

AUSTRALIA / JUDGMENT

Crush and Haul Pty Ltd v Environment Protection Authority

[2023] NSWLEC 1367**COURT**

Land and Environment Court

DECIDED

19 July 2023

BEFORE

Targett AC

CASE / FILE NUMBER

2022/350294

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Source record**Land and Environment Court****New South Wales****Amendment notes****Medium Neutral Citation:** Crush and Haul Pty Ltd v Environment Protection Authority [2023] NSWLEC 1367**Hearing dates:** 13 and 14 June 2023**Date of orders:** 19 July 2023**Decision date:** 19 July 2023**Jurisdiction:** Class 1**Before:** Targett AC**Decision:**

The Court orders:

- (1) The appeal is upheld.
- (2) Licence Application No 21745 is granted consent in accordance with the terms in Annexure A, except for proposed condition A4.1 which is to be deleted.
- (3) The exhibits are returned, except for A, B, C, E, F, 1, 3 and 4.

Catchwords: ENVIRONMENT PROTECTION LICENCE – deemed refusal of environment protection licence application – whether applicant a fit and proper person

Legislation Cited:	Corporations Act 2001, s 50 Criminal Procedure Act 1986 Environmental Planning and Assessment Act 1979, ss 4.15, 4.46 Land and Environment Court Act 1979, ss 17, 39 Protection of the Environment Administration Act 1991, s 6 Protection of the Environment Operations (General) Regulation 2022, cl 66 Protection of the Environment Operations Act 1997, ss 3, 45, 48, 55, 58, 63, 64, 65, 66, 83, 91, 144, 169, 169A, 211, 287; Sch 1 cl 16, & 19 Waste Avoidance and Resource Recovery Act 2001
Cases Cited:	Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33 Environment Protection Authority v Crush & Haul Pty Ltd; Environment Protection Authority v Cauchi [2022] NSWLEC 113 Environment Protection Authority v Rixa Quarries (No 2) Pty Ltd [2017] NSWLEC 93 Environment Protection Authority v Wyanga Holdings Pty Ltd; Environment Protection Authority v Cauchi [2015] NSWLEC 78 at [214] Hughes and Vale Pty Ltd v New South Wales (No 2) (1955) 93 CLR 127; [1955] HCA 28 Minister for Immigration and Border Protection v Makasa (2021) 270 CLR 430; [2021] HCA 1 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Texts Cited:	Department of Planning, Industry and Environment “NSW Waste and Sustainable Materials Strategy 2041 Stage 1: 2021-2027”, dated June 2021 Environment Protection Authority, “NSW Waste Avoidance and Resource Recovery Strategy 2014-21” dated December 2014 Environment Protection Authority, “Prosecution Guidelines”, dated March 2013
Category:	Principal judgment
Parties:	Crush and Haul Pty Ltd (Applicant) Environment Protection Authority (Respondent)
Representation:	
Counsel:	J Lazarus SC, with C Novak (Applicant) R Beasley SC, with B Kaplan (Respondent)
Solicitors:	Hones Lawyers (Applicant) Environment Protection Authority (Respondent)
File Number(s):	2022/350294

JUDGMENT

1. Introduction

The applicant, Crush and Haul Pty Limited, has the benefit of development consent (0328/16DA) (Development Consent) for “extractive industry (quarry extension)” at premises at 3367 and 4003 Solitary Islands Way, Dirty Creek (formally described as Lot 76 in DP 752820 (Lot 76) and Lot 550 in DP 1181369 (Lot 550)) (collectively, the Land).

The activities permitted on the Land by the Development Consent include “scheduled activities” listed in Schedule 1 to the Protection of the Environment Operations Act 1997 (POEO Act), namely “crushing, grinding or separating” and “extractive activities” under clauses 16 and 19, respectively (Proposed Activities). Under s 48 of the POEO Act, a person requires an environment protection licence (Licence) to carry out scheduled activities. Therefore, the applicant requires a Licence to carry out the Proposed Activities.

The applicant submitted Environment Protection Licence Application No 21745 (also known as Application No POEOA3523) to the respondent on 20 September 2022 seeking to carry out the Proposed Activities on Lot 550 (Licence Application).

The Applicant is aggrieved by the respondent’s decision not to determine the applicant’s Licence Application. This matter concerns an appeal by the applicant, pursuant to s 287 of the POEO Act, against the deemed refusal by the respondent of the applicant’s Licence Application.

The parties agree that the appeal was filed on 21 November 2022, within the time period specified in s 287 of the POEO Act for the filing of an appeal under that section.

This Court has jurisdiction to hear and dispose of the appeal by virtue of s 17(a) of the Land and Environment Court Act 1979 (LEC Act) in Class 1 of the Court’s jurisdiction. By virtue of s 39(2) of the LEC Act, in exercising that jurisdiction, this Court has “all the functions and discretions” conferred on the respondent in respect of the matter the subject of the appeal under the POEO Act. This appeal is by way of rehearing pursuant to s 39(3) of the LEC Act.

The parties agreed that the sole matter in dispute in this case was whether the applicant is a “fit and proper person” under s 45(f) of the POEO Act to hold the Licence applied for.

2. General background

The following facts are agreed as set out in the applicant’s written submissions, the applicant’s Amended Statement of Facts and Contentions (ASOFC) (Ex B) and the respondent’s Amended Statement of Facts and Contentions in Reply (ASOFC in Reply) (Ex 1):

The applicant currently operates a quarry known as Corindi Quarry on the Land. Presently, the current and sole director of the applicant is Mr Luke Cauchi.

The Corindi Quarry is located on land owned by Mr Spyros “Sam” Apokis.

Between around 2008 and 2012, Wyanga Holdings Pty Ltd (Wyanga Holdings) operated Corindi Quarry. At the relevant time, Mr Joseph Cauchi and Mrs Louise Cauchi were Wyanga Holdings’ only directors. Wyanga Holdings was a family business and Mrs Louise Cauchi and Mr Joseph Cauchi’s sons, including Mr Luke Cauchi, worked at Corindi Quarry.

Between around 2012 and August 2017, Rixa Quarries Pty Ltd (Rixa Quarries) operated Corindi Quarry. At the relevant time, Mr Joseph Cauchi and Mrs Louise Cauchi were the only directors of Rixa Quarries.

On 21 October 2015, Rixa Quarries submitted development application No 0328/16DA (Development Application) to Coffs Harbour City Council (Council) for “Extractive Industry (Quarry Extension)” on the Land.

The development the subject of the Development Application was integrated development pursuant to s 4.46 of the Environmental Planning and Assessment Act 1979 (EP&A Act) and required a Licence to authorise the carrying out of scheduled activities on the Land.

Between 24 August 2017 to present, the applicant has operated Corindi Quarry.

Between 24 August 2017 and 1 February 2022, Mr Luke Cauchi was the sole director of the applicant. Mr Luke Cauchi is the son of Mrs Louise Cauchi and Mr Joseph Cauchi. In relation to Mr Luke Cauchi and the applicant:

Between 24 August 2017 and around March 2019, Mr Luke Cauchi’s role at Corindi Quarry included managing orders for the supply of quarry material from customers, overseeing the work that needed to be done on site to fill orders, and operating machinery.

In around March 2019, Mr Luke Cauchi ceased working at the applicant.

On 6 January 2020, the respondent received the integrated development application associated with the Development Application.

On 24 January 2020, the respondent issued General Terms of Approval (GTAs) (Notice No 1590894) to Council in relation to the Development Application submitted by Rixa Quarries. At the relevant time that the respondent issued GTAs to Council for the benefit of Rixa Quarries, Mrs Louise Cauchi was a director of Rixa Quarries.

On 20 November 2020, the Northern Regional Planning Panel granted the Development Consent to Rixa Quarries.

On 1 February 2022, Mr Luke Cauchi resigned as a director of the applicant.

On around 1 February 2022, Mrs Louise Cauchi become the sole director of the applicant.

On around 20 September 2022, the applicant submitted an application for a Licence to the respondent.

On 10 November 2022, the respondent issued a Notice of Intention to Refuse Application for the Issue of a Licence to the applicant on the basis that the respondent did not consider the applicant to be a fit and proper person for the purpose of s 45(f) of the POEO Act.

On 31 January 2023, Mrs Louise Cauchi resigned as director and secretary of the applicant and Mr Luke Cauchi was re-appointed as sole director and secretary of the applicant.

3. Relevant history of environmental non-compliance

The parties disagreed as to the relevance and/or weight to be assigned to the compliance history of the applicant, its current and former directors, and companies of which a former director of the applicant was or is currently a director, in considering whether the applicant is a fit and proper person to hold a Licence under the POEO Act.

Based on the evidence tendered and submissions made by the parties, I have set out below a summary of the history of environmental non-compliance of the key individuals and companies alleged to be relevant to the determination of whether the applicant is a fit and proper person under the POEO Act.

3(a): The applicant

The applicant was found guilty of breaching s 48(2) of the POEO Act by Preston CJ in the decision of *Environment Protection Authority v Crush & Haul Pty Ltd; Environment Protection Authority v Cauchi* [2022] NSWLEC 113 (EPA v C&H; EPA v Cauchi). The applicant was found at [4]-[5] to have:

“[4]...extracted, processed or stored more than 30,000 tonnes of extractive materials per year in 2018 at the Corindi Quarry. From 1 January 2018 to 31 December 2018, Crush and Haul sold 92,966.28 tonnes of extractive materials from Corindi Quarry.

- [5] Crush and Haul was accordingly required to hold an environment protection licence to carry on the scheduled activity of land-based extractive activity at the premises of Corindi Quarry. Crush and Haul did not hold such a licence at the time that the activity was carried on. It thereby committed an offence against s 48(2) of the POEO Act.”

Relevantly, the applicant was found by Preston CJ to have:

committed the offence “recklessly”, stating at [81]-[82]:

“[81] In these circumstances, I find beyond reasonable doubt that Crush and Haul did commit the offence against s 48(2) of the POEO Act recklessly. Crush and Haul carried on the land-based extractive activity at Corindi Quarry with knowledge or foresight that the particular consequence or circumstance, that an environment protection licence was required for the premises by Crush and Haul extracting, processing or storing more than 30,000 tonnes per annum, was likely to result...

I find Crush and Haul did have this knowledge or foresight of the likelihood of the consequence or circumstance, that the 30,000 tonnes threshold would be exceeded triggering the need to obtain an environment protection licence, occurring.”

not have caused any environmental harm, stating, at [13]:

“[13]...Crush and Haul’s carrying on of the scheduled activity of land-based extractive activity without holding an environment protection licence did not cause any actual harm to the environment.

committed an offence against s 48(2) of the POEO Act of “low to medium objective seriousness” at [90].

On 22 August 2016, the applicant was issued with a Penalty Notice for breach of s 144 of the POEO Act and fined \$15,000 relating to the alleged operation of an unlawful waste facility at 1953-2109 Elizabeth Drive, Badgerys Creek (Affidavit, Stanton Viney, 1 June 2023, at par 10(c), Exhibit SV-1, Tab 4).

On 22 August 2016, the applicant was issued with a Penalty Notice and fined \$15,000 for breach of s 91(5) of the POEO Act, relating to the alleged failure to comply with a Clean-up Notice at 1953-2109 Badgerys Creek (Affidavit, Stanton Viney, 1 June 2023, at par 10(e), Exhibit SV-1, Tab 5).

On 12 October 2016, the applicant was served with a Notice Requiring Payment of Reasonable Costs and Expenses in the amount of \$66,299.80 (Affidavit, Stanton Viney, 1 June 2023, at par 10(g), Exhibit SV-1, Tab 8) which remains unpaid (Affidavit, Stanton Viney, 1 June 2023, at par 16(b), Exhibit SV-1, Tab 34).

3(b): Mr Luke Cauchi

Mr Luke Cauchi is the current and only director of the applicant. Mr Luke Cauchi was relevantly convicted of an offence against s 169A(2) of the POEO Act in connection with the offence committed by the applicant discussed above in section 3(a) of this judgment. Preston CJ relevantly stated at [7]:

“[7] In the circumstances where Crush and Haul committed an offence against s 48(2) of the POEO Act (which is defined as an executive liability offence in s 169A(1) of the POEO Act), Mr Cauchi was a director of Crush and Haul and Mr Cauchi knew or ought reasonably to have known that the executive liability offence would be or was being committed and failed to take all reasonable steps to prevent or stop the commission of that offence, Mr Cauchi himself committed an offence against s169A(2) of the POEO Act.”

His Honour went on to state at [62] and [66]:

“[62] I do not accept Mr Cauchi’s assertion of his belief that Crush and Haul would not and did not exceed the 30,000 tonnes threshold during 2018...

...

[66] I also do not accept Mr Cauchi’s assertion that he believed Crush and Haul could keep quarrying in excess of 30,000 tonnes once an application for an environment protection licence had been lodged with the EPA, regardless of whether an environment protection licence was actually granted by the EPA...”

However, unlike the applicant, his Honour held at [128] that the “EPA has not established beyond reasonable doubt that Mr Cauchi committed the offence against s 169A(2) of the POEO Act recklessly.”

In relation to environmental harm, his Honour stated at [131] that the “EPA did not contend that Mr Cauchi’s commission of the offence against s 169A(2) of the POEO Act caused actual environmental harm, that there was foreseeability of environmental harm, or that there were practical measures that might have been taken to prevent, control, abate or mitigate any environmental harm”.

His Honour found the offence against s 169A(2) of the POEO Act committed by Mr Luke Cauchi was “of low objective seriousness” at [133].

On 22 August 2016, Mr Luke Cauchi was issued with a Penalty Notice and fined \$7,500 for breach of s 144(1) of the POEO Act, relating to the alleged unlawful use of a place as a waste facility in breach of at 1953-2109 Elizabeth Drive, Badgerys Creek (Affidavit, Stanton Viney, 1 June 2023, at par 10(f), Exhibit SV-1, Tab 6).

3(c): Wyanga Holdings

As set out above, Wyanga Holdings was a previous occupier of the Land and operator of Corindi Quarry. Mrs Louise Cauchi and Mr Joseph Cauchi were the only directors of Wyanga Holdings. As the parties dispute the relevance or weight to be attributed to the past conduct of Wyanga Holdings in the assessment of whether the applicant is a fit and proper person to hold a Licence under the POEO Act, a brief background of Wyanga Holdings’ environmental compliance history is set out below based on the evidence tendered and submissions made by the parties.

Wyanga Holdings was issued Licence No 13330 on 30 January 2011 authorising extractive activities at Corindi Quarry. Licence No 13330 limited the amount of material that could be extracted from Corindi Quarry to 50,000 tonnes per annum.

Wyanga Holdings reported, on 15 April 2012, two breaches of its licence conditions in its annual return relevantly stating (Affidavit, Stanton Viney, 1 June 2023, at par 10(m), Exhibit SV-1, Tab 14):

“did not conduct tests when rain of up to 82mm fell over a consecutive 5 day period - failed to read and understand what monitoring was required for licence. Rain gauge has since been installed near the sediment pond”; and

“rainfall measuring device not installed, therefore no monitoring or recording... Rain gauge has since been installed and monitoring & recording of rainfall will take place”.

Wyanga Holdings exceeded the 50,000 tonnes per annum extraction limit in 2011, 2012 and 2013 and was convicted on 15 May 2015 of three offences against s 64(1) of the POEO Act for breaching a condition of its Licence by exceeding the extraction limits at Corindi Quarry. Wyanga Holdings was fined \$3,000 in connection with those offences (Environment Protection Authority v Wyanga Holdings Pty Ltd; Environment Protection Authority v Cauchi [2015] NSWLEC 78 at [214] (EPA v Wyanga; EPA v Cauchi)).

Sheahan J relevantly found (at [143]):

“[143] In light of all those objective circumstances in respect of the s 64 offences, I am of the opinion that the conduct of all the defendants raises the criminality from “low” (sic) to “low to moderate” objective seriousness.”

Wyanga Holdings was also convicted on 15 May 2015 for an offence against s66(2) of the POEO Act, for providing misleading information to the respondent in its annual return for the January 2011-2012 licence period in connection with Licence No 13330, in that it did not report the extraction over the licensed threshold at Corindi Quarry (EPA v Wyanga; EPA v Cauchi at [214]).

Wyanga Holdings was fined \$500 in connection with this offence (EPA v Wyanga; EPA v Cauchi at [214]).

The respondent suspended Licence No 13330 on 27 August 2013 and revoked Licence 13330 on 19 May 2015.

Wyanga Holdings previously held two other Licences for separate premises. Licence 12791 authorised land-based extractive activity at Eight Mile Road, Humula NSW 2652, and was suspended on 2 February 2015 following Wyanga Holdings being placed in liquidation. Licence 12791 was revoked on 11 February 2016 (Affidavit, Stanton Viney, 1 June 2023, at par 10(ee), Exhibit SV-1, Tab 32). Licence 13260 authorised crushing, grinding or separating at Tarcutta Quarry at Hume Highway, Tarcutta, NSW and was suspended on 27 April 2015 following Wyanga Holdings being placed in liquidation. Licence 13260 was revoked on 11 February 2016 (Affidavit, Stanton Viney, 1 June 2023, at par 10(ff), Exhibit SV-1, Tab 33).

No evidence was provided regarding the compliance history associated with Licence 12791 or Licence 13260, nor did either party submit these Licences were relevant to this case. I have therefore not considered these Licences further.

Wyanga Holdings was deregistered before judgment was issued in EPA v Wyanga; EPA v Cauchi and as a result the fine imposed (\$3,000) on Wyanga Holdings was not paid.

3(d): Rixa Quarries (No 2) Pty Ltd

Rixa Quarries (No 2) Pty Ltd (RQ No 2) is an entity of which Mrs Louise Cauchi and Mr Joseph Cauchi were directors. As the parties dispute the relevance or weight to be attributed to the past conduct of RQ No 2 in the assessment of whether the applicant is a fit and proper person to hold a Licence under the POEO Act, a brief background of RQ No 2's environmental compliance history is set out below based on the evidence tendered and submissions made by the parties.

On 25 July 2017, RQ No 2 was convicted of an offence against s 48(2) of the POEO Act in that it was the occupier of premises (being the Doonbah Quarry) at which a scheduled activity was carried out when it did not hold a Licence that authorised that activity to be carried on at the premises between 25 March 2013 to 10 October 2013 (Environment Protection Authority v Rixa Quarries (No 2) Pty Ltd [2017] NSWLEC 93 (EPA v RQ No 2)). RQ No 2 was fined \$350,000 and ordered to pay the Prosecutor's costs as agreed or assessed (EPA v RQ No 2 at [48]).

Pain J held at [31]:

“[31] I find that the offence is at the high end of medium objective seriousness having regard to the nature of the offence within an important regulatory scheme, the extent of actual harm to the environment and the potential for environmental harm, the potential for financial gain and that it appears to have been committed deliberately.”

RQ No 2 was deregistered following the judgment in EPA v RQ No 2 and did not pay the fine imposed by the Court.

3(e) J & L Cauchi Civil Contracting Pty Ltd

J & L Cauchi Civil Contracting Pty Ltd (J&L Cauchi) is an entity in which Mrs Louise Cauchi and Mr Joseph Cauchi have been directors since 1995 (Affidavit, Stanton Viney, 1 June 2023, at par 10(p), Exhibit SV-1, tab 17). As the parties dispute the relevance or weight to be attributed to the past conduct of J&L Cauchi in the assessment of whether the applicant is a fit and proper person to hold a Licence under the POEO Act, a brief background of J&L Cauchi's environmental compliance history is set out below based on the evidence tendered and submissions made by the parties.

J&L Cauchi received thirteen clean up notices from the respondent in 2002-2003 after the respondent formed a reasonable suspicion that J&L Cauchi had caused various pollution incidents (Affidavit, Stanton Viney, 1 June 2023, at par 10(q)-(cc), Exhibit SV-1, tab 18 to 30).

3(f): Mrs Louise Cauchi

Mrs Louise Cauchi is a former director of the applicant, in addition to being the 100% shareholder of the applicant and the mother of the current sole director of the applicant, Mr Luke Cauchi. As Mrs Louise Cauchi's environmental compliance history was submitted by the parties to be a relevant consideration in the determination of whether the applicant is a fit and proper person to hold the Licence applied for under the POEO Act, I have provided a brief summary of Mrs Louise Cauchi's environmental compliance history below.

On 15 May 2015, Mrs Louise Cauchi (and her husband, Mr Joseph Cauchi) were each convicted, as directors of Wyanga Holdings, of breaching s 169(1) of the POEO Act. This conviction arose out of Wyanga Holdings breaching a condition of its Licence by exceeding the extraction limits at Corindi Quarry as set out above, at [25], resulting in three offences (for each of the company, Mrs Louise Cauchi and Mr Joseph Cauchi) against s 64(1) of the POEO Act (amounting to 9 offences in total). Mrs Louise Cauchi was fined \$3,000 and Mr Joseph Cauchi was fined \$75,000 in connection with these offences (EPA v Wyanga; EPA v Cauchi at [214]).

Sheahan J held at [182] – [184]:

“[182] It was also conceded by the defendants' counsel that Wyanga “has no assets at the moment. It has a large number of creditors, and is no longer a going concern” (Tp33 LL21-22), bringing into question its capacity to pay any fine imposed.

[183] In any event Wyanga's actions are directly attributable to its only directors, namely, Louise and Joseph. As a non-human entity, the only way it can act is through its directors, who are its "directing mind and will". It will, therefore, suffice to impose penalties on Louise and/or Joseph for their role in the breaches, and to impose only a nominal fine on Wyanga.

[184] I agree with the defendants' submission that Joseph is more culpable than Louise for the s 64 breaches. He was primarily responsible for the operational side of the business, and, therefore, had direct involvement in the extraction of material; Louise on the other hand was concerned primarily with paper work, and had less involvement in what was actually extracted from the site."

On 15 May 2015, Mrs Louise Cauchi (and Mr Joseph Cauchi) were each convicted, as directors of Wyanga Holdings, of an offence against s 66(2) of the POEO Act related to providing misleading information to the respondent, as set out above, at [27]-[28], in relation to Wyanga Holdings. The charging of the offence under s 66(2) of the POEO Act against each of Ms Louise Cauchi and Mr Joseph Cauchi was "founded upon s 169 of that Act" (EPA v Wyanga; EPA v Cauchi at [2]), meaning that s 66(2) of the POEO Act was an offence attracting special executive liability for a director or other person involved in the management of the corporation. Mrs Louise Cauchi was fined \$24,000 and Mr Joseph Cauchi was fined \$1,000 in connection with these offences (EPA v Wyanga; EPA v Cauchi at [214]).

Sheahan J found at [198-199]:

"[198] On that basis, I am satisfied that the failure to disclose the exceedances was at least negligent, and really quite reckless, and will take that matter into account in the determination of the objective seriousness of the offence.

[199] In light of these objective factors I conclude that the s 66(2) offence is of "moderate" objective seriousness. There was no environmental harm caused, apart from the subjugation of the system, and there was no deliberate intention to mislead the EPA."

Sheahan J held at [212]:

"[212] I agree with the defendants' submission that Louise is primarily culpable for the s 66(2) breach. She had responsibility for all the paperwork, and in particular, the annual return, and, although all three defendants should and will be convicted, the bulk of the penalty (\$24,000) should be paid by her, with nominal fines of \$1,000 and \$500 respectively being paid by Joseph and the company."

On 19 November 2015, Mrs Louise Cauchi was issued with a Penalty Notice and fined \$750 for breach of s 211(1) of the POEO Act relating to the alleged failure to comply with a Notice issued by the respondent entitled Nomination or Place and Time to Attend and Answer Questions (Affidavit, Stanton Viney, 1 June 2023 at par 10(k) and Exhibit SV-1, Tab 12).

4. Statutory framework

On appeal, the Court, in assessing and determining the Licence Application, is exercising the functions conferred by s 55 of the POEO Act. In its consideration of whether to grant or refuse the issue of a Licence under s 55 of the POEO Act, the Court must take into consideration the matters set out in s 45 “as are of relevance”.

Section 55 of the POEO Act provides:

55 Grant or refusal of application

- (1) The appropriate regulatory authority may—
 - (a) in relation to an application for the issue of a licence—
 - (i) grant the application by issuing the licence, or
 - (ii) refuse the application, and
 - (b) in relation to an application for the transfer of a licence—
 - (i) grant the application by transferring the licence, or
 - (ii) refuse the application.
- (2) The appropriate regulatory authority must not refuse the application unless before doing so—
 - (a) it has given notice to the applicant that it intends to do so, and
 - (b) it has specified in that notice the reasons for its intention to do so, and
 - (c) it has given the applicant a reasonable opportunity to make submissions in relation to the matter, and
 - (d) it has taken into consideration any such submissions by the applicant.
- (3) If the appropriate regulatory authority grants an application for the transfer of a licence, the licence is, subject to any variation of the conditions of the licence under section 58(4), transferred subject to the conditions to which the licence is subject at the time of the transfer.

Note—

Section 287 enables appeals to be made in connection with licence applications within a specified period after the person is given notice of the decision concerned. The section provides that the person may appeal if the licence application is not determined within 60 days, and for the purposes of the appeal the licence application is taken to have been refused.

Section 45 of the POEO Act provides:

45 Matters to be taken into consideration in licensing functions

In exercising its functions under this Chapter, the appropriate regulatory authority is required to take into consideration such of the following matters as are of relevance—

- (a) any protection of the environment policies,
- (b) the objectives of the EPA as referred to in section 6 of the Protection of the Environment Administration Act 1991,
- (c) the pollution caused or likely to be caused by the carrying out of the activity or work concerned and the likely impact of that pollution on the environment,
- (d) the practical measures that could be taken—
 - (i) to prevent, control, abate or mitigate that pollution, and
 - (ii) to protect the environment from harm as a result of that pollution,
- (e) any relevant green offset scheme, green offset works or tradeable emission scheme or other scheme involving economic measures, as referred to in Part 9.3,
- (f) whether the person concerned is a fit and proper person,

Note—

See section 83 for provisions relating to the determination of whether a person is a fit and proper person for the purposes of this section.

- (f1) in relation to an activity or work that causes, is likely to cause or has caused water pollution—
 - (i) the environmental values of water affected by the activity or work, and
 - (ii) the practical measures that could be taken to restore or maintain those environmental values,
- (g) in connection with a licence application relating to the control of the carrying out of non-scheduled activities for the purpose of regulating water pollution—whether the applicant is the appropriate person to hold the licence having regard to the role of the applicant in connection with the carrying out of those activities,
- (h) in connection with a licence application—any documents accompanying the application,
- (i) in connection with a licence application—any relevant environmental impact statement, or other statement of environmental effects, prepared or obtained by the applicant under the Environmental Planning and Assessment Act 1979,
- (j) in connection with a licence application—any relevant species impact statement prepared or obtained by the applicant under the Threatened Species Conservation Act 1995 or Part 7A of the Fisheries Management Act 1994,
- (k) in connection with a licence application, any waste strategy in force under the Waste Avoidance and Resource Recovery Act 2001,

- (l) in connection with a licence application—
- (i) any public submission in relation to the licence application received by the appropriate regulatory authority under this Act, and
- (ii) any public submission that has been made under the Environmental Planning and Assessment Act 1979, in connection with the activity to which the licence application relates, and that has been received by the appropriate regulatory authority,
- (m) if the appropriate regulatory authority is not the EPA—any guidelines issued by the EPA to the authority relating to the exercise of functions under this Chapter.

A critical issue in this matter is whether the applicant is a “fit and proper person” for the purpose of s 45(f) of the POEO Act. The “Note” to s 45(f) relevantly states “see section 83 for provisions relating to the determination of whether a person is a fit and proper person for the purposes of this section”. Section 83 of the POEO Act provides:

83 Fit and proper persons

- (1) This section has effect in determining whether a person is a fit and proper person as referred to in section 45 (f) and section 79 (5) (f), but does not limit the generality of those sections.
- (2) The appropriate regulatory authority may take into consideration any or all of the following —
 - (a) that the person has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation,
 - (b) that, if the person is a corporation, a current or former director of the corporation or of a related body corporate—
 - (i) has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation, or
 - (ii) is or has been the director of another body corporate that has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation,
 - (c) the person’s record of compliance with the environment protection legislation,
 - (d) if the person is a corporation, the record of compliance with the environment protection legislation of any current or former director of the corporation or of a related body corporate,

- (e) whether, in the opinion of the appropriate regulatory authority, the management of the activities or works that are or are to be authorised, required or regulated under the relevant licence are not or will not be in the hands of a technically competent person,
- (f) whether, in the opinion of the appropriate regulatory authority, the person is of good repute, having regard to character, honesty and integrity,
- (g) if the person is a corporation, whether, in the opinion of the appropriate regulatory authority, a current or former director of the corporation or of a related body corporate is of good repute, having regard to character, honesty and integrity,
- (h) whether the person, in the previous 10 years, has been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,
- (i) if the person is a corporation, whether a current or former director of the corporation or of a related body corporate has, in the previous 10 years, been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,
- (j) whether the person, during the previous 3 years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit,
- (j1) if the person is a corporation, whether a current or former director of the corporation or of a related body corporate, during the previous 3 years and while a director of the corporation or related body corporate, was—
 - (i) an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, or
 - (ii) compounded with the director's creditors or made an assignment of the director's remuneration for the benefit of the creditors,
- (k) if the person is an individual, whether he or she is or was a director or person concerned in the management of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous 3 years,
- (l) if the person is a body corporate, whether the body corporate is the subject of a winding up order or has had a controller or administrator appointed during the previous 3 years,
- (m) whether the person has demonstrated to the EPA the financial capacity to comply with the person's obligations under or in connection with the licence or the proposed licence,
- (n) whether the person is in partnership, in connection with activities that are subject to a licence or licence application, with a person whom the appropriate regulatory authority does not consider to be a fit and proper person under this section,

(n1) if the person is a corporation, whether a related body corporate is a person whom the appropriate regulatory authority does not consider to be a fit and proper person under this section.

- (o) any other ground prescribed by the regulations.
- (3) A reference in subsection (2) to a director of a body corporate extends to a person involved in the management of the affairs of the body corporate.
- (4) Without limiting the generality of the above, the appropriate regulatory authority may disregard contraventions referred to in subsection (2) having regard to the seriousness of the contraventions, the length of time since they occurred, and other matters that appear relevant to the appropriate regulatory authority.
- (5) For the purposes of this section, other relevant legislation is any legislation declared by the regulations to be other relevant legislation for the purposes of this section. The regulations may so declare legislation that has been repealed or legislation of a place outside the State.

Section 3 of the POEO Act provides:

3 Objects of Act

The objects of this Act are as follows—

- (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,
- (b) to provide increased opportunities for public involvement and participation in environment protection,
- (c) to ensure that the community has access to relevant and meaningful information about pollution,
- (d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following—
 - (i) pollution prevention and cleaner production,
 - (ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,
 - (iia) the elimination of harmful wastes,
 - (iii) the reduction in the use of materials and the re-use, recovery or recycling of materials,
 - (iv) the making of progressive environmental improvements, including the reduction of pollution at source,
 - (v) the monitoring and reporting of environmental quality on a regular basis,

- (e) to rationalise, simplify and strengthen the regulatory framework for environment protection,
- (f) to improve the efficiency of administration of the environment protection legislation,
- (g) to assist in the achievement of the objectives of the Waste Avoidance and Resource Recovery Act 2001.

Section 287 of the POEO Act provides:

287 Appeals regarding licence applications and licences

- (1) Any person—
 - (a) who makes a licence application and who is aggrieved by any decision of the appropriate regulatory authority with respect to the application, or
 - (b) who is or was the holder of a licence and who is aggrieved by any decision of the appropriate regulatory authority with respect to the licence,

may, within 21 days (or such other period as is prescribed instead by the regulations) after being given notice of the decision of that authority, appeal to the Land and Environment Court against the decision.

(1A) The lodging of an appeal—

- (a) in the case of an appeal against a decision to suspend or revoke a licence (whether with or without conditions)—does not operate to stay the decision appealed against, and
- (b) in the case of an appeal against any other decision—does not, except to the extent that the Land and Environment Court otherwise directs in relation to the appeal, operate to stay the decision appealed against.

(1B) For the avoidance of doubt, the Land and Environment Court has no jurisdiction to make an order staying a decision referred to in subsection (1A) (a).

- (2) An appeal under this section extends to a decision to refuse the licence application, to impose conditions on the issue of a licence, to vary the conditions of a licence, to revoke or suspend a licence, to refuse to approve the surrender of a licence, to impose conditions on a revocation, suspension or surrender of a licence or to attach any new conditions to, or to vary any conditions of, a suspension, revocation or surrender of a licence.

Note—

The Dictionary defines licence application to mean an application for the issue, transfer or variation of a licence or for approval of the surrender of a licence.

- (3) For the purposes of this section, a licence application is taken to have been refused—

- (a) in the case of an application for a variation of a licence about which the appropriate regulatory authority is required to invite and consider public submissions under section 58 (6), if the application is not granted within 90 days after it is duly made, or
- (b) in the case of an application for a licence relating to controlled development, if the application is not granted within 60 days after it is duly made or within 30 days after development consent is granted for the controlled development, whichever is the later, or
- (c) in any other case, if the application is not granted within 60 days after it is duly made.
- (4) The period commencing when an applicant is duly required under this Act to provide additional information within a specified period for the purposes of determining a licence application and ending when that information is provided or the specified period ends (whichever occurs first) is not to be taken into account in determining whether a licence application is taken to have been refused.
- (5) Nothing in this section prevents the determination of a licence application under this Act after the end of a period referred to in subsection (3).
- (6) There is no appeal under this section against a condition that is imposed on a licence, or varied or revoked, by the regulations.

Note—

Section 4.52 of the Environmental Planning and Assessment Act 1979 provides that, in the case of integrated development under that Act involving a licence application, the Court is under the same obligation as the appropriate regulatory authority with respect to the issue of the licence in accordance with the previous general terms of any approval by that authority.

5. Consideration of meaning and scope of term “fit and proper person” under the Protection of the Environment Operations Act

As set out above, in determining whether to grant or refuse a Licence under s 55 of the POEO Act, the Court is required to take into consideration the matters listed in s 45, “as are of relevance”. The parties agree that the critical, and only contested head of consideration in this matter is s 45(f), being “whether the person concerned is a fit and proper person”.

The term “fit and proper person” is not defined in the POEO Act. However, that head of consideration is informed by s 83 which provides a non-exhaustive list of discretionary matters which may be considered in determining whether a person is fit and proper as part of a broader determination as to whether to grant or refuse a licence under s 55 of the POEO Act.

In considering the scope of the term “fit and proper person”, and the scope of the discretion that is required to be exercised to determine whether the applicant is a fit and proper person, both parties referred to a number of cases. I refer to the key cases below.

Both parties referred to the case of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 380; [1990] HCA 33 in their written submissions which is extracted below:

“The expression “fit and proper person”, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of “fit and proper” cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. This list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.”

The respondent submitted that the case of *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 was particularly relevant regarding the exercise of discretion and making a “legally reasonable” decision. In that case, French CJ relevantly stated:

*“Every discretion has to be exercised, as Kitto J put it in *R v Anderson, Ex parte Ipec-Air Pty Ltd* (80), according to “the rules of reason” (81)...” (at [24]).*

“The rationality required by “the rules of reason” is an essential element of lawfulness in decision-making. A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power...” (at [26]).

“...The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.” (at [63]).

“...Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.” (at [76]).

The respondent further submitted that the Court in this case, must be “satisfied” and “actually persuaded” that the applicant is a fit and proper person having regard to the principles set out in *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430; [2021] HCA 1 at [37]-[38] (Makasa).

In written submissions, both parties referred to the case of *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156; [1955] HCA 28 where, Dixon CJ, McTeirnan and Webb JJ said:

“...The expression “fit and proper person” is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection...”

The applicant also referred to a further passage from the above paragraph, where Dixon CJ, McTeirnan and Webb JJ said:

“...‘Fit’ (or ‘idoneus’) with respect to an office is said to involve three things, honest, knowledge and ability: ‘honesty to execute it truly without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it’ – Coke...”

The respondent submitted in its written submissions at par 25, “the question for this Court is not whether Crush and Haul is, in some general sense, a fit and proper person, but rather whether it is a fit and proper person to hold an EPL under the POEO Act in light of the objects in s 3”. The applicant agreed, stating at (Tcpt, 13 June 2023, p 43 (12)-(14)), “there is no dispute that those objects would naturally inform a consideration of matters under s 45 of the Act, and in particular s 45(f)”.

Having regard to the principles espoused in the cases above, I consider it necessary, that in exercising the Court’s power to determine whether to grant the Licence applied for under the POEO Act, I have regard to:

the circumstances and particular facts of this case;

the context of the term “fit and proper person” within its legislative context (being the POEO Act); and

the three characteristics of “fitness” for office, being honesty, knowledge and ability (on the basis that the term “fit and proper person” is not defined in the POEO Act, s 83(2) of the POEO Act is not a closed list of matters for consideration, and I consider these characteristics provide relevant guidance to the determination of whether a person is a fit and proper person under the POEO Act).

I must also exercise my discretion reasonably and with evident and intelligible justification.

In relation to the respondent’s argument that I must reach a state of actual persuasion and satisfaction that the applicant is a fit and proper person in accordance with the principles set out in Makasa, I note that Makasa was considering a different legislative regime with different language to that in s 45 of the POEO Act. I agree with the applicant’s submission that the statutory regime being considered in Makasa imposed an onus to satisfy the Minister of the character test whereas s 45 of the POEO Act requires consideration of various factors as are of relevance (which includes whether the applicant is a fit and proper person).

However, the objects of the POEO Act include (at s 3(a)), “to protect, restore and enhance the quality of the environment”. The licensing regime set out in Chapter 3 of the POEO Act seeks to regulate scheduled activities which “are by their nature activities that are either inherently or when conducted in a certain manner or extent likely to cause harm to the environment” (EPA v C&H; EPA v Cauchi at [16]). I therefore agree with the respondent’s submission that in order to grant a Licence to the applicant in this matter, I must be satisfied that the applicant is a “fit and proper person” for the purposes of s 45(f) of the POEO Act.

6. Consideration of whether the applicant is a “fit and proper person” under the Protection of the Environment Operations Act

Turning to the words of the POEO Act, being the legislative regime relevant to the determination of whether the applicant is a fit and proper person, the parties agree that s 83(1) does not limit the generality of s 45(f) and the matters to which this Court may have regard in determining whether the applicant is a fit and proper person are not confined to those listed in s 83(2). The applicant stated at (Tcpt, 13 June 2023, p 45 (9)-(11)) “you have the discretion to consider other matters, so long, as the EPA correctly points out, they properly relate to the purpose and subject matter of the legislation”.

Section 83(2) relevantly states that the appropriate regulatory authority (or the Court in this case) “may take into consideration any or all of the following...” This provision does not therefore mandate consideration of all matters listed or direct the decision maker as to the weight to be afforded to each matter. Notwithstanding this, the parties directed me to the matters set out in s 83(2) and I will consider each head of consideration in turn, in addition to other matters submitted to be relevant to the determination of whether the applicant is a fit and proper person under the POEO Act.

Section 83(2)(a) “That the person has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation”

The “person” in this case is the applicant, Crush and Haul.

As set out above, the applicant was found guilty of breaching s 48(2) of the POEO Act by Preston CJ in the decision of *EPA v C&H; EPA v Cauchi*. The offence was found to be of “low to medium objective seriousness” (at [90]).

The applicant’s conviction for a breach of s 48(2) of the POEO Act is a matter which I have considered in determining whether the applicant is a fit and proper person to be granted the Licence sought in this matter.

I note that the applicant’s conviction under s 48(2) of the POEO Act was not trivial and was found by Preston CJ to have been carried out recklessly. However, I do not consider that one conviction, which did not result in environmental harm and which was found to be of low to medium objective seriousness, is determinative, on its own, that a person is not a “fit and proper” person to hold a Licence under the POEO Act.

The task of determining whether a person is a “fit and proper person” to hold a Licence under the POEO Act should be determined through consideration of all relevant factors listed in s 83 of the POEO Act and any other matters which are considered relevant having regard to the specific facts of the case.

The parties did not submit that the applicant had previously had a licence suspended or revoked under environmental or other legislation.

Section 83(2)(b) “that, if the person is a corporation, a current or former director of the corporation or of a related body corporate – (i) has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation”

Current director

Mr Luke Cauchi is the current and only director of the applicant. As set out above, at [16]-[21] of this judgment, Mr Luke Cauchi was relevantly convicted of an offence against s 169A(2) of the POEO Act in connection with the offence committed by the applicant under s 48(2) of the POEO Act considered above in relation to s 83(2)(a) (see *EPA v C&H*; *EPA v Cauchi*).

His Honour relevantly stated at [62] and [66] that:

“[62] I do not accept Mr Cauchi’s assertion of his belief that Crush and Haul would not and did not exceed the 30,000 tonnes threshold during 2018. Mr Cauchi knew that Crush and Haul was obliged under the sub management agreement to ensure continuous productivity of the quarry and a bare minimum of 30,000 tonnes per annum out the gate...

...

[63] I also do not accept Mr Cauchi’s assertion that he believed Crush and Haul could keep quarrying in excess of 30,000 tonnes once an application for an environment protection licence had been lodged with the EPA, regardless of whether an environment protection license was actually granted by the EPA...”

However, his Honour found the offence against s 169A(2) of the POEO Act committed by Mr Luke Cauchi was “of low objective seriousness” (*EPA v C&H*; *EPA v Cauchi* at [133]).

Noting that the offence for which Mr Luke Cauchi was convicted related to the same conduct for which the applicant was convicted, in *EPA v C&H*; *EPA v Cauchi*, I similarly do not consider that Mr Luke Cauchi’s single conviction, which did not result in environmental harm and which was found to be of low objective seriousness, is determinative of the applicant, through Mr Luke Cauchi as its sole director, not being a “fit and proper” person to hold a Licence under the POEO Act.

This is particularly in circumstances where Mr Cauchi has no other convictions for environmental offences (Affidavit, Luke Cauchi, 24 April 2023, par 28), has expressed shame and embarrassment in relation to the 2022 convictions (Affidavit, Luke Cauchi, 24 April 2023, par 34), has educated, and is continuing to educate himself on his responsibilities as a director (Affidavit, Luke Cauchi, 24 April 2023, pars 36-38, 52-53, 68), and has committed to environmental compliance in the future (Affidavit, Luke Cauchi, 8 June 2023, pars 6 and 9).

The parties did not submit that Mr Luke Cauchi had previously had a licence suspended or revoked under environmental or other legislation.

Former director – Mrs Louise Cauchi

The parties agreed that Ms Louise Cauchi is a former director of the applicant. As set out above at [39]-[45], Mrs Louise Cauchi has been convicted of:

three offences against s 64(1) of the POEO Act related to Wyanga Holdings breaching a condition of its Licence by exceeding the extraction limits between 2011 and 2013 at Corindi Quarry; and an offence against s 66(2) of the POEO Act related to providing misleading information to the respondent in 2012.

In relation to the three offences against s 64(1) of the POEO Act which were also committed by Wyanga Holdings and Mr Joseph Cauchi, Mrs Louise Cauchi was fined \$3,000 (compared to \$3,000 for Wyanga Holdings and \$75,000 for Mr Joseph Cauchi). Of relevance to Mrs Louise Cauchi's conviction, Sheahan J held in *EPA v Wyanga; EPA v Cauchi* at [184]:

"[184] I agree with the defendants' submission that Joseph is more culpable than Louise for the s 64 breaches. He was primarily responsible for the operational side of the business, and, therefore, had direct involvement in the extraction of material; Louise on the other hand was concerned primarily with paper work, and had less involvement in what was actually extracted from the site."

However, in relation to Mrs Louise Cauchi's conviction for an offence against s 66(2) of the POEO Act which was also committed by Wyanga Holdings, Mrs Louise Cauchi was fined \$24,000 (compared to \$500 for Wyanga Holdings and \$1,000 for Mr Joseph Cauchi). Of relevance to Mrs Louise Cauchi's conviction, Sheahan J held at [212]:

"[212] I agree with the defendants' submission that Louise is primarily culpable for the s 66(2) breach. She had responsibility for all the paperwork, and in particular, the annual return, and, although all three defendants should and will be convicted, the bulk of the penalty (\$24,000) should be paid by her, with nominal fines of \$1,000 and \$500 respectively being paid by Joseph and the company."

No evidence was put before the Court that Ms Louise Cauchi had a licence held in her own name suspended or revoked under any environment protection legislation or other relevant legislation.

In its written submissions at par 41, the respondent summarised Mrs Louise Cauchi's history of contraventions of environment protection legislation as follows:

"The former director of Crush and Haul, Mrs Cauchi, has four convictions for breaches of the POEO Act relating to breaches by a related corporation, Wyanga Holdings, at Corindi Quarry. Mrs Cauchi has been the director of two other entities, Wyanga Holdings and Rixa 2, that have five convictions for breaches of the POEO Act at Corindi Quarry and at different premises. Wyanga Holdings also had three EPLs suspended, then revoked. It further reported two breaches of its licence conditions in its annual return lodged on 15 April 2012."

In its written submissions at par 72, the applicant stated that “the applicant’s principal submission is to the extent those contraventions have occurred by or through Mrs Louise Cauchi, in the particular circumstances of this case it is appropriate to disregard those contraventions as she no longer has control of the operations of the company.”

The consideration of a former director’s conduct is a matter specifically set out in s 83(2) of the POEO Act. Mrs Louise Cauchi’s contraventions of environment protection legislation, as a former director of the applicant, is a matter which I find relevant to the determination of whether the applicant is a fit and proper person to hold a Licence under the POEO Act. The task is therefore to determine the appropriate weight to assign to Mrs Louise Cauchi’s contraventions.

In considering the weight to assign to Mrs Louise Cauchi’s environmental compliance history, I have had regard to section 83(4) of the POEO Act which states:

83 Fit and proper persons

...

- (4) Without limiting the generality of the above, the appropriate regulatory authority may disregard contraventions referred to in subsection (2) having regard to the seriousness of the contravention, the length of time since they occurred, and other matters that appear relevant to the appropriate regulatory authority.

Seriousness of the contravention

The offences for which Mrs Louise Cauchi has been convicted were determined to be of:

“low to moderate” objective seriousness for the breaches of s 64(1) of the POEO Act, noting that Sheahan J only fined Ms Louise Cauchi \$3,000 for this offence on the basis that “Joseph is more culpable than Louise” (EPA v Wyanga; EPA v Cauchi at [184]); and

“moderate objective seriousness” for the breaches of s 66(2) of the POEO Act, noting that Sheahan J fined Mrs Louise Cauchi \$24,000 for this offence on the basis that “Louise is primarily culpable for the s 66(2) breach” (EPA v Wyanga; EPA v Cauchi at [212]).

These offences range from low to moderate seriousness and are therefore not at the high end of objective seriousness. Further, Mrs Louise Cauchi was found to be less culpable than Mr Joseph Cauchi for the breaches of s 64(1) of the POEO Act which was reflected in a \$3,000 fine. However, I find the offences committed by Mrs Louise Cauchi to be serious and not trivial.

Length of time since they occurred

The conduct that resulted in Mrs Louise Cauchi’s convictions under the POEO Act (discussed above at [39]-[45] of this judgment) occurred between 10 and 12 years ago. For completeness, I note that the conduct for which RQ No 2 was convicted (when Mrs Louise Cauchi was a director) also occurred in 2013, being some 10 years ago.

The time that has elapsed between Mrs Louise Cauchi's convictions, and the conduct that gave rise to those convictions, and the present is a relevant matter which reduces the weight to be given to these convictions.

Other matters

The applicant submits that "in determining whether it is appropriate to have regard to the conduct of persons who are former directors of the corporation, it is relevant to consider whether those persons have the capacity to exercise control" (applicant's written submissions at par 52). The applicant referred me to the case of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 231 at 349-350; [1990] HCA 33 where Mason CJ stated:

"The degree of an individual's capacity for control may not be so great as to warrant an inference that his character should be identified automatically with that of the licensee; in that event it would be necessary to look to the character and performance of the directors and the management. In another case, where the capacity of the individual for control of the licensee is great, the inference may be justified without examining the character and performance of the directors and management of the licensee. Especially is this so when it is established that the person having the capacity to control participates in the decision-making process..."

The applicant also referred to 382-383 of that judgment where Mason CJ stated:

"When the question is whether, having regard to its character or reputation, a company is fit and proper, the answer may be given by reference to the conduct, character and reputation of the persons by and through whom it acts or who are otherwise relevantly associated with it. The identity of the persons relevant to the character and reputation of a company will necessarily vary according to the circumstances of the company under consideration. At one extreme, if a person regularly exercises control in all important matters affecting the company's activities, then, ordinarily, the question will be sufficiently answered by reference to that person. At the other extreme, if no person is in a position of control or if one person, although in a position to exercise control, regularly delegates that control to others, then it will ordinarily be necessary to have regard to the persons who manage the company's affairs and activities. The question whether it is sufficient to have regard to one person or necessary to have regard to others when determining whether a company is fit and proper is one that depends on the circumstances of the company and not one any legal requirement imported by the expression, "fit and proper". It follows that, in appropriate circumstances, the question of the fitness and propriety of a company to hold a commercial licence under the Broadcasting Act may be determined by reference to a single person associated with it."

The respondent did not refute this argument, other than to say that the authorities referred to by the applicant were "not particularly helpful... you are guided by s 83(2). You've got express considerations set out for you in the Act, statutory considerations that you need, with respect, to engage with and commentary in relation to fit and proper in relation to other legislative regimes with different facts isn't going to be particularly helpful to you" (Tcpt, 14 June 2023, p 6 (30)).

In my consideration of s 83(2) and the numerous references to a “former director”, and noting that s 83 is a non-exhaustive and non-binding list of matters for consideration, I agree with the applicant’s submission that the weight to be placed on a former director’s history of contraventions with environment protection licence should be considered in the context of their present and future influence or control over the conduct of the applicant company seeking to obtain a Licence.

The facts of this case are that Mrs Louise Cauchi only ceased to be a director of the applicant company in January 2023, is a 100% shareholder of the applicant, and the current sole director’s mother. These facts must be considered in the context of Mrs Louise Cauchi’s history of environmental non compliances and the findings made by Preston CJ in *EPA v C&H; EPA v Cauchi* at [106] that:

“[106] I accept that there is a risk that Crush and Haul might reoffend whilst Mrs Cauchi is the sole director of Crush and Haul. Her record as a director of companies that breach the POEO Act is not a good one. Nevertheless, lessons can be learnt even if belatedly. I consider that in circumstances where Mrs Cauchi is the director of Crush and Haul there is a need for the sentence imposed on Crush and Haul for its offence to reflect specific deterrence. If this is done, Crush and Haul is less likely to reoffend.”

The respondent submitted (in its written submissions at par 61) that “the “undertakings” which Crush and Haul claims Mr Cauchi and Mrs Cauchi have provided to the Court do not advance matters, given their continued pattern of breaching environment protection legislation, their convictions and their non-compliance with orders made by this Court (cf ASFC Part B [1(b5)]-[1(b7)] sic).”

The fact that Mrs Louise Cauchi has provided an undertaking to the Court dated 13 June 2023 (Ex G) suggests that the applicant acknowledges that Mrs Cauchi’s environmental compliance history may present an issue in the applicant obtaining a Licence. I consider that Mrs Louise Cauchi’s control over the current or future conduct of the applicant company is a matter of relevance in the determination of whether the applicant should be granted a Licence under the POEO Act.

The applicant argued in its written submissions that Mrs Louise Cauchi at par 72 “no longer has control of the operations of the company” and at par 74 “will have no involvement in the operational management of the applicant”. The applicant’s submissions go on to state at par 75 that:

“The Court also has evidence before it that both Mrs Louise Cauchi and Mr Joe Cauchi no longer have direct or indirect control of the operational management of the applicant. The court can be comfortably satisfied that this is the case having regard to:

- (a) the personal circumstances of Mr and Mrs Cauchi (in particular the terminal health of Mr Joseph Cauchi, that they are now residing overseas; and their age) (Affidavit, Luke Cauchi, 24 April 2023 at par 8);

- (b) the written undertaking, dated 23 April 2013, provided by Mrs Louise Cauchi to the Court (Affidavit, Luke Cauchi, 24 April 2023 at par 48 and Exhibit LJC-2, Tab 3);
- (c) the evidence of Mr Luke Cauchi that it is time for generational change and providing undertakings to the Court and confirming that the applicant is willing to accept a condition restricting the involvement of Mr and Mrs Cauchi in the operational management of the Applicant (Affidavit, Luke Cauchi, 24 April 2023 at par 39 and 41-42); and
- (d) the applicant's proposed condition A4.1 below."

In relation to the concept of control, the respondent's primary argument appeared to be that this matter concerned a "family group of companies" (Tcpt, 14 June 2023, p 10 (20)-(23)) and "this family group has a history of offending under the legislation" (Tcpt, 14 June 2023, p 11, (16)-(17)).

However, the respondent did not provide any evidence that Mrs Louise Cauchi was presently controlling, or would control in the future, the conduct of the applicant company.

As stated above, Mrs Louise Cauchi provided an undertaking to the Court on 13 June 2023 which relevantly stated:

"I undertake to the Land and Environment Court of New South Wales:

1. No to exercise my [sic] powers, pursuant to s203C of the Corporations Act 2001 or by any other means, to remove Luke Joseph Cauchi as a Director or Secretary of Crush and Haul, and to appoint myself, or Joseph Cauchi, as a Director or Secretary of Crush and Haul in his place.
2. Not to exercise my powers, pursuant to s203C of the Corporations Act 2001 or by any other means, to appoint myself as a Director or Secretary of Crush and Haul.
3. Not to exercise my powers, pursuant to s 203C of the Corporations Act 2001 or by any other means, to appoint Joseph Cauchi (date of birth 1 October 1962) as a Director or Secretary of Crush and Haul."

Mrs Louise Cauchi is no longer a director of the applicant, did not provide affidavit evidence in the proceedings and was not cross examined during the hearing. I have therefore not placed material weight on the undertaking she provided to the Court on 13 June 2023.

As the current and only director of the applicant, I find the affidavit evidence and testimony of Mr Luke Cauchi to be highly relevant in determining whether the applicant is a fit and proper person to hold a Licence under the POEO Act. The affidavit of Mr Luke Cauchi, affirmed on 24 April 2023, relevantly provides the following:

"Having gone through the process of being convicted by the Court, I believe that I now have a better appreciation of the personal responsibilities of being appointed a director of a corporation and the importance of maintaining oversight of all matters and to not just rely on the advice of others, including my mother and father" (at par 38).

“I also undertake to the Court that whilst ever I am a Sole Director of the Applicant I will not permit the Applicant to employ mum (Mrs Louise Cauchi) or dad (Joseph Cauchi) in relation to any future operations of the Applicant, and will not permit them to hold positions as Directors or Secretaries of the Applicant” (at par 49).

“I further undertake to the Court that should I ever purchase any of the shares in the Applicant I will not exercise any rights under the Corporations Act 2001 (Cth) or by any other means to enable the Applicant to employ mother (Louise Cauchi) or father (Joseph Cauchi) in relation to any future operations of the Applicant, and will also not exercise any such rights to enable them to hold positions as Directors or Secretaries of the Applicant” (at par 50).

“Simply put, I want to turn over a new leaf and operate 100% in accordance with the law. Proof of my commitment is how we have pursued the development application and environment protection licence process, spending approximately \$600,000 to ensure that we have all required approvals. I have environmental and planning consultants, environmental lawyers and other experts who the Applicant will pay a lot of money to make sure we comply with all environment protection laws in the future” (at par 66).

The affidavit of Mr Luke Cauchi, affirmed on 8 June 2023, relevantly provides the following:

“I am not looking to excuse, or explain away the past conduct of those other entities, or Louise Cauchi. Rather, what I have been trying to do is give the Court and EPA comfort that it can be confident that conduct is in the past, and that I will now be taking the Applicant forward under my own sole control, in a way that is committed to complying with environmental and planning laws” (at par 6).

“More than my father’s health, between my parents, myself and my siblings, my parents and I have agreed that it is time for generational change... As both part of that generational change, and because of my father’s health (and my parents ageing), I have now taken back control of the company and operation of the quarry, and intend on keeping that control – I have absolutely no intention of my parents taking on a directorship or management role in the company in the future. Moreover, I am determined to put my parents’ (and particularly my mother’s) compliance issues in the past, and turn over a new leaf to running a fully compliant, law abiding company” (at par 9).

“I am also conscious that if the Court grants the EPL to the company, that it would be a second chance to the company. I am fully aware that this means that we would be on a very “tight leash” and that any future breaches of a material nature may lead to the EPA or Court suspending or revoking the EPL. I have noted that the EPA proposes to include conditions on the EPL for audits of weighbridge data and CCTV (condition M10.1) quarterly, a monthly report listing the quantities of extractive material transported from the facility (M10.2), and 6-monthly volumetric surveys (M10.3). I accept these conditions, and embrace them – I wish to move forward with a law abiding company, and if granted an EPL, am happy to provide any reasonable information and data to the EPA to give it comfort that the company is complying with the law” (at par 10).

During cross examination I found Mr Luke Cauchi to be genuine in his remorse and embarrassment for his and the applicant's convictions in 2022. I note that Preston CJ made similar findings in *EPA v C&H; EPA v Cauchi*, at [138] stating:

"[138] Mr Cauchi has expressed his genuine remorse for committing the offence... I accept Mr Cauchi's statements as evidencing his remorse for committing the offence. He has accepted responsibility for committing the offence, apologised for doing so and undertaken not to do so in future."

The respondent also accepted during the hearing that Mr Luke Cauchi is "ashamed and embarrassed" and "regretful" (Tcpt, 14 June 2023, pp 19 (7) and 20 (13)) about his and the applicant's convictions.

I also found Mr Luke Cauchi to provide evidence which he believed to be truthful, even if he grappled with some of the questions. For example, when asked if the applicant company had ever informed the respondent that it was dissatisfied with the respondent's cost compliance notice in 2016 requiring payment to the respondent of over \$66,000 in relation to a premises at Badgerys Creek, Mr Cauchi, after some thought, stated that relevant correspondence had been provided to the EPA. The applicant was then able to tender evidence of this correspondence during the hearing (letter from the applicant to the respondent dated 7 October 2016 – Ex H).

For completeness I note that I make no findings in relation to Mr Luke Cauchi's claims of improper conduct by the EPA in 2016 in relation to a property at Badgerys Creek as there was no evidence of these allegations presented to me by either party (other than one letter from the applicant to the respondent dated 16 June 2017 (Ex 5) and Mr Cauchi's assertions during the hearing) and I do not consider them to be relevant as to whether the applicant is a fit and proper person to hold the Licence applied for concerning Corindi Quarry.

The respondent provided no evidence that the statements in Mr Luke Cauchi's affidavits of 24 April 2023 and 8 June 2023 and his evidence in Court that Mrs Louise Cauchi would not control the conduct of the applicant was false or inaccurate. The fact that Mrs Louise Cauchi is Mr Luke Cauchi's mother is, without more, insufficient to displace Mr Luke Cauchi's evidence that he will control the applicant's compliance with the Licence, if granted.

As stated previously, Mrs Louise Cauchi is a 100% shareholder of the applicant. However, I note that:

the compliance history of shareholders in an applicant company are not matters listed for consideration under s 83 of the POEO Act, and

the respondent did not advance any argument establishing that Ms Cauchi is presently controlling the conduct of the applicant, or would do so in future, by virtue of being 100% shareholder, despite the parties being directly asked to address this issue (Tcpt, 13 June 2023, p 41 (9)-(18)).

Although I have taken in consideration that Mrs Louise Cauchi is a 100% shareholder of the applicant, I do not consider that there is any cogent evidence before me to refute Mr Luke Cauchi's evidence that he will be taking the applicant forward under his "own sole control, in a way committed to complying with environmental and planning laws" (Affidavit, Luke Cauchi, 8 June 2023 at par 6).

I have therefore not assigned Mrs Louise Cauchi's history of contraventions of environment protection legislation material weight in the consideration of whether the applicant is a fit and proper person to hold a Licence under the POEO Act for the scheduled activities sought and have placed significantly more weight on the testimony and evidence of Mr Luke Cauchi in the hearing before me.

I note that "honesty" is one of the three characteristics espoused in *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156; [1955] HCA 28 to denote "fitness" with respect to an office. In the absence of any cogent evidence to the contrary, I find Mr Luke Cauchi, and through him the applicant, to be genuine and honest in his remorse for his and the applicant's past offences, and his intention to operate in accordance with environmental protection legislation and the conditions of any Licence issued under the POEO Act.

For completeness, I note that the applicant has proposed condition A4.1 in the agreed draft Licence conditions filed with the Court on 15 June 2023. Condition 4.1 provides as follows:

"The licensee must not employ Louise Margaret Cauchi (date of birth 5 November 1962) or Joseph Cauchi (date of birth 1 October 1962) in relation to any future operations of the licensee, and must not permit them to hold positions as Director or Secretary."

The respondent did not oppose the imposition of this condition (or any of the conditions set out in the draft Licence conditions filed by the applicant with the Court on 15 June 2023) in the event that the Court is minded to grant the Licence to the applicant.

Section 63(1) of the POEO Act provides that "a licence may be issued subject to conditions or unconditionally" and s 65 provides that "this Part contains examples of conditions that can be attached to a licence. Accordingly, nothing in this Part prevents other conditions being attached to a licence".

In determining whether the applicant is a fit and proper person to hold a Licence under the POEO Act, I have considered Mrs Louise Cauchi's past offences under environment protection legislation as a former director of the applicant. On the basis of the evidence tendered and submissions made in this matter, I do not consider that Mrs Louise Cauchi is controlling or will control the conduct of the applicant company in the future. Therefore, having had due regard to the weighted considerations in this matter, proposed condition A4.1 is not required to be imposed to support the conclusion that the applicant is a fit and proper person under the POEO Act. On this basis, I do not consider that proposed condition A4.1 should be imposed in the circumstances of this case.

Section 83(2)(b) “that, if the person is a corporation, a current or former director of the corporation or of a related body corporate – (ii) “is or has been the director of another body corporate that has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation”

Current director

It was not argued by either party that Mr Luke Cauchi has been the director of another body corporate, whether related or otherwise, that has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any environment protection legislation or other relevant legislation.

Former director – Mrs Louise Cauchi

The parties agreed that Mrs Louise Cauchi, being a former director of the applicant, has been the director of bodies corporate, Wyanga Holdings and RQ No 2, which have contravened environment protection legislation and had licences suspended and/or revoked under environment protection legislation.

For the reasons set out in my consideration of Mrs Louise Cauchi under s 83(2)(b)(i) above at [79]–[117], I do not consider Mrs Louise Cauchi’s contraventions of environment protection legislation or contraventions by bodies corporate for which she was a director to be of material weight in this case on the basis that the respondent has not established:

that Mr Luke Cauchi’s affidavit and oral evidence that he will take the applicant forward under his “own sole control, in a way that is committed to complying with environmental and planning laws” (Affidavit, Luke Cauchi, 8 June 2023, at par 6) was false or inaccurate;

that Mrs Louise Cauchi is in fact controlling, or will control, the applicant’s conduct going forward; or

how Mrs Louise Cauchi could or would control the company by virtue of being 100% shareholder of the applicant.

Section 83(c) “the person’s record of compliance with the environment protection legislation”

Relevant to this head of consideration, the respondent states in its ASOFC in Reply (p 16-17) that the following facts should be considered:

The applicant was convicted for a breach of s 48(2) of the POEO Act in 2022.

The applicant was issued with two penalty notices under the POEO Act in 2016.

The applicant was issued with a cost compliance notice in 2016, while Mr Luke Cauchi was director, requiring payment to the EPA of over \$66,000 for the costs of sampling and other remediation steps for the premises at Badgerys Creek. Payment was never made.

An application was made to the respondent for a Licence while the applicant was operating at Corindi Quarry in 2018. Mrs Louise Cauchi gave instructions for the application to be made in the name of the person subleasing the quarry to the applicant and the purpose of this was “to avoid the EPA realising that the Cauchi family ‘have a share of the pie’” (EPA v C&H; EPA v Cauchi at [23] and [44]).

The applicant’s 20 September 2022 application for an environment protection licence contained misleading information about the applicant’s record of compliance as described above (this argument was not pressed at hearing on the basis that the respondent accepted that the relevant sections of the form that had been incorrectly filled out were done so inadvertently and there was no deliberate attempt to deceive the respondent (Tcpt, 13 June, p 68 (21)-(23)).

In relation to these arguments, the applicant argued:

The single breach of s 48(2) of the POEO Act for which the applicant was convicted was found by Preston CJ to be of low to moderate objective seriousness.

There is no pattern of conduct arising from the issue of the two penalty notices in 2016 and the offences committed under s 48(2) by the company or the offence committed by Mr Luke Cauchi, nor was there any proof of an offence in relation to the conduct in 2016 (Tcpt, 14 June, p 28 (32)-(26)).

According to the respondents own Prosecution Guidelines (Ex C, tab 7 - EPA Prosecution Guidelines, March 2013, [5.1.1]), penalty notices are issued for “minor breaches” which are “not considered serious enough to warrant instituting Court proceedings”. Further, the applicant argued that “the payment of a penalty notice doesn’t constitute an admission or amount to a conviction of the offence” (Tcpt, 13 June, p 59 (7)-(9)). The applicant also submitted that based on the evidence, the material the subject of the relevant notices was removed but just not within the time period specified by the respondent (Tcpt, 13 June, p 58 (29)-(30)).

In relation to the outstanding amount of \$66,000 for the respondent’s costs at Badgerys Creek issued in 2016, the respondent submitted that there is “clear evidence that there was a bona fide dispute about it, in addition to the fact that the EPA hasn’t pursued the matter in the previous seven years” (Tcpt, 14 June, p 26 (9)-(11)).

I do not consider that the two Penalty Notices, in addition to the s 48(2) offence, are collectively sufficient to establish a pattern of non-compliance with environmental legislation such that it must be determined that the applicant is not a “fit and proper person” to hold a Licence under the POEO Act. The relevant Penalty Notices were issued some seven years ago and it is acknowledged in the EPA Prosecution Guidelines that penalty notices

were introduced “to provide an effective and efficient means to deal with minor breaches of criminal provisions, which are not considered serious enough to warrant instituting Court proceedings” (Exhibit C, tab 7 - EPA Prosecution Guidelines, March 2013, [5.1.1]). I have therefore given the Penalty Notices issued to the applicant on 22 August 2016 little weight.

Further, on the evidence before me, I accept the applicant's argument that the applicant disputed the 2016 costs, as is evidenced in the documentation tendered, and received no response from the respondent following this correspondence. I therefore assign little weight to the applicant's failure to pay these costs from 2016 to the assessment of whether the applicant is a fit and proper person to hold a Licence under the POEO Act.

In relation to the application made to the respondent for a Licence, while the applicant was operating at Corindi Quarry in 2018, which contained false information at the instruction of Mrs Louise Cauchi, no evidence was provided that Mr Luke Cauchi had authorised or actioned this conduct. I have placed significant weight on Mr Luke Cauchi's evidence that he will have "sole control" of the applicant going forward (Affidavit, Luke Cauchi, 8 June 2023, par 6), is "aware of [his] obligations in the role of director" (Affidavit, Luke Cauchi, 24 April 2023, par 53) and "wishes to move forward with a law abiding company (Affidavit, Luke Cauchi, 8 June 2023, par 10).

I have therefore not assigned material weight to Mrs Louise Cauchi's record of non compliances with environment protection legislation on the basis that the respondent tendered no evidence, and made no submission (other than to say that "this is a family group of companies" (Tcpt, 14 June, p 10 (20)-(23)), that Mrs Louise Cauchi is in fact controlling, or will control, the conduct of the applicant going forward if it is granted a License under the POEO Act. I therefore do not find that Mrs Louise Cauchi's prior conduct and character should be identified automatically with that of the applicant in consideration of whether it will comply with its Licence, should it be granted.

The applicant is seeking a Licence so that it may lawfully carry out the activity it was convicted of carrying out unlawfully by Preston CJ in the EPA v Crush and Haul; EPA v Cauchi litigation. It was not alleged by the respondent that the applicant has carried out any unlawful activities, under environment protection legislation or otherwise, since those activities in 2018 for which it was convicted in that litigation.

I do not find the applicant's record of compliance with the environment protection legislation to be so poor that it would result in it not being considered a fit and proper person for the purposes of obtaining a Licence under the POEO Act.

Section 83(d) "if the person is a corporation, the record of compliance with the environment protection legislation of any current or former director of the corporation or of a related body corporate."

Current director

As set out previously, Mr Luke Cauchi, being the current sole director of the applicant, has been convicted for a breach of s 169A as a result of the applicant breaching s 48(2) of the POEO Act in 2022 and was issued with one penalty notice in 2016.

It was not alleged by the respondent that Mr Luke Cauchi has carried out any unlawful activities, under environment protection or otherwise, since those activities in 2018 for which he was convicted.

I note that Mr Luke Cauchi was convicted of an offence arising out of the same conduct for which the applicant was convicted under s 48(2) of the POEO Act. For the reasons set out in relation to the applicant above at [121]-[128], I do not find Mr Luke Cauchi's record of compliance with environment protection legislation to be so poor as to warrant a determination that the applicant is not a fit and proper person to hold a Licence under the POEO Act by virtue of Mr Luke Cauchi being its sole director.

Former director – Mrs Louise Cauchi

As set out previously, Mrs Louise Cauchi, being the former sole director of the applicant, has been convicted of four breaches of the POEO Act and issued with one penalty notice in 2015.

For the reasons set out in my consideration of s 82(2)(b)(i) above at [79]-[117], I do not consider Mrs Louise Cauchi's contraventions of environment protection legislation to be of material weight in this matter based on the evidence before me.

Related bodies corporate

Although I have considered contraventions of environment protection legislation of other body corporates for which Mrs Louise Cauchi was a director under s 82(2)(b)(ii), I note that s 83(2)(d) is directed towards the record of compliance of a "related body corporate".

The respondent argued that the record of compliance of Wyanga Holdings, RQ No 2 and J&L Cauchi were relevant to this head of consideration, being entities of which Mrs Louise Cauchi was or is the director. The respondent argued during the hearing that Wyanga Holdings, RQ No 2 and J&L Cauchi were "related bodies corporate" on the basis that (Tcpt, 14 June, p 23 (6)-(10) and (14)-(17)):

"...s 50 of the Corporations law states that a body corporate is a related body corporate if it's a subsidiary of another body corporation. Section 46 provides that "a body corporate... controls the (sic) first body's board," and these are family companies so it would fall within that."

"... it hardly matters because these subsections in relation to at least Wyanga and Rixa (No 2) are relevant in any event because of Mrs Cauchi's former involvement as a director, bearing in mind that she's still the 100% shareholder of the current applicant".

In relation to the fact that Wyanga Holdings and Rixa No 2 have been deregistered, the respondent submitted that "You wouldn't take Parliament to have intended that you can slip out of (sic) 83(2)(b)(i) or 83(2)(d) by dint of the related body corporate who is the offender under environmental protection legislation later on ceasing to exist by becoming deregistered or going into liquidation" (Tcpt, 14 June, p 10 (40)) and "if there is a temporal aspect it's whether the related body corporate was in existence at the time that the legislation was breached, not has been deregistered at a later point" (Tcpt, 14 June, p 10 (49)).

The applicant argued that:

Wyanga Holdings, RQ No 2 and J&L Cauchi were not “related bodies corporate” as they did not meet the definition in the POEO Act and Corporations Act 2001; and

Wyanga Holdings and RQ No 2 have been deregistered so were not capable of being related bodies corporate to the applicant.

On the basis of the evidence before me, I accept the applicant’s argument that the entities, Wyanga Holdings, RQ No 2 and J&L Cauchi are not “related bodies corporate” for the purposes of the definition of the POEO Act and s 50 of the Corporations Act and therefore do not need to consider the applicant’s further argument that Wyanga Holdings and RQ No 2 have been deregistered and therefore cannot be related bodies corporate.

Therefore, the record of compliance of Wyanga Holdings, RQ No 2 and J&L Cauchi are not directly relevant to the matters set out in s 83(2)(d) of the POEO Act. However, as s 83(2) is not a closed list of matters which can be considered in determining whether a person is a fit and proper person, I consider that the compliance history of Wyanga Holdings, RQ No 2 and J&L Cauchi, being bodies corporate which had the same director as a former director of the applicant (who was the sole director of the applicant until January 2023), is relevant to the determination of whether the applicant is a fit and proper person for the purposes of holding an EPL under the POEO Act.

In relation to J&L Cauchi, I note that its alleged non compliances on the evidence provided occurred some 20 years ago and did not result in any convictions. I would therefore give J&L Cauchi’s compliance history little weight in the consideration of whether the applicant is a fit and proper person to hold a Licence under the POEO Act.

Further, for the reasons set out in my consideration of Mrs Louise Cauchi under s 83(2)(b)(i) of the POEO Act above at [79]-[117], in addition to the fact that no evidence was adduced which demonstrated that the current director of the applicant, Mr Luke Cauchi, had any involvement in the regulatory compliance of either Wyanga Holdings, RQ No 2 or J&L Cauchi, I have not given Wyanga Holdings, RQ No 2 and J&L Cauchi’s record of compliance with environment protection material weight in the determination of whether the applicant is a fit and proper person to hold a Licence under the POEO Act.

Section 83(e) “Whether, in the opinion of the appropriate regulatory authority, the management of the activities or works that are or are to be authorised, required or regulated under the relevant licence are not or will not be in the hands of a technically competent person”

The respondent did not allege, at hearing, that the management of the activities or works that are to be authorised, required or regulated under the relevant Licence will not be in the hands of a technically competent person.

I note that “knowledge” and “ability” are two of the three characteristics espoused in *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156; [1955] HCA 28 to denote “fitness” with respect to an office.

In the absence of any cogent evidence to the contrary, Mr Luke Cauchi has demonstrated insight into the responsibilities held by a director (Affidavit, Luke Cauchi, 24 April 2023, pars 35-38) and therefore has “knowledge” for the purposes of the second characteristic considered in *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 at 156; [1955] HCA 28 to denote “fitness” with respect to an office. Further in the absence of any cogent evidence to the contrary, I accept that the applicant will be in the hands of a technically competent and therefore “able” and “knowledgeable” person, being Mr Luke Cauchi.

Section 83(f) “Whether, in the opinion of the appropriate regulatory authority, the person is of good repute, having regard to character, honesty and integrity”

I have set out the applicant’s history of contraventions with environment protection legislation above at [11]-[15].

In relation to this head of consideration, the respondent states in its ASOFC in Reply at p 21 that “the Respondent has formed the opinion the Applicant is not of good repute given the Applicant’s conviction under the POEO Act described above.”

I note that the applicant’s conviction under s 48(2) was not trivial and was found by Preston CJ to have been carried out recklessly. However, I do not consider that one conviction, on its own, which did not result in environmental harm and which was found to be of low to medium objective seriousness, amounts to a person not being of good repute. I similarly do not find that the two penalty notices issued to the applicant in 2016, in conjunction with the 2022 conviction, amount to the applicant not being of good repute. For these reasons, I consider that the applicant is presently of good repute.

Section 83(g) “if the person is a corporation, whether, in the opinion of the appropriate regulatory authority, a current or former director of the corporation or of a related body corporate is of good repute, having regard to character, honesty and integrity”

Current director

The respondent states in its ASOFC in Reply at p 22 that “the Respondent has formed the view that the current director of the Applicant, Mr Luke Cauchi, is not of good repute as Mr Cauchi has a conviction for a breach of the POEO Act as described above”.

I note that Mr Luke Cauchi’s conviction under s 169A of the POEO Act was similarly not trivial. In addition, Preston CJ did not accept all of Mr Cauchi testimony (*EPA v C&H*; *EPA v Cauchi* at [62]-[66]). However, I have no evidence before me to refute Mr Luke Cauchi’s affidavit evidence and testimony in Court that Mr Luke Cauchi is:

“ashamed and embarrassed” by the applicant’s and his own conviction in 2022 (Affidavit, Luke Cauchi, 24 April 2023 at par 34);

determined to “turn over a new leaf to running a fully compliant, law-abiding company,” (Affidavit, Luke Cauchi, 8 June 2023 at par 9); and

is “aware of [his] obligations within the role of director” (Affidavit, Luke Cauchi, 24 April 2023 at par 53).

The respondent accepted during the hearing that that Mr Luke Cauchi is “ashamed and embarrassed” and “regretful” (Tscpt, 14 June 2023, pp 19 (7) and 20 (13)).

I therefore do not consider that one conviction, on its own, which did not result in environmental harm, which was found to be of low objective seriousness, and for which the person acknowledges his mistakes and is committed to future environmental compliance, amounts to a person not being of good repute.

I similarly do not find that the penalty notice issued to Mr Luke Cauchi in 2016, in conjunction with the 2022 conviction, amounts to Mr Luke Cauchi not being of good repute.

For these reasons, I consider that Mr Luke Cauchi is presently of good repute.

Former director – Mrs Louise Cauchi

The respondent states in its ASOFC in Reply at p 22 that “the Respondent has formed the view the former director of the Applicant, Mrs Louise Cauchi, is not of good repute as Mrs Cauchi has previously breached environment protection legislation including providing misleading information to the Respondent as described above”.

Mrs Louise Cauchi’s environmental compliance history is “not a good one” (EPA v C&H; EPA v Cauchi at [106]) and would indicate a disregard for compliance with environmental legislation.

Like with Mrs Louise Cauchi’s environmental compliance history, I find that Mrs Louise Cauchi’s reputation is only relevant insofar as Mrs Louise Cauchi is established to currently control or be likely to control in future, the conduct of the applicant in relation to its compliance with the Licence applied for. As set out previously, I do not consider the respondent to have established:

that Mr Luke Cauchi’s affidavit and oral evidence that he will control the entity is false or inaccurate;

that Mrs Louise Cauchi is controlling, or will control, the applicant’s conduct going forward; or

how Mrs Louise Cauchi could or would control the company by virtue of being 100% shareholder of the applicant.

I therefore do not need to consider whether Mrs Louise Cauchi is of good repute for the purposes of determining whether the applicant is a fit and proper person to hold a Licence under the POEO Act.

Section 83(2)(h) “whether the person, in the previous 10 years, has been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty”

The parties agreed that s 83(h) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(i) “if the person is a corporation, whether a current or former director of the corporation or of a related body corporate has, in the previous 10 years, been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty”

As set out at [39]-[45] of this judgment, Mrs Louise Cauchi was convicted in 2015 under s 169 of the POEO Act in relation to Wyanga Holdings’ offence under s 66(2) of the POEO Act (being an offence which attracted special executive liability) for providing misleading information to the respondent. Given the length of time since the conduct that gave rise to this conviction (being some 11 years ago), the length of time since the conviction (9 years ago) and the failure of the respondent to displace Mr Luke Cauchi’s affidavit evidence that he will have “sole control” of the applicant going forward (Affidavit, Luke Cauchi, 8 June 2023 at par 6), I do not attribute significant weight to Mrs Louise Cauchi’s 2015 conviction for providing misleading information to the respondent 9 years ago.

Section 83(2)(j) “whether the person, during the previous 3 years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit”

The parties agreed that s 83(2)(j) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(j1) “if the person is a corporation, whether a current or former director of the corporation or of a related body corporate, during the previous 3 years and while a director of the corporation or related body corporate, was – (i) an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, or (ii) compounded with the director’s creditors or made an assignment of the director’s remuneration for the benefit of the creditors”

The parties agreed that s 83(2)(j1) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(k) “if the person is an individual, whether he or she is or was a director or person concerned in the management of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous 3 years”

The parties agreed that s 83(2)(k) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(l) “if the person is a body corporate, whether the body corporate is the subject of a winding up order or has had a controller or administrator appointed during the previous 3 years”

The parties agreed that s 83(2)(l) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(m) “whether the person has demonstrated to the EPA the financial capacity to comply with the person’s obligations under or in connection with the licence or the proposed licence”

The respondent did not press this head of consideration at the hearing. In the absence of any cogent evidence to the contrary, I have accepted that the applicant has demonstrated the financial capacity to comply with its obligations under or in connection with the proposed Licence.

Section 83(2)(n) “whether the person is in partnership, in connection with activities that are subject to a licence or licence application, with a person whom the appropriate regulatory authority does not consider to be a fit and proper person under this section”

The parties agreed that s 83(n) was not relevant to the facts of this case and I have not considered it further on this basis.

Section 83(2)(n1) “if the person is a corporation, whether a related body corporate is a person whom the appropriate regulatory authority does not consider to be a fit and proper person under this section”

The respondent argued that Wyanga Holdings and RQ No 2 were “related bodies corporate” as Mrs Louise Cauchi, being a former director of the applicant, was their director. The respondent stated that Wyanga Holdings and RQ No 2 were not fit and proper persons due to their prior convictions under the POEO Act as set out in the ASOFC in Reply (at p 25). As I have determined above, I do not consider the respondent to have established that Wyanga Holdings and RQ No 2 are “related bodies corporate” as that term is defined in the POEO Act and Corporations Act.

However, as set out in my consideration of s 83(2)(d) above at [129]-[133], on the basis that s 83 of the POEO Act does not provide an exhaustive list of matters for consideration, I have considered Wyanga Holdings and RQ No 2’s prior environmental compliance record and that of Mrs Louise Cauchi as being relevant to the determination of whether the applicant is a fit and proper person for the purposes of s 45(f) and s 83 of the POEO Act.

For the reasons set out in paragraph [141], I have not assigned material weight to the compliance history of Wyanga Holdings and RQ No 2, as the current director of the applicant, Mr Luke Cauchi, was not a director of those entities and it was not established, on the evidence before me, that he had any involvement in the regulatory compliance of those entities.

As they are not related bodies corporate to the applicant company pursuant to the POEO Act or Corporations Act, it is only Mrs Louise Cauchi’s involvement (being a former director of the applicant, Wyanga Holdings and RQ No 2) that makes the prior conduct of Wyanga Holdings and RQ No 2 relevant to the consideration of s 83(2)(n1). However, as set out in my consideration of s 83(2)(b)(i) above at [79]-[117], I have not assigned material weight to Mrs Louise Cauchi’s environmental compliance history in the determination of whether the applicant is a fit and proper person to hold a licence under the POEO Act.

S 83(2)(o) any other ground prescribed by the regulations

Protection of the Environment Operations (General) Regulation 2022 (POEO Regulation) – cl 66

In relation to this head of consideration, the parties directed me to cl 66 of the Protection of Environment Operations (General) Regulation 2022 (POEO Regulation) which states:

66 Fit and proper persons—the Act, s 83

For the Act, section 83(2)(o), the appropriate regulatory authority may take into account whether the person has, within the previous 3 years, failed to pay a fee or other amount payable under the environment protection legislation or has paid the fee or amount late.

The respondent submitted that the applicant had, as at the date of the hearing, failed to pay the agreed costs to the respondent in accordance with the court orders for costs made in *EPA v C&H*; *EPA v Cauchi* (ASOFC in Reply, p 25). The respondent submitted that this was a relevant consideration under cl 66 of the POEO Regulation and therefore s 83(2)(o) of the POEO Act.

The applicant argued that this clause did not technically apply to the facts of this case because the court orders for costs were made under the Criminal Procedure Act 1986 which does not fall within the definition of “environment protection legislation” which is defined in the POEO Act by reference to the Protection of the Environment Administration Act 1991 (POEA Act).

I agree with the applicant’s submission that the Criminal Procedure Act 1986 does not fall within the definition of “environment protection legislation” in the POEA Act. However, noting that s 83 sets out a non-exhaustive list of considerations potentially relevant to the determination of whether a person is a “fit and proper person” for the purposes of the POEO Act, I have considered the applicant’s failure to pay the court’s costs orders in connection with the *EPA v C&H*; *EPA v Cauchi* litigation.

In this regard, I note that the respondent’s invoice was issued on 8 November 2022 requiring payment within 28 days (Affidavit, Stanton Viney, 1 June 2023, at par 10(ii), Exhibit SV-1, Tab 36). Therefore, the costs have been outstanding for some six months.

I have also considered Mr Luke Cauchi’s evidence during the hearing that the applicant intends to pay these costs “in the near future” (Tscpt, 13 June 2023, p 28 (45)). Having regard to the relatively short period of time since the respondent’s invoice was issued, and Mr Cauchi’s evidence that these costs will be paid “in the near future”, I give the applicant’s present failure to pay the court’s costs orders in connection with the *EPA v C&H*; *EPA v Cauchi* litigation little weight.

For completeness, I also note the applicant’s failure to pay the EPA’s clean up costs from 2016 which are discussed earlier. For the same reasons set out at [124], I give the applicant’s failure to pay those costs similarly little weight in the determination of whether the applicant is a fit and proper person to hold the Licence sought in this matter.

7. Decision regarding whether the applicant is a “fit and proper person”

Having regard to the above consideration, I find that the applicant is a “fit and proper person” pursuant to ss 45(f) and 83 of the POEO Act in respect of the Licence sought to be obtained in this matter.

My reasons for this determination are as set out above, but can be generally summarised as follows:

the applicant has only one prior conviction under s 48(2) of the POEO Act where no environmental harm was caused and was deemed to be of low to medium objective seriousness (although it is noted that the offence was found by Preston CJ to have been carried out recklessly);

the current sole director, Mr Luke Cauchi, has only one prior conviction, being an executive liability offence under s 169A(2) of the POEO Act connected to the offence for which the applicant was convicted as set out above. This offence was found by Preston CJ to not have been carried out recklessly and to be of low objective seriousness. His Honour similarly found the offence to have caused no environmental harm;

I find Mr Luke Cauchi to be honest and genuine in his remorse for his and the applicant’s 2022 convictions;

I have placed material weight on Mr Luke Cauchi’s evidence that he will have “sole control” of the applicant going forward, is aware of his obligations in the role of director, and wishes to move forward with a law abiding company;

the former director, Mrs Louise Cauchi has a more concerning compliance history, however, is no longer a director of the applicant and there was no cogent evidence provided which refuted Mr Luke Cauchi’s affidavit evidence and testimony that he will be in control of the applicant and its activities going forward;

the respondent did not contend in the hearing that the activities sought to be licensed will not be managed and in the hands of a technically competent person. In the absence of any cogent evidence to the contrary, I have accepted that the activities sought to be licensed will be managed and in the hands of a technically competent and able person;

the respondent did not contend in the hearing that the applicant does not have the financial capacity to comply with the obligations proposed to be imposed under the licence. In the absence of any evidence to the contrary, I have accepted that the applicant has the financial capacity to comply with the obligations proposed to be imposed under the licence; and

the applicant’s outstanding costs owed to the respondent are of little weight as the:

2016 costs were disputed by the applicant and not ultimately pursued by the respondent (on evidence before the Court); and

outstanding costs from the EPA v Crush and Haul; EPA v Cauchi litigation is only six months old and there was undisputed evidence before the Court from Mr Luke Cauchi that these costs will be paid in the near future.

8. Other matters for consideration under s 45 of Protection of the Environment Operations Act

On the basis that I have determined that the applicant is a “fit and proper person” for the purposes of s 45(f) of the POEO Act, it is necessary to consider the other relevant matters for consideration set out in s 45. As set out previously, in exercising its functions under the POEO Act, the appropriate regulatory authority (or in this case, the Court) is required to take into consideration such of the matters set out in s 45 as are of relevance.

During the hearing, the applicant tendered a document titled “Applicant’s Facts & Submissions on s 45 of the POEO Act” (Applicant’s s 45 Submissions) which was tendered without objection. I understand that the matters raised in the Applicant’s s 45 Submissions are not in dispute between the parties and have considered the matters set out in s 45 on this basis.

Section 45(a) any protection of the environment policies

The applicant submits that protection of the environment policies are those made by the Governor under Chapter 2 of the POEO Act. No policies have been made under Chapter 2 of the POEO Act. Accordingly, this head of consideration is not relevant.

Section 45(b) objectives in s 6 of the Protection of the Environment Administration Act

The applicant submits that an environmental impact statement was submitted by Rixa Quarries Pty Ltd as part of 0328/16DA and that the environmental impacts of the proposed development for which a Licence has been sought was fully assessed as part of that development application.

The Northern Regional Planning Panel, in assessing the development application under s 4.15 of the EP&A Act, considered the principles of ecologically sustainable development, and determined that the proposed development was acceptable.

So far as s 6(b) of the POEA Act identifies an objective of reducing risks to human health and preventing degradation of the environment, the applicant notes that not only have those matters been considered as part of the environmental impact statement for DA 0328/16DA, additional protective measures have otherwise been included as conditions of development consent and also proposed Licence conditions.

Section 45(c) the pollution caused or likely to be caused

The applicant repeats its submissions in relation to s 45(b) above at [182]-[184].

Section 45(d) practical measures that could be taken re pollution

The applicant repeats its submissions in relation to s 45(b) above at [182]-[184].

Section 45(e) any relevant green offset scheme

The applicant submits that there are no relevant schemes of offset works which have been established under Parts 9.3, 9.3A-B which arise for consideration. Accordingly, this head is not relevant.

Section 45(f1) activity or work re water pollution

The applicant submits that there is no suggestion that the proposed development will cause, is likely to cause or has caused water pollution. Mitigation measures to avoid water pollution (including bunding of areas and on-site sediment control basins) have otherwise been identified in DA 0328/16DA and its accompanying documents. Accordingly, this head is not relevant to the Licence Application before the Court.

Section 45(g) non-scheduled activities

The applicant submits that the Licence Application seeks approval for the carrying out of the scheduled activities of crushing, grinding or separating and extractive industries as identified in cll 16 and 19 of Schedule 1 of the POEO Act. Accordingly, this head of consideration is not relevant.

Section 45(h) any documents accompanying the application

The applicant submits that the Licence application is accompanied by documents provided to the Court (Ex A) which relevantly include the Notice of Determination of DA 0328/16DA granting development consent subject to conditions.

Section 45(i) any relevant environmental impact statement

The applicant repeats its submissions in relation to s 45(b) above at [182]-[184].

Section 45(j) any relevant species impact statement

The applicant submits that DA 0328/16DA was not accompanied by a species impact statement. Accordingly, this head of consideration is not relevant.

Section 45(k) waste strategy under the Waste Avoidance and Resource Recovery Act 2001 (WARR Act)

The applicant submits that a waste strategy is not currently in force, although there is a “NSW Waste Avoidance and Resource Recovery Strategy 2014-21”. The applicant further submits that even if the “NSW Waste Avoidance and Resource Recovery Strategy 2014-21” was in force, it is not relevant to the EPL Application.

I note that there is presently a waste strategy presently in force under the Waste Avoidance and Resource Recovery Act 2001, being the NSW Waste and Sustainable Materials Strategy 2041 Stage 1: 2021-2027, dated (“First Published”) June 2021 (the NSW 2021 Waste Strategy). The NSW 2021 Waste Strategy updates the previous 2014-21 strategy.

On the basis that the activities sought to be licensed are not primarily concerned with waste recovery or recycling, and neither party raises the NSW 2021 Waste Strategy as being of relevance in this matter, I do not consider the NSW 2021 Waste Strategy is determinative in the decision of whether to grant the applicant the Licence sought under the POEO Act.

Section 45(l)(i) public submissions in relation to the Licence Application

This head of consideration is not relevant as public submissions under the POEO Act only arises under s 58(6) relating to variation of a licence where the proposed variation has not been the subject of environmental assessment and public consultation under the EP&A Act.

Section 45(l)(ii) public submissions under the EP&A Act

The applicant submits that there were three submissions made during the public exhibition period for DA 0328/16DA. The applicant submits that:

so far as impacts on property values were raised, those matters are irrelevant.

so far as issuing of blasting impacts and dust impacts are raised, these matters have been assessed in the Environmental Impact Statement accompanying DA 0328/16DA, the Council’s assessment report, and otherwise addressed in both conditions of development consent and the parties respective proposed conditions.

so far as objections relating to impacts on wildlife are concerned, in the circumstances these matters are insufficiently related to the EPL Application to be relevant.

Section 45(m) appropriate regulatory authority

The applicant submitted that the appropriate regulatory authority was the respondent (EPA) in this case. Accordingly, this head of consideration is not relevant.

Relevant objects of the Protection of the Environment Operations Act

Section 45 of the POEO Act does not mandate that the Court consider the objects of the POEO Act, as set out in s 3 of that Act. However, where relevant, they ought to be considered.

On the basis that I have determined that the applicant is a fit and proper person under s 45(f) of the POEO Act, and all other matters listed for consideration as are of relevance under s 45 of the POEO Act are not disputed by the parties, I do not consider the granting of the Licence to be contrary to any of the stated objectives in s 3 or inconsistent with any of the matters for consideration that are of relevance under s 45 of the POEO Act.

9. Conditions

The parties have agreed conditions in the event the Licence is granted. I accept that these conditions should be imposed with the exception of proposed condition A4.1 in respect of Mrs Louise Cauchi's involvement as discussed above at [117].

10. Conclusion

For the reasons set out above, I am satisfied that the Licence Application may be granted in the terms agreed between the parties in Exhibit A (except for proposed condition A4.1 which is to be deleted).

The Court orders:

The appeal is upheld.

Licence Application No 21745 is granted consent in accordance with the terms in Annexure A, except for proposed condition A4.1 which is to be deleted.

The exhibits are returned, except for A, B, C, E, F, 1, 3 and 4.

N Targett

Acting Commissioner of the Court

Annexure A

Amendments

27 July 2023

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Correction to cover sheet and representation.

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Decision last updated:

27 July 2023

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