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Land and Environment Court of NSW Judicial Newsletter

Legislation

- Statutes and Regulations

Planning:

The amendments to the *Environmental Planning and Assessment Act* 1979 made in Sch 3[1], [3] and [17] of the *Environmental Planning and Assessment Amendment Act* 2014, that:

(a) establish an electronic database of instruments and maps related to planning; and
(b) provide for a website (the NSW planning portal) from which they may be accessed by the public,

have been proclaimed to commence on 30 November 2015.

The Environmental Planning and Assessment Amendment (Residential Apartment Development) Regulation 2015, published 19 June 2015, amends the Environmental Planning and Assessment Regulation 2000:

(a) to provide for the referral of certain applications for the modification of development consent for residential apartment development to a design review panel constituted under State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (as amended by State Environmental Planning Policy No 65—Design Quality of Residential Flat Development (Amendment No 3));
(b) to make other amendments that are consequential on the amendments made by State Environmental Planning Policy No 65—Design Quality of Residential Flat Development (Amendment No 3); and
(c) to provide for a $3,000 maximum additional fee (increased from $760) for residential apartment development involving an application for development consent, or an application for the modification of the development consent, that is referred to a design review panel.

The Environmental Planning and Assessment Amendment (ePlanning) Regulation 2015, published 19 June 2015, amends the Environmental Planning and Assessment Regulation 2000:

(a) to include compiling and maintaining the NSW planning database and operating the NSW planning portal within the services covered by certain fees, and
(b) to exempt until 1 March 2016:
  (i) the NSW planning database from a requirement to maintain historical versions of documents and other material, and
  (ii) the Secretary of the Department of Planning and Environment from a requirement to establish an alert facility for the electronic notification of new planning decisions and matters.

Water:

Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources Amendment Order 2015, published 5 March 2015, amended the Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2003, regarding long-term extraction volumes and established supplementary water sharing rules that will be applied on a trial basis until 1 July 2019.

The Water Management (General) Amendment (Anabranch Water) Regulation 2015, published 26 June 2015, extends until 30 June 2017 the exemption of Anabranch Water (being the private irrigation board for the Great Anabranch of the Darling River Private Water Supply and Irrigation District) from the requirement that it must not serve a notice of a proposed take over of an existing water supply work after the expiration of 12 months after the constitution of its private irrigation district or on any person in respect of work that belongs to, or is under the control or management of, a public authority.

Pollution:

Pesticides Amendment Act 2015, assented 18 May 2015, will allocate to Class 4 of the Court's jurisdiction proceedings by the EPA to enforce undertakings under the amended Act.

Miscellaneous:

The *Courts and Crimes Legislation Amendment Act* 2015, commenced 15 May 2015. The Act, inter alia, amended the *Land and Environment Court Act* 1979 to:

(a) enable acting judicial officers to be appointed:
    (i) for a period not exceeding 5 years (instead of the current 12 months), and
    (ii) up to the age of 77 years (instead of the current 75 years);
(b) enable acting commissioners to be appointed for a period not exceeding 5 years (instead of the current 12 months);
(c) extend the classes of proceedings in which judges of the LEC of NSW may be assisted by commissioners to include Class 4 proceedings (Class 4 proceedings relate to environmental planning and protection and development contract civil enforcement); and
(d) amend the *Trees (Disputes Between Neighbours) Act* 2006 to extend the application of certain provisions relating to court orders in respect of high hedges that obstruct sunlight or views to land within a zone designated "rural-residential" under an environmental planning instrument.

The amendments made by the *Aboriginal Land Rights Amendment Act* 2014, except for those amendments relating to the appointment of investigators and administrators for Aboriginal Land Councils, have been proclaimed to commence on 1 July 2015.

The Aboriginal Land Rights Amendment (Local Aboriginal Land Councils) Regulation 2015, published 26 June 2015, amends the Aboriginal Land Rights Regulation 2014 as a consequence of the amendments made to the *Aboriginal Land Rights Act* 1983 by the *Aboriginal Land Rights Amendment Act* 2014, including making provision with respect to:

(a) the making of a list, by the New South Wales Aboriginal Land Council, for approval by the Minister, of persons who may be appointed as an administrator of a Local Aboriginal Land Council, and
(b) savings and transitional matters.

Uniform Civil Procedure (Amendment No 71) Rule 2015, published 8 May 2015, inserts Rule 50.16A which provides that a defendant to an appeal who objects to the competency of the appeal is required to file a notice of motion for an order dismissing the appeal as incompetent within 14 days of being served. Failure to do so may have costs consequences.

Uniform Civil Procedure (Amendment No 72) Rule 2015, published 8 May 2015, allows a notice of proposed dismissal of proceedings in the LEC to be served by email, instead of by post only, following 5 months in which no party has taken any step in the proceedings.

Bills:

The Statute Law (Miscellaneous Provisions) Bill 2015 was passed by both Houses of Parliament on 25 June 2015 following amendments made by the Legislative Council. The Bill:

(a) postpones the repeal of a number of regulations;

(b) amends the *Aboriginal Land Rights Act* 1983; and

(c) amends the *Environmental Planning and Assessment Act* 1979 to:

i. make it clear that the definition of *occupier* of premises includes a tenant or other lawful occupant who is not the owner of the premises;

ii. inserts an additional amendment relating to the proposed introduction of the NSW planning portal website. The amendment removes the requirement that notice of a development application for designated development be published in a newspaper circulating in the locality and allows instead for notification in accordance with the regulations; and

iii. makes it clear that the regulations may prescribe a version of the document that a consent authority must take into account in determining whether development consent can be granted in relation to bush fire prone land.

The latter amendments are to commence on 8 July 2015.

- State Environmental Planning Policy [SEPP) Amendments

The maps in the SEPP (Major Development) 2005 have been updated by the SEPP (Major Development) Amendment (Huntlee New Town Site) 2015, published 5 March 2015.

The maps in the SEPP (Sydney Region Growth Centres) 2006 have been amended by:

- SEPP (Sydney Region Growth Centres) Amendment (Blacktown Growth Centres Precinct Plan and Alex Avenue and Riverstone Precinct Plan) 2014, published 5 March 2015;
- SEPP (Sydney Region Growth Centres) Amendment (North Kellyville and Riverstone Precincts) 2015, published 5 March 2015; and
- SEPP (Sydney Region Growth Centres) Amendment (Area 20 Precinct) 2015, published 26 June 2015.

Threatened Species Conservation (Replacement Certification Maps) Order 2015, published 5 March 2015, replaced maps that show certified land that is within a growth centre for the purposes of certain provisions relating to biodiversity certification.

The SEPP (Western Sydney Employment Area) Amendment 2015, published 5 March 2015, updates the maps in the SEPP (Western Sydney Employment Area 2009.

State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development (Amendment No 3), published 19 June 2015, amends SEPP 65 as a consequence of the introduction

of the Apartment Design Guide to replace the Residential Flat Design Code for apartment development applications lodged after 19 June 2015 and determined after 17 July 2015. The amendment:

(a) inserts additional aims for improving the design quality of residential apartment development in cl 2(3);
(b) amends the statement in cl 4 of the development to which SEPP 65 applies;
(c) inserts cl 6A, which provides that provisions in a development control plan specifying requirements, standards or controls relating to specified matters provided in Parts 3 and 4 of the Apartment Design Code are of no effect;
(d) amends provisions relating to design review panels;
(e) replaces Part 4 Application of design principles;
(f) inserts Sch 1 Design quality principles; and
(g) makes consequential amendments to a number of local environmental plans, and State Environmental Planning Policy (Affordable Rental Housing) 2009 and State Environmental Planning Policy (Kosciusko National Park –Alpine Resorts) 2007.

The amendment commences on 17 July 2015.

- Miscellaneous

The Apartment Design Guide, which applies to apartment development applications lodged after 19 June 2015 and determined after 17 July 2015, is available on the website of the Department of Planning.

Court Practice and Procedure

The Chief Judge has issued two new policies for the Land and Environment Court, one on the Conference of Expert Witnesses and the other on Joint Expert Reports.

The Chief Judge has issued two new Practice Notes:

- The Practice Note - Urgent Applications outlines the practice and procedure for making urgent applications to the Court.
- The Practice Note - Subpoena Practices was revised to specify the provisions of the *Uniform Civil Procedure Rules 2005* that are excluded from application in Class 5, 6 and 7 proceedings (paragraph 4) and to provide more detail concerning the procedure for applications for costs of compliance with a subpoena (paragraph 19).

Judgments

- High Court of Australia

Isbester v Knox City Council [2015] HCA 20 (Keifel, Bell, Gageler, Keane and Nettle JJ)

(related decisions: *Isbester v Knox City Council* [2014] VSC 286 Emerton J; *Isbester v Knox City Council* [2014] VSCA 214 (Hansen and Osborn JJA, Garde AJA)

Facts: the appellant had been convicted of an offence under s 29(4) of the *Domestic Animals Act* 1994 (Vic) ("the Act") on her plea of guilty to the charge that on 4 August 2012 her dog "Izzy" had attacked a person and caused "serious injury". The Council's Co-ordinator of Local Laws, Ms Hughes, had directed Council employees to investigate the attack, determined that charges should be laid with respect to the attack, arranged for charges and summonses to be drafted, signed some of the charges as informant, and gave instructions to the Council's solicitors to prosecute the charges and to negotiate the pleas which were subsequently entered in the Magistrates' Court. The Council could have, but did not, seek an order for destruction of the dog under s 29(4) of the Act. Its practice was to convene a panel of its officers where it was necessary to consider cases of this kind. Ms Hughes decided that a hearing by the Knox Domestic Animals Act Committee ("the Panel") should be held and made arrangements for that to occur. The appellant was invited to and did attend, provided evidence, and made submissions to the Panel hearing. The Panel comprised Mr Kourambas, Director of City Development; the Council's Manager of City Safety and Health; and Ms Hughes, each of whom held a delegation from the Council for the purposes of s 84P(e) of the Act which empowered the Council to order the destruction of a dog if the owner had been found guilty of an offence under s 29. The briefs of evidence from the Magistrates' Court proceedings and Ms Hughes' notes of those proceedings were provided to the other Panel members. After the hearing, Mr Kourambas provided the instruction that the dog should be destroyed, and the appellant was notified of that decision.

The appellant unsuccessfully sought judicial review of the Council's decision on grounds including an apprehension of bias on the part of Ms Hughes. The primary judge held that the relevant decision to destroy the dog was made by Mr Kourambas, the delegate for that purpose, and not the other members of the Panel. On appeal, the Court of Appeal concluded that the case did not involve a conflict of interest, finding that the Panel hearing was not a quasi-judicial hearing; that although Ms Hughes had been in the position of accuser in the Magistrates' Court, she was not in that position at the Panel's hearing; and that she had no special or personal interest in the matters in controversy. The appellant appealed to the High Court.

Issue:
(1) whether Ms Hughes' involvement in the matter antecedent to the decision was incompatible with her participation in the decision.

Held: (Keifel, Bell, Keane and Nettle JJ, Gageler J in a separate judgment agreeing with the orders): allowing the appeal, setting aside the orders of the Supreme Court and quashing the decision of the Council, with costs:
(1) a decision under s 84P(e) of the Act affects the owner of the dog. Whether one described an interest in a dog as a property right, or acknowledged the importance of a domestic pet to many people, the appellant was a person who may be affected by a decision which would require her interests to be subordinated to the public interest. It was therefore understandable that the Council had accepted throughout the proceedings that a decision under s 84P(e) required compliance with the requirements of natural justice: at [30];

(2) there was no issue concerning Ms Hughes' possible prejudgment of the matter. The question was whether it might reasonably be apprehended that a person in her position would have an interest in the decision which could affect her proper decision-making: at [33];
(3) it was not realistic to view Ms Hughes' interest in the matter coming to an end when the proceedings in the Magistrates' Court were completed. A line could not be drawn at that point of her involvement so as to quarantine the Magistrates' Court proceedings from her actions as a member of the Panel. It was reasonably to be expected that her involvement in the prosecution of the charges created an interest in the final outcome of the matter: at [42]. In any event it was not accurate to describe her as a person who in fact had no ongoing involvement in advancing the matter after those proceedings. If she could not actually be described as a prosecutor with respect to the decision under s 84P(e), she was certainly the moving force: at [43];
(4) an interest such as that of a prosecutor, accuser or other moving party was of a kind that pointed to the possibility of a deviation from the true course of decision-making: at [45]. A "personal interest" in that context was not the kind of interest by which a person would receive some material or other benefit. It was not necessary to analyse the psychological processes to which a person in the position of a prosecutor or other moving party was subject; it was well accepted that it might reasonably be thought that the person's involvement in the capacity of prosecutor would not enable them to bring the requisite impartiality to decision-making: at [46];
(5) the participation of others did not overcome the apprehension that Ms Hughes' interest in the outcome might affect not only her decision-making, but that of others: at [48]; and
(6) a fair minded observer might reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision under s 84P(e). That conclusion did not imply that Ms Hughes acted otherwise than diligently and in accordance with her duties, as the primary judge had found, or that she was not in fact impartial. Natural justice required that she not participate in the decision and because that occurred the decision must be quashed: at [50].

- NSW Court of Appeal

Valuer-General v Fivex Pty Ltd [2015] NSWCA 53 (Basten, Gleeson and Leeming JJA)

(related decision: *Fivex Pty Ltd v Valuer-General* [2014] NSWLEC 27 Craig J)

Facts: Fivex Pty Ltd ("Fivex") owns land at Double Bay on which there is erected a four storey building with retail space at ground level and commercial office space on the upper levels, with a floor space ratio ("FSR") of 3.66:1. Fivex appealed pursuant to s 37 of the *Valuation of Land Act* 1916 ("VL Act") against the determination of the land value of the Land at the base date of 1 July for each of the years 2009, 2010 and 2011. The Woollahra Local Environmental Plan 1995 ("LEP") permitted buildings on Fivex's land to have a maximum FSR of 2.5:1, and permitted an increase to 3:1 with the council's consent. A FSR of 3:1 would permit a gross floor area ("GFA") of 1,649.1sqm, and the building as in fact constructed had a GFA of 2,012sqm. At first instance it was common ground that the highest and best use of the land was its current use, and that land value could be determined by applying a dollar value per square metre to the maximum GFA of a building erected on the land, and that the dollar value per square metre could be derived from the actual price paid per square metre for comparable sales and relevant valuation principles. The primary judge formed the view that the appropriate starting rate was $2,900/sqm; one of the sales used to determine the starting rate had included GST, while the other three sales used did not. The primary judge applied that starting rate to an area of 1,694.1sqm, being the maximum area permitted under the LEP with a FSR of 3:1, to result in a land value of $4,782,390, to which adjustments were made to achieve values for the other two years. The primary judge considered that s 6A(2) of the VL Act was not engaged as the highest and best use was the use to which the land was, in fact, being put, and held that the assumption in s 6A(2) was only required and permitted if the present use, having been lawfully commenced, represented a higher order of use in attaching value to the land than would be achieved by reason of a legal constraint imposed on the present use subsequent to its commencement.

Subsections 6A(1) and (2) of the VL Act provide:

"(1) The land value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would

require, assuming that the improvements, if any, thereon or appertaining thereto, other than land improvements, and made or required by the owner or the owner's predecessor in title had not been made.

(2) Notwithstanding anything in subsection (1), in determining the land value of any land it shall be assumed that:

(a) the land may be used, or may continue to be used, for any purpose for which it was being used or for which it could be used, at the date to which the valuation relates, and

(b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used,

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that the improvements, if any, other than land improvements, referred to in subsection (1) had not been made."

The Valuer-General appealed under s 57 of the *Land and Environment Court Act* 1979, submitting that the primary judge had erred in determining land value pursuant to s 6A(1) of the VL Act without making the assumptions stated in s 6A(2). Fivex cross-appealed submitting that the primary judge had erred in using a GST-inclusive sale price of a comparable property in the calculations.

Issues:

(1) whether the primary judge had erred in determining land value solely by reference to s 6A(1) of the VL Act;

(2) whether the concepts of "use" and "use for a purpose" which recur in subsection 6A(2) confined the meaning of the permissive assumptions required to be made; and

(3) whether the primary judge had erred in using a rate derived from sales some of which included GST, others of which did not.

Held: (Leeming JA, with whom Basten and Gleeson JJA agreed), allowing the appeal and remitting the proceedings to the Land and Environment Court for determination, dismissing the cross-appeal, and ordering the respondent/cross-appellant to pay the costs of the appellant/cross-respondent of the appeal and cross-appeal:

(1) it was not a correct legal construction of subsection 6A(2) that the provisions of s 6A did not mandate application in all cases of the assumptions identified in subsection (2). Subsection (2) was expressed in mandatory language ("it shall be assumed") and general language ("in determining the land value of any land"), and the opening words of subsection (2) were hierarchical words serving one purpose, which was to make it clear that the subsection prevails over any inconsistent approach reflected in subsection (1): at [30];

(2) it was one thing for the assumptions in s 6A(2) to apply, and another for them to be operative in the determination of land value. Subsection (2) drew an important and careful distinction between "may" and "shall". Although in every case the assumptions in s 6A(2) were required to be made, it was clear that because they were permissive they need not be determinative or even material to the determination of land value: at [34];

(3) while the principles derived from planning law informed the legal meaning of "use" and "purpose" in subsection (2) they were far from determinative, and were of limited use in the different context of valuing the unimproved value of land especially where the question was whether the subsection had a legal meaning which was narrower than its ordinary textual meaning: at [44];

(4) if the assumptions in s 6A(2) were only applicable to capture an "existing use" then it might be expected that s 6A(2) would incorporate that language, yet it used different language capable of bearing a broader meaning: at [45];

(5) paragraph (b) of s 6A(2) went beyond the use of the land and spoke in terms of the improvements on the land. If the operation of s 6A(2) were exhausted by ensuring that an existing use was one to which the valuation exercise might have regard, it was difficult to see why paragraph (b) was needed at all.

Conversely, the presence of s 6A(2)(b) required in particular an assumption to be made that the improvements as they existed in the real world "may be continued": at [46];

(6) the task required by the statute was a highly artificial one, however the statute referred in terms not merely to the purpose of the existing use, but also to the actual improvements in the real world that enabled that existing use to continue: at [48]; and

(7) ordinarily there is no error of law in a court failing to address an argument that has not been made. There was no error of law in the primary judge using a rate derived from sales some of which included GST, others of which did not, in circumstances where all required adjustment and where his Honour was not asked to perform adjustments by reference to their GST treatment: at [57].

Gold & Copper Resources Pty Ltd v Hon Chris Hartcher, Minister for Resources & Energy, Special Minister [2015] NSWCA 57 (Beazley P, Macfarlan and Gleeson JJA)

(related decision: *Gold & Copper Resources Pty Ltd v Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister (No 2)* [2014] NSWLEC 30 Pain J)

Facts: Newcrest Operations Pty Ltd ("Newcrest") was the holder of an exploration prospecting licence granted under the *Mining Act* 1992 ("the Act"). On 27 March 2009 Newcrest applied for a renewal of the licence for a period of two years. Subsequently, and outside the time prescribed by the Act for lodging an application for renewal, Newcrest sent to the Department of Primary Industries ("the Department") a new first page of the application in which the period specified for the term of the requested renewal was five years. On 8 October 2009 the licence was renewed for a period of five years commencing 20 May 2009. A challenge by Gold & Copper Resources Pty Ltd ("Gold & Copper") to the validity of the renewal under s 293(1)(q)(ii) of the Act was dismissed. Gold & Copper appealed pursuant to s 57 of the *Land and Environment Court Act* 1979, seeking orders that the renewal of the licence was void and of no effect on the basis that, as at the date of the renewal, there was no pending application before the Minister within the meaning of s 131 of the Act so as to enliven the power to renew the licence pursuant to s 114 of the Act. Newcrest and the Minister filed a notice of contention in which they contended that the appeal was brought outside the three month period after publication in the Gazette of the grant of renewal prescribed by s 137 of the Act and was therefore statute barred.

Issues:

(1) whether, when the decision to renew the exploration licence was made by the Minister's delegate on 8 October 2009, there was an "application" pending within the meaning of s 113 such as to enliven the Minister's power under s 114 to renew the exploration licence or to refuse the application;

(2) whether the application lodged by Newcrest had been "finally disposed of" within the meaning of s 117 and s 131 before the decision to renew the exploration licence was made on 8 October 2009; and

(3) whether the effect of Newcrest forwarding a replacement page 1 was to abandon the application lodged within the statutory time prescribed by s 113(3) and to immediately thereafter lodge a new application which was out of time.

Held: dismissing the appeal with costs:

(1) the application for a renewal of the exploration licence made on 27 March 2009 was not "finally disposed of" when the Minister decided to renew the licence. The phrase "finally disposed of" in ss 117 and 131 extended only to the situation in which, pursuant to s 114, the Minister had decided to grant the renewal or refuse the application: at [45];

(2) an application for renewal of an exploration licence could not be withdrawn except by means of a notice lodged with the Director-General of the Department in accordance with s 130 of the Act, and could not be withdrawn by oral communication or by conduct. The application for renewal of the licence was therefore never withdrawn: at [58];

(3) even if the Court allowed Newcrest to pursue the argument that it was not open for Gold & Copper to raise, on appeal, the question of its intention to submit a new application, having not raised it before the primary judge, there was no evidence before the Court of Newcrest's intention, and all that was known

was that the replacement page 1 was forwarded in response to some query or invitation from the Department: at [60];

(4) in any case the argument that Newcrest had submitted a new application was not consistent with s 16 of the Act pursuant to which the Minister could seek additional information from applicants. The new first page and additional information supporting an extended term would not result in the initial application ceasing to exist, and all that had changed was a detail of the application: at [62]; and

(5) having regard to the construction given to the provisions of the Act in issue it was not necessary to determine the notice of contention: at [63].

Note: on 16 June 2015 the Court varied its order as to costs, finding that the respondents were entitled to rely on an offer of compromise made on 20 January 2015, and ordering that the appellant pay the respondents' costs of the appeal on an ordinary basis up to and including 20 January 2015 and on an indemnity basis as and from 20 January 2015: *Gold & Copper Resources Pty Ltd v Hon Chris Hartcher, Minister for Resources & Energy, Special Minister (No 2)* [2015] NSWCA 163.

Minister for Resources and Energy v Gold and Copper Resources Pty Ltd [2015] NSWCA 113 (Ward JA, Bergin CJ in Eq, Sackville AJA)

(related decisions: *Gold and Copper Resources Pty Ltd v Newcrest Mining Ltd* [2014] NSWLEC 148 Biscoe J, *Gold and Copper Resources Pty Ltd v Minister for Resources and Energy* [2013] NSWLEC 66 Pain J, *Gold & Copper Resources Pty Ltd v Minister for Resources and Energy (No 2)* [2014] NSWEC 30 Pain J)

Facts: in 2009 Newcrest Mining Ltd ("Newcrest") and a related company, Newcrest Operations, held exploration licences (EL 3856 and EPL 1024 respectively) issued pursuant to the *Mining Act 1992* ("the Act") over an area surrounding the Cadia gold mine south-west of Orange. Both licences were due to expire on 20 May 2009. On or about 24 March 2009 Newcrest applied to the Minister to renew both licences for a term of two years. On 20 May 2009 Newcrest sent to the Minister replacement front pages for the renewal forms, in each case seeking an extension for five years instead of two years. A departmental officer replaced the first page of each renewal application with the substitute page. The Minister renewed EPL 1024 on 8 October 2009 for a period of five years ("the 2009 Renewal Decision"). On 14 March 2011 the Minister purported to renew EL 3856 for a term expiring 14 May 2014 ("the 2011 Renewal Decision"). Gold and Cooper Resources Pty Ltd ("Gold & Copper") commenced proceedings in 2011 challenging the 2011 Renewal Decision pursuant to s 293(1)(q) of the Act. On 17 May 2013 Pain J quashed the 2011 Renewal Decision, finding that the Minister's delegate had not been satisfied that there were "special circumstances" justifying the renewal of EL 3856 as required by s 114(6) of the Act, and remitted the renewal application to the Minister. In the course of those proceedings, Pain J had rejected an application by Gold & Cooper to amend its pleadings to allege that the removal and replacement of the front page of the renewal form had the consequence that no valid renewal application was before the Minister at the time the 2011 Renewal Decision was made, and did not determine that issue. On 24 August 2012 Gold & Copper commenced a second set of proceedings, challenging the 2009 Renewal Decision in respect of EPL 1024, primarily on the basis that there was no valid renewal application because of the removal and replacement of the front page of the application form. Pain J rejected that contention, and since the contention was rejected on its merits did not find it necessary to consider whether Gold & Copper was barred from bringing the proceedings in any event because they were instituted outside the three months specified in s 137(1) of the Act.

On 17 January 2014 the Minister renewed EL 3856 for a term expiring 20 May 2014, acting in purported compliance with the order made by Pain J requiring the Minister to redetermine Newcrest's renewal application ("the 2014 Renewal Decision"). On 26 June 2014 Gold & Copper commenced proceedings challenging the 2014 Renewal Decision. At the same time as serving the summons commencing those proceedings Gold & Copper served on the Minister a notice pursuant to r 59.9(2) of the Uniform Civil Procedure Rules ("UCPR") requiring the Minister to provide a copy of the 2014 Renewal Decision and a statement of reasons for that decision. The Minister did not comply with the notice. Gold & Copper filed a motion in Court seeking orders that the Minister provide to Gold & Copper and Newcrest a copy of the 2014 Renewal Decision and the reasons, prepared in accordance with UCPR r 59.9(3).

The primary judge noted that Gold & Copper's sole ground of challenge to the 2014 Renewal Decision was the same argument it unsuccessfully sought leave to present in the proceedings challenging the 2011

Renewal Decision in respect of EL 3856, and the same point that had been determined against Gold & Copper in the proceedings challenging the 2009 Renewal Decision in respect of EPL 1024. The primary judge held that an issue estoppel as between Gold & Copper and the Minister and Newcrest arose by virtue of the proceedings determined by Pain J in relation to EL 3856, and in any event Gold & Copper's failure to raise the invalidity argument in a timely fashion gave rise to an *Anshun* estoppel; and that an issue estoppel arose between Gold & Cooper and the Minister by reason of Pain J's rejection of Gold & Copper's challenge to the validity of Newcrest Operation's application to renew EPL 1024. On that basis the primary judge ordered that the relevant paragraphs of the summons be struck out. The primary judge held that the Court had power to make an order under UCPR r 59.9(4), and that the discretion should be exercised in favour of making an order.

The Minister sought leave to appeal from that interlocutory decision, joining Gold & Copper as first respondent and Newcrest as second respondent. Both respondents filed written submissions, with Newcrest supporting the Minister's contentions and Gold & Copper opposing grant of leave to appeal. Gold & Copper withdrew instructions to its legal representatives prior to the hearing of the leave application and did not appear at the hearing of that application.

Issues:

(1) whether r 59.9(4) conferred power on the primary judge to make an order requiring the Minister to give reasons for the 2014 Renewal Decision; and

(2) if so, whether the primary judge's exercise of discretion miscarried.

Held: (Sackville AJA, Ward JA and Bergin CJ in Eq agreeing): granting leave to appeal, allowing the appeal and setting aside the orders of the primary judge and dismissing the summons; Gold & Copper to pay the Minister's costs of the application for leave to appeal and of the appeal, Newcrest to bear its own costs of the application for leave to appeal and of the appeal:

(1) there was considerable force in the Minister's contention that r 59.9(4) does not confer power on the court to order a decision-maker to provide reasons unless, at the time the order is sought and made, the party seeking the order has stated grounds for the relief sought in the summons. Assuming this to be correct, where the only ground for relief stated in a summons has been struck out, the court lacks the power under r 59.9(4) to order a statement of reasons: at [72];

(2) it was not appropriate to express a final view on the issue. The Court did not have the benefit of argument from a contradictor, and some questions, such as the significance of grounds being stated but not with specificity, were not explored in argument: at [73];

(3) it was difficult to see how an issue estoppel arose in relation to an argument on which Pain J had made no ruling in quashing the 2011 Renewal Decision: at [75]. There was no similar difficulty with Gold & Copper's concession before the primary judge that Pain J's rejection of the challenge to the 2009 Renewal Decision to renew EPL 2014, as that decision was based squarely on the holding that the renewal application was valid notwithstanding the replacement of the front page. Both the Minister and Gold & Copper were parties to those proceedings and bound by any issue estoppel, however Newcrest (as distinct from Newcrest Operations) was not a party and so not necessarily bound by the issue estoppel: at [76];

(4) the primary judge's exercise of the discretion conferred by r 59.9(4) was informed by his Honour's view that although the sole ground for relief stated in the summons was barred by issue estoppel, Gold & Copper's pleading should not be regarded as an abuse of the process of the Court. In taking the approach of determining the application for an order on the assumption that the proceedings as constituted did not amount to an abuse of process, the primary judge made an error of principle which vitiated the exercise of discretion: at [79];

(5) it was not a proper exercise of the discretion conferred by r 59.9(4), assuming the power existed, to order the decision-maker to provide a statement of reasons where the only ground for relief relied upon by the applicant constituted an abuse of the court's process and no application was made or foreshadowed to amend the summons or other pleadings to raise an arguable claim for relief: at [81]; and

(6) in view of the way the matter was conducted before the primary judge, his Honour erred in declining to make an order dismissing the proceedings. The proceedings constituted an abuse of process and Gold & Copper neither made nor foreshadowed an unconditional application to amend. It foreshadowed an application to amend, but only if the Minister's statement of reasons provided evidence of a failure to comply with the legislation: at [91].

Community Association DP270253 v Woollahra Municipal Council [2015] NSWCA 80 (Barrett, Emmett and Leeming JJA)

(related decisions: *Community Association DP 270253 v Woollahra Municipal Council (No 2)* [2014] NSWLEC 8; *Community Association DP 270253 v Woollahra Municipal Council* [2013] NSWLEC 184 Pain J)

Facts: in the proceedings at first instance, the appellant, Community Association DP270253 ("the Association"), appealed against an order made by Woollahra Council ("the Council") under s 121B of the *Environmental Planning and Assessment Act* 1979 ("the s 121B Order"). The s 121B Order required the Association to construct a stairway over private land owned by the Association, to facilitate access by the general public to a rectangular parcel of land on the foreshore of Double Bay owned by the Association. The Land and Environment Court revoked the s 121B Order, finding that certain of the conditions of the consent had no nexus with the proposed development and, accordingly, were beyond power because they were unreasonable in the sense that no properly informed decision maker could have made the decision to impose those conditions. The Association then applied for an order that the Council pay its costs of the proceedings. The trial judge refused costs in the exercise of discretion conferred by r 3.7 of the Land and Environment Court Rules 2007. The Association sought and was granted leave to appeal the decision as to costs pursuant to s 57(4)(f) of the *Land and Environmental Court Act* 1979.

Issues:

(1) whether the primary judge erred in the exercise of discretion by declining to make an order for costs in favour of a successful party;
(2) whether the Council had acted unreasonably in circumstances leading up to the commencement of the proceedings; and
(3) whether findings of unreasonableness in relation to the challenged order of the Council are relevant to the costs discretion.

Held: appeal dismissed with costs:

(1) the central issue was the correctness, as a matter of law, of the primary judge's evaluative decision that, in terms of rule 3.7(2), the whole of the circumstances did not make it "fair and reasonable" that a costs order be made: at [43];
(2) unreasonableness warranting a costs order is confined to unreasonableness of conduct in relation to the particular proceedings. The general assertion that the s 121B Order was unreasonable was not explained or given any concrete content: at [47]-[48]; and
(3) no attempt was made in the application for costs to establish unreasonable circumstances that led up to the commencement of the proceedings. The imposition of conditions 14 years beforehand could not constitute such circumstances: at [62].

Rumble v Liverpool Plains Shire Council [2015] NSWCA 125 (Beazley P, McColl and Basten JJA)

(related decisions: *Liverpool Plains Shire Council v Rumble* [2013] NSWLEC 118, Biscoe J; *Liverpool Plains Shire Council v Rumble* [2014] NSWLEC 13, *Liverpool Plains Shire Council v Rumble* [2014] NSWLEC 139, Pain J)

Facts: Mr and Mrs Rumble conducted a car yard business at premises in Henry Street Quirindi that they jointly owned, and stored motor vehicles and other activities ancillary to that business at premises, and on the adjacent road reserve, in South Street Quirindi. In 2005 Mr Rumble, as owner of the property, had obtained development consent for temporary storage at the South Street premises of 20 vehicles for a maximum of 12 months and permanent storage of 10 vehicles. In 2013 Liverpool Plains Shire Council ("the

Council") obtained orders in proceedings before Biscoe J that Mr and Mrs Rumble remove or cause to be removed vehicles and vehicle components from the premises in South Street Quirindi and the road reserve adjacent to and nearby the premises, excluding roadworthy vehicles registered in the names of residents of the premises and used for their personal purposes, and orders restraining Mr and Mrs Rumble from using the premises in any way that fell with the definitions of "commercial premises", "transport depots", "vehicle body repair workshops", "vehicle repair stations" and/or "waste or resource management facilities" as defined in the *Liverpool Plains Local Environmental Plan* 2011 ("the LEP") or not in conformity with the residential zoning of the premises pursuant to the LEP. The Council had previously issued orders under s 121B of the *Environmental Planning and Assessment Act* ("the EPA Act") against Mr Rumble, and a notice of intention to issue an order addressed to Mr and Mrs Rumble.

Mr and Mrs Rumble did not appeal from the orders made by Biscoe J within the time prescribed by r 51.8 of the Uniform Civil Procedure Rules ("UCPR"). The Council commenced contempt proceedings which were heard by Pain J. On 19 February 2014 Pain J found that each had been in contempt of the Court's orders, and stood the matter over to enable Mr and Mrs Rumble to appear. On 26 May 2014 Pain J found that the contempt had been proved, and imposed differential and continuing financial penalties on Mr and Mrs Rumble.

Mr and Mrs Rumble did not have legal representation at any of the hearings before the Land and Environment Court or the Court of Appeal, and appeared in person only at the hearing conducted by Pain J at Quirindi for the purposes of determining the seriousness of the contempt and penalty, and appeared by telephone before the Court of Appeal.

Mr and Mrs Rumble sought leave to appeal and appealed from the three judgments in the Land and Environment Court. There was a notice of intention to appeal filed following the first hearing and findings made by Pain J on 19 February 2014. The appeal from the judgment of 26 May 2014 was filed within the relevant three month period. The appeals raised procedural grounds, including a challenge to the manner in which the orders of Biscoe J were served on the applicants; and challenges to the residential zoning of the South Street property, and to the powers of the Council to impose constraints on the use of the land, and a constitutional challenge to the validity of the laws establishing local councils and in particular the Council.

Issues:

(1) whether an extension of time within which to appeal from the orders of Biscoe J should be granted; and

(2) whether the substantive grounds of challenge to the orders made by Pain J should succeed.

Held: (McColl and Basten JJA, Beazley P dissenting): refusing the application for extension of time within which to appeal from the orders of Biscoe J, dismissing the appeal with respect to each applicant, and ordering that the applicants pay the costs of the Council:

(1) (Basten JA, McColl JA agreeing):
   a. the material before Biscoe J indicated that the property at South Street was being used by the business, of which Mr and Mrs Rumble were joint owners, for storage of vehicles that could not be accommodated at the Henry Street premises. It was entirely appropriate for an order to be made against both applicants: at [107]. The fact that Mrs Rumble did not own the land on which the offending vehicles were situated was immaterial. Any person who uses land for an unlawful purpose may be required to restore the land to its proper state, and if that person is not the owner of the land it will be necessary to ensure that the owner is a party to the proceedings so as to be bound by the orders to allow a third person access to the land in order to remove the offending structure: at [108];
   b. it was ownership of the vehicles, with access to the property, which was the basis of Mrs Rumble being a respondent in the proceedings and a proper subject of the orders. If the only basis for a challenge to the orders of Biscoe J were that he mistakenly thought that Mrs Rumble was an owner of the property that would not provide an arguable ground of appeal: at [112];
   c. the evidence given by Mrs Rumble before Pain J, acknowledging her continuing joint ownership of the business in 2013, and that she had access to the land and authority to have the vehicles moved, demonstrated that there could be no factual challenge to her joinder in the substantive orders: at [113];

d. even if the proposed appeal were to be allowed and the orders set aside, the failure to comply with the orders while they were still on foot would remain a contempt: at [114];
e. there was no reputable legal argument upon which the validity of the statutory scheme for regulation of land use in New South Wales could be challenged: at [133]; and
f. to the extent that the notice of appeal sought to challenge the decision of Pain J, there were no arguable grounds raised: at [137]; and

(2) (Beazley P, dissenting):

a. while the orders of Biscoe J remained on foot, compliance with them was required in accordance with their terms, notwithstanding that there was an apparent error as to ownership of the property and no evidence to support that Mrs Rumble was an occupier of the premises or responsible for the cars being on the property except to the extent that she had an ongoing interest in the car yard business: at [64];
b. the orders made by Biscoe J carried the possibility of significant consequence, and in the circumstances an extension of time to appeal against those orders as against Mrs Rumble should be granted, and the appeal allowed: at [70];
c. Mrs Rumble's appeal against Pain J's finding of contempt should be dismissed, and no penalty should be imposed against her: at [72];
d. the factual errors made in the judicial process in respect of Mrs Rumble did not extend to Mr Rumble, and he had demonstrated himself to be both obdurate and recalcitrant in understanding and complying with the planning laws governing his use of the premises. However he had been found to be remorseful, and had made attempts to engage the processes of the Court: at [78]. The position of the Council was not to be overlooked, and it had failed to get the conduct of the proceedings right: at [79]; and
e. it would be appropriate to further suspend the operation of the penalties imposed by Pain J on Mr Rumble for a further period of one month, and otherwise to dismiss the appeal against the orders and fines imposed on Mr Rumble: at [80].

Rafailidis v Roads and Maritime Services [2015] NSWCA 143 (Beazley P, Basten and Ward JJA)

(related decisions: *Rafailidis v Roads and Maritime Services (No 2)* [2014] NSWLEC 9 Craig J; *Rafailidis v Roads and Maritime Services (No 3)* [2014] NSWLEC 21 Sheahan J)

Facts: Mr and Mrs Rafailidis appealed pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* ("the JT Act") against the determination of the amount of compensation payable for the compulsory acquisition of a portion of the land owned by them. At first instance Craig J dismissed the appeal, rejecting a challenge to the validity of the JT Act, and determined an amount of compensation totalling $153,820, which was just over 50 percent higher than the valuation determined by the Valuer-General of $96,500. On 6 March 2014 Mr and Mrs Rafailidis filed a notice of motion challenging the validity of the orders made by Craig J and the jurisdiction of the Land and Environment Court ("LEC"). Sheahan J treated those challenges as an application to reopen pursuant to r 36 of the Uniform Civil Procedure Rules 2005 ("UCPR"), and refused the application.

In her appeal to the Court of Appeal, to which Mr Rafailidis was joined, Mrs Rafailidis raised thirteen grounds of appeal. The first five related to the decision of Sheahan J and comprised a challenge to the jurisdiction of the LEC, an allegation that his Honour could not proceed without the consent of Mr and Mrs Rafailidis, and a claim that his Honour was biased. The remaining grounds of appeal related to the decision of Craig J, and related to consent to the proceedings being heard in the LEC's "summary jurisdiction", and that the JT Act was not constitutionally valid.

Issues:

(1) whether the challenge relating to the jurisdiction of the LEC was made out;
(2) whether Sheahan J was biased; and
(3) whether the JT Act was constitutionally valid.

Held: (Beazley P, Basten and Ward JJA agreeing): appeal against the judgment of Craig J dismissed, application for leave to appeal against judgment of Sheahan J refused:

(1) the challenges to the valid existence of the LEC were factually incorrect and without substance. The LEC had jurisdiction to make the orders that were made by Sheahan J and Craig J pursuant to ss 19, 24, and 25 of the *Land and Environment Court Act 1979* and r 36 of the UCPR. In circumstances where the court was dealing with an application brought by Mr and Mrs Rafailidis, it was not open to them to challenge its jurisdiction and the court did not require any further consent from them to proceed: at [12];
(2) Mrs Rafailidis did not point to any evidence or circumstance that satisfied the test for apprehended bias: at [13];
(3) the proceedings before Craig J were regularly invoked by Mr and Mrs Rafailidis and any further consent was not required. They had no legal basis on which to claim a right to a hearing by a jury: at [14];
(4) the acquisition of land was made by a public authority of the State of New South Wales pursuant to New South Wales legislation, and s 51(xxxi) of the Commonwealth Constitution did not apply: at [15];
(5) no question of invalidity pursuant to the *Constitution Act 1902* arose: at [16];
(6) Mrs Rafailidis raised no argument such as would demonstrate that the laws in question were inconsistent with any provision of the Commonwealth Constitution, such that, pursuant to s 109, they would be invalid: at [19]; and
(7) the acquisition was undertaken pursuant to the compulsory processes permitted by statute and a contract was not required: at [21].

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2015] NSWCA 100 (Emmett, Macfarlan and Gleeson JJA)

(related decisions: *Cudgegong Australia Pty Limited v Transport for NSW* [2014] NSWLEC 19 Pain J, *Golden Mile Property Investments Pty Ltd (in liquidation) v Cudgegong Australia Pty Ltd* [2014] NSWCA 224, Beazley P, *Cudgegong Australia Pty Ltd v Transport for NSW* [2014] NSWLEC 19, Pain J)

Facts: in late 2012 land situated in Cudgegong Road, Rouse Hill (the "Resumed Land") was acquired under the *Land Acquisition (Just Terms Compensation) Act 1991* (the "JT Act") by the Second Respondent, Transport for NSW ("Transport NSW"). At the time of the acquisition the Applicant, Golden Mile Property Investments Pty Ltd ("Golden Mile"), was the registered proprietor of the Resumed Land under the *Real Property Act 1900*. At the time of acquisition Golden Mile had been deregistered under the *Corporations Act 2001* (the "Corporations Act").

In late 2008 the First Respondent, Cudgegong Australia Pty Ltd ("Cudgegong"), entered into a contract (the "First Contract") to buy the Resumed Land from Stacks Managed Investments Ltd ("Stacks"), which was exercising power of sale under a registered mortgage over the Resumed Land granted to it by Golden Mile. In early 2012 Transport NSW made its offer for compulsory acquisition of the Resumed Land in response to an enquiry by Cudgegong. In mid-2012 Stacks and Cudgegong mutually agreed to rescind the First Contract (the "Rescission Agreement") and entered into a further contract containing almost identical provisions (the "Second Contract") that same day. The Valuer-General determined that compensation payable under the Just Terms Act was $4,223,400. The sum of $3,043,760, being part of the compensation determined, was paid by Transport NSW to Stacks and to RTS Super Pty Ltd, the mortgagee under a second registered mortgage over the Resumed Land granted to it by Golden Mile.

In early 2013 Cudgegong commenced proceedings against Transport NSW in the Land and Environment Court (the "LEC") seeking an order that the compensation payable in relation to Cudgegong's interest in the Resumed Land be determined at in excess of $16 million. In early 2013 Golden Mile sought and was granted from the Supreme Court an order pursuant to s 601AH(2) of the Corporations Act that its registration be reinstated. In late 2013 the LEC ordered that Golden Mile be joined to the proceedings. The trial judge made an interlocutory order for Transport NSW to make an advance payment to Cudgegong. In so doing, the trial judge concluded that Cudgegong had a relevant interest in the Resumed Land under its arrangements with Stacks that took priority over any residual interest that Golden Mile may have had in the Resumed Land. Golden Mile sought leave in the Court of Appeal to appeal against this order, disputing whether it or Cudgegong was entitled to compensation under the JT Act as a result of the acquisition of the Resumed Land by Transport NSW.

Issue:

(1) whether Stacks had breached its duty to Golden Mile in entering into the Second Contract.

Held: appeal allowed, remitting the matter to the Land and Environment Court to determine the question of the respective interests that the applicant and the first respondent had in the Resumed Land as at 21 September 2012, and ordering the first respondent to pay the applicant's costs of the application for leave to appeal and of the appeal; orders conditional on the applicant's giving an undertaking to the Court that, if it be determined that Stacks acted in breach of its duty to the applicant in the exercise of the power of sale in entering into the Second Contract, the applicant would not seek any further remedy for breach of duty against either Stacks or the second respondent:

(1) under s 601AH(5) of the Corporations Act if a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. Although Golden Mile did not exist at the time of the Second Contract, ASIC had the capacity to enforce Golden Mile's rights under the Corporations Act. If the Second Contract was entered into by Stacks in breach of its duty as mortgagee, under the ordinary rules of priority Cudgegong's interest as the purchaser under the Second Contract would not prevail over Golden Mile's interest as mortgagor. Not exploring at first instance the steps Stacks could have taken to ensure that the price obtained under the Second Contract was not less than market value was an error of law: at [82]-[91].

Trives v Hornsby Shire Council [2015] NSWCA 158 (Basten, Macfarlan and Meagher JJA)

(related decision: *Hornsby Shire Council v Trives* [2014] NSWLEC 171 Craig J)

Facts: in three separate proceedings at first instance, Hornsby Shire Council ("the Council") sought judicial review of decisions by the appellant, Mr Trives, an accredited certifier, to issue complying development certificates for a new structure to be erected on each of three residential properties. The Court ordered that a separate question be tried as to whether the complying development certificates issued by Mr Trives were valid. At first instance the parties agreed that characterisation of the development for the purpose of determining validity of the complying development certificates was an issue of jurisdictional fact. Having regard to the *State Environmental Planning Policy (Exempt and Complying Development Codes)* 2008, the primary judge determined that the certificates were not validly issued. As the judgment in each case was interlocutory, Mr Trives sought leave to appeal pursuant to s 58(3) of the *Land and Environment Court Act* 1979.

Issues:

(1) whether the characterisation of the proposed development for the purpose of determining the validity of the complying development certificates issued by the appellant was a jurisdictional fact;

(2) whether the statutory scheme with respect to complying development certificates is materially different from that with respect to grants of development consent by consent authorities; and

(3) whether s 101 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") applied to limit review.

Held: (Basten JA, Macfarlan and Meagher agreeing): appeal allowed in each proceeding, setting aside orders answering the separate questions and as to costs:

(1) there was doubt as to whether the characterisation of the proposed development for the purpose of determining the validity of the complying development certificate was a "fact" at all. Whether a particular matter is a jurisdictional fact, in the sense of its existence being a precondition to the engagement of the power, is one of statutory construction: at [16]-[17]. To specify particular provisions which apply in particular circumstances, in this case by reference to "complying development", is merely to use the term as a generic label and not as an operative precondition: at [26];

(2) the present case could be distinguished from *Woolworths Ltd v Pallas Newco Pty Ltd* [2004]

NSWCA 422, in which the proper classification of the proposed development was identified as a matter distinct from the discretionary judgment required under s 79C of the EPA Act. By contrast, in the present case the characterisation or classification of the proposed development was not ancillary or extrinsic to the function conferred on the certifier: it was a central and essential function. There were no discretionary factors permitted once the certifier had determined that the proposal was complying development: at [39]; and

(3) it was not necessary for the Court to determine whether the effect of s 101 of the EPA Act in *Pallas Newco* could no longer be relied upon as a result of the decision of the High Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531: at [50]. However the Court noted that the decision in Kirk was not, in terms, concerned with decisions of non-judicial bodies, and it was concerned with a strong form of privative clause, not a provision imposing a limitation period on otherwise available relief: at [46].

Jojeni Investments Pty Ltd v Mosman Municipal Council [2015] NSWCA 147 (Macfarlan, Gleeson and Leeming JJA)

(related decision: *Jojeni Investments Pty Ltd v Mosman Municipal Council* [2014] NSWLEC 120 Sheahan J)

Facts: the applicant owned a two storey structure that had been converted from a single residence into two flats in 1933, and had been used for that purpose since that time. The applicant sought to demolish it, and construct a new building comprising three flats. Its entitlement to do so rested on the existence of existing use rights for "flats" generally, as "residential flat buildings" were now prohibited on the land. The Council contended that the existing use rights were for only "two flats in a building".

At first instance, the primary judge accepted the Council's description of the existing use rights, based on the assumption that the "existing use" flowed from a 1933 approval, and, accordingly, the scope of any existing use depended upon the terms of that approval (which had to be inferred from secondary documents), as opposed to characterising the purpose of the use at the level of "genus". The primary judge made a declaration that the land "has the benefit of existing use rights as two flats in a house". The appellant appealed from that declaration. On the appeal the Council sought to defend the substance of the result reached by the primary judge by contending that by virtue of s 109B(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") the use of the land for two flats was not prohibited and the applicant had no existing use rights.

Section 109B(1) provides "that nothing in an environmental planning instrument ["EPI"] prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and in force".

Issues:

(1) whether the primary judge erred in determining that the applicant had existing use rights for only "two flats in a building"; and

(2) whether s 109B(1) of the EPA Act deprived the applicant of existing use rights.

Held: (Leeming JA, with whom Macfarlan JA and Gleeson JA agreed): allowing the appeal, setting aside the orders made at first instance, and declaring that the property has the benefit of existing use rights as a building containing flats:

(1) the 1933 approval did not authorise the "use" of the land for two flats in a building, it merely authorised the internal structural works necessary for the conversion. Under the planning scheme then in place it was permissible to use the building as two separate residences without any approval at all. Accordingly, there was no need for the approval to authorise the "use" of the land, and nothing in the secondary documents suggested that the approval expressly authorised that use: at [50] – [55];

(2) as the existing use did not flow from the 1933 approval, the primary judge erred in determining that the nature of those rights depended upon the proper construction of the terms of the approval: at [71]. Rather, the principles of characterisation enunciated in *Shire of Perth v O'Keefe* (1964) 110

CLR 529 were to be applied, namely, the question was not to be answered through a "meticulous examination of the details of the activities undertaken on the land, but in the purpose served by those activities". Applying that principle, the proper designation of the existing use was for flats generally, and focussing on the precise number of flats in a building elided the distinction between use and purpose: at [86]; and

(3) the assertion that s 109B(1) detracts from existing use rights runs contrary to the underlying objective of the EPA Act generally, and of s 109B(1). Section 109B(1) does not extinguish existing use rights, nor subtract from the class of uses which qualify as "existing uses". It merely provides an additional immunity for carrying out development: at [101] – [104].

Roads and Maritime Services v Allandale Blue Metal Pty Ltd [2015] NSWCA 167 (Beazley P)

(related decisions: *Allandale Blue Metal Pty Ltd v Roads and Maritime Services (No 7)* [2015] NSWLEC 82, *Allandale Blue Metal Pty Ltd v Roads and Maritime Services (No 6)* [2015] NSWLEC 18, Pain J)

Facts: Roads and Maritime Services ("RMS") filed a notice of appeal on 18 May 2015 against the decision of the primary judge determining the amount of compensation payable to Allandale Blue Metal Pty Ltd ("Allandale") for the compulsory acquisition of a portion of its land at $3,387,796. RMS had made an advance payment of compensation of $1,046,627.10 in 2010. The principal ground of appeal related to the determination of Allandale's entitlement to compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 for disturbance. RMS submitted that if it succeeded on the appeal it would be liable at most to pay to Allandale the amount of approximately $505,746.

RMS sought a stay pending the outcome of the appeal of the orders of the primary judge requiring the payment of compensation to Allandale pending the outcome of the appeal.

Issue:

(1) whether RMS had established a case for a stay.

Held: dismissing the notice of motion, with costs:

(1) the primary issue was whether there was a risk that Allandale would dispose of its assets pending the appeal. An associated issue was whether Allandale would not be able to repay the monies without difficulty or delay if RMS was successful on the appeal: at [6];

(2) RMS had not established that there was a risk that Allandale would not be able to repay the compensation monies should RMS be successful on the appeal, or that there was a risk that it would dissipate its assets: at [12];

(3) the considerations relevant to the balance of convenience and the interests of justice pointed in both directions. There was the consideration that Allandale was entitled to "the fruits of its victory" such that compensation ought to be paid, and $500,000 ought to be paid immediately in any event, being the amount that RMS conceded would be payable if it succeeded on the appeal. Secondly there was a statutory recovery process available to RMS to enable recovery. Against that was the consideration that interest was payable on the amount outstanding at the Treasury rate, which RMS contended was higher than the rate otherwise available for term deposits over $50,000. Further, the Court had been able to allocate relatively early hearing dates: at [13]-[15]; and

(4) in circumstances where the balance of convenience and interests of jusice did not fall in favour of one party as opposed to the other, and where RMS had failed to establish that there were risks of dissipation of assets or difficulty in recovering the monies, the pimary principle that the successful party was entiTled to the fruits of its victory should prevail: at [17].

- NSW Court of Criminal Appeal

Environment Protection Authority v Riverina Australia Pty Ltd [2015] NSWCCA 165 (Hoeben CJ at CL, Hall and Garling JJ)

(related decision: *Environment Protection Authority v Riverina (Australia) Pty Ltd* [2014] NSWLEC 190, Pepper J)

Facts: the stated case related to the decision of the trial judge that the summons initiating water pollution charges under s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"), was duplicitous, and as such, the prosecutor, the Environmental Protection Authority ("the EPA") was required to elect to remove the duplicity, or otherwise, the summons would be struck out. The summons was patently duplicitous because of allegations for separate and discrete acts of pollution and latently duplicitous because it failed to plead essential matters of fact relating to the charge. The trial judge rejected the prosecutor's reliance on s 257 of the POEO Act in support of the proposition that it was not required to provide particulars of the circumstances or the time of the pollution (and that it only need prove that the pollution had in fact occurred, and emanated from the defendant's property).

Issues:
(1) whether the Court erred in finding that the summons was bad for duplicity because more than one offence had been charged in the one count of contravention of s 120(1) of the POEO Act; and
(2) whether, upon its proper construction, s 257 of the POEO Act obviated the need for the prosecutor to provide the defendant with the essential details of the particular act, matter or thing alleged as the foundation of the manner of contravention of s 120(1) of the POEO Act.

Held: (Hall J, Hoeben CJ at CL and Garling J agreeing): stated case answered in the negative, costs reserved:
(1) the general rule is that unless the allegation constitutes a continuing offence or offences which are closely related thereby amounting to the one activity, they should be separately charged: at [96];
(2) as the summons applied to two or more acts of pollution, relating to factually distinct incidences of pollution, any liability sought to be established at hearing of the summons would be based on a different factual foundation. The single count pleaded in the summons alleged two or more offences under s 120 of the POEO Act, and as such the summons contravened the rule against duplicity: at [109] and [126];
(3) a person prosecuted under s 120 of the Act is entitled to be provided with particulars of the alleged conduct that is, the time, manner and location of an alleged contravention because s 257 did not alter the operation of s 120 with respect to an occupier of premises: at [102];
(4) the EPA's submission that the offence was a 'result offence' was not a submission that addressed the failure to identify the factual substratum upon which it sought to have criminal liability imposed: at [108]; and
(5) in circumstances where the defendant was not informed as to whether the act of pollution related to a particular operation conducted by it on its premises, or to a particular part of the premises, the lack of particularity gave rise to the potential for a miscarriage of justice: at [117] and [127].

- Supreme Court of New South Wales

Metgasco Ltd v Minister for Resources and Energy [2015] NSWSC 453 (Button J)

Facts: Metgasco Ltd ("Metgasgo") was the holder of Petroleum Exploration Licence No 16 ("PEL 16") granted under the *Petroleum (Onshore) Act 1991* ("the Act"). PEL 16 was granted to a predecessor in title to Metgasgo in 1996. On the renewal of PEL 16 on 28 February 2013 for a further term to 12 November 2017 the earlier conditions were deleted and new conditions imposed in Schedule 2. Certain conditions were specified to be conditions relating to environmental management ("EM conditions"). Condition 8, which was not specified to be an EM condition, required the licence holder to engage in community

consultation in accordance with the *Guideline for community consultation requirements for the exploration of coal and petroleum, including coal seam gas* (NSW Trade & Investment 2012) ("the Guideline"), and to provide a report. The Guideline specified the need for "genuine and effective consultation" and for a Community Consultation Plan. In March 2013 Metgasco presented a "Category 3" exploration program to the Minister for approval, providing plans for construction of the Rosella E01 conventional gas well ("the Rosella well") located on freehold land in a former gravel quarry site in Bentley on the North Coast of New South Wales. On 6 February 2014 the Minister's delegate gave approval to the construction of the Rosella well subject to certain conditions, including the conditions in Sch 2 of PEL 16 and additional conditions which included a condition that the works be carried out generally in accordance with the location(s) and methods contained in the Review of Environmental Factors ("REF") submitted by Metgasco on 11 March 2013 ("the Activity Approval"). Arrangements were made to prepare the site including contracting a drill rig. Many residents became concerned about the activities of Metgasco and a camp was established with the aim of protesting against those activities. On 17 January 2014 Metgasco created a report entitled "Metgasco Community Consultation Program" providing an overview of the consultation efforts. On 14 May 2014 Metgasco received a letter from the Minister's delegate ("the Delegate") notifying Metgasco of her decision to suspend the Activity Approval, providing the reason that Metgasco was not complying with condition 8, noting concerns expressed by members of the impacted community about the way in which Metgasco had characterised its exploration activities and a meeting with landholders impacted by the proposed activity ("the first decision"). Metgasco requested a review of the first decision, providing written submissions on 6 June 2014. On 26 June 2014 Metgasco received a letter from the Delegate recording her decision "to confirm the suspension of Metgasco's activities", with 13 pages of reasons for doing so ("the second decision"). Those reasons in summary were that Metgasco had not engaged in effective consultation or developed a community consultation plan that contained a detailed description or analysis of stakeholders. In particular the delegate stated that Metgasco's community consultation program did not set out a detailed proposal or scheme of action to identify or include groups that should have been the focus of community consultation given the area covered by PEL 16 (such as the Lismore City Council and local environmental groups); that the program failed to adequately address the existence of a protest camp on the property adjoining the Rosella well; that Metgasco had developed a "defeatist attitude" in relation to community consultation and had failed to develop and deliver presentations to address heightened confusion and misinformation within the community; and that Metgasco's primary spokespeople lacked the skills to engage with an "often hostile" audience.

Section 22 of the Act provides for cancellation and suspension of a petroleum title. Subsection 22(1) provides that the Minister may cancel a petroleum title if satisfied that the holder of the title has, inter alia, "(a) contravened or failed to fulfil any of the conditions of the title". Subsection 22(3A) provides that the Minister may suspend "all or any operations under a petroleum title" if satisfied that the holder of the title has contravened, inter alia, "(b) any condition of the title that is identified as a condition related to environmental management". Subsection 22(6) provides that before suspending operations under a title, the Minister must provide written notice of the proposed suspension, give the holder a reasonable opportunity to make representations, and must take any representations into consideration.

Metgasco sought a declaration that the first decision was not made according to law, a declaration that the second decision to "confirm" the first decision was not made according to law, and an order in the nature of certiorari quashing both decisions. The second respondent, the Delegate, entered a submitting appearance.

Issues:

(1) in relation to the first decision, whether the Delegate had failed to comply with an essential precondition to the exercise of the power to suspend pursuant to s 22(3A) of the Act;

(2) whether the second decision was invalid because it purported to "confirm" the first decision;

(3) whether the condition, the breach of which was said to found the second decision, was a condition that could found a suspension ("a suspendable condition") or not, because it was not identified as an EM condition in PEL 16;

(4) whether irrelevant considerations were taken into account in the second decision; and

(5) whether it was unreasonable for the Delegate to have found that the consultation undertaken was inherently defective.

Held: declaring that the first and second decisions were not made according to law, and quashing both decisions; the Minister to pay the costs of the plaintiff of the proceedings:

(1) the requirements of s 22(6) had not been complied with before the first decision was made. The letter advising of the first decision came as a bolt from the blue to Metgasco, and that occurred in the context of Parliament having explicitly commanded that, before a suspension was to occur, a statutory regime of procedural fairness needed to be implement: at [41];

(2) because the second decision purported to confirm a decision when there was no power in the statute to do so, and because the decision it purported to confirm was itself invalid, the second decision was invalid as well: at [48];

(3) the Minister's submissions that the Delegate was not suspending for breach of a condition in the PEL but for breach of a condition in the Activity Approval, and the Act spoke of the kinds of conditions in the title that could found a suspension and said nothing of the conditions in the Activity Approval which could found suspension of activity, which provided flexibility with regard to activity approvals which attached to more specific and localised activities, were rejected. The Act applied the bifurcation between suspendable conditions and non-suspendable conditions to activity approvals by way of s 22(3A) of the Act. The reference to "specified operations under a petroleum title" extended to the activities to do with the Rosella well that were authorised by the Activity Approval: at [56]. The Delegate was not empowered to opt out of the effect of s 22(3A) by creating a new regime of conditions attaching to the Activity Approval, all of which were suspendable: Parliament did not intend that such a mechanism could be used to destroy the distinction between suspendable and non-suspendable conditions when the identical conditions attached to a PEL: at [57]. It would be extraordinary for Parliament to have gone to the trouble of creating the explicit bifurcation with regard to conditions attaching to a petroleum title but to have intended that an activity approval pursuant to such a petroleum title would not be similarly constrained: at [58];

(4) the Act did not empower the Delegate to suspend the Activity Approval for breach of a condition that was not identified as an EM condition in PEL 16, and the second decision was invalid on a second, ancillary basis: at [62];

(5) the reference in the Guideline to "effective consultation" focussed on the quality of the process of consultation, rather than the outcome whereby the persons who were the focus of the consultation were persuaded by it. To the extent the Delegate purported to confirm the suspension in the second decision on the basis of an asserted breach of the guidelines, and the reasons placed substantial weight on the failure of the consultation process to persuade, the Delegate had taken into account an irrelevant consideration. Were it necessary, Metgasco should succeed on that ground as well: at [69]-[70]; and

(6) the Delegate was entitled to consider whether Metgasco had engaged in consultation that could be characterised as being effective in its attributes but not its results, and that included whether the community consultation plan was sufficient. That decision was not so unreasonable as to be amenable to judicial review: at [74].

- Land and Environment Court of NSW

Judicial Review

Goyer v Pengilly [2015] NSWLEC 54 (Pepper J)

Facts: the applicant Mrs Goyer resided at 75 Crown Road, Queenscliff, which overlooked several properties, including the residential dwelling located at 73 Crown Road, which was the subject of a

development application made by the owners of that property to Warringah Council ("the Council"). The development application ("DA") proposed the addition of a second storey to their dwelling, which would result in the complete obstruction of the partial view of the ocean from an upstairs room of Mrs Goyer's dwelling. In consenting to the development application, the Council considered the text of cl D7 of the *Warringah Development Control Plan 2011* ("the DCP"), which provided that "development shall provide for the reasonable sharing of views", in addition to noting that "assessment of applications will refer to the Planning Principle established…in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 ("*Tenacity*")". Although the development application made no provision for the sharing of views between the two dwellings, the Council nevertheless determined to grant the consent. Mrs Goyer challenged the validity of the Council's decision.

Issues:

(1) whether the Council failed to take into consideration a mandatory relevant consideration contained in the requirements of cl D7 of the DCP as required by s79C(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979*;

(2) whether a strict application of the planning principle in the decision of *Tenacity* impermissibly fettered the Council's consideration of cl D7 of the DCP in making its determination; and

(3) whether it was manifestly unreasonable to grant the development consent in circumstances where there would be no sharing of views.

Held: dismissing the summons with costs:

(1) as a matter of construction, cl D7 neither prohibited consent being granted if the Council was not satisfied that the proposed development did not provide for the reasonable sharing of views, nor did it require, as a precondition to the merit assessment of the DA, satisfaction with that clause. What was demanded was a consideration of the requirement contained in cl D7, which is what the Council undertook: at [36];

(2) *Tenacity* provided an analytical platform to assess whether there was "reasonable sharing of views" as provided for in the DCP. This required the Council to consider the nature of the views affected; the extent of the impact; and the reasonableness of the proposal causing the impact, including as against available design alternatives. This is what the Council did: at [49];

(3) the Council applied the correct test established in the control in cl D7 of the DCP. The Council considered whether or not the development could provide for the reasonable sharing of views and determined that in all circumstances, it could not, but that the absence of any sharing of views by the proposed development was nevertheless reasonable: at [43]; and

(4) properly construed, the term "reasonable" imported the potential that in some circumstances, a proposal that wholly impeded the views of another could still be reasonable: at [56].

Lane Cove Council v Orca Partners Management Pty Ltd (No 2) [2015] NSWLEC 52 (Sheahan J)

Facts: these proceedings were brought by the Council to have the Court declare invalid a development consent ("DC"), issued by the second respondent, the Sydney East Region Joint Planning Panel ("the JRP"'), to the first respondent ("the Proponent"). As the estimated value of the project exceeded $20 million, the JRPP exercised the determination function of the Council pursuant to State Environmental Planning Policy (State and Regional Development) 2011 ("SEPP SRD").

The DC was granted in response to a staged development application made pursuant to s 83B of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), and granted approval to a "concept proposal" involving the amalgamation of 17 adjacent lots, and the construction of 265 residential units occupying four separate buildings on the site. It did not authorise any physical works; separate consents had to be obtained for any building works, and those future DCs could not be inconsistent with the concept approval.

The owners of the 17 lots to be amalgamated under the proposal were joined as respondents (3–28), as well as a company related to the proponent (Orca Partners - 29th respondent), which had entered into an

agreement with a third party (Yifang – 30th Respondent), assigning Yifang the rights it had acquired to purchase the completed apartments. The only active respondents were Yifang and the Proponent.

The DC approved a building envelope that exceeded the Height and the Floor Space Ratio ("FSR") standards in the *Lane Cove Local Environmental Plan 2009* (the "LEP"). Clause 4.6 of the LEP permitted contraventions of standards in prescribed circumstances.

First, a proponent was required to make a written request to the consent authority seeking to justify the contravention by demonstrating that compliance would be unreasonable and unnecessary in the circumstances, and that there are sufficient environmental planning grounds to justify the contravention ("the required matters"). In *Wehbe v Pittwater Council* [2007] NSWLEC 827; 156 LGERA 446 Preston CJ discussed a number of methods in which it may be established that compliance with standards would be unreasonable or unnecessary in the circumstances. Relevantly, his Honour said that one way was to establish that the objectives of the standards are achieved notwithstanding non-compliance, (at [42]). The written requests made by the Proponent relied on this method, and the Council argued that the requests did not establish that the objectives were achieved, as envisaged in *Wehbe*.

Second, the consent authority to whom the request is addressed must approve the contravening development only if it is satisfied that the request "adequately addressed" the required matters, and that it is in the public interest to do so. Whether approval is in the public interest depends on the extent to which the objectives of both the standards and the relevant zone are achieved despite the contravention.

Finally, the consent authority must be satisfied that the Director-General's concurrence has been obtained in respect of the proposal. The Director-General had issued a planning circular in 2008 to local councils entitling them to assume that concurrence had been given to proposals relying on cl 4.6 or similar clauses.

The Council's twelve grounds of challenge asserted that the DC granted in contravention of the standards was invalid on the basis that the written requests were deficient and that the JRPP did not, and could not, reach the required states of satisfaction on a lawful basis.

Issues:

(1) whether the existence of written requests demonstrating the required matters is a jurisdictional fact;

(2) whether the JRPP's decision that it was satisfied that the requests "adequately addressed" the required matters was a decision which no rational or logical decision maker could have made, and was, therefore, invalid for *Wednesbury* unreasonableness;

(3) whether the requests contained sufficient information about the final form of the development to enable the JRPP to be satisfied that the requests "adequately addressed" the required matters;

(4) whether the JRPP considered irrelevant matters, and/or failed to consider relevant matters, in forming the opinion that granting approval was in the public interest; and

(5) whether it was open to the JRPP to be satisfied that the Director-General's concurrence had been obtained in circumstances where concurrence had been issued to the Council, but not the JRPP, in respect of the proposal.

Held: none of the Council's grounds was made out, and the summons was dismissed, with costs reserved:

(1) whilst the existence of a written request seeking approval despite the contravention is a jurisdictional fact, one which actually demonstrates the required matters to an objective standard is not. Whether a request does so is a matter to be adjudicated in the consent authority's enquiry into whether the requests "adequately address" those matters, and, therefore, is not a jurisdictional fact: at [202] – [206];

(2) establishing that a decision is so unreasonable that no rational or logical decision maker could have made it is a very high threshold. There was more than enough information in the detailed written requests which directly dealt with the required matters in their terms to leave it open to the JRPP to be satisfied that they were adequately addressed: at [207] – [228];

(3) based on the material before the JRPP, the inference could not be drawn that the JRPP failed to consider relevant matters, namely, the consistency of the proposal with the objectives of the R4 zone and the standards. The requests dealt directly with those issues, and the assertions made therein were supported by detailed technical reports. The "public interest" requirements would have been very much

at the forefront of the JRPP's mind as the requests drew specific attention to them and they were a matter of particular contention between the Council and the Proponent. This supported the inference that the JRPP did consider the relevant matters in respect of public interest: at [251]–[257];

(4) the JRPP's consideration of the benefits of site amalgamation, and the simplification of traffic and parking were not "irrelevant considerations" in the public interest inquiry. These matters were relevant to the objectives of the R4 High Density Residential zone, which include the avoidance of site isolation and the provision of high density housing with good access to transport and ensuring the amenity of existing residences in the neighbourhood: at [258]–[264]; and

(5) although the planning circular was addressed to the Council and not the JRPP, pursuant cl 21(2) of SEPP SRD, the Council retained the function of obtaining concurrence for the proposal, and, therefore, the JRPP was entitled to be satisfied that concurrence had been obtained: at [268]–[279].

Moorebank Recyclers Pty Ltd v Benedict Industries Pty Ltd [2015] NSWLEC 40 (Preston CJ)

Facts: Sydney West Joint Regional Planning Panel ("JRPP") granted development consent to Benedict Industries Pty Ltd ("Benedict") for the construction of a marina and related facilities on land ("the land") owned by Tanlane Pty Ltd ("Tanlane"). Moorebank Recyclers Pty Ltd ("Moorebank"), an adjoining land owner, brought judicial review proceedings challenging the development consent on grounds that the JRPP failed to comply with the preconditions for consent contained in cl 7 of State Environmental Planning Policy No 55 – Remediation of Land ("SEPP 55").

The application for development consent was accompanied by an environmental impact statement ("EIS"). The EIS appended an environmental assessment report by Worley Parsons ("Worley Parsons report") and a report assessing impacts of the development on aquatic ecology ("aquatic ecology report"). In advance of its meeting to consider the development application on 22 August 2014, the JRPP was provided with a report by Council officers assessing the proposed development and recommending the granting of consent on certain conditions ("the Council report").

At the time of hearing, the land was still being used for extractive industries under a development consent issued by the Land and Environment Court in an appeal in 1993 ("the 1993 consent"). A condition of the 1993 consent required "rehabilitation" of the land to its former status as grazing land at cessation of extractive industries by backfilling the excavation with imported materials to approved landform levels. The JRPP was advised of this condition by Council officers at its meeting on 22 August 2014.

The JRPP granted development consent on conditions that differed from those in the Council report. The JRPP gave a written "Determination and statement of reasons". Matters considered by the JRPP included: SEPP 55, the Council report, written submissions and verbal submissions given at its meeting on 22 August. Under the heading "Reasons for panel decision", the determination stated "the panel notes the advice of council officers that the existing consent for the extractive industries on the site requires the site to be remediated, and this information together with the advice of council officers in the report, the panel is satisfied that the requirements of Clause 7 of SEPP 55 are met".

Issues:

(1) whether Moorebank carried out a preliminary investigation of the land in accordance with the contaminated land planning guidelines and whether a report specifying the findings was provided to the JRPP under cl 7(3) of SEPP 55;

(2) whether the JRPP considered a report specifying the findings of a preliminary investigation under cl 7(2) of SEPP 55;

(3) whether the JRPP considered whether the land was contaminated under cl 7(1)(a) of SEPP 55; and

(4) whether the JRPP considered that the land would be suitable, after remediation, for the purpose of marina under cl 7(1)(b) of SEPP 55 and whether the JRPP considered that the land would be remediated before the land is used for that purpose under cl 7(1)(c).

Held: declaring that the development consent granted by the JRPP for construction of a marina and related facilities is invalid and ordering that Benedict and Tanlane are restrained from carrying out the development:

(1) there was neither the preliminary investigation of the land nor the report of the preliminary investigation required by cl 7(2) and (3) of SEPP 55: at [91]. The investigations referred to in the EIS aquatic ecology report and Worley Parsons report did not involve the preliminary investigation of the land: at [93]-[103]. The patchwork of parts of the EIS, aquatic ecology report and Worley Parsons report were not readily identifiable as making up a single entity: at [104]-[105]. The patchwork of parts of the EIS, aquatic ecology report and Worley Parsons report did not make up a report specifying the findings of a preliminary investigation of the land: at [106];

(2) the JRPP failed to consider a report specifying the findings of a preliminary investigation under cl 7(2) of SEPP 55: at [108]. The JRPP did not consider the parts of the EIS, aquatic ecology report and Worley Parsons report in making its determination: at [107]. The Council report did not consider the EIS, aquatic ecology report and Worley Parsons report to be a report specifying the findings of a preliminary investigation of the land: at [107];

(3) the JRPP did make a positive finding that the land was contaminated for the purposes of cl 7(1)(a) of SEPP 55: at [142], [147]. The JRPP was advised of the need to consider the issue by the Council report and by verbal submissions given at its 22 August meeting: at [142]-[145]. The JRPP found that the land was contaminated by reason of extractive industries: at [145]; and

(4) the JRPP was satisfied under cl 7(1)(b) that the land would be suitable for the use of marina after remediation was carried out at the completion of extraction pursuant to a condition of the 1993 consent and that the land would be remediated before the land was used for that purpose under cl 7(1)(c): at [149], [151]. However, the JRPP's satisfactions miscarried by making mistakes of law: at [153], [163]-[164]. The advice of Council officers relied on by the JRPP involved erroneous construction of the terms of the 1993 consent: at [153]. A development consent is a statutory instrument and misconstruction of a statutory instrument is a mistake of law: at [153]-[157]. The advice was mistaken in law because the 1993 consent did not require "remediation" of contaminated land but "rehabilitation" by backfilling the excavation with imported materials to approved landform levels: at [158]-[159]. The 1993 consent would not make the land suitable for use as a marina because it only required rehabilitation for use as grazing land: at [160]-[161].

Friends of King Edward Park Inc v Newcastle City Council (No 2) [2015] NSWLEC 76 (Sheahan J)

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

Facts: this case dealt with a challenge to a development consent ("DC") granted by the Council to Annie Street Commercial Pty Ltd, the fourth respondent, for the development of a function centre and associated kiosk on a prominent coastal headland close to the Newcastle CBD.

The site has a rich colonial history, and holds cultural significance for Indigenous persons. It was the location of one of Australia's first mining ventures, and played a role in coastal fortification measures during World War 2. Since the late 19th century it was used as a bowling club, but sometime in the 1960s that use ceased, and it was not used for any purpose since that time. The improvements on the site had fallen into disrepair.

In 2005, the land was reserved from public sale for the purpose of "public recreation" under the *Crown Lands Act 1987* ("CL Act"), and a Crown Lands Trust, the second respondent, was established to manage the site. At all relevant times the land was zoned 6(a) Open Space and Recreation under the Newcastle Local Environmental Plan 2003, which permitted, with consent, any development allowed by a plan of management ("POM") made under the CL Act.

In 2007, the then Minister, the third respondent, adopted a POM in respect of the reserve, purporting to authorise the use of the land for "conference centres" and "commercial facilities that provide for public recreation" ("the authorised uses"). The hearing proceeded on the basis that the Council relied on the POM for its alleged power to grant the DC.

The proposed function centre satisfied neither of the tests for land to be used for the purpose of public recreation, namely that it must be open to the public as of right, and it must not be a source of private profit (*Council of the Municipality of Randwick v Rutledge* [1959] HCA 63; 102 CLR 54, at 88), and to properly authorise that use, the POM had to adopt an "additional purpose" in respect of the land, pursuant to s 114 of the CL Act.

The applicant alleged that the POM did not validly adopt an additional purpose because the Minister failed to take into account mandatory considerations as required by s 114(1C). Alternatively, even if the relevant matters were taken into account, a POM could not adopt an additional purpose which is "inconsistent with" or "subtracts from" the declared purpose of the reserve, namely "public recreation". It was also argued, that, even if the additional purposes were validly adopted, use of the land as a "function centre" could not properly be characterised as for either of those purposes. If any of those arguments were successful, it followed that the POM was invalid, the use of the land as a function centre was impermissible, and the Council had no power to grant the DC.

Additionally, the applicant argued that even if the development were permissible, the Council breached a number of provisions of the *Environmental Planning and Assessment Act 1979* in exercising its power to grant the consent. These breaches involved a late amendment to the development application, which incorporated a public pathway around the southern perimeter of the site. The applicant alleged that the inclusion of this pathway required the Council to re-consider a number of issues, including: mine subsidence; slope instability; colonial and aboriginal significance; and whether to re-exhibit the proposal.

The Minister submitted that if the Court found that the POM did not validly authorise additional purposes, those parts of the POM purporting to authorise the "additional purposes" could and should be severed.

Issues:

(1) whether the Minister took into account the relevant matters referred to in s 114(1C) of the CL Act;

(2) whether an "additional purpose" added through the adoption of a POM under the CL Act could be inconsistent with, or subtract from the declared purpose of the reserve;

(3) whether the purposes of "conference centres" and "commercial facilities that provide for public recreation" encompassed use of the land as a "function centre";

(4) if invalid, whether the invalid components of the POM purporting to authorise the additional purposes should be severed; and

(5) costs.

Held: declaring the DC and the POM to be invalid and of no effect, restraining the fourth respondent from taking any step to use the subject land for any purpose other than public recreation, and ordering the first and second respondents to pay the applicant's costs unless another order was sought as to costs within 21 days:

(1) the POM was drafted under a false legal assumption that it was not necessary to adopt an additional purpose to authorise the use of the land for the authorised uses, accordingly the matters required to be considered by the Minister under s 114(1C) of the CL Act were not taken into account: at [278];

(2) on a proper construction of the definition of "additional purpose" under s 112A, and the power to adopt an additional purpose through a POM under s 114, an additional purpose could be adopted which was inconsistent with, or subtracted from, the reserved purpose: at [307] and [318];

(3) the "function centre" could be said to be used neither for the purpose of a "conference centre", nor a "commercial facility that provides for public recreation". First, it was not open to the public as of right, and it would be a source of private profit. Therefore, it did not "provide for public recreation": at [320] – [321]. Secondly, the building was proposed to be used for events other than "conferences", and, therefore, could not be said to be used for the purpose of a "conference centre": at [325];

(4) development for the purpose of "function centre" in both the Reserve and the Park was prohibited and the Council had no power to grant the consent: at [333]; and

(5) the entire purpose behind the adoption of the POM was to authorise the use of the land for a commercial facility. Severing those parts of the POM which purported to authorise that use would alter

the intended operation of the POM. Accordingly, those invalid parts purporting to authorise the additional purposes could not be severed, and the entire POM was invalid: at [354] – [356].

Agricultural Equity Investments Pty Limited v Westlime Pty Ltd (No 3) [2015] NSWLEC 75 (Pepper J)

(related decisions: *Agricultural Equity Investments Pty Limited v The Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister* [2015] NSWLEC 23; *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd* [2013] NSWLEC 122 Pepper J)

Facts: Agricultural Equity Investments ("AEI") challenged the decision of the second respondent, Parkes Shire Council ("the Council") to grant the first respondent, Westlime Pty Ltd ("Westlime"), two modifications to its 1988 development consent ("the 1988 consent") concerning the London-Victoria Mine in Parkes ("the site"), the first in 2009 ("the 2009 consent") and the second in 2012 ("the 2012 consent"). AEI's interest related to a mineral exploration licence it held over the site. The original 1988 consent related to the extraction and processing of both mined and imported gold ore at the site. The 2009 modification, which permitted the use of the site for processing road-base and other material, was granted at a time when all gold mining operations had ceased. The 2012 modification approved the importation of mineral ore from other sites for processing.

Issues:

(1) whether the 1988 consent was exhausted or spent such that it could not be modified pursuant to s 96 of the *Environmental Planning and Assessment Act ("*the EPA Act")*;*

(2) whether the Council erred in law in granting the 2012 modification approval because in doing so it failed to have regard to the 1988 consent pursuant to s 96 (2) of the EPA Act;

(3) whether s 96(2) requires, as a matter of jurisdictional fact, that the development as modified by the application be substantially the same as the development consent as originally granted;

(4) whether the Council's decision to issue the 2012 modification approval was manifestly unreasonable in that no reasonable consent authority acting reasonably could have concluded that the development as modified was substantially the same as that originally granted; and

(5) if the Council's decision to grant either the 2009 or 2012 consent was infected with error, whether an order setting aside the consent and/or restraining Westlime from acting pursuant to the consent should be made.

Held: application dismissed with costs.

(1) as a matter of construction, no specific end date was imposed by the conditions attached to the 1988 consent. Conditions referring to "the end of the mine life", "the end of the development", or "the end of the project", were consistent with the objective contemplation of future mining and processing activity at the site, with no necessity that such activity be continuous or uninterrupted: at [94], [97]-[98];

(2) on the facts, as it was obliged to do under s 96(2) of the Act, the council had regard to the development as approved in the 1988 consent: at [138];

(3) the jurisdictional fact contained in s 66(2) of the Act is of the "special", limited, or subjective kind requiring the Council to be satisfied a jurisdictional fact exists, rather than the Court determining for itself whether the fact existed. Indicators included that s 96(2)(a) was expressed in subjective terms, that there was an evaluative element involved, and that there was some potential complexity in resolving whether the development as modified would be substantially the same, on which reasonable minds might differ. The Council had in fact reached the requisite state of satisfaction: at [161]-[163];

(4) the decision by the Council to approve the 2012 modification application was neither manifestly unreasonable, nor unreasonable. Although the developments could be differently characterised, the activity remained the same, namely, the winning and processing of ores on the land, and the transportation of ore to and from the land for processing: at [180]-[185]; and

(5) while strictly unnecessary to deal with the issue of relief, with respect to the 2009 consent, unnecessary delay in bringing the proceedings, the absence of any prejudice suffered by AEI compared to the

severe prejudice to Westlime if the injunction was granted, and absence of environmental harm, weighed against the grant of the relief sought under s124 of the EPA Act. Whereas the absence of those same factors with respect to the 2012 consent weighted in favour of granting the injunctive relief: at [192]-[197].

Save Little Manly Beach Foreshore Incorporated v Minister for Planning (No 3) [2015] NSWLEC 77

(related decision: *Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2)* [2013] NSWLEC 156 Biscoe J)

Facts: Save Little Manly Beach Foreshore Inc ("the Applicant") commenced judicial review proceedings seeking a declaration that the Manly Local Environment Plan 2013 (Amendment No 1) ("the impugned LEP") prepared by Manly Council ("the Council") and made by the Minister for Planning ("the Minister") was invalid. The proceedings primarily concerned 34, 36 and 38 Stuart Street, Manly, which were zoned RE1 Public Recreation under the Manly Local Environment Plan 2013. Numbers 34 and 36 were owned by the Council and No 38 was owned by Mr and Ms Lane, the Third Respondents. The planning proposal exhibited proposed to rezone Nos 34, 36 and 38 from RE1 Public Recreation to E4 Environmental Living. Following the finding of Biscoe J in *Save Little Manly Beach Foreshore Incorporated v Manly Council (No 2)* [2013] NSWLEC 156, the Council resolved to amend its planning proposal to only proceed with the rezoning for No 38. The amended planning proposal was made in early 2014.

Issues:

(1) whether the variations in the planning proposal made subsequent to exhibition exceeded the powers conferred by s 58 and/or s 59(2) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act");
(2) whether the exhibited planning proposal contained misleading information in that there was a failure to comply with the community consultation requirements of s 57(1) and s 57(2) of the EPA Act; and
(3) if the Court found breaches of the EPA Act in (1) or (2), whether the impugned LEP was a valid and lawful product of a process under Pt 3, Div 4 of the EPA Act.

Held: summons dismissed, costs reserved:

(1) as a result of legislative amendments in 2009, the process for making an LEP under the current Div 4 differs in significant respects from the old Div 3 (Regional Environmental Plans) and old Div 4 (LEP): at [57], [64]-[69]. In substance the significance of the requirement for community consultation remains and earlier authorities including *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78 continue to apply: at [72]. The power to vary the exhibited planning proposal under s 58 is necessarily constrained by the requirement that the resulting plan be a product of the Div 4 process: at [73]. A comparison of the exhibited planning proposal with the amended planning proposal shows that the amendments were not so different that the impugned LEP differed in important respects for No 38: [77]-[82]. The amendments were within the scope of the Council's power under s 58 and the Minister's power under s 59(2)(a): at [82];
(2) on one view, that the Council did not proceed with any amendment of the LEP in relation to Nos 34 and 36 meant that there was no misleading of the public: at [102]. However, even if the subsequent variations were misleading, the change was not a material one: at [103]; and
(3) it was unnecessary to consider issue (3), as the Applicant was unsuccessful on issues (1) and (2): at [108].

Ryan v Minister for Planning [2015] NSWLEC 88 (Sheahan J)

Facts: the applicant challenged the validity of an amendment to the *Lismore Local Environmental Plan* 2012, which rezoned 255 ha of land north of the township of Lismore, known as the North Lismore Plateau ("the Plateau") for the purposes of urban development ("the Amendment"). The Minister was the only active respondent in the proceedings. The amendment was made pursuant to the local environmental plan making process prescribed under Part 3 of Division 4 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). This process was introduced in 2009, and involves the Minister making a "gateway determination", whereby a planning proposal is formulated by the relevant planning authority, in this case Lismore Council, and then submitted to the Minister for Planning, who,

themselves, or through his/her delegate, make a "gateway determination", that settles, among other things, the public consultation process, if any, to be followed in respect of its formal adoption. A gateway determination was made and the proposal was publicly exhibited. As exhibited, the proposal envisaged the rezoning of the Plateau from RU1 Primary Production and partly R5 Large Lot Residential, to a mixture of residential and neighbourhood business zones, as well as a significant portion of the land (28%) for environmental conservation and environmental management ("E zones"). In the meantime, the Minister announced that the department would not endorse the use of E zones on rural land, in all Far North Coast LEPs, including the Lismore LEP. The Department then informed the Council that the E zones as shown on the zoning maps originally exhibited were to be shown as "deferred matter", pending the outcome of the E zone review, and further directed that those areas shown as "deferred matter" were to be changed back to their current zoning of RU1. These changes were then implemented.

The Amendment was published on 21 February 2014, and the areas that were originally proposed to be rezoned to "E zones" retained their rural zoning. The applicant argued that the Amendment infringed the implied limitation established in *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78, requiring the Amendment to be a product of the statutory process prescribed for the making of a local environmental plan ("LEP"), including any period of public consultation involved in that process. The Minister submitted that the implied limitation no longer applied to the new LEP making process introduced in 2009, and that, even if it was, the plan as made was not so substantially different from the exhibited proposal that it was no longer a "product of the process".

Issues:
(1) whether the *Leichhardt* line of authority applies to the new LEP making process under Division 4 of Part 3 of the EPA Act; and
(2) if it does, whether the plan as made, was a product of the LEP making process.

Held: declaring that the Amendment is invalid, ordering the first respondent to pay the applicant's costs:

(1) in *Save Little Manly Beach Foreshore Incorporated v Manly Council (No 3)* [2015] NSWLEC 77 Pain J determined that the *Leichhardt* line of authority still applied to the new LEP making process, because public consultation still plays a significant role in the new regime, even though it may not always be required by a "gateway determination": at [135];
(2) by reason of judicial comity, *Save Little Manly* should be followed, unless it is "plainly wrong". The Court was not so satisfied: at [142];
(3) the task of determining whether the LEP is a "product of the process" involves a comparison between the exhibited proposal and the LEP as made: at [156]; and
(4) the provision of E zones over almost a third of the subject land was envisaged to play a significant role in the abatement of environmental harm caused by the rezoning of the entire plateau for urban development. Accordingly, the provision of them would have been of significant importance to a number of members of the public concerned with preservation of the environment, and informed a number of the public submissions made in respect of it. As such, the LEP excluding the E zones was "not a product of the process", as the public were deprived of an opportunity to make submissions in respect of the LEP in its final form: at [151] – [153].

Criminal

Council of the City of Sydney v Trico Constructions Pty Ltd [2015] NSWLEC 56 (Preston CJ)

Facts: Trico Constructions Pty Ltd ("Trico") pleaded guilty to an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* of carrying out development without consent. The development concerned was the demolition of part of a pressed metal ceiling in a listed heritage building. The offence occurred over the weekend of 15 and 16 September 2012. The summons filed by the Council of the City of Sydney ("the Council") originally charged that the offence occurred between about 18

September 2012 and 12 December 2012. Affidavits filed and served at the same time as the summons established that the offence had occurred over the weekend of 15 and 16 September 2012. Trico entered a plea of not guilty to the original charge. A trial was embarked upon on 10 and 11 November 2014. During the second day of the trial, the Council applied for leave to amend the charge dates of the summons to commence on 15 September 2012 and end on 11 December 2012. Trico opposed leave being granted. The Court heard argument on the application for leave on 11 and 12 November 2014 and granted leave on 13 November 2014. Trico then sought an adjournment to consider its position in light of the amended charge period. The Court granted an adjournment to 18 November 2014. On 18 November 2014, Trico entered a plea of guilty to the charge as amended. A sentencing hearing was held on 16 and 17 March 2015.

Trico sought an order that the Council pay Trico's costs under s 257F of the *Criminal Procedure Act 1986* ("CP Act"). Section 257F provides that a Court may make a costs order, at its discretion or on application of a party, "if the matter is adjourned" (subs (1)), and that such an order may only be made if the other party "has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made" (subs (2)). The Council sought an order that Trico pay the Council's costs under s 257B of the CP Act.

Issues:

(1) what was the appropriate penalty to impose for the charge taking into account the objective circumstances and the subjective circumstances relevant to Trico; and

(2) whether Trico "incurred additional costs because of the unreasonable conduct or delays" of the Council and whether a costs order should be made under s 257F of the CP Act; and

(3) whether Trico should be ordered to pay the Council's costs under s 257B of the CP Act.

Held: convicting the defendant of the offence, ordering the defendant to pay a fine of $46,750, and ordering the defendant to pay the prosecutor's costs incurred on and after 18 November 2014:

(1) taking into account the objective and subjective circumstances relevant to Trico, the appropriate penalty for the offence was a fine of $55,000. The amount was discounted by 15% for the utilitarian value of the guilty plea, resulting in a final amount of $46,750: at [101];

(2) section 257F of the CP Act requires costs to have two causal relationships: at [136]. First, the costs must be incurred by the matter being adjourned: at [133]-[134], [136]. Second, these additional costs must be incurred because of the unreasonable conduct or delays of the party against whom the order is made: at [135], [136];

(3) Trico did not incur any "additional costs" under s 257F(2) of the CP Act: at [140]. The reference point for determining whether costs are "additional costs" is adjournment of the matter, not the unreasonable conduct or delays of a party. A cost is an additional cost if it will be incurred if the matter is adjourned but will not be incurred if the matter is not adjourned. It is an "additional" cost in the sense that it is additional to the costs incurred if there is no adjournment: at [133]. If the costs incurred do not fall within subs (2) then they cannot be the subject of a costs order under subs (1): at [134], [138]-139]. Therefore, because the costs claimed by Trico are not additional costs, the Court has no power under s 257F(1) to order the Council to pay those costs to Trico. It is irrelevant whether the costs were incurred because of the unreasonable conduct or delays of the Council: at [141]; and

(4) the Council's conduct in incorrectly drafting the commencement date of the charge period in the original summons as 18 September 2012, when it had knowledge that the offence commenced on 15 September 2012, was unreasonable. The Council's delay in seeking leave to amend the summons was also unreasonable: at [146]. This unreasonable conduct and delay amounted to disentitling conduct. It disentitled the Council from being compensated for its costs up to the time when the cause of the unreasonable conduct and delay was remedied: at [147].

Leichhardt Council v Geitonia Pty Ltd (No 6) [2015] NSWLEC 51 (Biscoe J)

(related decisions: *Leichhardt Council v Geitonia Pty Limited and Gertos* [2015] NSWLEC 25; *Leichhardt Council v Geitonia Pty Ltd (No 2)* [2015] NSWLEC 30; *Leichhardt Council v Geitonia Pty Ltd (No 3)* [2015]

NSWLEC 31; *Leichhardt Council v Geitonia Pty Ltd (No 4)* [2015] NSWLEC 32; *Leichhardt Council v Geitonia Pty Ltd (No 5)* [2015] NSWLEC 33, Biscoe J)

Facts: the case involved three defendants each charged in separate proceedings which were heard together. The three defendants were: Geitonia Pty Ltd ("Geitonia"), the developer and owner of land at 1-13 Parramatta Road, Annandale (the land), and the beneficiary of the development consent for the land; GRC Projects Pty Ltd ("GRC"), Geitonia's project manager; and Mr Bill Gertos, the sole shareholder and director and alter ego of Geitonia.

The three defendants were charged that between 17 October 2011 and 17 November 2011, they each committed an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* in that each carried out development otherwise than in accordance with a development consent, contrary to s 76A(1). The allegedly unauthorised development was the demolition of most of the front (southern) façade of a disused two to three storey building on the land. The demolition was carried out by Global Demolitions Group Pty Ltd ("Global") under a contract between Global and GRC. A verbal demolition agreement was concluded in the week of 3 October 2011 and a written contract between Global and GRC was signed on 18 or 19 October 2011.

Issues:

(1) whether on the proper construction of the development consent, it permitted the demolition of the southern façade that occurred;

(2) whether the defendants were liable for the conduct of the demolisher, Global; and

(3) whether the defence of necessity excuses what would otherwise be an unlawful demolition.

Held: each defendant was convicted as charged:

(1) there was no ambiguity in the development consent's requirement for retention of the majority of the southern façade. The development consent described the approved development as including "retention of part of the existing building, including the majority of its front and side facades". Reading the development consent as a whole, including the plans, architectural drawings and supporting information received with the development application (such as the statement of environmental effects and geotechnical investigation report), confirmed that the majority of the southern façade was to be retained: at [41]-[52];

(2) Geitonia was liable directly for the conduct of Mr Gertos who was the embodiment of Geitonia and its sole director and shareholder. Geitonia was vicariously liable for the conduct of Global because Mr Gertos (Geitonia's alter ego) negotiated and agreed with John Loukis and George Loukis, the principals of Global, for the demolition of the external walls: at [120]-[121];

(3) Mr Gertos was separately liable for his own conduct in carrying out development on the land contrary to the development consent. His liability was vicarious for the conduct of Global. This was because, from all the evidence, there was a clear inference that Mr Gertos gave instructions to demolish the southern façade directly to Global and also to GRC for it to contract with Global for the outcome that the external walls would be demolished: at [127];

(4) GRC was vicariously responsible for Global's demolition of the southern façade because Global did so under its contract with GRC: at [134];

(5) the defendants failed to discharge their evidential onus to raise a defence of necessity. Alternatively, the prosecution had discharged its onus of negativing the defence beyond reasonable doubt: at [171];

(6) the evidence regarding the condition of the southern façade indicated that there was no imminent peril at the time of the demolition. An engineer's report of 19 October 2011 advised that the façade walls were capable of being temporarily braced. Therefore if there was any peril, it was not imminent for the façade walls could be held at least temporarily in abeyance through bracing. The defendants knew or should have known that the option of at least temporary bracing was available that could create an interval of time before any peril might eventuate. Instead the defendants proceeded with the implementation of their pre-existing plan to demolish the southern façade contrary to the clear terms of the development consent: at [166];

(7) the defendants did not discharge their evidential onus as to honestly believing that there was an imminent peril. It was difficult for Mr Gertos to discharge his evidential onus of honestly believing there was an imminent peril without giving evidence of this belief: at [169]; and

(8) further, the defendants were at fault in bringing about any peril. They did not conform to requirements to ensure the structural stability of the southern façade laid down in demolition plans and generally used heavy demolition machinery: at [170].

Leichhardt Council v Geitonia Pty Ltd (No 7) [2015] NSWLEC 79 (Biscoe J)

(related decision: *Leichhardt Council v Geitonia Pty Ltd (No 6)* [2015] NSWLEC 51 Biscoe J)

Facts: this case concerned the sentencing of three defendants who were convicted after a trial of committing an offence against s 125(1) of the *Environmental Planning and Assessment Act* 1979 in that each carried out development on land, being development which was permissible with consent under an applicable environmental planning instrument, otherwise than in accordance with a development consent which had been obtained and was in force, contrary to s 76A(1). The unauthorised development was the demolition of most of the front (southern) façade of a disused two to three storey building on land at 1-13 Parramatta Road, Annandale (the land). The three defendants were: Geitonia Pty Ltd, the developer and owner of land, and the beneficiary of the development consent for the land; GRC Projects Pty Ltd (in liq), Geitonia's project manager; and Mr Bill Gertos, the sole shareholder and director and alter ego of Geitonia.

Issue:

(1) what was the appropriate sentence to be imposed.

Held: Geitonia Pty Limited was fined $50,000; GRC Projects Pty Ltd (in liq) was fined $50,000; Mr Gertos was fined $150,000; and each defendant was ordered to pay a portion of the prosecutor's total costs in the three proceedings:

(1) the southern façade was not a heritage listed item under the *Leichhardt Local Environmental Plan* 2000 ("the LEP"), its demolition did not affect nearby heritage listed items, and its aesthetic value was not high. Nevertheless, the offence caused substantial environmental harm in that it caused the loss of a façade which had heritage significance arising from its distinctive character, historical value and such aesthetic value as it had and its retention was consistent with the following heritage conservation objectives in the LEP: at [18];

(2) the commission of the offence caused substantial harm by undermining the objectives and integrity of the regulatory system of development control: at [23]-[25];

(3) the offence was committed for financial gain, in the sense of saving of costs of the defendants in demolishing the façade rather than retaining it: at [28];

(4) the risk of harm was foreseeable, and there were practical measures that the defendants could have taken to avoid the harm: at [29], [30];

(5) the objective seriousness of the offence was in the medium range for this type of offence: at [33];

(6) the defendants did not have any prior convictions, were unlikely to reoffend, and had good prospects of rehabilitation: at [35]-[40];

(7) the defendants did not express any remorse for committing the offence: at [37]; and

(8) where an individual offender and the company that he owns are each being sentenced for the same offence, the fines to be imposed should be such as to avoid double punishment of the individual arising from the diminution in the individual's valuable interest in the company to the extent of the fine imposed on the company: at [52].

Sutherland Shire Council v Benedict Industries Pty Ltd (No 3) [2015] NSWLEC 97 (Pepper J)

(related decisions: *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 Biscoe J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 2)* [2015] NSWLEC 39 Craig J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 4)* [2015] NSWLEC 101 Pepper J)

Facts: the prosecutor, Sutherland Shire Council ("the Council"), sought leave to rely on 10 additional affidavits and to amend its Div 2A notice under s 247E and s 247J of the *Criminal Procedure Act* 1986 ("the Act") on the first day of a four week criminal trial. The additional evidence replaced an earlier affidavit filed by the prosecutor, the deponent of which was determined to be unreliable. The additional evidence concerned the absence of any consent to undertake the acts the subject of the charges. This was the third application for such leave, the first two applications being the subject of two earlier judgements by Biscoe and Craig JJ.

Issues:

(1) whether excluding late evidence was consistent with the principles of case management;

(2) whether the new evidence should be excluded pursuant to s 247N(1) of the Act;

(3) whether further delay would cause irremediable prejudice to the defendant; and,

(4) if leave was granted, whether the matter should be adjourned.

Held: leave granted to prosecutor to file new evidence, costs reserved:

(1) a trial judge is afforded a discretion to exclude evidence, where a prosecutor has failed to comply with directions for the filing of evidence. The paramount purpose of case management in the modern era is the just resolution of proceedings: at [66]-[67];

(2) the exercise of the Court's discretion to grant leave to rely on further evidence pursuant to Div 2A of the Act is that of fairness or justice as between the parties. This exercise will be informed by a variety of factors which include consideration of the prejudice that will be suffered by the defendant if the evidence is permitted; the prejudice to the prosecutor if the evidence was to be excluded; the conduct of the parties to the proceedings to date; the delay caused by the grant of leave; the costs associated with the grant of leave, the application of case management principles, and the efficient dispatch of Court business: at [68];

(3) the prejudice that the prosecution would suffer if the new evidence was excluded would be potentially catastrophic to the continuation of the prosecutions because the evidence concerned an element of all the charges, namely, the absence of consent. On the balance, it was not in the interests of justice and fairness, as between the parties, to refuse the leave application: at [89]-[91];

(4) on the material before the Court, although any further delay in the finalisation of the proceedings would prejudice the defendant, it had failed to demonstrate that the granting of leave to the prosecutor would cause prejudice that could not be remedied by an adjournment and suitable order as to costs: at [82]; and

(5) it was a fundamental aspect of fairness that a defendant be afforded sufficient opportunity to understand and make forensic decisions with respect to the evidence relied upon by prosecutor prior to the trial commencing, therefore, the hearing was vacated and the matter was adjourned: at [56].

Sutherland Shire Council v Benedict Industries Pty Ltd (No 4) [2015] NSWLEC 101 (Pepper J)

(related decisions: *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 Biscoe J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 2)* [2015] NSWLEC 39 Craig J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 3)* [2015] NSWLEC 97 Pepper J)

Facts: the defendant, Benedict Industries Pty Ltd ("Benedict"), in proceedings relating to the damage and removal of trees and bushland vegetation without relevant consent, sought to challenge the validity of the Sutherland Shire Tree and Bushland Preservation Order 2001 ("the TPO") made under the *Sutherland Shire Local Environment Plan* 2000 ("the 2000 LEP"), the alleged violation of which gave rise to the prosecutions under s 125 of *the Environmental Planning and Assessment Act* 1979 by Sutherland Shire

Council ("the Council"). The TPO had been published in the New South Wales Government Gazette and St George and Sutherland Shire Leader. A resolution passed by the Council ("the resolution") ordered that the draft TPO take effect on publication, but did not adopt the TPO in express words. The TPO was intended to create a uniform instrument for tree preservation across all of the Sutherland Shire Local Government Area ("the LGA"). A draft TPO was publicly exhibited by resolution of the Council, and subsequently amended. The TPO required the amendment of the *Sydney Regional Environmental Plan 17 – Kurnell Peninsula* ("SREP 17") and *Sutherland Local Environment Plan – Menai* ("the Menai LEP") in order to ensure that it applied across all of the LGA as envisaged by cl 1 of the TPO.

Issues:

(1) whether the resolution by the Council validly made the TPO for the purposes of the 2000 LEP;

(2) whether the TPO was invalid because it failed to apply consistently across the LGA, because at the time of that resolution the amendments to SREP 17 and Menai LEP had not yet been made;

(3) whether the TPO was outside of the authority conferred by the LEP 2000, because it confined exceptions to the TPO to those only granted in writing, and did not permit oral consent as purportedly contemplated by cl 13(3) of the 2000 LEP;

(4) whether the TPO was outside of the authority conferred by the LEP 2000, because the effect of cll 2 and 5 of the TPO was to purportedly abrogate ancillary use rights to remove or damage trees and bushland vegetation while carrying out a valid development consent; and

(5) whether the TPO ceased to have any valid operation in respect of the land due to the repeal and replacement of the 2000 LEP with the Sutherland Shire Local Environment Plan 2006 ("the 2006 LEP").

Held: application dismissed, costs reserved:

(1) although the resolution represented the formal embodiment of the Council's decision, it would be erroneous for it to be construed as if it were akin to legislation, whether primary or subordinate. It was therefore permissible to have regard for the circumstances which surrounded the making of the resolution. The resolution was to be reasonably construed as the Council agreeing, and implicitly resolving, to make the TPO: at [48]-[53],[55];

(2) because the TPO came into effect upon its publication, and the necessary amendments to SREP 17 and the Menai LEP were made prior to that publication, the TPO applied to the entire LGA consistent with the object of cl 1 of the TPO: at [73]-[74];

(3) even if the TPO did not immediately cover the entire LGA, where a provision of a subordinate legislation (cl 1 of the TPO) is not authorised by the empowering legislation, the provision may be severed or read down so as to preserve the validity of the balance of the subordinate legislation to apply to those areas to which it could validly apply: at [76];

(4) subordinate legislation may validly complement primary legislation by providing expedient regulations incidental to the execution of the primary provisions. The requirement that exceptions to the general prohibition be made in writing neither impermissibly widened nor supplemented the primary legislation, and was expedient given the administrative chaos that would ensue from allowing consent to be granted orally by the council to damage or remove trees and bushland vegetation: at [94]-[96];

(5) favouring an interpretation of cll 2 and 5 that promoted the validity of the TPO pursuant to the principle of legality, the exercise of properly characterised ancillary rights to carry out development concomitant upon the grant of approval by the Council that would otherwise be caught by the general prohibition in the TPO, was preserved: at [92]; and

(6) an analysis of the terms of the 2006 LEP indicated that while the Council had repealed the 2000 LEP, it did not do so in relation to the land the subject of the relevant charges. Although the TPO no longer applied to all of the LGA as envisaged by cl 1, no aspect of the operation of cl 1 operated to prevent that clause being read down to apply the TPO to the land expressly excepted from the repeal, so as to preserve the validity of the TPO in those areas which encompassed the land the subject of the proceedings: at [108].

Sutherland Shire Council v Benedict Industries Pty Ltd (No 5) [2015] NSWLEC 103 (Pepper J)

(related decisions: *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 Biscoe J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 2)* [2015] NSWLEC 39 Craig J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 3)* [2015] NSWLEC 97 Pepper J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 4)* [2015] NSWLEC 101 Pepper J)

Facts: the defendant, Benedict Industries Pty Ltd ("Benedict"), in proceedings which related to contraventions of ss 76B and 125 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), sought by subpoena the production of historical council records ("the records") from Sutherland Shire Council ("the Council"). The absence of a relevant consent was an element of all the charges. The Council sought its reasonable losses and expenses relating to production of the documents pursuant to r 33.11 of the *Uniform Civil Procedure Rules* 2005 ("the UCPR"). The *Criminal Procedure Act* 1986 ("the CPA"), however, stated that costs may only be awarded to a prosecutor where the court has convicted the accused person of an offence, or has made an order under section 10 of the *Crimes (Sentencing Procedure) Act* 1999.

Issues:

(1) whether s 257B of the CPA, as a subsequently enacted statute, limited the operation of r 33.11 of the UCPR with respect to the ability of a prosecutor to seek losses and expenses relating to production of the subpoena, absent the conditions of s 257B of the CPA being met;

(2) whether the losses and expenses claimed by the Council were reasonable; and

(3) whether delaying disentitling conduct by the Council precluded the claim for losses and expenses pursuant to r 33.11 of the UCPR.

Held: application dismissed, no order as to costs.

(1) the question was one of inconsistency or repugnancy of powers in separate enactments. It is generally presumed that where there is more than one applicable law, there is no contradiction, unless actual contrariety or irreconcilable conflict is apparent: at [18]-[19];

(2) the "losses and expenses" of answering a subpoena referred to in r 33.11(1) of the UCPR fell within the ambit of "costs" contained in s 257B of the CPA. To the extent that the prosecutor sought an order that the accused pay its reasonable losses and expenses of answering the subpoena, the prosecutor was precluded from seeking payment until such time that a precondition to a prosecutor seeking costs, contained in s 257B, were met: at [26];

(3) Benedict was informed of the difficulty and expense of complying with the subpoena, but nevertheless sought the production of the documents. The expenses sought by the Council were only for the fees charged by the NSW Government Repository for production of the records, in addition to the costs associated with sorting and claiming privilege over the records, and were, therefore, reasonable: at [35]; and

(4) the function of r 33.11 of the UCPR was to compensate applicants for actual loss or expense incurred in answering the subpoena, provided the loss or expense is reasonable. The alleged disentitling conduct of the Council did not bear on either the need to issue the subpoena, or the reason why the loss and expenses were incurred by it. In the absence of an established causal connection between the cost of complying with the subpoena and the disentitling conduct, the conduct of the council was not a relevant consideration: at [40] and [44].

Environment Protection Authority v Sydney Water Corporation [2015] NSWLEC 80 (Preston CJ)

Facts: Sydney Water Corporation ("Sydney Water") operates the Malabar Waste Water Treatment Plant ("the Plant") on the coast in the Sydney suburb of Malabar. Between about 5 and 7 September 2013, treated effluent was discharged into the ocean through a submerged cliff face discharge pipe ("the Shoreline Pipe") at Yellow Rock on Malabar headland. The effluent that entered the Shoreline Pipe came through a leak in a split joint in a reclaimed effluent pipe. The split joint was caused by movement of the

reclaimed effluent pipe, which in turn was caused by one of the brackets holding in the pipe breaking sometime prior to May 2010 and not being fixed.

A local fisherman first notified the Environment Protection Authority ("EPA") of the incident at around 7.40pm on 5 September after noticing a foul odour and dark discolouration on the surface of the water near Yellow Rock earlier that morning. The fisherman had also noticed the odour on the three previous days. The leak was contained by 11.00am on 7 September 2013 and the broken bracket and split joint replaced on 8 September. Water quality testing was conducted at Malabar and Maroubra beaches on 6, 7 and 8 September 2013 and no sewage or pollutant increase linked to the incident were detected. However, Randwick City Council decided to close Malabar Beach as a precautionary measure on 7 and 8 September 2013.

Sydney Water held an environmental protection licence ("the Licence") for "sewage treatment" at the Plant. The Licence authorised the discharge of effluent from the Shoreline Pipe only when inflows to the Plant exceeded a specified volume. The inflow did not exceed the specified volume at the time of the incident. Ordinarily, the effluent would be discharged in accordance with the Licence from the "deep ocean outfall" which ends 80 m underwater and approximately 3.6 km east of Malabar headland. The Licence also required by a condition that the Plant "must be maintained in a proper and efficient condition".

The EPA prosecuted Sydney Water in the Land and Environment Court for offences against ss 120(1) and 64(1) of the *Protection of the Environment Operations Act 1997*, respectively, for polluting waters and failing to comply with the Licence condition to maintain the Plant in a proper and efficient condition. Sydney Water pleaded guilty to both offences.

Issues:

(1) what were the objective circumstances of the offences;

(2) what were the subjective circumstances of Sydney Water; and

(3) what was the appropriate penalty for each charge.

Held: convicting the Sydney Water of the offences, ordering Sydney Water to pay $102,500 to the Environmental Trust, to pay $55,000 to Randwick City Council to carry out a project, to pay the EPA's legal costs of the prosecution and to place and pay for a publication notice:

(1) the offence was in the low to moderate range of objective seriousness: at [79]. The harm caused by the offences was substantial having regard to the nature of the pollutant, the number of days over which the pollutant was discharged, the sizable volume of pollutant discharged, the difference between the marine environment that actually received the pollutant and the marine environment intended to receive the pollutant, and the interference with public amenity and enjoyment at Malabar beach: at [92]. Sydney Water could and should have reasonably foreseen the environmental harm caused or likely to be caused to the environment by the commission of the offences: at [67]. There were practical measures that Sydney Water could have taken that would have prevented the offences occurring: at [69]-[71], [73]. Sydney Water had complete control over causes which gave rise to the offences: at [75]. There was no premeditation by Sydney Water to commit the offences nor was Sydney Water negligent in its failure to undertake the maintenance required by the Licence: at [77]. The offences were not committed for financial gain: at [78];

(2) Sydney Water's record of prior convictions was not an aggravating factor, nor was it a mitigating factor: at [83], [84]. Sydney Water entered early pleas of guilty providing full utilitarian value to the criminal justice system: at [85]. Sydney Water expressed genuine remorse for the offences: at [86], [91]. Sydney Water is of good corporate character: at [92]. Sydney Water is unlikely to reoffend: at [93]; and

(3) synthesising all of the relevant objective and subjective circumstances, the appropriate penalty was $140,000 for each of the offences. The amount was discounted by 25% for the utilitarian value of the guilty pleas, making the amounts $105,000 for each offence: at [102]. The totality principle was considered because there were two offences arising out of the same incident: at [103]. The two offences were caused by the same conduct of Sydney Water: at [105]. However, the boundaries of the offences were not coterminous. The external or physical elements of the offences were different: at [106], [111]. There were areas of overlap of aggravation being reflected in the commission of each offence: at [114]. It would be wrong to punish Sydney Water twice for its conduct in committing the

offences in these areas of overlap: at [114]. To remove the extent of double punishment the aggregate of the fines was reduced by 25%, resulting in a final amount of $78,750 for each offence, a total penalty of $157,500: at [115].

Harrison v Perdikaris [2015] NSWLEC 99 (Preston CJ)

Facts: in 2009, Mr Perdikaris instructed three contractors to increase the capacity of two dams, Windmill Dam and Taila Dam, on rural property owned by his wife ("the property"). Both dams had been constructed on the property and across Chimney Creek. The contractors excavated earth from near Chimney Creek and deposited it on the old dam walls to increase their width and depth and the volume of water that the dams could impound ("the activities"). No approvals had been obtained authorising these activities.

The activities caused disturbance to the bed and banks of Chimney Creek, increased the sediment load in Chimney Creek and temporarily reduced flow downstream of Chimney Creek during high flow events. At times of high rainfall, additional areas of Chimney Creek were drowned and on three occasions overtopping of Windmill Dam was observed, on one occasion destroying the crossing over Chimney Creek at a downstream property.

Mr Harrison, as delegate of the NSW Office of Water, prosecuted Mr Perdikaris for two offences against s 91E(1) of the *Water Management Act* 2000 ("WM Act").

Mr Perdikaris agreed to and did carry out remedial works in accordance with directions under s 329(2) of the WM Act that resulted in the reduction of Taila Dam, removal of Windmall Dam entirely and the construction of an alternative road with culverts across Chimney Creek.

Issues:

(1) what is meant by the term "watercourse" within the definition of "river" in the Dictionary of the WM Act;

(2) what is the meaning of the term "likely" within the phrase "the extent of the harm caused or likely to be caused to the environment" in s 364A(1)(c) of the WM Act;

(3) what were the objective circumstances of the offences;

(4) what were the subjective circumstances of Mr Perdikaris; and

(5) what were the appropriate penalties for each charge taking into account the objective circumstances and the subjective circumstances relevant to Mr Perdikaris.

Held: convicting Mr Perdikaris of the two offences, ordering Mr Perdikaris to pay fines totalling $93,500, directing the Registrar to pay 50% of the fines to prosecutor and ordering Mr Perdikaris to pay the prosecutor's legal costs:

(1) the expression "watercourse" within the definition of "river" in the Dictionary of the WM Act would at least include channels that would be accepted to be watercourses under the common law of England, which has been received into and forms part of Australian law: at [26]. The wide and inclusive definition of "river" in the WM Act and the particular physiographic, geomorphologic and hydrologic conditions of NSW might justify the expression "watercourse" as not being restricted to only those watercourses accepted under the common law: at [27];

(2) the word "likely" in s 364A(1)(c) of the WM Act means a real and not remote chance, rather than more probable than not (in the sense of being more than a 50% chance): at [68];

(3) the offences were in the moderate range of objective seriousness: [87]. There was no evidence that the offences had impact on other persons' rights under the WM Act: at [52]. Collectively, the immediate and consequential actual and likely harms to the environment were of medium seriousness: at [73]. Practical measures that could and should have been taken by Mr Perdikaris to prevent the actual and likely environmental harms were not taken: at [75]-[76]. Mr Perdikaris clearly could reasonably have foreseen the harm that was actually caused or was likely to be caused to the environment by the offences: at [78]. Mr Perdikaris had complete control over the causes giving rise to the offences by his deliberate decisions to direct the carrying out of the activities: at [79]. Mr Perdikaris committed the

offences intentionally and with knowledge of their illegality: at [84]. Mr Perdikaris did not commit the offences for financial gain: at [86];

(4) Mr Perdikaris' record of convictions did not reveal that he had a propensity for the type of offences for which he was being sentenced: at [89]. Mr Perdikaris entered delayed pleas of guilty which had utilitarian value, although less than they would have had had they been entered earlier: at [100]. Mr Perdikaris was remorseful for the offences: at [103]. Mr Perdikaris was unlikely to reoffend given his genuine remorse for the offences and the remedial works he undertook: at [106]. Mr Perdikaris cooperated with the prosecutor by his plea bargain, by agreeing to carry out remedial works, by agreeing to a comprehensive statement of facts and a bundle of documents and by agreeing to pay the prosecutor's costs: at [107]; and

(5) synthesising all of the relevant objective and subjective circumstances relevant to Mr Perdikaris, the appropriate penalty for the offence concerning Windmill Dam was $70,000 and for the offence concerning Taila Dam was $40,000. The amounts were discounted by 15% for the utilitarian value of the pleas of guilty, making the final amounts $59,000 and $34,000 respectively: at [112].

Contempt

Blacktown City Council v The Penatrators Pty Ltd (No 5) [2015] NSWLEC 62 (Biscoe J)

(related decisions: *Blacktown City Council v The Penatrators Pty Limited* [2013] NSWLEC 169 Pepper J, *Blacktown City Council v The Penatrators Pty Limited (No 2)* [2013] NSWLEC 170 Biscoe J, *Blacktown City Council v The Penatrators Pty Limited (No 3)* [2014] NSWLEC 4 Biscoe J, *Blacktown City Council v The Penatrators Pty Limited (No 4)* [2015] NSWLEC 8 Biscoe J).

Facts: this case concerned the sentencing of the two respondents who had been found guilty of contempt of court in two civil enforcement proceedings (heard and determined together). The contempt arose from disobedience of an order made by the Court on 4 February 2014 to remove all waste materials stored and transport to a place lawfully authorised to receive that material within 30 days relating to land at Hamilton Street, Vineyard and 74 Melbourne Road, Riverstone. The respondents were The Penatrators Pty Limited and Mr Michael Galainy who is, and at all material times was, the company's sole director, shareholder and alter ego.

Issue:

(1) what was the appropriate sentence to be imposed.

Held: in each proceeding, the respondents fined the sum of $50,000, to be paid by 31 May 2015; if and so long as the order made by the Court on 4 February 2014 is not complied with after 31 May 2015, the respondents fined the further sum of $25,000 per calendar month or part thereof commencing on 1 June 2015, to be paid by the end of the following calendar month; the respondents to pay the applicant's costs on an indemnity basis as agreed or assessed; and the respondents are jointly and severally liable for payment of the said fines and costs:

(1) the contempt was objectively serious. The contempt was wilful. Some 15 months had elapsed since the orders were made and they still had not been complied with, notwithstanding that the respondents were found guilty of contempt some three months ago: at [10];

(2) the excuse or reason for the contempt proffered by Mr Galainy was not accepted given unchallenged evidence from the applicant and the absence of supporting evidence from Mr Galainy. Even if there were any substance in the alleged concerns, it would be unacceptable if Mr Galainy's alleged concerns were to effectively negate the orders: at [11]-[14];

(3) the potential environmental harm from continued storage of unsightly building waste materials on the Hamilton Street property was moderately serious: at [18];

(4) the contemnors had benefited from non-compliance with the orders to the extent that they had not been burdened by the cost of complying with them, and had benefited from the original statutory breaches by obtaining payments from customers from the unlawful use of the properties: at [19];

(5) there was no evidence of prior convictions of the contemnors for offences of this character. However, adverse inference could be drawn concerning Mr Galainy's character based on his conviction for the offence of intimidation, and transcript evidence at an interlocutory hearing in the proceedings: at [21]; and

(6) there was a need for specific and general deterrence: at [22].

Civil Enforcement

Council of the City of Sydney v Wilson Parking Australia Pty Ltd [2015] NSWLEC 42 (Beech-Jones AJ)

Facts: since September 2008 the first respondent, Wilson Parking Australia 1992 Pty Ltd ("Wilson") operated a car park at the rear of 4-6 York Street Sydney ("the Premises"). From 2008 to 2012 Wilson sought to obtain development consent to operate the car park, however no such consent was obtained. The applicant, the Council of the City of Sydney ("the Council"), sought declaratory relief to the effect that the use of the premises by Wilson was unlawful and in breach of a notice issued under s 121B of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"). The Council also sought injunctive relief effectively preventing the use of the Premises as a car park, and to enforce an undertaking given to it by Wilson on 8 May 2012 to the effect that Wilson would cease operating the car park within 28 days of any adverse final determination by the Court against the refusal of its second application for development approval to operate a car park.

Issues:

(1) whether the Land and Environment Court had jurisdiction under s 16(1A) of the *Land and Environment Court Act 1979* ("the Court Act") to entertain an action for the enforcement of the undertaking;
(2) whether the undertaking was enforceable in its own right as a contract or, in the alternative, whether Wilson was estopped from resiling from it; and
(3) whether the Premises had the benefit of existing use rights to operate a car park under either ss 107 or 109 of the EPA Act.

Held: declaring Wilson Parking was unlawfully using the premises for the purposes of public car parking in contravention of the *Sydney Local Environmental Plan* 2012 and the EPA Act:

(1) the origin of the undertaking was a long standing dispute over whether or not Wilson was in breach of s 76A of the EPA Act. The Council applied to the Land and Environment Court for a judicial determination of that dispute. In substance the dispute as to whether it was resolved by an enforceable undertaking was truly ancillary to the Class 4 dispute, so the Land and Environment Court had jurisdiction under s 16(1A) of the Court Act: at [49];

(2) the agreement embodied by the undertaking was ultra vires and unenforceable as it constituted an unauthorised fettering of the Council's power to apply to the Land and Environment Court under s 123 for relief to restrain a breach of the EPA Act. It would not be unconscionable for Wilson to resile from its undertaking. Thus the Council's claims in contract and promissory estoppel failed: at [6]; and

(3) there was no *Anshun* estoppel preventing Wilson from seeking to establish that it was entitled to exercise existing use rights to conduct a car park at the Premises: at [6]. However, the reliance by Wilson on the existing use provisions was unsuccessful for a number of reasons, including that it failed to prove that the conduct of a car park at the Premises in the period after 12 July 1946 was lawful. Wilson also failed to prove that there was a continuous use of the Premises as either a non-dedicated car park or as a car park that was not ancillary to the use of 341 George Street as a bank between 1951 and 1971 and beyond sufficient to engage the protection of the relevant provisions preserving existing uses during that time: at [7].

Woolcott Group Pty Ltd v Rostry Pty Ltd [2014] NSWLEC 46 (Preston CJ)

Facts: Rostry Pty Ltd ("Rostry") applied to Tamworth Regional Council ("the Council") for development consent for the construction of poultry farms on five parcels of land. The Council caused notice of the applications to be published in two newspapers. The notices stated that the applications and accompanying information would be placed on public exhibition and be available for inspection at three locations for a period commencing 20 January 2014. The notices did not specify the end date of the exhibition period but did state that written submissions should be "made prior to 5.00pm on 03 March 2014". Notice containing the same information was also given to 17 adjoining landholders by letter dated 17 January 2014. One adjoining landholder, Mr Fernance, was not notified on 17 January. Mr Fernance was notified by a letter dated 31 January 2014 that contained the same information as the other notices with the exception that the date by which he was told he must make a written submission was 5.00pm on 14 March 2014. The applications and accompanying information were placed on public exhibition on the Council's website and at the three locations on 20 January 2014. The applications and accompanying information were removed from exhibition on the Council's website at 5.00pm on 3 March 2014 and from two of the three locations on 4 March 2014.

Woolcott Group Pty Ltd ("Woolcott") wrote a submission in the form of a letter objecting to the applications, addressed to the Council's post office box, dated 27 February 2014. On Friday 28 February 2014, the submission was placed in a prepaid express post envelope addressed to the Council's post office box and placed in a yellow express post box by 6.00pm. Australia Post tracking information showed that the envelope was "delivered" to the Tamworth Post Office and was awaiting collection by the addressee on Monday 3 March 2014. This information was also confirmed via email from Australia Post to Woolcott. The Australia Post tracking information also showed that the envelope was returned to Tamworth Post Office on 7 March 2014 and then again "delivered" to the correct address or addressee on the same day. Australia Post gave evidence at hearing that the ordinary course of post for a prepaid express post envelope posted from the Sydney metropolitan area to a post office box in Tamworth is the next business day. Woolcott's letter was date stamped by the Council as having been received by the Council on 12 March 2014. The Council acknowledged receipt of Woolcott's submission via a letter dated and sent on 12 March 2014.

Rostry and all persons who made submissions, including Woolcott, were notified by letters dated 16 July 2014 of the Council's determinations to grant development consent to the five applications. Woolcott appealed to the Land and Environment Court under s 98(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act") against the determinations of the Council. Rostry filed five notices of motion seeking that Woolcott's appeals be summarily dismissed on the ground that Woolcott is not "an objector" within the meaning of ss 4(1) and 98(1) of the EPA Act as it did not make a written submission to the Council by way of an objection to the development applications during the submission period under s 79(5) of the EPA Act.

Issues:

(1) what was the submission period under s 79(1)(a) of the EPA Act;
(2) what is the meaning of "make written submissions to" the consent authority during the submission period under s 79(5) of the EPA Act; and
(3) whether Woolcott made a submission during the submission period.

Held: dismissing Rostry's notices of motion filed for summary dismissal of the appeals and ordering Rostry to pay Woolcott's costs of the motion:

(1) the submission period for Rostry's development applications was 20 January to 3 March 2014: at [58]. The Council's notice to Mr Fernance permitting him to make a submission up to 5.00pm on 14 March 2014 was legally ineffective under s 79(1)(a) of the EPA Act: at [60]. The Council did not extend the submission period for Woolcott to 12 March 2014: at [70]–[73]. The power under s 79(1)(a) of the EPA can only be exercised so as to extend the submission period universally for all persons and not

differentially for one or some persons: at [59], [62], [70]. There cannot be one submission period for public exhibition and a different submission period for making public submissions: at [59], [61], [72];

(2) a written submission under s 79(5) of the EPA Act cannot be considered to have been made to a consent authority until the particular mode by which the submission is made to the consent authority has been completed or effected: at [84], [87]. The written submission must be given to or served upon the consent authority: at [87]. The receipt by the consent authority of the written submission will be proof that the submission was made to the consent authority: at [90]-[91]; and

(3) the envelope containing Woolcott's submission was delivered, during the submission period, to the Council on 3 March 2014: at [99], [107]. The delivery of the envelope to the Council's post office box in Tamworth was delivery to the Council: at [100]. It mattered not that the Council did not process and register Woolcott's submission until after the expiry of the submission period: at [100]. The requirement in s 79(5) is a requirement that the document be given or served upon the consent authority. Section 153 of the EPA Act, that a document sent by pre-paid post shall be deemed to have been given or served at the time at which the document would be delivered in the ordinary course of post, applied: at [102]-[104]. In the ordinary course of post, an express post envelope would be delivered the next business day. Therefore, s 153 operated to deem the envelope, containing Woolcott's submission, to have been given or served upon the Council on 3 March 2014 which was during the submission period: at [105]–[106].

Karimbla Constructions Services (NSW) Pty Ltd v Pittwater Council [2015] NSWLEC 83 (Pain J)

Facts: Karimbla Constructions Services (NSW) Pty Ltd ("the Applicant") lodged with Pittwater Council ("the Council") a development application in relation to its property in Macpherson Street, Warriewood ("the property"). The property lies within the R3 Medium Density zone within the Warriewood Valley Release Area to which cl 6.1(3) of the Pittwater Local Environmental Plan 2014 ("the PLEP") applies. The property is located within buffer area 1m in the Urban Release Area Map as defined for the purposes of cl 6.1(3) of the PLEP, which provides that the number of dwellings to be erected in that buffer is "no dwellings". The Council refused the Applicant's development application because, inter alia, the reference to "no dwellings" prohibits residential development on the site and therefore cannot be varied pursuant to cl 4.6 of the PLEP. The Applicant appealed pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979, and on the Council's application, an order was made for determination of a separate question.

Issue:

(1)whether the "no dwellings" specification for "Buffer area 1m" in the table to cl 6.1(3) of the PLEP is a "development standard" to which cl 4.6 of the PLEP applies.

Held: the answer to the question posed is "no":

(1) while there are conflicting views as to how to determine whether a provision in an LEP is a development standard, the two step approach set out in *Strathfield Municipal Council v Poynting* [2001] NSWCA 270; (2001) 116 LGERA 319 as refined in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* [2006] NSWCA 323; (2006) 149 LGERA 360 is available and should be applied: at [26]-[28]; and

(2) the language of cl 6.1(3) and the structure of the PLEP as a whole indicated that the provision had the character of prohibition: at [31]-[34]. That it was a prohibition was supported by numerous reasons, including that cl 6.1(3) was the means for imposing prohibitions in the Warriewood Valley Release Area as the Land Use Table in cl 2 could not be varied because the PLEP was a Standard Instrument local environmental plan under the *Standard Instrument (Local Environmental Plans) Order* 2006: at [35]. As cl 6.1(3) was a condition precedent to the permissibility of development, it was inapt to refer to contravention of such a provision: at [37]. In cl 4.6(8) the application of cl 4.6 was excluded in certain defined circumstances, which did not refer to cl 6.1(3). This was because cl 6.1(3) was not a development standard: at [39]. Clause 6.1(3) did not satisfy the first step in *Poynting* and therefore was not a development standard: at [42].

Practice and Procedure

Bankstown City Council v Ramahi [2015] NSWLEC 74 (Preston CJ)

Facts: Mr Kayellou, an accredited certifier, issued multiple complying development certificates to Ms Ramahi for a secondary dwelling ("the development") on land she owned in Condell Park ("the land"). Bankstown City Council ("the Council") was notified of the issue of the complying development certificates by Mr Kayellou. After construction of the development commenced, the Council received a complaint from a neighbour. The Council subsequently and on several occasions attended the site and on several occasions communicated with Ms Ramahi, Mr Kayellou and the builder regarding its concerns with the development.

In June 2014, the Council sent letters of demand to Ms Ramahi, Mr Kayellou, and the builder stating that "Council considers that the complying development certificate is invalid" and that rectification work must be carried out within 14 days or the Council would commence proceedings in the Land and Environment Court. Ms Ramahi's solicitors then requested that the Council delay commencing proceedings until after the determination of an application for a building certificate lodged by the builder on behalf of Ms Ramahi. The Council complied with that request. About two weeks after the application for a building certificate was refused, on 26 February 2015, the Council filed a summons to commence judicial review proceedings in the Land and Environment Court against the two determinations of Mr Kayellou dated 19 February 2014 and 7 April 2014. The Council also sought, by notice of motion, an order under r 59.10(2) of the Uniform Civil Procedure Rules 2005 ("UCPR") extending the time for commencing proceedings to 26 February 2015, the day on which the summons was filed.

Issues:

(1) whether s 101 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") amounts to "a statutory limitation period for commencing the proceedings" under r 59.10(4) of the UCPR for the purposes of determining whether r 59.10 applies to the proceedings; and

(2) if no to issue (1), whether an extension of time for commencing the proceedings should be granted under r 59.10 of the UCPR.

Held: extending the time for commencing the proceedings to 26 February 2015, the date of filing of the summons:

(1) the proceedings to which r 59.10(4) of the UCPR refer are the particular proceedings for judicial review of a decision, not proceedings in general or proceedings of a particular class: at [72]. The limitation period in section 101 of the EPA Act commences on the date on which public notice of the granting of a complying development certificate is given: at [70]. Neither Mr Kayellou, nor the Council, had given public notice of any of the determinations of the applications for the issue of complying development certificates: at [71]. Therefore, the limitation period within which proceedings must be commenced under s 101 had not yet begun: at [71]. Because no public notice was given for the purposes of s 101 of the EPA Act, s 101 does not operate to establish a limitation period in these proceedings and, for the purposes of r 59.10(4), there would only be a statutory limitation period for commencing proceedings if and when public notice of the determinations was given: at [72]; and

(2) taking into account the following factors, the Council made out a strong case for extending the time to commence proceedings under r 59.10 of the UCPR: at [109]. The Council has a responsibility and an interest in challenging the decisions to issue the complying development certificates: at [76], [79]. Any prejudice that Ms Ramahi might suffer due to the delay was not sufficient to not extend the time of commencing the Council's proceedings: at [85], [86]-[94]. The Council's actions in trying to resolve the problems rather than immediately commencing court proceedings were not unreasonable: at [97]. It is in the public interest that the Council be allowed to bring the proceedings to challenge the validity of the complying development certificates and to remedy the breach caused by carrying out development, without consent, that is not complying development: at [99], [101]. The delay in commencing proceedings was not undue and had been adequately explained: at [102]. The Council was highly likely to succeed in establishing that the complying development certificates were issued outside power and in breach of the EPA Act: at [103]. The Council had reasonable prospects of obtaining relief to

remedy the clear breach of the EPA Act by carrying out development, without consent, that is not complying development and not in accordance with a valid complying development certificate: [106], [107]-[108].

Council of the City of Sydney v Wilson Parking Australia Pty Ltd (No 2) [2015] NSWLEC 84 (Beech-Jones AJ)

(related decisions: *Council of the City of Sydney v Wilson Parking Australia Pty Ltd* [2015] NSWLEC 42 Beech-Jones AJ, *Wilson Car Parking 1992 Pty Ltd v Council of the City of Sydney* [2012] NSWLEC 1319 Brown C)

Facts: the Council had been successful in its application for injunctive relief to prevent the first respondent, Wilson Parking Australia Pty Ltd ("Wilson") from conducting a car park at the premises it leases from the second respondent at 4-6 York Street Sydney. The Court stayed the operation of those injunctions up to and including 23 April 2015, and stated it was minded to make an order that Wilson pay the Council's costs of the proceedings and would do so unless liberty to apply was exercised. Wilson filed a notice of motion seeking a cost order to the effect that it be ordered to pay 70% of the Council's costs of the proceedings and the Council pay 30% of its costs. Wilson filed a further notice of motion seeking an order extending the stay of the injunctive relief pending an appeal from the first instance decision.

Wilson contended that the form of costs order that it sought was warranted because the Council had sought injunctive relief on two separate bases but was only successful in respect of one, namely whether there were existing use rights, and had failed to obtain orders enforcing the undertaking given by Wilson in May 2012 to cease using the premises as a car park if its Class 1 appeal against refusal of development consent for the operation of the car park was unsuccessful. Its solicitor provided an affidavit estimating that the costs referable to the undertaking issue were 30% of the overall costs of the proceedings. Wilson had filed a notice of appeal, and provided evidence as to the rental payable for the premises and its net income from the operation of the car park, and its financial report for the year ended 30 June 2014.

Issues:

(1) whether it was appropriate to depart from the usual order that costs follow the event;

(2) if so, whether it was appropriate to make a costs order reflecting a 70/30% assessment of the costs involved in litigating the issue on which the Council had succeeded; and

(3) whether a stay pending appeal should be ordered.

Held: ordering Wilson to pay 75% of the Council's costs in the proceedings and refusing the application for a stay pending appeal but extending the existing stay until 2 June 2015:

(1) the Council's claim concerning the enforcement of the undertaking was not a dominant issue but clearly was a separable issue, and a costs order reflecting the Council's relative success on that claim compared with the existing use rights claim was warranted: at [11];

(2) a further apportionment of the sub-issues won and lost in relation to the undertaking issue was not justified given that the overall exercise being undertaken was an amelioration of the order to be made in favour of a successful applicant, and it was that applicant who chose to litigate on that issue: at [12];

(3) if the determination of costs were of costs of proceedings based solely on the claim for enforcement of the undertaking, there would have been no order as to costs. Wilson's departure from its own undertaking proffered though solicitors occasioned the Council incurring the cost of those proceedings: at [13];

(4) having had the advantage of having considered closely the course of the hearing of the proceeding, if the Court were to consider the assessment of costs referable to the undertaking issue compared to the existing rights issue it would have been 10 to 15% compared to 85 to 90%. Allowing some deference to Wilson's solicitors' assessment, the costs order should reflect a 75/25% assessment of the costs involved in the litigating of the existing rights issue: at [15];

(5) proceeding on the basis that Wilson's appeal was reasonably arguable, and assuming that the resolution of any appeal would take approximately six to nine months and that if Wilson succeeded it

would be a further three months before the car park could return to full profitability, if Wilson were denied a stay but pursued the appeal it was likely to incur holding costs for a vacant site of somewhere between $48,000 and $72,000 until the resolution of the appeal together with a commensurate loss of profits: at [31];

(6) if Wilson chose to close the car park because it was not prepared to incur holding costs of approximately $8,000 a month, that would not be an instance of the refusal of the stay rendering the appeal abortive or nugatory. A party with the means and capacity to incur a modest level of holding costs pending an appeal which, if successful, would lead to the resumption of a profitable business, could not force a stay by declaring it would abandon the business if a stay was not granted: at [33];

(7) the relevant public interest in the enforcement of the planning regime as established by law was embodied in the decision in Wilson's unsuccessful Class 1 appeal: at [36]. Assuming in Wilson's favour that the public interest was simply a matter to be weighed in the assessment of the balance of convenience rather than a matter that warranted a greater weight, the stay was refused beyond a short period necessary to enable Wilson to apply to the Court of Appeal: at [38];

(8) on the Court's findings, it had been over six years since Wilson commenced operating a car park contrary to law, over three years since it gave an undertaking to cease operations if its second Class 1 appeal was denied, and over a year since it failed to comply with that undertaking. The time had arrived for the public interest and enforcement of the planning controls to be vindicated. Against that, a refusal of a stay would occasion Wilson only a modest level of financial prejudice which it could readily absorb if it chose to do so. If it succeeded in the appeal it could return to the operation of the car park unless it chose to surrender the lease in the meantime: at [39].

Allandale Blue Metal Pty Ltd v Roads and Maritime Services (No 7) [2015] NSWLEC 82 (Pain J)

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

Facts: Roads and Maritime Services ("RMS") filed a Notice of Motion seeking a stay, until 24 June 2015 or in the event RMS filed a notice of appeal until the determination of that appeal, of the notes and orders made by Pain J on 24 March 2014 concerning a determination of compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* ("the JT Act").

Issues:

(1) whether the orders could be stayed under s 67 of the *Civil Procedure Act 2005* or r 51.44 of the Uniform Civil Procedure Regulation 2005 ("UCPR"); and

(2) if the orders could be stayed, whether the Court would exercise its discretion to grant a stay.

Held: dismissing the Notice of Motion:

(1) Order 1, which determined an amount of compensation, did not specify any obligation on the RMS to pay Allandale Blue Metal Pty Ltd ("ABM") or any timeframe for doing so, as that is resolved separately under the JT Act. Order 1 was a declaratory order, and it was doubtful whether such an order could or should be stayed. A stay was not granted having regard to the declaratory nature of Order 1: at [23]-[25];

(2) *obiter*: even if the orders could be stayed, the Court would not exercise its discretion to grant a stay for a number of reasons, including that under the JT Act an applicant should get the benefit of an award of compensation by the Court in its favour sooner rather than later, the RMS did not discharged its onus of establishing a potential risk of ABM not repaying compensation, and RMS' application for a stay was delayed: at [27]-[34];

(3) *obiter*: the Court has no power to deal with an application to stay the execution of notes, which are not part of the Court's orders. They reflect an agreement made inter parties: at [3]; and

(4) *obiter*: r 51.44 of the UCPR can apply in circumstances where there is a notice of intention to appeal, rather than a notice of appeal: at [25].

Challenger Listed Investments Limited v Valuer-General (No 2) [2015] NSWLEC 60 (Pepper J)

(related decision: *Challenger Listed Investments Ltd v Valuer-General* [2015] NSWLEC 7 Biscoe J)

Facts: Challenger Listed Investments Limited ("Challenger"), owned industrial land ("the land") which was designated contaminated under s 11 of the *Contaminated Land Management Act 1997* ("the CLM Act"). The Valuer-General ("VG") disregarded the contamination in valuing the land on the basis that sites with an existing use, with a known or ongoing contamination, where the land is an operating site, were to be valued on the existing use value of the site with no allowance made for the contamination, relying on s 6A(2) of the *Valuation of Land Act 1916* ("the VL Act"). Challenger contested the determination on the basis that the $5.9m decontamination cost negatively affected the land's monetised value. Biscoe J ordered, on Challenger's application, the determination of a separate question worded as follows:

> "Having regard that the Land is contaminated and that the source of the contamination are the improvements on the Land or their operation, is the contamination of the Land a matter to be disregarded in the determination of "land value" under the Valuation of Land Act 1916?"

The ordering of the separate question was opposed by the VG due to the likely impact of its pending appeal in *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53 ("*Fivex* NSWCA"). The VG had conceded that the first instance decision in *Fivex Pty Ltd v Valuer-General* [2014] NSWLEC 27 made VG's reliance on s6A (2) untenable. In the alternative, the VG contended that:

(1) the contamination should be regarded as a by-product of an improvement to the land pursuant to *Leppington Pastoral Company Pty Ltd v Valuer-General* [2010] NSWLEC 170 ("Leppington"), which was to be ignored in valuation pursuant to s 6A(1); and

(2) that s 6A(1) required the consideration of the value derived from the land by a hypothetical vendor. That hypothetical vendor was not necessarily the polluter who was liable for remediation under the CLM Act.

Before Biscoe J, Challenger contested the correctness of *Leppington,* arguing that the decision failed to follow earlier decisions of judges of the LEC.

Upon the handing down of the decision in *Fivex* NSWCA, the VG conceded the separate question.

Issues:

(1) what was the scope of the answer to the separate question, in light of the decision of *Fivex* NSWCA;

(2) the continued correctness of the *Leppington* decision in light of *Fivex* NSWCA;

(3) whether commissioners were bound, as a matter of precedent, to follow decisions of single judges of the court; and

(4) whether the presumptive rule in r 3.7(2) of the *Land and Environment Court Rules 2007* ("LEC Rules") should be displaced by making a costs order against the VG.

Held: separate question answered in Challenger's favour, each party to bear their own costs:

(1) having regard to the Court of Appeal's decision in *Fivex,* the separate question should be answered in the negative: at [35];

(2) while the existence of contamination was a relevant mandatory consideration for the VG, in considering the present use of the land, which by virtue of s 6A(2) could be assumed to continue, factual circumstances such as the contamination coexisting with the current use of the land and the effect of the contamination, if any, on the value of the land, were all matters that remained to be determined by the VG on the available evidence: at [35];

(3) *Leppington* had to be treated with extreme caution in light of Leeming JA's analysis of s 6A in *Fivex* NSWCA: at [27];

(4) citing with approval *Mac Services Group v Mid-Western Regional Council* [2014] NSWLEC 1072, there is no legislative hierarchy which supports the proposition that a commissioner is bound to follow the decision for a single judge, although he or she should do so as a matter of comity unless in the opinion of the commissioner the judgment is plainly wrong: at [29]-[31]; and

(5) there were no factors that ought to have displaced the presumptive rule in r 3.7 (2) of the LEC Rules that there be no order as to costs in the proceedings. Rule 3.7 (2) applied to "all" matters in Class 3 of the Court's jurisdiction, including the notice of notion for a separate question before Biscoe J, and the hearing of the separate question.

Bisvic Pty Ltd v Valuer-General [2015] NSWLEC 70 (Preston CJ)

Facts: Bisvic Pty Ltd ("Bisvic") made three objections in August 2014 under Pt 3 of the *Valuation of Land Act 1916* ("the VL Act") to three land values ascertained by the Valuer-General ("VG") at base dates in 2011, 2012 and 2013 for land at Yallah ("the land"). The basis of each objection was that an unutilised value allowance under Div 3 of Pt 7 of the *Land Tax Management Act 1956* ("the LTM Act") had not been ascertained by the VG. On 10 November 2014, the Valuer-General gave written notice to Bisvic of the determinations of the objections stating that "the Valuer has made the recommendation that the above land value is correct therefore no alteration to the assigned value is recommended". The accompanying valuation report stated that "the land is not eligible for an unutilised value allowance under section 62K" of the LTM Act.

Bisvic also had sent letters to the Chief Commissioner of the Office of State Revenue ("the Chief Commissioner") and its solicitor on 8 July 2014 and 9 December 2014 regarding the unutilised land value allowance by the Chief Commissioner. However, there was no evidence that the Chief Commissioner treated either letter as an application under s 62K(1) of of the LTM Act for an unutilised value allowance to be ascertained, or made any determination of satisfaction that the land satisfied a description in s 62J(1) of the LTM Act, or referred those letters as applications to the VG under s 62K(1A) of the LTM Act for determination of an unutilised value allowance.

Bisvic appealed on 23 December 2014 to the Land and Environment Court against the VG's determinations. In February 2015, the VG applied by notice of motion in each appeal for an order declaring that the Court has no jurisdiction and that the appeals be stuck out or alternatively that the appeals be dismissed in accordance with r 13.4(1)(b) of the Uniform Civil Procedure Rules 2005, or for any other order the Court sees fit.

Issues:

(1) whether the duty of the VG to ascertain the unutilised value allowance was enlivened by the Chief Commissioner under ss 62J(1), 62K(1) and 62K(1A) of the LTM Act;

(2) if no to issue (1), whether the Court has the function, under s 35B of the VL Act, of determining Bisvic's objections under Pt 3 of the VL Act; and

(3) if no to issue (2), whether the appeals must necessarily be dismissed.

Held: dismissing each of the three appeals:

(1) the Chief Commissioner did not refer an application by Bisvic under s 62K(1) of the LTM Act to the VG for determination of an unutilised value allowance: at [56]. The duty of the VG under s 62K(2) to ascertain an unutilised value allowance for the land value of Bisvic's land was not enlivened and hence the VG could not be said to have not performed the duty of ascertaining an allowance for that land value: at [56]. The objections made by Bisvic could not validly have included an objection on the ground under s 62N(2) of the LTM Act that an unutilised value allowance had not been obtained: at [57];

(2) the VG did not originally have the function under s 62K(2) of the LTM Act to ascertain an unutilised value allowance for the land value of Bisvic's land, and did not have that function when determining, under s 35B of the VL Act, Bisvic's objections under Pt 3 of the VL Act: at [58]. Hence, this Court in determining the appeals from the VG's determinations did not have that function: at [58]; and

(3) Bisvic could not discharge its onus of proving that the Court should ascertain an unutilised value allowance for the land value of Bisvic's land: at [58]. Bisvic's case on appeal was not limited to the grounds of the objection, however, Bisvic took no objection to the VG's valuation of the land or the VG's determination of Bisvic's objections on any other ground: at [60]. The consequence was that the only appropriate order is that each of Bisvic's appeals be dismissed: at [62].

Perilya Broken Hill Limited v Valuer-General (No 6) [2015] NSWLEC 43 (Biscoe J)

(related decisions: *Perilya Broken Hill Limited v Valuer-General* [2012] NSWLEC 235 Lloyd AJ; *Perilya Broken Hill Limited v Valuer-General* [2013] NSWCA 265 Emmett JA, Lemming DA and Preston CJ of LEC; P*erilya Broken Hill Limited v Valuer-General (No 3)* [2013] NSWLEC 215 Biscoe J; *Perilya Broken Hill Limited v Valuer-General (No 4)* [2014] NSWLEC 97 Biscoe J; *Perilya Broken Hill Limited v Valuer-General (No 5)* [2015] NSWLEC 20 Biscoe J)

Facts: this case concerned a separate question for determination arising from the judgement of the Court of Appeal in *Perilya Broken Hill Limited v Valuer-General* [2013] NSWCA 265 relating to valuation of a lead, zinc and silver mine. The Court of Appeal held that if s 6A of the *Valuation of Land Act* 1916 ("the VL Act") required the valuation to proceed on the basis that the minerals were privately owned, then Lloyd AJ, at first instance, erred in law by not having regard to the refund of statutory royalties that the land owner would enjoy under s 284(2) of the *Mining Act* 1992 which would amount to millions of dollars in each year of production. The error arose because the common valuation methodology of the parties ignored ss 284(2) and (2A) of the *Mining Act*. Alternatively, if the minerals (or some of them) had to be treated as publicly owned — which was not contended before Lloyd AJ — then in order to comply with s 6A they were to be treated differently from privately owned minerals and the land would need to be valued differently.

Issue:

(1) whether under s 6A(1) of the VL Act the land value of land containing publicly owned minerals, as defined in the *Mining Act*, was to be determined on the assumption that the minerals are privately owned.

Held: the land value of land containing publicly owned minerals is to be determined on the assumption that the minerals are privately owned:

(1) the issue was one of statutory construction of s 6A(1) of the VL Act. The "fee simple of the land" in s 6A(1) does not refer to the actual fee simple vested in the owner, where minerals may be reserved to the Crown, but to a hypothetical absolute or pure fee simple such as constitutes full ownership in the eye of the law. The expression "the fee simple of the land" in s 6A(1) includes publicly owned minerals in the land and therefore requires them to be treated as though they are privately owned: at [16], [34].

Oriental Bar Pty Limited v Valuer-General [2015] NSWLEC 59 (Pain J)

Facts: the owners of three hotels with heritage listed buildings contested land valuations for two base dates, 2010 and 2012, under the *Valuation of Land Act* 1916 ("the VL Act"). The applicants contended that the land values should be lower than the Valuer-General's determination of land values, not least because the Valuer-General had used an incorrect estimate of the gross floor areas for all three properties.

Issue:

(1) the application of the provisions for land subject to heritage restrictions under an environmental planning instrument in s 14G of the VL Act to valuation of the land value of land under s 6A(1) of the VL Act where the highest and best use under planning controls is not the current use of the land.

Held: finding that the values of all three properties must be amended to reflect their actual gross floor areas, and directing the parties to file draft final orders for the 2010 and 2012 base dates:

(1) it was not possible to resolve how the highest and best use was to be considered in the context of s 6A(1) and s 14G: at [54];

(2) the comparable sales of the applicants' valuer could not be relied upon: at [67]; and

(3) the other valuer's comparable sales were selected on the basis of the current use, not the highest and best use under the relevant planning controls. One of these sales was adopted by both valuers in the course of the hearing, and this was analysed in order to provide an outcome based on the evidence before the Court: at [78]-[99].

Costs

Charlie Lovett Pty Ltd v Hurstville City Council (No 2) [2015] NSWLEC 87 (Sheahan J)

(related decision: *Charlie Lovett Pty Ltd v Hurstville City Council* [2014] NSWLEC 1146 Pearson C)

Facts: the applicant was granted consent in 2011 for the use of premises for a coffee shop, an associated warehouse/manufacturing operation, and a separate takeaway. The Notice of Determination included a condition (no 4) that "The Coffee Shop and Ocean 7 are restricted to a twelve (12) month trial period after issue of Occupation Certificate". This condition was inconsistent with the formal Council resolution that provided that the hours of operation, not the premises itself, or their use, were subject to a trial period.

In 2013 the applicant submitted a modification application under s 96 of the *Environmental Planning and Assessment Act* 1979 that sought, among other things,(a) the consolidation of the food premises into one cafe operation by removing a non-structural wall, and (b) the deletion of condition 4 imposing the trial period. That modification was refused by Pearson C, on the basis that the development as modified would not be substantially the same as that originally approved. The applicant then commenced an appeal under s 56A of the *Land and Environment Court Act* 1979.

The hearing of that appeal commenced on 20 November 2014 and was adjourned part-heard to 19 December 2015. Due to the applicant's counsel then becoming unavailable, it was further adjourned, by consent, to 4 May 2015. In the interim, the applicant's owner and sole director became aware of the inconsistency between the Council resolution and the Notice of Determination. He repeatedly raised his concerns regarding the offending condition with both Councillors and Council officers. He was eventually advised by the Council to lodge a new modification application, which he did on 17 December, and it was approved on 26 March 2015. That modification achieved substantially what was sought in the first modification application. As a result, the part-heard 56A proceedings were rendered futile, and the applicant discontinued the proceedings on 6 May 2015.

Both parties sought costs orders in their favour: the applicant sought its costs of both the Class 1 and 56A appeal, and the Council its costs in only the appeal.

Issue:

(1) whether the conduct of either party was so unreasonable to warrant departure from the usual rule in r 3.7 of the *Land and Environment Court Rules* 2007 that each party pay its own costs in Class 1 proceedings.

Held: neither the applicant nor the Council acted so unreasonably to warrant the making of a costs order against it; each party was ordered to pay its own costs of (1) the first instance proceedings, (2) the 56A proceedings and (3) the hearing on costs:

(1) it was not unreasonable for the Council to defend the class 1 proceedings, seek to enforce its conditions of consent, resist the 56A proceedings and then reconsider its approach to the modification when the applicant's concerns with the inconsistency between Council's resolution and the Notice of Determination were raised with it: at [174];
(2) the applicant was not unreasonable in electing to appeal. Although this was a narrow approach, and perhaps not its best option to address its concerns with the consent, an applicant is entitled to exercise rights of appeal, and such conduct cannot be said to be unreasonable: at [182]; and

(3) as each side had an arguable case for costs, but neither succeeded, each party should pay its own costs of the costs hearing: at [184].

Section 56A Appeals

Wechsler v Sydney City Council (No 2) [2015] NSWLEC 35 (Craig J)

(related decisions: *Wechsler v Sydney City Council* [2013] NSWLEC 1116 Morris C; *Wechsler v Sydney City Council* [2014] NSWLEC 201 Craig J)

Facts: Mr Wechsler applied to the Council of the City of Sydney ("the Council") pursuant to s 96 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act") to modify a development consent granted for a residential flat building in Potts Point. The Council refused a number of modifications sought by Mr Wechsler, who then appealed to the Court against the refusal pursuant to s 97AA of the EPA Act. That appeal was upheld in part. Mr Wechsler appealed pursuant to s 56A(1) of the *Land and Environment Court Act 1979* ("the Court Act") from so much of the decision of the Commissioner as did not sustain the modifications that he sought.

Issues:

(1) whether refusal by the Commissioner to allow Mr Wechsler to give evidence of factual matters directed to the issues in the proceedings, but only to allow him to make submissions, was a denial of procedural fairness;

(2) whether a statement made by Commissioner in the course of proceedings as to the powers open to her affected the manner in which Mr Wechsler approached the presentation of his case; and

(3) whether refusal of leave to amend his application, when the consequence of those amendments were determined without hearing evidence from the Applicant in respect of them, was a denial of procedural fairness.

Held: appeal upheld, and remitting the matter for rehearing and determination:

(1) apart from submissions of law, submissions should be founded only upon evidence, either oral or documentary, that has first been received as such in the course of hearing. Mr Wechsler was denied the opportunity to provide evidence upon which to found his intended submissions. The Commissioner's refusal to allow Mr Wechsler to give evidence, but only to make submissions, denied Mr Wechsler the right to a fair hearing: at [19];

(2) a statement made by the Commissioner, in response to a compromise offer advanced by Mr Wechsler, signified a denial of a fair hearing, by seeking to dissuade Mr Wechsler from pursuing a course in the presentation of his case on a basis that lacked any legal foundation: at [23]; and

(3) the compromise advanced by Mr Wechsler was determined without affording him the opportunity to give evidence in respect of it, identifying a further basis upon which procedural fairness was denied: at [25].

Bolinger v Blackmore Design Group [2015] NSWLEC 38 (Pain J)

(related decisions: *Blackmore Design Group v Council of the City of Sydney* [2014] NSWLEC 1136, *Blackmore Design Group v Council of the City of Sydney (No 2)* [2014] NSWLEC 1204 Pearson C)

Facts: in July 2014 the Commissioner dismissed Ms Bolinger's application for joinder to Blackmore Design Group's appeal pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") against the decision of the Council of the City of Sydney refusing consent to a development application for a residential flat building on a site adjoining that owned by Ms Bolinger. In October 2014 the Commissioner handed down the substantive judgment in the s 97 appeal and final orders were entered on 21 November

2014. On 5 November 2014 the applicant filed a summons seeking leave to appeal the Commissioner's decision of July 2014 pursuant to s 56A of the *Land and Environment Court Act 1979* ("the Court Act").

Issue:

(1) whether leave to appeal out of time should be granted;

(2) whether the appellant had a fairly arguable case; and

(3) whether a non-party can file a s 56A appeal in relation to a commissioner's decision not to allow joinder as a party.

Held: leave to appeal refused:

(1) having regard to the lack of evidence explaining the delay in commencing these appeal proceedings, that the substantive proceedings had been finalised, and the substantial financial cost to the respondent, no leave to appeal should be granted: at [14];

(2) the Commissioner identified matters requiring consideration in the two limbs relevant to an application for joinder under s 39A of the Court Act, reviewed the applicant's evidence, and reviewed the opportunities afforded to the applicant to participate in proceedings, including at the site view. No error of law arose in these circumstances. The applicant did not have a fairly arguable case: at [15]–[21]; and

(3) *obiter*: section 39A of the Court Act states that in an appeal under s 97 of the EPA Act the Court can at any time order the joinder of a party. Section 56A of the Court Act states that a right of appeal exists for a party in Class 1 proceedings against an order or decision of the court on a question of law. Any right of appeal under s 56A arises from the operation of the Court Act not the EPA Act. This suggests there is no appeal available to the applicant, and the avenue available is by way of prerogative writ in the Supreme Court: at [11].

Botany Bay City Council v Botany Development Pty Ltd (No 2) [2015] NSWLEC 55 (Sheahan J)

(related decision: *Botany Development Pty Ltd v Botany Bay City Council* [2014] NSWLEC 1231 Brown C)

Facts: this was an appeal under s 56A of the *Land and Environment Court Act 1979* against a decision of the Commissioner to grant consent to the construction of a 3 - 6 storey residential flat building ("RFB") with 158 units, upon the filing of agreed plans and conditions that reflected the findings made in the judgment.

Relevantly, the Commissioner found that "unit size" was not a reason for refusal. The appellant alleged that the Commissioner erred in failing to take into account the Council's development control plan ("DCP"), which prescribed apartment size minimums, with which a number of the apartments did not comply. The Council submitted that this failure came about because the Commissioner misconstrued cl 30A(1)(b) of the State Environmental Planning Policy No 65 (Design Quality of Residential Flat Development) ("SEPP 65"). That clause is a "must not refuse" clause, providing that consent must not be refused to RFBs on the basis of apartment area, if the areas meet the "recommended internal … and external area[s] for the relevant apartment type set out in Part 3 of the Residential Flat Design Code" ("RFDC"). The Commissioner determined that the apartments did meet those areas, and, therefore, the development could not be refused on the basis of non-compliance with the DCP.

The page of the RFDC addressing apartment areas contains two separate and inconsistent sets of apartment sizes. First, there is a table, which lists external and internal areas for nine different apartment "types". Secondly, there are "rules of thumb", which purport to "suggest" minimum apartment sizes for one, two and three bedroom apartments, which can contribute to housing affordability. The rules of thumb make no distinction between internal and external areas.

In determining that the apartments met the recommended areas for the purposes of cl 31A(1)(b), the Commissioner relied on the "rules of thumb" as providing the recommended areas. The Council alleged that this was in error, arguing that, on a proper construction of cl 30A(1)(b), the sizes contained in the table provide the recommended areas, with which only 63% of the apartments complied.

Issue:

(1) whether the "recommended areas" referred to in cl 30A(1)(b) of SEPP 65 were those contained in the table or those in the rules of thumb.

Held: upholding the appeal and remitting the matter to the Commissioner:

(1) matters of statutory interpretation can be raised for the first time on appeal: at [58];

(2) the precise wording of cl 30A(1)(b) indicates that the recommended areas are those in the table, as opposed to the rules of thumb. Firstly, it makes reference to "internal and external areas"; this must be a reference to the table, because the rules of thumb make no distinction between internal and external areas. Secondly, it refers to "relevant apartment type", which must be a reference to the "apartment types" listed in the table: at [94]–[96];

(3) the subjective thought of those involved in the drafting of the RFDC, or of the Council officers assessing the proposal, was irrelevant to the question of statutory construction, as the precise wording of cl 30A(1)(b) must be construed objectively: at [105]–[108]; and

(4) the "recommended areas" are those contained in the table, and, therefore, the Commissioner erred in finding that the development must not be refused on the basis of non-compliance with the apartment size minimums in the DCP.

The Presbyterian Church (New South Wales) Property Trust v Woollahra Municipal Council [2015] NSWLEC 47 (Pain J)

(related decision: *The Presbyterian Church (New South Wales) Property Trust v Woollahra Municipal Council* [2014] NSWLEC 1218 Moore SC)

Facts: the appellant appealed under s 56A of the *Land and Environment Court Act 1979* against the Senior Commissioner's decision to refuse its development application ("the DA"). The appellant operates Scots College Preparatory School in Bellevue Hill ("the school"). The school is divided into two segments, one located at 5 and 7 Mansion Road ("Mansion Road campus") and a second located between Mansion Road and Victoria Road ("Victoria Road campus"). The access handle to the Mansion Road campus is located between 19 Kambala Road and 17 Kambala Road. In its DA, the appellant sought a change of use of a building at 19 Kambala Road from "residential" to "educational establishment" and some minor associated works. The appellant proposed to relocate to 19 Kambala Road the existing kindergarten classes currently undertaken on the Mansion Road campus. The DA did not seek to increase student or staff numbers beyond the existing cap. The Senior Commissioner refused the DA, finding that parking, traffic and road safety risks from parental behaviour in Kambala Road were unacceptable. The Senior Commissioner was not satisfied that there was no likelihood of any increase whatsoever in the safety risks to pupils and parents arising from the school's proposal.

Issues:

(1) whether there was a denial of procedural fairness by the Senior Commissioner by finding on an issue not within the facts and contentions and not giving the Appellant an opportunity to address it; and

(2) whether the Senior Commissioner erred on a question of law in his consideration of s 79C(1)(b) of the *Environmental Planning and Assessment Act 1979* by applying a different test of potential impact that focused on traffic and pedestrian safety issues.

Held: dismissing the appeal:

(1) the issue of traffic and pedestrian safety was raised broadly in the Statement of Facts and Contentions. Further, the Senior Commissioner raised the issue of the possibility of traffic impacts as a result of the appellant's DA at the end of the first day of hearing. The appellant was put on notice of the issue and had the opportunity to address it. There was no denial of procedural fairness by the Senior Commissioner: at [20]–[26]; and

(2) the appellant's allegation that the question posed by the Senior Commissioner applied a different test of potential impact to s 79C(1)(b) was a formalistic and inappropriate way to analyse the Senior

Commissioner's judgment. The whole of the judgment that addressed traffic issues needed to be considered, and that entire consideration addressed likely impact of traffic: at [29]–[30].

Forgall Pty Ltd v Greater Taree City Council [2015] NSWLEC 61 (Preston CJ)

(related decision*: Forgall Pty Ltd v Greater Taree City Council* [2014] NSWLEC 1132 Dixon C)

Facts: Forgall Pty Ltd ("Forgall") applied to Greater Taree City Council ("the Council") for development consent for a bioclinic facility located on rural land at Wallabi Point. The Council rejected the application and Forgall appealed to the Land and Environment Court under s 97(1) of the *Environmental Planning and Assessment Act 1979*. The matter was heard by a Commissioner of the Court.

The Commissioner dismissed the appeal and refused consent to the development application. In the Commissioner's judgment she identified that there was a lack of detail and uncertainty about the vegetation clearing that would be required to comply with the requirements of the Rural Fire Service, for bushfire protection and emergency vehicle access, and what landscaping was proposed to mitigate the impacts caused by the clearing of vegetation. She concluded in her judgment that with the absence of a final landscaping design, it was impossible to assess the development as being consistent with the relevant zone objectives in the applicable local environmental plan. The Commissioner also opined in her judgment that it was difficult to accept the adequacy of a two page Aboriginal Cultural Heritage Due Diligence Report ("the ACHDD Report") prepared by Forgall's consultant planner.

Forgall appealed under s 56A(1) of the *Land and Environment Court Act 1979* against the Commissioner's decision on the basis that it was denied procedural fairness.

Issues:

(1) whether the Commissioner denied Forgall procedural fairness; and

(2) whether making an order for costs was fair and reasonable under r 3.7(2) of the Land and Environment Court Rules 2007.

Held: dismissing the appeal and ordering the applicant to pay the respondent's costs of the appeal:

(1) the absence of a final landscaping plan was not an issue additional to the issues raised by the parties but rather a fact of relevance to the central issue raised in the appeal: at [75], [76]. Forgall, as the party asserting the factual basis, bore the responsibility for adducing the necessary evidence: at [78]. Forgall's failure to adduce sufficient evidence (including a final landscaping plan) at hearing lay at its own feet: at [86]. The Commissioner was not obliged to give notice to Forgall that its evidence was insufficient: at [87]. Forgall's failure to adduce further evidence, including the final landscaping plan, did not give rise to a failure by the Commissioner to afford Forgall procedural fairness: at [87];

(2) the Commissioner's determination did not depend on her factual finding that the ACHDD Report was not adequate or sufficient: at [89]. The Commissioner could not be said to have decided the application and the appeal on the adequacy or sufficiency of the ACHDD Report and this was accepted by Forgall at the hearing of the appeal. Procedural fairness did not require the Commissioner to give notice to Forgall of her concern that the ACHDD Report was not adequate or sufficient: at [90]; and

(3) the appeal was limited to a question of law. Resolution of that question of law did not depend on the unreasonableness of any conduct of the parties: at [97]. There were no other circumstances that point against the making of a costs order in favour of the successful party: at [97]. It was fair and reasonable to make an order that Forgall pay the Council's costs of this appeal: at [98].

Council of the City of Sydney v Base Backpackers Pty Ltd [2015] NSWLEC 63 (Preston CJ)

(related decision: *Base Backpackers Pty Limited v Sydney City Council* [2014] NSWLEC 1249 Morris C)

Facts: Base Backpackers Pty Ltd ("Base") held a development consent which had a condition of consent that restricted the base trading hours of a hotel, known as the Scary Canary Hotel, to between 12 noon and 12 midnight, seven days a week, but permitted extended trading hours to 3.00am for a trial period of 12

months. The trial period had continued by various modifications approved by the Council of the City of Sydney ("the Council"), with the last trial period expiring on 22 December 2013. Base continued to trade for extended hours after this date under a grace period. Base applied to modify the consent for a further continuation of the late night trading hours for five years. The Council refused Base's application and Base appealed to the Land and Environment Court. The matter was heard by a Commissioner of the Court who upheld Base's appeal and modified the development consent to permit a further trial period of 12 months for the late night trading hours. The Council appealed against the Commissioner's decision under s 56A(1) of the *Land and Environment Court Act 1979*.

Issues:

(1) whether the Commissioner erred on a question of law in her consideration of the late night trading provisions of the Sydney City Development Control Plan 2012 ("the DCP"); and

(2) whether making an order for costs was fair and reasonable under r 3.7(2) of the Land and Environment Court Rules 2007 ("the Rules").

Held: dismissing the appeal and ordering the Council to pay Base's costs of the appeal:

(1) the Commissioner's reasons for decision must be read as a whole and considered fairly. A verbal slip or infelicity of expression did not necessarily warrant drawing an inference of an error of law: at [57]. On this fair reading of the Commissioner's reasons as a whole, the Commissioner had not been shown to have erred in her approach: at [58]. The Commissioner correctly identified the applicable provisions of the DCP and the questions that she had to answer: at [59]. The Council did not establish that the Commissioner erred on a question of law in her consideration of the late night trading provisions of the DCP: at [77]; and

(2) it was fair and reasonable that the Council be ordered to pay the costs of the appeal of Base: at [86]. The mere fact that an appeal falls within the circumstances in r 3.7(3)(a) of the Rules is not determinative of how the discretion under r 3.7(2) to make an order for costs is to be exercised: at [83]. The determination under r 3.7(2) requires the Court to consider all of the circumstances: at [84]. This appeal was limited to a question of law and there was no examination of the evidence or the conduct of the parties in the proceedings below: at [84]. There were no other circumstances or conduct of the successful party that would disentitle it from costs or would suggest that the making of a costs order in its favour would not be fair and reasonable: at [85].

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (Pain J)

(related decision: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 Pearson C)

Facts: Four2Five Pty Ltd (the "Appellant") appealed against the refusal of its development application for the construction of a mixed use development by Ashfield Council (the "Respondent"). The Commissioner upheld the appeal, granting development consent subject to several conditions that had the effect of deleting some units on the top level. The Appellant appealed against the Commissioner's decision under s 56A of the *Land and Environment Court Act 1979*.

Issues:

(1) whether the Commissioner misconstrued cl 4.6 of the *Ashfield Local Environmental Plan* 2013 ("the LEP") in holding that cl 4.6(3)(b) requires an applicant for development consent to show that environmental planning grounds existed "particular to the circumstances of this proposed development on the subject site" to justify contravening the development standard; and

(2) whether the Commissioner misconstrued cl 4.6 of the LEP in holding that an applicant who seeks to justify the contravention of a development standard must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case by reference to other ways or matters than those referred to in cl 4.6(4)(a)(ii).

Held: appeal dismissed:

(1) it was debatable that issue (1) identified a question of law. To the extent the issue could be described as a question of mixed fact and law, the Commissioner was exercising her discretion as to whether she

was satisfied under cl 4.6(4)(a)(i) that the Appellant's written request seeking to justify the contravention of the development standard adequately addressed the matters in subclause (3). The terms in subclause (3)(b) of sufficient environmental planning grounds were not defined and had wide import. The use of the word "sufficient" did not suggest a low bar. The Appellant did not establish any error in the Commissioner's approach to the construction of cl 4.6. Clause 4.6 is not identical to the *State Environmental Planning Policy No 1 – Development Standards*: at [29]-[31]; and

(2) the Appellant's argument on issue (2) overlooked the terms of cl 4.6. Clause 4.6(4)(a)(i) had more work to do than subclause (4)(a)(ii), not least because the use of "and" between the subclauses suggested (4)(a)(i) and (ii) are separate requirements: at [34].

Commissioner and Registrar Decisions

Brindley v Parramatta City Council [2015] NSWLEC 1160 (Registrar Gray)

(related decision: *Brindley v Parramatta City Council* [2014] NSWLEC 1193 Moore SC)

Facts: the applicant sought its costs of an appeal pursuant to s 97AA of the *Environmental Planning and Assessment Act 1979* against a refusal by Parramatta City Council ("the Council") to approve a modification application extending the hours of a drug and alcohol rehabilitation centre. The appeal went to a conciliation conference under s34 of the *Land and Environment Court Act* 1979 which was unsuccessful in resolving the proceedings. Subsequent to the termination of the conciliation conference, leave was granted to the applicant to modify the modification application. Following a contested hearing, Moore SC granted the application for a trial period of 9 months. The applicant sought an order that the Council pay the applicant's costs for the entire proceedings on the basis that the Council did not participate in the conciliation conferences in good faith (having sought 3 adjournments and sent a person without authority to resolve the proceedings), and that the Council continued to press contentions in the proceedings that had no reasonable prospects of success. Further, the applicant submitted that it had made a Calderbank offer to the Council prior to the filing of the notice of motion for costs.

Issues:

(1) whether it was fair and reasonable in the circumstances for a costs order to be made against the Council under rule 3.7 of the *Land and Environment Court Rules 2007 (NSW),* as to the whole or part of the proceedings;

(2) whether the Council had unnecessarily put the applicant to the cost of participating in a section 34 conciliation conference, by failing to participate in the conciliation conference in good faith or otherwise;

(3) whether the Council was unreasonable in its continued contest of the modification application following the termination of the conciliation conference; and

(4) whether an email sent to the Council could be considered a Calderbank letter, and if so, whether costs should be awarded on an indemnity basis in relation to the notice of motion for costs.

Held: ordering the Council to pay the applicant's costs for part of the proceedings, and 50% of the costs of the notice of motion:

(1) where one party knowingly unnecessarily puts the other party to the cost of a section 34 conciliation conference, either by not participating in good faith or by some other way, it is fair and reasonable for a costs order to be made: at [23];

(2) there was insufficient evidence to establish that the Council did not participate in the conciliation conference in good faith. The adjournment of the conciliation conferences for the purpose of council meetings does not mean that the Council is not participating in good faith: at [24];

(3) it could not be accepted that an applicant has been put unnecessarily to the cost of a section 34 conference where that conference resulted in a modified proposal and therefore a better outcome for the development: at [27] – [28];

(4) following the termination of the conciliation conference and the amended modification application, the Council continued to press contentions in the proceedings that were unsupported by probative evidence or reason, therefore unnecessarily putting the applicant to the cost of preparing for a contested hearing in relation to those contentions: at [30-38]. The Council was ordered to pay the applicant's costs of the proceedings from the date on which the Council made the decision to continue to contest the proceedings through the filing of the Amended Statement of Facts and Contentions: at [39]; and

(5) indemnity costs were not awarded as the email could not be considered a Calderbank letter: at [44].

Arco Iris Trading Pty Ltd v North Sydney Council [2015] NSWLEC 1113 (Moore SC)

Facts: the applicant owns a commercial suite in a predominantly commercial building on Military Road Cremorne. The only exception to the general commercial/retail uses within the building arose from the conversion of one of the units to a residential use, approved by the Council under a previous planning regime. The applicant applied for approval to convert its unit from a commercial use to a residential use. The Council refused development consent on two grounds. First, that the unit, if permitted to be converted, would not satisfy the requirements to be "shop top housing" and that, because that was the only residential use permitted under the *North Sydney Local Environmental Plan 2013* ("the LEP") in the B4 zone in which the premises were located, the proposed use was prohibited. Secondly, the Council considered that there were merits issues associated with what were said to be non-compliances with the relevant provisions of the Council's development control plan ("DCP"). Those non-compliances were that it was the Council's opinion that despite the commercial unit being located some 15m into the building along an entrance foyer, up a short flight of stairs, and along a short corridor, it nonetheless should be regarded as being at ground level and/or being at the street frontage of Military Road; on that interpretation, the Council's position was that various provisions of the DCP said to be engaged were not satisfied. The applicant appealed under s 97 of the *Environmental Planning and Assessment Act 1979*.

Issues:

(1) whether the proposal could properly be characterised as "shop top housing" and therefore permissible; and

(2) if the proposed development were permissible, whether the provisions of the DCP applied so that it was inappropriate to approve the development on the merits.

Held: upholding the appeal and approving the conversion from commercial to residential use subject to conditions of consent to be settled by the parties in light of the decision:

(1) it was possible for the building to have two ground levels as the building had two street frontages and the frontage to the secondary street, at the rear, was to a level of the building that did not constitute a basement and thus, relevantly, constituted a "ground level" of the building: at [18], [19];
(2) it was sufficient that it be at a level entirely above some commercial premises at ground level even if that ground level was the ground level caused by the slope of the site and it having two street frontages. As the proposed dwelling would be entirely above the level of car parking constituting part of the commercial premises by virtue of its non-exclusion from the definition of such premises, it satisfied the test of shop top housing set by Sheahan J in *Hrsto v Canterbury City Council (No 2)* [2014] NSWLEC 121 notwithstanding the fact that it was not entirely above the immediately adjacent retail premises fronting Military Road: at [21];
(3) for the purposes of defining the various commercial premises within the building, the car parking level accessed from the rear street frontage formed part of each of the relevant commercial premises as a consequence of the terms of the relevant definition in the LEP: at [22];
(4) to the extent that there was car parking at that level that was associated with the proposed residential use and would form part of the Strata entitlement of the proposed to be converted unit, such parking did not form part of the dwelling for the relevant purposes: at [23], [24];
(5) as a consequence, the proposal was properly characterised as shop top housing and was permissible: at [30]; and
(6) with respect to the matters raised by the Council as being said to arise from the provisions of the DCP, a proper factual consideration of the extent of the distance to and nature of the access to the premises

from the entrance at Military Road meant that it could not be regarded as being either at ground level or with a street frontage and therefore the provisions relied upon by the Council could not act as a basis to refuse the application: at [36] - [41].

Single v Van Motman [2015] NSWLEC 1133 (Moore SC)

Facts: the applicant and the respondent each asserted that he held a 100% interest in two mineral claims located in the Grawin Glengarry Sheepyards opal fields in the Lightning Ridge region. The applicant's claim was based on what should be regarded as an assertion of an equitable interest while that of the respondent was based on the fact that he was the registered title holder of each of the claims. Although some evidence was given informally during the course of the site inspection, the vast bulk of the evidence in the proceedings was proposed to be adduced by affidavits (six in the applicant's case and two in the respondent's case) or statutory declarations (two in the respondent's case). The applicant and respondent were self-represented and neither of them required any of the deponents for the purposes of cross-examination. Because the written evidence had been prepared without the benefit of legal advice, significant questions of admissibility of a wide range of elements in the proposed evidence required to be dealt with as the proceedings, in Class 8 of the Court's jurisdiction, were to be conducted with the proper application of the rules of evidence. The presiding Commissioner discussed with the parties two options to deal with the evidence: either to go through each of the documents and undertake a sentence by sentence analysis of and ruling on what was properly admissible, or to have regard to that which was properly admissible as evidence by treating it as evidence, having regard to that which was relevant and properly regarded as submissions as submissions and ignoring any element of the written documents that was inadmissible for any reason.

Issue:

(1) what was an appropriate approach to adopt to determining admissibility and/or relevance of the documentary evidence.

Held: determining that the applicant had a 50% equitable interest in each of the mineral claims and making declarations to that effect, with the result that the respondent as registered titleholder holds a residual 50% interest in each of the claims:

(1) after the alternative approaches to determining admissibility and relevance were explained to the parties, the parties agreed that the second alternative, namely for the presiding Commissioner to have regard to that which was properly admissible as evidence by treating it as evidence, having regard to that which was relevant and properly regarded as submissions as submissions and ignoring any element of the written documents that was inadmissible for any reason, was preferable and acceptable: at [30].

Chidiac v Mosman Council [2015] NSWLEC 1044 (Moore SC)

Facts: the applicant owns a four level residential flat building on the waterfront at Curraghbeenah Point, the eastern headland of Mosman Bay, within the R3 zone under the *Mosman Local Environmental Plan* 2012 ("the LEP"). Three levels contain apartments whilst the lowest level is occupied as an unapproved residence. The owner applied to Mosman Council to demolish and replace it with the new structure being virtually entirely within the existing building envelope. The proposed building would have its roof at existing parapet height. With the roof at this level and lesser floor to ceiling heights, there would be five residential levels.

The present building was constructed well before the present height and floor space ratio ("FSR") controls were set for the site in the LEP. The controls in the LEP carried forward controls in similar terms that had applied since at least the 1980s. The height control now specifies 8.5 m above ground level whilst the existing building is 14.5 m above that level (as would be the replacement). With respect to the FSR control, the LEP sets a limit of 0.55:1 whilst the existing structure has an FSR of 1:1. Because of the proposal to incorporate an additional residential level, the FSR exceedence over that permitted by the LEP would increase as the new FSR would be 1.5:1. The LEP is based on the *Standard Instrument—Principal Local Environmental Plan* and includes a provision permitting objection to be made under cl 4.6 of the LEP to

compliance with development standards. Objections were made to compliance with the height and FSR controls.

The Council raised a range of merit issues concerning the design of the proposed replacement building.

Issues:

(1) whether the three, cumulative tests arising from cl 4.6(4)(a)(ii) of the LEP were satisfied:
   a. whether the proposed development was consistent with the objectives for the building height standard in cl 4.3 of the LEP;
   b. whether the proposed development was consistent with the objectives for the FSR standard in cl 4.4 of the LEP; and
   c. whether the proposed development was consistent with the LEP's objectives of the R3 zone;
(2) if there was no realistic possibility that the desired future character for the area would be achieved at any realistic time in the future, what effect (if any) did that have on a proper assessment of the objections to compliance with the two development standards; and
(3) if the cl 4.6 objections were sustained, whether the merit issues raised by the Council warranted refusal.

Held: finding that the cl 4.6 objections could not be upheld and there was no power to approve the proposed development, and dismissing the appeal:

(1) the proposed development was inconsistent with the first and third objectives for the building height standard in cl 4.3 of the LEP: at [49] – [82];
(2) the proposed development was inconsistent with the first objective for the FSR standard in cl 4.4 of the LEP: at [84] – [99];
(3) the proposed development was inconsistent with the fourth objective of the R3 zone: at [104], [105];
(4) there was no realistic prospect at any time in the foreseeable future that an owner of the site would redevelop it in a fashion compliant with the height and FSR controls and thus consistent with the desired future character of the area: at [120], [121]; and
(5) it was not appropriate to move on to consider the merit issues raised: at [129].

Court News

- Senior Commissioner Tim Moore has been appointed as an Acting Judge of the Court for the period commencing on Thursday 25 June 2015 to Friday 18 December 2015
- Commissioner Graham Brown has been appointed as the Acting Senior Commissioner for the period commencing on Thursday 25 June 2015 to Friday 18 December 2015
- The Land and Environment Court of NSW has a new website. Please ensure that you update your bookmarks
- The information contained on the website regarding Compensation for Compulsory Acquisition of Land has been updated to provide additional information and to reflect recent case law.