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Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes**

The Government has announced that it has accepted all recommendations of the Review of the *Trees (Disputes Between Neighbours) Act* 2006.

Effective 30 November 2009, the *Valuation of Land Amendment Act* 2009, amends the *Valuation of Land Act* 1916 and the *Heritage Act* 1977 in relation to the valuation of heritage restricted land. (Full explanatory note)

Effective 1 November 2009, the *Crimes (Appeal and Review) Amendment Act* 2009 — makes amendments to the *Crimes (Appeal and Review) Act* 2001 including:

(a) to allow an appeal court to set aside a conviction for the purpose of making an order under s 10 of the *Crimes (Sentencing Procedure) Act* 1999 , and

(b) to make it clear that a person may appeal against both a conviction and sentence, and

(c) to provide that an appeal against conviction is to be by way of rehearing on the evidence given in the original Local Court proceedings rather than on the basis of certified transcripts, and

(d) to enable an appeal court to remit certain matters to the original Local Court on an appeal, and

(e) to remove the current requirement that an appeal court direct that costs be paid to the Registrar of a Local Court, and

(f) to require appeals made to the Land and Environment Court to be lodged with the Registrar of that Court rather than with the Registrar of a Local Court. (Full explanatory notes)

On 16 October 2009, the uncommenced provisions (Sch 1 [1]-[17], [24]-[37] and [39]-[43], sec 2 (1)) of the *Heritage Amendment Act* 2009 commenced. (Sch 1 [38]: not in force.)

Protection of the Environment Operations (Clean Air) Amendment (Vapour Recovery) Regulation 2009 — published 13 November 2009, amends the Protection of the Environment Operations (Clean Air) Regulation 2002 to make further provision to minimise the discharge of petrol vapours that cause damage to the environment by a staged extension of the prescribed control equipment requirements and provides for the issue of penalty notices for certain offences.

The *Aboriginal Land Rights Amendment Act* 2009 will commence on 31 March 2010. (Full explanatory notes)

Environmental Planning and Assessment Amendment (Asbestos) Regulation 2009 — published 18 December 2009, aims to improve safety where complying development involves bonded asbestos material (of more than 10 square metres) or friable asbestos material by:

(a) requiring details of the estimated area of bonded asbestos material or friable asbestos material involved in a proposed development to be included in the application for a complying development certificate, and

(b) adding a condition to each complying development certificate requiring that development involving asbestos to be undertaken by a business that is licensed under the Occupational Health and Safety Regulation 2001, and

(c) requiring a contract that evidences compliance with the condition (and specifies the landfill site lawfully able to accept asbestos to which any removed asbestos will be delivered) to be provided to the principal certifying authority before any development pursuant to the complying development certificate commences.

Protection of the Environment Operations (Waste) Amendment Regulation 2009 — published 18 December 2009:

(a) amends Schedule 1 to the *Protection of the Environment Operations Act* 1997 (the Act) with respect to the scheduled activities of non-thermal treatment of liquid waste and non-thermal treatment of waste oil and the definition of building or demolition waste, and

(b) amends the Protection of the Environment Operations (Waste) Regulation 2005 with respect to the definition of *scheduled waste facility*, certain deductions from waste contributions payable under section 88 of the Act and record-keeping requirements for certain waste.

- ## Consultation Drafts

Court Information Bill 2009 (1 October 2009) in respect of access to information held by courts.

For the Plantations and Reafforestation Amendment Bill 2009 (25 November 2009) and the Plantations and Reafforestation (Code) Amendment Regulation 2009 (2 December 2009) submissions close on 12 February 2010. Further information is available on the Department of Primary Industries website - Plantations Act and Code Review.

- ## State Environmental Planning Policy (SEPP) Amendments

The SEPP (Major Development) 2005 has been amended by the following:

- SEPP (Major Development) Amendment (Sandon Point) 2009 — published 27 November 2009, designates Sandon Point as a state significant site.
- SEPP (Major Development) Amendment (Sydney Olympic Park) 2009 — published 2 October 2009, designates Sydney Olympic Park as a state significant site.
- SEPP (Major Development) Amendment (Wahroonga Estate) 2009 — published 18 December 2009, designates the Wahroonga Estate site as state significant.

State Environmental Planning Policy No 62—Sustainable Aquaculture (Amendment No 4) — published 18 December 2009, allows for pond-based and tank-based aquaculture in nominated zones. Further information is available in the circular issued by the Department of Planning.

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Asbestos) 2009 — published 18 December 2009, imposes new standards and requirements for anyone that removes or

demolishes asbestos material in relation to complying or exempt development. For further information see the circular issued by the Department of Planning.

SEPP (Western Sydney Employment Area) Amendment (Savings) 2009 — published 2 October 2009, amends the savings provision in the SEPP (Western Sydney Employment Area) 2009.

SEPP (Infrastructure) Amendment (Riding for the Disabled Centre) 2009 — published 20 November 2009.

SEPP (Housing for Seniors or People with a Disability) Amendment (Site Compatibility Certificates) 2009 — published 4 December 2009, in conjunction with the Native Vegetation (Application of Act) Regulation 2009 — published 4 December 2009, amends the *Native Vegetation Act* 2003 to exclude land for which a site compatibility certificate has been issued in accordance with State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, from the operation of that Act. More information is available in the circular and application guidelines issued by the Department of Planning.

- **Miscellaneous**

NSW Legislative Council's Standing Committee on State Development Report on the NSW Planning Framework was published on 10 December 2009 (please note the report is over 300 pages). The Summary of Recommendations are:

(a) that the Minister for Planning establish an independent expert and representative group to undertake a fundamental review of the NSW planning framework with a view to formulating recommendations for legislative, strategic planning and system changes in order to develop a planning system that achieves the best mix of social, economic and environmental outcomes for NSW. That the review group include representatives from urban, coastal, and regional/rural areas and include representatives who are practitioners of the planning system. That the Department of Planning (DOP) and other State agencies provide support to the review group in undertaking its task. That the findings of the review group be subjected to broad community review and input and build on the work of this Committee's report. That the review commence in 2010, recognising it may take up to five years to complete;

(b) that the NSW Government develop and implement common regional boundaries for use by government agencies and the planning process;

(c) that the DOP develop a number of new regional strategies to ensure that there is an appropriate regional strategy in place for all local government areas across the State. That as a first step the DOP consult with local government not currently within a regional strategy area to determine appropriate and manageable new regional strategy boundaries;

(d) that the DOP review the Standard Instrument LEP template with a view to developing a number of templates that reflect the different needs of metropolitan, rural and coastal local government areas;

(e) that the NSW Government provide additional funding to local councils, the DOP and the Parliamentary Counsel's Office so all councils have a Standard Instrument LEP made within the next two years;

(f) that the DOP develop best practice electronic planning systems and support their implementation at the local government level with additional funds and training, if needed; and

(g) that the process for the granting of mining exploration licences be amended so that at the same time that a licence is granted, the government appoint an independent committee of stakeholders to determine the terms of reference and manage a strategic and scientific assessment of natural resource constraints, which is to be funded by the mining company.

NSW Legislative Assembly Standing Committee on Natural Resource Management (Climate Change) - Final Report "Return of the Ark: The adequacies of management strategies to address the impacts of climate change on biodiversity" - published on 3 December 2009. The List of Recommendations (30) commence on page viii of the report (please note it is over 120 pages).

- **Civil Procedure Amendments**

Uniform Civil Procedure Rules (Amendment No 30) 2009 — published 11 December 2009. The objects of these Rules include:

(a) to clarify the circumstances in which a court should allow proceedings to be commenced or carried on as representative proceedings; and

(b) to make changes to rules dealing with subpoenas to produce documents to ensure that the Uniform Civil Procedure Rules 2005 remain consistent with the Federal Court Rules in respect of subpoenas.

- **Mining Legislation Amendments**

Mine Subsidence Compensation Amendment (Claims and Contributions) Regulation 2009 — published 18 December 2009, amends the Mine Subsidence Compensation Regulation 2007:

(a) to enable up to 3 years of equivalent rent to be claimed (in special circumstances) in respect of buildings or works which are untenantable, under repair or in the course of construction by reason of damage from subsidence; and

(b) to prescribe the rates of contributions payable by the proprietors of colliery holdings to the Mine Subsidence Compensation Fund for the 2009 calendar year.

Mining Amendment (Miscellaneous) Regulation 2009 — published 18 December 2009, amends the Mining Regulation 2003:

(a) to prescribe that, in addition to a registered valuer, an Australian lawyer of at least 7 years standing may carry out an inquiry and report in relation to an objection to an opal prospecting licence or a significant improvement claim;

(b) to prescribe that the person to whom any such inquiry and report is referred must take certain steps in carrying out the inquiry and report; and

(c) to declare that certain activities in specified areas are taken not to be mining for the purposes of the *Mining Act* 1992, which will allow for the rehabilitation of abandoned mine sites in those areas.

Judgments

High Court of Australia

ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51 (9 December 2009) (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J in dissent)

Action commenced in the original jurisdiction of the High Court.

Facts: The plaintiffs conducted farming enterprises near Hillston in New South Wales. The plaintiffs were registered proprietors of an estate in fee simple of at least part of the land upon which they conducted their enterprise. The lands are located near the Lachlan River and within the lower Lachlan Groundwater System. Until 1 February 2008 the plaintiffs had a number of bore licences issued under the *Water Management Act* 1912. The licences permitted the holder to use a bore to extract water from the ground. The plaintiffs used the groundwater to irrigate their properties. The plaintiffs also had licences to take water from the Lachlan River and this surface water was also used in irrigation. Because it was usually less expensive to use surface water rather than groundwater, surface water was generally used in preference to groundwater extracted under the bore licences. The amount of groundwater the plaintiffs used varied from year to year.

On 1 February 2008 the bore licences were replaced with new licences called aquifer licences. These were issued under the *Water Management Act* 2000. The new aquifer access licences permitted the plaintiffs to take less water than the bore licences had allowed. The loss represented a decrease in entitlements under the bore licences of about 66%-77%. On 6 February 2009 the plaintiffs were offered structural adjustment payments by the State pursuant to a funding agreement between the State and the Commonwealth.

Issues:

(1) the central issue was whether the reduction in the plaintiffs' entitlement to water without any legal right to compensation other than the proposed structural adjustment payments being inadequate had been an acquisition of their property otherwise than on just terms contrary to s 51(xxxi) of the Constitution; and

(2) if so, then a number of subsidiary issues arose, in particular whether the Commonwealth lacked executive power pursuant to s 61 of the Constitution to enter into a funding agreement and whether the Act authorising the CEO of the National Water Commission to enter into the funding agreement on behalf of the Commonwealth was invalid.

Held: Dismissing the appeal the majority held that:

(1) the bore licences that were cancelled were a species of property: at [147] per Hayne, Kiefel and Bell JJ, [197] per Heydon J. French CJ, Gummow and Crennan JJ were equivocal as to the proprietary characteristics of the bore licences: at [69];

(2) the reduced groundwater entitlements were not the subject of private rights enjoyed by the plaintiffs. Rather, it was a natural resource and the State had the power to limit the volume of water to be taken from that resource. The State exercised that power from time to time by legislation imposing a prohibition upon access to and use of that natural resource, which might be lifted or qualified by compliance with a licensing system. The changes about which the plaintiffs complained implemented the policy of the State respecting the use of a limited natural resource but did not constitute an 'acquisition' by the State in the sense required by s 51(xxxi). In this regard 'acquisition' is construed in s 51(xxxi) to mean an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of the property. It is to be distinguished from a deprivation or taking: French CJ and Gummow, Crennan JJ at [82]-[84], Hayne, Kiefel and Bell JJ at [147]-[153]; and

(3) because of the Court's conclusion that the replacement of the plaintiffs' bore licences did not constitute an acquisition of property within the meaning of s 51(xxxi) of the Constitution, the subsidiary questions of invalidity with respect to the funding agreement did not arise.

NSW Court of Appeal

- **Aboriginal Land Rights**

Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council & Anor [2009] NSWCA 352 (Hodgson and Macfarlan JJA, Basten JA in dissent)

First instance LEC decision: *New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands* [2008] NSWLEC 241 (Sheahan J and Davis AC)

Facts: On 22 February 2000 the New South Wales Aboriginal Land Council (NSWALC) lodged aboriginal land claims relating to land in the Berowra area of Hornsby Shire. On 19 May 2000 the Metropolitan Local Aboriginal Land Council (MLALC) also lodged a land claim in relation to land in the Berowra area (together, the Land Councils).

On 25 November 2005 the Minister administering the *Crown Lands Consolidation Act* 1913 refused each of the claims on the basis that:

(a) part of the lands were used by the public for recreational activities such as bushwalking and therefore the land was "needed or likely to be needed for the essential public purpose of nature conservation";

(b) part of the lands were "needed or likely to be needed as residential land";

(c) the whole of the lands were "lawfully used and occupied" by Hornsby Shire Council; and

(d) the whole of the lands were "lawfully used and occupied" by the general public, "for the purpose of public recreation and bush regeneration".

Following the rejection of the land claims by the Crown Lands Minister the Land Councils exercised the right given to them by s 36(6) of the *Aboriginal Land Rights Act* 1983 (the Act) to appeal to the Land and Environment Court. To prove that the land the subject of the claims was not "claimable Crown lands" the Crown Lands Minister relied on certificates issued by him pursuant to s 36(8) of the Act. The certificates stated that the relevant land "was on the date when [the claims were] made needed or likely to be needed for an essential public purpose". The relevant public purpose was not identified in the certificates but was revealed in evidence before the Court to be nature conservation.

The primary judge held that the Minister had not established that the Crown lands the subject of the claims were required as residential lands or for nature conservation, and were in part already lawfully used or occupied. The judge also held the certificates to be invalid and therefore inadmissible. The primary judge therefore held that the Minister did not establish that there were proper grounds for rejection of the land claims.

Issues:

(1) whether in the opinion of the Crown Lands Minister the lands were needed or likely to be needed as residential land as at the date when the claims were made in 2000;

(2) whether the lands claimed were required for an essential public purpose, namely, nature conservation, upon certificates purportedly issued pursuant to the Act and whether these certificates were invalid on the basis of various grounds of judicial review (wrong question asked and failure to take into account mandatory relevant considerations); and

(3) whether as at the date of the claim any part of the subject land was not claimable Crown land on the ground that it was lawfully used or occupied.

Held:

(1) the Minister could not demonstrate the necessary opinion that the lands were needed or likely to be needed as residential land. The views and opinions held by the managing director of Landcom, a New South Wales government agency, could not constitute the opinion of the Crown Lands Minister. This was because there was no evidence of any express conferral of authority by the Crown Lands Minister on Landcom or its managing director: at [70] and [125]-[134];

(2) the certificates were valid and admissible and pursuant to s 36(8) of the Act had conclusive effect. The Minister was asked to consider matters which were relevant in the briefing material put before him and therefore the contention that the Minister had asked the wrong question as the result of those posed for his consideration in the briefing material failed: at [33], [148]-[149]. Accordingly it followed that the primary judge's conclusion that the certificates were void was erroneous in law. In relation to the alleged error that the Minister failed to take into account mandatory relevant considerations, this ground was also rejected by the Court. It therefore concluded that the primary judge was in error in so finding: at [33] and [150]-[164]; and

(3) the Court upheld the primary judge's conclusion that occasional entry onto, the existence and maintenance of fire trails, and/or the existence of council or community sponsored generic plans of management dealing with bushcare – even if work is done on the land pursuant to them – were insufficient to establish lawful use and occupation or control by the council: at [166]-[172].

- **Compulsory Acquisition of Land**

Sydney Water Corporation v Caruso [2009] NSWCA 391 (Allsop P, Tobias JA and Sackville AJA)

First instance LEC decisions: *Caruso and Ors v Sydney Water Corporation* [2008] NSWLEC 320 (Pain J); *Caruso and Ors v Sydney Water Corporation (No 2)* [2008] NSWLEC 331 (Pain J)

Facts: By notice published in the Government Gazette on 23 March 2007, the appellant, Sydney Water Corporation, compulsorily acquired part of the land owned by each of the respondents (the acquired land) for the public purpose of the provision of a trunk drainage scheme pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 (JTA). The respondents lodged objections to the amounts of compensation they were offered in the Land and Environment Court.

In order to assess the market value of the acquired land and any increase in the value of the residue land caused by the acquisition it was necessary to determine the underlying zoning of the area. Pain J in [2008] NSWLEC 320 found that the underlying zoning for the determination of market value is rural.

It was also necessary to determine the highest and best use to which the acquired land could be put given that part of this land surrounded a creek and was in a flood zone.

The appellant appealed to the NSW Court of Appeal under s 57(1) of the *Land and Environment Court Act* 1979 (LECA).

Issues: The appellants challenged the following findings made by Pain J at first instance:

(1) that the rezoning of the residue land and any increase in value or "betterment" of the land was not caused by the public purpose of the appellant in undertaking trunk drainage works on the acquired land but rather reflected the overall planning aims and objectives of the Baulkham Hills Shire Council;

(2) that the prudent hypothetical parties to the sale of the acquired land would have assigned value to it on the basis that they would have been advised that the highest and best use of the acquired land within the flood zone was its development pursuant to the implementation of a regional drainage scheme within the creek corridor (the Bewsher Scheme), which would not require rezoning, was likely to receive council approval and was likely to be implemented on a property-by-property basis rather than through cooperation amongst property owners;

(3) that the primary judge intended to adopt an approach whereby when expert evidence conflicted, all doubts were to be resolved in favour of the claimant where practicable in order to achieve a just result, in accordance with the passage from the judgment of Talbot J in *McBaron v Roads and Traffic Authority of New South Wales* (1995) 87 LGERA 238 at 244-245; and

(4) that it was not an attribute or characteristic of the lands within the flood zone that these were required for catchment trunk drainage.

The respondents cross-appealed and sought to challenge the following findings by Pain J:

(1) that disregarding any increase or decrease in the land value caused by the carrying out of the public purpose for which the land was acquired in accordance with s 56(1)(a) of the JTA, at the date of the acquisition, the underlying zoning of the acquired land would have remained Rural 1(a); and

(2) that the claims of most of the respondents for the costs of any stamp duty incurred or proposed to be incurred by them in acquiring property to replace the acquired land were precluded by s 61(b) of the JTA.

Held: Dismissing the appeal and cross-appeal, their Honours found:

(1) section 56(1)(a) of the JTA only applied to any increase or decrease in the value of the acquired land, and did not apply to assessing the value of any residue land. Rather, s 55(f) of the JTA was applicable to any question of "betterment", that is, any increase in the value of land adjoining the acquired land by reason of the carrying out of the public purpose for which the land was acquired. Whether the rezoning of the residue land was due to the public purpose for which the land was acquired so to engage s 55(f) of the JTA is a question of fact and was therefore unassailable on an appeal under s 57(1) of the LECA: at [77];

(2) the finding that a prudent hypothetical purchaser was likely to consider that it would be feasible to obtain development consent for a proposal such as the Bewsher Scheme on the basis that any detention basins otherwise planned for the flood zone could ultimately be located elsewhere was a finding of fact and therefore unassailable on an appeal under s 57(1) of the Court Act: at [95]-[96];

(3) (a) as to whether legal error was disclosed in the reasoning of primary judge, the primary judge's expression of principle that she should resolve competing expert evidence in favour of the claimant involved legal error. The general principle that in determining the compensation payable to a dispossessed owner doubts should be resolved in favour of a more liberal estimate does not detract from the need to engage with and evaluate the evidence of competing witnesses (per Allsop P, Sackville AJA agreeing). Further where conflicting expert evidence is given in relation to a hypothetical as distinct from a real situation involving the use of land, a primary judge is entitled to resolve those doubts, like other doubts bearing upon value, in favour of the dispossessed owner (per Tobias JA);

(b) as to the test of whether legal error vitiates a decision, in order for a decision to be vitiated by error, the error has to be one upon which the decision depends. In this case the alleged error in finding that a hypothetical prudent purchaser would be prepared to add value to the purchase price he or she would be prepared to pay for the land in the flood zone on the basis that a scheme such as the Bewsher Scheme may obtain development consent was not an error involving the resolution of the conflicting expert evidence: at [148]-[149];

(4) a determination of the characteristics or attributes of land involves a finding of fact and was therefore unassailable on an appeal under s 57(1) of the LECA;

(5) a finding as to the underlying zoning of the acquired land was not a decision on a question of law and was therefore unassailable on an appeal under s 57(1) of the LECA; and

(6) under s 61(b) of the JTA, if the market value of land was assessed on the basis that the land had the potential to be used for a purpose other than that for which it was used prior to the acquisition, compensation was not payable for any financial loss that would necessarily have been incurred in realising that potential. Thus, s 61(b) denied a claim under s 59(d) of the JTA for stamp duty costs incurred in connection with the purchase of land for relocation where such relocation was necessary to

enable the realisation of a potential use of the acquired land for a purpose other than that for which it was used prior to the acquisition; at [184]-[188].

- **Statutory Interpretation**

Hastings Co-operative Ltd v Port Macquarie Council [2009] NSWCA 400 (Allsop P and Basten JA, Handley AJA in dissent)

First instance LEC decision: *Hastings Co-operative Ltd v Port Macquarie Hastings Council* [2009] NSWLEC 99; (2009) 167 LGERA 205 (Lloyd J)

Facts: In August 2008, the respondent council granted development consent for a supermarket in Wallace Street, Wauchope. The supermarket was characterised as a "general store" which was permissible development, with consent, within the relevant zone under the Hastings Local Environmental Plan 2001 (LEP).

One ground on which the appellant challenged the validity of the development consent was that the supermarket also fell within the definition of a "shop" for the purposes of the LEP. Clause 9 of the LEP sets out what is permitted or prohibited development within the zone. Only specified shops listed in Schedule 2 of the LEP are permissible, with consent, within the zone. Supermarkets and general stores were not on that list.

In the dictionary of the LEP a "general store" was defined as "a shop used for the sale by retail of general merchandise". A "shop" was "a building or place used for the purpose of selling …but does not include a building or place elsewhere specifically defined in this Dictionary or a building or a place used for a land use elsewhere defined in the Dictionary."

Dismissing the appeal, Lloyd J held that a supermarket is not a "shop".

Issues:

(1) whether a "general store" remains within the scope of the definition of "shop" despite the proviso contained within that definition; and

(2) whether anomalies within the statutory context of the definition of "shop" are such as to deny the operation of the definition within cl 9.

Held: Dismissing the appeal, Allsop P and Basten JA found:

(1) "[t]he usual purpose of a definition in a statutory instrument is not to form an operative provision, but to identify some element of an operative provision and thus define its scope of operation": at [16];

(2) the definition of "general store" indicates that it is a subcategory of "shop". A difficulty arises when the meaning of "shop" is incorporated into the operative provisions of cl 9, which would exclude "general store" from the term "shop" as it is elsewhere specifically defined. There was a theoretical difficulty in defining something as a member of a class of which it was not a member. The resolution of that conundrum was to recognise that the definitions operate separately from their context in the operative provisions by construing the definitions separately, as definitions, before notionally inserting their terms into the operative provisions. It was then apparent that a shop, not including a general store, was a prohibited development and a general store is not a prohibited development: at [18];

(3) there was no practical reason why a general store should not fall within the concept of a building or place or a land use elsewhere specifically defined, merely because it used the term "shop" in its own definition. Accordingly, a general store falls within both limbs of the exception to the definition of "shop": at [22] and [24];

(4) it was unclear whether an anomaly arises from the LEP out of the fact that general stores are not excluded as prohibited development when all other "shops", other than those identified in Sch 2 were. Accordingly, there was no contextual basis for inferring an intention to deny the operation of the definition

of "shop" within cl 9 when doing so would serve to rewrite the LEP in order to give it a different operation from that which, in its terms, it had: at [25]-[34]; and

(5) "that a search for logic and consistency within planning instruments is often doomed to fail. … Why one use is permissible and another similar use is prohibited will often be a matter of speculation. Where the language used has an identifiable meaning, that meaning should not be set aside by an attempt to impose logical consistency. … It may be conceded that there is no obvious logic in permitting a general store, but not other forms of shop. Nevertheless, the promotion of logic and consistency provides no sound basis for a court to rewrite a planning instrument." In the present case there was no clear or coherent policy underlying various zoning provisions: at [38]-[39].

Waugh Hotel Management Pty Ltd v Marrickville Council [2009] NSWCA 390 (Hodgson, Campbell and Young JJA)

First instance LEC decision: *Waugh Hotel Management v Marrickville Council* [2007] NSWLEC 775 (Jagot J and Hoffman C)

Facts: The applicant appealed in Class 1 proceedings against the deemed refusal of development consent for alterations and additions to and use of premises in Illawarra Road, Marrickville for a hotel. The proposal included a bar area, a gaming area including gaming machines and a TAB. Rooftop parking spaces were to be occupied by staff. The appeal to the Land and Environment Court was dismissed on the ground that the development would not provide adequate parking to meet its demand; it would create a risk of increased activity, anti-social behaviour and disturbance in the lane at the rear; and that concentration of licensed premises in a disadvantaged location involved a risk of disproportionate alcohol-related harm.

Issues:

(1) whether the grounds for refusal contravened s 209(3)(b) of the *Gaming Machines Act* 2001, which provides:

> A consent authority (within the meaning of the *Environmental Planning and Assessment Act* 1979) cannot:
>
> …
>
> (b) refuse to grant any such development consent to a hotel of registered club for any reason that relates to the installation, keeping or operation of approved gaming machines in a hotel or on premises of a registered club.

Held: Dismissing the appeal:

(1) if a consent authority wished to refuse development consent on a ground the substance of which was an aspect of the operation of the business that might possibly be produced or contributed to by the presence of gaming machines, but might also have been produced by some alternative mode of conducting the hotel, that was not refusing development consent for a reason that relates to the installation keeping or operation of approved gaming machines, within the meaning of s 209(3)(b). The presence of people on the premises could give rise to consequences such as parking, safety or noise generation, that had to be considered regardless of the reason why those people were there: at [92]; and

(2) the first two reasons for refusal were not ones that related to the installation, keeping or operation of gaming machines, and in arriving at the third reason the focus was deliberately on harm created by alcohol alone after excluding any harm arising from gaming: at [123].

- **Apprehension of Bias**

Adamson v Ede [2009] NSWCA 379 (Giles, Hodgson and Campbell JJA)

First instance NSWSC decision: *ACN 097 590 817 Pty Ltd as Trustee of the ACN Trust v Ede; Adamson v Ede* [2007] NSWSC 1384 (Windeyer J)

Facts: Mr Ede had borrowed $80,000 from Mr Adamson's family trust (the Trustee) to settle Family Court proceedings. Upon settlement Mr Ede became the sole registered proprietor of a rural property near Bulahdelah, known as Lot 106. At all times Mr Adamson was Mr Ede's solicitor.

The Trustee brought proceedings in the Supreme Court of NSW claiming a two-thirds beneficial interest in Lot 106 and sought an order that Mr Ede repay all loan monies. Mr Ede at all times acknowledged he had borrowed $80,000 from the Trustee.

At first instance, Windeyer J held that the Trustee was entitled to a repayment of $80,000 plus interest and dismissed all other claims by the Trustee, including alleged further loans. In a cross-claim against the Trustee and Mr Adamson personally, Mr Ede successfully had a charge over Lot 106 in favour of Mr Adamson declared void and two caveats (lodged by the Trustee and Mr Adamson) over Lot 106 were ordered to be withdrawn.

Issues:

(1) whether the judge failed to accord the Trustee procedural fairness in the manner in which he conducted the proceedings, in particular – by not giving Mr Adamson an opportunity to be heard before making adverse and serious findings of credit against him, and – by not giving Mr Adamson an opportunity to be heard before making certain findings of facts;

(2) whether the judge erroneously rejected evidence tendered by the appellants;

(3) whether the judge erred by holding that the onus of proof of the validity of a document purporting to transfer Lot 106 to the appellants rested on the appellants;

(4) whether the judge displayed apprehended bias against the appellants; and

(5) whether the judgment and findings appealed against were obtained by fraud of Mr Ede.

Held: Dismissing the appeal on all grounds:

(1) Mr Adamson could have been in no doubt that adverse allegations were being made against him, and admitted as much when making an application for the judge to disqualify himself: at [106]. A fundamental task of the trial judge is to make decisions on credibility, which inevitability involves taking demeanour into account. The trial judge was under no obligation to warn Mr Adamson that he may make findings detrimental to him on the basis of his perceived evasiveness. Procedural fairness does not require the decision maker to disclose what he thinks about the evidence before he makes a final decision, as to do so risks conveying an impression of prejudgment (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63: (2006) 228 CLR at 166 applied): at [110]-[119];

(2) it was for the party seeking to have evidence admitted at trial to explain the basis upon which the evidence was relevant and admissible. As Mr Adamson gave no such explanation to the trial judge, there was no error in rejecting them: at [94]. A party is bound on appeal by the manner in which he or she conducted the case in the court below: at [96]. Section 75A of the *Supreme Court Act* 1970 requires the Court not to receive further evidence on appeal except on special grounds. There are no '*special grounds*' here as the documents now sought to be tendered were all in existence at the time of the trial and relate to topics which Mr Adamson abandoned while attempting to cross-examine: at [141];

(3) as the defence denied the existence of the agreement sued on, for Mr Adamson to prove his case he bore the onus of proving the agreement he sued on. The transfer was part of the agreement: at [150]. Onus of proof played no role in the outcome. The trial judge's findings were about the circumstances in which the transfer was executed, leading to the conclusion that Mr Adamson had not made out the

agreement on which he sued. As such it is not appropriate for the Court to embark, unaided, on an examination of the scope of the presumption of regularity, and other presumptions that existed concerning documents: at [152]-[153];

(4) Mr Adamson relied on the trial judge's rulings on onus of proof of the authenticity of the transfer, an adverse finding on costs in an interlocutory injunction application, and the failure to warn of an adverse finding on credit and the opportunity to provide further submissions on these findings as grounds for apprehended bias. As the appellant failed on all these challenges on appeal, there was no bias; and

(5) where it is alleged that a judgment has been obtained by fraud, the fraud allegation should be brought in separate proceedings, and not by an appeal from the judgment alleged to have been obtained by fraud: at [184].

Land and Environment Court of NSW

Judicial decisions

- **Practice and Procedure**

Rivers SOS Inc v Minister for Planning (No 2) [2009] NSWLEC 216 (Preston CJ)

Facts: The applicant, Rivers SOS Inc, brought Class 4 proceedings challenging the validity of an approval granted by the Minister for Planning of a coal project in Helensburgh on five grounds. To establish grounds two, four and five of its further amended points of claim the applicant sought to rely on the expert evidence of a civil engineer who specialises in groundwater and related earth science issues in the mining industry. This evidence was not before the Minister at the time of decision-making. The respondents objected to the evidence of the expert on the basis of relevance and that the pleaded grounds of review did not justify the introduction of the expert evidence.

Issues: Whether the expert evidence was relevant to establish:

(1) that the Minister's approval would result in a permanent reduction in water quantity or quality and adverse environmental consequences of subsidence impact (ground two);

(2) a set of possible offsets to compensate for the impact of the development from which the Director-General could select as required by Condition 6 of Schedule 6 of the Minister's approval (ground four); and

(3) that the amended project had substantial and different impacts to the original project (ground five).

Held: Allowing the expert evidence, his Honour found:

(1) the expert's evidence read fairly and with the other paragraphs to which they expressly or impliedly related and in the context of the whole affidavit, established a sufficient factual basis and reasoning warranting its admissibility: at [12]; and

(2) the evidence would assist in establishing facts relevant to the issues in the pleaded grounds of review, including that the project approved by the Minister would result in a permanent reduction in water quantity or quality, the adverse environmental consequences of subsidence impact, a set of possible offsets that could be provided to compensate for the impact and that the amended project has substantial and quite different impacts to the original project: at [6], [8] and [10]

Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 4) [2009] NSWLEC 231 (Biscoe J)

Facts: The prosecutor applied under s 38 of the *Evidence Act* 1995 for leave to question Mr Mura, a prosecution witness in the proceedings and a director of the defendant company, on the evidence he gave in cross examination. Mr Mura gave evidence to the effect that he had no discussion with Mr Jack Issa, his co-director of the defendant company, about lending money to the company to pay a contractor for land clearing, the subject of the charge against the defendant company. Mr Mura's evidence was unfavourable to the prosecutor and the prosecutor submitted that it was inconsistent with answers given by Mr Mura in a prior record of interview with the prosecutor. The prosecutor submitted that if it had known the details of the money lent, it would have treated certain financial or accounting records differently.

Issues:

(1) whether leave should be granted to allow further questioning of the prosecution witness by the prosecution after the defence had concluded its cross-examination.

Held: Granting leave:

(1) s 38(4) of the *Evidence Act* suggests that an application for an unfavourable witness to be questioned should ordinarily be made during the course of the evidence-in-chief of the witness or before the other party cross-examines the witness. Although the witness had already been cross-examined in this case, granting leave would not unduly lengthen the hearing, would not be unfair to either the defendant or the witness, was of some importance and because the proceedings were of a criminal nature (consideration required under s 192 of the *Evidence Act*): at [8], [11] and [12].

Norton v Blacktown City Council (No 2) [2009] NSWLEC 218 (Pepper J)

(related decision: *Norton v Blacktown City Council* [2009] NSWLEC 214 (Pepper J))

Facts: Mr Coruhlu was a childcare centre developer. He employed the applicant, Mr Norton (who was a specialist in childcare development as well as a real estate agent, business agent and strata manager) to conduct the development application process for a childcare centre in the Blacktown area. Mr Norton was named as the applicant in the development application, and when the application was refused by Blacktown council, he was also named as the appellant in proceedings appealing the council's decision in this Court. Mr Norton considered this to be a continuation of his role as coordinator of the development. Mr Coruhlu agreed to take care of all costs associated with the legal proceedings and it was he who gave instructions to the solicitors. Mr Norton was, however, copied in on some correspondence between Mr Coruhlu and his legal advisers. On 3 October 2008 Mr Norton was granted leave to discontinue the proceedings. In the process he certified that "the applicant does not represent any other person": at [37]. In related proceedings Mr Norton was ordered to pay the council's costs of the discontinued proceedings. Mr Coruhlu, without Mr Norton's knowledge, initially agreed to pay the council's costs of discontinuance of $29,000 but later reneged. On 23 September 2009 Mr Norton applied to join Mr Coruhlu to the proceedings and for him to pay the discontinued proceedings costs order.

Issues:

(1) whether Mr Coruhlu, as a non-party, could be joined to proceedings that had been discontinued and whether he could be ordered to pay the discontinued proceedings cost payable by Mr Norton.

Held: Dismissing the application her Honour found:

(1) r 42.3 of the Uniform Civil Procedure Rules 2005 (UCPR) can, in some instances, enliven a court's power to award costs against a non-party who purports, without authority, to conduct proceedings in the name of another person, thereby being a true "party". In this case, there was insufficient evidence of visible or active participation by Mr Coruhlu in the proceedings to warrant his inclusion within the ambit of the term "party". Therefore costs were not ordered to be paid by Mr Coruhlu: at [29];

(2) rr 6.24 and 6.26 of the UCPR state that a court may order a non-party to be joined if that person is a person who ought to have been joined as a party or a proper party to the proceedings. Her Honour found based on the evidence, that while the proceedings were on foot, Mr Coruhlu "ought to have been joined as a party" because the outcome of the proceedings would have affected his rights and liabilities given his interest in the property. Had Mr Norton made the application prior to his discontinuance of the proceedings, it is likely that Mr Coruhlu would have been joined to the proceedings: at [36]; and

(3) merely because the proceedings had been discontinued did not mean that a party to the proceedings was precluded from seeking supplemental orders or ancillary relief such as the joinder of a party or for costs to be paid by a non-party. The Court did have a supplemental jurisdiction to join a party to proceedings for the purpose of making an application for costs in some circumstances notwithstanding that the proceedings have been discontinued provided the non-party person would otherwise be a proper party to the proceedings: see r 6.26(2)(a) of the UCPR. Such an order would not vary or impact upon the final judgment made in the proceedings. Such an order would not contravene the statutory regime in respect of costs set out in r 42 of the UCPR: at [40] and [53].

- **Bias**

Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd [2009] NSWLEC 228 (Biscoe J)

Facts: A disqualification application was made by the defendant company on the basis that his Honour had on the previous day sentenced a director of the defendant company. The director had admitted that the corporation committed the offence. It followed, by reason of his status as a director of the corporation that he was also guilty by reason of the operation of s 45(1) of the *Native Vegetation Act* 2003. The defendant company did not plead guilty to the offences and had a different statement of agreed facts.

Issues:

(1) whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the proceedings.

Held: Dismissing the application, his Honour found:

(1) the previous proceedings involved the conviction of the company director on his plea of guilty essentially on the basis of agreed facts and the prosecutor's uncontested submissions. In this case the defendant company had pleaded not guilty, with a different statement of agreed facts and the defendant company intended to put in contest whether the relevant conduct of Mr Mura could be attributed to it. On this basis, a fair-minded properly informed lay observer would not reasonably apprehend that his Honour would not bring an impartial mind to the resolution of the issues, and would understand that this case would be decided only on the basis of the evidence before the Court: at [10]-[11] citing *Johnson v Johnson* (2000) 201 CLR 488 at [13] as authority.

- **Judicial Review**

Dates v Karuah Local Aboriginal Land Council [2009] NSWLEC 221 (Pain J)

(related decision: *Dates v Roads and Traffic Authority of NSW* [2009] NSWLEC 82; (2009) 167 LGERA 82 per Biscoe J)

Facts: The applicant, Mr Dates, is a member of the Worimi people in the Karuah area and claimed to have native title rights and interests over the land that was to be sold by the Karuah Local Aboriginal Land Council (the first respondent) to the RTA (the third respondent). The applicant brought Class 4 proceedings

challenging the sale pursuant to s 40AA(1) of the *Aboriginal Land Rights Act* 1983 (ALRA) and raising issues against the same respondents that related to previous proceedings before Biscoe J in [2009] NSWLEC 82.

Issues:

(1) whether the applicant was estopped from pursuing the proceedings because the issues raised were matters that should have been raised by it in [2009] NSWLEC 82 (*Anshun* estoppel).

Held: Dismissing the application, her Honour found that:

(1) the operation of s 40AA(1) of the ALRA properly belonged to the subject matter of Biscoe J's earlier decision. Therefore an *Anshun* estoppel arose and the applicant was prevented from pursuing the proceedings: at [20]; and

(2) her Honour also found that s 40AA(1) of the ALRA did not apply to the sale of the land from the first respondent to the third respondent: at [58].

Casa v City of Ryde Council [2009] NSWLEC 212 (Pepper J)

Facts: The applicants were property developers who wanted to demolish two houses and erect five villas in Gladesville. The applicant's agent, Orth Constructions, lodged an application for development consent on 4 December 2001. The consent was granted with deferred commencement conditions on 16 July 2002. The deferred commencement conditions were required to be satisfied before the respondent council could enliven the council's jurisdiction to determine whether the consent became operative. Once deferred commencement conditions were deemed satisfied by the council, the development consent was operative and remained valid for five years.

One deferred commencement condition was the requirement for the applicant to lodge with council an amended landscape plan that included a 7m setback and details of additional dense landscaping to screen the driveway on the southern boundary. Orth Constructions lodged a landscape plan on 12 August 2002 that included the 7m setback but did not include landscaping details. The council notified Orth Constructions that the plan nevertheless satisfied the deferred commencement conditions and that the consent was operative as at 27 August 2002 (the first notification). Mr Casa stated that he was not aware of this notification.

Another condition was for Orth Constructions to obtain a construction certificate. Orth Constructions applied for one on 16 June 2004. An amended landscape plan was submitted by Orth Constructions to council on 20 July 2004 as a result of applying for the construction certificate. On 17 December 2004 the council wrote to Orth Constructions stating that the amended landscape plan submitted in June 2004 was satisfactory and the consent was operative from 17 June 2004 (the second notification).

The council argued that the 17 December 2004 notification was an error. The applicant submitted that this notification was the correct notification. If it was not, the parties agreed that the consent had lapsed.

Issues:

(1) which notification was the valid notification. To determine whether the first notification was valid the Court was required to determine whether s 80(3) of the *Environmental Planning and Assessment Act* 1979 established that the council's satisfaction that the conditions of the deferred development consent had been met was a jurisdictional fact: at [9];

(2) whether the first notification was manifestly unreasonable: at [10]; and

(3) whether the council was estopped from denying the representation that the consent was operative in the second notification: at [11].

Held: Dismissing the application, her Honour found:

(1) the question of whether something is a jurisdictional fact turns on the language and construction of the statute. The proper construction of s 80(3) of the EPAA was that it did not establish a jurisdictional fact: at [64]-[70];

(2) the council was satisfied that the deferred commencement condition had been fulfilled even though not all aspects of the condition were complied with. Strict compliance with the deferred commencement condition was not required: at [73]-[75], [78], [80]-[81];

(3) the second notification was invalid. The first notification was valid and therefore the development consent lapsed on 27 August 2007;

(4) the council had evidence before it to support its decision that the deferred commencement condition had been fulfilled. The first notification was therefore not manifestly unreasonable: at [86]-[87] and [64]; and

(5) the council, in carrying out its functions under the EPAA by approving the development consent and issuing a construction certificate was not estopped from asserting that a prohibited decision was of no effect: at [113] citing of *City of Sydney v Waldorf Apartments Hotel Sydney Pty Limited* [2008] NSWLEC 97; (2008) 158 LGERA 67 at [64]-[67] and [70]-[72].

Hill Top Residents Action Group Inc v Minister for Planning [2009] NSWLEC 185 (Biscoe J)

Facts: The applicant, Hill Top Residents Action Group Inc, brought Class 4 proceedings against the first respondent, the NSW Planning Minister and the second respondent, the proponent of a proposed rifle range in the southern highlands. The applicant contended that the Minister's approval of the rifle range was void and the carrying out of work pursuant to the approval was unlawful on three grounds. The rifle range was subject to the State Environmental Planning Policy (Major Projects) 2005 (Major Projects SEPP) that established the land use zones as Zone SP1 Special Activities and Zone E2 Environmental Conservation within the rifle range site.

Issues: The applicant submitted that the Minister's approval was void because:

(1) cl 11 of Part 33 Schedule 3 of the Major Projects SEPP prohibited the project (or sapped the Minister of power to approve it) under Part 3A of the *Environmental Planning and Assessment Act* 1979 (EPAA);

(2) one panel member appointed by the Minister under s 75G(1)(a) to assess the project was not an expert and his lack of appropriate expertise was a jurisdictional fact which had not been established; and

(3) the Minister failed to attach a schedule to the Statement of Commitment and therefore the rifle range's approval lacked finality and was in breach of s 75J(5) of the EPAA which required the proponent to comply with obligations in a Statement of Commitment made by it.

Held: Upholding the application his Honour held:

(1) under cl 11 the catching of bullets on the range danger area was prohibited on the E2 land because the catching of bullets in the rifle range danger area in Zone E2 was an active use, not a passive use. That use was ancillary to the dominant purpose of a shooting range. The rationale for the existence of the range danger area was the shooting range. As a shooting range was not a permissible use on the E2 land the range danger area was also prohibited: at [59];

(2) whether the panel member appointed by the Minister was not an expert as intended by parliament under s 75G was not relevant to the proceedings because the real issue was whether under ss 75K(1)(b) and 75L(1)(c) dissatisfied proponents and objectors are permitted to appeal to this Court if "the project has not been the subject of a report of a panel of experts constituted under s 75G". Those provisions stood rather differently to the concept of jurisdictional fact. They did not stipulate any criterion the satisfaction of which enlivened the exercise of a power or discretion: at [113]-[114]; and

(3) there was no breach of s 75J(5). That section did not impose any obligation on the Minister, instead it provided that the conditions of approval may require the proponent to comply with any obligations in a Statement of Commitments made by the proponent: at [127].

Rivers SOS Inc v Minister for Planning [2009] NSWLEC 213 (Preston CJ)

Facts: The Minister for Planning approved the Metropolitan Coal Project ("the Project") that involved longwall mining under two rivers pursuant to s 75J(1) of the *Environmental Planning and Assessment Act* 1979 (EPAA). The longwall mining near water features requires close assessment and imposition of conditions to prevent, minimise and/or offset environmental consequences. The applicant brought Class 4 proceedings challenging the validity of the approval.

Issues: The applicant raised five grounds of challenge:

(1) the Minister failed to make a decision to approve or disapprove the Project to the extent that it related to particular swamps or, alternatively, invalidly delegated the determination of that to the Director-General. Condition 4(c) of Schedule 3 of the approval prohibited the proponent from undermining the swamps without the written approval of the Director-General and, amongst other things, a description of the measures that would be implemented to manage the potential environmental extraction plan on these swamps. The applicant argued that this condition was fundamental and inseverable from the approval. Its validity results in invalidity of the approval;

(2) the Minister exercised the function to approve the Project without complying with the notice requirements of s 47(3) of the *Sydney Water Catchment Management* 1998 (SWCM Act);

(3) the Minister failed to comply with the provisions of cl 12 of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP) before approving the Project, each of which was a precondition to the exercise of power of approval;

(4) the Minister failed to determine the Project application, in that Condition 6 of Schedule 6 of the approval failed to deal adequately with the issue of the mitigation of impacts of the Project on the Woronora Catchment; as a result, the approval lacked finality; and the effect of the condition was to leave open the possibility that the Project, as approved, would be a significantly different development from that in respect of which application was made. The condition was fundamental to the approval and was not severable; and

(5) the Minister approved the Project with the revised mine plan proposed in a preferred project report submitted to the Director-General which differed substantially from the mine plan which had been the subject of submissions by the public and public authorities and a public hearing by the Planning and Assessment Commission (PAC). This was in breach of a statutory requirement that the PAC conduct a public hearing into the Project or, alternatively, in breach of the principles of natural justice.

Held: Dismissing the proceedings, his Honour found:

(1) the Minister's approval was not whether or not the Project can include the undermining of the swamps as that decision was already approved by the Minister. Rather, the approval was regarding the proposed performance measures and indicators for the proposed undermining of the swamps: at [39]. Those measures were found to be satisfied and approved by the Director-General and the Minister: at [40]-[46];

(2) the Minister complied with the notice requirement through the Department of Planning's letter of 20 October 2008 to the Sydney Catchment Authority as required under s 47(1) of the SWCM Act: at [73]. As the Minister did not exercise the function under s 75J(1) of the Act about which notice had been given, until 22 June 2009, far in excess of 28 days after notice was given to the Sydney Catchment Authority, s 47(3) of the SWCM Act was also complied with: at [74];

(3) the SEPPs – including the Mining SEPP, and hence cl 12 of the Mining SEPP – did not apply at the time the Minister exercised the power under s 75J(1) to approve the Project: at [80]-[87] and [108]-[112];

(4) the Minister dealt with the impacts of the Project on the Woronora Catchment, by preventing, mitigating, remediating and, only as a last resort, providing suitable offsets to compensate for any residual impacts not dealt with by the other mechanisms: at [132]. The fact that the proponent may need, if the circumstances in Condition 6 of Schedule 6 were satisfied, to provide a suitable offset to compensate for the impact to the satisfaction of the Director-General, did not cause the approval to lack finality: at [133]. Condition 6 of Schedule 6 is not outside the power of s 75J(4) of the Act to impose conditions: at [134].

Condition 6 of Schedule 6 could not be said to leave open the possibility that the approved Project would be a significantly different project from that made in the application: at [135]; and see [114]-[136]; and

(5) there was no right, interest or legitimate expectation of the applicant that was affected by the PAC not conducting a public hearing: at [156] and [161]. There were no other rights available to the applicant that required a public hearing: at [157]-[160].

Joly Pty Ltd v Director-General of the Department of Environment, Climate Change and Water [2009] NSWLEC 217 (Pain J)

Facts: The applicant brought Class 1 proceedings against a direction given by the respondent for it to remediate cleared land under s 38 of the *Native Vegetation Act* 2003 (NVA). The aim of the remediation was to regenerate trees to the point where they will survive cattle grazing and to enable a return of wetland breeding for a number of threatened bird species.

The applicant's solicitor annexed to his affidavit numerous agreements between the Commonwealth and NSW governments that outline the framework between the two governments that went towards promoting environmental initiatives and protection of native vegetation.

Issues:

(1) whether making a direction as to how a land owner can use their land pursuant to s 38 of the NVA was an acquisition of land permissible under the NSW *Constitution Act* 1902 and the *Commonwealth of Australia Constitution Act* 1900.

Held: Making the remediation direction, her Honour found:

(1) s 38 of the NVA and the direction did not purport explicitly to acquire the applicant's land: at [60];

(2) s 38 was a valid law: at [58]-[61] relying on *Spencer v Commonwealth of Australia* [2009] FCAFC 38; (2009) 174 FCR 398 at [19] and *Pye v Renshaw* (1951) 84 CLR 58; and

(3) a remediation direction issued under s 38 can restrict activity on the applicant's land: at [63].

- **Existing Use Rights**

Shoalhaven City Council v South Coast Concrete Crushing & Recycling Pty Ltd [2009] NSWLEC 197 (Lloyd J)

Facts: The respondents owned and operated a quarry which was subject to a mining lease (ML1) authorising the extraction of brick clay and clay shale.

Between 1964 and about 2000, material was continually extracted from the quarry and most of this material was used to make bricks at the adjacent brickworks. In about 2000, brickmaking ceased and the extracted material was either used to blend with imported waste materials, or exported off-site. This change corresponded with a substantial increase in rates of extraction. The quarry continued to be used in that manner.

His Honour held (at [21]) that since 2000, the activities constituted a use as an "industry" and an "extractive industry" under the Shoalhaven Local Environmental Plan 1985 (LEP).

It was submitted by the council that the activities following 2000 amounted to an unlawful change of use and an unlawful intensification of use. The basis of their submission was that an "industry" was prohibited in the relevant zone and an "extractive industry" was permissible only with development consent - and no such development consent had been granted.

In response, the respondents submitted that the uses were permitted because they were protected by existing use rights. In the respondent's submission, the uses had continued (and had not been changed or

abandoned) since prior to 1964, being the date when extractive industries, industries, mines and quarries were first prohibited under an interim development order.

Further in response, the respondents submitted that the crushing and recycling activities were authorised by a development consent granted by the council in 2003 for the "crushing and recycling waste products".

Issues:

(1) the extent to which the use was protected by the 2003 development consent for "crushing and recycling waste products";

(2) the extent to which the use was protected by existing use rights under s 107(1) and s 109(1) of the *Environmental Planning and Assessment Act* 1979 (EPAA);

(3) if the quarry did enjoy existing use rights, whether that use was intensified contrary to the limitations in s 109(2) of the EPAA; and

(4) the effect of the immunity from development control granted to mining leases prior to 16 December 2007: see s 74 of the *Mining Act* 1992 (now repealed).

Held:

(1) the 2003 development consent authorised the crushing and blending of "waste products" imported onto the site (and not extracted material): at [32]. The consent also authorised the exportation of these materials as this activity was ancillary to the consent: at [39];

(2) despite the abandonment of brickmaking in 2000 (at [136]), two of the uses were subject to existing use rights, namely, the extraction of clay and shale material, and the crushing and blending of extracted and imported clay and shale material. Both uses had continued for the relevant period and were properly characterised, respectively, as an "extractive industry" and an "industry" at all relevant times: at [131]-[133]. The fact that the final marketable product had changed since 2000 had no bearing on whether the use had continued: at [100] and [134];

(3) there was an intensification in the existing use for an "extractive industry" because extraction rates had increased substantially following 24 November 2001, being the relevant date for the application of the existing use intensification threshold under s 109(2) of the EPAA Act: at [193]-[199]; and

(4) the only impact of the immunity under the *Mining Act* was to delay the cut-off date applicable for the purposes of the existing use intensification threshold under s 109(2) of the EPAA Act: at [169].

- **Compulsory Acquisition of Land**

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2009] NSWLEC 219 (Biscoe J)

First instance LEC proceedings*: Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2004] NSWLEC 315 (Talbot J); [2004] NSWLEC 535; (2004) 136 LGERA 164 (Talbot J) (disturbance loss judgment)

First appeal NSWCA proceedings: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2005] NSWCA 251; (2005) 63 NSWLR 407; (2005) 141 LGERA 243 (Beazley, Basten and Stein JJA)

Second instance LEC proceedings*: Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2006] NSWLEC 138 (Talbot J)

Second appeal NSWCA proceedings: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (No. 2)* [2006] NSWCA 386; (2006) 68 NSWLR 487; (2006) 151 LGERA 186 (Handley, Beazley and Basten JJA)

HCA proceedings: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ)

(related proceedings: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] NSWLEC 247; (2008) 161 LGERA 86; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] NSWLEC 282 (Biscoe J); *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178; 168 LGERA 1 (Beazley, Basten and Young JJA))

Facts: The applicant, Walker Corporation, owned valuable real estate at the eastern end of the Balmain peninsula on the southern side of Sydney Harbour. It comprises a flat sandstone central ridge or plateau, which fell dramatically to relatively narrow foreshores on its northern and southern boundaries. Access was by old, narrow roads through residential areas. This land was compulsorily acquired by the respondent. At the acquisition date the land was zoned "Industrial" under the Leichhardt Local Environment Plan 2000 (LEP 2000). The applicant bought the land in the hope that it could be rezoned as "Residential" enabling residential development in the future. This was thwarted when the Premier later announced that the land would be used for a public park on 19 February 2002. The High Court dismissed the second NSWCA appeal and found the Premier's proposal to carry out the public purpose for the acquired land was that of the Authority and not that of Leichhardt council or some aggregation over time of the policies of the council and the State government: at [53]-[54]. The matter was remitted back to the Land and Environment Court before Biscoe J to determine the market value of the land prior to the compulsory acquisition that was to be paid to the applicant.

Issues:

(1) whether to adopt a top down or a bottom up approach to valuing the land;

(2) whether the State Environmental Planning Policy No 5 - Housing for Older People or People with a Disability 1988 (SEPP 5) (now repealed) applied to the land and consequently affected the value of the land;

(3) whether there were any existing use rights on the land which consequently affected the value of the land;

(4) whether s 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act* 1991 (JTA) was to be applied earlier than the Premier's 19 February 2002 announcement that the land would be public space; and

(5) the value of the developable industrial areas of the land.

Held: Determining that the total compensation the applicant was entitled to was $17,055,138.50, his Honour found:

(1) the "top down" methodology for valuing the property was appropriate: at [41];

(2) a prudent hypothetical buyer and seller as at the acquisition date, properly advised as to *Q & R Developments Pty Ltd v Sutherland Shire Council* [2001] NSWLEC 250, (2001) 117 LGERA 438, would have thought it likely that SEPP 5 applied to the land: at [81]. The 83 units in Walker's 2001 SEPP 5 development application as a realistic point from which to discount sufficiently for SEPP 5 risks: at [122]-[123]. The value of the land at the acquisition date, with SEPP 5 potential, was assessed as 83 units multiplied by $600,000 per unit equalling $49,800,000, discounted by one third to $33,200,000, and finally rounded to $33,500,000: at [141];

(3) a hypothetical buyer and seller as at the acquisition date would have perceived existing use rights a riskier basis for a residential development than for a residential development based on SEPP 5. This would have been reflected in a significantly lower market value. As the market value based on existing use rights was less than the market value based on SEPP 5, it was unnecessary to value the land according to whether existing use rights existed: at [170]-[171];

(4) dismissing the applicant's s 56(1)(a) case, the applicant was unable to prove that the making of the LEP 2000 caused the decrease in the value of the land. Walker argued that except for the maintenance of the industrial zoning in LEP 2000, the land would have been zoned residential and that the decrease in value caused by the Premier's proposal was simply the difference between the residential value of the land and its industrial value. The proposition that the land would have been zoned residential was not established on the evidence: at [201]. His Honour also stated that there was an insufficient causal connection between the industrial zoning in LEP 2000 and the subsequent resumption in 2002 to attract s 56(1)(a): at

[195]; there was no evidence of the State government making the choice for the zoning of the land to remain industrial: at [198]. The Minister was not the author of the LEP 2000, Leichhardt Council was. The Minister could only make some changes to the instrument as determined by Part 3 Division 4 of the EPAA (since amended): at [197];

(5) the hypothetical buyer and seller at the acquisition date probably would have settled on a rate of $1250 per m^2 for the developable floor space area of 16,000m^2. This yielded an industrial market value of developable space at $20 million: at [212] and [228]; and

(6) the market value of the land at the acquisition date was $33,500,000: at [141]. Compensation referable to market value was assessed at $17,000,000 by deducting from that market value the purchase price of $16,500,000, which represented the cost of completing the contract of sale. Disturbance loss was determined at $55,138.50: [2004] NSWLEC 535. The total compensation was therefore found to be $17,055,138.50.

- **Criminal Jurisdiction**

Plath v Chaffey [2009] NSWLEC 196 (Preston CJ)

Facts: The defendant, Mr Chaffey was a bird enthusiast. On his trip to Lord Howe Island, where many threatened species reside, he collected and destroyed the contents of the total of 96 eggs, 94 of which were the subject of five charges. The defendant pleaded guilty to all charges.

Four offences were against s 118A(1)(a) of the *National Parks and Wildlife Act* 1974 (NPWA) for the harming of animals that were eggs of threatened and vulnerable species. One offence was against s 98(2)(a) of the NPWA for harming animals that were eggs of protected fauna. The manner of harm was by way of "'blowing' the eggs, … by making a hole in the eggshell and removing the contents of the egg while preserving the shell".

The defendant was impecunious and did not have capacity to pay any fines: at [73]-[77]. The prosecutor submitted that the maximum penalty for the offences against s 118A(1)(a) of the NPWA in respect of vulnerable species included imprisonment for one year either by itself or in addition to a fine. The maximum penalty for the offence against s 98(2) in respect of protected fauna includes imprisonment for six months either by itself or in addition to a fine.

Held:

(1) the early plea of guilty resulted in a 25% discount: at [62]-[65];

(2) the circumstances of the offences did not cross the custody threshold. There was not the necessary combination of both serious damage or risk of serious damage with a very high degree of culpability on the part of the offender: at [181];

(3) a community service order may be imposed in circumstances where a sentence of imprisonment can be imposed but is not appropriate and where the sentencing purpose is reparation: at [97]. A fine was not appropriate due to the defendant's impecuniosity: at [98]. The defendant was ordered to fulfil 107 hours, discounted to 80 hours applying the totality principle, of community service work: at [87], [97] and [102]-[103]; and

(4) the defendant was ordered to pay the prosecutor's costs into the National Parks and Wildlife Fund in accordance with s 176(3) of the NPWA.

Plath v Rawson [2009] NSWLEC 178 (Preston CJ)

Facts: The defendant, Mr Rawson had been a farmhand for 44 years mostly involved in farm maintenance such as fencing, spraying weeds and clearing vegetation. In late 2005, he agreed to work as an independent contractor to clean up a property by cutting, poisoning and otherwise clearing vegetation and opening up pasture land. The land had been partly cleared, but regrowth of vegetation including exotic and noxious weeds as well as native rainforest species, including threatened species, had occurred over the last few decades with the decline in agricultural use.

From 1 December 2005 to about 7 September 2006, the defendant cut, poisoned and otherwise injured vegetation on the land of threatened plant species against s 118A(2) of the *National Parks and Wildlife Act* 1974. The scale of activity covered about 170 hectares. Around 35,000 to 40,000 camphor laurels, privets and other weeds, as well as nearly 1,200 threatened or vulnerable species of rainforest plants were cut and poisoned. The vegetation affected was scattered in clumps and corridors over the land.

The defendant pleaded guilty to each of the offences. The pleas of guilty constituted an admission of the "essential legal ingredients of the offences" including that the defendant cut at least one plant of each threatened species the subject of each offence, however, he disagreed that he picked the numbers of plants particularised by the prosecutor. This lead to the prosecutor having to adduce at the sentence hearing extensive evidence to prove the number of plants cut and poisoned.

Held: Sentencing the defendant, his Honour found:

(1) the defendant did not have genuine contrition and remorse for the commission of the offences or the consequences caused by commission of the offences and there was a risk of reoffending. It was necessary for individual deterrence to be reflected in the sentence: at [164];

(2) the sentence hearing was extended by the defendant not admitting that he had picked all of the plants the subject of the charge, later proven. The utilitarian benefit of the pleas of guilty were therefore reduced and the discount set at 18%;

(3) the defendant was fined a total of $75,000;

(4) the defendant was sentenced to 270 hours of community service work, the community service work to run concurrently with the hours of community service work ordered in proceedings 50082/07; and

(5) the defendant was ordered to pay the prosecutor's costs as determined in accordance with s 257G of the *Criminal Procedure Act* 1986.

Director-General, Department of Environment and Climate Change v Jack & Bill Issa Pty Ltd (No 5) [2009] NSWLEC 232 (Biscoe J)

Facts: The defendant company pleaded not guilty to the carrying out of native vegetation clearing contrary to the *Native Vegetation Act* 2003 (NVA). The clearing was undertaken by a contractor on the defendant's property instructed by Mr Mura and paid for from the bank account of a company with which Mr Mura was associated but which was unrelated to the defendant. At all relevant times Mr Mura was one of the two directors and two equal shareholders of the defendant company, the other being Mr Jack Issa.

Issues:

(1) whether, pursuant to s 44(b) of the NVA, the defendant did not cause or permit the contractor to carry out the clearing. This issue turned on whether the conduct of Mr Mura in causing or permitting the contractor to carry out the clearing was attributable to the defendant company either because Mr Mura was the "will and mind" of the company or because it was vicariously liable for Mr Mura's conduct.

Held: Finding the defendant guilty, his Honour found Mr Mura's conduct was attributable to the defendant company because:

(1) Mr Mura was the mind and will of the defendant insofar as this concerned the management operation of clearing of the land: at [120];

(2) the company was vicariously liable for Mr Mura's conduct. Clearing of the land was within his implied or apparent authority. It was not necessary for the clearing to have been expressly authorised by Mr Issa. It was enough that the company put Mr Mura in a position to clear the land: at [121];

(3) Mr Mura's conduct was attributable to the defendant on the basis of the special rule of attribution as derived from s 44(b) of the NVA, namely, that he was a director of a two director private company which owned the Land, on which the offence occurred, at least insofar as the clearing furthered the defendant's interests or at least was not against them: at [122]; and

(4) consequently, the defendant failed to discharge its onus under s 44(b) of the Act. Alternatively, the prosecutor proved its case under s 12(2) of the NVA: at [123].

- **Mining Jurisdiction**

Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2) [2010] NSWLEC 1 (Preston CJ)

(related proceedings: *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165; (2009) 170 LGERA 22 (Preston CJ))

Facts: The applicant, an incorporated association formed to contest exploration and mining on land in the Caroona district on the Liverpool Plains in NSW, brought proceedings pursuant to s 296 of the *Mining Act* 1992 to challenge the validity of an exploration licence (EL6505) granted to Coal Mines Australia Pty Ltd (CMA) a subsidiary of BHP Billiton. The members of the applicant included landholders in the Caroona district whose properties were within the area of the licence. The area covered by the licence was formerly part of the area covered by Coal Authorisation No 216 (A216) issued in 1980 under the *Coal Mining Act* 1973 (repealed in 1992) and successively renewed until 24 April 2003 under the *Mining Act*. Another application for renewal of A216 was made in 2003, and that was held in abeyance pending the undertaking of a process of inviting expressions of interest for the award of an exploration licence over the Caroona coal exploration area. A Ministerial Submission on 20 January 2006 recommended that the Minister announce CMA as the successful applicant, and proposed that the successful applicant be awarded the exploration licence over the Caroona coal area by way of part transfer of A216.

On 22 February 2006 the Minister signed and dated the Instrument of Renewal for A216 for a term expiring on 28 February 2011. On 12 April 2006 the Department's Manager, Coal and Petroleum Titles, by delegation from and on behalf of the Minister and Director-General, approved a submission to approve pursuant to ss 121(1)(a) and 123(1)(b) of the *Mining Act* the partial transfer of A216 to CMA and to register CMA pursuant to s 122(3) as holder of EL6505. CMA and the Minister executed EL6505 on 12 April 2006.

Issues:

(1) whether, essential preliminaries under Part 3 of the *Mining Act* for the valid grant of an exploration licence had been complied with in the grant of EL6505;

(2) whether, if EL6505 was a partial transfer of A216 under Part 7 of the *Mining Act*, A216 was invalid and not able to be partially transferred because of non-compliance with the requirements of s 114(6) of the *Mining Act* in the renewals of 1998 and 2006, and non-compliance with s114(3) in the renewal of 2006; and

(3) whether, if EL6505 was a partial transfer of A216 under Part 7 of the *Mining Act*, the partial transfer was invalid because there was no document of transfer in accordance with s 123(2) of the *Mining Act*, and because EL6505 provided for a date of expiry after the date of expiry of A216 in breach of s 123(1)(b) of the *Mining Act*.

Held: Dismissing the proceedings, his Honour found:

(1) the Minister and CMA did not contend that EL6505 was the grant of an exploration licence under Part 3 of the *Mining Act* and the first category of challenge did not need to be addressed: at [5];

(2) the applicant had not established that the Minister failed to form the mental state of satisfaction required by s 114(6) that special circumstances existed to justify the renewal of a licence over a number of units that exceeded half the number of units over which the licence was in force when the application for renewal was made. In relation to the 1998 renewal, the Ministerial briefing included, among other things, reference to the requirements of s 114(6) and the statement that by reason of matters included in the briefing the requirements of s 114(6) had been satisfied. In relation to the 2006 renewal, the Minister was aware that the renewal of A216 was taking place at the same time, and in part in order to facilitate, the transfer of part of A216 and his knowledge at the time of renewal was based not only on the information supplied in briefings for the renewal but also for the transfer of part of A216. For both renewals the inference should be drawn that the Minister had formed the requisite mental state of satisfaction under s 114(6): at [60]-[68];

(3) the onus rested on the applicant as the challenger of the Minister's decision to prove that the Minister did not form the required mental state of satisfaction. The applicant could discharge this onus by reference to the documentary material evidencing the decision-making process if that material was sufficient to allow the Court to draw the inference that the Minister did not form the required mental state of satisfaction. There were other judicial mechanisms that the applicant could have invoked to establish that the Minister had not formed the required mental state of satisfaction, including interrogatories, or seeking a direction under r 4.3 of the Land and Environment Court Rules 2007 that the Minister furnish a written statement setting out the reasons for the decision: *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154; (2009) 166 LGERA 436: at [69]-[70];

(4) A216 was purportedly renewed from 22 February 2006 to 28 February 2011, which exceeded the period of five years specified in s 114(3)(a) of the *Mining Act*. The challenge to the renewal of A216 in 2006 on the basis of breach of s 114(3) failed for the following reasons:

(a) an authority granted, renewed or transferred under the *Mining Act* was an "instrument" for the purposes of the *Interpretation Act* 1987, and applying s 32 of that Act, A216 should be construed as operating to the full extent of, but not so as to exceed, the power conferred by s 114(3). If s 32 of the *Interpretation Act* was not applicable, the application of the common law rules of severance would lead to the same result: at [77];

(b) a breach in this case of s 114(3) was not the kind of breach of statutory provision that would result in invalidity of A216: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355: at [88]; and

(c) section 137(1) of the *Mining Act*, which precludes a challenge to the grant, renewal or transfer of an authority in legal proceedings commenced more than 3 months after notification in the Gazette, was applicable to the particular breach of s 114(3) in the 2006 renewal of A216. The Minister's renewal satisfied the threefold principle in *R v Hickman* [1945] HCA 53; (1945) 70 CLR 598; and the requirement in s 114(3) was not of such significance in the legislative scheme that it constituted an "essential", "indispensable", "imperative" or "inviolable" limitation or requirement: *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2005) 138 LGERA 207; *Woolworths Ltd v Pallas Newco* [2004] NSWCA 422; (2004) 61 NSWLR 707: at [93];

(5) there was no statutory requirement, express or implied, in the statutory scheme for transfer of an authority contained in Part 7, Div 2 of the *Mining Act*, for a document or instrument of transfer between a transferor and transferee to effect a transfer of an authority. The application for approval of the transfer met the relevant requirements of s 120(2). The Minister by his delegate approved the part transfer pursuant to s 121(1)(a) and the terms of the new authority as set out in EL6505 pursuant to s 123(2)(b). The Director-General, as transferor of part of A216, applied for registration of the transfer, and by his delegate registered CMA as the holder of the new authority of EL6505. Pursuant to s 122(4) on registration CMA became the holder of the new authority of EL6505: at [112];

(6) while EL6505 provided that its term was five years from 12 April 2006, there was no breach of s 123(1)(b) of the *Mining Act* which provided that EL6505 should have been granted for the period ending on the date of expiry of A216 (28 February 2011). The period for which EL6505 was taken to have been granted was fixed by operation of s 123(1)(b) and not by the terms of EL6505; alternatively, EL6505 should be

construed by reason of s 32 of the *Interpretation Act* as operating to the full extent of but so as not to exceed s 123(1)(b). The same conclusion could be reached by reference to the test in *Project Blue Sky*; the privative clause of s 137(1) of the *Mining Act* applied to protect EL6505 from challenge in these proceedings for this particular breach of s 123(1)(b): at [121]; and

(7) the applicant did not establish any of its grounds of challenge to EL6505 or A216: at [124].

- **Appeals against decisions of Commissioners under s 56A of the LECA**

Botany Bay City Council v Parangool Pty Ltd [2009] NSWLEC 198 (Lloyd J)

First instance Commissioner decision: *Parangool Pty Ltd v Botany Bay City Council* [2009] NSWLEC 1189 (Murrell C)

Facts: The applicant submitted a development application for "occupation of existing warehouse building for general warehouse use" in Mascot. The Council refused consent on the ground that the proposed development was prohibited. The existing use as a warehouse was approved in August 2002 at a time when the land was zoned Industrial 4(a) under the Botany Local Environmental Plan 1995, under which the use of land for a warehouse or distribution centre was permissible with consent.

The August 2002 development consent described the proposed development as "use of existing warehouse building for the warehousing/storage and distribution of alcoholic goods". In October 2002 the land was rezoned to Mixed Uses 10(a) Commercial/Residential in which zone a warehouse or distribution centre was prohibited. Murrell C upheld the appeal and granted development consent.

Issues:

(1) whether the only lawful existing use was that of a warehouse "for the warehousing/storage and distribution of alcoholic goods" and for no other use, so that what the Commissioner had done was to consent to a change of use to another use, namely a general warehouse use, and so erred in law.

Held: Upholding the appeal and setting aside the Commissioner's orders, his Honour held:

(1) the existing use rights relied upon were dependent on the terms of the 2002 development consent: s 107(2)(d) of the *Environmental Planning and Assessment Act* 1979 (EPAA): at [14];

(2) the genus test for the characterisation of an existing use is irrelevant to a situation where the existing use was claimed to flow from an existing development consent: *Botany Bay City Council v Workmate Abrasives Pty Ltd* [2009] NSWLEC 198; (2004) 138 LGERA 120. The Commissioner erred in applying the genus test explained in *Shire of Perth v O'Keefe* (1964) 110 CLR 529: at [16];

(3) it was not in dispute that the premises had a floor space of more than 1,000m^2, so that cl 41(2)(e) of the Environmental Planning and Assessment Regulation 2000 could not apply to enable the existing use to be changed to another use: at [10]; and

(4) there was no power to approve the change of use to warehousing generally. On the facts, only one conclusion was open, and the Court should dismiss the appeal under s 97 of the EPAA: at [18] citing *Thaina Town (on Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; (2007) 156 LGERA 150.

Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 4) [2009] NSWLEC 226
(Preston CJ)

First instance Commissioner decision: *Australian Leisure and Hospitality Pty Ltd v Manly Council (No 3)* [2009] NSWLEC 1180 (Brown C)

(related proceedings: *Australia Leisure and Hospitality Group Ltd v Manly Council (No 2)* [2008] NSWLEC 312, (2008) 167 LGERA 1 (Pain J) and *Australian Leisure and Hospitality Pty Ltd v Manly Council* [2005] NSWLEC 316 (Bly and Brown CC))

Facts: In 2005 the Court upheld an appeal under s 97(1) of the *Environmental Planning and Assessment Act* 1979 (EPAA) against a deemed refusal of a development application made by the applicant, Australian Leisure and Hospitality (ALH), for major alterations and additions to the New Brighton Hotel at The Corso in Manly. The alterations and additions included the provision of glazed bi-fold doors on the ground floor and a proposed outdoor eating area. The outdoor eating area and work on the first floor balconies were to be located on the public roads of The Corso and Sydney Road, for which the council was the roads authority. The council subsequently refused to approve the applications made by ALH under s 125(1) of the *Roads Act* 1993 (the Act) to use the footway for the purposes of a restaurant. There is no right of appeal by way of merits review against a council's decision to refuse approval under s 125 of the Act.

ALH applied to this Court under s 96(8) of the EPAA to modify condition 50 of its 2005 approved development consent to add:

> (iii) Approval is granted under section 125 of the *Roads Act* 1993 (NSW) to use the footway adjacent to the subject premises for restaurant purposes for a period of seven (7) years.

A separate question of law was heard (by Pain J in [2008] NSWLEC 312) in advance of the merits of the proceedings, rephrased as follows:

> Whether on a proper construction s 39(2) of the *Land and Environment Act* 1979 in so far as it refers to powers conferred on the Court for the disposal of Class 1 appeals applies in a modification application under s 96 of the EPAA invoking s 125 of the *Roads Act*.

Pain J answered that separate question in the affirmative. The council appealed to the Court of Appeal against the decision of Pain J and the appeal has not yet been heard. Brown C in [2009] NSWLEC 1180 heard the balance of the proceedings and upheld the appeal and modified condition 50.

Issues:

(1) whether the Commissioner erred in law in finding that, in determining an application under s 125 of the *Roads Act*, it was not open to him to consider any matters beyond those items specified in the objects set out in s 3 of the *Roads Act*; and

(2) whether the Commissioner erred in considering only the matters specified in s 3 of the *Roads Act* when he ought also to have considered matters under s 79C of the EPAA that were relevant to the s 96 application.

Held: Allowing the appeal under s 56A(1) of the *Land and Environment Court Act* 1979 (LECA), setting aside the Commissioner's orders and dismissing the proceedings under s 96(8) of the EPAA, his Honour found:

(1) the proceedings involved an original application under s 96(8) of the EPAA directly to the Court and not an appeal under s 96(6) of the EPAA or any other appeal provision against a decision of the council. There was no decision of the council the subject of the "appeal" as defined in s 39(1) of the LECA, and so the Court could not have "the functions and discretions which the person or body whose decision is the subject of the appeal had" for the purposes of s 39(2) of the LECA. The Court could not in hearing and disposing of the proceedings exercise the council's function to grant approval under s 125 of the *Roads Act*: at [15];

(2) the Commissioner erred by failing to ask himself the right question as to what were the relevant considerations that he, as decision maker under s 125 of the Act, was bound to take into account. The decision maker was bound to consider and make findings of fact in relation to each element in the

matters expressly stated in s 125 as well as considerations implied from the subject matter, scope and purpose of the Act conferring the discretionary power: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. The objects of the Act assist in construing the subject matter, scope and purpose of the statute but do not exhaust the inquiry; the terms of the power itself may also be relevant to be considered; and the public interest may, by implication from the subject matter, scope and purpose of the statute, be a relevant matter to be considered: *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423: at [74];

(3) the public interest was central to the task of a council fulfilling statutory functions under the Act; the public interest is multi-faceted and includes the public interest in members of the public being able to pass along and use public roads, in persons adjoining the public road having access to the public road and in regulating the carrying out of various activities on public roads: at [74];

(4) it was irrelevant that the Commissioner, in exercising a discretionary power pursuant to s 125 of the Act took into account a planning issue or aspect that was relevant to be taken into account in an earlier exercise of the power under the EPAA to grant development consent: at [78];

(5) the Commissioner was bound to have regard to the facts and law relevant to those applications as they existed at the hearing when determining ALH's application under s 96(8) to modify the consent granted in 2005 and its application for approval under s 125 of the Act: at [79];

(6) the Commissioner erred on questions of law in relation to the exercise of power under s 125 of the Act (at [84]) and in relation to the s 96 modification by failing to: ask the right questions; consider the relevant power and relevant considerations under s 96 of the EPAA; identify the source of power to modify the consent (being s 96(1), s 96(1A) or s 96(2)); address whether ALH's application proposed a modification that could be made under any of the sources of power in s 96; refer to s 96(3) and identify and take into consideration matters referred to in s 79C(1) as are of relevance to the modification application; and identify whether it was within power to impose the conditions proposed by the council and ALH: at [85]; and

(7) even though the separate question decided by Pain J was based on a hypothetical premise, it remained and bound the parties unless and until it was set aside on appeal. The separate question did not decide that the Court had the functions of the council under s 125 of the Act. His Honour stated that there was no need to remit the matter to the Commissioner to be determined in accordance with the decision on the separate question because it was not dispositive of the proceedings: at [102].

Land and Environment Court

Commissioner decisions

- **Development Application Appeals under s 97 of the EPAA**

West Apartments Pty Ltd v City of Sydney Council [2009] NSWLEC 1411 (Moore SC and Pearson C)

Facts: The applicant appealed under s 97(1) of the *Environmental Planning and Assessment Act* 1979 (EPAA) against the refusal by the respondent council of a development application for approval of a stratum subdivision of a property in Wattle Street, Ultimo. On the property two residential/commercial tower blocks were being erected. At the north eastern corner was a dilapidated heritage building known as the Briscoe building. A condition of the development consent was for the applicants to restore the Briscoe building. The development application sought to create three stratums, two of which were to be the major part of the residential towers, and the third was to be comprised of the Briscoe building with two residential levels and part of the commercial and car parking spaces.

The council opposed the application on the basis that the restoration of the Briscoe building could not be guaranteed by the arrangement, and that the arrangement of the proposed stratums was inappropriate when assessed against the planning controls. After a site view and three days of hearing in July 2009 the matter was adjourned to enable the provision of further evidence. The matter came back for directions on five occasions, the last on 17 November 2009, and for hearing on 26 November 2009. On that occasion statements of evidence of two witnesses were admitted, one stating that the drawings then submitted contained inadequate information to enable the carrying out of conservation works to the Briscoe building or the preparation of an adequate cost estimate for those works, and the other noting disparities between drawings including inconsistencies between the applicant's quantity surveyor's report and the development consent approved plans. A statement of evidence by the council's building surveyor noted discrepancies between the development consent plans and what was actually constructed on the site. The applicant requested an adjournment to February 2010 to enable further evidence to be obtained.

Issues:

(1) whether it was appropriate to grant the adjournment.

Held: Declining to grant the adjournment, the Commissioners found:

(1) the potentially unlawful departures from the plans as approved and the fact that an approved structure had been modified without development consent did not act as an inhibition to a subsequent modification of the development consent to regularise the structure: at [29] citing *Windy Dropdown Pty Ltd v Warringah Council* [2000] NSWLEC 240;

(2) there was no reason to exclude the possibility of the applicant lodging a fresh development application: at [30];

(3) if an adjournment was granted, given the unsatisfactory nature of the evidentiary trail that had evolved from the applicant since the adjournment of matters on 30 July 2009 there would need to be close supervision of the process, which would involve not merely a cost to the parties but a significant demand on the time of the Court: at [34] citing *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27;

(4) given what had occurred since July 2009 the Court was not confident that even if the matter was adjourned it might not be subject to a further application to vacate, or that matters that might need to be dealt with either by rectification or by way of s 96 modification would appropriately be ready or resolved by that time: at [35]; and

(5) there was no adequate explanation for the reasons for the present evidentiary position on as to why, when on 17 November 2009 an express opportunity was given to the applicant to deal with or make an application to deal with the evidentiary defects, it did not do so: at [13] and [37].

Court News

Departures

After 12 years of dedicated service in the Land and Environment Court, Justice Lloyd's commission expires on 27 January 2010.