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- Statutes

Effective 26 May 2010, the *Environmental Planning and Assessment Amendment (Development Consents) Act* 2010, amended the *Environmental Planning and Assessment Act* 1979. The object of the amending Act is to facilitate the carrying out of development that has previously been approved by removing in certain circumstances any reduction of the maximum period of 5 years during which the development consent does not lapse pending the carrying out of the development. [full explanatory notes]

Commencing 20 August 2010, the Environmental Planning and Assessment Amendment (Planning Certificates for Growth Centres) Regulation 2010, will require a local council to include in a planning certificate it issues in respect of land within its area that is zoned under Part 3 of State Environmental Planning Policy (Sydney Region Growth Centres) 2006, or under a Precinct Plan (within the meaning of that Policy) or proposed Precinct Plan, certain matters in relation to that land.

The Evidence Regulation 2010 remakes the Evidence Regulation 2005, with minor changes, and will commence on 1 September 2010.

Effective 15 June 2010, the *Local Government Amendment (General Rates Exemptions) Act* 2010 amended the *Local Government Act* 1993 in relation to rate exemptions for land partly used by religious or charitable bodies. The Department of Local Government has released a circular on the amendments.

On 2 July 2010, the *Threatened Species Conservation Amendment (Biodiversity Certification) Act* 2010 commenced. The Act amended the *Threatened Species Conservation Act* 1995 by establishing new arrangements for the biodiversity certification of lands. The Minister administering the *Threatened Species Conservation Act* 1995 (*the Minister*) may, on application by a planning authority, confer biodiversity certification on specified land. The effect of biodiversity certification is as follows:

(a) the environmental assessment requirements for the approval of a project, or a concept plan for a project, under Part 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPAA") do not require an assessment of the impact of the project on biodiversity values if the project is carried out or proposed to be carried out on biodiversity certified land;

(a) development on biodiversity certified land is taken, for the purposes of Part 4 of the EPAA, to be development that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat;

(b) an activity to which Part 5 of the EPAA applies which is carried out or proposed to be carried out on biodiversity certified land is taken, for the purposes of Part 5 of the EPAA, to be an activity that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat; and

(c) the *Native Vegetation Act* 2003 does not apply to the biodiversity certified land. The Minister may confer biodiversity certification only if the planning authority has a biodiversity certification strategy, which is a policy or strategy for the implementation of conservation measures that ensure that the overall effect of biodiversity certification is to maintain or improve biodiversity values.

The Act also made provision for:

(a) the establishment of a biodiversity certification assessment methodology;

(b) the enforcement of conservation measures against parties who agree to the biodiversity certification;

(c) the suspension, revocation or modification of biodiversity certification; and

(d) biodiversity certification agreements, which are agreements entered into in connection with biodiversity certification. [full explanatory notes]

The *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act* 2010 was assented to on 28 June 2010. When proclaimed it will amend the *Crimes (Sentencing Procedure) Act* 1999, the *Crimes (Administration of Sentences) Act* 1999 and other laws to provide for sentences of imprisonment by way of intensive community correction and repeal provisions for periodic detention. [full explanatory notes]

Amendments to Water Sharing Plans:

Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources 2010 — published 23 April 2010.

The Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources Amendment Order 2010 — published 9 July 2010, amends the *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources* 2003. The following orders also apply:

- Access Licence Dealing Principles Order 2007—Murrumbidgee Regulated River Water Source — published 30 April 2010; and
- Access Licence Dealing Principles Order 2007—New South Wales Murray Regulated River Water Source, Lower Darling Regulated River Water Source — published 30 April 2010.

Environmental Planning and Assessment Amendment (Burwood Town Centre Levies) Regulation 2010 — published 10 May 2010 provides that, for development within the area to which Burwood Local Environmental Plan (Burwood Town Centre) 2010 applies, the maximum section 94A levy that may be imposed is:

(a) if the proposed cost of carrying out the development is $250,000 or less, nil; or

(b) if the proposed cost of carrying out the development is more than $250,000, 4 per cent.

Environmental Planning and Assessment Amendment (Planning Certificates) Regulation 2010 — published 30 April 2010, requires councils to include the following matters in planning certificates:

(a) information about biobanking agreements under the *Threatened Species Conservation Act* 1995*;* and

(b) whether or not the land is land on which complying development may be carried out under each of the codes for complying development because of the provisions of clause 1.19 of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

The *Crown Lands Amendment (Special Purpose Leases) Act* 2009 amends the *Crown Lands Act* 1989 to extend the provisions relating to the granting of special purpose leases to land within the Eastern and Central Division of New South Wales. Special purpose leases are able to co-exist with certain other tenures and allow for the establishment of renewable energy generators (such as wind farms) over land that is leased for other purposes (such as grazing purposes). [full explanatory notes]

Effective 28 April 2010, the *National Parks and Wildlife (Broken Head Nature Reserve) Act* 2010, revokes the reservation of certain land at Broken Head, which is currently reserved as part of Broken Head Nature Reserve. [full explanatory notes]

The *National Parks and Wildlife Amendment Act* 2010 commenced on 2 July 2010, except for the following provisions which will commence on 1 October 2010:

(i) Schedule 1 [2] (to the extent that it inserts definitions of *Aboriginal heritage impact permit and harm*),

(ii) Schedule 1 [9];

(iii) Schedule 1 [31]–[37];

(iv) Schedule 1 [41] (to the extent that it inserts section 91L); and

(v) Schedule 3.2 [1], [4] and [5].

The National Parks and Wildlife Amendment Regulation 2010 also commenced on 2 July 2010.

The *Mining and Petroleum Legislation Amendment (Land Access) Act* 2010 commenced on 9 June 2010. The Act amends the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 in relation to access to land by the holders of prospecting titles over the land following the decision of the Supreme Court in *Brown & Anor v Coal Mines Australia; Alcorn & Anor v Coal Mines Australia Pty Ltd* [2010] NSWSC 143. The Act:

(a) removes the obligation, before prospecting activities are carried out, for an access arrangement to be made with certain secondary landholders whose interests are recorded on the land register but who are not entitled to possession of the land (such as a financial institution holding a registered mortgage over the land), but retains the obligation on holders of those titles to pay compensation to those secondary landholders for compensable loss caused by their prospecting activities;

(b) enables separate land access arrangements to be made where there are multiple landholders of particular land and removes provision for the termination of any arrangement with multiple landholders whenever one of those landholders ceases to be a landholder or when an additional person becomes a landholder;

(c) makes a person who becomes an additional landholder of land for which there is an existing access arrangement subject to that arrangement unless the person objects within 7 days after being notified of the arrangement and, if he or she objects, until an access arrangement is agreed or determined or a period of 28 days expires without any such agreement or determination;

(d) provides for access arrangements to make provision for the notification to the holder of the prospecting title of particulars of additional landholders and makes it clear that additional provisions may be included in the arrangements if they are not matters already required by or under the Act or the conditions of the prospecting title;

(e) enables access arrangements to be varied by agreement of the parties, by the arbitrator who determined the arrangement or by the Land and Environment Court;

(f) repeals an uncommenced provision of the *Mining Amendment Act* 2008 that would have required the specification of the amount of compensation that is payable in the event of compensable loss before prospecting activities are carried out (in addition to requiring a land access arrangement before those activities are carried out);

(g) excludes secondary landholders from various other provisions that require landholders to be notified before leases and other authorities are granted or areas constituted for prospecting; and

(h) validates existing land access arrangements and leases and other authorities if they comply with the revised requirements set out in the proposed Act. [full explanatory notes]

The *Trees (Disputes Between Neighbours) Amendment Act* 2010 commenced on 26 May 2010, apart from Schedule 1 [1], [5]–[8], [11]–[13], [16] and [18] which will commence on 2 August 2010. The amendments:

(a) extend the operation of Part 2 of the Trees (Dispute Between Neighbors) Act 2006 to trees situated on land zoned "rural-residential";

(b) give the Court jurisdiction to hear disputes about high hedges that severely obstruct sunlight to a window of a dwelling on adjoining land or views from such a dwelling;

(c) give the Court jurisdiction to hear and determine matters under the Dividing Fences Act 1991 in certain circumstances where a related application has been made under the principal Act;

(d) clarify that an application for an order under Part 2 of the principal Act can still be made following the removal of the tress that caused the damage or injury on which the application is based;

(e) enable a local council to register an order for costs as a charge on the land concerned and carry out work in accordance with an order;

(f) provide for plants that are vines to be treated as trees for the purpose of the principal Act; and

(g) amends the Native Vegetation Act 2003 to allow native trees to be removed pursuant to an order [full explanatory notes].

Uniform Civil Procedure Rules (Amendment No 32) 2010 — published 7 May 2010, amends the Uniform Civil Procedure Rules 2005 in relation to:

(a) the rate of interest after judgment prescribed for the purposes of section 101 of the *Civil Procedure Act* 2005;

(b) the format in which documents may be produced in order to comply with a subpoena; and

(c) the power of the Court to award costs under s 98 of the *Civil Procedure Act* 2005.

- State Environmental Planning Policy (SEPP) Amendments

SEPP (Exempt and Complying Development Codes) Amendment (Miscellaneous) 2010 — published 23 April 2010, amends some definitions and references to land use zones in the SEPP (Exempt and Complying Development Codes) 2008.

SEPP Amendment (Capital Investment Value) 2010 – published 7 May 2010, applies the definition of capital investment value in the Environmental Planning and Assessment Regulation 2000 to SEPPs.

SEPP (Standard Instrument) Amendment (Miscellaneous) 2010 — published 30 April 2010, amends a number of Local Environmental Plans to permit, with consent, temporary use of land for up to 52 days in any period of 12 months subject to the conditions in Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2010 — published 30 April 2010.

SEPP (Major Development) 2005 was amended by the following:

- SEPP (Major Development) Amendment (Joint Regional Planning Panels and Consent Functions) 2010 — published 18 May 2010, amended circumstances in which regional panels are to exercise specified consent functions as provided for in the SEPP (Major Development) 2005;
- SEPP (Major Development) Amendment (Maps) 2010 — published 23 April 2010, amends the maps for certain state significant sites; and
- SEPP (Major Development) Amendment (Three Ports) 2010 — published 23 April 2010, amends provision for the Port Botany site.

SEPP (Sydney Region Growth Centres) Amendment (Alex Avenue and Riverstone Precincts) 2010 — published 17 May 2010, identifies new or amended maps to which the SEPP (Sydney Region Growth Centres) 2006 applies.

SEPP (Mining and Infrastructure) Amendment 2010 — published 28 May 2010, makes changes to the areas covered by the SEPP (Mining, Petroleum Production and Extractive Industries) 2007 and amends the SEPP (Infrastructure) 2007 by providing for the development of monitoring stations to be permitted without consent or exempt development, depending on the land on which the monitoring station is to be constructed. [Note: in the Camberwell Cumulative Impacts Review, which looked into the potential impacts of an expansion of coal mining on Camberwell Village residents, air quality experts proposed recommendations for improved air quality management.]

SEPP (Exempt and Complying Development Codes) Amendment (City of Sydney Special Events) 2010 — published 11 June 2010, allowed the temporary extension of trading hours during the FIFA World Cup 2010 in the City of Sydney. For further information see Planning Circular PS-015, issued by the Department of Planning on 11 June 2010.

Further amending legislation made for the FIFA World Cup include:

- *Major Events Regulation* 2010;
- *Environmental Planning and Assessment Amendment (Sydney International FIFA Fan Fest) Regulation* 2010 — published 14 May 2010; and
- *Liquor Amendment (2010 FIFA World Cup) Regulation* 2010 — published 14 May 2010.

SEPP (Western Sydney Employment Area) Amendment (Food and Drink Premises and Service Stations) 2010 — published 18 June 2010, amended cl 11 of the SEPP (Western Sydney Employment Area) 2009 to permit, with consent, service stations and food and drink premises in the general industrial zone IN1.

SEPP No 53—Metropolitan Residential Development Amendment (Ku-ring-gai) 2010 — published 25 June 2010, rezones certain land in Warrawee to allow for multi-unit housing development to be carried out on the site.

SEPP (Infrastructure) Amendment (Landfill) 2010 — published 9 July 2010, amends cl 123 of the SEPP (Infrastructure) 2007. The amendment outlines what must be considered when assessing development applications for waste or resource management facilities.

SEPP (Major Development) Amendment (Rise Bilambil Heights) 2010 — published 9 July 2010, amends SEPP (Major Development) 2005 to identify the Rise Bilambil Heights site in the Tweed LGA as a state significant site.

SEPP (Infrastructure) Amendment (Telecommunications Facilities) 2010 - published 16 July 2010, introduces new provisions into the SEPP (Infrastructure) 2007, that allow telecommunications infrastructure providers to be either exempt from planning approval, or be able to receive a ten-day complying development approval, for a number of telecommunications facilities subject to strict criteria including health and amenity considerations. New telecommunications towers in residential zones will continue to require development

application approval from the local council. More detail is available in the Telecommunications Guideline. [Ministerial media release]

- Bills

Following public consultation, the Coastal Protection and Other Legislation Amendment Bill 2010 was introduced into the Legislative Assembly on 11 June 2010. The object of this Bill is to make amendments to the *Coastal Protection Act* 1979 ("the Principal Act") and other legislation to deal with coastal erosion and projected sea level rise, including amendments relating to the following:

(a) the improvement of the operation and enforcement of the Principal Act;

(b) providing that certain temporary coastal protection works (such as sandbags) may be placed on beaches and sand dunes to mitigate erosion in specified circumstances without obtaining development consent or other specified permissions; and

(c) enabling local councils to make and levy an annual charge for the provision of coastal protection services (such as services to maintain coastal protection works or to manage the impacts of such works) on rateable land that benefits from such services.

Proposed Part 4D: Proposed section 55W provides for appeals to the Land and Environment Court from a decision of a Coastal Authority (other than a decision of the Minister or the Minister administering the *Crown Lands Act* 1989) to make an order under the proposed Part.

Schedule 1 [24] amends section 56A of the Principal Act to make it clear that the Land and Environment Court may make a order under that section that a person remove or clean up material dumped following (as well as during) a beach erosion event.

Schedule 1 [26] and [27] amend section 59 of the Principal Act to provide that proceedings for offences against proposed section 55Q(4) or proposed Part 4D may be taken before the Land and Environment Court. Proceedings for other offences will continue to be taken before the Local Court.

For further information about the draft Coastal Protection and Other Legislation Amendment Bill see the Department of Environment, Climate Change and Water website. [full explanatory notes]

The Parliament of Australia has passed the Building Energy Efficiency Disclosure Bill 2010, which provides for the establishment of a new national scheme for the disclosure of commercial office building energy efficiency. The explanatory memorandum, impact statement and executive summary of the bill is available through this link (note the document is over 100 pages).

On 20 May 2010, the Marine Parks Amendment (Moratorium) Bill 2010 was introduced into the Legislative Assembly. The Bill seeks to impose a moratorium on the declaration of additional marine parks or the expansion of sanctuary zones within existing marine parks.

- Miscellaneous

On 22 June 2010, the Joint Standing Committee on the Office of the Valuer General resolved to conduct the following inquiry:

That the Committee inquire into the provisions of the *Valuation of Land Act* 1916 with particular reference to:

(1) the efficiency and effectiveness of the current provisions of the Act;

(2) its application to stakeholders; and

(3) any other related matter.

The closing date for submissions is 30 July 2010.

Recent Briefing Papers published by the NSW Parliamentary Library Research Service include:

- Coastal Erosion & Sea Level Rise - full briefing paper and summary;
- NSW Planning Framework: History of Reforms;
- Biodiversity Certification; and
- Biodiversity: Regulatory Framework - full briefing paper and summary.

On 1 July 2010, the *Government Information (Public Access) Act* 2009 ("GIPA") replaced the *Freedom of Information Act* 1989. The Department has a website "Accessing the Department's Information" that explains the public's rights to information under GIPA and provides links to the information held by the Department.

The Government Information (Public Access) Regulation 2009 (which was Schedule 5 in the GIPA) also commenced on 1 July 2010.

The *Court Information Act* 2010 was assented to on 26 May 2010.

The Department of Planning has released:

- Planning Circular [BS 10 007] which briefly outlines the key changes to the Building Code of Australia 2010 as they apply to NSW;
- a 12 Month Review Paper on the State Environmental Planning Policy (Exempt and Complying Developments Codes) 2008 – The Codes SEPP; and
- Planning Circular [PS 10-014] on changes to local development contributions.

Court Practice, Procedure and Policies

On 1 July 2010 the Court's fees increased 4% as set out in the Civil Procedure Amendment (Fees) Regulation 2010 and the Criminal Procedure Amendment (Fees) Regulation 2010.

Effective 28 June 2010, the *Courts Legislation Amendment Act* 2010 amended the *Land and Environment Court Act* 1979 to enable the puisne Judges of the Supreme Court to act as Judges of the Land and Environment Court and amended the *Supreme Court Act* 1970, enabling the Chief Judge and the other Judges of the Land and Environment Court to act as Judges of the Supreme Court.

The Chief Judge has issued a new Practice Note - Pre-Judgment Interest Rates - effective 1 July 2010.

The Chief Judge has made a new instrument of delegation of the functions of the Court to the Registrar pursuant to s 13 of the *Civil Procedure Act* 2005, effective 4 May 2010.

The Court has issued a number of policies in 2010, which are published on its website:

- Case Management;
- Commissioner Mentoring;
- Commissioners' Code of Conduct;
- Commissioners' Performance Appraisal;
- Complaints Against Commissioners of the Land and Environment Court;
- Continuing Professional Development;
- Court Attire;
- Delays in Reserved Judgments;
- Guidelines for Fee Waiver, Postponement and Remittance of Court Fees (these guidelines apply to the Land and Environment Court pursuant to r 11(3) of the Civil Procedure Regulation 2005, notwithstanding that they do not refer specifically to the Land and Environment Court);
- Identity Theft Prevention and Anonymisation Policy; and
- Site Inspection.

The Chief Judge has issued Practice Note – Class Two Tree Applications effective 23 July 2010. This practice note applies to all applications under the Trees (Disputes Between Neighbours) Act 2006 in Class 2 of the Court's jurisdiction. The forms for Class 2 applications made pursuant to the Trees (Dispute Between Neighbours) Act 2006 have been updated. Forms D, E and F have been repealed, and all of the tree forms have been replaced with a new version of Form C and new supplementary forms – Form G and Form H.

The Chief Judge has also approved forms for Class 8 proceedings under the *Mining Act* 1992 and *Petroleum (Onshore) Act* 1991.

A new series of Appeal Information Sheets are now available on the Court website:

- Development Applications;
- Valuation Objections;
- Orders;
- Rates Notices;
- Compensation for resumption of land; and
- Trees Disputes (Notes and FAQs).

The Court website has recently been updated to include pages on Tree Dispute Principles, Biodiversity and Mining.

Judgments

Overseas

- Judicial Review

The Queen on the application of London Borough of Hillingdon & Ors v Secretary of State for Transport & Anor [2010] EWHC 626 (Admin) (Carnwath LJ)

Facts: in 2003 the Secretary of State published a White Paper *The Future of Air Transport* ("ATWP") designed to set out a strategy for air transport in the UK for the next 30 years. The strategy included proposals for substantial growth at a number of airports and proposed new runways at four airports, including Heathrow. The ATWP stated that the government supported the proposal for the new runway at Heathrow subject to being satisfied that a key condition relating to compliance with air quality limits could be met, and conditional on measures to prevent deterioration of the noise climate and improve public transport access. At that time government policy was that there should be a 60% reduction in CO_2 from 1990 levels by 2050 but international aviation was not included in those figures. In 2007 the Secretary of State began a new consultation process with the publication of a consultation document that restated the government's view that there was a strong economic case for a third runway. In 2008 the *Climate Change Act* 2008 was passed. Section 1 imposed a statutory duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline ("the 2050 cap"); emissions from international aviation were not included however provision was made for their inclusion in accordance with regulations to be made by the Secretary of State. On 15 January 2009 the Secretary of State made a statement to the House of Commons ("the 2009 Statement") announcing his conclusions following the consultation, stating that all three of the conditions for supporting a third runway could be met and that any additional capacity would be subject to a new "green slots" principle to provide incentive for use of the most modern aircraft. At the same time the Department issued a document entitled *Adding capacity at Heathrow: Decisions following Consultation* ("the Decisions Paper") confirming support for a third runway at Heathrow. In February 2010 the Secretary of State stated that the government proposed the preparation of an Airports National Policy Statement ("NPS") under s 5 of the *Planning Act* 2008. Section 12 of the *Planning* Act provides a means by which consultations carried out and policy decisions made before the new procedure for preparation of a NPS in s 5 can be taken into account; and s 106 establishes the special status of the NPS in subsequent decision-making, providing that when deciding an application for an order granting development consent the decision-maker may disregard representations if they relate to the merits of policy set out in an NPS. The applicants were a group of local authorities and organisations opposed to the third runway proposal, and Transport for London which has responsibility for transport arrangements for Greater London. The applicants challenged the legality of the decisions announced in January 2009, being the Secretary of State's statement to Parliament and the Decisions Paper ("the 2009 Decisions") on the grounds of breach of natural justice in failing to undertake a fair consultation, failure to take into account material considerations, and failure to provide adequate reasons, and sought the quashing of the decision to confirm policy support for a third runway and new terminal at Heathrow.

Issues:

(1) whether the 2009 Decisions were susceptible to judicial review; and

(2) whether the Secretary of State could rely on the policy decision made in 2003 without regard to developments since then including in relation to climate change policy.

Held:

(1) as statements of government policy on particular issues at particular points of time, the 2003 ATWP and the 2009 Decisions carried weight, but they were not immutable, nor could they limit the scope of the permissible debate in relation to a future Airports NPS: at [64];

(2) although the 2009 Decisions took the form of a statement to Parliament it was not for that reason immune from challenge. Such high level Ministerial statements of airport policy were susceptible in principle to judicial review even if they had no direct substantive effects: at [65];

(3) any grounds of challenge had to be seen in the context of a continuing process towards the eventual goal of statutory authorisation and there had to be something not just "clearly and radically wrong", but also such as to require the intervention of the court at this stage: at [69];

(4) judicial review proceedings were not a suitable forum to resolve the technical debate about whether the objectives of the ATWP for expansion of the airport were fundamentally inconsistent with the policy on climate change including the 2050 cap. The claimants' submissions were a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper and were clearly matters which would have to be taken into account under the new Airports NPS: at [77];

(5) the claimants' points that a number of factors undermined the economic justification for the proposal demonstrated why it made no sense to treat the economic case as settled in 2003. As potential grounds for judicial review at this stage, however, they had been overtaken by the concession that the economic case was subject to review in light of changing circumstances. They did not require the intervention of the Court at this stage: at [84];

(6) it was impossible to determine precisely what the Secretary of State ultimately understood to be the scope of the third condition relating to public transport access, or what if anything he had decided about it. It was equally impossible to ascertain what if anything he had made of the points raised by Transport for London, and it was difficult to see how a concluded view of any significance could be arrived at without addressing their concerns as the responsible statutory authority: at [92];

(7) the effect of the 2009 Decisions at the time they were made had been overtaken by developments since the proceedings began. The preparation of the Airport NPS would necessarily involve a review of all the relevant policy issues including the impact of climate change policy: at [96]–[97]; and

(8) it was doubtful whether a quashing order was appropriate in relation to a statement of policy which had no substantive legal effect at the time and, assuming an undertaking not to rely on s 12 of the *Planning Act*, would have none under that Act.

- Sentencing

R v Thames Water Utilities Ltd [2010] EWCA Crim 202 (Moore-Bick LJ, David Clarke and Sweeney JJ)

Facts: Thames Water Utilities ("Thames") was a supplier of water and sewerage services. During the course of cleaning newly installed tertiary sewage treatment tanks for the first time, approximately 1,600 litres of sodium hypochlorite was flushed out of one of the tanks into the River Wandle in London. Thames pleaded guilty to an offence of causing polluting matter to enter controlled waters contrary to s 85(1) of the *Water Resources Act* 1991 (UK). The defendant had 82 previous convictions between March 1991 and May 2008 for offences in connection with the discharge of sewage from its premises. The defendant had delayed alerting the Environment Agency even though the consequences of the spill were devastating to aquatic life. Police were required to keep the public away from the river for their own safety due to the fumes. The defendant pledged to pay £500,000 in compensation and for future improvement. Additional aggravating features included that there had been insufficient risk analysis of the cleaning system by the defendant and the cleaning up activity had been carried out in an unsupervised manner with insufficient resources. Mitigating factors included the timely plea of guilty and that the defendant had abandoned the system used at the time of the commission of the offence and had since devised a fail-safe system. At first instance the judge found that the starting point for a fine was £250,000 but ultimately fined Thames £125,000. Thames appealed the sentence.

Issues:

(1) whether the judge had taken insufficient account of the £500,000 in reparations pledged or paid;

(2) whether the starting point of the fine was too high; and

(3) whether too much weight had been given to Thames' previous convictions.

Held: the fine at first instance was excessive and was reduced to £50,000:

(1) the following sentencing principles were articulated by the Court: at [39]:

(i) the environment is a precious heritage. It is incumbent for the present generation to preserve it;

(ii) Parliament has imposed a heavy burden to do everything possible to ensure that individuals and companies do not cause pollution by the escape of materials from sewage treatment plants into controlled waters;

(iii) contravention of the Act is a strict liability offence because parliament regards the causing of polluting matter to enter controlled waters to be so undesirable as to merit the imposition of criminal punishment irrespective of a company's knowledge, state of mind, belief or intention;

(iv) there is an onus on a prudent company to conduct ongoing risk assessment by looking at the probability of events occurring that might lead to pollution and the extent of the damage, or possible damage, if such an event occurs;

(v) the size of the overall penalty will depend on the particular facts of each case;

(vi) punishment, deterrence, and reparation are all important purposes of sentence;

(vii) the purpose of deterrence, in this context, includes that the penalty for a breach should always be more than an expense that should have been incurred to prevent the incident: it should be large enough to bring the message home to the defendant and others to deter future breaches, and it should be such that wealthy offenders that have the potential to cause the most serious damage are equally deterred along with offenders of limited means;

(viii) consistency of fines will be difficult to achieve between cases. Such consistency is not a primary aim of sentencing in cases of this type;

(ix) the actual or potential extent of the damage caused may aggravate the seriousness of the offence. Considerations included the noxiousness of the pollutant, how far it spread, the long term effects, its impact on human and animal health, what action was necessary to clean, restore or rehabilitate the environment and whether it prevents other activities from being undertaken;

(x) more general aggravating features include the degree of culpability, whether the action was taken or not taken to maximise profit, evidence of repetition, failure to heed advice, caution, concerns or warnings. Corrective action, both putting right the failures that led to the offence, and ensuring lack of repetition, should be seen as the necessary minimum response; and

(xi) a plea of guilty at an early opportunity and the payment of compensation are mitigating factors: at [39];

(2) the failures in this case made the offence an extremely serious one of its type: at [46]. This had to be balanced against the wholly unprecedented payment and pledge of £500,000 in reparation, as well as other mitigating factors: at [50];

(3) there was a clear policy need, in cases of this type, to encourage the making of voluntary reparation by offenders whilst at the same time ensuring appropriate punishment and deterrence. Assessment of voluntary reparations should be mindful of the fact that the offender is likely to make a public relations gain and may be able to spread the payments out to a greater extent compared to a fine. Offenders should not be able to buy off the punishment aspect of sentence: at [53];

(4) the starting point of £250,000 was within the appropriate range: at [55];

(5) the nature and amount of the voluntary reparation made and pledged in this case was clearly exceptional. The company had thereby clearly brought the necessary deterrent message home to its managers, shareholders and others. As a consequence the deterrence element of the notional fine should have been reduced to nil: at [55]; and

(6) the company had a large number of previous convictions for similar strict liability offences, albeit that none related to the works and only two related to the escape of bleach. The recorder was entitled to regard the company's previous convictions as aggravating the offence: at [48].

High Court of Australia

Spencer v Commonwealth of Australia (reserved 16 June 2010) [2010] HCATrans 156

(related decision: *Spencer v Commonwealth of Australia* [2009] FCAFC 38 (Black CJ, Jacobson and Jagot JJ))

Facts: Mr Spencer owned a property at Shannons Flat, New South Wales known as "Saarahnlee". The property is subject to the *Native Vegetation Act* 2003. Previously it was subject to the *Native Vegetation Conservation Act* 1997.

The State statutes prohibited the clearing of native vegetation other than in specified circumstances. As a consequence, Mr Spencer claimed that they made Saarahnlee unsuitable for commercial farming. He also claimed that they effectively amounted to the acquisition or expropriation of his interests in Saarahnlee. Mr Spencer further submitted that the State statutes operated with the effect or authority of two Commonwealth laws, namely, the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) and the *Natural Heritage Trust of Australia Act* 1997 (Cth). Mr Spencer claimed that the Commonwealth statutes were laws with respect to the acquisition of property other than on "just terms" as required by s 51(xxxi) of the Commonwealth Constitution ("the Constitution"), and therefore, were invalid.

On 26 August 2008, Emmett J of the Federal Court of Australia dismissed Mr Spencer's matter. This was on the basis that he had failed to identify any relevant Commonwealth law with respect to the acquisition of property. On 24 March 2009, the Full Federal Court unanimously dismissed Mr Spencer's appeal. The Court found that Mr Spencer could not surmount the following fundamental problems with his claims:

(1) the authoritative statements in *Pye v Renshaw* [1951] HCA 8 concerning the operation of ss 51(xxxi) and 96 of the Constitution;

(2) the decision of the New South Wales Court of Appeal in *Arnold v Minister Administering the Water Management Act 2000* ([2008] NSWCA 338 – see now [2010] HCA 3); and

(3) the consequences of Mr Spencer accepting the validity of the State statutes. This meant that even if the Commonwealth statutes and inter-governmental agreements were invalid, the *Native Vegetation Act* 2003 would remain in force and impose the same prohibitions and restrictions on his property.

Mr Spencer issued a Notice of Constitutional Matter pursuant to s 78B of the *Judiciary Act* 1903 (Cth). The Commonwealth filed a draft notice of contention the grounds of which included that an exercise of power by the Commonwealth to grant financial assistance under s 96 of the Constitution was not vitiated if exercised for the purpose of inducing a State to exercise its powers of acquisition on other than just terms.

Issues: on 12 March 2010 the High Court granted special leave to appeal (*Spencer v Commonwealth of Australia* [2010] HCATrans 55). The questions of law said to justify the grant of special leave to appeal include:

(1) whether *Natural Resources Management (Financial Assistance) Act* 1992 (Cth) and *Natural Heritage Trust of Australia Act* 1997 (Cth) or provisions thereof are laws which by their terms, operation or effect may be characterised as laws with respect to the acquisition of property, within the meaning of s 51(xxxi) of the Constitution?

Held: the proceedings were heard before a full court of the High Court on 16 June 2010 (*Spencer v Commonwealth of Australia* [2010] HCATrans 156) and are reserved.

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2010] HCATrans 140 (20 May 2010)

(related decision: *Minister Administering the Crown Lands Act v Aboriginal Land Council* [2009] NSWCA 352)

Held: application for grant of special leave refused.

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16 (Gummow ACJ, Heydon, Crennan, Kiefel and Bell JJ)

(related decision: *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210 (Moore J))

Facts: the respondent was a citizen of Pakistan, born in 1965. He was a Sunni Muslim. His first language was Urdu and he gave evidence before the Refugee Review Tribunal ("the RRT") through an interpreter. On 3 July 2007, he arrived in Australia on a visitor visa valid for three months. On 16 August 2007, he lodged his application for a protection visa. In the application the respondent said that he sought the protection visa on the basis of his belief and practice of homosexuality. The issues before the RRT concerned whether the respondent was a member of a particular social group and whether he had a well founded fear of persecution by reason of his membership of that social group. The RRT held that it did not accept that the respondent would engage in homosexual activities in the future, and therefore, it did not accept that he would face persecution due to his membership of a particular social group, whether actual or perceived, were he to return to Pakistan now or in the reasonably foreseeable future. The RRT relied on two aspects of the respondent's conduct as a basis for rejecting his claim. It considered that the respondent's conduct, first, in returning to Pakistan for three weeks in 2007 before coming to Australia, and secondly, in failing to seek asylum in the United Kingdom in 2006 when he was there, was conduct which was inconsistent with his claimed fears of persecution arising as a result of his homosexuality. Accordingly, the RRT decided that it was satisfied that he did not fulfil the criterion for the issue of a protection visa. The respondent appealed and lost at first instance before the Federal Magistrate's Court. However, the Federal Court allowed an appeal from that Court and quashed the decision of the RRT. Moore J held that the RRT had fallen into jurisdictional error because its determination that the respondent was not a refugee was based on illogical or irrational findings or inferences of fact. The Minister appealed the decision of Moore J to the High Court.

Issues:

(1) can "illogicality", "irrationality", or "lack of articulation" in a finding of jurisdictional fact amount to jurisdictional error?

(2) whether the findings of fact impugned by Moore J were findings of jurisdictional fact?

(3) was the decision of Moore J that the RRT had fallen into jurisdictional error based on illogical or irrational findings or inferences of fact correct?

Held: in upholding the appeal the High Court held as follows:

(1) "illogicality" or "irrationality" can give rise to jurisdictional error in a finding of jurisdictional fact making it amenable to jurisdictional review. However, not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case: at [130];

(2) the test for "illogicality" or "irrationality" must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from the evidence, a decision cannot be said by a review in court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion: at [131]; and

(3) on the probative evidence before the RRT, a logical or rational decision maker could have come to the same conclusion as the RRT. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on

the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence and the decision maker does not come to that conclusion or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these scenarios applied in the present case. The RRT did not believe the respondent's claim that he had engaged in the practice of homosexuality and accordingly it was not satisfied that he feared persecution if he returned to Pakistan. There was no sense in which the decision the respondent did not fear persecution or the findings upon which that decision was based could be "clearly unjust", "arbitrary", "capricious", "not *bona fide*" or "*Wednesbury* unreasonable". Accordingly, the RRT's decision did not demonstrate any jurisdictional error and therefore, the decision of Moore J was incorrect: at [135]-[136];

NSW Court of Appeal

Jemena Gas Network (NSW) Limited v Mine Subsidence Board [2010] NSWCA 146 (Spigelman CJ, Allsop P, Giles, Basten and Macfarlan JJA)

(related decision: *Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2009] NSWLEC 106 (Sheahan J))

Facts: Jemena Gas Networks (NSW) Limited ("Jemena") owned and operated a gas pipeline that traversed an area the subject of an underground coal mining lease. The lease encompassed a block of parallel, adjacent panels of coal that had been approved for longwall mining. Jemena anticipated that the extraction of coal from Longwall 32 would cause subsidence that would endanger the pipeline. They did not anticipate damaging subsidence from the mining of the other panels. Prior to the mining of Longwall 32, Jemena carried out works to prevent and mitigate damage from the anticipated subsidence. Pursuant to the *Mine Subsidence Compensation Act* 1961 ("the Act"), Jemena made a claim to the Mine Subsidence Board ("the Board") to be compensated for the costs of the works carried out. The Board rejected the claim. Jemena appealed the decision.

Sheahan J, applying the decision in *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137; (2007) 154 LGERA 60, held that the works were incurred in anticipation of future subsidence and therefore Jemena was not entitled to compensation pursuant to the Act.

Issues:

(1) whether a particular "incident" of subsidence had to be linked to damage, real or anticipated, both in temporal and casual terms;

(2) whether *Wambo* was decided wrongly and if so could it be departed from by the Court of Appeal; and

(3) whether Jemena was entitled to make a claim to the Board for expenses which it had incurred in order to prevent damage to its gas pipeline, which was threatened by subsidence caused by underground longwall coal mining in its vicinity;

Held: dismissing the appeal:

(1) an appellate court may depart from its earlier authority when that authority is "plainly" or "clearly" wrong: at [46], [56], [168] and [189];

(2) *Wambo* was not "plainly" or "clearly" wrong. The Court was bound to follow the decision in *Wambo*: at [95], [172] and [189];

(3) the mining of each longwall was a separate event. The subsidence occasioned from the mining of Longwall 32 was not "further subsidence" following "initial subsidence" as a result of the mining of other longwalls: at [38] and [40];

(4) *Wambo* correctly held that the Act did not authorise expenditure made in anticipation of a subsidence that had not yet occurred: at [81]-[95];

(5) the phrase "a subsidence that has taken place" in s 12A(1)(b) of the Act to was to be assessed at the time the Board formed an opinion as opposed to when the owner anticipates damage: at [144] and [189];

(6) the causal link required that the subsidence not precede the commencement of the extraction: at [130]; and

(7) whether or not a subsidence, which is exacerbated as mining continues, was part of a relevant subsidence for the purposes of s 12A which allows compensation for subsidence that has occurred, involved a question of fact that was not relevant to the proceedings in light of the agreed facts: at [184]-[186].

Marrickville Metro Shopping Centre Pty Limited v Marrickville Council [2010] NSWCA 145 (Tobias, Basten JJA and Handley AJA)

(related decision: *Marrickville Metro Shopping Centre Pty Limited v Marrickville Council* [2009] NSWLEC 109 (Pain J))

Facts: Marrickville Metro Shopping Centre ("the centre") appealed a decision of Pain J that decisions of Marrickville Council ("the council"), first, creating the "*Business-Marrickville Metro*" rating sub-category and second, to levy that sub-category at a rate higher than other commercial rating categories were not invalid.

The centre sought declarations that the decision to create the sub-category was invalid on the grounds that the sub-category was not created by reference to a "centre of activity" as required by the legislation, that the council took into account an irrelevant consideration of relieving the burden of rates payable by other rate payers, that this shift in burden meant the decision was made for an improper purpose, and that the decision was manifestly unreasonable. The centre also claimed that the requirement of notice of a change of rating category had not been satisfied. The decision to set the *ad valorem* rate for the sub-category from 2002 to 2008 was challenged on a similar basis to the creation of the sub-category.

Issues:

(1) whether the decisions by the council to create a sub-category specific to the centre's land and to fix the *ad valorem* rate applicable to that sub-category ("the decisions") were manifestly unreasonable;

(2) whether the decisions were made for an improper purpose;

(3) whether the decisions were affected by an apprehension of bias on the part of three councillors who were commercial ratepayers operating businesses in competition with the centre and who were present and voted when the decisions were made;

(4) whether the decisions were *ultra vires* for not describing a "category" of land use; and

(5) whether the decisions were in breach of the provisions of the *Local Government Act* 1993 ("the LGA") which made the levying of the rates invalid;

Held: dismissing the appeal:

(1) the LGA expressly permitted the *ad valorem* rate determined with respect to a particular sub-category to be different from the *ad valorem* rate determined with respect to any other sub-category or category. The only limitation was that the *ad valorem* rate specified for a parcel of land could not differ from the *ad valorem* rate specified for any other parcel of land within the same category or subcategory: at [20];

(2) an abstract notion of fairness was irrelevant to the issues in the case. Mere "unfairness" could not, at least of itself, support a finding of manifest unreasonableness in the *Wednesbury* sense: at [75];

(3) there was no explicit or implied prohibition in the LGA on a single site being a category or a sub-category. Whether a sub-category could be determined depended upon whether it could be considered as a centre of activity: s 529(2)(d) of the LGA. The name or description "Marrickville Metro" merely reflected the activity of the shopping centre on the site and there was only one such shopping centre in the local government area. There was nothing legally wrong with identifying the relevant category by reference to the name of the activity at that site: at [77]-[78]. Applying the ordinary meaning of the words "centre of activity" the concentration of activities at the Marrickville Metro site, being a large number of retail shops, fell within the description "centre of activity": at [79];

(4) the LGA expressly permitted differential rating between categories and sub-categories, and therefore, discrimination in the imposition of rates between those categories and sub-categories: at [93]. It was not an irrelevant consideration giving rise to illegality to seek to impose a greater rate burden on one category or sub-category than another. The fact that the statute permitted such a form of discrimination militated against any finding of manifest unreasonableness: at [97]. There was no relevant statutory criteria that was required to be satisfied before the council exercised the power: at [99], [208] and [232];

(5) the decisions were not arbitrary as the council had before it the various reports of the General Manager as well as the benefit of the views of the various councillors: at [100] and [110]. The council had a broad discretion in the setting of an *ad valorem* rate: at [116];

(6) the decision of the council that the only large shopping complex in the local government area should have a sub-category of its own with a commensurate increase in the *ad valorem* rate applicable was a decision which the statute recognised and permitted without pre-condition: at [128] and [231];

(7) it was not unlawful to name the sub-category "Business – Marrickville Metro". It was not imposed on a single landowner but upon a centre of activity. It related to the land use of the rated land and not to the identity of the landowner: at [133];

(8) it was not improper that raising the *ad valorem* rate in one category resulted in a reduction in other categories because of the statutory cap on revenue that could be raised by the council: at [134]. It inevitably followed, by the very fact that the statute permitted the creation of categories and sub-categories, and further, expressly permitted the determination of different *ad valorem* rates for the different categories and sub-categories, that this would result in a form of discrimination between categories and sub-categories. This was an authorised purpose and not beyond power: at [143], [206] and [231];

(9) there was no apprehension of bias by councillors voting who were also commercial ratepayers and operated local businesses. Councillors are elected from their local community to represent that community. It was highly likely that they would have personal and business interests in that community. These circumstances were not such that a fair-minded lay observer might reasonably apprehend that a councillor might not bring an impartial mind to the resolution of the issue of rate setting before him or her: at [163], [212] and [233]-[237]; and

(10) in accordance with the principles of *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, the failure to comply with ss 520 and 521 of the LGA did not lead to invalidity of the decisions. The structure of the LGA was that pursuant to s 546 a rate is levied on the land as specified in a served rate notice. The notice was required by s 544 to include the name of the rate. The making of the rate and the service of the notice by their very nature informed the ratepayer that the sub-category in respect of which the rate was levied had relevantly taken effect in the year to which the rates notice was directed: at [193] and [218]-[222].

Jeray v Blue Mountains City Council [2010] NSWCA 153 (Handley, Sackville AJA)

(related decision: 40986 of 2008, 16 July 2009 (Lloyd J))

Facts: Mr Jeray, a litigant in person, sought leave to appeal out of time a decision of Lloyd J which dismissed an application seeking declarations that certain development consents granted by the council were "null and void".

On the fourth day of the hearing before Lloyd J Mr Jeray filed a motion seeking the disqualification of his Honour and an order that a different judge hear the proceedings. Mr Jeray stated that the actions of Lloyd J had been inexcusable but refused to specify what those actions were despite Lloyd J waiving the need for the formality of an affidavit. Mr Jeray insisted that he wanted time to put on affidavit evidence. The respondent submitted in court that if a litigant declined to take any further part in the proceedings they were effectively discontinuing the proceedings. Mr Jeray stated that he did not wish Lloyd J to hear the motion because he sought a "neutral adjudicator" and Lloyd J hearing the motion "would be a conflict of interest". Lloyd J informed Mr Jeray that he would hear the motion immediately. Mr Jeray declined to give reasons as to why he should disqualify himself. Lloyd J invited Mr Jeray on three occasions to orally provide reasons in support of his notice of motion and he declined to do so. Lloyd J indicated to Mr Jeray that the case was in its fourth day of hearing, that a considerable amount of evidence had been adduced, and that the matter should proceed. He also stated that Mr Jeray could proceed with the matter and appeal the decision on the motion at a later time. His Honour said that Mr Jeray's refusal to give reasons for the motion or to continue with the proceedings was in substance a discontinuance which gave him no option but to dismiss the motion. Lloyd J again stated that Mr Jeray could renew the motion for disqualification at a later time if he wished to do so. Mr Jeray declined to proceed with the hearing on the motion other than with a different judge. Lloyd J determined that in substance Mr Jeray was discontinuing the proceedings and dismissed them with costs.

Issues:

(1) whether Mr Jeray should be granted an extension of time to file a notice of appeal; and

(2) whether the leave to appeal ought to be granted.

Held: granting an extension of time to file a notice of appeal and granting leave to appeal:

(1) Mr Jeray had an arguable case that he was denied procedural fairness by the manner in which the proceedings were dismissed. There are circumstances in which a trial judge may be obliged to provide an unrepresented litigant with sufficient information about the practice and procedure of a court to ensure that a fair trial takes place: at [14]; and

(2) before dismissing the proceedings Lloyd J should have taken further steps to ensure that Mr Jeray understood what was to happen, what powers his Honour proposed to exercise and what the consequence of the orders proposed by his Honour would be for the proceedings instituted by Mr Jeray: at [15].

Land and Environment Court of NSW

Judicial decisions

- Practice and Procedure

The Owners – Strata Plan No 855 v Gosford City Council [2010] NSWLEC 106 (Preston CJ)

Facts: the applicant appealed to the Court under s 97(1) of the *Environmental Planning and Assessment Act* 1979 ("*EPA Act*") against the actual refusal by the council of the applicant's development application for the demolition of an existing residential flat building and the erection of a new residential flat building in Avoca. The site is zoned residential 2(a) and development for the purpose of a residential flat building is prohibited in the zone under the Gosford Planning Scheme Ordinance. The applicant relied on the existing use right provisions in the *EPA Act* and Environmental Planning and Assessment Regulation 2000 as the source of power for the consent authority to grant development consent for the proposed development. The council acknowledged that part of the land subject to the applicant's development application had the benefit of existing use rights, but contended that the proposed development would extend well beyond that part of the land that had the benefit of existing use rights.

The council, by notice of motion, moved the Court for an order under Pt 28 r 28.2 of the Uniform Civil Procedure Rules 2005 that the question of the extent of the existing use rights on the land subject to the development application be heard and determined separately from and before other questions in the proceedings.

Issues:

(1) whether the question of the extent of the existing use rights on the land subject to the development application should be heard and determined separately from and before other questions in the proceedings.

Held: dismissing the notice of motion:

(1) the separate question that the council isolated for separate determination was not without merit and was capable of separate determination. In comparing the time and costs involved in preparing for and conducting a separate determination of questions as opposed to a final hearing of all issues, the balance favoured ensuring the just, quick and cheap resolution of all issues, rather than separate questions: at [20], [23]; and

(2) there would be no material saving in ordering the separate determination of the existing use questions from other questions in the proceedings. There would be a duplication of evidence and hearing time if a separate question was ordered and a separate determination could give rise to an appeal if a party was dissatisfied with the Court's interlocutory ruling on the separate questions. The applicant was in an advanced state of preparedness for a final hearing of all questions and the proceedings could be ready for hearing of all questions in the same time frame that a hearing on separate questions relating to existing use would occur: at [11]–[19].

Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 4) [2010] NSWLEC 91 (Preston CJ)

Facts: the applicant, Caroona Coal Action Group Inc, brought proceedings challenging the validity of certain mining authorities issued by the Minister for Mineral Resources ('the Minister') to Coal Mines Australia Pty Limited ("CMA"). Prior to the hearing of the proceedings, Preston CJ directed the Minister to provide discovery of documents relating to the mining authorities. One document was an expression of interest submitted by BHP Billiton (CMA is a wholly owned subsidiary of BHP Billiton) to the NSW Government entitled "Caroona Coal Exploration Area December 2005" ("the Caroona EOI").

Prior to the hearing, CMA's solicitors sought an undertaking that inspection of the Caroona EOI would be limited to the applicant's legal advisers and that the applicant's legal advisers would not disclose to any other persons including the applicant or any other individual member of the applicant details of the Caroona EOI. The applicant's solicitors agreed to the terms of the undertaking sought by CMA. The Caroona EOI was included in a tender bundle of documents that was received into evidence at the hearing. No application was made under Part 21 r 21.7 of the Uniform Civil Procedure Rules ("UCPR") restricting disclosure or use of the Caroona EOI which was included within the tender bundle.

After the hearing, but before judgment was handed down, the applicant's legal advisers gave notice of their intention to disclose to members of the applicant the Caroona EOI. By notice of motion, CMA sought an order under Part 21 r 21.7 of the UCPR restricting disclosure of specified statements and data in the Caroona EOI to the applicant's legal advisers only.

The Minister did not wish to be heard on the CMA's application.

Issues:

(1) whether the Caroona EOI document is confidential; and

(2) whether access to the Caroona EOI should be restricted.

Held: upholding the notice of motion and restricting access to the Caroona EOI:

(1) disclosure and use of the statements and data in the Caroona EOI should be restricted and a redacted version of the Caroona EOI should be placed on the Court file: at [46];

(2) the orders sought by CMA did no more than is necessary to achieve the due administration of justice and the requirement of open justice would not be infringed if such orders were made: at [39];

(3) the Caroona EOI was only potentially relevant to the applicant's argument that a grant of an exploration licence had been made under Pt 3 of the *Mining Act* 1992 and certain preliminaries to the grant of such licence had not been complied with. However, this claim fell away at the hearing and any evidence potentially relevant to the claim was not considered in determining the applicant's challenge. The redacted statements and data were not referred to in the substantive judgment or in the judgment on costs. It was not necessary for any member of the public who wished to understand these judgments to look at the Caroona EOI: at [40]–[42];

(4) the particular statements and data, in respect of which orders restricting disclosure and use were sought, were not referred to by the applicant, the Minister, or CMA in their submissions. The contents of these statements and data were not read out in open court and accordingly any member of the public did not need to inspect the Caroona EOI to understand the submissions made or the evidence read in open court: at [43];

(5) it was by no means clear that any member of the public who might be sitting in court listening to the hearing could inspect the exhibits received in evidence in the case: at [44] *British American Tobacco Australia Services Ltd v Cowell* [2003] VSCA 43; (2003) 8 VR 571 at [36] referred to; and

(6) a confidentiality order could still be made in respect of material that was in evidence and was relied upon. The fact that the Caroona EOI was received into evidence, without either objection of an order under r 21.7 of the UCPR being sought at the time, did not prevent the Court now making such an order: at [45].

Austar Coal Mine Pty Ltd v Mitchell [2010] NSWLEC 74 (Craig J)

Facts: the defendant sought an order for access to the plaintiff's property, subject to a mining lease, for the purposes of determining compensation payable to it by the plaintiff pursuant to s 265 or the *Mining Act* 1992. The defendant claimed it required access in order either to verify the manner in which the land was used for mining purposes or to better understand the nature of those activities being conducted on the plaintiff's property.

Issues:

(1) whether underground mining activities not carried on beneath the subject land potentially founded a basis for compensation under Part 13 of the *Mining Act* 1992.

Held: granting the defendant access to the surface of the property but not to its underground structures:

(1) the definition of 'compensable damage' provided in s 262 did not entitle the examination of the mining activities as potentially founding a basis for compensation: at [10];

(2) section 276 adequately dealt with the concern that underlying the defendant's request for access by enabling a further assessment of compensation to be made in the event that the consequences of the plaintiff's activities occurred in a way that was inconsistent with the manner in which activities were currently being conducted: at [12]; and

(3) in order to assist the expeditious disposal of the proceedings, and given that the plaintiff did not oppose the proposal, access was granted to the defendant's experts for the purpose of making surface observations of the plaintiff's property: at [14].

Australian Enterprise Holdings Pty Ltd t/as AEH Group v Camden Council [2010] NSWLEC 70
(Pepper J)

Facts: AEH Group sought to appeal against the conditions imposed by a notice of determination for the demolition of existing structures and the construction of a mixed use development, comprising multi unit housing, shop-top housing, tourist facilities, restaurant, ancillary shops, professional suites, a residential care hostel and medical centre at the former Camden High School site. The development conditions necessitated that the remediation works were to be completed in full prior to the development consent being operative. AEH Group sought to undertake staged remediation, demolition and construction of the development, the purpose of which was to allow the inevitable subdivision of the already approved and proposed development scheme into a combination of community title and strata lots. It was important that AEH Group obtain staged remediation and development to obtain financing secured against progressively rehabilitated and developed land. AEH Group sought leave to rely on the following material by way of amended development application in order to achieve subdivision of the site:

(a) amended architectural plans;

(b) community title strata subdivision plans; and

(c) additional expert reports.

Issues:

(1) whether the material amounted to a new development over which the Court had no jurisdiction or whether it was an amended development application;

(2) whether the material the applicant sought to rely upon was permitted by cl 55 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation") which stated that a development application may be amended or varied by the applicant any time before the application is determined; and

(3) whether a deemed development pursuant to ss 4 and 4B of the *Environmental Planning and Assessment Act* 1979 ("EPAA") was a new development that would require a new application pursuant to s 78A of the EPAA.

Held: granting leave to rely on the additional material:

(1) the Court could permit a development application that had been determined to be amended in accordance with cl 55 on the basis that on appeal the Court has all the functions and discretions which the body whose decision the subject of the appeal had in respect of the matter pursuant to s 39(2) of the *Land and Environment Court Act* 1979: at [28];

(2) the Court had jurisdiction to allow an amendment or variation to a development application but not to entertain an original application: at [34];

(3) whether a development application is being amended pursuant to cl 55 of the Regulation required a broad approach: at [29], [41]. The mere fact that the amended development application involved a subdivision of land was not sufficient to repel the application of cl 55: at [41]. The addition of the subdivision plans was an integral element of the staged remediation and development of the site: at [42]. Furthermore, it was likely that subdivision would have been a matter in the council's contemplation when approving the application: at [43]. Although creating a "changed development", the amendments did not convert the application into an original or new development application: at [46];

(4) it was not the case that all deemed development pursuant to ss 4 and 4B of the EPAA required a new development application whenever the classes of development specified in those provisions were sought irrespective of how minor the amendment or variation was: at [40];

(5) notwithstanding the availability of the power to permit the amended application, a discretion was nevertheless retained as to whether that power ought to be exercised by the Court: at [47]. The factors in favour of granting leave to AEH Group to rely on the additional material were that the council was not able to point to any detriment it might suffer if the amended application was permitted; the proceedings

did not have a hearing date or a first return date and AEH Group had acted without delay; AEH Group had offered to pay the council's reasonable costs with respect to the additional expenses incurred by reason of the amendments; the unchallenged expert evidence was that a staged model of development and remediation was environmentally appropriate; the amended application would facilitate the publicly desirable result of remediation of contaminated land; the application would permit a sizable development to be undertaken with financial security; and if a further and separate development application was to be lodged for subdivision this would cause further holding costs to be incurred by AEH Group and would likely result in a further appeal to the Court, such an outcome being neither sensible nor resulting in the just, quick and cheap resolution of the real issues of the Class 1 proceedings or any future proceedings regarding the development (s 56 of the *Civil Procedure Act* 2005): at [49]; and

(6) the nature of the amendments was not "minor" pursuant to s 97B of the EPAA, and therefore, AEH Group were required to pay the council's costs occasioned by the amended development application: at [7], [51]-[53].

Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 3) [2010] NSWLEC 135 (Pepper J)

(related decision: *Director-General Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2)* [2010] NSWLEC 73 (Pepper J))

Issues:

(1) whether the Court had the power to order joint conferencing of experts and the preparation of a joint report in criminal sentencing proceedings in the Class 5 jurisdiction of the Court.

Held:

(1) the Court did not have the power to make the orders sought by the prosecutor in light of Pt 75 r 3K of the Supreme Court Rules 1970 which apply to the Court by reason of r 5.2 of the Land and Environment Court Rules 2007: at [34].

Joseph v Valuer General [2010] NSWLEC 96 (Craig J)

Facts: the applicant (a self-represented litigant) appealed to the Court pursuant to s 37 of the *Valuation of Land Act* 1916 No 2 ("the Act") from the determination by the Valuer General of the "land value" of his land. The appeal was lodged outside of the time limit imposed by s 38(1) of the Act for the making of such an appeal.

Issues:

(1) whether the Court, in the exercise of its discretion under s 38(2) of the Act, should give leave to appeal after the expiration of the time period imposed by s 38(1).

Held: granting leave:

(1) four matters need to be considered when exercising the discretion under s 38(2), namely, the length of delay that has been occasioned, the reasons for that delay, the extent of prejudice occasioned by reason of that delay, and whether or not there is an arguable case to disturb the Valuer General's determination: at [9];

(2) although there was a considerable delay in the applicant lodging the appeal, that delay needed to be considered conjointly with the reasons given for it. In correspondence exchanged by the applicant with officers of the Land and Property Management Authority, reference was made to the right of appeal pursuant to s 37 but at no time was reference made on behalf of the Valuer General to the time limit for that appeal. Such correspondence containing reference to s 37 continued even after the time for appeal had expired: at [10]-[11];

(3) no prejudice would be suffered by the Valuer General by reason of an extension in time to appeal: at [13]; and

(4) a valuation report tendered by the applicant referring to comparable sales of properties in the vicinity of his land provided evidence upon which the Court could form the opinion that there is at least an arguable case on the part of the applicant justifying the prosecution of his current appeal: at [15].

- Judicial Review / Appeal

Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited (No 2) [2010] NSWLEC 104 (Preston CJ assisted by Adam AC)

(related decision: *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48 (Preston CJ assisted by Adam AC))

Facts: in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Limited* [2010] NSWLEC 48, an objector appeal against Upper Shire Council's ("the council") decision to grant consent to a limestone quarry, Preston CJ determined that the quarry was appropriate to be approved if suitable conditions could be drafted. In reaching the conclusion, Preston CJ applied the precautionary principle and determined that the conditions of consent should reflect an adaptive management approach to the quarry site.

Directions were made for the parties to address the outstanding matters and a timetable set for the further review and amendment of the draft conditions of consent.

Issues:

(1) whether appropriate conditions could be drafted to address the risks to geodiversity and biodiversity; and

(2) whether the final conditions ensured adequate offset was provided for damage caused to the White Box endangered ecological community.

Held: upholding the appeal and setting out the conditions of consent:

(1) in order to approve a development that was different in material respects, and on different conditions from those originally approved by the council, it was necessary for the Court to uphold the appeal: at [14] (*Gerroa Environment Protection Society Inc v Minister for Planning and Cleary Bros (Bombo) Pty Ltd (No 2)* [2008] NSWLEC 254: at [5]–[6] referred to);

(2) the final conditions implemented a precautionary, adaptive management approach, yet still met criteria of finality and certainty: at [11]; and

(3) the final conditions ensured that adequate offset was provided for damage caused to the White Box endangered ecological community: at [12].

Iris Diversified Property Pty Ltd v Randwick City Council [2010] NSWLEC 58 (Pain J)

Facts: the applicant owned land at Clovelly used for hotel purposes since at least 1926 and had existing use rights for a hotel use. The land was zoned Residential 2C pursuant to Randwick Local Environmental Plan 1998 ("the LEP") and development for the purposes of "hotel" is prohibited in the zone. A development application sought consent for alterations and additions to the hotel including a new basement carpark, a change of use of part of the land for six multi-unit housing apartments pursuant to the incorporated provisions of the Environmental Planning and Assessment Regulation 2000 ("the Regulation") and strata subdivision. Development for the purpose of multi-unit housing was permissible with development consent within the 2C zone. The application did not comply with council's development standards in relation to landscaped area and floor space ratio. Clause 41(1)(d) of the Regulation was amended on 29 March 2006 by the

Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006 to provide that an existing use may "be changed to another use, but only if that other use is a use that may be carried out with or without development consent".

Issue: whether cl 41(1)(d) (as incorporated into the LEP by virtue of s 108(3) of the *Environmental Planning and Assessment Act* 1979 known as the incorporated provisions) allowing a change of use from an existing use to a permissible use was derogated from if the change of use was assessed against the development standards in the LEP: at [30].

Held: dismissing the applicant's construction of the LEP:

(1) the application of development standards to the assessment of a conforming use did not derogate from the incorporated provisions. The assessment would not detract from, destroy or impair the operation of cl 41(1)(d): at [50].

CPT Manager Limited (acting as trustee of the Broken Hill Trust) v Broken Hill City Council [2010] NSWLEC 69 (Craig J)

Facts: the applicants sought a declaration that the consent granted by the first respondent for a new major shopping centre in Broken Hill was invalid and of no effect. The powers of the council relevant to the proceedings were at all times exercised by an administrator appointed pursuant to s 256 of the *Local Government Act* 1993. Land included in the development application included the area of a lane, opened as a public road, which the developer sought to have closed pursuant to the *Roads Act* 1993.

Issues:

(1) whether the consent was invalid by reason of apprehended bias on the part of the Administrator of the council by way of prejudgment in that:

    (a) the decisions of the Administrator, both to apply to the Minister to close the lane and also to agree upon the price at which the lane would be sold to the second and third respondents following closure, was made prior to the determination of the development application;

    (b) the Administrator failed to provide any or any cogent reasons for the decision to grant the consent in the face of a recommendation from independent consultants retained by the council that such consent be refused; and

    (c) by letter from the council to a representative of the developer, the latter had been invited to attend an onsite meeting with the Administrator ("the private meeting");

(2) whether the council failed to comply with its own development control plan imposing requirements for the advertising of development applications. Although the development application was advertised, the frequency with which advertisements were published was said not to have conformed to the requirements of the development control plan; and

(3) whether an order for costs, if made against the applicant, should include the costs of the council as well as the developer respondents.

Held: dismissing the application:

(1) when determining to apply for road closure and agree upon the price for the sale of the road prior to a determination of the development application, the council was performing a separate statutory function in relation to the road closure from that involved in the determination of the development application and no basis to found a claim of apprehended bias arose from the concurrent performance of these statutory functions: at [110];

(2) no statutory obligation was imposed upon the council to give reasons and neither the Model Code of Conduct adopted under the *Local Government Act* 1993 nor any other conduct of the council created an expectation for reasons to be given: at [128], [131];

(3) it was not established that the private meeting alleged by the applicant took place. An equal opportunity to meet the administrator was given to the objectors. The judicial paradigm for the conduct of legal proceedings with all parties present at once is not to be translated to the performance of the function being undertaken by the Administrator: at [136], [138];

(4) a requirement for the advertisement of the development application to be placed in a local newspaper "for a minimum of 28 days" should not be construed, in the context of the DCP, as requiring advertising on 28 separate occasions. The advertisements that were placed met the requirements of the Development Control Plan. Consequently, there was no breach of s 79A(2) of the *Environmental Planning and Assessment Act* 1979: at [171]; and

(5) the applicant is ordered to pay the costs of both the council and the developer respondents. The council's active participation in the proceedings was appropriate and reasonable given the general importance of the challenge made to the concurrent consideration by the council of applications under the *Roads Act* 1992 and the *Environmental Planning and Assessment Act* 1979: at [184].

Reid's Farms Pty Ltd v Murray Shire Council [2010] NSWLEC 127 (Pepper J)

Facts: Reid's Farms Pty Ltd ("Reid's Farms") sought declarations to the effect that a consent granted to KSK Developments Pty Ltd ("KSK") had lapsed. KSK lodged a development application ("the DA") with Murray Shire Council ("the council") in respect of a proposed tourist development and effluent disposal site. The DA was in respect of integrated development. KSK commenced a Class 1 appeal under s 97 of the *Environmental Planning and Assessment Act* 1979 ("EPAA") pursuant to the deemed refusal of the DA by the council. The day after the appeal was filed, the DA was approved subject to deferred commencement conditions that had to be complied with within 6 months ("the December consent"). In particular the deferred commencement condition required the lodgement of amended plans which did not have any buildings within a 60 m set back from the Murray River and for the ancillary sewage treatment plant. The deferred commencement conditions were not complied with within 6 months of the December consent as provided for in that consent. After consent was granted, KSK submitted a s 82A application for the council to review the determination. No public notification was made of the review, although Reid's Farms were aware of the review. On review, amendments were made to the deferred commencement conditions. KSK discontinued its Class 1 appeal on 23 July 2009. On the 6 August 2009, KSK lodged a s 96(1A) modification application which modified the deferred commencement conditions. The s 96 modification application was approved.

Issues:

(1) whether s 82A review was permissible because the review was of a determination in respect of integrated development prohibited by s 82(1)(c);

(2) whether s 96(1A) was an alternative source of power to support the review;

(3) whether s 95(6) could be used to extend time for compliance with a deferred development consent;

(4) whether s 95A was an alternative source of power to support the review;

(5) what was the effect of the Class 1 appeal and the discontinuance of that appeal on any expiration of the December consent;

(6) was there a failure to comply with a statutory duty to notify the application the subject of the s 82A review;

(7) did Reid's Farms have a legitimate expectation that it would be notified of the s 82A review application, which if not met would result in a denial of procedural fairness;

(8) whether any "practical injustice" arose as a consequence of any failure to notify;

(9) had the December consent lapsed such that there was nothing to later amend or modify under s 96(1A);

(10) whether the December consent was void for uncertainty because the council left for future consideration fundamental matters the subject of the consent, namely, details concerning the 60 m set back and the ancillary sewage treatment plant;

(11) was there a failure to take into account a mandatory relevant consideration under the Murray LEP; and

(12) was the decision of the council to grant the December consent manifestly unreasonable?

Held: dismissing the application and holding that the consent had not lapsed:

(1) s 82A(1)(c) prohibits review of integrated development. The determination the subject of the s 82A application was the December consent, which was a determination in respect of integrated development. The council, therefore, had no power under s 82A to review it: at [38];

(2) the council could not use either ss 96(1A) or 95A as an alternate source of power to effect the review: at [61] and [53];

(3) s 95(6) could not be used to extend the time for the expiration of a deferred development consent: at [59]-[60];

(4) the council had in place a "Notification for Development Applications Policy" pursuant to s 82A(4)(a)(ii): at [66]-[67]. The policy applied to all development applications including subsequent requests for reviews and to modification applications. This required notification if the proposal was more than of a minor or inconsequential nature: at [72]. The council came to the view that it was not, and therefore, that there was no failure by the council to comply with the notification requirements: at [76];

(5) there was no denial of procedural fairness because no practical injustice arose from the absence of notification. Reid's Farms had had a previous opportunity to object on the same grounds that it stated it would have relied upon had it been notified of the review: at [79];

(6) the operation of the consent was suspended pending the determination of the s 97 appeal to the Court: at [89]. The proceedings were 'determined' by the discontinuance of the appeal: at [92]. The consent did not, therefore, become operational until post the discontinuance: at [94];

(7) at the time of the subsequent s 96(1A) modification application the December consent had not lapsed and there was no statutory impediment to approval of the application: at [95]-[95];

(8) the consent was not uncertain. The deferred commencement conditions requiring an amended site and development plan in accordance with the Murray LEP did not mean that the consent did not approve the fundamental matters the subject of the consent: at [108];

(9) the council fulfilled its duty to give "proper, genuine and realistic consideration" to the mandatory relevant considerations specified by the LEP. The council fulfilled its duty by relying on expert reports that had detailed discussion of the development and the requirements of the LEP: at [122]; and

(10) the decision of the council was not manifestly unreasonable: at [127].

- Costs

Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 3) [2010] NSWLEC 59 (Preston CJ)

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

Facts: the applicant, Caroona Coal Action Group Inc, brought proceedings challenging the validity of certain mining authorities issued by the Minister for Mineral Resources ("the Minister") to Coal Mines Australia Pty Limited ("CMA"). The applicant's challenge was unsuccessful: *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2)* [2010] NSWLEC 1. The Minister and CMA, having been successful in the proceedings, applied for their costs.

Issues:

(1) whether a departure from the usual costs rule contained in r 42.1 Uniform Civil Procedure Rules 2005 was justified;

(2) whether the litigation could be characterised as having been brought in the public interest;

(3) whether circumstances in addition to the mere characterisation of the litigation as being brought in the public interest existed; and

(4) whether there were any countervailing factors that spoke against departure from the usual costs rule.

Held: awarding costs to the Minister and CMA:

(1) any departure from the usual costs rule on the basis of some circumstance, including the public interest, needs to be principled: at [10] – [12];

(2) the multifaceted nature of the public interest means that use of the generic category of "public interest" as a criterion for grounding justification for departure from the usual costs rule is unlikely to be helpful. Parties in environmental matters may claim to uphold one or other perception of the public interest, but the basis for giving preferential treatment to one public interest, namely environmental protection, over other public interests like social development and economic development, is justified by the need for the courts to ensure access to justice in environmental matters: at [26] – [27];

(3) the cost of litigation is a practical barrier to access to justice. A consequence of this is that for citizens seeking to enforce environmental law this aspect of the public interest risks being unrepresented or, at least, underrepresented, in the courts: at [34] – [35];

(4) in determining whether a departure from the usual costs rule is appropriate, it is reasonable for a court to examine the litigation concerned to ascertain whether it can be characterised as having been brought for the relevant, unrepresented aspect of the public interest: at [36] – [37];

(5) the considerations relevant to determining whether the litigation has been brought to uphold the relevant aspect of the public interest were summarised by Lloyd J in *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* [2004] NSWLEC 434; (2004) 136 LGERA 365 at [15]. The considerations do not need to be answered in a particular way in order for litigation to be characterised as being in the public interest. Other considerations may be relevant: at [38] – [46];

(6) because of the nebulous and broad nature of the concept of the public interest "something more" than the mere characterisation of the litigation as being brought in the public interest may be required. The claim that the proceedings are in the public interest must be established; it is not sufficient merely to lay claim to representing the public interest for the proposition to be accepted: at [47] – [49];

(7) the "something more" should not be interpreted to mean that some other circumstance unrelated to the public interest in the litigation is always required to justify departure from the usual costs rule. The circumstance or factor can relate to the public interest in the litigation: at [47], [53] – [55];

(8) the courts have identified a number of circumstances or factors that, when coupled with the characterisation of the litigation as being brought in the public interest, justify departure from the usual costs rule. The circumstances fall into five categories: at [60]

   (a) the litigation raises one or more novel issues of general importance;

   (b) the litigation has contributed, in a material way, to the proper understanding, development or administration of the law;

   (c) where the litigation is brought to protect the environment or some component of it, the environment or component is of significant value and importance;

   (d) the litigation affects a significant section of the public; and

   (e) there was no financial gain for the applicant in bringing the proceedings;

(9) in the present case, the nature, extent and other features of the public interest involved are limited and there are no other special circumstances which would justify departure from the usual costs rule: at [81];

(10) none of the statutory provisions claimed to have been breached by the Minister in the renewal and partial transfer of the exploration licence directly concerned environmental protection and the applicant did not adduce evidence that prospecting activities authorised by the exploration licences in the past have caused, or in the future pose a risk of causing, harm to the environment. The litigation did not directly seek to uphold the public interest of environmental protection: at [84];

(11) the litigation did not raise any novel issues of general importance and has not, in any material respect, contributed to the proper understanding, development or administration of the law in respect of the renewal or partial transfer of exploration licences under the *Mining Act* 1992: at [85] – [86];

(12) there are countervailing factors that speak against a departure from the application of the usual costs rule. The private interests of the landowner members of the applicant, both legal and financial, did stand to be materially affected by the litigation. The applicant was a vehicle used by its members to bring the proceedings: at [89]; and

(13) the landowners have the financial incentive and means to fund the litigation and hence achieve access to justice: at [91].

Tou v Maskiney [2010] NSWLEC 105 (Preston CJ)

(related decision: *Tou v Maskiney* [2010] NSWLEC 1068)

Facts: Mr and Mrs Tou ("the applicants") had complained to their neighbour, Mr Maskiney ("the respondent"), on numerous occasions over a 10-year period about damage caused to the applicants' property by a Casuarina tree growing on the respondent's property. The damage to the applicants' property included the blockage of the sewer and lifting and cracking of the driveway caused by tree roots. The respondent denied liability for the tree, did not apply to the local council to have the tree removed and refused to pay any compensation to the applicants for damage caused to their property.

In December 2009 the applicants commenced proceedings in the Court seeking an order under the *Trees (Disputes Between Neighbours) Act* 2006 for removal of the tree causing property damage and compensation for the damage. The respondent did not respond to the application until 12 February 2010, three days before the first court hearing, when an offer of settlement was made. The applicants rejected the offer and made a counter-offer that the respondent subsequently rejected.

The matter proceeded to hearing before Commissioner Fakes where the application was upheld and the respondent was ordered to remove the tree, pay part of the repair costs of fixing the driveway and engage a plumber to clear the sewer on the applicants' land: at [22].

Following the completion of proceedings before Commissioner Fakes, the applicants filed a notice of motion seeking an order for the costs of those proceedings.

Issues:

(1) whether it is fair and reasonable in the circumstances of the case to order the respondent to pay the applicants' costs in accordance with r 3.7(2) of the Land and Environment Court Rules 2007; and

(2) whether the respondent had acted unreasonably in the circumstances leading up to the commencement of proceedings.

Held: upholding the motion and awarding costs:

(1) an example of unreasonable conduct is where a party, by its conduct, effectively invites the litigation: at [4];

(2) in the letter of offer of 12 February 2010 and in the subsequent conduct of the proceedings, the respondent did not dispute the fact that his trees had caused, were causing and would continue to cause property damage to the applicants. These facts existed at all material times leading up to the litigation

and there was no relevant change in circumstances. The respondent could have, but did not, make formal application to the local council to have the tree removed or make the offer he subsequently made on 12 February 2010 at an earlier time. Instead, the respondent denied legal responsibility for the tree and the damage it caused. No reasonable explanation was given for the action the respondent took: at [25]–[26];

(3) it is not reasonable conduct for a tree owner to repel any demands by a neighbour who has suffered, is suffering and will continue to suffer property damage caused by the tree owner's tree until such time as the neighbour brings proceedings: at [27];

(4) the respondent acted unreasonably in the circumstances leading up to the commencement of the proceedings and it is fair and reasonable to order costs in favour of the applicants: at [22]; and

(5) the respondent's 12 February 2010 letter of offer was reasonable and similar to the orders ultimately made by Commissioner Fakes. Costs should therefore be restricted in time up to and including the court appearance on 15 February but not afterwards: at [22] – [23].

Shoalhaven City Council v South Coast Concrete Crushing & Recycling Pty Ltd [2010] NSWLEC 80 (Pepper J)

Facts: this matter first came before Lloyd J to determine the substantive issues of dispute between the parties, which related to the mining and extraction activities of South Coast Concrete Crushing & Recycling Pty Ltd ("SCCCR"). Previously there had been discussions between Shoalhaven City Council ("the council") and SCCCR that resulted in the council rejecting SCCCR's development application and proceedings being commenced against it. SCCCR lodged a Pt 3A application pursuant to the *Environmental Planning and Assessment Act* 1979 ("EPAA"). The council sought an undertaking from SCCCR that the extraction rate on the site would not exceed 64,555 tonnes annually; that there be compliance with all conditions of consent; and that it would otherwise conduct its operations subject to the requirements of the mining lease, in exchange for the council's consent to a lengthy adjournment of the proceedings pending Pt 3A approval. SCCCR was not prepared to give this undertaking. SCCCR sought several adjournments of the hearing of the matter on the basis that the Minister was likely to grant Pt 3A approval and because of its failure to comply with directions for the filing of evidence. Just prior to the hearing, SCCCR made an offer to the council to limit extraction to 65,000 tonnes in exchange for an adjournment of three months. The council rejected the offer on the basis that the hearing was imminent.

Lloyd J decided the facts and substantive issues in dispute between the parties concerning the operation of SCCCR's mining and extraction activities. No final orders were made on the basis of, first, a request by SCCCR to allow the extent of any existing use rights to be determined as a separate question, and second, a request by SCCCR to defer matters of discretion. After Lloyd J handed down his decision, SCCCR was granted Pt 3A approval. The parties agreed that there was therefore no utility in seeking final orders. Both parties, however, sought costs.

Issues:

(1) whether there had been an 'event', that is to say, a hearing on the merits, engaging the normal rule that costs follow the event given that no final orders were made by Lloyd J and there was no hearing as to whether, as a matter of discretion, relief ought to be granted;

(2) whether the Pt 3A approval under the EPAA constituted a supervening event with the result that there ought to be no order as to costs;

(3) whether in light of the findings made by Lloyd J either party ought to be awarded their costs on the basis that it was the 'successful' party; and

(4) whether there was any disentitling conduct on behalf of the council precluding an order for costs being made in its favour.

Held: SCCCR to pay the council's costs because:

(1) the council was successful on the majority of the issues determined by his Honour: at [44] (for analysis of Lloyd J's decision see at [39] - [40]);

(2) the proceedings before Lloyd J constituted a hearing on the merits. Evidence was presented to the Court and argument was heard in full. The decision of Lloyd J made legal and factual findings that established the merits and the lawfulness of the activities undertaken by SCCCR on the site: at [26]. The fact that no injunctive relief was sought by the council to restrain the activities of SCCCR was not determinative of the issue of whether there had been a hearing on the merits: at [27];

(3) Part 3A approval did not constitute a supervening event sufficient to warrant an order that each party bear their own costs: at [9]. The subject of the dispute before Lloyd J remained irrespective of the question of relief: at [35]. There had been no avoidance of any costs of the litigated action as a result of the approval: at [31]-[32]. In these circumstances, a costs order was appropriate to compensate the successful party against the expense to which it had been put by reason of the litigation: at [36];

(4) the council was not disentitled to an award of costs because it pursued the proceedings notwithstanding that it knew that an application for Pt 3A approval had been made and might be granted: at [10]. The council was entitled to pursue the action because: the Pt 3A application may not have necessarily resulted in the grant of approval; there had been significant delays in the application; there was a possibility of third party objections; and SCCCR maintained that its conduct was not unlawful activity and refused any interim restraint on extraction: at [52]; and

(5) SCCCR's conduct during the proceedings increased costs. SCCCR was aware that the council was uncertain of the lawfulness of it's activities: at [53]. SCCCR declined the offer initially made by the council to limit its extraction pending Pt 3A approval. The subsequent similar undertaking by SCCCR came too late because by that stage the council was ready to proceed with the hearing which was imminent: at [52].

Gray v Macquarie Generation (No 2) [2010] NSWLEC 82 (Pain J)

Facts: in *Gray v Macquarie Generation* [2010] NSWLEC 34 Pain J made an order summarily dismissing part of the applicants' amended points of claim on the question of whether there was lawful authority to emit carbon dioxide from the Bayswater power station in the Hunter Valley under an environmental protection licence issued pursuant to the *Protection of the Environment Operations Act* 1997. The respondent sought an order that its costs be paid by the applicants and argued that it was largely successful in its notice of motion to have the applicants' claim summarily dismissed. The applicants argued that the proceedings were brought in the public interest, not all of the claim was dismissed and that the usual order that costs follow the event should not be made.

Issue:

(1) whether for these proceedings, which can be characterised as public interest litigation, should the usual order that costs follow the event be made.

Held:

(1) adopting the principles in relation to the determination of costs in public interest litigation in *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59, it was held that a novel and potentially significant issue was raised by part of the applicants' claim and that there were no countervailing circumstances which suggested that the usual order for costs ought apply in the respondent's favour: at [22].

- Compulsory Acquisition of Land / Valuation

Everest Project Developments Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 & The Roads and Traffic Authority of New South Wales [2010] NSWLEC 88
(Sheahan J)

Facts: the applicant commenced proceedings under the *Land Acquisition (Just Terms Compensation) Act* 1991, after being dissatisfied with the compensation determined for land acquired by the Minister ("1st respondent"). The Minister, on behalf of the RTA ("2nd respondent"), acquired land in the Waterloo area of Sydney for the purpose of urban road improvement. The Minister filed a submitting appearance in the proceedings after the RTA was joined as a party, leaving the RTA to defend the matter.

The land acquired was a sliver (a boomerang shape) on the corner of a "parent lot" (36,883 m^2 in size), also known as "Sydney Gate" which had a frontage to Bourke Street of 200 m and 130 m to Lachlan Street. The sliver of land acquired (2,781 m^2 in size) comprised 7.5% of the parent lot and will be used by the RTA to create a new left turn lane for traffic turning from Lachlan Street into Bourke Street. The parent parcel was a 'brownfield' site and the surrounding area had been historically an industrial area. However, the area has been transforming into a residential area.

In September 2001, the acquired land was rezoned "Arterial Road Reservation 9(a)" under Amendment 7 of the South Sydney LEP 1998. Common ground between the parties was that, but for the acquisition, the acquired land and the parent parcel would be zoned "10(e) Mixed Use" in their entirety.

Negotiations had begun with South Sydney Council for the development of the Sydney Gate site (in knowledge of the pending land acquisition) in May 2003. Following the amalgamation of the South Sydney Council area into the City of Sydney Council on 6 February 2004, a masterplan for the development of the Sydney Gate site was approved on 23 June 2005. This masterplan would be applicable to the residue parcel only following the acquisition and the land would be developed in four notional blocks (of which two had development consent granted in 2007, although no work had commenced by August 2009). The masterplan provided for a mix of uses (75% residential, 19% commercial and 6% retail) and a gross floor area of 78,179 m^2 (a FSR of 2.12:1).

The council, in its calculations of the gross floor area developable, notionally transferred development potential of the acquired land to the residue parcel.

On 10 August 2007, the acquisition took effect and on 10 September 2007, the Valuer General issued its notice of determination comprising $3.5M in market value compensation plus $10,000 for disturbance costs. Having rejected the determination, the applicant appealed and claimed that the loss of the relatively small area of land had seriously reduced the development potential or 'yield' of the residue site. This was, the applicant argued, because the unavailability of the acquired land prevented the masterplan development from qualifying for a bonus floor space ratio to achieve the maximum of 2.5:1. This in turn, caused "lost floor space" area of 11,728 m^2 – the diminution in value of which would be $8,678,720 based on an agreed valuation of $740 per m^2.

Alternatively, the applicant argued that the market value would be $3,086,910 based on an agreed valuation of $740 per m^2, a base FSR of 1.5:1 and the 2,781 m^2 acquired.

On the other hand, the RTA claimed that the applicant was unsuccessful in achieving its bonus FSR because of design issues, its failure to satisfy the council on Public Domain improvement issues and its failure to satisfy the council on the balance between residential and non-residential development. The RTA later submitted that the market value of the acquired land was nil, having regard to the potential of the land before and after the acquisition, and suggested the applicant was entitled to a 'nominal' figure of no more than $445,000.

Although the RTA did not specifically raise betterment as an issue, it was claimed that the applicant would be in a better position having regard to savings on asbestos removal and contribution to public domain improvements as a consequence of the acquisition.

Issues:

(1) whether witnesses acting for the applicant, who had earlier acted for the applicant in negotiations with council, could be considered independent witnesses;

(2) whether the parent parcel and/or the residue parcel could achieve the bonus FSR of 2.5:1;

(3) whether the residue parcel (in the 'after' scenario and contemplated by the approved masterplan) was capable of achieving the same 'yield' as the parent parcel (in the 'before' scenario);

(4) whether the applicant 'benefited' from the acquisition by not having to pay for the rehabilitation of contaminated land or contribute to Public Domain Improvements; and

(5) whether a nominal amount of compensation can be "just".

Held: determining that market value compensation for the acquired land was $500,000 that:

(1) issues on the independence of witnesses can be addressed by the attribution of weight to their evidence: at [43];

(2) the council never excluded the prospect of a redesigned masterplan achieving the bonus FSR of 2.5:1: at [194];

(3) the maximum bonus FSR was achievable in both the 'before' and the 'after' scenario: at [196];

(4) the applicant was unable to achieve the bonus FSR because of its chosen mix of uses, inadequate Public Domain Improvement contribution and council's concerns about design: at [198];

(5) as the bonus FSR was achievable, the applicant's primary claim for $8m failed: at [202];

(6) the development potential of the Sydney Gate site was the same in the 'before' and 'after' as to development potential of the acquired land was "notionally added back" to the residue land: at [201], [204] and [216];

(7) because the development potential in the 'before' and 'after' was the same, the applicant's alternative claim for $3m also failed: at [207];

(8) a nil market value is not a just result: at [209]; and

(9) there was no science or precedent for the nominal amount ordered: at [214] and [219].

Hua v Hurstville City Council [2010] NSWLEC 61 (Pain J)

Facts: the council compulsorily acquired land on which the applicants conducted a bakery business under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"). The applicants appealed the quantum of compensation for disturbance. A joint valuation report agreed on a sum for compensation based on extinguishment and also on a sum for compensation based on relocation. There was no agreement between the experts as to which basis of compensation to apply. The applicants sought to rely on s 59(c) and/or s 59(f) of the JT Act, on the basis of a claim for relocation and/or reinstatement costs.

Issues:

(1) does "relocation" include the cost of reinstatement; and

(2) whether such compensation for disturbance is claimable under s 59(c) and/or s 59(f) of the JT Act.

Held: allowing the applicants' appeal:

(1) relocation costs can include the replacement of essential equipment in new premises which can be described as reinstatement: at [59]; and

(2) the preferable view is that the costs of re-establishing the business elsewhere, whether described as relocation or reinstatement is claimable under s 59(c) of the JT Act: at [59].

Taylor v Port Macquarie-Hastings Council [2010] NSWLEC 113 (Biscoe J)

Facts: on 1 April 2005 the respondent, Port Macquarie-Hastings Council, compulsorily acquired rural land ("the Land") from the applicants for the purpose of waste management. The acquired land was 37.1944 ha

located immediately to the east of the small village of Kew in the Port Macquarie-Hastings Local Government Area. The applicants brought proceedings in the LEC arguing that the amount of compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 should be assessed at $4,540,000. The respondents argued compensation should be assessed at $900,000 or alternatively, if the land had industrial potential, at a maximum of $1,270,000.

Issues:

(1) whether the Land had the potential for a higher and better use than permitted by its rural zoning;

(2) the impact of ecology, physical constraints, a disused quarry and published planning strategies on the potential for the development of the Land;

(3) whether other sales were comparable; and

(4) whether the subjective intention of purchasers of other land was relevant to the issue of comparability.

Held: determining that the applicants were entitled to compensation in the amount of $1,525,000 it was held that:

(1) at the acquisition date the Land had significant potential for industrial use and that was its highest and best potential use: at [98];

(2) the hypothetical buyer and seller would have been aware that the Land had an ecology risk and made significant allowance for it in the price. However, they would not regarded it as a severe constraint on development: at [54];

(3) the main physical constraint on development was the Land's hilly topography: at [55]. The Camden Haven Urban Growth Strategy ("CHUGS") would encourage the hypothetical parties to think that 15 ha of the eastern half of the land had potential for industrial development notwithstanding the physical constraints, but no potential for urban residential development: at [59];

(4) the quarrying resource on the Land had value. A hypothetical purchaser for an industrial use would be attracted to temporary quarrying pending rezoning and industrial development consent: at [112];

(5) CHUGS designated 15 ha of the eastern part of the Land as "suitable for industrial investigation only": at [64]. The hypothetical parties would consider these 15 ha had potential for industrial use: at [100]. They would also have perceived that the western half of the land had potential for industrial use: at [101]. But would be unlikely to regard the Land as attracting a premium for potential urban residential use: at [96];

(6) the potential residential character of the applicants' comparable sale properties was likely to attract residential developers and was therefore unlikely to provide a reliable indicator of the value of the Land: at [113];

(7) when assessing comparability the subjective intentions of the buyer and seller are generally irrelevant. However, there may be special circumstances relating to the buyer or seller which plainly affect the comparability of a sale. Special circumstances include showing that the buyer, to the knowledge of the seller, had a higher potential use in view, perhaps not permitted by the existing zoning, which commanded a higher price: at [131];

(8) since it was concluded that the highest and best potential use of the Land was not residential or seniors living it was unnecessary to consider evidence of the subjective intentions of the purchasers of the applicants' comparable sales: at [130]; and

(9) to assess market value a rate of $60,000 per ha was adopted for the 15 ha identified in CHUGS as suitable for industrial investigation. A rate of $25,000 per ha was adopted for the 15 ha on the western half of the Land on account of greater uncertainty for industrial development. The residue of the Land was valued at $20,000 per ha, reflecting the rate adopted by the council's valuer: at [146]. The existing building on the Land was valued at $75,200: at [146]. Loss attributable to disturbance was valued at $30,000: at [147]. Thus, the total compensation payable was $1,525,000.

- Criminal Jurisdiction

Director General, Department of the Environment and Climate Change v Olmwood (No 2) [2010] NSWLEC 100 (Pain J)

Facts: following a contested hearing, Olmwood Pty Ltd was found guilty of the offence of clearing native vegetation in breach of s 12 of the *Native Vegetation Act* 2003 ("the NV Act"): *Department of Environment and Climate Change v Olmwood Pty Ltd* [2010] NSWLEC 15. At the time of the commission of the offence the maximum penalty prescribed by Parliament was 10,000 penalty units or $1,100,000. The purposes of sentencing under s 3A of the *Crimes (Sentencing Procedure) Act* 1999 must be considered in light of the relevant statutory scheme which has been breached.

Held: in fining the defendant $100,000 it was held that:

(1) the nature of the offence was serious in the statutory context of the NV Act given its objective of limiting illegal clearing of native vegetation: at [35];

(2) there had been some loss of native floristic diversity in the short term but this is unlikely to result in long-term impact, but there would be some secondary harm to the environment in the loss of fauna habitat: at [46]; and

(3) the defendant, through the actions of an individual, had acted recklessly in relation to the clearing of vegetation: at [57]-[58].

Environment Protection Authority v Wattke; Environment Protection Authority v Geerdink [2010] NSWLEC 24 (Pain J***)***

Facts: each defendant was charged with two offences under the *Protection of the Environment Operations Act* 1997 ("the POEO Act") in that they negligently disposed of waste in a manner that harmed or was likely to harm the environment (s 115(1)) and that they polluted water (s 120(1)). One defendant was charged as he was a director of the company involved in the offence, the other defendant was charged in his capacity as a person involved in the management of the company. Both pleaded guilty to the offences, and therefore, admitted the essential elements of each offence. The maximum penalty applicable to an offence committed under s 115(1) by an individual is $500,000 or four years' imprisonment, or both. By reason of s 214(2) of the POEO Act the maximum term of imprisonment which can be imposed by the Land and Environment Court is two years. The maximum penalty applicable to an offence committed under s120(1) is $250,000 with a maximum daily penalty of $60,000 for each day that the offence continues. The purposes of sentencing under s 3A of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSP Act") must be considered in light of the relevant statutory scheme which has been breached.

Held: in sentencing the defendants it was held that:

(1) the level of environmental harm caused by the s 115 offences was very substantial and had occurred over a prolonged period of time: at [28];

(2) the level of environmental harm caused by the s 120 water pollution offences was also reasonably significant, but otherwise localised: at [37];

(3) the total harm caused was foreseeable given the volume of material dumped and the fact that it was significantly contaminated with materials that would degrade the environment: at [40];

(4) the offences were committed for the purpose of obtaining financial benefit as part of the company's business of the collection and disposal of waste, and evidenced a seriously negligent course of conduct over several months of disposing inappropriate waste: at [50];

(5) in relation to the s 115 offences, the volume and type of toxic waste dumped and the level of environmental harm constituted aggravating factors relevant to sentencing under s 21A of the CSP Act: at [56];

(6) as a result of the delays in entering guilty pleas the discount to be afforded for the utilitarian value should be reduced: at [69];

(7) the objective seriousness of the offences was not significantly reduced by the fact that each defendant had experienced varying degrees of psychological distress, including depression and anxiety since the offences were committed: at [87];

(8) the appropriate sentence for each offence was determined in light of the totality principle: at [98];

(9) for each of the s 115 offences each defendant was required to undertake 460 hours of community service as well as a fine of $50,000: at [113]; and

(10) for each of the s 120 water pollution offences each defendant was liable to a penalty of $10,000: at [114].

Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2) [2010] NSWLEC 73 (Pepper J)

Facts: DECC sought to prosecute Walker Corporation ("Walker") for an offence contrary to s 12(1) of the *Native Vegetation Act* 2003. DECC alleged that through its contractor, Environmental Land Clearing Pty Ltd ("ELC"), Walker cleared native vegetation between 1 June and 6 February 2007.

Walker was the owner of property near Wilton. After Walker acquired the property it decided it needed to be "tidied up". Walker engaged ELC as a contractor to undertake the work. There was no formal written contract between Walker and ELC. While ELC purported to hold itself out as a specialist in environmental land clearing, in fact it had no specialist knowledge, other than in relation to the machines to be used, of the regulatory requirements in respect of the clearing of native vegetation. ELC was directed by Mr Fife, an employee of Walker, as to what areas of land were to be cleared. Mr Fife's instructions were not specific as to what vegetation was to be cleared other than "small regrowth". ELC removed and mulched small bushes and saplings. In August 2006, employees of ELC expressed concern as to the extent of the clearing. ELC commissioned an ecologist's report at this time with the authority of Walker. The report was received by ELC and forwarded to Walker. No response to the report was given by Walker other than Mr Fife reassuring ELC that it could continue clearing, which it did. Historically the property had been affected by saline water contamination from a mine, grazing activities and fire and storm events.

Issues:

(1) whether "clearing" as defined in the Act, occurred on the property;

(2) whether the clearing was of "native vegetation", as defined in the Act;

(3) whether "only regrowth" was cleared;

(4) whether the clearing was otherwise permitted; and

(5) whether Walker was liable for the unlawful clearing carried out by ELC.

Held: Walker caused ELC to carry out unlawful clearing for the purpose of s 44 of the Act:

(1) the work undertaken by ELC included the removal of blackberries, the mulching of smaller standing trees and the under scrubbing of bush and understorey. This constituted vegetation that was "cut down" or "thinned" or "removed", and therefore, 'cleared' under the Act: at [102];

(2) vegetation for the purpose of s 12 included both dead and living material: at [111]-[114];

(3) the vegetation cleared was "native": at [210]-[221];

(4) the defendant had the onus of proving on the balance of probabilities that the vegetation cleared on the property was "regrowth" as defined in s 9(2) of the Act: at [226]. The term "regrowth" was not to be constructed expansively because this would not accord with the objects of the Act: at [231]. "Regrowth" did not include propagated vegetation and the original growth of vegetation in an area previously vegetated. Both these concepts constituted "growth" not "regrowth": at [235]. What was permitted was the clearing of native vegetation that had "regrown" since 1 January 1990 and not native vegetation that

had 'grown' since 1 January 1990: at [235]-[236]. The age of vegetation cleared was older than 1 January 1990, and therefore, was not "regrowth": at [243];

(5) the clearing was not a permitted activity as defined by Div 3 pursuant to ss 22, 23, 42 of the Act: at [256]–[262];

(6) the following principles apply in the context of a prosecution under s 12 of the Act where liability is being attributed to a corporate defendant pursuant to s 44 of the Act:

(a) s 44(b) provides a statutory basis of a landholder liability arising out of the acts of a third party separate from the common law principle of vicarious liability. However, an offence against s 12 is one of strict liability thereby attracting the principles of vicarious liability;

(b) the defence provided for in s 44 must be established on the balance of probabilities by the defendant;

(c) a company can be criminally liable through the actions of its officers or employees, as the embodiment of the company;

(d) in determining who is the 'directing mind and will' of the company the real question is, on the proper construction of the statute, whose act is intended to count as the act of the company. The acts of both a high-level employee or director and the acts of low-level employees may count if that is required by the terms or the offence and the objects of the statute;

(e) in cases concerning a protective regulatory regime such as that contained in s 12 of the Act, the conduct of the officers or employees involved in the *actus reus* of the offence may be attributed to the company at least where such conduct is in furtherance of the company's interests or not against them;

(f) to "cause" clearing does not require the exercise of particular control over the third party whose actions resulted in the clearing event to the extent that would otherwise be necessary to establish vicarious liability. Where the clearing by a third party arises as a natural consequence of the landholder's conduct that landholder can be said to have caused the clearing; and

(g) to "permit" means to intentionally allow. That is to say, with knowledge or awareness rather than any intentional failure to act. Knowledge that something is a contravention is likely to be done in the future is to "permit" it to be done. However, mere carelessness or negligence in failing to prevent an act giving rise to a contravention is not to "permit" it to occur;

(7) it was beyond reasonable doubt that, notwithstanding that Mr Fife was not a director of Walker, his acts were those of Walker: at [276]-[277];

(8) Walker failed to demonstrate that it engaged ELC for the purpose of relying upon ELC to provide specialist expertise and advice on whether the clearing of vegetation that it was engaged to carry out was lawful or not: at [299]-[300]. The clearing that ELC did carry out was undertaken in accordance with and directly as a result of Walker's instructions: at [302]. The clearing of native vegetation that it carried out was therefore as a natural consequence of the instructions given by Mr Fife (at [305]), and therefore, Walker was taken to have carried out the clearing pursuant to s 44 of the Act: at [307];

(9) Walker did not permit native vegetation to be cleared because it had no awareness or knowledge that native vegetation would be cleared in breach of the Act: at [308]-[310]; and

(10) in the alternative, Walker was vicariously liable for the actions of ELC. Although Walker did not exercise detailed control over the manner of doing the work which lead to the clearing of native vegetation, Walker gave a direction to do an act that would lead by all physical necessity to the clearing of native vegetation: at [317]-[318].

- Section 56A Appeals

Cavasinni Constructions Pty Ltd v Fairfield City Council [2010] NSWLEC 65 (Craig J)

(first instance commissioner decision: *Cavasinni Constructions Pty Ltd v Fairfield City Council* [2009] NSWLEC 1320 (Pearson C))

Facts: the applicant obtained conditional development consent to carry out alterations and additions to an existing restaurant building. Condition 3(a) of the consent required the creation of a right of carriageway across the site to provide general service access to properties located to its east. The applicant subsequently sought to modify the consent in several respects, including the deletion of condition 3(a). The council refused the application. The applicant appealed to the Court pursuant to s 96(6) of the *Environmental Planning and Assessment Act* 1979. The Commissioner allowed the appeal in part but refused to delete condition 3(a).

Issues:

(1) whether condition 3(a) was validly imposed;

(2) whether the applicant had been denied procedural fairness in circumstances where the sole basis upon which the commissioner exercised the discretion not to require removal of condition 3(a) was a basis not argued by either party and not identified at the hearing; and

(3) whether the refusal to delete condition 3(a) was manifestly unreasonable.

Held: upholding the appeal:

(1) when considering the validity of condition 3(a), it was first necessary to determine whether the requirements of s 80A(1)(a) had been met, that is, whether the condition related to a matter referred to in s 79C(1) of the *Environmental Planning and Assessment Act* 1979 and whether that matter was relevant to the particular development under consideration: at [17];

(2) it is wrong to address the 'tests' as to validity of a condition of consent, as those tests are articulated in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, before determining that the requirements of s 80A(1)(a) are met in respect of the condition under consideration: at [21];

(3) in the context of s 80A(1)(a), those 'tests' required that a condition fairly and reasonably relates to any matter referred to in s 79C and that it be of relevance to the development which is the subject of the consent: at [24]-[26];

(4) this necessitated a finding identifying a nexus between the proposed condition and the development: at [26];

(5) while a commissioner is not bound to determine proceedings solely by reference to the issues tendered and argued by the parties, if the determination is to be made on a basis not addressed by the parties, procedural fairness requires that the basis be identified to the parties and the opportunity afforded to them to be heard as to that basis: at [39]-{44];

(6) the extent to which the 'benefit-burden' principles identified in *Progress and Securities Pty Ltd v North Sydney Municipal Council* [1988] NSWLEC 56; (1988) 66 LGRA 236 and *Monaldo Pty Ltd v Baulkham Hills Shire Council* [1995] NSWLEC 165 may inform the exercise of discretion in an appeal under s 96(6) questioned but not determined: at [47]-[49]; and

(7) manifest unreasonableness was rejected as a ground of appeal: at [54].

Meriton Apartments Pty Ltd v Council of the City of Sydney [2010] NSWLEC 64 (Pain J)

(first instance commissioner decision: *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 1336 (Moore SC))

Facts: Meriton Apartments Pty Ltd successfully appealed against the amount of a s 94 *Environmental Planning and Assessment Act* 1979 contribution levied by the Council under the City of Sydney Development Contributions Plan 2006 ("the s 94 plan") in relation to a development site: *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 1336. The s 94 plan allowed a particular type of "discount" on contributions owed on the basis of an existing workforce (a workforce demonstrating an existing demand) but limited the calculation to a particular census date. The Senior Commissioner held it was appropriate to take into account the fact that the site was in government ownership for a considerable period of time and thus not rateable. The period of non-rateability was a period when the council received no revenue from the site to subsidise or contribute towards the costs of community facilities. He reduced the amount of credit to be offset against Meriton's s 94 contribution liability because no rates were paid on the property for a certain period. Meriton commenced a s 56A appeal against the Senior Commissioner's decision alleging an error of law in that he took into account an irrelevant matter.

Issue: whether the Senior Commissioner took into account an irrelevant matter when he discounted the credit allowed to Meriton in calculating its liability for the s 94 contribution.

Held: dismissing the appeal, it was held that:

(1) the s 94 plan contemplates apportionment of contribution based on an assessment of the existing workforce population as part of the necessary analysis to determine the overall contribution amount. The Senior Commissioner identified the periods of rateability of the land as a significant matter potentially giving rise to a discount: at [29]; and

(2) there was no relevant error of law, namely, the taking into account of a legally irrelevant matter, identified in the Senior Commissioner's approach: at [31].

Galluzzo v Campbelltown City Council [2010] NSWLEC 99 (Craig J)

(first instance commissioner decision: *Galluzzo v Campbelltown City Council* [2009] NSWLEC 1425 (Bly C))

Facts: the applicant sought development consent to expand, both in use and built form, an existing child-care centre. The centre was constructed on land zoned partly 'Special Uses Sub-Arterial Road Zone' and partly 'Environmental Protection Zone.'

Issues:

(1) when there were no plans for resumption of the 'Special Uses' component of the land, did the Commissioner misdirect himself as to the relevant provisions of the Campbelltown LEP 2002; and

(2) whether the Commissioner misdirected himself as to the character of the area in which the development was to take place.

Held: dismissing the appeal:

(1) the provisions of the LEP did not require there to be a plan for resumption of the Special Uses zoned land: at [15];

(2) there was evidence available to the Commissioner upon which to conclude that the road widening would take place within 15 years, and thus satisfy a consideration required by the LEP in respect of development upon the Special Uses land: at [19]-[21], [24]; and

(3) the determination by the Commissioner as to the character of the area was a question of fact. No question of law arose so as to found an appeal: at [28].

Sevenex Pty Limited v Blue Mountains City Council (No.2) [2010] NSWLEC 101 (Sheahan J)

(first instance Commissioner decision: *Sevenex Pty Limited v Blue Mountains City Council* [2009] NSWLEC 1264 (Moore SC))

Facts: the applicant appealed against the decision of Senior Commissioner Moore to refuse development consent to establish a koala and reptile exhibit, and "Aboriginal Cultural Trail" and diorama, and ancillary facilities on the lower ground floor of the Three Sisters Plaza, Echo Point, Katoomba. The issue of permissibility, being the threshold issue, was determined in the negative by the Commissioner, as the applicant could not rely on an existing consent or existing use rights under cl 41(1)(e) of the Environmental Planning and Assessment Regulation 2000.

The subject land is zoned "residential bushland conservation" under the Blue Mountains LEP. Under the zoning, the present and proposed uses are prohibited. However, the Three Sisters Plaza enjoys a consent granted by the council in 1993 for "the establishment of a commercial development on the abovementioned land. The Development Application as shown on the plans DRS No. 92016 SK/1 to SK/15". Despite the consent being modified in late 1993, the plans relied upon by the applicant identified the use on the lower ground floor as 'retail and crafts', species of a broad "commercial" use.

Alternatively, the applicant claimed permissibility on the basis a change from the existing commercial use is a change to another commercial use within cl 41(1)(e) of the Regulation. Under cl 41(3) 'commercial use' means the use of a building, work or land for the purpose of 'office premises', 'business premises' or 'retail premises' (as defined in the Standard Instrument (Local Environmental Plans) Order 2006).

Issues:

(1) whether the consent granted allowed a broad use as a 'commercial development', and therefore, the proposed use was not a change in use;

(2) whether the plans incorporated into the consent restricted use to that identified in the various locations; or

alternatively:

(3) whether the proposed use was permissible under cl 41(1) of the Regulation, as the existing use of "retail and crafts" (a type of commercial use) could be changed to another commercial use.

Held: appeal dismissed:

(1) the consent granted in 1993 was not for a broad commercial development, rather, the plans incorporated into the consent specified the approved uses within the development (being "retail and crafts" on the lower ground floor): at [36];

(2) the sale of tickets for admission, or sale of souvenirs, was insufficient to satisfy the definition of "retail premises": at [38] and [44];

(3) the applicant could not rely on the existing consent as the proposed use was a change from the consented use – the proposed development being in the nature of "education by entertainment": at [40];

(4) the proposed development would not be providing a service in the planning sense, as required under the definition of "business premises" in the Standard Instrument: at [47]; and

(5) the applicant could not rely upon cl 41(1)(e) of the Regulation as the proposed use was not the use of a building for the purpose of office premises, business premises or retail premises as defined in the Standard Instrument: at [49].

Murlan Consulting Pty Ltd v Ku-ring-gai Council and Others (No 4) [2010] NSWLEC 95 (Pain J)

Facts: on 26 June 2007, Commissioner Watts and Acting Commissioner Taylor ("Dr Taylor") dismissed a Class 1 application commenced by Murlan Consulting Pty Ltd. Murlan appealed under s 56A and the appeal was dismissed by Pain J in October 2007. In August 2008, Murlan filed a motion in the Court requesting that the decisions of the two Commissioners be set aside on the basis that Murlan was not afforded procedural fairness because of a reasonable apprehension of bias in relation to Dr Taylor based on an alleged pre-existing and continuing relationship with the council. Pain J concluded that an apprehension of bias was not established and did not set aside the Commissioners' decision: *Murlan Consulting Pty Ltd v Ku-ring-gai*

Council and Anor [2008] NSWLEC 318. Murlan appealed to the Court of Appeal. The appeal was upheld and Murlan's amended notice of motion was remitted to the LEC for redetermination: *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300. The Attorney General exercised his right to intervene in the remitted proceedings pursuant to s 64(2) of the *Land and Environment Court Act* 1979 (the Court Act).

Issues:

(1) the application of the correct test necessary to determine whether a fair minded lay observer might reasonably apprehend that Dr Taylor may not have an impartial mind in the Class 1 proceedings; and

(2) whether the Attorney General is liable for a costs order against him in the remitted proceedings as an intervenor pursuant to s 64(2) of the Court Act.

Held: allowing the notice of motion:

(1) applying the broad test in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, the proximity of the professional relationship of the Acting Commissioner with the council due to presentation of two conference papers with council staff while the matter was part heard, and council support for a research grant, might suggest that the relationship might give rise to an apprehension of bias in the mind of a fair-minded observer: at [82]; and

(2) considering the principle expressed in *O'Toole v Charles David Pty Ltd (No 2)* [1991] HCA 14; (1991) 171 CLR 232, there were no special circumstances arising from the Attorney General's intervention to suggest that the Attorney ought pay costs: at [128]. All parties were ordered to pay their own costs of the remitted proceedings: at [129].

- Injunctions and Declarations

Randwick City Council v Jomaring Pty Ltd & Anor [2010] NSWLEC 111 (Sheahan J)

Facts: the proceedings concerned the operation of the top floor (also known as the Aquarium Bar and Bistro) of the Beach Palace Hotel complex in Coogee. The applicant council commenced proceedings seeking (1) a declaration that the respondents use of the top floor as 'a hotel' is contrary to s 76A of the *Environmental Planning and Assessment Act* 1979 as development consent had not been obtained and (2) orders restraining the further use as a hotel.

The issue of the permissibility of the operations on the top floor had been raised by council as early as 2001. After the 2001 dispute concerning permissibility was resolved, the operator of the Aquarium expended some $800,000 to refurbish the premises. Permissibility issues were again raised by the council in 2007 with the Statement of Claim initiating the proceedings filed in April 2009.

It was not contested that the top floor of the Beach Palace Hotel has development consent to operate only as a 'restaurant' (under a series of development consents issued between 1985 and 1986 under the Randwick Planning Scheme Ordinance which required separate development consent for the various levels in the complex).

The top floor had operated since the 1980s, firstly as the 'China Bowl Restaurant', which was a cabaret style restaurant with live entertainment until the late 1990s; secondly as a restaurant conducted by the owner of the ground floor café and in 2003-2004 it operated independently again as a Thai restaurant. The present operations began in 2005-2006 when the second respondent became the leasee of the premises.

Witnesses for the council gave evidence (and their observations were unchallenged) as to the present operation and character of the Aquarium on their various visits. Their observations included the fact that patrons were allowed into that part of the premises after the kitchen closed at 9pm, that only a small number of meals were served to patrons in comparison with the total number of patrons, that some patrons were "intoxicated and boisterous" and that the predominant use of the top floor was for the consumption of alcohol

and entertainment rather than the consumption of meals. Also noted was the presence of large screen televisions, pool tables and high noise levels when a disc jockey was playing music.

Issues:

(1) what the use of 'restaurant', objectively determined, meant when consent was issued in the 1980s under the Randwick Planning Scheme Ordinance;

(2) whether the present use of the premises is in breach of the consent; and

(3) whether discretion should be exercised having regard to the circumstances of the historical use and council's knowledge of that use.

Held: in declaring the use to be contrary to s 76A of the EPAA, with the restraining order stayed for six months (to allow the respondent to regularise the offending use):

(1) the council's decision to grant consent to a 'restaurant' was particular in that it was a specific species of the genus 'refreshment room' under the Randwick Planning Scheme Ordinance: at [79];

(2) council's concept of 'restaurant' in the 1980s was based on an emphasis on 'main meals' (as defined in the Macquarie Dictionary): at [80];

(3) the dominant aspect of a 'restaurant' use would be the service of food. The provision of entertainment and drinks would be subordinate aspects: at [81];

(4) the fact that the top floor is now embraced by the hotel's liquor licence is not conclusive of its use as a hotel rather than as a restaurant: at [82];

(5) the 'activities, transactions, and processes' of the premises, being the provision of meals/food is not the 'dominant' use of the top floor, but a use 'ancillary' to the provision of drinks and entertainment: at [83];

(6) significantly, the presentation of meals concludes at approximately 9pm, but the premises continue to admit patrons, and to trade, until usually midnight. Whereas when a 'restaurant' kitchen closes, no new customers are usually admitted, and it stays open only to allow customers already inside to conclude their meals: at [87];

(7) the present operation of the top floor is as a 'hotel' rather than as a 'restaurant' as the primary service provided to its patrons is the sale of drinks, including alcohol, supported by the provision of food services and entertainment: at [87]; and

(8) the delay of council bringing proceedings and some acquiescence on council's part in the continued operation of the Aquarium meant an exercise of discretion to stay the orders was appropriate in the circumstances: at [95].

Ainsworth v Yarrowee Pty Limited [2010] NSWLEC 118 (Sheahan J)

Facts: on 24 November 1988, Mulwaree Shire Council (the then consent authority) granted consent to the respondent for the subdivision of land, near Taralga in what is now Upper Lachlan Shire. The land, some 360 ha, was subdivided into two lots and became Lot 1 of DP 800788, now owned by the applicant, and Lot 2 of DP 800788, retained by the respondent. The consent contained the following condition, which was the subject of the proceedings:

"5. The existing road through proposed Lot 2 providing access to proposed Lot 1 being contained within a public road reserve and any land being dedicated to Council…"

At the time of the subdivision, a road reserve led from Hillcrest Road (to the west of the land), through what is now Lot 2 to a house paddock on what is now Lot 1, but access to the remainder of Lot 1 was gained via an unsealed road. There are physical impediments to any alternative access to the rest of Lot 1 due to improvements and vegetation around the house, some of which existed at the time of subdivision. The unsealed road is impassable at times and it is impossible to gain access the remainder of Lot 1 by driving

over the last section of the road reserve. In 1990 Mulwaree Shire Council accepted that the consent had been complied with, and a subdivision plan was issued accordingly.

The applicant acquired Lot 1 in January 2008, unaware that the unsealed road providing the access was not completed nor contained in the public road reserve as required by condition 5. The applicant firstly tried to have council enforce the condition in November 2008 but then began the proceedings. It was claimed that condition 5 had not been satisfied and the applicant sought to have the court enforce it by seeking an order that the road reserve be extended further east to an established gateway. This access at the established gateway would provide access to the remainder of Lot 1, some 99% of the parcel, which is used for grazing purposes.

After these proceedings were commenced, the respondent obtained approval for a further subdivision creating a public road over part of the land occupied by the unsealed road. That plan (DP 1148483) was registered on 23 February 2010.

The applicant relied on evidence that the unsealed road led east from Hillcrest Road, past what is now Lot 1 to a quarry, a State park, and a creek or swimming hole.

The respondent did not acknowledge the existence of a "road", past the point of entry to the house paddock, either now or at the time of subdivision. Further it was maintained by the respondent that access to the remainder of Lot 1 could be provided if the applicant removed or trimmed some trees in the road reserve.

Issues:

(1) whether condition 5 should be construed so that the words "existing road" mean the road providing access to the rural gateway of Lot 1 (beyond the house paddock);

(2) whether the road now contained within the Public Road reserve dedicated to council, comprised "all of the road" the subject of condition 5;

(3) whether condition 5 should be construed in such a way that the respondent was required to provide access to Lot 1 at more than one point;

(4) whether the definition of "road" in the *Local Government Act* 1919 (under which the Mulwaree Planning Scheme Ordinance was made) meant only the gravel road, as distinct from any "wheel tracks";

(5) whether the subdivision registered on 23 February 2010 was evidence of the completion of requirements imposed in the 1988 consent;

(6) whether the proceedings for enforcement of conditions had any utility; and

(7) whether relief should be refused in the Court's exercise of discretion on the basis that any non-compliance with condition 5 would be technical, or because of delay in bringing proceedings, and council's acceptance in 1990 that the conditions had been satisfied.

Held: application for relief upheld:

(1) acknowledgement of compliance with conditions of consent by the council did not preclude the Court finding the respondent to be in breach: at [37];

(2) a "road", as defined in the *Local Government Act* 1919 and the Macquarie Dictionary, did not have to be surfaced or lined with gravel: at [46];

(3) the road extending past the house on Lot 1 towards to quarry meets the definition of "road": at [47];

(4) the ordinary and literal meaning of condition 5 suggests the extent of road accessing Lot 1 as at 1988, not just one part of it: at [53];

(5) condition 5 was imposed for the purpose of providing access to the house as well as the rural property for grazing and it was clearly necessary to provide access beyond the house: at [54]; and

(6) relief should not be denied as the respondent took no real action to fulfil condition 5 until the proceedings had commenced and the applicant was not tardy in seeking to enforce the condition: at [57].

Commissioner Decisions

- Development Appeals under the EPAA

Hemmes Trading Pty Ltd v Council of the City of Sydney [2010] NSWLEC 1124 (Brown C)

Facts: the applicant applied for modification of a development consent to continue extended trading hours last approved in 2004 for a five year trial period for licensed premises ("Establishment"). The premises were located within the City centre zone under the Sydney Local Environmental Plan 2005, and were Category A premises – High Impact within a Late Night Management Area under the City of Sydney Late Night Trading Premises Development Control Plan 2007 ("the DCP"). The DCP identified base trading hours and extended trading hours for various categories of late night trading premises, and for these premises the base trading hours were 6.00am to midnight and the extended trading hours were 24 hours. The DCP limited approvals for extended trading hours to a trial period, and stated that up to 24 hour trading may be permissible in Late Night Trading Management Areas where applicants "have a sustained track record of good management, minimising amenity and safety impacts". The council approved the extension of trading hours for all the facilities of Establishment until 3.00am for a one year trial with the exception of the Tank Nightclub. As a result the trading hours for the Tank Nightclub were restricted to 2.00am. The council relied on evidence of incidents recorded on the Police Computerised Operational Policing System ("COPS"), the Incident Log Book for the premises required under the *Liquor Act* 2007, Bureau of Crime Statistics and Research ("BOCSAR") data, and Escalated Licensing Operations Response Model ("ELORM") data.

Issues:

(1) whether the trading hours of the Tank Nightclub should be extended to 10.00am for a further five year trial period; and

(2) whether there should be a trial period for one year or for five years for the continuation of the previously approved trading hours for other facilities in Establishment.

Held: approving the extension of trading hours, including the Tank Nightclub, for a five year period:

(1) while the COPS incident reports were matters that may be relevant to an assessment under the DCP, BOCSAR and ELORM ratings were used generally by the Police under their *Liquor Act* responsibilities and raised different assessment criteria to the DCP. The BOCSAR and ELORM ratings were a quantitative assessment and the emphasis in the DCP was on a qualitative assessment largely based on good management through a robust plan of management: at [69];

(2) given the use as a nightclub and the number of people attending the venue and the serving of alcohol, it would be unrealistic to expect that there would be no instances of anti-social behaviour and it would also be unrealistic to expect security staff to instantly address any problems given the often spontaneous nature of these events. The test of good management includes how management responds at the time of the incident and how management responds through ongoing or revised management practices. Conversely, poor management may include a large number of unacceptable incidents or whether there was a consistent pattern of unacceptable incidents: at [71];

(3) considering the Plan of Management, the COPS data, the Incident Log Book, council inspection notes, complaints, Police inspections, and the response of management to entry by members of outlaw motorcycle gangs, and accepting that there are some areas that require further communication between Police and management, given the type of establishment, its operating hours and the responsiveness of management to particular issues, it could reasonably be said that the premises were well managed: at [107]; and

(4) there was no evidence that the facilities other than the Tank Nightclub were not properly managed, nor significant breaches of the Plan of Management, and applying cl3.1 c iii of the DCP a five year trial period was warranted for these facilities: at [116].

Glendinning Minto Pty Ltd v Gosford City Council [2010] NSWLEC 1151 (Tuor C)

Facts: the applicant appealed against the refusal of consent for the construction of a dwelling, roads and associated works on each of seven lots of land at Kariong, with a total site area of about 75 ha. Clause 22(1) of Gosford Interim Development Order 122 ("the IDO") permits the erection, with consent, of dwelling houses on an allotment of land zoned 7(a) under the IDO provided it has an allotment of not less than 40 ha; cl 22(2)(b) and cl 22B(1)(a) provide exemptions which permit a dwelling to be erected on the lots despite each of the seven lots being less than 40 ha. Under the Draft Gosford Local Environmental Plan ("the draft LEP") dwelling houses remained a permissible use on the site despite the lots being less than the minimum size of 40 ha. Access to one of the lots was only available across a Crown public road owned by the Land and Property Management Authority and owner's consent to construct the access had not been obtained. The owner's consent was conditional on the council's concurrence to the transfer of the Crown road to it. The site adjoins Brisbane Waters National Park on three sides, and there were a number of Aboriginal sites on the site or in close proximity to it. The site was vacant and heavily vegetated with remnant native vegetation. Vegetation on the site identified as endangered species under the *Threatened Species Conservation Act* 1995 include *Darwinia glaucophylla, Hibbertia procumbens* and *Melalueca deanii*; the site provides habitat for a number of endangered species of fauna. The disturbance of the proposal for the houses and for the road would be a total area of 34.424 sqm, which was about 4% of the total site area, and comprised two vegetation types, Red Bloodwood – scribbly gum healthy woodland (woodland), and Hairpin banksia – slender tree heath (heath). A total of 951 trees were to be removed and replacement trees planted at the ratio of 2:1 in previously disturbed areas of the site; other trees outside the dwelling Principal Development Areas and the area for road widening were to be retained and the site managed under a Vegetation Management Plan. The applicant prepared a Species Impact Statement, and sought concurrence of the Department of Environment, Climate Change and Water ("DECCW") which had not been granted. DECCW had reviewed the applicant's offset proposal and noted that there was a shortfall in ecosystem credits required to be retired from the development site with respect to the number of similar credits provided from the offset area; that two management zones should be applied to each impacted vegetation type instead of the one management zone applied in the offset proposal and that the offset report did not include a definite proposal to ensure conservation of the offset area in perpetuity.

Issues:

(1) whether the Court should grant concurrence to the transfer of the Crown road;

(2) what weight should be given to the zoning of the site;

(3) whether the site was suitable for the proposed development given the ecological impacts, the adequacy of assessment of aboriginal heritage and the proposed bush fire safety measures; and

(4) whether the offset proposal for retention and management of vegetation elsewhere on the site was adequate to compensate against the loss of threatened species and their habitat.

Held: dismissing the appeal:

(1) applying *Goldberg v Waverley Council* [2007] NSWLEC 259; (2007) 156 LGERA 27, if the agreement of the council to the transfer of the Crown road is a function and discretion which could be exercised by the Court under s 39(2) of the *Land and Environment Court Act* 1979, it would be inappropriate to agree to the transfer in circumstances where no formal request had been made to council and where it had not been afforded the opportunity to consider such a request and either accept it or refuse it: at [35]-[36];

(2) applying *BGP Properties v Lake Macquarie City Council* [2004] NSWLEC 399; (2004) 138 LGERA 237, the rezoning of the site in 2001 to permit dwelling houses on the site despite the non compliance with minimum lot size and the maintenance of the current zoning and confined range of uses in the draft LEP, meant that there was no reason why significant weight should not be given to the zoning and the

development and its impacts had to be assessed recognising that dwellings, in some form, are an appropriate use for the site: at [44]-[46];

(3) the fire safety measures for the proposal had been assessed under the framework provided in s 79BA of the *Environmental Planning and Assessment Act* 1979, s 100B of the *Rural Fires Act* 1997 and *Planning for Bushfire Protection 2006* ("PBP"), and the Rural Fire Service and both fire experts agreed that it provided adequate fire safety measures. While both experts acknowledged that greater fire safety could be achieved, that did not mean that the proposal was not safe and did not meet the relevant requirements in PBP. Applying *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256, it was not appropriate to set aside the requirements of PBP or to impose more onerous requirements on the development. The application achieved acceptable fire safety, however, to achieve that level of safety resulted in other impacts, particularly ecological: at [55];

(4) the offset proposal was not in a form that met the benchmark of improving and maintaining biodiversity values. There was a shortfall in the number of woodland offset credits, which required that a degree of discretion be exercised to ensure that the benchmark was met. While under s 39(6) of the *Land and Environment Court Act* the Court could grant consent without the concurrence of DECCW, given its stated concerns, the different assumptions and the questions in relation to the adequacy of the offset package, it was inappropriate to do so in the absence of support from DECCW or clear expert evidence which addressed its concerns. The use of the biobanking assessment methodology is relatively new and complex and it is important that it be implemented in a rigorous manner: at [86]; and

(5) the offset proposal was a fundamental consideration in determining whether the development has acceptable ecological impacts and was not a matter that could be dealt with by conditions: at [89].

Bresact Pty Ltd v Manly Council [2010] NSWLEC 1137 (Dixon C)

Facts: In 2007 the council granted development consent for the alteration of an existing building with frontages to The Corso and Market Lane Manly including a shopfront to Market Lane and the conversion of the existing first floor office into two residential units. The building had no onsite parking. The consent was subject to condition DA274 requiring payment of contributions under s 94 of the *Environmental Planning and Assessment Act* 1979 in respect of two dwellings and two car parking spaces "in accordance with the council's Section 94 Policy applicable at the time of payment prior to the issue of a construction certificate". The council calculated the contribution payable at $113,561.49, being $53,561.79 for the two residential units and $61,949.32 for two car parking spaces. In 2009 the Minister issued a Direction under s 94E of the EPAA capping residential s 94 contributions to $20,000 per dwelling. The applicant applied under s 96 of the EPAA to modify the condition to require payment of contributions in the sum of $40,000.

Issues:

(1) whether the modified development is substantially the same as the development for which consent was granted;

(2) whether condition DA274 was of a kind allowed by the council's s 94 contributions plan; and

(3) whether the amount calculated on the basis of the plan in the sum of $113.561.49 is reasonable in the circumstances of the case.

Held: dismissing the appeal:

(1) the modified development was substantially the same as that originally approved: at [61];

(2) condition DA274 was a condition of a kind allowed by a contributions plan and the applicable plan was the Manly Section 94 Contribution Plan 2004: at [64];

(3) the Minister's s 94E Direction was not retrospective and did not apply to the consent: at [72];

(4) it was not relevant in considering the meaning of condition DA274 to have regard to a change of circumstances such as the issue of a s 94E direction which post dated the consent and by its terms did not retrospectively apply: at [75];

(5) the evidence established that the development would increase the demand for parking because there would be two residential units with no onsite parking. The applicant was aware of the development constraints of the small site, that approval of the development was dependent on the applicant offsetting the shortfall by payment of a s 94 contribution and the applicant had not provided persuasive evidence to justify the proposed amendment: at [80]; and

(6) the condition was reasonable and of a kind allowed by a contributions plan and could not be modified under s 94B(3) of the EPAA: at [90].

King v Minister for Planning; Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning; Gullen Range Wind Farm Pty Ltd v Minister for Planning [2010] NSWLEC 1102 (Moore SC, Fakes C)

Facts: in 2009 the Minister for Planning granted project approval under s 75J of the *Environmental Planning and Assessment Act* 1979 for a wind farm development of between 80 to 93 turbines to be located in four sectors over a distance of approximately 25 km on the Gullen Range on the Southern Tablelands, subject to conditions which included the removal of two groups of turbines totalling 11 turbines in the vicinity of Crookwell airstrip. The township of Grabben Gullen is located approximately 3 km to the west of one of the sectors, and there are 32 non-associated residences within 1.5 km of one or more turbines and about 60 non-associated residences within 2 km of one or more turbines. The project was assessed under Pt 3A of the EPAA, and was also designated development under Sch 3 of the Environmental Planning and Assessment Regulation 2000. Three separate sets of proceedings were commenced challenging aspects of the Minister's determination, and were heard together. The appeal by the proponent Gullen Range Wind Farm Pty Ltd was an appeal pursuant to s 75 K of the EPAA against five conditions of consent, relating to reinstatement of turbines, relocation of turbines, acquisition of certain lots on a property owned by Mr and Mrs King, sealing of a section of road, lighting on turbines, and annual contributions to the Community Enhancement Program. The element of the proponent's appeal seeking reinstatement of the deleted turbines was determined separately during the course of the proceedings: *Gullen Range Wind Farm Pty Ltd v Minister for Planning* [2009] NSWLEC 1444. The Parkesbourne-Mummel Landscape Guardians Inc had objected to the proposal during the assessment stage and had appealed pursuant to ss 75L and 98 of the EPAA against the approval.

Mr and Mrs King appealed in relation to a number of turbines in the southern sector of the proposal located on the eastern boundary of their property. The Upper Lachlan Shire Council took part in the appeal by the proponent pursuant to s 75K(3) of the EPAA.

Issues:

(1) whether the controls in the Upper Lachlan Shire Council Development Control Plan – Wind Power Generation 2005, including setback controls, should be applied;

(2) whether the proposed construction work on two unmade Crown roads would disturb contaminants from an abandoned sheep dip or disturb Aboriginal cultural items;

(3) whether the noise, visual or shadow flicker impacts on various properties warranted their inclusion in an acquisition schedule or the removal of nominated turbines;

(4) whether the impact of the proposed wind farm on subdivision potential should be considered; and

(5) whether the basis for determining contributions to the community enhancement scheme to compensate the local community for the visual impact of hosting wind farms was appropriate.

Held:

(1) the numerical limits in the council's DCP should not be given any weight because s 75R of the EPAA did not require it, and because the evidence concerning the adoption of the numerical limits was inaccurate and without foundation (applying *Stockland Development Pty Ltd v Manly* Council [2004] NSWLEC 472): at [88], [92] and [661];

(2) adopting *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59; (2007) 161 LGERA 1, there was no lawful basis for requiring compensation for impact on potential resale value of properties if the wind farm was constructed: at [108], [656];

(3) the conditions of consent should be amended to prohibit soil disturbing activities in a specified area near the abandoned sheep dip: at [126];

(4) subject to seeking appropriate approvals under the *National Parks and Wildlife Act* 1974, the nature of the aboriginal cultural material on the Crown road was such that it did not provide any basis for modification to or refusal of the proposal: at [129];

(5) the viewing of the wind farm that would occur from the public domain would, with the exception of the hamlet of Grabben Gullen, occur while driving along rural roads in a local road network in the vicinity of the four sectors, and there were no individual viewing points from the public domain (including in or near the hamlet) that would require any modification or refusal of the project: at [191]-[193] and [203];

(6) there were no shadow flicker or unacceptable noise impacts on the public domain: at [207];

(7) unacceptable visual, noise and shadow flicker impacts warranted the inclusion of six of the Kings' subdivision allotments and seven other landholdings or allotments with dwelling entitlements in an acquisition schedule: at [654];

(8) the acquisition process should be structured so that the proponent could elect to acquire any or all of the unacceptably impacted properties or delete any or all of the relevant impacting turbines: at [632]-[635] and [655];

(9) the consent should include a condition requiring that if the proponent had not initiated the process for the acquisition of a nominated property within four years of the date of the Minister's consent or prior to construction activities in the relevant sector of the proposal, the nominated turbines identified as causing an unacceptable impact on that property were deleted from the development consent: at [640];

(10) the proposal was permissible with development consent and consent had been granted prior to any subdivision being permitted on any of the potentially subdivisible landholdings, and there was no lawful basis on which modification to, or refusal of, the proposed wind farm would be appropriate because of loss of subdivision potential: at [584]-[588] and [658]; and

(11) the community compensation scheme should be based on an amount of $1,666 per turbine per annum – not an amount referable to generating capacity – and, in the first instance, should be applied for purposes that encourage use of renewable energy technologies on non-associated properties within 10 km of a turbine (with no householder contribution to be required): at [609], [612], [618] and [665].

Court News

Departures

Court Officer Richard Mortensen retired on 8 July 2010.

Court Officer Charmaine Mansfield will retire on 5 August 2010.

Arrivals

Sue Morris was appointed as a Commissioner on 28 June 2010.

The following Acting Commissioners were also appointed:

- David Galwey (Arboriculture)
- Philip Hewett (Arboriculture)
- David Johnson (Environmental Scientist – pollution)
- Michael Ritchie (Environmental Scientist – waste)
- Robert Smith (Environmental Scientist – natural resources) and
- Jennifer Smithson (Planner)