EPLA CONFERENCE – COURT OF APPEAL UPDATE

The Hon Justice A S Bell*

President, New South Wales Court of Appeal

25 October 2019

Introduction

1 Between 1 October 2018 and 22 October 2019, 34 appeals from the Land and Environment Court were determined by the Court of Appeal and the Court of Criminal Appeal, 30 of which were substantive decisions. This is a noticeable increase from the number of substantive decisions determined in previous years: 13 between 2017 and 2018[1], 20 between 2016 and 2017[2], and 16 in the Court of Appeal alone between 2015 and 2016[3].

2 The substantive decisions of the Court of Appeal and the Court of Criminal Appeal may be summarised as follows:

Jurisdiction	Number	Appeal allowed	Appeal dismissed	Answers given
Class 1	5	2[4]	3[5]	0
Class 3	8	3[6]	5[7]	0

* I am grateful for the assistance of Ms Winnie Liu in the preparation of this paper.

[1] A J Meagher, "EPLA Conference – Court of Appeal Update" (26 October 2018).

[2] M J Leeming, "Land and Environment Court Seminar – Appeals from the Land and Environment Court" (3 August 2016).

[3] T Payne, "Recent appeals from the Land and Environment Court EPLA Conference" (20 October 2017).

[4] *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245; *NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd* [2019] NSWCA 182.

[5] *AMT Planning Consultants Pty Ltd t/as Coastplan Consulting v Central Coast Council* [2018] NSWCA 289; *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28; *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

[6] *Melino v Roads and Maritime Services* [2018] NSWCA 251; *Bayside Council v Karimbla Properties (No 3) Pty Ltd* [2018] NSWCA 257; *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41.

[7] *Moloney v Roads and Maritime Services* [2018] NSWCA 252; *Olefines Pty Ltd v Valuer-General of New South Wales* [2018] NSWCA 265; *Community Association DP270447 v ATB Morton Pty Ltd* [2019] NSWCA 83; *G Capital Corporation Pty Ltd v Roads and Maritime Services* [2019] NSWCA 234; *Barkat v Roads and Maritime Services* [2019] NSWCA 240.

Jurisdiction	Number	Appeal allowed	Appeal dismissed	Answers given
Class 4	12	5[8]	7[9]	0
Class 5	3	1[10]	1[11]	1[12]
Class 6	2	0	0	2[13]
Total	**30**	**11**	**16**	**3**

3 It is necessary to make a few observations about the methodology. First, procedural and interlocutory decisions are excluded from the table above but can be found in the appendix to this paper. Secondly, the appeals "allowed" include appeals allowed in part. Thirdly, cross-appeals have not been counted separately to avoid double counting.

4 Given the higher than usual number of appeals from the Land and Environment Court over the last 12 months, this paper will consider in detail only a select number of appeal decisions in each Class of jurisdiction focussing on those appeals which were allowed.

General themes

5 A number of general themes emerge from an analysis of the substantive decisions of the Court of Appeal and Court of Criminal Appeal over the last 12 months. First, the

[8] *Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* [2018] NSWCA 240; *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2018] NSWCA 304; *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26; *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* [2019] NSWCA 141; *Barrak v City of Parramatta Council* [2019] NSWCA 213.

[9] *Cmunt v Snowy Monaro Regional Council* [2018] NSWCA 237; *Fagin v Australian Leisure and Hospitality Group Pty Limited* [2018] NSWCA 273; *Henroth Investments Pty Ltd v Sydney North Planning Panel* [2019] NSWCA 68; *Local Democracy Matters Incorporated v Infrastructure NSW* [2019] NSWCA 65; *Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council* [2019] NSWCA 147; *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2019] NSWCA 216; *DeBattista v Minister for Planning and Environment* [2019] NSWCA 237.

[10] *Port Macquarie-Hastings Council v Mansfield* [2019] NSWCCA 7.

[11] *Turnbull v Chief Executive of the Office of Environment and Heritage* [2018] NSWCCA 229.

[12] *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2019] NSWCCA 174.

[13] *Moseley v Queanbeyan-Palerang Regional Council* [2019] NSWCCA 42; *Cmunt, Jiri v New South Wales Commissioner of Police; Cmunt, Marie v New South Wales Commissioner of Police* [2019] NSWCCA 177.

overall rate of appeals from the Land and Environment Court remains low despite an increase in the number of appeals as compared to previous years. In 2018, there were 1,306 disposals[14] in the Land and Environment Court broken down as: Class 1 (883), Class 2 (101), Class 3 (106), Class 4 (129), Class 5 (58), Classes 6 and 7 (25) and Class 8 (4). The percentage of cases that is the subject of appeal to the Court of Appeal and Court of Criminal Appeal from the Land and Environment Court (allowing for methodological inaccuracies in comparing different data sets) is around 2%.

6 Secondly, appeals from the Land and Environment Court, although an important component of the work of the Court of Appeal and the Court of Criminal Appeal, constitute less than 10% of the Court Appeal's workload and around 1% of the Court of Criminal Appeal's workload. The "Supreme Court of New South Wales Statistics (as at 26 June 2019)" records that in the calendar year 2018, there were 361 disposals in the Court of Appeal and 366 disposals in the Court of Criminal Appeal.

7 Thirdly, consistent with previous years, appeals from proceedings in the Class 4 jurisdiction accounted for nearly half of the appeals from the Land and Environment Court. Parties to Class 4 proceedings may appeal as of right pursuant to s 58 of the *Land and Environment Court Act 1979* (NSW).[15] Appeals from Classes 1, 2 and 3 proceedings are limited to questions of law pursuant to s 57 of the *Land and Environment Court Act*. More than half of the Class 4 appeals in the last year were dismissed.

8 Fourthly, it is rare for special leave to the High Court to be sought in respect of decisions emanating from the Land and Environment Court via the Court of Appeal and, over the last 12 months, no special leave has been granted in respect of such decisions. Special leave was sought and refused in *Bayside Council v Karimbla Properties (No 3) Pty Ltd* [2018] NSWCA 257, *Muriniti v King* [2019] NSWCA 153 and *Cmunt v Snowy Monaro Regional Council* [2018] NSWCA 237. A special leave application has been filed in *Barrak v City of Parramatta Council* [2019] NSWCA 213 which is awaiting determination.

9 Finally, the Court of Appeal and the Court of Criminal Appeal have been able to list and resolve matters expeditiously. This is important and reflects well on the industry

[14] Disposals comprise pre-trial disposals and disposals by hearing, see the Land and Environment Court of New South Wales, *Annual Review 2018*, pp 29-30.
[15] Except for interlocutory orders, orders made by consent and orders as to costs.

of my colleagues on the Court of Appeal. Thus, in calendar year 2019, the average number of days between hearing and the decision date for appeals from the Land and Environment Court to the Court of Appeal has been 41 days, and a number of these appeals were of 2 or 3 days in duration.

10 The Court of Appeal has also been able to accommodate expedited hearings at the request of the parties without the need to demonstrate special circumstances. An example of an expedited hearing that took place in early 2019 and which will be familiar to most of you was the decision in *Local Democracy Matters Incorporated v Infrastructure NSW* [2019] NSWCA 65 which concerned the demolition and rebuild of the Sydney Football Stadium at Moore Park. The matter required expeditious disposal given the imminence of the 2019 New South Wales state election which took place on 23 March 2019, and the fact that the stadium had become the subject of political argument.

11 The community association, Local Democracy Matters Inc, and Waverley Council sought judicial review of the Minister for Planning's decision to grant consent to a concept development application for the Stadium.

12 Proceedings were commenced in the Land and Environment Court on 5 February 2019 in its Class 4 jurisdiction. On 6 March 2019, with considerable and impressive industry, Justice Nicola Pain delivered her judgment dismissing the application. A notice of appeal was filed later that day. The appeal was heard on an expedited basis 9 days later on 15 March 2019 (including an early morning view) and the Court made orders that same day dismissing the appeal. Reasons were delivered by the Court of Appeal on 12 April 2019.

13 The three grounds of appeal in the matter were substantially the same as the arguments raised before the primary judge. The Court of Appeal upheld the primary judge's findings that (1) the minimum public exhibition period of the Concept DA as required by statute was 28 days not 30 days, (2) the Minister did form the requisite opinion as to design excellence of the concept proposal to the extent that such considerations were relevant to the Concept DA and (3) the Minister did comply with cl 7 of the State Environment Planning Policy No 55 ("SEPP 55") with respect to the need to remediate contaminated land to the extent that such actions were required for the Concept DA.

14 I now turn to Class 1 where appeals are limited to questions of law.

Class 1 jurisdiction

15 Over the last twelve months, there were five appeals from decisions of the Land and Environment Court exercising its Class 1 Jurisdiction. Three of the five appeals were dismissed. An appeal was allowed in *NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd* [2019] NSWCA 182 on a narrow basis. In *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, consent to a development application was quashed.

NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd [2019] NSWCA 182 ("Rabbits Eat Lettuce")

16 *Rabbits Eat Lettuce* concerned the safety of a music festival known as the "Bohemian Beatfreaks Event". Richmond Valley Council granted Rabbits Eat Lettuce Pty Ltd ("Rabbits Eat Lettuce") consent to host two festivals a year on land in Kippenduff with temporary camping for no more than 3,000 people subject to certain conditions. Relevantly, condition 7 provided that "An event must not proceed if either New South Wales Police, New South Wales Rural Fire Service or Richmond Valley Council advises it is unsafe to do so."

17 In late 2018, the Commissioner of Police withdrew support for the festival prompting Rabbits Eat Lettuce to commence class 1 proceedings in the Land and Environment Court seeking an order that the event was not unsafe to proceed. The Commissioner of Police objected to the Land and Environment Court's jurisdiction to hear the appeal on the basis that there was no right of appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act") which replaced s 97 of that Act on 1 March 2018. The primary judge found that there were significant differences between s 8.7 and the former s 97 such that the broader appeal rights under the new section permitted Rabbits Eat Lettuce to bring its appeal to the Land and Environment Court

18 The Commissioner of Police on appeal advanced a number of arguments including that condition 7 was not a condition that required anything to be carried out "to the satisfaction of the consent authority or other person" for the purposes of subs 8.7(2). Rather, it was put that condition 7 was met when any one or more of the named

consent authority determined the festival to be unsafe. For that reason, it was argued that the condition fell outside of s 8.7.

19 The Court of Appeal allowed the appeal on the narrow ground that s 8.7 did not apply to Condition 7 of the development consent and thus, as a matter of jurisdiction, no appeal lay from the Commissioner of Police's decision to the Land and Environment Court. Justice Leeming who delivered the principal judgment noted that no quashing of the Commissioner of Police's decision to withdraw support for the festival had been sought by way of judicial review, confirming that what had been sought by Rabbits Eat Lettuce was merits review by the court standing in the shoes of the Commissioner of Police. His Honour said at [46] that he considered that the Commissioner of Police's decision amounted to an exercise of public power that would have been susceptible to judicial review. This, however, was not the route taken by the appellant.

Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245 ("*Al Maha v Huajun*")

20 In *Al Maha v Huajun*, the Court of Appeal set aside a development consent granted by a Commissioner of the Land and Environment Court. It must be noted from the outset that Al Maha Pty Ltd ("Al Maha") was not a party to the Land and Environment Court proceedings and did not have a right of appeal. Instead, Al Maha sought judicial review of the Commissioner's decision to grant development consent pursuant to s 69 of the *Supreme Court Act* 1970 (NSW). Al Maha owned land on Leicester Street, Strathfield. Huajun Investments Pty Ltd ("Huajun") owned the adjoining land on which it proposed to develop a residential flat building. The City of Canada Bay Council refused the development application causing Huajun to appeal to the Land and Environment Court. Two conciliation conferences were held. After the second conciliation conference, the parties reached agreement as to the terms of the orders sought which included granting development consent to the further amended development application subject to conditions agreed between the parties. The Commissioner made orders to that effect. Al Maha complained that the development consent permitted Huajun to construct a driveway over Al Maha's land without its consent. Huajun attempted to remedy the situation by making an application to amend the Commissioner's decision under the slip rule pursuant to the Uniform Civil Procedure Rules 2005 (NSW) r 36.17 so that the consent did not approve the carrying out of the development on Al Maha's land.

21 The Court of Appeal quashed the Commissioner's orders on two grounds. First, the Commissioner's decision was not made in the proper exercise of the Court's functions as Al Maha did not consent to the construction over its land, an issue that the slip rule could not cure. Secondly, the height of Huajun's proposed development exceeded the height control imposed by Canada Bay Local Environmental Plan 2013. While cl 4.6 of the LEP permits a consent authority to grant consent despite non-conformity with a development standard, the consent authority is required to be satisfied that certain conditions have been met before granting consent. The Commissioner's reasons, which were limited and did not address any findings of fact, did not indicate that she had been satisfied of those conditions.

Class 3 jurisdiction

22 The Land and Environment Court's Class 3 jurisdiction involves matters concerned with land tenure, valuation, rating and compensation matters. In the last 12 months, 9 appeals were determined by the Court of Appeal, 8 of which were substantive decisions. Over half of the appeals related to the compulsory acquisition of land and compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("Just Terms Act"). The balance of the appeals comprised matters concerning the valuation of land, the "residential" rate payable by the owner of the land during the period of development and a challenge to orders granting an easement over land. Given the limited right of appeal from Class 3 decisions on questions of law, only three of the eight appeals were allowed.

Road and Maritime Services v United Petroleum Pty Ltd [2019] NSWCA 41 ("*RMS v United Petroleum*")

23 United Petroleum operated a service station and restaurant business on a parcel of land on the Pacific Highway between Woolgoolga and Ballina. It leased the land from related parties on terms that the lease was terminable on one month's notice. The RMS compulsorily acquired the land in 2015. United Petroleum was unable to relocate its business. It sought compensation for loss attributable to disturbance under s 59(f) of the Just Terms Act.

24 Section 59(f) relevantly provided that loss attributable to disturbance of land means "any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition".

25 The primary judge awarded United Petroleum $2 million as the capitalised sum for the loss of the business and $83,000 for the difference in rent that the respondent had to pay to the RMS in the period between compulsory acquisition and vacant possession which was at a higher rate than the rent that it would have otherwise paid to the lessors. The question on appeal was whether s 59(f) extended to compensation for loss of ongoing business profit or for any increase in rent paid to RMS. As Basten JA put it at [15], the question for determination was whether United Petroleum could be compensated under s 59(f) for the loss of opportunity to continue to operate its business on the land which had been acquired.

26 Five judges of the Court of Appeal held that s 59(f) did not allow for compensation for the types of loss suffered and claimed by United Petroleum.

27 Section 59(f) contains various constraints to defining loss as being attributable to disturbance. First, the financial loss needs to be identified as a financial cost "relating to the actual use of the land". Secondly, the loss must be a "direct and natural consequence" of the acquisition. Thirdly, s 59(f) provides for "any *other* financial costs" not "any financial costs". This description was not to undermine the limits on recoverability of financial costs covered in s 59(a)–(e) as that would result in s 59(f) subverting the limitations contained in the earlier paragraphs. In other words, s 59(f) was not to be read in isolation from the other sub-paras of that section all of which were concerned with costs incidental to the loss of the land. Loss of revenue was held to be not aptly described as a financial cost.

28 It was held that loss of future income from a lease terminable on one month's notice was not a loss attributable *to disturbance* because it was not reasonably incurred as a "direct and natural consequence" of the acquisition of an interest in land. Since the lease could be terminated with one month's notice, it could not be said that the interest in land had any value beyond the termination of the lease. To compensate the respondent for the continuing operation of a business unsupported by an interest in land would not fit the description of "loss attributed to disturbance of land" as defined in s 59. At [118]−[119], Sackville AJA said:

> "Since one month's notice was required to terminate the tenancy at will, it is only the loss of one month's profits [that] can fairly be said to be the "direct and natural consequence of the acquisition". I do not consider that the loss of profits in respect of a longer period satisfies the requirements of s 59(f) of the Just Terms Act.
>
> …

> I consider that it is the "financial costs" that must be incurred as a direct and natural result of the acquisition of the tenancy at will. The fact that the tenant at will would not have incurred the losses had the acquisition not taken place does not establish that the claimed losses were a direct and natural consequence of the acquisition. The inquiry needs to go further."

29 With respect to the United Petroleum's payment of rent to RMS, the Court found that the payments were not a direct and natural consequence of the acquisition of the terminable interest in land, but rather the consequence of the respondent choosing to remain in occupation at the agreed fee pursuant to s 34 of the Just Terms Act. It would be inconsistent to read s 59(f) as allowing for the recovery of the amount paid as the occupation fee pursuant to s 34.

Melino v Roads and Maritime Services [2018] NSWCA 251 ("*Melino v RMS*")

30 *Melino v RMS* was another matter concerning the compulsory acquisition of land for the purposes of upgrading the Pacific Highway. The appellants, members of the Melino family, owned farm land for sugar cane production and cattle grazing. There was a dwelling on the acquired land occupied by tenants at the date of acquisition as well as various fixtures relating to the farming operations. The appellant sought compensation pursuant to the Just Terms Act and was awarded market value of the acquired land including fixtures, the decrease in value of the adjoining land and compensation for various disturbance claims. However, the primary judge declined to award compensation for disturbance in respect of (1) replacement costs of the construction of a replacement dwelling, (2) the cost of replacing farm structures, (3) loan establishment fees and interests and (4) an agreed amount for the cost of road works.

31 On appeal, the Court held that the appellants were not entitled to the replacement costs for the construction of a dwelling. In this context, it was relevant that the dwelling was not actually used other than as a rental property. It was held that as the primary judge had already awarded the appellants compensation for the market value of the dwelling, which encapsulated the right to potential profits from renting the property after the date of the acquisition, they were not entitled to replacement costs. As Payne JA put it at [85], "the market value of the acquired land included the capacity of the land to generate a profit in future by renting the dwelling."

32 In relation to the cost of replacing farm structures, it was held that the primary judge erred on a question of law in failing to address the appellant's separate claim. In

relation to the loan establishment fees and interest incurred as a result of the execution of a new mortgage, the evidence showed that the financial costs incurred were not caused by the relocation such that compensation pursuant to ss 59(1)(e) and 59(1)(f) were not available. In relation to the cost of road works, the primary judge awarded compensation for costs based on the evidence before him. The appellants failed to adduce further evidence of additional payments made for the road.

Bayside Council v Karimbla Properties (No 3) Pty Ltd [2018] NSWCA 257 ("*Bayside v Karimbla Properties*")

33 *Bayside v Karimbla Properties* concerned the categorisation of land for the purposes of calculating ordinary rates payable to council. The respondents were members of Meriton Group. Each respondent owned a parcel of land situated in the local government area of the Council of the City of Sydney ("the Council"), Bayside Council and North Sydney Council. It was common ground between the parties that any findings concerning land owned by Karimbla Properties (No 24) Pty Ltd ("Karimbla 24") on O'Dea Avenue, Waterloo, within the Council's local government area, would apply to the other properties and councils.

34 In December 2012, Karimbla 24 lodged a development application with the Council seeking consent to build residential apartments, three retail tenancies and parking. At that time, the land was rated as "business" pursuant to Chapter 15, Part 3 of the *Local Government Act 1993* (NSW) ("Local Government Act"). In May 2013, development consent was granted and later modified for the construction of residential apartments. An occupation certificate was issued in April 2016. In June 2016, Karimbla 24 submitted an application to the Council to have the O'Dea Avenue Land declared as "residential" for the purposes of s 514 of the Local Government Act with retrospective effect from 9 February 2013. The Council determined that the change in categorisation from "business" to "residential" only took effect from the date of Karimbla 24's application on 6 June 2016.

35 Karimbla 24 appealed to the Land and Environment Court seeking orders that the land be declared "residential" and that adjustments be made to the rates paid and payable by Karimbla 24 to the Council. The Land and Environment Court declared that the O'Dea Avenue Land was within the residential rating category from 21 January 2013 when the DA was lodged and ordered the Council to pay Karimbla 24

the sum of $398,952.37 being an adjustment of rates consequential upon that declaration.

36 The Court of Appeal allowed an appeal on the basis that the "dominant use" of land "for residential accommodation" pursuant to s 516(1) of the Local Government Act required *the present use* of the land to be for residential accommodation. McColl JA and Emmett AJA found that the issuing of an occupation certificate indicated that a future intended use for residential accommodation had come sufficiently to fruition to become a *present use* for residential accommodation. White JA disagreed on this point finding that the issue of an occupation certificate did not create a deemed state of occupation. Instead, the commencement of occupation of a building as a residence is an objectively verifiable fact. White JA agreed with the majority that the categorisation of the land as business did not revert to residential until the development was completed and the building occupied as residential accommodation.

37 As noted earlier in this paper, special leave to appeal to the High Court in this matter was refused.[16]

Class 4 jurisdiction

38 Twelve of the twenty-eight appeals from the Land and Environment Court arose from proceedings in Class 4 jurisdiction, of which three appeals were allowed and two appeals were allowed in part.

Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd [2018] NSWCA 240 ("*Hakea v Louisiana Properties*")

39 In *Hakea v Louisiana Properties* a question arose as to whether a lot owner who constructed a road on an adjoining lot without the permission of that lot owner could obtain relief against trespass and breaches of the EPA Act by relying on an easement granted over the adjoining lot owner's land pursuant to s 88B of the *Conveyancing Act 1919* (NSW) and by relying on the adjoining lot owner's development consent which required substantially the same road to be constructed.

[16] *Karimbla Properties (No. 7) Pty Limited v North Sydney Council; Karimbla Properties (No.34) Pty Ltd & Ors v Bayside Council; Karimbla Properties (No.49) Pty Ltd & Ors v Council of the City Of Sydney* (17 April 2019) [2019] HCASL 126.

40 In 2005, Louisiana Properties Pty Ltd ("Louisiana") obtained two related development consents (1) to develop a medical centre and nursing home on land it owned ("the Louisiana Consent") and (2) to subdivide the land. The western part of the land became lot 101 (including a proposed nursing home) ("Subdivision Consent"); the eastern part of the land became lot 102. The Louisiana Consent contained a condition that required Louisiana to build a link road that connected to land owned by Wyong Hospital. In 2005, a plan of subdivision was registered granting the owner of lot 101 a right of access by way of easement over lot 102. Louisiana sold lot 101 to Hakea Holdings Pty Ltd ("Hakea") and retained lot 102. In 2013, Hakea obtained development consent to construct the nursing home on lot 101 ("the Hakea Consent"). A condition of the Hakea Consent was the construction of a means of access to, and egress from, lot 101 other than by the most direct road, as the Council considered that road to be flood prone and subject to a risk of bushfires. Hakea, through its building contractor, built a road across lot 102 to the boundary of the hospital land.

41 Louisiana sought damages from Hakea on the basis that the construction of the road constituted a trespass, and further sought orders that Hakea and its builder remove the road and revegetate the land, pursuant to s 124 of the EPA Act. The primary judge found in favour of Louisiana awarding exemplary damages of $30,000 for the trespass and, after further hearing, ordered removal of the road and revegetation of the land pursuant to s 124 of the EPA Act. The primary judge implicitly found that Hakea had breached s 76A(1)(a) of the EPA Act which prohibits carrying out of development on land without consent where consent is required. At the further hearing, the primary judge allowed Louisiana to adduce fresh evidence that Hakea had breached s 76A(1)(b) of the EPA Act by not constructing the road "in accordance with" the Louisiana Consent. The primary judge also found that the road constituted the erection of a "building" for the purposes of s 81A(2) of the EPA Act which, in conjunction with Louisiana Consent, required a construction certificate to be issued before the road could lawfully be constructed.

42 The Court of Appeal allowed an appeal finding that there was no trespass to land because Hakea could rely on the right of access conferred by the s 88B instrument attached to the Subdivision Consent and, as the successor in title to lot 101, Hakea could rely on the Louisiana Consent insofar as it benefited lot 101. With respect to the question of whether Hakea had breached s 76A(1)(b) of the EPA Act, the Court held that the primary judge erred by relying on the fresh evidence to find breaches of

s 76A(1)(b) when the fresh evidence was adduced solely for the purpose of exercising discretion under s 124. The Court also held that neither the Louisiana Consent nor s 81A(2) of the EPA Act required Hakea to obtain a construction certificate. With respect to the proper construction of s 81A(2) the Court observed that a road is not a "building" for the purposes of that section.

Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141 ("*Stamford v Mulpha*")

43 *Stamford v Mulpha* concerned the proper construction of s 57(1)(e) of the *Heritage Act 1977* (NSW) ("Heritage Act") which prohibits the carrying out of any development "in relation to" the "land" on which a heritage listed building is situated without the approval of the Heritage Council.

44 Stamford Property Services Pty Ltd ("Stamford") owned a parcel of land at the corner of Macquarie and Albert Streets in central Sydney. On that lot stood the well-recognised building known as the "Old Health Department Building" and, adjacent to it, a more modern building that occupied much of the balance of the lot. Stamford applied for development consent to demolish the more modern building and erect a much larger tower in its place preserving the Old Health Department Building under the proposal. Mulpha Australia Ltd ("Mulpha"), which owned land immediately to the south of Stamford's land, objected to the development application on the basis of its heritage impacts.

45 The Heritage Council approved the reuse and refurbishment of the Old Health Department Building subject to conditions. The Council took the view that its role was limited to the Old Health Department Building and thus that it could only provide comments on the proposed tower development on the remaining part of the Lot. The significance of this may be understood in the context of the fact that officers of the Heritage Council (but not the Approvals Committee) had endorsed the following statement:

> "The heritage significance of the Former Heritage Building is inextricably linked to its ability to reflect the status of Macquarie and Bridge Streets as a prestige address for many government institutions, becoming an important component of the precinct. However, this precinct's heritage values would be harmed by the erection of a tower in this low-scale setting."

46 Mulpha commenced proceedings in the Land and Environment Court seeking to prohibit the Central Sydney Planning Committee from determining Stamford's application and to compel the Heritage Council to provide a "lawful decision" on the application for approval under the Heritage Act. The primary judge found that the Heritage Council misdirected itself in finding that it was legally constrained only to consider the listed building. The primary judge found that it was a requirement for the Heritage Council to identify and consider, through a factual and qualitative assessment, whether there was a "relevant nexus" between the listed building and the proposed development in order to determine whether the development is "in relation to" the land for the purposes of s 57(1)(e) of the Heritage Act.

47 The Court of Appeal held that s 57(1)(e) does not require the Heritage Council to make a determination by way of qualitative assessment of whether there is a sufficient "nexus" between the proposed development and the heritage listed item. Leeming JA and Emmett AJA held that the prohibition on carrying out development without heritage approval in s 57(1)(e) of the Heritage Act, properly construed, applies only to the part of the land *on which the heritage listed building is situated*, and not to the whole of the parcel of land on only part of which the listed building had been erected. McCallum JA dissented, finding that the word "land" in s 57(1)(e) means the whole of the cadastral land.

Cando Management and Maintenance Pty Ltd v Cumberland Council [2019] NSWCA 26 ("*Cando v Cumberland Council*")

48 In *Cando v Cumberland Council* an appeal was allowed on the narrow ground that development consent had not lapsed by operation of s 95(4) of the EPA Act. Cando Management and Maintenance Pty Ltd ("Cando") constructed nine partially completed townhouses in Guildford. Cando obtained development consent in 2004 which lapsed on 23 July 2009 unless Cando had physically commenced on the land building, engineering or construction work relating to the building prior to that date. In 2011, the land was rezoned R2 Low Density Residential such that Cando's development of the nine townhouses became prohibited. Cumberland Council contended that Cando had caused the townhouses to be built in egregious disregard of the EPA Act and that none of the work engaged in prior to 23 July 2009 was lawful.

49 In July 2015, the Council sought orders for the demolition of improvements constructed on the land or an injunction restraining Cando from using the premises until that use was authorised by development consent. The Council's primary contention was that Cando had carried out development without consent in breach of s 76B of the EPA Act or, in the alternative, had carried out work not in accordance with the development consent in breach of s 76A(1)(b) of the EPA Act.

50 Cando contended that the development consent had not lapsed by operation of s 95(4) of the EPA Act which prevented consent from lapsing if lawful "construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies" within five years of the grant of consent. Cando pointed to the clearing of shrubs as evidence of construction work undertaken in addition to demolition work, which the parties agreed had not been undertaken lawfully. The Council contended that the clearing of shrubs, like the clearing of trees, was part and parcel of the demolition work.

51 The Court of Appeal disagreed with the primary judge that the clearing of shrubs was part of the demolition work contemplated by the development consent. On that narrow ground, the Court held that the clearing of shrubs was construction work for the purposes of s 95(4) of the EPA Act. Thus the Court found that the development consent had not lapsed and Cando had breached s 76A(1)(b) of the EPA Act rather than s 76B. The Court upheld the orders restraining Cando from using the premises until that use was authorised by development consent and rejected Cando's claim for relief under s 124 of the EPA Act that it be allowed to occupy the premises without an occupation certificate upon completing rectification works.

Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2018] NSWCA 304 ("*Moorebank Recyclers v Tanlane*")

52 *Moorebank Recyclers v Tanlane* concerned the validity of a planning proposal and gateway determination pursuant to ss 55 and 56 of the EPA Act that failed to comply with cl 6 of the SEPP 55.

53 Tanlane Pty Ltd ("Tanlane") owned land along the Georges River which it proposed to develop for residential subdivision and for the construction of a marina. In 2016, Tanlane submitted a planning proposal that involved two proposed amendments to the Liverpool Local Environmental Plan 2008 ("LLEP"): first, an amendment enabling

residential development as an additional permitted use on a proposed marina site zoned RE2 “Private Recreation” and secondly, a rezoning of part of Tanlane’s land from RE2 “Private Recreation” to R3 “Medium Density Residential”. It was common ground that Tanlane’s land was contaminated.

54 In August 2016, Liverpool City Council passed resolutions supporting the development and authorised the planning proposal in amended form to be forwarded to the Greater Sydney Commission for the purposes of a “Gateway determination” pursuant to Part 3 Division 4 of the EPA Act. In March 2017, a delegate of the Commission determined that the planning proposal should proceed subject to certain conditions.

55 Moorebank Recyclers Pty Ltd (“Moorebank Recyclers”), which owned the adjoining land, brought proceedings in the Land and Environment Court contending that the Council resolutions and the Gateway determination failed to comply with cl 6 of the SEPP 55 which required the planning authority to take steps to consider the issue of contamination before forwarding a planning proposal to the Department under s 56 of the EPA Act and were invalid. The primary judge found against Moorebank Recyclers on the basis that at the time of making the Council resolutions and the Gateway decision, cl 6 of the SEPP 55 did not need to be considered. The primary judge also observed that the Council resolutions were not necessarily justiciable and that cl 6 of SEPP 55 would not apply to the part of the planning proposal which sought to enable residential development on Tanlane’s land.

56 Moorebank Recyclers successfully appealed to the Court of Appeal which held that cl 6 of the SEPP 55 must be complied with at the time that a planning proposal is prepared under s 55 of the EPA Act before it is submitted to the Minister under s 56. This construction is supported by the text of cl 6 of the SEPP 55 which requires a planning authority to consider issues of contamination and remediation “in preparing” an environmental planning instrument which can only take place prior to the planning proposal being forwarded to the Minister. The Council, being the public authority responsible for preparing the planning proposal for the purposes of ss 55 and 56 of the EPA Act, was clearly the “planning authority” within the meaning of cl 6 of the SEPP 55. Thus the Council was obliged to comply with cl 6 of the SEPP 55 in preparing the planning proposal. In light of the fact that the Council resolutions were invalid, it followed that the Gateway decision was also invalid.

Court of Criminal Appeal decisions

57 In the last 12 months, the Court of Criminal Appeal determined three appeals from the Land and Environment Court's Class 5 jurisdiction and two appeals from the Court's Class 6 jurisdiction. Two of the appeals were in the form of a stated case pursuant to s 5BA of the *Criminal Appeal Act 1912* (NSW) ("*Criminal Appeal Act*"); one appeal concerned the setting aside of two subpoenas issued by the prosecutor brought under s 5F of the *Criminal Appeal Act*; one appeal against sentence which was dismissed and one appeal was brought as a stated case pursuant to s 5AE(1) of the *Criminal Appeal Act* concerning the interpretation of various provisions of the *Protection of the Environment Operations Act 1997* (NSW) ("POEO Act").

Cmunt, Jiri v New South Wales Commissioner of Police; Cmunt, Marie v New South Wales Commissioner of Police [2019] NSWCCA 177 ("*Cmunt v NSW Commissioner of Police*")

58 In *Cmunt v NSW Commissioner of Police* the Court of Criminal Appeal held that there was no error in striking out an appeal to the Land and Environment Court that was out of time. Mr and Mrs Cmunt were convicted and sentenced in the Local Court for failure to comply with a noise abatement order in contravention of s 277(1)(b) of the *Protection of the Environment Operations Act 1997* (NSW) ("POEO Act"). An "environmental offence" within the meaning of the *Crimes (Appeal and Review) Act 2001* (NSW) may be appealed to the Land and Environment Court within 28 days after sentence has been imposed. The Land and Environment Court may, within 3 months of the relevant order, grant leave to appeal. Mr and Mrs Cmunt, being litigants in person, acted on incorrect advice and appealed to the District Court. The appeal was disposed of on the basis that the District Court did not have jurisdiction to determine the appeal. Mr and Mrs Cmunt later filed summonses in the Land and Environment Court to appeal against the conviction which were out of time.

59 The primary judge concluded that he had no jurisdiction to determine the appeal on the basis that the summonses were filed out of time and that the determination of the District Court was final and dispositive of the appeal. Instead of making orders striking out the summonses, the primary judge submitted a question of law to the Court of Criminal Appeal pursuant to s 5BA(1) of the *Criminal Appeal Act*.

60 Simpson AJA noted that an essential feature of the procedure is that the case stated must contain all of the ultimate facts found that underpin the ultimate conclusion.

Failure to do so may result in the Court declining to answer the question submitted. In the present case, although the facts underlying the decision were not clearly stated, they were also not in dispute. Accordingly, the Court considered the underlying facts and concluded that the primary judge made no error of law in striking out the summonses. Mr and Mrs Cmunt also appealed unsuccessfully against a Class 4 decision of the Land and Environment Court[17] in relation to which special leave to the High Court was refused[18].

Moseley v Queanbeyan-Palerang Regional Council [2019] NSWCCA 42 ("*Moseley*")

61 In *Moseley* the Court of Criminal Appeal determined four questions in the form of a stated case pursuant to s 5BA of the *Criminal Appeal Act*. The appellant, Mr Moseley, had been convicted and fined for developing land without development consent contrary to the Palerang Local Environment Plan 2014 ("PLEP") and ss 76A and 125 of the EPA Act. Mr Moseley had excavated land for a shed, created four stockpiles of materials, constructed a creek crossing, constructed a track from the creek crossing to an area up the hillside, excavated an area for a house site and constructed a dam. Mr Moseley did not dispute that he had developed the land nor that he did not have development consent. Instead, he contended that he had undertaken development work under exculpatory circumstances as permitted by various statutory instruments.

62 The Court of Criminal Appeal rejected Mr Moseley's contention that the development had been carried out for the "purpose" of extensive agriculture which, pursuant to the PLEP, may be undertaken without development consent. The Court found that the appellant's use of land for extensive agriculture was speculative at best and that the appellant's state of mind alone was not sufficient to demonstrate that the "purpose" of the development was for extensive agriculture. The Court was of the view that to exculpate developments without consent on a speculative basis would undermine the whole of the regime of deterrence.

[17] *Cmunt v Snowy Monaro Regional Council* [2018] NSWCA 237.
[18] *Cmunt & Anor v Snowy Monaro Regional Council* [2019] HCASL 325.

Port Macquarie-Hastings Council v Mansfield [2019] NSWCCA 7 ("*Mansfield*")

63 In *Mansfield*, the Council appealed from an interlocutory decision pursuant to s 5F of the *Criminal Appeal Act* in which the primary judge set aside two subpoenas issued by the Council on the basis that they were without a legitimate forensic purpose.

64 In September 2017, Mr Mansfield was charged with two offences of carrying out development in breach of s 76B of the EPA Act and without consent in breach of s 76A of that Act. Almost two years prior to charges being laid, the Council issued two notices pursuant to s 119J of the EPA Act requiring the production of information or records in connection with an investigation purpose. Documents were produced under the notice which enabled the Council to frame two subpoenas that it subsequently issued. Mr Mansfield sought to have the subpoenas set aside on the basis that the s 119J notices had been issued for the impermissible purpose of a criminal prosecution. He argued that since there is no power under the EPA Act to prosecute, any notice issued under s 119J is invalid if it is issued with a view to commencing criminal proceedings. The primary judge upheld Mr Mansfield's principal submission that the s 119J notices were issued unlawfully and set aside the subpoenas.

65 The Court of Criminal Appeal allowed the appeal and found that the EPA Act clearly envisages that investigations into breaches of the EPA Act would result in the information gathered to be used in subsequent criminal proceedings (ss 119F and 119S). Parliament could not have intended the issuing of s 119J notices to be *ultra vires* simply because criminal prosecution would later be contemplated.

Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v MacKenzie [2019] NSWCCA 174 ("*EPA v Grafil*")

66 *EPA v Grafil* concerned the construction and application of s 144(1) of the POEO Act, and various other provisions of the Act and regulations engaged by the offence provision.

67 Grafil Pty Ltd ("Grafil") and its director, Mr Mackenzie, were charged with the offence of using land as a waste facility without lawful authority in contravention of s 144(1) of the POEO Act. Several stockpiles between 24,000 and 44,000 tonne of waste containing asbestos were found on the site. The trial judge found Grafil and Mr Mackenzie not guilty of committing an offence against s 144(1) of the POEO Act. At

the request of the EPA and pursuant to s 5E(1) of the *Criminal Appeal Act*, the trial judge submitted 15 questions of law arising at or in reference to the proceedings.

68 The Court of Criminal Appeal found that the trial judge erred in finding Grafil and Mr Mackenzie not guilty of the offence. The Court said that the stockpiles were "waste" as defined in the POEO Act. The waste was deposited on the land which constituted "waste disposal (application to land)" and waste storage which required a licence. The Court determined that the defendant bears the onus of proving that it had lawful authority to use the land as a waste facility. Whether the waste is asbestos waste does not depend on the nature of the waste or its volume, but that "any waste that contains asbestos" is asbestos waste.

69 Further, the Court found that the trial judge erred in finding that stockpiling of waste materials was ancillary or subordinate to the development consent which permitted sand extraction and related activities such as road construction. Accordingly, Grafil did not have lawful authority to use the land as a waste facility.

70 An anterior dispute arose as to whether the EPA could make a request under s 5AE when it made substantial changes to the request made during the proceedings before the final form was submitted to the Court of Criminal Appeal. The Court determined that the form of questions may change, even substantially, between the first and final forms of the submitted questions. Section 5AE does not limit the number of requests that may be made.

71 The Court also noted that unless a proposed question of law is "so obviously frivolous and baseless that its submission would be an abuse of process", the trial judge is obliged on request by the prosecution to submit a question of law.

APPENDIX
COURT OF APPEAL DECISIONS (1 October 2018 – 22 October 2019)

CLASS 1

No.	Date	Bench	Class	Outcome	Catchwords
Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245					
1.	26 October 2018	Basten JA Leeming JA Preston CJ of LEC	Class 1	Decision quashed	JUDICIAL REVIEW – decision of Land and Environment Court Commissioner – decision to grant consent to development application for residential flat building that contravened height development standard – decision in accordance with parties' agreement reached at conciliation conference – whether Commissioner lacked jurisdiction to make decision – development partly on neighbouring owner's land – whether neighbouring owner's consent was required to development application – whether Commissioner formed the requisite opinions of satisfaction to justify contravention of development standard – whether decision to grant development consent was legally unreasonable – whether conciliation conference was validly constituted CIVIL PROCEDURE – power to amend orders – "slip rule" – Commissioner's decision to amend orders under slip rule – amendments to conditions of consent and approved plans – whether order valid – Uniform Civil Procedure Rules 2005, r 36.17

No.	Date	Bench	Class	Outcome	Catchwords
AMT Planning Consultants Pty Ltd t/as Coastplan Consulting v Central Coast Council [2018] NSWCA 289					
2.	28 November 2018	Basten JA Macfarlan JA Sackville AJA	Class 1	Appeal dismissed	PLANNING LAW – existing use rights – development consents granted in 1980 and early 1983 for use as a caravan park – conditions restricted use of the caravan park to short term accommodation – use as a caravan park prohibited from 5 May 1983 – whether existing use rights as a caravan park limited to short term accommodation – whether conditions can be taken into account in characterising existing use – whether a condition referring to the Council's Caravan Code had an ambulatory operation.
Ku-ring-gai Council v Bunnings Properties Pty Ltd [2019] NSWCA 28					
3.	26 February 2019	Beazley P Meagher JA Preston CJ of LEC	Class 1	Appeal dismissed	APPEAL – appeal against Land and Environment Court judge's decision on questions of law upholding Commissioner's decision – appeal against consent authority's refusal of development application – Commissioner made interim findings, allowed amendment of development application and granted consent to amended development application – whether Commissioner acted outside power – whether Commissioner failed to exercise jurisdiction by not finally disposing of appeal in first judgment – merits review jurisdiction – whether exercise of administrative or judicial power – whether 'amber light approach' outside power

No.	Date	Bench	Class	Outcome	Catchwords
RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130					
4.	6 June 2019	Gleeson JA Payne JA Preston CJ of LEC	Class 1	Appeal dismissed	APPEAL – appeal against Land and Environment Court judge's decision to refuse development application – proposed development contravened height development standard – judge not satisfied cl 4.6 request justified contravention – judge not satisfied development consistent with objectives of standard – whether misdirection as to cl 4.6 and objectives of standard – whether denial of procedural fairness by not giving amber light approach
NSW Commissioner of Police v Rabbits Eat Lettuce Pty Ltd [2019] NSWCA 182					
5.	25 July 2019	Macfarlan JA Leeming JA White JA	Class 1	Appeal allowed	PLANNING AND ENVIRONMENTAL LAW – Land and Environment Court – jurisdiction – condition of consent provided that music festival must not proceed if Commissioner of Police advised it was unsafe – whether Class 1 appeal lay from Commissioner's decision – whether decision concerned an aspect of development required to be carried out to the satisfaction of consent authority or any other person – comparison of (former) s 97 and current s 8.7 of Environmental Planning and Assessment Act 1979 (NSW) – decision did not fall within s 8.7

CLASS 3

No.	Date	Bench	Class	Outcome	Catchwords
Melino v Roads and Maritime Services [2018] NSWCA 251					
6.	2 November 2018	Beazley P Basten JA Payne JA	Class 3	Appeal allowed	LAND AND ENVIRONMENT – compulsory acquisition of land – compensation – compensation awarded for market value – whether claim for disturbance available – relationship between heads of compensation for market value and disturbance – whether costs claimed were or would be reasonably incurred as a direct or natural consequence of acquisition – whether costs claimed related to the actual use of the acquired land – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 55, 59
Moloney v Roads and Maritime Services [2018] NSWCA 252					
7.	2 November 2018	Beazley P Basten JA Payne JA	Class 3	Appeal dismissed	ENVIRONMENT AND PLANNING – acquisition of land – compensation – compensation awarded for market value including loss of amenity to main dwelling on residue land – whether claim for disturbance available for cost of relocation to replacement dwelling on residue land – relationship between heads of compensation for market value and disturbance – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 54, 55, 59 ENVIRONMENT AND PLANNING – acquisition of land – compensation – compensation awarded for market value including right to potential profits from acquired land – whether

No.	Date	Bench	Class	Outcome	Catchwords
					claim for disturbance available for loss of profits from acquired land – relationship between heads of compensation for market value and disturbance – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 54, 55, 59
Olefines Pty Ltd v Valuer-General of New South Wales [2018] NSWCA 265					
8.	12 November 2018	Basten JA Macfarlan JA Leeming JA	Class 3	Appeal dismissed	STATUTORY INTERPRETATION – primacy of text –structure of legislation – construction of provision containing zeugma – no wider context or extrinsic factors to be considered – Stevens v Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193; [2005] HCA 58 applied VALUATION – land value – Valuation of Land Act 1916 (NSW), 6A – construction of, and relationship between, s 6A(1) and s 6A(2) – utility of references to separate "s 6A(1)" and "s 6A(2)" valuations VALUATION – land value – where actual use of land prohibited by zoning but permitted as existing use – contaminated land – whether trial judge erred by disregarding costs of remediation – whether trial judge erred by disregarding location in "blast zone" – whether error to add uplift to amount derived from sales of land of comparable value to account for existing use rights

No.	Date	Bench	Class	Outcome	Catchwords
Bayside Council v Karimbla Properties (No 3) Pty Ltd [2018] NSWCA 257					
9.	14 November 2018	McColl JA White JA Emmett AJA	Class 3	Appeal allowed	LAND AND ENVIRONMENT – categorising rateable land – assessment of the rates payable by the owner of land during the period of development – whether the dominant use of land can be categorised as "for residential accommodation" when the relevant land is being developed for the purpose of the construction of residential apartments – s 516(1)(a) of the Local Government Act 1993 (NSW) considered
Roads and Maritime Services v United Petroleum Pty Ltd [2019] NSWCA 41					
10.	6 March 2019	Basten JA Macfarlan JA Payne JA Sackville AJA Preston CJ of LEC	Class 3	Appeal allowed	LAND LAW – compulsory acquisition – compensation – interest in land acquired terminable on one month's notice – claim for loss attributable to disturbance – termination of business – claim for loss of ongoing profits of business – Health Administration Corporation v George D Angus Pty Ltd [2014] NSWCA 352 not followed LAND LAW – compulsory acquisition – compensation – loss attributable to disturbance – claim for additional rental paid to acquiring authority for period between compulsory acquisition and vacant possession COSTS – compulsory acquisition – claim for compensation – claimant successful at trial – claim rejected on appeal – claim not unreasonable – exception to general rule that costs follow the event – Dillon v Gosford City Council [2011] NSWCA 328; 184

No.	Date	Bench	Class	Outcome	Catchwords
					LGERA 179 applied
Community Association DP270447 v ATB Morton Pty Ltd [2019] NSWCA 83					
11.	18 April 2019	Bell P Leeming JA Payne JA	Class 3	Appeal dismissed	JUDICIAL REVIEW – late application to quash orders of Land and Environment Court granting development consent – substantial unexplained delay – weakness of case sought to be advanced – application to extend time refused PRACTICE – parties – appeal against refusal of development consent – where development contemplated obtaining access across neighbouring land – whether neighbouring landowner a necessary party to appeal – whether Land and Environment Court lacked jurisdiction to impose easement in separate proceedings commenced while appeal was pending – Land and Environment Court Act 1979 (NSW), s 40, considered PRACTICE – parties – whether lot owners of land subject to Community Land Development Act 1989 (NSW) necessary parties to application for easement over Community Association's land – whether other persons with registered easements over the land sought to be burdened by the proposed easement were necessary or proper parties – effect of non-joinder in circumstances where third parties were informed of application and requested not to be joined – UCPR r 6.23 and Land and Environment Court Act 1979 (NSW), s 40(3), considered REAL PROPERTY – easements – power of court to impose

No.	Date	Bench	Class	Outcome	Catchwords
					easement – whether easement reasonably necessary for effective use and development of dominant tenement – whether error of law in formulation or application of test – whether Shi v ABI-K Pty Ltd (2014) 87 NSWLR 568; [2014] NSWCA 293 qualified Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2012] NSWCA 445 – whether error of law in imposing condition upon number of daily truck movements – Conveyancing Act 1919 (NSW), s 88K – Land and Environment Court Act 1979 (NSW), s 40
G Capital Corporation Pty Ltd v Roads and Maritime Services [2019] NSWCA 234					
12.	24 September 2019	Meagher JA Gleeson JA McCallum JA	Class 3	Appeal dismissed	LAND LAW – compulsory acquisition of land – compensation – where applicants entered into contracts for sale of relevant land – where land compulsorily acquired before settlement of those contracts – where applicants objected to amount of compensation for market value – where applicants' primary compensation claim for unpaid purchase price as loss attributable to disturbance under Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 59(1)(f) – where questions directed to whether applicants entitled to any compensation for that loss determined separately – whether there was "actual use of land" by applicants

No.	Date	Bench	Class	Outcome	Catchwords
Barkat v Roads and Maritime Services [2019] NSWCA 240					
13.	11 October 2019	Leeming JA Emmett AJA Simpson AJA	Class 3	Appeal dismissed	LAND LAW – Compulsory acquisition of land – Compensation – Objection to amount of compensation APPEALS – Right of appeal conferred by s 57 of the Land and Environment Court Act 1979 (NSW) limited to questions of law – Whether adjustments made by primary judge when considering comparable sale constitute errors of law – Whether primary judge erred in concluding acquisition of appellants' land was for a purpose intrinsically connected with the draft Parramatta Road Urban Transformation Strategy (PRUTS) – Whether primary judge erred in disregarding prospect of rezoning the appellants' land apart from the draft PRUTS APPEALS – General principles – Admission of fresh evidence
Croghan v Blacktown City Council [2019] NSWCA 248					
14.	15 October 2019	Meagher JA McCallum JA Simpson AJA	Class 3	Appeal allowed	COSTS – party/party – exceptions to general rule that costs follow the event – Land and Environment Court – Class 3 compensation proceedings – where UCPR r 42.1 does not apply and offer of compromise rejected and judgment obtained for less than amount of offer – application of UCPR r 42.15(2) – principles relevant to exercise of discretion to "order otherwise" – whether primary judge erred in applying those principles ENVIRONMENT AND PLANNING – Land and Environment Court – practice and procedure – costs –Class 3 compensation

No.	Date	Bench	Class	Outcome	Catchwords
					proceedings – where presumption that costs follow the event does not apply – whether primary judge erred in applying UCPR r 42.15

CLASS 4

No.	Date	Bench	Class	Outcome	Catchwords
Cmunt v Snowy Monaro Regional Council [2018] NSWCA 237					
15.	22 October 2018	Basten JA Leeming JA Emmett AJA	Class 4	Appeal dismissed	LAND & ENVIRONMENT – where respondent issued appellants with notice preventing appellants from keeping more than two dogs on property – where respondent issued appellants with orders requiring removal of certain structures and advertisements – where respondent brought proceedings against appellants for failure to comply with notice and orders – where primary judge ordered compliance within 60 days – where appellants appealed primary judge's decision – whether respondent had jurisdiction to issue notice and orders – whether respondent had standing to bring enforcement proceedings – whether evidence before primary judge supported the respondent's claims – whether primary judge failed to consider appellants' evidence

No.	Date	Bench	Class	Outcome	Catchwords
Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd [2018] NSWCA 240					
16.	24 October 2018	Basten JA Meagher JA Preston CJ of LEC	Class 4	Appeal allowed	ENVIRONMENT AND PLANNING – consent – owner of lot constructed road on adjoining lot – owner of adjoining lot sought relief for trespass and breaches of Environmental Planning and Assessment Act 1979 (NSW) – whether road constructed without development consent – whether road constructed otherwise than in accordance with development consent – whether entry onto land for purpose of construction authorised by general right of access – Environmental Planning and Assessment Act 1979 (NSW), ss 76A(1)(a), 76A(1)(b), 124. ENVIRONMENT AND PLANNING – erection of buildings – whether roadway following natural lie of land a "building" – whether construction certificate required – Environmental Planning and Assessment Act 1979 (NSW), ss 4, 81A(2). LAND LAW – easements – section 88B instruments – right of access – description of "right of access" in s 88B instrument did not include right to construct trafficable surface – whether instrument's express terms varied statutory short form meaning of "right of access" – whether construction a trespass – Environmental Planning and Assessment Act 1979 (NSW), Sch 8, Pt 14. STATUTORY INTERPRETATION – contextual construction – use of dictionaries

No.	Date	Bench	Class	Outcome	Catchwords
Fagin v Australian Leisure and Hospitality Group Pty Limited [2018] NSWCA 273					
17.	16 November 2018	McColl JA Meagher JA Sackville AJA	Class 4	Appeal dismissed	ENVIRONMENT AND PLANNING – development consent – where subject matter of consent "Internal alterations, enclosure of rear patio, awning over patio and part of beer garden and use of beer garden" of hotel – where works authorised by consent never undertaken – where appellant sought to enforce consent condition prohibiting the playing of music in hotel beer garden – whether consent lapsed – whether certain works undertaken before consent granted prevented its lapse – whether the "use" of beer garden after consent granted prevented its lapse – whether Court would decline to grant relief on basis that a later consent sufficiently regulated noise
Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd [2018] NSWCA 304					
18.	14 December 2018	Basten JA Payne JA Emmett AJA	Class 4	Appeal allowed	ENVIRONMENT AND PLANNING – Environmental planning instruments – Local environment plan –Liverpool Local Environmental Plan 2008 – Environmental Planning and Assessment Act 1979 (NSW), Pt 3 Div 4 – Planning proposal – State Environmental Planning Policy No 55, cl 6 – whether obligations in State Environmental Planning Policy No 55, cl 6 engaged when planning proposal considered by Local Council – whether obligations in State Environmental Planning Policy No 55, cl 6 engaged when delegate of the Greater Sydney Commission made gateway determination pursuant to

No.	Date	Bench	Class	Outcome	Catchwords
					Environmental Planning and Assessment Act 1979 (NSW), s 56 – whether Local Council failed to comply with obligations in State Environmental Planning Policy No 55, cl 6 – whether delegate of the Greater Sydney Commission failed to comply with obligations in State Environmental Planning Policy No 55, cl 6 – whether compliance with obligations in State Environmental Planning Policy No 55, cl 6 a mandatory pre-condition to valid exercise of power STATUTORY INTERPRETATION – Environmental Planning and Assessment Act 1979 (NSW), Pt 3 Div 4 – State Environmental Planning Policy No 55, subcl 6(1) – whether "preparing" an environmental planning instrument includes preparing a planning proposal – State Environmental Planning Policy No 55, subcl 6(2) – whether proposed amendment to local environmental plan involves "including land" in a "particular zone"
Cando Management and Maintenance Pty Ltd v Cumberland Council [2019] NSWCA 26					
19.	25 February 2019	Beazley P Meagher JA White JA	Class 4	Appeal allowed in part	ENVIRONMENT AND PLANNING — Consent — Duration or lapsing of — Onus of proof for establishing criteria preventing lapse of consent ENVIRONMENT AND PLANNING — Consent — Duration or lapsing of — Whether work consisting of clearing trees and shrubs prevented lapse of consent — Whether work related to building or work on land to which consent applied — Whether work in compliance or not prohibited by consent

No.	Date	Bench	Class	Outcome	Catchwords
					ENVIRONMENT AND PLANNING — Land and Environment Court — Jurisdiction and powers — Discretionary powers — Whether power to make orders extends to sanctioning and authorising breaches of Act
Henroth Investments Pty Ltd v Sydney North Planning Panel [2019] NSWCA 68					
20.	12 April 2019	Basten JA Payne JA Sackville AJA	Class 4	Appeal dismissed	ENVIRONMENT AND PLANNING – environmental planning instruments – local environmental plan –proposal to rezone land – review of rejection by planning panel – power of panel to consider proposal – power of panel to recommend replacement of local council as relevant planning authority – no recommendation made – whether panel obliged to have regard to a local strategy endorsed by the Department – whether panel obliged to consider requirements of Secretary with respect to determination of planning proposal JUDICIAL REVIEW – availability of judicial review – whether power to review an administrative decision not to make recommendation at a preliminary stage of decision-making process – whether failure to take a particular matter into account could have affected legal interests – whether matter not taken into account COSTS – party/party – orders when proceedings involve multiple parties – parties with same interests –whether party inappropriately joined to primary proceeding and appeal should be awarded costs – whether improper for decision-maker to take

No.	Date	Bench	Class	Outcome	Catchwords
					an active role in proceedings where no other party with interest
Local Democracy Matters Incorporated v Infrastructure NSW [2019] NSWCA 65					
21.	12 April 2019	Leeming JA Sackville AJA Emmett AJA	Class 4	Appeal dismissed	ENVIRONMENT AND PLANNING – judicial review of decision by the Minister for Planning to grant consent to a concept development application (Concept DA) to redevelop the Sydney Football Stadium – Concept DA proposal included Stage 1 works involving the demolition of the existing Stadium to ground level – whether the Minister's consent granted in contravention of mandatory requirements of the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) ENVIRONMENT AND PLANNING – whether Concept DA had to be placed on public exhibition for a minimum of 28 days or 30 days – whether the repealed s 89F of the EPA Act providing for a minimum of 30 days was a "relocated" provision within the meaning of cl 4A(2) of the Environmental Planning and Assessment (Savings, Transitional and other Provisions) Regulation 2017 (NSW) – whether applicant discharged its onus of establishing that the Minister failed to form an opinion as to the design excellence of the proposal as required by cl 6.21(3) of the Sydney Local Environmental Plan – whether the applicant discharged the onus of establishing that the Minister failed to comply with cl 7 of SEPP 55, which prevents development on contaminated land unless the Minister is satisfied or certain

No.	Date	Bench	Class	Outcome	Catchwords
					matters
Malifa v Georges River Council [2019] NSWCA 139					
22.	31 May 2019	McCallum JA Emmett AJA	Class 4	Leave to appeal refused	CIVIL PROCEDURE – Court of Appeal – leave to appeal from consent orders – no reason to grant leave established
Stamford Property Services Pty Ltd v Mulpha Australia Ltd [2019] NSWCA 141					
23.	6 June 2019	Leeming JA McCallum JA Emmett AJA	Class 4	Appeal allowed	JUDICIAL REVIEW – Heritage Council – heritage listing of building occupying part of appellant's land – prohibition upon carrying out any development in relation to the land on which the listing building was situated without Heritage Council approval – Heritage Act 1977 (NSW), s 57(1)(e) – appellant applied to redevelop the balance of its land – Heritage Council proceeded on basis that its approval was only required for proposed activities within the listed building – adjoining landowner sought judicial review, claiming Heritage Council had misdirected itself – whether prohibition required a nexus between development and heritage values of listed building – whether prohibition applied to development on any part of the lot on which the listed building was situated – significance of statutory text, context and purpose

No.	Date	Bench	Class	Outcome	Catchwords
Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council [2019] NSWCA 147					
24.	20 June 2019	Basten JA Gleeson JA Preston CJ of LEC	Class 4	Appeal dismissed subject to order 2	ENVIRONMENT AND PLANNING — consent —validity — conditions of consent to be approved by Crown instrumentality — compliance with Environmental Planning and Assessment Act 1979 (NSW), s 91A — whether consent unconditional ENVIRONMENT AND PLANNING — consent —construction — use of development application in construing development consent — use of environmental impact statement in construing development consent — significance of material being included on public register — when document or plan incorporated into consent — where reference necessary to describe development adequately ENVIRONMENT AND PLANNING — consent — breach of conditions of consent — consent conditioned by purpose of activity — whether quarry breached limiting purpose by use other than primarily for railway ballast — whether breach where quarrying outside area specified on plan — interference with amenity of neighbourhood — transport of greatly more than 30% of quarrying products by road ENVIRONMENT AND PLANNING — consent —modification, revocation or review — whether Council consented to change of conditions ENVIRONMENT AND PLANNING — existing use rights — enlargement, expansion or intensification — scope of existing use rights — date at which existing use rights are assessed —

No.	Date	Bench	Class	Outcome	Catchwords
					rights limited for railway undertaking on particular lands — effect of consent not negated by existing use rights ADMINISTRATIVE LAW — judicial review — validity of variation of licence issued by the Environment Protection Authority — jurisdictional facts — conditions under Protection of the Environment Operations Act 1997 (NSW), ss 50 and 58
Muriniti v King [2019] NSWCA 153					
25.	27 June 2019	Gleeson JA Emmett AJA	Class 4	Leave to appeal refused	APPEAL – leave to appeal from costs orders made by the Land and Environment Court – whether leave should be granted under s 58 of the Land and Environment Court Act 1979 (NSW). APPEAL - whether the primary judge applied the correct test for the making of an order under s 99 of the Civil Procedure Act 2005 (NSW) – whether the primary judge based his conclusions on findings that were not open on the evidence – whether there was bias on the part of the primary judge – whether there was a denial of procedural fairness – whether the primary judge erred in considering that he had previously made a relevant finding that there was no evidence of conspiracy.
Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd [2019] NSWCA 216					
26.	3 September 2019	Basten JA Macfarlan JA Leeming JA	Class 4	Appeal dismissed; Appeal as to	ADMINISTRATIVE LAW – jurisdictional facts – whether conditions of project approval specified objective criteria, satisfaction of which was a precondition to the exercise of the

No.	Date	Bench	Class	Outcome	Catchwords
				costs allowed	decision-maker's powers ADMINISTRATIVE LAW – unreasonableness – whether decision-maker's satisfaction with a mining strategy was legally unreasonable – whether decision-maker's view was at least arguable CIVIL PROCEDURE – Court of Appeal – whether leave to appeal required against costs order where there is an appeal as of right against the substantive orders made at first instance - s 58(3)(c) Land and Environment Court Act 1979 (NSW) COSTS – administrative law – whether decision-maker entitled to costs when appears to advance arguments in proceedings between two well-represented litigants – Hardiman (1981) 144 CLR 13; [1980] HCA 13 considered
Barrak v City of Parramatta Council [2019] NSWCA 213					
27.	3 September 2019	Payne JA White JA McCallum JA	Class 4	Appeal allowed in part	LOCAL GOVERNMENT — powers, functions and duties — power of mayor and council to expel councillor for "act of disorder" — whether describing mayor as "clown" during meeting an "act of disorder" — whether power of expulsion validly exercised — whether dispute suitable for adjudication by Land and Environment Court

No.	Date	Bench	Class	Outcome	Catchwords
DeBattista v Minister for Planning and Environment [2019] NSWCA 237					
28.	1 October 2019	White JA McCallum JA Emmett AJA	Class 4	Appeal dismissed	ENVIRONMENT AND PLANNING – building control – council consent and approval – whether the Council's processes in determining whether to amend a Local Environmental Plan are of a political and policy nature only, precluding the Land and Environment Court from intervening – whether there was a reasonable apprehension of bias that should preclude the Council from proceeding with the Planning Proposal for the amendment of the Local Environmental Plan APPEALS – whether the primary judge demonstrated any error in failing to make an order requiring the Council to withdraw the Planning Proposal for the amendment of the Local Environmental Plan – whether the proceedings in the Land and Environment Court have been the subject of final disposition
Muriniti v King; Newell v Hemmings [2019] NSWCA 232					
29.	2 October 2019	Payne JA McCallum JA Simpson AJA	Class 4	Summons seeking leave to appeal dismissed	APPEALS – applications for leave to appeal from personal costs orders against lawyers – whether necessary for Lawcover to be joined to the proceedings for the purposes of having the summonses seeking leave to appeal dismissed – where Lawcover had determined that it would not appeal the personal costs orders – where the Court had held that Lawcover was contractually entitled so to conclude – where applicants were permanently restrained from taking any steps to conduct or

No.	Date	Bench	Class	Outcome	Catchwords
					prosecute an appeal – where applicants have frustrated Lawcover's reasonable and proper attempts to bring the applications to an end – Lawcover joined – summonses seeking leave to appeal dismissed

COURT OF CRIMINAL APPEAL DECISIONS

No.	Date	Bench	Class	Outcome	Catchwords
Turnbull v Chief Executive of the Office of Environment and Heritage [2018] NSWCCA 229					
1.	17 October 2018	Payne JA Simpson AJA Wilson J	Class 5	Appeal dismissed	CRIMINAL LAW – appeal – appeal against sentence – whether sentence manifestly excessive. CRIMINAL LAW – appeal – appeal against sentence – offence under s 12(1) of the Native Vegetation Act 2003 (NSW) – where another person charged under the same section – where offences of a similar nature – application of parity principle
Port Macquarie-Hastings Council v Mansfield [2019] NSWCCA 7					
2.	25 February 2019	Hoeben CJ at CL Harrison J Schmidt J	Class 5	Appeal allowed	CRIMINAL LAW – appeal against interlocutory judgment – where accused charged with breach of ss 76A and 76B of the Environmental Planning and Assessment Act 1979 – where prior to commencement of the trial the accused applied to set aside subpoenas issued by the prosecutor –subpoenas set aside because they were based upon information gathered by unlawful

No.	Date	Bench	Class	Outcome	Catchwords
					s 119J notices issued by a council – whether s 119J notices can be issued to a person when the council considers a later criminal prosecution against that person likely – s 119J notices not ultra vires WORDS AND PHRASES – 'in connection with an investigation purpose' – Environmental Planning and Assessment Act, s 119J(1)
Moseley v Queanbeyan-Palerang Regional Council [2019] NSWCCA 42					
3.	1 March 2019	Hoeben CJ at CL R A Hulme J Button J	Class 6	Answers to questions in state case	ENVIRONMENTAL LAW – stated case – Criminal Appeal Act 1912 (NSW), s 5BA – asserted error of law in approach to purpose to the extent that it informs use of land – asserted reversal of onus — no error of law established – one question inappropriate to answer as not pertaining to pure question of law – questions answered accordingly
Cmunt, Jiri v New South Wales Commissioner of Police; Cmunt, Marie v New South Wales Commissioner of Police [2019] NSWCCA 177					
4.	2 August 2019	Simpson AJA Walton J Adamson J	Class 6	Answer to question in stated case	CRIMINAL LAW – case stated pursuant to Criminal Appeal Act 1912 (NSW), s 5BA – where only route of appeal against sentence and conviction in Local Court is in Land and Environment Court – where appeal to District Court dismissed on jurisdictional grounds – whether summons seeking appeal in Land and Environment Court filed out of time should be

No.	Date	Bench	Class	Outcome	Catchwords
					dismissed – stated case defective
Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie [2019] NSWCCA 174					
5.	2 August 2019	Preston CJ of LEC; Davies J; Adamson J	Class 5	Answer to question in stated case	APPEAL AND REVIEW – question of law stated under Criminal Appeal Act s 5AE during summary proceedings in Land and Environment Court – offence of using land as a waste facility without lawful authority – whether prosecutor permitted to make second s 5AE request in substantially different form to first request – meaning of "waste" – whether recycled materials deposited on land in stockpiles met definition of waste – whether stockpiling of materials on land a scheduled activity – whether depositing waste on land was the scheduled activity of waste disposal by application to land – whether temporary stockpiling of waste on land was the scheduled activity of waste storage – meaning of "asbestos waste" – whether waste contained asbestos – application of exemption granted under regulations – effect of exemptions that activity a non-scheduled activity – statutory exception to onus of proof – defendants bore onus of proving lawful authority – defendants bore onus of proving exemptions apply – no lawful authority pursuant to development consent or other approval – whether continuing offence proven – whether offences time barred – errors of law established – proceedings remitted to Land and Environment Court for determination in accordance with the answers given to the submitted questions

No.	Date	Bench	Class	Outcome	Catchwords
					WORDS AND PHRASES – “waste” – “waste facility” – “waste disposal by application to land” – “waste storage” – “asbestos waste” – “without lawful authority”