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Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Planning:

Statute Law (Miscellaneous Provisions) Act 2012, assented to 21 June 2012, makes amendments to or repeals various acts. Amendments to the *Environmental Planning and Assessment Act* 1979:

(a) enable joint regional planning panels to provide advice about planning or development matters or environmental planning instruments to the Director-General of the Department of Planning and Infrastructure, and not just to the Minister for Planning and Infrastructure as is currently the case;

(b) enable the Minister to make an order declaring that the whole of particular development is State significant development even if part of the development is already State significant development under a State environmental planning policy;

(c) enable a person who has provided security to a council in accordance with a condition of a complying development certificate to appeal to the Land and Environment Court if dissatisfied with the failure or refusal of the council to release the security; and

(d) remove any doubt that a provision of the Act under which the Minister may modify his or her approval of State significant infrastructure also enables the Minister to modify his or her approval of a staged infrastructure application under the Act.

Environmental Planning and Assessment Amendment (Miscellaneous) Regulation 2012, published 27 July 2012, has:

(a) amended the *Environmental Planning and Assessment Act* 1979 with respect to arrangements for changing the status of development from a Part 3A project to State significant infrastructure or State significant development and to preserve consent arrangements for certain development applications made before the introduction of joint regional planning panels that would otherwise be subject to determination by such a panel;

(b) made a number of miscellaneous amendments to the Environmental Planning and Assessment Regulation 2000 (including to specify the rate of the contributions levy for development on land subject to the contributions plan for the Chatswood CBD);

(c) set out the functions of the Director-General with respect to requests by proponents to have specified development declared to be State significant development and to provide for the fee payable for the exercise of those functions; and

(d) confirmed that the Western Lands Commissioner is a public authority for the purposes of the Act.

Environmental Planning and Assessment Amendment (Transitional Part 3A Projects) Regulation 2012 , published 24 August 2012:

(a) modifies the application of certain provisions of Part 3A (as in force immediately before its repeal) to transitional Part 3A projects, and

(b) prescribes time limits for proponents of Part 3A projects or concept plan applications to comply with environmental assessment requirements. [fact sheet]

Environmental Planning and Assessment Further Amendment (Existing Mining Leases) Regulation 2012, published 27 July 2012, extends to 30 September 2012 a transitional provision relating to certain existing mining leases.

Environmental Planning and Assessment (Sydney Cove) Savings and Transitional Repeal Proclamation 2012 , published 27 July 2012, revokes the repeal of the *Environmental Planning and Assessment (Sydney Cove) Savings and Transitional Regulation 1999* by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2011*. Pursuant to section 29A (1) of the *Interpretation Act 1987*, the Regulation is taken not to be, and never to have been, repealed.

Water:

On 3 August 2012 Sch 4[7] of the *Water Management Amendment Act* 2008 commenced, which amended s 72A of the *Water Management Act* 2000 in relation to dealings in relation to an access licence held by co-holders.

Water Management (General) Amendment (Miscellaneous) Regulation 2012, published 3 August 2012:

(a) prescribes certain requirements for consent by co-holders of access licences to the appointment or revocation of appointment of nominees in relation to certain dealings under the *Water Management Act* 2000;

(b) makes provision with respect to entitlements under the *Water Act* 1912 that authorise the taking of water from the Gwydir Unregulated and Alluvial Water Sources, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies;

(c) creates an exemption from the need for an approval under the Act for the construction or use of certain water supply works that are included in a project under the *Soil Conservation Act* 1938; and

(d) updates a cross reference and clarifies the application of an exemption.

Water Management (General) Amendment (Upper Parramatta River Catchment Trust) Regulation 2012, published 29 June 2012, repeals the provisions in the Water Management (General) Regulation 2011 that relate to the Upper Parramatta River Catchment Trust, as a consequence of the commencement (on 30 June 2012) of an amendment to the *Water Management Act* 2000 which removed the Trust as a water supply authority under that Act.

Water Management (General) Amendment (Extension of Transitional Period) Regulation 2012, published 29 June 2012, extended the operation of transitional provisions retaining certain entitlements under the *Water Act* 1912 (to take water for the purpose of prospecting or fossicking for minerals or petroleum) so that those entitlements may be retained until 1 July 2013.

Sydney Water Catchment Management Amendment Regulation 2012, published 15 June 2012:

(a) provides that it is an offence for a person to carry out an activity in a special area or controlled area with the consent of the Sydney Catchment Authority otherwise than in accordance with the conditions of any such consent;

(b) identifies part of the Shoalhaven Catchment Area as Schedule 1 land. Clause 20 of the Sydney Water Catchment Management Regulation 2008 prohibits certain activities on Schedule 1 land (such as camping or fishing in water on any such land);

(c) removes references to certain areas that are no longer special areas; and

(d) provides that the supply of water to Goulburn Mulwaree Council is a function of the Sydney Catchment Authority.

The Water Management (Application of Act to NSW Border Rivers Unregulated and Alluvial Water Sources) Proclamation 2012 set 1 June 2012 as the date from which Part 2 and 3 of Chapter 3 of the *Water Management Act* 2000 applies to the Water Sharing Plan for the NSW Border Rivers Unregulated and Alluvial Water Sources 2012 (which also commenced on I June 2012). Additionally, the Water Management (General) Amendment (NSW Border Rivers Water Sharing Plan) Regulation 2012, published 1 June 2012, prescribes a new category of access licence and made provision with respect to entitlements under the *Water Act* 1912 to which the plan applies.

The Water Sharing Plan for the Rocky Creek, Cobbadah, Upper Horton and Lower Horton Water Source Amendment Order 2012, published 3 August 2012, amends the Water Sharing Plan for the Rocky Creek, Cobbadah, Upper Horton and Lower Horton Water Source 2003.

The Water Sharing Plan for the Lachlan Regulated Water Source Amendment Order 2012, published 29 June 2012, amends the Water Sharing Plan for the Lachlan Regulated River Water Source 2003 in respect of carrying over water allocations credits and replenishment flows. The Water Sharing Plan for the Lachlan Regulated River Water Source Amendment Order 2012, published 14 September 2012, amends the Water Sharing Plan for the Lachlan Regulated River Water Source 2003 by amending Appendix A Rivers and lakes in the Lachlan Regulated River Water Source.

The Water Sharing Plan for the Tenterfield Creek Water Source Amendment Order 2012, published 1 June 2012, amended the Water Sharing Plan for the Tenterfield Creek Water Source 2003.

The Water Sharing Plan for the Gwydir Unregulated and Alluvial Water Sources 2012 commenced 3 August 2012. Additionally Part 2 and 3 of Chapter 3 of the *Water Management Act* 2000 apply to the Plan.

The Water Sharing Plan for the Lachlan Unregulated and Alluvial Water Sources 2012 commenced on 14 September 2012. Additionally Part 2 and 3 of Chapter 3 of the *Water Management Act* 2000 apply to each water source to which the Plan applies. The Water Management (General) Amendment (Lachlan Unregulated and Alluvial Water Sources Water Sharing Plan) Regulation 2012, published 14 September 2012, amends the Water Management (General) Regulation 2011 in relation to certain access licences.

On 1 July 2012 the NSW Office of Water introduced new Guidelines for Riparian Corridors on Waterfront Land, to amend the riparian corridor widths that apply to watercourses, provide flexibility in

how riparian corridors can be used, and provide a "riparian corridors matrix" to enable applicants to determine what activities can be considered in riparian corridors.

Miscellaneous:

On 10 August 2012 Sch 1[9] of the Local Government Amendment Act 2012 No 15 commenced, which amended s 451 of the *Local Government Act* 1993 relating to disclosures of certain pecuniary interests and the duties of councillors with respect to matters in which they have such pecuniary interests.

Local Government (General) Amendment (Special Disclosures of Pecuniary Interest) Regulation 2012, published 10 August 2012, amended the Local Government (General) Regulation 2005 to:

(a) prescribe the form and contents of special disclosures of pecuniary interest under s 451 of the *Local Government Act* 1993 (being special disclosures of pecuniary interests in the making of a principal environmental planning instrument, or an amendment, alteration or repeal of an environmental planning instrument, applying to the whole or a significant part of the council's area); and

(b) require any such disclosure made at a council meeting or council committee meeting to be recorded in the minutes of the meeting.

Local Government (General) Amendment (Caretaker Period Restrictions) Regulation 2012 — published 22 June 2012**,** provides that councils must not exercise certain functions during the period of 4 weeks preceding an ordinary election.

The remaining provisions of the *Heritage Amendment Act* 2011 commenced on 1 September 2012 as set out in the proclamation. The Act amends the *Heritage Act* 1977 in relation to the Heritage Council and the listing of items on the State Heritage Register and for other purposes.

Home Building Amendment (Exemption) Regulation 2012, published 10 August 2012, exempts the Crown from certain requirements of the *Home Building Act* 1989 and the Home Building Regulation 2004 in respect of community housing or public housing projects that were undertaken by companies that have since been placed into administration.

The following regulations have been remade, with minor changes, to replace the previous regulations which were repealed on 1 September 2012:

- Civil Procedure Regulation 2012;
- Electronic Transactions Regulation 2012;
- Fisheries Management (Aquaculture) Regulation 2012 (some amendments);
- Fluoridation of Public Water Supplies Regulation 2012;
- Heritage Regulation 2012 (some amendments);
- Lake Illawarra Authority Regulation 2012;
- Mine Subsidence Compensation Regulation 2012;
- Protection of the Environment Administration Regulation 2012;
- Regional Development Regulation 2012;
- Strata Schemes (Freehold Development) Regulation 2012 (some amendments);

- Strata Schemes (Leasehold Development) Regulation 2012 (some amendments); and
- Valuation of Land Regulation 2012.

The Subordinate Legislation (Postponement of Repeal) Order (No 2) 2012, published 24 August 2012, postpones the repeal of a number of regulations from 1 September 2012 to 1 September 2013. The list includes the following:

- Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005;
- Lord Howe Island Regulation 2004; and
- Marine Pollution Regulation 2006.

The *Plumbing and Drainage Act* 2011 commenced on 1 July 2012. The Plumbing and Drainage Regulation 2012, published 29 June 2012, prescribes:

(a) various periods within which certain notifications under the *Plumbing and Drainage Act* 2011 are to be given in relation to the carrying out of plumbing and drainage work;

(b) the period within which compliance certificates are to be issued for plumbing and drainage work;

(c) certain information to be provided to the plumbing regulator in relation to plumbing and drainage work involving alternative solutions under the *Plumbing Code of Australia*;

(d) exemptions from certain provisions of the Act in relation to the carrying out of minor plumbing and drainage work and plumbing and drainage work carried out by employees of network utility operators;

(e) certain offences under the Act and the Regulation as offences for which penalty notices may be issued; and

(f) fees payable under the Act.

Sydney Water (Stormwater Drainage Areas) Order 2011, published 29 June 2012, repeals the declaration of all existing stormwater drainage areas and declares new areas. The *Sydney Water Act* 1994 gives Sydney Water the power to make and levy stormwater drainage area charges on the owners of land within a stormwater drainage area.

National Park Estate (Riverina Red Gum Reservations) Amendment (Description of Lands) Notice 2012, published 29 June 2012, adjusts the description of lands included in the *National Park Estate (Riverina Red Gum Reservations) Act* 2010.

- **State Environmental Planning Policy [SEPP) Amendments**

The SEPP (Major Development) 2005 has been amended by the SEPP (Major Development) Amendment (Vincentia Coastal Village Site) 2012, published 25 May 2012, which changes definitions applying to that site in the SEPP.

SEPP (Exempt and Complying Development Codes) Amendment (General Housing Code) 2012, published 27 July 2012, inserts land in the Lake Macquarie local government area into the SEPP (Exempt and Complying Development Codes) 2008.

- **Bills**

The Coastal Protection Amendment Bill 2012 will amend the Coastal Protection Act 1979, including by:

(a) renaming "emergency coastal protection works" as "temporary coastal protection works";

(b) providing that a person does not require regulatory approval for temporary coastal protection works that comply with requirements for those works set out in the Coastal Protection Act;

(c) removing requirements specifying when temporary coastal protection works can be placed, and that they be removed 12 months after placement;

(d) amending the requirements for use and occupation of public land for the placing and maintaining of temporary coastal protection works;

(e) reducing penalties for various offences relating to certain unauthorised anti-beach erosion work and temporary coastal protection works;

(f) removing s 56B from the Coastal Protection Act which enables regulations with regard to categorisation of land within the coastal zone into risk categories, including provision of information in planning certificates issued under s 149 of the Environmental Planning and Assessment Act 1979; and

(g) repealing existing regulations made under s 56B.

- **Consultation Drafts**

The Government released the draft Boarding House Bill 2012 (Exposure Draft) and the Exposure Draft Boarding House Bill 2012 Position Paper (Position Paper) which were accessible through a circular released by the Division of Local Government (Circular No 12-26).

- **Miscellaneous**

The NSW Law Reform Commission has released an interim report titled Sentencing: Interim report on standard minimum non-parole periods and its report on Bail.

The NSW Parliamentary Library Services has released a briefing paper titled Wind Farms: regulatory developments in NSW.

The Division of Planning and Infrastructure has released the following planning circulars:

- Development assessment on bush fire prone land – section 79BA (PS12-004)
- Building Code of Australia 2012 – key changes (PS12 001)

The Division of Local Government released the following Circulars to Councils:

- Information about rating for 2012/13 (12-17)
- Modernisation of Local Government legislation (12-32)

On 11 September 2012 the NSW Government released its Strategic Regional Land Use Policy, which is intended to balance growth in the mining and coal seam gas (CSG) industries with the need to protect agricultural land and water uses. The Policy package includes identification of Strategic

Agricultural Land, establishment of a Land and Water Commissioner, and the introduction of an Aquifer Interference Policy, a requirement for an Agricultural Impact Statement at exploration stage for mining and CSG projects, and CSG Codes of Practice: http://www.nsw.gov.au/strategicregionallanduse.

Court Practice and Procedure

The *Courts and Other Legislation Amendment Act 2012*, which was passed on 5 September 2012 and assented to 10 September 2012, among other things, amends the *Land and Environment Court Act 1979* to:

(a) allow an Acting Commissioner of the Land and Environment Court to complete or otherwise deal with any matter that the Acting Commissioner had heard or partly heard before the expiry of his or her term of appointment as an Acting Commissioner;

(b) require leave of the Court for a person to appear by an agent, as opposed to an Australian legal practitioner;

(c) require a person (other than an Australian legal practitioner) to provide certain information to a client before the Land and Environment Court may grant leave for the person to appear as an agent for the client in proceedings before that Court;

(d) require the Court to consider whether the agent has provided the required information, and whether the granting of leave for a person to appear by an agent is in the best interests of the person; and

(e) make it clear that the Land and Environment Court has jurisdiction in respect of disputes arising from a determination made by the Director-General of the Department of Trade and Investment, Regional Infrastructure and Services in relation to an objection to the granting of a mining lease.

The *Courts and Other Legislation Amendment Act* 2012 also amended s 13 of the *Civil Procedure Act* 2005 to allow the senior judicial officer of a court, by instrument in writing, to authorise registrars and other officers of the court to exercise the court's functions under the *Civil Procedure Act* 2005 and any other Act or law.

The amendments to s 63 of the *Land and Environment Court Act* 1979 concerning leave for agents commence on a date to be proclaimed, and will not apply to proceedings commenced before that date. The other amendents commence on assent.

- **Fees**

Court fees increased on 1 July 2012 as set out in the Civil Procedure Amendment (Fees) Regulation 2012 and the Criminal Procedure Amendment (Fees) Regulation 2012.

- **Civil Procedure Amendments**

Uniform Civil Procedure Rules (Amendment No 54) 2012, published 10 August 2012, amends the Uniform Civil Procedure Rules 2005 to make it clear that provisions of the rules that are expressed to apply only in relation to a specified court or courts do not apply in relation to any other court.

Uniform Civil Procedure Rules (Amendment No 55) 2012, published 14 September 2012, amends the Uniform Civil Procedure Rules 2005 r 4.4 by adding a new subrule (4) that allows a party's barrister to sign a document setting out proposed consent orders between the parties.

Judgments

- **United Kingdom**

St Vincent's Housing Association Ltd v Secretary of State for Communities and Local Government [2011] EWHC 3339; [2012] JPL 845 (Admin) (Shaun Spencer J)

Facts: St Vincent's Housing Association Ltd, the claimant, applied to the High Court as a person aggrieved by the decision of a planning inspector to refuse planning permission for the erection of 10 bungalows. On the east boundary of the subject site was a considerable number of mature deciduous trees, some of which were to be removed but many of which were the subject of a tree preservation order. These trees created a tree shadow zone. A Natural Environment Notice policy, known as NE21, stated that "[w]here trees are located on or adjacent to development sites, development proposals will be permitted provided that…an appropriate layout of development is achieved which prevents the development being subjected to an unacceptable degree of shade cast by trees which are to be retained." In making his decision to refuse planning permission, the inspector relied on a tree shadow zone plan for the site, which indicated that the gardens and rear-facing windows of four of the 10 proposed bungalows would be heavily overshadowed by the trees to be retained if the development was permitted. Furthermore, the inspector considered that given the proximity of the trees to the proposed bungalows and the likely impacts of debris (leaves, pollen and honeydew, branches), birds roosting, and overshadowing of gardens and bungalows making them damp and dark, the new residents would perceive the impacts of the trees to be a significant nuisance and danger and the council would find it difficult to resist an application to remove the trees. This loss of trees as a result of the development would have an unacceptable impact on the character and appearance of the local area and on the value of the wildlife corridor. The claimant submitted that there was no evidence before the inspector from which he could rationally draw the conclusions he made in the decision letter.

Issues:

(1) whether the inspector erred in law by making predictions regarding the likely outcome of future applications to remove the trees;

(2) if so, whether the inspector's decision would have been different had he not erred in his prediction exercise; and

(3) whether the reasons given in the inspector's decision were adequate.

Held: refusing the application:

(1) even if the tree shadow zone plan represented the worst case, the worst case was something that could happen. The inspector was entitled to regard the shadow zone set out on the drawing as representing the case: at [13];

(2) the propositions that the trees would impact on residents and their gardens and bungalows were ones the inspector was entitled to take into account and were simply general common sense: at [13];

(3) bearing in mind the content of NE21 and that the decision was made by a planning inspector who would be appropriately qualified in this area, the inspector was entitled to conclude that the applications to fell the trees, if made, would be granted: at [16];

(4) the inspector's decision would not be different had he concluded in his prediction exercise that the trees would not have gone. Considering the concerns raised by the inspector in relation to overshadowing, the inspector would still have refused permission: at [18]; and

(5) the reasons for the decision were adequately set out in the inspector's decision, the point being that the proximity to the bungalows and the degree of shadow cast would make it difficult for the Council the resist applications to fell trees on safety and amenity grounds: at [20].

Hulme v Secretary of State for Communities and Local Government [2011] EWCA Civ 638 (Elias LJ, Patten and Mummery LJJ agreeing)

Facts: the second respondent, RES Developments Ltd, sought planning permission for a wind farm to be operated for 25 years. After a series of appeals and inquiries, the appellant sought to appeal to the Court of Appeal on six grounds, five of which were rejected by Sullivan LJ. Sullivan LJ did, however, consider that there was an arguable error of law with respect to the imposition of two conditions of the permission designed to deal with the potential impact of noise resulting from the rotation of the turbines. The evidence before the preliminary inquiry was that if aerodynamic ("blade swish") noise was excessive it could interfere with the amenity of local residents and in particular could disturb sleep. Condition 20 of the permission set out a procedure to be followed by the wind farm operator if a noise complaint from a nearby householder was received, including assessing whether aerodynamic noise levels breached limits set in condition 20. Condition 21 required a scheme to be adopted which could evaluate and monitor this level. Condition 21 provided that the scheme "shall terminate when compliance with condition 20 has been demonstrated to the satisfaction of…the local planning authority". Condition 16 set overall noise limits for the turbines resulting from aerodynamic noise and/or mechanical noise. The appellant submitted that condition 21 did not envisage that the scheme should be designed to provide a mechanism for enforcement of the condition 20 standard. The appellant also submitted that even if the scheme could incorporate an enforcement mechanism, once the developer could demonstrate compliance with condition 20 as agreed by the local planning authority, the scheme would then cease to operate altogether. Thereafter the principles imposed by condition 20 could be ignored without any effective remedy even if subsequently there was a complaint. The respondents submitted that the only proper construction of condition 21, read in the context of the decision letter as a whole, was that it was intended to include an enforcement mechanism. The scheme would necessarilly continue for the duration of the operation of the wind farm. In the alternative, the only circumstances where the scheme would terminate would be if the developer could show that the turbines could not infringe the levels envisaged by condition 20.

Issues:

(1) whether conditions 20 and 21 achieved the objective of imposing a mechanism to ensure that the level of aerodynamic noise did not exceed acceptable levels;

(2) whether the scheme could be terminated in circumstances where no enforcement mechanism would thereafter be available to deal with complaints that the aerodynamic noise levels were too high; and

(3) whether the scheme could seek to tie the enforcement in some way to the noise levels identified in condition 16 so that no effective sanction would apply in circumstances where the swish noise exceeded the level in condition 20 but the overall noise level did not exceed the level in condition 16.

Held: rejecting the appeal:

(1) the obligation not to contravene the standards set out in condition 20 arose as a matter of construction or necessary implication from the language of the express conditions when read in the context of the decision letter. It did not involve an impermissible reading into the planning permission of an obligation said to arise from extrinsic circumstances: at [37];

(2) the obligation to comply with the standards in condition 20 would run for the duration of the planning permission. That obligation could be enforced by the planning authority in the normal way: at [38];

(3) it was not conceivable that condition 21 meant that as soon as there was a particular complaint and compliance with condition 20 was satisfied, the scheme would terminate so it would not be available to address complaints from other affected householders: at [31]; and

(4) the scheme could not provide for a system of enforcement which would simply allow a breach of condition 20 to be reflected by means of a penalty to be taken into account when assessing noise levels under condition 16. The clear intention was that the standard laid down in condition 20 should be met: at [34].

Discussion of principles of interpretation of conditions of planning permissions, including implied conditions.

Barr v Biffa Waste Services Ltd [2012] EWCA Civ 312; [2012] 2 P & C R 6 (Carnwarth LJ, Patten and Arden LJJ agreeing)

Facts: in 2004, Biffa Waste Services Ltd ("Biffa") received a permit to tip pre-treated waste, which is more odorous than ordinary mixed refuse, in an area of Westmill that lay near to a housing estate. Condition 2.6.12 of the permit stated '[t]here shall be no odours emitted from the Permitted Installation at levels as are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the Permitted Installation boundary'. A week after Biffa began tipping pre-treated waste at the site in 2004, residents began complaining about strong odours. The tipping and the residents' complaints about the resulting odours continued until 2009. In October 2007, Biffa received four convictions relating to separate breaches of condition 2.6.12. In 2009, 152 residents of the estate brought a group action against Biffa, claiming damages for nuisance. Biffa claimed it had statutory authority for the odour emissions. The trial judge dismissed the residents' claims, rejected Biffa's statutory authority defence and in the course of his reasoning carried out an elaborate reinterpretation of the law of nuisance. The trial judge found that the controlling principle of the modern law of nuisance was that of reasonable user. There was no implied statutory immunity for the nuisance, but if the user was reasonable, then absent proof of negligence or breach of permit, the claim must fail. He found that in the context of the modern system of regulatory controls and the specific waste permit, the common law must be adapted to 'march in step with' the legislation. The judge also found that the granting of the permit was 'strategic', in that it altered the character of the neighbourhood in which reasonableness was to be judged. He found that the permit impliedly gave statutory immunity for the escape of a certain amount of odour emissions and that it was necessary to set a precise threshold to distinguish between the acceptable and the unacceptable. In the absence of any alternative suggestion, the judge set the threshold at 'one odour complaint day each week (i.e. 52 each year) regardless of intensity'. Only two complainants were found to have met this threshold. The group of complainants appealed to the Court of Appeal against the decision of the trial judge and Biffa cross-appealed against the judge's rejection of the statutory immunity defence.

Issue:

(1) whether the trial judge erred in applying the law.

Held: allowing the appeal, remitting the case for further review and dismissing the cross-appeal:

(1) although an activity conducted in contravention of planning or development controls is unlikely to be reasonable, the converse does not follow. There was no requirement for the claimants to allege or prove negligence or breach of condition of a permit to prove unreasonableness: at [46] and [76];

(2) there was no principle that the common law should 'march with' a statutory scheme covering similar subject-matter. Short of express or implied statutory authority to commit a nuisance, there was no basis, in principle or authority, for using such a statutory scheme to cut down private law rights: at [46], [93] and [95];

(3) that the acceptability of the use has to be judged by reference to the character of the neighbourhood is uncontroversial. However there was no evidence that the permit was 'strategic' in nature and changed the essential character of the neighbourhood, which had long included tipping. The relevant change was the introduction of a more offensive form of waste: at [46], [74] and [82];

(4) the permit did not, and did not purport to, authorise the emission of such smells. Far from being anticipated and impliedly authorised, the problem was not covered by the original Waste Management Plan. As the judge accepted, Biffa did not have statutory immunity, express or implied. Biffa's attempt to find an alternative route to the same effective end was misconceived. It depended on a misreading of authorities, misunderstanding of the statutory framework, and misinterpretation of the permit: at [41], [46], [47] and [94]-[106]; and

(5) there was no precedent for requiring claimants to specify a precise limit of acceptable smell, and there was no accepted methodology for doing so. By adopting such a threshold, the judge deprived at least some of the claimants of their right to have their individual cases assessed on their merits: at [46], [115], [115], [121], 139] and [140]-[145].

- **High Court of Australia**

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia [2012] HCA 25

(related decision: *Public Service Association of SA Inc v Industrial Relations Commission (SA)* (2011) 109 SASR 223, [2011] SASCFC 14, Doyle CJ, Duggan and Vanstone JJ)

Facts: the Public Service Association of South Australia Inc ("PSA") sought special leave to appeal to the High Court from a decision of the Full Court of the Supreme Court of South Australia, wherein the Full Court held that it did not have jurisdiction to entertain a summons, filed by PSA, for judicial review of a decision of the Industrial Relations Commission of South Australia ("the Commission"). The Commission had found that it lacked jurisdiction to hear PSA's original application because it did not relate to an "industrial dispute", which constituted a jurisdictional fact pursuant to s 4 of the *Fair Work Act* 1994 (SA) ("the Act"). PSA sought to challenge this finding in the Full Court, but the Full Court refused to hear the appeal on the basis of s 206 of the Act, which provided that a determination of the Commission may only be challenged "on the ground of an excess or want of jurisdiction". The Full Court held that a failure to exercise jurisdiction did not constitute an excess or want of jurisdiction.

Issues:

(1) whether the decision of *Kirk v Industrial Court (NSW)* [2010) HCA 1; (2010) 239 CLR 531 applied to protect the supervisory jurisdiction of the Supreme Court, as enshrined in s 73(ii) of the Constitution, in relation to judicial review of a wrongful failure by a tribunal to exercise jurisdiction; and

(2) whether s 206 was invalid because it purported to remove the Supreme Court's supervisory jurisdiction in that regard.

Held: special leave to appeal was granted, with the appeal treated as heard instanter and allowed. The decision of the Full Court was set aside and the matter was remitted to the Full Court for determination of PSA's summons for judicial review:

(1) it was beyond the power of the South Australian legislature to prevent the Supreme Court from engaging in review of jurisdictional error, whether this was constituted by a failure to exercise jurisdiction or a purported exercise of jurisdiction. *Kirk* did not distinguish between categories of jurisdictional error: at [30] per French CJ, [60] and [65] per Gummow, Hayne, Crennan, Kiefel and Bell JJ and [73]-[74] per Heydon J;

(2) further, *Kirk's* protection of the supervisory jurisdiction of State Supreme Courts was not limited to jurisdictional review of courts, as demonstrated by the subsequent cases of *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181, but extended to tribunals: at [83]-[85] per Heydon J; and

(3) section 206 was not necessarily invalid, but it had to be read in a manner that took into account the incapacity of the legislature to take from the Supreme Court its authority to grant relief for jurisdictional error: at [35] per French CJ and [64]-[66] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

- **Federal Court of Australia**

Minister for Sustainability, Environment, Water, Population and Communities v De Bono [2012] FCA 643 North J

Facts: the applicant Minister for Sustainability, Environment, Water, Population and Communities ("the Minister") sought remedies against Mr De Bono for contravention of s 18(6) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). Section 18(6) is a civil penalty provision

that provides that a person must not take an action that will have or is likely to have "a significant impact on a listed threatened ecological community included in the endangered category".

The EPBC Act was amended to include the Threatened Grey Box Grassy Woodlands and Derived Native Grasslands of South-eastern Australia ("the ecological community") in its list of threatened ecological communities from 1 April 2010. The ecological community was present on the western paddock of Mr De Bono's property, an area of 69 ha located in Parwan, Victoria. Between April and December 2010 Mr De Bono ploughed approximately 44 ha of this paddock and disturbed embedded rocks over a 59 ha area, resulting in significant damage to the ecological community.

Before commencement of the hearing, on 25 April 2012, the parties had reached agreement on the remedies of declaration, injunction, remediation and costs, and had filed a statement of agreed facts. They also agreed that Mr De Bono should pay a pecuniary penalty, but disagreed on the amount of this penalty. However, by the second day of the hearing, on 2 May 2012, the parties had agreed that $150,000 would be an appropriate penalty.

Issues:

(1) the role of the Court with respect to the imposition of a penalty where, as in this case, the parties have agreed upon an appropriate penalty; and

(2) whether the agreed penalty contained in the proposed consent orders were reasonably open to be made on the material before the Court, having regard to the factors contained in s 481(3) of the *Federal Court Act* (Cth) ("the FCA") including:

   (a) the nature and extent of the contravention;
   (b) the nature and extent of any loss or damage suffered as a result of the contravention;
   (c) the circumstances in which the contravention took place; and
   (d) whether Mr De Bono had been convicted under the FCA for similar conduct.

Held: the Court accepted the agreement of the parties as to the appropriate orders to be made. Mr De Bono was declared to have contravened s 18(6) of the EPBC Act and was ordered to pay a pecuniary penalty of $150,000, implement a management plan at his own cost and pay the Minister's costs in the fixed sum of $40,000. Injunctive relief was also granted:

(1) where parties have come to an agreement over a civil pecuniary penalty and other orders, the Court will generally accept the agreement, however, the Court must first determine whether the orders sought fall within the range of outcomes reasonably open on the material before the Court: at [15]; and

(2) a number of factors militated towards a penalty at the higher end of the spectrum. These factors included: the very high monetary maximum of $550,000 for contravention of s 18(6) of the EPBC Act by an individual; the inherent seriousness of damaging an ecological community in the endangered category; the fact that the ploughing, rock removal and piling destroyed the ecological community and caused extreme damage over a relatively large area; and the open defiance of the law with which the actions were taken: at [62]-[67]. However, consideration of several other factors meant, on balance, that the proposed figure was within the range of appropriate penalties, namely that: Mr De Bono cooperated with the Minister during proceedings, resulting in agreement being reached with respect to the proposed orders and penalty; the agreed amount was high enough to serve the purpose of both general and specific deterrence; Mr De Bono had not been previously convicted for a similar offence; Mr De Bono had agreed to pay a substantial costs order; and Mr De Bono had agreed to a remediation plan: at [68]-[74].

- **NSW Court of Appeal**

Huang v Hurstville City Council [2012] NSWCA 177 (Allsop P, Macfarlan JA, Sackville AJA)

(related decisions: *Huang v Hurstville City Council (No 2*) [2011] NSWLEC 151 Pain J; *Huang v Hurstville City Counci*l [2011] NSWLEC 1175 Dixon C)

Facts: Ms Huang appealed to the Court from the determination of the respondent council refusing development consent for the use of premises for sex services. That appeal was dismissed on the basis that the proposed use did not comply with cl 16A of the *Hurstville Local Environmental Plan* 1994 ("the LEP") concerning the distancing of premises used for sex services from educational establishments, places of worship, hospitals, and the like. Ms Huang's appeal pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the LEC Act") was dismissed, Pain J agreeing with Dixon C that the requirements of cl 16A were not development standards as defined in the *Environmental Planning and Assessment Act* 1979 ("the EPAA") and that *State Environmental Planning Policy No 1 – Development Standards* did not confer power to depart from those provisions. Ms Huang sought leave to appeal.

Issue:
(1) whether leave to appeal should be granted.

Held: application for leave to appeal dismissed with costs:

(1) the question whether cl 16A was a development standard was undoubtedly a question of law within the meaning of s 57(1) of the LEC Act however the legislative intent manifested by s 57(4) was that that circumstance was insufficient of itself to entitle a party to appeal to the Court of Appeal, and something more was required: at [9];

(2) while Pain J's decision may be of significance in the determination of other applications for development consent, that would almost always be so where a judge of the Court determines a question of law, and s 57 made it clear that the legislature intended that in some, and perhaps many, cases the decision on a question of law would not be subject to appeal: at [10];

(3) it was also of significance that the planning provision in question, cl 16A of the LEP, applied only to uses of property for very limited purposes and only in the Hurstville area: at [11]; and

(4) in determining the question of law before her, the primary judge had the guidance of decisions of the Court of Appeal in which the proper approach to such questions was authoritatively stated. Her decision was a thorough one which was unlikely to be reversed if leave to appeal were granted: at [12].

McGinn v Ashfield Council [2012] NSWCA 238 (McColl JA, Sackville AJA and Gzell J)

(related decisions: *McGinn v Ashfield Council* [2011] NSWLEC 84; *McGinn v Ashfield Council* [2011] NSWLEC 105, Biscoe J)

Facts: the respondent council granted development consent for the construction of a detached dwelling at the rear of an existing dwelling. The allotment on which the proposed development was to be erected ran north to south, and had a frontage on its northern boundary to a street ("the Street") and on the southern boundary abuts a lane ("the Lane"). The existing dwelling was towards the north of the allotment, and the proposed dwelling was to the south of the allotment facing the Lane. The development application proposed a driveway from the Lane to a garage on the eastern part of the dwelling, and a driveway from the Street along the eastern boundary of the allotment turning about halfway along that boundary to a new garage; that driveway defined the northern boundary of the garden of the proposed dwelling and the southern boundary of the garden to the rear of the existing dwelling. The appellant, who resided next door to the proposed development, brought proceedings seeking a declaration that the development consent was invalid. The appellant argued that the proposed dwelling had a frontage to the Street and not to the Lane, and that if the proposed dwelling had a front address on the Lane, not the Street, it would be consistent with the objectives of the Ashfield Development Control Plan 2007 ("the DCP"); and that the proposed development did not comply with the design principles for dual occupancy in the DCP. The appellant submitted that the development did not have street frontage. The application was dismissed, and the appellant appealed.

Issues:

(1) whether the proposed development met the objectives of the DCP;

(2) whether the council had taken into consideration the provisions of the DCP; and

(3) whether the council had erred in forming a positive opinion of consistency with the objectives of the DCP because it was based on incorrect information.

Held: dismissing the appeal with costs:

(1) the council had not erred in concluding that the proposed dwelling had a frontage to the Lane and the primary judge was entitled to so find. An arrangement with the postal authorities for an address on the Street did not alter the fact that one side of the proposed dwelling faced the Lane and the proposed dwelling had ingress from and egress to the Lane; the attribution of an entry to one of the doors in the approved plans did not mean that the proposed dwelling could not have a frontage to the Lane; and the proposed dwelling had access to the Lane by the access driveway and no access to the Street: at [51]-[54];

(2) the council was required to take into consideration the DCP, and clearly took it into account. The Development Assessment Report to the council gave the DCP due prominence, and it was noted that notwithstanding non-compliance with ss 3.3 and 3.4 of the DCP the objective of the DCP was achieved by the development: at [65];

(3) the council was entitled to form that view, and it was not required to refuse the development application. The provisions of the DCP were addressed and were taken into consideration: at [66];

(4) the appellant had failed to demonstrate that the primary judge's analysis of the DCP and its objectives was in error: at [68]; and

(5) the primary judge had not erred in his conclusion that the council was not misled and knew that one of the two street frontages was a lane and knew that it was approving a proposed dwelling that had a frontage only to a lane: at [72].

Sertari Pty Ltd v Quakers Hill SPV Pty Ltd [2012] NSWCA 292 (Basten JA)

(related decision: *Quakers Hill SPV Pty Ltd v Blacktown City Council* [2012] NSWLEC 200 Sheahan J)

Facts: Sertari Pty Ltd ("Sertari") owns a hotel in Quakers Hill, including adjoining land subject to a right of carriageway. The respondent is the owner of a site on which a development is proposed; the only vehicular access to that site is by way of the right of carriageway over Sertari's land. The development consent granted to the development is subject to a deferred commencement condition requiring the respondent to prepare a pedestrian management plan to be approved by Blacktown City Council ("the council"). The respondent commenced Class 1 proceedings appealing against a deemed refusal by the council to determine that the deferred commencement condition had been satisfied, and those proceedings were the subject of a conciliation conference under s 34 of the *Land and Environment Court Act* 1979. Sertari applied to be joined as a party to the Class 1 proceedings, and that application was refused by the acting Registrar. Sertari sought to review that decision under r 49.19 of the Uniform Civil Procedure Rules 2005 ("the UCPR") before a judge of the Court. That application was dismissed, on the basis that there was no power to review the decision of the Registrar and that relief had to be sought in the Supreme Court. Sertari commenced proceedings in the Supreme Court, seeking review of the Registrar's decision and a stay of the Land and Environment Court proceedings.

Issues:

(1) whether a stay should be ordered.

Held: standing the matter over for seven days, ordering that the Land and Environment Court be restrained from dealing with the proceedings pending resolution of the proceedings in the Supreme Court, and reserving costs:

(1) there was much to be said for the conclusion that there was power in the Judge of the Land and Environment Court to undertake a review of the Registrar's decision pursuant to r 49.19 of the UCPR: at [13];

(2) if the Supreme Court were to form the view that that was the correct outcome, it was unlikely that it would review the judgment of the Registrar, but the matter would go back to the Land and Environment

Court, if the matter were not resolved by agreement, for a judge of that court to undertake the review: at [14];

(3) the matter should be stood over for seven days to allow the respondent and Sertari to consider whether there could be a consensual resolution of the dispute: at [15]; and

(4) there was uncertainty as to the position of the council, and whether there may need to be a disputed hearing before the Land and Environment Court, and the safer course was to make an order in the nature of a stay: at [18].

- **Queensland Supreme Court**

Baker v Minister for Employment Skills and Mining & Anor [2012] QSC 160 (Dalton J)

Facts: QCLNG Pipeline Pty Ltd ("QCLNG") had permission in the form of a point-to-point licence to build a pipeline from the Surat Basin to Gladstone. The pipeline was several hundred kilometres long and would pass over the applicant's rural property. Section 463(1) of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) ("the Act") provided that a person who held a pipeline licence could apply for permission ("a part 5 permission") to enter the area, or proposed area, of a licence to construct or operate a pipeline the subject of the licence or proposed licence. Section 465 of the Act required applicants for a part 5 permission to provide a consultation notice to each owner of the land describing the land and the site and specifying the consultation period during which time each landowner could lodge submissions to the Minister about the proposed part 5 permission. QCLNG gave a consultation notice to the applicant on 16 January 2012 with a consultation period specified to end on 14 February 2012. The applicant had been provided a map of the location of the pipeline by QCLNG in November 2011, however the consultation notice given to the applicant did not contain a description of the land over which the part 5 permission was sought. In response to a request from the applicant for more precise details of the location of the pipeline, on 10 February 2012, QCLNG sent a letter to the applicant attaching a map which showed the pipeline with precise decription of the location. This was two days before the end of the consultation period. QCLNG applied for a part 5 permission on 20 January 2012, however the Department of Employment, Economic Development and Innovation found that the original maps provided in the application were insufficiently detailed. On 15 February 2012, QCLNG supplied supplementary submissions including more detailed map information to the Minister. The applicant complained that the material before the Minister, as at the end of the consultation period, did not with any accuracy identify the land to which the part 5 permission related. Furthermore, the applicant did not, before the end of the consultation period, receive the material in the supplementary submission, and in particular the material in the submission that specifically identified the land over which the part 5 permission was sought. The precise location of the pipeline was only clarified after the end of the consultation period and so the applicant was not given an opportunity to make submissions about the specific piece of land the subject of the part 5 application.

Issue:

(1) whether the applicant was denied procedural fairness by the decision of the Minister to grant a part 5 permission.

Held: declaring void the decision of the Minister:

(1) the application lodged on behalf of QCLNG did not contain a precise description of the land over which part 5 permission was sought, either in words, or in the two maps which were part of the application. The consultation notice sent to the applicant on 16 January 2012 also did not describe the land over which part 5 permission was sought: at [23] and [25];

(2) the applicant had a right to be told precisely what land was the subject of the part 5 application. The word "land" in s 465 meant the land the subject of the part 5 permission that was sought, that is, the land which would become pipeline land if the part 5 permission was granted. There could be no utility in statutory provisions requiring that the applicant be consulted, and given an opportunity to lodge submissions, about land which the applicant licensee sought as pipeline land if the applicant was not properly appraised of what land was the subject of the application. The applicant needed to be

appraised of this in order that the consultation notice, the consultation period and the opportunity to make submissions to the Minister, amounted to a meaningful exercise: at [20], [22] and [40];

(3) Mr Baker did not receive accurate details of the land over which part 5 permission was sought until two business days before the end of the consultation period. The consultation period mandated by the Act was 20 business days. Mr Baker did not have sufficient time to understand the import of the information as to the proposed part 5 land in the two business days available to him: at [38], [41] and [42]; and

(4) the Court was not persuaded that had Mr Baker been properly appraised of the subject land, as he should have been from the time of the delivery of the consultation notice, there might have been a different result: at [41].

- **NSW Supreme Court**

Dimitrios Michos & Anor v Botany Bay City Council [2012] NSWSC 625 (Slattery J)

Facts: the Botany Bay City Council ("the council") is the registered proprietor of the nature-strip on the corner of Vernon and Florence Avenues Eastlakes, which abuts the corner residential property owned by Mr Dimitrios Michos and Mrs Rene Michos ("the plaintiffs") since 1979. There are three native fig trees growing on the nature strip which are the subject of a heritage order made in 2000.

Between 1979 to 1998 the plaintiffs had called plumbers to unblock sewage lines on at least two occasions, and the council reimbursed the plaintiffs for the costs. In 2000, following further discussions between Mrs Michos and the council, and further inspections of the plaintiffs' property, the council installed a root barrier. In 2004 Mrs Michos complained to the council about cracking in the concrete footpath; further blockages in the sewerage system were cleared, some being reimbursed by the council. In 2005 the plaintiffs commenced constructing an extension to the rear of the house and during the course of earth works Mrs Michos noticed that roots had entered the property and grown along the eastern rear wall of the house. After further correspondence between the plaintiffs, the council and its claims manager, in October 2009 the plaintiffs commenced proceedings. The plaintiffs claimed that the roots of the fig trees were damaging their property and sought orders restraining the council from allowing the roots of the fig trees to encroach on their land and cause a nuisance to them, and claimed damages and interest. The council denied liability to the plaintiffs either in nuisance or negligence, and argued that if the three fig trees had caused damage to the plaintiffs' land and the structures built thereon such damage was minimal and injunctive relief was not warranted. The council conceded that the fig tree roots had penetrated the plaintiffs' property.

Issues:

(1) whether the plaintiffs had made out their claim in nuisance;

(2) whether the claim in negligence was made out;

(3) whether injunctive relief should be granted;

(4) if so, in what form should it be granted; and

(5) whether damages should be awarded.

Held: a mandatory injunction requiring the erection of a 2m deep root barrier immediately outside the western and northern boundaries of the property should be granted, and damages awarded for damage to the lawn, the path, the subterranean pipes and fences and for loss of enjoyment:

(1) the plaintiffs had made out their claim in nuisance: there was a serious and continuing problem which prevented the plaintiffs from using their front lawn and which was lifting fences, gates and path, and even if the foundations of the main residence were not interfered with, the interference with the use of the front of the premises was substantial and it was not reasonable for the plaintiffs to accept that on a continuing basis: at [63];

(2) the risk of root penetration was foreseeable, the risk of harm from the tree roots was not insignificant, and a reasonable person would have taken precautions in the form of putting in an effective root barrier or removing the trees, and the plaintiffs had satisfied ss 5B and 5C of the *Civil Liability Act* 2002 in relation to the claim in negligence: at [70]-[75];

(3) the council breached the duty to take reasonable steps to avoid the foreseeable risk of harm to the plaintiffs' property by failing to install an effective root barrier, and the plaintiffs' claim in negligence was made out: at [76];

(4) the plaintiffs' problems of root penetration would continue and the plaintiffs would continue to suffer damage to the lawns and structures on their property if injunctive relief was not granted, and the plaintiffs had made out their case for injunctive relief: at [89];

(5) mandatory injunctive relief should be granted as merely negative relief would leave open debates about the form and placement of a root barrier: at [99];

(6) it was necessary in considering the award of damages for nuisance to determine what part of the loss claimed was due to the fig tree roots and what part was caused by the ordinary movement in the soil and sub-soil layers: at [108]-[109]; and

(7) the plaintiffs were entitled to recover the amount of $12,500 for replacement of the garden path (at [119]); $40,000 for replacement of the western fence and part of the cost of replacement of the northern fence (at [127]); $16,225 for removal of roots from the lawn (at [133]); $500 for cosmetic work to the entrance way and steps (at [139]); $15,127 for replacement of the sewer line (at [149]); and $40,000 for loss of amenity (at [157]).

Hornsby Shire Council v The Valuer General of New South Wales [2012] NSWSC 894 (Garling J)

Facts: on 21 February 2003 the Valuer General ("the VG") made a determination of compensation pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 with respect to land owned by CSR Ltd ("CSR") which had previously been used as a quarry, determining that the amount of compensation payable by the acquiring authority, Hornsby Shire Council ("the council") was $25,099,500. In 2008 the council filed a Statement of Claim in which it claimed that the determination of the VG was invalid and should be set aside; and in the alternative, claiming that the determination was made in circumstances where the VG owed it a duty of care and the determination was negligently conducted, and claimed damages. The council relied on conduct in which it claimed CSR engaged, by which CSR put forward to the VG a claim that it was possible that a hypothetical residential development could be constructed on the site in a financially feasible way with only a relatively modest sum being put aside for the cost of ensuring the land was stable; and intentionally withheld from the VG a number of geotechnical reports which demonstrated that the site was entirely unsuitable from the perspective of stability for construction of the proposed hypothetical residential development. The council also sued the State of New South Wales ("the State") alleging that the State was vicariously liable for the negligence of the VG, and claimed damages for negligence against the persons responsible for production of the valuation that underlay the VG's determination.

On 14 September 2011 the council filed a Further Amended Statement of Claim making claims for relief described as administrative law relief, being that the determination was invalid, and claims for damages and other relief based on negligence and breach of statute. On 27 February 2012 the VG and the State filed a joint defence to the Further Amended Statement of Claim. The VG and the State sought an order under r 28.2 of the Uniform Civil Procedure Rules ("UCPR") for the separate hearing and determination of the claim for administrative law relief. The VG and the State also sought leave pursuant to r 12.6 of the UCPR to withdraw various admissions made in their defence filed to the original Statement of Claim and their subsequent defence, the principal admission being that the VG owed the council a duty of care to make a determination of compensation owed to CSR with reasonable skill, care and diligence. In affidavits in support of the application to withdraw the pleadings reference was made to a Memorandum of Advice received from senior and junior counsel; the council submitted that by that affidavit and submissions made in court the VG and the State had waived privilege in the Memorandum of Advice.

Issues:

(1) whether the claims for administrative law relief should be heard and determined separately from, and in advance of, the other claims in the proceedings;

(2) whether the VG and the State ought to have leave to withdraw various admissions made in the defence filed to the original Statement of Claim; and

(3) whether legal professional privilege had been waived in the contents of the Memorandum of Advice.

Held: dismissing the application for determination of a separate question, and granting leave to withdraw the admissions:

(1) it was not appropriate to separate out the issues as contended for by the VG and the State because:

  (a) the factual issues were clearly closely related: at [43];

  (b) central to both the separate claims for relief was whether CSR in fact conducted itself in the way pleased, whether than conduct constituted fraud, and whether that conduct affected the valuation undertaken and determination made: at [44];

  (c) depending on the findings made on those issues, a question would arise as to whether the different valuations which may have resulted assisted in the proof of the appropriateness of the determination of the VG had he conducted himself according to law; that question would be a matter also relevant to the quantification of damages: at [45];

  (d) while the claims for relief would ordinarily result in a differential attitude to participation on the part of the VG, that potential embarrassment was capable of being properly and carefully managed in the course of proceedings: at [48]; and

  (e) the procedure proposed would not necessarily result in the saving of any time nor costs: at [49];

(2) the affidavits and submissions had not exposed the state of mind of the VG and the State, and there was no waiver of legal professional privilege: at [58], [59]; and

(3) assuming that leave was necessary for the VG and the State to withdraw any admissions in any previous pleadings, leave ought to be granted because:

  (a) the questions raised as to whether the VG was capable of being sued for damages, whether the VG owed any common law duty of care or statutory obligation, and whether the individual who held the office of VG was entitled to the benefit of the immunity from suit in cl 9 of sch 1 of the *Valuation of Land Act* 1916, were matters that were all fairly arguable; and they were novel questions, the determination of which might have a significant impact on the way in which the VG went about his duties: at [64];

  (b) the VG was entitled to the benefit of a judicial determination of those issues: at [65];

  (c) the council had properly conceded that it could not demonstrate any irremediable prejudice if the admissions were withdrawn provided it had a proper opportunity to obtain any evidence necessary to support the pleading of the existence of a duty of care: at [68]; and

  (d) the issues were real issues and fairly arguable, and it would not be appropriate in the exercise of discretion to hold the VG and the State to an admission which may have the consequence that the entirety of the suit was fought on a false legal basis: at [70].

D'Amore v Independent Commission Against Corruption [2012] NSWSC 473 (McClellan CJ at CL)

Facts: Ms D'Amore was the subject of an investigation and report by the Independent Commission Against Corruption ("ICAC"). The report was published in December 2010 and made findings of "corrupt conduct" under s 13 of the *Independent Commission Against Corruption Act* 1988 ("the Act"). Ms D'Amore sought a declaration that the report, and the findings of corrupt conduct, were invalid due to jurisdictional error. The alleged corrupt conduct related to Ms D'Amore's actions in obtaining sitting day relief payments without fulfilling the statutory preconditions of relief entitlement.

Issues:

(1) whether ICAC's power to make a finding of corrupt conduct was dependent on a finding of jurisdictional fact;

(2) if so, whether the relevant jurisdictional fact – that Ms D'Amore had committed an offence – existed at the time the finding was made;

(3) whether ICAC's finding of jurisdictional fact was reviewable on the basis that ICAC purported to make the finding on the basis of no evidence, or no rationally probative evidence;

(4) whether ICAC's finding of jurisdictional fact was reviewable on the basis of irrationality or illogicality in ICAC's reasoning process; and

(5) whether ICAC made its finding on the basis of no evidence or as the result of an irrational or illogical reasoning process.

Held: the summons was dismissed:

(1) ICAC's power to make a finding of corrupt conduct under s 13 of the Act was dependent on a finding of jurisdictional fact, of the kind described in *Minister for Immigration v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 and *M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 85 ALJR 891, because it was conditioned on the formation of a state of mind by ICAC. Specifically, the power was conditioned on ICAC's satisfaction that the conduct of the person under investigation involved an offence: at [73];

(2) the jurisdictional fact created by s 13 was found to exist because ICAC formed, in good faith and having properly contrued the elements of the offence, an evaluative judgment that Ms D'Amore had committed an offence by signing the claim forms with the knowledge that the requisite preconditions had not been met: at [75];

(3) the state of satisfaction required by the legislation could not have been formed if there was no evidence to support it. ICAC's finding as to its satisfaction was therefore open to review on the ground of no evidence: at [75]-[76];

(4) following the decision of *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611, irrationality or illogicality in the finding of a jurisdictional fact "may" constitute jurisdictional error. Thus it was necessary to consider both grounds of review. The High Court did not decide in *SZMDS* whether irrational or illogical fact-finding formed an independent ground of review and it was unecessary to decide that question in the present case because an anwer to whether ICAC's finding was irrational or illogical would supply an answer to to the no evidence ground of review: at [81] and [84]; and

(5) ICAC's finding was not made on the basis of irrational or illogical reasoning, and was based on rationally probative evidence: at [88] and [96].

- ## Land and Environment Court of NSW

Judicial Review

Mulpha FKP Pty Ltd v The Hills Shire Council [2012] NSWLEC 101 (Biscoe J)

Facts: in February 2008, the respondent council granted development consent to the applicant for a proposed residential subdivision. By deed in January 2008 between the applicant and the Minister for Planning, the applicant agreed to pay the Minister a land release contribution for regional transport infrastructure, and a bank guarantee was delivered to the Minister. In August 2011, the Department of Planning informed the applicant that it would only release the applicant from the deed if the applicant confirmed the surrender of the consent, and it would call upon the bank guarantee if the applicant disposed of the land without being released from the deed. On 26 August 2011, the applicant gave the council a notice of voluntary surrender of the consent under s 104A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") pursuant to cl 97(3) of the *Environmental Planning and Assessment Regulation*

2000 ("the Regulation"). No part of the development had been carried out. Relevantly, cl 97(4)(a)(ii) of the Regulation provided that a voluntary notice of surrender took effect when the council notified the surrenderor that the surrender would not have an adverse impact on any third party or the locality. In December 2011, the applicant contracted to sell the land to a third party. Completion of the contract was conditional on the surrender of the consent. The applicant lodged a new development application on behalf of the purchaser which was similar to the existing consent. A new consent would attract lower local infrastructure contributions under s 94 of the EPA Act. After more than eight months since the provision of the notice of voluntary surrender, the applicant commenced proceedings to compel the council to give the notification or make a decision whether to give it.

Issues:

(1) whether cl 97(4) of the Regulation applied to a development consent which had not been commenced to be carried out;

(2) whether the council had a duty or a discretion to issue the notification, or merely an obligation to consider the notice of voluntary surrender;

(3) whether the loss of the land release contribution under the deed and lower s 94 contributions were relevant considerations under cl 97(4)(a)(ii); and

(4) if there was an obligation to consider the notice, whether a reasonable time had elapsed.

Held: the council was to decide whether the surrender the subject of the applicant's notice of voluntary surrender would or would not have an adverse impact on any third party or the locality within 14 days, and if it would not: issue the notification, or if it would: inform the application of that decision:

(1) cl 97(4) applies to a consent which has not commenced to be carried out. Even though the subparagraphs of cl 97(4)(a) are in precisely the same terms as those in cl 97(3)(e), which applies only to a consent which has commenced to be carried out, the chapeau of cl 97(4) is clear that it applies generally to a notice of voluntary surrender and is not restricted to the situation on which cl 97(3)(e) is predicated: at [26];

(2) the purpose, text and context of the statutory voluntary surrender regime, and the vulnerability of the surrenderor show that the council is expected to exercise its statutory function under cl 97(4)(a), which should be characterised as a duty. The council has no discretion. Its only function is to address and answer the two questions posed by cl 97(4)(a), and only those questions, and, if the answers are in the affirmative, to issue the notification: at [30]-[39], [56];

(3) the loss of the land release contribution and the lower contributions under s 94 of the EPA Act were irrelevant under cl 97(4)(a)(ii) of the Regulation. As no development had commenced under the consent, no contributions were payable under the deed, nothing would change following the surrender, and no loss would be suffered by reason of the surrender. If a new consent is obtained, which entails different s 94 contributions payable as a result of current planning laws, this will be a lawful consequence of the planning system which cannot be described as an adverse impact on a third party (the council or the Minister) or the locality. Furthermore, the surrender cannot have an adverse impact on the Minister if the Minister was agreeable to it: at [50]; and

(4) as the two contributions issues were irrelevant, the council had had more than a reasonable time to perform its duty under cl 97(4)(a) of the Regulation. Even if they were relevant, a reasonable time for the council to discharge its duty had expired: at [50]-[51].

Wollongong City Council v K and M Prodanovski Pty Limited [2012] NSWLEC 107 (Sheahan J)

Facts: the council granted development consent under the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") to agents acting on behalf of the respondent company on 28 June 2005 ("the DC"). The DC was originally due to expire on 28 June 2007, but was subsequently extended by council so that the lapsing date became 28 June 2008.

The conditions of consent incorporated into the consent various obligations including: compliance with Australian Standard AS2601 ("Demolition Standard"); the requirement to consult with NSW WorkCover; and the requirement to obtain several investigatory reports on environmental matters, some of which

foreshadowed a need for further investigations to be made. Note 4 to the DC stated that no site preparation works "*may be carried out prior to the issue*" of a Construction Certificate ("CC"), or prior to the appointment of a Principal Certifying Authority ("PCA").

It was common ground that no work was undertaken prior to 4 April 2008, and that the works relied on by the respondent to prevent lapsing of the consent - some demolition and geotechnical works - were undertaken for the respondent by the demolisher Silvestri, and Douglas Partners Pty Ltd, prior to 28 June 2008. However, at the time of undertaking the works, Silvestri did not have the requisite licence, a PCA had not yet been appointed, nor a CC issued, and various reports required pursuant to the conditions of the consent had not yet been prepared/submitted to the appropriate authority.

Issues:

(1) whether the works undertaken on the land prior to 28 June 2008 – being the demolition and the geotechnical works – were lawful under the DC granted on 28 June 2005;

(2) if the works were unlawful, whether such works could constitute "physical commencement" for the purposes of s 95(4) of the EPA Act; and

(3) whether the DC had lapsed.

Held: the DC had lapsed pursuant to s 95 of the EPA Act, and the respondent was restrained from carrying out, or authorising or permitting the carrying out, of development on the land in purported reliance upon the DC. The respondent was also ordered to pay the applicant's costs. The Court found that:

(1) the consent had lapsed as a result of the illegality of some preparatory or preliminary works – demolition and geotechnical engineering – which were done in breach of some terms of the consent: at [142]; and

(2) although some of the respondent's breaches, such as the proven lack of an appropriate licence at the time of demolition, and the failure to notify NSW WorkCover, might be regarded as "technical" or "de minimis", the proceedings turned on more serious failures to comply with express or implied requirements of the consent, such as compliance with the Demolition Standard, and the completion of specified documents and reports: at [144].

Hurstville City Council v Minister for Planning and Infrastructure [2012] NSWLEC 134 (Pain J)

Facts: Hurstville City Council ("the council") challenged a concept plan approval made by the respondent Minister's delegate, the Planning Assessment Commission ("PAC"), under the now repealed Pt 3A s 75O of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). The major project application dated 9 December 2010 lodged by the second respondent, Earljest Pty Limited ("the proponent") related to a mixed use residential and retail development at 21 - 35 Treacy Street. One of the five letters which accompanied the application dated 2008 as purported owner's consent related to the property now owned by the third respondent. During the exhibition period of the environmental assessment for the concept plan approval the council made a submission on the project and requested the matter be referred to the PAC. The PAC was constituted as the Minister's delegate in May 2011. In a meeting on 6 June 2011 the proponent's solicitor alleged political bias within the council and the PAC advised that it would consider the application on the merits. On 14 and 29 June 2011 the PAC received emails from that solicitor making allegations against the council. The PAC met with the council on 16 June 2011. It determined on 1 July 2011 to approve the concept plan. Afterward, in relation to a modification application pursuant to former s 75W of the EPA Act, the proponent sent the Department of Planning and Infrastructure a number of owners' consents including a letter dated 2010 concerning the third respondent's property.

Issues:

(1) whether:

(a) owner's consent was provided in the 2008 letter; or

(b) the 2010 letter had to be communicated to the PAC before its determination for the purposes of Pt 3A; and

(2) whether the PAC breached any duty to provide procedural fairness to the council in not providing it with the opportunity to respond to the allegations made by the proponent's solicitor in the emails received by the PAC on 14 and 29 June 2011.

Held: amended summons dismissed:

(1) in relation to owner's consent:

(a) the 2008 letter referred to the making of a development application under Pt 4. As it did not in its terms relate to a concept plan approval application under Pt 3A, it did not constitute owner's consent: at [65]; and

(b) the 2010 letter comprised owner's consent: at [66]. The significance of owner's consent given the ability of an owner to veto an application over his or her land was applicable to Pt 3A. Notification of owner's consent to the PAC before its determination was required: at [70]. However, greater flexibility of the process under Pt 3A compared to that under Pt 4 and aspects of the Pt 3A scheme, suggested that failure to notify the PAC of owner's consent before its determination did not give rise to invalidity of the concept plan approval: at [73]-[75]; and

(2) the council had a right to make a submission under former s 75H(4) of the EPA Act on the proponent's environmental assessment during the exhibition period and availed itself of this right over and beyond the Pt 3A requirements. No further obligation of procedural fairness arose: at [105]. The council did not establish that it was denied procedural fairness in the PAC not expressly making a statement of disavowal in relation to the two emails, as it did in the meeting on 6 June 2011, or not drawing these to the council's attention to provide it with an opportunity to comment: at [106]-[118].

Fokas v Kogarah RSL Club Ltd [2012] NSWLEC 136 (Biscoe J)

Facts: Kogarah City Council, the third respondent, granted development consent to the Uniting Church in Australia Property Trust (NSW) ("the Uniting Church"), the second respondent, with the consent of the first respondent Kogarah RSL Club ("the RSL"), for the use of an existing building on the RSL's land as a training facility by a hospital located on adjoining land owned by the Uniting Church. Condition 16 of the consent required an easement for parking to be created benefiting all the lots comprising the RSL's land and an adjoining lot belonging to a third party, and burdening the two lots comprising the Uniting Church's land. The applicant, who was self-represented, interpreted condition 16 and a plan approved by the development consent ("the plan") as requiring an easement to be created over her property and her neighbour's property, both of which also adjoined the RSL's land. The applicant sought orders to exclude condition 16 from the consent and for the plan to be destroyed. The applicant also sought orders that two other approved plans be, respectively, excluded from condition 16 and corrected. All three respondents conceded at the hearing that there were numerous errors in condition 16 and the plan, but submitted that condition 16 and the plan did not require the creation of an easement which would affect the applicant's property or that of her neighbour.

Issues:

(1) whether condition 16 was invalid because the proposed development did not give rise to a need for the easement as there was already an agreement in existence between the RSL and the Uniting Church to provide such access and parking;

(2) whether condition 16 was invalid because it was not authorised by s 80A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") as it was not relevant to the subject matter of the consent or any matter under s 79C(1) of the EPA Act;

(3) whether condition 16 was invalid:

(a) because, by its terms and the plan, the council had authorised the grant of an easement over the properties of the applicant and her neighbour without their consent, or

(b) because of errors in it; and

(4) whether an order should be made that the plan be destroyed and the other two approved plans be excluded from condition 16 and corrected.

Held: a declaration that condition 16 was invalid to the extent that it referenced two lots to be benefited and burdened which should not have been included, a declaration as to the proper construction of the balance of condition 16, and an order that the respondents take all reasonable steps to obtain a modification of condition 16 so that it read according to its proper construction:

(1) the first ground was rejected. The necessity of the easement was irrelevant to the validity of condition 16. The only question was its legality. In any event, an easement was necessary to bind successors in title: at [12]-[13];

(2) the second ground was rejected. One of the matters arising from the development application was the rearrangement of the parking on site. The rearrangement proposed to utilise adjoining land in different ownership to the land on which the proposed training facility was to be located. It was relevant for the council to ensure that the future use of the Uniting Church's adjoining land for parking could be secured in case the ownership of that land changed. Condition 16 related to an aspect of the development. The means that the council considered appropriate to secure the legal right to use the parking in such fashion was the requirement for the grant of an easement for parking. Thus, condition 16 related to a relevant matter under s 79C(1) of the EPA Act: at [14]-[15];

(3) ground 3(a) was rejected. First, the plan was an elevation plan and did not suggest that any works were proposed which would affect the applicant's land or that of her neighbour. It was of no consequence that there were errors in the plan. Secondly, the terms of condition 16 could not be construed as authorising or requiring an easement over the applicant's land or her neighbour's land because the lots referred to in the condition did not include those lands. Thirdly, the consent, the application form and the Statement of Environmental Effects made no reference to any easement over the lands belonging to the applicant and her neighbour. The respondents accepted that condition 16 did not contemplate an easement which burdened those lands: at [16]-[18];

(4) ground 3(b) was accepted. It was common ground that there were four errors or drafting slips in condition 16. There was also a fifth slip. Two of these errors were serious because they misstated part of the lands to be benefited and burdened. The adjoining lot belonging to a third party should not be benefited by the proposed easement, and only part of one of the lots comprising the Uniting Church's land should be burdened; the other lot should not be burdened. A reasonable decision-maker, properly and fully informed, could not have included references to those two lots in condition 16. Therefore, condition 16 was invalid insofar as it referred to those two lots. The remaining three errors were drafting slips which could be remedied by a modification application under s 96 of the EPA Act: at [19]-[25]; and

(5) as to the fourth issue, the destruction of the plan was not relief that WAS available in judicial review proceedings. Given that the plan did not intend an easement over the applicant's land or that of her neighbour, there was no basis for declaring it invalid and it should not be destroyed. As regards the other two approved plans, the exclusion of an approved plan from the consent and the correction of an approved plan were not forms of relief the Court would grant in judicial review proceedings, and there was no basis for declaring them invalid or for correcting them: at [26]-[28].

Parramatta Business Freedom Association Inc v Parramatta City Council [2012] NSWLEC 139 (Biscoe J)

(related decision: *Parramatta Business Freedom Association Incorporated v Parramatta City Council* [2012] NSWLEC 104 Biscoe J)

Facts: in December 2011, the respondent council resolved to adopt a policy prepared in November 2011 banning smoking in outdoor dining areas, to commence on 1 May 2012 with a six month lead time for implementation, by including no smoking conditions in "leases" and "licences" issued to footway restaurants for outdoor dining. The council also resolved to grant a six month "lease holiday" to those businesses that implemented the ban by 1 May 2012. When issuing outdoor dining approvals in April 2012 under ss 125 and 126 of the *Roads Act* 1993 ("Road Act") and s 68 Part E of the *Local Government Act* 1993 ("LG Act") to footway restaurants, some of which were members of the first applicant Association, the council's sub-delegate purported to implement a policy banning smoking in outdoor dining areas that was prepared in December 2011 but which had not been adopted by the council and which was substantially

different from the November policy. To implement the ban, the council sent a resource pack to footway restaurants, which had been granted the approvals, containing, inter alia, “No Smoking” posters, stickers and table cards, which claimed to be regulated under s 632 of the LG Act, to be placed in outdoor dining areas. The Association challenged the power of the council to impose the smoking ban and the validity of the no smoking conditions in the LG Act approvals issued to its members, which included Armani at Parramatta Pty Ltd (“Armani”). Armani commenced related proceedings in the Supreme Court challenging the validity of the no smoking condition in its Roads Act approval, which was transferred to the Court, and was joined as the second applicant in the Association’s proceedings.

Issues:

(1) whether references to “leases” and “licences” in the November policy included the outdoor dining approvals;

(2) whether, by distributing the resource pack, the council had sought to ban smoking in footway restaurants through the erection of notices in a public place under s 632 of the LG Act and whether it had the power to do so under that section;

(3) whether, through the no smoking conditions in Armani’s LG Act approval, the council had sought to amend an existing development consent held by Armani;

(4) whether the council had power to impose the no smoking conditions in the LG Act approvals under s 94 of the LG Act;

(5) whether the council had power to impose the no smoking condition in Armani’s Roads Act approval under ss 125 or 126 of the Roads Act;

(6) whether the conditions were invalid because they erroneously referred to the December policy as having been adopted by the council;

(7) whether the council’s sub-delegate acted beyond power in imposing the conditions; and

(8) whether the imposition of the conditions was ultra vires because of uncertainty as to the commencement or enforcement dates of the smoking ban under the terms of the December 2011 resolution.

Held: declarations that the no smoking conditions in the approvals were invalid:

(1) references to “lease” or “licence” in the November policy included the Roads Act approvals. Payments in the nature of rent were payable under those approvals, and in common parlance, a right to use part of a public footway for a specified purpose comes within the rubric of a licence. This was reinforced by the context that, within the Parramatta local government area, there were 75 outdoor dining approvals in force, and only one lease and one licence for outdoor dining areas: at [23];

(2) the material in the resource pack included a checklist and a fact sheet. The checklist said that to be eligible for the six month “lease holiday” to be granted under the council’s resolution, the posters, stickers and table cards had to be displayed by 1 May 2012. The references to a lease holiday in the checklist and in the council’s resolution should be construed as including a holiday for fees in the nature of rent payable under the Roads Act approvals. The fact sheet said that it provided “general tips” to help the restaurants to communicate with customers and staff about the smoking ban. Therefore, a financial incentive was held out to the restaurants to put up the no smoking posters, stickers and table cards, and tips, not amounting to recommendations, were given. Furthermore, it is a criminal offence under s 632(1) of the LG Act not to comply with the terms of a notice erected by the council in a public place. Thus, the council had not erected nor had it attempted to erect no smoking notices under s 632. The question whether the council had power to erect no smoking notices under s 632 did not arise: at [36]-[42];

(3) conditions of approvals issued under the LG Act and the Roads Act cannot amend a development consent issued in the different statutory context of Part 4 of the *Environmental Planning and Assessment Act* 1979. Furthermore, Armani’s development consent required compliance at all times with the council’s outdoor dining policy, and specifically contemplated that outdoor dining approvals had to be obtained and complied with. The consent did not refer to an outdoor dining policy as at any

particular date, but rather referred to the outdoor dining policy as revised from time to time. It cannot be said that when these approvals were obtained they operated to amend the consent: at [49]-[52];

(4) the council had power under s 94 of the LG Act to determine an application under s 68 Part E subject to conditions. As indicated by s 89, the public interest (including the protection of public health, safety and convenience) was a factor to be considered by the council when determining an application for an approval under s 68 Part E. The November policy was replete with references to the council's obligation to promote public health outcomes and commitment to protect the public from the health and social impacts of second-hand smoke. Therefore, the imposition of a condition in an LG Act approval designed to protect public health, safety and convenience was within power under s 94 because it was reasonably capable of being regarded as relating to the purpose for which the function of the council was being exercised: at [56]-[64];

(5) one of the objects of the Roads Act is to regulate the carrying out of various activities on public roads. Sections 125-127 involve a broad grant of power to regulate footway restaurants, which is consistent with the fact that the council is the owner of public roads including their footways. Thus, the council had power under s 125 to impose the no smoking condition in Armani's Roads Act approval: at [76]-[79];

(6) the no smoking conditions described smoking by reference to the December policy. The definition of smoking in the December policy, which did not appear in the November policy, extended the ordinary concept of smoking. On their proper construction, as the no smoking conditions were premised on the December policy having been adopted by the council, they were inoperative, or alternatively may be characterised as invalid: at [65];

(7) the council's powers to impose the no smoking conditions under the LG Act and the Roads Act could only be exercised by its sub-delegate, under the instrument of sub-delegation, in a way that was consistent with the council's policies and decisions. As the conditions adopted the extended concept of smoking in the December policy, which did not appear in the November policy, the sub-delegate did not exercise the delegated function in a way that was consistent with a policy of the council and had therefore exceeded the power granted under the instrument of sub-delegation. Therefore, the conditions were beyond the sub-delegate's power and were invalid: at [66]-[68], [81]; and

(8) it was clear enough that the six month lead time for the implementation of the smoking ban referred to in the council's resolution was an approximation and that the council's intention was that implementation and enforcement would commence on 1 May 2012: at [71].

Crane v Waverley Council [2012] NSWLEC 142 (Biscoe J)

Facts: the respondent council resolved to compulsorily acquire a lot under old system title ("the Land"). The two applicants were the owners of two adjoining lots and had for many years used the Land to gain access to their respective properties from a public road. The last registered owner of the Land had died in 1908, and after unsuccessfully attempting to discover the present living owner, the council put up a notice on the Land stating its intention to compulsorily acquire the Land and requesting any person having an interest in the Land to lodge a claim with the council ("the Notice"). The applicants interpreted this Notice as a proposed acquisition notice ("PAN") issued under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"). In correspondence between the applicants and the council, the council repeatedly said that a PAN was yet to be issued, but failed to expressly deny that the Notice was a PAN until it filed its Points of Defence on 16 April 2012. One of the applicants lodged with the Registrar-General a plan of redefinition which would give her possessory title over certain parts of the Land, including the part providing access to the applicants' respective properties, subject to a right-of-way in favour of the other applicant. The applicants commenced judicial review proceedings on the grounds that the Notice was an unlawful PAN because it failed to comply with statutory requirements, including a failure to obtain the Minister's approval to issue a PAN. The applicants also claimed possessory title to parts of the Land, and sought a declaration that the Land was owned by the executors of Marianne Fletcher, who had inherited the Land from the last registered owner and who had died in 1937. These executors were themselves deceased.

Issues:

(1) whether the Notice was a defective PAN;

(2) whether the applicants had possessory title over certain parts of the Land;

(3) whether a declaration should be made that the executors of Marianne Fletcher owned the Land; and

(4) whether the applicants, if unsuccessful, should pay all of the respondent's costs.

Held: the proceedings were dismissed and the applicants ordered to pay the respondent's costs from 20 April 2012:

(1) it was understandable that the applicants construed the Notice, on its face, as a defective PAN given its title, "Legal Notice"; the fact that there is no statutory requirement for a legal notice prior to compulsory acquisition other than a PAN and an acquisition notice published in the Gazette, and that a PAN is at the heart of all pre-acquisition procedures in the JT Act; the Notice's statement that the council would proceed with the compulsory acquisition; and the absence of any statement in the Notice that its only purpose was to locate any person having an interest in the Land. However, taking into account the context of the antecedent requirement of obtaining the Minister's consent for a PAN, and the procedure set out in the Department's "Guidelines for the Compulsory Acquisition of Land by Councils" which applied when a council could not locate the owner of land, it was clear that the council did not intend the Notice to be a PAN but rather a non-statutory inquiry into the ownership of the Land as a step in obtaining the Minister's approval. Therefore, the Notice should not be construed as a defective PAN: at [33]-[36];

(2) at the hearing, the applicants did not press the possessory title claim but instead pressed for a finding that steps had been taken towards an application to the Registrar-General for possessory title by one of the applicants. Being non-contentious, such a finding was made: at [39];

(3) the declaration sought should not be made because any question as to the ownership of the Land only arose if, and after, the Minister approved the issuing of a PAN. Furthermore, the statutory scheme was not frustrated by an inability to serve a PAN on a person who could not be identified as an owner despite diligent inquiries because a PAN was only required to be given to a person who had a registered interest, who was in lawful occupation, or who had, to the actual knowledge of the acquiring council, an interest in the land; and an owner of an interest in compulsorily acquired land was entitled to compensation irrespective of whether that person was given a PAN: at [42]; and

(4) the unusual circumstances of the case should be considered in determining the applicants' liability for the respondent's costs. The Notice was unintentionally misleading on its face, and could reasonably have been construed as an intended PAN. The council first expressly denied that the Notice was a PAN when it filed its Points of Defence. The applicants should be credited with a few days thereafter to consider their position. The applicants not only continued with their case but expanded their claims, and should pay the respondent's costs from 20 April 2012, with no costs orders for the period before that date: at [43]-[47].

Simpson v Wakool Shire Council [2012] NSWLEC 163 (Preston CJ)

Facts: Mr Simpson brought proceedings challenging the validity of a consent granted by Wakool Shire Council ("the council") to the second respondent, Jonesy's Dairy Fresh Pty Limited, to use an existing industrial building for a dairy processing plant in the rural town of Barham. The grounds of review were, first, procedural impropriety by the council failing to notify affected land owners and occupiers of the development application as required by Development Control Plan No 8 – Notification Policy ("DCP 8") and secondly, irrationality by the council failing to consider the relevant matters of noise and odour impacts of the proposed dairy processing plant on surrounding residential properties. The council entered a submitting appearance save as to costs. The consent holder defended the proceedings and submitted that the council was not obliged to comply with the notification requirements of DCP 8 because the proposed development was "advertised development" for the purposes of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") and that the council did consider the relevant matters of the impacts of noise and odour. If, however, the council did err by failing to give notification of the proposed development or to consider noise and odour impacts, the consent holder submitted the court should exercise its discretion not to set aside the development consent, either inherent in the power to remedy the breach or under s 25B of the *Land and Environment Court Act 1979* ("the Court Act"). Under the Wakool Local Environmental Plan 1992 ("the

LEP"), development for the relevant purposes of "industry" or "rural industry" was not identified as advertised development for the purposes of the EPA Act. Development Control Policy No 1 – Shire of Wakool ("DCP 1") and DCP 8 applied to the land. DCP 1 and DCP 8 required written notice of the development application to be given to owners and occupiers of land adjoining property for which an application had been received. DCP 8 also required written notification to be given to owners and occupiers of land that may be affected by a development proposal.

Issues:

(1) whether the council failed to give proper notification of the proposed development;

(2) whether the council failed to consider relevant matters of noise and odour impacts of the proposed development; and

(3) if either of the above breaches occurred, determination of the appropriate remedy.

Held: declaring the development consent invalid:

(1) under s 79C(1)(a)(iii) of the EPA Act, the council was required to take into consideration the provisions of any applicable development control plan. DCP 8 was applicable. DCP 8 required that notification be given to owners and occupiers of land that may have been affected by the proposal. There were in fact owners and occupiers of land whom the council could have considered may be affected by the proposed development and, in that event, to whom notification would therefore have needed to be given. The failure to notify the development application for the proposed development in accordance with DCP 8 was a breach of s 79A(2) of the EPA Act: at [18], [19] and [22];

(2) sections 4(1), 29A(1) and 74C(1)(b) of the EPA Act made clear that a development control plan must "identify development as advertised development" for it to be considered advertised development for the purposes of the EPA Act. Neither DCP 1 nor DCP 8 identified any particular development as advertised development. In any event, the argument that the proposed development was advertised development would not have assisted in disproving a breach of the notification and advertising requirements because notice of the development application would have been required to be published in a local newspaper and no such notice was published: at [24], [25] and [29];

(3) Mr Simpson did not establish either that the council had insufficient information to discharge its duty to consider, or that the council did not in fact take into consideration, the impacts of noise and odour in determining the development application for the proposed development. The council was informed of the essential characteristics of the development; issues raised by objectors and the council's Senior Health and Building Surveyor relating to noise, odour, traffic generation and amenity; and the assessing officer's consideration of the issues of noise, odour, traffic generation, amenity and liquid trade waste. The relevant matters were identified, analysed and addressed by appropriate conditions of consent: at [38]-[66] and [75];

(4) the council, by imposing conditions 2 (providing an 18 month trial period) and 16 (requiring verification of no intrusive noise), did not defer for later consideration noise and odour impacts. Setting a trial period to enable assessment of whether, and demonstration that, the noise and odour impacts of the development were as predicted and were acceptable, was an appropriate exercise of the discretionary power and within the statutory scheme. Retention of practical flexibility was in accordance with the statutory scheme under the EPA Act: at [76]-[78];

(5) it was not appropriate or just to exercise the discretion not to make a declaration of invalidity. The observance of statutory requirements for notification and advertising was a condition precedent to the exercise of the statutory power to determine the development application. The failure to comply with the statutory requirements in DCP 8 and s 79A(2) of the EPA Act for notification of the development application was not a minor or merely technical breach of the EPA Act. Compliance with mandatory, statutory requirements for notification and advertisement is in the public interest. The Court could not know whether the council would have made the same determination of the development application had it complied with the statutory requirements for notification: at [83]-[86], [89] and [95]; and

(6) it was not appropriate to make an order under s 25B of the Court Act to suspend the operation of the development consent on terms that the council give notice of the development application in accordance with DCP 8 and s 79A(2) of the EPA Act and then reconsider and redetermine the

development application taking into account any submissions received in response to the notification. Compliance with the mandatory requirements for notification of development applications is in the public interest. Public participation in the development process is crucial to the integrity of the planning system under the EPA Act: at [101], [102] and [106].

Amalgamated Holdings Ltd v North Sydney Council [2012] NSWLEC 138 (Biscoe J)

Facts: Uniting Church in Australia Property Trust (NSW) ("Uniting Church") was granted development consent for a Stage 1 concept proposal for a high-rise aged care housing development which included two towers. The development application was assessed by North Sydney Council ("the council") and determined by the Sydney East Joint Regional Planning Panel ("the Panel"). Section 23G of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), which created the regional panel scheme, permitted some functions of a council, but not others, to be conferred on a regional panel. At the time, cl 13F of *State Environmental Planning Policy (Major Development)* 2005 ("the Major Development SEPP") conferred a council's determination function on a panel, but expressly did not confer the assessment function. After assessing the application, the council provided the Panel with a report which recommended modifications by way of reductions to the heights of the two towers. The Panel adopted these modifications as conditions of consent in determining to grant consent. The applicant owned land adjoining the proposed development from which it operated a hotel, and, concerned about the impact on views from its hotel, sought judicial review of the consent. The council and Panel filed submitting appearances. The Uniting Church sought interest on its costs from the date on which those costs were paid pursuant to s 101(4) of the *Civil Procedure Act* 2005 ("the CP Act").

Issues:

(1) whether the Panel had exceeded its jurisdiction to determine the application because, contrary to cl 13F(2)(d) of the Major Development SEPP, the council, in assessing the application and making recommendations to the Panel, had not first assessed the modifications which the council had recommended and which the Panel had adopted;

(2) whether, under the regional panel scheme, the assessment function of a council was confined to jurisdictional facts precedent to a panel's determination function, and the assessment of the mandatory matters in s 79C of the EPA Act was part of a panel's determination function and not a council's retained assessment function;

(3) whether the council, in assessing the proposed development, had failed to properly consider the design principles in *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 ("the Seniors SEPP") in contravention of s 79C(1)(a)(i) of the EPA Act; and

(4) if the Uniting Church were successful, whether it should be awarded interest on costs from the date on which those costs were paid.

Held: the proceedings were dismissed with costs, with interest on costs payable from the date those costs were paid:

(1) under the Major Development SEPP, the council retained the function of assessing development applications, and there was no doubt that the council did thoroughly assess the Uniting Church's application. Having assessed the application, the council found it wanting and recommended specific modifications which it assessed as necessary to provide a more acceptable envelope. These modifications were the very product of the council's assessment of the application. Thus, the council had discharged its assessment function. If the question of whether the council assessed its suggested modifications was one of fact and degree, then the modifications fell on the right side of the line: at [20]-[23];

(2) a regional panel is to have local input through a council's assessment of an application, and this assessment is a condition precedent to a panel's determination of an application. Excluding s 79C matters from a council's retained assessment function and confining it to jurisdictional facts diminished the importance of the EPA Act's assessment policy. Therefore, a council's reserved assessment function included assessing relevant matters listed in s 79C of the EPA Act, and the determination function conferred on a panel included the evaluation of the same matters: at [26]-[30];

(3) considering that the application was for a staged concept approval without requisite details, the Seniors SEPP design principles were in fact properly considered as they were addressed in the Uniting Church's Statement of Environmental Effects, in the applicant's written submissions to the council, and in the council's report to the Panel: at [33]. In any event, the Seniors SEPP was inapplicable because the development application was not made pursuant to it and was permissible with consent under a local environmental plan. The Seniors SEPP design principles were only applicable and a mandatory consideration under s 79C(1)(a)(i) of the EPA Act where the application was made pursuant to the Seniors SEPP: at [34]-[37]. However, if the Seniors SEPP was applicable to an application not made pursuant to it, the only mandatory consideration under s 79C would be cl 32 of the Seniors SEPP, which is concerned with the consent authority's subjective satisfaction. The Seniors SEPP design principles would not be free-standing mandatory considerations: at [38]; and

(4) the exercise of the discretion under s 101(4) of the CP Act focuses on whether the successful party has been out of its money for costs already paid and whether that party will be appropriately compensated by an award of costs in its favour without interest on costs already paid. The focus could also be on whether the successful party was likely to be out of money for costs paid in the future and before interest on costs becomes payable after assessment under s 368(5) of the *Legal Profession Act* 2004. The party claiming interest had to demonstrate that costs have been paid, though inferences may be drawn from the nature of the litigation. Evidence of the amounts paid and the dates of payment was not essential, and it was not necessary to show special circumstances. Often no inference that costs had been paid could be drawn from the proceedings being in the nature of judicial review. However, having regard to the nature and scale of the Uniting Church's business, it was inferred that costs would have been paid during the course of the litigation. Although the proceedings had not been on foot for long, they did not have a substantial public interest nature and were driven by the applicant's business concerns. On balance, interest should be ordered: at [43], [47]-[51].

Greenwood v Warringah Council [2012] NSWLEC 152 (Sheahan J)

Facts: these Class 4 proceedings, and related Class 1 proceedings, concerned the use of land, and the conduct of a quarrying/recycling business on it, by the applicant, Scott Robert Greenwood ("Scott").

The proceedings arose from Scott's discovery, at the end of 2009, that the development consent ("DC") granted to his father, Robert Greenwood, now deceased, and upon which he had primarily relied, had expired on 1 January 2003, as a result of a modification, of which he had no notice, granted in 1994, following Robert's death. The modification expanded the materials permitted for recycling to include clay/soil, bricks/concrete, and tree loppings/shrubbery, as well as the sandstone covered by the original DC. Added to the modification, was a 'sunset clause' nominating 1 January 2003 as the expiration date of the consent. Notification of the modification was addressed to Robert, and received by Scott's mother, with whom Scott was not on speaking terms. Following his father's death, but prior to the council's grant of the modification, Scott had begun managing the business, and made his own development application in respect of the business, which was granted by the council, with no mention of the modification or the 'sunset clause'. During December 2009 Scott received a letter from the Environment Protection Authority drawing attention to the 1994 modification, and the sunset clause, as a result of a licence variation application he had submitted. During February 2010, the council issued a Notice of Intention to issue an order that Scott cease certain operations, as the 'sunset clause' had expired, and the use of the property had, therefore, become unauthorised. Negotiations to resolve the issue began, and Scott submitted a further development application, which was refused in March 2011. In May 2011, Scott commenced the Class 1 appeal against the council's refusal, and the Class 4 proceedings challenging the validity of the modification. The Court ordered that the Class 4 proceedings should be determined first.

Issues:

(1) whether the respondent council had power to make the modification inserting the 'sunset clause';

(2) whether the respondent council denied the applicant procedural fairness in the course of making its decision to modify the DC by adding the 'sunset clause';

(3) whether the modification inserting the 'sunset clause' was invalid and/or ineffective, because notice could not be given to the deceased, and was not given to the applicant;

(4) whether the modification application lodged by the deceased abated or lapsed upon his death;

(5) whether the DC was limited in the activities it permitted, and the land area it covered; and

(6) whether costs should be awarded.

Held:

(1) the 'sunset clause' was not a valid condition, due to the absence of an adequate nexus between it and the subject matter of the application: at [179];

(2) the 'sunset clause' could and should be severed from the modification approval, and from the DC, as modified: at [180];

(3) the applicant had no notice of the condition imposed by the council, and for that reason, along with a number of others, an appeal was not available to him. The council had, therefore, denied the applicant procedural fairness when it purported to modify the DC without appropriately notifying him: at [191]-[193];

(4) although the council did not have a duty to guarantee the receipt of the notice of the modification, and had complied with the notification requirements in the regulations, the council could not rely on that compliant notification to satisfy its duty, as a matter of fairness, to notify Scott, as the known principal of the business at the relevant time: at [201]-[202];

(5) the modification application did not abate or lapse on Robert's death: at [211]; and

(6) although operations over a wider area of the Greenwood land may have been contemplated, the scope of the operation was dictated by the planning approvals, and the DC, as modified, applied to only Mining Lease 47, and was not limited to the screening of imported materials for recycling of only sandstone, but covered screening of imported materials for the recycling of sandstone, soil, masonry, and vegetation: at [213] and [216].

The parties were given 28 days to consider what orders should be made and returned to court to argue briefly about them. The court made four declarations:

(1) the sunset clause condition is invalid;

(2) materials to be recycled are limited to those in (6) above;

(3) the consent as otherwise modified applies only to the area covered by ML 47; and

(4) only that area enjoys existing use rights.

The question of costs was reserved, and the Class 1 proceedings were referred back to the Registrar for further disposition.

Martin v The State of New South Wales [2012] NSWLEC 182 (Lloyd AJ)

Facts: Mr Martin was granted five exploration licences under the *Mining Act* 1992 ("the Act"). These licences expired, and Mr Martin consequently applied to have them renewed. As at the hearing, four of the licence renewal applications had been refused and the fifth had not been determined. Mr Martin had also applied for an additional licence, which had not been determined.

In relation to Exploration Licence ("EL") 6949, in October 2010 Mr Martin was advised by Mr Cottier of the (then) Department of Industry and Investment ("the Department") that the area for renewal was to be reduced by 50% and requested Mr Martin to specify, within 28 days, which units he wished to retain. Mr Martin responded via email on 8 November by requesting a meeting to discuss his "various exploration licences". On 1 December, Ms Hughes, private secretary to the Minister administering the Act ("the Minister"), sent an email to Mr Martin indicating that a meeting would be organised "to discuss your issues". Before any meeting was held, however, on 6 December 2010, the application was refused.

The Minister refused Mr Martin's applications for renewal in relation to EL 7214, EL 7143 and EL 7144 on 23 February 2011. In relation to each of these refusals, Mr Cottier had written to Mr Martin, in letters dated 24 December 2010 and 2 February 2011, indicating that the Department did not support renewal of the

licence over the full area, and requesting that Mr Martin specify which units he wished to retain. The Minister refused each of these applications upon receiving no response from Mr Martin.

Mr Martin sought declarations that there were no valid reasons why the applications should not have been granted. He alleged that the decision maker, the Minister, acted without power and denied him procedural fairness.

Issues:

(1) whether the decision to refuse Mr Martin's application for renewal of EL 6949 was liable to be set aside on the ground that he was denied procedural fairness;

(2) whether the email exchange of Mr Martin and Ms Hughes was limited to EL 6949 or related to all of his applications;

(3) whether the legislation empowered the cancellation of Mr Martin's exploration licences on the basis of his failure to identify which units he wished to retain;

(4) whether Mr Martin was implicitly granted renewals over 50% of the units by virtue of a request that he nominate the 50% of the units he wished to retain, and whether in those circumstances it was unfair of the Department to have 100% of his units taken away; and

(5) whether the delegation of power to the relevant decision maker was invalid.

Held: a declaration was made that the refusal of the application for renewal of EL 6949 was invalid and an order was made remitting that application to the Minister for consideration. The summons was otherwise dismissed:

(1) the email of Ms Hughes generated a legitimate expectation on the part of Mr Martin that no decision would be made in relation to EL 6949 without a meeting first taking place and therefore the decision to refuse Mr Martin's application was liable to be set aside on the ground that he had been denied procedural fairness: at [15];

(2) although the emails of 8 November and 1 December 2011 were not expressly limited to EL 6949, and referred to Mr Martin's "various exploration licences" and his "issues", the Department had written to Mr Martin in relation to EL 7214, EL 7143 and EL 7144 after the exchange of emails and clearly notified Mr Martin of what information he needed to provide and what the consequences would be if he failed to provide it. In those circumstances no procedural unfairness occurred: at [16]-[49];

(3) section 114 of the Act clearly empowered the Minister to refuse the licences on the basis of Mr Martin's failure to identify which units he wished to retain: at [51];

(4) none of the applications for renewal were impliedly granted, either in part or at all, as was clear from the letters sent to Mr Martin. Further, there could be no part-grant of the renewals where it was not known which units the renewals were intended to cover: at [52]; and

(5) the delegation of the power was lawful, as was the exercise of the delegation: at [53]-[57].

Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel [2012] NSWLEC 166 (Biscoe J)

Facts: the first respondent panel granted development consent to an application lodged with the second respondent council by UGL Services Pty Ltd, the third respondent, on behalf of the State of NSW, the fourth respondent, for the demolition of an existing police station and two adjoining residences, and the construction of a new two-storey police station with basement parking. Under the terms of the relevant development control plan ("DCP"), notice of the proposed development was required to be sent to the owners of adjoining lands and owners considered by the council to be detrimentally affected. The DCP mandated that the letters had to include the "address of the site (Lot No. Deposited Plan, and House No.)" and "a brief description of the proposal expressed as informatively as possible in a short statement". The applicant claimed that the consent was invalid on the basis that s 79A(2) of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") had been breached as the letters which were sent failed to comply with the requirements of the DCP. First, that the address given in the letters for the development site as

"Lot 701 DP 1002309, Pearl Street Kingscliff" was incorrect because the true address was Marine Parade. The existing police station did not have a street number. According to the council's rating records and NSW Land and Property Information, the address was Pearl Street. According to the NSW Police records and the White Pages, the address was 154 Marine Parade. The development application gave the address as 152-154 Marine Parade, whilst the statement of environmental effects stated that the address was 154 Marine Parade. Secondly, that the description of the proposed development in the letters did not satisfy the requirement in the DCP because it did not mention that the two adjoining residences would also be demolished and that there would be basement parking.

Issues:

(1) whether the reference in the letters to Pearl Street rather than Marine Parade meant that there was a failure to comply with the DCP;

(2) whether the description of the proposed development in the letters satisfied the requirements of the DCP; and

(3) if there had been a breach of the DCP resulting in invalidity, whether an order under s 25B of the *Land and Environment Court Act* 1979 ("LEC Act") should be made.

Held: declaration that the development consent was invalid, and an order restraining the third and fourth respondents from acting on that consent:

(1) the essential requirement of the DCP was that the address of the site must be notified. The words in parentheses may be examples or alternatives of how this could be done rather than cumulative requirements. The police station was in fact known by two different addresses: 154 Marine Parade and Pearl Street, depending on the source of information. Looking at the letters as a whole, because they gave the correct lot and deposited plan numbers, and referred to Pearl Street and to the existing Kingscliff police station, this was sufficient to identify the address of the development site to recipients of the letters. A police station has a special identity which distinguishes it from the general ruck of development sites, particularly in a small community such as Kingscliff, and particularly where the letters were only sent to owners and residents of adjacent land. Therefore, there had not been a breach of the DCP in relation to the address: at [29]-[32];

(2) by omitting to mention that the two adjoining residences would be demolished and that there would be basement parking, the letters did not satisfy the description requirements of the DCP. Those reading the letters could reasonably but erroneously understand that only the existing police station was to be demolished and that the new station would not intrude on the footprints of the adjoining residences. It was necessary to include the two omissions in order to adequately indicate that the new police station would be much larger and would have a greater intensity of use. This failure to satisfy the DCP was a breach of s 79A(2) of the EPA Act which invalidated the consent: at [37]-[41]; and

(3) it was inappropriate to suspend the operation of the consent under s 25B of the LEC Act. Adopting *Simpson v Wakool Shire Council* [2012] NSWLEC 163, compliance with mandatory requirements for notification of development applications is in the public interest as public participation is crucial to the integrity of the planning system. Submissions responding to such notification may influence the consent authority's consideration and determination of the application. The process of notification, submission, consideration and determination should not be done in the shadows of a s 25B order, especially where the proposed development is of a large police station on a large site in a prominent position and will likely have significant impacts on many people: at [44]-[47].

GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143 (Lloyd AJ)

Facts: the applicant challenged the validity of a development consent granted by the third respondent, the Northern Joint Regional Planning Panel, exercising the functions of the Liverpool Plains Shire Council, to the second respondent MAC Services Group Pty Ltd ("MAC"). The proposed development was to construct a "workforce accommodation facility" at Werris Creek consisting of 1,500 rooms for use by short-term occupants (miners) with a commercial kitchen and recreation facilities. The rooms were to be in groups of three to four rooms (pods) under a common roof with an estimated floor space of 16 square metres plus

verandah. The consent contained a deferred commencement condition, requiring "a detailed Infrastructure Servicing Strategy" to be endorsed by the council before the consent could become operational.

Under the Parry Local Environmental Plan 1987 ("the LEP") the land was in the 1(b) General Agriculture Zone, under which "residential buildings (other than dwelling houses and units for aged persons)" were prohibited.

Issues:

(1) whether the accommodation was properly characterised as "residential buildings", and prohibited, or as an innominate use and permissible; and

(2) whether the consent was invalid for uncertainty because of a failure to consider a fundamental matter.

Held: dismissing the application:

(1) the proposed development was not within the meaning of the compound term "residential buildings", and was an innominate use and thus permissible with consent: at [28]-[31]; and

(2) appropriate consideration had been given to the issues addressed in the deferred commencement provision and that condition did not render the consent invalid: at [46]-[47], [49].

Hunter Community Environment Centre Inc v Minister for Planning [2012] NSWLEC 195 (Pain J)

Facts: in Class 4 proceedings Hunter Community Environment Centre Inc ("the applicant") challenged the decision of the Minister for Planning ("the Minister") to grant approval under now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") to Delta Electricity's ("Delta's") Munmorah Power Station Rehabilitation project. Prior to the 2007 amendments of the EPA Act, the Minister could not approve a project unless the environmental assessment requirements were complied with and was bound to consider the Director-General's report ("DG's report") on the project. After the amendments, the DG's report had to contain a statement relating to compliance with the environmental assessment requirements under Div 2 with respect to the project (s 75I(2)(g)); the Minister could not approve a project unless he received the DG's report (s 75J(1)(b)); and the Minister was bound to consider the report, including the statement relating to compliance with environmental assessment requirements (s 75J(2)(a)). The environmental assessment requirements issued by the DG ("EARs") under s 75F for the project included that Delta identify measures for management and disposal of coal ash in its environmental assessment. The DG's report contained a statement pursuant to s 75H and s 75I(2)(g), that the DG was satisfied that Delta's environmental assessment addressed the EARs ("the statement relating to compliance"). The DG's report did not identify ash disposal as a key environmental issue. It concluded that Delta had undertaken an adequate and appropriate level of environmental assessment and recommended that project approval be granted subject to specific conditions. One of the recommended conditions of approval required Delta to investigate all feasible options for future ash disposal.

Issues:

(1) whether the statement relating to compliance failed to comply with s 75I(2)(g); and

(3) whether the Minister failed to consider compliance with the DG's environmental assessment requirements, a mandatory relevant consideration, owing to a misapprehension of a material matter of fact, because the statement relating to compliance was misleading in relation to methods of flyash disposal.

Held: summons dismissed:

(1) there was no discernable error in *Drake-Brockman Minister for Planning* [2007] NSWLEC 490. A statement relating to compliance did not have to state in terms that there was or was not compliance with the EARs, as that would be formalistic and inconsistent with the broad meaning of "relating to" compliance: at [34]-[36]. In compliance with s 75I(2)(g), the DG's report contained one or more statements relating to whether Delta's environmental assessment complied with the EARs: at [37]-[48];

(2) the time to which a statement relating to compliance was directed depended on particular circumstances and did not have to be directed to when the DG's report was given to the Minister: at [50]-[51]. In addition to compliance with the EARs, environmental assessment requirements under Div 2 could include later processes. As the DG's report considered Delta's environmental assessment responding to the EARs and subsequent assessment processes, it complied with the timing requirements in s 75I(2)(g): at [52]-[53];

(3) the parties agreed that the question of compliance with the EARs was a relevant consideration in a jurisdictional sense: at [80]; and

(4) Delta's environmental assessment identified measures at a conceptual level for flyash management and disposal. The DG's report did not mislead the Minister about compliance with the EAR regarding flyash disposal as it did not require that an option for disposal be selected: at [86]-[90]. The briefing note to the Minister which stated that the project was acceptable if conditions were imposed, showed that the Minister was likely to be cognisant of the issues in relation to future ash disposal. He was therefore not acting under a misapprehension of a material fact: at [91]-[92].

Barrington – Gloucester – Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure [2012] NSWLEC 197 (Pepper J)

Facts: on February 2011 the Planning Assessment Commission ("PAC"), as a delegate of the first respondent, the Minister for Planning and Infrastructure ("the Minister"), granted two approvals subject to conditions to the second respondent, AGL Upstream Infrastructure Investments Pty Ltd ("AGL"), for Stage 1 of a coal seam gas extraction, processing and transportation development in the Gloucester Basin ("the project"). The approvals were in relation to a concept plan and major project application under ss 75O and 75J respectively of Pt 3A (now repealed) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"). The applicant, Barrington-Gloucester-Stroud Preservation Alliance Inc ("the Alliance") contended that each of the approvals was invalid.

Issues:

(1) whether the conditions of the project approval, particularly those relating to groundwater and wastewater, were invalid for uncertainty;

(2) whether the principles of ecologically sustainable development ("ESD"), including the precautionary principle, were mandatory relevant considerations under Pt 3A; and

(3) whether the Minister failed to correctly formulate and consider the precautionary principle.

Held: the applicant's amended summons was dismissed:

(1) the conditions were, taking into account the need to allow flexibility in relation to Pt 3A matters, within the permissible limits of the power pursuant to which they were imposed. Section 75J(4) permits the Minister or his delegate to approve a project subject to conditions, and this includes conditions that require the satisfaction of the Director-General as to particular matters or require plans or reports to be prepared. The outer limits of the approval were still clear. The conditions relating to groundwater management, gas well location and water re-use, when viewed in the context of other approval conditions and background documents expressly incorporated into the conditions, were not uncertain: at [7] and [93]-[144];

(2) the principles of ESD, including the precautionary principle, are mandatory relevant considerations forming part of the public interest. The PAC was therefore obliged to consider these principles, albeit at a high level of generality: at [7] and [170]-[171]; and

(3) the PAC did not incorrectly formulate or apply the precautionary principle. Articulation of the principle in both the Environmental Assessment ("EA") and Director-General's EA Report was consistent with its statutory description in s 6(2) of the *Protection of the Environment Operations Act* 1997 and s 4(1) of the EPAA: at [186]-[190]. The precautionary principle was adequately considered by the PAC in granting project approval, including in respect of groundwater and water re-use: at [7], [208] and [215]. It was expressly referred to in the EA, the Director-General's EA Report and other correspondence. Direct application of ESD principles to each condition imposed was not required, nor was specific

reference to the particular principles comprising ESD. Although 'proper, genuine and realistic' consideration of the principles should have been given, this formula had to be applied cautiously lest it permit an impermissible slide into merits review. It was for the PAC to decide the weight to be given to ESD principles, and to decide whether the two preconditions to the application of the precautionary principle (serious or irreversible damage and scientific uncertainty) existed as a matter of fact: at [7] and [174]-[179].

Compulsory Acquisition

Davies v Sydney Water Corporation [2012] NSWLEC 130 (Craig J)

Facts: Sydney Water Corporation ("Sydney Water") compulsorily acquired part of the applicants' land ("Lot 57") for the purpose of trunk drainage. Drainage was required as part of the release of Lot 57 and other land for urban development. The applicants objected to the amount of compensation offered by Sydney Water pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991.
It was accepted by the parties that the market value of the acquired land should be undertaken on a "before and after" basis. The acquired land was zoned 'Special Uses – Trunk Drainage' at the date of acquisition. That land, together with a small part of the residue land, was affected by the 1:100 year flood event.

Issues:

(1) the underlying land zoning applicable to the acquired land; and

(2) the assumptions to be made as to trunk drainage measures for Lot 57 on the hypothesis that the acquired land, as a component part of Lot 57, had not been zoned to accommodate the public purpose of trunk drainage.

Held: making findings to indicate the manner in which the market value and other heads of compensation were to be determined:

(1) the underlying zone of part of the acquired land was residential, observing the fact that the part so zoned could have been filled to accommodate residential development: at [121]-[123]. This was consistent with the fact that part of the residue land had been zoned residential although below the 1:100 year flood line. The policies of both the central government and the local council did not mandate that all flood prone land be sterilised from development: at [126]-[130]; and

(2) while the creek that ran through the acquired land was intended to provide drainage, the hypothetical purchaser of the acquired land would reasonably have been advised of a scheme to provide drainage that did not involve the use of the acquired land for that purpose: at [147]-[148], [156], [162]. Such a scheme, designed to a level sufficient to advise such a purchaser, was decided on evidence as the 'Bewsher Scheme': at [131]-[146], [159], [164].

Tolson v Roads and Traffic Authority of New South Wales [2012] NSWLEC 170 (Sheahan J)

Facts: these class 3 proceedings concerned the compulsory acquisition of 2.3ha of the first applicants' land by the RTA for road purposes. The first applicants were the registered proprietors of the whole parcel of land, comprising 24.321ha of land, which they leased to a family company, owned and directed by them, which sub-leased it to the second applicant, another family company, also owned and directed by them. Neither of the lease agreements was registered, but both were written. The land was used by the second applicant for the operation of a mushroom substrate plant, and the Tolsons had exerted considerable efforts in the past to ensure the plant operations could continue successfully. The parties agreed that use as a substrate mushroom farm constituted its highest and best use.

As a result of the acquisition, and the public purpose for which it was acquired, the residue land was severed into two separate, non-contiguous, lots, and the applicants claimed that their plans for further expansion had been hindered.

The Valuer General ("VG") determined compensation for market value at nil and disturbance at $30,800. The applicants, who claimed $2.8M for market value, plus disturbance to be determined, appealed under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JTC Act") against the VG's determination. By the conclusion of the hearing, the first applicants, based on revised expert evidence, claimed compensation in the amount of $1.56M (including injurious affection) plus disturbance and special value. The respondent argued that the public purpose had afforded the applicant the opportunity to extent its industrial activities, and argued betterment of the land. It, therefore, denied any entitlement to market value, special value or injurious affection. Although the RTA agreed with the quantum of legal and valuation fees claimed by the first applicants, it argued that those amounts should be set off against betterment, so that no award for compensation should be made. It also disputed the first applicants' claim for town planning fees, arguing that that amount had been invoiced to the second applicant.

The second applicant claimed $18,131.85 for disturbance only, comprising its costs of constructing a new access road, and rectification of gas flow. The RTA accepted those amounts.

Issues:

(1) whether the lease agreements could be disregarded for valuation purposes;

(2) if not, what value should be attributed to them;

(3) whether the first applicants were entitled to compensation for special value;

(4) whether as a result of the acquisition, the residue land had suffered injurious affection, or had enjoyed betterment; and

(5) whether betterment could be set off against the other heads of compensation found in s 55 of the JTC Act, including disturbance.

Held: the first applicants' claims for market value, special value, and injurious affection compensation for the respondent's acquisition of their land were dismissed. In relation to the claims for disturbance, the court awarded the first applicants $14,733.62, and the second applicant $21,002.30. The Court found that:

(1) the first and second applicants were separate legal entities, and enforcement of the lease in equity was not a consideration entirely personal to them. Although the acquisition effectively terminated the leases, that was not relevant to the calculation of the value of the land. As the first applicants' interest was a reversionary interest, and a hypothetical purchaser would acquire the freehold subject to the lease, it was not a matter that could be disregarded for valuation purposes, and the leases were, therefore, relevant in the calculation of market value: at [202]-[205];

(2) the value of the acquired land should be calculated, based on the present value of the rental revenue to be received for the remainder of the lease, plus a value for the reversionary interest: at [206];

(3) the Tolson interests were not uniquely placed to continue to exploit the land. A hypothetical purchaser would be able to continue to operate the mushroom substrate plant, and the claim for special value should therefore be rejected: at [224]-[225];

(4) the applicants' town planning evidence should be accepted, but its valuation evidence rejected. The land therefore enjoyed substantial betterment: at [240];

(5) the court must determine the appropriate compensation according to the regime of the JTC Act, which in this case dictated a "nil" result. Therefore, no compensation should be awarded to the first applicants under s 55(a) of the JTC Act: at [245]-[246];

(6) a dispossessed owner must be entitled to obtain relevant advice. The first applicants were therefore entitled to recover a reasonable amount for their valuation and legal fees, notwithstanding the betterment of the land: at [249]; and

(7) as the town planning fees were invoiced to the second applicant, and no evidence had been provided to show a debt incurred by the first applicant in respect of them, the second applicant should receive compensation for that amount, in addition to the disturbance costs it had claimed: at [250]-[252].

Contempt

Sydney City Council v Li (No 2) [2012] NSWLEC 123 (Preston CJ)

(related decision: *Sydney City Council v Li* [2011] NSWLEC 165 Preston CJ)

Facts: on 24 August 2011, the Court found that Mr and Mrs Li, the first and second respondents, had failed to comply with all the requirements of a fire safety order issued by Sydney City Council ("the council") at their premises at 193 Regent Street, Redfern. The Court ordered the outstanding works to be completed within 16 weeks from the date of the court order. Certain of the outstanding works were concerned with ensuring safe egress, in the event of fire, for the occupants of the residence on the first floor of the premises to a public road. The existing egress from the first floor residence was via an internal stairway to the ground floor shop and then through a roller shutter to Regent Street, at the front of the premises. There was then no existing, lawful means of access from the premises to the public laneway at the rear of the premises. The respondents did not carry out the outstanding works within the specified time. Instead, after the court orders were made, the respondents sought to modify the fire safety order by creating a right of way over adjoining properties they owned so as to provide lawful access to the rear laneway. Council required registration of this easement, however a number of mishaps caused delay of the registration. Once the easements were registered, the fire safety order was modified to allow egress from the first floor of the premises via the external stairway directly to the rear laneway. The respondents were charged with contempt of court for failing to complete the outstanding works in the court orders within the period specified by the Court. The respondents did not attend the contempt proceedings, despite being served with the contempt charge and the council urging them to attend. The Court considered it appropriate to continue the hearing of the contempt proceedings in the respondents' absence.

Issues:

(1) whether the respondents were in contempt of court;

(2) liability of the parties for costs; and

(3) whether the court orders of 24 August 2011 should be modified.

Held: declaring the respondents to be in contempt of court and ordering them to pay the council's costs:

(1) the reason for Mr and Mrs Li's failure to comply with the Court's orders of 24 August 2011 was that they sought, with the agreement of the council, to pursue an alternative solution to the fire safety risk by providing an external stairway discharging from the first floor residence directly to the rear laneway. Unfortunately, due to a series of mishaps, the creation and registration of the necessary easements over adjoining properties took longer than expected: at [32];

(2) once, however, the easements were registered, Mr and Mrs Li readily consented to the council modifying the fire safety order to implement the alternative solution and they undertook and completed all works required by the modified fire safety order within the time specified: at [33];

(3) in these circumstances, the Court agreed with the council's submission that it was sufficient to find that Mr and Mrs Li were guilty of contempt by failing to comply with the Court's order, but not to impose any penalty, by way of fine or otherwise, for that proven contempt: at [34];

(4) it was appropriate to order the respondent to pay the council's costs. The council was successful in proving contempt and securing Mr and Mrs Li to, in effect, purge their contempt by carrying out the modified works. The amount claimed by the council was reasonable: at [35]-[37]; and

(5) the Court did not have the power to discharge its orders of 24 August 2011 in light of the modification of the fire safety order and the carrying out of the works required under the modified fire safety order. The power to set aside entered orders is only available if the parties consent. Because Mr and Mrs Li did not attend the hearing, they were not able to state whether they consented to the orders being set aside: at [38].

Tweed Shire Council v Sikiric (No 2) [2012] NSWLEC 119 (Sheahan J)

(related decision: *Tweed Shire Council v Sikiric* [2011] NSWLEC 240 Sheahan J)

Facts: in class 4 proceedings the council had obtained orders relating to the defendent's use of the relevant land as a poultry/egg establishment without the requisite development consent ("DC"). The key orders of the Court were order (3) restraining the defendant from using the land for keeping poultry without DC, (4) that he remove all poultry within 21 days (by 1 January), (5) that the poultry sheds be demolished within 40 days (by 20 January), (6) that he pay the costs of the proceedings, and (7) that all building materials used in the construction of the existing 2 poultry sheds were not to be stored on the land unless more than 50m from the southern boundary and 100m from any waterbody.

On 4 January 2012, the defendant contacted the Court via email and pleaded for an extension of time for compliance with the Court's orders of 9 December 2011. In reply, Court officers advised him of the procedures to be undertaken and his rights of appeal. The defendant's solicitors also requested from the council an extension of time until 15 February 2012. The council agreed to hold off until that date, but on 29 March 2012, after a review of the conditions at the property on 16 March 2012, the council filed a notice of motion and Statement of Charge for contempt.

The matter was set down for hearing on 24 May 2012, and on 23 May 2012 compliance with some of the Court's orders was achieved. The defendant pleaded guilty to the charge of contempt on 17 May 2012. Counsel for both parties agreed that a fine would be appropriate.

Issue:

(1) what penalty ought be imposed upon the defendant as a result of his failure to adhere to the Court's orders of 9 December 2011.

Held: the defendant was convicted of the charge of contempt of orders 4 and 5, fined a sum of $18,000 plus a weekly penalty of $2,000 (suspended until 3 June 2012, pending removal of all chickens and poultry sheds), and ordered to pay council's costs incurred since 1 January 2012 on an indemnity basis. Orders 6 and 7 of the orders of 9 December 2011 were also affirmed. The Court found that:

(1) it was only the "ominous spectre" of the sentencing hearing that brought about the defendant's compliance with at least some of the relevant orders: at [15];

(2) the only evidence of contrition or remorse came by way of a plea of guilty entered on 17 May 2012. A 10% discount was given for that plea: at [18] and [20];

(3) the defendant had continuing health concerns, a partner and two children to support, was financially strained and had no prior criminal record: at [19]; and

(4) inclement weather had hampered the defendant's compliance efforts once they had been commenced: at [19].

Palerang Council v Banfield (No 2) [2012] NSWLEC 158 (Pepper J)

(related decision: *Palerang Council v Banfield* [2012] NSWLEC 85 Biscoe J)

Facts: Palerang Council ("the council") commenced contempt proceedings against Ms Banfield alleging that she was in breach of consent orders relating to the unlawful construction and use of a shed located on her property ("the shed"). The shed was constructed without development approval and Ms Banfield had been living in the shed, along with her family, since 2008. The orders required Ms Banfield to, unless development approval was obtained to occupy the shed, cease occupancy of the shed by 14 September 2011 and demolish the shed by 14 December 2011 ("the orders"). The council agreed to allow Ms Banfield to live in the shed until 14 December 2011. Development approval was obtained by Ms Banfield for a kit home, and for a temporary shed that she intended to occupy while a permanent dwelling was being constructed. As at the date of the hearing no construction had taken place and Ms Banfield remained in the shed in breach of the orders. Ms Banfield unsuccessfully sought a stay of contempt proceedings in April 2012. She lodged a development application for occupancy of the shed the day before the contempt

hearing. Upon commencement of the hearing, Ms Banfield pled guilty causing the proceedings to be adjourned to allow her to file evidence in mitigation of sentence.

Issues:

(1) whether the contempt should be classified as technical or wilful;

(2) the objective seriousness of the contempt;

(3) whether there were any factors in mitigation of the penalty to be imposed and the adequacy of evidence proving those factors;

(4) the appropriate penalty to be imposed;

(5) Ms Banfield's capacity to pay a fine; and

(6) whether the council should be awarded costs on an indemnity basis.

Held: Ms Banfield was convicted of contempt and ordered to pay $16,600 within 28 days, plus a monthly fine of $2,000 while the contempt remained unpurged, suspended until 4 October 2012:

(1) the contempt was classified as wilful because Ms Banfield was aware that her actions put her in contempt of the orders, her financial difficulties did not provide a complete reason for her failure to comply, and there was no evidence that the council had acted unreasonably: at [94]-[95].

(2) the contempt was considered to be of moderate objective seriousness because of its wilful nature and, although no actual harm was caused to the environment, there was a potential for harm because the shed appeared structurally unsound and was without approved sanitary facilities: at [104];

(3) mitigating factors included that Ms Banfield was of good character, had no antecedents, and had expressed contrition and remorse. Entering a plea of guilty at the commencement of the hearing, rather than at the earliest opportunity, entitled her to a discount of 15%: at [107]. The contempt, however, remained unpurged: at [110]. Ms Banfield's financial hardship and medical condition (depression and anxiety) were taken into account in mitigation of the penalty, however, these factors could only be afforded limited weight because the evidence led was insufficient: at [53]-[57] and [71]-[72]. The mitigating factors justified a discount of 17%: at [146];

(4) due to the ongoing nature of the contempt, a fine, plus an additional periodic fine, was considered appropriate because this would incorporate elements of coercion and of both specific and general deterrence. A community service order was considered inappropriate because it would have the effect of further delaying proceedings: at [113]-[114] and [118]-[122];

(5) Ms Banfield had limited capacity to pay a substantial fine. Ms Banfield's financial circumstances did not preclude the Court from imposing a fine, but they were taken into account in fixing the quantum of the fine to be imposed: at [115]-[117] and [126]; and

(6) Ms Banfield's conduct in delaying the proceedings and continuing to breach court orders was not sufficiently unreasonable to justify costs being awarded in favour of the council on an indemnity basis: at [143].

Council of the City of Sydney v Mae (No 2) [2012] NSWLEC 188 (Sheahan J)

(related case: *Council of the City of Sydney v Mae* [2009] NSWLEC 84 Sheahan J)

Facts: the defendant, Mr Mae, was charged with contempt of court for failing to obey orders made in Class 4 proceedings concerning (1) unauthorised works done at premises at 20 Belvoir Street Surry Hills, and (2) the unauthorised use of the premises as a backpacker/boarding house facility. The substantive proceedings were commenced on 15 October 2008, and on 2 June 2009, the Court made declarations that the respondent: (1) had not complied with council orders served on him pursuant to the *Environmental Planning & Assessment Act* 1979 ("the EPA Act"), (2) had unlawfully used the premises as a boarding house in contravention of the South Sydney Local Environmental Plan and the EPA Act, and (3) had unlawfully carried out work on the premises without first obtaining development consent. The Court also ordered: (1) that the respondent be restrained from using the premises as a boarding house until

development consent is granted, (2) that all unauthorised building works at the premises be removed within 28 days, (3) that the respondent be restrained from advertising the premises as available for use as a boarding house, or leasing/licensing the premises for that purpose, without first obtaining consent, and (4) that the respondent pay the applicant's costs on a party-party basis.

Following that judgment, the defendant continuously defied both the council and the Court. On 16 February 2010 the council filed the notice of motion for contempt and the statement of charge, and directions were given, requiring Mae to appear in response to those charges, on 25 February 2010. When Mae failed to appear on that date, a warrant was issued for his arrest, but, as the Sheriff's Office was unable to locate him, and due to the seriousness of the charge, a general warrant was issued for him to be brought before the Court as soon as he could be arrested. In the meantime, with Mae's advertising programme continuing, and execution of the warrant proving difficult, the council elected to pursue bankruptcy proceedings against him, in respect of the costs outstanding under order (4) made against him on 2 June 2009.

The warrant was finally executed on 6 June 2012. Bail was granted, and on 29 June, Mae pleaded guilty to the charge of contempt.

Issues:

(1) whether the defendant ought be convicted of contempt of court;

(2) if so, for what grade of contempt; and

(3) what penalty ought be imposed upon the defendant as a result of his disobedience of court orders.

Held: the defendant was convicted on the charge of contempt, sentenced to perform 450 hours of community service works, and ordered to pay a fine of $54,000. He was further ordered to pay the council's just and reasonable legal costs and disbursements, including investigation expenses, on an indemnity basis. The Court found that:

(1) the contempt was contumacious and deserving of serious punishment: at [76];

(2) a fine would not be sufficient punishment: at [80];

(3) the defendant put overseas travel and his passion for filmmaking ahead of submitting to the Court's jurisdiction, and systematically avoided council officers and the Sheriff: at [78];

(4) the defendant was intelligent and talented, and although there were strong arguments in favour of imprisonment, such punishment was not appropriate in this case. Instead, the defendant's "gifts" should be put to good use through the imposition of a community service order: at [84]; and

(5) although entered very late, and after three years of defiance, the defendant's plea of guilty had some utilitarian value. A 10% discount was therefore applied to the sentence (500 hours, and $60,000): at [86].

Criminal

The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd & Kinnarney (No 2) [2012] NSWLEC 95 (Biscoe J)

(related decisions: *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd and Kinnarney* [2012] NSWLEC 30 Biscoe J; *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd & Kinnarney* [2012] NSWLEC 45 Biscoe J)

Facts: the corporate defendant was convicted of an offence against s 143(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") for transporting waste to a place which could not lawfully be used as a waste facility for that waste. Pursuant to s 169(1) of the Act, Mr Kinnarney, as a director of the corporate defendant, was taken to have contravened s 143(1). The defendants were before the Court for sentencing. The defendants had transported contaminated landfill containing asbestos, bricks,

tiles and other such waste to a residential semi-rural property. For the purposes of sentencing, it was assumed that the prosecutor's costs would be roughly $200,000.

Issues:

(1) considering the objective circumstances of the offences, the subjective circumstances of the defendants and that Mr Kinnarney was the sole shareholder of the corporate defendant, what were the appropriate sentences.

Held: the corporate defendant was fined $50,000 and Mr Kinnarney was fined $30,000, and both defendants were to pay the prosecutor's legal costs as agreed or as determined:

(1) the offences were of moderate objective seriousness. The transporting and depositing of the fill to the property caused significant degradation of the land, and insofar as that degradation was due to asbestos fragments and other contaminants, it had the potential to cause harm to the health or safety of humans. The offences caused significant actual and likely harm to the environment. The environmental harm was reasonably foreseeable, the defendants could have prevented it but took no practical measures to prevent or mitigate the harm, they had control over the causes giving rise to the offences (though the placing of the fill was at the instigation of the owner of the subject property), and the offences were committed in the course of running a business and for the purpose of reducing costs: at [7]-[29];

(2) an aggravating subjective consideration was that Mr Kinnarney had previously been convicted of two related offences for carrying out development without development consent by filling land with material similar to that in the present case and clearing bushland on his own property. These prior convictions were recorded after the commission of the subject offences, but were relevant to show that the subject offences were not uncharacteristic aberrations. There was no evidence of remorse or good character, though the defendants provided some assistance to the prosecutor by providing crucial evidence and exposing the untruths told by the owner of the subject property: at [30]-[34];

(3) as well as general deterrence, in light of Mr Kinnarney's prior convictions, there was some need for the penalty to deter the defendants from committing similar offences again: at [35]; and

(4) as Mr Kinnarney was the sole shareholder of the corporate defendant, the sentences imposed should avoid punishing, in effect, Mr Kinnarney twice over. Taking into account the defendants' liability for the prosecutor's costs, had the corporate defendant been the only contravenor, it would have been fined $80,000; had Mr Kinnarney been the only contravenor, he would have been fined $40,000. To avoid double punishment, the amounts should be adjusted, and the overall penalty of $80,000 was appropriate in the circumstances: at [39]-[42].

Harrison v Baring [2012] NSWLEC 117 (Pain J)

Facts: Mr Baring ("the defendant") was charged with ten strict liability offences under the *Water Management Act* 2000 ("WM Act") in relation to the watering of wheat and canola crops, each on two separate occasions in 2008 on a property called Baring Park, east of Condobolin on the Lachlan River. Pursuant to s 363 of the WM Act, the charges were laid against the defendant as the sole director of a deregistered company, Baring Park Pty Ltd ("BPPL"), for knowingly authorising or permitting the acts constituting the offences. BPPL was the holder of a water supply and water use approval, relating to two water supply works being pumps, and a water access licence during the relevant period. Eight of the offences related to not ordering water under either the access licence or the approval contrary to s 341(1)(a) and s 343(1)(a1) respectively. At the relevant time these sections provided that it was an offence to take water from a water source otherwise than in accordance with an access licence and to use a water supply work to take water otherwise than in accordance with a water supply and water use approval. The two remaining charges were in relation to the canola crop only and constituted failing to report that a meter was not functioning, contrary to s 343(1)(a1). Baring Park Project Pty Ltd sold wheat and canola to two companies. The defendant did not appear and was not represented at the hearing. The prosecutor's application for the matter to proceed ex parte was granted.

Held: the defendant was found guilty of the ten offences:

(1) the prosecutor established that water was taken from the Lachlan River on the four occasions the subject of eight offences and that no water was ordered as required by the WM Act as (at [30]-[31]):

(a) there was evidence that BPPL took water from the Lachlan River to water its wheat crop twice and to pre-water and water its canola crop without placing water supply orders with, and having them approved by, State Water Corporation, in breach of BPPL's water access licence; and

(b) there was evidence that BPPL took water from the Lachlan River using two pumps without previously lodging water supply orders with State Water Corporation, in breach of BPPL's water supply and water use approval; and

(2) the prosecutor established that the BPPL took water on two occasions using a pump, the meter of which was not working, and did not notify this to the Department of Water and Energy, in breach of BPPL's water supply and water use approval: at [30]-[31]; and

(3) the prosecutor proved that the defendant knowingly authorised or permitted the acts constituting the offences as he was the sole director of BPPL; supervised the running of the farm; made decisions about watering; decided to, and directed, the pre-watering and watering; operated the pump; was responsible for ordering water; and voluntarily made admissions to officers of State Water Corporation: at [14], [30]-[31].

Harrison v Baring (No 2) [2012] NSWLEC 145 (Pain J)

(related decision: *Harrison v Baring* [2012] NSWLEC 117 Pain J)

Facts: the Court found Mr Baring ("the defendant"), the sole director of Baring Park Pty Ltd ("BPPL"), guilty of ten offences under s 341(1)(a) and s 343(1)(a1) of the *Water Management Act* 2000 ("WM Act") (now repealed) in relation to four separate occasions of watering of crops in 2008, in that he knowingly authorised or permitted the acts or omissions constituting the offences. The defendant was taken to have committed those offences by reason of s 363(1). He did not appear and was not represented at the sentence hearing. The prosecutor's application for the matter to proceed ex parte was granted. The maximum penalty applicable to the offences was $132,000. Section 364A of the WM Act sets out matters relevant to imposing a penalty and s 21A of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSP Act") sets out aggravating and mitigating factors to be taken into account in sentencing. Relevant to consideration of sentence were the objects of the WM Act identified in s 3, including to provide for the sustainable and integrated management of the water sources for the benefit of both present and future generations; to protect, enhance and restore water sources; and to provide for the orderly, efficient and equitable sharing of water.

Issue:

(1) considering the objective and subjective circumstances of the case, what was the appropriate sentence.

Held: the defendant was convicted, fined a total sum of $270,000 for the ten offences, ordered to pay the prosecutor half of the fines, and ordered to pay the prosecutor's costs:

(1) the objective circumstances were in the moderate to serious range: at [68]:

(a) objective factors identified in s 364A(1) of the WM Act were taken into account. Although there was no direct evidence of other persons' rights being negatively affected or environmental harm as result of the offences, the inference arose beyond reasonable doubt that the taking of at least 280 ML of water over four occasions had the potential, and was very likely, to affect the rights of other licence holders and to harm the environment: at [48]-[49]. The extent of the impact on other persons' rights and likely environmental harm were likely to have been significantly greater because the offences were committed during a severe water shortage: at [50]. The defendant had complete control over the causes that gave rise to the offences: at [59]; could have reasonably foreseen the harm likely to be caused to the environment as a result of the offences: at [62]; could have taken practical measures to prevent the offences: at [63]. The defendant's intentions in committing the offences were for financial gain: at [65]. The market price of the water at $1,000 per ML was a substantial cost foregone with the cost of the water being substantially greater than any profit from the crops: at [67];

(b) additional objective factors were taken into account under s 364A(2) or s 21A(1)(c) of the CSP Act. The offences precluded the State from managing the release of water from Wyangala Dam, from monitoring the taking of water, from maintaining an accurate water allocation account and being denied the opportunities to determine whether or not water was available in the relevant water allocation account and to calculate aggregate water usage accurately: at [44]-[46]. The offences resulted in breaches of trust placed on licence holders by the State to ensure that they abide by the licences and approvals granted under the WM Act: at [54];

(c) the prosecutor submitted that it should be inferred the defendant was aware of the regulatory requirements set out in the WM Act and the conditions attaching to the BPPL's water access licence and water supply works approval, as a factor under s 364(1)(f) which refers to the defendant's control of the causes. That was considered as part of the element of the offences for which the defendant was found guilty, in that he was found to have knowingly authorised or permitted the acts or omissions constituting the offences. It was not therefore considered again as an additional aggravating factor in sentencing: at [57]. The relationship if any between a conviction for an offence as a director based on s 363 of the WM Act which requires consideration of knowledge of a defendant director and sentencing under s 364A(1)(f) was unclear: [59]; and

(d) that the offences were committed for financial gain could not additionally be taken into account as an aggravating factor under s 21A(o) of the CSP Act as that would be impermissible double counting: at [66];

(2) mitigating factors in s 21A(3) of the CSP Act taken into consideration were that the defendant did not have a significant record (at [70]), he was unlikely to re-offend (at [71]), and the defendant made initial admissions of one watering event which the prosecutor was otherwise unaware of referred to in *Harrison (No 1)* but assistance to law enforcement authorities was otherwise non-existent (at [73]); and

(3) the totality principle was applied given that the ten offences arose from four occasions of taking water which took place over a relatively confined period of five to six months and was directed to the same activity of growing a crop albeit of two different varieties. Further, one act of taking water resulted in more than one charge. The failure to report a meter not functioning was an important offence given the statutory scheme: at [93].

Chief Executive, Office of Environment and Heritage, Department of Premier and Cabinet v Powell [2012] NSWLEC 129 (Sheahan J)

Facts: the Office of Environment and Heritage ("OEH") prosecuted Mr Powell and a family company known as Cleo's Unitisation Pty Ltd ("Cleo's") for breaches of s 12(1) of the *Native Vegetation Act 2003* ("NV Act"). The offence charged was for the clearing of land without development consent or a property vegetation plan. Cleo's was the defendant in two matters, and Mr Powell, in his capacity as the managing director of Cleo's, the defendant in the other. At all relevant times Mr Powell acted on behalf of the company when carrying out or authorising clearing on the property. Pleas of not guilty were entered on 8 July 2011, but when Mr Powell entered a guilty plea on 6 September 2011, the prosecutor agreed not to proceed with the two charges against the company.

The clearing offence was allegedly committed between March 2007 and August 2009. Although substantial unauthorised clearing was alleged, it was not alleged that the area was totally cleared, as in "razed". Evidence of the offence first came to the attention of an authorised officer of the prosecutor during May 2009. After an initial inspection on 14 May 2009, OEH officers arranged with Mr Powell to attend the property on 15 May 2009. On 25 January 2010, Mr Powell met on site with two OEH officers, following reports that further land had been cleared. Mr Powell was very frank, and identified for them several additional cleared areas. He also acknowledged the presence of koalas on the land, and explained that he took steps during the clearing operations to induce them to move. It was agreed that the vegetation cleared was in medium condition, that the native vegetation species was *Eucalyptus camaldulensis* ("Red River Gum"), listed by the Murrumbidgee Catchment Management Authority ("CMA") as an Invasive Native Species, and that the area cleared was 65 ha. The clearing allegedly included some large mature examples, along with some understorey and groundcover. A number of the cleared gums were hollow bearing, a factor of relevance to their habitat value.

Issues:

(1) whether the Court should exercise its discretion to find the offence proven but record no conviction pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* ("CSP Act"); and

(2) the appropriate penalty to be imposed for the breaches of the NV Act.

Held: although the defendant had an "unblemished record", the submission that his infraction of the law was "small" was rejected and the Court found that s 10 of the CSP Act was not appropriate. The defendant, Powell, was found guilty and convicted of the offence charged in the summons, fined a sum of $120,000 and ordered to pay the prosecutor's costs and appropriate investigation expenses. The charges against the defendant company were dismissed by consent, with no order as to costs. The Court found that:

(1) although Powell had been frank with the OEH officers, he was not completely open about the extent of clearing, continued the illegal clearing despite relevant advice and specific requests that he stop, and was found to have covered up evidence of some of the clearing: at [151];

(2) the defendant was entitled to a full 25% discount for the utilitarian value of his plea of guilty. It was not entered at the earliest opportunity, but he was entitled to see the whole of the prosecutor's evidence and to obtain counsel's advice, before pleading to the charge: at [159];

(3) the offence was of moderate objective gravity and resulted in harm at the lower end of medium: at [131];

(4) the defendant had full control of the offending operation, and full power to avoid unacceptable harm: at [161]; and

(5) the defendant had no prior record, but displayed no real signs of contrition or remorse, and made no attempt at remediation: at [161].

Environment Protection Authority v Djura [2012] NSWLEC 122 (Biscoe J)

Facts: the defendant pleaded guilty to two charges under ss 57(1) and 48(1)(a) of the *Contaminated Land Management Act* 1997 ("the Act") for, respectively, falsely representing that he was an accredited site auditor under the Act, and carrying out a statutory site audit of potentially contaminated land when he was not so accredited. He was before the Court for sentencing. Prior to committing the offences, the defendant had suffered an illness which caused permanent and moderate impairment in his cognitive function. The defendant was the sole director and shareholder of a company through which he ran a small hazardous material consultancy business, which he intended to close down in a month's time after sentencing. The maximum penalty for each offence was $66,000. In relation to the s 48(1) offence, instead of pursuing the charge, the prosecutor could have elected to issue a penalty notice pursuant to s 92A of the Act, and cl 10 and Schedule 1 of the *Contaminated Land Management Regulation* 2008, which would have resulted in a fine of $750.

Issues:

(1) whether the lesser fine available by way of a penalty notice was a factor which affected the relative seriousness of the s 48(1) offence when determining the objective seriousness of that offence; and

(2) considering the objective factors of the offences and the subjective circumstances of the defendant, what were the appropriate sentences.

Held: the defendant was convicted of both offences as charged, fined $3,750 for each offence, and was to pay the prosecutor's costs as agreed or assessed:

(1) there is a line of authority that where there was another and less punitive offence which could have been charged and which was as appropriate or even more appropriate to the alleged facts, this should be taken into account as a factor that affects the relative seriousness of the offence charged. But this line of authority was distinguishable and did not support the defendant's submission that regard should be had to the penalty notice amount of $750 for a s 48(1) offence. The purpose of penalty notices is to provide a simple, administrative procedure for punishing offences which are perceived to be of low objective seriousness as an alternative to launching a prosecution. The mere fact that there was a

discretion to issue a penalty notice and its prescribed amount were irrelevant to sentencing. Further, there was no penalty notice provision for an offence against s 57(1): at [58]-[71];

(2) the offences were in the low range of objective seriousness. There was a need to protect the integrity of the site auditor scheme, which was in place to ensure that risks to human health and the environment from contaminated land were properly identified and remediated. The defendant's conduct undermined the integrity of the scheme. The maximum penalty of $66,000 for each offence reflected the seriousness of the offences. The defendant had control of the causes giving rise to the offences and there were practical measures he could have taken to have avoided committing the offences. However, the offences did not cause any environmental harm and were not committed for financial gain: at [47]-[57];

(3) general deterrence was important, but there was no need for specific deterrence as these were the defendant's first offences and he intended to discontinue his consultancy business: [73]-[74];

(4) there were a number of mitigating subjective factors. These included that the offences were not part of a planned or organised criminal activity, the defendant did not have any previous convictions, was a person of good character, had shown remorse and had provided evidence that he had accepted responsibility for his actions, had cooperated with the prosecutor during the investigation, and had pleaded guilty at the earliest available opportunity (and was therefore entitled to a 25 per cent discount). The defendant's means to pay even a relatively low fine on top of the prosecutor's costs and his own legal costs were relevant. The aftermath of the defendant's illness had a debilitating effect on the viability of his business and he was in a vulnerable financial position. He had no significant assets other than his residential unit and a half interest in a commercial premises. His income would be substantially lowered by the closure of his business: at [75]-[77]; and

(5) the principle of totality was relevant. The two offences were closely linked. They took place at around the same time and generally involved the same course of conduct. The total fine reflecting the overall criminality should be apportioned equally between the two offences. The defendant should be fined $10,000 before discounting by 25 per cent for the early guilty plea. The total amount of $7,500 should be apportioned equally between the two offences: at [84]-[86].

Chief Executive, Office of Environment and Heritage v Kennedy [2012] NSWLEC 159 (Biscoe J)

(related decision: *Chief Executive of the Office of Environment and Heritage v Kennedy* [2012] NSWLEC 93 Biscoe J)

Facts: the defendant pleaded guilty to an offence under s 12 of the *Native Vegetation Act* 2003 ("the Act") for clearing native vegetation on his rural property without a development consent or a property vegetation plan. The prosecutor contended that 44.7 hectares of native vegetation had been unlawfully cleared mostly comprising 2,500 to 4,000 mature trees ("remnant native vegetation"). The defendant contended that only a little more than 600 mature trees were unlawfully felled, and that the rest of the clearing fell under exceptions relating to regrowth or creating infrastructure buffer distances for existing fences, roads and tracks so that 27.08 hectares had been unlawfully cleared. The defendant accepted that he was mistaken in believing that the clearing of the 600 or so mature trees, which he intended to use to construct rural infrastructure, was permitted as a routine agricultural management activity ("RAMA"). Shortly before the hearing on sentence, the defendant had been issued with a remedial direction concerning the property. He had been previously given a remedial direction in 2005 concerning a different property on which he had also unlawfully cleared native vegetation.

Issue:

(1) considering the objective and subjective circumstances of the case, what was the appropriate sentence.

Held: the defendant was convicted of the offence under s 12 of the Act, fined $40,000 and ordered to pay the prosecutor's costs as assessed or agreed:

(1) the offence was of moderate objective seriousness: at [80]. The defendant hindered the attainment of the objects of the Act by clearing native vegetation without consent, consequently undermining the

regulatory system. Offences that undermine the integrity of this system are objectively serious: at [42]-[44]. The environmental harm caused was moderate: there had been extensive logging on the property before the defendant's unlawful clearing, and it was accepted that a little more than 600 mature trees were unlawfully felled and 32.48 hectares had been unlawfully cleared. It was also accepted that the clearing of regrowth and fallen timber had eradicated noxious animals and had therefore had an offsetting environmental benefit: at [60]-[68]. Even though the offence was one of strict liability, the defendant's state of mind may affect the seriousness of the offence. The defendant's conduct was negligent rather than reckless as he genuinely believed that the clearing came within statutory defences or exceptions, and he was partly correct. Part of the clearing fell under the regrowth and buffer exceptions, although the defendant mistakenly believed he satisfied the rural infrastructure RAMA defence: at [69]-[74]. The defendant's reasons for clearing included the commercial object of improving stock management. This was an aggravating circumstance, but it was substantially negated by the remedial direction for the property: at [75]-[76];

(2) in terms of the defendant's subjective circumstances, he carried out the clearing under an erroneous understanding of the rural infrastructure RAMA defence, he did not have any prior convictions for environmental offences, and a remedial direction had been issued for the property: at [81]-[84]. The defendant's guilty plea was not made at the earliest opportunity, but rather at the sixth mention, and after he had initially pleaded not guilty. The utilitarian value of a plea is reduced by the extent to which an offender contests issues of fact at the sentencing hearing. The defendant put the prosecutor to proof as to the number of mature trees felled and was successful, and as to the area unlawfully cleared and the extent of environmental harm and was partially successful. A discount of 20 per cent should be allowed for his guilty plea: at [84]-[87]. There was no evidence that the defendant was remorseful, but he had supplied information as requested and discussed the matter with investigators: at [88]-[89];

(3) the defendant was the subject of the 2005 remedial direction concerning another property when he undertook the clearing the subject of this prosecution. The penalty to be imposed ought therefore be sufficient to act as a specific deterrence to him, as well as a general deterrence: at [90]-[91]; and

(4) synthesising the various considerations, the appropriate penalty was a fine of $50,000, which was reduced for the guilty plea by 20 per cent to $40,000: at [95].

Environment Protection Authority v Queanbeyan City Council (No 3) [2012] NSWLEC 220 (Pepper J)

(related decisions: *Environment Protection Authority v Queanbeyan City Council (No 2)* [2011] NSWLEC 159 Pepper J; *Environment Protection Authority v Queanbeyan City Council* [2010] NSWLEC 237 Pepper J)

Facts: Queanbeyan City Council ("the council") pleaded guilty to an offence of polluting waters under s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the Act"). The pollution incident resulted from a pump failure at the sewage pump station at Morisset St ("the SPS"), which caused approximately 1.1ML of sewage to flow into the Queanbeyan River in NSW and across the ACT border into the Molonglo River and Lake Burley Griffin on 4 and 5 November 2007.

On 3 December 2003 and 9 April 2004 there were earlier discharges of untreated sewage from the SPS at various points within a nearby caravan park. Accordingly, the Environment Protection Authority ("EPA") issued the council with a prevention notice under s 96 of the Act. The council was also served with a notice to provide information and a second prevention notice following three further spills between June 2004 and February 2006. In response, the council installed a telemetry system that issued an SMS text message alert in the event of a pump failure. A retention structure was also installed at Waniassa St Park, 10m from the Queanbeyan River, as a temporary solution pending the replacement of the SPS.

The cause of the overflow the subject of the charge was the dual failures of pump 1 and the telemetry system such that no SMS alert was sent when the pump failed. A council officer reset the pump but left the council depot knowing that, although the telemetry system was operational, a problem remained with the SMS notification. Accordingly, no SMS was sent when a second discharge occurred on the night of 4 November, which was not discovered until 6.45am 5 November. The council undertook a clean up process, which was completed by 12pm 5 November.

Issues:

(1) what was the extent of environmental harm caused by the overflow;

(2) whether the extraterritorial operation of the offence could be taken into account in the determination of an appropriate sentence;

(3) whether and to what extent the principle articulated in *R v De Simoni* (1981) 147 CLR 383 at 389 ("the *De Simoni* principle") applied;

(4) the objective gravity of the offence; and

(5) to what extent the subjective circumstances of the council acted to mitigate the penalty imposed, including the council's prior criminality and late guilty plea.

Held: the council was ordered to pay $80,000 to the Murrumbidgee Catchment Management Authority to be used for the Numeralla East Landscape Project. The council was also ordered to publicise the offence and to pay the EPA's legal and investigative costs in the sum of $344,189:

(1) the release of oxygen-demanding matter and nutrient nitrogen and phosphorus into the river systems, whilst incremental, was insignificant in terms of environmental harm and public health risk. Although the increase over background risk for pathogens at the Molonglo waterskiing area was negligible, this area was closed down for three days because of increased risk of exposure to viruses: at [120]-[123] and [166]-[167];

(2) s 120 is concerned with an offence of the pollution of the waters of NSW. However, the connection to the pollution that occurred in the ACT as a result of the commission of the offence in NSW could not be ignored and was included in the Court's consideration of the extent of the environmental harm caused: at [150]-[153];

(3) the *De Simoni* principle:

   a. prevented the Court from considering whether the offence was committed wilfully or negligently by reason of the more serious offence of wilfully or negligently causing a leak or spill created by s 116 of the Act: at [178]-[179];

   b. did not prevent consideration of the matters listed in s 241 of the Act on the basis that those matters form elements of the s 116 offence because s 241 mandates their consideration in sentencing for any offence under the Act: at [204]-[205];

(4) having regard to the extent of environmental harm and the fact that: there were additional practical measures available that could have been taken to prevent or mitigate the harm; the EPA failed to establish beyond reasonable doubt that the council acted in disregard of public safety; the offence was not committed for financial gain but rather in the course of providing a community service; the harm was reasonably foreseeable; and the council had control over the causes that gave rise the offence, the offence was classified as one of moderate objective gravity: at [210]; and

(5) the council entered a late plea of guilty one week before the scheduled hearing date, entitling it to a discount of 15%: at [221]. The council had also acted, in part, in a way that demonstrated contrition and remorse and had cooperated in the investigation of the offence: at [230], [246] and [250].

Civil Enforcement

Pittwater Council v Martoriati [2012] NSWLEC 131 (Preston CJ)

Facts: in or before February 2012, the respondent, Mr Martoriati, excavated behind, beside and under his house. The respondent dumped spoil from the excavation behind a log retaining wall resting against existing trees behind the crest of the excavation. The fill and the wall applied a surcharge load to the top of the excavation and a lateral load to the trees at the crest of the unsupported excavation. The likelihood of instability of the slope was almost certain in the short to medium term. The respondent also dumped spoil on his neighbour's property behind a sandstone block retaining wall and a cut timber retaining wall

supported by existing trees. The fill, in a steep battered slope, was unstable. The respondent erected a steel support system to support his house, necessitated as a result of his excavation underneath and around his house. On 16 February 2012, Pittwater Council ("the council") issued a stop work order to stop the respondent making the safety problems any worse. On 9 March 2012, the council wrote to the respondent seeking his undertaking to implement specified remedial works. Mr Martoriati did not give the undertaking or do the remedial works. The council then commenced proceedings seeking orders that Mr Martoriati take specified action to address the instability, structural and safety problems. On 29 March 2012, the Court made interlocutory orders that Mr Martoriati carry out certain remedial works recommended by the council's geotechnical engineer by 11 April 2012. In the orders of 29 March 2012 the Court also allowed the council's structural engineer to inspect Mr Martoriati's land and house to ascertain whether the steel frame that supported the house was safe and, if the frame was found not to be safe, to recommend remedial measures to make it safe. After receiving the structural engineer's report, the council issued, on 5 April 2012, an emergency order under s 124 of the *Local Government Act* 1993 ("the LGA") requiring Mr Martoriati to vacate the premises and complete, by 11 May 2012, the remedial works specified in order 9 of the court orders made on 29 March 2012 and also the remedial works recommended by the structural engineer. Prior to the final hearing in the subject proceedings, Mr Martoriati did not appear before the Court, including when interlocutory orders were made. The Court was satisfied, however, that he had knowledge of the proceedings.

Issues:

(1) whether the respondent carried out development without obtaining the required development consent;

(2) whether the respondent failed to take the action he was required to take by the emergency order;

(3) whether the respondent was in breach of interlocutory orders made by the Court that he undertake certain remedial works; and

(4) if such breaches occurred, what remedial orders should be made.

Held: declaring that the respondent had acted contrary to law and issuing prohibitory and mandatory injunctions:

(1) the respondent breached s 76A(1) of the *Environment Planning and Assessment Act* 1979 by carrying out development without consent. The respondent's carrying out of the works and the erection of the steel structure were for the purpose of his dwelling house. The carrying out of such development for the purpose of a dwelling house required development consent: at [43]-[47];

(2) the respondent breached s 124 of the LGA by failing to comply with the emergency order of 5 April 2012. He did not complete any of the works and actions required by the order by 11 May 2012. He did not vacate the property after 5 April 2012 and still had not vacated the property as at the date of the final hearing: at [50]-[54];

(3) the respondent was in breach of the Court orders of 29 March 2012. Order 9 of those court orders required the respondent to carry out specified remedial works by 11 April 2012. The works were not completed by this date: at [55];

(4) the respondent, within four weeks of the date of the orders, was ordered to vacate the property, and not return to the property, except to carry out the required works and undertake the required measures, until certain works were completed: at [67], [68] and [100];

(5) the respondent was ordered to undertake specified remedial measures and works on his property and his neighbour's property in a sequential fashion: at [64] and [100]; and

(6) it was appropriate that the respondent pay the council's costs of the proceedings: at [99].

Kennedy v Stockland Developments Pty Ltd [2012] NSWLEC 168 (Lloyd AJ)

(related decisions: *Kennedy v Stockland Developments Pty Ltd (No 6)* [2012] NSWLEC 34 Pepper J; *Kennedy v Stockland Developments Pty Ltd (No 5)* [2012] NSWLEC 21 Pepper J; *Kennedy v Stockland Developments Pty Ltd (No 4)* [2012] NSWLEC 3 Sheahan J; *Kennedy v Stockland Developments Pty Ltd*

(No 3) [2011] NSWLEC 249 Pepper J; *Kennedy v Stockland Developments Pty Ltd (No 2)* [2011] NSWLEC 10 Pain J; *Kennedy v Stockland Developments Pty Ltd* [2010] NSWLEC 250 Pain J)

Facts: on 21 December 2006 the Minister for Planning ("the Minister") granted a concept plan approval under Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), as then in force, to Stockland Developments Pty Ltd ("Stockland") and Anglican Retirements Villages ("ARV") for a residential subdivision and a retirement village at Sandon Point, Wollongong. On 29 November 2009 the Minister granted major project approval to Stockland for subdivision and modification of the concept plan. Subsequent modifications of the major project approval were granted on 19 April and 9 August 2010. As at the date of the hearing, Stockland had commenced work on the development.

Mr Kennedy claimed that the work involved in the construction of a temporary pathway and the deposit of fill on ARV land ("the work") was being carried out without consent, or alternatively without environmental assessment under Pt 5 of the EPA Act, and that the work was causing damage, destruction or desecration of Aboriginal cultural heritage objects in breach of s 86 of the *National Parks and Wildlife Act* 1974.

Issues:

(1) whether the work was being carried out unlawfully; and

(2) whether the work was causing harm to any Aboriginal object or place.

Held: the summons was dismissed:

(1) the major project approval included the construction of the temporary pathway and included bulk earthworks and batter located within the ARV land. The work was carried out in accordance with the relevant Environmental Assessment and construction certificate. Assessment under Pt 5 of the EPA Act was not required because the work was the subject of major project approval under Pt 3A: at [18], [23]-[25]. Neither the temporary pathway nor the fill and batter were prohibited under the zoning provisions of the State Environmental Planning Policy (Major Development) Amendment (Sandon Point) 2009 because the zoning provisions did not apply to work approved under Pt 3A: at [26]-[28]; and

(2) the evidence indicated there had been no disturbance to the Turpentine forest or its significance to Aboriginal people, including to any "women's place": at [31]-[33] and [39]; and that a cultural heritage assessment had been undertaken in relation to the temporary pathway: at [34]-[35]. There was no evidence of any harm or disturbance to any Aboriginal object or evidence of Aboriginal habitation: at [40].

***Lester v Ashton Coal Pty Limited* [2012] NSWLEC 181** (Preston CJ)

Facts: Mr Lester, the applicant, brought civil proceedings under s 193(1) of the *National Parks and Wildlife Act* 1974 ("Parks Act") claiming that the first respondent, Ashton Coal Pty Limited ("Ashton") had breached s 86(1) of the Parks Act. Section 86 provided "[a] person must not harm or desecrate an object that the person knows is an Aboriginal object." Included in the definition of "harm" was destroying, defacing or damaging the object, moving the object from the land on which it had been situated or causing or permitting the object to be harmed. Section 87(1) of the Parks Act provided a defence to an offence under s 86(1). Section 87(1) provided: "[i]t is a defence to a prosecution for an offence under section 86 (1)…if the defendant shows that: (a) the harm or desecration concerned was authorised by an Aboriginal heritage impact permit, and (b) the conditions to which that Aboriginal heritage impact permit was subject were not contravened. Mr Lester alleged that subsidence which had occurred as a result of the first respondent's underground longwall mining, and other mining-related activity, had caused harm to Aboriginal objects at three different locations – the Oxbow site, Waterhole site and Pleistocene site. Mr Lester sought declarations of these three breaches and other orders. Ashton defended the proceedings and the second respondent, the Office of Environment and Heritage, restricted its participation in the proceedings to certain matters of relief.

In relation to the Oxbow site, Mr Lester claimed that mining-induced subsidence of parts of the land on which Aboriginal objects were situated caused the objects to move position in space and that this was

movement of the Aboriginal objects from the land on which they were situated, which fell within the definition of harm in s 5 of the Parks Act.

The Waterhole site included a sandstone outcrop with nine grinding grooves in a group on the top of the outcrop (known as GG1). Mr Lester claimed that longwall mining in the area of, and first workings underneath, the grinding grooves by Ashton caused subsidence of the land and surface cracking of GG1. Mr Lester also claimed that Ashton knew that the grinding grooves were Aboriginal objects because they were described in a report prepared for the purposes of the company's development application and in a Court-issued Aboriginal Heritage Impact Permit (AHIP). Mr Lester claimed that Ashton had undertaken construction, by erecting a new fence, within 70m of the grinding grooves, in breach of condition 7 of the Court-issued AHIP and that Ashton had harmed Aboriginal objects situated on the land where the fence was constructed.

Eleven artefacts were recorded as occurring at the Pleistocene site. Xstrata had a project approval under the former Part 3A of the *Environmental Planning and Assessment Act* 1979 for a nearby mine which required Xstrata to realign Brunkers Lane, which traversed the Pleistocene site, to create Lemington Road. Mr Lester claimed that condition 11 of the Court-issued AHIP required the area where the road was to be constructed to be investigated in accordance with the methodology provided in Attachment 2 to the Court-issued AHIP before ground disturbance occurred. Mr Lester claimed that the Court-issued AHIP required Ashton to make Xstrata aware of condition 11 and Ashton failed to do this. Hence, Mr Lester claimed that Ashton could not rely on the defence under s 87(1) of the Parks Act because Ashton had not shown that conditions of the AHIP were not contravened. Mr Lester claimed, therefore, that Ashton was responsible for any harm caused to Aboriginal objects within the Pleistocene site by Xstrata's construction of the realignment of Brunkers Lane/Lemington Road, and thereby breached s 86(1) of the Parks Act.

Issues:

(1) whether Ashton harmed Aboriginal objects at any of the three sites; and

(2) if so, what relief should be granted.

Held: dismissing the summons and reserving the question of costs:

(1) The applicant's and second respondent's geoarchaeological and geotechnical experts agreed that subsidence had occurred at the Oxbow site, and the majority of this subsidence occurred during the period of active mining of Ashton's nearby longwall mines. Residual movement was accepted as likely to have occurred subsequently at low levels. However, the evidence of subsidence did not establish that Aboriginal objects at the site were harmed or moved within the meaning of s 5: at [25]-[29], [35], [42], [47];

(2) at best, Mr Lester's case was that the Aboriginal objects recorded as occurring at the Oxbow site may have moved *in situ* with the movement of the ground in which the objects were situated. There was no direct evidence that any Aboriginal object recorded at the Oxbow site had so moved. It should not be inferred from observations of Aboriginal objects in the vicinity where subsidence occurred that the objects had so moved: at [43], [44];

(3) Mr Lester did not establish that Ashton harmed either the grinding grooves or any other Aboriginal object at the Waterhole site. At best, the evidence of the applicant's expert witnesses was that subsidence-induced changes to the rock surface of the outcrop at GG1 could not be categorically ruled out. There were physical signs of deterioration on the outcrop surface immediately to the east-southeast of GG1. The evidence of Ashton's experts that this deterioration was not caused by subsidence from Ashton's longwall mining or first workings, but rather from natural forces, was accepted. The first workings, being mine roadways, underneath the Waterhole site did not cause subsidence; and the end of Ashton's closest mine, Longwall Panel 4, was sufficiently distant from the outcrop on which the grinding grooves GG1 were located that any subsidence, tilt or strain caused by longwall mining would have been of such a small magnitude as not to cause perceptible rock disturbance at the grinding grooves: at [67], [69], [94], [96], [97];

(4) Mr Lester did not establish that Ashton harmed any Aboriginal objects in erecting a new fence at the Waterhole site. There was no evidence that there was any Aboriginal object along the line of the new fence or that any Aboriginal object was harmed in the process of erecting the fence. Mr Lester's

argument that Ashton breached condition 7 of the Court-issued AHIP was misplaced. Even if condition 7 were to have been breached (which was not found to be the case), that would not cause Ashton to have breached s 86(1) of the Parks Act. Non-compliance with conditions of an AHIP would only be relevant to rebut any defence that might be raised by Ashton under s 87(1) that any harm caused to Aboriginal objects was authorised by the AHIP. Ashton did not raise such a defence. In any event, Mr Lester did not establish that Ashton had contravened condition 7 of the AHIP because the evidence did not establish that Ashton did erect a fence within 70m of the Waterhole site: at [98], [100]-[107]; and

(5) Mr Lester did not establish that Ashton harmed any Aboriginal objects at the Pleistocene site in breach of s 86(1) of the Parks Act. The evidence did not establish that any of the Aboriginal objects that might have occurred at the Pleistocene site were in fact harmed. Mr Lester did not establish that Ashton was either primarily or vicariously liable for any act causing harm at the Pleistocene site. Xstrata was not engaged by Ashton to construct the realignment of Brunkers Lane/Lemington Road and Ashton did not control or direct Xstrata in the actual carrying out of the construction. Mr Lester's reliance on conditions 11 and 1 of the Court-issued AHIP was to no avail. Even if there were to be any breach of conditions 11 and 1 by Ashton, that would not establish a breach of s 86(1) of the Parks Act: at [124], [125], [127], [128], [132].

Aboriginal Land Rights

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2012] NSWLEC 174 (Pain J)

Facts: the applicant appealed under s 36(6) of the *Aboriginal Land Rights Act* 1983 ("the ALR Act") against the respondent Minister's refusal of an Aboriginal Land Claim ("ALC") on 1 October 2010. The ALC was lodged on 11 March 2009 for land was located immediately south of Camberwell village on the New England Highway in the Hunter Valley region. The whole of the claimed land was reserved as a temporary common in 1876 and since 1995 was managed by the Camberwell Common Trust ("the trust"). At the date of claim, 11 March 2009, the common consisted of three lots including the claimed land. These were referred to in the documents produced by trust officers on subpoena, dating from 2000 to 2010, as commons 1, 2, and 3 or by physical description rather than by lot number. The common was revoked on 16 April 2010 and the trust consequently dissolved. The Minister argued that at the date of claim firstly, part of the claimed land which was reserved as a temporary common was lawfully used and occupied by the Camberwell Common Trust and commoners; secondly, another part was needed or likely to be needed for road widening; and finally that the whole or part of the claimed land was needed or likely to be needed for the essential public purpose of coal mining. Therefore she argued that the land was not claimable Crown land.

Issues:

(1) whether the Minister could rely on documents produced on subpoena by trust officers to discharge her onus of proof; and

(2) whether at the date of claim the claimed land was used or occupied as a common.

Held: appeal dismissed:

(1) the Minister could rely on the documents produced on subpoena to establish her case: at [89]. There was no requirement for a proper officer to swear to the bona fides of the trust's business records for evidentiary purposes: at [83]. The proper officers were obliged to comply with the terms of the subpoena in answering it: at [84]. The documents supplied by the trust officers met the description in the subpoena: at [85]-[87]. The Minister was not required to rely on direct evidence to establish her case and there was no failure in the Minister's conduct of the case relying only on produced documents: at [88]; and

(2) the Minister had discharged the onus of proof that the claimed land was not claimable land as it was lawfully used or occupied at the date of claim (at [137]-[139]):

(a) the evidence established that the trust was operating up to and at the date of claim: at [91];

(b) a permissible inference arising from the evidence was that the claimed land was common 2: at [96]. The trust records confirmed that the claimed land was used for agistment during 2004 to 2006 (several agistment documents specifically referred to common 2 in terms or by physical description): at [96]-[98]. By inference arising from other trust records, the claimed land was used for agistment during 2000 to 2002 and 2004 to 2006: at [100]-[106];

(c) the trust's business records established that it was responsible for the management of the whole common, informed by its management plans, which were informed by the Department of Lands' memoranda: at [119]. The general references in the produced documents to the trust's activities on the common were inferred as applying to the claimed land: at [122]. It could also be inferred that the common was used for passive recreation at least intermittently: at [123]; and

(d) recent use or occupation was established as general trust activity occurred on the claimed land in the 2008/2009 year: at [127]. There was legal possession and conduct amounting to actual possession. The use of the common was intermittent and deliberately passive at times to accommodate protective measures as reflected through the ten year history in the trust records: at [132]. In that context, the use as a common was not notional or nominal: at [133]-[134].

Costs

Turnbull v Director-General of the Department of Premier and Cabinet (No 2) [2012] NSWLEC 124 ***(Pain J)***

(related decision: *Turnbull v Director-General of the Department of Premier and Cabinet* [2012] NSWLEC 121 Pain J)

Facts: Mr Turnbull ("the applicant") filed an appeal against a stop work order ("SWO") issued under the *Native Vegetation Act* 2003 ("the NV Act") on 30 March 2012. In *Turnbull v Director-General of the Department of Premier and Cabinet* [2012] NSWLEC 121 (*Turnbull (No 1)*) the Court dismissed the Director-General of the Department of Premier and Cabinet's ("the respondent's") notice of motion and held that the appeal had been filed in time in accordance with s 39(1) of the NV Act. At the outset of the hearing of the applicant's notice of motion seeking to set aside the SWO because of alleged invalidity, the respondent advised that the SWO was to be revoked by the Department that day. The applicant sought costs of the proceedings not already awarded in *Turnbull (No 1)*. The respondent opposed such an order, submitting that each party should pay its own costs. Rule 3.7 of the Land and Environment Court Rules 2007 ("the Court Rules") allows the Court to award costs in Class 1 proceedings if it is fair and reasonable in the circumstances.

Issue:

(1) whether it was fair and reasonable to award costs as the appeal was dismissed after the SWO was revoked before the final hearing.

Held: application granted:

(1) the effect of the revocation of the SWO was that the proceedings were rendered otiose and an order for dismissal of the appeal followed automatically: at [8]; and

(2) the applicant took steps to resolve whether the SWO was warranted and incurred costs in exercising his appeal rights against the order when it continued in force, as an appeal did not give rise to a stay of the SWO. It was not an answer to those costs being incurred that there was no determination of either the applicant's notice of motion arguing the SWO was invalid or on its merits. Through the unilateral action of the respondent, the subject matter of the proceedings was removed without a substantiated explanation. The circumstances suggested unreasonable behaviour sufficient to justify a costs order in the applicant's favour: at [9].

Valoth v Parramatta City Council (No 2) [2012] NSWLEC 161 (Sheahan J)

(related decision: *Valoth v Parramatta City Council* [2011] NSWLEC 1184 Moore SC)

Facts: the applicants sought costs in respect of a Class 1 appeal, and costs of the motion.

The substantive proceedings concerned the refusal of Parramatta City Council ("the council") to issue a building certificate ("BC") in respect of a dwelling house, as it was not constructed in accordance with the construction certificate ("CC"), having been built over an easement to drain water.

Development consent in respect of the dwelling was granted in December 2002; a CC first issued in October 2005, but was later modified in 2006, reducing the size of the dwelling to avoid an easement; and an interim occupation certificate issued in October 2007. Inspections and surveys on the subject property between 2006-2008 revealed certain non-compliances with the CC, including a 0.24m encroachment. As a consequence, the council issued a Notice of Intention to Issue an Order pursuant to s 121B of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), requiring registration of details of the encroachment on the property title. From February 2008 to April 2010 the parties attempted to negotiate a solution regarding the non-compliant encroachment, but in September 2010, with a solution yet to be found, the applicants applied for the relevant BC. Following its refusal to issue a BC, the council issued a second Notice of Intention to Give an Order pursuant to s 121H of the EPA Act, requiring partial demolition, and removal of the encroaching portion of the development.

The applicants were successful in their Class 1 appeal, with the Senior Commissioner directing Council to issue a BC for the dwelling. Prior to making that direction, however, the Senior Commissioner gave directions for the filing and service of an engineer's certificate regarding the easement and the encroachment.

Issues:

(1) whether the council had acted unreasonably in the circumstances leading up to the commencement of the proceedings, and in the conduct of the proceedings;

(2) whether the council had defended the proceedings for an improper purpose; and

(3) whether the council had maintained a defence to the proceedings which did not have reasonable prospects of success or was otherwise unreasonable.

Held: the applicants' notice of motion was dismissed, with each side required to pay its own costs of the substantive proceedings. The applicants were also ordered to pay the respondent's costs of and incidental to the motion, on a party-party basis, as agreed or assessed. The Court found that:

(1) although the council had been criticised for not realising that the requirement for notation on the title was beyond power, or seeking legal advice before imposing it, the applicants had the benefit of legal advice and representation, and did not question it: at [114];

(2) while the council may not have explained its position with crystal clarity at all times, there was no unreasonable, irrational or improper conduct on its part: at [118]; and

(3) it was not reasonable for the applicants to seek an order for the costs of the proceedings, when the relevant principles regarding costs were well settled, and the applicants had failed to satisfy the Court that an order should be made: at [120]-[121].

Oshlack v Rous Water (No 3) [2012] NSWLEC 132 (Pepper J)

(related decisions: *Oshlack v Rous Water* [2011] NSWLEC 73; (2011) 184 LGERA 365 Biscoe J, *Oshlack v Rous Water (No 2)* [2012] NSWLEC 111 Pepper J)

Facts: as a consequence of the decision in *Oshlack v Rous Water (No 2)*, whereby Pepper J dismissed Mr Alan Oshlack's summons, the first and second respondents, Rous Water and Ballina Shire Council, sought an order that Mr Oshlack pay their costs of the proceedings. Mr Oshlack requested that there be no order as to costs, because the proceedings were brought in the public interest.

The proceedings concerned a challenge by Mr Oshlack to a decision made by Rous Water to approve the construction and operation of four fluoridation facilities within its local government area, and a challenge to Ballina Shire Council's approval of construction of a fluoride dosing plant at Marom Creek. A preliminary question was separately determined in *Oshlack v Rous Water*, whereby Biscoe J found that the respondent

local councils were required to comply with the provisions of ss 111 and 112 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") with respect to the impacts on human health and the environment of adding fluoride to public water supplies.

The points of claim filed by Mr Oshlack on 17 September 2010 and amended points of claim filed 7 June 2011 included a pleading in the following terms: "it is a jurisdictional fact that the proposal to fluoridate ought to have been accompanied by an Environmental Impact Statement pursuant to s 112(1)(a)(i) of the EPA&A Act" ("ground 2"). This claim was abandoned by Mr Oshlack on the second day of the hearing.

Issues:

(1) whether the proceedings were brought in the public interest for the purpose of making a costs order under r 4.1(1) of the Land and Environment Court Rules 2007, namely;

   (a) whether the proceedings could be characterised as public interest litigation;

   (b) whether there was "something more" that justified departure from the usual costs rule; and

   (c) whether Mr Oshlack engaged in any disentitling conduct;

(2) whether and to what extent the order of "costs in the cause" made by Biscoe J following determination of the preliminary question affected the costs order to be made; and

(3) whether costs should be apportioned.

Held: Mr Oshlack was ordered to pay 75% of the first and second respondents' costs:

(1) *Oshlack v Rous Water* was conducted in the public interest, but *Oshlack v Rous Water (No 2)* was not. Following Preston CJ's three-step approach in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited (No 3)* [2010] NSWLEC 59; (2010) 173 LGERA 80:

   (a) the proceedings were characterised as public interest litigation because they affected those people living within the respondents' local government areas, and sought to enforce public law obligations imposed by s 111 of the EPA Act: at [17]-[18];

   (b) "something more" was present in *Oshlack v Rous Water* because that decision raised a novel issue of general importance, namely, that ss 111 and 112 of the EPA Act apply to local councils adding fluoride to public water supplies. However, the "something more" requirement was not met with respect to *Oshlack v Rous Water (No 2)* because the issues in that matter turned almost exclusively on the facts of the case and did not raise any issue of general importance: at [25]-[27]; and

   (c) there was disentitling conduct by Mr Oshlack occasioned by his late abandonment of ground 2 on the second day of the hearing in *Oshlack v Rous Water (No 2)*. There was no disentitling conduct in *Oshlack v Rous Water*: at [31];

(2) it would be inconsistent with Biscoe J's order of "costs in the cause" in *Oshlack v Rous Water* to make no order as to costs with respect to *Oshlack v Rous Water* but to order Mr Oshlack to pay the respondents' costs of *Oshlack v Rous Water (No 2)*: at [59]; and therefore,

(3) an order apportioning costs would be more appropriate because it would accommodate the fact that *Oshlack v Rous Water* was conducted in the public interest and *Oshlack v Rous Water (No 2)* was not, and it would ensure consistency with Biscoe J's order of "costs in the cause": at [65].

Davies v Sydney Water Corporation (No 2) [2012] NSWLEC 150 (Craig J))

(related decision: *Davies v Sydney Water Corporation* [2012] NSWLEC 130 Craig J)

Facts: in the principal proceedings the Court awarded compensation to the applicants for the compulsory acquisition of their land under s 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991. On the basis of their success, the applicants claimed entitlement to costs on the ordinary basis and indemnity costs by reason of an offer for settlement that was not accepted by Sydney Water Corporation ("Sydney Water"). Sydney Water submitted that each party should pay their own costs. Sydney Water opposed any award of indemnity costs to the applicants.

Issues:

(1) whether the applicants were entitled to indemnity costs on the basis that an offer of compromise was made under Pt 42 r 42.14 of the Uniform Civil Procedure Rules 2005 ("UCPR") where Pt 20 r 20.26 of the UCPR was not complied with; and

(2) whether the applicants should be denied costs on the ordinary basis for some reason, including:

(a) delay on the part of the applicants;

(b) that the applicants were not awarded the quantum of compensation initially sought by them;

(c) the applicants' failure to accept offers made to resolve the disturbance component of their claim;

(d) the capacity of the applicants to sell part of the residue land; and,

(e) the impact of interest to be paid by Sydney Water when considering offers of settlement.

Held: costs awarded to applicants on the ordinary basis:

(1) the applicants were not entitled to indemnity costs: at [52]. The Court found that, in purporting to make an offer of compromise, the applicants' offer included a requirement for the payment of costs and therefore failed to comply with Pt 20 r 20.26(2) UCPR: at [43]. The Court did not accept the applicants' submission that it should make an 'otherwise order' under Pt 42 r 42.14: at [44]-[45]. This submission was made on the basis that the letter of offer was a Calderbank offer, however as the offer was never identified as a Calderbank offer, it could not be treated as one: at [47], [50]. It was observed that even if the letter was a Calderbank offer, an order for indemnity costs would not have been made: at [52]-[53]; and

(2) the Court did not accept any of Sydney Water's submissions as to why the applicant should be denied costs:

(a) the delayed was reasonably explained: at [20]-[21];

(b) the compensation awarded exceeded the sum which Sydney Water had offered to resolve the claim and the applicants should be entitled to costs: at [22]-[23];

(c) the way in which the proceedings were conducted between the parties meant that it was not possible for the applicants to accept offers in relation to the disturbance claim. There was no reason to make an exception to the general principle under this submission: at [25]-[27];

(d) the capacity of the applicants to sell part of their residue land was not relevant to entitlement for costs: at [29]-[31]; and

(e) the impact of interest on Sydney Water was not a relevant consideration to the award of costs as, unless the parties otherwise agree, interest is always an additional component of compensation: [33].

Parramatta Business Freedom Association Inc v Parramatta City Council (No 2) [2012] NSWLEC 176 (Biscoe J)

(related decisions: *Parramatta Business Freedom Association Inc v Parramatta City Council* [2012] NSWLEC 104 Biscoe J; *Parramatta Business Freedom Association Inc v Parramatta City Council* [2012] NSWLEC 139 Biscoe J)

Facts: the applicants in two related proceedings succeeded in obtaining declarations that particular conditions in outdoor dining approvals, which were issued by the respondent council and which banned smoking in outdoor dining areas, were invalid. The parties were before the Court on the issue of costs. The applicants contended that, as they were ultimately successful, the usual costs order should be made. The council invoked apportionment of costs principles, relying on the applicants' failure on four out of six distinct grounds of challenge to the validity of the conditions. The applicants countered that their proceedings were brought in the public interest and apportionment of costs principles should not apply.

Issues:

(1) whether there should be a departure from the general rule that costs follow the event so that costs may be apportioned; and

(2) if so, whether the public interest character of a matter may be used as a sword by a successful applicant to obtain costs to which it otherwise would not be entitled under apportionment of costs principles.

Held: the respondent was to pay 75 per cent of the applicants' costs in both proceedings:

(1) the mere fact that a successful applicant does not succeed on all issues is insufficient to depart from the general costs rule; something out of the ordinary is required. Under apportionment of costs principles, there may be something out of the ordinary where there are multiple issues and a successful applicant fails on an issue or group of issues that are dominant, separate or discrete from those upon which it has succeeded: at [5];

(2) a departure from the usual order by way of some reduction in the costs awarded to the applicants was justified. First, the four grounds on which the applicants failed were substantial issues in contest which were separable and discrete from the matters on which they succeeded. Substantial time and costs were incurred in addressing the unsuccessful discrete challenges: at [7]. Secondly, the applicants failed to plead the central ground upon which they were successful, failed to raise it until five days before the commencement of the hearing, failed to fully raise it until the first day of the hearing, and were not granted any of the relief expressly sought in their summonses. Up until five days before the commencement, the proceedings as put forward by the applicants were ultimately unsuccessful. Had the successful grounds been pleaded and raised properly, the proceedings may have been shortened: at [10]. Finally, the eight affidavits prepared by the applicants were either not read, or partly or mostly rejected: at [11]; and

(3) the applicants' submission that apportionment principles should not result in any departure from the usual costs order because the proceedings were brought in the public interest was novel and without authority. Environmental proceedings brought in the public interest may provide a shield against costs if a public interest litigant is unsuccessful. It is reasonable for a litigant to adduce evidence to show that the proceedings are brought in the public interest, and the reasonable costs of such evidence should not be disallowed on costs awarded to a successful applicant. However, public interest considerations should not result in an award of costs to a successful public interest litigant to which it is disentitled under apportionment principles, at least in the circumstances of this case. Furthermore, the notorious health hazards of smoking make proceedings to overturn a ban on smoking in outdoor dining areas a weak candidate for characterisation as being in the public interest, and a strong reason for bringing the proceedings was to protect the commercial interests of the applicants: at [8]-[9].

Cessnock City Council v Rush [2012] NSWLEC 178 (Pain J)

Facts: on 13 March 2012 the second respondent councillor gave notice of a motion for, inter alia, the termination of the employment of the Cessnock City Council's ("the council's") General Manager, to be heard on 21 March 2012. On 20 March 2012 the council commenced Supreme Court proceedings pursuant to s 20B of the *Public Interest Disclosures Act* 1994 to restrain councillors from taking action to terminate the general manager's contract of employment. On 2 May 2012 the councillors passed a resolution delegating the management and performance of Supreme Court proceedings to a third person. On 25 May 2012 the council commenced Class 4 judicial review proceedings against ten councillors and the third person challenging that resolution. A letter dated 30 May 2012 sent by the council's solicitors to the respondents advised that the council would not seek costs against them if they executed and returned proposed consent orders by 13 June 2012. All the respondents except Mr Ryan and Mr Parker consented to the council's proposed orders. On the first return date, 15 June 2012, Mr Ryan made an offer of compromise suggesting that the parties consent to the Court ordering that the councillors be restrained from acting on or seeking to pass a similar resolution, and that the council be restrained from acting on the resolution until after the Supreme Court proceedings were finalised. The council rejected this offer. Points of claim were filed on 19 June 2012. Mr Ryan and Mr Parker consented to the council's proposed orders on 20 June 2012. The Court made the consent orders on 22 June 2012 quashing the resolution dated 2 May 2012, and restraining the councillors from implementing the resolution and from exercising functions in

reliance upon the resolution. The council only sought costs against Mr Ryan and Mr Parker who represented themselves.

Issues:

(1) whether the council should be awarded one eleventh of its costs of the proceedings up to and including 15 June 2012;

(2) whether the council should be awarded all its costs of the proceedings after 15 June 2012; and

(3) whether the council should be awarded the costs of the hearing.

Held: partial costs awarded:

(1) the council should be awarded one eleventh of its costs up to an including 15 June 2012 from each of the respondents subject to limitations on counsel's fees, inter alia:
   (a) the consent orders were largely in the terms sought by the council in the summons, suggesting an order should be made in the council's favour as essentially the respondents capitulated to the council: at [32]. The respondents did not act unreasonably in agreeing to consent orders but for costs immediately after receiving the points of claim: at [34], [39];
   (b) it was not disentitling conduct for the council to reject Mr Ryan's offer of compromise made on 15 June 2012 as the terms of that offer were not legally open to the council to implement. Further, the effect of the offer of compromise, if made, was to stay the proceedings until the outcome of the Supreme Court proceedings which were directed to different circumstances. The appropriateness of making such an order was not apparent: at [36];

(2) the respondents did not act so unreasonably after 15 June 2012 to warrant an award of all the council's costs: at [39]; and

(3) the Court was concerned about the costs incurred in relation to the costs hearing as it took much of a day when the substantive matter was settled on the second mention date before the Court, senior counsel was briefed and considerable work was done by the council's solicitors. Costs recovery costs should not overwhelm the amount of costs in contention. The council should be awarded half the costs of the costs hearing subject to further limitations: at [42].

Hurstville City Council v Minister for Planning and Infrastructure (No 2) [2012] NSWLEC 196 (Pain J)

(related decision: *Hurstville City Council v Minister for Planning and Infrastructure* [2012] NSWLEC 134 Pain J)

Facts: Hurstville City Council, ("the council") commenced Class 4 proceedings challenging a concept plan approval granted under the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 by the Minister for Planning and Infrastructure's ("the Minister's") delegate, the Planning Assessment Commission. Henlia No 24 Pty Limited ("Henlia"), the owner of the land, was joined as the third respondent by amended summons filed on 9 November 2011. Earljest Pty Limited ("Earljest"), the second respondent, filed an amended appearance on 25 January 2012 submitting to the Court's orders save as to costs. The points of claim raised four grounds of challenge. At the hearing only two grounds were pressed. One ground was whether the grant of concept plan approval was invalid because owner's consent in respect of the subject land was not provided prior to its determination in accordance with cl 8F(1) of the *Environmental Planning and Assessment Regulation* 2000 ("the Regulation"). The proceedings were dismissed in *Hurstville City Council v Minister for Planning and Infrastructure* [2012] NSWLEC 134. Henlia, Earljest, and the Minister sought their costs of the proceedings. The Council argued that Henlia's and the Minister's costs should be discounted as the owner's consent ground was brought in the public interest. The Court has a broad discretion to award costs under s 98 of the *Civil Procedure Act* 2005 ("the CP Act"). The usual rule, identified in r 42.1 of the Uniform Civil Procedure Rules 2005, is that costs follow the event unless the Court considers that some other order ought be made. Rule 4.2 of the *Land and Environment Court Rules* 2007 provides that the Court may decide not to award costs against an unsuccessful applicant if satisfied that the proceedings were brought in the public interest. Under s 101 of the CP Act the Court can award interest on any costs payable.

Issues:

(1) whether the costs of the Minister and Henlia should be discounted on the basis that the proceedings had been brought in the public interest;

(2) whether Henlia should be awarded interest on costs and disbursements; and

(3) whether the submitting party, Earljest, should be awarded its costs.

Held: costs order made:

(1) the Minister's and Henlia's costs were payable in full:

(a) the proceedings could be characterised broadly as having been brought in the public interest. There was public interest in resolving the operation of cl 8F of the Regulation in relation to approvals granted under the former Pt 3A and in ensuring that approvals granted under Pt 3A were valid. The council sought to enforce public law obligations: at [18]. There were however competing public interests as two levels of government were opposing parties: at [17]. As Pt 3A was repealed, the scope of the public interest served by the proceedings was narrow: at [18]; and

(b) while broadly public interest proceedings there were no special circumstances sufficient to justify a departure from the usual costs rule: at [22]-[25];

(2) an order for interest on Henlia's costs was not warranted: the council's actions were concerned with the proper interpretation and administration of the statutory planning regime; the proceedings were not commercial litigation; and the proceedings did not require extensive preparation resulting in Henlia being out of pocket for large amounts: at [35]. There was no evidence of payment of legal costs by Henlia. The Court did not infer in judicial review proceedings that it was likely that Henlia paid costs to its lawyers: at [36]; and

(3) Earljest's costs were payable. It properly incurred costs up to the time it filed a submitting appearance and incurred costs after that date. Earljest did not exceed its role as a submitting party.

Practice and Procedure and Orders

Friends of King Edward Park Inc v Newcastle City Council [2012] NSWLEC 113 (Biscoe J)

Facts: the applicant challenged the validity of a development consent granted by the first respondent council to the fourth respondent for, inter alia, a function centre and public access pathway along the slopes of a cliff in the King Edward Headland Reserve ("the Reserve") in King Edward Park in Newcastle. The applicant also challenged the validity of a plan of management for the Reserve, which was dedicated for public recreation. The Reserve and the Park were listed as places of heritage and cultural significance.

The grounds of challenge included that the proposed function centre was prohibited in the Reserve because such development did not fall within the additional uses of "conference centres and commercial facilities that provide for public recreation" as permitted by the plan of management, and that the plan of management did not lawfully provide for those two additional uses because they were inconsistent with the Reserve's dedicated purpose. Furthermore, the applicant pleaded that when approving the pathway, which was located on unstable ground, the council failed to make further inquiries which should have included a geotechnical assessment addressing the impacts of cliffline instability, and that there was manifest unreasonableness because the council could not have known the likely impacts of the development without having conducted those inquiries.

In two notices of motion, the council sought $70,000 from the applicant as security for the council's costs, whilst the applicant sought directions that the applicant could file and serve reports by a geotechnical expert. The applicant was an incorporated association and indicated that, though it could raise additional funds, it would not be able to raise the amount of security sought by the council and would not be able to continue the proceedings if security in that amount were ordered. In evidence was the applicant's draft geotechnical report on the instability of the location of the proposed pathway.

Issues:

(1) whether the applicant should be ordered to provide security for the council's costs; and

(2) whether the applicant should be allowed to file and serve its geotechnical expert's report.

Held: the council's notice of motion for security for costs was dismissed, and a direction was made that the applicant may file and serve an expert geotechnical report limited to engineering and safety issues in relation to the pathway in its proposed location and substantially to the same effect as certain parts of the draft report:

(1) security for costs should not be ordered against the applicant because of the public interest nature of the litigation: the applicant sought to enforce public law obligations, and the proceedings were brought to protect heritage items and to preserve the Reserve for its dedicated purpose. Even if the applicant's motive was influenced by local amenity impacts, the broad public interest in the outcome of the proceedings was not diminished by such motive. There was something more than characterisation of the proceedings as public interest litigation in that the proceedings raised novel issues of general importance, would contribute materially to the proper understanding of the *Crown Lands Act* 1989, were brought to protect the environmental and heritage values of the subject land, would affect a significant section of the public because the public was entitled to access the Reserve and Park, and the applicant had no financial gain in bringing the proceedings. Moreover, it was likely that the proceedings would be stifled if an order for security were made: at [42], [63]-[65]; and

(2) in judicial review proceedings, the general principle is that the only documents that are admissible are those which were before the decision-maker when the decision was made. However, there are limited exceptions. The pleaded duty to make further inquiries by obtaining a geotechnical assessment and the manifest unreasonableness allegation sufficed to make admissible evidence as to what that assessment would have revealed in order to assess the environmental consequences of the council's inaction. Rule 31.17 of the *Uniform Civil Procedure Rules* 2005 restricts expert evidence to that which is reasonably required to resolve the proceedings. Evidence of the environmental consequences of the council's inaction was required to resolve the proceedings. Part of the draft report satisfied this and only that part should be adduced: at [74]-[75], [90].

Turnbull v Director-General of the Department of Premier and Cabinet [2012] NSWLEC 121 (Pain J)

(related decision: *Turnbull v Director-General of the Department of Premier and Cabinet (No 2)* [2012] NSWLEC 124 Pain J)

Facts: in Class 1 proceedings commenced on 30 March 2012, Mr Turnbull ("the applicant") appealed against a stop work order issued under s 37 of the *Native Vegetation Act* 2003 ("the NV Act") which was received by post on 3 March 2012. The Director-General of the Department of Premier and Cabinet ("the respondent") filed a notice of motion to strike out the appeal because it was not filed within 30 days of personal service of an identical stop work order on 21 February 2012. The respondent accepted during the hearing that sending the order by post was also service.

Issue:

(1) whether time to appeal against the stop work order had expired.

Held: notice of motion dismissed:

(1) the statutory regime informed the Court's approach to the appeal right in s 39(1). A stop work order issued under the NV Act takes effect immediately unless otherwise specified; contains potentially onerous requirements placed on a landholder without notice; and failure to comply with it is an offence under s 37(5). The appeal right in s 39(1) is an important right within the context of the NV Act and lodging of an appeal does not stay an order: at [16]; and

(2) on the precise application of s 39, the appeal right arose as a result of an act of service of the notice of the order. The applicant could therefore appeal against the order served on him by post as he was not out of time to do so within the terms of s 39(1): at [17].

Brock v Roads and Traffic Authority of New South Wales (No 2) [2012] NSWLEC 114 (Sheahan J)

(related decision: *Brock v Roads and Traffic Authority of New South Wales* [2010] NSWLEC 244 Sheahan J)

Facts: Mrs Brock had objected to the statutory offer made by the Roads and Traffic Authority ("RTA") of $650,000 for market value plus $74,828 for disturbance, in respect of the acquisition of some of her land. Mrs Brock commenced Class 3 proceedings on 25 February 2009, and on 24 March 2009 the RTA paid Mrs Brock an advance of $668,007 plus statutory interest of $16,382.69. On 20 July 2009 the RTA and Mrs Brock reached agreement for the RTA to implement, at its expense, property and irrigation "adjustment plans" worth $334,700 for the benefit of the residue land. Some elements of those plans overlapped with some elements of Mrs Brock's claim. Mrs Brock argued that some of the work done by the RTA pursuant to that agreed package proved to be unsatisfactory for her purposes. Between 30 April 2010 and 5 May 2010 both parties made formal offers of compromise, but no agreement was reached. On 29 November 2010 the Court awarded Brock $437,087 for market value and $31,380 for disturbance, an amount less than that already advanced to her by the RTA. A Notice of Appeal was filed during June 2011.

By way of notice of motion ("NOM") filed 12 May 2011, Mrs Brock sought an order that the RTA pay her costs of the proceedings, and "such further or other costs as the court deems fit". If ordered to make any repayments in respect of the overpayment, the applicant, a 52-year-old woman supporting her son and husband on moderate and some times negative income, sought five years to do so. The RTA sought an order that Mrs Brock repay to it $187,987.44 together with interest, that each party pay its own costs of the proceedings and the applicant pay its costs on the two motions. The RTA also sought an order that the applicant be given no more than two years to repay the amount of the overpayment. Prior to determination of the NOMs, the respondent's solicitors made a series of offers in attempt to settle the outstanding matters, but no agreement was reached.

Issues:

(1) whether the Court has the power/jurisdiction to deal with the question of the repayment of the amount overpaid;

(2) if so, whether an order to repay should be made, and on what terms;

(3) whether the applicant should be ordered to pay any of the respondent's costs of the substantive proceedings, given their outcome and attempts made to settle them; and

(4) who should pay the costs of the hearing of the NOMs.

Held: the applicant's NOM dated 12 May 2011 was dismissed, and she was ordered to repay to the respondent $187,987.44, together with interest calculated from the date of payment, by 31 December 2014. Each party was ordered to pay its own costs of the proceedings, and the applicant was ordered to pay the respondent's costs on the motions, on a party-party basis, as agreed or assessed, within six months of agreement or assessment. The court found:

(1) it had the power and the jurisdiction to make the orders sought for repayment to the respondent of overpaid compensation because the repayment question was ancillary to a case brought in the Court which was clearly within jurisdiction. There was no need for the respondent to commence proceedings in another Court of competent jurisdiction: at [88];

(2) it was clear that the overpayment must be refunded, and that the Court had no discretion to decline to make an order for repayment, for example, on the grounds of the applicant's impecuniosity, or her pending appeal. However, the Court thought that it was necessary to be fair, just and reasonable towards the applicant in her straightened financial circumstances, and therefore ordered that the repayment be made by 31 December 2014: at [97-98]; and

(3) that, although the applicant was not successful in her application, applying the principles laid down in *Dillon v Gosford City Council* [2011] NSWCA 328 no order for costs should be made in respect of the substantive proceedings: at [124]. However, those principles do not apply to the question of costs on motions, which normally "follow the event". As the applicant was entirely unsuccessful in her application for costs, it was appropriate to order that she pay the respondent's costs on the motions on a party-party basis: at [126-130].

Simmons v Marrickville Council; Kababy Pty Limited v Marrickville Council [2012] NSWLEC 133 (Biscoe J)

Facts: the applicants purported to file appeals against refusals of their respective related development applications in Class 1 of the Court's jurisdiction outside of the six month time limit prescribed by s 97(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). By notices of motion, the applicants sought to extend the time for filing the appeals.

Issues:

(1) whether r 7.4 of the Land and Environment Court Rules 2007 ("the Rules") empowers the Court to extend the six month time limit for appeals against refusal of a development consent under s 97(1) of the EPA Act.

Held: the applicant's notices of motion were dismissed and both proceedings were dismissed:

(1) the EPA Act does not grant the Court power to extend the time period for an appeal prescribed under s 97(1). The Rules do contain provisions fixing the time for an appeal (r 7.1(1)(a)) and allowing the Court to extend any time fixed by the rules (r 7.3). However, as s 97(1) of the EPA Act, which also confers the right of appeal, expressly provides for the time within which an appeal may be made to the Court, r 7.1(1)(a) does not apply, and therefore r 7.3 also does not apply. Rule 50.3(1) of the Uniform Civil Procedure Rules 2005 also specifies a period within which an appeal may be lodged and allows the Court to extend that time. However, this rule is subject to any other Act that makes provision to the contrary, and therefore the power under this rule is also not available to extend the time prescribed by s 97(1) (*Chen v Virgona* [2008] NSWLEC 281 applied): at [8]-[9]; and

(2) rule 7.4 of the Rules does not empower the Court to extend the time limit for appeals under s 97(1) of the EPA Act. A right of appeal is a creature of statute. Section 74 of the *Land and Environment Court Act* 1979 ("the LEC Act") does not expressly or implicitly confer power to make rules of court varying the time periods prescribed by statute for making an appeal. Thus, if r 7.4 did empower the Court to do this, it would be invalid as beyond power. Rule 7.4 must be construed as operating to the full extent of, but so as not to exceed, the power conferred under s 74 of the LEC Act. Insofar as the Rules have anything to say in relation to time for appealing and extension of such time, rr 7.1 and 7.3 cover the field. Rule 7.4 is concerned with fixing times within which something is to be done in or in connection with proceedings that have been validly commenced. Proceedings that have not been commenced within the prescribed time have not been validly commenced: at [10]-[15].

Rossi v Living Choice Australia Ltd t/as Living Choice (No 2) [2012] NSWLEC 144 (Pepper J)

(related decision: *Rossi v Living Choice Australia Ltd t/as Living Choice* [2012] NSWLEC 112 Pepper J)

Facts: by notice of motion, the applicant, Mr Anthony Rossi, sought leave to file a further amended summons and further amended points of claim. The application was opposed by both the first and second respondents, Living Choice Australia Pty Ltd ("Living Choice") and The Hills Shire Council ("the council") respectively. Mr Rossi additionally sought leave to rely on expert surveying evidence, and requested an order be made to compel Living Choice to accept documents by electronic means.

In September 2010 Living Choice obtained development approval for the construction of a retirement village on land owned by it in Glenhaven. It began placing large amounts of fill on its land near the boundary of Mr Rossi's neighbouring land. Mr Rossi alleged that this breached the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). He also sought a declaration that the consent was invalid. He further sought injunctive and discretionary relief requiring Living Choice to stop work, remove the fill and demolish any structures built upon the Living Choice land pursuant to the consent.

Issues:

(1) whether the Court should grant leave to Mr Rossi to rely upon the amended pleadings, specifically:

(a) whether the amendments were futile;

(b) whether Mr Rossi's conduct could be characterised as an attempt to "approbate and reprobate";

(c) whether a sufficient explanation for the lateness of the application had been provided; and

(d) whether any prejudice was likely to flow to the respondents if the amendments were permitted;

(2) whether the Court should grant leave pursuant to r 31.19 of the Uniform Civil Procedure Rules 2005 ("the UCPR") for the applicant to adduce expert surveying evidence in the proceedings; and

(3) whether Living Choice should be directed, pursuant to UCPR r 2.1, to accept service of documents by electronic means.

Held: leave was granted permitting Mr Rossi to amend the summons and points of claim, and to adduce expert surveying evidence:

(1) with the exception of paragraph 47 of the proposed further amended points of claim, which incorrectly assumed that the Court had jurisdiction in respect of the common law tort of trespass, and in light of the recent decision of the Court in *Amalgamated Holdings Ltd v North Sydney Council* [2012] NSWLEC 138, which held that consideration of the matters in s 79C of the EPA Act must be undertaken by both a council and a regional panel where the function of determining a development application is conferred on a regional panel (at [29]), the proposed amendments, which included additional claims made against the council, were not objected to on the ground of futility: at [6]-[7];

(2) although the claims made by Mr Rossi against the council changed throughout the proceedings, compelling it to repeatedly amend its position, there was nothing preventing Mr Rossi from pressing claims that he had previously contemplated in correspondence but not formally pursued before the Court. This was not a case of approbation and reprobation: at [11]-[12];

(3) although no satisfactory explanation was provided for the delay in making the application, this was not of itself determinative: at [4] and [26]-[30];

(4) prejudice was likely to flow to both respondents if the amendments were permitted because each would be required to file and serve additional evidence, including expert surveying evidence. Yet this prejudice was not insurmountable because, provided Mr Rossi's evidence was limited to that described by him during the hearing, the hearing dates could be preserved. The amendments would require the allocation of additional hearing days, but the lengthening of the hearing was preferable to a multiplicity of proceedings. Further, the prejudice likely to flow to Mr Rossi if the amendments were not permitted would be considerable because the pleadings as otherwise constituted contained no mechanism permitting him to seek relief against the council: at [14]-[25];

(5) the respondents conceded that if the amendments were permitted, it would be reasonable to allow Mr Rossi to adduce expert surveying evidence to prove his allegations in relation to: first, the location of a wall built on the common boundary of Living Choice's and Mr Rossi's land; and second, the location of small pines on Mr Rossi's land: at [21] and [38]; and

(6) Living Choice was entitled, under UCPR r 10.5, not to provide an electronic address for service. Inconvenience and expense to Mr Rossi alone were not sufficient to circumnavigate compliance with that rule: at [46].

NA & J Investments Pty Ltd v Minister Administering Water Management Act 2000; Arnold v Minister Administering Water Management Act 2000 (No 4) [2012] NSWLEC 120 (Biscoe J)

(related decisions: *Arnold v Minister Administering the Water Management Act 2000* [2007] NSWLEC 531 Lloyd J; *Arnold v Minister Administering the Water Management Act 2000 (No 2)* [2009] NSWLEC 55 Biscoe J; *Arnold v Minister Administering the Water Management Act 2000 (No 3)* [2009] NSWLEC 56 Biscoe J; *Arnold v Minister Administering the Water Management Act 2000 (No 4)* [2009] NSWLEC 87 Biscoe J; *NA & J Investments Pty Ltd v Ministering Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000* [2011] NSWLEC 51 Craig J; *NA & J Investments Pty Ltd v Ministering Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 (No 2)* [2011] NSWLEC 115 Craig J; *NA & J Investments Pty Ltd v*

Ministering Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 (No 3) [2011] NSWLEC 171 Craig J)

Facts: the numerous applicants in both proceedings were farmers who challenged the validity of Water Sharing Plans under the *Water Management Act* 2000 ("WM Act"), and claimed damages and compensation. In notices of motion, the respondents sought orders striking out, in both proceedings, those parts of the amended Applications that sought damages or compensation and those parts of the amended Points of Claim that alleged that the applicants had suffered loss or damage on the basis that the pleadings disclosed no reasonable cause of action for damages or compensation; or alternatively, orders for separate hearings of questions relating to liability for damages and compensation; and an order pursuant to s 61 of the *Civil Procedure Act* 2005 that all questions about the admissibility of the lay and expert evidence filed in affidavits which the applicants proposed to adduce at trial be ruled upon in advance under s 192A of the *Evidence Act* 1995. The hearing of the motions became in part a case management hearing. In an earlier case management decision ([2011] NSWLEC 171), the Court had determined that the claims under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("Just Terms Act") should be separately determined from the judicial review and constitutional claims. The applicants then filed and served further amended process in the existing Class 4 proceedings reflecting the separation of the Just Terms Act claims.

Issues:

(1) whether the applicants' claims for damages and compensation should be struck out, or whether, alternatively, orders for separate hearings of those issues should be made; and

(2) whether advance rulings in relation to the applicants' lay and expert evidence should be made.

Held: certain parts of the amended Applications and Points of Claim concerning damages and compensation were struck out; the claims for invalidity on judicial review grounds and unconstitutionality should be determined separately from, and prior to, the determination of the claim in tort for conversion; the admissible lay evidence proposed to be adduced in relation to the judicial review grounds was confined to certain categories; the Just Terms Act claims should be transferred to Class 3 files; and other case management directions were made:

(1) at the hearing, the applicants indicated that they did not press those parts of the Applications and Points of Claim concerning compensation under the WM Act and damages for allegedly unconstitutional conduct. Thus, those prayers and paragraphs would be struck out: at [21]. However, the applicants pressed a claim for damages based on the common law tort of conversion, which they submitted was available under the Applications and Points of Claim in their presently amended forms. The respondents denied that the proceedings included a claim in tort for conversion. Since the tort claim would disappear if the applicants failed to establish that the Water Sharing Plans were invalid, the parties agreed during the hearing that the dispute as to whether the tort claim was within the proceedings should await the determination of the rest of the proceedings: at [23], [29]-[30];

(2) section 192A of the *Evidence Act* is intended to empower the Court to make advance rulings in the interests of efficient trial management. Whether the Court should make such rulings is a discretionary case management decision to be made in accordance with the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in dispute. In judicial review proceedings, subject to the particular grounds of review raised, lay and expert evidence of matters which were not before the decision-maker is not relevant and thus not admissible. To be admissible, lay and expert evidence must be relevant to establishing one or more of the particular grounds of review alleged. In this case, the applicants' grounds of judicial review were failure to have regard to relevant considerations, having regard to irrelevant considerations, irrationality, failure to comply with mandatory statutory procedures and denial of procedural fairness. At this stage, it was appropriate to make some advance rulings in relation to the applicants' lay evidence given that the applicants had served a substantial amount of lay evidence: at [40], [43]-[46]; and

(3) it was administratively inconvenient, unconventional and outside the contemplation of the *Land and Environment Court Act* 1979 that Just Terms Act claims should be brought, and continue in, Class 4 proceedings. The applicants' Just Terms Act claims should be transferred to Class 3 court files and be assigned Class 3 file numbers: at [11]-[14].

Gold and Copper Resources Pty Ltd v The Minister for Resources and Energy [2012] NSWLEC 149 (Craig J)

Facts: in proceedings challenging the validity of a mining exploration licence renewal, Gold and Copper Resources Pty Limited ("GCR") sought leave to further amend its points of claim. The proposed amendments alleged that the conduct of an employee of Newcrest Mining Limited ("Newcrest") pertaining to the renewal constituted fraudulent misrepresentation. A similar allegation was proposed against an employee within the Government department for whom the Minister was responsible. Both Newcrest and the Minister opposed the grant of leave on the basis that pleadings alleging fraud were deficient as they did not satisfy the need for particularity and specificity.

Issues:

(1) whether the general law requirement to plead fraud with particularity and specificity applied where not a court of strict pleading; and, if so

(2) whether the applicant's points of claim satisfied those general law requirements

Held: motion dismissed, applicant to pay costs of each respondent:

(1) in judicial review proceedings, as was the case here, the Court required that the applicant file its points of claim as if that document was one to which principles of pleading applied: at [35]. The general law requirements of pleading fraud required that such pleadings be pleaded specifically and with particularity: at [36]. This requirement had applied to proceedings in courts which were not courts of strict pleading: at [37]-[38]; and

(2) leave to amend the points of claim was refused: at [52]. In applying the general law principles to the applicant's pleadings, the Court found that the necessity for a relevant and adequately pleaded nexus between the fraudulent conduct and the decision sought to be impugned was not satisfied: at [39]-[45]. Additionally, the pleadings of fraud were otherwise deficient in their lack of particularity: at [56], [57].

Parramatta City Council v Zreik [2012] NSWLEC 141(Craig J)

Facts: the second respondent applied to vary orders made by the Court on 3 May 2011. Those orders, which were made by consent, applied to premises owned by the second respondent. The premises had been constructed in breach of a development consent. The breaches were substantial. The orders included an order restraining use of the premises ("Order 1"), together with an order suspending the operation of Order 1 for a period of 12 months ("Order 2"). The variation sought was a three month extension to Order 2 to enable notice to be given terminating the occupancy of 10 of the 14 dwellings on the premises. Parramatta City Council ("the council") opposed the variation.

Issues:

(1) whether the scope of the power to vary orders under Pt 36 r 36.16(3) of the *Uniform Civil Procedure Rules* 2005 ("UCPR") applied to the variation of orders sought;

(2) whether, pursuant to Pt 7, r 7.3 of the *Land and Environment Court Rules* 2007 ("LECR") the Court had power to vary the order in the manner sought; and if so

(3) whether the evidence justified the discretionary exercise of power to make the variation sought.

Held: motion dismissed, second respondent to pay council's costs:

(1) Pt 36 r 36.16(3) of the UCPR did not provide scope for the particular variation of orders sought in this case: at [30]-[32]. However, the interrelationship between r 36.16(4) of the UCPR and r 7.3 of the LECR meant that there was sufficient scope under r 7.3 to vary the orders where such orders are "conditional": at [33]-[37];

(2) when read as a whole it was apparent that the orders made on 3 May 2011 were "conditional" in character: at [38]-[39]. In the circumstances, the power under r 7.3 was enlivened and the discretion sought to be invoked by the notice of motion was available to the Court: at [40]; and

(3) the Court was not persuaded that discretion under r 7.3 should be exercised: at [57]. The evidence indicated that despite the second respondent's knowledge of the effects of the 3 May 2011 orders, he

did not act in a manner that sought to comply with those orders in a timely manner: at [50]. This was demonstrated by the delayed pursuit of a development appeal for use of the premises in their existing state. It was also demonstrated by entering into residential tenancy agreements for 12 month terms during the latter months of 2011 and the early months of 2012 in the face of an order restraining use: at [46], [47], [48].

Bright v Acrocert Pty Ltd [2012] NSWLEC 173 (Craig J)

Facts: the applicants applied by motion for two interlocutory orders. The first sought leave to substitute a new party for the first respondent pursuant to Pt 6, r 6.32(1)(d) of the Uniform Civil Procedure Rules 2005 ("the UCPR"). This order was sought with the consent of both the party to be substituted and the respondents. The second order sought leave to adduce expert evidence, in the form of an expert interpretation of architectural plans, under Pt 31 r 31.19 of the UCPR. The respondents partly agreed to and partly opposed the second order being made.

Issues:

(1) whether the Court should make an order for substitution of party; and

(2) whether the expert evidence was reasonably required to resolve the proceedings in accordance with Pt 31 r 31.17 of the UCPR.

Held: party substituted, expert evidence allowed:

(1) the substitution order was granted: at [3]-[5], [21]. In accordance with r 6.32(2), the liability and conduct of the original party was transferred to the substituted party: at [5], [21]; and

(2) the Court was satisfied that expert evidence was reasonably required to resolve theproceedings: at [20]. The respondents submitted that as the Court has expertise in matters involving the consideration of architectural plans, the expert evidence was not required. The Court observed that while this proposition was undeniable, the complexities of the plans gave rise to conjecture that would be best resolved with the aid of expert evidence, that evidence would not hinder the efficient and expeditious disposal of the proceedings: at [15]-[18], [19].

Gilbank v Bloore [2012] NSWLEC 172 (Craig J)

Facts: the applicants sought an interlocutory order in proceedings for judicial review of a development consent granted for alterations and additions to a residential property. Leave was sought to adduce expert evidence in the form of a town planning and road safety expert pursuant to Pt 31 r 31.19 of the Uniform Civil Procedure Rules 2005 ("the UCPR").The evidence was said to be relevant to two of the four bases of challenge to be argued at hearing.First, the evidence went to the identification of an existing and applicable Australian standard for driveway widths servicing residential properties; and, second it went to the common practice of a local authority in applying the identified standard. The respondents opposed the application.

Issue:

(1) whether the expert evidence was reasonably required to resolve the proceedings in accordance with Pt 31 r 31.19 of the UCPR.

Held: leave granted to adduce expert evidence:

(1) on the basis of the claims sought to be argued by the applicants, expert evidence was reasonably required to resolve the proceedings: at [18]. While the scope for adducing expert evidence in judicial review proceedings is limited, one exception to this limitation is to allow evidence that is required to establish the manner in which a council, whose decision is sought to be impugned, would ordinarily embark upon the process of decision making: at [10]-[11]; and

(2) in accordance with this exception, the expert evidence was restricted to:

(a) the existence and application of an Australian driveway standard: at [18], [20], [21]; and

(b) what a council acting reasonably would have considered in applying the identified standard to the subject development application: at [19], [20], [21].

Quakers Hill SPV Pty Limited v Blacktown City Council [2012] NSWLEC 200 (Sheahan J)

(related decision: *Sertari Pty Ltd v Quakers Hill SPV Pty Ltd* [2012] NSWCA 292 (Basten JA)

Facts: this was a notice of motion ('NOM') filed by the applicant on 24 August 2012, for the summary dismissal of a NOM brought by Sertari Pty Ltd, the intervener in Class 1 proceedings. The intervener's NOM sought, pursuant to r 49.19 of the Uniform Civil Procedure Rules 2005 ("UCPR"), the review of a decision by the Registrar on 20 August 2012 refusing its application to be joined as a party to the proceedings.

The substantive proceedings concern a consent granted by the Court for the use of a right of carriageway, subject to conditions, including deferred commencement conditions, one of which required the preparation of a pedestrian management plan to be submitted and approved by the respondent council. A copy was also to be provided to the intervener as an affected party. The Class 1 proceedings were commenced to appeal the council's deemed refusal to determine that the relevant deferred commencement condition had been satisfied. The appeal was referred to a conciliation conference under s34 of the *Land and Environment Court Act* 1979 ("the Court Act") , and, although the parties apparently reached an agreement in that process, as Sertari was seeking to be joined as a party, the matter was adjourned.

Issue:

(1) whether upon application by an intervener in these circumstances, the Land and Environment Court had power under r 49.19 of the UCPR to review the decision of the Registrar.

Held: the applicant's NOM filed on 24 August 2012 was upheld, and the intervener's NOM filed 20 August 2012 was dismissed. The intervener was ordered to pay the applicant's costs on the motions. All other questions of costs were reserved. The matter was remitted to the Registrar, for finalisation of the s 34 conference, and further disposition of the matter. The Court found that:

(1) the principles to be applied in/to the review of a decision of the Registrar, under r 49.19 when such review is available, are well established. The Court will intervene in such delegated decisions in the interests of justice, and it is not necessary to find an error of law on the Registrar's part: at [27]-[29];

(2) the decisions of *Michael Suttor Pty Limited t/as Michael Suttor Architects v Woollahra Municipal Council* [2009] NSWLEC 148; 169 LGERA 29 and *Hardie Holdings Pty Ltd v Cessnock City Council* [2010] NSWLEC 11 should not be followed in so far as they accept jurisdiction in a Judge of the Land and Environment Court to review a Registrar's adverse decision on a joinder application. An aggrieved non-party in Sertari's situation has to seek relief from the Supreme Court: at [64]-[65]; and

(3) the literal meaning of r 49.19 conforms with the legislative intent discernable in the UCPR, which clearly distinguishes parties from non-parties. That construction is dictated by the terms of relevant provisions, and does not lead to an absurd outcome: at [66]-[67].

Fokas v Kogarah RSL Club Ltd (No 2) [2012] NSWLEC 185 (Biscoe J)

(related decision: *Fokas v Kogarah RSL Club Ltd* [2012] NSWLEC 136 Biscoe J)

Facts: the parties were before the Court for the hearing of the remaining prayer in the notice of motion filed by the third respondent, Kogarah City Council ("the council"), which sought a vexatious proceedings order under the *Vexatious Proceedings Act* 2008 ("the Act") against the applicant to prohibit her from instituting future proceedings in the Court against the council. The Supreme Court had previously made a vexatious proceedings order against the applicant in relation to other persons. The applicant had commenced 15 proceedings, including the present one, against various respondents in various courts and tribunals. Seven of these were against the council in this Court, and all, except the present one, were unsuccessful. The Court had also granted leave to the respondents to apply for a variation of the costs order made in the substantive proceedings in [2012] NSWLEC 136. The first and second respondents, Kogarah RSL Club Ltd and the Uniting Church in Australia Property Trust (NSW), did not subsequently press for costs. The council sought the costs of Patrick Nash, the original third respondent for whom the council had been substituted, and the apportionment of its costs of the proceedings generally. The council submitted that as

the second respondent had applied for a modification of the subject condition just before the substantive hearing commenced, the applicant's proceedings were unnecessary. The applicant did not appear at the hearing of both issues.

Issues:

(2) whether the vexatious proceedings order sought should be made against the applicant; and

(3) whether the original costs order should be varied.

Held: the applicant was prohibited from instituting proceedings in the Court against the council without first obtaining the leave of the Court under the Act, and was ordered to pay Mr Nash's costs, the council's costs of particular prayers in its notice of motion, and the council's costs of the second day of the hearing in the substantive proceedings:

(1) though the applicant did not appear on the hearing of the motion for the vexatious proceedings order, and therefore was not heard, she was aware that the council's prayer for such an order was to be heard on a particular date. Therefore, s 8(3) of the Act was satisfied: at [7]. Thirteen previous proceedings brought by the applicant were vexatious in that they were instituted or pursued without reasonable ground. The present proceedings were also vexatious for the same reason. They challenged the validity of a condition of a development consent and, though the condition was found to be partly invalid, the errors and drafting slips in the condition (except one error) were identified in spite, rather than because, of the applicant, the ultimate relief granted fell far short of what the applicant sought, and the great majority of the hearing time was taken up with grounds which had no merit. Thus, the applicant had frequently instituted or conducted vexatious proceedings: at [13]-[16]. A vexatious proceedings order should be made because the council had suffered substantial costs and inconvenience defending the vexatious proceedings brought by the applicant against it, over the years the applicant had failed to comply with costs orders made against her in favour of the council, she had displayed no insight into her litigious history, and she had advanced no defence to the council's application for the order: at [17]-[18]; and

(3) there was no reasonable basis on which Mr Nash could have been joined to the proceedings and the applicant should pay his costs of the proceedings: at [21]. The applicant should also pay the council's costs of the prayers in its notice of motion to be substituted for Mr Nash and for the vexatious proceedings order: at [22]. As for the costs of the proceedings generally, the result of the substantive proceedings would not have occurred in any event if the applicant had not brought those proceedings. It was not known whether the council would grant the modification application, which intended to change the condition whereas the substantive orders dealt only with its validity and construction. However, the orders were made largely in spite, rather than because, of the applicant in the sense that she failed in her aim to invalidate the condition, pressed grounds which had no reasonable prospects of success, only partly identified a ground which resulted in orders, and those orders fell well short of the relief she sought. Conversely, the council was responsible for the defects, and the orders rectifying them were beneficial to the respondents. Therefore, on balance, the previous order that there be no order as to the costs of the proceedings should be modified to a limited extent by grafting onto it a qualification that the applicant should pay the council's costs of the second day of hearing in the substantive proceedings as this day would have been entirely avoided except for the applicant pursuing unmeritorious claims: at [27]-[28].

Eurobodalla Shire Council v Gerondal (No 4) [2012] NSWLEC 146 (Pepper J)

(related decisions: *Eurobodalla Shire Council v Gerondal (No 3)* [2012] NSWLEC 46 Biscoe J; *Eurobodalla Shire Council v Gerondal (No 2)* [2012] NSWLEC 37 Pain J*; Eurobodalla Shire Council v Gerondal* [2011] NSWLEC 259 Pain J; *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 77 Craig J)

Facts: on 15 March 2012 Biscoe J delivered judgment in *Eurobodalla Shire Council v Gerondal (No 3)* [2012] NSWLEC 46. Eurobodalla Shire Council ("the council") commenced those civil enforcement proceedings seeking a declaration that Mrs Gerondal had infringed s 97 of the *Protection of the Environment Operations Act* 1997 by failing to comply with a Prevention Notice issued under s 96 of that Act by a Commissioner of the Court. Injunctive relief was sought to enforce the Notice, as well as orders

authorising the council to enter onto Mrs Gerondal's land to effect compliance with the Notice. Mrs Gerondal was unsuccessful in those proceedings.

The judgment of Biscoe J erroneously made reference to the "*Protection of the Environment Operations Act 1987*", rather than the 1997 Act, and the orders entered on 30 March 2012 made both this error and an additional incorrect reference to Mrs Gerondal's land as "19 Munjeroo Land", rather than "19 Munjeroo Lane". The council applied to have the orders amended pursuant to the 'slip rule'. It also sought an order permitting it to inspect Mrs Gerondal's land for the purpose of obtaining quotes for the removal of items pursuant to the orders.

Issues:

(1) whether the 'slip rule' applied;

(2) whether the orders of Biscoe J should be amended pursuant to the 'slip rule';

(3) whether the orders of Biscoe J could be impugned on the basis of futurity;

(4) whether the Court had power to order an inspection in the circumstances; and

(5) whether the Court should make an order permitting the council to inspect Mrs Gerondal's land for the purpose of obtaining quotes for the removal of items.

Held: the orders of Biscoe J were amended pursuant to the 'slip rule' and an order was made permitting inspection of Mrs Gerondal's land:

(1) the 'slip rule' is contained in r 36.17 of the Uniform Civil Procedure Rules 2005 ("the UCPR") and permits the correction of an order or judgment that has been formally entered to correct a clerical error or accidental omission or slip, that is, a mistake upon which no real difference of opinion can exist (at [10]-[11]);

(2) during the course of proceedings, reference was made to the "*Protection of the Environment Operations Act* 1997". It was clear that a typographical error had been made in the judgment of Biscoe J wherein the year of the statute was transcribed as "1987" instead of "1997", and that the error was reproduced throughout the orders. Cross-examination of Mrs Gerondal revealed that she was not under any misapprehension as to what piece of legislation was being referred to, despite her assertions to the contrary. Similarly, Mrs Gerondal was aware that the reference to "19 Munjeroo Land" was a reference to her property at "19 Munjeroo Lane": at [17]-[18] and [22];

(3) Mrs Gerondal alleged that the orders of Biscoe J were expressed in terms of futurity and did not convey any requirement for immediate compliance (*Bobolas v Waverley Council* [2012] NSWCA 126). However, the orders of Biscoe J were distinguishable on the basis that the timeframe for implementation was clear on their face. In any event, the invalidity of the orders was not a matter that could be dealt with on an application to amend the orders pursuant to the 'slip rule': at [13]-[15];

(4) the Court had power to order an inspection pursuant to the liberty to apply contained in Biscoe J's previous orders, under r 23.8 of the UCPR and possibly pursuant to the plenary power contained in r 2.1 of the UCPR: at [28]-[29]; and

(5) it was an appropriate exercise of the Court's discretion to order the inspection because this would allow the council to obtain quotes for the removal of items pursuant to the orders made by Biscoe J on 15 March 2012: at [31].

Valuation

New South Wales Golf Club v Valuer General New South Wales [2012] NSWLEC 137 (Lloyd AJ)

(related decisions: *New South Wales Golf Club v Valuer General* [1993] NSWLEC 202, (1993) 81 LGERA 438 Bannon J; *New South Wales Golf Club v Valuer General* [2007] NSWLEC 40, (2007) 151 LGERA 360 Talbot J)

Facts: the New South Wales Golf Club ("the Club") objected to the Valuer General's ("VG") valuation of the golf course operated by the Club as at 1 July 2009 of $6.01 million. The Club is situated at La Perouse, bordering Botany Bay National Park and is 58.85 hectares in size. The land is owned by the State of NSW and under the lease to the Club (due to expire on 26 July 2036), the use is restricted to a golf course and the lessee requires the Minister's consent to part with possession ("Crown lease restricted"). Clause 90 of the lease permitted the Minister, upon three months notice, to withdraw any part of the subject land without compensation. In 1991 the Valuer-General placed a valuation on the Club's land of $4.4 million, on appeal reduced by the Court to $2.236 million. In 2003 the Valuer-General placed a value on the land of $3.75 million, reduced by the Court to $2.5 million The Club contended that the value should remain unaltered since the previous determination by the Court of $2.5 million in 2007, particularly since the value of golf courses had fallen in the interim. The Club's valuer contended in the course of giving his evidence that the value should be nil.

Section 14I of the *Valuation of Land Act* 1916 ("the Act") states that when valuing land that is Crown lease restricted, restrictions on the disposition or manner of use that apply to the land must be taken into account.

Issues:

(1) whether the appeal should be dismissed on the ground that the applicant's valuer had failed to discharge the onus of proof by relying on reports from the previous appeal;

(2) what constituted land improvements;

(3) what was the best method of valuation to apply; and

(4) what effect did the restrictions on the lease have on the valuation.

Held: allowing the appeal, revoking the VG's valuation and determining the value of the land as at 1 July 2009 as nil:

(1) the valuer had in fact considered the circumstances existing at the relevant base date, being 1 July 2009. In particular his evidence was that the market for golf courses, rather than going up as reflected in the Valuer-General's valuation, had gone down since the previous hearing. That was enough to discharge the onus under s 40(2) of the Act, at least on a prima facie basis: at [20];

(2) the land improvements meant that the course was largely already constructed, and it must be regarded as having its present form, complete with tees, fairways, roughs, bunkers and greens, all in their present condition: at [24]-[25];

(3) the direct comparison of sales of vacant and similarly zoned open-space land was not reliable as such land had the benefit of adjoining residential development or tourist facility, whereas the subject property was a stand-alone golf course: at [34]-[35]. Analysis of rents charged for other golf courses showed no consistent pattern and was not adopted: at [38] The sales of existing golf courses was also not a reliable indicator as the courses were not stand-alone courses but were primarily a marketing tool to promote and add value to the associated development: at [39], [41]. A hypothetical purchaser would look at potential income as a means of valuation, especially as the other means have been shown to be unreliable: at [44]; and

(4) it had to be assumed that the hypothetical purchaser would construct a clubhouse together with its usual facilities and include its projected trading figures into the equation: at [45] The question then was how much a hypothetical purchaser would pay for the golf course given the uncertainty of tenure. The amount a hypothetical purchaser would pay was nil, especially as the purchaser would need to expend a substantial sum of money providing the necessary facilities to enable the land to be used as a functioning golf course. If one were to adopt the capitalisation of rents method the valuation would still be nil: at [57]-[58].

Section 56A Appeals

AMP Capital v Tim Shellshear & Associates Pty Ltd [2012] NSWLEC 165 (Lloyd AJ)

(related decision: *Tim Shellshear & Associates v Warringah Council & AMP Capital Investors Limited* [2012] NSWLEC 1097 Morris C)

Facts: on about 6 July 2011 Tim Shellshear & Associates Architects Pty Ltd ("TSA") lodged a development application with Warringah Council ("the council") for a Medical Centre and Day Surgery in Brookvale. The application was made on behalf of Primary Health Care, who operated a medical centre within Warringah Mall but whose lease was soon to expire. AMP Capital Investors Ltd ("AMP") was a part owner of Warringah Mall. The council recommended approval of the application but on 7 December 2011 the Sydney East Regional Planning Panel ("the Panel"), exercising the determination powers of the council, refused the application. Refusal was made on the basis that: (a) the use would be prohibited under the new Warringah Local Environmental Plan ("LEP 2011"); and (b) the use was inconsistent with the Desired Future Character under the existing Warringah Local Environmental Plan ("LEP 2000").

TSA appealed against the Panel's determination. AMP was granted leave to be joined as a party to the appeal. Commissioner Morris upheld the appeal and granted development consent. AMP appealed against the decision of the Commissioner under s 56A of the *Land and Environment Court Act* 1979, relying on 11 grounds of appeal that, it submitted, demonstrated errors of law.

Issues:

(1) whether the Commissioner took into account irrelevant considerations, or failed to take into account relevant considerations;

(2) whether the Commissioner's decision was illogical, irrational or manifestly unreasonable; and

(3) whether the Commissioner failed to give adequate reasons for the decision.

Held: the summons was dismissed:

(1) several of the Commissioner's findings challenged by AMP were findings and conclusions of fact and therefore contained no error of law: at [7] and [25];

(2) the Commissioner took into account many legitimate merit considerations, which were far from irrelevant. The taking into account of the aims of the LEP was not, for instance, an irrelevant consideration. Many of AMP's submissions in this regard demonstrated an overly pernickety or "fine-tooth comb" approach to examination of the Commissioner's reasons. Even if some of the Commissioner's considerations were irrelevant, they did not affect the decision in a material way: at [5]-[6], [41] and [44]-[45];

(2) it could not be said that the Commissioner failed to take into account relevant considerations. The policies and strategy documents referred to by AMP's expert, for example, were referred to in the Commissioner's reasons: at [61] and [78];

(3) it could not be said that the findings made by the Commissioner were made without evidence. Nor could it be said, bearing the test for irrationality or illogicality espoused in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 in mind, that there was anything irrational, illogical or manifestly unreasonable in the commissioner's findings. AMP's submissions seemed to be an invitation to impermissibly review the merits of the decision: at [56] and [67]; and

(4) the reasons given by the Commissioner satisfied the legal requirements to give reasons, and in particular, they dealt with the strategic planning documents relied upon by AMP's expert: at [63].

Johnson v Angus [2012] NSWLEC 192 (Preston CJ)

(related decision: *Johnson v Angus* [2012] NSWLEC 1207 Galwey C)

Facts: the Johnson family had views from their property to the waterway of Pittwater over the neighbouring property, owned by Mr and Mr Angus. Over the years, the water views from the Johnsons' house had been reduced due to the growth of trees on the Angus property. Three members of the Johnson family applied to the Court under s 14B of the *Trees (Disputes Between Neighbours) Act* 2006 ("Trees Act") for an order for the removal of three trees (a Turpentine and two Bangalow palms) and periodic pruning of fronds of other trees. Section 14B allowed an owner of land to apply to the Court for an order to remedy, restrain or prevent a severe obstruction of any view from a dwelling situated on the land if the obstruction occurred as a consequence of trees to which Part 2A of the Trees Act applied being situated on adjoining land. The trees to which Part 2A applied were defined in s 14A of the Trees Act as "groups of 2 or more trees that: (a) are planted (whether in the ground or otherwise) so as to form a hedge, and (b) rise to a height of at least 2.5 metres (above existing ground level)." The Commissioner partly upheld the Johnsons' application finding that the palms, but not the Turpentine, formed a hedge that severely obstructed a view and ordered the removal of two Bangalow palms and the periodic pruning of fronds of a Kentia palm and numerous Bangalow palms. The Commissioner found that the Turpentine was not a tree to which Part 2A of the Trees Act applied because it was not "planted", but rather self-sown, and it did not form part of a hedge with the palms, so as to satisfy the jurisdictional test in s 14A(1) of the Trees Act. The subject proceedings concerned the Johnsons' appeal against this decision on questions of law. The Johnsons submitted that the Commissioner erred in his construction of the word "planted" and that this word was interchangeable with "situated" or "located". They argued that the Commissioner concluded incorrectly that a hedge cannot include a separate or distinctively individual tree within a group of trees. They submitted that the Commissioner made a factual "finding not reasonably open on the evidence", that the Turpentine was more likely than not self-sown rather than planted. Finally, the Johnsons submitted that the Commissioner erred in finding that he had no jurisdiction in respect of the Turpentine.

Issues:

(1) whether the Commissioner erred in his interpretation of s 14A(1) of the Trees Act;

(2) whether the Commissioner made a finding of fact not reasonably open on the evidence; and

(3) whether the Commissioner erred by failing to exercise jurisdiction in respect of the Turpentine.

Held: dismissing the summons and making no order as to costs:

(1) the Commissioner did not err in interpreting the word 'planted' in s 14A(1)(a) as requiring human agency to put or set a tree in the ground for growth and as excluding a self-sown tree. The legislative drafter's choice of the word "planted" and not "situated" in s 14A(1)(a) must be seen to be deliberate: at [15], [16], [30], [32], [44];

(2) A grammatical analysis of the sentence in s 14A(1) of the Trees Act corroborated the meaning of the word 'planted'. The first part of the phrase was expressed in the simple present tense (trees that are planted) rather than the simple past tense (trees that were planted) or the past perfect tense (trees that had been planted). The use of the simple present tense in s 14A(1)(a) expanded the consideration so as to include not only the past action of planting the trees but also the current character of the trees as being planted: at [22], [29]; at [17] and [18];

(3) the goal of the verb "to form" was "a hedge". Hence, the adverb clause of purpose "so as to form a hedge" meant "with the result or purpose of making or producing a hedge". A tree that is self-sown can never satisfy the purpose stated in the adverb clause of purpose "so as to form a hedge": at [25], [26];

(4) the criteria relevant to determining whether trees are planted so as to form a hedge under s 14A(1)(a) include being sufficiently close in proximity, the species of trees planted, whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), the function and growth of the trees, and the planting arrangement of the trees: at [40], [41];

Endo Technik-Nord Pty Ltd v Kiama Municipal Council [2012] NSWLEC 198 (Pain J)

(related decision: *Endo Techik-Nord Pty Ltd v Kiama Municipal Council* [2012] NSWLEC 1096 Brown ASC)

Facts: Endo Technik-Nord Pty Ltd ("the appellant") appealed under s 56A of the *Land and Environment Court Act* 1979 against the decision of a commissioner who dismissed three appeals. One appeal was against Kiama Municipal Council's ("the council's) refusal to grant consent for a development described as a "cottage industry". The appellant proposed to conduct day courses on meditation and relaxation once a month for 10 - 15 participants. Items produced by the participants undertaking creative pursuits would be available for sale. Two facilitators would teach art to the participants and would produce instructive material for sale. The appellant's director would also produce instructive material for sale. The participants were to use an existing dwelling house on land zoned rural and timber stairs and a viewing platform constructed without development consent on high conservation value land zoned environmental protection. The Kiama Local Environmental Plan 1996 limited the purposes for which development was permissible in areas of high conservation value. Development for the purpose of a cottage industry was permissible with consent. Determination of this appeal dealt with the other two appeals before the Commissioner concerning the council's order requiring demolition of, and refusal to issue a building certificate for, the timber stairs and viewing platform.

Issue:

(1) whether the proposed activity was for the purpose of "cottage industry" as defined in the Kiama LEP.

Held: three appeals dismissed:

(1) the purpose of the proposed activities of relaxation and production of goods for sale was for facilitating meditation and relaxation exercises and spiritual development of course participants. It was not for the purpose of the production of goods in the definition of "industry" which refers to manufacturing process, including any handicraft or process of making goods or articles for sale. As the proposed use was not for an industrial purpose, it could not be a cottage industry: at [16];

(2) the definition of cottage industry requires that no more than two persons be employed other than residents of a dwelling. This definition was reflective of an activity whereby any persons referred to in the definition were engaged in the activity. In the context of this definition, participation of paying customers in a course on relaxation and meditation conducted by someone else was employment or the conduct of that activity. Therefore the proposed activity exceeded the limit on the number of persons permitted to be employed in a cottage industry: at [20];

(3) as the timber stairs and viewing platform were not part of a cottage industry, they were prohibited in the area of high conservation value: at [25].

Commissioner Decisions

Woolloomooloo Nominees Pty Ltd v Council of the City of Sydney [2012] NSWLEC 1179 (O'Neill C)

Facts: the applicant appealed against the refusal of consent to a development application for a rooftop addition to an existing hotel, the Woolloomooloo Bay Hotel, on the corner of Cowper Wharf Road and Bourke Street, Woolloomooloo. The existing hotel consisted of two storeys, with an approved maximum capacity of 485 people. The proposal was to retain the existing building with some alterations to the ground floor and first floor and to construct a second floor addition in lightweight materials to be used as a lounge bar, setback from the existing parapet of the hotel to provide an external terrace area and garden bed behind the parapet. The northern section of the proposed roof breached the 12m height control for the site by 0.8m and the 1.5:1 FSR control by 216 sq m, under the *South Sydney Development Control Plan 1997: Urban Design*. The proposed maximum number of people was 635 including staff, patrons and performers, and proposed indoor operating hours on a permanent basis was 9am to 2am Monday to Saturday and 10am until midnight on Sundays; and proposed outdoor operating hours on a permanent basis were 9am to midnight Mondays to Saturdays and 10am until midnight on Sundays. The current operating hours of the hotel did not conform to the *City of Sydney Late Night Trading Premises Development Control Plan* 2007 ("the Late Night Trading DCP"), as the approval for the existing hours was granted prior to the commencement of that DCP. The hotel is a local heritage item, and within the vicinity of local heritage items, and located within the Woolloomooloo Heritage Conservation Area ("the HCA"), under the *South Sydney Local Environmental Plan* 1998 ("the LEP"); and is within the vicinity of State significant heritage items, listed in the State Heritage Register and under the LEP. The *City of Sydney Heritage*

Development Control Plan 2006 ("the Heritage DCP") provided that the Heritage Inventory Assessment Report for each item or area would be considered as part of assessment of development applications, and that Heritage Inventory Assessment Reports could be obtained by contacting the council or online through the NSW Heritage Branch. There were two versions of the Heritage Inventory Assessment Report for the hotel: the 2005 version printed from the NSW Heritage Branch database being the version relied on by the applicant in its Statement of Heritage Impact submitted as part of the development application; and the 2012 version provided by the council's expert witness, which had been updated using relevant information taken from a heritage report for a nearby building.

Issues:

(1) whether the proposal would have an adverse impact on the heritage significance of the hotel, heritage items in the vicinity, and the HCA;

(2) whether the breaches of the height and floor space ratio controls for the site resulted in a proposal that failed to meet the objectives for those controls;

(3) what height the acoustic shield on the western side of the third floor terrace should be;

(4) whether the proposed operating hours should be consistent with those permitted under the Late Night Trading DCP; and

(5) what conditions should be imposed in relation to a trial period, security officers, and substantiation of noise complaints.

Held: directing amendments to the architectural plans, Plan of Management and conditions of consent:

(1) the updated 2012 version of the Heritage Inventory Assessment Report was the relevant version for consideration, pursuant to s 39(3) of the *Land and Environment Court Act* 1979, and because both heritage experts had relied on the updated version in their statements of evidence and their joint statement: at [61];

(2) the proposal should be amended to retain the northern elevation ground floor opening with new doors to match existing; and the grille should be retained and the northern elevation first floor window to the stairwell should be retained and the lift repositioned; as those amendments would reduce the overall impact of the proposal on the heritage significance of the hotel. The proposal satisfied the relevant requirements in the LEP and its impact on the heritage significance of the hotel, heritage items in the vicinity and the HCA was acceptable: at [64], [65];

(3) the proposal was sufficiently distinguished from the existing building in terms of setbacks from the parapet, form and materials to respect and reflect the overall built form of the area and was consistent with the built form along the southern side of Cowper Wharf Road and did not detrimentally affect the area. The proposal satisfied the objectives and performance criteria for the height and FSR controls: at [71];

(4) the proposal was appropriate to the condition of the site and its context and did not interfere with the contribution the existing masonry façade made to the physical definition of the street wall and public spaces, and satisfied the objectives for height control in the draft local environmental plan which had a high level of certainty: at [77];

(5) the proposed 1.4m high transparent acoustic screen wrapping around the northern and western elevations of the second floor terrace would effectively fulfil its intended purpose of ameliorating the noise of patrons' voices: at [83];

(6) the trading hours for the proposal should be consistent with the Late Night Trading DCP, and it was appropriate to require a 12 month trial period for extended trading hours: at [90], [91];

(7) the council's version of the condition requiring security officers to wear fluorescent vests at all times should be imposed: at [97]; and

(8) the applicant's version of the condition regarding a noise complaint was preferred as it provided a more scientific basis for overcoming any potential non-compliance with noise conditions and allowed the applicant to be involved in determining whether the complaint was valid and if so how it could be rectified: at [98].

Harris v Hurstville City Council [2012] NSWLEC 1224 (Hussey C)

Facts: the applicant appealed against the refusal of consent to a development application for conversion of an existing shop in Kingsgrove containing a funeral home to include a mortuary. The proposal did not include funeral services or viewings of deceased persons. The delivery of bodies was to be by delivery van using a rear roller door off a rear laneway. The premises were between two other shops; and there were existing dwellings on the opposite side of the rear laneway and the end of the laneway. The adjoining residence, which was at the interface with the zoning change from Business Centre to residential, shared the laneway for access to its rear yard and for maintenance of vegetation along the boundary fence.

Issues:

(1) whether consent should be refused because of amenity impacts from noise, privacy and traffic arising from the use of the rear lane; and

(2) whether consent should be refused in the public interest.

Held: upholding the appeal and granting development consent:

(1) the proposed development as modified with no night-time use would not result in any material traffic impacts so as to cause adverse amenity: at [18];

(2) the existing funeral home marketed coffins, transported to and from the site in vans and hearses using public roads and the public laneway, and the change in use would not significantly alter this situation: at [25];

(3) the revised internal layout for the mortuary enabled delivery vehicles to manoeuvre inside the building and the body transfers to be undertaken within the enclosed building and this would not cause any substantive amenity impacts: at [27];

(4) while strong sentiments were expressed about the possible psychological impacts on the residents of the adjoining residence based on their apprehensions about the activities of the mortuary, no expert evidence was provided and those objections were given diminished weight: at [33]; and

(5) there was no specific evidence that demonstrated widespread offence to the community arising from the limited expansion and change of use of the funeral parlour: at [37].

Reemst v Woollahra Municipal Council [2012] NSWLEC 1141 (Fakes C)

Facts: the applicant appealed under s26(1)(a) of the *Swimming Pools Act* 1992 ("the Act") against the refusal by the council of an application under s22 of the Act for an exemption from the child-resistant barrier requirements for an outdoor swimming pool. The council had approved the construction of the swimming pool in December 2008, subject to a condition requiring that the construction certificate plans and specifications must demonstrate compliance with the provisions of the Act, by detailing the location of all child-resistant barriers and the resuscitation sign. The application for an exemption was made on 10 February 2012, after the Principal Certifying Authority informed the applicant that while the swimming pool enclosure had been constructed in accordance with the construction certificate issued on 29 September 2010, it was non-compliant and an exemption should be sought. There were three ways of accessing the pool: a gate in the dividing fence on the southern side of the garden; a gate in an internal fence on the eastern side of the garden; and relevant to these proceedings, a door from the lower ground floor room to the eastern end of the pool deck. The parties' experts agreed that the lever on the door handle on that door would have to be replaced with a handle or inoperable lever in order for it to be a fully compliant child-resistant doorset. The *Swimming Pools Regulation* 2008 ("the Regulation") was amended with effect from 1 May 2011. The Regulation as in force before the amendment ("the Historical Regulation") prescribed compliance with the standards set out in AS 1926.1 – 2007 ("the Standard"). Clause 2.8 of the Standard included a note stating that in most circumstances allowing direct access to a pool area from a building even via child-resistant doorsets compromised safety and that option should only be used with caution where physical circumstances preclude any other acceptable solution. The Regulation following amendment ("the Current Regulation") referred to compliance with AS 1926.1-2007 or the Building Code of

Australia ("the BCA"). Part 3.9.3.0 of the BCA provided that a child-resistant doorset must not be used in a barrier for an outdoor swimming pool.

Issues:

(1) whether the relevant legislation and standards were those applicable at the time of the exemption application, or those applicable at the time the construction certificate was issued;

(2) whether compliance with the requirements was impracticable or unreasonable, because of the physical nature of the premises, or the design or construction of the swimming pool; and

(3) whether provision of a modified handle or keypad on the door from the dwelling would be an alternative provision, no less effective, for restricting access to the pool.

Held: dismissing the appeal and refusing the application for an exemption:

(1) the relevant legislation and Standards were those relevant at the time of the exemption application to the council: at [32];

(2) it was clear from the site inspection and the evidence of the temporary barrier that a similarly dimensioned and permanent child resistant barrier was practicable. There was adequate space at the eastern end of the pool deck to accommodate a gate, and the Act, the Regulation, and the Standards enabled an owner to choose the materials from which such a barrier was to be constructed: at [42];

(3) the 2011 amendment to the Regulation tightened up the requirements for child-resistant barriers by prohibiting child-resistant doorsets as a component of a child-resistant barrier around outdoor pools and the amendment of the Standard removed the apparent anomaly between provisions in the earlier edition. Those requirements were guided by good sense and compliance with them did not exceed the bounds of reason: at [43];

(4) there was nothing in the design or construction of the pool or in the physical nature of the premises that made it either impracticable or unreasonable to install a compliant child-resistant barrier: at [44];

(5) a child-resistant barrier was practicable and reasonable and a child-resistant doorset by itself was inadequate and unjustifiable: at [46]; and

(6) while there was some confusion regarding the permissibility or otherwise of child-resistant doorsets as part of a child-resistant barrier in the Historical Regulation and the earlier version of the Standard, the proceedings were initiated because the barriers around the pool were non-compliant with the requirements at the time of the construction certificate. The parties' experts had found the door handle to be unsatisfactory. Nothing had changed in the physical nature of the premises or in the design or construction of the pool from the construction certificate stage, and at the construction certificate stage it was also practicable to have installed a compliant child-resistant barrier: at [55].

Forgall Pty Ltd v Chief Executive of the Office of Environment and Heritage [2012] NSWLEC 1219 (Brown ASC)

Facts: the applicant appealed under s 39(1) of the *Native Vegetation Act* 2003 ("the NV Act") against a direction for remedial work ("the Direction") made pursuant to s 38(1) of the NV Act for part of a property at Wallabi Point. The Direction identified 10 separate areas (Areas 1 to 10), and with further survey work those areas were redefined to provide for 7 areas (Areas A to G). The applicant conceded that there was jurisdiction to make an order under s 38 of the NV Act in respect of the Areas A, B, C, D, E and F, excluding the area of an asset protection zone ("APZ"). There was agreement that vegetation clearing had occurred in Area G between 25 August 1997 and 17 May 2000 and 26 May 2006 and 19 March 2009; and that no development consent had been granted by the Minister in accordance with s 13 of the NV Act or that a property vegetation plan existed for Area G. Area G was located near the southern boundary of the site with Saltwater National Park, and Saltwater Gully to the west. The majority of Area G was "protected land" under the *Rivers and Foreshores Improvement Act* 1948 ("the RFI Act"), being within 40m of Saltwater Gully, and in 2000 a remediation notice was issued under the RFI Act requiring revegetation of disturbed areas within 40m of both sides of Saltwater Gully. In 2007 Greater Taree City Council ("the council") approved the erection of a machinery shed. The hearing proceeded on the basis that the 2007 approval for the shed was located within Area G. That consent was modified in 2009 and provided for a

first floor level within the existing shed and other minor modifications. The council informally sought relocation of the shed to its present location which was further east from Saltwater Gully than the approved location and some 30m outside Area G.

Issues:

(1) whether the clearing of vegetation in Area G was not in contravention of the NV Act because it was carried out as part of the historical activities on the site;

(2) whether the clearing was permitted by a development consent granted by the council for the erection of a shed;

(3) whether the clearing was permitted as routine agricultural management activities ("RAMA") being the maintenance of the area as a place for the parking and storage of farm equipment or a "rural structure";

(4) whether the clearing was permitted as it was "regrowth";

(5) whether the clearing was permitted as it was not "protected regrowth";

(6) whether any native vegetation that had been cleared was "likely to cause, on or in the vicinity of the land, any soil erosion, land degradation or siltation of any river or lake, or any adverse effect on the environment" as required by s 38(1)(b) of the NV Act;

(7) whether if the jurisdictional preconditions in s 38(1)(a) or (b) of the NV Act were satisfied, the Court should in the exercise of its discretion give a Direction.

Held: revoking the Direction and making a direction under s 39 of the NV Act requiring remedial work including fencing, stock management, removal of waste and weeds, regeneration works, monitoring and reporting:

(1) the approval of the shed did not authorise the clearing of the vast majority of Area G; at best, a relatively small area of Area G may have been required to be cleared if the shed was constructed in its approved location: at [24];

(2) even if the shed was approved within Area G and that approval authorised the clearing of vegetation, the clearing of native vegetation was not permitted as a RAMA as the clearing pre-dated the approval granted by the council: at [27];

(3) in the absence of evidence, the applicant had not established that any land cleared for a RAMA was cleared to the minimum extent necessary for carrying out activities associated with a RAMA as required under s 22(2)(a) of the NV Act: at [28];

(4) no evidence was provided to support the requirements of an exemption for Rural Structures under *State Environmental Planning Policy No 46 –Protection and Management of Native Vegetation*: at [30];

(5) approval of the shed by the council did not authorise the removal of any native vegetation under the NV Act; approval of the Minister was required by s 13 of the NV Act and that approval had not been granted: at [31];

(6) historical activities had not resulted in any meaningful clearing of native vegetation in Area G: at [65];

(7) Area G had been revegetated in compliance with the remediation notice issued under the RFI Act; and for the purposes of the NV Act the revegetation in 2000 was "growth" rather than "regrowth": at [75], [79];

(8) the applicant had not established that the native vegetation cleared in Area G was "only regrowth" within the meaning of s 19(1) of the NV Act: at [78];

(9) for the purposes of the NV Act the clearing between 26 May 2006 and 19 March 2009 was unlawful within 20m of the watercourse marked in blue on the "Vulnerable Land Map" for NSW: at [82];

(10) the clearing of Area B was likely to cause soil erosion and siltation largely because of its proximity to Saltwater Gully: at [91]; and

(11) the jurisdictional precondition in s 38(1)(b) was established so a direction could be made pursuant to s 38(1); and a direction was warranted: at [94], [95].

Dellara Pty Ltd v Minister for Planning and Penrith City Council [2012] NSWLEC 1186 (Tuor C, Johnson AC)

Facts: the applicant appealed pursuant to s 75K of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the refusal by the respondent Minister of a major project for a waste and resource management facility under Part 3A of the EPA Act. Penrith City Council ("the council") was an objector to the application and under s 75K(3) was a party to the appeal. The site, with an area of 60ha, had operated intermittently as a quarry since 1981 which had resulted in disturbance across most of the land, including two extraction areas, four dams, and a sump and perimeter bund walls which varied in height from 5m to 19m and were 1.9km long. There is a residential subdivision approximately 500m from the northern boundary of the site; rural residential properties to the east of the site; and Department of Defence owned land with significant areas of vegetation to the west of the site. During the period 2002 to 2008 unauthorised construction and demolition wastes including asbestos containing materials had been brought onto the site and incorporated into the northern and north eastern bund walls to a height exceeding the 3m height approved under the 1981 development consent. After the appeal was lodged, the applicant was granted leave to amend the project application ("the Modified Preferred Project"). Leave was granted in October 2011 to further amend the project application ("the Further Modified Preferred Project"). The Further Modified Preferred Project described the proposal as construction and operation of a materials recycling facility for construction and demolition waste and commercial and industrial waste; resumption of clay/shale extraction (particularly light-firing clay/shale); development and operation of staged waste emplacement cells; refurbishment of weighbridges and offices and construction of a range of on-site infrastructure; and progressive site rehabilitation including modification of existing perimeter bund walls and relocation of existing fill and revegetation. The proposed landfill area had a total capacity of 4.3million tonnes and an operational life of 25 years including capping and revegetation. The project was to be carried out in stages over a period of 25 years after the initial establishment period, which was to include the construction/shaping of the final rehabilitated landform along the northern and eastern sides of the property together with acoustic mounds above before the first waste material were received on site, and the construction and sealing of the 1.1km section of Patrons Lane between Luddenham Road and the site entrance. The rehabilitation of the site was proposed to occur progressively throughout the life of the project.

Issues:

(1) whether the intensification and extension of the industrial use of the site for 25 years would create land use conflicts and be inconsistent with the strategic planning objectives for the area;

(2) whether the project would result in unacceptable visual impacts for the duration of its operational life;

(3) whether the proposal proposed efficient management or extraction of the clay/shale resource on the site;

(4) whether the proposal to simultaneously use the facility for resource extraction and waste emplacement would cause interactions that would result in unacceptable impacts; and

(5) whether the project was contrary to the public interest.

Held: finding that the project application could be approved as amended by the Further Modified Preferred Project, and subject to agreed conditions as amended:

(1) land use conflicts manifests itself in impacts such as noise, air quality and traffic, and land use planning relies on objective criteria to measure those impacts and to determine whether they are reasonable. The proposal could meet the objective criteria for noise, air quality and traffic, and based on those objective measures the impact on amenity would be reasonable: at [104]-[105];

(2) while during the operational stage the industrial use of the site would result in a degree of inconsistency with the objectives of the zone under the *Penrith Local Environmental Plan* 2010, that was to be expected given that extraction and landfill were not permissible uses. That inconsistency had to be balanced against the proposal's permissibility and consistency with the *State Environmental Planning Policy (Infrastructure)* 2007 and the *Sydney Regional Environmental Plan 9 – Extractive Industries* ("SREP 9"). It also had to be considered against factors such as the current degraded

condition of the site, the existing approval for clay/shale extraction and the council's submission that this extraction should continue and be intensified: at [111];

(3) the scale of the development struck the appropriate balance between development and protection of the visual environment and amenity of surrounding residents. The proposal avoided land use conflicts to the extent that refusal of the application was not reasonable: at [112];

(4) the proposal would progressively decrease the existing adverse visual impact of the site when viewed from the surrounding area. The visual impact during the operational stage would not warrant refusal of the application, particularly given that the proposal provided for the progressive rehabilitation of the site and resulted in a final landform that all the experts agreed was acceptable: at [125], [129];

(5) the regional resource for which the site was identified in SREP 9 and for which an otherwise prohibited activity could be carried out was the light firing clay/shale, and it was the extraction of that resource that would realise its full potential by the project. The project represented an appropriate utilisation of the available resource of the light-firing clay/shale, and that material was the resource of most significant value at the site: at [140], [148];

(6) it was common practice for waste filling and extraction activities to take place simultaneously within the same facility. The interactions between the two activities and subsequent environmental impacts had been adequately assessed and could be managed through the proposed conditions of approval: at [160];

(7) the concerns raised by the community regarding land use conflict, visual impact, noise, air quality, traffic and contamination were resolved by the expert evidence and the issues raised in the community submissions would not, of themselves, warrant refusal of the application: at [197]-[199]; and

(8) the public interest was broader than the community submissions and required a balancing of the competing issues. While there was strong community concern regarding the project, the significant changes that had been made addressed the concerns raised. The benefits of progressive remediation, extraction of clay/shale resources, reprocessing and recycling, land filling and the return of the site to a final landform that was visually acceptable and in character with the local area outweighed the impacts during the life of the proposal on the surrounding community. The proposal was in the public interest: at [200].

Court News

- The Court welcomes Ms Awhina Martin as the new Manager Listings, commencing on 18 June 2012.