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Update Summary

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UPDATE 124-125

MAY 2021

LAND AND ENVIRONMENT COURT
LAW & PRACTICE NEW SOUTH WALES

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NOTE:

**This Update is a consolidated print update
containing updated content from
Updates 124-125.**

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UPDATED COMMENTARY

This update is a consolidated print update of **Update 124** (December 2020) and **Update 125** (February 2021).

Land and Environment Court Act 1979

Section 5: An appeal against the decision of Sheahan J in a Class 3 compensation for compulsory acquisition proceedings on the ground that his Honour had not given adequate reasons for his decision was dismissed: *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165. See [LECA.5.80]. See also further discussion at [LECA.57.105], [LECA.57.120].

Section 19: In a land claim in respect of a residence and paddock related to Helensburgh police station, Pain J found that the land was not lawfully used or occupied under s 36(1)(b) of the *Aboriginal Land Rights Act 1983* at the relevant dates and allowed the claim: *NSWALC v Minister Administering the Crown Land Management Act 2016* [2020] NSWLEC 133. See [LECA.19.170].

Section 23: In *Funnell v Blayney SC* [2020] NSWLEC 170, Pepper J granted a stay of a noise prevention notice issued pursuant to the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act), s 96 pending the hearing of the Class 1 appeal in which the applicants sought to set aside the notice. See [LECA.23.160].

Section 57: In *Zhiva Living Dural Pty Ltd v Hornsby SC* [2020] NSWCA 18, the questions of law sought to be raised had not been the subject of the s 56A appeal but arose from it, so it was found appropriate that the appeal be heard. See [LECA.57.45], and further at [LECA.57.105].

A new annotation, **Appeal against judge's failure to afford procedural fairness** has been added at [LECA.57.105], with particular reference to *Alexandria Landfill Pty Ltd* and *Zhiva Living Dural Pty Ltd*.

Section 58: In *Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd* [2020] NSWCA 254, the Ct of App refused leave to appeal against a costs order made against two respondents who had filed submitting appearances in a Class 4 civil enforcement proceeding relating to a challenge to the validity of a development consent. See [LECA.58.100].

Section 68: Robson J granted leave to the prosecutor, after the hearing had commenced, to amend the notice under s 247J of the *Criminal Procedure Act 1986* to rely on further evidence: *Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd (No 3)* [2020] NSWLEC 129. See [LECA.68.20].

Section 71: In *Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305* [2020] NSWCA 327, the Ct of App held that s 71 does not preclude the Sup Ct from deciding issues that would fall within the jurisdiction of the LEC under LEC Act, s 20 if those issues arise before the Sup Ct collaterally in proceedings of a different kind, such as proceedings for damages or injunction for breach of a common law duty. See [LECA.71.5].

Land and Environment Court Rules 2007

Rule 3.7: The unsuccessful applicant in a Class 1 development appeal was ordered to pay costs where the appeal had been dismissed on jurisdictional and merits grounds: *Huajun Investments Pty Ltd v City of Canada Bay Council* [2020] NSWLEC 108. See [LECR.3.7.20].

In *Carey v Pattinson (No 2)* [2020] NSWLEC 177, Pepper J refused to order costs against an unsuccessful applicant in a Class 2 tree dispute case in which the acting commissioner did not accept the applicant's expert evidence and dismissed the application. See [LECR.3.7.25].

Rule 4.2: Reference is made to *Boomerang & Blueys Residents Group Inc v NSW Minister for the Environment, Heritage and Local Government and MidCoast Council (No 3)* [2020] NSWLEC 150. See [LECR.4.2.10].

Civil Procedure Act 2005

Section 61: Pepper J, in refusing to grant expedition in an application for expedition of Class 4 judicial proceedings, noted that the development was likely to be completed even if expedition were granted. Pepper J also said applications for expedition ought not be used as a substitute for applications for interim relief to preserve the status quo: *BSM Holdings Pty Ltd v Deane Street Holdings Pty Ltd* [2020] NSWLEC 137. See [CPA.61.20].

Section 98: In *Boomerang & Blueys Residents Group Inc v NSW Minister for the Environment, Heritage and Local Government and MidCoast Council (No 3)* [2020] NSWLEC 150, Robson J dismissed the applicant’s Class 4 judicial review proceedings. See [CPA.98.20].

Uniform Civil Procedure Rules 2005

Rule 6.24: *Toplace Pty Ltd v The C of the City of Sydney* [2020] NSWLEC 121, Moore J ordered the joinder of adjoining owners to a Class 1 development consent modification appeal in circumstances where there was potentially a significant adverse direct impact on them if the modification were approved. See [UCPR.6.24.10], and also [LECA.39A.40].

Rule 13.4: In *Dolton v Eurobodalla SC* [2020] NSWLEC 141, Pepper J at [19] - [22] set out the principles and authorities relating to the exercise of the Court’s power to summarily dismiss proceedings in a case where the relief the applicant was seeking was not available in any of classes 1, 2, 3 or 4 in that the applicant was not appealing against or seeking judicial review of any relevant decision of the council. See [UCPR.13.4.10].

Rule 31.19: In *Bushfire Survivors for Climate Action Inc v EPA* [2020] NSWLEC 152, Moore J granted leave to the applicant to file and serve expert evidence from a nominated expert on a set of propositions/questions that were determined following “an iterative process” in which discussion took place between the judge and the parties concerning what might be the nature of propositions and/or questions which might provide an acceptable basis upon which his Honour might consider the granting of leave. See [UCPR.31.19.10].

Rule 33.4: Moore J held that the issuing of a statutory notice requiring production of documents did not mean that a subpoena seeking production of the documents was an abuse of process: *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2020] NSWLEC 136. See [UCPR.33.4.10].

Rule 34.1: A new annotation **Notice to produce – oppressive**, has been added at [UCPR.34.1.50], with reference to *Dexus CPA Pty Ltd v Sydney Metro* [2020] NSWLEC 71.

Rule 36.17: In *Verde Terra Pty Ltd v Central Coast Council (No 6)* [2020] NSWLEC 64, Pepper J exercised her discretion under the rule to amend a consent order setting out the terms of a subpoena. See [UCPR.36.17.10].

Evidence Act and Regulations

Evidence Act 1995

Section 69: A new annotation, **Exception: business records**, has been added at **[EA.69.10]**, with reference to *Secretary, Department of Planning, Industry and Environment v Auen Grain Pty Ltd (No 4)* [2020] NSWLEC 130 and *Mehmet v Carter* [2020] NSWSC 413.

Section 118: In *Azizi v Council of the City of Ryde* [2020] NSWLEC 180, Duggan J held that the protection afforded to a person by way of legal professional privilege is a protection that extends to the Valuer General exercising functions under the *Land Acquisition (Just Terms Compensation) Act 1991* s 41. See **[EA.118.10]**.

Section 131: In *Verde Terra Pty Ltd v Central Coast Council (No 8)* [2020] NSWLEC 148, the applicant in Class 4 proceedings sought to set aside consent orders made in earlier proceedings. See **[EA.131.10]**.

Section 135: A new annotation, **General discretion to exclude evidence**, has been added at **[EA.135.10]**, with reference to *Verde Terra Pty Ltd v Central Coast Council (No 7)* [2020] NSWLEC 140.

Forms and Fees

The Land and Environment Court fees have been updated. See **[7.05]**.

Practice Notes

The following Practice Notes have been updated:

- Practice Note Class 1 Residential Development Appeals at **[8.40]**
- Practice Note Class 1 Development Appeals at **[8.50]**
- Practice note: Classes 1, 2 and 3 miscellaneous appeals at **[8.70]**
- Practice Note Class 5 Proceedings at **[8.110]**
- Practice Note – Subpoena Practices at **[8.123]**.

Practice Information

The **Land and Environment Court Directory** has been updated: see **[9.8000]**.

Delegation to Registrars under section 13 of the Civil Procedure Act 2005 has been updated: see [9.8170].

Environmental offences

Crimes (Appeal and Review) Act 2001 (Extracts)

Section 70: A new annotation, s 70(1)(c) **limit on costs awarded against public prosecutor**, has been added at [10.957], with reference to *Hossein Yamini v Council of the City of Sydney (No 2)* [2020] NSWLEC 120.