THE HON JUSTICE ROBERT MACFARLAN*

JUDGE OF APPEAL, SUPREME COURT OF NEW SOUTH WALES

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COURT OF APPEAL UPDATE

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I. Overview

1 Between 23 October 2019, shortly before this speech was delivered at the 2019 EPLA conference, and 30 October 2020, the Court of Appeal (CA) and the Court of Criminal Appeal (CCA) have heard and determined seventeen appeals from the Land and Environment Court of NSW (LEC). Of these appeals, sixteen were substantive decisions. This is consistent with the number of substantive decisions determined in previous years: 13 between 2017 and 2018[2] and 20 between 2016 and 2017;[3] but a substantial decrease from the above-average 34 decisions determined between 2018 and 2019.[4] Additionally, there are currently four decisions heard since 23 October 2019 for which judgment has been reserved.

2 A summary of the sixteen substantive decisions of the CA and the CCA is as follows:

Jurisdiction	Number	Leave refused	Appeal allowed	Appeal dismissed	Answers given
Class 1	3	0	1[5]	2[6]	0
Class 3	3	0	0	3[7]	0
Class 4	4	2[8]	1[9]	1[10]	0
Class 5 (CCA)	6	1[11]	1[12]	4[13]	0
Total	16	3	3	10	0

[2] A J Meagher, "EPLA Conference – Court of Appeal Update" (26 October 2018).
[3] M J Leeming, "Land and Environment Court Seminar – Appeals from the Land and Environment Court" (3 August 2016).
[4] A S Bell, "EPLA Conference – Court of Appeal Update" (25 October 2019).
[5] *Zhiva Living Dural Pty Limited v Hornsby Shire Council* [2020] NSWCA 180.
[6] *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106; *Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council* [2020] NSWCA 137.
[7] *Apokis v Transport for NSW* [2020] NSWCA 39; *Alexandria Landfill Pty Ltd v Roads and Maritime Services* [2020] NSWCA 165; *RD Miller Pty Ltd v Roads and Maritime Services NSW* [2020] NSWCA 241.
[8] *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14; *Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd* [2020] NSWCA 254.
[9] *Coffs Harbour City Council v Noubia Pty Ltd* [2020] NSWCA 142.
[10] *Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2020] NSWCA 50.
[11] *O'Haire v Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2020] NSWCCA 19.
[12] *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263.
[13] *Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis* [2019] NSWCCA 312; *Hanna v Environment Protection Authority* [2019] NSWCCA 299; *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74; *Somerville v Chief Executive of the Office of Environment and Heritage* [2020] NSWCCA 93.

Methodology

3 Procedural and interlocutory decisions have been excluded from the summary table above but can be found in Appendix 1. The appeals which have been included under the "appeal allowed" heading include those appeals which were allowed in part but otherwise dismissed. Cross-appeals have not been counted separately so as to avoid double counting.

4 This paper considers in detail a select number of substantive appeal decisions from each Class of LEC jurisdiction, focussing on those appeals which were allowed.

II. General themes

5 A number of general themes emerge from an analysis of the substantive decisions of the CA and CCA over the last 12 months.

6 The overall rate of appeals from the LEC remains low, consistent with an average number of appeals as compared to previous years. During the 2019 law term, there were 1,251 matters finalised for proceedings in the LEC. This is comprised of 855 Class 1 proceedings, 93 Class 2 proceedings, 89 Class 3 proceedings, 107 Class 4 proceedings, 89 Class 5 proceedings, 14 Class 6 proceedings and 4 Class 8 proceedings. This is consistent with 1,200-1,340 total finalised matters in the LEC between 2015 and 2018. The number of matters that are brought on appeal to the CA or the CCA as a percentage of the total finalised matters of the LEC is 1%,[14] allowing for methodological inaccuracies in comparing different data sets.

7 While appeals from the LEC are an important component of the work of the CA and the CCA, they form a small proportion of the matters those Courts hear. LEC appeals constitute 3% of the CA's total caseload[15] and 1.6% of the CCA's caseload.[16] The vast majority of both Courts' caseloads are sourced from the District Court.

8 Some of the appeals are heavy (for example, *Alexandria Landfill* and *Randren House* were three and two day appeals respectively) and some are of significant public

[14] 17 total appeals from 1,251 matters finalised in the LEC.
[15] 11 appeals from the LEC of 339 disposals in the CA in 2019: "Supreme Court of New South Wales Statistics (as at 5 June 2020)", p 1.
[16] 6 appeals from the LEC of 368 disposals in the CCA in 2019: "Supreme Court of New South Wales Statistics (as at 5 June 2020)", p 2.

interest (for example, *Coffs Harbour v Noubia, Universal Property Group* and *Apokis*).

9 The prospects of success in an appeal to the CA on a question of law remain low, with appeals being allowed in three of the sixteen substantive appeals heard by the CA and CCA resulting in an appeal allowance rate of 19%. One was allowed each for Classes 1, 4 and 5 proceedings from the matters heard.

10 Appeals from Classes 1, 2, 3 and 8 proceedings are limited to questions of law pursuant to s 57 of the *Land and Environment Court Act 1979* (NSW) (LEC Act). If the order or decision of the Judge is an interlocutory order or decision, the party requires the leave of the CA pursuant to s 57(4).

11 Conversely, appeals from cases decided in the Class 4 jurisdiction often raise more complex and contentious questions, creating greater scope for appellate intervention. Parties to Class 4 proceedings have a broad right of appeal pursuant to s 58 of the LEC Act. These appeals are by way of re-hearing. A party needs the leave of the CA to appeal against an interlocutory order or decision pursuant to s 58(3).

12 The CCA hears appeals from Class 5 proceedings relating to criminal offences. A party who is convicted of an offence, against whom an order to pay any costs is made or whose application for an order for costs is dismissed, or in whose favour an order for costs is made, may appeal to the CCA against the conviction and sentence or order, pursuant to s 5AB of the *Criminal Appeal Act 1912* (NSW). An appeal against an order for costs in favour of the person may only be made with the leave of the CCA pursuant to s 5AA(1A) of the *Criminal Appeal Act*. The CCA also hears challenges to a decision or order of the LEC in proceedings in Classes 6 and 7. This occurs by the party requesting the LEC Judge who determined the proceedings to submit a question of law to the CCA for determination pursuant to s 5BA(1) of the *Criminal Appeal Act*.

13 Departing from previous years, appeals from proceedings in the Class 5 jurisdiction represented the largest proportion of the appeals heard by either of the Courts of Appeal, being six of the sixteen substantive decisions. This represented 7% of the 89 Class 5 matters heard by the LEC in total, substantially greater than the average LEC appeal rate of 1% as stated above. In previous years, the largest proportion of appeals came from Class 4 proceedings, being almost half in 2018-19, but represented only 25% of the appeals heard in 2019-20.

14 It is rare for special leave to the High Court to be sought and granted in respect of decisions emanating from the LEC via the CA or CCA. Over the last 12 months, special leave was sought and refused in four matters.[17] As at 30 October 2020, there is one special leave application awaiting determination by the High Court.[18]

15 The CA and the CCA have been able to dispose of LEC appeals expeditiously. This is an important aspect of access to justice. Over the past 12 months, the average number of business days between hearing and the date of judgment for appeals from the LEC to the CA or CCA has been 42 days, and some of these appeals were of two or three days in duration.

16 Of the seventeen appeals and applications for leave to appeal heard and determined by the CA in the last 12 months, one judgment was given *ex tempore*, six were delivered within 4 weeks, four were reserved for less than 2 months, and the multiday appeals of *Alexandria Landfill* and *Randren House* were reserved for 3 months each.

17 The CA is also able to accommodate expedited hearings at the request of the parties without the need to demonstrate special circumstances, although none were heard in the past 12 months.

III. Court of Appeal decisions

Class 1 jurisdiction

18 The LEC's Class 1 jurisdiction is concerned with environmental, planning and protection appeals. Over the last twelve months, there were three appeals from decisions of the LEC exercising its Class 1 j urisdiction. Two of the three appeals were dismissed. The one appeal which was allowed was on a number of bases relating to a denial of procedural fairness and the matter was remitted to the

[17] *Barkat v Roads and Maritime Services* [2019] NSWCA 240; *G Capital Corporation Pty Ltd v Roads and Maritime Services* [2019] NSWCA 234; *Barrak v City of Parramatta Council* [2019] NSWCA 213; *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2019] NSWCCA 174.
[18] *Alexandria Landfill v Transport for NSW* [2020] NSWCA 165.

commissioner.[19] Both appeals challenging the refusal of development consent were dismissed.[20]

Zhiva Living Dural Pty Limited v Hornsby Shire Council [2020] NSWCA 180

19 Zhiva Living Dural Pty Limited had applied to Hornsby Shire Council for development consent to construct a seniors housing development in Dural. The site was zoned RU2 Rural Landscape, and seniors housing development is prohibited in this zone. Nevertheless, Zhiva Living had obtained a site compatibility certificate which empowered the consent authority to grant consent to the development despite the prohibition. Zhiva Living brought an appeal against the Council's deemed refusal of the development application to the LEC. The commissioner dismissed the appeal without making an order refusing consent to the development application.

20 The sole reason for the commissioner dismissing the appeal was that he was not satisfied that the provisions of cl 55 of the Seniors SEPP had been met. Clause 55 provides: "A consent authority must not grant consent to carry out development for the purpose of a residential care facility for seniors unless the proposed development includes a fire sprinkler system." Zhiva Living had proposed that the commissioner could grant consent subject to the imposition of a condition of consent requiring the provision of a fire sprinkler system for the development. The commissioner held that the provisions of cl 55 cannot be satisfied by the imposition of a condition on consent, as the power to grant consent is enlivened only following satisfaction of the provisions of cl 55 and prior to the grant of consent. The commissioner concluded that he had no power to grant consent.

21 Zhiva Living brought an appeal in the LEC challenging the commissioner's decision and order relating to the commissioner's construction of cl 55 of the Seniors SEPP and a denial of procedural fairness. The primary judge determined that there was no utility in remitting the matter to the commissioner in circumstances where the first site compatibility certificate had lapsed and the second application for a site compatibility certificate had not been determined. The judge made an order refusing consent to Zhiva Living's development application. Zhiva Living sought leave to appeal against the decision and orders of the primary judge, arguing that in making that order the

[19] *Zhiva Living Dural Pty Limited v Hornsby Shire Council* [2020] NSWCA 180.
[20] *Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council* [2020] NSWCA 137; *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106.

judge denied Zhiva Living procedural fairness and otherwise made errors on questions of law.

22 The Court held that the primary judge denied Zhiva Living procedural fairness in determining not to remit the proceedings to the commissioner but instead to determine Zhiva Living's development application by refusing consent. The judge had no jurisdiction on the s 56A appeal to determine the two issues of the power of the commissioner to issue a site compatibility certificate and the validity of the development application by reason of the absence of a current site compatibility certificate, neither of which was raised in the grounds of appeal. If, however, the judge were to decide those two issues, he was obliged to afford the parties procedural fairness before doing so, which the Court found he did not do.

23 The Court held that the primary judge's finding that there was no valid development application capable of being remitted to the Commissioner to which they could grant development consent was legally incorrect. The lapsing of the site compatibility certificate or the issuing of a new site compatibility certificate had no legal effect on the development application. The judge erred on a question of law in deciding otherwise.

24 The Court held that the primary judge also denied Zhiva Living procedural fairness in exercising the power to determine the development application by refusing consent, rather than remitting the matter to the commissioner. The function of determining the development application was one to be exercised by the commissioner on the hearing of the appeal against the Council's refusal of the development application.

25 The primary judge's orders were set aside and the matter was remitted to the commissioner rather than the judge.

***Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106**

26 Universal Property Group Pty Ltd applied for consent to a development application for the construction of a residential secondary dwelling on a parcel of land in Schofields. The application was deemed to have been refused by Blacktown City Council, on the basis that the land was below the minimum lot size standard set by the Growth Centres SEPP. Universal lodged an appeal in the LEC, arguing that a clause of the Affordable Housing SEPP precluded the Council refusing consent on the basis of site area.

27 The trial judge accepted the parties' common position that there was an irreconcilable conflict between the two clauses, and determined that the more recent SEPP prevailed, being the Growth Centres SEPP. The judge found that the minimum lot size required under the Growth Centres SEPP was engaged, and the development application had to be refused as it did not meet this minimum lot size. Universal brought an appeal to the CA.

28 The Court held that claims of "actual contrariety" between provisions from one legislative source should be examined closely because there is a strong presumption that a legislative authority does not intend to contradict itself, nor that such a contradiction would arise through inadvertence. The principle of harmonious operation gives preference to a reasonable construction of a statutory instrument if the result is consistent with the operation of another, where a different interpretation would create inconsistency. The principle should be applied with greater emphasis when considering two statutory instruments administered within the one government department with respect to a single broad subject manner.

29 The Court held that there was no inconsistency between the SEPPs, and therefore it did not need to consider which prevailed over the other. The relevant clause was inserted into the Growth Centres SEPP five years after the promulgation of the Affordable Housing SEPP, and therefore the latter cannot be construed as impliedly repealing a clause of the Growth Centres SEPP. The terms that formed the basis of the appeal were two distinct concepts, and therefore there was no inconsistency between them. As the proposed development's lot size did not meet the minimum lot size, the Growth Centres SEPP required consent to be refused.

30 The Court dismissed the appeal.

Class 3 jurisdiction

31 The LEC's Class 3 jurisdiction involves matters concerned with land tenure, valuation, rating and compensation matters. In the last 12 months, three appeals were determined by the CA, all of which were substantive decisions. All of the appeals related to the compulsory acquisition of land and compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). None of the appeals was allowed.

***Apokis v Transport for NSW* [2020] NSWCA 39**

32 Mr Apokis was the registered proprietor of land in northern NSW. In 2014 the land was acquired by Roads and Maritime Services (now Transport for NSW). After resumption, over one million cubic metres of earth was excavated from the land and used for the highway. In 2015 the NSW Valuer General determined that the compensation payable to Mr Apokis for the land was $252,000. Mr Apokis commenced proceedings challenging that assessment. The Court gave judgment assessing compensation at almost $153,000 plus interest. Mr Apokis brought an appeal in the CA. The issues on appeal were whether the primary judge mistook his function in assessing the market value of the land; and erred in rejecting a claim for lost royalties based on the resource excavated from the land and used in the construction of the highway.

33 The Court held that the judicial function under s 56(1) of the *Land Acquisition Act* was not to make an objective valuation of the land, but to determine the market value of the acquired land by reference to the willing but not anxious seller and buyer as at the date of acquisition. This is an essentially factual matter and there are few opportunities to identify error on a question of law. The compensation is for the acquisition of the land, directing attention to the amount by which the owner is worse off as a result of the acquisition. Where the acquisition is of part of the land, and the parcel could not have been separately sold by the owner, the value of the whole parcel must be determined, and then subtract the value of the residual parcel after the acquisition, and the difference is the amount of just compensation representing the measure of what the owner has lost.

34 The Court held that where there is no marketable parcel of land which is acquired, the statutory test is not capable of direct application. The conventional approach is to value the whole of the parcel of land by applying the statutory test to the land as it existed immediately prior to acquisition and then applying the same test to the adjoining land or lands after acquisition. The value of the acquired land is assessed as the difference between the two figures.

35 The market value of the acquired land could not include any increase in value caused by the carrying out of the public purpose for which the land was acquired, such as the quarrying resource on the land. The Court also held that because the land was not being used by Mr Apokis for the extraction of that resource as at the date of

acquisition, there were no “financial costs” to him which were compensable to him under s 59 of the *Land Acquisition Act*.

36 The Court held that there was no error in the primary judge’s approach and the appeal was dismissed.

RD Miller Pty Ltd v Roads and Maritime Services NSW **[2020] NSWCA 241**

37 RD Miller owned land at Bega with frontage and access to a road that was formerly part of the Princes Highway. Since 2012, Miller has been undertaking subdivision of its land into rural residential allotments. Miller’s land had three gated access points along its western boundary adjoining the Princes Highway. Miller was entitled to access the Princes Highway from any location along the western boundary, under s 6(1) of the *Roads Act 1993.*

38 In 2013, the Roads and Maritime Services (“RMS”) constructed the Bega Bypass, which altered the access from Miller’s land to the former Princes Highway. After the Bega Bypass was opened to traffic, access across the boundary between Miller’s land and the Princes Highway was no longer physically possible at the access points. As a consequence, Miller was required to construct alternative access which increased the scope of works required for the future subdivision of the land.

39 In 2017, the Minister declared part of the Princes Highway at Bega, including the part adjoining Miller’s land, to be a controlled access road, under s 49 of the *Roads Act*. That order also restricted access between Miller’s land and the controlled access road to one point, under s 67(1) of the *Roads Act*. That restriction of access gave rise to Miller being entitled to compensation for any loss or damage arising from the loss of access, under s 68(1) of the *Roads Act*. Miller made a claim for compensation to RMS under s 226(1) of the *Roads Act* for the loss of access from its land to the controlled access road, under s 68(1) of the *Roads Act*. When agreement was not able to be reached with the RMS, Miller referred the claim for compensation to the LEC for determination, under s 226(3) of the *Roads Act*.

40 On the issue of entitlement to compensation, the Court held that the trigger in s 68(1) arises from the combined operation of the order under ss 48, 52A or 49 declaring a road to be a freeway, transitway or controlled access road, restricting access to or from the road under s 67, and the prohibition in s 70(b) on entering or leaving the road. The consequence of restriction or denial of access must be caused by the

event of the road becoming such a road, which is the sense in which s 68(1) uses the word “becoming”. Once such an order has been made, the prohibition in s 70(b) comes into effect. Thereby, access has been restricted or denied. Once this has occurred, the entitlement to compensation for any loss or damage arising from the loss of access is triggered. The “loss of access” is the restriction or denial of access across the boundary between the land and the public road.

41 On the issue of the amount of compensation payable, the Court held that this amount is fixed by s 69, and the method for determination is prescribed under s 69(1). It is an amount equal to the difference between the market value of the land immediately before and the market value of the land immediately after the specified consequence occurs, namely “the right of access was restricted or denied”. The prescribed method compares the market value of the land at two points of time either side of the time of the occurrence of the consequence of the right of access being restricted or denied, namely immediately before and after. The difference between these market values of the land will therefore be the money equivalent of the loss of access.

42 The Court held that the *Pointe Gourde* principle has no application in determining the amount of compensation payable under s 69 of the *Roads Act*. The essence of the *Pointe Gourde* principle is that, in assessing the market value of land that has been compulsorily acquired, any increase or decrease in the value of the land due to the carrying out of “the scheme” or “the public purpose” or “the proposal to carry out the public purpose” for which the land was acquired, is to be disregarded. The Court held that it has no application for the following reasons:

(1) the language of s 69 of the *Roads Act* does not expressly incorporate the principle in the assessment of the market value of the land required by that section;

(2) incorporation of the principle does not sit comfortably with the method prescribed in s 69 of the *Roads Act* for determining the amount of compensation payable;

(3) the principle has been developed for and in the context of determining compensation for the compulsory acquisition of property, and has not been applied in assessing compensation for loss not involving this; and

(4) the principle cannot readily be applied to the statutory scheme for determining the amount of compensation payable to an owner of land for loss or damage arising from a loss of access.

43 In dissent, White JA held that s 68(1) should be construed as encompassing the actual restriction or denial of access that occurred as part of a course of conduct that led to the road "becoming" a controlled access road. His Honour stated that Div 4 does not stipulate that the restriction for which compensation is payable as a result of the road's becoming a freeway, transitway or controlled access road is confined to the restriction imposed by the order itself. The compensatory nature of the provision ought not to be frustrated by the order in which steps are taken to cause a road to become a controlled access road.

44 The Court granted leave to appeal, but dismissed the appeal.

***Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165**

45 In 2014 Transport for NSW's predecessor, Roads and Maritime Services, compulsorily acquired two parcels of land owned by Alexandria Landfill Pty Ltd in St Peters, near Sydney Airport, for the purpose of building the WestConnex motorway. The parcel with which the appeal was concerned was 15.71 hectares in size and was being used for landfill and waste operations at the time of acquisition. Alexandria Landfill sought compensation under the *Land Acquisition Act*. The LEC determined that the owner was entitled to be paid compensation of $45.7 million in respect of the market value of the land.

46 Alexandria Landfill appealed to the Court of Appeal under s 57 of the *LEC Act* which restricted its appeal to questions of law. It contended that it was entitled to a substantially larger amount of compensation. The primary challenge was to the adequacy of the LEC judge's reasons. The Court found that this challenge did raise a question of law but dismissed the appeal.

47 The hearing in the LEC had been protracted. Some 24 experts from differing fields of expertise had given evidence. The parties' closing written submissions totalled about 1,000 pages in length and there was about 500 pages of transcript of the oral closing submissions. The primary judgment of 270 pages was described in the Court of Appeal as carefully structured and expressed but Alexandria Landfill complained that the judgment was largely a recitation of the evidence and submissions with little

actual reasoning. It claimed that in respect of some issues the judge simply chose to accept one party's submissions without providing an explanation.

48 Justice Basten, with Justice Leeming's agreement, stated that where an appeal is confined to questions of law the standard of reasons required to be given by the primary judge is such that it must be shown that the decision has not been reached capriciously or arbitrarily, but has been arrived at rationally. The reasons must thus reveal that all material factors have been identified and addressed, and that no prohibited considerations have been operative.

49 In reaching similar conclusions, I emphasised that the extent of the obligation on courts to give reasons for their conclusions is very much dependent upon the context. The adequacy of reasons is not to be judged against a standard of perfection, but the question is whether they attained the minimum acceptable standard. In this case the minimum standard was relatively undemanding for a number of reasons: firstly the LEC had to consider highly sophisticated and technical issues with as much expedition as possible; secondly valuation issues such as those in this case often involve substantial subjective elements and need not be determined with mathematical precision; thirdly a pragmatic and functional approach is to be taken; and finally a level of generality and implicit reasoning is acceptable.

50 The Court concluded that the primary judge's reasons were adequate in the circumstances of the case.

51 The Court then rejected contentions that Alexandria Landfill had been denied procedural fairness and that it was entitled to have a reasonable apprehension of bias. As to the latter, the Court held that the outcome of the case and the judge's reasons for judgment would not alone support a claim of reasonable apprehension of bias based on prejudgment. It did not therefore assist Alexandria Landfill to contend that every one of over 50 issues had been decided against it.

52 The Court also dealt with issues arising under s 59 of the *Land Acquisition Act* of disturbance and special value.

53 The appeal was dismissed by the Court of Appeal decision is the subject of an application for special leave to appeal to the High Court.

Class 4 jurisdiction

54 Four of the substantive sixteen appeals from the LEC arose from proceedings in its Class 4 jurisdiction, of which one appeal was allowed,[21] one appeal was dismissed,[22] one had leave refused[23] and one notice of appeal was dismissed as incompetent.[24]

Coffs Harbour City Council v Noubia Pty Ltd [2020] NSWCA 142

55 The Lakes Estate is a residential development on the south-west side of Coffs Harbour, located within an alluvial flood plain. Pursuant to a development consent given to Noubia Pty Ltd in 2003, three parcels of land were vested in the Coffs Harbour City Council. Noubia, as the developer and owner of the land, sought compensation for the land pursuant to a condition of the consent. The Council agreed to payment of an amount of $110,000 with respect to each of lots 94 and 163, but denied liability to pay compensation for lot 96.

56 As there was doubt as to the appropriate jurisdiction for Noubia to make its compensation claims, it commenced proceedings both in the LEC and in the Equity Division of the Supreme Court. Ultimately the two proceedings were heard together in the LEC.

57 Noubia valued lots 94 and 163 according to an alternative hypothetical development, which it contended was the "highest and best use" of the land. This would have allowed for a further 35 residential dwellings at a net value of over $100,000 per lot. However, this development dealt only with water emanating from the hypothetical development, and there was substantial evidence that Council would not approve a development that did not include a scheme for the detention and management of upstream water flows onto the land. The primary judge declared that Noubia was entitled to compensation with respect to lot 96 and identified the compensation payable with respect to lot 94 as $3,256,000 and lot 163 as $560,000. The Council brought an appeal challenging those orders.

58 The Court held that if Noubia's alternative development would not have been approved, it was not available and therefore was not the financially most advantageous development. There was substantial evidence that the Council would

[21] *Coffs Harbour City Council v Noubia Pty Ltd* [2020] NSWCA 142
[22] *Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2020] NSWCA 50
[23] *Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd* [2020] NSWCA 254
[24] *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14

not have approved a development which did not provide for the detention and management of upstream flows onto the land. Noubia's alternative could not be assumed to be an acceptable development which would receive development consent. Additionally, the trial judge did not resolve the critical issue of the public purpose, which should have been dispositive of the case.

59 The Court allowed the appeal, setting aside the judge's valuation of the two lots. The matter was remitted to the LEC for redetermination.

***Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2020] NSWCA 50**

60 In 2018 the Council of the City of Sydney issued a Development Control Order to the registered proprietor of heritage listed premises at 122 Pitt Street Sydney. Universal 1919 Pty Ltd had possession of the premises under a registered lease. It operated the "1821 Hotel" in the building on the site which has a Greek theme, including an 8m x 5m depiction of the Greek National flag on a ground floor wall. The depiction was created during renovations in 2016 by removing part of the cement render on the wall, leaving parts of the brickwork underneath exposed. The Order required removal of the flag by reinstatement of the cement render on the wall. The Order alleged that the carving of the flag occurred without planning approval, contrary to the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), and without approval under the *Heritage Act 1977* (NSW).

61 Universal 1919 brought an application for judicial review of the decision to make the Order. The application was dismissed and Universal 1919 brought an appeal challenging the dismissal. Universal 1919 contended that it was denied procedural fairness in relation to the making of the Order; the carving of the Greek flag was not a separate item of development that required approval but otherwise was approved as part of the 2016 renovation works approval; and that the Order was void because notice was not given to the principal certifier of the renovation works as required.

62 The Court held that the statutory scheme contained sufficiently "plain words" to exclude any right that Universal 1919 might otherwise have had to be afforded procedural fairness in relation to the issue of the Order. It provided that an enforcement authority has observed the rules of procedural fairness if it complied with certain provisions, including the requirement to give notice of a proposed order to the person to whom the order was to be directed. This specification was

exhaustive. The 'person to whom the proposed order is directed' meant the person to whom the Order is intended to be addressed, being the Owner, and not to Universal 1919, and therefore notice was only required to be given to the Owner. Critically, clause 7 in Schedule 5 provided that if the Council complied with the scheme, it was "taken to have observed the rules of procedural fairness."

63 The Court also rejected the lessee's argument that the depiction of the Greek flag was not a "development" as defined in s 4(2) of the *EPA Act*. It held that whilst it must be accepted that in some instances work done on a property may be *de minimis*, in this case, the subject carving constituted "the carrying out of a work" requiring development consent. For similar reasons it also required heritage approval.

64 The Court also rejected the lessee's argument that a detailed examination of the Local Council and Heritage Council approved plans for the 2016 renovations indicated that the creation of the flag depiction had in fact been approved before it was carried out. The principal certifier in respect of the development approval works was not the principal certifier regarding the carving of the flag.

65 The Court dismissed the appeal.

***Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd* [2020] NSWCA 254**

66 Lasovase was the owner of land in Wingecarribee Shire. Lee Environmental Planning, a town planning consultant company, was retained by Lasovase to obtain development consent from the Wingecarribee Shire Council for a dwelling to be built on the land. In June 2018, Lee Environmental Planning made a development application for a proposed building envelope for a future dwelling house on the Lasovase land. The application was granted in November 2018.

67 In February 2019, Reulie commenced proceedings in the LEC against Lee Environmental Planning, Lasovase and the Council seeking a declaration that the development consent was invalid and of no effect and an order restraining Lee and Lasovase from carrying out development in accordance with the development consent.

68 In February 2019, the Council advised all parties that it would not defend its approval but, rather, would file a submitting appearance in the proceedings. In June 2019, Lee Environmental Planning and Lasovase wrote to Reulie proposing that the

proceedings be discontinued on the basis of the surrender of the consent, the Council receiving and giving effect to the surrender. Whilst Reulie was taking steps to accept that offer, Lee Environmental Planning and Lasovase withdrew the offer.

69 At trial, the primary judge declared the development consent to be invalid and of no effect and restrained Lee Environmental Planning and Lasovase from carrying out development in accordance with the consent. The primary judge ordered that the three respondents were to pay Reulie's costs of the proceedings and the costs application. Lee Environmental Planning and Lasovase applied for leave to appeal on the issue of costs, seeking that the Council be entirely responsible for the costs of the decision below.

70 The Court of Appeal noted that leave to appeal is ordinarily granted only where there is an issue of principle, a matter of general importance or where an injustice can be demonstrated with reasonable clarity. The hurdle that an applicant for leave must clear is greater in a case limited to a challenge to the exercise of the costs discretion. To successfully challenge a discretionary costs decision it is necessary for an appellant to demonstrate that some error of principle has occurred, that the judge has failed to take material considerations into account, has taken irrelevant considerations into account, or that the order made below is "unreasonable or plainly unjust" such that "the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance": *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40; *Ross v Lane Cove Council* [2017] NSWCA 299 at [2]-[3].

71 The Court stated that, in this proceeding, no real issue of principle was raised. The key arguments advanced by the applicants did not raise any question of principle or question of public importance nor any possibility of injustice that rose higher than the barely arguable. Further, the circumstances of the case below meant that it was an inappropriate vehicle to determine any question of principle. The conclusions reached by the primary judge were reasonably open to her in the exercise of her Honour's discretion.

72 Whilst Uniform Civil Procedure Rule 2005 (NSW) 6.11 permits the filing of a submitting appearance "save as to costs", there is no other rule of court or other provision dealing with the costs consequences of the filing of a submitting appearance. There is no prima facie rule that a submitting party will never be ordered to pay costs. Where costs are sought against a party who has entered a

submitting appearance, a principled exercise of the costs discretion in s 98 of the *Civil Procedure Act 2005* (NSW) is required.

73 Leave to appeal was refused and the costs of the application for leave to appeal were borne by Lee Environmental Planning and Lasovase.

IV. Court of Criminal Appeal decisions

Class 5 jurisdiction

74 In the last 12 months, the CCA determined six appeals from the LEC's Class 5 jurisdiction, of which one appeal was allowed,[25] four were dismissed,[26] and one had leave refused.[27]

75 Multiple applications were brought under s 5F of the *Criminal Appeal Act 1912* (NSW) seeking leave to appeal from interlocutory judgments or orders made in the LEC, whereby the primary judge refused an application that she recuse herself for bias;[28] for declining to grant leave to amend to substitute the multi-count amended charges;[29] and for dismissing an application to have charges pending against the applicant struck out for being time-barred.[30]

76 Two matters related to sentences in relation to offences contrary to the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act), one being a challenge by the offender[31] and the other by the Environment Protection Authority (EPA).[32] These offences included supplying false or misleading information in a material respect, polluting land by dumping waste on it and transporting waste to a facility that cannot be used as a waste facility.

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[25] *Kiangatha Holdings Pty Ltd v Water NSW* [2020] NSWCCA 263.
[26] *Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis* [2019] NSWCCA 312; *Hanna v Environment Protection Authority* [2019] NSWCCA 299; *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74; *Somerville v Chief Executive of the Office of Environment and Heritage* [2020] NSWCCA 93.
[27] *O'Haire v Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2020] NSWCCA 19.
[28] *O'Haire v Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2020] NSWCCA 19
[29] *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74
[30] *Somerville v Chief Executive of the Office of Environment and Heritage* [2020] NSWCCA 93
[31] *Hanna v Environment Protection Authority* [2019] NSWCCA 299
[32] *Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis* [2019] NSWCCA 312

***Hanna v Environment Protection Authority* [2019] NSWCCA 299**

77 Dib Hanna and his wife operated a business known as New Line Demolition, Excavation and Tipper Hire which transported unwanted building and demolition materials from sites to other locations in Sydney. Mr Hanna was convicted of five offences contrary to the repeat waste offenders provision of the POEO Act, being s 144AB(2). The relevant conduct was polluting land by dumping waste on it and transporting waste to a facility that cannot be used as a waste facility. Mr Hanna pleaded guilty to each offence and agreed to the Court taking into account three other offences of which he admitted his guilt for the purposes of sentencing. Mr Hanna was sentenced to an aggregate term of imprisonment of 3 years with a non-parole period of 2 years and 3 months.

78 Mr Hanna brought an appeal against his sentence on a variety of grounds, including that the sentencing judge erred by taking additional matters into account, being the additional offences, and erred in the manner in which he did so. The primary judge took the additional offences into account in a general fashion as part of the "instinctive synthesis" which his Honour was required to, and said he did, undertake.

79 Mr Hanna also argued that the primary judge erred in his consideration of special circumstances and hardship to Mr Hanna and his family due to his age, no prior custodial sentence and serving time in custody in a State different to that where he would normally be a resident with his family. The primary judge had considered these matters but rejected that they constituted special circumstances for the purposes of his sentencing. On appeal, the Court held that it was not demonstrated that the primary judge did not consider these matters, and furthermore that it was not open to make this challenge to the exercise of judicial discretion when the argument was not raised before the primary judge.

80 Mr Hanna further argued that the sentence proceedings miscarried by reason of the failure to bring before the sentencing court the fact of Mr Hanna's residency status and the impact of any sentence on his capacity to remain in Australia, in consideration of hardship to Mr Hanna and his family. Mr Hanna sought to adduce new evidence which was said to be necessary to overcome a significant and demonstrable miscarriage of justice as a result of the absence of evidence through oversight by counsel. On appeal, the Court held that Mr Hanna did not demonstrate

such a miscarriage of justice. The evidence, if allowed, would not have constituted exceptional circumstances or very significant hardship to a third party.

81 Leave to appeal was granted but the appeal was dismissed.

Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis [2019] NSWCCA 312

82 Wollondilly Abattoirs Pty Ltd was charged with six offences relating to supplying false or misleading information in a material respect under the POEO Act. These involved the supply to the EPA of quarterly reports containing false analysis results for effluent samples. The general manager was charged with five correlating offences by a special executive liability provision in the Act. The offences were strict liability but the company's state of mind was relevant to sentencing. Both respondents pleaded guilty to all offences and were convicted: the company was convicted without further penalty, and the manager was fined a total of $12,000. The EPA brought an appeal against both respondents on grounds of manifest inadequacy.

83 The primary judge had rejected affidavit evidence of another employee on the grounds of the *De Simoni* principle. The *De Simoni* principle states that a sentencing judge is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[33]

84 In relation to the general manager, the main issues on appeal were whether the sentencing judge erred in excluding the affidavit evidence and whether the Court should have exercised its discretion to interfere with the sentence.

85 In relation to Wollondilly, the main issues on appeal were whether the sentencing judge erred in assessing the seriousness of the offences without reference to the state of the mind of the employees and in failing to find that each of the offences were committed knowingly and deliberately by Wollondilly referable to the state of mind of the key employees.

86 The Court held that the relevant consideration for sentencing is the criminal culpability of the corporation. The criminal blameworthiness lies in failing to have in place adequate measures to supervise or control the activities of its officers and/or

[33] *The Queen v De Simoni* (1981) 147 CLR 383; [1981] HCA 31.

employees. Section 169C of the Act does not attribute the individual's state of mind to the corporation; it does no more than make evidence of the state of mind of a relevant individual some evidence of the state of mind of the corporation. Where directors give evidence inconsistent with their having the alleged state of mind, the circumstance that one or two employees did have that state of mind will not prove that the corporation had that state of mind.

87 The Court held that maximum penalties and standard non-parole periods are the legislative signposts for seriousness of offences. Sections 169 and 169B of the Act have the same maximum penalty, and therefore the *De Simoni* principle did not arise. Taking into account the offender's state of mind in sentencing for an offence does not involve punishing the offender for a matter extraneous to the offence, and therefore any analogous principle to *De Simoni* did not arise.

88 Despite errors in the sentencing process, there was insufficient prospect that a substantially greater sentence would have been imposed if the matter were remitted as to warrant that course; nor was the sentence so inadequate such as to require intervention.

***Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWCCA 74**

89 Tropic Asphalts Pty Ltd was originally charged with three summary offences under the EP&A Act in relation to the alleged carrying out of development in breach of the terms of consent granted to it by Snowy Monaro Regional Council in January 2015, permitting the production of asphalt from a mobile batching plant. The charges all involved allegations of breaches over the period of operation of the plant at a particular site between 20 January 2015 and 18 March 2015. The breaches involved exceeding the plant production's limit of 150 tonnes per day at any time during operations and exceeding the limit of 12 trucks entering and exiting the site per day at any one time. Tropic Asphalts successfully challenged these charges on the grounds of duplicity as they failed to nominate a specified day upon which the relevant condition was said to have been breached.

90 The Council sought leave to amend each charge to break up each charge and separate it into multiple counts nominating individual days within the charge period. The primary judge only granted the Council leave as sought in the alternative to amend each summons to allege contravention of the relevant condition on one

particular day. The decision on amendment was important because, as is frequently the case where an issuer of duplicity arises, the relevant limitation period had expired and fresh charges could not be laid.

91 The Council brought proceedings pursuant to s 5F of the *Criminal Appeal Act* challenging the primary judge's interlocutory order or judgment dismissing the Council's application to amend. Tropic Asphalts lodged a competing application pursuant to s 5F challenging the primary judge's decision granting leave to the Council to amend the summonses in order to reduce each charge to a single day.

92 The Court held that the failure to specify that allegation was fatal: as the summonses alleged a course of offending conduct without specifying the day or days upon which the alleged breaches are said to have been committed, the charges were duplicitous and Tropic Asphalts could not have been required to respond to charges framed in that way.

93 The Court held that the Council sought to do no more than clarify the charges, by either nominating a single day upon which a breach of each condition was alleged to have been committed or by particularising every day upon which a breach of each condition was alleged to have been committed. It was not an attempt to formulate a new or different charge. The primary judge did not erroneously fail to consider or to determine whether a materially higher penalty would be imposed upon conviction on the original rolled-up charge, incorporating the multiple daily offences, compared to a conviction on all of the separated counts in the multi-day amendment. The decision should not have been compared or likened to the failure of a sentencing judge to apply the totality principle.

94 The Court granted leave to the Council on certain grounds but dismissed the appeal, and refused leave in relation to others. The Court granted leave to Tropic Asphalts but also dismissed the appeal.

Kiangatha Holdings Pty Ltd v Water NSW **[2020] NSWCCA 263**

95 Kiangatha constructed an unsealed road over a distance of some 8 to 10 kilometres. Water NSW alleged that Kiangatha failed to take sufficient measures for sediment and erosion control to contain the flow of sediment from ground disturbed in the road making. It alleged that this resulted in sedimentary pollutants either being deposited

into drainage lines or being placed in a position from which it was likely the sediment would descend or be washed into the drainage lines.

96 Kiangatha was charged by two separate Summonses with offences under s 120(1) of the POEO Act. One was particularised as alleging that soil and sediment was placed in a position where it was likely to pollute waters and the other involved actual pollution. Particulars subsequently provided alleged that the offences were committed at a variety of locations along the road, some 35 in the case of the actual pollution charge.

97 The LEC judge found that the construction of the road was able to be regarded as one activity which involved various acts which were closely related to the next and were part of one overall transaction with one underlying factual matrix. He accepted the prosecutor's submission that characterising the conduct as a single enterprise avoided an artificial breaking up of the individual acts involved in the construction of the road and gave effect to the broad scope and purpose of the legislation.

98 The CCA reversed this decision on appeal. The Court held that the placement of material in the different areas particularised was not able to be viewed as a single compendious action simply because each of the locations was part of the one road, constructed by the same contractor using the same methodology, at some time or times over a 5 month period.

99 Justice Fagan, who wrote the principal judgment, concluded by making the following general observation about duplicity of charges: "Judging by the number of cases in which New South Wales authorities have endeavoured to prosecute multiple discrete infringements of environment protection laws on single count summonses, it may be inferred that such authorities have gained the impression that the rule against duplicitous pleading is to be applied more loosely in relation to this type of offence than in the administration of the general criminal law. That is not so. … The rule is essential to the administration of criminal justice and must be applied to prosecutions of offences of all kinds."

V. Conclusions

100 Only a fraction of the cases decided in the LEC are the subject of an appeal to the CA or CCA. These appeals raise complex and diverse issues in the areas of statutory interpretation, jurisdiction, planning, real property and administrative law. Some of the cases summarised above have involved questions of principle and are of significant public importance. They involve some of the most challenging work that the CA and CCA face. The jurisdiction has been at the cutting edge of the development of legal principle in administrative law and statutory interpretation.

101 In deciding them, the appellate courts continue to have the benefit of the skills of the experienced practitioners in this specialist jurisdiction. The standard of written and oral advocacy in cases from this jurisdiction is high, for which the Court is greatly appreciative.

APPENDIX 1

COURT OF APPEAL DECISIONS (23 OCTOBER 2019 – 30 OCTOBER 2020)

CLASS 1

No.	Date	Bench	Outcome	Catchwords
Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106				
1.	9 June 2020	Basten JA, Gleeson JA, Emmett AJA	Leave to appeal granted, appeal dismissed	ENVIRONMENT AND PLANNING – planning schemes and instruments – State Environmental Planning Policies – secondary dwellings – site area and minimum lot size – whether minimum lot size requirement overridden – State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW), cl 22; State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (NSW), cl 4.1AC STATUTORY INTERPRETATION – amendment and repeal – implied repeal – harmonious construction – conflict between State Environmental Planning Policies – whether capable of harmonious construction – requirement for actual contrariety STATUTORY INTERPRETATION – amendment and repeal – implied repeal – clauses in separate instruments each purporting to control inconsistency by prevailing over the other – effect of each clause
Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council [2020] NSWCA 137				
2.	8 July 2020	Basten JA, Meagher JA, Emmett AJA	Leave to appeal granted, appeal dismissed	ENVIRONMENT AND PLANNING – development application – power to grant consent – local environmental plan – requirement that proposed development "is compatible" with the "flood hazard" of the land – assessing compatibility at date of determining application – whether future measures to ameliorate flood hazard relevant – future measures not part of application – Wingecarribee Local Environmental Plan 2010 (NSW), cl 7.9(3)(a)

				STATUTORY INTERPRETATION – extrinsic materials – dictionaries – usefulness of reliance on dictionaries in statutory interpretation STATUTORY INTERPRETATION – immediate context – consistency of operation – local environmental plan – statutory precondition to granting development consent – grammatical tense of clause – requirement for contextual construction of clause
Zhiva Living Dural Pty Limited v Hornsby Shire Council [2020] NSWCA 180				
3.	20 August 2020	Meagher JA, McCallum JA, Preston CJ of LEC	Leave to appeal granted, appeal allowed	APPEAL – appeal against Land and Environment Court judge's decision to refuse remitter to commissioner after upholding s 56A appeal – whether denial of procedural fairness by not giving parties opportunity to be heard on matters not raised on s 56A appeal – extension of time to file appeal granted – leave to appeal granted – appeal upheld – whether matter to be remitted to judge or commissioner – matter remitted to commissioner

CLASS 3

No.	Date	Bench	Outcome	Catchwords
Apokis v Transport for NSW [2020] NSWCA 39				
4.	13 March 2020	Basten JA; Leeming JA; Brereton JA	Dismissed summons seeking leave; granted leave and dismissed appeal	APPEAL – civil – notice of appeal – extension of time to apply for leave to appeal – where notice of appeal filed almost two years after the material date – where government respondent consented to late filing – relevance of model litigant policy VALUATION – compulsory acquisition of land – assessment of compensation – market value – role of "judicial valuer" – valuation of non-marketable parcel – assessment of value before and after acquisition – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 56(1) VALUATION – compulsory acquisition of land – assessment of compensation – disturbance

				– where acquired land included resource – assessment of value where resource only had value because of the carrying out of the public purpose for which the land was acquired – whether claimed disturbance related to "actual use" of acquired land – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 55(d) and 59(f)
Alexandria Landfill Pty Ltd v Roads and Maritime Services [2020] NSWCA 165				
5.	4 August 2020	Basten JA; Macfarlan JA; Leeming JA	Appeal dismissed	LAND & ENVIRONMENT – appellant asserted interest in various lands acquired by the respondent for the purposes of the WestConnex development project – appellant sought compensation under Land Acquisition (Just Terms Compensation) Act 1991 (Cth) – primary judge found compensation was owed for market value of land acquired and for disturbance by way of legal costs and valuation fees – whether primary judge erred in failing to have proper regard to the considerations in s 55 of the Act – whether primary judge erred in failing to provide any or adequate reasons in relation to certain matters – whether primary judge denied appellant procedural fairness – whether decision was affected by apprehended bias– whether primary judge erred in failing to find an issue estoppel arose – whether primary judge erred in interpretation of ss 57 and 59(1)(f) of the Act – whether primary judge erred in failing to address attribution of loss and attribution of conduct in relation to certain matters
RD Miller Pty Ltd v Roads and Maritime Services NSW [2020] NSWCA 241				
6.	2 October 2020	Bell P; White JA; Preston CJ of LEC	Appeal dismissed	APPEAL – interlocutory decisions to strike out pleadings and refuse leave to amend pleadings – application for leave to appeal – claim for compensation for loss of access to controlled access road – statutory construction of Pt 4, Div 5 of Roads Act 1993 – entitlement to compensation – access restricted or denied as a result of road "becoming" controlled access road – meaning of phrase "as a result of the road becoming" a controlled

				access road – whether road becomes controlled access road by the event of the Minister's order declaring road to be a controlled access road or by a "course of conduct" – assessment of compensation – "market value of land" – whether Pointe Gourde principle applies in assessment of compensation

CLASS 4

No.	Date	Bench	Outcome	Catchwords
Randren House Pty Ltd v Water Administration Ministerial Corporation [2020] NSWCA 14				
7.	19 February 2020	Basten JA; Leeming JA; Emmett AJA	Leave refused, notice of appeal dismissed as incompetent	APPEALS - time for commencing appeal - orders made dismissing applicants' claims - costs orders made months later - whether time for appeal only ran from costs orders - whether applicants should have an extension of time - whether applicants had sufficiently explained delay - extension of time for appeal refused JUDICIAL REVIEW – applicants' land claimed to be affected by Minister's plan made under Water Management Act 2000 (NSW) - applicants brought judicial review proceedings challenging numerous decisions including making of the Minister's plan - proceedings dismissed as not brought within 3 months as required by s 47 - application to reopen after judgment reserved refused - all bases of judicial review rejected - whether primary judge erred in finding proceedings statute-barred - whether Minister entitled to make decisions to make a plan at "high level" - whether Minister had duty to classify water sources of the State - whether first applicant should have been issued with a licence expressed in terms of unregulated water - whether error in refusing application to adduce further evidence - extension of time for appeal refused
Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd [2020] NSWCA 50				

8.	27 March 2020	Macfarlan JA; Meagher JA; Gleeson JA	Appeal dismissed	ADMINISTRATIVE LAW – denial of procedural fairness – whether common law right to procedural fairness excluded by statute – Environmental Planning and Assessment Act 1979 (NSW) Sch 5 – legislative intent plain ENVIRONMENT AND PLANNING – statutory interpretation – whether carving into cement render of wall constitutes "development" – Environmental Planning and Assessment Act 1979 (NSW) s 4.2 – whether development consent obtained
Coffs Harbour City Council v Noubia Pty Ltd [2020] NSWCA 142				
9.	15 July 2020	Bathurst CJ, Bell P, Basten JA	Appeal allowed	CIVIL PROCEDURE – hearings – procedural fairness – judge preferring evidence of one expert over another – earlier role of expert addressed during proceedings – basis of preference based on earlier role – no unfairness ENVIRONMENT AND PLANNING – consent – conditions – construction – transfer of land to Council – public purpose – importation of valuation principles from the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) JURISDICTION – Land and Environment Court – valuation of land – no compulsory acquisition – proceedings transferred from Equity Division – conferral of jurisdiction on transferee court – Civil Procedure Act 2005 (NSW), s 149B, 149E – Class 4 jurisdiction exercised – Land and Environment Court Act 1979 (NSW), s 20(1(cj) JUDGMENTS AND ORDERS – reasons – duty to give reasons – failure to give reasons – constructive failure to exercise jurisdiction distinguished VALUATION – methods of valuation – "before and after" method – developed land on alluvial floodplain – whether alternative hypothetical developments the most financially advantageous use of land – proposed alternative development subject to natural features of the land and associated constraints on use – whether alternative development would have

				received approval VALUATION – valuation of land – principles – whether detention and management of upstream water flows by downstream land owner a "public purpose" to be disregarded in a valuation exercise
Bobolas v Waverley Council [2020] NSWCA 201				
10.	31 August 2020	Macfarlan JA	Application dismissed	APPEAL – application for order staying the hearing of judicial review proceedings in the Land and Environment Court – no basis demonstrated for appellate intervention in respect of a matter of practice and procedure
Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd [2020] NSWCA 254				
11.	15 October 2020	Leeming JA; Payne JA; Simpson AJA	Leave refused	COSTS – party/party – leave to appeal – where applicants filed submitting appearances – whether applicants responsible for error of consent authority – whether failure by the primary judge to take into account considerations relevant to the costs discretion

COURT OF CRIMINAL APPEAL DECISIONS

CLASS 5

No.	Date	Bench	Outcome	Catchwords
Environment Protection Authority v Wollondilly Abattoirs Pty Limited & Davis [2019] NSWCCA 312				
1.	20 December	Brereton JA; Harrison J;	Appeals dismissed	CRIME – environment and planning – appeals – appeal against sentence – inadequacy – whether sentencing judge erred in assessment of seriousness – evidence of state of mind of corporation

	2019	Bellew J		CRIME – environment and planning – appeals – appeal against sentence – inadequacy – whether sentencing judge erred in application of De Simoni principle – whether moral culpability a factor EVIDENCE – exclusion of evidence – whether unfairly prejudicial to accused SENTENCING – EPA appeal against inadequacy of sentence – where grounds of appeal made out – whether Court should exercise discretion to intervene
Hanna v Environment Protection Authority [2019] NSWCCA 299				
2.	20 December 2019	Macfarlan JA; Walton J; Bellew J	Leave granted, appeal dismissed	CRIME – appeal – sentencing – offender agreed to court taking into account three offences of transporting waste to facility that cannot be used as a waste facility when sentencing him for principal offences – statutory Form 1 procedure not utilised – common law principle permitting additional offences admitted by offender to be taken into account in sentencing process – whether common law only authorises an additional offence to be taken into account in respect of a single, identified, charged offence CRIME – appeal – sentencing – non-parole period – special circumstances – whether sentencing judge erred in not considering matters relied upon in combination – whether hardship to offender's family may be taken into account – points not taken in court below CRIME – appeal – whether sentencing miscarried because of incompetence of offender's counsel – mandatory visa cancellation provisions in Migration Act engaged as a result of sentence – evidence and argument not put before sentencing judge as to mandatory cancellation of visa and its effects on the offender and his family
O'Haire v Barnes, Chief Regulatory Officer, Natural Resources Access Regulator [2020] NSWCCA 19				
3.	21 Febru	Payne JA; Beech-	Leave refused	CRIMINAL LAW – s 5F appeal – interlocutory judgment or order – whether trial judge erred by failing to correct a plea of guilty entered by counsel on behalf of the accused under the

	ary 2020	Jones J; N Adams J		slip rule JUDGMENTS AND ORDERS – amending, varying and setting aside – correction under slip rule ADMINISTRATIVE LAW – bias rule – apprehended bias – application of "double might" test
Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd [2020] NSWCCA 74				
4.	6 May 2020	Harrison J, Hamill J, Wilson J	Leave granted and appeal dismissed; leave refused	APPEAL – where charges found to be duplicitous – where leave sought to amend charges to nominate particular working days as separate counts of breach APPEAL – whether failure to take into account relevant consideration – whether denial of procedural fairness ENVIRONMENT AND PLANNING – consent – where alleged breach of terms of development consent
Somerville v Chief Executive of the Office of Environment and Heritage [2020] NSWCCA 93				
5.	6 May 2020	Johnson J; Adamson J; Bellew J	Dismissed appeal; remitted to LEC	ENVIRONMENT AND PLANNING — Offences — Prosecutions — whether commencement of criminal proceedings time barred LIMITATION OF ACTIONS — Operation of bar — National Parks and Wildlife Act 1974 (NSW) s 190(1) — whether distinct limitation periods can be relied on in the alternative — whether prosecutor must elect which limitation period is relied on
Kiangatha Holdings Pty Ltd v Water NSW [2020] NSWCCA 263				
6.	19 October 2020	Hoeben CJ at CL; Rothman J; Fagan J	Leave granted; appeal upheld	CRIMINAL LAW – appeal – Land and Environment Court – whether summonses bad for duplicity – appeal upheld

RESERVED DECISIONS

No.	Hearing Date	Catchwords
Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act		
1.	31/08/2020	LAND & ENVIRONMENT – appellant owned land on NSW coast in Tweed Heads South – appellant's land was included in the Coastal Wetlands and Littoral Rainforests Area Map under the State Environmental Planning Policy (Coastal Management) 2018 (NSW) – appellant commenced judicial review proceedings challenging the validity of the Policy – primary judge found in favour of respondents – whether primary judge erred in interpreting the term "coastal wetland" in s 6(1) of the Coastal Management Act 2016 (NSW) – whether primary judge erred in determining that the characterisation of land as "coastal wetland" was not a jurisdictional fact – whether primary judge erred in finding appellant's land fit the description in s 6(1) – whether primary judge erred in failing to find that the designation of parts of the appellant's land was not reasonably appropriate and adapted to achieving the objects of the Coastal Management Act and Policy – whether primary judge erred in failing to find the Policy was invalid
Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council		
2.	08/09/2020	LAND & ENVIRONMENT – first appellant lessee and second appellant lessor commenced proceedings seeking the imposition of four interrelated easements over land owned by the respondent council pursuant to s 88K of the Conveyancing Act 1919 (NSW) – easements were designed to permit and facilitate the use of an encroaching acoustic enclosure on council land for the benefit of the adjacent leased land which operated as a waste transfer and recycling facility – primary judge found in favour of respondent – whether primary judge erred in finding the claimed easements were not easements within the meaning of s 88K of the Conveyancing Act – whether primary judge erred in finding the claimed easements were not reasonably necessary within the meaning of s 88K – whether primary judge denied the appellants procedural fairness by, inter alia, failing to

		deal with certain submissions – whether primary judge erred in making or failing to make certain factual findings
Harris v WaterNSW		
3.	28/09/2020	CONVICTION – s 91G(2) of the Water Management Act 2000 (NSW) – whether the trial judge erred by finding that the prosecutor had demonstrated beyond reasonable doubt that the flow rate at the Bourke gauge was less than 4,894 ML/day in the period 22 June to 27 June 2016 – whether in the course of determining that flow issue, the trial judge further erred by: (a) failing to understand the effect of the evidence of Dr Martens in demonstrating why it was that the evidence upon which the prosecutor relied did not establish the alleged flow rate beyond reasonable doubt; (b) treating as relevant whether Dr Martens had identified practicable alternatives to measuring flow; (c) admitting the departmental record of gauge node points, and evidence based upon that record; (d) treating Mr Cutler as having given evidence as to what the field officers actually did when the gaugings in question were carried out; (e) failing to recognise Mr McDermott's treatment of the inherent uncertainty in the calculation of flow rate was one which assumed relevant standards and processes for the gathering of reliable gauge node points had been properly followed – whether the trial judge erred by finding that the prosecutor had demonstrated beyond reasonable doubt that it was a condition of the approval in question that water was prohibited from being taken when the flow in the Darling River at the Bourke gauge was equal to or less than 4,894 ML/day (Alleged Term) – whether in the course of determining that condition issue, the trial judge further erred by: (a) finding that the evidence established beyond reasonable doubt that, in a conversation with Mr Wheatley, the appellant had consented to receiving written notice varying or introducing a term into the approval by way of email addressed to a Mr Mark Adams; (b) finding that the evidence established beyond reasonable doubt that written notice introducing the Alleged Term into the approval was given to the appellant by email dated 23 September 2015 to Mr Adams; (c) finding that the respondent had made out its case that the Alleged Term was a condition of the

		approval by virtue of a combination of: (1) the operation of clause 3 of Schedule 10 to the Water Management Act 2000 (NSW) and (2) the water entitlement immediately preceding the approval containing a differently worded condition to the same effect. That finding was erroneous in circumstances where: (i) no such case had been advanced by the respondent; (ii) the applicant had not been given the opportunity to consider and be heard on that proposed finding, and had instead conducted his defence on the basis that no such finding was available; and (iii) in any event, the differently worded condition in the immediately preceding water entitlement was not to the same effect – whether by reason of the above errors and each of them, the trial judge erred in finding that the respondent had proved beyond reasonable doubt that the appellant had committed an offence against s 91 G(2) of the Water Management Act 2000 (NSW).
Omaya Investments Pty Ltd v Dean Street Holdings Pty Ltd		
4.	26/10/20	LAND & ENVIRONMENT – first appellant owned land adjoining a construction site in Burwood, which land was later acquired by the second appellant – first respondent was registered proprietor of construction site – second respondent was the contractor carrying out the works on the site and third respondent owned other land adjoining the construction site – the fourth and fifth respondents were the principal certifying authority and consent authority, respectively – appellants commenced civil enforcement proceedings against respondents alleging that the work carried out at the site was unlawful – primary judge found principally in favour of respondents – whether primary judge erred in finding that a construction certificate issued by the fourth respondent had been modified – whether primary judge erred in finding certain engineering plans were first stamped on or about a particular date – whether primary judge erred in finding appellants had not discharged their onus of establishing certain piling and shoring works were carried out between particular dates