders against the lawyers, was upheld.

(1) The Court was satisfied that the lawyers were guilty of "serious incompetence" and "serious misconduct", on grounds including, inter alia:
   (a) that they made various allegations of fraud and conspiracy which were not supported by evidence;
   (b) their pursuit of "misconceived contempt proceedings" against the Kings; and
   (c) they "bombarded" the Court with vast amounts of irrelevant affidavit and documentary evidence: at [161];

(2) The two lawyers were held jointly and equally responsible for a "most egregious abuse of process", which had negative consequences for both their own client and the Kings, who have been held blameless by the Courts: at [165].

***Young v King (No 14)*** **[2018] NSWLEC 162** (Sheahan J)

(related decisions: *Young v King (Nos 1-13)* (Land and Environment Court); various decisions of other Courts)

Facts: This decision dealt with the remaining outstanding costs issue in these lengthy proceedings. The applicant on the present Notice of Motion (**the NOM**) was Warwick Davies, a geotechnical engineer who was engaged by Mrs Young (**the applicant**) in the substantive proceeding, and later became the eighth respondent on a costs motion filed by her. In the present matter, Davies filed a NOM seeking to have a costs order, already awarded in his favour (see *Young v King (No 11)* [2017] NSWLEC 34 at [214]), converted to a specified gross sum payment in the amount of $125,016.20. The respondents on this motion were Mr Leonardo Muriniti and Mr Robert Newell, the two lawyers who represented the applicant (**the lawyers**). Neither the applicant, nor Mr and Mrs King (the respondents in the substantive proceedings), were engaged in this stage of the case. The first part of this decision dealt with an application from the lawyers to have Sheahan J recuse himself from hearing the present NOM. The lawyers had previously sought, and failed, to have Sheahan J recuse himself from hearing a NOM in a related costs proceeding: see *Young v King (No 12)* [2017] NSWLEC 150. The relevant legislative provision, surrounding orders for gross costs sums, is s 98(4)(c) of the *Civil Procedure Act 2005 (NSW)*, and guidance on the appropriateness of making such orders was drawn from the reasoning of Garling J in *Young v Hones (No 3)* [2014] NSWSC 499.

Issues:

(1) Should Sheahan J recuse himself from hearing the present NOM; and

(2) Should the applicant on the present NOM have the costs order already awarded in his favour, converted to a gross sum payment.

Held: The application for recusal was rejected. The application for an order for a specified gross sum was upheld.

(1) The test to be applied in the present NOM to the question of recusal on the grounds of bias in the present NOM is the "double might" test expressed in the case of *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63: at [38]. No fresh arguments on the issue of recusal, since *Young v King (No 12),* were advanced: at [47]. Accordingly, the "double might" test was not satisfied in the present case: at [53], and

(2) The evidence put forward on Davies' behalf was "logical and acceptable", and not "overstated" as to the merits of his claim for lump sum costs (see *Young v Hones (No 3)*: Garling J at [59] and [61]). It was fair and appropriate to make the gross sum order sought, and in the amount claimed: at [68].

- Merit Decisions (Judges):

***Dennes v Port Macquarie-Hastings Council* [2018] NSWLEC 95** (Preston CJ)

(related decision: *Dennes v Port Macquarie-Hastings Council* [2016] NSWLEC 1345 (Fakes C))

Facts: Mr Dennes applied to Port Macquarie-Hastings Council (**the Council**) for development consent to build a dwelling house on flood prone land in Beechwood. The Council refused to grant development consent to the application, finding that it was not consistent with the Council's Flood Policy 2015. Mr Dennes appealed against the Council's decision to the Land and Environment Court. Commissioner Fakes upheld the appeal and granted development consent to the application. Pursuant to s 80(3) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), the commissioner granted development consent subject to the following deferred commencement condition: "The proponent to submit to Council for approval a Flood Emergency Response Plan (**FERP**) for the proposed development. The FERP must be determined to be satisfactory by Council." Pursuant to cl 95(3) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**), the deferred commencement consent specified a period of 12 months from the date of determination of the consent (17 August 2016) within which Mr Dennes had to satisfy the Council as to the matter specified in the condition.

Mr Dennes and his architect submitted to the Council a FERP on or before 26 April 2017. On 20 June 2017, the Council emailed Mr Dennes' architect and wrote a letter to Mr Dennes to advise him that the submitted FERP "is not capable of being supported" and that the deferred commencement condition is not satisfied. Mr Dennes did not take any action in response to this notification, and as a result, he failed to satisfy the Council as to the matter specified in the deferred commencement condition, within the 12-month period specified (ie by 17 August 2017).

On 22 December 2017, Mr Dennes lodged an appeal under s 97(3) of the EP&A Act against the Council's decision that it was not satisfied with the FERP. Mr Dennes sought for the Court to substitute for the Council's decision of non-satisfaction the Court's decision that the submitted FERP is satisfactory and hence that the deferred commencement condition has been satisfied. The Council disputed that the Court has jurisdiction to hear and determine the appeal under s 97(3) of the EP&A Act because the development consent has lapsed. The Council contended that the deferred commencement consent lapsed on 17 August 2017, by operation of s 95(6) of the EP&A Act, when Mr Dennes did not satisfy the Council as to the matter specified in the deferred commencement condition within the 12 month period specified.

Issue: Did Mr Dennes' failure to satisfy the Council as to the matter specified in the deferred commencement condition within the period specified of 12 months cause the deferred commencement consent to lapse by operation of s 95(6) of the EP&A Act.

Held: Appeal dismissed.

(1) The deferred commencement consent granted by Commissioner Fakes has lapsed; Mr Dennes failed to satisfy the Council as to the matter specified in the deferred commencement condition within the period specified of 12 months from the date of determination of the consent (i.e. by 17 August 2017): at [38]; the mere submission of the FERP to the Council did not satisfy the deferred commencement condition: at [39]; s 95(6) of the EP&A Act operated to cause the deferred commencement consent to lapse upon the expiry of the specified 12 month period (on 17 August 2017): at [40]; and

(2) Once the deferred commencement consent lapsed, there was no effective development consent upon which Mr Dennes could rely for the purposes of making his appeal under s 97(3) of the

EP&A Act seeking for the Court to substitute its decision of satisfaction for the Council's decision of non-satisfaction as to the matter specified in the deferred commencement condition of the development consent : at [41]; as there is no decision that the Court can make on the appeal under s 97(3) that can revive the lapsed consent and cause it to operate, the appeal should be dismissed: at [43].

***Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement) v Minister for Planning* [2018] NSWLEC 130** (Preston CJ)

Facts: On 27 February 2007, the Minister for Planning approved, under s 75J of Pt 3A of the *Environmental Planning and Assessment Act 1979 (NSW)* (**EP&A Act**), the carrying out of a project for the remediation of Pasminco Cockle Creek Smelter Site. The applicant has substantially carried out the physical works involved in the approved remediation project, including excavating contaminated soil from various parts of the site and placing it in a containment cell.

On 24 January 2018, the applicant requested the Minister under s 75W(2) of Pt 3A of the EP&A Act to modify the Minister's approval by deleting, revoking or varying various conditions of the approval. The Minister did not determine the applicant's request. The applicant appealed to the Court under s 75W(5) of the EP&A Act against the Minister's failure to determine the request.

Schedules 2 and 4 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (NSW) (**Transitional Regulation 2017**) contain various provisions that regulate the circumstances in which an approved project can be modified under s 75W of the EP&A Act. Clause 8F of Sch 4 of the Transitional Regulation 2017 provides that "the consent of the owner of land on which a project is to be carried out is required for a project application or modification." The applicant had subdivided the land on which the project approved by the Minister's approval is to be carried out and had sold a number of the subdivided lots to other persons. The applicant had retained certain lots, including the land on which the containment cell has been constructed. The applicant provided its consent as the owner of the land that it has retained, however, none of the new owners of the subdivided lots provided their consent for the modification application.

The Minister contended that the consent of all owners of the subdivided lots that made up the land on which the project approved by the Minister's approval is to be carried out needs to be obtained before the Court has power to determine the modification application. The applicant submitted that, as the project has been carried out, including by remediating, subdividing and selling parts of the land, the land on which the project is to be carried out has been progressively reduced. Only that remaining part of the land on which the project is still to be carried out, being the land owned by the applicant including the land on which the containment cell is located, should be considered, for the purposes of requiring the consent of the owner, as land on which the project is to be carried out.

Issue: Did cl 85 of Sch 4 of the Transitional Regulation 2017 require the applicant to obtain the consent of all the owners of the subdivided lots for the modification application.

Held: Appeal dismissed; modification application refused.

(1) The category of "owner" remains fixed by reference to the land on which the "project" approved by the Minister is to be carried out; the person or persons who might be an "owner" can, however, change over time, as happened in this case when the land was subdivided and sold; such subdivision and sale of the land does not change the "land" on which the "project" approved by the Minister is to be carried out; the land remains that defined in the Minister's approval as the land on which the approved project is to be carried out; because the "land" does not change, the category of "owner" also does not change; the "owner" remains as the person or persons who own the "land": at [22];

(2) Applying this construction to the modification application in this case, cl 8F(1) required the consent of each person who is the owner of a lot that resulted from the subdivision of the land, defined in the Minister's approval, on which the Minister approved of the carrying out of the project: at [23];

(3) The applicant construed too narrowly what is involved in the carrying out of a project by focussing only on the carrying out of the physical works, such as the remediation works; the carrying out of the project in accordance with the Minister's approval, however, is not limited to the undertaking of physical works but includes any action required, expressly or impliedly, by the conditions of the approval or necessarily involved in the carrying out of the approved project: at [37]; and

(4) As the consent of all of the owners of the land on which the Minister approved of the carrying out of the project is required under cl 8F(1) of Sch 4 of the Transitional Regulation 2017, but such consent has not been obtained, the Court has no power to approve the modification application: at [38].

***Savellis v Sutherland Shire Council*** **[2018] NSWLEC 100** (Preston CJ)

Facts: Mr and Mrs Savellis applied for and were granted by Sutherland Shire Council (**the Council**) on 19 June 2015 development consent for the demolition of an existing dwelling and the construction of a dual occupancy. The development consent was subject to a deferred commencement condition under s 80(3) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) that required the applicant to release, vary or modify a restriction as to user so as to permit the development. Pursuant to cl 95(3) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**the EP&A Regulation**), the Council specified that the applicant must produce evidence to the consent authority sufficient to enable it to be satisfied as to the matter in the deferred commencement condition within a period of one year from the date of issue of the development consent (by 19 June 2016).

Mr and Mrs Savellis did not produce this evidence to the Council by 19 June 2016 or at all. To overcome this problem, they applied to modify the development consent under s 96(2) of the EP&A Act to extend the time period specified in the deferred commencement condition. On 10 March 2016, the Council determined to modify the consent, purportedly pursuant to s 96(2) of the EP&A Act, to extend the period to three years from the date of issue of the development consent (by 19 June 2018).

Under s 95(6) of the EP&A Act, a development consent that is subject to a deferred commencement condition lapses if the applicant fails to satisfy the consent authority as to the matter specified in the condition within five years from the grant of the consent or, as occurred in this case, by a shorter period specified by the consent authority. The mechanism to extend this lapsing period was to apply for and the Council to grant an extension under s 95A of the EP&A Act. Mr and Mrs Savellis did not apply for an extension under this section. The Council also did not purport to exercise the power under s 95A(2) of the EP&A Act to extend the lapsing period, firstly, because the Council stated it was exercising the power under s 96(2) of the EP&A Act and, secondly, because the Council granted an extension of a further two years when an extension of one year only is available under s 95A of the EP&A Act.

Faced with the prospect of the modified development consent lapsing after 19 June 2018, Mr Savellis made two applications to the Council in February and March 2018. First, Mr Savellis applied under s 95A(1) of the EP&A Act to extend the date in the deferred commencement condition by one year. Second, Mr Savellis applied for modification of the development consent under s 4.55(1A) (the former s 96(1A)) of the EP&A Act) to remove the deferred commencement condition. The Council rejected both applications on the grounds that the development consent had lapsed and cannot be modified. Mr Savellis appealed against the Council's refusal of both applications to this Court.

Issue: Did Ms Savellis' failure to satisfy the consent authority of the matter specified in the deferred commencement condition within the specified time period cause the development consent to lapse.

Held: Appeal dismissed; modification application refused.

(1) The development consent lapsed on the expiry of the period of one year after the date of issue of the consent (ie after 19 June 2016): at [41];

(2) The EP&A Act provides two different ways in which a development consent may lapse: the first way concerns development consents that are operative (in ss 95(1), (2) and (3) of the EP&A Act) and the second way concerns deferred commencement consents (in s 95(6) of the EP&A Act): at [42]-[45];

(3) The Council did not have power under s 96(2) to modify the deferred commencement condition development consent to extend the period of time and hence to extend the lapsing period for the purpose of s 95(6) of the EP&A Act; any purported modification of the development consent was legally ineffective to prevent the operation of s 95(6) causing the development consent to lapse: at [48]; and

(4) There is, therefore, no development consent on which Mr and Mrs Savellis can rely to make their applications under s 95A(1) to extend the lapsing period specified in the consent or under s 4.55(1A) to modify the consent to delete the deferred commencement condition; the Court on these appeals has no power under s 95A(2) to grant the extension of the lapsing period or under s 4.55(1A) to modify the consent to delete the deferred commencement condition: at [49].

***Wenli Wang v North Sydney Council* [2018] NSWLEC 122** (Robson J)

Facts: Wenli Wang (**the applicant**) appealed against North Sydney Council's (**the Council**) refusal of a development application for the substantial demolition of the existing dwelling and the construction of a three level dwelling house (**proposed development**) on the land known as 19 Waverton Avenue, Waverton (**the site**). The site was burdened by a restrictive covenant which prevented building above three storeys and above a certain height limit.

It was agreed that the proposed development did not accord with the terms of the restrictive covenant, and that cl 1.9A of the North Sydney Local Environmental Plan 2013 allowed the covenant to be set aside. Council submitted that, although the covenant was not dispositive of the appeal, it should nevertheless be taken into account, and further that the view loss impacts occasioned by the proposed development were so severe as to warrant the development application's refusal in any event.

Issues:

(1) What the effect of the restrictive covenant was in the circumstances; and

(2) Whether the view loss impacts were so severe as to warrant refusal of the development application.

Held: The appeal dismissed.

(1) If the Court was otherwise satisfied of the merits of the proposed development, the restrictive covenant would not prevent it from granting consent. However, the existence of the restrictive covenant was a matter which the Court could take into account: at [32].

(2) The view impacts occasioned by the proposed development were so severe upon the views presently enjoyed from 17 Waverton Avenue as to warrant the refusal of the development application: at [67]-[74].

- Merit Decisions (Commissioners):

***Chahda v Liverpool City Council* [2018] NSWLEC 1371** (Dixon SC)

Facts: This was an appeal by Mr Albert Chahda (**the applicant**) against Liverpool City Council's (**the respondent**) deemed refusal of a development application seeking consent for the construction of a 60-place child-care centre above basement car-parking on land described as Lot 7 DP 222767 at Chipping Norton, New South Wales (**the site**). On 7 June 2018, the applicant was granted leave to rely upon an amended application.

Issue: The site of the new development is proposed to be located on the northern side of Newbridge Road. This road is zoned SP2 (**the classified road**) under the Liverpool Local Environmental Plan 2008. The main issue to be determined is whether the proposed development satisfied the preconditions set out in subcl 101(2) of the State Environmental Planning Policy (Infrastructure) 2007 (**the Infrastructure SEPP**).

Held: Appeal dismissed; development application refused.

(1) The three preconditions in subcl 101(2) are conjunctive: *Modern Motels Pty Limited v Fairfield City Council* [2013] NSWLEC 1075. Therefore, any one precondition in subcl 101(2) about which the Court is not satisfied precludes the issue of consent: at [27];

(2) Subclause 101(2)(a) is not relevant because the classified road is the only access to the land: at [28];

(3) The evidence did not establish that the safety, efficiency and ongoing operation of the classified road would not be adversely affected by the development as a result of: the design of the vehicular access to the land, and the nature, volume or frequency of vehicles using the classified road to gain access to the land: at [34];

(4) The applicant's submission that the traffic expert's evidence "that the impact will not be significant" on the facts of this case, on this classified road, did not preclude the forming of the needed satisfaction was not accepted: at [34];

(5) Subclause 101(2) does not contemplate varying degrees of satisfaction; it invites satisfaction or not and an assessment by a traffic expert that "the impact will not be significant" does not allow the decision-maker to have the requisite satisfaction as required by subcll 102(2)(b)(i) and (iii) of the Infrastructure SEPP: at [35]; and

(6) The Court did not have jurisdiction to approve the development application: at [36].

***Forte Construction Group Pty Ltd v Inner West Council*** **[2018] NSWLEC 1400** (Gray C)

Facts: Forte Group (**the applicant**) appealed against an Interim Heritage Order (**IHO**) concerning an inter-war Californian bungalow style dwelling of 1920s construction located at Dulwich Hill. The dwelling had been altered by a second storey addition and by alterations to its front and rear, but many of its internal features remained substantially intact and were agreed by the heritage architects to be a representative example of "Mission Craftsman Interiors" typical of the inter-war period.

The IHO was made by Inner West Council (**the Council**) pursuant to s 25 of the *Heritage Act 1977 (NSW)*, which allows the Minister for Heritage to authorise a council to issue an IHO. A council that is so authorised may make an IHO if it considers that the item "may, on further inquiry or investigation, be found to be of local heritage significance" and if the item is "being or likely to be harmed" (s 25(2)). The Ministerial Order precludes an IHO from being made by a council unless certain matters are satisfied, including that, relevantly (at (1)(b)(i) of the authorisation):

> (b) it has considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the council and considers that:
>
> (i) the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance;

There was a dispute between the parties as to the extent of the Court's role on the appeal. The Council's position was that the Court's role was confined to determining whether there should be interim protection, and to the question of whether the building "may, on further inquiry or investigation, be found to be of local heritage significance" in accordance with s 25(2) of the Heritage Act. The applicant's position was that, if there is no further inquiry or investigation to be carried out, the Court's role extends to determining whether the building is of local heritage significance.

Issues:

(1) The scope of the Court's role on the appeal, and whether it extends to determining if an item is of local heritage significance;

(2) Whether, based on the evidence before the Court, there is further inquiry or investigation to be carried out;

(3) If there is further inquiry or investigation to be carried out, whether the item is likely to be found to be of local heritage significance; and

(4) If there is no further inquiry or investigation to be carried out, whether the item is of local heritage significance.

Held: Confirming the Interim Heritage Order and dismissing the appeal.

(1) The exercise of the discretion to issue an IHO, which is conferred on a council by s 25(2) of the Heritage Act, is limited by the terms of the authorisation by the Minister: at [17]-[19]. The Court's power on appeal, in exercising the functions and discretions of the Council pursuant to s 39(2) of the *Land and Environment Court Act 1979 (NSW)*, permits it to exercise the discretion conferred by s 25(2) subject to the limitations on that function imposed by those terms of the authorisation: at [20];

(2) On appeal, the Court is therefore required to consider whether "the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance." The use of the word "or" makes it clear that there are two alternate states of satisfaction, at least one of which must be reached in order to satisfy (1)(b)(i) and enable the order to be issued or confirmed. The first is that "the item is… of local heritage significance" and the second is that "the item… is likely to be found, on further inquiry and investigation, to be of local heritage significance." Where there is no further inquiry or investigation to be carried out, the role of the Court therefore extends to considering whether the item is of local heritage significance: at [23];

(3) In exercising the discretion and considering whether (1)(b)(i) is met, the Court can consider all of the evidence furnished on appeal and is not limited to the preliminary heritage assessment referred to in (1)(b): at [25];

(4) The Court's role does not go beyond reaching the state of satisfaction required by (1)(b)(i) to the point of determining whether the item should be included in a planning instrument. That is a separate function of the Council: at [26]; and

(5) In carrying out that role in the present appeal, the commissioner was satisfied that there was further inquiry or investigation to be carried out with respect to the rarity of an interior of the integrity of that found at the subject dwelling, and that on the further inquiry or investigation, the dwelling was likely to be found to be of local heritage significance (at [62]) for the following reasons:

(a) further inquiry or investigation can be carried out with respect to its rarity in light of new information on the identity of the builder: at [63];

(b) there was sufficient evidence to establish that on this further inquiry or investigation, the interior was likely to be found to be an exemplar of the mission craftsman interior and provide information that was otherwise only available in publications from the period: at [64]; and

(c) the fact that the dwelling had undergone significant alterations and additions did not mean that the characteristics of the dwelling that were likely to render it of local heritage significance were lost: at [65].

***FPG No.2 Pty Ltd v Randwick City Council* [2018] NSWLEC 1300** (Smithson C)

Facts: This appeal was against the Council's refusal of a modification application to add a private roof terrace on a recently constructed residential flat building (**RFB**) at 352 Clovelly Road, Clovelly. The Council contended that the modification did not comprise "substantially the same" development to which consent can be granted under s 4.55(2) of the *Environmental Planning and Assessment Act 1979 (NSW)*.

In granting consent to the RFB in 2015, the Council imposed conditions including requiring deletion of a roof terrace that had been proposed and a reduction in the overall height. One of the grounds for imposing this condition was to minimise view loss to Clovelly Beach from existing RFBs to the west of the site. The modification application sought to amend this consent to enable construction of a private roof terrace for the uppermost apartment in the RFB accessed from the balcony of that apartment. Objections to the original application and to the modification included the impact on water views, some of which were lost as a result of the new RFB.

Issues:

(1) Would the addition of a private roof terrace result in substantially the same development; and

(2) If so, should consent be granted given the impacts of the terrace and the reasonableness of these;

Held: Appeal dismissed and application refused.

(1) The RFB was approved on the basis that it had no roof terrace given the adverse impacts that arose from such a feature on the views, privacy and amenity of neighbours: at [87];

(2) In both *Innerwest 888 Pty Ltd v Canterbury Bankstown Council* [2017] NSWLEC 1241 and *Pozzobin v City of Canada Bay Council* [2014] NSWLEC 1143, the Court held that, conditions requiring modifications in order to make a development acceptable, if removed, would not make that development substantially the same, as the development would then become, in effect, unacceptable. That was that a reduced height and no roof terrace were essential elements of the approved development: at [91]-[92];

(3) In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, Stein J found that it is not sufficient that, simply because the type of development (an RFB) would be the same, it would therefore be substantially the same development. It is also necessary to consider whether the proposed modified development would be essentially the same or materially have the same essence as that originally approved. In *Moto Projects (No 2) Pty Ltd V North Sydney Council* [1999] NSWLEC 280, Bignold J found that the task does not merely involve comparing physical components but also an appreciation of the qualitative and quantitative aspects of the development being compared in the proper context including the circumstances in which the approval was granted: at [93]-[94];

(4) Whilst what is approved remains an RFB, and adding a roof terrace would not result in a radical transformation of the development, the test in s 4.55(2)(a) goes beyond requiring a radical transformation in order not to be substantially the same: at [95]-[96]. From a qualitative perspective, the terrace would introduce features not part of the approved development: additional structures above the currently approved height, and enabling and introducing access to (and use of) a rooftop by occupants of the apartment below: at [97]. This use, with structures and furnishings, will impact

views and potentially generate noise and overlooking of neighbours which are not aspects of the approved development. Having a roof terrace also results in a material difference to an RFB which contains only three dwellings, providing substantial additional private open space to one of those dwellings and effectively adding another level to the development. It materially changes the form and nature of the development as approved: at [99]-[100];

(5) The development was therefore not substantially the same as, being materially different to, that which has been approved. There was therefore no power to consent to the application: at [101]; and

(6) If that finding is wrong, the application ought to be refused in any event on the grounds of unacceptable ocean view impacts to neighbours having particular regard to the reasonableness of the proposal, being additional private open space to one apartment which already has the benefit of a substantial balcony for use as private open space with expansive ocean views: at [102]-[113].

***Johnston v Wollongong City Council*** **[2018] NSWLEC 1331** (Dixon SC)

Facts: This was an appeal by Julie and Joan Johnson (**the applicants**) under s 8.7 of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) against the refusal by Wollongong City Council (**the Council**) of DA/2016/1368 (**the DA**) for the construction of a two-storey dwelling house, swimming pool, spa and associated works at Lot 39 Woodland Avenue, Thirroul.

Issues:

(1) What was the correct statutory framework for the assessment of the application because the legislation changed after the evidence was concluded but before delivery of judgment;

(2) Whether the proposed development protected the visual amenity of the coast;

(3) Whether the proposed development was appropriate for, protected and improved the natural scenic quality of the location and surrounding area; and

(4) Whether the proposed development was low impact in an area with special ecological, scientific and aesthetic values.

Held: Appeal dismissed; development application refused.

(1) The *Coastal Management Act 2016 (NSW)* was commenced and the State Environmental Planning Policy (Coastal Management) 2018 (**the Coastal Management SEPP**) was commenced after the evidence concluded but prior to delivery of judgment. The Coastal Management SEPP, it contained a savings provision which precluded its application to this case: cl 21 of the Coastal Management SEPP. Therefore, the repealed State Environmental Planning Policy 71 - Coastal Protection (**SEPP 71**) continued to apply. However, the Coastal Management SEPP remained relevant as part of the public interest (s 79C(e)): at [56];

(2) The proposed development would adversely affect the visual amenity of the coastline and surrounding area by protruding beyond the cliff: at [120];

(3) The proposed development is a substantial development (at [117]), located in a prominent location with special aesthetic features, including a coastal cliff and rock shelf: at [118]. The proposal provides an intrusive development that would adversely affect the special aesthetic values of the area and impede on the natural scenic quality of the location and surrounding area: at [118]; and

(4) For these reasons, the proposal was not consistent with the E4 Environmental Living Zone objectives and was not suitable for development (s 4.15(e) of the EP&A Act): at [120].

***Kelly v Randwick Council*** **[2018] NSWLEC 1322** (Dickson C)

Facts: This development appeal is brought by Craig Kelly (**the applicant**) under s 8.7 (1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**), against the refusal of consent by Randwick City Council of an application for a two-lot strata subdivision. The subdivision application follows the construction of an approved dual occupancy (attached) on land at 84 Austral Street, Malabar, New South Wales.

Randwick Local Environmental Plan 2012 (**the RLEP 2012**) applies and zones the subject site R2 Low Density Residential. The RLEP 2012, at cl 4.1A, provides minimum subdivision lot sizes for strata plan schemes in the R2 zone.

Issue: Whether the development standard, in cl 4.1A Minimum subdivision in RLEP 2012, of 400 square metres, applies to a strata lot, or a minimum land size of 400 square metres.

Held: For the purposes of cl 4.1A of RLEP 2012 the development standard applicable to the "lot" applies to the size of strata lots.

(1) Section 6.2(2)(b) of the EP&A Act states that "subdivision" is a reference to strata subdivision;

(2) In *DM & Longbow Pty Ltd v Willoughby Council* [2017] NSWLEC 1358, the Court held that the reference to "subdivision of land" in cl 4.1(2) (RLEP 2012) includes a reference to strata subdivision: at [27];

(3) That the intent of cl 4.1A, when read as a whole, is to prohibit strata subdivision of any relevant land by any strata plan which results in strata lots that are less than the minimum size shown on the Lot Size Map in relation to that land. Therefore, both strata lots must meet the minimum size shown in the Lot Size Map of RLEP 2012 for the subject site: at [37]; and

(3) Given the relevant strata lots for the subdivision are 408 square metres, the development standard is met and the application can be consented to without reference to the submitted cl 4.6 variation request: at [38].

***Legge v North Sydney Council* [2018] NSWLEC 1288** (Brown C)

Facts: These proceedings concerned two separate appeals against the deemed refusal of a development application (**DA 40/17**), which sought the removal of existing signage and its replacement with new signage at 275 Alfred Street, North Sydney, and a modification application, which sought to modify an existing sign approval. The proposed signage would consist of three digital LED roof top signs/advertising structures which would display interchangeable static digital advertisements. North Sydney Council (**the Council**) contended that DA 40/17 should be refused as there was no power to approve pursuant to the State Environmental Planning Policy No. 64 - Advertising and Signage (**the Advertising and Signage SEPP**), and for a number of merit reasons. The Council contended that the modification appeal must also be refused because: firstly, there was no power to approve the application under the Advertising and Signage SEPP; secondly, the modification was not substantially the same as that originally approved; and thirdly, due to a number of merit reasons.

Issues:

(1) Whether there was power to approve DA 40/17; and

(2) Whether the proposed signage was substantially the same as that which was originally approved.

Held: The appeals dismissed; DA 40/17 refused; and the modification application refused.

(1) The proposed signage was characterised as an "advertisement" under the North Sydney Local Environmental Plan 2013 and Advertising and Signage SEPP: at [14] and [23]. The Advertising and Signage SEPP imposed a number of conditions precedent requiring satisfaction before the merits of the application could be considered: at [34]. The total signage area, size/proportion relationship with the building and setback of the signage was similar to the existing signage: at [53]. The proposal satisfied criteria relating to heritage (at [68]-[73]), views and vistas (at [74]-[75]), and illumination (at [81]-[85]). However, the proposed signage was likely to have a greater impact on the visual amenity of the locality because of the rectangular design of the advertising signs, the changing nature of the displays (rather than the benign and static form of the existing signs), and the different colours and forms of displays for different advertising: at [63]. Clause 21(1)(a)(i) of the Advertising and Signage SEPP was not satisfied as the advertisement did not "improve the visual amenity of the locality": at [62], [66] and [80]. The proposed signage was not consistent with the relevant objectives of the Advertising and Signage SEPP (at [64] and [65]) and did not satisfy the assessment criteria specified in Schedule 1: at [65] and [79]. An advertising design analysis for the area/precinct in which the site was located had not been prepared and the provisions of cll 19(a) and 21(1)(c) of the Advertising and Signage SEPP operated to deny the Court the ability to grant consent to DA 40/17: at [97]; and

(2) The consent as originally granted was for building identification signage, while the proposed use for which modification approval was sought was properly characterised as an "advertisement": at [113]. The proposed signs had a larger advertising area, a different purpose, a different form of signage, changing signage, multiple colours and required the demolition of the existing signs: at [116]. The different characterisation exposed the proposed altered use to a different and more onerous regime

under the relevant environmental planning instruments: at [113]-[114]. The proposed signs were substantially different as a result of qualitative and quantitative differences: at [116].

***Regent Land Pty Ltd ATF Regent Land Unit Trust v Georges River Council*** **[2018] NSWLEC 1370** (Smithson C)

Facts: Regent Land Pty Ltd (the applicant) appealed the deemed refusal by Georges River Council (**the Council**) of an 11-storey residential flat building (**RFB**) at 70-78 Regent Street, Kogarah. The primary issue was a height breach to accommodate 4 rooftop apartments, communal open space and a lift overrun. A secondary issue was not amalgamating with an adjoining site as required by the controls in order to maximise (dwelling) yield.

The site is located in an area referred to as the Kogarah North Precinct (**KNP**) which had recently been rezoned for high rise development with a maximum height limit of 33m and floor space ratio (**FSR**) of 4:1. This was the first of several applications to be determined in the KNP which sought to exceed the new height standard in order to achieve the maximum FSR. The applicant argued there was tension between the standards (or controls), as it is not possible to achieve the permissible FSR within a 33-metre height limit. As a consequence, the uplift in housing supply intended as an outcome of the rezoning of the KNP would not be achieved. A variation to the height standard under cl 4.6 of the Kogarah Local Environmental Plan 2012 (**the KLEP 2012**) was submitted. This clause permits variations to development standards, where justified.

Issue: Did the cl 4.6 request justify the height breach sought.

Held: Appeal upheld but for an amended development deleting the rooftop apartments.

(1) Two new KLEP 2012 core standards were introduced to guide development in, and the desired future character of, the KNP (height and FSR): at [99]. Both had to be met unless there were individual circumstances warranting variation. The Court was not satisfied these circumstances existed: at [103]-[139];

(2) Specifically, it was not appropriate to set aside one standard in order to maximise development potential under another: at [124]. Furthermore, floor space (density) was sought to be maximised even though a core "pre-condition" for maximising yield, namely amalgamation with adjoining lots, was not achieved and as a consequence the minimum required site width was not achieved: at [99];

(3) The tests required under cl 4.6 as to whether compliance with the height standard is unreasonable or unnecessary were not met having regard to the considerations in *Wehbe v Pittwater Council* [2007] NSWLEC 827. In particular, compliance with the objectives of the height standard was not met and there were insufficient environmental planning grounds to justify the breach: at [103]-[139];

(4) Maximising the floor space to deliver maximum dwelling yield was not a sufficient ground and, as the Court found in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009, it was not sufficient to set aside a standard on the basis that additional housing in a strategic location would be delivered: at [111]. A compliant development would have the same outcome with over 100 apartments delivered (at [110]) or the same number of apartments could be delivered, if they were made smaller. Furthermore, a number of benefits said to be delivered were required irrespective of the height: at [126]-[130];

(5) Achieving the maximum FSR was not a right nor necessarily desirable for all sites in the KNP, nor was it a burden to comply with the height limit as was claimed by the applicant's expert: at [137] and [138];

(6) It was also claimed, but not demonstrated, that the development would deliver a better built form outcome with less impacts than a development compliant with the controls: at [116];

(7) It was not up to the Council to demonstrate that their controls would deliver a better outcome: at [119];

(8) The implicit premise was not accepted that the new height control was inadequate for the KNP to deliver on its strategic intent. Nor that cl 4.6 was an appropriate mechanism to set aside this new core control: at [131]. To do so would give both the height standard and the amalgamation provisions no work to do and set a poor precedent for redevelopment in the KNP: at [137]-[138];

(9) In summary, application of cl 4.6 was by exception and should not be used on the basis of a general presumption that height breaches should be accepted in order to maximise density in the KNP: at [125]; and

(10) Accommodating additional quality rooftop communal open space, and lift access to it, was however, considered to justify the height breach but only for that purpose. The appeal was upheld on that basis: at [144].

***Ritchie v The Hills Shire Council*** **[2018] NSWLEC 1376** (Dixon SC)

Facts: On 11 August 2016, The Hills Shire Council (**the Council**) approved an application for dual occupancy under The Hills Local Environment Plan 2012 (**the THLEP 2012**).

On 21 June 2017, Mr Ritchie (**the applicant**) lodged an application for a development, described on the application form as a "proposed change of use from Dual Occupancy approved under Council's LEP to a Dual Occupancy under the Affordable Rental Housing SEPP 2009." Consent for subdivision of the site into two separate strata title residential lots was also sought.

According to the Council's evidence, there were two reasons for refusal of the application. First, the development was not located within an "accessible area" as defined under cl 4 of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (**the ARH SEPP**). Second, the Court has no jurisdiction to entertain the appeal due to a dual occupancy development only being permissible under the ARH SEPP if it is in an accessible area within the Sydney region: cl 10 (2).

Under cl 4(1) of ARH SEPP an accessible area means the development must be within "400 metres walking distance of a bus stop used by a regular bus service" (within the meaning of the Passenger Transport Act 1990).

The term "walking distance" is defined as "the shortest distance between 2 points measured along a route that may be safely walked by a pedestrian using, as far as reasonably practicable, public footpaths and pedestrian crossings", under cl 4(1) of the ARH SEPP. The conditions required under cl 4(1) must be satisfied in order to engage jurisdiction under cl 10 (2).

Issue: Were the bus stops relied upon by the applicant located within a 400-metre "walking distance" of a "bus stop used by a regular bus service" such as to engage jurisdiction under cl 10 (2).

Held: Appeal dismissed.

(1) The definition of "accessible area" and "walking distance" as defined under the ARH SEPP and the ordinary meaning to those words (consistent with the *Macquarie Dictionary* definitions of terms such as "practicable") was applied: at [12];

(2) The respondent's expert assessment accorded with Dixon SC's site inspection which found that the fastest and most reasonably practicable walking route to a regular bus stop was 475 metres: at [13];

(3) Both sites proposed by the applicant were found to be neither safe nor reasonably practicable, albeit measuring under 400 metres from the site. The first site along made pavement on Bruhn Circuit was found unsafe due to the lack of continuation of a path onto Memorial Avenue and a bend on this road which reduces both pedestrian and drivers' sightlines. In addition, pedestrians would be required to cross a two-lane classified road illegally outside of a pedestrian crossing in order to reach the bus stop: at [13];

(4) The second route suggested by the applicant required pedestrians to walk up a steep incline (behind the guard rail on the road reserve) and over vegetated and grassed rough ground to a bus stop. There is no guarantee that this area of the walking route would be accessible if it is not maintained, nor would it be safe for pedestrians to walk behind a guard rail on a classified road. The features of both of the proposed routes do not satisfy the definition of "walking distance" under cl 4 of the ARH SEPP: at [14];

(5) Further, the applicant provided no evidence that the bus stops relied upon provide a "regular bus service" in accordance with the requirement of the ARH SEPP: at [15];

(6) Despite the applicant's assertion, Div 1 (In-fill affordable housing) in Pt 2 of the ARH SEPP did not apply to the proposed development: at [16].

***Rogers v Inner West Council*** **[2018] NSWLEC 1305** (Gray C)

Facts: In previous court proceedings, development consent was granted with respect to two lots at Leichhardt for:

(a) the demolition of the existing improvements on the site,

(b) the subdivision of land by changing the location of the boundary between the two lots to create two lots of 204.8 square metres, and

(c) the construction of a semi-detached dwelling on each of the two lots.

The design of the dwelling houses did not incorporate off-street parking, which followed advice from the Council at two separate meetings that off-street parking would not be supported on grounds of street presentation, heritage and visual impact.

The consent was subject to conditions, including condition 64 that the owners, tenants and occupiers of the building are not eligible to participate in any existing or proposed council resident parking scheme, and that written notice of this prohibition be given to all future owners, tenants and occupiers of the dwelling. Mr Rogers lodged a modification application with the Court pursuant to s 4.55(8) of the *Environmental Planning and Assessment Act 1979 (NSW)* (**the EP&A Act**) seeking to remove condition 64.

Mr Rogers argued that the condition was invalid as it did not serve a town planning purpose, and that the condition should not have been imposed on the merits of the development consent. He also submitted that the condition was unreasonable as the Council had not consistently applied it to developments of the nature the subject of the application. In support of the condition remaining, the Council relied on paragraph 2(i) of the Residential Parking Scheme Policy (**the RPS Policy**), which provides:

"Dual occupancies, multi dwelling housing and residential flat buildings, subdivisions into two or more lots and the strata subdivision of residential flat buildings, approved after January 2001 are not allowed to participate in a RPS as off-street parking should be provided in accordance with Council's DCP - Parking."

The Council argued that the condition allows prior notice of the RPS Policy to be given to future owners, tenants and occupiers, and that it achieves the objective of Pt C.11 of the Leichhardt Development Control Plan 2013 (**the LDCP 2013**) to reduce car dependency.

Issues:

(1) What is the scope of the question for determination on the modification application;

(2) Whether condition 64 should be removed or retained.

Held: Granting the modification application and deleting the condition of consent.

(1) The question on the modification application is not restricted to determining the lawfulness of the condition or whether the condition should have been imposed on the grant of consent. Framing the question in either of these ways establishes a high threshold for removing a condition of consent. The question on the modification application is broader and simply concerns whether the power under s 4.55(8) should be exercised to remove the condition on principle, or on the merits of the application: at [38].

(2) Apart from the matters referred to in s 4.15, the exercise of the discretion on a modification application "is uncontrolled or fettered by any overriding principle" except in the context of s 4.55: at [42], citing *City West Housing Pty Limited v Council of the City of Sydney* [2002] NSWLEC 30. It is therefore open to consider the appropriateness and efficacy of maintaining the condition: at [43].

(3) It may be appropriate in certain circumstances for there to be a condition of consent that reduces the impact of a development on the availability of existing on-street parking, and there may be circumstances in which this could be done by precluding participation in a residential parking scheme: at [49].

(4) In the circumstances of the present development consent, the condition is an unreasonable fetter on the discretion of the Council and ought to be removed on principle: Firstly, the condition pre-judges how the current RPS Policy should be applied to the dwellings the subject of the consent and therefore prevents the Council from exercising a separate statutory and discretionary power: at [51]; second, the condition pre-judges how any future resident parking scheme may be applied and therefore prevents the Council from exercising its discretionary power in perpetuity: at [52]; third, it is not appropriate to fetter that discretion where the question of whether 2(i) of the RPS Policy applies is reasonably open for consideration given that the consent includes the erection of dwellings, arguably does not involve subdivision "into two or more lots" and there is no off street parking provided: at [53]; fourth, the RPS Policy (as a whole) will apply even in the absence of condition 64: at [54]; fifth, no evidence was furnished in support of the retention of the condition and the evidence weighs in favour of its removal given that the current occupants benefit from resident parking permits and the carrying out of the development will return one car-parking space to the street: at [55]; sixth, the

Council was unable to establish the planning purpose served by the condition as the development meets the standards of the LDCP 2013 and therefore a more restrictive condition would be in contravention of s 4.15(3A)(a) of the EP&A Act.

- NSW Civil and Administrative Tribunal:

***Office of Local Government v Shelley*** **[2018] NSWCATOD 103** (R C Titterton, Principal Member)

Facts: These proceedings concerned allegations made against Councillor Peter Shelley of the Mid-Western Regional Council (**the Council**). The Acting Chief Executive of the Office of Local Government (**the applicant**) sought an order pursuant to s 482A(2)(c) of the *Local Government Act 1993 (NSW)* (**the Local Government Act**) that Cr Shelley be suspended from civil office or, in the alternative, that his right to payment be suspended, or that he be reprimanded. The applicant's case was that Cr Shelley's conduct breached the Council's Code of Conduct, and so breached s 440(5) of the Local Government Act, in committing misconduct within the meaning of s 440F(1)(b). The conduct complained of was Cr Shelley's conduct in making a speech at a Council meeting on 1 June 2016 and publishing the remarks he made at the Council meeting on a Facebook page he administered.

Issues:

(1) Whether, at the Council meeting, Cr Shelley breached cl 8.12 of the Code by making allegations against Councillors Webb, Thompson and Martens, in circumstances where those allegations amounted to allegations that those councillors had breached the Code (**ground 1**);

(2) Whether the Facebook post was made by Cr Shelley, or occurred in carrying out his functions as a Council official;

(3) If yes to (2), whether Cr Shelley breached cl 8.12 of the Code by making allegations against Councillors Webb, Thompson and Martens on the Facebook page "KandosRylstone 2 Towns but 1 Community" (**ground 2**); and

(4) What was the appropriate disciplinary action.

Held: Grounds 1 and 2 of the application established; and the respondent reprimanded.

(1) When Cr Shelley's words were read as a whole, it was clear that he was alleging that Crs Webb, Thompson and Martens had engaged in inappropriate or unethical behaviour: at [25]. Cr Shelley's speech at the Council meeting amounted to an allegation that Crs Webb, Thompson and Martens had acted in circumstances where they had conflicts of interest: at [32]. The tenor and effect of the speech was to suggest that the councillors" behaviour was not proper and inappropriate, and contravened their obligations as councillors: at [34]. Particular (1) was not established and Particulars (2) to (8) were established: at [63]. Breaches of cls 3.1, 4.2, 4.3, 4.7 and 4.12 to 4.17 of the Code were established (at [34], [35], [39], [41], [45], [50], [56], and [62]) while breaches of cls 4.3 and 4.12 to 4.17 were not established: at [36], [39], [41], and [62]. Ground 1 was established: at [64];

(2) The Facebook post was inextricably linked to Cr Shelley's work as a councillor and carrying out his functions as a councillor: at [69]. Cr Shelley's disclaimer did not affect this conclusion: at [69];

(3) Particulars (1) to (8) of ground 1 were repeated in relation to ground 2: at [66]. The same conclusions were reached in relation to Particulars (1) to (8): at [71]; and ground 2 was established: at [72]; and

(4) Because there were no previous complaints of misconduct (at [94]), Cr Shelley presented as a man of considerable integrity (at [95]) and he had sought advice around the potential issue (at [93]), the appropriate disciplinary action was the recording of a reprimand: at [92].

***Shoebridge v Office of Environment and Heritage*** **[2018] NSWCATAP 144** (N Hennessy, LCM Deputy President and J McAteer, Senior Member)

Facts: When applying to the Office of Environment and Heritage (**the respondent**) for information under the *Government Information (Public Access) Act 2009 (NSW)* (**the GIPA Act**), Mr Shoebridge (**the appellant**) also applied for a 50% discount in any processing charges. The appellant was entitled to a discount "in a processing charge imposed by an agency if the agency is satisfied that the information

applied for is of special benefit to the public generally" pursuant to s 66 of the GIPA Act. The respondent told the appellant that they would make a decision about the discount after they had examined the information he had applied for and when they were ready to make a decision about access to the information. The appellant applied to the Civil and Administrative Tribunal for a review of the decision to delay determination. He submitted that an agency was required to determine his application for a public benefit discount when requiring him to pay an advance deposit of the anticipated processing charges. The Tribunal found that it did not have jurisdiction to review the decision to delay making a determination because it was not one of the "reviewable decisions" set out in s 80 of the GIPA Act. The appellant appealed to the Appeal Panel.

Issues:

(1) Whether the decision to delay determination was "a decision to refuse a reduction in a processing charge" under s 80(k) of the GIPA Act;

(2) Whether the decision to delay determination was "a decision to refuse to deal with an access application" under s 80(c) of the GIPA Act; and

(3) Whether the Tribunal's findings about when a decision in response to an application for a discount must be made were internally appellable decisions.

Held: Leave to appeal on a question other than a question of law refused; appeal dismissed.

(1) None of the appellant's grounds of appeal disputed the Tribunal's finding, either as a question of fact or a question of law, that the respondent had not made a decision to refuse a reduction in a processing charge: at [28]; and

(2) None of the appellant's grounds of appeal disputed the Tribunal's finding, either as a question of fact or a question of law, that the respondent had not made a decision to refuse to deal with an access application: at [29];

(3) An agency does not have to decide whether to give a discount until the access application is determined and a processing charge imposed: at [4]; these opinions were not an essential part of the Tribunal's decision, nor were they internally appellable decisions: at [31].

## Court News

### Arrivals/Departures:

Mr Timothy Horton had been appointed a commissioner from 5 November 2018.