# Recent appeals from the Land and Environment Court

# EPLA Conference

20 October 2017

Lendlease Darling Quarter Theatre
Terrace 3, 1-25 Harbour Street
Sydney

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## I. Overview

1. The 16 substantive decisions of the NSW Court of Appeal (civil appeals and applications for leave to appeal from the Land and Environment Court) determined in the last twelve months may be summarised as follows:

| **Jurisdiction of Land and Environment Court** | **Number** | **Appeals allowed** | **Appeals refused** | | |
|---|---|---|---|---|---|
| | | | **Leave refused** | **Leave granted, appeal refused** | **Leave not required, appeal refused** |
| **Class 1** | 3 | 1 | 1 | 1 | |
| **Class 2** | 1 | | 1 | | |
| **Class 3** | 2 | | | | 2 |
| **Class 4** | 9 | 5 | | | 4 |
| **Judicial review of Class 6 decision** | 1 | | 1 | | |
| **Total** | 16 | 6 (37.5%) | 10 (62.5%) | | |

[*] Judge of Appeal, Supreme Court of New South Wales.

2. Although the overall numbers are small and the results are obviously not statistically significant, a few observations about methodology are warranted. First, the second column only includes principal judgments. Procedural and interlocutory decisions are excluded but they can be found in the appendix to this paper. Secondly, the third column includes appeals that were allowed in part but otherwise dismissed. Thirdly, cross-appeals have not been counted separately to avoid double counting.

## II. General themes

3. At the outset, I will make a few observations about some themes which emerge when considering appeals from the Land and Environment Court in the Court of Appeal over the last 12 months.

4. First, the overall rate of appeals from the Land and Environment Court to the the Court of Appeal is very low. Over the last year there have been approximately 1,300 disposals in the Land and Environment Court broken down as: Class 1 (846), Class 2 (129), Class 3 (107), Class 4 (125), Class 5 (72), Class 6 (16) and Class 8 (5). The percentage of cases the subject of appeal to the Court of Appeal from the Land and Environment Court, even allowing for methodological inaccuracies in comparing different data sets, is around 2%.

5. Secondly, in the last 12 months (October 2016 – September 2017), appeals from the Land and Environment Court have constituted approximately 7% of the work of the NSW Court of Appeal. That is, out of a total of 385 disposals during this period, 27 were appeals from the Land and Environment Court. The difference between the 16 substantive decisions and the 27 appeals reflects disposals of notices of appeal (and applications for relief), disposals of applications for leave cases in the original jurisdiction and cases which are commenced but which for some reason do not proceed to finality.[1] Appeals from the Land and Environment Court since 2012 have been steady, where appeals in that year comprised 6% of the workload in the Court of Appeal.

6. Thirdly, the greatest number of appeals from the Land and Environment Court are again those arising from proceedings in Class 4 jurisdiction.

7. Fourthly, the prospects of success in an appeal to the Court of Appeal on a question of law (from decisions in the Classes 1, 2 or 3 jurisdiction) under s 57 of the *Land and Environment Court Act 1979* (NSW) remain low. Conversely, appeals from cases decided in the Class 4 jurisdiction often raise more complex and contentious questions, creating greater scope for appellate intervention.

## III. Appeals from cases decided in Class 4 jurisdiction

8. I will address in a little detail the appeals before the Court this year arising from cases decided in the Class 4 jurisdiction.

[1] An appeal filed pursuant to a grant of leave is counted as one contentious case (when leave is granted), not two.

9. Among the most significant cases decided in the Court of Appeal over the last year were appeals concerning challenges to the validity of the council amalgamation processes across NSW. The cases are complex and I will not address the detail of the decisions, but rather try and identify some important themes addressed by those cases.

10. As you will be aware, in January 2016 the NSW Minister for Local Government identified 35 proposals to amalgamate various local government areas under provisions of the *Local Government Act 1993* (NSW). The Acting Chief Executive of the Office of Local Government appointed a number of delegates to examine and report on the proposals. Relevantly, the Court of Appeal heard and determined five appeals from the Land and Environment Court challenging the proposals for amalgamation:

    - *Botany Bay City Council v Minister for Local Government (a 2016 case)*;
    - *Botany Bay City Council v State of New South Wales (another 2016 case)*;
    - *Woollahra Municipal Council v Minister for Local Government (a case decided in the last 12 months)*;
    - *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government (a 2017 case)*; and
    - *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government (a 2017 case).*

11. A major focus of the appeals was the legality of the process of examination and report by the relevant delegates conferred by s 218F of the *Local Government Act*, which turned on the correct construction of a number of provisions in the Act, in particular s 263 of that Act. The appeals occupied up to four days, which is a reflection of the factual and legal complexity of the scheme for council amalgamations, as well as the significant public interest aspects of the litigation.

12. Many of the grounds of appeal in these cases were common, i.e. whether the relevant councils were denied procedural fairness because they were not granted access to some documents produced by KPMG which the government relied upon for its own assessment of the financial benefits of the proposals, but which were not made available to the delegates for the purposes of their examination. There were also allegations, addressed in various ways in the cases, that the failure to obtain and have regard to that material was a constructive failure to exercise jurisdiction by the relevant delegate. Other grounds of appeal were directed towards the specific facts which arose under the particular proposal. Basten JA explained that background in *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government* [2017] NSWCA 188 at [9]-[17] (footnotes omitted):

*"[9] These appeals were not the only challenges brought to the proposals for amalgamation of councils first announced in January 2016. Relevantly for present purposes, three other cases had come before this Court, the first on two occasions:*

*(1) Botany Bay City Council v Minister for Local Government and Botany Bay City Council v State of New South Wales;*

*(2) Woollahra Municipal Council v Minister for Local Government; and*

*(3) Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government.*

*[10] In the first two matters, the challenges brought by the respective councils were unsuccessful and the appeals were dismissed. In the third matter, the appeal was upheld. One particular ground had no relevance to the present matters, namely that the proposal had involved the amalgamation of one local government area with part of another, not fulfilling the requirement for amalgamation of two or more local government areas. However, there were other grounds on which Ku-ring-gai Council was also successful. That decision, handed down two weeks before the present appeals were heard, led to amendments being proposed to the notices of appeal and a round of post-hearing written submissions.*

*[11] Some of the appeals raised grounds specific to their particular circumstances; an example arises with respect to the proposed Hunter's Hill, Lane Cove and Ryde amalgamation. The issue was whether Lane Cove and Hunter's Hill were "contiguous" as required by the relevant statutory provision for the creation of local government areas.*

*[12] Other grounds were described as "common" in a number of the appeals. These included grounds with respect to the reasonableness of the public notice given prior to examination of the proposals, whether the Councils were denied procedural fairness by the failure of the government to provide what became known as the "KPMG documents" and whether there had been a constructive failure on the part of the delegates in purporting to carry out examinations without access to the KPMG documents. (Those documents were understood to explain and justify the assumptions underlying the government's assessment of the financial benefits of the proposals, and demonstrate how they were calculated.) These grounds did not, however, raise entirely common issues, except to the extent that the factual background was the same in each case.*

*[13] When an analogous ground was considered in Ku-ring-gai Council, the Minister accepted that the undisclosed KPMG documents were relevant to the assessment of the financial benefits of the proposal. The concession was made*

*on the basis that two footnotes in the merger proposal document with respect to Ku-ring-gai and Hornsby local government areas expressly referred to documentation which had not been disclosed, although that fact was not immediately apparent from the name of the documents identified in the footnotes. (The identity of the documents could perhaps have been inferred, though with less confidence, from the affidavit filed by the Minister in support of her claim for public interest immunity.) In Ku-ring-gai Council, the Minister contended that the documents were covered by a form of public interest immunity which justified the non-disclosure. She also contended that the delegate's function of examination and report could be fulfilled without reference to that material.*

*[14] In the present cases, the Minister adopted a somewhat different approach. She invited the Court, on the basis of the materials that were now available, to infer that the undisclosed KPMG documents were immaterial and, for that reason, the exercise of the statutory function by the delegate was not affected by the non-disclosure. She did not, however, tender the undisclosed KPMG documents. Nor, indeed, is it clear that this Court would have accepted the documents if tendered, in circumstances where the other parties had had no advance access to them and it was at least plausible that the significance of the documents would require expert evaluation. It will, nevertheless, be necessary for the Court to address the Minister's submissions as to what may or may not be inferred as to the contents of the undisclosed KPMG documents.*

*[15] Further, the Minister sought to distinguish the conclusion reached by the majority in Ku-ring-gai Council by reference to the reasoning of the delegates in each report. Each delegate dealt in a different way with the financial benefits assessed by KPMG, as presented in the merger proposal documents. In principle, such a basis for distinguishing the earlier case is undoubtedly available and it will be necessary to examine the delegate's process of reasoning in each report in this respect.*

*[16] Finally, it is necessary to have regard to the manner in which the issue was raised before each delegate. For example, if a particular council did not take issue with the figures put forward in the merger proposal document, it may not be able to complain about the exercise of a function by reliance upon the unchallenged material. This issue requires consideration of the steps taken by the councils to obtain access to the undisclosed KPMG documents and the submissions made to the respective delegates.*

*[17] It is convenient to address the appeals in relation to a single proposal together, but separately from the other proposals. Thus, as the Hunter's Hill and Lane Cove proceedings involved the same report concerning a single*

*proposed amalgamation it is convenient to deal with these appeals together. Although Mosman and North Sydney Councils had separate representation, their appeals may be heard together as they too involved a single proposal. The appeal brought by Strathfield Municipal Council will be addressed separately, although it raised similar grounds."*

13. In *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 the Court (Bathurst CJ; Beazley P; Ward JA) dismissed an appeal from a decision to refuse a challenge by way of judicial review to the legal validity of the process for the proposed amalgamation of Randwick, Waverley and Woollahra Councils. Unlike the later decision in *Ku-ring-gai*, the proposal in this case did not involve the excision of any part of the three relevant local government areas.

14. The Court was not persuaded that the relevant "proposal" comprised the contents of the proposal document. Rather, it was simply the proposal to amalgamate three local government areas.

15. Woollahra Council sought to rely on the decision in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381; [2002] NSWCA 288 for the proposition that it was denied procedural fairness. The Court, having regard to the function of the delegate being performed, was not persuaded that the Council was denied procedural fairness. There was nothing in the *Local Government Act* which required the delegate to disclose all submissions adverse to an affected council for the purposes of providing the council an opportunity to respond.

16. In contrast to *Kur-ing-gai*, the Court was satisfied that the delegate undertook a proper examination of the financial advantages and disadvantages of the proposal.

17. In *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; 220 LGERA 386 the Court (Basten JA; Macfarlan JA; Sackville AJA) held that the proposal to merge Ku-ring-gai Council and Hornsby Shire Council could not proceed in its current form as Ku-ring-gai Council had been denied procedural fairness.

18. The Court was divided on the question of whether the primary judge erred in upholding the government's claim of public interest immunity to withhold the production of KPMG documents which contained a financial analysis of the merger proposal. Justice Basten (with whom Macfarlan JA agreed) held that the public interest in producing the information outweighed the public interest in preserving the secrecy or confidentiality of the information. Further, their Honours were satisfied that the delegate constructively failed to fulfil his statutory function by failing to have regard to the KPMG documents.

19. Sackville AJA held that the issues in the case could be resolved without the need for Kur-ing-gai to access KPMG documents. Moreover, the delegate was able properly to fulfil his function without the documents. His Honour was satisfied that the appeal should be allowed on the ground that the delegate misapprehended his functions because he failed

to consider a mandatory consideration, the particular of which was the excision of Hornsby South from the Hornsby.

20. *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government* [2017] NSWCA 188 was heard shortly after *Ku-ring-gai* and decided four months after that case. The Court (Basten JA; Macfarlan JA; Sackville AJA) addressed the appeals relating to five proposals together, but separately from the other proposals.

21. The Court allowed the appeals of Hunter's Hill and Lane Cove on the basis that the local government areas did not constitute a "single area of contiguous land" because there was no shared boundary, as required for amalgamation under s 204(3) of the *Local Government Act*.

22. The Court also allowed the Strathfield appeal. In applying the decision in *Ku-ring-gai Council*, the Court held that there was a constructive failure to exercise jurisdiction by the delegate in adopting uncritically assertions about financial benefit flowing from the amalgamations without separately considering the issue.

23. The majority (Macfarlan JA and Sackville AJA; Basten JA dissenting) dismissed the appeals of Mosman and North Sydney on the basis that the absence of the complete suite of KPMG documents did not affect the delegates' proper exercise of their statutory function to examine and report on the proposal.

24. On 12 May 2017 the High Court granted Woollahra Council special leave to appeal against the proposed merger: [2017] HCATrans 108, less than two months after the Court of Appeal handed down its decision in *Ku-ring-gai*. A hearing date was set before the High Court but vacated when the decision to seek to amalgamate the remaining councils, including Woollahra, was reversed.

25. Although, by reason of that reversal in government policy, the relevant council amalgamations have been abandoned, these decisions raise important issues which are likely to continue to resonate in future cases. In particular, it is not difficult to imagine cases where the importance of consideration of material of the kind the subject of the KPMG documents, and related financial modelling will be important in addressing complaints about procedural fairness or a constructive failure to exercise jurisdiction by a decision maker.

26. Every delegate responsible for examining and reporting on the amalgamations placed reliance, to a greater or lesser extent, on the calculations in the KPMG report as reflecting the financial benefits of amalgamations. It is not difficult to imagine future cases in the core areas of interest to people here present where a similar issue might arise.

27. In such a case it is useful to contrast the majority's view in the Mosman and North Sydney amalgamations with the decisions in relation to the successful councils. Given the abandonment of the amalgamations, the issue was not the subject of guidance from the High Court.

28. Another interesting feature of those cases was that the Minister was not formally bound by her concession in *Kur-ing-gai* that the KPMG documents were relevant. The case was fought differently in *Hunters Hill* where the Court was invited to infer that the documents which were undisclosed were immaterial.

29. It may be important in future cases to examine the treatment of the arguments of senior counsel for the Minister in *Hunters Hill*, who sought to distinguish *Kur-ing-gai* on the basis that the delegates, in each report, dealt with the financial benefits assessed by KPMG differently.

30. Another important case decided on appeal arising from a case decided in the Class 4 jurisdiction this year is *Bay Simmer Investments Pty Ltd v State of New South Wales* [2017] NSWCA 135. There the Court (Basten JA; Leeming JA; Sackville AJA) considered the statutory scheme for concept proposals in staged development applications under Pt 4, Div 2A of the *Environmental Planning and Assessment Act 1979* (NSW).

31. The Court allowed the appeal from a decision rejecting a challenge to a State significant development consent for an integrated arts precinct at Walsh Bay. The challenge was made by a restaurant owner who conducted a restaurant business on part of the proposed development site.

32. The issues on appeal were first, whether the proposal was a "staged development application" within the meaning of s 83B of the *Environmental Planning and Assessment Act*; and secondly, whether the delegate was required to consider the "construction-related impacts" pursuant to s 79C(1) of the *Environmental Planning and Assessment Act* for a staged development proposal.

33. The Court held that the structure, purpose and language of s 83B did not allow for a single staged development application for the whole site. Although the application referred to "one or more" subsequent applications, the scheme required at least two detailed proposals for separate parts of the site. Accordingly, the proposal was not a staged development application. The Court also found that a detailed assessment of construction-related impacts of a proposed development must be made at the concept proposal stage and not the later stages of the approval process, namely, when the application is lodged. Accordingly the development consent was invalid.

34. Another important aspect of the decision is the Court's approach to delegated legislation. As Basten JA stated at [39]-[40]:

> *"[39] Although there was a dispute between the parties as to whether it was proper to take the terms of the EIS into account in addressing this question, the State being of*

*the view that it could and should be taken into account, on either approach (the documents being consistent in this regard) the same conclusion is reached.*

*[40] This conclusion is consistent with the explanation given by the Minister in the second reading speech for the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005, which inserted Div 2A in Pt 4 of the Planning Act. The Minister stated: [14]*

> *'Schedule 3 to the bill provides for the existing provisions in the Act for staged approvals to be augmented with the introduction of procedures for the lodgment, assessment and approval of staged development applications. This will enable developers to stage complex developments with clear procedures for obtaining approvals for the development. Section 83B provides that a staged development application may set out an overview of the proposal across the whole site, with the details of each separate component of the development to be subjected to subsequent development applications. Alternatively, a first stage development application may include both the concept for the entire site and a detailed proposal for the first component of the development.'"*

35. What flowed from this decision was, at least in the short term, a greater responsibility on consent authorities and developers to provide more information in concept development applications at a very early stage in the development process.

36. However, the Environmental Planning and Assessment Amendment (Staged Development Applications) Bill 2017 (which received assent on 14 August 2017), has essentially overturned this decision by: (1) providing that a concept approval may be followed by only one subsequent development application; and (2) the assessment of the likely impact of the carrying out of the development for the purposes of s 79C does not need to be done in the concept proposal stage.

37. The explanatory memorandum to the Bill relevantly states:

> *"The object of this Bill is to amend the Environmental Planning and Assessment Act 1979 to confirm the manner in which the staged development application provisions of that Act have operated prior to a recent decision of the Supreme Court that invalidated a State significant development consent for the Walsh Bay Arts Precinct. That decision invalidates a staged development consent where a concept approval is followed by only 1 detailed development application or where the concept approval does not consider construction and other impacts arising from (and required to be assessed in connection with) the subsequent detailed development application. The Bill validates previous decisions but does not render valid the development consent that the Court declared invalid in relation to the Walsh Bay Arts Precinct nor any subsequent development application lodged in reliance on that development consent."*

38. In *4nature Incorporated v Centennial Springvale Pty Ltd* [2017] NSWCA 191 the Court (Beazley P; Basten JA; Leeming JA) upheld an appeal from a decision dismissing a

challenge to the validity of a State significant development consent granted for the continued operation of the Springvale coal mine, 15km north-west of Lithgow.

39. The Court found that the Planning Assessment Commission (**PAC**) (to whom the Minister had delegated his powers) failed properly to consider a mandatory statutory precondition to the grant of consent, namely that the "carrying out of the proposed development would have a neutral or beneficial effect on water quality" under cl 10(1) of the *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011*.

40. In determining the scope and operation of cl 10(1) the Court directed its attention to the legal meaning of its statutory source, namely s 34B(2) of the *Environmental Planning and Assessment Act*, which in terms provides:

> *"34B(2) Provision is to be made in a State Environmental Planning Policy requiring a consent authority to refuse to grant consent to a development application relating to any part of the Sydney drinking water catchment unless the consent authority is satisfied that the carrying out of the proposed development would have a neutral or beneficial effect on the quality of water."*

41. The Court emphasised that there was no general proposition mandating that the task of construing delegated legislation is materially different to the task of construing primary legislation.

42. The real issue in the Court was the identification of the appropriate "comparator" required by cl 10(1). The Court held that on proper construction, cl 10(1) required the comparison of "water quality" on two hypotheses: (1) where the development is carried out; and (2) where it is not. The Court held that the PAC erroneously assessed the effect on water quality by reference to a *hypothetical water quality*, assuming that mining operations would continue, rather than the *actual water quality*, assuming that mining operations were terminated.

43. Last week the Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Bill 2017 was passed by Parliament. Assent was granted on 13 October 2017. Schedule 1[4] of the Bill has the effect of reversing this decision to ensure the development consent of the Springvale coalmine is taken to have been granted in accordance with *Environmental Planning and Assessment Act* and at all relevant times valid since the date it was granted on 21 September 2015.

44. Further, the Bill also re-defines the "neutral and beneficial" test to be applied to existing developments that are seeking an extension. Section 34B(2A) (inserted after s 34B(2) of the *Environment Planning and Assessment Act*) provides:

> *"(2A) A State environmental planning policy that requires proposed development to have a neutral or beneficial effect on the quality of water may deal with the application of that test in the case of proposed development that extends or expands existing development."*

45. The new test requires that future extensions do not pollute the water any more than the existing development (prior to the extension) – a significantly less stringent test than that mandated in *4nature Incorporated.*
46. Part 4, "Validation of development consent relating to Springvale mine extension etc" was inserted at the end of Schedule 7. Relevantly, it states:

> *"**9 Validation of Springvale mine extension development consent***
>
> *(1) The Springvale mine extension development consent is validated (to the extent of any invalidity), and is taken:*
>
> > *(a) to have been duly granted in accordance with this Act and otherwise in accordance with law, and*
> >
> > *(b) to have been duly granted on 21 September 2015, and thereafter to be, and to have been at all relevant times, a valid development consent.*
>
> *(2) Without limiting subclause (1), the granting of a mining lease or any other thing done or omitted to be done on or after 21 September 2015 is as valid as it would have been had the development consent concerned been in force when the mining lease was granted or the thing was done or omitted.*
>
> *(3) This clause has effect despite the existence of any proceedings pending in any court immediately before the commencement of the amending Act or the decision in any such proceedings or in any other proceedings instituted before that commencement.*
>
> *(4) If any proceedings are withdrawn or terminated (or any decision in any proceedings no longer has effect) because of the operation of the amending Act, the Treasurer may, in the absolute discretion of the Treasurer, pay to any party to those proceedings the whole or any part of any amount that the Attorney General, on application made to the Attorney General in writing by or on behalf of that party, certifies as being the costs of or incidental to the proceedings reasonably incurred by that party. This subclause does not apply to any party to the proceedings to whom or for whose benefit a development consent the subject of the proceedings was granted."*

47. Despite these changes, this decision may still be an important one for future developments.

48. In *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd* (2017) 220 LGERA 181; [2017] NSWCA 46 the Court (Meagher JA; Ward JA; Payne JA) dismissed an appeal concerning the validity of petroleum exploration licences which were granted to construct the Leewood Project (a project to treat and reuse water produced from coal seam gas exploration). Civil enforcement proceedings and judicial review proceedings were commenced by the appellant, heard together in the Land and Environment Court and on appeal.

49. Two overlapping arguments were made on appeal. First, that the project was incorrectly characterised as being for the purpose of "petroleum exploration" within the meaning of cl 6(d) of the *State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW), and thus not permissible in the absence of a development consent. Secondly, the construction and operation of the project was not "prospecting" and thus could not be conducted under an assessment lease granted under s 33 of the *Petroleum (Onshore) Act 1991* (NSW). That section grants an assessment lease holder the "exclusive right to prospect for petroleum…on the land comprised in the lease". People for the Plains contended that while the project was located on PAL 2, under the approval it was permissible to treat water and brine produced from two other locations and such activity required a development consent.

50. The Court rejected both these arguments. As to the first argument, the Court held that considered as a whole, the project was for the dominant purpose of "petroleum exploration" (and not waste or resource disposal or management). As to the second argument, the Court rejected the suggested "purposive interpretation" of s 33.

51. The case involved, again, the mix of facts that will obviously come before the Courts in this area more commonly, being a suggested conflict between obligations imposed on decision makers about rules imposed about water and those imposed on resource extraction industries.

52. In *Cheetham v Goulburn Motorcycle Club Inc* (2017) 223 LGERA 43; [2017] NSWCA 83, the Court (McColl JA; Sackville AJA; Basten JA dissenting) considered whether a development consent, properly construed, permitted a development on a motorcycle club's land for the purpose of "recreation facilities (major)", being a prohibited use under the Goulburn Mulwaree Local Environmental Plan 2009 (**LEP**):

> *"**recreation facility (major)** means a building or place used for large-scale sporting or recreation activities that are attended by large numbers of people whether regularly or periodically, and includes theme parks, sports stadiums, showgrounds, racecourses and motor racing tracks."*

53. The Club (the respondent) argued that the use was consistent with "recreation facility outdoor)" under the LEP (which was a permissible use).

54. In dismissing the appeal, the majority held that the use of the land for a racing track was not prohibited *unless* it was "attended by large numbers of people". The majority had regard to the features of Site Plan and other plans specified in Condition 1, which provided evidence that the facility was not likely to be attended by large numbers of the public, distinct from members of the Club. Further, the majority rejected the argument that extrinsic documents (listing the likely number of attendees at club events) were incorporated into the consent.

55. Basten JA (dissenting) took a different approach. In assessing the scale of recreation activities, his Honour had regard to "the likely effects on surrounding land" within which the use was proposed, such as noise. Turning to the number of persons in attendance, his Honour had regard to "geographical considerations". Basten JA was satisfied that information the Club provided to the Council in respect to the likely number of attendees at a club activity or event provided sufficient evidence that the racing track would be attended to by a large number of people.

56. In *Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement)* [2017] NSWCA 263, handed down this morning, the Court (McColl JA; Leeming JA; Payne JA) determined the proper construction of a condition in a development consent. The Court identified the critical obligation in Condition 16 as:

> *"…any required stormwater detention structures shall be constructed with the civil works for the TriPad site…"*

57. The main issue on appeal was whether Condition 16 required Bunderra to construct a part of a reinforced concrete pipe under a roadway, dividing two neighbouring parcels of land in the Lake Macquarie area. The Court, in allowing the appeal, held that Condition 16 did not impose an obligation on Bunderra to construct the relevant part of the pipe. The Court was also satisfied that a subsequent stormwater management document ("the September GCA Strategy"), prepared after the development consent, was not retrospectively incorporated into the consent by necessary implication. Finally, the Court, in applying the decision in *Burwood Council v Ralan Burwood Pty Ltd (No 3)* (2014) 206 LGERA 40; [2014] NSWCA 404, held to the extent that there is an inconsistency between plans and specifications in a development consent and those the subject of a construction certificate, the latter will prevail.

## IV. Appeals from cases decided in Class 1 jurisdiction

58. *Woolworths Limited v Randwick City Council* [2017] NSWCA 179 involved the consideration of a separate question following the Council's refusal to grant consent to Woolworths to convert a football club into a liquor outlet. Woolworths appealed to the Land and Environment Court and the Council raised a contention which was heard separately from the underlying appeal. The issue was whether a football club was "designed or constructed for the purposes of commercial premises" under cl 6.13(3)(a) of the *Randwick Local Environment Plan 2012*, which provided:

> *"(3) Development consent must not be granted to development to which this clause applies unless:*
>
> > *(a) the development relates to a building that existed when this Plan commenced and was designed or constructed for the purpose of commercial premises… "*

59. The Court (Leeming JA; Payne JA; Preston CJ of LEC) held that the primary judge misdirected himself in the way he approached the inquiry required by cl 6.13(3)(a) for essentially two reasons. First, the primary judge erred in answering the question by reference to the Club's *historical use* as a registered club rather than the *historical purpose* for which the building was designed or constructed in 2003. Secondly, the primary judge erred by adding a limitation to the definition of "retail premises", namely that retail sales be directly to the public. There was no implication from the way these terms were defined in the instrument that a "registered club" could not be characterised as a "commercial premises".

60. Perhaps the most interesting thing about this case is that it involved a consent authority denying itself jurisdiction to decide the question posed by the applicant for consent.

61. *Qube Holdings Ltd v Residents Against Intermodal Development Moorebank Incorporated* [2017] NSWCA 250 was an appeal from an interlocutory decision, which involved a challenge to the standing of the respondent to appeal against the approval of a development consent relating to Stage 1 of the SIMTA Moorebank Intermodal facility. The Court (Macfarlan JA; Meagher JA; Payne JA) granted leave but dismissed the appeal.

62. The main issue on appeal was whether RAID Moorebank (as it then was prior to registration) was an "unincorporated body", which was necessary for RAID Inc. to have a right to appeal under s 98 of the *Environmental Planning and Assessment Act*. The Court held that it was sufficient to accept that an unincorporated body is one that has some form of combination of persons with a common interest or purpose, a degree of organisation and continuity and a clear method for identifying members. The Court was satisfied that RAID Moorebank was an "unincorporated body" within s 8(2) of the *Associations Incorporation Act 2009* (NSW) and its right to appeal passed to RAID Inc. upon incorporation.

63. This case may have an impact on future decisions dealing with unincorporated corporations who have made submissions and later down the track have incorporated under the *Associations Incorporation Act* and then made challenges to a development consent.

64. The *Associations Incorporation Act* contains confusing and unhelpful language which is to be contrasted with the definition of a "person" in the *Environmental Planning and Assessment Act*. As Meagher and Payne JJA noted at [3]:

> *"Section 98 of the EPA Act confers on an 'objector' a right of appeal to the LEC against the determination of a consent authority to grant consent to a development application. 'Objector' is defined in s 4 of the Act to mean 'a person who has made a submission under s 79(5) by way of objection to a development application for consent to carry out designated development'. 'Person' is defined in the same section*

*to include 'an unincorporated group of persons or a person authorised to represent that group'."*

## V. Conclusions

65. There are a number of observations I would like to make about the last year of the work of the Court of Appeal in addressing appeals from the Land and Environment Court.

66. The work is some of the most challenging that the Court faced – see the Council amalgamation cases in particular and the divergent ways the Court addressed those cases.

67. I am pleased to say that the standard of written and oral advocacy in cases from this jurisdiction is high. That is apparent in the selection of cases. As the statistics at the outset show, only a tiny percentage of cases decided in the Land and Environment Court are the subject of an appeal to the Court of Appeal. Those relatively few cases are well chosen and, with few exceptions, raise important issues of principle. In the presentation of cases the Court has been greatly assisted by the counsel who have regularly appeared in those cases. Despite what it may feel like for counsel at the time – the members of the Court are appreciative of the assistance.

68. The jurisdiction, and in particular cases arising from the Class 4 jurisdiction, have been at the cutting edge of the development of legal principle in administrative law and statutory interpretation. As I have said, even when particular decisions have provoked an immediate legislative reaction to change the result of the particular case, that case and the propositions for which it stands will continue to have a resonance both at first instance and in decisions of the Court of Appeal from cases decided in the Land and Environment Court in years to come.

# Appendix

## CLASS 1

### Stankovic v The Hills Shire Council and Namul Pty Ltd [2017] NSWCA 49

Payne JA; White JA

16 March 2017

PROCEDURE – application for leave to appeal – application to join appeal proceedings in the Land and Environment Court refused – whether leave to appeal that decision should be granted – applicant claimed that he was the lawful owner of the land the subject of the proceedings in the Land and Environment Court – issues raised by applicant finally determined in earlier proceedings – no question of principle – leave refused

### Woolworths Limited v Randwick City Council [2017] NSWCA 179

Leeming JA; Payne JA; Preston CJ of LEC

25 July 2017

DEVELOPMENT – proposed development of existing building for shop – precondition to grant of consent to development of shop – whether building designed or constructed for purpose of "commercial premises" – "commercial premises" includes "retail premises" – misdirection to ask whether current use of building is for registered club – misdirection to ask whether registered club can be "commercial premises" – whether building designed or constructed for "retail premises" – misdirection to require retail sale "directly to the public" – error not to hold on facts found that existing building designed or constructed for retail premises

### Qube Holdings Ltd v Residents Against Intermodal Development Moorebank Inc [2017] NSWCA 250

Macfarlan JA; Meagher JA; Payne JA

09 October 2017

VOLUNTARY ASSOCIATIONS – Associations Incorporation Act 2009 (NSW) s 6(2)(b) and Schedule 2 – meaning of "unincorporated body" – whether an "unincorporated body" must have a constitution or set of rules making provision for membership and voting, and a list or register of members – description of unincorporated bodies given in Kibby v Registrar of Titles [1999] 1 VR 861 applied VOLUNTARY ASSOCIATIONS – Associations Incorporation Act 2009 (NSW) s 39 – "special resolution" – whether the procedure for passing a special resolution prescribed in s 39 is applicable to an unincorporated body not yet registered under the Associations Incorporation Act – meaning to be given to "special resolution" as it is used in s 6(2)(b) of the Act

## CLASS 2

### Tanious v Georges River Council [2017] NSWCA 204

Leeming JA; White JA

16 August 2017

LEAVE – Leave sought to appeal against a decision of the Land and Environment Court on a question of law – Council orders regulating the keeping of poultry on residential premises by council – Concession that Japanese quail is "poultry" – No question of law – No question warranting grant of leave – Leave refused

## CLASS 3

### Dial A Dump Industries Pty Ltd v Roads and Maritime Services [2017] NSWCA 73

Beazley P; McColl JA; Leeming JA

06 April 2017

REAL PROPERTY – compulsory acquisition of land – compensation – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 4 – whether the appellant had an "interest" in the relevant land as defined in s 4 – whether legal interest in land must be a registered interest – whether legal interest arises from exclusive possession – nature of the legal interest arising from possession – principle in Perry v Clissold – whether appellant enjoyed exclusive possession – indicia of exclusive possession – distinction between occupation and possession REAL PROPERTY – compulsory acquisition of land – compensation – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 4 – whether the appellant had an "interest" in the relevant land as defined in s 4 – whether equitable interest – nature of interest of beneficiary of a trust – interest as a beneficiary having right to seek due administration – interest as beneficiary having right to possession REAL PROPERTY – compulsory acquisition of land – compensation – appellant had permission to use and occupy land and carry out certain activities on it – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 4 – meaning of "right … power or privilege over, or in connection with" land within para (b) of the definition of "interest in land" in s 4 – whether interest must be proprietary or quasi-proprietary EQUITY – trusts – nature of interest of a beneficiary having right to seek due administration of a trust – interest as a beneficiary in possession of land – principle in Keech v Sandford – whether lease held on trust for appellant in circumstances where declaration of trust had been made with respect to earlier lease and no declaration made with respect to later lease AGENCY – whether primary judge had made a finding of agency – when an agency relationship will arise – resolution provided that appellant company was "to act on behalf of" other companies in certain respects referred to in document – whether appellant company carried out activities as an agent

APPEAL – principles regarding when a new issue may be raised on appeal – issue in question not raised directly before primary judge but said to be "in play" – whether case would have been conducted differently if point had been raised at first instance

## Bligh Consulting Pty Ltd v Ausgrid [2017] NSWCA 95

McColl JA; Basten JA; Sackville AJA

11 May 2017

COMPULSORY ACQUISITION – acquisition of crane swing, rock anchor and scaffolding easements – whether primary Judge erred in rejecting injurious affection claim under s 55(f) of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (Just Terms Act) – whether primary Judge failed to apply "before" and "after" test in assessing compensation – whether primary Judge applied the wrong test in determining whether a tenant would vacate the servient tenement in consequence of the proposal to carry out a public purpose rock anchor easement – whether s 62 of the Just Terms Act applies to a rock anchor easement

# CLASS 4

## Woollahra Municipal Council v Minister for Local Government [2016] NSWCA 380

Bathurst CJ; Beazley P; Ward JA

22 December 2016

STATUTORY CONSTRUCTION – Local Government Act 1993 (NSW), s 218E – proposals to alter the boundaries of or amalgamate local government areas – meaning of "proposal" – whether proposal document which contained information and discussion or proposal to amalgamate constituted "proposal" STATUTORY CONSTRUCTION – referral of proposal by Minister to Departmental Chief Executive for examination and report pursuant to Local Government Act 1993 (NSW), s 218F – ss 218F(2) and 263(2A) require that inquiry be held for the purpose of function of examination and report in relation to a proposal for the amalgamation of two or more areas –delegate of Department Chief Executive conducted consultations with public but did not actively ask questions – delegate met with accounting firm conducting analysis and modelling privately – whether statutory requirement of "inquiry" met – meaning of "inquiry" – role of "inquiry" in exercise of functions of examination and report by Delegate of Department Chief Executive ADMINISTRATIVE LAW – examination and report on proposal for local government amalgamation by delegate of Departmental Chief Executive pursuant to Local Government Act 1993 (NSW), s 218F – mandatory relevant considerations pursuant to ss 218F(2) and 263(3)(a)-(f) – whether delegate required to have regard to financial advantages or disadvantages of proposal for residents and ratepayers of individual local government areas concerned – whether delegate conducted examination into financial advantages or disadvantages PROCEDURAL FAIRNESS – examination and report on proposal for local government amalgamation by delegate of Departmental Chief Executive pursuant to Local Government Act 1993 (NSW), s 218F –

extent of obligation to afford procedural fairness – whether delegate under a duty to notify affected local government council of key material upon which it proposed to rely in preparation of report – no absence or loss of opportunity to make submissions in relation to material PROCEDURAL FAIRNESS – review and comment by Boundaries Commission following referral of proposal for local government amalgamation to delegate of Departmental Chief Executive for examination and report pursuant to Local Government Act 1993 (NSW), s 218F – extent of obligation to afford procedural fairness – whether Boundaries Commission's required to afford affected local government council reasonable opportunity to respond to delegate's report ADMINISTRATIVE LAW – proposal for amalgamation of local government areas under Local Government Act 1993 (NSW), s 218E – accounting firm provided public statements regarding Minister's proposal for amalgamation of three local government areas – statements represented that accounting firm had conducted "independent analysis and modelling" – whether accounting firm independent – whether statements misleading – whether misleading statements impugned statutory process under Local Government Act

## People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd [2017] NSWCA 46; 220 LGERA 181

Meagher JA; Ward JA; Payne JA

14 March 2017

ENVIRONMENT AND PLANNING – Development control – when consent required – validity of approval – whether development consent not required due to cl 6 of the State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW) – whether treatment on one petroleum title of produced water generated on another title is use for the purposes of "petroleum exploration" ENVIRONMENT AND PLANNING – Development control – classification of uses – whether development was for the purpose of petroleum exploration – whether development properly characterised as a waste disposal facility or resource recovery facility ENVIRONMENT AND PLANNING – environmental planning – planning schemes and instruments – relationship between Petroleum (Onshore) Act 1991 (NSW) and State Environment Planning Policy (Infrastructure) 2007 (NSW) and State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW)

## Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government [2017] NSWCA 54; 220 LGERA 386

Basten JA; Macfarlan JA; Sackville AJA

27 March 2017

JUDICIAL REVIEW – Minister's proposal to merge part of a local government area (LGA) with the whole of another LGA – Merger Proposal referred to a Delegate of the Chief Executive for examination and report – whether the Delegate was required to consider the advantages and disadvantages of the Merger Proposal insofar as it contemplated the excision of part of one LGA – whether the Delegate misapprehended his functions under s 263(1) and (3) of the Local Government Act 1993 (NSW) – whether relief futile – whether

Delegate carried out the statutory task of examination and report in relation to the Merger Proposal – whether constructive failure to fulfil the statutory function because the Delegate lacked access to documents over which the Department claimed public interest immunity PUBLIC INTEREST IMMUNITY – whether the primary Judge was correct to uphold a claim of public interest immunity to the production of documents recording analyses of the financial advantages and disadvantages of the Merger Proposal – documents prepared by consultants but submitted to Cabinet – whether public interest in the production of the documents outweighed the public interest in preserving secrecy and confidentiality PROCEDURAL FAIRNESS – whether an objecting Council denied procedural fairness because it was refused access to documents relevant to the Delegate's task STATUTORY INTERPRETATION – whether reasonable public notice of an inquiry given as required by s 263(2B) of the Local Government Act 1919 (NSW)

## Cheetham v Goulburn Motorcycle Club Inc (2017) 223 LGERA 43; [2017] NSWCA 83

McColl JA; Basten JA; Sackville AJA

27 April 2017

JUDICIAL REVIEW – planning consent – whether proposed development prohibited under local environmental plan – whether characterisation of proposal a jurisdictional fact to be determined by the court

PLANNING LAW – development consent granted for a "motorcycle facility" – whether the development consent was for a prohibited use under Goulburn Mulwaree Local Environmental Plan 2009 – whether consent was for a "recreation facility (major)" – extent to which reference can be made to documents referred to in conditions of consent in construing the consent.

STATUTORY INTERPRETATION – definition in statutory instrument – how to construe "means" and "includes" – reliance on factual context

## Bay Simmer Investments Pty Ltd v State of New South Wales [2017] NSWCA 135

Basten JA; Leeming JA; Sackville AJA

15 June 2017

ENVIRONMENT AND PLANNING – Environmental Planning and Assessment Act 1979 (NSW) – whether proposal the subject of development application a "staged development application" under s 83B – whether s 79C applied to application – whether consent authority required to consider "construction-related impacts" of development – whether development consent valid

## People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd (No 2) [2017] NSWCA 157

Meagher JA; Ward JA; Payne JA

28 June 2017

PRACTICE AND PROCEDURE – costs – whether court should depart from general rule that costs follow the event – whether proceedings should be characterised as public interest litigation and, if so, whether there is something more that warrants departure from general rule

## Turnbull v Chief Executive of the Office of Environment and Heritage [2017] NSWCA 161

Basten JA; Meagher JA; Sackville AJA

04 July 2017

ENVIRONMENT AND PLANNING – clearing of native vegetation in contravention of s 12 of the Native Vegetation Act 2003 (NSW) – contravention admitted but not extent of clearing – whether "groundcover" had been cleared – whether clearing must be on each and every part of the land – whether remedial orders appropriate

## Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Counil v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government [2017] NSWCA 188

Basten JA; Macfarlan JA; Sackville AJA

31 July 2017

ADMINISTRATIVE LAW – examination of proposal to amalgamate local government areas – mandatory considerations defined by statute – procedural fairness – non-disclosure of documents – whether undisclosed underlying report part of adverse material – whether undisclosed report significant – public interest immunity claimed – confidentiality claimed ADMINISTRATIVE LAW – examination of proposal to amalgamate local government areas – mandatory considerations defined by statute – constructive failure to exercise function – whether undisclosed underlying report precluded proper examination of mandatory consideration LOCAL GOVERNMENT – proposal to amalgamate local government areas – validity of proposal –delegate to examine and report on proposal – failure of Minister to provide access to documents detailing financial advantages of amalgamations – reasonable notice of inquiry – conduct of inquiry – consideration of financial advantages and disadvantages of proposed amalgamation JUDGMENTS AND ORDERS – finding of invalidity of examination and report under Local Government Act, s 218F – remittal to same delegate – whether appropriate for Court to order that further examination and report not be undertaken by same delegate WORDS AND PHRASES – "contiguous" – whether local government areas separated by river "a single area of contiguous land" – Local Government Act s 204(3) – effect of bridge spanning river

## 4nature Incorporated v Centennial Springvale Pty Ltd [2017] NSWCA 191

Beazley P; Basten JA; Leeming JA

02 August 2017

ADMINISTRATIVE LAW – challenge to validity of State significant development consent for proposed extension of Springvale coal mine – consent authority's satisfaction that development would have "a neutral or beneficial effect" on water quality required – whether consent authority's approach valid ENVIRONMENT AND PLANNING – challenge to validity of State significant development consent for proposed extension of Springvale coal mine – development must have "a neutral or beneficial effect" on water quality under State Environment Planning Policy (Sydney Drinking Water Catchment) 2011 (NSW) cl 10(1) – nature of comparison required STATUTORY INTERPRETATION – delegated legislation – no general principle requiring laxity or flexibility in construction – adherence to basic principles of statutory construction – focus on text and context

## Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government (No 2) [2017] NSWCA 255

Basten JA, Macfarlan JA, Sackville AJA

12 October 2017

COSTS – application to reopen costs orders – whether alleged failure of appeal court to deal with two grounds of appeal justifies reopening costs orders made in relation to trial and appeal proceedings

JUDGMENTS AND ORDERS – application to reopen pursuant to Uniform Civil Procedure Rules 2005 (NSW), rr 36.16, 36.17 – whether judgment failed to address two appeal grounds – whether failure sufficient to warrant reopening in interests of justice – whether circumstances limiting practical consequences of reopening to allocation of costs affects exercise of discretion to reopen

## Shellharbour City Council v Minister for Local Government [2017] NSWCA 256

Basten JA, Macfarlan JA, Sackville AJA

12 October 2017

PRACTICE AND PROCEDURE – civil – costs – challenge to validity of proposed amalgamation of local government areas – challenge dismissed at trial – respondent abandons proposal – appeal discontinued – whether success inevitable – whether respondent's conduct unreasonable – whether respondent should pay costs of trial – whether respondent should pay costs of appeal

## Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement)

McColl JA; Leeming JA; Payne JA

20 October 2017

ENVIRONMENT AND PLANNING – construction of development consent – development consent approved 90-lot subdivision – whether condition 16 of development consent required construction of reinforced concrete pipe

ENVIRONMENT AND PLANNING – construction of development consent – whether a document can be retrospectively incorporated into a development consent by "necessary implication"

# CLASS 6

## Kovacevic v Queanbeyan City Council [2016] NSWCA 346

Beazley ACJ; Leeming JA; Payne JA

13 December 2016

APPEALS – appeal by prosecutor to Land and Environment Court from dismissal in Local Court of summary proceedings with respect to an environmental offence pursuant to Crimes (Appeal and Review) Act 2001 (NSW), s 42(2B)(b) – meaning of the definition of "prosecutor" as contained in Crimes (Appeal and Review) Act, s 3(1) – relevance of definition of "prosecutor" in Criminal Procedure Act 1986 (NSW), s 3(1) – whether Council the "prosecutor" for the purposes of bringing an appeal LAND & ENVIRONMENT – offence against s 125(1) of Environmental Planning and Assessment Act 1979 (NSW) – failure to cease using premises as a "transport depot" as defined in the Queanbeyan Local Environment Plan 1998 – meaning of the term "transport deport" – whether parking of vehicles used in connection with a business, industry or shop must involve the transport of something