EPLA Conference 2019

The year in the NSW Land and Environment Court

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It is a pleasure to be here at the 2019 EPLA conference to speak about the year that was in the Land and Environment Court.

Composition of the Court

I would like to begin with a note about the composition of the Court.

Justice Terry Sheahan AO retired this year after being a judge of the Land and Environment Court since April 1997. As is entirely appropriate, there has been a series of events to celebrate his extensive and enthusiastic contribution to planning and environmental law in NSW. I would like to add my own congratulations to him for a career dedicated to public service, first in State Parliament and then in the courts.

I hope he and you can forgive me for one anecdote, from the first matter in which I met him. In my first year at the Bar way back in 1997 I had a junior brief for one of the people accused by Franca Arena MLC of being part of a high level conspiracy of politicians and judges in NSW to protect paedophiles from police attention – there was a special commission of inquiry, which heard evidence and submissions, and reported that the accusations were scurrilous and were made totally without foundation. Terry Sheahan had to endure the absurd accusation that he was one of the conspirators. I was not acting for Terry but got to know him a little in the course of the proceedings – then as now he was personable, down to earth and always liked a chat. One of the features of Ms Arena's accusations was a startling lack of specificity – about the only time she brought up a specific date or time was a suggestion she made that on one particular Sunday afternoon, some of the conspirators had met in Parliament House in Macquarie Street. We all seized on the accusation because there was finally something specific to deny and disprove. Access records from State Parliament were called for – it was shown that, as usual, no one had been there on a Sunday afternoon. But the real clincher turned out to be Terry Sheahan's diary notes. There is good reason why Terry's Parliamentary information page still records that his recreational

interests are family and films. He was an avid film buff and would record what he saw, with who and when in his diary. Sure enough, the diary showed that on the Sunday afternoon in question he was at the Roxy Parramatta with his family watching a film, I think it was *Golden Eye* or *Mission: Impossible* or something like that. The diary note was a compelling contemporaneous exhibit providing the most solid of alibis. I hope Terry enjoys many good films in his retirement.

September 2019 brought us the excellent appointment of Justice Duggan as a judge of the Court. Justice Duggan is already proving to be what everyone who knows her predicted her to be – an obviously fair, efficient and correct judge. Long may it continue.

Among the interesting facts revealed at Justice Duggan's swearing in was her Honour's reference to the suggestion of Pepper J that the LEC is the first court in New South Wales legal history and perhaps the first court in Australian legal history to have at least parity in the gender balance – at present there are three women and three men on the court. That 50% composition is close to, but an important amount greater than, the High Court's 43% women and the Family Court's 46% women. I don't know of any superior court in Australia that has done better than 50%, although I think that in early 2019, 5 of the 8 magistrates in the ACT were women, but that has since become 3 of 8 presently. The NSW Supreme Court has, with all due respect, quite a way to go – its ratio is under 20%. There are enough excellent candidates out there to make a good judicial system with a generally even gender mix.

Other developments in the composition of the LEC since the last EPLA conference include the appointment of Commissioner Tim Horton in November 2018; of Acting Commissioner Julie Bindon in December 2018; of Acting Commissioner Philip Clay SC in September 2019 and of Acting Commissioner Maureen Peatman in September 2019. In my view they are all very worthy appointees and I believe that they all have the respect of the profession – I wish all of them an enjoyable and satisfying time with the Court.

LEC decision numbers

Some statistics put the recent work of the judges and commissioners of the Land and Environment Court into numbers.

I have obtained these numbers myself, using the Caselaw web site. There is also a much more detailed analysis of the performance of the Court in the Court's 2018 annual report, which was published in July this year.

In calendar 2018, there were 207 published decisions by judges. That was up from 181 in calendar 2017 and 167 in calendar 2016 – and the number of decisions in 2018 was about the same as 2015.

In calendar 2019, there have been 150 decisions by judges published so far.

I will not descend into the number of judgments each judge prepared in a calendar year. That statistic is certainly not irrelevant to the question of judicial productivity, but it is a blunt metric in that it does not take into account time on leave or time applied to other professional commitments (whether that be running the court, running the Friday list, sitting on the Court of Appeal or working in the Northern Territory). There are other problems with it as a metric, for example, it treats a published decision on a short interlocutory point as though it were the same as a judgment after a complex trial. So all I will say is that in 2018 Moore J and Robson J had the lead on the raw numbers, as each published over 50 decisions for the calendar year.

In calendar 2018, there were 696 published decisions by Commissioners of the Court. That was about the same as the 711 in 2017; and up from 636 in 2016 and 568 in 2015. In 2019, there have been 507 Commissioner decisions published so far.

Citation of LEC decisions

In September 2019, the LEC published on its web site the results of the *2018 AustLII Database Metric and Statistics*. That is a brief collation of information from the AustLII database about the number and sources of citations of NSW LEC decisions, extracted from the judgments in the AustLII database.

According to the report, the decision of the LEC that was most frequently cited in 2018 (including internal citations in other LEC decisions) was *Tenacity Consulting v Warringah*, the decision of Roseth SC in 2004 about view loss analysis. Three of the top five most cited cases were about principles for determining tree disputes (*Yang v Scerri*, *Barker v Kyriakides* and *Robson v Leischke*) and the other one in the top five was *Wehbe v Pittwater*, the Chief Judge's decision in 2007 about SEPP 1 objections. It makes sense that, since Commissioners publish many more decisions than the judges, the authorities that are important statements of principle about frequently litigated merits issues are the most cited authorities.

Now I can move on to a few of the significant Land and Environment Court cases decided over the past year.

Sydney Football Stadium proceedings

How could you look back on the past year without remarking on the State election that was held on 23 March 2019 and a case that arrived in the LEC in February as the legal offshoot of one of the significant infrastructure debates swirling around during the election campaign – the fate of the Sydney Football Stadium. Two applicants, an incorporated community association called Local Democracy Matters and Waverley Council brought proceedings for judicial review of decisions to grant consent to a concept plan and to consent to the demolition of the stadium. Justice Pain heard and determined the matters urgently.

> ***Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW*** [2019] NSWLEC 18
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> On 26 February after a three-day hearing, Pain J granted an interlocutory injunction restraining hard demolition works at the Sydney Football Stadium for about two weeks to allow judgment to be prepared and delivered. I note there was no undertaking as to damages – Pain J exercised the power under rule 4.2(3) of the LEC Rules to decide not to require the applicants to give any undertaking as to damages if satisfied that the proceedings have been brought in the public interest.
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> ***Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW*** [2019] NSWLEC 20
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> Summonses were dismissed on 6 March 2019.
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> ***Local Democracy Matters Incorporated v Infrastructure NSW*** [2019] NSWCA 65
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> NSWCA dismissed the appeal at the end of the hearing on 15 March and delivered reasons for judgment on 12 April
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> ***Local Democracy Matters Incorporated v Infrastructure NSW (No 2)*** [2019] NSWCA 118
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> On 23 May the CA dealt with costs on the papers. The unsuccessful appellant LDM was required to pay the Minister's costs of the appeal. The CA did not

think the proceedings involved the necessary “something more” than merely being brought in the public interest. The court said at [15] that “while it may be accepted that protection of the urban environment may qualify as protection of the environment, it is difficult to see that the demolition of one (modern) stadium and its replacement by another is sufficient to engage this criterion. It may also be accepted that there was no financial gain for LDM bringing the proceedings, but that of itself is insufficient to warrant a departure from the rule.”

Local Democracy Matters Incorporated v Infrastructure NSW; Waverley Council v Infrastructure NSW (No 4) [2019] NSWLEC 140

Pain J has recently published judgment dealing with the costs of the applications. Her Honour held on 1 October that the proceedings were brought in the public interest within the meaning of rule 4.2 of the LEC Rules 2017 and made no order as to costs, in each of the matters.

Rule 4.2(1) provides that **“***The Court may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest*”. Pain J pointed out and relied on the width of the Court’s discretion on costs and made no order for costs on the basis that it was brought by a not for profit community group; was not for pecuniary gain; the fact that some members associated with the Greens was not significant; SFS is a significant recreational and sporting facility in a prominent location; there was some legal and environmental significance of ground related to whether Minister considered design excellence principles in making the relevant decision; and there was a petition with 220,000 signature which showed the very high level of public engagement with the matter. The case brought by Waverley Council was found to have been brought in interests of constituents and community interest in the redevelopment of a significant site and for similar reasons was regarded as brought in the public interest.

The determination that Waverley Council did not have to pay costs is an interesting one. Unless I missed it her Honour did not refer to the CA decision on costs, perhaps because of the specific rule in the LEC. It is not the first time that a local Council has

taken a litigious path against a State government decision-maker and said that the local interest it represents is in the public interest.

In *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 4)* [2019] NSWLEC 56 at [63], Robson J said that "*There is no general principle that when a council is an applicant it is taken to be acting in the public interest. This is particularly so where, as in the present case, Council is challenging the position … of the Secretary, a senior officer of the executive government of the State*."

Many judgments recognise that the public interest is a multi-facted concept – and in my view there will be many cases with room for a claim by a Council applicant that it is acting in the public interest, even if it is challenging a State government decision.

Protective costs orders

While referring to issues concerning costs, I should mention protective costs orders and the decision of ***Neringillah Community Association v Laundry Number Pty Ltd***. The case was decided by Pepper J last October [2018] NSWLEC 157 and has more recently been reported (2018) 236 LGERA 102. It is a very careful and comprehensive review of the principles applicable under UCP rule 42.4, which provides that "The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another." Her Honour capped the costs recoverable by the first respondent at $40,000.

Coal mines

Mining cases continue to feature as a prominent and important part of the jurisdiction of the LEC, in both its judicial review jurisdiction and its merits jurisdiction.

A matter of very great public interest was the merits decision of the Chief Judge in ***Gloucester Resources Limited v Minister for Planning*** [2019] NSWLEC 7, (2019) 234 LGERA 257.

Gloucester Resources sought consent to develop, operate and rehabilitate an open-cut coal mine in close proximity to the country town of Gloucester, known as the Rocky Hill coal project. The project would produce 21 million tonnes of coal over 16 years. The project involved constructing three contiguous open-cut pits which would be surrounded by a long-term amenity barrier to mitigate noise and visual impacts. The open-cut pits would be approximately 1km from the closest rural residential properties.

The DA attracted 2,570 submissions, with 2,308 objections and 261 in support. The PAC refused consent in December 2017. Gloucester Groundswell Inc was joined as a party to the Class 1 appeal. The main issues were compatibility with existing, approved and likely preferred uses of the land in the vicinity of the mine; visual impacts; social impacts; economic and public benefits; and climate change impacts. The applicant did not challenge the science of climate change or the global need for immediate GHG emissions reductions but contested that the Rocky Hill coal project needed to be refused to meet those objectives.

The application was refused. As to climate change findings, which caught the most public attention in a flurry of media attention after the decision, Rocky Hill coal project would result in GHG emissions including directly (scope 1 and 2 emissions) and indirectly (scope 3 emissions). The Chief Judge held that Scope 1, 2 and 3 emissions were relevant to be considered in the environmental impact assessment stage and in assessing whether the project should be granted approval. It was held that consideration of the principles of ecologically sustainable development could include consideration of climate change. There was a finding that all GHG emissions would contribute to climate change, that is, it was found there would be a causal link between the project's emissions and climate change. The Court found that the unacceptable planning, visual and social impacts justified refusal of consent while the GHG emissions of the Rocky Hill coal project and its likely impacts on climate change provided a further reason for refusal.

On the other side of the coin is the judicial review proceedings in *Australian Coal Alliance Inc v Wyong Coal* [2019] NSWLEC 31. In that case, Moore J considered and rejected various grounds of review of a PAC decision approving the Wallarah 2 Coal Mine. It was held that the PAC had had sufficient regard to the issue of downstream GHG emissions. Other grounds were also dismissed, so the approval stood.

The issue of consideration of scope 3 emissions continues to be a very hot political topic. Just yesterday, 24 October, the State government introduced the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* to prohibit any condition on development consents that is "*imposed for the purpose of achieving outcomes or objectives relating to*" either "*(a) the impacts occurring outside Australia or an external Territory as a result of the development, or (b) the impacts occurring in the State as a result of any development carried out outside Australia or an external*

Territory". The Bill also proposes the removal of the reference to "downstream emissions" in clause 14(2) of the Mining SEPP 2007.

Jurisdictional facts

A recurring issue in judicial review cases in the LEC is whether a particular statutory context involves a jurisdictional fact. The term "jurisdictional fact" generally describes a criterion the satisfaction of which enlivens the exercise of a statutory power or discretion, and perhaps also a non-statutory executive power.

In late 2018 a judgment of Robson J addressed the issue – *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd (No 3)* [2018] NSWLEC 193. The Council challenged the validity of a decision of the Department of Planning that approved a rehabilitation strategy for the Mt Arthur coal mine. The case is worth mentioning because it focussed on the interpretation of a condition of the approval that is in a familiar form – condition 42 said that "*The Proponent shall prepare a revised Rehabilitation Strategy for the Mt Arthur mine complex to the satisfaction of the Secretary. This strategy must: …*" and then listed four things in paragraphs (a) to (d) that the strategy must do, including (c) describe and justify the proposed rehabilitation plan for the site, including the final landform and land use; and (d) include detailed rehabilitation objectives for the site that comply with and building on the objectives in Table 14.

The Council submitted that whether or not the strategy did those things was a question the court could ask and answer because the requirements were jurisdictional facts. Robson J disagreed and held that paragraphs (a) to (d) of Condition 42 are not jurisdictional facts. Rather, it is part of the Secretary's function to satisfy himself or herself about those matters, when approving a strategy.

Judicial review on the ground of legal unreasonableness was available, but the decision was found not to be unreasonable because it was based on an arguable construction of the approval and understanding of the facts.

An appeal by the Council against the decision was dismissed, other than to vary the costs orders made in respect of the participation of the decision-maker, the Secretary of the Department of Planning, and addressing the *Hardiman* principle along the way. That decision is *Muswellbrook Shire Council v Hunter Valley Energy Coal Pty Ltd* [2019] NSWCA 216.

Crime

The LEC saw an active year in its criminal jurisdiction.

Unlawful tree removal was again in the Courts, and in three cases Robson J found Mr Reitano, Mr Chia and Henlong Property Group guilty of offences against the National Parks and Wildlife Act 1974 and EP&A Act respectively.

Another prosecution under the NPW Act was ***Chief Executive, Office of Environment and Heritage v Clarence Valley Council*** [2018] NSWLEC 205, (2018) 236 LGERA 291. In that matter, Preston CJ sentenced Clarence Valley Council, which pleaded guilty to an offence under s 86(1) of the *National Parks and Wildlife Act 1974* (NSW) for harming an Aboriginal object that it knew was an Aboriginal object. The offence concerned an Aboriginal scar tree of significant cultural importance. The tree was registered as a culturally modified tree on the Aboriginal Site Register in 1995 and later transferred to the Aboriginal Heritage Information Management System maintained by the Office of Environment and Heritage. In an incident in 2013, the council had lopped the crown of the tree and was issued with, and paid, a penalty notice under s 86(2) of the NPW Act. On 19 May 2016 the council completely removed the scar tree, cutting it into four pieces. The following day, the council realised it had harmed an Aboriginal object in breach of s 86(1) of the NPW Act and self-reported to the OEH.

Council pleaded guilty, had no priors and an early guilty plea was rewarded with a 25% discount. But the scar tree was highly significant to members of the Aboriginal community and the removal of the tree caused serious emotional harm, which was an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999*. The council had accepted responsibility for its actions, acknowledged the harm caused, publicly apologised for the commission of the offence and readily participated in the restorative justice conference with the Grafton Ngerrie Local Aboriginal Land Council; and the council had shown genuine remorse.

The outcome was that the Council was convicted; ordered to pay $300,000 to GNLALC; ordered to establish and conduct cultural skills development workshops for relevant field and senior management staff and made to pay prosecutor costs of $48,000. It turned out to be a pretty expensive mistake.

One other criminal matter I should mention is the unusual sight of the Office of Environment and Heritage being the *defendant* in a prosecution. Proceedings were brought by the EPA on a charge of polluting waters, an offence against s 120(1) POEO Act 1997, arising from a leak into Perisher River from the Perisher sewage treatment plant, caused by a change in the chemicals at the plant and insufficient staffing to deal with the process properly. OEH pleaded guilty and was fined $84,000 plus costs. ***EPA v Crown in right of NSW (OEH)*** [2019] NSWLEC 66 (Pepper J).

Contempt of court

It has also been an active year for applications for contempt of court. In particular, Molesworth AJ and Sheahan J each found respondents guilty of contempt of court and imposed fines and required the applicant's costs to be paid on the indemnity basis – see ***Blacktown City Council v Everson*** [2019] NSWLEC 4 and ***Hawkesbury City Council v Kara-Ali (No 3)*** [2019] NSWLEC 55.

Time for a s 56A appeal

A few days ago, Duggan J determined an important point about appeals under s 56A from a decision of a Commissioner. The case is ***Northern Beaches Council v Tolucy Pty Ltd*** [2019] NSWLEC 151.

There appeared to be a conflict between rules about the time within which an appeal must be brought. Rule 7.1 of the LEC Rules refers to a period of 60 days, the UCP Rule 50.3 refers to a period of 28 days. The question was whether Rule 7.1 applied to a s 56A appeal – if it did, it was a local rule of the LEC that prevailed over the UCPR. Pepper J had decided in *Teh v Dormer* [2016] NSWLEC 42 that the time limit in rule 7.1 was the applicable one.

Duggan J respectfully disagreed and found that rule 7.1 does not apply to s 56A appeals. So a s 56A appeal has to be lodged within 28 days after the decision of the Commissioner that is appealed from.

Compulsory acquisition cases

It has also been another active year for the Court, and also for the Court of Appeal, in compulsory acquisition cases.

Ian Hemmings has asked me to mention the decision of Sheahan J in ***Alexandria Landfill v Roads and Maritime Services (No 6)*** [2019] NSWLEC 98. It was, we think, the most compensation ever sought in a compulsory acquisition case in Australian legal history, since the final claim was well over half a billion dollars. The acquired site was two lots in St Peters used for landfilling and waste operations. The large amount of compensation sought was derived from hypothetical development concepts for highest and best use of the land after a period for completion of the waste operations, calculated using a discounted cash flow valuation methodology. There were very many areas of expertise, planners, land valuers, business valuers, contamination experts, waste and landfill experts, landfill gas and contamination experts and others.

The case was heard over approximately 10 weeks of hearing time, in various tranches of hearings between late 2017 and April 2018. The court wrote a judgment of 861 paragraphs and determined compensation in the amount of just over $50 million. A notice of appeal has recently been filed.

Cases arising from acquisitions for the Sydney Metro project are also coming to hearing. Several significant issues of principle will have to be determined about the nature and extent of rights to compensation when subsurface land is acquired for a tunnel, particularly in cases in which the upper extent of the tunnel is relatively close to the surface of the land.

There were many interesting decisions in the LEC in the last year – of course time has permitted only a few of them to be selected by me. But I do recommend that people should keep an eye out for the Judicial Newsletter published by the Court three or so times a year – it is an excellent and authoritative way to stay up to date and the Court should be admired for regularly producing such a useful resource in the area in which we all practice.

25 October 2019