

*CDK*

Principal Registrar &  
Chief Executive Officer



## NOTICE OF APPEAL

### COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2023/00119871

### TITLE OF PROCEEDINGS

Appellant	Ian Stuart Neilson
Respondent	Secretary, Department of Planning & Environment

### PROCEEDINGS IN THE COURT BELOW

Title below	<i>Neilson v Secretary, Department of Planning &amp; Environment</i> [2023] NSWLEC 32
Court below	Land and Environment Court of New South Wales
Case number below	2022/18446
Date[s] of hearing	7, 8, 9, 28 February 2023, 1 March 2023
Material date	23 March 2023
Decision of	Justice Pain

### FILING DETAILS

Filed for	Ian Stuart Neilson, appellant
Filed in relation to	whole decision below
Legal representative	Rod Pogson, Gibney & Gunson
Legal representative reference	23188
Contact name and telephone	Rod Pogson, [REDACTED]
Contact email	[REDACTED]

### HEARING DETAILS

This notice of appeal is listed for directions at

### TYPE OF APPEAL

Statutory Interpretation

### DETAILS OF APPEAL

- 1 This appeal is brought under under s58(1) of the *Land and Environment Court Act* 1979.
- 2 This notice of appeal is not filed pursuant to leave to appeal.
- 3 The appellant has filed and served a notice of intention to appeal, which was served on the prospective respondent on 14 April 2023.

- 4 The appellant appeals from the whole of the decision below.

### **APPEAL GROUNDS**

The appellant appeals from the decision of Pain J (23 March 2023) in *Neilson v Secretary, Department of Planning & Environment* [2023] NSWLEC 82, on the following grounds:

#### **The respondent had a duty to maintain Lagoon Trail and Cowdroys Road to an All Weather 2WD and All Weather 4WD standard respectively**

- 1 Her Honour erred in finding, including at [147] and [167], (notwithstanding first finding that s81 of the NPW Act imposed a duty on the Respondent to implement, carry out and give effect to the Plan of Management (**PoM**) at [133]), that there was no duty to implement, carry out and give effect to the obligation in clause 5.3.1, item 10 of the PoM to manage Lagoon Trail to an All Weather 2WD Standard and maintain Cowdroys Road to an All Weather 4WD Standard.
- 2 Her Honour ought to have found that on a proper construction of s81 and the PoM there was a duty to implement, carry out and give effect to the particular obligations in clause 5.3.1, item 10, within a reasonable time, because:
  - a. The Respondent accepted that it had a duty to implement, carry out and give effect to the PoM pursuant to s81 ([133]);
  - b. They are obligations in the PoM that is in turn subject to the duty imposed by s81;
  - c. The language of the PoM does not confer a discretion as to what standard is to be applied to these roads;
  - d. s81 operates with clause 5.3.1, item 10 to impose a duty to manage Lagoon Trail to an All Weather 2WD Standard, and to maintain Cowdroys Road to an All Weather 4WD Standard; and
  - e. The fact that no time for compliance is specified does not nullify or remove the duty to bring them to the specified standard described in clause 5.3.1, item 10, within the reasonable time implied by law.

#### **Neither road was at the standard required by the PoM**

- 3 Her Honour correctly found at [164] that an 'All Weather' standard means a vehicle (whether 4WD or 2WD) can use the road in wet and dry weather.

- 4 Her Honour further correctly found that it was common ground as between the parties' engineering experts that Lagoon Trail was not maintained to the required All Weather 2WD standard at [52].
- 5 Her Honour should have found as a result of the findings at [52] and [164] that Lagoon Trail was not maintained to the All Weather 2WD Standard.
- 6 Instead of leaving the matter open as her Honour did at [187], her Honour should have found that Cowdroys Road was not maintained to the All Weather 4WD Standard based on the following evidence and findings below:
  - a. the evidence of the Appellant that he could only access Cowdroys Road in dry weather (with or without a trailer), as recorded at [18];
  - b. the evidence that the Appellant could not access that last section of Cowdroys Road at all with his 4WD and boat trailer since 2010 (for 12 years) (at [129]);
  - c. the evidence that the road was signposted a dry weather only (at [16] and [129]); and
  - d. the evidence that Cowdroys Road was closed by the Respondent for lengthy periods of several months during wet weather (at [129]).

**There was unreasonable delay in performing the duty in relation to each road**

- 7 Her Honour erred in finding at [140] and [181] that there is an unlimited or "necessary" discretion as to when the duty will be carried out "based on available staffing and funding", rather than a duty that is subject to a requirement implied by law that there be no unreasonable delay in its performance.
- 8 Her Honour erred in finding at [171] that the test for unreasonable delay in the performance of the s81 duty as applied to clause 5.3.1, item 10, of the PoM is *Wednesbury* or *Minister v Li* unreasonableness, namely that no Secretary in the position of the Secretary would have made the decisions on road maintenance which the Secretary did in fact make since 2011.
- 9 Her Honour erred in finding at [168] – [184] that there was no unreasonable delay in performing the duty imposed by a combination of s81 and clause 5.3.1, item 10, of the PoM.
- 10 Her Honour erred in finding at [173] that to establish unreasonable delay in performing the particular obligations in clause 5.3.1, item 10, of the PoM, the whole of the allocation of funding across the implementation of all aspects of the PoM would need to be considered, as such a requirement would amount to the



acceptance of an unlimited discretion as to timing, as this would render the duty to perform those obligations within a reasonable time illusory contrary to law.

- 11 Her Honour erred at [184] in finding that the persuasive onus of negating the existence of unreasonable delay had not shifted to the Respondent, and should have found that the Appellant had demonstrated a delay which required explanation by the Respondent and had not satisfied its resulting evidential onus.
- 12 Her Honour erred at [182] in finding that the adverse impact of the failure to perform the clause 5.3.1, item 10 obligations on the Appellant was irrelevant to assessing whether there was unreasonable delay, and should have found that this was a relevant consideration.
- 13 Her Honour should have found that there was unreasonable delay in performing the respective duties for the following reasons, and her Honour's finding to the contrary was against the weight of the evidence:
  - a. The PoM containing the obligations in clause 5.3.1, item 10 has been in force since 2011.
  - b. Lagoon Trail was classified as a 4WD access road in the NPWS asset management system contrary to the All Weather 2WD standard specified in the PoM: [34].
  - c. The roads are still not at the specified standards and on the evidence, have never been.
  - d. The evidence recorded at [25] and [175] was that the Respondent was able to obtain funding for the roads from multiple sources.
  - e. The Respondent had sufficient budget for works including as evidenced by \$5.2m in untied operational expenditure funding in 2021/22 alone, yet had only spent comparatively minor amounts on the roads over many years as recorded at [12], until belatedly spending \$47,636.25 on Lagoon Trail and \$137,215.52 on Cowdroys Road in April/May 2022 after the commencement of proceedings.
  - f. The recent expenditure on Cowdroys Road was post commencement of the litigation, and on the evidence was not pre-planned but instead was a defensive response to the commencement of proceedings (a matter left undecided by her Honour at [178]). However, the fact of that expenditure confirms that significant funding is available, as and when required, for these roads.

- g. The Respondent did not in fact prioritise road works in accordance with the “priority principles” put forward in the Respondent’s lay evidence from its own officers Issaverdis and He, and they are self-serving principles developed by the Respondent for the purposes of the proceedings [28] and [43].
- h. The obligations in clause 5.3.1, item 10 had not been carried out despite many repeated demands by the Appellant (“extensive communications”) and assurances by the Respondent that they would be, in circumstances where the failure to perform the obligation was preventing commercial access to the Appellant’s oyster lease and causing a financial loss of \$480,000 per annum [15].
- i. The Appellant has been unable to access the Oyster Lease using a 4WD vehicle with or without trailer along Cowdroys Road or Lagoon Trail since 2010 ([129]).
- j. The (Appellant’s) uncontested evidence that. he has not had access to (the Oyster Lease) since about 2010 and has suffered and continues to suffer a significant and growing financial loss, as a consequence [82].

**The respondent should have been ordered to do the roadwork required to achieve this standard for both of these roads**

- 14 Her Honour erred in not ordering the Respondent to do the work identified in the evidence and required to place each road into the required standard.
- 15 In particular, her Honour erred in not ordering that the identified roadwork that on the evidence (referred to at [52] and [125] and as identified in the Further Amended Summons) was required to place Lagoon Trail into an All Weather 2WD Standard be done. The failure to so order was unreasonable, and contrary to the evidence and her Honour’s own finding at [52] that Lagoon Trail was not at the required standard.
- 16 Her Honour should also have ordered that the work required to be done to ensure a 4WD (including without trailer) can access the last section of Cowdroys Road in wet weather as identified in the Further Amended Summons. The failure to do so was unreasonable and contrary to the evidence and findings referred to at paragraph 6 above at [18] and [129].
- 17 The order should have extended to correcting the grade of Lagoon Trail and Cowdroys Road to a maximum of 15 degrees at the specific points or chainages specified in the Further Amended Summons as it was common ground between the

engineering experts for each party below that the Fire Trail Standards provided a reasonable guide for what was required (in engineering terms) for 4WD access which in particular set a maximum longitudinal grade of no more than 15 degrees ([45], [49]).

- 18 Her Honour erred at [152] - [154] in not finding that the use of the word “thoroughfare” in clause 5.3.1, item 10 of the PoM required that Lagoon Trail and Cowdroys Road needed to be managed so as to allow access to Nelson Creek Lagoon by vehicles with boat trailers rather than as “dead end” roads, and in particular should have found that this required an order for the removal of the log barriers placed by the Respondent at the end of Lagoon Trail.

### ORDERS SOUGHT

- 1 Appeal allowed.
- 2 Orders of the court below be set aside.
- 3 In lieu thereof order that:
  - a. The Respondent do such work and take such steps as are necessary to upgrade Lagoon Trail to an all weather 2WD standard within 28 days. The works to comprise:
    - i. reducing the height, and easing the grade, of the cross bank nearest to the northern end of Lagoon Trail to a maximum of 15 degrees;
    - ii. regrading the road over a length of 30 metres to the new car park; and
    - iii. removing the logs that impede access to the mean high water mark at the end of Lagoon Trail.
  - b. The Respondent do such work and take such steps as are necessary to upgrade Cowdroys Road to an all weather 4WD standard within 28 days. The works to comprise:
    - i. ensuring the grade at CH800 is not greater than 15 degrees;
    - ii. reducing the height of the cross bank at CH1400 so it is no greater than 15 degrees;
    - iii. regrading so that the grade from CH1400 to CH 1642 is no more than 15 degrees; is not greater than 15 degrees; and
    - iv. placing a gravel surface over the road from CH200 to CH1400.
  - c. The Respondent pay the appellant’s costs of proceedings 2022/18446 in the Land and Environment Court; and

- d. The Appellant's further amended summons dated 3 March 2023 filed in proceedings 2022/18446 be otherwise dismissed.

4 The Respondent pay the Appellant's costs of the appeal.

#### UCPR 51.22 CERTIFICATE

The right of appeal is not limited by a monetary sum

#### SIGNATURE OF LEGAL REPRESENTATIVE

This notice of appeal does not require a certificate under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014.

I have advised the appellant[s] that court fees will be payable during these proceedings.  
These fees may include a hearing allocation fee.

Signature



Capacity

solicitor on record

Date of signature 20/06/2023.



## NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

## HOW TO RESPOND

**Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

Court forms are available on the UCPR website at [www.ucprforms.nsw.gov.au](http://www.ucprforms.nsw.gov.au) or at any NSW court registry.

## REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

## PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.



## FURTHER DETAILS ABOUT APPELLANT

### Appellant

Name Ian Stuart Neilson

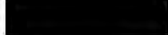
Address



### Legal representative for appellant

Name Rod Pogson

Practising certificate number



Firm Gibney & Gunson

Address 2/346 Griffith Road

LAVINGTON

NSW

2641

Telephone

Fax

Email



Electronic service address

Not applicable

## DETAILS ABOUT RESPONDENT

### Respondent

Name Secretary, Department of Planning & Environment

Address c/- Crown Solicitor's Office

60-70 Elizabeth Street

SYDNEY

NSW

2000