Land and Environment Court Seminar

27 April 2022

Appeals to the Court of Appeal and the Court of Criminal Appeal

2021 (and the first 12 weeks of 2022)

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This paper summarises judgments delivered by the Court of Appeal and the Court of Criminal Appeal in 2021 and February, March and April 2022. Its purpose is merely to bring to your attention (a) the part played by appeals from the Land and Environment Court as an aspect of its overall workload, and (b) some particular decisions which may be of interest.

1. The overall statistics

There were 20 substantive decisions of the Court of Appeal and Court of Criminal Appeal:

Class 1	3	2 allowed, 1 dismissed
Class 3	5	3 allowed, 2 dismissed
Class 4	7	2 allowed, 5 dismissed
Class 5	5	2 allowed, 3 dismissed
Total	20	9 allowed, 11 dismissed

In other words, as you would expect, although Class 1 proceedings comprise the bulk of the litigation in the Court, there are very few appeals. Of course, appeals do not lie from decisions of the court constituted by a Commissioner, and only by leave from the Court hearing a s 56A internal appeal, and in any event, only on a question of law. On the other hand, Class 4 appeals lie as of right, and are often about important rights, often not quantifiable by money, and often turn on questions of law; they are the most numerous. They are the only appeal by way of hearing which lies to the Court of Appeal as of right not subject to any monetary threshold.

* Judge of Appeal, Supreme Court of New South Wales. I acknowledge the assistance of Ms Hannah Dawson in assembling the judgments upon which this presentation is based. All errors are mine.

Over the period 2016-2020, the total number of appeals has been (see p 56 of Land and Environment Court Annual Review 2020):

2016	15
2017	25
2018	28
2019	25
2020	17

The comparable figure for 2021 may possibly be 15 if those figures are confined to substantive appeals. That is to say, of the 20 in the first table, 5 appeals were decided in 2022.

It is difficult to draw any conclusions from the numbers over the last 6 years. It is possible that there is a longer term downward trend in appeals. It is also possible that there was a spike in appeals (including Class 3 appeals) following acquisitions for some major infrastructure projects which reflects the higher numbers in 2017-2019. It is also possible that the dip is attributable to the COVID-19 pandemic, although that did not much reduce the total number of civil appeals determined, while criminal appeals actually increased. But the sample space is too small for any inference to be drawn with any confidence.

One thing that is clear is that appeals represent a tiny fraction of the matters commenced in the Land and Environment Court. Most litigation is won or lost or resolved by compromise at trial, rather than on appeal.

It is a little laborious to count judgments delivered each year (as opposed to the "disposals" in the annual review) and what follows may be a little inaccurate, but over the period 1 January 2021 to last week, by my count there were the following substantive judgments (excluding costs judgments and procedural rulings on subpoenas etc): Class 3: 23, Class 4: 38 and Class 5: 34. I haven't attempted to count Class 1 proceedings because they are so numerous and because of s 56A appeals.

If one compares the number of judgments at first instance with the number of judgments of the Court of Appeal over the same 15 month time frame, the following emerges:

Class 3	5	23
Class 4	7	38
Class 5	5	34
Total	17	95

It will be seen that in the order of 1 in 5 of judgments written and delivered will, as a matter of statistics, be the subject of an appeal or an application for leave to appeal. For what it is worth, that is a smaller proportion of the civil actions resolved by judgment in the District Court from which appeals are brought, although it is also a larger proportion of convictions and sentences imposed by that Court which are subject to appeal or review.

2. A series of interesting procedural appeals

One point made last week by Basten JA at an appellate judges conference concerned specialists and generalists. Judges on the Court of Appeal and Court of Criminal Appeal are necessarily generalists. They typically know a lot less about the particular area in an appeal brought from the Land and Environment Court than the lawyers on both sides. On the other hand, they may be much better placed to see how some ruling or aspect of procedure or question of substantive law fits in with the law in other areas.

As it happens, the most interesting (at least to my mind) of the appeals from the Land and Environment Court have addressed questions of procedure, notably, joinder of parties and the powers to make preservation orders and to set aside subpoenas. The notion that these decisions are of interest may seem improbable. However, Professor Zuckerman wrote that "Civil procedure is both simpler and more complex than is usually assumed", in part because "litigation can give rise to intricate problems and generate considerable difficulties for a variety of reasons": A Zuckerman, *Civil Procedure Principles of Practice* (Foreword to 1st ed 2003). The complexity may make a broader approach more apposite. But even if I am wrong about their intrinsic interest, there can be little doubt that these decisions are practically significant. Because procedural issues arise in the early stages of litigation, and because most litigation does not result in a judgment after a final hearing, what was said by the Court of Appeal in a procedural appeal is apt to have a bearing upon a much larger number of proceedings commenced in the Land and Environment Court (or for that matter any other court) than what was said in an appeal from a final judgment after trial.

3. Two appeals involving joinder of parties.

Tahmoor Coal v Visser [2022] NSWCA 35 dealt with the new provisions for subsidence from coal mining companies. Instead of the MSB, a procedure is now within the Department, whose determination created a debt and an obligation to pay, with a criminal sanction. The coal miner sought to be joined. The joint judgment said this was to be allowed, on the basis of conventional principles from the UCPR and general principle – the coal miner was directly affected, rather than from some general principle about statutory compensation schemes. The dispositive reasoning was at [24]-[26]:

> The expectation [that the appropriate parties are identified in the relevant legislation establishing the compensation scheme] is manifestly inconsistent with the scope and detail to be found in the *Civil Procedure Act* and the UCPR. The inference that statutory compensation schemes stand apart from the usual run of civil litigation does not withstand inquiry. First, there is nothing in Sch 1 to the UCPR which identifies any such exclusion. Secondly, the most widely litigated statutory scheme for compensation is that found in the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Part 3, Div 5 of that Act provides for appeals to the Land and Environment Court in relation to such claims: it makes no provision for the proper parties to the proceedings in the Court. Thirdly, the Compensation Act does not need to make such provision with respect to the entity liable to pay compensation: it follows from general law principles, quite apart from the UCPR, that the party liable to make the payment is entitled to be heard in the proceedings and should be bound by the judgment. Those two essential elements are only achieved by making it a party.
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> It follows that the judge's statement at [31] that there is "no provision in the [Compensation Act] to warrant a finding that Tahmoor ought to be joined as a party" cannot be accepted. As the Secretary submitted, there is equally no provision for a claimant to be a party to an appeal by the company; yet the conclusion that a claimant would not be allowed to defend its determination of compensation is patently implausible. The Compensation Act is devoid of procedural provisions relating to court proceedings. It does not expressly confer any powers on the Land and Environment Court: it does not provide for the interlocutory steps undertaken in this case, nor does it identify any final orders the Court may make.
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> Similarly, the statement in *Visser* at [38] that the "carefully structured statutory compensation scheme ... suggests the application of the general joinder provisions in the UCPR are not relevant on the question of who is a necessary party" cannot be accepted. No such exclusion of the statutory effect of the UCPR can be implied in the circumstances of the legislation summarised above.

At [4]-[6] the further point is made that there is no such legal person as a Department, and the appropriate party to proceedings will be an officer (such as the Secretary). See *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2015) 215 LGERA 103; [2015] NSWCA 349 at [143]-[144] and *State of New South Wales v Sticker* [2015] NSWCA 180 at [9].

AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces [2021] NSWCA 112 will be familiar to this audience. It too was an interlocutory appeal in Class 1 proceedings, arising out of the review of the Independent Planning Commission's decision to refuse parts of a modification application under (preserved) s 75W concerning an underground coal mine. The applicant and the Minister reached agreement at a conciliation conference. Before orders were made, an objector applied to be joined. The primary judge (hearing an application as Duty Judge) acceded to that application, and the miner appealed.

The Court unanimously allowed the appeal, holding that s 8.15(2) of the EPA Act was not available, because the appeal was under s 75W(5), and that while there was an alternative source of power supporting the joinder, the fact that an objector wished to make submissions which the parties did not make did not make the objector a necessary party.

The Court divided on whether to resolve all grounds of appeal. Meagher JA and I said that it was inappropriate to determine whether there was power to amend a modification application, which point might never arise and which the applicant asked us not to determine; Preston CJ of LEC said that there was no such power. As you probably know, (a) a new agreement was reached which did not involve an amendment, (b) that agreement has been approved by the Court (see *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2022] NSWLEC 1089) and (c) about 6 weeks after the decision of the Court of Appeal, in July 2021 the Environmental Planning and Assessment Amendment (Modifications) Regulation 2021 came into force allowing amendments to modification applications.

3. An important decision on subpoenas

The Court of Appeal only tends to look in detail at subpoenas once a decade. But **Secretary of the Department of Planning, Industry and Environment v Blacktown City Council [2021] NSWCA 145** was the vehicle for a review of the principles governing subpoenas in all civil litigation, dismissing an appeal from a decision of the court constituted by Pepper J. The decision also bears upon the precedential weight to be given to decisions of the Court of Appeal refusing leave.

The most important point is that the occasions on which a legitimate forensic purpose (or the converse, an abuse of process) is established cannot be reduced to a single rule. However, while it

is sufficient for a subpoena to likely assist the issuing party's case, it is not necessary. Bell P said at [80]:

> My review of the authorities in relation to the setting aside of subpoenas and/or the refusal to permit access to documents produced leads me to the conclusion that, although a party will generally be able to demonstrate that it had a legitimate forensic purpose in issuing a subpoena where, to quote Simpson J (as her Honour then was, and with whom Spigelman CJ and Studdert J agreed) in *Saleam* at [11], it can:
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> "(i) identify a legitimate forensic purpose for which access is sought; and
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> (ii) establish that it is 'on the cards' that the documents will materially assist his case",
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> at least in civil matters, an inability to demonstrate that it is "on the cards" that the documents sought will materially assist the subpoenaing party's case will not automatically require either that the subpoena be set aside or that access to the documents produced be refused. It will generally be sufficient and prima facie evidence of a legitimate forensic purpose if the documents sought to be produced on subpoena have an apparent relevance to the issues in the case and or bear upon the cross examination of witnesses expected to be called in the proceedings.

That is perhaps the kindest way of disagreeing with an earlier decision of which I am aware.

Brereton JA said at [89]:

> I agree with Bell P, for the reasons given by his Honour, that an issuing party is not required to show that it is "likely" (or "on the cards") that the documents sought will materially assist its case, as distinct from that it is "likely" (or "on the cards") that they will add, in some way or another, to the relevant evidence in the case, and that the essential question is whether the documents called for are apparently relevant, or capable of providing a legitimate basis for cross-examination, in which case there is a legitimate forensic purpose for the issue of the subpoena. In my view, at least in civil proceedings and in the absence of any question of public interest immunity, no more is required to support the issue of a subpoena for production than that there is a reasonable basis for supposing that the material called for will likely add, in the end, in some way or another, to the relevant evidence in the case. This reflects the notions that the documents relate to, throw light on, or are sufficiently relevant to the dispute; that they "appear relevant in the sense that they relate to the subject matter of the proceedings"; or that they could possibly throw light on the issues in the case. Moreover, documents will add "in some way" to the relevant evidence in the case if they are capable of assisting in cross-examination, or go to credit, and notwithstanding that they are inadmissible according to the rules of evidence. (footnotes omitted).

McCallum JA agreed with both those passages.

Secondly, on the precedential authority of Court of Appeal decisions refusing leave, Bell P referred to what Callaway JA had said in *X v Director of Public Prosecutions* [1995] 2 VR 622 at 626:

> [E]ven where leave is refused because a decision is not attended with sufficient doubt, the Court of Appeal does not thereby affirm the decision, nor does it acquire the precedential status of a decision of this court. The reasons for that are, first, that the question is whether leave should be granted as opposed to the correctness of the decision and, secondly, that argument may be limited accordingly.

However, the President drew attention to the two different ways in which a decision refusing leave might be made at [28]:

> One consequence of the general practice of the New South Wales Court of Appeal in giving fuller reasons for its decisions refusing leave to appeal than is perhaps the case in other jurisdictions is that, whether or not strictly binding, such decisions (such as the decision of this Court in *ICAP* refusing leave to appeal) will frequently contain observations of persuasive authority or practical use and value for judges at first instance. It should be remembered, however, that decisions refusing leave to appeal will not always have had the benefit of full argument, this depending principally upon whether or not the leave application has been listed separately or concurrently on the contingent basis that leave to appeal might be granted: see r 51.14 of the Uniform Civil Procedure Rules 2005 (NSW). If the application for leave is listed separately, only 20 minutes are permitted for the development of argument.

4. Powers of the Court in Class 3 proceedings

Council of the City of Ryde v Azizi [2021] NSWCA 165 was an otherwise humdrum interlocutory Class 3 appeal which might easily be overlooked, but it sheds important light on the powers of the Land and Environment Court, and the intersection between Class 3 and Class 4 of its jurisdiction.

A council objected to the amount of compensation following an acquisition which the Valuer-General ordered it to pay. It proposed to appeal, and pending appeal, it did not want to transfer the funds to the landowners, who were impecunious and from whom there was a risk it might not recover if its appeal were allowed, and so it proposed to keep the funds in the council's solicitor's trust account. Mr Azizi sought an order that he and his company be paid. The judge ordered that the funds be transferred to the landowners, and the appeal was dismissed.

The discussion focussed upon the order, which was in the nature of mandamus, directed to the council to pay the compensation to the landowners. Could such an order be made in Class 3 proceedings or did separate proceedings need to be commenced in the Supreme Court (noting that the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) is not a "planning and environmental law" such as to engage Class 4)?

After reviewing ss 16(1A) and 22-25 of the *Land and Environment Court Act*, Basten JA writing for the Court concluded at [33]-[34]:

> Looked at from the perspective of the Court, the jurisdiction expressly conferred is to hear and dispose of the claim for compensation. By way of contrast, an order to enforce a statutory entitlement to payment of 90% of the offer bears the hallmarks of a claim for mandamus against a statutory authority. The enforcement of such an obligation would naturally fall within class 4 jurisdiction of the Land and Environment Court, which includes jurisdiction to hear and dispose of proceedings "to enforce any right, obligation or duty conferred or imposed by a planning or environmental law ...": LEC Act, s 20(2)(a). That jurisdiction extends to commanding the exercise of a function conferred or imposed by a planning or environmental law and making declarations in relation to any such right, obligation or duty or the exercise of any such function: s 20(2)(b) and (c). However, such jurisdiction is not available in relation to rights, obligations or functions arising under the *Land Acquisition Act*, which does not fall within the definition of a "planning or environmental law" in s 20(3). On the other hand, the Land and Environment Court has all the powers of enforcement available under Pt 8 of the *Civil Procedure Act 2005* (NSW) and the relevant Uniform Civil Procedure Rules 2005 (NSW). The provisions of ss 68(2) and 48(4) of the *Land Acquisition Act* could be said to involve the impositions of obligations enforceable in a court of general civil jurisdiction for payments of money; alternatively they could be seen as interlocutory steps which will only arise once proceedings have been commenced in the Land and Environment Court.
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> As a matter of principle, legislation should not be read narrowly in such a way as to create a division of jurisdiction between two institutions if an alternative reading allowing for matters to be disposed of in one court only can be adopted. That approach is consistent with the provision of complete and final relief in a single court, as reflected in s 20(2) of the *Land and Environment Court Act* and as reflected in the reasoning of Kirby P in *Stables Perisher*, [15] referred to above. On that approach, the Land and Environment Court has jurisdiction both to enforce the obligation for payment of a proportion of the compensation offer, on an interlocutory basis, and, in making final orders, to provide for any overpayment that may have been made on an interim basis.

Basten JA also addressed whether the court had power to impose conditions on the grant of relief at [35]-[36]:

> Such an order was identified in the course of submissions as a "*Castlemaine Tooheys* order", referring to the judgment of the High Court in *Castlemaine Tooheys Ltd v South Australia*.
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> The judgment of Mason ACJ in *Castlemaine Tooheys* is a useful source of reference in relation to the considerations which may apply in granting an injunction in the nature of a freezing order. However, use of the case as a label for a power diverts attention from the source of the power being exercised. There is specific provision for freezing orders in Pt 25, Div 2 of the UCPR. There is no exclusion in Sch 1 to the UCPR of any aspect of Pt 25 from the powers available in the Land and Environment Court, including in its class 3 jurisdiction. Accordingly, and contrary to a submission by the applicant in the stay application in this Court, there is no reason to doubt the power of the Land and Environment Court to make such an order. (footnotes omitted).

5. Three miscellaneous decisions

RIG Consulting Pty Ltd v Queanbeyan-Palerang Regional Council [2021] NSWCA 130

This Class 1 appeal caused three judges to write, even though this appeal very clearly had to be dismissed on one of the two bases. But it exposed what appeared to be a textual error in the Standard Instrument, which a developer sought to exploit in order to achieve a second subdivision of a resulting lot.

It was an example of something judges may be generally familiar with – whenever the literal meaning of a provision is rejected – which is the inevitable consequence of the contextual approach to construction endorsed in *Project Blue Sky* reflected in the familiar words at [78]:

> Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

This does not mean that in every case a contrived meaning is available which increases the development potential of land! Most of the time the literal meaning is the legal meaning.

Ku-ring-gai Council v Buyozo [2021] NSWCA 177

The Court of Appeal allowed this appeal and established that a modification application cannot be made in order to remove a condition requiring a monetary contribution. That was because the "development" was not thereby modified in any way.

Preston CJ of LEC also suggested that one could not modify a condition of consent which had already been performed; Basten and Payne JJA found that unnecessary and inappropriate to determine.

Nadilo v Eagleton [2021] NSWCA 232

To finish, a costs appeal. Where a defendant capitulates in terms of orders, costs follow the event, even if as in this case there were two bases advanced by the applicant, one of which was stronger than the other. Brereton JA, with whom Meagher JA agreed, said at [12]-[13]:

> Like Burchett J in *ONE.TEL*, I do not consider that in circumstances where one party effectively capitulates, rendering further litigation unnecessary, without any element of compromise, it is necessary to demonstrate "unreasonableness" to obtain an "order otherwise". However, if there were such a requirement, the respondents' persistence in defending the proceedings, rather than availing themselves earlier of any opportunity to avoid the applicant incurring costs, would satisfy it. The respondents had every opportunity to avoid the applicant incurring costs: they could have installed compliant machinery in the first place; they could have rectified it before proceedings were commenced; they could have rectified it promptly after proceedings were commenced; and they could have conceded at any earlier stage of proceedings that they were bound to rectify it. To defend the proceedings rather than to take any of those steps was, in the relevant sense and context, unreasonable.
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> The outcome that, in circumstances where the applicant was compelled to come to court to obtain relief to which she was plainly entitled, and which she obtained as a result of the respondents' practical capitulation by belatedly taking steps to render the machinery noise compliant, she was required to bear her own costs of doing so, is a plain injustice.

Preston CJ of LEC wrote to the same effect.

Appeals from the Land and Environment Court: February 2021-April 2022

	Case	LEC jurisdiction	Coram	Result	Catchwords
1	*AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112	Class 1	Meagher JA Leeming JA Preston CJ of LEC	Appeal allowed	PRACTICE AND PROCEDURE – joinder – appeal against refusal of application to modify development consent – parties agree on terms of a decision to dispose of appeal – intervenor raising jurisdictional issue that court has no power to so dispose of the appeal – source of power to join intervenor – whether s 8.15(2) Environmental Planning and Assessment Act available power for joinder – section 8.15(2) not an available power of joinder for this appeal - whether r 6.24 Uniform Civil Procedure Rules alternative source of power for joinder – whether joinder as a party necessary to determine all matters in dispute – whether power to amend modification application – whether error in exercise of discretion to join intervenor – whether joinder legally unreasonable
2	*R.I.G. Consulting Pty Ltd v Queanbeyan-Palerang Regional Council* [2021] NSWCA 130	Class 1	Basten JA Leeming JA Preston CJ of LEC	Appeal dismissed	ENVIRONMENT AND PLANNING — consent — power to grant – subdivision – provision fixing development standard – minimum size of lots created by subdivision – proposed subdivision non-compliant – whether development standard applied to proposed subdivision – provision that consent not be granted for subdivision of "resulting lot" – proposed subdivision of a resulting lot – whether provision applied to proposed subdivision
3	*Ku-ring-gai Council v Buyozo Pty Ltd* [2021] NSWCA 177	Class 1	Basten JA Payne JA Preston CJ of LEC	Appeal allowed	ENVIRONMENT AND PLANNING – consent – application to modify consent – condition of consent requiring payment of monetary contribution – power to reduce contribution – no change to development – contribution paid in full – calculation of contribution – construction of "gross floor area"– loading areas excluded – only loading areas in approved plans excluded – no utility in modification

4	*Mangoola Coal Operations Pty Limited v Muswellbrook Shire Council* [2021] NSWCA 46	Class 3	Bell P Macfarlan JA Brereton JA	Appeal allowed	LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – re-categorisation by Council of farmland to mining land – relevance of impact of ongoing drought on cattle grazing – hiatus in activity on land different to abandonment – activity in rating years required to be considered in its context including what occurred previously on the land and what intended to occur after LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – easement burdening rateable land for benefit of adjacent mine – very small land area subject to easement and cattle grazing rights interrupted only to "trifling extent" – limited significance of easement to determination of dominant use of land LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – relevance of source of requirement to use land for a particular purpose – reason for existence relevant but not determinative – use of land as Aboriginal Cultural Heritage Offset and Habitat Enhancement Offset areas the antithesis of mining – offset areas not used "for a coal mine" under s 517 Local Government Act – consideration of Peabody Pastoral Holdings 211 LGERA 337
5	*Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145	Class 3	Bell P Brereton JA McCallum JA	Appeal dismissed	CIVIL PROCEDURE – subpoenas – to produce documents or things – application to set aside – legitimate forensic purpose – test for determining the validity of a subpoena issued in civil proceedings – whether sufficient that the documents sought by a subpoena have "apparent relevance" to an issue in the proceedings – whether necessary to satisfy the court that the documents are likely materially to assist the case of the party issuing the subpoena – consideration of bases for setting aside subpoenas CIVIL PROCEDURE – Subpoenas – Legitimate forensic purpose – origins of concept – converse of abuse of process – whether a party issuing a subpoena will lack a legitimate forensic purpose if unable to demonstrate that documents sought by subpoena

					likely to assist its case – legitimate forensic purpose may be presumed where documents sought have apparent relevance to matters in issue or are capable of assisting in cross examination
6	*Council of the City of Ryde v Azizi* [2021] NSWCA 165	Class 3	Basten JA Meagher JA Payne JA	Appeal dismissed	COURTS – Land and Environment Court (NSW) – jurisdiction and powers – class 3 jurisdiction – assessment of value of land compulsorily acquired – enforcement of statutory obligation to pay 90% of Valuer General's assessment pending resolution of claim – power to make freezing order
7	*Tahmoor Coal Pty Ltd v Visser* [2022] NSWCA 35	Class 3	Basten JA Gleeson JA Payne JA	Appeal allowed	APPEALS – leave to appeal – interlocutory order in Land and Environment Court – refusal to join new party – strongly arguable case of error – need to identify proper parties – amount in issue sufficient to justify court proceedings ENERGY AND RESOURCES – mining – subsidence – compensation claimed from proprietor of active mine – appeal by claimants from Secretary's decision on review – Mine Subsidence Compensation Act 2017 (NSW), s 16 CIVIL PROCEDURE – joinder of parties – whether proprietor of active mine a "necessary party" –proprietor liable to pay compensation – whether direct affectation satisfies test of necessity – Uniform Civil Procedure Rules 2005 (NSW), rr 6.24, 6.27 – Ross v Lane Cove Council 86 NSWLR 34; [2014] NSWCA 50 applied CIVIL PROCEDURE – appeal from administrative determination of compensation – Secretary of Department identified as decision-maker – naming of party – government department not a person –joinder of Secretary

8	*Transport for NSW v Eureka Operations Pty Ltd* [2022] NSWCA 56	Class 3	Leeming JA White JA Preston CJ of LEC	Appeal dismissed; cross-appeal allowed (proceedings remitted)	LAND VALUATION — compulsory acquisition – partial acquisition of land – lease of land – lease to operate service station and convenience store business – compensation payable – market value of acquired land – decrease in value of residue land - before and after approach to determine compensation – appropriate valuation method – assessment of diminution in cash flow of business– whether valuation method available – whether valuation methodology accepted by primary judge raises question of law – agreement for term of lease to be extended – equitable term of lease – compensation to be determined having regard to equitable term of lease
9	*Omaya Investments Pty Ltd v Dean Street Holdings Pty Ltd* [2021] NSWCA 2	Class 4	Basten JA Payne JA Brereton JA	Appeal dismissed	ENVIRONMENT AND PLANNING – development approval – variation of plans – formalities for approval of changes – whether requirement for written application – recording approval of certifying authority – notification of consent authority – effect of breach of regulations
10	*Settlers Estate Pty Ltd v Penrith City Council* [2021] NSWCA 13	Class 4	Gleeson JA Payne JA Preston CJ of LEC	Appeal dismissed	APPEAL – breach of development consent –construction certificate part of development consent – drainage line not constructed in location shown on construction certificate plan – construction of construction certificate plan – whether misconstruction – judicial notice – whether common knowledge – refusal of leave to reopen – whether denial of procedural fairness – whether incorrect factual or legal assumption – leave to appeal refused
11	*Dincel Construction System Pty Ltd v Penrith City Council* [2021] NSWCA 133	Class 4	Gleeson JA Payne JA Brereton JA	Appeal allowed in part	ENVIRONMENT AND PLANNING – Court of Appeal – jurisdiction and powers – where appellants imported fill, engaged in earthworks, constructed hardstand areas and used land for storage without development consent – where appellants admitted breaches – where primary judge ordered cessation of use, removal of fill and restoration of premises – where primary judge suspended injunctive relief – whether House v The King error in granting injunctive relief established

12	*North Parramatta Residents' Action Group Inc v Infrastructure New South Wales (No 2)* [2021] NSWCA 146	Class 4	Bathurst CJ Basten JA Leeming JA	Appeal dismissed	ENVIRONMENT AND PLANNING – development consent – challenge to validity – whether environmental impact statement complied with Environmental Planning and Assessment Regulation cl 7(1)(c) – requirement to consider feasible alternative sites – requirement to consider feasible alternative designs
13	*KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216	Class 4	Basten JA Payne JA Preston CJ of LEC	Appeal dismissed	ADMINISTRATIVE LAW – judicial review – error of law – review of decision of consent authority – construction of State Environmental Planning Policy – whether decision-maker considered conditions aimed at ensuring that greenhouse gas emissions are minimised to the greatest extent practicable ADMINISTRATIVE LAW – judicial review – error of law – obligation to consider case presented by applicant – minimising scope 3 greenhouse gas emissions of thermal coal – whether refusal of proposal could lead to use of inferior resource with higher emissions ADMINISTRATIVE LAW – judicial review – error of law – reference in reasons to "no evidence" – where information before decision-maker – whether reasons indicated decisionmaker not satisfied that information provided rational basis for finding sought
14	*Nadilo v Eagleton* [2021] NSWCA 232	Class 4	Meagher JA Brereton JA Preston CJ of LEC	Appeal allowed	COSTS – where Class 4 proceedings in Land and Environment Court dismissed by consent – where on application under UCPR r 42.20(1) primary judge ordered "otherwise" by making no order as to costs – where notwithstanding consent orders applicant clearly successful party – whether manifest error in failing to order respondents pay applicant's costs of proceedings
15	*Coffs Harbour City Council v Noubia Pty Limited* [2022] NSWCA 32	Class 4	Leeming JA Simpson AJA Preston CJ of LEC	Summons seeking leave to appeal dismissed	APPEAL – leave to appeal – discretionary decision on matter of practice and procedure – admission of further evidence on remitter – no issue of principle, public importance or injustice

Court of Criminal Appeal					
16	*Chia v Ku-ring-gai Council* [2021] NSWCCA 189	Class 5	Hoeben CJ at CL Harrison J Wilson J	Appeal allowed; new trial ordered	ENVIRONMENTAL OFFENCES – appeal – appeal against conviction – where defendant appeals against conviction for injuring trees the subject of a Tree Preservation Order without consent contrary to s 125 of Environmental Planning and Assessment Act 1979 – whether defendant vicariously liable for actions of independent contractor and his subcontractors – assessment of nature and terms of instruction given and any qualifications to that instruction – whether trial judge failed to consider defence argument that defendant instructed contractor to comply with 10/50 Code – whether the instruction that contractor comply with 10/50 Code would operate as a qualification upon the width of general instructions amounting to an instruction not to fell trees beyond the 10/50 zone – conviction quashed – new trial ordered
17	*Turnbull v Office of Environment and Heritage* [2021] NSWCCA 190	Class 5	Hoeben CJ at CL Harrison J Button J	Appeal dismissed	CRIME — accusatorial principle — admissions in civil proceedings sought to be used in subsequent criminal prosecution — plaintiff and prosecutor same legal person — admissions made voluntarily and on legal advice of counsel — admissions made in open court — applicant deposed he would not have made admissions if advised of possible criminal prosecution — use of admissions in subsequent criminal proceedings said to breach accusatorial principle — application for a stay distinguished — practical difficulties in restraining use of admissions ENVIRONMENT AND PLANNING — land clearing offence prosecuted in Land and Environment Court — Class 4 and Class 5 jurisdictions — proceedings based on same alleged acts commenced in both jurisdictions – admissions made disputing extent of civil contravention of Native Vegetation Act

18	*Environment Protection Authority v Charlotte Pass Snow Resort Pty Ltd* [2021] NSWCCA 289	Class 5	Preston CJ of LEC Price J Adamson J	Appeal allowed	PROSECUTION – duplicity – whether summons bad for duplicity – multiple acts of water pollution – defendant charged compendiously with single offence of water pollution – exception to rule against duplicity – whether single criminal enterprise – multiple acts of water pollution involve single compendious instance of offending – guilty plea to single offence – application to withdraw guilty plea – question of duplicity decided before application to withdraw guilty plea – error in doing so
19	*Budvalt Pty Ltd v Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator* [2022] NSWCCA 9	Class 5	Preston CJ of LEC Price J Adamson J	Appeal dismissed	CRIME – environmental offence – *Water Management Act 2000* (NSW) – appeal against sentence – whether judge adopted a two stage approach to sentencing – whether judge erred in not taking into account publication order in determining quantum of fine – whether error in assessing objective seriousness of offence – whether mistake of law and appellant company's lack of intention to commit the offence was mitigating factor – whether genuine contrition and remorse demonstrated – whether quantum of fine was manifestly excessive
20	*Bartter Enterprises Pty Ltd v Environment Protection Authority* [2022] NSWCCA 43	Class 5	Basten JA Davies J Dhanji J	Appeal dismissed	ENVIRONMENT AND PLANNING – offences – appeal – failure to comply with condition of environment protection licence – condition to maintain plant in a proper and efficient condition – meaning of "maintain" – release of ammonia gas during upgrade works – circuit piping not able to contain ammonia – Genkem Pty Ltd v Environment Protection Authority (1994) 35 NSWLR 33 applied

Procedural rulings					
21	*Seek Justice Pty Ltd v Blue Mountains City Council* [2021] NSWCA 87	Class 4	Macfarlan JA	Application for injunction rejected	APPEALS – procedure – informal urgent application for injunction pending appeal – applicant applied to stop trail running event in the Blue Mountains from proceeding the next day – primary judge dealt thoroughly with circumstances of proposed event and carefully weighed matters going to the balance of convenience – applicant did not show any reason for a different view to be taken than that taken by the primary judge
22	*Council of the City of Ryde v Azizi* [2021] NSWCA 120	Class 3	Payne JA	Stay granted	APPEALS – procedure – stay pending appeal
23	*North Parramatta Residents' Action Group Inc v Infrastructure New South Wales* [2021] NSWCA 128	Class 4	Basten JA	Motion seeking interim injunction dismissed	APPEAL – injunction – application for injunction to preserve property the subject of the appeal – expedition granted – interim injunction granted – whether conditions should be imposed limiting the effect of the injunction – public interest underlying the litigation – merit of appeal – prejudice to respondent – appeal to be heard in seven days
24	*Black Hill Residents Group Inc v Marist Youth Care Ltd* [2021] NSWCA 314	Class 4	White JA	Security for costs ordered	COSTS — Security for costs — Relevant factors — Impecuniosity — Whether evidence establishes that members of incorporated association do not have means to provide the security sought — Strength of the claim — Where opponent's submissions on appeal fail to grapple with finding central to the determination below