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In the Zone

APR 2026 QUARTERLY

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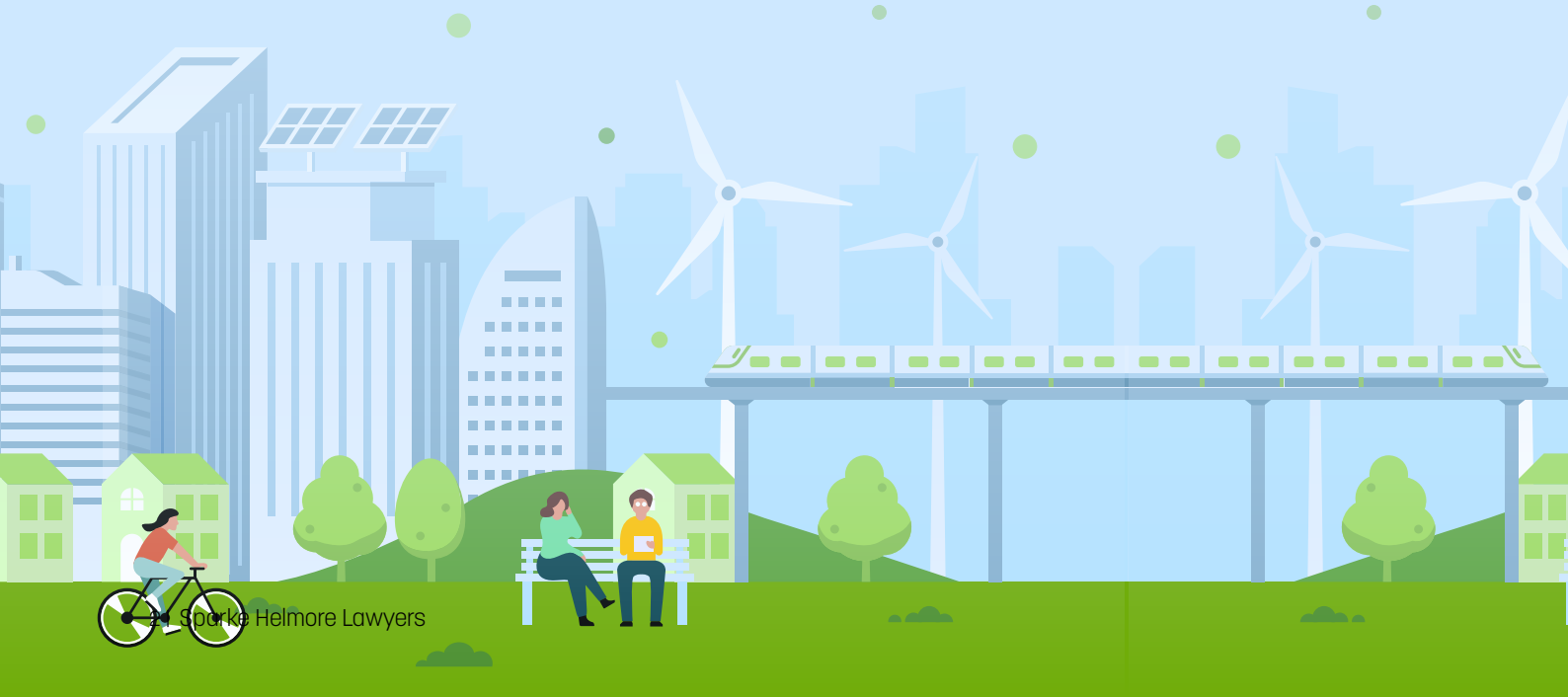

PARTNER WELCOME

INTRODUCTION

Welcome to our latest edition of In the Zone, coming to you in a new, easier to read, format.

This edition addresses a diverse range of decisions that have potential consequences for both developers and consent authorities. The cases show that development, particularly in NSW, can be very difficult for controversial projects that do not carefully and comprehensively address all of the issues that arise for consideration. They also show the significance of adequately addressing jurisdictional issues and keeping an eye on statutory time limits.

I hope you find the insights provided in this edition both informative and useful.

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Recent Decisions

Land and Environment Court

North Lismore Plateau housing estate refused because of inadequate cultural heritage assessment

Mackycorp Pty Ltd v Lismore City Council [2026] NSWLEC 1036, by Commissioner Walsh (30 January 2026)

Read the full decision here

Background

Mackycorp Pty Ltd (**Applicant**) appealed under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) against the refusal by the Northern Regional Planning Panel to grant development consent to a large residential subdivision on the North Lismore Plateau. The proposal sought consent to subdivide approximately 126 hectares into 667 residential lots, two commercial lots and associated infrastructure (the **DA**).

During the appeal proceedings, the Council withdrew its opposition to the DA following amendments to the proposal and reached agreement on conditions. However, a local Aboriginal elder and knowledge holder, Mr Ryan, was joined as a second respondent to the appeal and maintained objections, primarily on the basis that the DA would cause serious harm to Aboriginal cultural heritage associated with the North Lismore Plateau.

Evidence before the Court indicated the Plateau held high Aboriginal cultural significance, including in terms of both tangible artefacts and intangible cultural landscape values associated with pathways, Dreaming stories and connections between culturally significant sites in the Bundjalung nation. The second respondent contended that the Applicant's Aboriginal Cultural Heritage Assessment Report (**ACHAR**) and consultation process were inadequate and failed to properly assess these values.

Decision

The Land and Environment Court dismissed the appeal and refused development consent.

The Court found that the Applicant had failed to provide a satisfactory assessment of the Aboriginal cultural heritage significance of the site within its wider cultural landscape and therefore had not adequately evaluated the DA's likely impacts under s 4.15(1) of the EPA Act. Key findings included:

- The ACHAR was deficient, focusing largely on archaeological and visual impacts rather than properly assessing cultural significance, particularly intangible heritage values and cultural landscape relationships.
- The report failed to apply Burra Charter values to individual sites and did not adequately evaluate the significance of artefacts discovered on the site.
- Consultation with Aboriginal knowledge holders was inadequate, including the failure to consult a key elder who had long been involved in earlier cultural heritage assessments of the plateau.

- Expert evidence relied on by the Applicant was rejected where it discounted the cultural significance of the site by requiring overly precise physical evidence of intangible cultural connections.
- Because the significance of the site had not been properly understood, the Court considered that the impacts and mitigation measures could not be properly assessed.

The Court accepted that the proposal had significant public benefits, including the provision of housing supply on strategic flood-resilient residential land near Lismore following the 2022 floods. However, these benefits did not outweigh the unresolved cultural heritage concerns.

Key takeaway

The decision demonstrates that a development application may fail even where the land is zoned for the proposed use and strategic planning supports the development if the cultural heritage significance of the site has not been properly assessed. In particular:

- An ACHAR must robustly assess both tangible and intangible cultural heritage values, including cultural landscape relationships.
- Meaningful consultation with Aboriginal knowledge holders is critical and cannot be treated as a minimal procedural exercise.
- Where the significance of heritage values is inadequately understood, the Court will not rely on post-consent processes (such as AHIP approvals) to address the deficiency.

Objector appeal against Independent Planning Commission approval of state significant development dismissed

Faulks v Independent Planning Commission [2026] NSWLEC 1032 by Commissioner O'Neill (29 January 2026)

Read the full decision here

Background

The Independent Planning Commission (**IPC**) granted development consent for the Wallaroo Solar Farm (**DA**), a 100-megawatt solar farm development in the Yass Valley. The DA comprised State Significant Development and owners of neighbouring properties, Benjamin Faulks and Johnny Roso (together, the **Applicants**) appealed against the IPC's approval of the Project in Class 1 proceedings (**Appeal**). The Applicants were entitled to bring the Appeal under s 8.8(2) of the EPA Act because they were persons who made an objection during public exhibition of the DA.

The Applicants contented that the DA would result in significant adverse impacts on the scenic quality, visual amenity and landscape character of the surrounding area. It was also contended that the use of the site should not be permissible and would be inconsistent with the Yass Valley Settlement Strategy 2036 (**Settlement Strategy**).

Decision

The Appeal was dismissed and the development consent was granted by Commissioner O'Neill for the following reasons in particular:

- The Commissioner accepted the proponent's expert evidence that the area was not pristine wilderness, rather a highly modified agricultural landscape containing among other things fields, transmission lines, sheds, barns, silos and other agricultural infrastructure. The Commissioner found that (at 87 and 96):

> Large-scale solar energy developments are not by their nature inconsistent with maintaining a rural character. We are accustomed to seeing renewable energy projects on farmland, and large-scale renewable energy projects within rural and natural landscape settings. I accept Mr Moir's evidence that the visibility of a solar array, or portions of a solar array, is not in of itself a visual impact.
>
> …
>
> Having viewed the site from a number of locations in the vicinity of the site (see [12]) and with the assistance of the photomontages in the VIA and Exh C (Appendices A and B), I accept the conclusion of the VIA that the visual impact of the proposed development on the scenic quality of the surrounding land and the visual amenity of local landowners is acceptable…

- The Applicants' submission that while *State Environmental Planning Policy (Transport and Infrastructure) 2021* (**Transport and Infrastructure SEPP**) permits electricity generating works in a 'broad brush fashion across the state…just because it's permissible across the state in a rural zone doesn't mean it's appropriate in every rural zone in the state' was rejected. The Commissioner found that the DA was permitted with consent under the Transport and Infrastructure SEPP in prescribed non-residential zones and that this was the starting point for assessment, with a determination of an individual application then to be made by analysing the suitability of the site for the development
- The Settlement Strategy included a 5km buffer zone of productive rural land along the ACT border to prevent excessive encroachment of residential development and thereby prevent urban sprawl. It was found that the site did not sit within the buffer zone and that, since solar developments are permitted in non-residential zones under s 2.36(1)(b) of the Transport and Infrastructure SEPP, they should not be considered intensive urban development. The Court further found that the Settlement Strategy did not consider non-residential renewable energy projects, only sustainable housing policy, and therefore in no way restrained the DA.

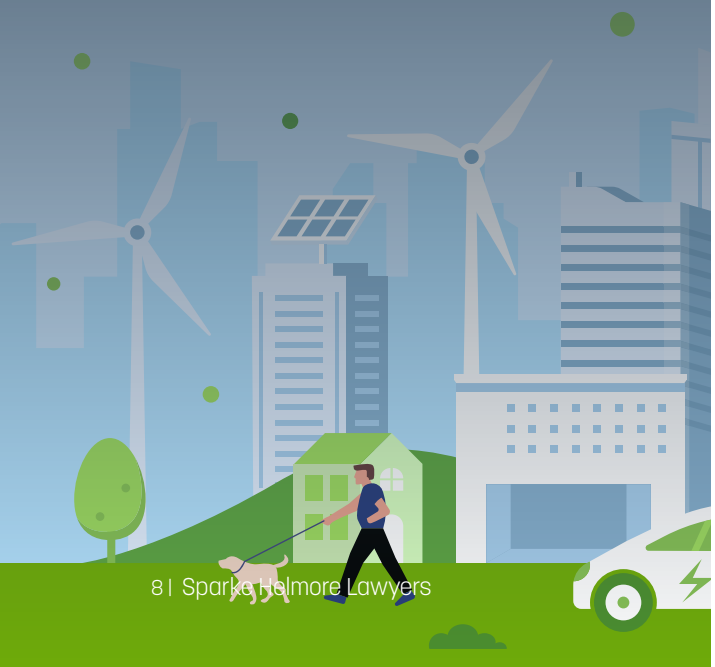
Key takeaway

Permissibility and compliance with rural land use and character are commonly raised as issues in renewable development project cases, especially wind farms. Visual amenity is also frequently raised as an objection to rural renewable development projects, particularly wind and solar farms. This decision indicates that the visibility of a solar farm in a rural area will not necessarily be regarded by the Court as inherently inconsistent with rural character, given large-scale solar developments most frequently occur in such regional locations due to availability of space.

Chief Judge examines the difference between administrative and judicial functions of the Land and Environment Court

Save the Robots Pty Ltd ATF Save the Robots Trust v The Council of the City of Sydney [2025] NSWLEC 150 by Preston CJ (19 December 2025)

Read the full decision here



Background

The Council of the City of Sydney (the **Council**) issued Save the Robots Pty Ltd ATF Save the Robots Trust (**Save the Robots**) with a development control order (the **Order**) to demolish an advertisement and associated structure (the **Sign**) on the roof of a building at Taylor Square. Save the Robots appealed against the Order under s 8.18(1) of the EPA Act contending, amongst other things, that the Sign benefited from the existing use rights and its use could be continued, despite a prohibition on the display of advertisements in s 3.8(1) of the *State Environmental Planning Policy (Industry and Employment) 2021*.

The estoppel issue

The Council contended that Save the Robots was estopped from raising the argument that the use of the Sign involved an existing use on the basis it had already unsuccessfully raised that argument in an appeal against the Council's refusal to grant consent to a new digital advertising sign to replace the existing Sign. In that case (*Save the Robots Pty Ltd ATF Save the Robots Trust v The Council of the City of Sydney* [2025] NSWLEC 1081), the Commissioner rejected Save the Robots' argument, finding that 'there are no existing use rights applicable to the existing billboard' (at [84]).

Council argued that an issue estoppel can arise in administrative appeals and not just in judicial proceedings.

Preston CJ rejected the Council's argument for the central reason that the Commissioner's finding was 'neither in the exercise of judicial power nor a judicial determination rendered in other adversarial proceedings' (at [97]).

In doing so, His Honour reinforced the distinction between the administrative and judicial functions undertaken by Commissioners and Judges of the Land and Environment Court, with reference to the following passages from *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 at [177]-[183]:

> 177. The jurisdiction which the Court exercises on hearing and disposing of an appeal under s 97 now s 8.7 of the EPA Act is the original jurisdiction under s 4.16 of the EPA Act to determine the development application the subject of the appeal by granting or refusing consent to the application. The function of determining a development application is by nature administrative… The function of determining a development application involves the making of a discretionary administrative decision. The consideration and determination of a development application under s 4.15 and

s 4.16 of the EPA Act respectively involve evaluation, weighing and balancing of competing considerations, including the benefits of the proposed development, the likely impacts of the proposed development in the locality and on the environment, and the public interest. The decision maker has a discretion as to whether to grant or to refuse consent to the development application.

178. The making of the discretionary administrative decision is to be distinguished from the making of a judicial decision. As Brennan J observed in Re Drake v Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634 at 643; [1979] AATA 179:

> 'In this respect, the making of a discretionary administrative decision is to be distinguished from the making of a curial decision. Generally speaking, a discretionary administrative decision creates a right in or imposes a liability on an individual; a curial decision declares and enforces a right or liability antecedently created or imposed. The distinction is too simply stated, but it suffices to show that the adjudication of rights and liabilities by reference to governing principles of law is a different function from the function of deciding what those rights or liabilities should be.

179. The determination of a development application by the Court on the appeal does not involve adjudication of a dispute about the existing rights and obligations of the parties…Instead, the Court's function on the appeal is to decide whether the applicant should be given the right, in the form of a development consent, to carry out development on land…

…

182. The fact that on an appeal under s 97 now s 8.7 of the EPA Act the function is performed by a court does not change the function from being administrative in nature to judicial…

Decision

Notwithstanding that the Court did not find in favour of any of the arguments put by Save the Robots, the Court decided that the Order should be modified to allow a reasonable time for Save the Robots to comply with it, being one year from the date of the Court's order.

Key takeaway

A party to proceedings in the Land and Environment Court may have a legal argument available to it, even where the same matter of fact has been determined in previous proceedings which involved the Court exercising an administrative function (such as a Class 1 appeal brought under s 8.7 of the EPA Act) rather than a judicial function (which involves a curial decision about a party's rights or obligations).

Court criticises Council's approach in Class 1 proceedings, where it raised 41 contentions, as a 'scattergun' approach

GTH Resorts No 10 Pty Ltd v Ballina Shire Council [2026] NSWLEC 1054 by Gray C (13 February 2026)

Read the full decision here

Background

The Applicant sought development consent for a seniors housing development involving 110 independent living units and associated facilities on land in West Ballina. The site was partly zoned R2 Low Density Residential, R3 Medium Density Residential and RU2 Rural Landscape under the Ballina Local Environmental Plan 2012, with seniors housing permissible in the residential zones.

The proposal was refused because of concerns about:

- flood risk and evacuation capacity
- impacts on nearby wetlands and ecological communities
- adequacy of stormwater, groundwater and biodiversity assessments, and
- whether the design met the principles for seniors housing under the *State Environmental Planning Policy* (Housing) 2021 (**SEPP**).

The Applicant appealed to the Land & Environment Court against the refusal.

The Council's Statement of Facts and Contentions (**SOFAC**) in the appeal raised 41 contentions. While about 15 were resolved by agreement, the Council maintained that there were a range of impacts that either had not been adequately addressed through the development application documents or were unacceptable in some way. Those impacts included impacts from bulk and scale, visual impacts on neighbouring properties, impacts on flooding and flood behaviour, impacts on surface water and groundwater in the areas to be conserved, impacts on aquatic ecology and biodiversity conservation, and impacts on Aboriginal cultural heritage. The Council also argued that the site was not suitable for the proposed development on the basis that it was now a prohibited form of development.

Decision

The Court upheld the appeal and granted development consent (subject to conditions).

Key findings included that:

- The proposal adequately addressed the design principles for seniors housing under the SEPP, including neighbourhood amenity, privacy, accessibility and built-form considerations.
- Flood risk and evacuation issues were acceptable, with evidence demonstrating sufficient warning time and viable evacuation routes, and with appropriate floor levels and refuge measures incorporated.

- Stormwater and hydrological impacts on the adjacent conservation wetlands were appropriately managed and would not result in unacceptable environmental impacts.
- The biodiversity assessment report adequately addressed potential impacts on ecological communities and fauna habitat, and the development footprint had been reduced to avoid higher-value vegetation areas.

The Court rejected the Council's arguments that deficiencies in documentation justified refusal, noting that alleged inadequacies in reports or information do not necessarily establish unacceptable impacts.

Commissioner Gray was critical of the manner in which the Council framed its contentions, making the following observations in the judgment (at para [3]):

> In advancing its numerous contentions, the Council focused some of the particulars on alleging inadequacies in the development application documents. For some of the contentions, the Council took the risk of alleging inadequacies in documents or insufficient information in preference to advancing evidence of impacts, notwithstanding that neither a document's inadequacy nor insufficient information is necessarily a reason for refusal. Even on GTH addressing those inadequacies in an updated document, the Council came forward with new deficiencies. Very few of these types of contentions were agreed by the Council to be resolved, notwithstanding that some were squarely addressed by GTH. In my view, the Council took a 'scattergun' approach, firing at all angles in the hope that at least one might hit their target. I am of the view that these aspects of the Council's approach to this appeal stands apart from what is required of it by s 56(3) of the Civil Procedure Act 2005 (NSW).

Key takeaway

The decision demonstrates that in merit appeals the Court will focus on whether the evidence demonstrates acceptable environmental and planning outcomes, rather than merely identifying perceived gaps in supporting documentation. A Council may face criticism if the contentions in a SOFAC raise numerous matters which do not justify the actual refusal of the development application, but instead merely comprise issues that could be resolved by the provision of additional information, clarification or imposition of a condition of development consent.

Court considers time period allowable for consent authority to review a refusal decision

Lachlan Haskins v Yass Valley Council [2026] NSWLEC 14 by Pritchard K (19 February 2026)

Read the full decision here

Background

Lachlan Haskins (**Applicant**) lodged Development Application 230239 (**DA**) to construct two serviced apartments, and a storage shed at Murrumbateman (**Site**). The DA was refused by Yass Valley Council (**Council**) on 25 July 2024.

On 14 August 2024, the Applicant submitted a request for a review pursuant to Division 8.2 of the EPA Act (the **8.2 Request**).

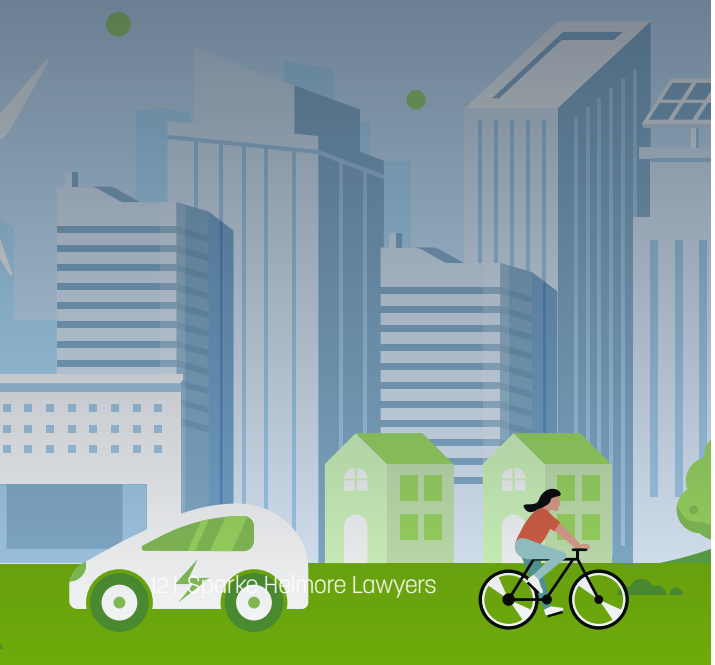
On 27 June 2025, Council informed the Applicant that the 8.2 Request was presented to Council on 23 June 2025 and Council had determined to uphold the refusal (the **Review Determination**). Enclosed with the Review Determination was a notice of determination dated 26 June 2025.

On 27 June 2025, the Review Determination was registered on the NSW planning portal.

On 6 November 2025, the Applicant commenced Class 1 Proceedings pursuant to s 8.7 of the EPA Act seeking to appeal Council's actual refusal of the DA (**Class 1 Appeal**). The Council applied for the Class 1 Appeal to be struck out on the grounds that it was commenced 'far beyond the 6 months allowed by s 8.10 of the EPA Act'.

The primary issue for consideration was whether the Applicant brought the Class 1 Appeal within time pursuant to s 8.10(1)(a) of the EPA Act. Three sub-issues were also considered, including:

1. Whether Council had power to determine the 8.2 Request after the period in s 8.3(2)(a) of the EPA Act had expired (s 8.3(2)(a) providing that a determination decision cannot be reviewed (by a consent authority) after the period within which an appeal may be made to the court has expired if no appeal was made) (**Issue 1**).
2. If yes, whether as a matter of fact, the Review Determination 'changed' the refusal within the meaning of s 8.4 of the EPA Act, with the result that the determination was 'changed on review' within the meaning of s 8.5(4) such that it replaced the earlier refusal on the date the Review Determination was registered on the NSW planning portal (**Issue 2**).
3. If the question of fact raised by Issue 2 is resolved against the Applicant, whether the Review Determination was a 'decision' subject to appeal to the Court within the meaning of s 8.6 of the EPA Act (**Issue 3**).



Decision

Pritchard J dismissed the Class 1 Appeal (with no order as to costs) making the following findings on each of the issues:

Issue 1

The Court accepted Council's submission that notwithstanding an amended development may have come forward through the review process, Council had no power to conduct the review. The period within which an appeal could be lodged against the Council's refusal of the DA on 25 July 2024 expired on 25 January 2025. Accordingly, the Court had no jurisdiction to consider the Class 1 Appeal because it was out of time.

Issue 2

With Issue 1 being determined against the Applicant, the question of whether the Review Determination resulted in the refusal being "changed on review" within the meaning of s 8.5(4) of the EPA Act did not need to be decided. The Court did however address the submissions on this matter and agreed with the Applicant's construction of the Review Determination as a distinct refusal due to the changes to the DA and the new grounds for refusal. The review determination was therefore "changed" within the meaning of s 8.5(4) of the EPA Act.

Issue 3

On Issue 3, both parties accepted that a changed determination from a review would carry appeal rights under s 8.6(2), therefore restarting the time period wherein an appeal could be commenced. However, the Court found, consistent with the reasoning of Lloyd J in *Hainbury Pty Ltd v Campbelltown City Council* [2007] NSWLEC 713, that Council did not have the power to restart the appeal period because the Review Determination was made outside the relevant time period.

Key takeaway

Lodging a Class 1 appeal is a necessary step to keep the power of the decisionmaker to review alive. This is particularly important in circumstances where the review is likely to take longer than the period within which an appeal may be lodged, or the request for review was lodged late in that period.

2

Recent Decisions

Federal Courts including High Court of Australia

McArthur River Mine decision on payment of native title compensation

Davey on behalf of the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples v Northern Territory of Australia (No 5) (McArthur River Project Compensation Claim) [2026] FCA 153 by Banks-Smith J (27 February 2026)

Read the full decision here

In a Federal Court decision delivered on Friday, 27 February 2026, the Northern Territory has been ordered to pay more than $54 million in compensation to Traditional Owners over the development of the McArthur River Mine, operated by Glencore, near Borroloola. The Court found the Northern Territory was liable to compensate the Gudanji, Yanyuwa and Yanyuwa-Marra Peoples for the extinguishment and impairment of native title rights. The liability arose from acts that enabled the open-cut mine, the Bing Bong port and associated infrastructure. Read more here.

3

Legislative Amendments

Energy and Other Legislation Amendment (Renewable Energy Infrastructure) Bill 2026

The *Energy and Other Legislation Amendment (Renewable Energy Infrastructure) Bill 2026* was introduced on 5 February 2026. The Bill deals with a range of matters including decommissioning of infrastructure in the NSW renewable energy sector; a requirement for environment protection licences for solar energy infrastructure; the imposition of certain conditions on development consents relating to the decommissioning of solar and wind energy infrastructure. Read more here.

National Environmental Standards for Matters of National Environmental Significance and Environmental Offsets (National Environmental Standards)

The Commonwealth DCCEEW recently closed consultation on the draft National Environmental Standards (implemented under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) reforms that were passed at the end of 2025). Consultation documents are available here.

Planning System Reforms Act 2025

The NSW Government has continued to implement the *Environmental Planning and Assessment Amendment (Planning System Reforms) Act 2025* with a further suite of provisions commencing on 21 March 2026. Read more here.

4

Other industry news

River Murray, Coorong, Lake Alexandrina listed as critically endangered

The River Murray, Coorong, and Lake Alexandrina have been listed as critically endangered under the EPBC Act after a recommendation from the Threatened Species Scientific Committee. Read more here, and visit the consultation page here.

Establishment of the Development Coordination Authority (DCA)

On Thursday, 11 December 2025, the DCA was formally established under the EPA Act to provide input and support planning decisions around development applications and rezonings. Read more here.

Landmark victory restores Doongmabulla Springs case against Carmichael Mine

In Queensland, the Court of Appeal handed down a landmark ruling for the Nagana Yarrbayn Wangan and Jagalingou Cultural Custodians in their fight to protect the Doongmabulla Springs. Read more here.

Legal intervention to Woodside over reef climate harm

In a legal request made to the Minister, the Australian Conservation Foundation argue that new evidence directly linking the Woodside project's emissions to coral bleaching on the Great Barrier Reef means that the project's environmental assessment must be reconsidered. Read more here.

A New Approach to Strategic Planning: Discussion Paper

A New Approach to Strategic Planning: Discussion Paper was released for public feedback, proposing a simpler, three-tiered strategic planning framework which includes state, region and local plans, and introduces seven (7) statewide priorities to guide consistent land use planning across NSW. Read more here.

Housing and Productivity Contribution (HPC) Works-in-Kind Guideline released

The Department of Planning, Housing and Infrastructure has released the HPC Works-in-Kind Guideline setting out how proponents can deliver eligible state and regional infrastructure in lieu of paying the HPC as a monetary contribution. Read more here.

Sydney Gay and Lesbian Mardi Gras Parade Route (Parade Route) added to the National Heritage List

The inclusion of the Parade Route in the National Heritage List recognises its outstanding significance to Australia's history and culture. The listing includes the original 1978 Parade Route and the contemporary route. The listing protects the community's connection to the route and its history. It does not prevent changes to the roads or the annual Mardi Gras Parade. Read more here.

Carbon Leakage Review report released.

In 2023 the Australian Government announced it would review carbon leakage as part of the Safeguard Mechanism reforms. Carbon leakage occurs when domestic production moves to countries with weaker climate policies. The review report has now been completed and its recommendations will be considered in the 2026-27 review of the Safeguard Mechanism. Read the report here.

DCCEEW announces National Solar Panel Recycling Pilot

The Pilot is estimated to start in mid-2026. Read more here.

NSW Coal Industry 2026-50 statement supports mining, workers and regional communities

The NSW Government has released the *NSW Coal Industry 2026-50* statement providing a framework that maintains energy security, supports regional jobs and communities, honours export commitments and outlines the role the coal sector will play in support of NSW's legislated emissions reduction targets. Importantly, this policy indicates the Government is likely to prohibit new greenfield coal mines. Read more here.

Congratulations to Partners Alan McKelvey, Catherine Morton and Naomi Simmons

We are excited to share that Partners **Alan McKelvey, Catherine Morton** and **Naomi Simmons** have been recognised in the 2026 Doyle's Guide as Leading Town Planning & Development Lawyers – NSW. Alan has been ranked as a Leading lawyer while Catherine and Naomi have each been recognised as Recommended lawyers.

Alan specialises in NSW planning, environment and mining law and has extensive litigation experience, particularly in the NSW Land and Environment Court. His sister, Janet McKelvey, has also been recognised in the Doyle's Guide as a Preeminent Environmental Law Junior Counsel in NSW—it clearly runs in the family.

Alan understands the complex NSW planning system and uses this knowledge to assist predominantly miners and property industry participants to obtain planning approvals. He is constantly helping clients prepare planning applications, review environmental impact statements, interpret planning approvals and deal with valuation matters. He also advises on environmental incident management and investigations by regulators.

Catherine provides regular advice to council and private clients on various aspects of planning law. She has been involved in extensive litigation in the Supreme Court and the Land and Environment Court, typically involving judicial review, easements proceedings, contempt proceedings and merits appeals from the actual or deemed refusal of development applications.

Naomi is an Accredited Specialist in Local Government and Planning Law and also practises environment law. Naomi's focus includes Land and Environment Court litigation, drafting and negotiating planning agreements and advising on planning and environment legislation in NSW.

The celebration continues with Sparke Helmore ranked as a Leading Town Planning & Development Law Firm – New South Wales (Second Tier)—an improvement on last year's third tier placement.

Congratulations to Alan, Catherine, Naomi and the entire team!

Our team

Property, Environment and Local Government

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