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Legislation

- Statutes and Regulations

Planning:

The [Greater Sydney Commission Act](#) 2015 commenced 27 January 2016.

[Standard Instrument \(Local Environmental Plans\) Amendment \(Maps\) Order 2016](#), published 27 January 2016, amended the Standard Instrument so that a reference to the Minister is taken to be a reference to the Greater Sydney Commission in the case of any map that applies to a local government area in the Greater Sydney Region (within the meaning of the [Greater Sydney Commission Act](#) 2015) and that is adopted by a local environmental plan on or after 27 January 2016.

[Environmental Planning and Assessment Amendment \(Savings and Transitional\) Regulation 2015](#), published 8 January 2016, made provisions of a savings and transitional nature consequent on the amendments made by the [Greater Sydney Commission Act](#) 2015 to the [Environmental Planning and Assessment Act](#) 1979. Those amendments include providing for local environmental plans applying in the Greater Sydney Region to be made by the Greater Sydney Commission instead of the Minister for Planning.

[Environmental Planning and Assessment Amendment \(Historical Documents\) Regulation 2016](#), published 26 February 2016, exempts until 1 July 2016 the NSW planning database from a requirement to maintain historical versions of documents or other material published on the NSW planning portal.

[Environmental Planning and Assessment Amendment \(Sydney Metro City and Southwest Project\) Order 2015](#), published 18 December 2015, declares development for the purposes of Sydney Metro City and Southwest, a proposed metro railway system of approximately 30km from Chatswood to Sydenham and west to Bankstown, to be State significant infrastructure and critical State significant infrastructure.

[Environmental Planning and Assessment Amendment \(WestConnex\) Order 2015](#), published 25 November 2015, declares development for the purposes of the New M5 project, being a new multi-lane road link between the M5 East Motorway (east of King Georges Road) and St Peters, the widening of the M5 East Motorway between King Georges Road and proposed tunnels and an interchange at St Peters together with associated works to upgrade local roads, to be State significant infrastructure and critical State significant infrastructure.

Local Government:

[Local Government Amendment \(Councillor Misconduct and Poor Performance\) Act](#) 2015, commenced 13 November 2015, amends the [Local Government Act](#) 1993 to modify the legislative scheme for dealing with councillor misconduct and poor performance and council maladministration, and for law revision purposes. [Local Government \(General\) Amendment \(Model Code of Conduct\) Regulation 2015](#), published 13 November 2015, prescribes an amended model code of conduct applicable to councillors, members of staff of councils and delegates of councils consequent on

enactment of the *Local Government Amendment (Councillor Misconduct and Poor Performance) Act 2015*. [Section 440](#) of the *Local Government Act 1993* requires each council to adopt a code of conduct that incorporates provisions of the model code.

Criminal:

[Environmental Planning and Assessment Amendment \(Proceedings\) Regulation 2015](#), published 4 December 2015, inserts cl 44A in Sch 7 Savings and Transitional Provisions of the Environmental Planning and Assessment Regulation 2000. Clause 44A provides that if, before the substitution of [s 127 \(5A\)](#) of the *Environmental Planning and Assessment Act 1979* relating to commencement of proceedings for an offence against that Act or the regulations under that Act, evidence of an offence came to the attention of an authorised officer, then the evidence is taken to have come to the attention of an investigation officer at that time.

Water:

[Water Sharing Plan for the Richmond River Area Unregulated, Regulated and Alluvial Water Sources Amendment Order 2016](#), published 19 February 2016, amended the [Water Sharing Plan for the Richmond River Area Unregulated, Regulated and Alluvial Water Sources 2010](#).

[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2015](#) commenced 8 January 2016. The Act amends, inter alia, the *Water Management Act 2000* to:

- (a) correct terminology used in connection with the transfer of a water access licence on the default of payment of a debt secured over the licence;
- (b) make it clear that certain allocations under a new water access licence (which replaces an original co-held water access licence) are to be determined according to who holds a majority share of the holdings under the original licence (rather than who holds a majority of those holdings); and
- (c) provides that a nominated water supply work (such as a water pump) under an original co-held water access licence is not taken to be the nominated water supply work under a new water access licence if the nomination of the water supply work is withdrawn.

Mining and Petroleum:

[Mining and Petroleum Legislation Amendment \(Grant of Coal and Petroleum Prospecting Titles\) Act 2015](#), other than the amendment to s 223 of the *Mining Act 1992* relating to inclusion of land in an opal prospecting area, commenced 18 December 2015.

[Mining and Petroleum Legislation Amendment \(Harmonisation\) Act 2015](#) has been proclaimed to commence on 1 March 2016, other than the amendment made to the *Petroleum (Onshore) Act 1991* to insert [Section 28B](#), which commenced on 18 December 2015. Section 28B provides that, in addition to the other rights conferred by an exploration licence or assessment lease, the licence or lease confers on its holder:

- (a) the right to carry out such operations as may be described by the regulations to enable the beneficial use of gas recovered from the land comprised in the licence or lease, but only if that gas would otherwise have been flared or released into the atmosphere as part of activities under the licence or lease, and
- (b) the right to use that gas subject to, and in accordance with, the regulations.

Some of the provisions of the [Mining and Petroleum Legislation Amendment \(Land Access Arbitration\) Act 2015](#), which amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* in relation to land access mediation and arbitration processes, have commenced. The amendments to s 31(7) and s 49(7) of the *Mining Act 1992*, and s 72(7) of the *Petroleum (Onshore) Act 1991*, commenced on 18 December 2015. The amendments to the savings and transitional provisions in Sch 6 to the *Mining Act 1992* and Sch 1 to the *Petroleum (Onshore) Act 1991* commence on 1 March 2016.

[Mining Amendment \(Licences for Operational Allocation Purposes\) Regulation 2015](#), published 18 December 2015:

- (a) prescribes the operational allocation purposes for which an existing holder of an exploration licence, assessment lease or mining lease can make an application for an exploration licence for coal under [s 13C](#) of the [Mining Act](#) 1992 (as inserted by the [Mining and Petroleum Legislation Amendment \(Grant of Coal and Petroleum Prospecting Titles\) Act](#) 2015);
- (b) specifies the maximum surface area of land to which an application for such a licence can relate; and
- (c) allows for exploration licences to be offered for coal only, rather than for both coal and oil shale, by transferring oil shale into a new group (Group 9A) within the groups of minerals prescribed by the Mining Regulation 2010 and to make amendments that are consequential on that transfer.

[Petroleum \(Onshore\) Amendment \(Beneficial Use of Gas\) Regulation 2015](#), published 18 December 2015:

- (a) describes all assessable prospecting operations authorised by the relevant exploration licence or assessment lease (which are required to be carried out in accordance with an activity approval) as those that can be carried out to enable the beneficial use of gas;
- (b) provides that the right to the beneficial use of gas is limited to a period of 270 days (whether or not consecutive), per well, in total;
- (c) provides that gas cannot be used for beneficial purposes unless the relevant activity approval specifically extends to include the beneficial use of the gas; and
- (d) provides that royalty is payable under and in accordance with [Part 7](#) of the [Petroleum \(Onshore\) Act](#) 1991 in respect of any petroleum recovered by the holder of the title and used beneficially.

[Mining Legislation Amendment \(Harmonisation\) Regulation 2016](#), published 26 February 2016, makes the following amendments consequential on the enactment of the [Mining and Petroleum Legislation Amendment \(Harmonisation\) Act](#) 2015:

- (a) amendments to savings and transitional provisions inserted in the Mining Act 1992:
 - (i) to ensure that environmental information provided by holders of authorities can be disclosed to or exchanged with other agencies, and
 - (ii) to ensure that existing activity approval conditions in assessment leases are taken to be activity approvals issued under new provisions requiring such approvals for assessable prospecting operations,
- (b) amendments to the [Mining Regulation 2010](#):
 - (i) to specify the information required to accompany applications for renewal of exploration licences, assessment leases and mining leases, and
 - (ii) to provide for the content of work programs required to accompany applications for exploration licences and assessment leases, and
 - (iii) to specify the reports required to be prepared by the holder of an authority and to omit provisions requiring reports on operations to be in accordance with the agenda provided, and
 - (iv) to require the collection, labelling and preservation of certain cores and samples, and
 - (v) to specify matters relating to the disclosure or use of information and protected documents that are otherwise required to be kept confidential, and
 - (vi) to provide for the notification of agents of certain holders of authorisations, and
 - (vii) to prescribe the offences under the Mining Act 1992 that can be dealt with by penalty notice and the penalty if they are dealt with that way, and
 - (viii) to omit redundant provisions and update terminology and cross-references as a consequence of amendments to the Mining Act 1992.

[Petroleum \(Onshore\) Legislation Amendment \(Harmonisation\) Regulation 2015](#), published 26 February 2016, makes the following amendments consequential on the enactment of the [Mining and Petroleum Legislation Amendment \(Harmonisation\) Act](#) 2015:

- (a) amendments to savings and transitional provisions inserted into the [Petroleum \(Onshore\) Act 1991](#):
- (i) to ensure that environmental information provided by holders of petroleum titles can be disclosed to or exchanged with other agencies, and
 - (ii) to ensure that existing activity approval conditions in assessment leases are taken to be activity approvals issued under new provisions requiring such approvals for assessable prospecting operations,
- (b) amendments to the [Petroleum \(Onshore\) Regulation 2007](#):
- (i) to provide for the drawing of plans accompanying applications for the renewal or partial cancellation of petroleum titles (in addition to applications for grant of petroleum titles, as at present),
 - (ii) to provide for the contents of work programs for an exploration licence or an assessment lease,
 - (iii) to provide for the lodgment of fixed agendas relating to a work program supporting an application for a petroleum title that was prepared using the two-part format,
 - (iv) to make it a condition of every petroleum title that the holder of the title will carry out not just the operations described in the work program (as at present) but any other activities described in the work program and to comply with any commitments in relation to the conduct of operations specified in the work program in respect of the title,
 - (v) to specify the information required to accompany applications for renewal of a petroleum title and the manner of describing land where a renewal is sought in respect of part only of the land comprised in the title,
 - (vi) to provide for the beneficial use of gas for prospecting operations the subject of development consent,
 - (vii) to specify the manner of describing land where a cancellation of a petroleum title is sought in respect of part only of the land comprised in the title,
 - (viii) to specify matters relating to the disclosure or use of information and protected documents that are otherwise required to be kept confidential,
 - (ix) to specify the geological plans, maps and records required to be kept by holders of petroleum titles,
 - (x) to specify the reports required to be prepared and lodged by the holder of a petroleum title, and exemptions from reporting requirements,
 - (xi) to require the collection, labelling and preservation of certain core and characteristic samples of strata, petroleum and water,
 - (xii) to provide for the notification to the Secretary about agents of certain petroleum title holders and other persons,
 - (xiii) to prescribe the criteria for eligibility for a refund or rebate of royalty paid or payable by a holder of a petroleum title who has made a contribution to a fund for programs for the benefit of the community,
 - (xiv) to prescribe the offences under the Petroleum (Onshore) Act 1991 that can be dealt with by penalty notice and the penalty if they are dealt with in that way, and
 - (xv) to omit redundant provisions (including about audits and the waiver of fees) and update terminology and cross-references as a consequence of amendments to the Petroleum (Onshore) Act 1991.

[Access Licence Dealing Principles Amendment Order 2015](#), published 11 December 2015, amends the [Access Licence Dealings Principles Order 2004](#) to allow for the temporary assignment of water allocations held under an access licence of the subcategory town water supply.

[Protection of the Environment Operations Amendment \(Enforcement of Gas and Other Petroleum Legislation\) Act](#) 2015, commenced 1 December 2015, and amends the [Protection of the Environment Operations Act](#) 1997 in relation to the enforcement of requirements for gas and other petroleum exploration and production authorities and of the conditions of those authorities.

Miscellaneous:

[Regulatory Reform and Other Legislative Repeals Act](#) 2015, commences 1 March 2016. It will repeal the [Valuers Act](#) 2003 and the [Valuers Regulation](#) 2010 and make consequential amendments.

[Courts and Other Justice Portfolio Legislation Amendment Act](#) 2015, commenced 24 November 2015 (other than Sch 1.6, which commenced 1 January 2016) amended various acts relating to courts, inter alia, including:

- [Civil Procedure Act](#) 2005 in respect of interest paid on orders for costs; and
- [Fines Act](#) 1996 to expand the definition of 'fine' to include any monetary penalty imposed by a court for contempt of court.

Bills:

[Transport Administration Amendment \(Authority to Close Railway Lines\) Bill 2016](#), introduced into the Legislative Assembly 24 February 2016, proposes to amend the [Transport Administration Act](#) 1988 to:

- authorise a rail infrastructure owner to close the railway line that runs from Balmain Road, Lilyfield, to Victoria Road, Rozelle (including that part of the railway line known as the Rozelle rail yards), and
- enable the Minister for Transport and Infrastructure to authorise, by order published in the Gazette, a rail infrastructure owner to close any other railway line in the greater Sydney, Newcastle, Central Coast or Wollongong metropolitan region for the purposes of or in connection with development that is declared to be State significant infrastructure under the [Environmental Planning and Assessment Act](#) 1979.
- State Environmental Planning Policy [SEPP) Amendments

The maps in the [SEPP \(Sydney Region Growth Centres\) 2006](#) have been changed by the following SEPPs:

- [SEPP \(Sydney Region Growth Centres\) Amendment \(Alex Avenue and Riverstone Precincts\) 2015](#), published 18 December 2015
- [SEPP \(Sydney Region Growth Centres\) Amendment \(Leppington Precinct\) 2015](#), published 13 November 2015

The [SEPP \(Exempt and Complying Development Codes\) Amendment \(Extension of Provision\) 2015](#), published 27 November 2015, extends the time, until 30 November 2018, for land identified in cl 1.19(3) to which the [code](#) does not apply.

[SEPP Amendment \(Carter Street Priority Precinct\) 2015](#), published 27 November 2015, amends the plans and maps in the [Auburn LEP 2010](#).

[SEPP Amendment \(Parramatta North\) 2015](#), published LW 20 November 2015, amended the plan and maps in the [Parramatta LEP 2011](#).

[SEPP Amendment \(Wyong\) 2015](#), published 18 November 2015, amended the [Wyong LEP 2013](#).

[State Environmental Planning Policy \(Infrastructure\) Amendment \(Disposal of Drug Exhibit Waste\) 2016](#), published 19 February 2016, amended the [SEPP \(Infrastructure\) 2007](#), to clarify when disposal

of drug exhibit waste is exempt development.

- On Exhibition

The Office of Environment and Heritage has a [coastal management reform package](#) on exhibition. The package includes:

- a draft Coastal Management Bill, to provide new statutory objects for coastal management, divide the coastal zone into four coastal management areas, establish requirements for the preparation of coastal management programs which are intended to replace current coastal zone management plans, establish a new NSW Coastal Council to replace the NSW Coastal Panel, regulate coastal protection works, and incorporate enforcement provisions in the *Environmental Planning and Assessment Act 1979*;
- a draft Coastal Management SEPP, to map the four coastal management areas, and consolidate and update existing provisions in [SEPP No 14 – Coastal Wetlands](#), [SEPP No 26 – Littoral Rainforests](#), and [SEPP No 71 Coastal Protection](#); and
- proposals for a coastal management manual providing requirements for coastal management programs, the process for preparing a coastal management program, and a technical toolkit.

Submissions closed 29 February 2016.

The Office of Local Government is seeking feedback on [Reform of the Local Government Act](#) – submissions close 15 March 2016.

IPART is undertaking a [review](#) of the Local Government Rating System in NSW.

The NSW Department of Planning and Environment is seeking feedback on:

- [expanding complying development](#) – submissions close 1 March 2016; and
- [Community Consultative Committee Guidelines for State Significant Development](#) – submissions close 31 March 2016.

- Miscellaneous

The NSW Parliamentary Research Service has released an e-brief on [Aboriginal cultural heritage protection: proposed reforms](#).

Court Practice and Procedure

The Chief Judge has issued a new practice note, [Practice Note - Section 56A Appeals](#), which sets out the practice and procedure for appeals against the decision of a commissioner pursuant to section 56A of the *Land and Environment Court Act 1979*. The practice note commenced on 21 December 2015.

[Land and Environment Court \(Amendment No 1\) Rule 2016](#), published 19 February 2016, amends the [Land and Environment Court Rules 2007](#), to:

- (a) apply particular provisions of [Part 51B](#) of the [Supreme Court Rules 1970](#), so far as applicable, to appeals from the Local Court to the Land and Environment Court in Class 6 or 7 of the Land and Environment Court's jurisdiction. Specifically Part 5 of the *Land and Environment Court Rules 2007* has been amended so that specified rules in Part 51B of the *Supreme Court Rules 1970* now apply to proceedings in Classes 6 and 7. In particular, rules 3, 5 (1),(2) and (6)-(9), 7-

12, 14-16, 17(1) and (3) and 18 of Part 51B of the Supreme Court Rules 1970 apply, so far as applicable, to proceedings in Class 6 or 7; and

- (b) amend Rule 3.4 to reflect the changes to the relevant sections of the *Environmental Planning and Assessment Act 1979*, so that references to sections 97(4), 97(5) and 98(3) are removed and replaced with a reference to section 97A(4).

Effective 19 February 2016, the Chief Judge has issued a new Approval of Form. The new approval:

- Sets out the forms to be used for commencing appeals, applications for leave to appeal, and cross-appeals in proceedings in Class 6 and 7; and
- Approves the use of a Summons (Judicial Review) (UCPR Form 85) for commencing proceedings for or in the nature of judicial review in Class 4 or 8, consistent with Part 59 of the *Uniform Civil Procedure Rules 2005*.

Judgments

- United Kingdom

Trump International Golf Club Scotland Limited v The Scottish Ministers [\[2015\] UKSC 74](#) (Lords Neuberger, Mance, Reed, Carnwath and Hodge)

(related decisions: *Trump International Golf Club Scotland Ltd v Scottish Ministers* [\[2015\] CSIH 46](#) The Lord President Gill, Lords Menzies and Malcolm, *Trump International Golf Club Scotland Ltd v Scottish Ministers* [\[2014\] CSOH 22](#) Lord Doherty)

Facts: Trump International Golf Club Scotland Limited (“Trump Golf Club”) had developed a golf club and resort in Aberdeenshire. In 2011 Aberdeen Offshore Wind Farm Limited applied for, and subsequently received, consent under the [Electricity Act 1989](#) to construct 11 wind turbines off the coast of Blackdog, Aberdeenshire, 3.5km away from the golf club and resort, with the consequence that the development would impact the visual amenity enjoyed by guests of Trump Golf Club. Annex 1 of the consent confined the development to 11 turbines each with a maximum blade tip height of 198.5m and Figure 1 attached to the consent showed the approved location of the 11 turbines. Trump Golf Club sought to challenge the validity of the consent granted, on two grounds: first, whether the Scottish Ministers had power under the legislation to grant consent (not addressed in this summary), and secondly, whether one of the conditions of consent was void for uncertainty.

Conditions 13 and 14 relevantly stated:

Condition 13: Prior to the Commencement of Development a Construction Method Statement (‘CMS’) must be submitted by the Company to the Scottish Ministers and approved, in writing by the Scottish Ministers... The CMS must include, but not be limited to, information on the following matters:

...
(g) Design Statement.

The CMS must be cross referenced with the Project Environmental Management Plan, the Vessel Management Plan and the Navigational Safety Plan.

Condition 14: Prior to the Commencement of the Development, a detailed Design Statement must be submitted by the Company to the Scottish Ministers for their written approval, after consultation by the Scottish Ministers with [Scottish Natural Heritage], ... and any other such advisors as may be required at the discretion of the Scottish Ministers. The Design Statement must provide guiding principles for the deployment of wind turbines...

Issues:

- (1) whether the consent was void because condition 14 was unenforceable;

- (2) whether the consent was void because condition 14 was so uncertain that it was irrational; and
- (3) whether additional obligations could be implied into a consent.

Held: dismissing the appeal:

- (1) condition 14 was not a fundamental condition which determined the scope and nature of the development, therefore, even if it was invalid it would not invalidate the consent: at [24]-[25];
- (2) condition 14 was not unenforceable. What would amount to compliance with condition 14 would depend both on the terms of the Design Statement, as well as how the Design Statement was incorporated into the Construction Method Statement required by condition 13. When interpreting condition 14, it was essential to read it in its context: at [28]-[30];
- (3) condition 14 was not uncertain. It required that a developer produce a design statement to and receive approval from the Scottish Ministers prior to the commencement of the development. A planning condition will only be void for uncertainty if it can be given no sensible or ascertainable meaning: at [27];
- (4) there is no absolute prohibition against implying terms into a document, including a consent, although a court will exercise great restraint in implying terms into public documents such as consents which create in rem rights and carry possible criminal sanctions if breached. The interpretation of the words of a document allows a court to conclude that it must have been intended that the document would have a certain effect, although the words to that effect are absent: at [34] and [66];
- (5) there is not a special set of rules applying to planning conditions as opposed to other legal documents. Rather it is acceptable to imply terms, as a technique of interpretation, in accordance with the familiar albeit restrictive principles applied to other legal documents: at [53] and [60]; and
- (6) the English planning cases, developed under the [Town and Country Planning Act 1990](#), were not of particular assistance in interpreting the *Electricity Act 1989*, due to material differences between the two schemes: [67]-[68].

Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government
[\[2015\] EWCA Civ 1250](#) (Gloster and Jackson LJ, Sir David Keene)

Facts: Distinctive Properties (Ascot) Ltd (“the appellant”) owned 6.4ha of land which was subject to a Tree Preservation Order (“TPO”) made under [s 198](#) of the [Town and Country Planning Act 1990](#) (“the Act”) that, in effect, prevented any person from cutting down, lopping or damaging any tree listed in the relevant schedule, and included trees in specified woodland. At the direction of the appellant, approximately 0.8ha of land within woodland was clear-felled by contractors. The Council of the Royal Borough of Windsor and Maidenhead (“the Council”) issued a Tree Replacement Order (“TRN”) under [s 207](#) of the Act, requiring the planting of trees of specified species, to be 60-90cm in height, at a uniform spacing of 2.5m x 2.5m, amounting to 1,280 trees in total.

The appellant appealed to the Secretary of State for Communities and Local Government on the basis that, by calculating the number of visible tree stumps, only 27 trees had been removed and that the TRN went well beyond the number of trees to which the power to require replacement related. The inspector determining the appeal concluded that the appellant was wrong to concentrate on the number of stumps present as that failed to account for “saplings” or “potential trees” that may have been removed, and that the purpose of the TRN was to secure the reinstatement of the woodland.

The appellant challenged the decision in the High Court on the grounds that a TRN cannot require the replanting of a greater number of trees than had been removed and further, that the inspector had erred in law in his finding that a “seedling” or “potential tree” counted as a tree. The challenge was dismissed, and the appellant appealed to the Court of Appeal.

Issues:

- (1) whether a woodland TRN can require the planting of a greater number of trees than the number removed or otherwise destroyed;

- (2) whether the inspector erred in law in the manner he approached the question of how many trees previously existed; and
- (3) whether the term “tree” under the Act included saplings but not shrubs, bushes or scrub, and not seedlings.

Held: dismissing the appeal:

- (1) a TRN could not require more trees to be replaced than had been removed or destroyed: at [26];
- (2) in arriving at a figure for the number of trees lost in a protected woodland, an estimate would often be necessary as it is nearly impossible to determine how many trees exist within a woodland at any given time: at [27]. Further, the burden of proof of establishing that the number of trees listed in the TRN exceeded the number of trees removed rested with the appellant, who had failed to adduce sufficient evidence on this point: at [28];
- (3) when a TRN is made in respect of a woodland TPO, the ultimate objective is the preservation of woodlands in the interest of amenity. Therefore, the inspector did not err when he referred to reinstating the woodland as a single entity rather than planting a specified number of trees: at [32];
- (4) under the Act, a “tree” is to be so regarded at all stages of its life, subject to the exclusion of a mere seed: at [42];
- (5) a seedling would therefore fall within the statutory definition of a tree once it was capable of being identified as a species which ordinarily takes the form of a tree. That would accord with the purpose of a woodland TPO in seeking to protect a woodland over a period of time as trees come and go, as they die and as they are regenerated: at [42]; and
- (6) insofar as the Council and then the inspector had relied upon the inclusion of “seedlings/saplings” when arriving at an estimate of the number of trees on site before the clearance, the Court was not persuaded that they had erred in law: at [44].

Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government
[\[2015\] EWHC 1743](#) (Admin) (Cranston J)

Facts: Broadview Energy Developments Ltd (“Broadview”) sought planning approval for a wind farm in South Northamptonshire, which was at first instance refused by the South Northamptonshire District Council (“the Council”). Broadview appealed; the appeal was considered by a planning inspector and Broadview was successful. That decision was then challenged by the Council and a member of a local action group. The challenge was upheld, and the matter was remitted to the Planning Inspectorate for redetermination. Another planning inspector was appointed, and he recommended the grant of planning permission. At the time of this decision, the Secretary of State for Communities and Local Government (“Secretary of State”) had called in the matter for determination by himself on the grounds that the appeal involved a renewable energy development, and planning permission was refused.

Throughout the various appeals the MP for South Northamptonshire, Ms Leadsom, had written a number of letters to the Secretary of State and the chief executive of the Planning Inspectorate expressing the view of her constituency against the grant of permission. The correspondence included a letter to the Minister of Housing which made reference to a conversation that had occurred between the two in the House of Commons tea room. In the letter Ms Leadsom outlined her desire to put in writing the points she had made to the Minister orally against the development. Broadview gained access to the numerous letters and emails between Ms Leadsom and the Minister following a freedom of information request under the [Environment Information Regulations 2004](#).

Broadview challenged the refusal of planning permission, seeking orders to quash the decision of the Secretary of State, on the grounds that the Secretary of State had acted in breach of natural justice and procedural fairness in not informing it of the correspondence and also allowing private meetings with Ms Leadsom; that the decision was vitiated by actual, or apparent, bias, by taking into account the correspondence and allowing Ms Leadsom to make oral representations; and that the Secretary of State had failed to have regard to and acted in breach of his own planning propriety guidance which required that the correspondence and meetings should have been made known to all parties, and that the private meetings with Ms Leadsom should have been declined.

Issue:

- (1) whether the decision of the Secretary of State to refuse planning permission was unlawful.

Held: application dismissed:

- (1) there was not sufficient evidence to establish that the decision of the Secretary of State was unlawful either through unfairness, actual or apparent bias, or a material breach of the planning propriety standards: at [49];
- (2) planning is an area where often Ministers are the primary decision makers, and there was nothing unlawful in the Minister being lobbied by Ms Leadsom through correspondence: at [49]; and
- (3) Ministers are lobbied by MPs concerning constituency issues and given Ministers are Parliamentarians, MPs utilise the opportunity to lobby them in person through informal encounters on the Parliamentary estate. This is an element of Parliamentary democracy and generally there could be no lawful objection to it: at [49].

- High Court of Australia

Wei v Minister for Immigration and Border Protection [2015] HCA 51 (Gageler, Keane and Nettle JJ)

Facts: Mr Wei was a Chinese national studying in Australia on a student visa, a condition of which was that he be enrolled in a registered course. [Section 19](#) of the [Education Services for Overseas Students Act 2000](#) (Cth) ("ESOS Act") required that the provider of the registered course record in the Provider Registration and International Student Management System ("PRISM") that a student was enrolled. However in this case the provider, Macquarie University, failed to do so. As a consequence, officers of the Department of Immigration and Border Protection ("DIBP") formed the view that Mr Wei was not enrolled in a registered course, and attempted to notify him of its intention to cancel his visa ("the notification"). All attempts at communicating the notification to him failed, except a single phone call where, after the DIBP officer requested that Mr Wei give his current address, he responded "I'm not telling you that" and hung up, because he did not believe the caller was a DIBP officer. Upon the period for responding to the notification expiring, a delegate of the Minister for Immigration and Border Protection ("the Minister") decided to cancel Mr Wei's visa ("the decision"). Mr Wei discovered the decision four months after it was made, and immediately lodged an application for review with the Migration Review Tribunal ("MRT"). However, because the application was lodged out of time, the MRT ruled that it did not have jurisdiction to review the decision. Mr Wei sought prohibition and certiorari in the original jurisdiction of the High Court, outside the 35 day period specified in [s 486A](#) of the [Migration Act 1958](#) (Cth) ("Migration Act").

Issue:

- (1) whether the erroneous provision or omission of information, by a third party under a statutory obligation, to a decision maker, can result in a jurisdictional error on behalf of the decision maker.

Held: granting an extension of time, and issuing writs of certiorari and prohibition, with costs:

- (1) (by Gageler and Keane JJ): there is no reason in principle why jurisdictional error should be confined to error or fault on the part of the decision maker: at [23]. Section 19 of the ESOS Act imposed an imperative duty on Macquarie University and a material non-compliance with that duty could result in a subsequent invalid exercise of power. To cancel a visa [s 116\(1\)\(b\)](#) of the Migration Act required the decision maker's "satisfaction". Satisfaction requires a state of mind formed reasonably, on a correct understanding of the law, and must be untainted by a material breach of any other express or implied condition. In this case this included the imperative duty imposed on Macquarie University by s 19 of the ESOS Act: at [32]-[33]. The decision was therefore affected by jurisdictional error as a result of the antecedent breach by Macquarie University: at [34]-[35]; and
- (2) (by Nettle J): according to established principle, an error of fact is ordinarily an error made in the exercise of jurisdiction and is not ultra vires. Therefore, it should not be accepted that, by taking into account the PRISM record which contained an incorrect record in relation to Mr Wei, the Minister had acted ultra vires. Rather, there was a constructive failure to exercise jurisdiction which rendered the decision ultra vires. The DIBP officer knew that the notification had not been communicated to Mr

Wei, which deprived Mr Wei of the opportunity contemplated by [ss 119-121](#) of the Migration Act to demonstrate why the grounds for cancellation did not exist. Given that such material was centrally relevant to the decision and was readily available, that the Minister proceeded to make the decision without it was so unreasonable as to be beyond jurisdiction (applying *Prasad v Minister for Immigration and Ethnic Affairs* [\[1985\] FCA 47](#)): at [49]-[50].

- Federal Court of Australia

Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [\[2015\] FCA 1275](#) (Jagot J)

(related decisions: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2008\] FCA 3](#) Allsop J, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2007\] FCA 124](#) Allsop J, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2006\] FCFCA 116](#) Black CJ, Finkelstein and Moore JJ, *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2005\] FCA 664](#) Allsop J)

Facts: in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [\[2008\] FCA 3](#), the Federal Court of Australia (“FCA”) made a declaration that Kyodo Senpaku Kaisha Ltd (“Kyodo”) had contravened certain provisions of the [Environment Protection and Biodiversity Conservation Act 1999](#) (“EPBC Act”) relating to the moratorium on whaling, and granted an injunction (“2008 injunction”) restraining Kyodo from killing, injuring, taking or interfering with any Antarctic minke whale, fin whale or humpback whale in the Australian Whale Sanctuary, in addition to treating or possessing any such whale so killed unless granted permission or authorisation under ss 231, 232 or 238 of the EPBC Act.

The Humane Society International Inc (“HSI”) applied to the FCA seeking that Kyodo be found guilty of contempt of court on the basis that Kyodo had killed, taken, treated and possessed Antarctic minke whales in the Australian Whale Sanctuary during the 2008/2009, 2009/2010, 2010/2011, and 2011/2012 whaling seasons, in contravention of the 2008 injunction. As in all previous proceedings, Kyodo did not appear in the proceedings.

Issues:

- (1) whether Kyodo was guilty of contempt of court;
- (2) whether a penalty should to be imposed given that it was questionable whether it could be enforced; and
- (3) what the appropriate penalty should be if found in contempt.

Held: Kyodo was convicted of contempt of court and fined \$250,000 for each of the four whaling seasons during which it contravened the 2008 injunction, resulting in a total fine of \$1,000,000:

- (1) to establish contempt of court, HSI was required to prove beyond all reasonable doubt the following five elements: (i) that an order was made by the court; (ii) that the terms of the order were clear, unambiguous and capable of compliance; (iii) that the order was served on the alleged contemnor; (iv) that the alleged contemnor had knowledge of the terms of the order; and (v) that the alleged contemnor had breached the order. The court was satisfied beyond all reasonable doubt that each of the elements was proven in respect of each of the four whaling seasons and that the actions of Kyodo fell at least within the category of wilful contempt of court: at [12] and [32];
- (2) whilst it may eventuate that Kyodo could not be compelled to pay the fine because Kyodo did not have any assets within the jurisdiction, the onus of establishing this lay with Kyodo, who did not appear, and not HSI. Further, an apprehension that a contemnor would disobey an order to pay a fine was not a sufficient reason to decline imposing a fine. Given the public interest nature of the claim and the possibility that a ship owned by Kyodo may enter Australian territorial waters, it was appropriate to impose a penalty: at [33]; and
- (3) the best guides to an appropriate penalty were the relevant provisions in the EPBC Act, as the present case could be distinguished from the existing cases where fines had been imposed for a contempt of court. Under the EPBC Act, the actions of taking, killing, and then dividing or cutting up

any whale in the Australian Whale Sanctuary, and otherwise being in possession of such a whale or part of it, involved a multiplicity of offences, some of which carried a maximum fine for corporations of \$550,000. This evidenced Parliament's view of the objective seriousness of the conduct restrained by the 2008 injunction. Taking into account the deliberate, systematic and sustained conduct of Kyodo, the fact that on a conservative view a minimum of five Antarctic minke whales had been killed during each of the four whaling seasons, the public interest in the denouncement of the conduct, the fact that Kyodo had sought to generate revenue from its activities, and the fact that Kyodo had not offered any expression of contrition, an appropriate penalty for the contempt of court was a fine of \$250,000 for each of the four whaling seasons, resulting in a total fine of \$1,000,000: at [45].

- NSW Court of Appeal

Bobolas v Waverley Council (No 4) [2015] NSWCA 337 (Basten and Leeming JJA, Tobias AJA)

(related decisions: *Waverley Council v Bobolas (No 3)* [2014] NSWLEC 16 Biscoe J, *Waverley Council v Bobolas (No 2)* [2013] NSWLEC 130 Biscoe J, *Bobolas v Waverley Council* [2014] NSWCA 78 Ward JA, *Bobolas v Waverley Council* [2014] NSWCA 131 Meagher and Gleeson JJA, Sackville AJA)

Facts: on 5 December 2012 Waverley Council ("the Council") issued orders pursuant to s 124 of the *Local Government Act 1993* ("the LG Act") to each of Mary, Elena and Liana Bobolas ("the appellants") requiring action to be taken to remove an accumulation of waste from their property, within 28 days from the date of service. Copies of the orders were sent by post addressed to each of the individual appellants at the premises, and were affixed to the front gate. The orders (referred to as "s 22A orders" by reference to the relevant item in the table contained in s 124 of the LG Act) were not complied with and the Council commenced civil enforcement proceedings in the Land and Environment Court ("LEC") seeking relief under s 678(10) of the LG Act. The appellants sought to set aside the summons or its service; on 9 August 2013, following a hearing on the Council's application for substituted service, orders were made for service of the summons by way of affixing it to the front gate of the property and by posting it to the address of the property and an order that subsequent service of documents in the proceedings could be effected by posting the documents to the appellants at the property. Subsequent orders and directions were made by the LEC. The appellants did not appear when the matter was listed for hearing on 4 March 2014, and the matter was heard in their absence and orders were made directing the Council to execute its functions under s 678 of the LG Act by carrying out the work which was required under the s 124 orders, and ordering that the appellants pay the Council's costs of the proceedings. On 14 March 2014 the appellants commenced proceedings in the Court of Appeal seeking an injunction to restrain the Council from carrying out the work on the property and a stay of the orders made on 4 March 2014, denying that the orders had been served at the premises as required by the 4 March 2014 orders. A stay was granted on an interlocutory basis and subsequently discharged.

The principal relief sought in the notice of appeal was for the orders of the LEC on 4 March 2014 to be set aside and dismissed. The order under s 678(10) had been performed, however the Council acknowledged the continuing utility in the appeal by reason of the debt due to the Council for the expenses and associated costs incurred created by s 678(6) of the LG Act. The appellants did not comply with directions made; on 19 August 2015 an amicus was appointed, who provided written submissions. Ms Elena and Ms Liana Bobolas made submissions orally in support of the appeal; at the conclusion of those submissions an opportunity was provided for them to obtain an indication from Ms Mary Bobolas as to whether she wished to say anything, and they advised the Court that their mother was not in a state to attend and present argument and had not provided any submissions to be made on her behalf.

Issues:

- (1) whether the validity of the LEC's order under s 678 depended on the validity of the s 22A order made by the Council;
- (2) whether the primary judge erred in concluding that the orders had been served;

- (3) whether there was a denial of procedural fairness in reliance of five additional affidavits filed by the Council on 26 February 2014 when the matter was set down for hearing on 4 March 2014 and the Council had advised in November the previous year that its evidence was complete; and
- (4) whether [s 200](#) of the LG Act qualified the right of entry conferred by s 678 or the orders made pursuant to s 678 of the LG Act.

Held: dismissing the appeal with costs:

- (1) (Leeming JA, Basten JA and Tobias AJA agreeing): the evidence before the primary judge included an affidavit of a Council officer that he had inspected the premises on 24 January 2013 and observed that the waste and rubbish had increased since his earlier inspections. The primary judge relied on that evidence to conclude that the power to issue the s 22A order was available. If the matters in item 22A in the table contained in s 124 were a jurisdictional fact then there was no error in reliance on what that officer had seen on 24 January 2014; if not, it was plain not only that he had formed the opinion that he did on the earlier inspection and that he continued to hold that opinion when the order was issued. In either event, no error was shown in the primary judge's reasoning: at [36];
- (2) (Leeming JA, Basten JA and Tobias AJA agreeing): it was open to the appellants to challenge the efficacy of the service of orders on them before the primary judge and they declined to do so. There was no error in the primary judge relying on the uncontroverted evidence before him to conclude that affixing the orders to the front gate satisfied the requirements of [s 710\(2\)\(e\)](#) of the LG Act which provides that service may be effected by fixing the notice "on any conspicuous part of the land, building or premises...": at [38];
- (3) (Leeming JA, Basten JA and Tobias AJA agreeing): no issue capable of giving rise to appellable error arose in the three affidavits concerning service of documents relating to interlocutory steps: at [40]. In relation to the affidavit of the Council officer updating his evidence as to the state of the property and that relating to service of the s 22A order, which were material to the reasons of the primary judge, there was no complaint at the time to the Council or to the primary judge, given that the appellants did not appear, and it was difficult to see how there could be an issue of procedural fairness where the party who alleged such misfeasance failed, without explanation, to appear: at [41]. There was no evidence that the appellants had any difficulty in responding to the late evidence, nothing to suggest that there was anything controversial about any aspect of that evidence, or that there was any evidence that the appellants could have sought to adduce in response. It followed that no error in the primary judge taking the course he did was established: at [42];
- (4) (Leeming JA, Basten JA and Tobias AJA agreeing): section 200 was in terms confined to powers of entry and inspection conferred by Part 2 of Chapter 8 of the LG Act, and the powers exercised by a Council pursuant to an order made under s 678 did not fall within that description: at [47]. In any event, that was a question of law that had already been raised and decided adversely to the appellants by the Court of Appeal: at [48];
- (5) (Basten JA, Leeming JA and Tobias AJA agreeing): there was confusion in the minds of the appellants between (a) effective service as permitted or prescribed by the rules of Court and orders made by the Court, and (b) the physical receipt by the person to be served with the material required to be served. The process by which a challenge could be made to what was said to be improper or inadequate service was in [r 12.11](#) of the [Uniform Civil Procedure Rules 2005](#), and that challenge should then be disposed of properly in its terms after which, assuming that the originating process has been duly served the respondents would be required to file a notice of appearance giving an address for service following which there would be little room for dispute as to where and how documents should be served on them: at [59]; and
- (6) (Basten JA, Leeming JA and Tobias AJA agreeing): a further confusion arose as to the effect of documents having been filed. There is a clear distinction between filing an affidavit in the Court registry and the affidavit becoming evidence in the case. As the appellants did not attend before the primary judge none of the affidavits which they filed were in evidence because none were read: at [61].

Forgall Pty Ltd v Greater Taree City Council [\[2015\] NSWCA 340](#) (Basten and Simpson JJA)

(related decisions: *Forgall Pty Ltd v Greater Taree City Council* [\[2015\] NSWLEC 61](#) Preston CJ, *Forgall Pty Limited v Greater Taree City Council* [\[2014\] NSWLEC 1132](#) Dixon C)

Facts: Forgall Pty Ltd (“Forgall”) lodged a development application with the respondent Greater Taree Council (“Council”) seeking consent for a post-operative health clinic for cancer patients and other seriously ill people. The Council refused the application and Forgall appealed the decision in the Class 1 jurisdiction of the Land and Environment Court (“LEC”). The Commissioner dismissed the appeal on the basis that in the absence of a final landscaping design it was not possible to ensure that the development was consistent with the relevant zone objectives including whether it is appropriate in a rural location and protects or conserves the environmental values of the land and visual amenity including landscape and scenic quality and tourism values.

It was Forgall’s position that due to standard practice between the parties there was a concession from the Council that a landscape plan was not required to accompany the application and would only be required once the application was approved. The Council submitted there was no such concession, but merely recognition that if Forgall were otherwise successful a landscaping plan would be a necessary condition of consent. Forgall appealed under [s 56A](#) of the [Land and Environment Court Act 1979](#) contending that it was not afforded procedural fairness by the Commissioner.

The appeal, which was limited to a question of law, was dismissed, on the basis that Forgall was provided ample opportunity to adduce evidence (such as a detailed landscaping plan) consistent with the objectives of the relevant rural general zone but ultimately failed to do so. Forgall appealed to the Court of Appeal.

Issue:

- (1) whether the primary judge erred in finding there was no error of law in the decision of the Commissioner.

Held: (Basten and Simpson JJA) dismissing the appeal with costs:

- (1) there was no express agreement or “concession” that a landscaping plan was not required or that any other aspect of the objectives of the Rural General Zone were not at play: at [12];
- (2) there was no arguable basis to challenge the process of reasoning detailed by the primary judge in reaching his conclusion that there was no procedural unfairness infecting the decision of the Commissioner: at [14]; and
- (3) there was no issue of principle raised in the reasoning of the primary judge: at [14].

Ashton Coal Operations Pty Ltd v Hunter Environmental Lobby Inc [\[2015\] NSWCA 358](#) (Beazley P, Macfarlan and Gleeson JJA)

(related decisions: *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [\[2014\] NSWLEC 129](#), *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 4)* [\[2014\] NSWLEC 200](#) Pain J)

Facts: on 4 October 2012 the Minister, through a delegate, gave conditional approval to the South-East Open-Cut coal mine project proposed by Ashton Operations Pty Ltd (“Ashton”) for the extraction of 16.5 million tonnes of coal from land in the Hunter Valley New South Wales, near Camberwell Village (“the project”). Hunter Environment Lobby Inc appealed to the Land and Environment Court (“LEC”) against the approval under the (now repealed) [s 75L](#) in the former [Part 3A](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”). On 27 August 2014 the LEC held that approval should be granted subject to conditions to be determined (“First Judgment”); after a further hearing, the LEC determined the conditions to be imposed (“Second Judgment”), which included condition 10A:

“The Proponent [Ashton] must not carry out any development work on the Project site until it has:

- (a) Purchased, leased or licensed property 129 from the owner of property 129.”

Property 129 is owned by Ms Bowman, who is steadfastly opposed to the project. The project as approved involves seven years of active mining, seven years of reject emplacement and four years of site

rehabilitation. It is designed to proceed in stages, with mining to commence in the north of the area to be mined and continuing to the south of that area. Property 129 constitutes a significant part of the southern portion of the area and once mined is to be the site of the final pit void. Mining operations would proceed for two years without the use of Property 129. [Clause 8F](#) of the [Environmental Planning and Assessment Regulation 2000](#) (“the EPA Regulation”) relevantly provides that the consent of the owner of land on which a project is to be carried out is required for a project application, unless (1)(c) “the application relates to a mining or petroleum production project”. The agreed position of Ashton and the Minister was that if Ms Bowman objected to a mining lease over her land, the mining lease would not be granted; Ashton had obtained a mining lease over part of the proposed project area (not including Property 129).

Ashton appealed against the imposition of condition 10A.

Issues:

- (1) whether the decision to impose condition 10A was an unreasonable exercise of power in that it was inconsistent with the First Judgment;
- (2) whether the decision to impose condition 10A was an unreasonable exercise of power in that it was inconsistent with the operation and purpose of cl 8F(1)(c) of the EPA Regulation; and
- (3) whether the decision to impose the condition in finding that it was required in the public interest misconceived and misunderstood the concept of the public interest under Part 3A of the EPA Act.

Held: (Macfarlan JA, Beazley P and Gleeson JA agreeing): dismissing the appeal with costs:

- (1) there was no inconsistency between the First and Second Judgments, and they dealt with different issues. In the First Judgment, the question was whether non-control of Property 129 was a bar to approving the project. In the second, the question was whether the approval should be subject to a condition concerning that property: at [21];
- (2) there was no inconsistency between condition 10 and cl 8F(1)(c). That clause excepts a mining project from the requirement that the consent of the owner of land on which a project is to be carried out is required for a project application, which prevents mining project applications that are not supported by such a consent from being refused, but does not address the question of whether a condition of the grant of such an approval requires such consent either at the outset or at some later stage in the project’s life. The power of the relevant Minister (and on appeal, the LEC) under s 75J of the EPA Act to impose conditions on an approval is unconfined. In the absence of authority in the regulation-making power to do so, a provision of the EPA Regulation could not detract from the breadth of that power, and in any event cl 8F(1)(c) did not purport to do so, as it is concerned with the approval of a project and not with the conditions to which any such approval may be subject: at [23];
- (3) an inability to access and control Property 129 would have considerable significance for the project’s performance and environmental impact as the property constituted a large part of the area to be mined, so that if it were not mined the economic benefits of the project would be different from those assessed; and the property was required to implement the final landform including the final void, so that if the property was not available for that purpose the project’s environmental impact would be significantly different from that assessed: at [27]. If condition 10A were not imposed the project was likely to commence without control over all the property to be affected being obtained: at [28]. If Ashton mined the project area for a substantial period but did not obtain control of Property 129 it would not be able to complete the project as assessed. The primary judge’s primary purpose in imposing condition 10A, being to ensure that the project proceeded in its entirety, was a proper and reasonable planning purpose that fairly related to the development approved, and thus conformed with the *Newbury* test: at [31];
- (4) while a generalised, unspecified concept of “unfairness” to affected property owners was not of itself relevant, that term might be used to refer to the environmental impact of a proposed project on adjoining owners, and that was a proper consideration: at [33]; and
- (5) clause 8F(1)(c) of the EPA Regulation did not in terms evince a policy that the absence of the consent of owners of land on which a project was to be carried out was not relevant to whether it was in the public interest that that project be approved or to the terms on which approval should depend; and there was nothing in it that precluded an approval authority imposing such conditions as it considered

appropriate in the particular circumstances. There was therefore no error of law involved in the imposition of a condition concerning the ownership of property integral to the project assuming, as was the case, that the primary judge considered that the particular planning circumstances required it: at [35].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349 (Beazley P, Macfarlan and Leeming JJA)

(related decision: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima)* [2014] NSWLEC 188 Pain J)

Facts: on 24 February 2012 the New South Wales Aboriginal Land Council (“the appellant”) lodged Claim 36016 under s 36 of the *Aboriginal Land Rights Act 1983* (“the ALR Act”) in respect of two adjacent parcels of Crown land in Berrima. The claimed land included the site of Berrima gaol and associated gardens, outbuildings and recreational facilities. The claimed land was subject to three dedications made under the predecessors of the *Crown Lands Act 1989*, for “Gaol Site (extension)” in 1891, “Gaol Purposes” in 1894, and “Gaol Site (addition)” in 1958. The dedications were in force at the date of the claim, however the gaol itself had been decommissioned with effect from around October 2011. Thereafter there was a reduced security presence at the correctional centre which at the time of claim amounted to one security guard present 24 hours a day, 7 days a week; electricity, water and sewerage services remained connected; a fire alarm system was in place and from time to time checked by a contractor; and some assets continued to be stored. Groups of persons serving Community Service Orders regularly visited the land to work on the gardens, including on both days of the two weekends immediately preceding and following the lodging of the claim. That work concentrated on the roses and extended to fruit trees at the back of the gaol, mowing the lawns and maintaining and weeding the gardens, and a chicken coop was replaced with a vegetable garden. In December 2011 and January 2012 offenders began repairing an irrigation system on the grounds.

The claim was rejected pursuant to s 36(5)(b) of the ALR Act on the basis that the claimed land was lawfully used and occupied by Corrective Services NSW (“CSNSW”). The primary judge rejected an appeal, finding that the claimed land was lawfully occupied by CSNSW, as a manifestation of the Crown in NSW, at the date of the claim. The appellant appealed.

It was common ground that both parcels of land were held under Torrens title, with the registered proprietor being “the State of New South Wales”; that as at the date of the claim all the proclamations of the land under colonial and state legislation relating to the detention of prisoners had been revoked; and that the dedications for “Gaol Site (extension)”, “Gaol Purposes” and “Gaol Site (addition)” had not been revoked and so the land fell within the definition of “claimable Crown lands” in s 36(1)(a) of the ALR Act.

Issues:

- (1) whether the primary judge erred in law in her findings that the land was in fact occupied at the time the claim was lodged;
- (2) whether the primary judge erred in law in making particular findings of fact relating to security provided at the time the claim was lodged and the maintenance which was being undertaken at that time;
- (3) whether the primary judge failed to consider whether each part of the claimed land, including each of the four decommissioned buildings, comprised claimable Crown lands for the purposes of s 36(7) of the ALR Act which empowers the transfer of part of a parcel of land claimed if some but not the whole of the land the subject of the claim is not “claimable Crown lands”; and
- (4) whether the primary judge erred in law in determining whether the occupation was lawful.

Held: (Leeming JA, Beazley P and Macfarlan JA agreeing): dismissing the appeal, and ordering the appellant to pay 80% of the Minister’s costs of the appeal:

- (1) the primary judge had not erred in her reliance on a process of inferential fact finding in forming a view that the reference to “static guards” was to a mobile security service. The fact that direct evidence could have been given of that did not mean that it was inappropriate for the primary judge to

infer that fact from the contemporaneous documents tendered. It did not mean that there had been any shifting of an evidential burden such as to give rise to an error of law: at [67];

- (2) the inference was available, and irresistible, that there was a guard actually on site; that refuted the contention that there was no evidence that any guard was actually on site: at [83]. The challenge to the primary judge's finding as to maintenance did not identify any vitiating error of law: at [88];
- (3) there was no error, let alone an error of law, in the primary judge relying on the presence of offenders serving Community Service Orders on weekends as sustaining a factual finding of occupation. It was not the case that the land had ceased to be used for the purposes of punishment of offenders, and all that was occurring on the land was that it was "mothballed" pending a decision as to its future use: at [91];
- (4) the primary judge's reliance on the limited security and maintenance carried out as but part of the facts on which a conclusion of occupation would be grounded reflected the correct approach, which was to look at all of the acts taking place on the land in their totality, and disclosed no error of law: at [97];
- (5) the findings of fact included a 24 hours a day, 7 days a week presence of security on the site, retained by the State, who kept the buildings locked, coupled with regular visits on Saturdays and Sundays by offenders under the supervision of a CSNSW officer; those findings alone sufficed to sustain a finding of occupation: at [100];
- (6) the appellant conceded that no submission that the four decommissioned buildings should be considered individually had been made at first instance, and the submission was that the buildings, considered collectively, should be transferred if the evidence relating to the grounds was held to amount to lawful occupation. The primary judge found that the activities that established occupation applied to the land as a whole such that the entirety of the claimed land was occupied, and if that conclusion were wrong, the gaol buildings and surrounding gardens were integrally related. That reasoning reflected the limited nature of the submission propounded at trial: at [103]-[104]. There was no appellable error in failing to address an argument not squarely advanced at first instance: at [105]-[106];
- (7) section 2 of the New South Wales Constitution Act 1855 (18 & 19 Vict c54), which remained in force, did not deny to the Crown any prerogative or non-statutory powers with respect to the waste lands of the Crown, and there was no need for separate statutory authority in order for the activities taking place on the land after the prison proclamations were revoked to be lawful: at [137]. Even if statutory authority were required, there would be implied statutory authority under the *Crown Lands Act* to maintain and secure the land for the time reasonably needed to perform the obligations imposed by that Act, to assess the land pending the decision to revoke the dedications: at [139]; and
- (8) it had not been shown that the primary judge erred in law in concluding that there was lawful occupation: at [147]. The question posed by s 36 was whether the claimed land was lawfully occupied and it mattered not whether the land was occupied by the Crown, or a statutory authority, or a private individual: at [141]. Even if the primary judge's reasoning that CSNSW could lawfully occupy the land disclosed error, it would not affect the outcome of the appeal, and was not material or objective: at [142]. It was highly artificial to attribute lawful occupation to CSNSW which was not a legal person. If it were necessary to attribute the acts constituting lawful occupation to a particular legal person, it was conventional to say that the lawful occupation was by the Crown in right of New South Wales: at [146].

Hunter Development Corporation v Save Our Rail NSW Incorporated [2015] NSWCA 346 (Beazley ACJ, Macfarlan and Meagher JJA)

(related decision: *Save Our Rail NSW Inc v State of New South Wales by the Minister administering Transport for New South Wales* [2014] NSWSC 1875 Adams J)

Facts: Hunter Development Corporation ("HDC") entered into an agreement for the acquisition of land and assets from Rail Corporation New South Wales ("Railcorp"). Part of the agreement was that a train line situated on the subject land was to be removed so other uses of the land could be made available. The

effect of this condition was that the train service from Sydney to Newcastle would terminate at a train station two stops earlier.

Save Our Rail (“SOR”), an incorporated community organisation, commenced proceedings in the Supreme Court seeking an order prohibiting RailCorp from fulfilling its obligations under the agreement which SOR argued would be contrary to [s 99A](#) of the [Transport Administration Act 1988](#) (“the Act”), which provides that a rail infrastructure owner must not close a railway line unless authorised by an Act of Parliament. At the time of the proceedings, no such statute existed. The trial judge, Adams J, had to determine two issues, first, whether the compulsory acquisition of land by HDC constituted a closure of the rail line so as to attract the operation of s 99A, and secondly, whether HDC’s acquisition of the subject land made it a “rail infrastructure owner” for the purpose of the Act.

The trial judge held that the compulsory acquisition of the land by HDC did not constitute a closure of a railway for the purposes of s 99A, and secondly that HDC, having acquired rail assets, was a “rail infrastructure owner” within the meaning of the Act. The effect of these rulings was that without an authorising Act of Parliament, HDC could not undertake the proposed removal works.

HDC appealed the ruling in relation to its status as a railway infrastructure owner and SOR cross appealed against the findings that RailCorp had not closed a railway line for the purposes of the Act.

Issues:

- (1) whether the assets transferred to HDC were “vested” in HDC “by or under” the Act such that HDC had become a “railway infrastructure owner”; and
- (2) whether the proposed removal of the assets constituted a closure of a railway.

Held: (Beazley ACJ, Macfarlan and Meagher JJA agreeing): allowing the appeal by HDC, setting aside the declaration made by the trial judge and dismissing the summons; dismissing the cross-appeal; and ordering SOR to pay the costs in the court below and costs of the appeal and the cross-appeal of HDC and the second, third and fourth respondents:

- (1) the terms “vest” and “by and under” are protean in nature and their meaning must be ascertained not by reference to authority but by reference to the text and context of s 99A: at [87];
- (2) the transfer of the assets to HDC was by consequence of the Asset Sale Agreement it had entered into with RailCorp and was not put into effect by the statutory powers under which RailCorp had entered into the agreement. Therefore, the assets did not “vest” in HDC “by or under” the Act and subsequently HDC could not be considered a “rail infrastructure owner” within the meaning of the Act: at [89]-[94]; and
- (3) the term “otherwise disposed of” in s 99A could not be construed to encapsulate the termination of the train line between Wickam and Newcastle. It was a relatively small section of the train line that was closed and given the line still operated between the same cities, it did not come within the scope of s 99A: at [95]-[101].

Perilya Broken Hill Ltd v Valuer-General [\[2015\] NSWCA 400](#) (Bathurst CJ, Macfarlan and Leeming JJA)

(related decisions: *Perilya Broken Hill Ltd v Valuer-General (No 6)* [\[2015\] NSWLEC 43](#), *Perilya Broken Hill Ltd v Valuer-General (No 8)* [\[2015\] NSWLEC 72](#), *Perilya Broken Hill Ltd v Valuer-General (No 5)* [\[2015\] NSWLEC 20](#) Biscoe J, *Perilya Broken Hill Ltd v Valuer-General* [\[2012\] NSWLEC 235](#) Lloyd AJ, *Valuer-General v Perilya Broken Hill Ltd* [\[2013\] NSWCA 265](#) Emmett and Leeming JJA and Preston ChJ of LEC)

Facts: Perilya Broken Hill Ltd (“Perilya”) has title to, and is the holder of mining leases for, land in and near Broken Hill used as a mine for the production of lead, zinc and silver. The Valuer-General (“VG”) valued the land at \$20,900,000 as at 1 July 2007. Perilya appealed to the Land and Environment Court (“LEC”) pursuant to [s 37](#) of the [Valuation of Land Act 1916](#) (“VL Act”) against the dismissal of its objection to the valuation, and contended for a land value of \$5,250,000. The appeal was conducted on the basis that the minerals were privately owned. Lloyd AJ allowed Perilya’s appeal, revoked the VG’s determination, and determined the value of the property at \$4,900,000 as at 1 July 2007. The VG’s appeal to the Court of Appeal was allowed, and the matter remitted to the LEC. Following the remitter, it became common

ground that all of the minerals were reserved to the Crown. In February 2014 the VG, without leave, filed and served expert evidence contending for a new owner/operator valuation methodology, said to be of significance for valuations in future years. Shortly after the remitter the primary judge had ordered that facts determined at the first hearing and not disturbed on appeal were not to be reopened without leave of the court. In response to the VG's proposed new valuation methodology Perilya applied for leave to reopen a number of findings of fact including to rely on evidence as to the estimated cost to obtain/reconstruct mining information. The primary judge refused leave to permit the VG to rely on the proposed new valuation methodology and refused leave to Perilya to rely on its mining information. The parties agreed to a separate determination of the question whether the land value was to be determined on the assumption that the minerals were privately owned. That question was answered affirmatively on 30 March 2015, the primary judge holding that the expression "fee simple of the land" in s 6A(1) of the VL Act includes publicly owned minerals in the land and requires them to be treated as if they are privately owned: *Perilya Broken Hill Ltd v Valuer-General (No 6)* [2015] NSWLEC 43. On 5 May 2015 Perilya applied for leave to contend for a variation of the methodology applied by Lloyd AJ at first instance to account for the value of the mining information as a cost in the methodology to be used in the valuation, and to rely on evidence which had been served almost a year previously in response to the VG's application to rely on a different methodology, together with a further more recent affidavit. The primary judge refused the application; noted Perilya's concession that, if its application were refused, the resulting valuation would exceed the \$20,900,000 for which the VG contended, such that the appeal would be moot; and dismissed the proceedings: *Perilya Broken Hill Ltd v Valuer-General (No 8)* [2015] NSWLEC 72. Perilya appealed.

Issues:

- (1) whether the primary judge erred in concluding that the hypothetical fee simple to be assumed for the purposes of s 6A of the VL Act included minerals reserved to the Crown;
- (2) whether the primary judge erred in relying on the definition of "land" in [s 21](#) of the [Interpretation Act 1987](#) to include corporeal hereditaments which include minerals, in concluding that minerals were included in the hypothetical fee simple of the land contemplated by the VL Act;
- (3) whether the primary judge erred in concluding that regard could not be had to Crown lands statutes which effect a restriction on title or ownership; and
- (4) whether the primary judge erred in refusing leave to permit Perilya to rely on further evidence in his consideration that it was no part of the interpretation of s 6A that it was mandatory to consider the proposed mining information evidence.

Held: (Leeming JA, Bathurst CJ and Macfarlan JA agreeing): dismissing the appeal with costs:

- (1) the decision in *Gollan v Randwick Municipal Council* [[1961 AC 82](#)], an appeal directly from the Court of Appeal to the Privy Council, confirmed the correctness of the High Court's decision in *Royal Sydney Golf Club v Federal Commissioner of Taxation* [[1955 91 CLR 610](#)] on a different, but materially identically worded, statute. It followed that *Gollan* had to be treated as if it were an appeal from the High Court, such that it is for the High Court and the High Court alone, not to follow the construction applied by it; and *Gollan* continued to bind the Court: at [77];
- (2) *Gollan* held that a reservation to the Crown in the grant is disregarded for the purposes of the hypothetical fee simple valued under the VL Act: at [69];
- (3) whether or not the *Interpretation Act* definition of "land" required the conclusion that minerals were included in the hypothetical fee simple of the land contemplated by the VL Act was not to the point. The primary judge's essential reasoning was that the VL Act required a valuation of a hypothetical absolute or pure fee simple, disregarding reservations to the Crown. That conclusion was unimpeachable in light of what was established in *Gollan*, and unaffected by the defined meaning of "land": at [79];
- (4) while there was a difference between a grant in fee simple subject to a reservation of minerals to a Crown grant, such that title to the minerals was never obtained by the grantee, and a grant in fee simple subject to a reservation permitting the taking of gravel and stone (as in *Gollan*), that was not to the point. Section 6A requires a valuation of the hypothetical fee simple, and *Gollan* established that

that hypothetical fee simple disregards conditions amounting to reservations in the strict sense, and also conditions attaching to the grant. Very clear language or compelling considerations would be required to achieve the unlikely outcome that the hypothetical fee simple in s 6A would not be taken to be subject to a reservation of gravel on the actual title, but would be subject to a reservation of minerals if there was one on the actual title; and neither was present in s 6A: at [82];

- (5) the fact that title to minerals may exist outside the estate of the owner of the fee simple in land did not detract from what was to be valued when the hypothetical fee simple contemplated by s 6A was considered; consistently with *Gollan*, that hypothetical fee simple was an “absolute or pure title” which includes ownership of minerals: at [85];
- (6) the general principle that the determination of land value is subject to laws of general application was not in doubt, and in order to apply that principle it was necessary to distinguish between the actual title vested in the land owner, and laws of general application. The hypothetical fee simple contemplated by s 6A disregards limitations in the former but has regard to limitations from the latter. The reasons of the primary judge, fairly read, made plain that his Honour regarded planning statutes as the prime examples of, and not exhaustive of, the category of statutes of general application, and there was no error in that statement: at [88]. In any event, although the reason for the reservation of the minerals in the grants of land owned by Perilya was the *Crown Lands Act 1989* and its predecessors, it was the reservations themselves which were particular to Perilya’s title which were to be disregarded for the purpose of the hypothetical fee simple: at [89]; and
- (7) the consideration impugned by Perilya in the primary judge’s refusal of leave was in one of five paragraphs relied upon to make a discretionary decision relating to the case management of litigation with an unduly protracted history; moreover, it was, on its face, supplementary. No challenge was, or could be, made to the observation that for more than a year beforehand Perilya had only sought leave to rely upon the mining information defensively: at [99]. The decision to reject Perilya’s application to adduce further evidence was the product of the particular and unfortunate procedural history of the litigation and prevented the evidence being tendered; it did not disclose any error of law: at [100].

Roads and Maritime Services v Allandale Blue Metal Pty Ltd [2016] NSWCA 7 (Basten and Ward JJA, Sackville AJA)

(related decision: *Allandale Blue Metal Pty Ltd v Roads and Maritime Services (No 6)* [2015] NSWLEC 18 Pain J)

Facts: in February 2010 the Roads and Traffic Authority of NSW, predecessor to Roads and Maritime Services (“RMS”), acquired land for the purpose of constructing the F3 Freeway to Branxton Highway Link (“Hunter Expressway”). The Expressway bisected an area of 631ha owned by Allandale Blue Metal Pty Ltd (“ABM”); some 54.7ha were acquired, leaving a residue of 576ha. Part of the land was used for grazing, subsidiary to the use of another part of the land as a quarry for andesite. ABM had granted a lease for an annual rental to Quarry Products (Newcastle) Pty Ltd (“QPN”) to carry on the quarrying business; at the date of acquisition, the lease had expired and QPN continued occupancy, terminable on one month’s notice, paying only an annual rental of \$70,000. It was accepted that this was not a commercial relationship. Construction of the Expressway limited the quarrying operations, and as a result of the acquisition the expected life of the quarry was reduced from approximately 12 years to 10.3 years. There was a cottage used by an employee responsible for control of access to the land and stockyards on part of the land which, after acquisition, were located on the residue land to the north of the Expressway; the main access to the quarry and the bulk of the grazing land was to the south of the Expressway. An area of 145.5ha of timbered land to the north of the Expressway was isolated from all other parts of the residue land, and was surrounded by private property in the hands of others. A condition of the consent for construction of the Expressway required RMS to provide access to that lot, and RMS had constructed an underpass.

Both AMB and QPN made claims for compensation under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (“the JT Act”). Proceedings by QPN were discontinued when QPN accepted the amount of \$807,758 including costs and valuation fees, as the lessee’s loss. ABM rejected an offer a little in excess of \$1 million and continued its claim in the Land and Environment Court. At first instance the

primary judge made findings of fact and identified the appropriate basis for calculation of the compensation payable, and the parties made the necessary calculations resulting in an order for payment to ABM of compensation of \$3,387,796. ABM had claimed compensation pursuant to [s 55\(f\)](#) of the JT Act with respect to the decrease in value of the land containing the sterilised andesite resource; the primary judge determined the market value on the approach that given the ability of ABM to terminate the lease to QPN on one month's notice, ABM's interest in the residual land was effectively equivalent to a fee simple estate unencumbered by a leasehold interest. RMS accepted that an amount should be paid for construction of new stockyards to the south of the expressway, but rejected a claim for the replacement of the cottage with a building to the south; the primary judge found that the separation of the cottage from the main parcel of land had a negative impact on oversight of the grazing business conducted by ABM, assessed the use of the cottage as half in the interests of ABM and half in the interests of QPN, and allowed ABM to recover half the cost of the new cottage. The only means of access to the timbered lot was by way of an underpass constructed as part of the Expressway; the primary judge allowed compensation for "injurious affection" assessed at 15% of the value of the severed land.

RMS appealed. Ground 1 of the appeal was based on the proposition that ABM had recovered expenses and losses for which its lessee QPN had already received compensation; ground 2 identified the sole bases of compensation to which RMS submitted ABM was entitled, including (a) the market value of the land acquired, (b) the cost of replacing certain cattle yards, and (c) the net present value of the loss of rent from the quarry for the period by which the life of the quarry was foreshortened, giving a total of \$505,746; ground 3 challenged the allowance for the replacement of a cottage; and ground 4 related to the allowance made with respect to the area of timbered land to the north of the Expressway which had been severed from the rest of the land, RMS asserting that access had been provided by way of an underpass and that the highest and best use of the land was for bio-banking which did not require access.

Issues:

- (1) whether the primary judge erred in determining market value on the basis that ABM's interest in the residual land was effectively equivalent to a fee simple estate unencumbered by a leasehold interest, in circumstances where the evidence from the directors of the companies was that neither QPN nor ABM intended to terminate the lease during the life of the quarry;
- (2) whether ABM could recover for "the same loss" for which QPN had received compensation;
- (3) whether the primary judge erred in her approach to the claim under [s 59\(f\)](#) of the JT Act for the financial cost of building a new cottage;
- (4) whether the primary judge erred in her assessment of the change in value of the severed timbered land; and
- (5) what order should be made as to costs of the appeal.

Held: (Basten JA, Ward JA agreeing, and Sackville AJA agreeing with the orders proposed and with the reasons relating to grounds 3 and 4): allowing the appeal in part, setting aside order (1) of the primary judge and determining the compensation payable to be the sum of \$3,115,171, and ordering RMS to pay 80% of ABM's costs of the appeal:

- (1) speculation as to the future conduct of the parties had to be disregarded, and ABM's claim was properly assessed on the basis that QPN had a terminable interest: at [43];
- (2) the loss was not "the same loss" if it was suffered by two separate entities; and to the extent that each entity suffered a loss arising from the same circumstance, there was nothing in the JT Act to preclude each recovering its separate loss. Although [s 56\(2\)](#) prevents, in general terms, former owners of land receiving a sum for the market values of each interest which, together, will exceed the market value of the land, QPN received no amount on account of the market value of the land; no other provision of the statute achieved such a result in the circumstances of the present case. To the extent the result was anomalous, the anomaly arose from the way in which QPN's claim was assessed: at [45];
- (3) grounds 1 and 2 of the appeal were rejected. ABM was entitled to the market value of the land which had been acquired and the diminution in value of the residual land, pursuant to [s 55\(a\)](#) and (c) respectively: at [46];

- (4) the primary judge's finding favouring a cottage on the larger portion of the residue and next to the entrance reflected an assessment of the reasonableness of the evidence proffered by ABM: at [50]. There was no substance in the challenge to the finding assessing the use of the cottage as half in the interests of ABM and half in the interests of QPN, it was not true that there was no evidence to support it, and nor could it be said that the finding was not reasonably open on the evidence, that being the only available question of law: at [52];
- (5) the submission that there was no reduction in value resulting from the severance of the timbered land because access was not required in order to allow the land to be used for its most valuable use, bio-banking, should not be accepted. Even land which is to be reserved from active use requires access by the landowner, who will have responsibilities which may include steps to minimise the risk of fire and the removal of invasive species: at [64];
- (6) at the date of trial, in practical terms RMS had already granted unrestricted access to the timbered land, and in legal terms the arrangement by which RMS would lodge an instrument under [s 88E of the Conveyancing Act 1919](#) recording the terms of consent to access and use of the underpass would be secured shortly: at [68]. RMS not only would, but was legally obliged to by the conditions of consent, provide access in perpetuity, and the primary judge should have found that ABM had failed to establish a reduction in the value of the timbered lot. Ground 4 should be upheld: at [70];
- (7) RMS had been successful in respect of one element of the award of compensation amounting to \$272,625, and the determination of compensation should be reduced by that amount, leaving a balance payable of \$3,115,171, assuming that the figure provided in order (1) did not contain interest: at [71]. The reduction achieved by RMS as to the amount of compensation payable was approximately 10% of the amount in dispute on the appeal, and it was appropriate to award ABM 80% of its costs of the appeal: at [72]; and
- (8) the orders of the Land and Environment Court entered on 9 March 2015 did not include an order with respect to costs, and absent information as to whether there was such an order and if there was, whether it should be varied and in what way as a result of the outcome of the appeal, the application by RMS that ABM pays its costs at first instance had to be rejected. Any outstanding issues as to the costs in the Land and Environment Court should be determined by that Court: at [73].

Elachi v Council of the City of Shoalhaven [\[2016\] NSWCA 15](#) (Basten and Ward JJA, Sackville AJA)

(related decision: *Council of the City of Shoalhaven v Elachi* [\[2015\] NSWLEC 85](#) Biscoe J)

Facts: on 4 April 2015 the appellant cleared an area of native vegetation on land at Callala Beach in the Shoalhaven local government area. The respondent Council brought proceedings in the Land and Environment Court ("LEC") seeking a declaration that the work contravened [s 76A\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act"), an order restraining the appellant from further clearing, and an order that he restore the property to its pre-clearing state. There was no dispute that the clearing undertaken by the appellant was "development"; the question was whether it could be lawfully carried out without consent. As no relevant consent had been obtained, if consent were required the work contravened s 76A(1).

The primary judge made the declaration and the restraining order, and an order for rectification was later made by consent. The appellant appealed, arguing that there was no requirement that development consent be obtained pursuant to cl 5.9 of the *Shoalhaven Local Environmental Plan 2014* ("the LEP").

Clause 5.9(2) provides that the clause applies to species or kinds of trees or other vegetation prescribed for the purposes of the clause in a development control plan. Clause 5.9(3) provides that a person must not ringbark, cut down, top, lop, remove, injure or wilfully destroy any tree or other vegetation to which such a development control plan applies without the authority conferred by a development consent or a permit granted by the Council. Clause 5.9(8) provides that the clause does not apply to (a) the clearing of native vegetation (i) that is authorised by a development consent or property vegetation management plan under the [Native Vegetation Act 2003](#) ("the NV Act") or (ii) that is otherwise permitted under [Div 2](#) or [3](#) of

[Part 3](#) of that Act. Clause 5.9(9A) provides that subclause 5.9(8)(a)(ii) does not apply in relation to land identified as “Cl 5.9” on the Clauses Map. The land was identified as “cl 5.9” on the Council’s “Clauses Map”. The Shoalhaven Development Control Plan 2014 (“the DCP”) prescribed, for the purposes of cl 5.9(2) of the LEP, “[a]ll species of trees or vegetation” occurring within three identified areas, which included areas mapped by Chapter G4 of the DCP. Clause 5.2 of the DCP provided “exemptions” from the need to obtain development approval or a tree removal permit, including in relation to non-urban areas, at cl 5.2.3 the clearing of native vegetation authorised by a development consent or property vegetation plan under the NV Act or otherwise authorised by that Act.

Issue:

- (1) whether the primary judge erred in holding that the appellant had contravened the prohibition in cl 5.9(3) of the LEP and therefore breached s 76A(1) of the EPA Act.

Held: dismissing the appeal, and ordering the appellant to pay the respondent’s costs of the appeal:

- (1) Basten JA, Ward JA and Sackville AJA agreeing: there was no error on the part of the primary judge in holding that the appellant had contravened the prohibition in cl 5.9(3) of the LEP and therefore breached s 76A(1) of the EPA Act: at [29] (Basten JA), [35] (Ward JA), [37] (Sackville AJA);
- (2) Basten JA, Ward JA and Sackville AJA agreeing: the fact that the land was mapped land for the purposes of cl 5.9(9A) did not have the effect of removing cl 5.9(8)(a)(ii) from the LEP; the fact that this was mapped land had the effect that the exemption from the cl 5.9(3) prohibition that might otherwise have been available was not engaged: at [26]-[29] (Basten JA), [35] (Ward JA), [41] (Sackville AJA);
- (3) Basten JA: the exemption in cl 5.2.3 of the DCP did not assist the appellant: at [17]. That provision did not constitute the specification of species for the purposes of s 26(4)(a) of the EPA Act and was therefore invalid: at [20]. Further, in circumstances where the LEP addressed the question of permission, authority and exemption under the NV Act, by virtue of s 74C of the EPA Act, any provision in the DCP which was substantially the same as cl 5.9(8) of the LEP would have no effect; and nor would such a provision that was inconsistent with the LEP have any effect, which must be the case in respect of the land marked on the Clauses Map as Cl 5.9 land: at [23]; and
- (4) Ward JA, Sackville AJA agreeing: the expression “to which any such development control plan applies” in cl 5.9(3) of the LEP qualified the words “any tree or other vegetation”, and not the activity of removing them with which cl 5.2.3 of the DCP was concerned: at [35], [38].

- NSW Court of Criminal Appeal

Turnbull v Chief Executive of the Office of Environment and Heritage [2015] NSWCCA 278 (Meagher JA, McCallum and Button JJ)

(related decisions: *Chief Executive of the Office of Environment and Heritage, Department of Premier and Cabinet v Turnbull* [2014] NSWLEC 150 Sheahan J, *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112 Preston CJ)

Facts: the appellant was convicted of an offence against s 12 of the *Native Vegetation Act 2003*, having pleaded guilty to clearing native vegetation on two properties in the north west of New South Wales between 1 November 2011 and 18 January 2012, and fined \$140,000 and ordered to pay the reasonable investigation and legal costs and disbursements of the prosecutor. The trial judge had found that 38.7ha had been cleared; there was no dispute that 3000 trees were destroyed. The trial judge found that the damage caused was substantial, which was an aggravating feature of the matter; that while the appellant had pleaded guilty at an early stage a discount of only 12.5% was allowed for the utilitarian value of that plea because the trial judge was not prepared to find that the appellant was remorseful; the applicant had acted with wilful disregard of the consequences of his actions on the basis that he hurried to complete the clearing of the native vegetation before he was served with a stop work order; and, having regard to a conversation with an officer of the local Catchment Management Authority that approval was needed to clear native vegetation, that the appellant had acted recklessly in the sense that he contemplated the possibility that his actions were unlawful but nevertheless proceeded. In Class 1 appeals in the Land and Environment Court orders had been made for remediation work likely to rectify much of the environmental harm caused by the offence; the trial judge had found that the appellant was not the owner of the properties the subject of the remediation directions and that therefore any such mitigation of the environmental harm could not be attributed to the appellant personally and did not act as a mitigating factor in his sentencing. The appellant sought leave to appeal to the Court of Criminal Appeal pursuant to s 5AB of the *Criminal Appeal Act 1912* against the sentence.

Issues:

- (1) whether the trial judge erred in finding that the level of environmental harm caused was substantial, increasing the objective seriousness of the offence;
- (2) whether the trial judge erred in finding that the appellant's conduct was a reckless breach that increased the objective seriousness of the offence;
- (3) whether the trial judge erred in finding that financial motivation was to be taken into account as an aggravating factor;
- (4) whether the trial judge erred in finding that the appellant flagrantly disregarded the consequences of his actions by continuing clearing in knowledge that he was likely to soon receive a stop work order, and failed to take account of the appellant's good character as a relevant matter on sentence;
- (5) whether the trial judge erred in finding that the appellant should only receive a 12.5% discount for his early plea of guilty;
- (6) whether the trial judge erred in finding that mitigation of environmental harm by the remedial directions and LEC orders could not be attributed to the appellant personally and did not act as a mitigating factor; and
- (7) whether the trial judge erred in ordering the appellant to pay all of the legal costs of the prosecutor and ought to have made no order in relation to the four day sentencing hearing.

Held: (Button J, Meagher JA and McCallum J agreeing): leave to appeal granted, order with regard to costs amended to that it read that the appellant was ordered to pay the reasonable legal costs and disbursements of the prosecutor as agreed or assessed, and appeal otherwise dismissed:

- (1) it was open to the trial judge to find that the three consequences of the actions of the appellant, being that 3000 trees were destroyed, that the habitat of koalas was badly affected, and that the habitat of a particular threatened species of bird was affected, amounted to damage that could be judged to be substantial: at [53]. The proposition that it was not open to the sentencing judge to make his own evaluation of the degree of environmental damage in the asserted absence of expert evidence was rejected: at [55];
- (2) the finding that the appellant was aware, in a general sense, that his actions may have been unlawful was open to the sentencing judge: at [63];
- (3) there was uncontroverted evidence that the appellant was to benefit financially by way of profits from the first year of operation of one of the properties, and in light of that evidence it was well open to the sentencing judge to find that the offence had been motivated to some degree by a desire to achieve a financial gain, and to regard that as an aggravating factor on sentence: at [67]-[68];
- (4) the admission by the appellant in his record of interview that he was trying to clear as much land as possible before the arrival of the stop work order because of financial pressure provided a sound basis for the finding that the appellant acted in flagrant disregard of the consequences of his actions: at [74];
- (5) it was not accepted that the substantial majority or even a majority of the matters that were in dispute and required resolution by the extended proceedings on sentence were determined in favour of the appellant : at [78]. The question of the discount that should be afforded to an offender for the utilitarian value of an early plea of guilty was a matter of evaluative judgement reposed in sentencing judges. The discount provided was soundly open to the evaluation of the trial judge in all the circumstances of the case: at [81];
- (6) the completed or envisaged actions of other persons pursuant to a remediation direction were not relevant to the question of whether the appellant had shown remorse as a subjective feature, and there was no error demonstrated in the approach taken by the trial judge: at [87];
- (7) it was conceded on the appeal that the trial judge had erred in ordering costs as extending to the reasonable investigation costs of the prosecutor, that concession including the proposition that his Honour had no power to order such costs. While the prosecutor made it clear that no steps would be taken to seek to enforce that part of the costs order, for abundant caution that order should be altered: at [93]; and
- (8) (Button J, Meagher JA agreeing, McCallum J not deciding): in many, if not most, applications for leave to appeal against sentence, the subtle difference between in meaning between a mistake of fact by a sentencing judge that was material to sentence and a finding of fact that was not open to a sentencing judge would have no effect on the result; and that was the case here as on either formulation the applicant had not demonstrated factual error on the part of the sentencing judge: at [31]. If there were a real difference between the two formulations discussed in *Clarke v R* [2015] NSWCCA 232, the established test of asking whether the sentencing judge had made a finding of fact that was not open, should be maintained: at [32].

- Supreme Court of New South Wales

***Roads and Maritime Services v Rockdale City Council* [2015] NSWSC 1844** (Black J)

Facts: Rockdale City Council (“the Council”) is the registered proprietor of two parcels of land located at Marsh Street Arncliffe, Lot 14 in DP 213314 (“Lot 14”) and Lot 1 in DP 108492 (“Lot 1”). The predecessor of the Council acquired Lot 14 on the terms of a deed dated 30 October 1957 (“Deed”) between the Commonwealth of Australia, Cumberland County Council and the Commissioner for Main Roads, the predecessor to Roads and Maritime Services (“RMS”). The Council holds Lot 1 subject to a declaration of trust made on 14 April 1958 (“Declaration of Trust”). Lot 14 and Lot 1 were transferred pursuant to [s 526](#) of the [Local Government Act 1919](#) (“the 1919 Act”) which provided that a council may accept and hold any real or personal property conveyed to it for any charitable or public purpose and act in the administration of

such property for the purposes and according to the trusts for which the same may have been conveyed. It was common ground that from the commencement of the [Local Government Act 1993](#) (“the LG Act”) Lot 14 and Lot 1 were each taken to have been classified as community land for the purposes of Part 2 of Chapter 6 of that Act because they were each subject to a trust for a public purpose. The Council had not adopted a plan of management for Lot 14 or Lot 1, however on 21 October 2015 the Council resolved to exhibit a draft plan of management for all community land in its area including Lot 14 and Lot 1 which would, if adopted, categorise each lot as a sports ground, except for part of Lot 1 which would be categorised as a park.

The Deed and Declaration of Trust referred to the Cumberland County Council Planning Scheme Ordinance (“CCPSO”) which came into force on 27 June 1951 and defined (in cl 3) the term “County road” to mean “any road indicated on the scheme map as shown white between black lines or shown broken white between broken black lines irrespective of whether such road is a main road within the meaning of the Main Roads Acts 1924-1950”. It was common ground that the scheme map associated with the CCPSO shows a corridor in white between broken black lines on parts of Lot 14 and Lot 1.

The Deed included provision in cl 1 that the Council hold Lot 14 “which is required for a County Road under the Cumberland County Council Planning Scheme, for that purpose..”, “make the same available without cost to the Commissioner for Main Roads or any other body that may be the constructing authority for the County Road when required to do so ...”, and pending that requirement, “not use the said land or permit same to be used for any purpose other than the purpose of a public park, public reserve or public recreation area”; and in cl 2 that it not erect or permit the erection of a building without first obtaining the approval of the Cumberland County Council. The Declaration of Trust relating to Lot 1 was in similar terms, including the provision in cl 1 that “as to part of the said land that is as to so much thereof as is required for a County road under the [CCPSO] the Council holds the same for that purpose...”.

The RMS sought orders that the Council make available to it, at no cost, the land in Lot 14 and Lot 1, for road works, being for use as a temporary works compound and a smaller area for permanent facilities to facilitate the operation of the road, in respect of the proposed extension of the M5 Motorway (“New M5 Project”) and the widening of Marsh Street. RMS claimed declarations that on the proper construction of the Deed and the Declaration of Trust the Council must make available to RMS at no cost to RMS the land in Lot 14 and Lot 1 respectively; and in the alternative, sought orders, if and to the extent that Lot 14 and Lot 1 are held on a charitable trust for the purposes stated in the Deed and Declaration of Trust respectively, for an administrative scheme or in the alternative a cy-pres scheme by which the land was to be made available to RMS at no cost.

Lot 14, and part of Lot 1, are occupied by the Kogarah Golf Club Ltd (“Club”), the fourth defendant, which operates a golf club partly on the land. The Attorney General (second defendant) was joined as a party in her capacity under the *Charitable Trusts Act* 1993 with functions of enforcement of trusts for a charitable purpose and as protector of charities. The third defendant was the Minister administering the [Environmental Planning and Assessment Act 1979](#), as successor to the assets, rights and liabilities of the Cumberland County Council.

Issues:

- (1) whether the whole or only part of Lot 14 was subject to the trusts for a County road created by the Deed;
- (2) whether the Declaration of Trust required the Council to make that part of Lot 1 required by RMS available without cost to RMS;
- (3) whether the requisite land was required for the purposes permitted by the Deed and Declaration of Trust;
- (4) whether the LG Act and the classification of the land as community land and its proposed categorisation as a sportsground were impediments to the Council making the required land available to RMS;
- (5) whether the obligations of the trusts under s 529 of the 1919 Act was an obligation preserved under cl 3 of Sch 7 of the LG Act;

- (6) whether the trust obligations and rights to enforce the terms of the Deed and the Declaration of Trust which had accrued to RMS, or the Attorney General, at the time the 1919 Act was repealed were preserved by [s 30](#) of the [Interpretation Act 1987](#);
- (7) whether the trusts were charitable trusts;
- (8) whether the Council had acted in breach of trust or threatened to breach the trusts in preferring a compulsory acquisition of the land for its fair value to the obligations as trustee to deliver the land to RMS; and
- (9) whether the Club should be compensated for losses associated with the new arrangement for its course.

Held: standing the proceedings over for a short period to allow the parties to make submissions as to the form of any declaratory orders that should be made and to allow the Council an opportunity to give effect to the trusts or give appropriate undertakings:

- (1) clause 1 of the Deed required the Council to make the relevant land, being the whole of Lot 14, or that part of it now required, available without cost to RMS as the successor to the Commissioner for Main Roads, when required to do so by that body, and the trigger for the obligation to do so was the requirement of RMS: at [41];
- (2) clause 1 of the Declaration of Trust used the language “required for a County road...” not the language “reserved” for a County road. The concept of land that is “required for a County [r]oad under the [CCPSO]”, was necessarily future looking and contemplated the possibility that the land that would in future be required would potentially be different from that which was then reserved under the CCPSO. The language limiting the Council’s use of the land pending its requirement for a County road also contemplated that that requirement would be made in the future. The Declaration of Trust also required the Council to make available that part of Lot 1 that was now required by RMS available at no cost to RMS: at [51], [52];
- (3) the proposed uses of Lot 14 and Lot 1 fell within the scope of the Deed in respect of Lot 14 and the Declaration of Trust in respect of Lot 1 or the trusts created by those documents: at [62]. The Deed used the language “required for a County [r]oad”. That concept was wider than the concept of “as a County [r]oad” both as a matter of language and reading the Deed as a whole and in its context. The use of part of Lot 14 as a temporary construction facility, where that use was proximate to and genuinely for the purpose of constructing a road was properly described as use *for* that road although not use *as* that road, and that proposition extended to facilities such as ventilation shafts and electricity substations which are necessary for the operation of a road as it would also extend to drainage or a footpath or an emergency exit gate that was necessary to the operation of that road: at [60]. The language in cl 1 of the Declaration of Trust in respect of Lot 1 similarly referred to the Council holding the land “required for a County road”: at [61];
- (4) [section 46\(1\)\(a\)](#) of the LG Act, which provides that a lease, licence or other estate in respect of community land may be granted “for the provision of public utilities and works associated with or ancillary to public utilities” would permit the Council to provide the relevant lease, licence or other estate in respect of Lots 14 and 1, and would not require an express authorisation in a plan of management. Services or facilities carried on for the purpose of providing a public road had the character of a “public utility” and in particular an element of public benefit: at [85]. Use of the relevant land for permanent facilities comprising ventilation shafts, an electrical substation, site access, water treatment plant and sedimentation pond for tunnel operation and motorway infrastructure also fell within the concept of a “public utility” in its general usage: at [86];
- (5) the provision of the relevant land to RMS would also be permitted under s 46(1)(b)(i) and s 46(4) of the LG Act, so far as the land would be for the provision of public roads: at [87];
- (6) the Court assumed, without deciding, that the general savings provision in cl 3 of Sch 7 of the LG Act was capable of preserving the operation of the Deed and the Declaration of Trust, so far as they were created under the 1919 Act, so that the Deed and the Declaration of Trust continued to have effect: at [99];

- (7) the effect of s 30 of the Interpretation Act would be to preserve the operation of the trusts, to the extent they had been created under s 526 of the 1919 Act. However that section did not go further so as to immunise the performance of any future obligation under the trusts from the requirements of [ss 45](#) and 46 of the LG Act or any other relevant statutory provision: at [103];
- (8) while it was not necessary to decide the question, the construction of roads and the ancillary works necessary for their construction were purposes beneficial to the community and fell within the spirit of the Preamble of the *Statute of Charitable Uses* by analogy with the reference to “highways” in that statute. The trusts providing for the land not required for a County road to be used for the purposes of a public park or public reserve were also charitable in character: at [111];
- (9) the obligations under ss 45, 46, [47](#), [48](#) and [49](#) of the LG Act might narrow the obligations arising under the trust, but only to the extent of an inconsistency, and as trustee, the Council had to seek to perform the trusts to the extent that it might do so without breach of those prohibitions. The Council was not entitled to continue as trustee, in a conflict of duty and duty, if an exercise of classification of land which it was required to perform under the LG Act would be inconsistent with its obligations as trustee or would defeat the purposes of the trust, at least where it could readily avoid the conflict by resignation as trustee of the trusts: at [114];
- (10) it was not necessary to express any final view as to the allegations that the Council had acted in breach of trust or threatened to breach the trusts, where no claim for compensation for breach of trust was made and no party sought to remove the Council as trustee if it now performed its obligations as determined by the Court. Where it was not necessary to do so, it was not appropriate to do so, given the serious character of the issues raised: at [126]; and
- (11) it was not appropriate to impose conditions on orders made in the proceedings, to give effect to existing charitable trusts, so as to promote the interests of a third party which had available to its other equitable remedies in respect of any representations on which it had relied to its detriment. The preferable course was to leave the Club to rely on such rights or remedies as it may have in respect of the promises or representations on which it relied: at [160].

- Land and Environment Court of NSW

Judicial Review

Ocean Shores Community Association Inc v Byron Shire Council (No 3) [\[2015\] NSWLEC 171](#) (Pain J)

(related decisions: *Ocean Shores Community Association Inc v Byron Shire Council (No 2)* [\[2015\] NSWLEC 162](#), *Ocean Shores Community Association Inc v Byron Shire Council (No 4)* [\[2015\] NSWLEC 175](#), Pain J)

Facts: Ocean Shores Community Association Inc (“the Applicant”) commenced judicial review proceedings seeking a declaration of invalidity of the Byron Local Environmental Plan (Amendment No 2) (the “LEP Amendment”). The LEP Amendment reclassified the subject land in Ocean Shores (the “land”) from “community” to “operational” land under the [Local Government Act 1993](#) (the “LG Act”). Byron Shire Council (the “Council”) wished to sell the land; a plan of subdivision had been registered; and the Council had entered into contracts for sale with numerous purchasers. The sale of the land was restrained by an injunction granted earlier in proceedings. The Council had submitted a planning proposal to the second respondent, the Minister of Planning (“the Minister”) seeking to reclassify the land from “community” to “operational” land. A gateway determination under [s 56\(2\)](#) of the [Environmental Planning and Assessment Act 1979](#) (the “EPA Act”) was issued by the Minister’s delegate as Acting Deputy Secretary (the “Gateway Determination”). At the time the Gateway Determination was made, the land was already classified as operational land. The Council passed a resolution classifying the land as community land before the LEP Amendment reclassifying it as operational came into effect.

Issues:

- (1) whether the Minister's delegate had a valid delegation to issue the Gateway Determination;
- (2) whether the LEP Amendment was contrary to the objects in [s 5](#) of the EPA Act; and
- (3) whether the Minister's delegate issued the Gateway determination on a mistaken factual basis.

Held: amended summons dismissed, costs reserved:

- (1) the Minister's delegate was also an Executive Director at the time he issued the Gateway Determination. By virtue of the [Government Sector Employment Act 2013](#) the Minister's delegate was able to hold concurrently the positions of Executive Director and Acting Deputy Secretary: at [33]. The Minister's delegate had a valid delegation under the Instrument of Delegation dated October 2013 as an Executive Director: at [34]. The Administrative Arrangements (Administrative Changes – Ministers and Public Service Agencies) Order 2014 effected the change that the word "Secretary" replaced the words "Director-General" wherever those words appeared, including in the Instrument of Delegation reference to "Deputy Directors-General": at [38]. The Minister's delegate had a valid delegation as an Acting Deputy Secretary: at [40];
- (2) the LEP Amendment was not inconsistent with the objects in s 5 of the EPA Act. The EPA Act recognises the operation of provisions such as [s 30](#) of the LG Act which allows for the reclassification of land from community to operational: at [44]. The objects must be construed broadly: at [45]; and
- (3) it was not necessary for the land to be classified as community land prior to the issuing of the Gateway Determination. The EPA Act does not require a gateway determination to take a particular form. The Gateway Determination was informed by the planning proposal, which identified the factual position in relation to the land: at [50]. The relevant time that the land had to be classified as community land was when the LEP Amendment commenced: at [52].

Hornsby Shire Council v Trives (No 3) [\[2015\] NSWLEC 190](#) (Biscoe J)

(related decisions: *Hornsby Shire Council v Trives* [\[2014\] NSWLEC 171](#) Craig J; *Trives v Hornsby Shire Council* [\[2015\] NSWCA 158](#) Basten, Macfarlan and Meagher JJA)

Facts: in three judicial review proceedings Hornsby Shire Council ("the Council") sought declarations that three complying development certificates ("CDCs") issued in early 2014 were invalid and consequential orders that within 28 days the accredited certifier cause them to be demolished and removed. The CDCs were purportedly issued pursuant to [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) ("SEPP") for the erection of structures certified as complying development and characterised as "detached studios" on three residential properties. The three residential properties were at Epping, Carlingford and Hornsby, in the local government area of the applicant Council, on land zoned R2 Low Density Residential under the [Hornsby Local Environmental Plan 2013](#) ("the LEP"). The structures proposed under the CDCs contained in the case of Hornsby two attached units, and in the case of Epping and Carlingford, one unit. Each unit comprised a suite of rooms that was capable of being used as a separate domicile. There was already an existing dwelling house on each lot at the time the CDCs were issued.

The validity of the CDCs was determined as a separate and preliminary question in each proceeding. The first respondent was the accredited certifier ("the Certifier"). The owners of each property were the second and third respondents in each proceeding, who submitted to any order of the Court on the separate question.

The separate question in each proceeding was heard and determined by Craig J who answered it in the negative: *Hornsby Shire Council v Trives* [\[2014\] NSWLEC 171](#). The parties agreed before Craig J, and his Honour proceeded on the basis, that characterisation of the proposed structures was an issue of objective jurisdictional fact to be determined by the Land and Environment Court ("LEC") on the evidence before it. Apart from that issue Craig J's reasoning that the proposed structure on each lot could not be complying development or a detached studio was not challenged in the subsequent appeal to the Court of Appeal. The Court of Appeal held that the LEC on judicial review could not decide whether the proposed development was complying development as an objective jurisdictional fact, but could decide whether the

Certifier could reasonably have held the opinion that the proposed studios were complying development on the correct construction of the SEPP and the LEP specifying what was complying development. The three proceedings were remitted to the LEC to be determined according to law.

Issue:

- (1) whether the three CDCs were valid.

Held: in each proceeding, answering the separate question that the CDCs were not validly issued, and ordering the first respondent to pay the applicant's costs of the separate question following remitter by the Court of Appeal:

- (1) the proposed structures were not complying development because they were not ancillary to the existing dwelling house on the lot as required by cl 3.5 of the SEPP, and any contrary opinion of the Certifier was not reasonable. Each of the proposed "studios" comprised a number of self-contained rooms capable of being used as a separate domicile. Its use was not subservient to the dominant purpose of the existing dwelling house. Its form did not dictate an ancillary result. Rather, it was an independent form, and hence use: at [60]-[69];
- (2) the Certifier could not reasonably have been satisfied that the proposed structures were established in conjunction with a dwelling house in accordance with cl 1.5 of the SEPP. In circumstances where the proposed structures contained suites of rooms which were capable of being used as a separate domicile from the existing dwelling house on the lot, the Certifier could not have been reasonably satisfied that each would be established in conjunction with the existing dwelling house: at [70]-[73];
- (3) each of the proposed developments were not compliant because it would result in there being more than one dwelling house on the lot contrary to the requirement in cl 3.8(1)(a) of the SEPP, and any contrary opinion held by the Certifier was unreasonable. Each of the proposed structures was a dwelling house for the purpose of cl 3.8(1)(a) of the SEPP: at [74]-[78]; at
- (4) on the correct construction of the SEPP and the LEP as applied to the clear facts, the proposed structures were not permissible with consent in the R2 zone in which they were to be erected, and any state of satisfaction by the Certifier that they were permissible in that zone was unreasonable. The Epping and Carlingford structures were dual occupancy or secondary dwellings and the Hornsby structure was multi dwelling housing, all of which were prohibited under the LEP in the R2 zone: at [79]-[97].

Roden v Bandora Holdings Pty Ltd [\[2015\] NSWLEC 191](#) (Pain J)

Facts: Mr Roden (the "Applicant") commenced judicial review proceedings seeking an order that a development consent ("the consent") granted to Bandora Holdings Pty Ltd (the "Respondent") by Byron Shire Council (the "Council") was unlawful and invalid. The consent was granted for the purpose of a "rural tourist facility", specifically for a recreational use being an occasional wedding function venue (the "proposed use"). The consent authorised the use of an existing dwelling and surrounding areas on land located on or near a ridgetop (the "land"). The proposed use included the erection of a marquee. The land was in the 1(a) General Rural Zone (the "1(a) zone") under the [Byron Local Environmental Plan 1988](#) (the "BLEP"). The Council's Development Application Evaluation Report (the "Assessment Report") recommended granting consent to the proposed use and was signed by the assessing officer and the approval officer acting under delegated authority.

Issues:

- (1) whether a "rural tourist facility" was prohibited in the 1(a) zone;
- (2) whether the Council considered the matters required in cl 31 (Development on ridgetops) of the BLEP in assessing and determining the proposed use; and
- (3) whether the Council considered the matters (relating to visual impact and effect on present and potential use on the land and lands in the vicinity) required in cl 34(3) of the BLEP in assessing and determining the proposed use.

Held: dismissing the amended summons, and postponing for 14 days an order that the Applicant pay the Respondent's costs:

- (1) in the 1(a) zone a "rural tourist facility" is an innominate permissible use, and "tourist facilities" is a nominate prohibited use. [Clause 34](#) of the BLEP applies to rural zones where rural tourist facilities are permissible. As a "rural tourist facility" is expressly or impliedly prohibited in all other zones, the BLEP should be read to give cl 34 effect: at [46]-[48]. The words "may consist of" and "or the like" in the definition of a "rural tourist facility" demonstrated that that definition was not exhaustive. The words "may include" in the definition of "tourist facilities" was exclusive: at [50]-[58]. A "rural tourist facility" was for low-scale uses: at [62]. A reading of the BLEP as a whole lead to the conclusion that a "rural tourist facility" and "tourist facilities" are mutually exclusive: at [61]. Such an approach was consistent with the objectives of the 1(a) zone: at [63];
- (2) the Applicant in part impermissibly challenged the merits of the Council's decision to grant consent: at [83]. There was no failure to consider [cl 31](#), it was expressly and correctly identified in the Assessment Report: at [85]. As any alternative location for the marquee would have required substantial earthworks, there was "no alternative location" for the purposes of cl 31: at [90]-[92]. Subclauses 31(a) and (b) were objectives to be considered by the Council not preconditions to the grant of consent. The Council's file demonstrated that the objectives were considered: at [95]. It was within the proper scope of the Council's assessment function to consider landscaping combined with the intermittent nature of the proposal as a satisfactory response to subcl 31(a) and (b): at [94]; and
- (3) the Applicant's approach focussed selectively and impermissibly on the Assessment Report and ran the risk of being a challenge of the merits of the Council's decision: at [112]-[113]. While there was no specific reference to cl 34(3) in the Assessment Report, the substance of that clause was considered as demonstrated by the Assessment Report and the Council's file: at [114]-[128]. The Applicant's construction of subcl 34(3)(d) and (e) could be accepted, but the Council's finding of satisfaction could not be challenged by asserting an unproven fact and the Applicant did not plead that the Council acted unreasonably in the *Wednesbury* sense: at [129].

Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd and Minister for Planning [\[2016\] NSWLEC 6](#) (Preston CJ)

Facts: Upper Mooki Landcare Inc (the "Applicant") brought judicial review proceedings challenging the legality and validity of a decision of the Minister for Planning (the "Minister"), by his delegate, the Planning Assessment Commission ("the PAC") to grant development consent to a development application ("the DA") made by Shenhua Watermark Coal Pty Ltd ("Shenhua") to carry out the Watermark Coal Project ("the Project"), an open cut coal mine. The Project was assessed and determined as "State significant development" under the [Environmental Planning and Assessment Act 1979](#) ("EPA Act"). The Project was expected to have direct and indirect impacts on the local and regional populations of koalas by, for example, removing "known and potential forage and breeding habitat". The four grounds of challenge all had a common concern about the manner in which the impacts of the Project on koalas were assessed in the DA and considered by the PAC in determining the DA.

Issues:

- (1) whether the DA and, therefore, the PAC's consideration of the DA, was infected by a misdirection regarding the requirement of cl 1(1)(e) of [Sch 1](#) of the [Environmental Planning and Assessment Regulation 2000](#) ("EPA Regulation") that the DA contain "an indication of whether the development is likely to significantly affect threatened species, populations or ecological communities, or their habitats";
- (2) whether the DA and, therefore, the PAC's consideration of the DA, was infected by a misdirection regarding the requirement in s 5A of the EPA Act, that various factors be considered in deciding whether a development is likely to have a "significant effect on threatened species, populations or ecological communities, or their habitats";
- (3) whether the PAC's consideration of the Project's impacts on koalas as required by [s 79C\(1\)\(b\)](#) (as applied by [s 89H](#)) of the EPA Act miscarried because the PAC failed to consider: the size of the

population of koalas that would be directly impacted by the Project and how many fatalities were likely to arise as a result of the Project's koala translocation plan; and

- (4) whether the PAC failed to consider, as part of the public interest under s 79C(1)(e) of the EPA Act and as informed by the public trust doctrine, two principles of ecologically sustainable development in assessing the impact of the Project on koalas, namely, the precautionary principle and the principle of biological diversity and ecological integrity.

Held: proceedings dismissed; costs reserved:

- (1) the DA and, therefore, the PAC's consideration of the DA, was not infected by misdirection regarding the requirements of cl 1(1)(e) of Sch 1 of the EPA Regulation. This clause only required Shenhua to give an "indication" on the DA form of whether the Project was likely to significantly affect the threatened species of koala or its habitat by providing a binary response of either 'yes' or 'no'. Shenhua did give this "indication" by ticking the box marked 'yes' on the DA form: at [109]-[115];
- (2) the DA and, therefore, the PAC's consideration of the DA, was not infected by misdirection regarding [s 5A](#) of the EPA Act because s 5A did not apply to the Project, as the Project was 'State significant development'. Other legislative provisions referred to in s 5A that require the consideration of whether development is likely to significantly affect threatened species, populations or ecological communities, were also not applicable to the Project: at [116]-[123];
- (3) the PAC did not fail to consider any relevant matter that it was bound to consider under s 79C(1)(b) (as applied by s 89H) of the EPA Act concerning the impacts of the Project on koalas. The PAC did not have to consider these impacts in the particular manner articulated by the Applicant. The PAC did actively consider the likely impacts of the Project on koalas and adopted an acceptable adaptive management response to address these impacts: at [141]-[145]; and
- (4) the PAC was bound by s 79C(1)(e) (as applied by s 89H) of the EPA Act to consider the precautionary principle and the principle of biological diversity and ecological integrity in determining the DA for the Project. Due to this, it was unnecessary to consider the public trust doctrine. The evidence demonstrated that the PAC did sufficiently consider, analyse and assess these two principles of ecologically sustainable development: at [177]-[186].

Criminal

Willoughby City Council v Screnzi [\[2015\] NSWLEC 192](#) (Craig J)

Facts: by an amended summons filed on 27 March 2015, the defendant was charged with two offences against [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") to which he pleaded guilty that same day. Those charges related to building work as well as site works for landscaping undertaken without development consent on a residential property at Northbridge. The amended summons in each proceeding had, in purported compliance with [s 127\(5B\)](#), stated the date upon which evidence of the offences had first come to the attention of the Council's officer, Mr Balafas, as "authorised officer". The sentence hearing was heard over three days, after which judgment was reserved. Shortly thereafter it was determined by the defendant that Mr Balafas was not "an authorised officer within the meaning of Division 2C of Part 6" of the EPA Act, with the consequence that the provisions of s127(5A) were not engaged. A notice of motion was then filed on 18 September 2015 in each proceeding by the defendant, seeking to re-open the hearing and obtain an order that the defendant be given leave both to withdraw the plea of guilty and instead enter a plea that the proceedings were statute-barred by reason of being commenced after the expiration of the relevant limitation period of two years fixed by s 127(5) of the EPA Act.

Issues:

- (1) whether the prosecution must establish that the proceedings were commenced in time;
- (2) whether the statutory bar upon commencement of proceedings could be waived; and

(3) whether the court must give effect to a statutory bar even if a plea has been entered.

Held: the defendant was acquitted of the charges alleged and given leave to withdraw the plea of guilty entered in both proceedings:

- (1) where the commencement of the proceedings for the offence charged are the subject of a statutory limitation period, the prosecutor bears the onus of establishing that the proceedings have been commenced within the time limited by that provision: at [54]. There was no evidence to establish that the proceedings were commenced “not later than two years after” the offences were alleged to have been committed, as required by s 127(5) of the EPA Act: at [42]. The two year period was determined by reference to the facts established by the prosecutor and not by reference to the date or time alleged in the charges stated in both amended summons: at [29];
- (2) once the court is made aware, by whatever means, that proceedings for an offence may have been commenced after a statutory limitation period had expired, and the facts establish that to be the case, it is not open to the court to allow the prosecution to continue, even if the accused/defendant does not seek to invoke the statutory provision: at [54]; and
- (3) the need for the court to give effect to a statutory bar applies even if a plea of guilty has been entered to the offence: at [54]. Once the limitation provision is raised the court lacks any discretion to maintain a guilty plea and the provision must logically give rise to a plea in bar rather than a defence: at [56].

Council of the City of Sydney v Adams [\[2015\] NSWLEC 206](#) (Preston CJ)

Facts: Mr Adams (the “Defendant”) owned a 1840s colonial Georgian terrace house in Millers Point, Sydney. The house was listed on the State Heritage Register, which is maintained under the [Heritage Act 1977](#), and was included as a heritage item under the Sydney Local Environmental Plan 2012 (“the SLEP 2012”). The applicable conservation management plan (“the CMP”), which was attached to the contract of sale when the Defendant purchased the house, identified a significant proportion of the original interior plaster and timber joinery as being of exceptional heritage significance. The CMP also contained heritage-related restrictions and requirements relating to the house. In particular, the CMP specified that development consent was required under the SLEP 2012 to carry out development, including demolition or alterations of the interior. From about 21 to 28 November 2014, the Defendant began demolishing and altering elements of the interiors of the house without obtaining prior development consent. Despite a Council of the City of Sydney (“the Prosecutor”) heritage officer orally directing the Defendant to stop work, the Defendant continued his activities until 7 December 2014. The defendant ceased his activities after receiving a formal stop work order on 8 December 2014. These demolition and alteration activities were undertaken in breach of cl 5.10(2) of SLEP 2012 and hence [s 76A](#) of the [Environmental Planning and Assessment Act 1979](#) (“EPA Act”). The Defendant pleaded guilty to an offence against [s 125\(1\)](#) of the EPA Act in that he carried out development only permissible with development consent under SLEP 2012, contrary to s 76A of the EPA Act, without development consent first having been obtained.

Issues:

- (1) whether [s 19\(2\)](#) of the [Crimes \(Sentencing Procedure\) Act 1999](#) (“CSP Act”) had reduced the maximum penalty for committing an offence against s 125(1) of the EPA Act because legislative changes to the EPA Act (enacted after the Defendant committed the offence) had introduced a three-tier offence regime (ss [125A](#), [125B](#) and [125C](#)) with reduced maximum penalties for individuals;
- (2) whether the offence caused actual environmental harm;
- (3) whether the Defendant committed the offence intentionally, recklessly or negligently; and
- (4) whether the Court should make an order pursuant to [s 10\(1\)\(b\)](#) of the CSP Act to discharge the Defendant on condition that he enter a good behaviour bond.

Held: Defendant convicted of the offence as charged; fined \$60,000; and ordered to pay the Prosecutor’s costs (\$35,000):

- (1) s 19(2) of the CSP Act did not operate to apply the reduced maximum penalties for individuals under ss 125A, 125B or 125C of the EPA Act to the offence committed by the Defendant prior to these provisions commencing operation. Sections 125A, 125B and 125C did not apply to the offence

committed by the Defendant against s 125(1) of the EPA Act because each of these sections only applied to “an offence to which this section applies”. When the Defendant committed the offence, he could not have committed an offence to which those sections applied. Therefore, the maximum penalties were not affected by the legislative changes to the EPA Act offence regime: at [21]-[31];

- (2) the offence caused substantial actual harm of medium seriousness because numerous exceptional elements of the interiors of a highly significant, heritage listed house were removed, as was much considerable timber joinery: at [32]-[37];
- (3) the Defendant committed the offence recklessly but not intentionally. Despite being aware of the existence of the CMP and that the house and its interiors was listed as a heritage item, the Defendant disregarded whether or not his activities could lawfully be carried out without development consent under the EPA Act. Furthermore, the Defendant continued his activities despite being instructed to cease work by the Prosecutor’s heritage officer. The Defendant’s belief that his activities did not require development consent for his activities due to Standard Exemption 2 of the *Heritage Act 1977* was misguided and erroneous: at [42]-[60];
- (4) *other objective circumstances*: the Defendant’s offence undermined the objectives and integrity of the regulatory system of development control (in particular, the Defendant’s actions foreclosed the opportunity to assess and preserve heritage features of exceptional value): at [38]-[41]; the Defendant could reasonably have foreseen that his activities would likely cause environmental harm: at [61]; the Defendant could have taken practical measures to avoid causing environmental harm, such as checking with the Prosecutor as to what development approvals might be required: at [62]; and the Defendant had control over the causes that gave rise to the offence: at [63];
- (5) overall, the objective seriousness of the offence was of medium seriousness, but at the lower end of that range: at [64];
- (6) *subjective circumstances*: the Defendant had no prior convictions; pleaded guilty at the earliest available opportunity; was otherwise of good character; accepted responsibility for his actions and was remorseful; was unlikely to re-offend; co-operated with the Prosecutor; and agreed to pay the Prosecutor’s costs: at [65]-[75];
- (7) the purposes of this sentence included publically denouncing the conduct of the Defendant and deterring others who may be tempted to commit similar offences: at [76]-[78]; and
- (8) the evidence and the objective circumstances did not support making an order under s 10(1) of the CSP Act: at [81].

Aboriginal Land Claims

New South Wales Aboriginal Land Council v The Minister Administering the Crown Land Act (Moir Park Road No 1 and Moira Park No 2 claims) [\[2015\] NSWLEC 179](#) (Moore AJ)

Facts: in 2009 the New South Wales Aboriginal Land Council (“NSWALC”) lodged two separate land claims pursuant to [s 36](#) of the [Aboriginal Land Rights Act 1983](#) (“the ALR Act”) for Lot 489 DP 755242 (“Lot 489”) and Lots 7043 and 7044 DP 93598 (“Lots 7043/4”), being areas of Crown land located within the urban area of Morisset within the Lake Macquarie City Council local government area. The joint Crown Land Ministers responsible for determining land claims under the ALR Act (“the Minister”) refused both applications on the basis that part of the land would be needed, or likely be needed for residential land (s 36(1)(b1) of the ALR Act); and part of the land would be needed, or likely be needed for the essential public purpose of sewerage reticulation (s 36(1)(c) of the ALR Act).

NSWALC appealed to the Land and Environment Court. In relation to the application of s 36(1)(b1), the Minister purported to rely on findings of a previous Minister who had determined a claim over Lot 489 made in 1989, refusing the claim on the basis that the intended use of the claimed lands envisaged that there would be residential allotments across the whole of the lands. The Minister contended that use of land for residential development for the purposes of subdivision, which has the resulting subsequent

purpose of providing residential development, constitutes an “essential public purpose” under s 36(1)(c) of the ALR Act.

Issues:

- (1) whether the s 36(1)(b1) element of the rejection of the 1989 claim could be validly relied on by the Minister in refusing both the 2009 claims; and
- (2) whether the residential development for the purpose of subdivision was an “essential” public purpose.

Held: upholding the appeals and ordering the transfer of both lots in fee simple to the Biraban Local Aboriginal Land Council:

- (1) whilst the use of Lot 489 was clearly needed or likely needed for the allotment of residential buildings in 1989, this status had radically changed at the time of the 2009 claims. By this stage, there was no longer to be residential development across the totality of the Lot and the view of the development potential of the lands had contracted significantly: at [186]. On this premise, there was no factual basis on the evidence that the provisions of s 36(1)(b1) of the ALR Act, upon which the Minister sought to sustain his determination to refuse either claim, was available at the date of the 2009 claims: at [180];
- (2) section 36(1)(b1) does not derogate from the range of land excluded by s 36(1)(c) but rather adds a new exclusionary capacity that is distinctively assessed on the more stringent basis of the subjective opinion held by the Crown Lands Minister: at [166];
- (3) the coincidence of use and purpose for residential development cannot invoke the claimability exclusion of s 36(1)(c): at [174]. Adoption of the Minister’s position regarding the interrelationship of ss 36(1)(b1) and 36(1)(c) would potentially mean any Crown land that was zoned residential and had the capacity to be used for that purpose would be capable of being rendered unclaimable. Therefore, residential development for the purpose of subdivision was not an “essential” public purpose on proper consideration of that term as used in s 36(1)(c) of the Act: at [181]; and
- (4) on the proper construction of s 36(1)(c) the Minister had no basis for resisting the claimability of the lands: at [184].

Development Appeals

***Lotus Project Management Pty Ltd v Pittwater Council* [2015] NSWLEC 166 (Pain J)**

Facts: Lotus Project Management Pty Ltd (the “Applicant”) owned two adjoining parcels of land (the “subject land”). The Applicant appealed against the refusal by Pittwater Council of its development application in which it sought consent for the demolition of existing structures on the subject land and the erection of 39 dwellings in two residential flat buildings under the [State Environmental Planning Policy \(Affordable Rental Housing\) 2009](#) (the “Affordable Housing SEPP”). The subject land fell within “Buffer area 3b” in the table to [cl 6.1\(3\)](#) of the [Pittwater Local Environmental Plan 2014](#) (the “PLEP”). Two questions were listed for separate determination.

Issues:

- (1) whether the “not more than 9 dwellings or less than 7 dwellings” specification for “Buffer area 3b” was a development standard; and
- (2) whether [cl 13\(2\)](#) of the Affordable Housing SEPP applied to the proposed development.

Held: the answer to issue (1) and (2) is “no”:

- (1) the primary task was one of statutory construction: at [41]. It was appropriate to apply the two-step approach in *Strathfield Municipal Council v Poynting* [2001] NSWCA 270; (2001) 16 LGERA 319 given the reasoning in *Agostino v Penrith City Council* [2010] NSWCA 20; (2010) 172 LGERA 380 and the authorities that case relied on: at [46]. It was necessary to consider the PLEP as a whole. No single provision of the PLEP was determinative of the outcome of the first-step in *Poynting*. “Buffer area 3b”

prohibited development that did not meet its specification: at [56]. Concerning the second-step in *Poynting*, cl 6.1(3) imposed a requirement as to Council's satisfaction, limited the number of dwellings permissible on land and did not operate by reference to a number of dwellings to be erected as part of a proposed development. "Buffer area 3b" did not specify an aspect of the development as required by the definition of "development standard" in the [Environmental Planning and Assessment Act 1979](#): at [57]-[58]; and

- (2) the definition of "existing maximum floor space ratio" in the Affordable Housing SEPP did not require a local environment plan to use the word "maximum" in the context of floor space ratio for that definition to be engaged: at [28]. Application of controls in the PLEP enabled the calculation of a maximum floor space ratio which conformed with the Affordable Housing SEPP definition: at [29]. The Affordable Housing SEPP could not apply to the proposed development because of the finding in (1): at [32], [60].

De Angelis v Wingecarribee Shire Council [\[2016\] NSWLEC 1](#) (Craig J)

(related decisions: *De Angelis v Pepping* [\[2015\] NSWCA 236](#) Macfarlan and Gleeson JJA, Sackville AJA , *De Angelis v Pepping* [\[2014\] NSWLEC 108](#) Adamson AJ)

Facts: the Applicant appealed pursuant to [s 97\(1\)\(b\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") against the Respondent's deemed refusal of development application for a mixed use development. After commencement of the appeal, two local environmental plans were made purporting to amend the principal planning instrument, Wingecarribee Local Environmental Plan 2010 ("WLEP 2010"), controlling use of the land in question. The first amending instrument was held to be invalid on appeal from this Court to the Court of Appeal (*De Angelis v Pepping* [2015] NSWCA 236). The second amending instrument ("LEP 38") was published on the NSW legislation website on 16 October 2015. Both amending instruments applied only to the site of the development application, and the effect of both amending instruments was to prohibit retail development.

The Court ordered that the following question be first determined:

"Whether development application LUA 13/0968 lodged with the Wingecarribee Shire Council on 11 November 2013 is saved by virtue of clause 1.8A of the *Wingecarribee Local Environment Plan 2010* or whether it is prohibited by the making of *Wingecarribee Local Environment Plan 2010 (Amendment No 38)*."

Issue:

- (1) whether the development application was saved by cl 1.8A of WLEP 2010 and was to be determined as if the amending local environmental plan had not commenced.

Held: answering the separate question that the development for which the consent was sought was not prohibited and was to be determined as if the amending instrument had not commenced:

- (1) the phrase "this Plan" in cl 1.8A was to be read as a reference to the planning instrument as amended from time to time: at [48];
- (2) clause 1.8A operates to "alleviate the exposure to amendment" of the WLEP 2010 after a development application had been made. The clause enables the consent authority or the Court, on appeal under s 97 of the EPA Act, to determine such a development application as an exercise of planning discretion under s 80 of the EPA Act rather than compel its refusal should the amendment prohibit the purpose of development for which the application was made: at [50]; and
- (3) any new or different application for the development site would require determination by applying the provisions of WLEP 2010 as amended by LEP 38: at [52].

Colonial Credits Pty Ltd v Pittwater Council [\[2015\] NSWLEC 188](#) (Moore AJ)

Facts: Colonial Credits Pty Ltd ("the Applicant") was granted development consent for a part-Torrens Title/part-Community Title residential subdivision for property in Warriewood. The topography of the land surrounding the property necessitated the requirement of an efficient drainage system to dispose of water draining from a catchment that was uphill from the site and subsequently passed through the site due to its

lower elevation. The requirement for such a drainage system was separate from the drainage system required to satisfy the drainage needs of the site itself and the question of who should bear this cost formed the basis of this matter.

As part of the development consent, provision was made for a contribution to be made by the Applicant toward the cost of the provision of community facilities. The contribution to be paid pursuant to condition C19 of the development consent was \$1,998,815.64 but following a conciliation process was subsequently modified by consent to be \$1,936,715.64.

The Applicant sought a further modification of the contribution imposed by condition C19 to reduce the amount by \$880,000. The Applicant appealed against the refusal of the modification application. Section 94B(3) of the [Environmental Planning and Assessment Act 1979](#) ("EPA Act") provides that a condition requiring a contribution to be made may be disallowed or amended by the Court if it was unreasonable in the particular circumstances of that case, even if it was determined in accordance with the applicable contributions plan.

Issues:

- (1) whether there was a proper statutory foundation in s 94B(3) of the EPA Act to enable the Court to grant any relief to the Applicant, provided it was appropriate in the circumstances to do so; and
- (2) if there was power enabling the Court to provide relief, what sort of relief would be appropriate.

Held: dismissing the appeal:

- (1) the power to disallow or amend a contributions condition, such as condition C19, must find a basis of unreasonableness in the contributions plan's application to the site. It is not sufficient, if a burden imposed on the beneficiary of a development consent is said to be unreasonable, if it has no foundation of unreasonableness in the contributions plan itself: at [48];
- (2) the drainage system the subject of the application to modify the contribution was not provided for as a community facility in the Council's contribution plan and therefore on the correct interpretation of s 94B(3), there was no jurisdictional foundation for reducing the contribution required by condition C19 of the development consent: at [58]; and
- (3) following the finding as to s 94B(3) of the EPA Act, there was no need to assess the merits of the application or subsequently consider the quantum of relief. Notwithstanding this, it would have been inappropriate for a determination as to the merits of the application to be reached based on a lack of appropriate evidence that would have amounted to a denial of procedural fairness to both parties: at [59].

Compulsory Acquisition

MMTR Pty Ltd v Roads and Maritime Services [2015] NSWLEC 177 (Craig J)

Facts: the respondent's statutory predecessor compulsorily acquired approximately 2ha of the applicant's land at Thrumster, near Port Macquarie. The land was acquired for the purpose of the Oxley Highway Upgrade ("OHU"), providing the principal link between the Pacific Highway and Port Macquarie. Planning for the area and the OHU had extended over many years by both the local council and the respondent's statutory predecessors. At the date of acquisition the relevant land use controls applicable to the land were those contained in Port Macquarie-Hastings (Area 13 Thrumster) LEP 2008 ("LEP 2008"). Upon the making of LEP 2008, the land was rezoned from a rural zoning principally to R1 General Residential. The applicant objected to the amount of compensation offered and commenced proceedings under [s 66\(1\)](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991 \(NSW\)](#) ("the JT Act"), seeking a maximum amount of \$21,448,273. It was agreed by the consultant valuers retained by the parties and accepted by the applicant, that if it was established that (a) the rezoning of the parent parcel occurred by reason of the proposal to carry out the OHU, and (b) the OHU was a single public purpose spanning from approximately 1986 to the current date, the amount of betterment accruing to the residue land would substantially exceed

all other heads of compensation, including market value and as such no compensation would be payable to the applicant.

Issues:

- (1) whether the residential zoning of the applicant's land under the LEP 2008 occurred by reason of the proposal to carry out the public purpose for which the land was acquired;
- (2) whether the residue land enjoyed betterment as a result of the proposal to carry out the public purpose; and
- (3) whether the betterment outweighs other heads of compensation.

Held: compensation determined in the sum of \$25,377:

- (1) for some time there had been a synergy between the actions of the respondent's statutory predecessors directed to the OHU, including the years planning for it, and the Council's decision to investigate and ultimately rezone land at Thrumster from its long time rural zoning to zones having the effect of authorising urban development upon the land: at [120]. The decision by the local council to adopt LEP 2008 would not have occurred had the proposal for the OHU not been adopted by the respondent's statutory predecessors: at [142]. Therefore, the residential zoning of the applicant's land at the date of acquisition occurred by reason of the long term proposal of the respondent to implement the public purpose of the OHU: at [176];
- (2) while the immediate cause of the value uplift in the residue land was the rezoning, that effect was in turn the consequence of the proposal by the respondent to carry out the public purpose of the OHU: at [142]; and
- (3) as the 'betterment' or increase in value accruing to the residue land substantially exceeded all heads of compensation payable to the applicant, including market value, proper effect was given to the provisions of s 55(f) of the JT Act, save for the claim made for disturbance under s 59: at [179].

Cudgegong v Transport for NSW (No 3) [\[2015\] NSWLEC 185](#) (Pain J)

(related decisions: *Cudgegong Australia Pty Limited v Transport for NSW* [\[2014\] NSWLEC 19](#) Pain J; *Cudgegong Australia Pty Ltd v Transport for NSW (No 2)* [\[2014\] NSWLEC 36](#) Pain J; *Golden Mile Property Investments Pty Ltd (in liquidation) v Cudgegong Australia Pty Ltd* [\[2014\] NSWCA 224](#) Beazley P; *Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [\[2015\] NSWCA 100](#) Macfarlan, Emmett and Gleeson JJA)

Facts: in late 2008 the Applicant, Cudgegong Australia Pty Ltd ("Cudgegong"), entered into a contract for sale of land (the "first contract") to buy land situated on Cudgegong Road, Rouse Hill (the "land") from Stacks Managed Investments Ltd ("Stacks"), which was exercising a power of sale under a registered mortgage over the land granted to it by the Second Respondent, Golden Mile Property Investments Pty Ltd ("Golden Mile"). A second mortgage over the land was granted to RTS Super Pty Ltd ("RTS Super") by Golden Mile. In early 2012 the First Respondent, Transport for NSW ("Transport NSW") made its offer for compulsory acquisition of the land in response to an enquiry by Cudgegong. From early 2012 the directors of Cudgegong negotiated with Mr Stack, director of Stacks and RTS Super, for a period of approximately six months. In mid-2012 Stacks and Cudgegong mutually agreed to rescind the first contract (the "rescission deed") and entered into a further contract for sale of land containing almost identical provisions (the "second contract") that same day. The date of completion of the second contract was one year after that of the first contract. The second contract was for approximately \$500,000 more than the first contract. Mr Stack did not obtain further valuations of the land or seek other buyers. In late 2012 Transport NSW compulsorily acquired land under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#). At the time of the acquisition Golden Mile was the registered proprietor of the land under the [Real Property Act 1900](#).

In early 2013 Cudgegong commenced proceedings against Transport NSW in the Land and Environment Court (the "LEC") appealing the Valuer-General's determination of compensation payable. In late 2013 the LEC ordered that Golden Mile be joined as a party in the proceedings. The trial judge made an interlocutory order that Transport NSW to make an advance payment to Cudgegong. In so doing, the trial judge concluded that Cudgegong had a relevant interest in the land under its arrangements with Stacks

that took priority over any residual interest that Golden Mile may have had in the land. Golden Mile successfully appealed against this order and proceedings were remitted to the LEC for determination of the issues below. The outcome of these issues determined which entity had the relevant compensable interest.

Issues:

- (1) whether the rescission of the first contract for sale was interdependent with the second contract; and
- (2) whether Stacks was in breach of its duties as mortgagee to Golden Mile.

Held: Cudgegong has the relevant compensable interest in the land:

- (1) the evidence established an oral agreement whereby the rescission of the first contract was conditional on entry into the second contract on the agreed terms. There was nothing to suggest that evidence was concocted. Collusion between Stacks and Cudgegong was not alleged: at [56]-[57]. While the second contract contained an entire agreement clause which clause was a rebuttable presumption that there were no further terms, the evidence was sufficiently weighty to rebut that presumption: at [61]. There was no statement that the entire agreement clause excluded all other terms: at [62]. The parole evidence rule could not apply as the agreement was part oral and part written: at [65]. The agreement fell within the second class of contractual types referred to in *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353: at [69]. The rescission of the first contract was legally interdependent with the second contract: at [70]; and
- (2) as the rescission deed and second contract were legally interdependent, Mr Stack was not exercising the mortgagee's power of sale anew: at [73]. Under s 420A(1)(b) of the *Corporations Act 2001 (Cth)*, Stacks must have achieved the best price reasonably obtainable in light of the circumstances which applied when the property was sold: at [74]. The reasonableness of Mr Stack's actions had to be assessed in light of all the circumstances, which included considering the risks and costs of particular courses of action. It was not open to Mr Stack to take additional steps to achieve a higher price: at [89]. While Golden Mile had discharged its initial evidential burden, Cudgegong was able to discharge its tactical burden: at [90]. Mr Stack took all reasonable care to sell the property for the best price reasonably obtainable in the circumstances, in light of the risk of Cudgegong completing the first contract and the realistic commercial context before him: at [91]. Mr Stack acted in good faith: at [92]. Golden Mile did not satisfy its legal burden of proving that Stacks breached duties owed as mortgagee to Golden Mile: at [93].

Valuation of Land

***CFS Managed Property Limited v Valuer- General* [2016] NSWLEC 2 (Pain J)**

Facts: the Applicant CFS Managed Property Ltd appealed against the determination by the Valuer-General ("VG") of land values for 108-120 Pitt Street Sydney ("the Moneybox building") for base dates 1 July 2010 (\$29,200,000), 1 July 2011 (\$32,100,000) and 1 July 2012 (\$32,100,000). The land was identified by the VG as heritage restricted so that assumptions in s 14G(1) of the *Valuation of Land Act 1916* ("the VL Act") had to be applied as well as the requirements of s 6A(1) of the VL Act. The VG's valuer applied a net rental differential method which had been applied in earlier appeals in relation to the same land. The Applicant's valuer applied a half sale of the land in 2011 to the determination of the valuation of the unimproved land.

Issues:

- (1) what was the appropriate valuation methodology to apply given the requirements of the VL Act;
- (2) whether the sale of half the land was legally available given *Toohey's Limited v Valuer-General* (1928) AC 439 ("Toohey's");
- (3) if the sale of half land was legally available, whether that sale was reliable, and whether it satisfied *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418 ("the Spencer test"); and

(4) what were the appropriate adjustments for depreciation and improvements.

Held: finding the land value at the 2011 base date to be \$28,026,702 and directing the parties to discuss appropriate land values at the two other base dates the subject of the appeal:

- (1) the VL Act does not specify what valuation methodology should be applied. Provided that a particular method makes the assumptions required by s 6A(1) and s 14G(1) it can be acceptable: at [73];
- (2) *Toohey's* did not prohibit the application of the sale of half land given recent cases such as *Valuer-General of New South Wales v Fivex Pty Ltd* [2015] NSWCA 33 in the Court of Appeal: at [84]-[94];
- (3) the sale of half the land satisfied the *Spencer* test and was reliable: at [141]; and
- (4) appropriate adjustments could be made for depreciation and improvements to derive the unimproved land value for the purposes of s 6A(1) of the VL Act: at [161]-[178].

Section 56A Appeals

Hall v O'Brien [2015] NSWLEC 200 (Preston CJ)

(related decisions: *O'Brien v Slack-Smith* [2015] NSWLEC 1179 Dixon C ("the May judgment"); *O'Brien v Slack-Smith (No 2)* [2015] NSWLEC 1271 Dixon C ("the July judgment"))

Facts: Ms O'Brien ("the Respondent") applied, under s 236G(1)(a) of the *Mining Act 1992* ("the Mining Act"), for a determination regarding the small-scale title Access Management Plans ("AMPs") for three properties in Lightning Ridge. Mr Hall and Mrs Hall ("the Appellants"), the occupiers of two of the affected properties, opposed the determination of the AMPs on the terms sought by the Respondent. In the May judgment, the Commissioner did not make a final determination on the disputed AMPs but, instead, specified the matters for inclusion and the framework within which the parties were to negotiate. Negotiation between the parties was unsuccessful and therefore the Commissioner determined the final terms of the AMPs under s 236G(2) of the Mining Act in the July judgment. The Appellants appealed against the Commissioner's decision in the July judgment under s 56A of the *Land and Environment Court Act 1979* on numerous questions of law.

Issues:

- (1) whether the Commissioner's decision not to make provision in the AMPs for matters relating to the manner in which the holders of small scale titles may exercise rights of access was an error of law;
- (2) whether the Commissioner's decision to fix the times relating to rights of access along access roads/tracks in the AMPs as being between one hour before sunrise and one hour after sunrise was an error of law; and
- (3) whether the Commissioner's reasons for her decision to fix a minimum distance between access roads/tracks and particular water tanks in the AMPs were inadequate and therefore an error of law.

Held: appeal upheld, decisions set aside and remitted for redetermination, Respondent ordered to pay the Appellants' costs:

- (1) [section 236D](#)(1) of the Mining Act sets out matters for which an AMP could make provision. The Commissioner's conclusion that an AMP could not or should not provide for various matters relating to the manner in which the holders of small scale titles may exercise rights of access, including the use of unregistered vehicles on the land and having unlicensed drivers driving vehicles on the land, was inconsistent with s 236D(1) and was in error: at [27], [30];
- (2) the power under s 236D(1) to make provision for these various matters in an AMP was not taken away or restricted by the fact that these matters may be dealt with under other sources of power, such as the conditions of small scale titles or other provisions of mining legislation. This was confirmed by s 236D(2), which gave paramountcy to these other sources of power over an AMP in the event of an inconsistency: at [28]. Therefore, the Commissioner was in error by concluding that

these crucial matters in issue did not need to be addressed in the AMPs because they were dealt with by other sources of power: at [29];

- (3) the Commissioner erred in law in making the finding that the standard hours of access in the AMPs should be set as being between one hour before sunrise and one hour after sunrise where there was no evidence in support of that finding and no reasons were given for that finding: at [40], [52];
- (4) the Commissioner gave some reasons for her finding fixing a minimum distance between access roads/tracks and particular water tanks in the AMPs. Those reasons were based on the evidence available, and did not involve any error of law: at [66]; and
- (5) the Respondent's submission that the Court should not set aside the Commissioner's determinations of the AMPs because the Commissioner would inevitably remake the same findings was rejected: at [70].

Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7 (Preston CJ)

(related decision: *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 Morris C)

Facts: Micaul Holdings Pty Ltd (the "Respondent") lodged a development application ("the DA") with Randwick City Council (the "Appellant") to demolish existing buildings, remove trees and construct a residential flat building ("the development"). The Respondent appealed the deemed refusal decision of the DA by the Appellant. The proposed development contravened the relevant building height and floor space ratio building standards ("the standards") set out in Part 4 of the [Randwick Local Environmental Plan 2012](#) ("RLEP"). Accordingly, the Respondent made two written requests, under [cl 4.6](#) of RLEP, which justified non-compliance with the standards ("the cl 4.6 objections"). The cl 4.6 objections set out reasons for why compliance with the standards was unreasonable and unnecessary, explained why there were sufficient planning grounds to justify non-compliance with the standards and concluded that the development was consistent with both the objectives of the relevant RLEP land use zone and the standards. The Commissioner upheld the Respondent's appeal and granted development consent for the development. The Appellant appealed this decision under [s 56A](#) of the [Land and Environment Court Act 1979](#) on the basis that the Commissioner, in making her decision, erred in law in three main respects.

Issues:

- (1) whether the Commissioner failed to be satisfied, as required by [cl 4.6\(4\)\(a\)\(ii\)](#) of RLEP, that the development was in the public interest because it was consistent with the objectives of the standards and the objectives for development of the applicable RLEP land use zone;
- (2) whether the Commissioner failed to give adequate written reasons for concluding:
 - (a) that it was unreasonable or unnecessary for the development to comply with the standards under RLEP, which were required to be considered under [cl. 4.6\(3\)\(a\)](#), and
 - (b) that the development was in the public interest because it was consistent with the objectives of the standards and the objectives for development of the relevant RLEP land use zone, which were required to be considered under [cl. 4.6\(4\)\(a\)\(ii\)](#); and
- (3) whether the Commissioner failed to consider the relevant matter of the wall height control in [cl 4.4](#) of the Randwick Development Control Plan 2013 ("RDGP").

Held: appeal dismissed; Appellant to pay the Respondent's costs:

- (1) the Commissioner's process of reasoning throughout her judgment demonstrated that the Commissioner was satisfied about the matter in [cl 4.6\(4\)\(a\)\(ii\)](#) of RLEP. The Commissioner identified that the development breached the standards; summarised the relevant reasoning and conclusions of the cl 4.6 objections; recognised that [cl 4.6](#) imposed a precondition to the exercise of her power to grant development consent; quoted the relevant parts of [cl 4.6](#) and discerned that [cl 4.6](#) imposed four tests, the last of which was the matter in [cl 4.6\(4\)\(a\)\(ii\)](#). Following this, the Commissioner concluded that she was satisfied of the matter in [cl 4.6\(4\)\(a\)\(ii\)](#), which she repeatedly re-affirmed subsequently in her judgment: at [11];

- (2) the Commissioner provided sufficient reasons to show why she was satisfied about the matter in cl 4.6(4)(a)(ii) of RLEP. The Commissioner's judgment, on a fair reading, demonstrated that she implicitly adopted the relevant reasons justifying non-compliance articulated in the cl 4.6 objections (which the Commissioner summarised) as her own reasons for being satisfied of the matter in cl 4.6(4)(a)(ii): at [19]. The Commissioner prefaced her conclusion that the tests in cl 4.6 were satisfied with the expression 'having regard to the evidence and in particular the written objections prepared'. This demonstrated that the written cl 4.6 objections formed the basis for the Commissioner's satisfaction that the test in cl 4.6(4)(a)(ii) had been met: at [23];
- (3) the Commissioner provided sufficient reasons to show that she was satisfied about the matter in cl 4.6(3)(a) of RLEP. The Commissioner's conclusion that compliance with the standards was unreasonable or unnecessary was, again, based on the relevant reasons articulated in the cl 4.6 objections, which the Commissioner summarised and adopted as her own reasons: at [31]-[32]. Contrary to the Appellant's assertion, the cl 4.6 objections did identify an established basis for which compliance with the standards was unreasonable or unnecessary. Namely, the cl 4.6 objections asserted that compliance with the standards was unreasonable or unnecessary because the development did not cause environmental harm and was consistent with the objectives of the standards: at [34]. In any event, the determination of the matter in cl 4.6(3)(a) was not a principal contested issue in the Appellant's Amended Statement of Facts and Contentions and, therefore, the Commissioner was not under a duty to give reasons for being satisfied of the matter in cl 4.6(3)(a): at [35] and [37];
- (4) clause 4.6(3)(a) did not require the Commissioner to be directly satisfied that compliance with each of the standards was unreasonable or unnecessary in the circumstances of the case. Rather, the Commissioner only needed to be satisfied that the cl 4.6 objections adequately addressed the issue that compliance with the standards was unreasonable or unnecessary: at [38]-[40]; and
- (5) non-compliance with the wall height control in cl 4.4 of RDCP was not a principal contested issue because it was not raised as an independent issue in the Appellant's Amended Statement of Facts and Contentions and, in any event, the issue was resolved by the experts in the proceedings before the Commissioner's decision. For these reasons, the Commissioner was not required to resolve this issue or to provide reasons as to how or why she resolved it: at [46]-[51].

Commissioner Decisions

Lark v Shellharbour City Council [\[2015\] NSWLEC 1535](#) (Fakes C)

Facts: in February 2012 the applicant was granted development consent for the demolition of a garage and construction of a second detached single storey dwelling and Torrens Title subdivision of a site in Warilla. The site is located within the Elliot Lake Catchment; the lake is included in the Council's adopted Elliot Lake – Little Lake Flood Study ("the Flood Study"). As the site is mapped as flood prone land, the stamped approved plans showed the finished floor levels of the living room at 3.31 m AHD, compliant with the flood planning level of a minimum of 3.21 m AHD for all habitable rooms as required by [Shellharbour Local Environmental Plan 2013](#) ("SLEP") and Shellharbour Development Control Plan. The flood planning level defined in cl. 6.3(5) SLEP is the level of 1:100 ARI (average recurrent interval) flood event plus 500mm freeboard. Conditions of consent B10 and B11 specifically required that all habitable floor levels must be constructed to a minimum level of 3.21m AHD and must comply with Shellharbour City Council's Floodplain Risk Management Development Control Plan ("FRM DCP").

The construction of the dwelling was almost complete however the finished floor levels did not comply with the requirements of conditions B10 and B11 and the as-built floor levels were between 0.16 and 0.18m below the prescribed level. An Occupation Certificate could not be issued unless compliance was achieved.

The applicant appealed against the deemed refusal of an application under [s 96](#) of the [Environmental Planning and Assessment Act 1979](#) to modify the development consent; the application was amended

during the course of the proceedings so as to substitute the specified finished floor levels with the as-built levels.

Issues:

- (1) whether the development as modified was substantially the same as the development for which consent was originally granted; and
- (2) if so, whether the modified development should be approved on the merits.

Held: dismissing the application:

- (1) the setting of the habitable floor levels at the height specified in SLEP and FRM DCP was an important, material and essential element of the Council's assessment process and ultimate determination of the original development application, and the proposed levels were qualitatively and quantitatively non-compliant: at [64];
- (2) the requirement for the floor levels of habitable rooms to be equal to or greater than the 100 year ARI flood level plus a freeboard of 500mm was unambiguous and consistent with the NSW Floodplain Development Manual and accompanying Guideline on Development Controls on Low Flood Risk Areas – Floodplain Development Manual: at [65];
- (3) whilst the proposed modification concerned only one element of the whole, the floor levels were based on the Flood Planning Level and were a material and essential feature of the original consent. As the modified development as proposed was not substantially the same as the original development approved in 2012 the Court had no power to approve the modification: at [67]-[68];
- (4) on the merits, the proposed development was incompatible with the flood hazard of the land as established by the Flood Study and did not comply with the requirements of cl. 6.3 SLEP and therefore could not be approved: at [69];
- (5) the Council had consistently applied the 500mm requirement for freeboard: at [72]; and
- (6) a reasonable person would expect that a new dwelling in a flood prone area would be constructed in accordance with the applicable controls and standards and thus the proposed modification was not in the public interest: at [74].

Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure and Anor [2015] NSWLEC 1465 (Dixon C and Sullivan AC)

Facts: the applicants, a Local Aboriginal Land Council and a neighbouring landowner, were objectors to a Major Project Application ("the Project Application") to which the now repealed [Part 3A](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") applied. They appealed in the Court's Class 1 jurisdiction pursuant to [s 75L\(3\)](#) of the EPA Act against the decision of the Planning and Assessment Commission ("PAC") on 23 December 2013, as delegate of the Minister, the first respondent, to give Project Approval to the continued operation and extension of an existing sand quarry at Calga, NSW ("the Calga Sand Quarry Project").

The land the subject of the Project Approval is owned by Rocla Materials Pty Ltd ("Rocla") which was the second respondent.

A number of engravings and sites had been identified on or in the vicinity of the Rocla land, which, it was accepted, are of particular significance for an understanding of the Aboriginal cultural landscape. Of particular significance to Aboriginal people is a rock engraving called the 'Women's site'. It was accepted, given the heavily vegetated environment of the proposed Stage 4 extraction area, that future investigations of the Rocla land might uncover new sites which may further inform the cultural landscape, and /or possibly heighten the significance of the 'Women's site'.

Issues:

- (1) whether the investigations undertaken to date had been adequate to allow a decision as to whether to grant approval to the Project Application;

- (2) whether the consultation with relevant stakeholders had been adequate to grant approval to the Project Application;
- (3) whether the assessment of the cultural significance of the Rocla land (and, in particular, the Stage 4 Extraction Area) had been adequate to allow a decision as to whether to grant approval to the Project Application;
- (4) whether the assessment of the impacts of the Project on the Aboriginal cultural heritage of the Rocla land had been adequate to allow a decision as to whether to grant approval to the Project Application;
- (5) whether the proposed mitigation measures appropriately ameliorated any impacts on Aboriginal cultural heritage; and
- (6) whether the Project was in the public interest.

Held: upholding the appeal and refusing the amended application for the Calga Sand Quarry Project:

- (1) there was little consideration of Aboriginal landscape use in its regional setting in the evidence and this was a fundamental flaw in the application: at [258]-[263]. There was credible evidence before the Court that there are extensive areas which may contain rock engravings which are yet to be explored, and that these further investigations should be carried out before a decision is made about granting consent to the Project Application: at [284]. Test excavation of subsurface deposits should be conducted as part of the investigations into Aboriginal heritage of the Rocla land: at [294]-[297]. Therefore, the investigations undertaken to date had not been adequate to allow a decision as to whether to grant approval to the Project Application: at [298]-[300];
- (2) given the rarity of the Women's site and the potential significance of the site in the locality, including the development site, it was imperative that the outcomes of the investigations of the Stage 4 area inform the consultation process with the relevant Aboriginal stakeholders so their views could be considered in the assessment of the Project Application: at [330]. Consultation with the Aboriginal stakeholders was incomplete: at [331];
- (3) at this stage there was insufficient knowledge about the cultural significance of the site to grant development approval: at [308]-[310]. The ethnographic, historical and archaeological investigations had not been sufficient to demonstrate the full heritage values of the known sites; they had not been adequate to disprove that more sites of significance in themselves (or sites which would add significant information to the already known demonstrated significant Aboriginal Cultural heritage of the area) would be discovered: at [335];
- (4) Rocla's proposal to investigate, assess and conserve and salvage sites in the course of quarrying as part of the Conservation Management Plan ("CMP") presented a very real risk that new significant sites and/or information which might enhance the significance of known sites would be discovered too late to influence land use decisions or to conserve other discovered significant sites in the cultural landscape: at [336];
- (5) the mitigation measures proposed were not adequate to protect sites or information found by further investigations: at [338]-[339]. The Respondents' draft conditions did not satisfactorily address the Aboriginal cultural heritage issues raised by the evidence: at [463];
- (6) in the absence of sufficient information the Court had to assume the worst and find that there is a threat of serious and irreversible environmental damage. Therefore it followed that there was a shift in the evidentiary burden and that Rocla must demonstrate that the threat of serious or irreversible damage did not exist or was negligible. On the evidence, the Court was not so satisfied. Prudence dictated that until all the consequences of the decision are known through the identified investigations there should be no approval of the Project. This was not a case of "step wise" or an adaptive management approach whereby uncertainties are acknowledged and the area affected by the Project is expanded as the extent of the uncertainty is reduced: at [458]-[462]. In assessing the proposed mitigation and management measures and the residual impacts on Aboriginal heritage against the benefits of the project including a consideration of the sand resource as being of regional significance, the financial and social benefits of the project, the public interest, the owner's needs, resources, external constraints and the physical condition of the land, the balance in a risk weighted assessment did not weigh in favour of an approval of the Project at this time: at [464].

***Martin & Ors v Hume Coal Pty Ltd (No.2)* [2015] NSWLEC 1550** (Dixon C)

(related decision: *Martin & Ors v Hume Coal Pty Ltd* [2015] NSWLEC 1461 Dixon C)

Facts: the Applicants own land within an exploration licence area over which Hume Coal Pty Ltd (“Hume”) holds an exploration authorisation for the exploration of coal. Hume had served on each of the Applicants a notice under s 142 of the [Mining Act 1992](#) (“the Mining Act”) seeking access to their land pursuant to an access arrangement. The Applicants applied by summons seeking orders and declarations that particular improvements on their land were “dwelling houses, gardens or significant improvements” within the meaning of [s 31](#) of the Mining Act, and as such Hume was prevented from exercising any rights conferred by the licence over the surface of the land including accessing any of the proposed drilling sites by vehicle. The Applicants brought their proceedings directed to s 31 before arbitration under [s 145](#) of the Mining Act concerning the terms of an access agreement had been completed. The Applicants were unsuccessful in their application concerning s 31, and the summons was dismissed. An application by the Respondent for payment of costs in the s 31 proceedings was opposed by the Applicants. The Applicants sought an order that each party bear their own costs of the s 31 proceedings on the basis that determination of the application of the s 31 question was part of the arbitration process, and under [s 152\(1\)](#) of the Mining Act costs of the arbitration are to be borne by each party.

Issue:

- (1) whether the effect of s 152(1) of the Mining Act is to remove the otherwise broad discretion as to costs conferred on the Court by [s 98](#) of the [Civil Procedure Act 2005](#) (“the CP Act”).

Held: dismissing the Applicants’ application to set aside the order for costs made on 13 November 2015, affirming the costs order, and ordering the Applicants to pay the defendant’s costs of the application:

- (1) the dispute resolved by the Court pursuant to s 31(5) of the Mining Act did not form part of the arbitration “hearing” as defined by s 152(1): at [26];
- (2) section 152(1) has no application to proceedings in this Court, whether commenced pursuant to s 31(5) or otherwise: at [27];
- (3) the Mining Act in this instance did not affect the Court’s power under s 98 of the CP Act to order that costs follow the event: at [29]; and
- (4) the Applicants were entitled, under s 31(5), to pursue resolution of these disputes through the Court process, independent of the arbitration hearing, in the expectation that if successful that would be the end of the matter. However, in electing to make that application they bore the risk that they may not be successful, with the result that the usual rule that costs follow the event will apply unless good reason is proffered to justify a departure: at [35].

Court News

Acting Justice and Senior Commissioner Timothy Moore has been appointed a judge of the Land and Environment Court, effective from 4 January 2016. Please see the [Attorney General's media release](#).

The [2014 Annual Review](#) is available, 16 November 2015.